CHAPTER SIX
PARTIES TO CRIME AND VICARIOUS LIABILITY

PARTIES TO CRIME

In legal terms, the use of the word "parties," refers to the different players in the criminal justice system who are liable for criminal sanctions. While California law does identify those who are liable for crimes (PC 26 & PC 27), it also identifies those who would not be liable for crimes.

The label of parties to crime refers to those who initiate crimes, and those who aid and abet or help, in the accomplishment or attempt of that crime.

PC 30. Parties to Crimes Classified
The parties to crimes are classified as:

1. Principals
PC 31. Principals
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, command, or coercion, compel another to commit any crime, are principals in any crime so committed.*

2. Accessories
PC 32. Accessories
Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony.

PC 33. Punishment of Accessories
Except in cases where a different punishment is prescribed, an accessory is punishable by a fine not exceeding five thousand dollars ($5,000), or by imprisonment in the state prison, or in a county jail not exceeding one year, or by both such fine and imprisonment.

We'll add accomplices as well for number 3. Note that California doesn't have a separate statute to define accomplices, other than in PC 1111.

3. Accomplices
PC 1111 includes the language defining an accomplice as: *An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.*

PC 1111. Testimony of Accomplices - Accomplice Defined
A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

In addition to the Penal Code, Evidence Code, etc., there is also the California Jury Instructions regarding accomplices: Criminal or **CALJIC.** For example, CALJIC *3.11 Testimony of an accomplice must be corroborated. You cannot find a defendant guilty based upon the testimony of an accomplice unless that testimony is corroborated by other evidence that tends to connect such that defendant with the commission of the offence. (sic)*

[Testimony of accomplice includes any out-of-court statement purportedly made by the accomplice received for the purpose of proving that what the accomplice stated out-of-court was true.]

Feigned Accomplices
A "feigned" accomplice would be one who merely pretends or acts as though they were helping someone prepare to commit a crime, but their true motive is to help gain information to turn over to the police for prosecutorial purposes. Timing is everything, so you couldn't wait until the police kick in the door and yell, "Freeze," when you say, "*Oh, I was just doing this to rat on so and so!"* This brings up another issue of ***"abandonment" or "renunciation."*** Undercover officers actually would be examples of "feigned" accomplices since they have to 'pretend" to be actively involved in the criminal endeavor. However, entrapment issues must be considered as well, since you would risk losing the case should that occur.

ACTUS REUS OF ACCOMPLICE LIABILITY

Statutes and judicial decisions describe the *actus reus of accomplice liability* using a range of seemingly confusing terms such as "aid," "abet," "encourage," and "command." Whatever the terminology, keep in mind that the actus reus of accomplice liability is satisfied by even a relatively insignificant degree of material or psychological assistance. In California, the terms "aid," "abet," are used in the definition of a *principal*. In other words, an *accomplice* in California is treated the same as a *principal*, with only a cursory referral to an accomplice's role in PC 1111.

Note that the Penal Code does not refer directly to accomplices as a "party" to crime, yet there is a direct statute that holds accomplices accountable. The *mens rea* requirement for accomplice liability generally requires intent to assist in the commission of a specific crime.

***MENS REA* OF ACCOMPLICE LIABLITY**
A conviction for accomplice liability requires that a defendant both assist and intend to assist before, during or immediately after the commission of a crime. This requires proof that the defended knew, supported and assisted in the commission of a specific crime.

ACCESSORY AFTER THE FACT

Note these key points with accessories in California. The accessory comes only *after a felony* has already occurred. The person *MUST KNOW* that the person is wanted by the police, and then knowing this, helps the person avoid arrest or escape from the police. In some states, there are "accessories" before the fact, but not in California. Proving an accessory after the fact requires specific *intent* to prevent or interfere with an offender's arrest, prosecution or conviction.

VICARIOUS LIABILITY

The term ***vicarious*** attaches liability to an act performed or suffered by one person as a substitute for another or to the benefit or advantage of another. An individual is held liable for the acts of another based on the relationship between the two parties. It typically is applied to crimes that do not require a criminal intent. Individuals may be held liable based on their relationship with the perpetrator of a crime.

The most common instance involves extending guilt to an employer for the acts of an employee or imposing liability on a corporation for the acts of a manager or employee.
Two other instances of vicarious liability are reviewed in this chapter. The first involves holding the owner of an automobile liable for traffic tickets issued to the car despite the fact that the auto may have been driven by another individual. The second entails imposing responsibility on parents for the acts of their children. Are parents liable for the action of their children? The answer is yes, and it can be either criminal or civil damages. Parents are responsible if the parent has knowledge of the child's potential for misconduct and fails to take reasonable steps to prevent such misconduct.

CORPORATE LIABILITY
Vicarious liability extends legal responsibility to corporate officers and to corporations in order to encourage executives to monitor and to supervise employees. Vicarious liability typically is limited to “welfare offenses” that do not carry criminal punishment and which are designed to safeguard public health and safety.

In actions where either the organization is liable, or where individual supervisors or managers, even corporate executives are liable, the term respondeat superior is used. It’s pronounced, rehs-pond-dee-at superior, and is Latin for "let the master answer," which is a key doctrine in the law of agency, which provides that a principal (employer) is responsible for the actions of his/her/its agent (employee) in the "course of employment." Thus, an agent who signs an agreement to purchase goods for his employer in the name of the employer can create a binding contract between the seller and the employer. Another example: if a delivery truck driver negligently hits a child in the street, the company for which the driver works will be liable for the injuries. http://dictionary.law.com/

TRAFFIC TICKETS AND VICARIOUS LIABILITY
Owners of automobiles are vicariously liable for traffic tickets based on their legal ownership of the car. Most parking statutes consider the owner of the vehicle prima facie responsible for paying the ticket. This means that unless you present evidence that you were not responsible, you are presumed liable for the ticket. In other words, the prosecutor is not required to present any evidence to establish your responsibility; you are presumed responsible unless you appear in court and establish that someone else was driving your car.

