THE CALIFORNIA SUPREME COURT AND THE FELONY MURDER RULE:

A Sisyphean Challenge?

MIGUEL A. MÉNDEZ*

INTRODUCTION

This article examines the California Supreme Court's major encounters with the felony murder rule. In its unvarnished version, this rule allows a prosecutor to convict a defendant of murder without having to prove the mental states of murder as defined in the California Penal Code. The prosecutor, however, must prove that the homicide occurred during the commission or attempted commission of a felony. As will be explained, under California law the homicide will constitute first degree murder if the felony underlying the homicide is among the felonies enumerated in Section 189 of the Penal Code.[1] It will constitute second degree murder if the underlying felony is not among those felonies.

To appreciate the effects of the felony murder rule, it is necessary to understand how California law defines and punishes various homicides.

---

* Professor of Law and Martin Luther King. Jr. Scholar, UC Davis School of Law; Adelbert H. Sweet Professor of Law, Emeritus, Stanford University. I want to thank my colleagues, Floyd Feeney, Elizabeth Joh, Donna Shestowsky, and Robert Weisberg, for their helpful comments. I alone, however, am responsible for any errors.

1 *See* California Penal Code § 189 (West's 2010 Desktop Edition) [hereinafter Cal. Penal Code].

Part A provides this overview. Differentiating among the various homicides in turn requires an understanding of different homicidal mental states. Part B presents the classification of different homicidal mental states. Part C introduces the core doctrine surrounding the felony murder rule in California. It is followed by Part D which describes the major limitations the California Supreme Court has imposed on the doctrine. Part E traces the statutory roots of the second degree felony murder rule, as described by the California Supreme Court. Part F examines potential problems with the Court's explanation of the rule's roots. Part G explores the Court's construction of the Penal Code provisions setting out the first degree felony murder rule and questions whether it was necessary for the Court to rely on legislative history in construing the provisions. Part H presents a critique of the Court's felony murder jurisprudence by examining the felony murder rule's place in California's law of murder. Part I attempts to shed some light on why the Court has taken extraordinary measures to preserve the felony murder rule and concludes with a call on the California Legislature to reconsider the wisdom of retaining the rule.

A. AN OVERVIEW OF HOMICIDE IN CALIFORNIA

As a review of any standard criminal law casebook will attest, homicide is considered the most "graded" offense. This means that both the Common Law and statutory treatment of homicide focuses on the circumstances that differentiate one form of homicide (e.g., murder) from another (e.g., negligent homicide). Since the harm is the same in all cases — the death of a human being — the judicial and statutory focus has been on the mental state of the offender. If the offender, for example, intended to bring about the death of the victim, the offender will be deemed guilty of murder;[2] if on the other hand, the offender did not even contemplate the death of the victim, the offender may be guilty only of negligent homicide.[3]

---

[2] *See, e.g.,* California Penal Code §§ 187-188. That would be the case unless, of course, the offender acted within the parameters of such doctrines as self-defense or defense of others, *see, e.g.,* Cal. Penal Code § 197(1), or heat of passion. *See* Cal. Penal Code § 192(a).

[3] *See* Cal. Penal Code § 192(b).

The mental state is determinative not only of the kind of homicide of which the offender may be convicted, but also of the severity of the punishment imposed for that type of homicide. In California, where the crime of murder is divided into degrees, first degree murder is punishable by death, imprisonment for life without possibility of parole, or imprisonment for a term of twenty-five years.[4] Second degree murder, on the other hand, is generally punishable only by a term of fifteen years to life.[5] The lesser homicides are punished even less severely. Voluntary manslaughter is punishable by a term of three, six, or eleven years,[6] and involuntary manslaughter (California's equivalent of negligent homicide), by a term of two, three or four years.[7]

As these punishments suggest, blameworthiness plays a critical role in the definition of, and punishment for, a particular homicide. The greater the offender's indifference to the value of human life, the greater the likelihood that the offender will be charged with a more serious homicide. The most blameworthy are those who choose to kill after considering the "pros" and "cons" of taking human life. This position is reflected in California's first degree murder statute which defines a "willful, deliberate, and premeditated" killing as first degree murder.[8] As the standard instruction tells California jurors, a homicide is "deliberate" if it is the "result of careful thought and weighing of the considerations for and against the proposed [homicidal] course of action."[9]

Negligent homicide is at the other end of the blameworthiness spectrum. An offender can be convicted of this offense even if the offender was unaware that his or her course of conduct posed a substantial risk of death to others. Even if the offender, for example, mistakenly believed that the gun he or she fired was empty, the offender can still be convicted of negligent homicide if the jury believes that a reasonable person under similar circumstances would have been aware of a substantial risk that the gun might be loaded. As the standard instruction emphasizes to California

4 *See id*. at § 190(a).

5 *Id*.

6 *Id*. at § 193(a).

7 *Id*. at § 193(b).

8 *Id*. at § 189.

9 Cal. Jury Instructions, Criminal 8.20 (Spring 2010 ed.) [hereinafter CALJIC].

jurors, the test is not "what the defendant actually intended, but what a person of reasonable and ordinary prudence would have expected likely to occur."[10]

In California, second degree murder embraces one of two mental states. As in the case of first degree murder, one is the desire to take the life of the victim but without the deliberation required for first degree murder.[11] The other mental state requires proof that the offender was at least aware that his or her conduct posed a substantial risk of death to others but despite that awareness chose to run the risk.[12] Evidence that the offender did not intend to kill does not excuse. The gravamen of the offense is the conscious creation of homicidal risks that lamentably materialize.[13] A classic example in California is the drunk driver who chooses to continue drinking even though he is aware of the homicidal risk he may pose to others if he attempts to drive home. Regrettably, he kills another driver on the way home, although at the time he chose to drink and drive he may have very much hoped that he would not.[14]

In California, voluntary manslaughter is defined as an unlawful killing without malice "upon a sudden quarrel or heat of passion."[15] Like second degree murder, it can embrace one of two mental states: a desire to bring about the death of the victim (purpose) or conscious creation and disregard of a homicidal risk (recklessness). As a doctrinal matter, however, the killing is not murder because killings committed under extenuating circumstances (upon a sudden quarrel or heat of passion) are not considered as having been committed with "malice aforethought," the mental state of murder.[16] Defendants charged with murder will be entitled to voluntary

---

10 *Id.* at 8.46.

11 As stated in California Penal Code § 188, "a deliberate intention unlawfully to take away the life of a fellow creature." *See* Cal. Penal Code § 188. This is known in California as "express malice."

