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IMPLIED MALICE AIDING AND ABETTING: A DOCTRINAL MAZE

Jason Mayland*

In the wake of the California Legislature's elimination of the natural and probable consequences theory of second-degree murder, a new doctrine has emerged for assigning murder liability to accomplices in fatal assaults: implied malice aiding and abetting. This theory, which preserves murder liability for assailants who neither kill nor intend to kill, combines the doctrines of aiding and abetting and implied malice. The difficulty of navigating the resulting thicket of interlocking requirements raises a serious risk that the doctrine will be applied too broadly. After outlining the history of accomplice liability for murder in California and analyzing several cases where implied malice aiding and abetting has already been employed to sustain murder liability, this Note attempts to identify the potential pitfalls that face courts and legal practitioners in the application of this complex new theory.

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INTRODUCTION

In 2018, the California Legislature passed Senate Bill No. 1437 (SB 1437),¹ which fundamentally altered murder liability in the state of California. According to its title, the bill aspired to limit “accomplice liability for felony murder.”² The bill’s drafters aimed to fix a penal code that “irrationally treated people who did not commit murder the same as those who did . . . [by] reserving the harshest punishment to those who directly participate in the death.”³ This was a long-awaited reform: more than three decades earlier, California Supreme Court Chief Justice Rose Bird had called the felony murder rule a “vestige of an archaic and indiscriminate philosophy . . . that one who commits a felony is a bad person with a bad state of mind, so [we should disregard] the fact that the fatal result he accomplished was quite different and a good deal worse than the bad result he intended.”⁴

Still, for all the attention that SB 1437 got for reining in the felony murder rule, in truth, it did even more because it also limited accomplice liability under the doctrine of aiding and abetting.⁵ This was no small thing, because the crime of assault cannot form the basis of a felony murder conviction; defendants who neither kill nor intend to kill but who take part in a group assault that turns deadly can only be convicted of murder as aiders and abettors.⁶ This category of defendants will be the main focus of discussion in this Note.

Aiding and abetting is not just a different avenue of prosecution from felony murder. It is premised on a very different theory of culpability: while felony murder has always been based on criminal *acts* that are “malum in se”—dangerous to human life by their very nature⁷—aiding and abetting liability hinges on the defendant’s culpable *intent*, no matter how minimal his or her participation may be.⁸

1. S.B. 1437, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

2. *Id.*

3. Jazmine Ulloa, *California Sets New Limits on Who Can Be Charged with Felony Murder*, L.A. TIMES, (Sept. 30, 2018, 9:40 PM), <https://www.latimes.com/politics/la-pol-ca-felony-murder-signed-jerry-brown-20180930-story.html>. [<https://perma.cc/56KY-YGU2>].

4. *People v. Burroughs*, 678 P.2d 894, 913 (Cal. 1984) (Bird, C.J., concurring), *overruled on other grounds*, 999 P.2d 675 (Cal. 2000).

5. *People v. Gentile*, 477 P.3d 539, 543 (Cal. 2020), *superseded by statute*, S. Res. 1437, 115th Cong. (2018) (enacted).

6. *People v. Ireland*, 450 P.2d 580, 590 (Cal. 1969).

7. Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 416 (2011).

8. *People v. Beeman*, 674 P.2d 1318, 1319 (Cal. 1984); *see also* *Rosemond v. United States*, 572 U.S. 65, 72, 76 (2014) (stating that an aider and abettor’s participation can be minimal as long as they know and intend to aid the full extent of the crime).

For decades, these differences have been somewhat obscured in the prosecution of non-killing accomplices because California law allowed the conviction for an underlying lesser crime to supply the necessary elements of guilt for murder under either theory. The felony murder doctrine “act[ed] as a substitute for the *mental state* ordinarily required for the offense of murder.”⁹ And under the natural and probable consequences doctrine of aiding and abetting, if an intent to facilitate an underlying crime was proven, it could also provide the culpable mental state for any “reasonably foreseeable” death that resulted from the crime’s commission.¹⁰

These were powerful, expansive doctrines that resulted in a presumption of some degree of murder liability for any participant in a felony that included a killing.¹¹ But at a certain point, it became clear that California’s Penal Code “had opted for simplicity at the expense of justice.”¹² Bright-line rules that cast a wide net were creating “lengthy sentences that [were] not commensurate with the culpability of the individual,” resulting in unjust punishments and overcrowded prisons.¹³

SB 1437 changed that, instituting changes based on the “bedrock principle . . . that a person should be punished for his or her actions according to his or her own level of individual culpability.”¹⁴ No longer was mere participation in an inherently dangerous felony enough to make an accomplice liable for murder—each participant would be judged on their own personal actions and mens rea.¹⁵ And no longer would intent to aid and abet an underlying crime transfer to an intent to commit the killings that resulted from that crime—aiders and abettors would need to display malice aforethought, just like any other principal in a murder.¹⁶

In the wake of these changes, courts and juries have been required to navigate the idiosyncratic fact patterns of each crime to assess an

9. *People v. Patterson*, 778 P.2d 549, 557 (Cal. 1989).

10. *People v. Medina*, 209 P.3d 105, 106 (Cal. 2009).

11. See David O. Brink, *The Nature and Significance of Culpability*, 13 CRIM. L. & PHIL. 347, 369 (2019).

12. Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability*, 37 HASTINGS L.J. 91, 140 (1985).

13. SB 1437, 2017–18 Leg., Reg. Sess. § 1(e) (Cal. 2018).

14. *Id.* § 1(d).

15. *Id.* § 1(g).

16. See CAL. PENAL CODE § 188(a)(3) (2019); *People v. Gentile*, 477 P.3d 539, 543 (Cal. 2020), *superseded by statute*, S. Res. 1437, 115th Cong. (2018) (enacted).

accomplice's individual culpability for the killing.¹⁷ They could take some solace that in the realm of felony murder there was an existing road map for how to do that because the authors of SB 1437 preserved felony murder liability for anyone who was a “major participant in [an inherently dangerous felony] and acted with reckless indifference to human life.”¹⁸ Those terms are based on well-settled jurisprudence from the U.S. Supreme Court¹⁹ and concepts that had been explicitly defined by California's highest court in the years leading up to SB 1437's enactment.²⁰

By contrast, after the California Legislature barred the imputation of malice to aiders and abettors “based solely on [their] participation in a crime,” effectively eliminating the doctrine of natural and probable consequences,²¹ the analysis of murder liability for aiders and abettors who did not intend to kill offered no such well-worn path. Did SB 1437's changes mean that aiders and abettors who neither killed nor intended to kill were now shielded from a finding of malicious intent? It was a high-stakes query, because petitioners seeking to vacate their murder convictions after SB 1437's changes could only be denied relief if they could be convicted under a still-valid theory of murder liability.²²

As it turned out, while the legislature had narrowed the path, the road was not completely blocked. SB 1437 left open liability for all principals in a crime who harbored “malice aforethought.”²³ So even though direct aiding and abetting liability typically requires an accomplice to share the “specific intent” of the perpetrator,²⁴ Penal Code section 188 still allows for an accomplice to be found guilty of murder while harboring implied malice, which is not based on a specific intent

17. See *In re Scoggins*, 467 P.3d 198, 210 (Cal. 2020) (stating that the determination of liability under the felony-murder statute requires a “fact-intensive, individualized inquiry”).

18. CAL. PENAL CODE § 189(e) (2019).

19. See generally *Tison v. Arizona*, 481 U.S. 137 (1987) (preserving felony murder liability for major participants in deadly felonies who exhibit reckless indifference to human life).

20. See *People v. Banks*, 351 P.3d 330, 337 (Cal. 2015) (identifying factors that denote “major participation”); *People v. Clark*, 372 P.3d 811, 881–87 (Cal. 2016) (identifying the factors that indicate a “reckless indifference to human life”).

21. CAL. PENAL CODE § 188(a)(3) (2019).

22. CAL. PENAL CODE § 1172.6(a)(3) (2022).

23. *People v. Lasko*, 999 P.2d 666, 668 (Cal. 2000).

24. *People v. Gentile*, 477 P.3d 539, 550 (Cal. 2020), *superseded by statute*, S. Res. 1437, 115th Cong. (2018) (enacted).

to kill someone but a consciousness that one's actions are highly dangerous to human life and a willingness to act despite that danger.²⁵

But how would that work, exactly? What kind of doctrine could mesh the distinctly subjective intent requirement of aiding and abetting with the partially objective intent standard of implied malice?²⁶ Unlike the post-SB 1437 landscape for felony murder liability, this was a doctrinal maze with no obvious map. The first hint of an answer came in a passage of dicta by the California Supreme Court in *People v. Gentile*,²⁷ which postulated the existence of “an aider and abettor who does not expressly intend to aid a killing [who] can still be convicted of second degree murder.”²⁸ The doctrine was fully defined by the Third Circuit Court of Appeal a few months later, and a heretofore unheard-of theory of murder liability was born: “implied malice aiding and abetting.”²⁹

The doctrine sparked immediate controversy, with California's Office of the State Public Defender calling it an invalid, “repackaged” version of natural and probable consequences liability which would “render[] the Legislature's goal in enacting SB 1437—limiting the scope of vicarious liability—a hollow promise.”³⁰ The California Supreme Court acknowledged those concerns in *People v. Reyes*,³¹ the first case in which it judged the implied malice aiding and abetting liability of a real—not hypothetical—defendant. While the *Reyes* court held that the defendant in that case was not liable under the theory, it identified “no basis to abrogate” the doctrine itself, citing a handful of decisions in which lower courts had already applied it.³²

The problem is that, according to the *Reyes* court's reasoning, in at least one of those cited cases the doctrine was arguably *misapplied*. Such errors should come as no surprise because implied malice aiding and abetting combines accomplice liability, a domain where “considerable confusion exists” about the requirements from one jurisdiction

25. *People v. Phillips*, 414 P.2d 353, 361 (Cal. 1966), *overruled on other grounds*, *People v. Flood*, 957 P.2d 869 (Cal. 1998); see CAL. PENAL CODE § 188(a)(3) (2019).

26. See E. Brantley Webb, *Aiding and Abetting 924(c) Offenses: An Analysis of Rosemond v. U.S.*, 22 GEO. MASON L. REV. 1, 1 (2014); *People v. Cravens*, 267 P.3d 1113, 1121 (Cal. 2012) (describing the subjective and objective components of implied malice).

27. 477 P.3d 539 (Cal. 2020).

28. *Id.* at 550.

29. *People v. Powell*, 278 Cal. Rptr. 3d 150, 173 (Ct. App. 2021).

30. Brief for Office of the State Public Defender as Amicus Curiae Brief Supporting the People at 15, *People v. Reyes*, 2022 WL 19467811 (Cal. June 24, 2022) (No. S270723).

31. 531 P.3d 357 (Cal. 2023).

32. *Id.* at 362.

to the next,³³ with implied malice, a legal construct with a statutory definition that even the California Supreme Court acknowledges is “far from clear in its meaning” and “quite vague.”³⁴

The combination of these two very different doctrines creates a thicket of interlocking and potentially head-spinning requirements. For instance, determining whether a defendant is guilty of implied malice aiding and abetting requires the identification of two separate culpable actions with two separate determinations of mens rea, plus a finding of proximate cause.³⁵ It requires a finding of “shared intent” by two people who do not necessarily have the same result in mind.³⁶ Its actus reus depends on someone else’s action,³⁷ its mens rea is partially physical, and it bars murder liability for the “natural and probable consequences” of a crime while assigning it based on the “natural consequences” of a specific act.³⁸

Confused yet? You are not alone. Even the court that defined this new doctrine struggled to apply all its elements precisely.³⁹ And while the *Reyes* court stated that it could see no legal foundation for limiting or invalidating the doctrine, this Note will identify one basis that is suggested by the text of SB 1437 and the *Reyes* court’s own reasoning. If implied malice aiding and abetting does continue as a valid form of murder liability, it is essential to get it right, because the fate of many of the people that SB 1437 aimed to help—those who neither killed, nor intended to kill, but who were convicted of murder anyway—may depend on it.