PARENTS AND VIARIOUS LIABILITY
The vicarious liability of parents for the criminal conduct of their children is based on the parents’ legal status and responsibility for their children.

As we saw in Chapter 4, parents of gang members can be prosecuted and held criminally liable for their child’s gang-related activities. If the parents fail to exercise reasonable care, supervision, protection and control over their minor child, they can be charged with contributing to the delinquency of a minor.

(PC § 272) By law, such neglect on the part of parents is punishable by up to one year in jail and a fine of $2,500. (PC § 272(a)(1)

PC 272 (a)(1) Every person who commits any act or omits the performance of any duty, which act or omission causes or tends to cause or encourage any person under the age of 18 years to come within the provisions of Section 300, 601, or 602 of the Welfare and Institutions Code or which act or omission contributes thereto, or any person who, by any act or omission, or by threats, commands, or persuasion, induces or endeavors to induce any person under the age of 18 years or any ward or dependent child of the juvenile court to fail or refuse to conform to a lawful order of the juvenile court, or to do or to perform any act or to follow any course of conduct or to so live as would cause or manifestly tend to

cause that person to become or to remain a person within the provisions of Section 300, 601, or 602 of the Welfare and Institutions Code, is guilty of a misdemeanor…
(2) For purposes of this subdivision, a parent or legal guardian to any person under the age of 18 years shall have the duty to exercise reasonable care, supervision, protection, and control over their minor child.

Review Questions:

1. If a “red light” camera photographed your license plate, but failed to record your face, would you still be liable for the citation? What would your options be?
2. How could failure to follow the jury instructions from CALJIC harm a case?
3. If you were drag racing with a friend, and a pedestrian was run over by him, would you be liable?
4. Give an example of vicarious liability in your workplace.
5. Define the key differences between an “accomplice” and an “accessory” to a crime?

Web Resources

http://dictionary.law.com/

Case Study #1: In re Travis C (1992)., 9 Cal. App. 4th 1688

Discussion question: Can a 14-year old boy liable for committing felony sex offenses?

Facts
On the evening of January 7, 1991, 11-year-old Terry M. (the victim) spent the night at the home of her best friend, 12-year-old Amy C., as she had done on several previous occasions. Appellant is Amy's 14-year-old brother, who resided with Amy and their mother. The victim arrived at Amy's house at about 4 p.m. on January 7. That evening appellant, the victim and Amy watched television together. While they watched television, appellant rubbed the victim's back on the outside of her clothing.

At about 10 p.m., Amy and the victim prepared to go to bed in Amy's room. As was her habit, Amy placed an extra mattress on the floor for the victim. The victim wore to bed a sweater, panties and sweatpants with an elastic waistband. Appellant asked if he could sleep in Amy's room, as he had done on prior occasions when the victim spent the night, claiming he was afraid of the dark. They agreed and Amy placed another mattress on the floor next to the victim's mattress. After turning out the lights, the three talked for a while before going to sleep.

The victim testified that she awoke in the middle of the night to find appellant had reached his hand under her panties and was touching her between her legs in her frontal crotch area. At the time of the first touching, the victim was lying on her back. She slapped appellant, turned away from him onto her side and pulled the covers over herself. However, appellant reached his hand a second time under her panties and touched her crotch in the lower area. The victim turned toward appellant, slapped him again, and then, frightened, got up and ran into the bathroom.

After washing her face, she returned to Amy's room and noticed appellant was awake. She did not speak to him and lay down by the closet to sleep. She awoke again around 3 a.m. when appellant left the room. She then returned to her mattress and went to sleep.

The victim and Amy awoke at 5 a.m. to prepare to catch the school bus. Appellant was scheduled to take the same bus. The victim took a shower and then returned to Amy's room and lay down. Soon thereafter she went home and told her mother of the two touchings. The victim's mother testified the victim came home crying and shaking, saying appellant had touched her "front and butt." Amy did not attend school that day. The victim's mother subsequently reported the incident to police.

Officer Partida investigated the alleged molestation. She interviewed the victim, who told her appellant had touched her twice on the buttocks but did not mention any touching of the crotch area. The victim later testified she did not know why she failed to mention to Partida that appellant had touched her crotch.

Partida also interviewed appellant, who denied the touchings had occurred. Appellant told Partida he did sleep in the room, but had not asked to do so. He also told Partida he awoke that night when the victim went to the bathroom, and when the victim returned she commented that it was hot. Appellant told Partida he then left the room, turned on the air-conditioner, and returned to his own room. Appellant's mother saw that he was in his room by around 3:30 a.m. However, appellant's mother told Partida the air- conditioner was not on at that time.