12 As stated in California Penal Code § 188, "when the circumstances attending the killing show an abandoned and malignant heart." *See id.* This is known in California as "implied malice."

13 *See id.*

14 *See, e.g.,* People v. Watson, 30 Cal.3d 290, 300, 637 P.2d 279, 285, 179 Cal.Rptr. 43, 49 (1981).

15 *See* Cal. Penal Code § 192(a).

16 A homicide committed upon a sudden quarrel or heat of passion is by definition not a malicious killing. *See id.*

manslaughter instructions if they introduce evidence from which a reasonable jury could find that at the time they killed, their reason, due to some provocation, was obscured to the degree that they acted rashly and without deliberation or reflection.[17] The classic example is the husband who admits killing his spouse upon learning about her infidelity.[18] But to convict the defendant of the lesser homicide, it is not enough for the jury to accept the defendant's explanation. To place limits on the offense of voluntary manslaughter, the jury must also find that the provocation would have moved a reasonable person of average disposition to lose his or her self-control and act rashly in similar circumstances.[19]

Although this overview of homicide in California omits important details, it suffices for our purpose. Homicide is a highly nuanced concept. Whether one who kills is guilty of a particular homicide depends on whether the offender harbored the mental state or states associated with that homicide. Moreover, whether one is sentenced to a term of years, life, or even death for the homicide is a function of the mental state. Mental states requiring proof of a greater indifference to the value of human life describe the most blameworthy offenders and call for the heaviest punishments. Indeed, the justification for imposing the most severe penalties rests squarely on the moral principle that those who show the least regard for the value of human life deserve the least mercy. As we shall see, this approach to moral accountability contrasts sharply with the justifications advanced for another form of murder: felony murder.

B. CLASSIFICATION OF HOMICIDAL MENTAL STATES

It was not until the advent of the American Law Institute's Model Penal Code that clarity was brought to American criminal mental states. Prior to the promulgation of the Model Penal Code by the American Law Institute

---

17 *See* CALJIC 8.42.

18 *See, e.g.,* People v. Berry, 18 Cal.3d 509, 556 P.2d 777, 134 Cal.Rptr. 415 (1976).

19 *See* CALJIC 8.42. In addition, the jury must find that a reasonable person, even if provoked to kill, would not have "cooled off" by the time the defendant killed. If a reasonable person would have cooled off by then, the jury should return a murder conviction. *See* CALJIC 8.43.

in 1962, legislatures and especially courts struggled with the definition of such vague Common Law terms as "intent," "mens rea," "scienter," "recklessness," "willfulness," and "wantonness." All of these terms (as well as others) were designed to signal the existence of a discrete mental state, but none succeeded in defining the mental states with sufficient particularity to allow legislators and judges to distinguish one mental state from another.[20] States that have relied on the Model Penal Code to reform their Common Law penal codes have been able to eliminate much of the uncertainty and confusion engendered by the Common Law terms. Unfortunately, California is among a minority of states that have opted to retain the Common Law approach to culpable mental states.[21]

Although the current California Penal Code was enacted by the legislature in 1872,[22] it is nonetheless the product of Common Law jurisprudence. Strong evidence of its Common Law roots can be found in the provisions relating to homicide. The various homicides are not couched in the contemporary English associated with the Model Penal Code but with the terms first devised by the English Common Law judges. Murder, for example, is defined as "the unlawful killing of a human being, or a fetus, with malice aforethought."[23]

> Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.[24]

To the modern reader, the definition of malice — the mental state that sets murder apart from the lesser homicides — is not particularly helpful.

---

20 For an extended discussion of how the Model Penal Code solves many of the problems stemming from the use of Common Law mens rea terms, *see* M. Méndez, *A Sisyphean Task: The Common Law Approach to Mens Rea*, 28 Davis L. Rev. 407 (Winter 1995).

21 According to Professor Phillip Johnson, about half of the states have revised their penal codes since 1962, and the Model Penal Code played a significant role in the drafting of the revised provisions. *See* P. Johnson, Criminal Law 69 (West 6th ed. 2000).

22 *See* Cal. Penal Code § 2.

23 *Id.* at § 187(a).

24 *Id.* at § 188.

Although express malice denotes a desire to take human life, the definition of implied malice is hopelessly obscure. In particular, a modern reader cannot fathom the mental state conjured by a killer who acts with "an abandoned and malignant heart." In *People v. Watson,*[25] the California Supreme Court brought some clarity to this aspect of implied malice:

> We have said that second degree murder based on implied malice has been committed when a person does "'an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life . . . .'" (*People v. Sedeno*, supra, 10 Cal.3d at p. 719, quoting from *People v. Phillips,* supra, 64 Cal.2d 574, 587.) Phrased in a different way, malice may be implied when defendant does an act with a high probability that it will result in death and does it with a base antisocial motive and with a wanton disregard for human life. (*People v. Washington* (1965) 62 Cal.2d 777, 782 [44 Cal.Rptr. 442, 402 P.2d 130].)[26]

In Model Penal Code terms, the killer who acts with express malice acts purposely;[27] his conscious object is to kill the victim.[28] The killer who acts with implied malice acts recklessly;[29] he consciously disregards a substantial risk that his conduct might result in the death of another human.[30] He might also be acting knowingly if he is aware that it is practically certain that his conduct will result in the death of another human.[31]

The California Penal Code's reference to the absence of a considerable provocation can be understood only in relation to the crime of voluntary manslaughter. As has been noted, the Penal Code defines voluntary manslaughter as "the unlawful killing of a human being without malice . . . upon a sudden quarrel or heat of passion."[32] For many years, the

---

25 30 Cal.3d 290, 637 P.2d 279, 179 Cal.Rptr. 43 (1981).

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

27 *See* MPC § 2.02(2)(a).

28 *See id.*

29 *See* MPC § 2.02(2)(c).

30 *See id.*

31 *See* MPC § 2.02(2)(b).

32 Cal. Penal Code § 192(a).

California courts construed this provision as applying only to intentional killings where the accused claimed he was provoked to kill. In People v. Lasko,[33] the California Supreme Court extended the provision to include the provoked killer who kills only with a conscious disregard for the life of the deceased.[34] As the Court correctly noted, under the statutory scheme for murder and manslaughter, there is no malice — either express or implied — when the accused kills upon a sudden quarrel or in the heat of passion.[35] If as a doctrinal matter the presence of provocation necessarily displaces express malice when the killer kills intentionally, it necessarily displaces implied malice when the killer kills recklessly.

