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People v. Watson: Drunk Driving Homicide—Murder or Enhanced Manslaughter?

In *People v. Watson*,¹ the California Supreme Court held that the conduct of a reckless drunk driver who caused a fatal auto accident was sufficient to support a second degree murder charge.² The court found that there was a rational ground for concluding that the defendant had acted wantonly and with a conscious disregard for human life. This Note argues that the court's failure to specify precisely when an intoxicated driver's conduct reaches the level of implied malice is misguided in that it fails to provide needed guidance to the lower courts, provides an opportunity for discriminatory application of the law, and fails to ensure that the defendant's conduct posed a high risk of causing death. This Note also criticizes the court's use of the defendant's intoxicated conduct in evaluating his mental state.

Part I of this Note summarizes the facts of *Watson* and the majority and dissenting opinions. Part II examines the preexisting law of second degree murder and vehicular manslaughter and presents some relevant statistics on alcohol-related fatalities. Part III discusses the flaws of the *Watson* decision. Part IV suggests two alternative approaches to *Watson*. The first is a specific standard by which courts can apply the *Watson* decision that focuses on the defendant's blood alcohol level, the degree of his recklessness, and the defendant's own knowledge of his drunk driving problem. The second proposed approach is a better, legislative alternative to second degree murder convictions for drunk driving homicides. This second alternative calls for an amendment of the vehicular manslaughter statute to provide sentence enhancements for each prior reckless driving or reckless drunk driving conviction of any defendant who causes a death while excessively intoxicated and driving recklessly. Part IV also considers whether the second degree felony murder rule should be applied to cases of drunk driving homicide. This Note concludes that drunk drivers who cause

1. 30 Cal. 3d 290, 637 P.2d 279, 179 Cal. Rptr. 43 (1981).

2. California has thus aligned itself with the growing minority of jurisdictions which have sustained murder convictions in drunk driving homicide cases. Comment, *Murder Convictions for Homicides Committed in the Course of Driving While Intoxicated*, 8 CUM. L. REV. 477, 489 (1977). For a review of both cases rejecting and cases allowing murder convictions for drunk driving homicides, see *id.* and Annot., 21 A.L.R.3d 116 (1968).

fatalities should not be prosecuted for second degree murder absent evidence of intent to kill or injure.

I THE CASE

A. *The Facts*

Robert Watson drove to a bar, drank a large quantity of beer, and left in the early morning hours of January 3, 1979. About one and one-half hours after leaving the bar he drove through a red light, narrowly avoiding a collision by skidding to a stop in the middle of the intersection. He then drove away at high speed, approached another intersection,³ and, although he applied his brakes,⁴ struck a subcompact car. Three passengers in the subcompact car were thrown from the vehicle, and the driver and one of the passengers were killed.

The speed limit at the scene of the accident was thirty-five miles per hour. Expert testimony indicated that Watson's car was traveling at approximately seventy miles per hour when it struck the subcompact, while an eye-witness testified that Watson's speed was between fifty-five and sixty miles per hour. Watson's blood alcohol level one-half hour after the collision was 0.23 percent.⁵

Watson was charged with two counts of second degree murder⁶

3. Whether the traffic signal was green for Watson when he entered the intersection was not clear. See *infra* note 22.

4. Watson's vehicle left skid marks of 112 feet prior to the point of impact and 180 feet between the point of impact and the vehicle's stopping point. 30 Cal. 3d at 293, 637 P.2d at 281, 179 Cal. Rptr. at 45.

5. *Id.* at 294, 637 P.2d at 281, 179 Cal. Rptr. at 45. Watson's blood alcohol level was more than twice the 0.10% level at which persons were *presumed* to be driving under the influence on the date of the collision. Act of June 24, 1969, ch. 231, § 1, 1969 Cal. Stat. 565, 565, *renumbered and amended by* Act of Sept. 29, 1981, ch. 940, § 31, 1981 Cal. Legis. Serv. 3437, 3448 (West) (current version at CAL. VEH. CODE § 23155 (West Supp. 1983)). Under current law, it is *unlawful* for a person to drive with a blood alcohol level of 0.10% or higher. CAL. VEH. CODE § 23152 (West Supp. 1983).

6. Sections 187 through 189 of the California Penal Code provide:

Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.

Such malice may be 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.

When it is shown that the killing resulted from the intentional doing of an act with express or implied malice as defined above, no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite such awareness is included within the definition of malice.

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,

and two counts of vehicular manslaughter.⁷ At the preliminary examination, the magistrate concluded that the facts were insufficient to support a finding of implied malice and dismissed the murder counts. Nevertheless, the state charged Watson with two counts of murder. Watson's motion to dismiss the murder counts was granted by the trial court, and the state appealed to the supreme court, which reversed.

B. *The Majority Opinion*

The majority⁸ first rejected the defendant's argument that the legislature intended to classify and punish all vehicular homicide as manslaughter and that a charge of second degree murder was therefore precluded.⁹ The court stated that a specific statute preempts a general statute only (1) when each element of the general statute corresponds to an element of the specific statute, or (2) when it appears from the statutory context that a violation of the specific statute will usually result in a violation of the general statute.¹⁰ The majority concluded that the murder charge was not precluded because the statutes have distinct culpability requirements.¹¹ A prosecution for second degree murder requires a finding of malice, while vehicular manslaughter is expressly defined as a killing without malice but with gross or ordinary negligence.¹² Implied malice requires actual awareness of risk, while gross negligence does not.

robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree.

CAL. PENAL CODE §§ 187-189 (West Supp. 1983).

7. Section 192 of the California Penal Code provides that:

Manslaughter is the unlawful killing of a human being, without malice. It is of three kinds:

1. Voluntary—upon a sudden quarrel or heat of passion.
2. Involuntary—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; provided that this subdivision shall not apply to acts committed in the driving of a vehicle.
3. In the driving of a vehicle—
 - (a) In the commission of an unlawful act, not amounting to felony, with gross negligence; or in the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence.
 - (b) In the commission of an unlawful act, not amounting to felony, without gross negligence; or in the commission of a lawful act which might produce death, in an unlawful manner, but without gross negligence.

Id. § 192 (West 1970).

8. Associate Justice Richardson wrote the majority opinion. Associate Justices Tobriner, Mosk, and Newman, and Superior Court Judge Lachs (sitting by assignment of the chairperson of the judicial council) concurred.

9. 30 Cal. 3d at 295-96, 637 P.2d at 282-83, 179 Cal. Rptr. at 46-47.

10. *Id.* at 295-96, 637 P.2d at 282, 179 Cal. Rptr. at 46 (citing *People v. Jenkins*, 28 Cal. 3d 494, 502, 620 P.2d 587, 592, 170 Cal. Rptr. 1, 6 (1980)).

11. *Id.* at 296-97, 637 P.2d at 283, 179 Cal. Rptr. at 47.

12. *See supra* notes 6-7.

The majority also rejected the defendant's assertion that the legislature intended that the vehicular manslaughter statute preclude application of the murder statute.¹³ The majority reviewed the legislative history of the vehicular manslaughter statute and concluded that the statute "was enacted to proscribe vehicular homicides which resulted from grossly negligent conduct, without precluding the possibility of a murder charge when the circumstances revealed more aggravated culpability."¹⁴ The majority once again focused on the difference between implied malice and gross negligence to buttress its argument.¹⁵

Third, the majority reviewed the facts of the case to determine whether a reasonable jury could find that the defendant had committed second degree murder.¹⁶ The court held that the following facts, in combination, could reasonably support a charge of second degree murder. The defendant (1) was legally intoxicated;¹⁷ (2) had driven to the bar and must have known that he would have to drive later; (3) was presumably aware of the hazards of drunk driving; (4) drove at an excessive speed; (5) narrowly avoided a collision prior to the fatal accident by skidding to a stop; and (6) resumed his excessive speed and tried to brake before the fatal collision.¹⁸ The majority expressed no opinion as to whether the above facts "conclusively demonstrate implied malice . . . sufficient to convict defendant of second degree murder."¹⁹

Finally, the majority refused to consider whether the defendant's intoxication rendered him incapable of entertaining malice, deeming a diminished capacity defense relevant only at trial.²⁰

C. *The Dissenting Opinions*

Chief Justice Bird, in a dissenting opinion,²¹ criticized the majority's statement that the facts were undisputed, and resolved all factual doubts in the defendant's favor.²² She argued that speeding through a

13. 30 Cal. 3d at 297, 637 P.2d at 283, 179 Cal. Rptr. at 47.

14. *Id.*

15. *Id.* at 298, 637 P.2d at 284, 179 Cal. Rptr. at 48.

16. *Id.* at 300, 637 P.2d at 285, 179 Cal. Rptr. at 49.

17. *See supra* note 5 and accompanying text.

18. 30 Cal. 3d at 300-01, 637 P.2d at 285-86, 179 Cal. Rptr. at 49-50.