With those compelling stakes in mind, this Note will navigate the legal maze of implied malice aiding and abetting—its history, its emergence in the wake of SB 1437, and its subsequent application in

33. WAYNE R. LAFAYE, *SUBSTANTIVE CRIMINAL LAW* 343 (2nd ed. 2003).

34. *People v. Knoller*, 158 P.3d 731, 738 (Cal. 2007); *People v. Chun*, 203 P.3d 425, 429 (Cal. 2009).

35. *People v. Powell*, 278 Cal. Rptr. 3d 150, 168–70 (Ct. App. 2021).

36. *See People v. Gentile*, 477 P.3d 539, 550 (Cal. 2020), *superseded by statute*, S. Res. 1437, 115th Cong. (2018) (enacted) (stating that a direct aider and abettor must “know and share the murderous intent of the actual perpetrator”). *But see Powell*, 278 Cal. Rptr. 3d at 169 (“[T]o be liable for an implied malice murder, the direct aider and abettor must . . . aid the commission of the life endangering act, not the result of that act.”).

37. *Powell*, 278 Cal. Rptr. 3d at 169 (stating that “the actus reus includes whatever acts constitute aiding the [perpetrator’s] commission of the life-endangering act”)

38. *Gentile*, 477 P.3d at 543 (stating that SB 1437 bars both first- and second-degree murder liability under the “natural and probable consequences theory”); *People v. Phillips*, 414 P.2d 353, 363 (Cal. 1966) (stating that implied malice murder involves “an act, the natural consequences of which are dangerous to human life”).

39. *See* discussion *infra* Sections I.H.2, II.B, and II.C.

the real cases that the *Reyes* court cited to affirm the theory's validity. Along the way, this Note will identify specific aspects of the doctrine that, if applied incorrectly, will lead to overly broad murder liability for those who do not kill. Without careful application and rigorous adherence to SB 1437's requirements, the intent of the bill will be partially unrealized, and undeserving defendants will be lost in the maze of implied malice aiding and abetting.

I. BACKGROUND

A. *The Doctrine of Aiding and Abetting*

From the early annals of American jurisprudence, "aiding and abetting" has been understood to mean "assistance, co-operation, and encouragement" in relation to a crime.⁴⁰ Aiding and abetting liability in California flows from section 31 of its Penal Code, which states that "all participants in the commission of a crime . . . whether they directly commit the act, or aid and abet its commission . . . are principals" in that crime.⁴¹ Aiding and abetting, also known as the doctrine of complicity,⁴² allows liability to flow equally to everyone who collaborates to commit a crime: "once the conspiracy or combination is established, the act of one conspirator . . . is considered the act of all, and is evidence against all. Each is deemed to consent to, or command, what is done by any other in furtherance of the common object."⁴³

The U.S. Supreme Court has long acknowledged that the culpability of those who do not kill is "plainly different" than that of those who do.⁴⁴ And "it is of the very essence of our deep-rooted notions of criminal liability that guilt be personal and individual."⁴⁵ Since it seemingly contradicts these principles to assign equal culpability to one accomplice for a killing perpetrated by another, aiding and abetting liability requires "the most exacting mental state in the criminal code."⁴⁶

40. *United States v. Gooding*, 25 U.S. 460, 476 (1827).

41. CAL. PENAL CODE § 31 (2023).

42. Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CALIF. L. REV. 323, 336 (1985).

43. *Gooding*, 25 U.S. at 469.

44. *Enmund v. Florida*, 458 U.S. 782, 798 (1982).

45. Francis Bowes Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 717 (1930).

46. Wesley M. Oliver, *Limiting Criminal Law's "In for a Penny, In for a Pound" Doctrine*, 103 GEO. L.J. ONLINE 8, 9 (2013).

The California Penal Code has historically been “silent as to [the required] mental state” for aiding and abetting,⁴⁷ so the exact definition of accomplice mens rea was first developed by the judiciary.⁴⁸ The established standard was articulated in the California Supreme Court decision *People v. Beeman*.⁴⁹ It requires that an aider and abettor must act with “knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating the commission of, the offense.”⁵⁰ This California jurisprudence resonates with Judge Learned Hand’s early definition of aiding and abetting, later adopted by the U.S. Supreme Court, that requires an aider and abettor to participate in the perpetrator’s crime as “something that he wishes to bring about, that he seek by his action to make it succeed.”⁵¹

California demands this high bar of both knowledge and intent to prove that a defendant aided and abetted an initial “target” crime.⁵² Before the passage of SB 1437, once the intent to commit *that* crime was established, liability could flow to many other crimes that the defendant did not intend, including murder, through the doctrine of natural and probable consequences.⁵³

B. The Natural and Probable Consequences Theory of Aiding and Abetting

The natural and probable consequences theory of aiding and abetting has been a part of California law for more than a century.⁵⁴ In 1902, William Kauffman was in a group of six men who planned to crack open a safe at a cemetery outside of San Francisco.⁵⁵ They found an armed security guard at the cemetery and abandoned the plan, but on their way home, one of Kauffman’s accomplices got into a gun

47. John F. Decker, *The Mental State Requirement for Accomplice Liability in Criminal Law*, 60 S.C. L. REV. 237, 329 (2008). In 2018, SB 1437 added the first mens rea requirement for aiders and abettors to the Penal Code—but only for crimes that qualify for first-degree murder liability. See CAL. PENAL CODE § 189(e) (as amended by Cal. S.B. 1437).

48. Decker, *supra* note 47, at 325, 329.

49. 674 P.2d 1318, 1319 (Cal. 1984).

50. *Id.* at 1325.

51. *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949) (quoting *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938)).

52. *People v. Prettyman*, 926 P.2d 1013, 1020 (Cal. 1996) *superseded by statute*, S. Res. 1437, 115th Cong. (2018) (enacted).

53. Oliver, *supra* note 46, at 9.

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

55. *Id.*

fight with a policeman and killed him.⁵⁶ Kauffman was convicted of second-degree murder, and the state's high court affirmed the conviction in *People v. Kauffman*,⁵⁷ holding that when a group of "confederates" commit a crime with a "common design . . . [e]ach is responsible for everything done by his confederates, which follows incidentally in the execution of the common design as one of its probable and natural consequences."⁵⁸ The *Kauffman* court reasoned that the issue of whether a given act qualified as such a consequence was a question of fact for the jury.⁵⁹

Aiding and abetting liability had traditionally been premised on a defendant's subjective intent to take part in a crime.⁶⁰ But under the natural and probable consequences doctrine, liability for additional, unintended crimes, including murder, would be judged on an objective standard of what was "reasonably foreseeable."⁶¹ The issue of whether the defendant actually foresaw the unintended crime was irrelevant—liability was judged on "whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted."⁶²

This doctrine significantly expanded the potential murder liability for participating in a crime, but for a large part of the last century in California, it was overshadowed by the felony murder rule, which imposed strict liability for any death that occurred during a felony on all its participants.⁶³ A finding that a defendant took part in a highly dangerous felony and that a killing occurred during the course of that felony resulted in a murder conviction.⁶⁴ Since a felony murder charge did not even require a finding that a killing was a reasonably foreseeable part of a crime, it was an easier path to a conviction than aiding and abetting.⁶⁵

56. *Id.*

57. 92 P. 861 (Cal. 1907).

58. *Id.* at 862.

59. *Id.* at 863.

60. See *People v. Joiner*, 101 Cal. Rptr. 2d 270, 283 (Ct. App. 2000).

61. *People v. Croy*, 710 P.2d 392, 398 n.5 (Cal. 1985).

62. *People v. Chiu*, 325 P.3d 972, 976 (Cal. 2014) (quoting *People v. Medina*, 209 P.3d 105, 110 (Cal. 2009)).

63. Miguel A. Mendez, *The California Supreme Court and the Felony Murder Rule: A Sisyphean Challenge?*, 5 CAL. LEG. HIST. 241, 251 (2010).

64. *People v. Cantrell*, 504 P.2d 1256, 1266–67 (Cal. 1973).

65. See *People v. Garewal*, 218 Cal. Rptr. 690, 698 (Ct. App. 1985) (stating that "intent and foreseeability are of no moment in felony-murder prosecutions").

However, for some prosecutions, felony murder was not an option. In 1969, in its decision *People v. Ireland*,⁶⁶ the California Supreme Court recognized what is known as the felony murder “merger doctrine,” which states that felony murder liability cannot be premised on a lesser, included felony.⁶⁷ The primary example of such a lesser felony is assault.⁶⁸ The *Ireland* court reasoned that since almost any murder could be characterized as a form of assault, “allowing the prosecution to use [that crime] as the predicate felony would relieve the prosecution from having to prove malice in most homicides.”⁶⁹

In *Ireland*, the prosecution had sought to predicate a second-degree murder charge on the felony of assault with a deadly weapon, and the trial court instructed the jury that it could do so.⁷⁰ But the California Supreme Court reversed, finding that because virtually any killing could also be considered an assault, allowing felony murder liability for assault would remove the need to prove intent. The court found that such “bootstrapping finds support neither in logic nor in law,” and it refused to extend felony murder to such cases.⁷¹

After *Ireland*, the natural and probable consequences doctrine became the main tool for prosecuting accomplices to murders that happened during assaultive crimes.⁷² But the doctrine was not without its own controversy, because it dispenses not only with the requirement of “any personal act” related to the killing, but also with the “requirement of any personal act of any kind.”⁷³ Drafters of the Model Penal Code spurned the doctrine, calling it “incongruous and unjust.”⁷⁴

Still, in California, before the advent of SB 1437, the doctrine persisted and arguably expanded. In 2009, in *People v. Medina*,⁷⁵ the California Supreme Court applied the doctrine to uphold the second-degree murder convictions of two men who had verbally challenged a rival gang member.⁷⁶ After the fist fight that resulted, a third man

66. 450 P.2d 580 (Cal. 1969).

67. *Id.* at 590.

68. Mendez, *supra* note 63, at 255–56 (citing *Ireland*, 450 P.2d at 590).

69. *Id.*

70. *Ireland*, 450 P.2d at 589.

71. *Id.* at 590.

72. *See* *People v. Medina*, 209 P.3d 105, 110 (Cal. 2009); *see also* *People v. Chun*, 203 P.3d 425, 443 (Cal. 2009) (confirming that participation in any crime that is assaultive in nature cannot be the basis of second-degree felony murder liability).

73. Michael G. Heyman, *The Natural and Probable Consequences Doctrine: A Case Study in Failed Law Reform*, 15 BERKELEY J. CRIM. L. 388, 395 (2010).

74. *Id.* (citing MODEL PENAL CODE § 2.06, cmt. 314 n.42 (AM. L. INST. 1980)).

75. *Medina*, 209 P.3d at 105.

