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SHOULD THE COURT AID AND ABET THE UNINTENDING ACCOMPlice: THE STATUS OF COMPLICITY IN CALIFORNIA

Catherine Carpenter*

I. INTRODUCTION

On February 6, 1984, the California Supreme Court laid to rest an issue that had plagued the California Court of Appeals for ten years. The supreme court in People v. Beeman decisively reversed the conviction of Timothy Mark Beeman for aiding and abetting a robbery, and in so doing, reshaped the law on accomplice liability in California. Once a jurisdiction that marched to its own beat, California was now in step with the rest of the nation on the requirement of intent for aider and abetter liability. And with the advent of Beeman, the accomplice it seems, has been propelled again into the limelight.

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2. People v. Beeman, 35 Cal. 3d 547, 674 P.2d 1318, 199 Cal. Rptr. 60 (1984). He was also convicted of burglary, false imprisonment, destruction of telephone equipment and assault with intent to commit a felony.

3. As used in this article, an "aider and abettor" is a person who does not actually perpetrate the crime, but aids in its commission either by advice, counsel, or encouragement before or at the scene of the crime. The term "aider and abettor" will also be used interchangeably with the terms "accessory and accomplice". For an excellent discussion on this topic, see Westerfield, The Mens Rea Requirement of Accomplice Liability in American Criminal Law - Knowledge or Intent, 51 Miss. L.J. 155 (1980).

4. Recently, the United States Supreme Court had occasion to define the parameters of accomplice liability under the U.S. CONST. amend. VIII. It states: "Excessive bail shall not be

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As Beeman indicates, the present controversy surrounds the acceptable minimal level of mens rea required for conviction of an accomplice. The Beeman decision reaffirmed the traditional common law necessity of intent as the mens rea for accomplice liability.\(^5\) Jurisprudence has long recognized the importance and jealous regard of intent in criminal law.\(^6\) It should come as no surprise, then, that the court would take this stand and continue historical protection.

This article explores the status of complicity cases following the resurgence of intent. The first part tracks the historical basis for accomplice liability, from the early requirement of shared criminal intent to the acceptance of a standard requiring only knowing assistance. It concludes with the court’s partial return to the traditional role of intent in accessorial liability and demonstrates that the rejection of shared criminal intent in favor of knowing assistance was an ineffectual policy attempt to redress certain conduct that was criminal but unreachable.

The second part of the article critically examines the intertwined relationship of conspiracy and complicity. The argument ad-

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5. See Lord Mohun’s case, 12 How. St. Tr. 949 (1692), where it was stated that if the person present at the scene of the homicide “doth neither aid nor abet, nor anyways agree to the doing of the thing [the killing] will neither be murder nor manslaughter . . . for if he never engaged or agreed to the killing of him, nor was there for that purpose . . . he is certainly not guilty. Also, in The Queen v. Coney, 8 Q.B.D. 534 (1882), Justice Hawkins wrote: “[T]o constitute an aider and abettor some steps must be taken by word, or action, with the intent to instigate the principal.” Id. at 557. For a general discussion, see W. BLACKSTONE COMMENTARIES 34-40 (11th ed. 1791). See also Sayre, Criminal Responsibility for the Acts of Another, 43 HARV. L. REV. 689 (1930).

6. See, e.g., Morissette v. United States, 342 U.S. 246 (1952). In Morissette, the Supreme Court overturned defendant’s conviction for theft under 18 U.S.C. § 641 because the trial court had refused to allow defendant present the defense of mistake. The Supreme Court found that the trial court concluded improperly that intent was not a required element of the offense. See also Sandstrom v. Montana, 442 U.S. 510 (1979). As recently as the 1984 term, the United States Supreme Court affirmed the reversal of conviction for murder where the burden of proof was impermissibly shifted to defendant by jury instruction which allowed the implication of malice and intent to be drawn from any deliberate and cruel act. See Koehler v. Engle, 52 U.S.L.W. 4383 (1984).
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vanced is that the mens rea of knowledge continues to play a vital role in accomplice liability. Analyzing the functional parallel of knowledge in conspiracy cases will provide insight into assessing the culpability of the aider and abettor.

Finally, the article explores the feasibility of legislative revision in the form of a criminal facilitation statute. For ten years, the courts of California posited the belief that knowing assistance was sufficient for liability. Underlying these opinions was the attempt to punish unintending but knowing conduct that furthered criminal activity. The desire to punish this type of conduct is meritorious, although the method employed, the aider and abettor statute, was not the appropriate vehicle. Thus, the article concludes that the solution needed is the enactment of a separate statute to punish the facilitator.

II. THE DEVELOPMENT OF THE CONFLICT

From a historical perspective, accomplice liability in California has undergone major changes, both in substance and in form, in an attempt to provide an effective framework for the conviction of accessories to a crime. The law has evolved from the common law position, which classified persons in a criminal transaction according to their degree of involvement in the crime, to the codification of parties under Penal Code sections 31 and 971, in which the distinc-

7. See supra note 1.
8. There were four categories of party liabilities at common law: principal in the first degree, principal in the second degree, accessory before the fact, and, accessory after the fact. A principal in the first degree was the primary actor who perpetrated the crime, while a principal in the second degree aided at the scene of the crime, his presence either actual or constructive. The accessory before the fact aided, encouraged, or promoted the crime but was not present at the scene. An accessory after the fact to the crime aided a felony after the perpetration of the crime.

For a general discussion of party liability, see generally W. LaFave & A. Scott, HANDBOOK ON CRIMINAL LAW §§ 63-66 (1972); R. Perkins & R. Boyce, CRIMINAL LAW 722-69 (3d ed. 1982); G. Fletcher, RETHINKING CRIMINAL LAW §§ 8.5-8.8 (1978).
9. CAL. PENAL CODE § 31 (West 1970), which defines principals as:
All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children, under the age of fourteen years, lunatics or idiots, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, commands, or coercion, compel another to commit any crime, are principals in any crime so committed. (Enacted 1872.)

10. CAL. PENAL CODE § 971 (West 1970) which states:
The distinction between an accessory before the fact and a principal, and between principals in the first and second degree is abrogated; and all persons
tions among the parties have all but been eliminated. Borne out of frustration with procedural technicalities that arose in the charging and convicting of principals and accessories, the resulting changes have circumvented some procedural obstacles experienced at common law.

Nevertheless, the controversial nature of the accomplice continued to plague the courts, amid confusion on the appropriate standard for the mens rea required of an accomplice. Unlike some jurisdictions, California did not have the benefit of a specific legislative enactment addressing the state of mind necessary for conviction as an accomplice. The result has been a patchwork of inconsistent application of the common law terminology of criminal intent, but with

11. An accessory after the fact was the only party not to merge under CAL. PENAL CODE § 31 (West 1970). See CAL. PENAL CODE § 32 (West 1970), which defined and maintained the common law classification.

12. Under the common law provisions, the courts often faced insurmountable obstacles relating to issues of jurisdiction and the convictions and sentencings of secondary parties. The jurisdiction over the principal was predicated on the commission of the crime, but the accessory was charged in the jurisdiction in which he gave aid or counsel, resulting in conflicting legal requirements of proof and conviction. By far the most difficult of the common law rules, was the requirement that the principal must be convicted prior to the accessory. If for any reason the principal should have evaded trial, or been acquitted, the accessory could not be punished. For an excellent view of the common law approach, see Perkins, Parties to Crime, 89 U. Pa. L. Rev. 581 (1941).