Of particular relevance to this article, the Court cited the anomalous result that would ensue if it held that the doctrine of provocation displaced only express malice:

> Under the Attorney General's approach, one who shoots and kills another in the heat of passion and with the intent to kill is guilty only of voluntary manslaughter, yet one who shoots and kills another in the heat of passion and with conscious disregard for life but with the intent merely to injure, a less culpable mental state than intent to kill, is guilty of murder. This cannot be, and is not, the law.[36]

Although California is a Common Law state, the Court's sensitivity to different degrees of culpability is the key to understanding the Model Penal Code's mental states. Under the Model Penal Code, criminal homicide can be murder, manslaughter, or negligent homicide.[37] Criminal homicide is murder when it is committed purposely or knowingly,[38] or recklessly under circumstances manifesting an extreme indifference to the value of human life.[39] Criminal homicide is manslaughter when it is committed merely recklessly,[40] or when a homicide that would otherwise be murder is

---

33 23 Cal.4th 101, 999 P.2d 666, 96 Cal.Rptr.2d 441 (2000).

34 *See* i*d*. at 109, 999 P.2d at 671, 96 Cal.Rptr.2d at 446.

35 *See id*.

36 *Id*.

37 *See* MPC § 210.1.

38 *See* MPC § 210,2(1)(a),

39 *See* MPC § 210.2(1)(b).

40 *See* MPC § 210.3(1)(a).

committed under the influence of an extreme mental or emotional disturbance for which there is a reasonable explanation or excuse.[41] This is the Model Penal Code's equivalent of the California's voluntary manslaughter doctrine. Criminal homicide is negligent homicide when it is committed negligently.[42] In Common Law jurisdictions such as California, this offense is known as involuntary manslaughter.[43]

As one would expect, under the Model Penal Code murder is punished more heavily than manslaughter, and manslaughter is punished more heavily than negligent homicide.[44] This hierarchy stems from the Code's recognition that only the most blameworthy should be punished as murderers: those whose conscious object is to kill (purposeful killers);[45] those who are practically certain that their misconduct will result in death (knowing killers),[46] and those who persist in their misconduct even though they are substantially certain that it will result in death (extremely reckless killers).[47] What all three killers share is a mental state that evinces an extreme indifference to the value of human life. Those who merely disregard a substantial risk that death might ensue from their conduct are guilty only of manslaughter.[48] Those who fail to appreciate a homicidal risk that would have been apparent to reasonable persons are guilty only of negligent homicide.[49]

---

41 *See* MPC § 210.3(1)(b).

42 *See* MPC § 210.4(1).

43 *See* Cal. Penal Code § 192(b).

44 Under the Model Penal Code, murder is a felony of the first degree, manslaughter is a felony of the second degree, and negligent homicide is a felony of the third degree. *See* MPC §§ 210.2(2), 210,3(2), and 210.4(2). Section 6.06 provides that a person who has been convicted of a felony may be sentenced to prison as follows: "(1) in the case of a felony of the first degree, for a term the minimum of which shall be fixed by the Court at not less than one year nor more than ten years, and the maximum of which shall be life imprisonment; (2) in the case of a felony of the second degree, for a term the minimum of which shall be fixed by the Court at not less than one year nor more than three years, and the maximum of which shall be ten years; (3) in the case of a felony of the third degree, for a term the minimum of which shall be fixed by the Court at not less than one year nor more than two years, and the maximum of which shall be five years."

45 *See* MPC § 2.02.(2)(a)(i).

46 *See* MPC § 2.02.(2)(b)(ii).

47 *See* People v. Register, 60 N.Y.2d 270, 285, 457 N.E.2d 704, 712, 469 N.Y.S.2d 599, 607 (1983) (Jasen, J. dissenting).

48 *See* MPC § 2.02.(2(c).

49 *See* MPC § 2.02.(2)(d).

The Model Penal Code's mental state hierarchy has another important dimension, an evidential one, which is germane to this article.

> When the law provides that negligence suffices to establish an element of an offense, such element also is established if a person acts purposely, knowingly, or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.[50]

Proof of a higher mental state, such as purpose, necessarily entails proof of a lower mental state, such as knowledge. With regard to murder, proof that the accused's conscious object was to kill the victim (purpose) necessarily proves that the accused was practically certain that his conduct would result in the victim's death (knowledge). Proof that the accused was practically certain that his conduct would result in the victim's death necessarily proves that he was substantially certain that death might result from his conduct (extreme recklessness). Whether all three mental states are sufficiently blameworthy to justify a murder conviction is, of course, a policy question for the legislature. The American Law Institute concluded that any of the three justify such a conviction. On the other hand, by adhering to the Common Law tradition, the California Legislature has declared that only one of two mental states justifies a murder conviction: express malice (purpose) or implied malice (a form of recklessness). In the absence of one of the necessary mental states, one would expect a defendant accused of murder to be acquitted. That, however, is not the case in California.

C. THE FELONY MURDER RULE: THE CORE DOCTRINE

One of the very few things that can be said with certainty about the felony murder rule is that it is mired in controversy. Even its origin has been questioned. In a landmark opinion abolishing the felony murder rule, the Michigan Supreme Court, after reviewing the authorities recounting the origin of the rule, concluded its examination by noting:

---

50 MPC § 2.02(5).

> [T]he doctrine is of doubtful origin. Derived from the misinterpretation of case law, it went unchallenged because of circumstances which no longer exist. The doctrine was continuously modified and restricted in England, the country of its birth, until its ultimate rejection by Parliament in 1957.[51]

Two other observations can be made about the rule with confidence. First, most of the opposition to the rule has come from courts, not legislatures, which have imposed various limitations on the operation of the rule.[52] As we shall see, the California Supreme Court has been no exception. Second, the California felony murder rule, as construed by the courts, establishes a strict liability offense with respect to the death element. The clearest statement of the rule can perhaps be found in *People v. Stamp*.[53]

> Under the felony-murder rule of section 189 of the Penal Code, a killing committed in either the perpetration of or an attempt to perpetrate robbery is murder of the first degree. This is true whether the killing is willful, deliberate and premeditated, or merely accidental or unintentional, and whether or not the killing is planned as a part of the commission of the robbery. . . .
>
> The doctrine is not limited to those deaths which are foreseeable. . . . Rather a felon is held strictly liable for all killings committed by him or his accomplices in the course of the felony. . . . As long as the homicide is the direct causal result of the robbery, the felony-murder rule applies whether or not the death was a natural or probable consequence of the robbery. So long as a victim's predisposing physical condition, regardless of its cause, is not the only substantial factor bringing about his death, that condition, and the robber's ignorance of it, in no way destroys the robber's criminal responsibility for the death. . . . So long as life is shortened as a result of the felonious act, it does not matter that the victim might have died soon anyway. . . . In this respect, the robber takes his victim as he finds him.[54]

---

51 People v. Aaron, 09 Mich. 672, 698, 299 N.W.2d 304, 312 (1980).

52 *See id.*

53 2 Cal.App.3d 203, 82 Cal.Rptr. 598 (1969).