76. *Id.* at 107.

retrieved a gun and shot the rival as he fled, killing him.⁷⁷ The *Medina* majority upheld the murder convictions of the two non-shooting accomplices, finding that it was reasonably foreseeable that simply challenging a rival gang member by asking “Where you from?” could result in someone’s death—even though there was no evidence that the defendants knew the eventual killer had access to a gun when the fight began.⁷⁸ The majority held that to qualify as foreseeable “a consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough.”⁷⁹ Justice Carlos Moreno dissented, stating that the court was extending an already far-reaching theory to hold accomplices “responsible for any crime that was a natural and *possible* consequence” of the crime they intended.⁸⁰

C. *SB 1437 and the End of “Natural and Probable Consequences” Liability*

In 2017, the California Legislature adopted Senate Concurrent Resolution No. 48, which stated a clear intent to enact changes to the Penal Code that would “more equitably sentence offenders in accordance with their involvement with [a] crime.”⁸¹ The resolution addressed aider and abettor liability, “specifically the ‘natural and probable’ consequences doctrine, which . . . results in greater punishment for lesser culpability.”⁸² The resolution contended that “it can be cruel and unusual punishment to not assess individual liability for nonperpetrators of the fatal act . . . and impute culpability for another’s bad act, thereby imposing lengthy sentences that are disproportionate to the conduct in the underlying case.”⁸³

The law reduced murder liability for accomplices in two significant ways. First, it amended the felony murder doctrine to make those who committed or attempted to commit a felony liable for murder only if:

- (1) The person was the actual killer.

77. *Id.* at 107–08.

78. *Id.* at 114–115.

79. *Id.* at 110 (quoting *People v. Nguyen*, 26 Cal. Rptr. 2d 323, 334 (Ct. App. 1993)).

80. *Id.* at 118–19 (Moreno, J., dissenting) (quoting *People v. Medina*, No. A108345, 2005 WL 1908382 (Cal. Ct. App. Aug. 10, 2005)).

81. S. Con. Res. 48, 2017–2018 Leg., Reg. Sess. (Cal. 2017).

82. *Id.*

83. *Id.*

(2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree.

(3) The person was a major participant in the underlying felony and acted with reckless indifference to human life⁸⁴

Secondly, SB 1437 amended the definition of murder to require that, with the exception of participants in dangerous felonies identified in Penal Code section 189(a), “in order to be convicted of murder, a principal in a crime shall act with malice aforethought,” and, crucially, “[m]alice shall not be imputed to a person based solely on his or her participation in a crime”⁸⁵—thus abolishing the natural and probable consequences doctrine.

The authors of SB 1437 aimed to remove the “highly artificial” modes of vicarious murder liability that had persisted for so long.⁸⁶ Felony participation would no longer impart strict liability for murder, nor would it serve as a per se imputation of malice to every accomplice in the crime.⁸⁷ California law would now demand more.

D. A Void Waiting to be Filled: The Need For a “Still-Valid” Theory of Murder Liability to Block Section 1172.6 Eligibility

In addition to amending the definition of murder in the California Penal Code, SB 1437 created a statute, now codified as section 1172.6, that allows people who were convicted under the felony murder or natural and probable consequences doctrines or who pled guilty under threat of prosecution under those doctrines to petition to have their sentences vacated.⁸⁸ More than five thousand such petitions were filed in 2021 alone.⁸⁹

The new law states that petitioners are only eligible for relief if they “could not presently be convicted of murder or attempted murder because of changes to Section 188 and Section 189 made effective

84. CAL. PENAL CODE § 189(e) (2019).

85. *Id.* § 188(a)(3).

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

87. *See* CAL. PENAL CODE § 189(e) (2019).

88. CAL. PENAL CODE § 1172.6 (2022).

89. Julian Navarro, *Follow Up on the Effectiveness of SB 1437*, DAVIS VANGUARD (Feb. 22, 2022) <https://www.davisvanguard.org/2022/02/follow-up-report-on-the-effectiveness-of-sb1437-overwhelming-majority-of-applicants-denied> [<https://perma.cc/D2M5-3UUD>].

January 1, 2019.”⁹⁰ However, petitioners who *could* be prosecuted under a still-valid theory of liability would be *ineligible*.⁹¹ The California Legislature has further revised the statutory language to clarify the burden of proof for such a denial: the People must prove that the petitioner is guilty beyond a reasonable doubt under a still-valid theory of murder liability.⁹²

What does this mean for the participants in assaultive crimes who neither killed nor showed express intent to kill? According to the amended definition of murder under section 188 of the Penal Code, no defendant can be convicted of murder without displaying malice aforethought.⁹³ Malice can be either express or implied.⁹⁴ That left only one valid avenue by which prosecutors could block the section 1172.6 petitions for such defendants: proving that they were a direct aider and abettor to the actual killing who harbored implied malice.

E. Implied Malice: A Maze Within a Maze

The path to a new theory of aiding and abetting would ultimately run through the landscape of a completely different doctrine: implied malice. Unfortunately, in the history of California’s criminal jurisprudence, that landscape has more often resembled a swamp than dry land. The Penal Code states that “[m]alice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart,”⁹⁵ but as the California Supreme Court has conceded, that definition is “quite vague,” has provided juries with “little guidance,”⁹⁶ and “has never proved much assistance in defining the concept in concrete terms.”⁹⁷ By one account, the statutory definition of the term is “hopelessly obscure.”⁹⁸

The confusion is compounded by the fact that, in its own attempts to interpret the archaic language of the statute, the California Supreme Court has alternately relied on two different definitions of the term.⁹⁹ The first, known as the *Thomas* standard, comes from a concurrence

90. CAL. PENAL CODE § 1172.6(a)(3) (2022).

91. *Id.*

92. *Id.* § 1172.6(d)(3) (as amended by S.B. 775, 2021–2022 Leg., Reg. Sess. (Cal. 2021)).

93. *Id.* § 188(a)(3).

94. *Id.* § 188(a).

95. *Id.* § 188(a)(2).

96. *People v. Chun*, 203 P.3d 425, 429 (Cal. 2009).

97. *People v. Dellinger*, 783 P.2d 200, 203 (Cal. 1989).

98. *Mendez*, *supra* note 63, at 247.

99. *See, e.g., People v. Cravens*, 267 P.3d 1113, 1121 (Cal. 2012) (Liu, J., concurring).

by Justice Traynor to the 1953 decision in *People v. Thomas*,¹⁰⁰ which stated that implied malice is present when “the defendant for a base, anti-social motive and with wanton disregard for human life, does an act that involves a high degree of probability that it will result in death.”¹⁰¹

The second definition, from *People v. Phillips*,¹⁰² states that implied malice murder is a “killing [which] proximately result[s] from 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.”¹⁰³ The court has explicitly acknowledged that despite their obvious differences—most glaringly, between the high probability of death required by *Thomas* and the mere probability required by *Phillips*—the two definitions describe “one and the same standard.”¹⁰⁴

There are certain required elements of implied malice that are beyond dispute. First, implied malice can only exist under circumstances where a “killing results from an intentional act.”¹⁰⁵ Malice can only be implied in the context of an actual killing, and though the killing may be accidental, the act that causes the killing must be performed intentionally.¹⁰⁶ Second, both definitions of implied malice combine objective and subjective elements.¹⁰⁷ The objective element is satisfied by the highly dangerous physical act that the defendant committed, and the subjective element is established by circumstantial evidence of the defendant’s mental state at the time of the crime, which must be either a “conscious” or a “wanton” disregard for human life, depending on the standard applied.¹⁰⁸

The Court has not helped matters by occasionally using “implied malice” and “conscious disregard for life” interchangeably.¹⁰⁹ In fact, as the foregoing definitions make clear, conscious disregard only

100. 261 P.2d 1 (Cal. 1953).

101. *Id.* at 7 (Traynor, J., concurring).

102. 414 P.2d 353 (Cal. 1966).

103. *Id.* at 363.

104. *People v. Nieto Benitez*, 840 P.2d 969, 976 (Cal. 1992).

105. 17A CAL. JURIS. 3d, *Criminal Law: Crimes Against the Person* § 34 (2023); *People v. Cook*, 139 P.3d 492, 515 (Cal. 2006).

106. CALIFORNIA CRIM. JURY INSTRUCTIONS (CALCRIM) No. 520 (JUD. COUNCIL OF CAL. 2021).

107. *People v. Cravens*, 267 P.3d 1113, 1121 (Cal. 2012) (Liu, J., Concurring).

108. *People v. Phillips*, 414 P.2d 353, 363 (Cal. 1966); *People v. Thomas*, 261 P.2d 1, 7 (Cal. 1953) (Traynor, J., concurring).

109. *See People v. Bland*, 48 P.3d 1107, 1117 (Cal. 2002); *People v. Stone*, 205 P.3d 272, 277 (Cal. 2009).

satisfies one part of implied malice.¹¹⁰ Counterintuitive as it might be, the imputation of the *mental* state of implied malice is partially derived from an objectively dangerous *action*.¹¹¹ When the defendant is the actual killer, that action is transparently obvious, because it doubles as the *actus rea* of the murder: the intentional act that was a proximate cause of the victim's death.¹¹²

The question is whether an aider and abettor—who by definition did not proximately cause the victim's death (or else they could simply be prosecuted as an actual killer)—can harbor implied malice.¹¹³ In 2020, the California Supreme Court weighed in on the answer.

*F. People v. Gentile Contemplates
"Implied Malice Aiding and Abetting"*

In 2020, the California Supreme Court held in *People v. Gentile* that SB 1437 barred use of the natural and probable consequences theory to convict aiders and abettors of either first- or second-degree murder, because doing so “authorize[s] precisely what Senate Bill 1437 forbids: it allows a factfinder to impute malice to a person based solely on his or her participation in a crime.”¹¹⁴

Gentile involved a murderous assault by one or two people—depending on whose account was to be believed.¹¹⁵ Guillermo Saavedra was a caretaker for a Mexican restaurant.¹¹⁶ Sandra Roberts was a homeless woman who sometimes stayed with Saavedra.¹¹⁷ When Roberts's ex-husband Joseph Gentile, Jr. came to visit the restaurant, Roberts told him that Saavedra had been sexually assaulting her.¹¹⁸ What followed, late that night, was a murderous assault.¹¹⁹ Roberts claimed that Gentile did it alone.¹²⁰ Gentile claimed that he had only punched Saavedra until Saavedra apologized, and that it was Roberts herself

110. *Bland*, 48 P.3d at 1117; *Stone*, 205 P.3d at 277.

111. *See* *People v. Chun*, 203 P.3d 425, 429 (2009); CALCRIM No. 520.

112. *See* CALCRIM No. 520.

113. *See* *People v. Gentile*, 477 P.3d 539, 550 (Cal. 2020), *superseded by statute*, S. Res. 1437, 115th Cong. (2018) (enacted) (offering proximate cause as an avenue of murder prosecution that is separate from aiding and abetting.)

114. *Id.* at 548 (citing CAL. PENAL CODE § 188(a)(3)).

115. *Id.* at 543.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 543–44.

120. *Id.* at 543.

who then repeatedly hit Saavedra with a sledgehammer.¹²¹ The jury found Gentile guilty of murder, but not of assault with a deadly weapon, which suggested that they believed his version of events.¹²² Still, the jury convicted Gentile of first-degree murder for aiding and abetting Roberts's assault with a deadly weapon, the natural and probable consequences of which was death.¹²³

The court of appeal reduced Gentile's sentence to second-degree murder pursuant to the California Supreme Court's decision in *People v. Chiu*,¹²⁴ which held that aiders and abettors could not be convicted of first-degree murder on a natural and probable consequences theory.¹²⁵ Then the legislature passed SB 1437, and Gentile appealed again, arguing that the statute also barred natural and probable consequences liability for second-degree murder.¹²⁶ The court of appeals disagreed and affirmed his conviction, but when Gentile appealed to the high court, he got a more sympathetic hearing.¹²⁷

Justice Goodwin Liu relied on a close reading of the text of SB 1437 to reason that the bill barred natural and probable consequences liability for all degrees of murder—including murder of the second degree.¹²⁸ At first glance, for our chosen group—aiders and abettors of a crime who neither killed nor intended to kill—this holding would seem to foreclose any liability for murder outside of the felony murder exception in section 189(e)(3). After all, aside from that exception, section 187 defines murder as killing “with malice aforethought.”¹²⁹ If a person who participated in a crime did not kill, and their intended crime cannot be used to impute malice, how can they be guilty of murder?