13. Several states require that a defendant charged as an aider and abettor to a crime, and therefore liable as a principal, must entertain the requisite intent for that crime. See, e.g., CONN. GEN. STATE. ANN. § 53a-8 (West 1972) (an individual must act with the mental state required for the commission of an offense to be an aider or abettor prosecuted and punished as a principal); see State v. Nardini, 187 Conn. 513, 96 A.2d 396 (1982) (the accessory statute, § 53a-8, requires that an aider and abettor have the intent to aid and the intent to commit the offense with which he is charged); see also State v. Haskins, 188 Conn. 432, 513, 447 A.2d 828 (1982); see N.Y. PENAL LAW § 20.00 (McKinney 1975) (statute requires that for an individual to be liable as an aider and abettor he must act with the mental culpability required for the commission of the crime charged); see also People v. Reyes, 82 A.D.2d 925, 440 N.Y.S.2d 674 (1981) (the Court found that there was insufficient evidence of the defendant's mental culpability to commit the crime, and therefore he could not be convicted as a principal for aiding the perpetrator); see also People v. Green, 80 A.D.2d 693, 436 N.Y.S.2d 453 (1981); see generally TEX. PENAL CODE ANN. § 7.02 (Vernon 1974) (subsection (a)(1)), which requires that for a person to be liable for an offense committed by another, he must act with the kind of culpability required for the offense).

14. For a general discussion, see W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW, § 64 (1972). See also Hicks v. United States, 150 U.S. 442 (1893); State v. Taylor, 70 VT. 1, 39 A. 447 (1898); People v. Molano, 253 Cal. App. 2d 841, 61 Cal. Rptr. 821 (1967). While it is true that the common law cases focused extensively on the party's conduct to mark
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a modification that came about recently—the inclusion of the mens rea of knowing assistance.

During this period, the case law was best exemplified by People v. Dole, in which the California Supreme Court emphasized that the accomplice's conduct must "not only be consistent with guilt, it must also be inconsistent with any reasonable hypothesis of innocence." In that case, the court required that Dole, in handling the forged check, demonstrate his guilty intent or knowledge that such check would be used to defraud the loan company. Although the language of knowledge was used, it was of critical importance in the Dole line of cases that the accomplice intended to encourage the commission of the crime. The critical factor in some of the early California cases was also whether defendant's conduct demonstrated that

his degree of culpability, the cases were replete with references to the accomplice's criminal intent.

15. 122 Cal. 486, 55 P. 581 (1898).
16. Id. at 495, 55 P. at 585.
17. Id. at 492-93, 55 P. at 584. Subsequent courts reiterated the language used in Dole, describing the requisite for conviction as either intent or knowledge. See People v. Warren, 130 Cal. 683, 63 P. 86 (1900) (citing Dole as authority for the requirement that a person accused of stealing cows under an aider and abettor theory must have a distinct and conscious assertion of possession to be convicted under that theory); People v. Morine, 138 Cal. 626, 72 P. 166 (1903) (court claimed that appellant's intent was clear under the facts, thus the evidence was sufficient to render a manslaughter conviction under an aider and abettor theory); People v. Yee, 37 Cal. App. 579, 174 P. 343 (1918) (to be convicted as an aider and abettor, an individual must criminally or with guilty knowledge and intent, aid the actual perpetrator of the act); People v. Fredoni, 12 Cal. App. 685, 108 P. 663 (1910).

It is clear, however, from an examination of these cases, that the secondary parties exhibited far more than knowing assistance in the facilitation of the crimes. In fact, these cases reflect that the accomplices, by words or conduct, shared the criminal intent of the primary party. See People v. Warren, 130 Cal. 683, 63 P. 86 (1900) (accused required to have a distinct and conscious assertion of possession to be convicted as an aider and abettor); see also People v. Lewis, 9 Cal. App. 279, 98 P. 1078 (1908) (even though the appellant was not present during the acts charged, there was sufficient evidence that he aided the perpetrator with the guilty knowledge and felonious intent to be convicted as a principal); People v. Fisher, 30 Cal. App. 135, 157 P. 7 (1916) (the court claimed that appellant must have the specific intent to kidnap the victim in order to be convicted as an aider and abettor on a kidnapping charge).

18. Conduct that objectively demonstrates the accomplice's intent to contribute, encourage, or promote a target offense as proof of liability gained much critical and legal support in the federal decision of United States v. Peoni, 100 F. 2d 401 (2d Cir. 1938). Judge Learned Hand framed the issue of defendant's guilt by whether it could be proven that Peoni had encouraged the further sale of the counterfeit bills from his buyer, Dorsey, to a third party. The court concluded that defendant lacked the purposive attitude necessary to hold him liable as an aider and abettor of counterfeit bills. Id. at 402-03. For a contrary result, see Backun v. United States, 112 F. 2d 635 (4th Cir. 1940). Judge Parker determined, in contrast to Judge Hand's view on the required culpability of an accomplice, that the aider's knowledge that assistance will help in the commission of the felony, here transporting stolen merchandise, was sufficient for conviction.
he intended to encourage the illegal activity.\textsuperscript{19}

A. The Emergence of Knowledge

Without clear cut parameters of mens rea in accomplice liability, a schism developed in the later case law. On one side, courts maintained the common law precept that the conviction of an accomplice required an intent to aid the perpetrator of the crime.\textsuperscript{20} On the other side, the courts posited the view that intent was not required for conviction and, without regard to the necessity of purposive conduct, required only knowing assistance by the secondary party.\textsuperscript{21}

The dichotomy in views stemmed in part from the interpretation of ambiguous language contained in the supreme court decision of \textit{People v. Terry}.\textsuperscript{22} In that case, defendants were charged with the shooting deaths of two people during the course of robberies. An instruction was refused by the trial court that would have required for conviction a finding that the accomplice, Juanilda, had the specific intent to rob.\textsuperscript{23} The court, in affirming the conviction, without the use of that instruction, stated that Juanilda “could be an aider and abettor without ever forming the intent to take any money or other property. . . . She was an aider and abettor if, with knowledge of Terry’s criminal purpose, she encouraged, promoted, or assisted in the commission of the crimes.”\textsuperscript{24}

At the time of the \textit{Terry} decision, the pertinent California jury instruction on accomplice liability read: “A person aids and abets the commission of a crime if he knowingly \textit{and with criminal intent

\begin{itemize}
\item \textsuperscript{19} See \textit{People v. Durham}, 70 Cal. 2d 171, 449 P.2d 198, 74 Cal. Rptr. 262 (1969).
\item \textsuperscript{23} \textit{People v. Terry}, 2 Cal. 3d 362, 401, 466 P.2d 961, 986, 85 Cal. Rptr. 409, 434 (1970).
\item \textsuperscript{24} \textit{Id. See also} \textit{People v. Holford}, 63 Cal. 2d 74, 81, 403 P.2d 423, 427, 45 Cal. Rptr. 167, 171 (1965); \textit{People v. Belenger}, 222 Cal. App. 2d 159, 163, 34 Cal. Rptr. 918, 920 (1963).
aids, promotes . . . the commission of such crime."25 In response to Terry and its progeny, the instruction was modified in 1974 to read: "A person aids and abets the commission of a crime if, with knowledge of the unlawful purpose of the perpetrator of the crime, he aids, promotes . . . the commission of such crime."26 This change enabled a jury to convict upon an offer of proof of knowledge without any requirement of a showing of criminal intent on the part of the accomplice. The altered instruction gave rise to subsequent challenges that without the necessity of intent the instruction created prejudicial error in its statement of the law on accomplice liability. Following Terry, a line of cases emerged defending the changed jury instruction.

In People v. Ott,27 defendant had been convicted of aiding and abetting a drug sale and had appealed claiming that the jury had been improperly instructed on the issue of culpability. Defendant contended that California courts, supported by earlier case law, traditionally required more than knowing assistance to satisfy the mens rea for aiding and abetting.28 The court upheld the conviction, however, and reaffirmed the validity of newly revised CALJIC instruction on aiding and abetting. It based its decision on two separate points, both of which will be explored.