19. *Id.* at 301, 637 P.2d at 286, 179 Cal. Rptr. at 50. The routine charging of second degree murder in vehicular homicide cases was "not encouraged or contemplated." *Id.*

20. *Id.*; *see infra* note 76.

21. Superior Court Judge Ibáñez (sitting by assignment of the chairperson of the judicial counsel) concurred in Chief Justice Bird's dissenting opinion.

22. Chief Justice Bird reasoned that, because the magistrate had found that probable cause did not exist, and since on appeal evidence must be viewed in the light most favorable to the determination in the trial court, all issues of fact should be resolved in the defendant's favor. One witness testified that the defendant was traveling at a speed between 55 and 60 miles per hour and had entered the intersection when the traffic signal was green. The state argued at the preliminary

green light at a speed between fifty-five and sixty miles per hour at one o'clock in the morning is not an act likely to result in death, and hence malice could not be inferred.²³

The chief justice disagreed with the majority's characterization of the facts. She argued that (1) a single episode of drunk driving does not usually result in death or injury; (2) driving to a bar does not justify the conclusion that the defendant harbored a conscious disregard for life when he later drove under the influence; (3) the defendant may not have been aware of the hazards of drunk driving; (4) evidence of intoxication may show a lack of awareness of risk, which is relevant to whether a second degree murder charge can be brought; and (5) braking prior to a collision shows that the defendant sought to avoid the risk of killing anyone.²⁴

The chief justice noted that the majority's presumption as to what the defendant "must have known" would make prosecution for second degree murder possible in all cases where a death results from drunk driving.²⁵ This presumption significantly reduces the requirement that the prosecutor prove that the defendant, with conscious disregard for life, intended to commit an act likely to kill.²⁶

Pro Tem Justice Ibáñez also filed a dissenting opinion. He argued that any distinction between implied malice and gross negligence is illusory and certainly inadequate as a guideline for crucial determinations by the prosecution or the trier of fact.²⁷ He maintained that such a radical change in the law is a policy decision best left to the legislature.²⁸ Finally, he read the vehicular manslaughter statute's legislative history to preclude second degree murder charges when the driver lacked actual intent to cause death or serious injury.²⁹

II

LEGAL BACKGROUND

A. Implied Malice Second Degree Murder

California defines murder as "the unlawful killing of a human being . . . with malice aforethought."³⁰ Malice aforethought may be express or implied. It is express when there is evidence of a deliberate

hearing that this witness was perjuring himself. The chief justice accepted this witness' testimony. 30 Cal. 3d at 302-03, 637 P.2d at 286-87, 179 Cal. Rptr. at 50-51.

23. *Id.* at 304, 637 P.2d at 288, 179 Cal. Rptr. at 52.

24. *Id.* at 305-07, 637 P.2d at 288-89, 179 Cal. Rptr. at 52-53.

25. *Id.* at 305, 637 P.2d at 288, 179 Cal. Rptr. at 52.

26. *Id.* at 305, 637 P.2d at 289, 179 Cal. Rptr. at 53.

27. *Id.* at 308-09, 637 P.2d at 290-91, 179 Cal. Rptr. at 54-55.

28. *Id.* at 309-10, 637 P.2d at 291, 179 Cal. Rptr. at 55.

29. *Id.* at 310-11, 637 P.2d at 291-92, 179 Cal. Rptr. at 55-56.

30. See CAL. PENAL CODE §§ 187-189 (West Supp. 1983), quoted at *supra* note 6.

intention to kill.³¹ It is implied when the killing is done with provocation which is insufficient to reduce the charge to voluntary manslaughter,³² or when the surrounding circumstances show that the defendant acted with an abandoned and malignant heart.³³ *Watson* involved the possible application of the latter type of implied malice murder.³⁴ Implied malice murder is second degree murder³⁵ and is punishable by imprisonment in the state prison for a term of fifteen years to life.³⁶

The court has expressed two similar tests for finding this latter type of implied malice: (1) when the defendant intended, with conscious disregard for life, to commit acts likely to kill;³⁷ or (2) when the defendant, for a base, antisocial motive and with wanton disregard for human life, commits an act that has a high probability of causing death.³⁸ In the abstract, these definitions are not very helpful. An examination of cases in which the physical act and mental state elements of implied malice murder have been at issue is thus necessary.

1. *The Physical Act Requirement*

Definitions of the physical act required to infer malice do not indicate how high the probability of death must be for the physical act element to be met. However, the cases indicate that the instrumentality used by the defendant and the defendant's intent are the key elements in deciding whether his actions created a high probability that death would result. Ordinarily, intentional or reckless use of items traditionally thought of as "weapons," such as guns, knives, or axes, poses the high risk of death required to infer malice.³⁹ Absent the use of a

31. *See id.*

32. *See id.*; *id.* § 192 (West 1970).

33. *See id.* §§ 187-189 (West Supp. 1983), *quoted at supra* note 6.

34. This Note will use the general term of implied malice murder to refer to abandoned and malignant heart murder. The reader should keep in mind that only one type of implied malice murder is being discussed.

35. *See CAL. PENAL CODE* §§ 187-189 (West Supp. 1983), *quoted at supra* note 6.

36. *Id.* § 190 (West Supp. 1983).

37. *People v. Phillips*, 64 Cal. 2d 574, 587, 414 P.2d 353, 363, 51 Cal. Rptr. 225, 235 (1966).

38. *People v. Washington*, 62 Cal. 2d 777, 782, 402 P.2d 130, 134, 44 Cal. Rptr. 442, 446 (1965).

39. The defendant in *People v. Copley*, 32 Cal. App. 2d 74, 89 P.2d 160 (1939), stabbed the deceased with a long butcher knife when the deceased attempted to drive away two men who were the defendant's guests for the evening. The court rejected the defendant's contention that there was no proof of malice to support her second degree murder conviction, as malice could be inferred from the defendant's deliberate act which endangered another's life.

In *People v. Semone*, 140 Cal. App. 318, 35 P.2d 379 (1934), the defendant fired a shotgun containing lead slugs at two men 535 feet away, killing one of them. The defendant testified that he fired the gun into the air, did not intend to kill anyone, and believed the shotgun contained only bird shot incapable of inflicting injury at such a distance. However, a witness testified that the defendant had fired directly at the men. The court affirmed a second degree murder conviction.

weapon, the defendant's conduct must be more flagrant.⁴⁰ Prior to *Watson*, the California Supreme Court had indicated that conduct surrounding an automobile fatality might, in some instances, support a second degree murder charge.⁴¹

2. *The Mental State Requirement*

The degree of culpability required for a finding of implied malice was unclear before *Watson*.⁴² In *People v. Washington*, the supreme court stated that the required mental state was a "conscious disregard for life."⁴³ Thus, the defendant must have been aware of the risk he was creating. One year later, the court criticized the use in a jury instruction of the statutory term "abandoned and malignant heart" because it might lead a jury to employ an objective standard in determining whether the defendant had acted with a conscious disre-

tion, noting that the evidence supported the conclusion that the shooting was done in an unlawful manner with grave danger of fatal injury resulting.

In *People v. Hubbard*, 64 Cal. App. 27, 220 P. 315 (1923), the court noted that the defendant could be found guilty of second degree murder for killing with a gun, even if the gun discharged accidentally, if the circumstances disclosed such a wanton recklessness as to show an abandoned and malignant heart. See also *People v. Doyell*, 48 Cal. 85 (1874) (striking deceased with an axe sufficient to support second degree murder charge even if no actual intent to kill existed).

Intentional use of a weapon may support a second degree murder charge even when the defendant did not actually commit the killing. In *People v. Washington*, 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965), the supreme court held the first degree felony murder rule inapplicable to situations where the death was not the result of the defendant's, or an accomplice's, actions. The court stated, however, that "[d]efendants who initiate gun battles may also be found guilty of murder [in the second degree] if their [intended] victims resist and kill," through the use of abandoned and malignant heart implied malice murder. *Id.* at 782, 402 P.2d at 134, 44 Cal. Rptr. at 446.

40. In *People v. Efstathiou*, 47 Cal. App. 2d 441, 118 P.2d 22 (1941), the defendant had pursued the deceased and exchanged blows with him, causing the deceased to fall, strike his head on the sidewalk, and die. The defendant's acts were held to be capable of being reasonably viewed by the jury as imminently dangerous to human life, especially in view of the defendant's pursuit of the deceased. Cf. *People v. Munn*, 65 Cal. 211, 3 P. 650 (1884) (reversing the second degree murder conviction of a defendant who had punched the deceased several times).