Unfortunately for defendants who are so situated, the *Gentile* court left the door to liability slightly ajar. Justice Liu reasoned that while malice could no longer be imputed based on a defendant's mere participation in an underlying crime, the language of SB 1437 did preserve liability for *directly* aiding and abetting murder.¹³⁰ Liu supported

121. *Id.*

122. *Id.* at 544.

123. *Id.*

124. 325 P.3d 972 (Cal. 2014).

125. *Id.* at 980.

126. *Gentile*, 477 P.3d at 544.

127. *Id.* at 557.

128. *Id.* at 543.

129. CAL. PENAL CODE § 187 (1996).

130. *Gentile*, 477 P.3d at 550.

this assertion by citing the statute's mandate that liability should be "premised on [a] person's *own actions and subjective mens rea*."¹³¹ Justice Liu wrote that "an aider and abettor who does not expressly intend to aid a killing can still be convicted of second degree murder if the person knows that his or her conduct endangers the life of another and acts with a conscious disregard for life."¹³² In other words, an aider and abettor can still be denied relief under Penal Code section 1172.6 if their own actions and state of mind support a conviction of second-degree murder with implied malice.

This passage in *Gentile* was dicta.¹³³ It was not necessary to the holding, and it was mentioned hypothetically as an alternative to the theory that the court had just invalidated.¹³⁴ As our courts of appeal have subsequently noted, while the California Supreme Court's dicta should not be considered binding precedent, it is very persuasive and "should be followed, particularly where the comments reflect the court's well-considered reasoning."¹³⁵

There is a case to be made that dicta that invents a heretofore unheard-of theory of murder liability in a passing hypothetical paragraph should not be classified as "well-considered," but irrespective of whether the high court intended the passage to have the force of law, at least one court of appeal saw it as an invitation. The *Gentile* court had evoked a doctrine in hypothetical terms but declined to give it a working definition. It would not be long before a lower court stepped up to finish the job.

G. *People v. Powell: Implied Malice Aiding and Abetting Defined*

Only five months after the *Gentile* decision, in April 2021, the Third District Court of Appeal defined and validated this doctrine of liability, dubbing it "aiding and abetting implied malice murder."¹³⁶ In *People v. Powell*,¹³⁷ a man who had been assaulted recruited a few friends to go to the house of his assailant to exact revenge.¹³⁸ The

131. *Id.* at 548 (citing S.B. 1437, 2017–2018 Leg., Reg. Sess. (Cal. 2018)).

132. *Id.* at 550.

133. Brief for Office of the State Public Defender, *supra* note 30, at 20 (citing *People v. Glukhoy*, 292 Cal. Rptr. 3d 623, 634 (Ct. App. 2022)).

134. *See Gentile*, 477 P.3d 539, 550.

135. *Glukhoy*, 292 Cal. Rptr. 3d at 634 (quoting *People v. Tovar*, 216 Cal. Rptr. 3d 750, 756 (Ct. App. 2017)).

136. *People v. Powell*, 278 Cal. Rptr. 3d 150, 170 (Ct. App. 2021).

137. 278 Cal. Rptr. 3d 150 (Ct. App. 2021).

138. *Id.* at 154.

group broke into the assailant's house, but instead of finding their intended victim, they encountered his father asleep on the couch.¹³⁹ A violent assault ensued.¹⁴⁰ The victim knew about his son's altercation earlier that night and may have had a knife ready for protection.¹⁴¹ What is certain is that the first defendant, Jeffrey Powell, sustained lacerations from a knife, and that he stabbed the victim multiple times in the chest, killing him.¹⁴² There was no evidence that a second assailant, Christopher Langlois, had any part in the stabbing, but the state's witness testified that during the melee, Langlois picked up a coffee table and hit the victim with it.¹⁴³ A jury found both Powell and Langlois guilty of second-degree murder.¹⁴⁴

Powell and Langlois were convicted in 2015, before SB 1437 eliminated natural and probable consequences theory.¹⁴⁵ On direct appeal after the bill's changes took effect, Langlois contended that he could no longer be convicted of aiding and abetting murder, because "it is not possible to directly aid and abet implied-malice murder, because 'direct aiding and abetting liability turns on the intent of the aider and abettor.'"¹⁴⁶

The *Powell* court disagreed,¹⁴⁷ citing a case called *People v. McCoy*.¹⁴⁸ *McCoy* involved a drive-by shooting by two men, Ejaan McCoy and Derrick Lakey.¹⁴⁹ They drove up to a street corner where four men were standing, with McCoy driving and Lakey in the passenger seat.¹⁵⁰ Angry words were exchanged, and McCoy and Lakey fired a flurry of shots.¹⁵¹ One of the men on the street corner was killed, and the evidence showed that the bullets came from McCoy's

139. *Id.* at 155–56.

140. *Id.* at 156.

141. *Id.* at 155.

142. *Id.* at 157–59.

143. *Id.* at 156.

144. *Id.* at 153.

145. KXTV Staff, *3 Men Sentenced in Father's Slaying*, ABC10 (May 1, 2015, 3:02 PM), <https://www.abc10.com/article/news/local/citrus-heights/3-men-sentenced-in-fathers-slaying/103-181950567> [<https://perma.cc/FA6T-RZWZ>].

146. *Powell*, 278 Cal. Rptr. 3d. at 166.

147. *Id.* at 168–69.

148. 24 P.3d 1210, 1214–15 (Cal. 2001).

149. *Id.* at 1212.

150. *Id.*

151. *Id.*

gun.¹⁵² However, McCoy testified that he fired in self-defense because he thought he saw one of the men on the corner raise a gun first.¹⁵³

Both McCoy and Lakey were convicted of first-degree murder at trial, but the court of appeal overturned McCoy's conviction because it said that the trial court had given the jury erroneous instructions about the theory of unreasonable self-defense.¹⁵⁴ The court of appeal also reversed Lakey's conviction, partially relying on the theory that "an aider and abettor cannot be convicted of a greater offense than that of which the actual perpetrator is convicted."¹⁵⁵

The California Supreme Court disavowed this theory, stressing that "aider and abettor liability is premised on the combined acts of all the principals, but on the aider and abettor's *own* mens rea."¹⁵⁶ The *McCoy* court held that while this mens rea requirement protects an aider and abettor who does not act with the malice of the perpetrator, it also means that an aider and abettor can be guilty of a murder even when the main perpetrator is not because their liability, ultimately, is their own.¹⁵⁷ According to the *Gentile* and *Powell* courts, *McCoy* stands for the proposition that an aider and abettor can "share" the murderous intent of a killer not by acting according to a common design, but by acting with a similarly culpable mental state.¹⁵⁸

After invoking *Gentile*'s acknowledgement that a direct aider and abettor could still be guilty of implied malice murder, the *Powell* court laid out a detailed description of the required elements of such a theory. This definition will be the Rosetta Stone of the subsequent analysis in this Note:

In the context of implied malice, the actus reus required of the perpetrator is the commission of a life endangering act. For the direct aider and abettor, the actus reus includes whatever acts constitute aiding the commission of the life endangering *act*. . . . The mens rea, which must be personally harbored by the direct aider and abettor, is knowledge that the perpetrator intended to commit *the act*, intent to aid the

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* (citing *People v. McCoy*, 93 Cal. Rptr. 2d 827, 830 (Ct. App.), *rev'd*, 24 P.3d 1210 (Cal. 2001)).

156. *Id.* at 1215 (emphasis added).

157. *Id.*

158. *People v. Gentile*, 477 P.3d 539, 546–47 (Cal. 2020) *superseded by statute*, S. Res. 1437, 115th Cong. (2018) (enacted); *People v. Powell*, 278 Cal. Rptr. 3d, 168–69 (Ct. App. 2021).

perpetrator in the commission of *the act*, knowledge that *the act* is dangerous to human life, and acting in conscious disregard for human life.¹⁵⁹

One element of this definition immediately stands out: it anchors liability not on a crime, but on a “life-endangering *act*.”¹⁶⁰ As the nexus of the doctrine of implied malice aiding and abetting, this life-endangering act serves a dual purpose: it is both the objective that the aider and abettor intends to help and the physical action—imputed to the accomplice as a result of that intent—that helps establish that the accomplice harbored implied malice.

Powell’s formulation was elegant, but it presented an immediate doctrinal problem. At the time that *Powell* was decided, an aider and abettor was required to share the perpetrator’s intent to commit a *crime*, not just an act.¹⁶¹ The *Powell* court conceded that the standard jury instructions for aiding and abetting liability were “not tailored for implied malice murder.”¹⁶² But after *Powell*, rather than revising the theory to meet the existing requirements, the jury instructions for aiding and abetting were retrofitted to match the theory: whereas CALJIC 3.01 used to demand that the defendant must act with “the intent of committing, encouraging or facilitating the commission of the target *crime*,”¹⁶³ in the current instruction, the word “crime” has been replaced with “[act] [or] [crime].”¹⁶⁴

The doctrine of implied malice aiding and abetting caused immediate controversy, with the Office of the State Public Defender of California protesting that it “has never been, and is not, a valid theory of murder.”¹⁶⁵ But the California Supreme Court denied review of the *Powell* decision on July 14, 2021, tacitly affirming it as good law,¹⁶⁶ and then explicitly affirmed *Powell*’s formulation in *Reyes*, stating that “case law has recognized and applied [the] theory, and we see no basis to abrogate it.”¹⁶⁷ With that blessing from California’s highest court,

159. *People v. Powell*, 278 Cal. Rptr. 3d 150, 169–70 (Ct. App. 2021).

160. *Id.*

161. *Id.* at 170–71; CALIFORNIA CRIM. JURY INSTRUCTIONS (CALCRIM) No. 401 (JUD. COUNCIL OF CAL. 2023).

162. *Powell*, 278 Cal. Rptr. 3d at 173.

163. *People v. Coffman*, 96 P.3d 30, 111 (Cal. 2004) (emphasis added).

164. CALIFORNIA JURY INSTRUCTIONS—CRIM. (CALJIC) NO. 3.01 (WEST’S COMM. ON CAL. CRIM. JURY INSTRUCTIONS 2021).

165. Brief for Office of the State Public Defender, *supra* note 30, at 24.

166. *People v. Powell*, S269119 (Cal. July 14, 2021) (petition for review denied).

167. *People v. Reyes*, 531 P.3d 357, 362 (Cal. 2023).

implied malice aiding and abetting has been elevated from a hypothetical to a concretely defined rule for imposing and preserving murder liability for criminal accomplices who have neither killed nor intended to kill.

H. Example Cases of the Application of Implied Malice Aiding and Abetting

In the more than two years since *Powell* was decided, dozens of cases have cited it and have relied on its reasoning.¹⁶⁸ Before this Note wades into the numerous requirements of the theory, it will detail a handful of cases, including those cited by the California Supreme Court to affirm the validity of the theory,¹⁶⁹ which can serve as examples of the potential pitfalls of attempting to apply the doctrine.