First, the Ott court concluded that the concept of shared criminal intent referred to by prior courts was in fact only the need that the perpetrator and the accomplice share in the knowledge that the perpetrator would commit a crime.29 This argument becomes problematic when the cases cited by the Ott court are examined. Although the cases cited with approval by those opinions did involve instances of assistance, they also supported the finding of purposive conduct to demonstrate intent.30


28. Id. at 129, 148 Cal. Rptr. at 486.


30. See People v. Butts, 236 Cal. App. 2d 817, 836, 46 Cal. Rptr. 362, 374 (1965) (evidence showed defendant's active participation in a fist fight even though he was not aware of the instrumentality causing the homicide); People v. Villa, 156 Cal. App. 2d 128, 134, 318
Secondly, the court found that knowledge of the wrongful purpose of the perpetrator "eo ipso establishes criminal intent." The court emphasized that "[a]lthough the guilt of the aider and abettor is dependent upon the actor's crime, the criminal intent of the aider and abettor is presumed from his actions with knowledge of the actor's wrongful purpose." This argument restates an obvious but critical point—in most cases an inference can be drawn from an accomplice's knowing assistance that the accomplice intended to aid the commission of a crime.

In positing this theory, the court oversimplifies the offer of proof required in a criminal case. There is a vast difference between using knowledge as a basis to infer intent and in deciding that the jury need only consider the issue of knowledge without regard to intent. Thus, if intent is presumed from knowledge, the ultimate factual basis issue in Ott—the intent to aid in the drug sale—was taken from the jury. In comparison, a jury instructed under the former CALJIC 3.01 would have had to determine that Ott knowingly and with criminal intent aided in the drug sale. Under such an instruction, evidence of knowledge may be introduced to infer the intent to aid, but the ultimate resolution would remain a finding of criminal intent. More importantly, under the Ott rationale, evidence reasonably dispelling the inference of criminal intent would not necessarily negate the presumed mens rea.

B. The Yarber Confrontation

The struggle in the appellate courts illustrated above over whether knowing assistance or intent to contribute should be the required mens rea culminated in the case of People v. Yarber, which responded to the generalizations asserted in Ott. Yarber presented a situation that was factually bizarre yet significant because of Bonnie Yarber's successful challenge of the jury instructions.
The Yarbers were charged with many sexual offenses involving several teenage girls. The husband, Wendol, was convicted of eighteen counts of oral copulation with minors, and his wife Bonnie was convicted of aiding and abetting the copulation of Wendol on June 17th. The evidence most damning came from one of the teenagers, Mary S., who testified that on June 17th Bonnie orally copulated her husband while the girls watched and that they followed her actions. It was acknowledged that at no time on the 17th did Bonnie ask the girls to copulate Wendol, although there was evidence to indicate that she had made the requests on June 14th, several days previously. Because the charge against Bonnie specified June 17th, the prosecution conceded that her conviction could not rest solely on her acts of June 14th.

Two possible inferences could be drawn from Bonnie Yarber’s act of copulation—either she orally copulated her husband with the purpose of encouraging the girls to do the same, or she copulated him without any intent to contribute to the commission of the crime that followed, but with the knowledge that this action might occur. With these inferences in mind, it is clear that the offered jury instruction on aiding and abetting were critical to the outcome of the case.

The court of appeals reversed Bonnie Yarber’s conviction on the basis that the jury instruction given created prejudicial error. It rejected the Ott premise that: (1) knowledge alone is sufficient for conviction, and (2) if intent is required, knowledge presumes its existence. Noting that knowledge could support an inference that criminal intent existed, the court stressed its importance at trial. Nevertheless, the court maintained that the jury instruction must reflect that intent demonstrated by the accomplice was the ultimate fact to be proved. As Justice Feinberg wrote:

The Elhamer/Ott synthesis that intent is inferred from the knowledge by the aider and abettor of the perpetrator’s purpose is sound, generally, as a matter of human experience, but we cannot extrapolate therefrom, as a matter of law, that the infer-

36. Id. at 900, 153 Cal. Rptr. at 877. As the court indicated in its footnote, even this testimony was suspect since Mary S. expressed doubts on cross examination about her recollection. Testimony by two other girls conflicted with Mary’s statement. Id. at 900 n.1, 153 Cal. Rptr. at 876 n.1.

37. This acknowledgement came at the appellate level when the Attorney General conceded that the District Attorney misstated the facts in closing argument. The request made by Bonnie occurred on June 14. Id. at 900 n.2, 153 Cal. Rptr. at 876-77 n.2.

38. Id. at 909-17, 153 Cal. Rptr. at 882-87.
ence must be drawn. Intent is what must be proved; from a person's action with knowledge of the purpose of the perpetrator of a crime, his intent to aid the perpetrator can be inferred. But where a contrary inference is reasonable—where there is room for doubt that a person intended to aid a perpetrator—his knowledge of the perpetrator's purpose will not suffice. Since the current jury instructions, in effect, took the issue from the jury, the court concluded that there was prejudicial error.

The Yarber court then proffered language of its own to remedy what it perceived as a defective instruction. Under its provision, the jury would be instructed that: “a person aids and abets the commission of a crime if, with knowledge of the unlawful purpose of the perpetrator, he intentionally aids, promotes, encourages or instigates by act or advice the commission of such crime.” The court found that the instruction given in Bonnie's case was prejudicial because the jury may have found Bonnie guilty simply because she had knowledge that her act would precipitate similar conduct from the girls, without a finding that she had the mens rea to intentionally aid in that goal.

Although the Yarber decision may present sound legal analysis, the justification used does not appear to fit the particular facts of the case. If we examine the case law supporting shared criminal intent, it seems clear that common to those cases is the acknowledgement that knowledge coupled with purposive conduct supports a conviction. It could be argued that Bonnie Yarber's conduct supported the inference that she knew that in copulating her husband the girls would engage in similar conduct. The facts show that Bonnie's conduct, if viewed over the course of the three days, demonstrated a purposive attitude to involve the girls in the copulation of her husband. Under this analysis, the jury's finding here was rationally supported by the facts of the case. At the worst, the refusal of the

39. Id. at 916, 153 Cal. Rptr. at 886-87. The court sets out several situations in which a contrary inference might be raised at trial. For example, the existence of a state of mind, such as mistake, would negate intent. Also, the facts of People v. Valenzuela, 130 Cal. App. 3d 903, 907-09, 182 Cal. Rptr. 160, 162-64 (1982), hearing granted, June 16, 1982, suggests a factual pattern illustrative of the concern expressed by the court. In Valenzuela, defendant physically aided the commission of a robbery, but her state of mind was such as to negate the intent to commit the robbery. See also infra note 61 and accompanying text.


41. According to Mary S., Bonnie asked her to copulate Wendol on the 14th of June. Other evidence indicates that Bonnie and Wendol showed X-rated movies to the girls and performed sexual acts in front of them. Id. at 899, 153 Cal. Rptr. at 876.
jury instruction may have involved a case of harmless error which did not dictate a reversal.42

Assuming that the jury decided the case solely on the basis of Bonnie Yarber's having exhibited knowledge, the opinion offers sound guidelines on the issue of accomplice liability. Ironically, Yarber herself may not represent the classic accomplice that the court addressed. After all, in reviewing the examples that Justice Feinberg offered to support his theory, Bonnie Yarber does not seem to fit the role of facilitator whose state of mind is negated by mistake or other innocent-type mens rea.

As Justice Scott stated in the dissent:

[T]he facts of this particular case indicate that a contrary inference is not reasonable and that a shared criminal intent is indisputably indicated. . . . The entire behavior of Bonnie Sue and Wendol indicates that they were acting as a unit, up to and including June 17, in their attempts to involve the children in their sexual activity.43

The majority attempted to require more than mere knowledge of the wrongfulness of the perpetrator's conduct; yet, it would appear that Bonnie had demonstrated the type of purposive conduct from which a jury could find the requisite intent.