41. *People v. Fuller*, 86 Cal. App. 3d 618, 150 Cal. Rptr. 515 (1978), was apparently the first California case to apply the implied malice test to conduct involving the use of an automobile (although the California Supreme Court had previously indicated in dicta that such an application was possible, *People v. Satchell*, 6 Cal. 3d 28, 33-34 n.11, 489 P.2d 1361, 1365 n.11, 98 Cal. Rptr. 33, 37 n.11 (1971)). Defendants fled a burglary in their automobile with an officer in hot pursuit. During a high speed chase the defendants narrowly avoided colliding with several police cars seeking to block their path, and at times drove against oncoming traffic. The defendants ran a red light and collided with another car, killing its driver. The court reversed the trial court's dismissal of a first degree murder charge, finding the felony murder rule applicable to escaping burglars. For the guidance of the trial court, the court went on in dicta to indicate that the facts supported a second degree murder charge under the test for implied malice whether the felony murder rule was applicable or not.

42. For a discussion of early cases which conflicted on the degree of awareness required, see Collings, *Negligent Murder—Some Stateside Footnotes to Director of Public Prosecutions v. Smith*, 49 CALIF. L. REV. 254, 281-85 (1961).

43. 62 Cal. 2d 777, 782, 402 P.2d 130, 133-34, 44 Cal. Rptr. 442, 445-46 (1965).

gard for life.⁴⁴ The court again held that the defendant must actually be aware of the risk he is creating to satisfy the mental state requirement of second degree murder.

However, two other supreme court cases clouded the issue by failing to require explicitly that the defendant be aware of the risk he was creating.⁴⁵ In both cases the court applied a different test for implied malice. It held that a defendant acts with wanton disregard for human life where (1) the act was done for a base antisocial purpose; (2) the defendant was aware of the societal duty not to commit illegal acts that involve a risk of grave injury or death;⁴⁶ and (3) the defendant was able to act in accordance with that duty.⁴⁷ Nowhere in the decisions was it expressly stated that the defendant must have been aware of the risk he was creating. Recent appellate court decisions have followed this lead,⁴⁸ with one case explicitly stating that actual awareness of the risk created is not required.⁴⁹ *Watson* thus served to clarify this important issue by explicitly requiring subjective awareness of the risk being created.⁵⁰

44. *People v. Phillips*, 64 Cal. 2d 574, 588, 414 P.2d 353, 364, 51 Cal. Rptr. 225, 236 (1966). The defendant in *Phillips* was a chiropractor who repeatedly assured the parents of an eight year old girl that he could cure her of cancer. The defendant caused the parents to stop all modern medical treatment, resulting in an appreciable shortening of the girl's life. The supreme court reversed a second degree murder conviction, holding the felony murder rule inapplicable to fraudulent medical practice. The jury instructions on the felony murder rule removed the issue of malice from the jury's deliberations. The defendant's acts were proven by expert testimony to be likely to result in death, but the issue of whether the defendant was conscious of the risk he was creating had not been adjudicated.

45. *People v. Poddar*, 10 Cal. 3d 750, 518 P.2d 342, 111 Cal. Rptr. 910 (1974); *People v. Conley*, 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966).

46. The requirement of an awareness of the obligation to act within the laws regulating society is no longer included with the definition of implied malice. *See supra* note 6.

47. *People v. Poddar*, 10 Cal. 3d 750, 759-60, 518 P.2d 342, 349, 111 Cal. Rptr. 910, 917 (1974); *People v. Conley*, 64 Cal. 2d 310, 321-22, 411 P.2d 911, 918, 49 Cal. Rptr. 815, 822 (1966). Poddar's second degree murder conviction was reversed for failure to give instructions on diminished capacity. 10 Cal. 3d at 760-61, 518 P.2d at 349-50, 111 Cal. Rptr. at 917-18. Conley's first degree murder conviction was reversed for failure to give instructions on manslaughter. 64 Cal. 2d at 316, 411 P.2d at 914, 49 Cal. Rptr. at 818.

48. *People v. Fuller*, 86 Cal. App. 3d 618, 629, 150 Cal. Rptr. 515, 521 (1978); *People v. Love*, 111 Cal. App. 3d 98, 107-08, 168 Cal. Rptr. 407, 412 (1980).

49.

Our high court has . . . [placed] in the more culpable category [of second degree murder] not only those deliberate life-endangering acts which are done with a subjective awareness of the risk involved, but also life-endangering conduct which is "only" done with the awareness the conduct is contrary to the laws of society.

People v. Love, 111 Cal. App. 3d 98, 107-08, 168 Cal. Rptr. 407, 412 (1980).

50. The majority repeatedly emphasized the need for such awareness in distinguishing grossly negligent vehicular manslaughter from implied malice second degree murder. Nonetheless, some of the language in *Watson* is still susceptible to the interpretation that conscious awareness of the high risk is not required. However, references to what *Watson* "must have known" or "what may be presumed" indicate what a reasonable jury could find in the circumstances. Indeed, the court concludes by stating six facts which "reasonably . . . support a conclusion that [the]

B. Vehicular Manslaughter

The above discussion of the physical act and mental state requirements for second degree murder must be compared and contrasted with those for vehicular manslaughter. This comparison will illustrate conduct which traditionally has not been found dangerous enough to justify inferring malice.

In California, manslaughter is the unlawful killing of a human being without malice. There are three kinds of manslaughter—voluntary, involuntary, and vehicular.⁵¹ Vehicular manslaughter resulting from gross negligence is distinguished from that resulting from ordinary negligence, although both are punishable by imprisonment for up to one year.⁵² As with second degree murder, vehicular manslaughter's physical act and mental state elements have been the subject of judicial scrutiny.

1. The Physical Act Requirement

A conviction for vehicular manslaughter resulting from gross negligence can be supported by a physical act involving some evidence of intoxication and high speed.⁵³ By analogy, intoxication combined with

defendant acted wantonly and with a conscious disregard for human life." 30 Cal. 3d at 301, 637 P.2d at 286, 179 Cal. Rptr. at 50. See *supra* text accompanying notes 11 & 17-18.

51. See *supra* note 7.

52. CAL. PENAL CODE § 193(c) (West Supp. 1983). The statute distinguishes between vehicular manslaughter which is the result of gross negligence and that which is not. Conviction of the former may result in imprisonment in the county jail or state prison, while conviction of the latter provides only for imprisonment in the county jail. The statute once permitted imprisonment for up to 5 years for grossly negligent vehicular manslaughter, Act of June 25, 1945, ch. 1006, § 2, 1945 Cal. Stat. 1942, 1943, but has since been amended, Act of Sept. 21, 1976, ch. 1139, § 134, 1976 Cal. Stat. 5061, 5069.

53. In *People v. Costa*, 40 Cal. 2d 160, 252 P.2d 1 (1953), the defendant had been speeding at from 70-90 miles per hour, and two and one-half hours after the fatal collision had a blood alcohol level of 0.12%. Costa was driving with a conditional driver's license which explicitly forbade both driving under the influence and speeding. The police had stopped Costa for speeding shortly before the accident and were pursuing Costa when the accident occurred. The court affirmed Costa's grossly negligent vehicular manslaughter conviction.

In *People v. Young*, 20 Cal. 2d 832, 129 P.2d 353 (1942), the supreme court read a recklessness requirement into the then applicable vehicular homicide statute. The defendant's car struck and killed a child who had just disembarked from a street car. The defendant had been traveling at about 35 miles per hour in clear, dry weather. The defendant testified that the street car had stopped abruptly and that the child had stepped suddenly into her path. The court overturned the lower court's finding of recklessness and unanimously reversed the defendant's conviction of "negligent homicide." The court also noted that speed alone or inattention to the roadway does not constitute recklessness.

See also *People v. Martin*, 136 Cal. App. 2d 709, 289 P.2d 69 (1955) (conduct of defendant who had been drinking and tried to negotiate sharp curve on mountain highway at 55-60 miles per hour sufficient to support charge of grossly negligent manslaughter); *People v. Flores*, 83 Cal. App. 2d 11, 187 P.2d 910 (1947) (upholding grossly negligent vehicular manslaughter conviction of defendant who had been drinking and was speeding on a residential street).

other forms of negligence, such as illegal passing or unsafe lane changes, would also be sufficient to establish gross negligence. Although it has been held that speed alone may not support a finding of recklessness,⁵⁴ there has been no indication whether speed alone can constitute gross negligence. Similarly, no case has dealt with the question of whether intoxication alone will warrant a finding of gross negligence.⁵⁵

2. *The Mental State Requirement*

Watson reaffirmed that a finding of gross negligence as used in the vehicular manslaughter statute does not require the defendant to have been aware of the risk he was creating. Instead, all that is required is "the exercise of so slight a degree of care as to raise a presumption of conscious indifference to the consequences."⁵⁶ The statute contemplates a higher degree of culpability than that involved in ordinary negligence.⁵⁷ The standard applied is an objective one: whether a reasonable person would have been aware of the risk involved. If so, then awareness is presumed.⁵⁸

C. *Drunk Driving and Automobile Fatalities*

Prior to *Watson*, California law generally did not allow vehicular homicides to be prosecuted as murder, absent application of the felony murder rule or a showing of intent to kill or injure.⁵⁹ The reason for this was that an automobile does not ordinarily pose a serious enough threat to human life to warrant inferring malice. In the absence of an intent to injure, only an instrument likely to cause death, such as a weapon, could be the basis for inferring malice. At first this seems illogical, given the fact that 50,000 automobile fatalities occur annu-

54. See *People v. Young*, 20 Cal. 2d 832, 129 P.2d 353 (1942), discussed at *supra* note 53. But see *People v. Fuller*, 86 Cal. App. 3d 816, 150 Cal. Rptr. 515 (1978), discussed at *supra* note 41.