1. People v. Superior Court of San Diego County (Valenzuela) (2021)

An early example of the use of implied malice aiding and abetting is *People v. Superior Court of San Diego (Valenzuela)*.¹⁷⁰ This case is chosen not for its uniqueness, but because it is typical of the way a petty argument can escalate to assault and then to lethal violence; the court called the fact pattern “as familiar . . . as it is tragic.”¹⁷¹ Daniel Valenzuela confronted a group of teenagers outside a taco shop after one of the teens had a conflict with his daughter.¹⁷² The argument intensified, and Valenzuela challenged the older kids in the group to a fight in a nearby park.

By later that day, both sides had gathered reinforcements: Valenzuela brought a friend named Cesar Diaz, and the teenagers brought a friend named Orlando.¹⁷³ When the two groups faced off in a large park, Diaz was armed with a knife.¹⁷⁴ At one point during the melee, as Diaz was being “pummeled” by three teenagers, he stabbed Orlando in the heart, and the teen died half an hour later.¹⁷⁵

168. See, e.g., *People v. Vargas*, 300 Cal. Rptr. 3d 777, 786 (Ct. App. 2022); *People v. Vizcarra*, 300 Cal. Rptr. 3d 371, 379–81 (Ct. App. 2022); *People v. Glukhoy*, 292 Cal. Rptr. 3d 623, 630 (Ct. App. 2022).

169. *Reyes*, 531 P.3d at 363.

170. 288 Cal. Rptr. 3d 627 (Ct. App. 2021).

171. *Id.* at 631.

172. *Id.*

173. *Id.* at 633–34.

174. *Id.* at 631.

175. *Id.* at 636.

The issue was whether Valenzuela could be charged with second-degree murder for arranging the fight in the first place. As a classic “merger” case, a felony murder prosecution was out of the question.¹⁷⁶ At a preliminary hearing, the magistrate refused to hold Venezuela on the charge of aiding and abetting murder, because there was “not sufficient evidence” that Valenzuela knew Diaz had a knife.¹⁷⁷ The People challenged that ruling, and the Fourth District Court of Appeal overturned it, citing *Powell* and finding that Valenzuela could still be found guilty under the theory of implied malice aiding and abetting.¹⁷⁸

2. *People v. Glukhoy* (2022)

*People v. Glukhoy*¹⁷⁹ reads more like a hypothetical example in a criminal law textbook than a real case, but it is based on actual events.¹⁸⁰ Police discovered that identical twin brothers Roman and Ruslan Glukhoy were stealing from parked cars in Auburn, California.¹⁸¹ The twins fled, evading police in a pair of high-speed chases—the first with Roman as driver, and the second with Ruslan at the wheel of a different vehicle and Roman in the rear passenger seat.¹⁸² At the end of the second chase, during which Ruslan had driven through morning traffic at up to one hundred miles per hour, he ran a red light and struck a car in the intersection, killing the two people inside.¹⁸³

Along with convictions for evading the police with wanton disregard for public safety, both twins were found guilty of murder: Ruslan, the driver, was convicted of first-degree murder and sentenced to two life terms without the possibility of parole;¹⁸⁴ Roman, the twin in the back seat, was convicted of two counts of second-degree murder and sentenced to consecutive fifteen-year-to-life terms.¹⁸⁵

On appeal to the Third District Court of Appeal, Roman argued that his second-degree murder convictions had been based on the natural and probable consequences doctrine and should therefore be

176. See *People v. Hansen*, 885 P.2d 1022, 1028 (Cal. 1994).

177. *Valenzuela*, 288 Cal. Rptr. 3d at 636.

178. *Id.* at 640–42.

179. 292 Cal. Rptr. 3d 623 (Ct. App. 2022).

180. See generally Kate Saemons, *Crash Lands Identical Twins in Jail for Decades*, USA TODAY (Jan. 24, 2017, 9:04 AM), <https://www.usatoday.com/story/news/nation/2017/01/24/crash-lands-identical-twins-jaildecades/96983574/> [<https://perma.cc/2T66-SNV4>].

181. *Glukhoy*, 292 Cal. Rptr. 3d at 628.

182. *Id.*

183. *Id.* at 629; see Saemons, *supra* note 180.

184. *Glukhoy*, 292 Cal. Rptr. 3d at 629–30.

185. *Id.*

vacated after SB 1437.¹⁸⁶ As it happened, Roman’s appeal came before the Honorable William J. Murray, Jr., the same judge who had written the definition of implied malice aiding and abetting in *Powell*.¹⁸⁷

The People conceded that Roman’s original second-degree murder conviction, which had been based on the natural and probable consequences doctrine, had been invalidated by *Gentile*.¹⁸⁸ The question was whether Roman’s petition for resentencing should be denied under a different, still-valid theory—namely, implied malice aiding and abetting.¹⁸⁹

The court contended that Ruslan’s life-endangering act was “reckless and dangerous driving conduct,”¹⁹⁰ and that Roman aided that act by telling his brother which freeway exit to take shortly before the crash: “when [Ruslan] asked where they should go, [Roman] said they should get off the freeway at Antelope Road because they knew the area. The evidence conclusively satisfie[d] the actus reus requirement for an aider and abettor.”¹⁹¹ The *Glukhoy* court also reasoned that Roman’s objective actions and apparent mental state satisfied the requirements to establish implied malice: “the evidence is also overwhelming as to Roman’s knowledge that Ruslan’s driving conduct was dangerous to human life and that Roman acted in conscious disregard for human life when he advised [Ruslan] where to go.”¹⁹² The court denied Roman’s felony murder resentencing petition, finding him guilty under the theory it had defined just months before.¹⁹³

3. *People v. Weatherington* (2021)

The third example of the implied malice aiding and abetting theory as applied involves a group assault that spawned multiple prosecutions, convictions, and subsequent appellate decisions. Of those decisions, only *People v. Garcia* has been officially published,¹⁹⁴ but this Note will mainly refer to *People v. Weatherington*¹⁹⁵ because the level

186. *Id.* at 627.

187. *Id.* at 626; *People v. Powell*, 278 Cal. Rptr. 3d 150, 153 (Ct. App. 2021).

188. *Glukhoy*, 292 Cal. Rptr. 3d at 630.

189. *Id.* at 642–46.

190. *Id.* at 642.

191. *Id.*

192. *Id.* at 644.

193. *Id.* at 630–31.

194. *See People v. Garcia*, 271 Cal. Rptr. 3d 206 (Ct. App. 2020); *People v. Ortiz*, No. B300776, 2022 WL 619630 (Cal. Ct. App. Mar. 3, 2022).

195. No. F000270432007, 2021 WL 2309801 (Cal. Ct. App. June 7, 2021).

of participation of the defendants in that case (Monte Weatherington and George Vived) is best suited to the discussion here.

In 1998, members of a street gang called Paso 13 decided to confront one of their former associates, Raul Mosqueda, who had become friendly with a rival gang.¹⁹⁶ Paso 13 members David Rey and Oscar Garcia found out from Vived that Mosqueda would be attending a party in Paso Robles, California on the night of April 12, 1998.¹⁹⁷ Rey and Garcia conspired with at least four accomplices, including Vived and Weatherington, to confront Mosqueda for his disloyalty and “beat his ass.”¹⁹⁸ They drove to the site of the assault in three different cars.¹⁹⁹ Gang members Rey and Garcia drove to the site by themselves, and on the ride over, Rey showed Garcia a knife.²⁰⁰ Rey did not mention the knife to anyone else before the group reassembled outside the party.²⁰¹

When Mosqueda refused to come outside, the group of assailants forced their way into the house, attacking him in the hallway as guests scattered.²⁰² One of Mosqueda’s friends tried to come to his defense, and Weatherington fought with him one-on-one, with the tussle moving into an adjacent bedroom.²⁰³ At some point during the melee, Garcia said to Rey, “You got a knife, stick him,” and Rey stabbed Mosqueda four times in the chest.²⁰⁴ When he saw the blood, Vived stopped assaulting the victim and pressed himself against the wall, appearing to express shock when he shouted, “Oh shit . . . What happened?”²⁰⁵ The group then fled the apartment, and Mosqueda died a short time later.²⁰⁶ Rey was convicted of first-degree murder, and Garcia, Ortiz, Weatherington, and Vived were convicted of second-degree murder.²⁰⁷

196. *Id.* at *1.

197. *Id.* at *1–2.

198. *Id.* at *2.

199. *Id.*

200. *Id.*

201. *People v. Garcia*, 271 Cal. Rptr. 3d 206, 210 (Ct. App. 2020).

202. *Id.* at 211.

203. *Weatherington*, 2021 WL 2309801, at *2.

204. *Id.*

205. *Id.* at *2–3.

206. *Id.* at *3.

207. *People v. Garcia*, 271 Cal. Rptr. 3d 206, 209–10 (Ct. App. 2020); *Weatherington*, 2021 WL 2309801, at *1; *People v. Ortiz*, No. B300776, 2022 WL 619630, at *1 (Cal. Ct. App. Mar. 3, 2022).

After the passage of SB 1437, Weatherington and Vived petitioned to have their murder convictions vacated.²⁰⁸ The court of appeal stated that despite the lack of evidence about Vived's intention to kill Mosqueda, his lack of knowledge that Rey had a knife, and the shock he exhibited when the stabbing occurred, he could still be convicted under *Powell's* newly crafted theory of implied malice aiding and abetting:

Vived was not affiliated with Paso 13, did not know Rey had a knife, and displayed shock and dismay when he realized that Mosqueda had been mortally wounded. But these factors do not negate the presence of . . . the mental component of implied malice. . . . Vived participated in a home invasion and seven-against-one brutal beating of a defenseless, despised victim. . . . It is of no consequence that Vived did not intend to kill Mosqueda.²⁰⁹

Weatherington argued that he had even less culpability: like Vived, he didn't know Rey was armed, but unlike Vived, he was not close to Mosqueda when the stabbing occurred, and he was not personally affiliated with the gang.²¹⁰ But the court found that he was "in the same position as Vived," and denied his resentencing petition.²¹¹

4. *People v. Reyes* (2023)

The final example is the first case in which the California Supreme Court considered the implied malice aiding and abetting liability of an actual defendant: *People v. Reyes*.

In August 2004, Andres Reyes was a fifteen-year-old member of the F-Troop street gang in Santa Ana, California.²¹² Reyes was riding bicycles with six older friends who were between sixteen and twenty-one years of age.²¹³ One of them, Francisco Lopez, was carrying a gun, and he showed it to the group.²¹⁴ A few hours later, the group biked near rival gang territory.²¹⁵ Lopez accosted Pedro Rosario, who was driving a car, and as the other gang members watched from their

208. *Weatherington*, 2021 WL 2309801, at *1.

209. *Id.* at *7.

210. *Id.*

211. *Id.*

212. *People v. Reyes*, 531 P.3d 357, 358–59 (Cal. 2023).

213. *Id.* at 359.