54 *Id.* at 209-210, 82 Cal.Rptr. at 602-603.

The facts of *Stamp* are compelling. Stamp and an accomplice entered a business with the intent of robbing the employees. Stamp, who was armed with a gun, had the owner (Honeyman) lie down with the rest of the employees while Stamp and his accomplice took their money.

> As the robbers, who had been on the premises 10 to 15 minutes, were leaving, they told the victims to remain on the floor for five minutes so that no one would "get hurt."
>
> Honeyman, who had been lying next to the counter, had to use it to steady himself in getting up off the floor. Still pale, he was short of breath, sucking air, and pounding and rubbing his chest. As he walked down the hall, in an unsteady manner, still breathing hard and rubbing his chest, he said he was having trouble "keeping the pounding down inside" and that his heart was "pumping too fast for him." A few minutes later, although still looking very upset, shaking, wiping his forehead and rubbing his chest, he was able to walk in a steady manner into an employee's office. When the police arrived, almost immediately thereafter, he told them he was not feeling very well and that he had a pain in his chest. About two minutes later, which was 15 to 20 minutes after the robbery had occurred, he collapsed on the floor. At 11:25 he was pronounced dead on arrival at the hospital. The coroner's report listed the immediate cause of death as heart attack.
>
> The employees noted that during the hours before the robbery Honeyman had appeared to be in normal health and good spirits. The victim was an obese, sixty-year-old man, with a history of heart disease, who was under a great deal of pressure due to the intensely competitive nature of his business. Additionally, he did not take good care of his heart.
>
> Three doctors, including the autopsy surgeon, Honeyman's physician, and a professor of cardiology from U.C.L.A., testified that although Honeyman had an advanced case of atherosclerosis, a progressive and ultimately fatal disease, there must have been some immediate upset to his system which precipitated the attack. It was their conclusion in response to a hypothetical question that but for the robbery there would have been no fatal seizure at that time. The fright induced by the robbery was too much of a shock to

> Honeyman's system. There was opposing expert testimony to the effect that it could not be said with reasonable medical certainty that fright could ever be fatal.[55]

The court affirmed the first degree murder convictions of Stamp and his accomplice. The court also affirmed the first degree murder conviction of an additional accomplice, the getaway driver, who never entered the business. Setting aside the matter of accomplice liability, it is clear from an analysis of *Stamp* that (as the court pointed out) the death element of the offense is predicated on strict liability. To survive a defense motion for a directed verdict, all the prosecution needs to do is offer evidence from which a reasonable jury could find (1) the actus reus of the underlying felony plus a death, (2) the mens rea of the underlying felony, and (3) the most basic causal connection between the commission or attempted commission of the underlying felony and the death. If it discharges this production burden, the prosecution will be entitled to have the judge instruct the jury on felony murder even if it fails to offer any evidence of the mental states associated with the homicides that have been discussed (i.e., purpose, recklessness, or negligence). Thus, the availability of the rule allows the prosecution to dispense with the requirement of producing evidence of express or implied malice or even negligence with respect to the death element.

Such a dispensation for an offense as serious as murder is surprisng given our law's commitment to the principle that, as a rule, harms should not be punishable unless accompanied by a culpable mental state. As Justice Robert Jackson observed almost sixty years ago:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public

[55] *Id*. at 208, 82 Cal.Rptr. at 601.

> prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will."[56]

D. JUDICIAL LIMITATIONS

Divorcing harms from what otherwise would be the associated mental state undermines the moral basis (a blameworthy mental state) that justifies the imposition of punishment. Not surprisingly, some state courts have responded to this dilemma by imposing limitations on the felony murder rule. One is to elevate the death element from strict liability to negligence.[57] In these jurisdictions, prosecutors must convince the jurors that the accused either foresaw or should have foreseen the death. The California courts, however, have never imposed this limitation in their construction of the state's felony murder rule. Instead, the California Supreme Court has imposed two other limitations. One, known as the merger doctrine, originally applied to both the first and second degree felony murder rules. As will be explained, it now applies only to the second degree murder rule. The other limitation has applied only to the second degree murder rule. This limitation requires that the felony underlying the murder charge be dangerous to human life in the abstract.

The Dangerous in the Abstract Requirement

In *People v. Ford,*[58] the California Supreme Court restricted the felonies that could support a conviction of second degree murder to those that are "inherently dangerous to human life."[59] As the Court explained in *People v. Williams,*[60] the purpose of the felony-murder rule is to deter felons from killing negligently or accidentally. "This purpose may be well served with

---

56 Morissette v. United States, 342 U.S. 246, 250-251 (1952) (footnotes omitted).

57 *See, e.g.,* State v. Hoang, 242 Kan. 40, 43, 755 P.3d 7, 9 (1988) ("A requirement of the felony murder rule is that the participants could reasonably foresee or expect that a life might be taken in the perpetration of the felony.").

58 60 Cal.2d 772, 388 P.2d 892, 36 Cal.Rptr. 620 (1964).

59 *Id*. at 795, 388 P.2d at 907, 36 Cal.Rptr. at 635.

60 63 Cal.2d 452, 406 P.2d 647, 47 Cal.Rptr. 7, 10 (1965).

respect to felonies such as robbery or burglary, but it has little relevance to a felony which is not inherently dangerous. If the felony is not inherently dangerous it is highly improbable that the potential felon will be deterred; he will not anticipate that any injury or death might arise solely from the fact that he will commit the felony."[61]

As defined by the statute, the felony must carry "a high probability" that death will result.[62] Whether a given felony is dangerous to human life in the abstract is a question of law,[63] and in reaching its decision the court may not take into account the facts giving rise to the felony.[64] The court is limited to a facial analysis of the statute defining the felony, unless the court needs expert help determining whether the commission of the felony as contemplated in the statute poses a high probability of death.[65]

Policy concerns led the California Supreme Court to adopt the "in the abstract" requirement. Allowing the court to consider the evidence giving rise to the felony would inevitably result in a finding that the felony is dangerous to human life. "[T]he existence of the dead victim might appear to lead inexorably to the conclusion that the underlying felony is exceptionally hazardous."[66] Such an analysis would extend the second degree felony murder rule beyond any rational purpose it serves and undermine the traditional requirement that the state prove malice when charging murder.