55. Cases of speed or intoxication alone resulting in death are usually prosecuted as ordinary vehicular manslaughter, but this is inconclusive as to whether an aggravated case could constitute gross negligence. *But cf.* *People v. Eagles*, 133 Cal. App. 3d 330, 338, 183 Cal. Rptr. 784, 788-89 (1982) (excessive speed, running a red light, and failure to brake prior to the fatal collision constitutes gross negligence).

56. 30 Cal. 3d at 296, 637 P.2d at 283, 179 Cal. Rptr. at 47; see also *People v. Costa*, 40 Cal. 2d 160, 166, 252 P.2d 1, 5 (1953).

57. *People v. Young*, 20 Cal. 2d 832, 837, 129 P.2d 353, 356 (1942).

58. *Watson*, 30 Cal. 3d at 296, 637 P.2d at 283, 179 Cal. Rptr. at 47.

59. See *supra* notes 39-41 and accompanying text. The dicta in *Fuller* indicates that a second degree murder prosecution could have been brought directly in that case. While a discussion of *Fuller* is beyond the scope of this Note, it should be noted that the defendants in *Fuller* were not driving under the influence of alcohol, were obviously very much aware of their actions, and intentionally committed several severe forms of reckless driving (e.g., high speed, wrong way driving, running red lights). Thus, *Fuller* is clearly distinguishable from drunk driving homicide cases.

ally,⁶⁰ with about 5,000 of those occurring in California.⁶¹ A look at some statistics, however, reveals that use of an automobile does not always give rise to a high probability of causing death.

Approximately one-half of all automobile fatalities are alcohol-related. The probability of a fatal accident occurring rises dramatically as a driver's blood alcohol level increases. "A person with a blood alcohol level of 0.08% poses four times the risk of causing a fatal accident as a person who has not been drinking; at 0.15% the risk is twenty-five times as great."⁶² Problem drinkers are involved in two-thirds of the alcohol related automobile fatalities; the other one-third are caused by social drinkers.⁶³ Seven percent of all drivers are problem drinkers; sixteen percent are social drinkers.⁶⁴ Thus, seven percent of the driving public—the problem drinkers—account for roughly one-third of all automobile fatalities. Excessive speed and reckless driving also contribute to the likelihood of a fatal accident. Because force at impact increases geometrically with a vehicle's speed, excessive speed increases the likelihood that an accident will be fatal; the greater the force the greater the risk of death. Similarly, reckless driving increases the chance that an accident will occur.

While the chances of fatal injury increase drastically as intoxication increases, the actual probability of such injury resulting from a single episode of drunk driving may still be quite small. For example, sober drivers traveled approximately 165.1 billion miles in California in 1981 with "only" 2500 fatalities.⁶⁵ Assuming that the average driver covers 12,000 miles per year, the chance of a sober driver becoming involved in an automobile fatality in any one year is approximately two hundredths of one percent.⁶⁶ So a driver with a blood alcohol level

60. See NATIONAL INST. ON ALCOHOL ABUSE AND ALCOHOLISM, PROCEEDINGS OF THE FOURTH ANNUAL ALCOHOLISM CONFERENCE OF THE NATIONAL INSTITUTE ON ALCOHOL ABUSE AND ALCOHOLISM 23 (M. Chafetz ed. 1975) [hereinafter cited as PROCEEDINGS]; Kornblum & Binder, *The Alcoholic Driver: A Proposal for Treatment as an Alternative to Punishment*, 590 INS. L.J. 133, 137 (1972); Little, *A Theory and Empirical Study of What Deters Drinking Drivers, If, When and Why?*, 23 AD. L. REV. 169, 187 (1971); Comment, *Alcohol Abuse and the Law*, 94 HARV. L. REV. 1660, 1674 (1981).

61. See CALIFORNIA HIGHWAY PATROL, ANNUAL REPORT OF FATAL AND INJURY MOTOR VEHICLE TRAFFIC ACCIDENTS i, 58 (1980).

62. Comment, *supra* note 60, at 1675. Further, minor impairment of driving ability in most subjects has been detected at a blood alcohol level of only 0.03%, with serious impairment beginning at 0.08%. Comment, *The Drinking Driver: An Approach to Solving a Problem of Underestimated Severity*, 14 VILL. L. REV. 97, 100 (1968). It takes about nine ounces of 100 proof liquor for the average man to reach a blood alcohol level of 0.10%. See *id.* at 101.

63. PROCEEDINGS, *supra* note 60, at 33-34.

64. *Id.*

65. See San Francisco Chron., Mar. 27, 1982, at 3, col. 4.

66. This is calculated as follows: 165.1 billion miles per year divided by 12,000 miles per year per driver = 13,758,333 drivers. 2500 fatalities per year divided by 13,758,333 drivers = 0.00018 fatalities per driver per year.

of 0.15%, who has a chance of being involved in a fatal accident twenty-five times greater than a sober driver,⁶⁷ has about a one-half of one percent chance of causing a fatality during any one year.⁶⁸ While other factors such as rate of speed, manner of driving, time of day, location, and weather conditions obviously influence this probability, the likelihood of inflicting death in any one drunk driving episode may be quite low. The high volume of alcohol-related traffic fatalities is more the result of the large number of drunk drivers,⁶⁹ than a high probability of most drunk drivers causing a fatality.⁷⁰

III ANALYSIS

The *Watson* majority was correct in concluding that current law does not preclude second degree murder charges in drunk driving homicide cases.⁷¹ Nonetheless, the opinion suffers from several serious flaws. By failing to specify the exact conduct necessary to support a finding of implied malice, the court left open the possibility of unwarranted or discriminatory second degree murder charges. In addition, the court considered the defendant's intoxicated conduct without addressing the difficulty of proving the mental state of an intoxicated de-

67. Comment, *supra* note 60, at 1675.

68. This calculation presumes an equivalency between the number of driving episodes per year for non-alcohol-impaired and alcohol-impaired drivers. Since it is likely that the average alcohol-impaired driver would make less trips (while intoxicated) per year than his sober counterpart makes while sober, the actual probability of a fatality could be significantly lower. Also, the effect of multiple homicides resulting from one drunk driving episode is ignored here. This would again reduce the probability of a fatality occurring in an average drunk driving episode, since the dangerous episodes account for a greater proportion of the fatalities.

69. Arrests for drunk driving exceed 1.2 million per year, but the odds of a driver with a blood alcohol level of 0.10% being arrested may be as low as 1 in 2,000. Comment, *supra* note 60, at 1675, 1677; Note, Taylor v. Superior Court: *Punitive Damages for Nondeliberate Torts—the Drunk Driving Context*, 68 CALIF. L. REV. 911, 929 (1980).

70. *But see supra* text accompanying note 63; *infra* text accompanying note 91.

71. The majority's conclusion that the legislature did not intend to preclude application of the general murder statutes seems justified in light of the accepted distinction between implied malice and gross negligence. Certainly, one who intentionally injures another with an automobile, resulting in death, can be charged with second degree murder, not just vehicular manslaughter. The legislature had no intent as to the possible prosecution of drunk driving homicide as second degree murder, as this was not at issue when the vehicular manslaughter statutes were adopted. *See Watson*, 30 Cal. 3d at 297-98, 637 P.2d at 283-84, 179 Cal. Rptr. at 47-48.

Watson reestablished the rule that actual awareness of the risk is required for a finding of implied malice. A discussion of the merits of this rule is beyond the scope of this Note. For a thorough review of the history of the controversy over whether to require such awareness, as well as an analysis supporting the requirement of actual awareness, see Collings, *supra* note 42. *See also* Comment, *Ambiguous Abandon and Murky Malignancy: Charging the Jury on Implied Malice*, 114 U. PA. L. REV. 495 (1966). The Model Penal Code also requires actual awareness of the risk before one can be prosecuted for murder. *See* MODEL PENAL CODE § 210.2 comment, at 27-28 (Proposed Official Draft 1962).

fendant. Finally, the court's decision to permit charging a handful of potential defendants with second degree murder does little to further any of the recognized goals of the criminal justice system. This Part discusses these criticisms in some detail.