One could surmise, then, that the Yarber court was less concerned with the particular facts of Yarber than with remedying a perceived flaw in the law on accomplice liability.44 In that context, it did serve as a catalyst for the ultimate review of the topic by the California Supreme Court in People v. Beeman.45 Beeman, however, was not without factual peculiarities. Beeman's sister-in-law was robbed by two men who were close friends of defendant Beeman. At trial, both men testified against Beeman disputing his claim that he had not been involved in the robbery. They testified that Beeman


43. People v. Yarber, 90 Cal. App. 3d 895, 917-18, 153 Cal. Rptr. 875, 887-88 (1979) (Scott, J., dissenting). In his note, J. Scott indicated that the reason the State Public Defender did not raise the issue of instructional error initially was because "the error [did] not exist." Id. at 918, 153 Cal. Rptr. at 888.

44. The State Public Defender did not raise the issue of aiding and abetting on appeal; rather, the parties briefed the issues on the court's suggestion. Id. at 918 footnote, 153 Cal. Rptr. at 888 footnote (Scott, J., dissenting). This may indicate that the court, already concerned with the guidelines of accomplice liability, seized this opportunity to attack the Ott reasoning.

45. 35 Cal. 3d 547, 674 P.2d 1318, 199 Cal. Rptr. 60 (1984).
had encouraged the commission of the crimes by drawing a layout of the home, giving helpful suggestions on carrying out the robbery, and offering to sell the "loot." Beeman defended these claims by admitting that he may have made the gestures indicated, but that they were made without the criminal intent that the state had implied.

On the charge of aiding and abetting the robbery, the trial court instructed the jury: "A person aids and abets the commission of a crime, if, with knowledge of the unlawful purpose of the perpetrator of the crime, he aids, promotes, encourages or instigates by acts or advice the commission of such crime." Beeman was convicted of the crimes; his appeal rested in large measure on the alleged instructional error given by the court that he could be found guilty of the robbery without intending to aid and abet its commission.

The court of appeals concluded that the trial court had stated the correct law on aiding and abetting; it based the decision on two principles. The court found that the prior case law was well settled and that it supported a finding of knowledge as the mens rea for accomplice liability. Further, the court concluded that the policies surrounding aiding and abetting were best served by the requirement of volitional aid when coupled with guilty knowledge, rather than intentional aid.

In what can only be labelled the "Terry misunderstanding," the supreme court reviewed the law on aiding and abetting and con-

46. 35 Cal. 3d at 551-52, 674 P.2d at 1320, 199 Cal. Rptr. at 62.
47. Id. at 562, 674 P.2d at 1327, 199 Cal. Rptr. at 69. The mens rea for robbery under CAL. PENAL CODE § 211 (West 1970) is the felonious intent that accompanies the taking. The intent must be to permanently deprive the owner of his property. See People v. Butler, 65 Cal. 2d 569, 421 P.2d 703, 55 Cal. Rptr. 511 (1967), for a discussion of the animus furandi required in robbery where defendant claimed a bona fide belief to claim money owing him through violence. To negate intent, Beeman attempted to characterize all his conduct as innocent. For example, in explaining his possession of some of the stolen jewelry, Beeman told the court that he had devised a plan so that the robbers would have to relinquish control over some of the stolen items. He stated that he did this in order to ultimately collect and return all of the stolen property. 35 Cal. 3d at 553, 674 P.2d at 1321, 199 Cal. Rptr. at 63.
48. 35 Cal. 3d at 554-55, 674 P.2d at 1321-22, 199 Cal. Rptr. at 63-64 (citing CALIFORNIA JURY INSTRUCTION, CRIMINAL No. 3.01 (4th rev. ed. 1979)).
49. See id. at 554, 674 P.2d at 1321, 199 Cal. Rptr. at 63.
50. People v. Beeman, 179 Cal. Rptr. 100, 105-09 (Cal. App. 1981) (opinion omitted on direction of the supreme court by order dated Feb. 10, 1982). The two cases cited with approval by the appellate court and discussed in greater detail infra are People v. Terry, 2 Cal. 3d 362, 85 Cal. Rptr. 409, 466 P.2d 961 (1970), and People v. Standifer, 38 Cal. App. 3d 733, 113 Cal. Rptr. 653 (1974). Both cases have been credited with the ensuing revision in the California Jury Instruction Criminal § 3.01 that occurred in 1974.
51. People v. Beeman, 179 Cal. Rptr. at 107.
cluded that "[t]here is no question that an aider and abettor must have criminal intent in order to be convicted of a criminal offense."52 This statement is remarkable because the supreme court had previously stated in People v. Terry,83 "[T]he test is did the defendant aid and abet the perpetrator with knowledge of the perpetrator's criminal intent?"84

Rather than overrule Terry, the supreme court deftly backpedaled its way out of a difficult position. It rejected the Attorney General's argument that Terry sanctioned, and even required, the reasoning established in the Ott case.86 The court clarified that an accomplice need not specifically intend to commit the crime, but that he must intend to aid the perpetrator's commission of the crime.87 With this statement, the court shed light on its oft-quoted sentence from Terry that "[o]ne who aids and abets does not necessarily have the intention of enjoying the fruits of the crime."88

While Beeman spurned the sole use of knowledge to convict, it did not adopt the view espoused by other states which requires that the aider and abettor have the same intent as the perpetrator.89 Beeman adopted, instead, a modified version of "shared criminal intent." In a case of robbery, for example, other states require that the aider and abettor have the intent to permanently deprive the owner of its property.89 According to the California Supreme Court, however, the aider shares in the criminal intent if the aider "knows the

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52. 35 Cal. 3d at 556, 674 P.2d at 1323, 199 Cal. Rptr. at 65. The court cited to People v. Tewksbury, 15 Cal. 3d 953, 544 P.2d 1335, 127 Cal. Rptr. 135 (1976), and to CAL. PENAL CODE § 20 (West 1970).
54. People v. Beeman, 35 Cal. 3d at 557, 674 P.2d at 1324, 199 Cal. Rptr. at 66 (citing People v. Terry, 2 Cal. 3d 362, 401, 466 P.2d 961, 85 Cal. Rptr. 409 (1970)). One can see why Terry is credited with the change in the California Jury instruction § 3.01—the language of Terry was taken verbatim.
55. Lest one gets the impression that only the Attorney General believed that Terry stood for this proposition, it should be noted that most courts of appeals following 1970 also interpreted Terry to mean that intent was not required. See People v. Green, 130 Cal. App. 3d, 181 Cal Rptr. 507 (1982); People v. Valenzuela, 130 Cal. App. 3d 903, 182 Cal. Rptr. 160 (1982); People v. Beeman, 179 Cal Rptr. 100 (Cal. App. 1981) (opinion omitted on direction of the supreme court by order dated Feb. 10, 1982); People v. Yarber, 90 Cal. App. 3d 895, 153 Cal Rptr. 875 (1979); People v. Ott, 84 Cal. App. 3d 118, 148 Cal. Rptr. 479 (1978); People v. Standifer, 38 Cal. App. 3d 733, 113 Cal. Rptr. 653 (1974); People v. Elhamer, 199 Cal. App. 2d 777, 18 Cal. Rptr. 905 (1962). For a contrary interpretation, see People v. Grant, 113 Cal. App. 3d 432, 179 Cal. Rptr. 218 (1980) (in which the court determined that Ott and Standifer had incorrectly applied Terry).
56. People v. Beeman, 35 Cal. 3d at 560, 674 P.2d at 1326, 199 Cal. Rptr. at 68.
57. Id. (citing People v. Terry, 2 Cal. 3d at 401).
58. Id. at 562, 674 P.2d at 1327, 199 Cal. Rptr. at 69. See also note 47.
59. Id.
full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime."\(^60\)

From the above analysis, it appears that the court has adopted a position between the polarized stands of the \textit{Ott} court and the common law. In light of this standard, how will the courts interpret future cases? Consider, for example, the problem developed in \textit{People v. Valenzuela}\(^61\) in which the defendant helped another to commit the actus reus of the crime of robbery by taking a television set. Valenzuela's defense at trial on a charge of aiding and abetting robbery was that she did not intend to permanently deprive the owner of the set, but rather that she was motivated by a desire to diffuse a potentially violent situation.