214. *Id.*

215. *Id.*

bicycles, Lopez shot Rosario in the head.²¹⁶ Reyes testified to being about thirty feet away when the shooting occurred, and he denied hearing the altercation or even knowing why it occurred.²¹⁷

After the killing, Reyes was carrying the murder weapon.²¹⁸ Less than an hour after the killing, back in his own gang territory, he got in a fist fight with another boy.²¹⁹ Reyes wielded the gun during the fight, but it was knocked away and never fired.²²⁰ Two days later, the police arrested Reyes, and he admitted being at the scene of the killing, saying, “I didn’t shoot, but because I was there with my homies, I’m going to get charged with murder too.”²²¹

Reyes was charged with first-degree murder, but the charge was later reduced, and he was eventually convicted of second-degree murder.²²² Still, because of gang and firearm enhancements, Reyes received a sentence of forty years to life.²²³ In 2019, Reyes petitioned to vacate his murder conviction under Penal Code section 1172.6.²²⁴ *Gentile* and *Powell* had not yet been decided, but the trial court denied the petition based on the contention that Reyes could still be convicted under a theory of direct implied malice murder.²²⁵ The trial court adhered to the requirements for CALCRIM No. 520, the jury instructions for a finding of implied malice murder.²²⁶ These instructions, like the *Powell* definition for implied malice aiding and abetting, hinge on a finding of “an act or failure to act, the natural and probable consequences of which were dangerous to human life.”²²⁷

The trial court found that fifteen-year-old Reyes’s life-endangering act was, “along with several other gang members, one of which was armed, travell[ing] into gang territory.”²²⁸ On appeal, Reyes challenged the claim that he had committed any act that aided the shooting itself.²²⁹ The court of appeal disagreed, reasoning that the trial court

216. *Id.*

217. *People v. Reyes*, No. G059251, 2021 WL 3394935, at *3 (Cal. Ct. App. Aug. 4, 2021), *rev’d*, *People v. Reyes*, 531 P.3d 357 (Cal. 2023).

218. *Reyes*, 531 P.3d at 359.

219. *Id.*

220. *Id.*

221. *Reyes*, 2021 WL 3394935, at *2.

222. *Id.* at *3.

223. *Reyes*, 531 P.3d at 360.

224. *Reyes*, 2021 WL 3394935, at *3.

225. *Id.* at *3–4, *6.

226. *Id.* at *5.

227. CALCRIM No. 520.

228. *Reyes*, 531 P.3d at 360.

229. *Id.*

had to consider “the totality of [the] defendant’s actions on the day in question” to support a finding of implied malice, including the separate fight that took place after the killing.²³⁰ Based on that reasoning, the appellate court affirmed the lower court’s denial of Reyes’s petition.²³¹

In 2023, the California Supreme Court reversed the decision, finding that Reyes could not have been convicted of implied malice murder because his “acts of bicycling into rival gang territory and chasing after Rosario’s car . . . were too attenuated in the chain of events to have proximately caused the killing.”²³²

In a somewhat unorthodox move, citing “the lack of clarity [about the theory of guilt used to block Reyes’s petition] . . . and out of an abundance of caution,” the Court addressed Reyes’s direct aiding and abetting liability, even though it had not been explicitly considered by the trial court.²³³ The Court held that since the trial court had only considered whether Reyes harbored implied malice, and not whether Reyes knew about and acted to help Lopez commit the shooting, the trial court had committed an “error of law” in regard to implied malice aiding and abetting liability.²³⁴ The court reversed the denial of Reyes’s petition.²³⁵

II. NAVIGATING THE MAZE OF IMPLIED MALICE AIDING AND ABETTING

After covering the history, the definition, and five examples of case law related to implied malice aiding and abetting, this Note will now explore the complexities of the rule to help prosecutors, defense attorneys, courts, and juries avoid the potential pitfalls of applying this complex and demanding doctrine of liability. It will also suggest a potential legal basis for reconsidering the doctrine in the future.

A. The “Highly Dangerous Act” That the Defendant Aids and Abets Must Have Proximately Caused the Victim’s Death

As defined in *Powell*, the implied malice aiding and abetting doctrine focuses on identifying the “life endangering act” that the

230. *Reyes*, 2021 WL 3394935, at *5.

231. *Id.*

232. *Reyes*, 531 P.3d at 361–62.

233. *Id.* at 360–61.

234. *Id.* at 364.

235. *Id.*

defendant aided in some way.²³⁶ This is the same act that is contemplated in the *Phillips* definition of implied malice: “an act, the natural consequences of which are dangerous to life.”²³⁷ However, what is imperative to remember, and equally difficult to conceive of in the context of aiding and abetting, is that such an act is only the physical component of the *mens rea* of an implied malice murder.²³⁸ The actus reus of an implied malice murder is a killing that is proximately caused by the perpetrator.²³⁹

The standard for a sufficiently culpable act of aiding and abetting is typically low—any act that aids the commission of the intended crime or act will satisfy the actus reus element of aiding and abetting.²⁴⁰ But if the doctrine of implied malice aiding and abetting relies on both aiding and abetting and implied malice principles to establish liability, it stands to reason that *both* actus rei must be satisfied for liability to attach.

When applying the implied malice aiding and abetting doctrine as defined in *Powell*, it may be tempting for prosecutors, courts, and juries to reason that once any life-endangering act by the perpetrator is identified, and the fact that the defendant aided that act is established, the actus reus element of a conviction for directly aiding and abetting an implied malice murder is satisfied. But the work is not done, because, as the California Supreme Court has consistently stated, the physical and mental components of implied malice only establish the *mens rea* necessary for an implied malice murder.²⁴¹

Malice can only be implied based on an intentional act that proximately causes a killing.²⁴² Therefore, for an accomplice to be treated as a principal in an implied malice murder, the act that they aid and abet must be a proximate cause of the victim’s death.²⁴³ The California Supreme Court confirmed this requirement in *Reyes*—but it did so while affirming the *Powell* court’s definition of implied malice aiding and abetting, which relegates the proximate cause requirement to a

236. *People v. Powell*, 278 Cal. Rptr. 3d 150, 169–70 (Ct. App. 2021).

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

238. *People v. Chun*, 203 P.3d 425, 429 (Cal. 2009).

239. *Phillips*, 414 P.2d at 363; *People v. Knoller*, 158 P.3d 731, 742 (Cal. 2007).

240. Dressler, *supra* note 12, at 102; *Rosemond v. United States* 572 U.S. 65, 72–73 (2014).

241. *People v. Bryant*, 301 P.3d 1136, 1138 (Cal. 2013); *People v. Cravens*, 267 P.3d 1113, 1118 (Cal. 2012); *Chun*, 203 P.3d at 429.

242. *Phillips*, 414 P.2d at 363.

243. *People v. Reyes*, 531 P.3d 357, 363 (Cal. 2023).

footnote.²⁴⁴ The marginalization of this crucial aspect of the rule raises the risk that it could be overlooked.

The scope of actions that can satisfy the proximate cause requirement are surprisingly wide: more than one person's actions can be a proximate cause of a killing, and a jury "need not determine which of the concurrent causes was the principle or primary cause" to find multiple people guilty of murder.²⁴⁵ A defendant's actions need only be a "substantial factor" in the victim's death to be the proximate cause of that death.²⁴⁶ In one case, two rival gang members were in a gunfight, and only one stray bullet killed an innocent bystander—even though both could not possibly have been the actual killer, and though they were acting at cross-purposes to each other in the most violent sense, both were convicted as actual killers on a proximate cause theory.²⁴⁷

There is little doubt that the defendants in our example cases were involved in highly dangerous criminal activities: the Glukhoy twins were fleeing police at high speed; Valenzuela, Weatherington and Vived took part in group assaults, and Reyes was at least present when his friend shot and killed a rival gang member.²⁴⁸ But if the aided and abetted "life-endangering" act that a court identifies is not tethered to proximate cause, prosecutors, courts, and juries could be free to explore the fact pattern of a homicide to find a highly dangerous act committed by the killer that the defendant aided in some way, regardless of whether that act was a substantial factor in the victim's death, thus unmooring the determination of implied malice from its foundations.

This is exactly what courts have already done on multiple occasions.²⁴⁹ To be sure, Weatherington and Vived took part in a many-on-one assault. But to qualify as a substantial factor—and a proximate cause—of a victim's death, a jury must find that without a defendant's action, "the death would not have occurred when it did."²⁵⁰ Weatherington, for one, had little effect on the killing, because he was in another room when the stabbing occurred.²⁵¹ But while the

244. *Id.*; *People v. Powell*, 278 Cal. Rptr. 3d 150, 169 n.27 (Ct. App. 2021).

245. *People v. Catlin*, 26 P.3d 357, 405 (Cal. 2001); CALIFORNIA CRIM. JURY INSTRUCTIONS (CALCRIM) No. 3.41 (JUD. COUNCIL OF CAL. 2023).

246. *People v. Jennings*, 237 P.3d 474, 496 (Cal. 2010).

247. *People v. Sanchez*, 29 P.3d 209, 216 (Cal. 2001).

248. See discussion *supra* Section I.H.

249. See discussion *supra* Section I.H.

250. *Catlin*, 26 P.3d at 405.

251. *People v. Weatherington*, No. F000270432007, 2021 WL 2309801, at *2 (Cal. Ct. App. June 7, 2021).

Weatherington court acknowledged that implied malice required an act that proximately caused a killing,²⁵² it never engaged in any analysis of *Weatherington*'s knowledge of or intent to aid the stabbing. Instead, it relied on the facts and the holding in *Powell*, where the defendant was another non-killing participant in a group assault.²⁵³ The comparison is flawed, however, because the *Powell* court never engaged in a proximate cause analysis either—rather, it determined that the jury had convicted Langlois on a theory of express, not implied, malice.²⁵⁴

The trial court that considered Reyes's petition for resentencing also struggled with this distinction: “[W]hat I’m trying to get at, I can’t see—it’s the act. Does there have to be a greater act for implied malice than an act for natural and probable consequences?”²⁵⁵ The court concluded that no greater act was required²⁵⁶—but that is incorrect. Under the natural and probable consequences theory, aiding and abetting the underlying crime—say, *Weatherington* or *Vived* taking part in the beating of *Mosqueda*—was sufficient to supply the actus reus for murder.²⁵⁷ But now, since the aider and abettor must personally harbor implied malice to be guilty of murder, and implied malice only arises when a defendant commits an act that proximately causes the victim's death, an implied malice aiding and abetting defendant's culpable act must be greater: it must aid the act that proximately killed the victim.

B. The Doctrine of Aiding and Abetting Should Not Be Used to Capture the “Life-Endangering Act” Within a Much Broader Pattern of Conduct

Section I.G of this Note observed that the formal definition of aiding and abetting liability changed after *Powell* combined it with implied malice. Aiders and abettors no longer had to intend to aid a specific crime—they could now be liable for aiding and abetting a highly dangerous act.²⁵⁸ This revision was necessary because, as the *Powell* court observed, “the aider and abettor of implied malice

252. *Id.* at *5.

253. *Id.*

254. *People v. Powell*, 278 Cal. Rptr. 3d 150, 173 (Ct. App. 2021).

255. Reporter's Transcript on Appeal at 293, *People v. Reyes*, 2021 WL 3394935 (Cal. Ct. App. Aug. 4, 2021) (No. G059251).

256. *People v. Reyes*, No. G059251, 2021 WL 3394935, at *5 (Cal. Ct. App. Aug. 4, 2021), *rev'd*, *People v. Reyes*, 531 P.3d 357 (Cal. 2023).

257. *Weatherington*, 2021 WL 2309801, at *5.

258. See discussion *supra* Section I.G; CALJIC 3.01.

murder need not intend the commission of the crime of murder. Rather, relative to the aider and abettor's intent, he or she need only intend the commission of the perpetrator's act."²⁵⁹

Though this change ensured that *Powell*'s newly defined theory of liability would be on more stable doctrinal footing, it gave rise to a different interpretive problem: crimes have specific statutory definitions, while "acts" do not. Determining whether a defendant intended to aid and abet a robbery can proceed according to defined elements. But what happens when prosecutors or courts are free to define the target act of the perpetrator as they see fit, according to their own invented definitions?