A. *The Dangers of an Uncertain Standard*

The court identified six facts which in combination supported an inference of malice. Two of those facts were relevant to the physical act requirement: the defendant had become legally intoxicated and had driven at an excessive speed. These two facts also contributed towards the defendant's mental state, as did four others: (1) he had driven his car to the bar and "must have known" that he would drive later; (2) he was presumably aware of the hazards of drunk driving; (3) he narrowly avoided a collision prior to the fatal accident by skidding to a stop; and (4) he resumed his excessive speed and tried to brake before impact.

A major flaw in the majority's analysis is that it does not state which of these six facts, alone or in combination, are the sine qua non of a finding of implied malice. Such an omission may lead to unwarranted prosecutions and dramatic changes in plea bargaining positions.⁷² Second degree murder charges may be brought in drunk driving cases where they are inappropriate and unwarranted convictions may result. At the least, the plea bargaining positions of the parties will have been significantly altered given the increased penalty applicable to second degree murder. While vehicular manslaughter carries a maximum one year penalty, the sentence imposed for second degree murder is 15 years to life. Faced with these alternatives, defendants may be inclined to plead guilty to the lesser charge despite their innocence.

The court's failure to set specific standards for inferring malice may lead to discriminatory law enforcement. The use of prosecutorial and judicial discretion has been a major problem in enforcing drunk driving laws.⁷³ Juries also exercise wide discretion and nullification power in alcohol-related driving offenses.⁷⁴ Discrimination can occur on unconscious levels, and can include not only "traditional" factors such as race or national origin but also social status or job occupa-

72. Although § 1192.7(a) of the California Penal Code purports to abolish plea bargaining in cases where the indictment or information charges any serious felony or drunk driving, CAL. PENAL CODE § 1192.7(a) (West 1982), it is doubtful that this § will have any practical effect because (1) there is no restriction on plea bargaining in the precharge stage, and (2) the statute itself allows plea bargaining when "there is insufficient evidence to prove the people's case." *Id.*

73. See, e.g., PROCEEDINGS, *supra* note 60, at 38-47; Little, *supra* note 60, at 185-86.

74. See, e.g., Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1528 (1974); Comment, *supra* note 60, at 1677.

tion.⁷⁵ Given this historic pattern of discretion, decisions about whom to prosecute or convict on second degree murder charges in drunk driving homicide cases could be discriminatory. While such discrimination cannot be eliminated, its impact can effectively be minimized by setting specific guidelines—something the *Watson* court failed to do.

B. *Misguided Consideration of Intoxicated Conduct*

Given Watson's extreme intoxication, the court's use of his near collision and resumption of speed just prior to the fatal accident is untenable. While a sober person who narrowly avoids an accident will probably react by realizing the danger he has just avoided, no similar reaction can be expected of an intoxicated person. Indeed, by avoiding the collision, Watson may have felt reassured that he was still "under control" and not endangering anyone. He also may not have realized how high the risk of death was, how intoxicated he was, or how fast he was driving. In short, the fact that Watson was heavily intoxicated makes proof beyond a reasonable doubt of his actual awareness of risk while intoxicated impossible.⁷⁶ Given the inherent difficulty of using any evidence of the defendant's intoxicated conduct to prove a particular mental state, such evidence should not be considered in deciding whether the defendant had actual awareness of the risk he created.⁷⁷

Moreover, the majority's rule allowing introduction of evidence regarding the defendant's intoxicated conduct to prove his mental state will punish some intoxicated drivers while allowing the most dangerous drivers to go free. The more intoxicated the defendant, the more difficult it will be to prove actual awareness of the risk. Yet the more intoxicated the defendant, the less aware he is of his environment and

75. It has been suggested that juries may be prone to acquit where "there but for the grace of God, go I." Little, *supra* note 60, at 182. "[S]ignificant segments of the population are still not included on juries as often as they would be in a completely random system aimed at impaneling a representative cross-section. Blue-collar workers, nonwhites, the young, the elderly and women are the groups most widely underrepresented on juries" J. VAN DYKE, *JURY SELECTION PROCEDURES* 24 (1977). See also Schulhofer, *supra* note 74, at 1557-58 ("[I]f uneven law enforcement is unavoidable, random inequalities [based on fortuitous results] are to be preferred to those that reflect social or individual bias.").

76. "Alcohol . . . often . . . [results] in a tendency to underestimate speed." U.S. DEP'T OF HEALTH, EDUC. & WELFARE, *FIRST SPECIAL REPORT TO THE U.S. CONGRESS ON ALCOHOL AND HEALTH*, reprinted in *ALCOHOLISM: INTRODUCTION TO THEORY AND TREATMENT* 42 (D. Ward ed. 1980). Evidence of voluntary intoxication is relevant to the issue of whether a defendant acted with the requisite mental state for the crime charged. CAL. PENAL CODE § 22 (West Supp. 1983). *But see infra* text accompanying note 102.

77. The Model Penal Code provides that evidence of intoxication can rebut the mental state of intent or knowledge, but not that of recklessness, even though under the Code recklessness also requires actual awareness of risk. Thus, under the Code, evidence of voluntary intoxication presumably could not be used by a defendant to rebut the mental state element in an implied malice murder prosecution. See MODEL PENAL CODE § 2.08(2) comment, at 2-9 (Tent. Draft 1953).

actions, and the greater the risk he poses to society.⁷⁸ Under the majority position, those who pose the greatest danger to society will be the least likely to be convicted of second degree murder.

C. *Incompatibility with the Goals of the Criminal Law*

The goals of the criminal law, and of punishment in general, include specific deterrence, general deterrence, restraint, rehabilitation, education, and retribution.⁷⁹ Few of these goals are significantly furthered by allowing drunk drivers to be charged with, and convicted of, second degree murder.

Specific deterrence is the use of punishment to deter the defendant from repeating the same crime.⁸⁰ Punishment of any crime has an element of specific deterrence. The harsher the penalty the more the defendant will wish to avoid reexperiencing it. Whether imposing a second degree murder sentence would increase specific deterrence is questionable. An otherwise law abiding citizen who had completed a year in state prison would probably feel very determined not to repeat the experience. Imprisonment for fifteen years or more is unlikely to add significantly to this already strong incentive. Moreover, only an extremely small percentage of problem drinkers cause fatal accidents in any one year,⁸¹ and not all of these would have had the malice necessary to be convicted of second degree murder. So only an insignificant proportion of the total driver population would actually be deterred to a greater extent—those “unlucky” few who actually cause death and are convicted of second degree murder.

General deterrence—the deterrence of others achieved by punishing the defendant for his offense⁸²—is sufficiently furthered by existing sanctions. One who drives under the influence risks fines, suspension of driving privileges, and imprisonment if caught and convicted.⁸³ If involved in an accident resulting in serious injury or death, the intoxicated driver faces tort liability including the possible assessment of punitive damages,⁸⁴ and imprisonment in state prison for up to one

78. U.S. DEP'T OF HEALTH, EDUC. & WELFARE, *supra* note 76, at 42; *supra* text accompanying notes 60-63; Comment, *supra* note 60, at 1682.

79. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 5, at 21-25 (1972); Schulhofer, *supra* note 74, *passim*; Note, *A Punishment Rationale for Diminished Capacity*, 18 U.C.L.A. L. REV. 561, 573 (1971).

80. W. LAFAVE & A. SCOTT, *supra* note 79, § 5, at 22.

81. See *supra* text accompanying notes 65-70.

82. W. LAFAVE & A. SCOTT, *supra* note 79, § 5, at 23.

83. Possible punishment for a first conviction of drunk driving is imprisonment in county jail for from four days to six months and a fine of from \$375 to \$500. CAL. VEH. CODE § 23160 (West Supp. 1983). Punishment increases for repeat offenders. See *id.* §§ 23165, 23170.

84. Taylor v. Superior Court, 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979), discussed at *infra* note 102.

year.⁸⁵ Of course, an intoxicated driver also risks his own death. Given these sanctions, the very slight possibility of a lengthier sentence is unlikely to add any deterrent effect. Most individuals who drive while under the influence of alcohol must simply assume that a fatal accident will not happen to them, and so any additional sanctions would have little deterrent effect.

In addition, the likelihood of apprehension has more effect on deterrence than does the punishment's severity.⁸⁶ The probability of apprehending any given drunk driver may be as low as one in two thousand,⁸⁷ and the probability of his causing a fatal accident during a single episode of drunk driving is also quite low. Therefore, many drunk drivers feel, and are, relatively safe from criminal sanctions. An increase in punishment that is presumed by the target class to be inapplicable to it would have no marginal deterrent effects, especially when existing deterrents already impose significant penalties.

Finally, and perhaps most importantly, the problem drinker, who causes by far the largest percentage of vehicular homicides, is the least deterrable of all classes of drivers.⁸⁸ These individuals are the most willing to deny their drinking problem, the danger posed by their behavior, and the probability of arrest or accident.⁸⁹ Even if there were a small deterrent effect on social drinkers, there is unlikely to be any deterrence of those causing two-thirds of all alcohol-related vehicle fatalities.