Issue
By a petition filed under Welfare and Institutions Code section **602,** appellant Travis C., a 14-year-old minor, was charged with 2 felony counts of violating Penal Code n2 section 288, subdivision (a) (lewd and lascivious acts upon a child under the age of 14) and 2 misdemeanor counts of violating section 647.6 (annoying and molesting a child under the age of 18). The felony counts were found true beyond a

reasonable doubt; the misdemeanor counts were dismissed; and appellant was ***determined to be a minor coming under the provisions of Welfare and Institutions Code section 602 (i.e., adjudged a ward of the court).*** The maximum term of confinement was set at 10 years, less credit for time served, and appellant was placed on probation subject to various conditions.

The principal issues raised on appeal are (1) insufficiency of the evidence to sustain the true findings, and (2) the improper segmenting of the acts into separate offenses when they should have been found as a matter of law to be continuous conduct constituting only one offense.

Decision
The judgment is reversed and remanded for entry of judgment in conformity with this opinion, and for resentencing.

Case Study #2: Cynthia D. v. Superior Court (1993) , 5 Cal. 4th 242

Discussion Question: Should a juvenile be returned to a parent who is a high risk? What's the liability of the parent?

Facts
Only a skeletal statement of facts is necessary since the question presented is legal rather than factual in nature. A dependency petition was filed in April 1989 on behalf of Sarah D. (minor) by the San Diego County Department of Social Services (DSS), alleging that Cynthia D. (mother) was unable to protect minor from molestation and nonaccidental injury, and that mother used narcotics and/or dangerous drugs. (§ 300, subd. (b).) Juvenile court jurisdiction was found, and minor was declared a dependent of the juvenile court in June 1989. Minor was initially placed in the home of a relative, but a supplemental petition was filed when the relative became unable to care for minor. The court found the allegation in the supplemental petition true by clear and convincing evidence, and minor was placed with a foster family, with whom she still resides. The foster parents have been approved to adopt minor in the event she becomes eligible for adoption.

Issue
Following several review hearings, an 18-month review hearing was held on May 29, 1991. At that time, based on a preponderance of the evidence, the court found that return of minor to mother's custody would create a substantial risk of detriment to minor, that reasonable reunification services had been provided mother, and that the matter should be set for a selection and implementation hearing under section 366.26 to determine whether the permanent plan for minor should be long-term foster care, guardianship, or adoption.

A few days before the date set for the section 366.26 hearing, mother filed a petition for writ of mandate/prohibition seeking to have the Court of Appeal order the trial court to vacate its order setting the section 366.26 hearing and to prohibit it from taking any further action to terminate mother's parental rights. Mother claimed that the statutory provisions violated due process because they allowed findings of detriment to be made by a preponderance of the evidence rather than by clear and convincing evidence. The Court of Appeal denied relief, and we granted review.

Decision
This is one of several cases we have taken to resolve recurring issues involving juvenile dependency proceedings pursuant to Welfare and Institutions Code section 300 et seq. The sole issue raised in the petition for review in this case is a due process challenge to the statutory provisions that allow termination of parental rights based on a lesser standard of proof than clear and convincing evidence. The Court of Appeal found the provisions to be constitutional. We affirm.

Case Study #3 : People v. Riley(1993) , 20 Cal. App. 4th 1808

Discussion Question: Was Riley (Hayden's roommate) an accessory to murder?
(You really have to read the case to determine who the players are. The ***victim*** was David Woods.)

Facts
On the night of June 11, 1991, Carol Romine was working as a prostitute. Scott Hayden, riding a motorcycle, approached Romine. Romine then agreed to a sexual act with Hayden in exchange for $40. Romine and Hayden retired to Romine's motel room, where Hayden gave Romine the $40 and they engaged in the agreed-upon sexual act.

Hayden afterward produced a pistol from his duffel bag, held the gun to Romine's head, and demanded his money back. Romine gave Hayden the $40.

Michael Rowe, Romine's boyfriend, was in another room of the motel and happened to observe Hayden holding the gun to Romine's head. Rowe, with the aid of a friend, accosted Hayden as Hayden was leaving Romine's room. Rowe put his hand in Hayden's back and told him to "freeze." Hayden dropped his duffel bag and put his hands in the air. Romine came out of her room, yelling that she had been robbed; Rowe told someone to call the police. Hayden said he was not waiting for the police. Rowe retrieved the $40 from Hayden's pocket as Hayden mounted his motorcycle and left. In a loud, angry voice, Hayden vowed to return. Fearing Hayden, Rowe and Romine moved to a different motel room, in possession of the $40 and Hayden's duffel bag. Hayden's gun was inside the duffel bag.

Hayden returned about 30 to 45 minutes later, riding as a passenger with Riley, (the defendant in this case) in defendant's truck. Defendant drove slowly around the motel parking lot. The victim, David Woods, was in the parking lot with some other motel residents. Defendant stopped the truck and Hayden fired two gunshots out the driver's window. Woods fell down. After a few seconds' pause, several more shots were fired toward Woods. Witnesses observed defendant's truck drive slowly in the parking lot, exit, make a U-turn, and drive once more slowly past the motel. Woods was struck by a bullet that entered the shoulder area and exited his chest. He died in the motel parking lot.

The next day, defendant gave a gun to Lewis Rivenbark, defendant's business partner, for safekeeping. Defendant bragged that the gun had been used in a killing. When police later recovered the gun, they determined that the gun was used to fire a bullet found at the scene of the killing.

When defendant was arrested, he gave a videotaped statement to police. At first, defendant denied knowing about or being present at the shooting at the motel. Defendant claimed to have been at home all evening. When police told defendant that defendant's girlfriend failed to confirm his alibi, defendant changed his story.