The Merger Doctrine

In *People v. Ireland*[67] the Court held that the underlying felony must be independent and not an integral part of the homicide.[68] Since most deaths result from some sort of assault, allowing the prosecution to use the assault as the predicate felony would relieve the prosecution from having to prove

---

61 *Id.* at 457 n.4, 406 P.2d at 650 n.4, 47 Cal.Rptr. at 10 n.4.

62 *See* People v. Patterson, 49 Cal.3d 615, 626, 778 P.2d 549, 558, 262 Cal.Rptr. 195, 204 (1989).

63 *See* People v. Williams, 63 Cal.2d 452, 458 n.5, 406 P.2d 647, 650 n.5, 47 Cal. Rptr. 7, 10 n.5 (1965).

64 *See id.*

65 *See, e.g.*, People v. James, 62 Cal.App.4th 244, 259, 74 Cal.Rptr.2d 7, 15 (1998).

66 People v. Burroughs, 35 Cal.3d 824, 830, 678 P.2d 894, 898, 201 Cal.Rptr. 319, 323 (1984).

67 70 Cal.2d 522, 539, 450 P.2d 580, 590, 75 Cal.Rptr. 188, 198 (1969).

68 *Id.*

malice in most homicides.[69] That would undermine California's position, as reflected in the Penal Code, that only those killers who kill with malice aforethought should be treated as murderers. As the California Supreme Court emphasized in *Ireland,* "This kind of bootstrapping finds support neither in logic nor in law."[70]

Ireland involved the second degree felony murder rule because the underlying felony (assault with a deadly weapon) is not among the felonies enumerated in Section 189 of the California Penal Code. Section 189 provides that "[a]ll murder . . . which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206 [torture], 286 [sodomy], 288 [lewd and lascivious conduct], or 289 [forcible acts of sexual penetration] . . . is murder of the first degree."[71]

In *People v. Wilson*[72] the California Supreme Court faced the question whether the *Ireland* limitation should be imposed on one of the felonies (burglary) enumerated in Section 189. Citing *Ireland*, the Court held that a burglary that was committed simply because the defendant entered a building with the intent to assault the victim could not serve as the predicate felony under Section 189.[73] According to the Court, using the burglary as the basis for felony murder would serve no purpose; it would not deter a defendant who enters the structure with the intent to inflict a felonious assault, such as assault with a deadly weapon.[74]

> Here the prosecution sought to apply the felony-murder rule on the theory that the homicide occurred in the course of a burglary, but the only basis for finding a felonious entry is the intent to commit an assault with a deadly weapon. When, as here, the entry would be nonfelonious but for the intent to commit the assault, and the assault is an integral part of the homicide and is included in fact in the offense charged, utilization of the felony-murder rule extends

---

69 *Id.*

70 *Id.*

71 *See* CAL. PENAL CODE § 189.

72 1 Cal.3d 431, 462 P.2d 22, 82 Cal.Rptr. 494 (1969) *overruled by* People v. Farley, 46 Cal.4th 1053, 210 P.3d 361, 96 Cal.Rptr.3d 191 (2009).

73 *Id.* at 440, 462 P.2d at 28, 82 Cal.Rptr. at 499.

74 *Id.*

> that doctrine "beyond any rational function that it is designed to serve." We have heretofore emphasized "that the felony-murder doctrine expresses a highly artificial concept that deserves no extension beyond its required application." (*People v. Phillips* (1966) *supra*, 64 Cal.2d 574, 582, 51 Cal.Rptr. 225, 232, 414 P.2d 353, 360.)
>
> "The purpose of the felony-murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit." (*People v. Washington* (1965) 62 Cal.2d 777, 781, 44 Cal.Rptr. 442, 445, 402 P.2d 130, 133.) Where a person enters a building with an intent to assault his victim with a deadly weapon, he is not deterred by the felony-murder rule. That doctrine can serve its purpose only when applied to a felony independent of the homicide.[75]

In *People v. Farley,*[76] however, the Court overruled *Wilson*, holding that it could not ignore the legislature's clear intention to allow the use of burglary as a predicate felony, even if the defendant committed the burglary by entering the structure with the intent to assault the victim.[77] In sharp contrast to its position in *Ireland* and *Wilson*, the Court in *Farley* found that the felony murder rule serves a rational function after all even in these circumstances:

> First, a person who enters a building with the intent to assault, rather than to kill (in which case the felony-murder rule would be unnecessary), may be deterred by the circumstance that if the victim of the assault dies, the burglar "will be deemed guilty of first degree murder." Second, the circumstance that the degree to which the peril is heightened may vary, depending upon the particular structure in which the assault occurs, does not negate the purpose of deterring assaults and the heightened risks entailed by assaults that are committed within structures. Individuals within any type of structure are in greater peril from those entering the structure with the intent to commit an assault, than are individuals in a public location who are the target of an assault. . . . Victims

---

75 *Id.* at 440, 462 P.2d at 28, 82 Cal.Rptr. at 499-500.

76 46 Cal.4th 1053, 210 P.3d 361, 96 Cal.Rptr.3d 191 (2009).

77 *Id.* at 1118-1120, 210 P.3d at 409-410, 96 Cal.Rptr.3d at 248-249.

> attacked in seclusion have fewer means to escape, and there is a diminished likelihood that the crimes committed against them will be observed or discovered. These risks are present regardless of whether the burglary and assault occur in a home, a tent, or a trailer coach. . . . For these reasons, we reject *Wilson*'s conclusion that no purpose is served by applying the felony-murder doctrine to a burglary premised upon an intent to assault.[78]

The question whether a felony that is not enumerated in Section 189 merges with the homicide has generated its own jurisprudence. An example is Section 246 which punishes discharging a firearm into an occupied dwelling.[79] In *People v. Wesley*[80] two codefendants were charged with murdering the occupant of a dwelling. The evidence showed that the victim was killed when each discharged a firearm at the dwelling. Since the evidence showed that "the homicide and the underlying felony . . . were committed by the same act,"[81] the California Court of Appeal held that *Ireland* barred the use of the underlying felony.

> The discharge of the firearms by the defendants was the means by which the homicide was committed and was in fact an "integral part"' and a "'necessary element"' of the homicide. Under the rule of Ireland and Wilson, the question as to whether the criminal act of committing the two lesser offenses was done with "malice aforethought" should have been left to the jury.[82]

In *People v. Hansen,*[83] however, the California Supreme Court overruled *Wesley*. As in *Wesley*, the defendant in *Hansen* was charged with murder. Also, as in *Wesley*, the evidence in *Hansen* showed that the death resulted from the defendant's discharging a firearm at an inhabited dwelling. The Court, however, rejected *Wesley*'s premise that *Ireland's* "integral part of

---

78 *Id*.