Under a \textit{Beeman} analysis, did defendant share in the criminal intent even though the evidence may suggest that her sole motivation was to get her friend out of the house before any violence erupted? It could be argued that the California Supreme Court would not endorse a defense to accomplice liability because Valenzuela did in fact give aid by carrying out the television set. Further, she did this act with an intent to facilitate the robbery, although motivated by a different desire than the intent to commit the theft. An argument that advances Valenzuela's position would only have merit if "shared criminal intent" requires that she entertained the underlying mens rea for robbery. Because in \textit{Beeman} the supreme court expressly refuted this point,\(^62\) it appears that she would be convicted. Thus, \textit{Beeman} may be viewed as an intermediate position between the requirements of knowledge and intent.

While \textit{Beeman} embraced the reasoning of \textit{Yarber} that intent as the ultimate issue of proof cannot be presumed, the court rejected the exact instruction offered by the court of appeals.\(^63\) Instead, it advanced wording that it believed would be unambiguous. The new language suggested was: "A person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of commit-

\(^{60}\) Id. at 560, 674 P.2d at 1326, 199 Cal. Rptr. at 68.


\(^{62}\) People v. Beeman, 35 Cal. 3d at 559, 674 P.2d at 1325, 199 Cal. Rptr. at 67.

\(^{63}\) The \textit{Yarber} instruction stated that "[a] person aids and abets the commission of a crime, if, with knowledge of the unlawful purpose of the perpetrator, he intentionally aids, promotes, encourages, or instigates by act or advice the commission of such crime." People v. \textit{Yarber}, 90 Cal. App. 3d at 916, 153 Cal. Rptr. at 887.
ting, encouraging or facilitating the commission of the offense, (3) by acts or advice aids, promotes, encourages or instigates, the commission of the crime.”

The dissent by Justice Richardson emphasized the point mentioned above that if there was a failure to give a proper jury instruction in this case, it was not prejudicial error. He reiterated the view expressed by the Beeman court of appeals that “the verdicts clearly demonstrated that the jury disbelieved the testimony of appellant which would have supported a finding that he did not have the requisite criminal intent.” As the dissent implies, the Beeman facts may not have provided the best vehicle with which to overturn established law.

The supreme court in Beeman appeared to answer decisively the question of intent in accomplice liability, but two questions remain unresolved. The first concerns the role that the mens rea of knowledge will play following Beeman. The second concerns the court’s failure to address the problem of the criminal facilitator, conduct that would be criminal under the Ott standard, and which should continue to be punished.

III. THE PARAMETERS OF KNOWLEDGE

Despite the requirement of intent affirmed in Beeman, the mens rea of knowledge will continue to play a vital role in determining liability. As the Beeman court stated: “[P]roof of the aider and abettor’s intent may be made by way of an inference from her volitional acts with knowledge of their probable consequences.”

To evaluate the parameters of knowledge in accomplice liability, it is useful to examine the crime of conspiracy which also uses knowledge to establish the mens rea. At one level, although conspiracy and complicity address different societal dangers, both doctrines sufficiently overlap to punish group behavior. It may be beneficial, then, to create a uniform mens rea to punish group conduct.

64. People v. Beeman, 35 Cal. 3d at 561, 674 P.2d at 1326, 199 Cal. Rptr. at 68.
65. Id. at 563, 674 P.2d at 1328, 199 Cal. Rptr. at 70.
66. Id. For cases that have determined that the failure to give a Yarber-type jury instruction was not prejudicial, see People v. Fagalito, 123 Cal. App. 3d 524, 176 Cal. Rptr. 698 (1981); People v. Lopez, 116 Cal. App. 3d 882, 172 Cal. Rptr. 374 (1981); People v. Grant, 113 Cal. App. 3d 432, 170 Cal. Rptr. 218 (1980).
67. Not coincidentally, the same battle cry was made by the Yarber dissent when the majority overturned the conviction before the court. People v. Yarber, 90 Cal. App. 3d 895, 917-18, 153 Cal. Rptr. 875, 887-88 (1979) (Scott, J., dissenting).
68. People v. Beeman, 35 Cal. 3d 559-60, 674 P.2d at 1325, 199 Cal. Rptr. at 67.
69. As Justice Hand stated in United States v. Falcone, 109 F.2d 579, 581 (2d Cir.
Conspiracy recognizes that group criminal activity poses an added threat to society. To that end, it attempts to deter conduct at a very early stage in the criminal transaction. In addition to its role as an inchoate crime, however, conspiracy also serves to punish those actors who do not actually commit the target offenses, but who, nonetheless, contemplate their commissions. There are two such categories of liability: (1) the prosecution for the substantive offense intended by the agreement, and (2) the prosecution for offenses deemed to be within the scope of the conspiracy, but not necessarily intended.

In the typical conspiracy case, proving the conspirator's intent poses no unusual challenge for the prosecution because the conspirator has demonstrated clearly his involvement in the partnership. His lack of presence at the scene of the crime will not negate his mani-
fested intent to commit the crime.74 Similarly, in most aiding and abetting cases there is no problem of proof. Like the conspirator, the aider and abettor has clearly made his shared criminal intent apparent.75

In some cases, however, courts have experienced difficulties in determining conspiratorial liability when there has been no affirmative assertion of specific intent to commit the underlying offense. The courts have employed the mens rea of knowledge to prove intent in these troubling cases.

Let us return to our initial discussion of a merchant who supplied goods or services that provided essential aid to the purchaser's crime. The formulation of any rule affecting the potential criminal liability of a merchant must be tempered by factual and legal distinctions. Such distinctions are illustrated in the case of United States v. Falcone.76 In that case, the court found that mere knowledge of the use of the product, without additional facts, would not be sufficient to impose liability on the seller of yeast.77 As Justice Hand stated: "It is not enough that [a seller] does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome."78

The courts tread cautiously in approaching those factors that, when combined with knowledge, would create liability for the supplier. In Direct Sales v. United States,79 the United States Supreme Court clarified the position of Falcone and found that the type of activity in which the drug manufacturer was involved created "suffi-

76. 109 F.2d 579 (2d Cir. 1940) aff'd, 311 U.S. 205 (1940). For a contrary result, see People v. Samarjian, 240 Cal. App. 2d 13, 49 Cal. Rptr. 180 (1966), where the court held that defendant, convicted of conspiracy to commit forgery, did not demonstrate that he had conspired with the ticket passers nor that he knew that the passers were conspiring with each other.
77. Important to that court's ruling was the fact that defendant seller had supplied a legal commodity, yeast, and therefore without any additional facts of intent to partake in the venture, there was no conspiracy. Earlier cases did not follow this analysis. In Vukich v. United States, 28 F.2d 666 (9th Cir. 1928), the court affirmed the conviction of a supplier of goods for a distillery, concluding that the business could not be carried on without supplies. Similarly, in Borgia v. United States, 78 F.2d 550 (9th Cir. 1935), the court was less concerned that the commodities sold to the distillery maker were legal and more concerned with whether defendant knew or should have known the purpose for which the purchasers were taking the goods.
78. United States v. Falcone, 109 F.2d 579, 581 (2d Cir. 1940).
79. 319 U.S. 703 (1943).
cient additional facts” to find a conspiracy. The evidence indicated that the drug manufacturer knew of the illegal purpose for which the physician was ordering the morphine and that the vast quantities sold to the doctor should have put the manufacturer on notice that the doctor was not dispensing the drugs legally.80

In addition to knowledge, however, the Court in Direct Sales found the element necessary for conviction which was missing in Falcone—the defendant “intend[ed] to further, promote and cooperate in [the criminal venture].”81 Direct Sales was convicted of conspiracy because it had reaped benefits over and above those normal to the mail order business as a result of the doctor’s illegal activity. The Supreme Court did not base the conspiracy, therefore, on the knowledge of Direct Sales, but rather on the intent to conspire that was implied from the ongoing relationship between the physician and the drug company. While the Court noted the inherent danger of “piling inference upon inference”82 to arrive at the determination of the mens rea, it nonetheless concluded that these facts warranted the making of the required inference.