Defendant told police he had come home very drunk. Hayden came to defendant's house and told him he had been robbed after patronizing a prostitute. Hayden's bag and gun were taken. Defendant suggested that they go in his truck to the motel, to try to get Hayden's possessions back. Defendant gave Hayden a .357 pistol and a speed loader.

Defendant drove Hayden back to the motel in defendant's truck. Hayden saw a Black man, and told defendant the man had been involved in the robbery. Hayden leaned across defendant and yelled, "Hey, Nigger," out the window. Hayden, still leaning across defendant's body, rapidly fired several shots out of the driver's side window. Defendant said he did not realize Hayden was going to shoot anyone and he drove quickly away after Hayden fired the shots. Defendant did not know for sure if Hayden's shots had struck anyone. Defendant told police he had thrown the pistol away in the bottom of a lake.

Defendant testified in his own behalf at trial. He claimed he had been drinking all afternoon on the day of the shooting. That night, Hayden came to defendant's house, saying he had been robbed by three Black men. Defendant asked Hayden if he wanted to go back to the motel; Hayden said he did not want to go on his motorcycle because it would be recognized. He asked defendant to drive him to the motel, and defendant agreed. Defendant also lent Hayden a loaded revolver, and a speed loader with five more bullets.

On the way back to the motel, Hayden for the first time told defendant about the circumstances of the robbery; i.e., that Hayden had first held his gun to the prostitute's head. Defendant knew that Hayden had boasted before that he had once shot someone who robbed him. Defendant testified that, when they arrived at the motel, defendant told Hayden he would not get out of the truck and that they should go home and call the police. Defendant claimed that he did not know Hayden was going to shoot anyone, and he was surprised when Hayden started firing out of the driver's window. Defendant drove immediately away. Defendant told his girlfriend to say that defendant had not left the house that evening. The next day, defendant gave the gun to Rivenbark; Rivenbark was supposed to throw the gun in a lake. When defendant later learned that Rivenbark had not disposed of the gun, defendant's lawyer contacted police and told them where they could find the gun.

A witness who was present at the motel testified that he saw Hayden, in the passenger seat, fire the shots at Woods. Defendant was leaning back while Hayden was shooting.

In rebuttal, a police officer testified that defendant told him that, when Hayden came to defendant's house on the night of the shooting, Hayden was very angry about having been robbed.

Issue

Defendant,(Riley) together with Hayden, was charged in count 1 with the murder of David Woods. (Pen. Code, § 187, subd. (a).) Count 1 also alleged that a principal to the offense was armed with a firearm under Penal Code section 12022, subdivision (a)(1). Count 2 alleged that defendant was an **accessory** after the fact with respect to the murder (Pen. Code, § 32), and count 3 charged both defendant and Hayden with shooting at an inhabited dwelling in violation of Penal Code section 246, and alleged both that defendant had personally used a firearm, and that a principal was armed with a firearm in the commission of the offense (Pen. Code, § 1203.06, subd. (a)(1), 12022.5, 12022, subd. (a)(1)).

Jury trial commenced on March 10, 1992. Defendant's trial was severed from Hayden's. (this meant a separate trial for each of them) The jury found defendant not guilty of first degree murder as to count 1, but was unable to reach a verdict on second degree murder. The jury also found defendant guilty as to count 2, and acquitted him of the charge of shooting at an inhabited dwelling in count 3. The trial court declared a mistrial as to count 1, and the murder count was retried. At the second trial, a new jury found defendant guilty of second degree murder and found true the allegation that a principal was armed with a firearm in the commission of the offense.

The court sentenced defendant to a term of 15 years to life for second degree murder, plus 1 year for the firearm enhancement. The court imposed the middle term of two years on count 2, **accessory** after the fact, to be served concurrently. Defendant appeals.

(1a) Defendant's principal contention is that his conviction at the first trial of being an **accessory** after the fact to murder precluded retrial of the murder charge. He claims that principles of double jeopardy barred the retrial of count 1.

Defendant relies on one case which held that a person could not be convicted both as a principal of a substantive offense and as an **accessory** after the fact. From this he reasons that, as a matter of law, conviction as an **accessory** after the fact operates as an implied acquittal of the principal offense. He concludes, therefore, that the court's acceptance of a partial verdict, finding defendant guilty as an **accessory,** prevented his retrial on the murder count.

Defendant's argument rests entirely on the premise that being a principal to an offense and being an **accessory** after the fact are necessarily mutually exclusive. Defendant relies on *People v. Prado* (1977) 67 Cal.App.3d 267 [136 Cal.Rptr. 521], and other cases, in support of this premise.

In *People v. Prado*, *supra*, 67 Cal.App.3d 267, a codefendant was found guilty of both robbery and **accessory** to robbery. The court held that it was improper to convict the codefendant of both crimes, because the offenses were mutually exclusive. The court based this conclusion on cases and treatises stating that an **accessory** after the fact is someone who is not guilty of the crime as a principal. (at pp. 271-273.)

As the court pointed out in *People v. Francis* (1982) 129 Cal.App.3d 241 [180 Cal.Rptr. 873], however, the offenses of principal and **accessory,** and the states of mind required to be found guilty of each, are *not* mutually exclusive. "The court in *Prado* appears to have assumed, without citation of any authority, that convictions as both principal and **accessory** are mutually exclusive or inconsistent, and, therefore, to have examined the admitted evidence in an effort to ascertain at which conviction, if either, the jury would have arrived if so instructed. However, the offenses of robbery and **accessory** to robbery, like the offenses of murder and **accessory** to murder as in the present case, are not mutually exclusive or inconsistent. Though the offenses are distinct and different, the elements of the crime of murder are not inconsistent with the elements of the crime of **accessory** to murder. One guilty of the former is not necessarily not guilty of the latter or vice-versa." (*People v. Francis*, *supra*, 129 Cal.App.3d 241, 251-252, fn. omitted.)