79 CAL. PENAL CODE § 246.

80 10 Cal.App.3d 902, 89 Cal.Rptr. 377 (1970), *disapproved by* People v. Hansen, 9 Cal.4th 300, 885 P.2d 1022, 36 Cal.Rptr.2d 609 (1994), *overruled by* People v. Chun, 45 Cal.4th 1172, 203 P.3d 425, 91 Cal.Rptr.3d 106 (2009).

81 *Id*. at 907, 89 Cal.Rptr. at 380.

82 *Id*.

83 9 Cal.4th 300, 885 P.2d 1022, 36 Cal.Rptr.2d 609 (1994), *overruled by* People v. Chun, 45 Cal.4th 1172, 203 P.3d 425, 91 Cal.Rptr.3d 106 (2009).

the homicide" language constitutes the crucial test in determining the existence of merger.

> Such a test would be inconsistent with the underlying rule that only felonies "inherently dangerous to human life" are sufficiently indicative of a defendant's culpable mens rea to warrant application of the felony-murder rule. (See *People v. Satchell, supra,* 6 Cal.3d 28, 43, 98 Cal.Rptr. 33, 489 P.2d 1361.) The more dangerous the felony, the more likely it is that a death may result directly from the commission of the felony, but resort to the "integral part of the homicide" language would preclude application of the felony-murder rule for those felonies that are most likely to result in death and that are, consequently, the felonies as to which the felony-murder doctrine is most likely to act as a deterrent (because the perpetrator could foresee the great likelihood that death may result, negligently or accidentally).[84]

The Court stressed that permitting the use of Section 246 as the underlying felony would not subvert the legislative policy of insisting on proof of malice for murder in most other cases. "[U]nlike the situation in *People v. Ireland* . . . , application of the felony-murder doctrine in the present context will not have the effect of preclud[ing] the jury from considering the issue of malice aforethought. . . ."[85] The reason, explained the Court, is that "[m]ost homicides do not result from a violation of section 246."[86] In addition, the Court emphasized that allowing the use of Section 246 as the predicate felony would be consistent with the goal of the felony murder rule: "the deterrence of negligent or accidental killings that occur in the course of the commission of dangerous felonies."[87]

In *People v. Robertson,*[88] however, the Court took a different, seemingly inconsistent position. The issue was whether a related statute, Section 246.3, could serve as the predicate felony in applying the second degree felony murder rule. Section 246.3 makes it an offense to discharge a firearm

---

84 *Id*. at 314, 885 P.2d at 1030, 36 Cal.Rptr.2d at 617.

85 *Id*. at 315, 885 P.2d at 1030, 36 Cal.Rptr.2d at 617.

86 *Id*.

87 *Id*.

88 34 Cal.4th 156, , 95 P.3d 872, 17 Cal.Rptr.3d 604 (2004), *overruled by* People v. Chun, 45 Cal.4th 1172, 203 P.3d 425, 91 Cal.Rptr.3d 106 (2009).

"in a grossly negligent manner which could result in injury or death to a person."[89] A facial analysis of the statute suggests that the use of this felony would be barred by *Ireland*. Any death resulting from the commission of the felony would appear to be the outcome of the assaultive conduct contemplated by the statute.[90] Nonetheless, the Court could have affirmed the felony murder conviction on the ground advanced in *Hansen*: most deaths simply do not occur as a result of violating such felonies as Sections 246 and 246.3. Instead, the Court chose to rely on another ground,[91] one the Court announced over thirty years earlier in *People v. Mattison*.[92]

Mattison held that an inherently dangerous felony that would otherwise be barred by *Ireland* can nevertheless qualify as the predicate felony if the offender does not commit the felony "with the intent to commit an injury which would cause death."[93] An example would be selling a beverage laced with methyl alcohol. Methyl alcohol is a poison, and Section 347 of the Penal Code makes it a felony to furnish beverages that contain poisons.[94] Since administering a poison is a form of assault, *Ireland* would preclude the use of Section 347 as the predicate felony. But under *Mattison* the felony can still be used if the offender furnishes the beverage not to cause the victim an injury that would cause death but to satisfy the victim's desire for an intoxicating beverage.[95]

---

89 *See* Cal. Penal Code § 246.3.

90 The California Supreme Court has defined an assault as a crime of negligence. *See* People v. Williams, 26 Cal.4th 779, 786-787, 29 P.3d 197, 202-203, 111 Cal.Rptr.2d 114, 120-121 (2001). Accordingly, the fact that gross negligence suffices for liability under Section 246.3 appears to satisfy *Ireland*'s requirement that the conduct contemplated by the statute be assaultive in nature.

91 *See* People v. Robertson, 34 Cal.4th 156, 171, 95 P.3d 872, 881, 17 Cal.Rptr.3d 604, 610 (2004), *overruled by* People v. Chun, 45 Cal.4th 1172, 203 P.3d 425, 91 Cal. Rptr.3d 106 (2009).

92 4 Cal.3d 177, 481 P.2d 193, 93 Cal.Rptr. 185 (1971).

93 *Id.* at 185, 481 P.2d at 198, 93 Cal.Rptr. at 190.

94 *See* Cal. Penal Code § 347.

95 In *Mattison*, the defendant and the victim were inmates in a California prison. The defendant worked as a technician in the prison lab where methyl alcohol was kept. He was known for selling alcohol to inmates. The victim offered to buy the alcohol from him. *See* People v. Mattison, 4 Cal.3d 177, 180, 481 P.2d 193,195, 93 Cal.Rptr. 185, 187 (1971).

In *People v. Chun*[96] the issue was whether another provision of Section 246 could serve as the predicate felony under *Ireland*. Section 246 punishes discharging a firearm at occupied motor vehicles as well as at occupied dwellings.[97] The question in *Chun* was whether discharging a firearm at an occupied motor vehicle could serve as the predicate felony. The Court recognized that its merger jurisprudence had given rise to two tests to determine when *Ireland* does not apply when the commission of the underlying felony involves assaultive conduct: (1) when, as in *Hansen*, the violation of the felony rarely results in death or (2) when, as in *Robertson*, the felon did not intend to commit an injury that would result in death. As the Court acknowledged, the two tests cannot "apply at the same time."[98] Concluding that *Robertson* had implicitly overruled *Hansen*, the Court overruled *Hansen* explicitly.[99]

Determining whether the felon committed the underlying felony without the intent to commit an injury that would cause death requires a factual determination. Although the parties can be counted upon to present evidence on this issue, a crucial question is whether the issue is for the judge or jury to decide. Since the question whether the felony qualifies as a predicate felony has been viewed as one of law, it would seem that the judge, not the jury, would have to make this determination. On the other hand, determining the defendant's intention may require passing on the credibility of the witnesses called on this issue, and questions regarding credibility are generally reserved for the jurors. To avoid resolving these difficulties, including the need for an evidentiary hearing, the Court in *Chun* rewrote the rules for implementing the *Ireland* limitation.