In *Weatherington*, the court identified the highly dangerous act as the "home invasion and seven-against-one brutal beating of a defenseless, despised victim."²⁶⁰ There is little doubt that such a group attack is highly dangerous, but it was not, on its own, the act that proximately killed the victim—at the risk of stating the obvious, Mosqueda died because Rey stabbed him.²⁶¹ The *Weatherington* court decided that it did not need to prove that Weatherington and Vived intended to aid that stabbing, because they aided a more broadly defined life-endangering act that included the stabbing.²⁶²

Likewise, in *Valenzuela*, the defendant asked his friend Diaz to accompany him to a park for a fight against a group of teenagers, and while he likely knew Diaz was armed, he did not specifically aid or encourage Diaz to stab the victim.²⁶³ However, the *Valenzuela* court did not identify the stabbing itself as the highly dangerous act, but the broader conduct of "Diaz's participation in an armed melee."²⁶⁴

In *Glukhoy*, the Honorable Judge William J. Murray, Jr., who defined implied malice aiding and abetting liability in *Powell*, defined the life-endangering act even more broadly, concluding that Roman Glukhoy aided his brother Ruslan's "driving conduct during [his] ongoing effort to evade law enforcement and avoid apprehension."²⁶⁵ The court reasoned that "there is no serious argument" that this driving conduct was the proximate cause of the victims' deaths.²⁶⁶ But

259. *Powell*, 278 Cal. Rptr. 3d at 170–71.

260. *Weatherington*, 2021 WL 2309801, at *7.

261. *Id.* at *2.

262. *Id.* at *7.

263. *People v. Superior Ct. (Valenzuela)*, 288 Cal. Rptr. 3d 627, 636 (Ct. App. 2021).

264. *Id.* at 642.

265. *People v. Glukhoy*, 292 Cal. Rptr. 3d 623, 643 (Ct. App. 2022).

266. *Id.*

“driving conduct” is an alarmingly broad category of action, and is virtually indistinguishable from the underlying felony of driving in willful or wanton disregard of safety while evading a police officer, which is not considered inherently dangerous to human life.²⁶⁷

The lower court decisions in *Reyes* might have stretched this concept to its furthest point, identifying the defendant’s decision to ride bicycles to the border of rival gang territory with an associate who was carrying a gun as “dangerous to human life.”²⁶⁸ That act was not only a broad and varied course of conduct, it was quite a creative formulation of a cohesive “act,” given that it took place over hours and involved several different people.²⁶⁹

In *Reyes*, the California Supreme Court reasoned that such a broad definition of the culpable act was “too attenuated in the chain of events to have proximately caused the killing; any causal link between Reyes’s conduct and Rosario’s death is tenuous at best.”²⁷⁰ The Court chose to identify the life-endangering act as the shooting itself.²⁷¹ If that commonsense, narrow application was followed in our other example cases, the life-endangering acts in those cases would look quite different: in *Glukhoy*, the act that proximately caused the deaths of the victims would likely be Ruslan’s decision to drive through a red light at an intersection at high speed; in *Weatherington, Valenzuela, and Powell*, the act that proximately caused the death would be a stabbing.²⁷²

Were the other courts’ broad characterizations of a “highly dangerous act” simply wrong? The answer is: perhaps, but not so fast. Remember how the principle of aiding and abetting works: “[W]hen an accomplice chooses to become a part of the criminal activity of another, she says in essence, ‘your acts are my acts’ We euphemistically may impute the actions of the perpetrator to the accomplice by ‘agency’ doctrine.”²⁷³ By this logic, if an accomplice intends to aid and abet a broader course of action, the more specific actions within it

267. *Id.* at 629–30 (citing CAL. VEH. CODE § 2800.2 (1959)); *see also* *People v. Howard*, 104 P.3d 107, 112–13 (Cal. 2005) (holding that driving with reckless disregard for the safety of people is not an inherently dangerous felony for the purposes of murder liability).

268. *People v. Reyes*, No. G059251, 2021 WL 3394935, at *5–6 (Cal. Ct. App. Aug. 4, 2021), *rev’d*, *People v. Reyes*, 531 P.3d 357 (Cal. 2023).

269. *Reyes*, 531 P.3d at 359.

270. *Id.* at 361–62.

271. *Id.* at 363.

272. *See* discussion *supra* Section I.H.

273. *People v. Prettyman*, 926 P.2d 1013, 1018 (Cal. 1996) *superseded by statute*, S. Res. 1437, 115th Cong. (2018) (enacted) (quoting Dressler, *supra* note 12, at 111).

can be imputed to him. This doctrinal loophole seems to skirt SB 1437's addition of Penal Code section 188, subdivision (a)(3), which provides that "[m]alice shall not be imputed to a person based solely on his or her participation in a crime," because the doctrine of aiding and abetting imputes culpable *acts*, not malice.²⁷⁴

The *Glukhoy* court reasoned that SB 1437's revisions to section 188(a)(3) do not affect the scope of actions required to aid and abet murder—only the requirement that the defendant harbor implied malice: "Given the mens rea requirements for aiding and abetting implied malice, not only is malice not 'imputed' . . . but liability is not grounded 'solely' upon participation" in the broader criminal conduct. Rather, liability is "grounded upon the requirement that the aider and abettor personally harbor implied malice."²⁷⁵

If we assume that the *Glukhoy* court's interpretation of the doctrine is correct, when accomplices aid and abet the broader criminal act, they take ownership of the specific act that killed the victim, and the only remaining questions are whether they knew that the broader course of conduct was dangerous to human life and whether they acted despite that knowledge.²⁷⁶

Does that settle the issue? Were Judge Murray and the other courts in the example cases correct to assign liability based on a broader definition of a "highly dangerous act"?

Once again—not so fast. In *Reyes*, the California Supreme Court said that "implied malice murder requires attention to the aider and abettor's mental state concerning the life endangering act committed by the direct perpetrator, *such as shooting at the victim*."²⁷⁷ This suggests that while the aiding and abetting doctrine could theoretically impute a specific killing act from the intent to commit a broader course of conduct, implied malice requires the intent to aid that more specific and narrowly-defined act—the act that proximately killed the victim. In other words, a court cannot rely on a broad definition of the "act" to impute the murderous acts within it to an accomplice, while relying

274. CAL. PENAL CODE § 188(a)(3) (2019); see Dressler, *supra* note 12, at 111.

275. *People v. Glukhoy*, 292 Cal. Rptr. 3d 623, 635 (Ct. App. 2022). This argument is both technically correct and somewhat misleading, because while malice is not imputed to an accomplice through aiding and abetting, the acts that form the basis of that malice *are*. For instance, Ruslan's life-endangering act was imputed to Roman through Roman's participation in, and intent to aid, Ruslan's broader crime.

276. *Id.*

277. *People v. Reyes*, 531 P.3d 357, 363 (Cal. 2023) (emphasis added) (citing *People v. Powell*, 278 Cal. Rptr. 3d 150, 169 n.27 (Ct. App. 2021)).

on a narrower definition of the act to sustain the proximate cause necessary for implied malice.

Under that interpretation, the *Glukhoy* court misapplied the very doctrine that it had defined in *Powell*. It reasoned that Roman Glukhoy's intent to aid his brother's reckless driving conduct by telling him which exit to take off the freeway made him liable for every red light that Ruslan subsequently drove through.²⁷⁸ But at most, Roman's recommendation to his brother to exit the highway at a certain point was a theoretical cause of the crash that occurred after Ruslan "ran a series of red lights" before finally crashing into the victim's car.²⁷⁹ An action needs to be more than a "merely theoretical" factor in a killing to be a proximate cause of that death,²⁸⁰ and to be a proximate cause of a murder, an act must be unlawful.²⁸¹ Roman's decision to tell his brother what highway exit to take does not satisfy either of those requirements.

From a policy perspective, the California Supreme Court has explicitly stated that it is up to the judicial system to ensure that aiding and abetting liability is not interpreted too broadly.²⁸² For that reason, the court barred the imposition of first-degree murder liability premised on the natural and probable consequences theory before SB 1437 was ever written or enacted.²⁸³

As the Office of the State Public Defender observed in its amicus brief in *Reyes*, "[a]llowing focus on actions further attenuated from the life endangering act threatens an end-run around the Legislature's elimination of the natural and probable consequences theory of murder."²⁸⁴ Implied malice aiding and abetting theory should not derive murder liability for a non-killing accomplice from a broader and more attenuated scope of conduct than it could reasonably use against the actual killer.

278. *Glukhoy*, 292 Cal. Rptr. 3d at 644.

279. *Id.* at 629.

280. *People v. Jennings*, 237 P.3d 474, 496 (Cal. 2010) (quoting *People v. Briscoe*, 112 Cal. Rptr. 2d 401, 413 (Ct. App. 2001)).

281. CALIFORNIA JURY INSTRUCTIONS—CRIM. (CALJIC) No. 8.55 (WEST'S COMM. ON CAL. CRIM. JURY INSTRUCTIONS 2021) (stating that murder or manslaughter requires "an unlawful act which was a cause of [the] death").

282. *People v. Chiu*, 325 P.3d 972, 978 (Cal. 2014).

283. *Id.* at 980.

284. Brief for Office of the State Public Defender, *supra* note 30, at 31.

C. To Aid and Abet a Murder with Implied Malice, an Accomplice Must Know the Full Extent of the Main Perpetrator's Intent

To be liable as a direct aider and abettor, the mental state of an accomplice must be “at least that of the actual perpetrator,” and in the context of a second-degree murder charge, an aider and abettor must harbor at least as much implied malice as the actual killer.²⁸⁵ But the inquiry does not end there because the aider and abettor must also subjectively know and want to aid the intent of the perpetrator, a requirement that drastically increases the difficulty of establishing culpable intent.²⁸⁶ In the oral argument for *Reyes* at the California Supreme Court, the prosecution conceded as much:

DEP. DISTRICT ATTORNEY JENICHI SEMITSU: The reason that the trial court did not [employ implied malice aiding and abetting as a theory of guilt in *Reyes*] was because it was easier to reach this conclusion through a direct implied malice murder theory because, quite frankly, implied malice, on some level, through aiding and abetting is actually more difficult to prove to some extent because you have to get into two peoples' state of mind.

JUSTICE GOODWIN LIU: That's true.²⁸⁷

The *Powell* court reasoned that SB 1437 preserved direct aiding and abetting liability because it is based on “the aider and abettor's own mens rea.”²⁸⁸ The California Supreme Court has even extended this reasoning to the point that if he or she harbors a greater degree of malice, an aider and abettor can be convicted of first-degree murder when the actual killer is not.²⁸⁹

But it is far too easy for practitioners to engage in an implied malice determination and believe that their job is done, when aiding and abetting doctrine requires an additional level of intent—“the most exacting mental state in the criminal code.”²⁹⁰ In *Beeman*, which set

285. *People v. McCoy*, 24 P.3d 1210, 1214 (Cal. 2001).

286. *See People v. Reyes*, 531 P.3d 357, 363 (Cal. 2023).

287. *Supreme Court Oral Argument 2023-04-04, People v. Reyes (Andres Quinonez)*, S270723, SUP. CT. CAL. ORAL ARGUMENT WEBCAST, at 2:24:33 [hereinafter *Reyes Oral Argument*], http://jcc.granicus.com/player/clip/3557?meta_id=107526&redirect=true&h=da0a18bf4aa89a005df3b2c8961e46bc [http://perma.cc/K2AE-YUYC].

288. *People v. Powell*, 278 Cal. Rptr. 3d 150, 169 (Ct. App. 2021) (citing *McCoy*, 24 P.3d at 1215).

289. *McCoy*, 24 P.3d at 1214–15.