Significantly, the *Prado* court itself recognized that "[t]he requisite intent to be a principal in a robbery is to permanently deprive the owner of his property. Thus, this is a *totally different and distinct state of mind* from that of the accused whose intent is to aid the robber to escape." (*People v. Prado*, *supra*, 67 Cal.App.3d at p. 273, italics added.) As the language of the *Prado* court's example itself demonstrates, there is nothing inherently or necessarily inconsistent between an intent to deprive someone of property and the intent to aid a robber to escape. Nothing prevents a person from harboring both intents; the intents are different, and not overlapping.

Defendant's reliance on *United States v. Gaddis* (1976) 424 U.S. 544 [47 L.Ed.2d 222, 96 S.Ct. 1023], *Milanovich v. United States* (1961) 365 U.S. 551 [5 L.Ed.2d 773, 81 S.Ct. 728], and *Heflin v. United States* (1959) 358 U.S. 415 [3 L.Ed.2d 407, 79 S.Ct. 451], are also misplaced. *Gaddis* dealt with federal convictions of both bank robbery and receiving the proceeds of the robbery. *Milanovich* involved federal convictions of theft and receiving the same stolen property. *Heflin* involved bank robbery and possession of the same stolen property.

Each of these cases contravened the rule that a thief cannot be convicted of receiving the same property which was the subject of the theft. In such theft/receiving stolen property cases, the *very same* act and intent underlie both offenses, i.e., the taking possession (the stealing and, necessarily, the receiving) of the property. (See *People v. Jaramillo* (1976) 16 Cal.3d 752 [129 Cal.Rptr. 306, 548 P.2d 706].) To permit conviction and punishment for both offenses would effectively inflict multiple punishment for a single act.

The same multiple-punishment rationale appears in part to underlie the result in *People v. Prado*, *supra*, 67 Cal.App.3d 267, as the court stated that "[e]ssentially the same acts are relied upon to prove Gonzalez'

participation in the robbery on the aiding and abetting theory, and to prove he was an **accessory** after the fact." (*Id.* at p. 274.)

Of course, as the court in *People v. Jaramillo*, *supra*, 16 Cal.3d 752, recognized, where the act of theft and the act of receiving are completely severed, "such as when the thief has disposed of the property and subsequently receives it back in a transaction separate from the original theft, conviction on both charges would be proper." (*Id.* at p. 759, fn. 8.)

Here, (unlike *Prado*) the conviction as a principal and the conviction as an **accessory** depend upon entirely different conduct: Defendant's acts of obtaining the gun and speed loader, giving them to a drunk and angry Hayden, suggesting that Hayden return to the motel to retrieve his property, and driving Hayden to the motel in defendant's truck comprise the essentials of his guilt as a principal to the murder. The conviction of **accessory** is based on defendant's act, the following day, of attempting to dispose of the gun. This act occurred after the murder was complete.

There is therefore nothing necessarily illogical or inconsistent in finding defendant guilty of both murder and **accessory** to murder. If indeed there is a rule prohibiting conviction as both a principal and an **accessory,** it has nothing to do with double jeopardy; n1 defendant is not subjected to multiple punishments for the same conduct by these convictions, nor is a conviction of one an implied acquittal of the other.

Decision
Defendant Jack Dewayne Riley appeals his convictions of second degree murder and **accessory** after the fact to the murder. We conclude that defendant's contentions on appeal are *without merit, and affirm. The judgment is affirmed.*

Case Study #4: **Bailey v. Filco, Inc. (1996)., 48 Cal. App. 4th 1552**

Discussion Question: Corporate Liability : If you went on a break to get some cookies and you get in an accident is your employer liable?

Facts
During a paid, morning break while working at Filco, Shinn drove to The Cookie Tree to buy cookies for herself and at least one other employee to eat while on duty. Shinn did not notify a supervisor that she was taking her break or leaving the premises--nor did she have to--and no Filco supervisor sent Shinn to The Cookie Tree to buy the cookies or to run an errand for Filco. While driving down a four-lane city street, Shinn realized she had passed her destination, attempted to make a U-turn, and collided with Bailey's car at approximately 10:50 a.m. Afterwards, Shinn returned to work at Filco.

Shinn worked at Filco as a full-time, hourly sales cashier. Her duties included ringing up merchandise, selling small appliances, and renting videos. Her duties did not include driving, and Shinn never used her car for work purposes. Filco did not even request Shinn to bring a car to work.

Filco did not require that Shinn clock out for her 2 daily, 10-to-15-minute breaks. Filco did ask its hourly employees to clock out for lunch. Filco only asked Shinn to make sure another Filco employee was operating the cash register and waiting on customers before she left on a break. Otherwise, Filco operated with a "hands-off" management style regarding breaks. The Filco management never scheduled Shinn's breaks. Filco never required Shinn to remain on the premises during a break, obtain a supervisor's permission to take a break or leave the store on break, or even notify a supervisor that she was taking a break. Filco did not prohibit Shinn from using her car during a break. Filco management considered an employee on break to be free from work, and there is no evidence Shinn was ever asked to assist with customers while on her break. Filco provided a break room for its employees, complete with coffee, cokes, and a place to sit and relax; on previous occasions, Shinn had used this break room. However, use of the break room did not change the fact that the employee was on break.