Direct Sales offers a valuable comparison to aiding and abetting cases. Significantly, what “additional factors” are necessary to establish the intent to aid and abet as set out in the Beeman decision? The Beeman court, in dicta, mentioned that knowledge of the probable consequences coupled with volitional acts may raise the inference of intent.83 The difficulty in that statement, however, lies with the term “volitional acts” which only seems to require acts that are intended and not done negligently. Acts that are intentional may be done without any purpose of encouraging the commission of the crime, as the Beeman opinion noted.84 The opinion, however, fails to demarcate the kind of volitional act that coupled with knowledge would create an inference of intent.

Two methods of analysis are suggested as possibilities for determining the liability of an aider and abettor. One theory was used by the Falcone-Direct Sales line of cases. Under this method, if there is no direct evidence of intent, the critical focus seems to be whether the

80. The doctor ordered morphine sulphate tablets in the quantity of 79,000 half-grain tablets from the period of November, 1937 to January, 1940. By contrast, the average physician ordered no more than 400 quarter-grain tablets annually. Id. at 706.
81. Id. at 711.
82. Id. The court of appeals in People v. Yarber, 90 Cal. App. 3d at 911, 153 Cal. Rptr. at 883-84 expressed the same concern with respect to the aider and abettor jury instruction before it.
83. 35 Cal. 3d at 560, 674 P.2d at 1326, 199 Cal. Rptr. at 68.
84. Id.
actor has demonstrated \textit{purposive conduct} to participate in the illegal activity. Measuring intent by purposive conduct, rather than by merely looking at whether the act committed was voluntary, ensures that an actor will not be held liable if his conduct does not imply the intent to participate.

Consider, for example, \textit{United States v. Cadena},\textsuperscript{85} in which the court, by attempting to follow the dictates of \textit{Direct Sales}, held crew members on board a ship chargeable with conspiracy to transport marijuana because they had knowledge of the existence of the drug on board. In so holding, the court merely found the knowledge of the crew members and from this raised the inference of their intent to conspire. While they may have committed volitional acts, there is no evidence that the crew members engaged in the type of purposive conduct that would imply their intent to conspire. The dissent distinguished the crew members' actions from those of the drug company in \textit{Direct Sales}, arguing that the crew members may have promoted the objective of transporting the marijuana, but that unless they realized that they were involved in a conspiracy, and so intended, they should not be held liable.\textsuperscript{86}

If purposive conduct were the standard, the focus of inquiry might rest on the nature of the crime committed by the perpetrator. Factors to be considered by the court might include the seriousness of the crime contemplated and whether the commodity sold was of an illegal nature. The relevance of the legality of the commodity sold was advanced in \textit{Direct Sales} in which the Court found that the sale of an illegal good "makes a difference in the quantity of proof required to show knowledge that the buyer will utilize the article unlawfully. . . . So far as knowledge is the foundation of intent, the latter thereby also becomes the more secure."\textsuperscript{87}

As the Supreme Court acknowledged in \textit{Direct Sales}, the issue ultimately revolves around the quantum of proof of intent for secondary party liability. The court of appeals in \textit{Cadena} placed unwarranted reliance on the knowledge of the crew members and failed to consider additional factors which could have provided more reliable evidence of whether their conduct was intended to be criminal.

While the \textit{Direct Sales} line of cases focused on the purposive

\textsuperscript{85} 585 F.2d 1252 (5th Cir. 1978).
\textsuperscript{86} Id. at 1267.
\textsuperscript{87} United States v. Direct Sales, 319 U.S. at 711-12. See also United States v. Michelena-Orovio, 702 F.2d 496, 505 (5th Cir. 1983); United States v. Burchinal, 657 F.2d 985, 990-91 (8th Cir. 1981); United States v. Rush, 666 F.2d 10, 11-12 (2d Cir. 1981); United States v. Alvarez, 610 F.2d 1250, 1256 (5th Cir. 1980).
conduct of the actor, another possible analysis was explored in *People v. Lauria*. The facts revealed that Lauria, who owned an answering service, knew that several of his customers were prostitutes and that, despite this knowledge, he continued to offer them the answering service which, of course, promoted their unlawful activity. Lauria’s knowledge of their illegal activities would not, alone, create liability. Thus, the trial court followed the approach in *Direct Sales* and concluded that none of the *Direct Sales* criteria existed.

The court of appeals took the analysis one step farther though—it analyzed the nature of the offense charged. It reasoned that Lauria’s conviction for a misdemeanor could not be supported by the same factual inference as a conviction for a felony. The court did not believe that “an inference of intent drawn from knowledge of criminal use properly applies to the less serious crimes classified as misdemeanors.”

Although it may appear that the court’s distinction between felony and misdemeanor crimes is irrelevant, it actually raises a significant consideration. The argument can be made that a party who has knowledge of the imminent commission of a serious crime would be more inclined to refuse to assist in the completion of it. A serious crime carries with it consequences that a secondary party would not be willing to undertake unless he had the “shared criminal intent” of the perpetrator.

In the case of a misdemeanor, such as prostitution, a party not wishing to share in the enterprise might not loudly protest its commission given the nature of the crime. The same party seeing a serious crime committed might arguably react differently. The *Lauria* analysis refused to imply from his silence that Lauria intended to conspire with the prostitutes.

The *Beeman* court reemphasized the importance of knowledge in assessing culpability regardless of the method of analysis used.

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89. For example, the volume of business the seller is given provides the incentive for continued cooperation. Unlike *Direct Sales*, the facts of *Lauria* offered no such obvious increase in volume or profits over the services of other customers.
90. 251 Cal. App. 2d at 481, 59 Cal. Rptr. at 634. The court did not embrace in the *Lauria* opinion the converse of that rule—that knowledge of the commission of a felony would imply the intent to assist. One commentator questioned this line of analysis when he asked, "Why can a fact finder infer intent if the object crime is a felony, but cannot if the crime is a misdemeanor? The distinction is difficult to understand. The nature of the defendant’s conduct and state of mind rather than the category of the ultimate or object crime should determine if a court may infer intent." Marcus, *Criminal Conspiracy: The State of Mind Crime—Intent, Proving Intent, and Anti-Federal Intent*, U. OF ILL. L.F. 627, 643-44 (1976).
91. 35 Cal. 3d at 560, 674 P.2d at 1325-26, 199 Cal. Rptr. at 67-68.
To encourage schematic uniformity between conspiracy and complicity, it is urged that in the aftermath of Beeman the courts look to the analyses of conspiracy cases for guidance. As the next section will present, another avenue for consideration, apart from knowledge as the foundation for intent to aid and abet, is the use of knowledge as the basis for culpability under a separate criminal facilitation statute.

IV. FILLING THE GAP: THE NEED FOR A CRIMINAL FACILITATION STATUTE

When the California Supreme Court clarified the mens rea of aiding and abetting in People v. Beeman, it effectively reduced the number of potential actors chargeable as accomplices. If intent is necessary to a conviction for aiding and abetting, then actors who have demonstrated less than purposeful aid cannot be punished for the commission of a crime, even though they may have engaged in facilitious actions. If these actors lack the Beeman concept of shared criminal intent, it is questionable that they should incur no criminal liability for their knowing assistance which may have been instrumental to the success of the crime.