Restraint is the removal from society of dangerous individuals so they can do no more harm.⁹⁰ Restraint would be served very well by the longer sentence which accompanies a second degree murder conviction. But since the risk of any one driver causing a fatality is quite small, and there are many drivers who are problem drinkers, the total number of traffic deaths may be reduced only slightly if those problem drinkers who cause a fatality are incarcerated for longer periods. Still, the lengthy incarceration of the most dangerous problem drinkers who

85. CAL. VEH. CODE § 23180 (West Supp. 1983); CAL. PENAL CODE § 193 (West Supp. 1983).

86. PROCEEDINGS, *supra* note 60, at 35; *see generally* Comment, *supra* note 60, at 1677-78 ("Improving the apprehension rate is the lynchpin of any effective program of countermeasures [to drunk driving].").

87. Comment, *supra* note 60, at 1677; Note, *supra* note 69, at 929.

88. *See* C. BRIDGE, ALCOHOLISM AND DRIVING 71 (1972); Robertson, Rich & Ross, *Jail Sentences for Driving While Intoxicated in Chicago: A Judicial Policy that Failed*, 8 LAW & SOC'Y REV. 55, 66 (1973); Note, *supra* note 69, at 927; Comment, *Driving Under the Influence of Alcohol: A Wisconsin Study*, 1970 WIS. L. REV. 495, 508.

89. *See* C. BRIDGE, *supra* note 88, at 35; Kornblum & Blinder, *supra* note 60, at 140.

90. W. LAFAYE & A. SCOTT, *supra* note 79, § 5, at 22.

continue to drive while intoxicated may be warranted.⁹¹

Allowing second degree murder convictions will not increase the likelihood of rehabilitating either the problem drinker or the social drinker. The problem drinker can only be rehabilitated if he has an intense personal commitment and the aid of a support network.⁹² The shock of having killed someone and being prosecuted for murder may provide the motivation for such a commitment, but then so would a prosecution for manslaughter. Similarly, the social drinker is just as likely to reduce or stop his driving while intoxicated because of a manslaughter prosecution as one for murder.⁹³

The criminal law teaches the public what conduct is and is not desirable, especially where conduct is *malum prohibitum*.⁹⁴ Allowing second degree murder convictions will increase public awareness that drunk driving is a serious problem. A conviction for *murder*, with its stigma, has exactly the shock value which could change attitudes towards drunk driving. However, other forms of communication could accomplish this same result in a less conspicuous, but more effective, manner. Continuous education of the public through the media, public meetings, and the schools is more likely to increase and maintain public awareness than a front page supreme court decision that quickly fades into the background.

"Retribution" asserts that criminals are guilty of morally culpable conduct and deserve a punishment befitting their crime—the crime being defined by both an *actus reus* and a *mens rea*.⁹⁵ Also, by punishing the guilty, society maintains respect for the law and helps suppress acts of private vengeance.⁹⁶ The longer prison sentence accompanying sec-

91. For example, violation of a parole condition of not driving under the influence would justify a return to prison. *Cf. infra* text accompanying notes 106-13.

92. See C. BRIDGE, *supra* note 88, at 71; Kornblum & Blinder, *supra* note 60, at 145-46.

93. Participation in an alcohol treatment program is a condition to any grant of probation for drunk driving. CAL. VEH. CODE § 23161 (West Supp. 1983). Of course, the use of such programs should be required before any problem drinker is released back into society. Successful completion of the program strongly supports the granting of probation or parole, since the individual is no longer a danger to society, but retribution may still be appropriate. See *infra* text accompanying notes 96-97.

94. W. LAFAVE & A. SCOTT, *supra* note 79, § 5, at 23-24.

95. Retaliation has also been identified as a goal of the criminal law. *Id.* at 24; Schulhofer, *supra* note 74, at 1508-11. Retaliation is the return of suffering for suffering, and is supported as natural justice based on harm caused. But retaliation as a goal of the criminal law has been criticized and rejected by most American jurisdictions and legal theorists. *Id.* at 1510-11. The concept of *mens rea* is at least a partial rejection of retaliation. Retaliation still has some impact, however, because people continue to follow it. For example, juries are more likely to convict upon weak evidence if the harm caused by the defendant was great. *Id.* at 1530-31. Allowing second degree murder convictions would serve the ends of retaliation, and perhaps some deep seeded drive for "an eye for an eye." But retaliation must be rejected because of the importance of culpability in fixing punishment.

96. W. LAFAVE & A. SCOTT, *supra* note 79, § 5, at 24.

ond degree murder convictions will further the criminal law's retributive goal. If the defendant actually had the mens rea for implied malice, some increase in punishment seems warranted. Increased punishment will emphasize the value of the lost human life to society,⁹⁷ and satisfy demands for "justice" by the victim's relatives and friends.

Thus, allowing convictions for second degree murder in drunk driving homicide cases only marginally furthers some of the goals of the criminal law. Specific deterrence, general deterrence, and rehabilitation—three of the most important goals of the criminal law because they most closely correspond to the net decrease expected in vehicle fatalities—are not furthered by an increase in punishment. Education might be increased, but at a great cost to a few "unlucky" individuals, while effective and less burdensome alternatives are available. Retribution is furthered, but it is always furthered by any increase in punishment where death was the result of the defendant's culpable conduct. Restraint would be increased, but the negligible benefit to society hardly seems worth the great cost to every defendant. Overall, the great increase in punishment for a few drunk drivers is not justified. Accordingly, the *Watson* court should not have permitted second degree murder charges to be brought in drunk driving homicide cases absent an express legislative directive to do so.

IV

ALTERNATIVE APPROACHES

As noted, the *Watson* decision suffers from a number of critical flaws. The uncertainty of the court's guidelines may lead to discriminatory enforcement. In addition, the court's failure to limit its consideration of intoxicated conduct was ill-advised. The most fundamental flaw, however, is that the substantial increase in punishment of a few unlucky defendants is unjustified. The first Section of this Part suggests a way that trial courts can best apply the *Watson* decision to minimize its defects. The second Section proposes a better, legislative alternative for the punishment of drunk driving homicide. The final Section considers and rejects a possibility overlooked by the *Watson* court: application of the felony murder rule to drunk driving homicides.

A. A Specific Standard

The *Watson* court focused on four factors: (1) the defendant's legal intoxication; (2) his excessive speed; (3) his having driven to the bar;

97. Currently, the Penal and Vehicle Codes do not explicitly provide for any difference in punishment between drunk driving resulting in bodily injury and drunk driving resulting in death. CAL. PENAL CODE §§ 192-193 (West Supp. 1983); CAL. VEH. CODE §§ 23153, 23180 (West Supp. 1983). *But see infra* note 109.

and (4) his (presumed) awareness of the risks of drunk driving. The court's approach was correct because these factors actually reveal the risk of a vehicular homicide occurring and the defendant's awareness of that risk. However, these factors need to be defined more specifically to create an accurate standard for the inference of malice.

1. *The Physical Act Requirement*

While a driver with a blood alcohol level of 0.15% has a one-half of one percent chance per year of causing an automobile fatality, the probability that a death will result from a "gun attack" was found in one study to be fourteen percent.⁹⁸ Thus, such a drunk driver poses less than four one-hundredths of the chance of causing death as a person who fires a gun at another person. An intoxicated driver who drives in an otherwise normal manner does not pose the high probability of death required in implied malice cases.⁹⁹ Only definitive research can pinpoint exactly when the risk posed by a drunk driver's conduct creates a significant probability of death. But certainly a high blood alcohol level along with excessive speed or some other form of reckless driving should be required.¹⁰⁰ These requirements would limit the potential for discriminatory enforcement of the law.

2. *The Mental State Requirement*

Watson makes it clear that the defendant's actual awareness of the risk created is required before he may be charged with second degree murder. The use of the defendant's intoxicated behavior to decide whether he was aware of the risk, however, gives too much discretion to the components of the criminal justice system and is unlikely to convict the most dangerous drunk drivers.

An alternative to the use of the defendant's intoxicated behavior is to consider the defendant's mental state when he starts to drink. Any individual who begins to drink knowing that he (1) tends to continue drinking until becoming very intoxicated;¹⁰¹ (2) tends to drive recklessly when drunk; and (3) will probably drive after drinking, has the requisite mental state from which to infer malice.¹⁰² One who begins to

98. See Schulhofer, *supra* note 74, at 1594 n.318.

99. See *supra* notes 39-41 and accompanying text.

100. Note that the setting of the blood alcohol level and degree of recklessness needed to infer malice appears to involve a legislative, not a judicial, judgment. Consistency in the standard's application is needed because of the frequency of such offenses and the penalty's severity. See *infra* text accompanying notes 110-13.