This appeal presents the issue of whether, as a matter of law, Shinn was within her scope of employment when she drove during her ten-to-fifteen minute unscheduled, paid break to purchase cookies to eat back at work.

Issue
The parties have two minor factual disagreements. First, Bailey contends Shinn "was equivocal as to how many co-employees she intended to provide cookies to upon her return," but that on prior occasions she had gotten cookies "for the people at work"; Filco maintains Shinn went only for herself and one other employee. Whether or not Shinn intended to purchase cookies for herself and another employee or every Filco employee on duty is immaterial; what is important is that no Filco supervisor instructed Shinn to buy cookies at The Cookie Tree or to run any type of errand. Secondly, Filco maintains that Shinn's supervisor was aware of only one of Shinn's prior trips, while Bailey contends Shinn's supervisor was aware of more than one trip made by Shinn and other employees. However, these differences are not material and do not affect the outcome of this appeal. There is no evidence of any express or implied Filco directive, oversight or participation particular to Shinn's "cookie run(s)."

Theory of ***Respondeat Superior***
Under the theory of **respondeat superior,** an employer is vicariously liable for an employee's torts committed within the scope of employment. (*Perez, supra*, 41 Cal. 3d at p. 967; *Mary M. v. City of Los Angeles* (1991) 54 Cal. 3d 202, 208 [285 Cal. Rptr. 99, 814 P.2d 1341] (*Mary M.)*; *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal. 4th 291, 296 [48 Cal. Rptr. 2d 510, 907 P.2d 358] (*Lisa M*.).) This theory is justified as " 'a deliberate allocation of a risk. The losses caused by the torts of

employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business.' " (*Hinman v. Westinghouse Elec. Co*. (1970) 2 Cal. 3d 956, 959-960 [88 Cal. Rptr. 188, 471 P.2d 988] (*Hinman)*, quoting Prosser, Law of Torts (3d ed. 1964) p. 471.) The employer is liable not because the employer has control over the employee or is in some way at fault, but because the employer's enterprise creates inevitable risks as a part of doing business. (*Ibid*.; *Rodgers v. Kemper Constr. Co*. (1975) 50 Cal. App. 3d 608, 618 [124 Cal. Rptr. 143] (*Rodgers*); *Mary M*., *supra*, 54 Cal. 3d at p. 208.) Under this theory, an employer is liable for "the risks inherent in or created by the enterprise." (*Hinman*, *supra*, 2 Cal. 3d at p. 960.)

…**Respondeat superior** liability holds an employer economically responsible for those activities characteristic of the enterprise itself. (*Id*. at p. 1607; *Rodgers, supra,* 50 Cal. App. 3d at p. 618.)

Decision
Plaintiff David C. Bailey (Bailey) was injured in an automobile accident with Carolyn Shinn (Shinn), an employee of defendant Filco, Inc., a retail business engaged in the sale and rental of electronic goods and appliances. Bailey sued Filco under a theory of **respondeat superior.** At the time of the accident, Shinn was on a paid break and was driving to obtain some cookies to eat back at work. The jury found that Shinn was not engaged within the scope of her employment at the time of the accident, and the court entered judgment for Filco. On appeal Bailey contends that Shinn was acting within the scope of employment as a matter of law when the car accident occurred.

We conclude that Shinn's act of driving on her break to The Cookie Tree to buy cookies lacked the necessary linkage to Filco's enterprise or her duties at Filco. Shinn's act was a substantial departure and unforeseeable. The reasons for applying the doctrine of **respondeat superior** do not support finding Filco liable under these circumstances. We conclude, as a matter of law, that Shinn was acting outside the scope of employment at the time of her accident with Bailey.

We conclude, as a matter of law, that Shinn committed the alleged tort outside the scope of her employment. Consequently, we affirm the judgment. The judgment is affirmed.

Case Study #5: *People. v.* Sedeno *10 Cal. 3d 703(1974)*

Discussion Question*:* Can a defendant whose mental capacity was diminished by mental illness, disease or defect short of insanity, or by intoxication, been able to have the capacity to premeditate, deliberate and harbor malice?

Facts

On the morning of May 6, 1966, defendant, Leandro Sedeno, was a prisoner in the Daly City jail, having been held there overnight following his arrest on a misdemeanor charge. Shortly after 6 a.m., Officer Van Pelt, accompanied by another officer of the Daly City Police Department, took the only other prisoner then in the jail from his cell for photographing and fingerprinting. When they returned, and while the second officer was securing that prisoner, Officer Van Pelt removed defendant from his cell in order to take him to the squad room for the same "processing." On the way, defendant, who was walking in his stocking feet ahead of Officer Van Pelt, leaned over to pick up a pair of boots. When the officer instructed him to leave the boots, defendant straightened up and hit the officer in the jaw with his elbow, knocking the officer backward into a wall. Defendant then ran out of the building.

Officer Van Pelt called to another officer and pursued defendant, whom he quickly spotted nearby reaching down as if to put on a shoe. When the officer attempted to seize defendant, however, defendant struck him in the face and chest, using his fists with sufficient force to cause bruises and a swollen jaw. The officer thereupon threw defendant against a fence and struck him on top of the head with his baton. He again attempted to seize defendant, but when he turned his head momentarily as two more officers ran out, defendant broke away and ran toward Mission Street, a major thoroughfare linking Daly City and San Francisco.