This issue is explored through a reexamination of the Beeman facts. While the prosecution presented considerable incriminating evidence against Beeman, assume that on remand the jury believes that Beeman did not share the criminal intent of the robbers. Beeman's acquittal would necessarily follow from such a finding; yet, he had done everything from drawing the floor plan to dressing one of the robbers.

92. Id.
93. Id. at 557-58, 674 P.2d at 1323-1324, 199 Cal. Rptr. at 65-68; see also supra notes 58-62.
94. Whether particular conduct should be punished is a central question in criminal law. For an excellent discussion, see Robinson, A Theory of Justification: Social Harm As A Prerequisite for Criminal Liability, 23 U.C.L.A. L. Rev. 266 (1975); Packer, Making the Punishment Fit the Crime, 77 Harv. L. Rev. 1071 (1964).
95. As the appellate court noted, Beeman "raised the subject of the robbery with his cohorts, discussed the method by which it could be committed, informed them of the riches which could easily be taken, gave them the address of the home of the victim, described the intended victim's car, drew a floor plan of the house, and agreed to sell the stolen items for a share in the proceeds." 179 Cal. Rptr. 100, 107-08 (Cal. App. 1981) (opinion omitted on direction of the supreme court by order dated Feb. 10, 1982).
96. This assumption may not be altogether specious. After all, at Beeman's first trial, the jury had sought further instructions on accomplice liability indicating that it had not rejected outright Beeman's testimony. 35 Cal. 3d at 562, 674 P.2d at 1327, 199 Cal. Rptr. at 69.
97. The evidence indicated that Beeman loaned one of the robbers a suit telling him: "If you are going to do a robbery, you can't look like a bum." 179 Cal. Rptr. at 108.
The Beeman facts illustrate the gap that has been created by the exclusion of knowing assistance as the mens rea in accomplice liability. A legislative remedy that would shore the gap and redress the wrongs committed by these actors, which go unpunished under present complicity law, would be the enactment of a criminal facilitation statute. Such a statute would characterize as a separate offense the knowing assistance of a crime without having to resort to traditional notions of complicity or conspiracy to achieve the result. New York’s facilitation statute provides an example:

A person is guilty of criminal facilitation in the second degree when, believing it probable that he is rendering aid to a person who intends to commit a crime, he engages in conduct which provides such person with means or opportunity for the commission thereof and which in fact aids such person to commit a felony.

The statute was designed to address accessorial conduct that, although unintentional, does aid in the commission of a felony. According to the provisions of the statute, the facilitator would be punished under the classification which also provides its own sentencing provisions.

A statute, similar to the one pioneered in New York, would address conduct that has been unsuccessfully treated under accomplice liability. Knowing assistance would provide the mens rea for accountability under such a provision, and because intent is not a prerequisite, those actors who furnish assistance with knowledge of the perpetrator’s intent would be convicted.


100. N.Y. Penal Law § 115.05 (McKinney 1978). The provision does not provide for liability in facilitating a misdemeanor. Also note that the original language of N.Y. Penal Law § 115.05 required that the facilitator actually knew that the perpetrator was going to commit the crime. This language was changed to the present standard of “believing it probable.” See also Note, The Proposed Penal Law of New York, 64 Col. L. Rev. 1469, 1523-24 (1964). New York’s provision is similar to a draft of criminal facilitation that was rejected by The American Law Institute. MODEL PENAL CODE § 2.04(3)(b), comment (Tent. Draft No. 1, 1953).


102. See supra note 1.

103. The enactment of a criminal facilitation statute in California has been contemplated. Shortly after New York adopted its statute, a proposed change to the California Penal
Currently, several activities continue to be treated within accomplice liability parameters, but because of logical flaws that permeate the analysis, these activities would be better routed under a separate crime of facilitation. The analytical difficulties in the use of foreseeability to convict an accomplice of a specific intent crime and in the treatment of the supplier, will be examined under a facilitation model.

A. The Specific Intent Crime

Sometimes an actor is held responsible for a crime that was not intended, but was deemed to be the natural and probable consequence of initial wrongdoing. Any culpability for that unintended, but foreseeable, crime stems from the risk presumed in the undertaking. Illustrative of this point is the felony-murder doctrine which holds felons liable for deaths that result from dangerous felonies, generally proscribed by statute.

The difficulty in using the foreseeability test in accomplice liability results from employing a negligence-based standard for the secondary party's guilt, but retaining the underlying requirement of specific intent for the perpetrator. To complicate the situation further, courts have used the natural and probable consequences test when the initial activity triggering complicity may be as innocuous...
as the voluntary association with a gang. Problems arise therefore on two separate fronts: (1) whether the initial wrongdoing is sufficiently criminal to trigger the foreseeability test, and (2) whether the foreseeability test may be used successfully in a specific intent crime.

Whether an accomplice may assert an affirmative defense to negate the specific intent of the underlying crime was explored in *People v. Vasquez.*107 Because defendant was charged as an accomplice to an assault with intent to commit murder,108 the court recognized that defendant’s position as an aider and abettor did not preclude an affirmative defense of intoxication to negate the specific intent in assault.109

The *Vasquez* assertion that an underlying specific intent may be negated—in this case by intoxication—must be examined in its broader context. The controlling factor in *Vasquez* was that defendant had been charged with assault, leading to the conclusion that the court sanctioned the defense of intoxication because assault required specific intent.110 In so doing, the court placed the accomplice on equal footing with the perpetrator in allowing him to negate a specific intent if required to be proved.

What is often seen, however, is that because the accomplice assumes the risk of the commission of foreseeable crimes committed by the perpetrator, his specific intent is not required. The perpetrator’s specific intent is imputed to the aider and abettor through the foreseeability test, raising the question of whether an affirmative defense may be asserted in this situation.111

This conflict between fulfilling the requisite specific intent and

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109. The court allowed the use of diminished capacity through intoxication by resorting to then Cal. Penal Code § 22 which stated:

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute any . . . crime, the jury may take into consideration the fact that the accused was intoxicated . . . in determining the purpose, motive or intent.

29 Cal. App. 3d at 87-88 n.6, 105 Cal. Rptr. at 184 n.6.
110. For support that assault is a specific intent crime, see People v. Hood, 1 Cal. 3d 444, 462 P.2d 870, 82 Cal. Rptr. 618 (1969); People v. Nance, 25 Cal. App. 3d 925, 102 Cal. Rptr. 266 (1972); People v. Glover, 257 Cal. App. 2d 502, 65 Cal. Rptr. 219 (1967).
111. The problem described does not arise in a conspiracy context as it does in aiding and abetting because conspiracy requires the specific intent to commit a crime. See People v. Horn, 12 Cal. 3d 290, 524 P.2d 1300, 115 Cal. Rptr. 516 (1974). The co-conspirator, unlike the accomplice would have the opportunity to present an affirmative defense to negate the specific intent requirement at the conspiracy level.
the desire to create culpability for foreseeable consequences is illustrated by *People v. Montano*.\(^{112}\) Montano was convicted of aiding and abetting the attempted murder of a fifteen-year-old from a rival gang. His defense was that, at most, he had anticipated that his friends would beat up the boy, but because he had not known that they were armed, he could not have contemplated that they would shoot the boy. To substantiate his claim, Montano testified that he stayed in the car while his two friends took the boy up into a secluded mountain spot; he believed that his friends would, at most, beat the youth.\(^{113}\)

The *Montano* appellate court was faced with an accomplice who repudiated any specific intent to kill, but who, nonetheless, was convicted of the crime of attempted murder which requires the specific intent to kill.\(^{114}\) Two reasons may be offered to justify the conviction: the trial court may have concluded that the evidence demonstrated that Montano harbored the specific intent to kill,\(^{115}\) or alternatively, that although Montano had not entertained the specific intent, the death of the rival gang member may not have been an "unreasonable result to be expected."\(^{116}\)