290. Oliver, *supra* note 46, at 9.

California's long-settled standard for aiding and abetting liability, the court stated that "the aider and abettor will 'share' the perpetrator's specific intent when he or she knows the *full extent* of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating [it]."²⁹¹ In the context of implied malice aiding and abetting, that means that an accomplice must understand the *full extent* of the perpetrator's intent to commit the life-endangering act that proximately killed the victim, and must act with the intent to facilitate it completely.

In *Reyes*, where the lower court held that the defendant could be liable for murder for riding his bicycle into rival gang territory knowing that his friend had a gun, the California Supreme Court detailed what the "full extent" standard for his liability should actually look like: "Here, assuming the life-endangering act was the shooting, the trial court should have asked whether Reyes knew that Lopez intended to shoot at the victim, intended to aid him in the shooting, knew that the shooting was dangerous to life, and acted in conscious disregard for life."²⁹²

Of course, the prosecution in *Reyes* could not come close to meeting that standard. It could not even prove direct implied malice murder, a bar it admitted was "easier to reach."²⁹³ Our other example cases contain more illustrations of courts falling short of this challenging mens rea standard.²⁹⁴ In *Valenzuela*, the court contemplated the defendant's state of mind before the fatal melee, acknowledging that it was "reasonable to think there [were] conversation[s] [between Valenzuela and Diaz] about 'Where [are] we going? Who [are] we fighting? Are they going to be armed? Are you guys armed? Should I arm myself?'"²⁹⁵ These questions contemplate an objective foreseeability analysis about an armed confrontation, not an inquiry into whether Valenzuela subjectively knew that Diaz intended to stab someone and whether he planned to help in that endeavor.

The *Weatherington* court stated flatly that it was not necessary for Weatherington or Vived to know that the actual killer was armed with

291. *People v. Beeman*, 674 P.2d 1318, 1326 (Cal. 1984).

292. *People v. Reyes*, 531 P.3d 357, 363 (Cal. 2023).

293. *See id.*; *Reyes Oral Argument*, *supra* note 287, at 2:24:33.

294. *See discussion supra* Section I.H.

295. *People v. Superior Ct. (Valenzuela)*, 288 Cal. Rptr. 3d 627, 642 (Ct. App. 2021).

a knife—the intent to participate in a “vicious assault” was enough.²⁹⁶ The court did not consider whether Vived or Weatherington knew that Rey intended to stab Mosqueda—much less whether they intended to *aid* that stabbing—because it had defined the requisite life-endangering “act” more broadly.²⁹⁷ By hiding the actual life-endangering act—the stabbing—within a broader crime, the *Weatherington* court avoided having to confront whether Weatherington and Vived knew and intended to aid “the full extent of [Rey’s] criminal purpose.”²⁹⁸

The *Glukhoy* court made an admirable attempt to fully apply the mens rea standard, but in doing so, it employed some questionable leaps of logic. First, the court made a finding that when Roman advised his brother about the correct highway exit to take, he “knew his brother intended to continue driving recklessly when he offered the advice about where to go.”²⁹⁹ Then came this somewhat odd pronouncement: “Roman’s advice to get off [the freeway] at Antelope [Road] could only have been done with the intent to aid Ruslan’s reckless and dangerous driving conduct.”³⁰⁰ Assuming, contrary to the discussion in Section II.B, that “reckless driving conduct” is not an overly-broad definition of a life-endangering act, how exactly does a choice of freeway exit further the recklessness of that act?

The *Glukhoy* court addressed this question head-on, engaging in an extended, fact-intensive analysis to establish that Roman knew how dangerous the reckless driving could be—including the fact that he had been the driver in an “extremely violent crash” a short time earlier.³⁰¹ After noting that Roman suggested the particular freeway exit because he and Ruslan “knew the area,” the court reasoned that it proved that Roman was fully aware the off-ramp would lead them to busy intersections full of pedestrians.³⁰² On that basis, the court found that “Roman acted in conscious disregard for human life when he advised Ruslan where to go.”³⁰³

This is a head-scratching conclusion that raises numerous questions. To name just a few: Didn’t Roman’s suggestion for Ruslan to

296. *People v. Weatherington*, No. F000270432007, 2021 WL 2309801, at *7 (Cal. Ct. App. June 7, 2021).

297. See discussion *supra* Section II.B.

298. *People v. Beeman*, 674 P.2d 1318, 1326 (Cal. 1984).

299. *People v. Glukhoy*, 292 Cal. Rptr. 3d 623, 644 (Ct. App. 2022).

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

drive into a neighborhood he knew well make it objectively *less* likely that Ruslan would crash and kill someone, not more so? Didn't the suggestion to exit the freeway less than a mile from where Ruslan lived *reduce* the distance that that he needed to drive recklessly, or, in fact, drive at all?³⁰⁴ Does SB 1437, which was crafted to end the irrational practice of giving killers and non-killers the same punishment, allow the passenger in a fatal car crash to be as liable for murder as the driver because the passenger suggested a certain freeway exit?³⁰⁵

Whatever the answers to these questions, it is fair to say that the mens rea requirement of implied malice aiding and abetting reaches the darkest corners of this maze-like doctrine. The process of “getting into two people’s heads” requires complex and often counterintuitive analysis.³⁰⁶ The question is, if appellate courts struggle to apply this mens rea standard correctly, can we honestly expect juries to do so?

D. A “Basis to Abrogate”: Implied Malice Aiding and Abetting Contradicts the Legislative Language and Intent of SB 1437

In *Reyes*, the California Supreme Court affirmed the demanding intent standard for implied malice aiding and abetting,³⁰⁷ but it stopped short of heeding the California Office of the State Public Defender’s call to invalidate the doctrine altogether, stating that it saw “no basis to abrogate” the theory.³⁰⁸ However, such a basis for abrogation may have been evidenced by the text of SB 1437 from the start.

When the California Supreme Court first contemplated the existence of implied malice aiding and abetting liability in *Gentile*, it acknowledged the legislature’s directive that “with the exception of the felony murder rule, ‘[a] person’s culpability for murder must be premised on that person’s *own actions and subjective mens rea*.’”³⁰⁹

The doctrine of aiding and abetting stands in obvious tension with this directive for several reasons. First, it renders a defendant “liable

304. *See id.* (referencing evidence that the eventual crash site was less than a mile from the twins’ home).

305. *See* Ulloa, *supra* note 3, at 4.

306. *Reyes Oral Argument*, *supra* note 287, at 2:24:33.

307. *See* discussion *supra* Section II.C.

308. *People v. Reyes*, 531 P.3d 357, 362 (Cal. 2023). In *Glukhoy*, the Honorable Judge William J. Murray, Jr. also wrote that there is not “any legislative history indicating disagreement with our holding in *Powell*.” *Glukhoy*, 292 Cal. Rptr. 3d at 636 (citing *People v. Powell*, 278 Cal. Rptr. 3d 150, 169–70 (Ct. App. 2021)).

309. *People v. Gentile*, 477 P.3d 539, 548 (Cal. 2020), *superseded by statute*, S. Res. 1437, 115th Cong. (2018) (enacted) (quoting S.B. 1437, 2017–2018 Reg. Sess. § 1(g) (Cal. 2018)).

for another's actions as well as that person's own actions."³¹⁰ If an accomplice "chooses to become a part of the criminal activity of another, she says in essence, 'your acts are my acts.'"³¹¹ *Powell* also acknowledged that "aiding and abetting [liability] is based on *the combined actus reus of the participants*."³¹²

In the context of intent, "implied malice murder requires attention to the aider and abettor's mental state concerning the life endangering act *committed by the direct perpetrator*,"³¹³ so the mens rea of an implied malice aider and abettor is also partially premised on *someone else's* conduct.³¹⁴ All of these principles seem to contradict SB 1437's requirement that murder liability should attach based on a defendant's *own* actions and subjective mens rea.³¹⁵

The *Gentile* court resolved this tension by reasoning that in the realm of implied malice murder, aiders and abettors need not "know and share the murderous intent of the actual perpetrator" in the same way that they would share a perpetrator's intent to commit a specific crime; they only needed to separately harbor implied malice based on their own consciousness of the grave risk of their actions and their willingness to act despite that awareness.³¹⁶ The *Gentile* court also held that aiding and abetting liability is separate from "substantial factor" liability for implied malice murder.³¹⁷ Working in concert, these two holdings imply that in the context of aiding and abetting, a defendant can harbor the same level of implied malice as the actual killer without personally taking an action that is a proximate cause of the victim's death.³¹⁸ This result means that malice can be imputed to accomplices based on a broader range of conduct than would be

310. *People v. McCoy*, 24 P.3d 1210, 1214 (Cal. 2001).

311. *People v. Prettyman*, 926 P.2d 1013, 1018 (Cal. 1996), *superseded by statute*, S. Res. 1437, 115th Cong. (2018) (enacted) (quoting Dressler, *supra* note 12, at 111).

312. *Powell*, 278 Cal. Rptr. 3d at 169 (citing *McCoy*, 24 P.3d at 1216) (emphasis added).

313. *Reyes*, 531 P.3d at 363 (emphasis added).

314. *See id.*

315. *See* S.B. 1437, 2017–2018 Reg. Sess. § 1(g) (Cal. 2018).

316. *People v. Gentile*, 477 P.3d 539, 550 (Cal. 2020), *superseded by statute*, S. Res. 1437, 115th Cong. (2018) (enacted) (citing *People v. McCoy*, 24 P.3d 1210, 1214 (Cal. 2001)).

317. *Id.* at 550–51. If a defendant's conduct is a "substantial factor" in the killing, their murder liability is ultimately premised on their own actions, a result which comports with the language of SB 1437. Brief for Office of the State Public Defender, *supra* note 30, at 26–28. This suggests that "substantial factor" implied malice murder would be a superior substitute for implied malice aiding and abetting, should the latter theory ever be invalidated. *Id.*

318. *See* LAFAVE, *supra* note 33, at 354–55 (arguing that "accomplice liability theory . . . is not limited by the legal cause requirement").

permissible for the actual killer.³¹⁹ As this Note has shown, this distinction has already resulted in sustained murder liability for real defendants like Daniel Valenzuela and George Vived.³²⁰

The California Supreme Court has yet to fully confront these tensions between the doctrine of implied malice aiding and abetting and SB 1437's "bedrock principle . . . that a person should be punished for his or her actions according to his or her own level of individual culpability."³²¹ The contradictions between the two may be a basis to abrogate or even invalidate the theory on a future occasion.

CONCLUSION

California courts have a history of expanding accomplice murder liability "beyond any rational function that it is designed to serve."³²² For decades, when too many people received life sentences for killings they neither committed nor intended, courts sidestepped responsibility for the problem, claiming it was best handled by decisive action from our state legislature.³²³

SB 1437 *was* that action. If implied malice aiding and abetting is preserved as a valid theory, it will be invoked to block hundreds of resentencing petitions and to prosecute countless new defendants. It must be applied rigorously and consistently, without conflating or eliding the requirements of both the doctrines it draws upon. Doing any less will subvert the changes that the California Legislature finally gathered the courage and political will to make, which would be a highly dangerous act all its own.

319. *See id.*; *see also* CAL. PENAL CODE § 188(b) (2019) (stating that establishing malice aforethought requires a showing "that the killing *resulted* from an intentional act" (emphasis added)).

320. *See* discussion *infra* Section II.B.

321. S.B. 1437, 2017–2018 Reg. Sess. § 1(d) (Cal. 2018).

322. *People v. Washington*, 402 P.2d 130, 134 (Cal. 1965).

323. *People v. Dillon*, 668 P.2d 697, 715 n.19 (Cal. 1983) (claiming that since outcomes based on the felony-murder and misdemeanor-manslaughter rules "leave much to be desired . . . a thorough legislative reconsideration of the whole subject would seem to be in order").