> When the underlying felony is assaultive in nature, such as a violation of section 246 or 246.3, we now conclude that the felony merges with the homicide and cannot be the basis of a felony-murder instruction. An "assaultive" felony is one that involves a threat of immediate violent injury. (See *People v. Chance* (2008) 44 Cal.4th 1164, 1167-1168, 81 Cal.Rptr.3d 723, 189 P.3d 971.) In determining whether a crime merges, the court looks to its elements and not the

---

96 45 Cal.4th 1172, 203 P.3d 425, 91 Cal.Rptr.3d 106 (2009).

97 *See* CAL. PENAL CODE § 246.

98 *Id.* at 1198, 203 P.3d at 442, 91 Cal.Rptr.3d at 126.

99 *See id.* at 1199, 203 P.3d at 442, 91 Cal.Rptr.3d at, 126.

> facts of the case. Accordingly, if the elements of the crime have an assaultive aspect, the crime merges with the underlying homicide even if the elements also include conduct that is not assaultive.[100]

The Court's reference to "conduct that is not assaultive" is another example of the Court's efforts to clear some of the conceptual clutter that surrounds the felony murder rule. In making the merger determination, judges face a challenging task when the statute defines more than one offense, and one involves assaultive conduct but another does not. An example is the statute punishing child abuse by direct assault as well as by neglect.[101] Child abuse by direct assault clearly disqualifies the felony as the predicate under *Ireland*. Child abuse resulting from neglect (e.g., by withholding nutrition) may not. After *Chun*, the task of judges is simplified. They may not allow a prosecutor to use a felony that is inherently dangerous to human life as long as one of its provisions contemplates injury resulting from assaultive conduct.

Although the Court's efforts to simplify the tasks facing judges is commendable, uncertainty still surrounds even this aspect of the second degree felony murder rule. The Court left for another day the question of which "felonies are assaultive in nature, and hence may not form the basis of a felony-murder instruction, and which are inherently collateral to the resulting homicide and do not merge."[102]

Those who share the Court's skepticism about the value of the felony murder rule will applaud the Court's efforts to rein in the second degree felony murder rule. But a more intriguing question is whether California has such a rule in the first place. The Penal Code does not contain a provision explicitly referring to or defining second degree felony murder.

The only provision of the Penal Code that comes close to defining felony murder is Section 189. As has been stated, it provides in pertinent part that "[a]ll murder . . . which is committed in the perpetration of, or attempt to perpetrate, [enumerated felonies] is murder of the first degree."[103] But neither this section nor any other expressly refers to second degree felony

---

100 *Id*. at 1200, 203 P.3d at 443, 91 Cal.Rptr.3d at 127.

101 *See* Cal. Penal Code § 273a(a).

102 *See* People v. Chun, 45 Cal.4th 1172, 1200, 203 P.3d 425, 443, 91 Cal.Rptr.3d 106, 128 (2009).

103 Cal. Penal Code § 189.

murder. Occasionally, the omission has led some members of the Court to question its authority to define second degree felony murder. Justice Panelli has been among the most forceful in questioning the Court's authority.

> There are, or at least should be, no nonstatutory crimes in this state. *(In re Brown* (1973) 9 Cal.3d 612, 624, 108 Cal.Rptr. 465, 510 P.2d 1017; see Pen.Code, § 6.) The second degree felony-murder rule, however, either creates a nonstatutory crime or increases the punishment for statutory crimes beyond that established by the Legislature. We derive such authority neither from the Constitution (see Cal. Const., art. III, § 3) nor from the Penal Code. (See Pen.Code, §§ 6, 12, 13, 15.)
>
> My uneasiness with the second degree felony-murder rule is mirrored in the majority's adoption of the new "high probability of death" standard, which certainly will restrict the rule's future application. . . . It may also be reflected in how often the majority mentions that the Legislature has failed to act. . . . Today the majority expressly relies on that failure as a justification for continuing to "determine the scope" of this anomalous common law crime. . . . But in view of the Legislature's long-standing declaration that "[n]o act or omission . . . is criminal or punishable, except as prescribed or authorized by [the Penal Code]" (Pen.Code, § 6), I question whether subsequent legislative inaction is a sufficient justification.
>
> In short, I am not quite convinced that the second degree felony-murder rule stands on solid constitutional ground. Since the rule permits a court to increase the punishment for certain dangerous crimes, the temptation to invoke it is great when we are facing the type of social crisis that illegal drugs have brought upon us. While I am aware of the crisis, nevertheless, I respectfully suggest that it is the Legislature that has the resources and constitutional authority to determine and define what conduct is criminal and to set the punishment for such crimes.[104]

[104] People v. Patterson, 49 Cal.3d 615, 641, 778 P.2d 549, 568, 262 Cal.Rptr. 195, 214 (1989) (Panelli, J. dissenting).

Twenty years after Justice Panelli's criticism, the Court responded to his concerns. In *People v. Chun,*[105] the Court held that it was the legislature's intent to embody the second degree felony murder doctrine in the term "abandoned and malignant heart."[106]

E. SECOND DEGREE FELONY MURDER: AN EXERCISE IN IMAGINATIVE STATUTORY CONSTRUCTION

A rich imagination helps when construing a statute that makes no express reference to the doctrine that is the focus of the inquiry. The fact is that the California Penal Code does not contain the term "felony murder," much less "second degree felony murder." The only reference to the felony murder doctrine is Section 189's specification that only murder committed in the perpetration or attempted perpetration of enumerated felonies is murder of the first degree.[107] But as we shall see, even with respect to first degree felony murder, it is questionable whether Section 189 creates the offense of felony murder as a matter of statutory interpretation.

The problem, however, is more acute with regard to second degree felony murder. As a matter of plain English, the term "abandoned and malignant heart" provides no hint whatever that it embodies the second degree felony murder rule. How, then, did the Court conclude that the term includes the rule? By taking full advantage of its very vagueness.