Officer Van Pelt pursued defendant onto Mission Street on foot, stopping to telephone the station from a coffee shop to alert other officers. As he finished the call and returned to Mission Street, Officer Klass drove by in a black and white police car. Officer Van Pelt joined Officer Klass in the car and the pursuit continued. The two officers stopped again to pick up a third officer and then sighted defendant who was still running. They pulled the car across the sidewalk at a service station and all three officers, who were in uniform, emerged. The third officer, Sergeant Thomas Culley, told defendant to give up and he would not be hurt, but defendant, after shaking his finger at Officer Klass and mumbling in a low tone, ran around Officer Klass and continued down Mission Street.

Officer Van Pelt returned to the car. As he was doing so he saw Officer Klass tackle defendant from behind at the shoulders. He saw the two men fall between two parked cars where they were out of his vision, and he ran toward them. When Officer Van Pelt was still about 40 feet away he saw the pair emerge from between the parked cars. Officer Klass lay on his right side on the pavement with defendant lying behind and facing toward Officer Klass. Up to the time Officer Klass and defendant had disappeared from view between the parked cars, none of the officers had drawn his gun. When defendant and Officer Klass reappeared, however, defendant was holding with both hands the Smith & Wesson .357 Magnum revolver belonging to Officer Klass. Officer Van Pelt saw defendant, who was only 12 inches from Officer Klass, point the gun toward Officer Klass' back and fire. Officer Van Pelt then grasped defendant who turned and pointed the gun at Van Pelt's head. As Officer Van Pelt pushed the gun away, a shot was fired which caused powder burns on the officer's hand. Although the officer grabbed defendant's hands and defendant's finger was on the trigger, the officer did not put his hands over defendant's trigger finger and did not cause the gun to fire.

Unable to wrest the gun from defendant, Officer Van Pelt held it down on the ground until Sergeant Culley arrived and pried it from defendant's hand. Defendant continued to resist until several people restrained him.

Immediately after his arrest defendant was treated at the jail for a superficial scalp laceration caused by the blow from Officer Van Pelt's baton. The doctor who treated him found him to be active, alert, and behaving normally. Dr. Walter Rapaport, a psychiatrist, who examined defendant at approximately 10 a.m. on May 6, 1966, at the request of the district attorney or the police, found no evidence of mental illness at that time although he was aware that petitioner had a history of schizophrenia. His examination of defendant disclosed no distorted thinking and no psychiatric delusions or hallucinations. In the opinion of Dr. Rapaport, defendant was capable of premeditation and deliberation and of harboring malice. The doctor found no evidence that defendant had been rendered unconscious as a result of the blow and did not believe that defendant's behavior was the result of the blow on the head.

Officer Klass died on June 9, 1966, from causes directly related to the injuries he suffered in the shooting. Defendant was charged on July 19, 1966, with murder and attempted murder, but on August 19, 1966, after undergoing psychiatric examination pursuant to Penal Code sections 1367- 1368, was found to be presently insane. Criminal proceedings were suspended and defendant was committed to the Atascadero State Hospital. He was subsequently returned to court but was again found to be insane and was committed a second time on April 6, 1967. Criminal proceedings were reinstated on October 1, 1969, when the court found defendant to be competent to stand trial.

Defendant took the stand in his own defense and testified to a history of mental illness, diagnosed as paranoid schizophrenia, which had resulted in several periods of institutionalization. At the time of the shooting he was on an indefinite leave from a veteran's hospital and had discontinued the use of his prescribed medications for approximately a week.

Dr. Charles Respini, a psychiatrist called as a defense witness, had examined defendant in August 1966 and found him to be acutely psychotic and incompetent to stand trial at that time. In his opinion defendant had been sane at the time of the killing, and had the capacity to intend to kill, but his judgment was diminished in that he was overly suspicious and overreacted when he felt threatened. Dr. Respini did not believe defendant was capable of acting with malice.

Defendant testified that he was able to remember at least 95 percent of the events surrounding the shooting of Officers Klass and Van Pelt. He testified that when Officer Van Pelt took him from the cell, the officer pushed him and he "lost control." Rather than assaulting the officer he decided to "retreat" by fleeing. He denied hitting the officer and stated that he had been hit twice on the head with the baton and was bleeding when he panicked and again ran away. He feared that the officers would beat him again.

Defendant testified that he had been handcuffed immediately upon being tackled and that "a few" officers then kicked him "all over" his left side while one held his hands. Then someone choked him while his legs were held. When his neck was released, defendant lifted his head and saw an officer squatting in front of him facing away. Defendant stated that he grabbed the officer's gun from the holster, fired a shot into the air, and then attempted to drop the weapon but was unable to shake it loose. At this point Officer Van Pelt grabbed his hands and turned them, causing him to trigger the gun and accidentally fire it. Defendant, who claimed to be able to recall accurately the order of events, testified that the second shot which had been accidentally fired was the shot that struck Officer Klass. He denied having an intent to shoot Officer Klass. He stated that he took the gun in a "reflex action" because he was being choked, but then realized that he was doing wrong and therefore fired into the air rather than at the officer.

Issue
The theory of the defense suggested by the evidence and expressed by counsel in his opening statement, was that defendant was so mentally ill as to be unable to premeditate or harbor malice, and that the shot which resulted in the death of Officer Klass was fired accidentally.