101. This portion of the requirement could also be met by a specific intent to become very intoxicated.

102. An analogous approach was adopted in *Taylor v. Superior Court*, 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979), where the supreme court held that one who wilfully consumes

drink knowing that these three elements are met acts with actual awareness that "high risk" drunk driving is a probable result of his actions. Someone who has never drunk to excess, or does not drive or drive recklessly when intoxicated, is not shown to have the required awareness by merely beginning to drink.

Proof of the three elements necessary to establish actual awareness of the risk would focus on past drinking and driving habits. Knowledge of a tendency to drink to excess could be shown from evidence of drinking habits or evidence of prior alcohol-related offenses.¹⁰³ Proof of reckless drunk driving habits could come from evidence of prior reckless driving or reckless drunk driving offenses. Proof that the defendant knew he would probably drive once drunk could come either from evidence of prior drunk driving offenses or from evidence that the defendant drove to where he intentionally drank, had no other appar-

alcoholic beverages to the point of intoxication knowing that he thereafter must operate a motor vehicle has exhibited "civil malice" (a conscious disregard for the safety of others) resulting in liability for punitive damages if injury results. But the court refused to require a history of alcoholism, prior drunk driving convictions, or a prior alcohol related accident for civil malice to be inferred. *Id.* at 896, 598 P.2d at 857, 157 Cal. Rptr. at 696-97.

Malice aforethought requires knowledge of a greater probability of a more dangerous risk than does civil malice, as the former is concerned with second degree murder convictions while the latter is only concerned with punitive damages in civil actions. Thus, willful consumption to a point of intoxication knowing one will thereafter drive should not be sufficient to infer malice aforethought. *See supra* text accompanying notes 59-70; *see also* Note, *supra* note 69, at 929 ("[The] assumption that all intoxicated drivers pose probably dangerous consequences is clearly wrong and cannot justify the imposition of punitive damages against all such drivers.").

103. Prior reckless driving and alcohol related convictions would be inadmissible as evidence tending to establish the defendant's knowledge of his drinking and driving habits because jury findings constitute hearsay as to the existence of facts included within the offense. *See* CAL. EVID. CODE § 1200 (West 1966); *id.* § 1300 law revision commission comment (West 1966).

However, witnesses to the prior offense, such as police officers, could still testify. Such testimony would be admissible as evidence in second degree murder drunk driving homicide cases because it is relevant, necessary and extremely probative on the disputed issue of the defendant's mental state (awareness of his tendency to commit high risk drunk driving), despite its likely substantial, prejudicial effect. *See* CAL. EVID. CODE § 352 (West 1966); *People v. Eagles*, 133 Cal. App. 3d 330, 338-40, 183 Cal. Rptr. 784, 789-90 (1982) (evidence of defendant's reckless driving on the afternoon prior to the fatal accident was properly admitted in a prosecution for implied malice second degree murder as it was relevant to defendant's knowledge that his conduct was life endangering). The defendant would be entitled to an instruction limiting the jury's use of the evidence to the disputed issue, CAL. EVID. CODE § 355 (West 1966), but it seems unlikely that such an instruction could cure all of the evidence's prejudicial effect.

A discussion of the prior convictions' collateral estoppel effects, if any, is beyond the scope of this Note. *See* CAL. VEH. CODE § 40834 (West 1971) ("a judgment of conviction for any violation of this code . . . shall not . . . constitute a collateral estoppel of any issue determined therein in any subsequent civil action"); *People v. Camp*, 10 Cal. App. 3d 651, 89 Cal. Rptr. 242 (1970) (exclusions of evidence disputing paternity in child support action constituted error where defendant pled guilty in prior child support action). *See also Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 874-75 (1952) (state and federal cases are split on allowing prosecution's assertion of collateral estoppel doctrine); Note, *Perjury by Defendants: The Uses of Double Jeopardy and Collateral Estoppel*, 74 HARV. L. REV. 752, 763-64 (1961) (prosecution should not be allowed to assert collateral estoppel in perjury proceedings).

ent way of getting home, and did not (either when sober or drunk) ask someone to give him a ride or summon a cab.

3. *Problems with the Specific Standard*

While this test is preferable to that suggested by *Watson*, it may create a new problem. Unless the defendant is willing to admit to an awareness of these factors or to an undetected history of reckless drunk driving or similar offenses, proof of the mental state necessary to infer malice would center on introducing evidence of the defendant's prior alcohol-related or driving offenses before the jury.¹⁰⁴ This evidence is directly relevant to the mental state required to infer malice, but obviously would be very prejudicial to the defendant. The jury might be heavily influenced by a history of drunk driving offenses, for example, and fail to limit their consideration of this evidence to the issue of the defendant's mental state.¹⁰⁵ Thus, admitting evidence of the defendant's prior driving or alcohol-related offenses could have an adverse effect on the defendant's right to a fair and impartial trial.

B. Legislative Enactment of Punishment Enhancements

The specific standard limits the possibility of discriminatory enforcement and eliminates the consideration of intoxicated conduct to establish the defendant's mental state. In instances where the defendant has committed prior reckless driving or alcohol-related offenses, however, the standard threatens his right to a fair trial. Moreover, the standard does nothing to moderate the punishment which may be inflicted upon a handful of defendants under the *Watson* rule.

There is an alternative to inferring malice in drunk driving homicide cases—one that preserves the defendant's right to a fair trial, results in a more suitable punishment, and better serves the goals of the criminal law. This alternative would be to enhance the punishment for vehicular homicide where (1) the defendant's reckless driving¹⁰⁶ and excessive intoxication cause a death, and (2) the defendant has either prior reckless driving¹⁰⁷ or reckless drunk driving¹⁰⁸

104. See *supra* note 103. A study of alcohol-related automobile fatalities in Los Angeles County found that 25% of the intoxicated drivers had previous alcohol-related contact with law enforcement and 12% had alcohol-related driving offenses. PROCEEDINGS, *supra* note 60, at 26.

105. This seems all the more likely given a jury's tendency to convict where serious though unintended harm has occurred. Schulhofer, *supra* note 74, at 1530.

106. Obviously, this form of "recklessness" would not require actual awareness of the risk, since actual awareness would be presumed from the defendant's prior behavior and experience.

107. CAL. VEH. CODE § 23103 (West Supp. 1983).

108. The Vehicle Code should be amended to provide separate offenses of drunk driving and reckless drunk driving. See CAL. VEH. CODE §§ 23152, 23160 (West Supp. 1983). Increased punishment for reckless drunk driving is warranted given the greater risk posed by the defendant. Each prior enhanced manslaughter conviction would constitute a prior reckless drunk driving conviction for purposes of future enhancements. Reckless felony drunk driving convictions would

convictions.¹⁰⁹

While the degree of enhancement is best left to the legislature, the penalty for the equivalent of second degree murder in drunk driving homicide cases should be lower than for ordinary second degree murder.¹¹⁰ This is warranted given the lack of an actual intent to kill or injure, the relatively low probability of drunk driving causing death, and the cost of lengthy prison sentences to both society and the defendant. An enhancement should be added for *each*¹¹¹ prior reckless driving or reckless drunk driving conviction.¹¹² The more prior convictions, the greater the defendant's culpability, and the greater the threat he represents, in that he probably drives recklessly while extremely intoxicated more often than the average intoxicated driver.

also constitute prior reckless drunk driving convictions.

109. An analogous approach has already been adopted into California law. California's new drunk driving law provides for stiffer penalties for repeat offenders, CAL. VEH. CODE §§ 23160, 23165, 23170, 23180, 23185, 23190 (West Supp. 1983), with the punishment for felony drunk driving (that which results in bodily injury or death) increased from one to two, three or four years in state prison if the defendant has two or more drunk driving or felony drunk driving convictions. *Id.* §§ 23180, 23185, 23190.

One could argue that the provision increasing the punishment for repeat offenders who commit felony drunk driving should preclude manslaughter and murder prosecutions. But, prior to the new law, it has been held that felony drunk driving is not a lesser included offense of vehicular manslaughter, the two offenses are not mutually exclusive so as to preclude conviction of (but not sentencing for) both offenses, *People v. Rocha*, 80 Cal. App. 3d 972, 975-76, 146 Cal. Rptr. 81, 83 (1978), and the legislature did not intend to supplant the vehicular manslaughter provisions, *In re Frank F.*, 90 Cal. App. 3d 383, 386, 153 Cal. Rptr. 375, 377 (1979). Furthermore, each death is a separate violation of the manslaughter (or murder) statute, while the number of felony drunk driving violations does not increase with each added victim. *Id. Watson* specifically holds that multiple murder prosecutions in drunk driving homicides are not precluded by the vehicular manslaughter statute. So the logical conclusion is that the new felony drunk driving provisions do not preempt multiple manslaughter or murder prosecutions.