The appellate court affirmed the conviction using the natural and probable consequences test. The court found that the frequency of gang attacks and the resultant homicides in general could have been anticipated by the gang members. Under this reasoning, the conviction for aiding and abetting did not rest on Montano's knowledge that his friends were armed on that occasion, nor on his awareness that they intended to kill the victim.\(^{117}\)

The use of this analysis in accomplice liability is a serious misapplication. The natural and probable consequence test may be used

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112. 96 Cal. App. 3d 221, 158 Cal. Rptr. 47 (1979).
113. *Id.* at 224, 158 Cal. Rptr. at 49.
114. His conviction was for a violation of CAL. PENAL CODE § 217 (West 1970), assault with intent to commit murder, which is a form of attempted murder.
115. There is some confusion on this point. The judge made several comments at the conclusion of the trial and at sentencing to indicate that there may have been some doubt as to Montano's knowledge of the plans. See *People v. Montano*, 96 Cal. App. 3d at 227 n.2, 158 Cal. Rptr. at 50 n.2 (the appellate court quoted the trial court as saying "he could not say 'beyond a reasonable doubt' that Montano saw 'the placing of the gun in the small of the back [of the victim]'").
116. *Id.* at 227, 158 Cal. Rptr. at 50 (quoting People v. Martinez, 239 Cal. App. 2d 161, 48 Cal. Rptr. 521 (1966)).
117. *Id.* For a contrary result, see *People v. McChristian*, 18 Ill. App. 3d 87, 309 N.E. 2d 388 (1974) in which the court refused to use the natural and probable consequences test where the specific intent crime of conspiracy to commit murder was charged. Also see *People v. Bailey*, 60 Ill. 2d 37, 322 N.E. 2d 804 (1975).
successfully in crimes that can be met through recklessness,\textsuperscript{118} but it strains viability to resort to its use in specific intent crimes. In this case, Montano was convicted of the specific intent crime of attempted murder, without the specific intent to kill, and without the shared criminal intent of the perpetrators.\textsuperscript{119}

One can see the inconsistency by comparing the accomplice's conduct with the perpetrator's conduct. In Montano, the perpetrator would not be convicted of attempted murder if it could be proved, for instance, that his gun had misfired and injured the victim. The charge would fail for want of the prima facie element of the specific intent to kill.\textsuperscript{120} The perpetrator's involvement with a gang would not, in and of itself, satisfy the mens rea if it could be shown that he did not entertain the specific intent to kill. Montano, on the other hand, charged with the same crime as an aider and abettor, could be convicted without a showing of specific intent.

This criticism is not meant to advocate that Montano should have remained beyond the reach of the criminal law, but rather to suggest that accomplice liability may not provide the best tool for redressing his conduct. It is true that he helped lure the unsuspecting victim into the car, that he knew and intended that the victim be roughed up,\textsuperscript{121} and therefore his actions should have penal consequences. But, it is a misapplication to use the accomplice theory to determine his culpability. A better route to travel in such a case would be the employment of a criminal facilitation statute. The court, therefore, would not need to undergo the awkward pretense of creating specific intent where none exists, and the natural and probable consequences test would be left to the appropriate cases involving reckless conduct.

Under a criminal facilitation statute, Montano would be convicted because the thrust of any such provision is to deter knowing assistance which foreseeably causes or promotes the commission of a crime. In light of this, Montano would be punished for his involvement in trapping the youth. His assistance, coupled with the foresee-

\textsuperscript{118} See supra note 106.

\textsuperscript{119} See People v. Vasquez, 29 Cal. App. 3d 81, 105 Cal. Rptr. 181 (1972) (the court recognized the difference in charge between a general and specific intent crime). In Vasquez, the court allowed the use of the defense of intoxication by the aider and abettor to negate the specific intent crime of assault. See also supra note 109 and accompanying text.

\textsuperscript{120} See generally W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 59 (1972). See also Merritt v. Commonwealth, 180 S.E. 395 (1935); Thacker v. Commonwealth, 134 Va. 767, 114 S.E. 504 (1922). For a discussion regarding the inference of intent from surrounding circumstances, see State v. Starkey, 244 S.E.2d 219 (1978).

\textsuperscript{121} 96 Cal. App. 3d at 224, 158 Cal. Rptr. at 49.
ability that the youth would be seriously injured, would make him criminally liable for the shooting that resulted. Montano’s liability would not hinge, however, on the creativity of the court and its ability to impute the perpetrator’s specific intent to him.

B. The Supplier

As already noted, the accountability of the supplier of goods or services has caused the courts considerable difficulties. Because jurisdictions treat the aider and abettor as a principal to the crime, courts appear reluctant to uphold convictions for complicity if the supplier has not demonstrated a stake in the venture.

For example, whether the conduct exhibited by the supplier is deemed sufficiently dangerous to warrant criminal prosecution may depend upon the gravity of the crime charged and the potential sentence. In People v. Lauria, defendant admitted that he knew that a percentage of his clients using his answering service were prostitutes. The court, caught between the conflicting principles of controlling prostitution on the one hand, and allowing Lauria to conduct his lawful business without interference on the other, opted to exonerate Lauria.

Did the court believe that Lauria had committed no societal wrong when he knowingly furnished assistance to prostitutes, or did the court, instead, conclude that any wrong committed by Lauria was not sufficiently severe to constitute aiding and abetting? The type of conduct exhibited by Lauria would be reached by the enactment of a criminal facilitation statute with its separate sentencing provision. The court would be free to examine the supplier’s conduct without the burden of applying the harsher aiding and abetting sentence provision.

By employing the crime of facilitation, therefore, the court could

123. This standard was derived from United States v. Falcone, 109 F.2d 579 (2d Cir. 1940), aff’d, 311 U.S. 205 (1940), in which the court held that conviction requires that defendant promote the venture and have a stake in the outcome.
124. As was seen in the decisions of Enmund v. Florida, 458 U.S. 782 (1982) and Carlos v. Superior Court, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983), the courts were concerned with the gravity of the sentence—the death penalty—if defendant’s conduct may not have warranted such a serious punishment. Although based on the eighth amendment, that analysis follows through to these cases. See also supra note 4.
126. Id. at 475-76, 59 Cal. Rptr. at 632.
127. See, e.g., N.Y. Penal Code § 115.05 (McKinney 1978). It provides that criminal facilitation is a misdemeanor unless the object crime is murder or kidnapping.
view the supplier in the proper context, not as a principal to the crime of prostitution which would necessitate a showing of Lauria's stake in the venture.\textsuperscript{128} Instead, the court could focus upon Lauria's knowing facilitation of the crime, which Lauria should not be able to defend merely by claiming that he made no added profits. His culpability stems from the societal wrong in encouraging the commission of an unlawful activity, whether or not that encouragement takes the larger form of aiding and abetting the prostitute. Even though it is opposed by society, the conduct typified by Lauria is beyond the reach of the criminal law unless the crime of facilitation is employed.

V. CONCLUSION

Accomplice liability constitutes a vital component in criminal law. The reinjection of intent into the requirement for culpability is but a first step to a broader-based and more cohesive use of party liability. Discarding knowing assistance as the mens rea for the aider and abettor is legally sound, but it exacts a social cost in the process.

In the aftermath of \textit{Beeman}, conduct that was previously punishable must be rerouted so that the policy of deterrence may continue. The proposal advanced would be the criminal facilitation statute to shore the gap and assist in creating a far reaching and more effective tool in party liability.

\footnotesize{128. In the course of the business, it would be difficult to prove a "stake in the venture" since Lauria did not charge the prostitutes more than other clients nor is there evidence to suggest that he received a percentage of the fee collected by his clients.}