The court instructed the jury fully on first and second degree murder, n3 and on voluntary manslaughter in a context of diminished capacity. No instructions were requested and none was given on voluntary manslaughter as an intentional killing committed "upon a sudden quarrel or heat of passion," on involuntary manslaughter, on unconsciousness, or on self-defense, or the effect of an unreasonable belief that deadly force was necessary in defense of self.

Before a court must instruct *sua sponte* on voluntary manslaughter in the heat of passion as a lesser offense included within murder there must be either some evidence that heat of passion was present at the time of the killing or some reason for the court to know that the defendant is relying on that theory of manslaughter as a defense.

Here defendant testified that the arresting officers kicked and choked him although he was not resisting. That evidence might form the basis for a finding of adequate provocation. But no evidence was offered that suggested that defendant was acting in a resultant heat of passion when he shot Officer Klass.

He not only denied intending to shoot Officer Klass when he took the gun, a fact that would not preclude giving a requested instruction on voluntary manslaughter (*People* v. *Dewberry, supra,* 51 Cal.2d 548, 557), but twice expressly denied fighting back when he was being beaten. Additionally, he testified that he realized as soon as he took the gun that it was wrong to have done so and therefore fired into the air. Had defendant elected to invite the jury to speculate as to whether he had shot the officer in a heat of passion resulting from the assault upon him by the officer, notwithstanding his testimony to the contrary, he might have requested and received instructions on voluntary manslaughter in that context since inconsistent defenses may be offered. He may not, however, expect the trial judge to give a *sua sponte* instruction on that theory of manslaughter when his own testimony is to the effect that he was not acting in a heat of passion and there is neither direct evidence of heat of passion nor reason for the court to know that he is relying on that defense.

It was error, however, for the court to fail to give a *sua sponte* instruction on involuntary manslaughter. (Pen. Code, § 192, subd. 2.) Petitioner correctly contends that the evidence of diminished capacity was sufficient to warrant a *sua sponte* instruction because the jury might have believed that although he was conscious at the time of the shooting he lacked both the intent to kill and malice. (*People* v. *Mosher, supra*, 1 Cal.3d 379, 391.) The People suggest that the error was not prejudicial in the circumstances of this case since the jury, under the instructions given on first degree murder, necessarily found both that the killing was intentional and that it was committed with malice.

The People argue, however, that a defendant who has deliberated, who has carefully weighed his course of action and has considered the reasons for and against it, must have considered among those reasons the fact that it is unlawful and that he is obliged to act within the law. A similar argument was made by the People in *People* v. *Conley, supra*, 64 Cal.2d 310, 322-323.

In rejecting it we noted that at least since the decision in *People* v. *Gorshen* (1959) 51 Cal.2d 716 [336 P.2d 492] it has been settled that a defendant whose mental capacity was diminished by mental illness, disease or defect short of insanity, or by intoxication, might have premeditated and deliberated his act before killing and yet have been incapable of harboring malice.

Here there was expert testimony that defendant was schizophrenic, paranoid, delusional, and overly suspicious, that he felt threatened, lacked judgment, and did not have the ability to act with malice aforethought. The jury was instructed that "Malice is express when there is an intention unlawfully to kill a human being. [para.] Malice is implied (1) when the killing results from an act involving a high degree of probability that it will result in death, which act is intentionally done for a base, anti-social motive and with wanton disregard for human life; or (2) when the killing is a direct causal result of the perpetration or

the attempt to perpetrate a felony inherently dangerous to human life." The jury was not instructed in the language suggested by this court in *People* v. *Conley, supra*, 64 Cal.2d 310, 324, footnote 4, that evidence of diminished capacity could rebut the presumption that a person is able to comprehend the prohibition of acts dangerous to human life and the obligation to conform his conduct to the law. We cannot assume, therefore, that in finding that the defendant deliberated his conduct, the jury necessarily found that he was capable of comprehending his duty to conform his conduct to the law and after weighing that obligation made a reasoned decision to kill.

The existence of malice was a material issue raised by the evidence. We cannot determine that under the instructions given to it the jury (and that they) necessarily considered this issue.

Decision
A jury found defendant guilty of the first degree murder (Pen. Code, §§ 187, 189) of Officer Richard Klass and the attempted murder (Pen. Code, §§ 664, 187) of Officer James Van Pelt. The court fixed the punishment for the murder at life imprisonment. In this appeal defendant contends that the evidence is insufficient to sustain the verdict of first degree murder and that the trial court gave erroneous and incomplete instructions. We conclude that the judgment must be reversed.

Answers to Review Questions
Chapter 6

1. If a “red light” camera photographed your license plate, but failed to record your face, would you still be liable for the citation? What would your options be?
A. Since these are essentially strict liability crimes, the prosecutor is not required to present any evidence to establish your responsibility, you are presumed responsible unless you appear in court and establish that someone else was driving your car.

2. Would failure to follow the jury instructions from CALJIC harm a case?
A. Yes, it could, particularly on appeal.

3. If you were drag racing with a friend, and a pedestrian was run over by him, would you be liable?
A. Yes, you would be liable also… under the proximate cause rule.

4. Give an example of vicarious liability in your workplace.
A. While subjective, the student should be able to identify one or two issues; failure to train, supervise, or safety violations, etc.

5. Define the key differences between an “accomplice” and an “accessory” to a crime?
A. an accomplice is treated the same as a principal, as they help in aiding and abetting a crime. An accessory only occurs after a felony occurs, when the accessory helps a principal or accomplice, hide, escape, etc., from the police. The accessory must also know that the person is wanted by the police and trying to evade arrest and prosecution.