110. This is analogous to the approach of the manslaughter statute. The punishment for vehicular manslaughter is at most one year in state prison, while the punishment for involuntary and voluntary manslaughter can be as high as four and six years in state prison, respectively. This reflects the legislature's judgment that one who commits gross negligence in the operation of a vehicle resulting in death deserves less punishment than one who commits other forms of manslaughter. CAL. PENAL CODE § 193 (West Supp. 1983).

111. Of course, a limit might have to be placed on the maximum number of enhancements. But the maximum period of incarceration might conceivably approach that for second degree murder where the defendant has an excessive number of prior convictions. A defendant could be seen as being so dangerous that the restraint function of the criminal law becomes paramount.

112. An enhancement should also be added for each additional person killed in the accident. This will further the criminal law's retributive goal. *See supra* text accompanying notes 95-97. However, each victim should not constitute a separate offense. *See supra* note 109. Multiple sentences, if served consecutively, are not warranted because the number of victims is not an accurate measure of the defendant's culpability and dangerousness. *See Schulhofer, supra* note 74, *passim*. But *see People v. Eagles*, 133 Cal. App. 3d 330, 342-43, 183 Cal. Rptr. 784, 791-92 (1982) (proper to impose consecutive sentences for three convictions of grossly negligent vehicular manslaughter arising from one collision because the statute addresses itself to the "outrage" perpetrated on three victims; multiple convictions for multiple victims are *not* allowed under the felony drunk driving statute because the fundamental concern of that statute is not the outrage done the victims but rather prevention of and punishment for drunk driving).

The enhancement could also vary with the risk generated by the defendant's particular conduct while driving.

Enhancing the sentence for vehicular manslaughter has four major advantages over charging drunk drivers with second degree murder. First, the legislature is more competent than the court to set the levels of conduct at which increased punishment is justified. The difficulty of trying to pinpoint exactly when drunk driving poses a substantial risk to life has already been shown.¹¹³ The legislature is the body best able to weigh all the data on alcohol-related automobile fatalities and to specify the level of intoxication and the degree of recklessness (e.g., twenty miles per hour above the legal speed limit) which deserve increased punishment. The legislature would also be more responsive to the pervasiveness of the problem and could respond to the public's attitude and demands.

Second, the use of sentence enhancements reduces the potential for prosecutorial, judicial, and jury discretion and discrimination. Moreover, juries would be less likely to acquit sympathetic defendants since the enhancement might be only a few years rather than the fifteen years to life imposed for second degree murder.

Third, the use of sentence enhancements would better preserve the defendant's right to a fair trial. The prosecution would still have to establish the defendant's high blood alcohol level and reckless conduct, but the introduction of his driving record as evidence of his mental state would not be necessary. If the jury found the defendant guilty of high risk drunk driving resulting in a fatality, then the defendant's driving record would become relevant to sentencing under the legislative formula. The sentence would then be enhanced if he had prior reckless driving or reckless drunk driving convictions, or if his high risk drunk driving was particularly egregious (as defined by the legislature). The judge need only scan the defendant's driving record and the statute to determine the applicable enhancement.

Fourth, variable enhancements serve the goals of the criminal law in a much more balanced manner than second degree murder convictions. Linking the length of incarceration to the culpability and dangerousness of the driver (as judged by his conduct and driving record) will further the goals of retribution and restraint. The goal of specific deterrence may also be served, as the repeat offender may be an unusual individual for whom the existing penalty is insufficient. Those less culpable drunk drivers who represent relatively little danger to society will receive comparatively lighter sentences. The switch from second degree murder convictions to sentence enhancements will have no ef-

113. See *supra* text accompanying notes 59-70.

fect on the goals of general deterrence and rehabilitation. While a decrease in the educational effect may result, it can be offset through other avenues. Overall, the use of variable enhancements more accurately reflects the culpability and dangerousness of those who commit homicides while driving under the influence of alcohol.

C. The Second Degree Felony Murder Rule and Felony Drunk Driving

The *Watson* court did not resolve the question of whether the second degree felony murder rule might apply to felony drunk driving.¹¹⁴ The rule states that if the felony, when viewed in the abstract, is one inherently dangerous to human life, then any death resulting from the defendant's conduct is second degree murder.¹¹⁵ The felony murder rule does not apply where the underlying felony is a necessary ingredient of the homicide and its elements are necessary elements of the homicide.¹¹⁶

The felony murder rule should not be applied to cases of felony drunk driving. First, the underlying felony is a necessary ingredient of the homicide. Most, if not all, of its elements are necessary elements of the homicide. A case of drunk driving homicide will by definition *always* include a case of felony drunk driving.¹¹⁷

Second, in the eyes of the legislature felony drunk driving is not independent of the homicide. By making injury *or death* an element of

114. In *People v. Calzada*, 13 Cal. App. 3d 603, 91 Cal. Rptr. 912 (1970), the defendant caused the death of another driver while driving under the influence of a narcotic. The trial court dismissed a second degree felony murder charge. The appellate court reversed, holding that the underlying felony of driving under the influence of a narcotic (1) was not a felony included in fact within a homicide resulting from a collision; (2) was not a necessary ingredient of the homicide; (3) was complete as soon as the defendant started to drive; and (4) did not contain the necessary elements of homicide. The court refused to consider whether felony drunk driving, which occurs only when bodily injury or death accompanies drunk driving, CAL VEH. CODE §§ 23153, 23180 (West Supp. 1983), could serve as the basis for a second degree felony murder conviction.

Act of Feb. 25, 1959, ch. 3, § 2, 1959 Cal. Stat. 1523, 1708, which made driving under the influence of a narcotic a felony, has been repealed, Act of Nov. 16, 1971, ch. 1530, § 15, 1971 Cal. Stat. 3022, 3027. Driving under the influence of a narcotic is generally now a felony only when bodily injury or death results therefrom, just as with driving under the influence of alcohol. CAL. VEH. CODE §§ 23152(a), 23160, 23180 (West Supp. 1983).

115. *People v. Phillips*, 64 Cal. 2d 574, 582, 414 P.2d 353, 360, 51 Cal. Rptr. 225, 232 (1966).

116. *People v. Wilson*, 1 Cal. 3d 431, 440, 462 P.2d 22, 28, 82 Cal. Rptr. 494, 500 (1969).

117. The only way to conclude that this is not true would be to focus on the distinction between an *injury* supporting the felony and a *death* incurring the application of the felony murder rule. Thus, an intoxicated driver who injures one person and kills another could be liable under the felony murder rule (as the death was not included in fact in the felonious injury), while one who killed two persons would not be so liable (as felony drunk driving was included in fact in the homicides since the number of violations does not increase with each added victim, *see supra* note 109). This example shows the total irrationality of applying the felony murder rule to felony drunk driving.

felony drunk driving, the legislature established felony drunk driving (or vehicular manslaughter)¹¹⁸ as the proper punishment for deaths resulting from drunk driving. Imposing a harsher punishment in cases of ordinary drunk driving homicide by inferring malice through the felony murder rule would violate the legislative intent implicit in the felony drunk driving statute.

Finally, as already demonstrated,¹¹⁹ convicting intoxicated drivers of second degree murder will not significantly further the goals of the criminal law. Sentence enhancements that vary with culpability and dangerousness will serve the goals of the criminal law in a more balanced manner than using the felony murder rule to bootstrap an intoxicated driver's vehicular homicide into second degree murder.

CONCLUSION

The majority's position in *Watson* that an intoxicated driver who causes the death of another may be charged with second degree murder where his conduct reaches the level of implied malice is logically correct. The court's failure to specify precisely when an intoxicated driver's conduct reaches the level of implied malice is unfortunate as it fails to provide any guidance to the lower courts, provides an opportunity for discriminatory application of the law, and fails to ensure that the defendant's conduct actually posed a high risk of death. The court's focus on the intoxicated defendant's mental state is misguided, because inferences drawn from this evidence are unreliable and will serve to exonerate the most dangerous defendants.

One possible approach to the issue of when malice may be inferred would focus on the defendant's level of intoxication and degree of recklessness for the physical act requirement, and on the defendant's knowledge of his tendency to drink to excess, to drive recklessly when drunk, and to drive after drinking as evidence of his mental state. This approach is more consistent with the law of implied malice before *Watson*, but has several disadvantages. It hinders the defendant's right to a fair trial, and, like the majority's position, does not further the major goals of the criminal law in a manner that reflects the dangerousness and culpability of the defendant.

Sentence enhancements would preserve the defendant's right to a fair trial, reduce the potential for discriminatory enforcement of the law, and better serve the goals of the criminal law. The legislature should amend the vehicular manslaughter statute to provide for increased penalties for those drivers with prior convictions for reckless

118. See *supra* note 109.

119. See *supra* text accompanying notes 79-97.

driving or reckless drunk driving who cause a fatality while excessively intoxicated and driving recklessly. The increased punishment should vary with the defendant's conduct and prior driving record. Second degree murder prosecutions for drunk driving homicides should be prohibited unless actual intent to kill or injure is evident.

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