The term is unquestionably of Common Law origin and was adopted by the English judges to denote a mental state for murder where the killer did not intend to bring about the death of the victim.[108] If the offender intended to bring about the victim's death, then he was guilty of express malice murder. But if he did not intend to bring about the victim's death, he was guilty of implied malice murder.[109] In terms of punishment, however, whether one was guilty of express or implied malice murder was immaterial. The punishment for either form of murder was the same.

---

105 45 Cal.4th 1172, 203 P.3d 425, 91 Cal.Rptr.3d 106 (2009).

106 *See id.* at 1184, 203 P.3d at 431, 91 Cal.Rptr.3d at 113-114.

107 *See* CAL. PENAL CODE § 189.

108 *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 7.1 at 605-606 (West 2d. ed. 1986).

109 *See id.*

The debate at Common Law was whether the murderer who acts with implied malice had to be aware of the homicidal risk his conduct posed. "The English judge and criminal law historian Stephen took the view that one should not be guilty of murder of this type unless he was aware of the risk. Justice Holmes, on the other hand, thought he should be guilty of murder if a reasonable man would have realized the risk, regardless of whether he himself actually realized it."[110] The California Supreme Court sided with Stephen. In *People v. Watson*[111] it held that "malice may be implied when a person, knowing that his conduct endangers the life of another, nonetheless acts deliberately with conscious disregard for life."[112] Today, the standard jury instruction tells the jurors that malice may be implied when "1. The killing resulted from an intentional act; 2. The natural consequences of the act are dangerous to human life; and 3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life."[113]

Since implied malice is concerned with the conscious creation of homicidal risks, how did the Court conclude that the term includes the second degree felony murder doctrine? By relying on a cryptic note by the commissioners who drafted the 1872 penal code and an early case of dubious authority.

The Court began with an analysis of Section 19 of California's first penal code enacted in 1850.[114] Section 19 defined murder "as the unlawful killing of a human being, with malice aforethought, either express or implied."[115] Section 21 provided that "[m]alice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart."[116]

As is evident, Sections 19 and 21 of the 1850 code are identical to Sections 187 and 188 of the current penal code. The 1850 code, however,

110 *See id.* § 7.4 at 620 (West 2d. ed. 1986) (footnotes omitted).

111 30 Cal.3d 290, 637 P.2d 279, 179 Cal.Rptr. 43 (1989).

112 *Id.* at 296, 637 P.2d at 282, 179 Cal.Rptr. at 47.

113 *See* CALJIC 8.11.

114 People v. Chun, 45 Cal.4th 1172, at 1184, 203 P.3d 425, 432, 91 Cal.Rptr.3d 106, 114 (2009).

115 *Id.*

116 *Id.*

contained one provision that differs from the current penal code. Section 25 provided as follows:

> Involuntary manslaughter shall consist in the killing of a human being, without any intent so to do; in the commission of an unlawful act, which probably might produce such a consequence in an unlawful manner; *Provided* that where such involuntary killing shall happen in the commission of an unlawful act, which in its consequences naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged to be murder.[117]

The current code's closest approximation to Section 25 is Section 192, which in pertinent part provides as follows:

> Manslaughter is the unlawful killing of a human being without malice. It is of three kinds: (a) Voluntary — upon a sudden quarrel or heat of passion. (b) Involuntary — in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.[118]

Both Section 21 and current Section 187 contain the language "when no considerable provocation appears."[119] As has been noted, the language of Section 187 should be read in connection with Section 192(a).[120] Such a reading reveals the legislature's intention to exempt some intentional and reckless homicides from the operation of the murder statutes. If these homicides are committed upon a sudden quarrel or in the heat of passion, they constitute the lesser homicide of voluntary manslaughter, not murder.[121]

Section 192(b) defines two offenses. The language "in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection" refers to negligent homicide, which in California is a form of involuntary manslaughter. The gravamen of the offense is that the accused is guilty even if he was unaware of the

117 *Id.* at 1185, 203 P.3d at 432, 91 Cal.Rptr.3d at 114 (italics in the original).

118 Cal. Penal Code § 192(a)-(b).

119 *Compare* Section 21 *with* Cal. Penal Code § 188.

120 *See* text accompanying note 32 *supra*.

121 *See* Cal. Penal Code § 192(a).

homicidal risk if a reasonable person in similar circumstances would have been aware of it.[122]

The language "in the commission of an unlawful act, not amounting to felony" refers to the misdemeanor manslaughter rule, although in California it should be called the "the unlawful act manslaughter rule." Under this doctrine, defendants who kill while committing some misdemeanor or other unlawful act not amounting to felony are guilty of involuntary manslaughter even if they did not intend to kill the victim or were unaware that their conduct posed a homicidal risk.[123] Although no mental state attaches to the death element, the California Supreme Court requires the prosecution to prove that the accused committed the underlying unlawful act in a manner that endangers human life.[124]

Since both old Section 25 and current Section 192 embody the unlawful act manslaughter rule, the key difference between the two is that Section 25 defined as murder a homicide that "is committed in the prosecution of a felonious intent. . . ." As the California Supreme Court underscored in *Chun*, the most plausible construction of the language is that the legislature that enacted the 1850 code intended to include the felony murder doctrine.[125] The problem, however, is that the legislature that enacted the 1872 code omitted this language from Section 192 and failed to include it in the provisions defining murder (Sections 187 and 188). As previously discussed, the only reference to felony murder in the 1872 code appears in Section 189 which defines as first degree murder homicides occurring during the commission or attempted commission of enumerated felonies.[126] Limiting the felony murder rule to the commission or attempted commission of specified felonies suggests that the rule cannot be predicated on the commission or attempted commission of other felonies. In short, when the legislature adopted the 1872 penal code, it eliminated second degree felony murder.

---

122 *See* CALJIC 8.45 – 8.46.

123 *See* People v. Cox, 23 Cal.4th 665, 670, 2 P.3d 1189, 1192, 97 Cal.Rptr.2d 647, 650 (2000) and cases cited therein.

124 *Id.*

125 *See* People v. Chun, 45 Cal.4th 1172, 1185, 203 P.3d 425, 432, 91 Cal.Rptr.3d 106, 114 (2009).

126 *See* Cal. Penal Code § 189.

In *Chun*, however, the Court refused to adopt this construction by relying principally on a note to Section 192 prepared by the commissioners who drew up the 1872 Code. The note states that "[t]his section embodies the material portions of Sections 22, 23, 24, and 25 of the Crimes and Punishment Act of 1850."[127] According to the California Supreme Court:

> This latter note strongly indicates that the language change from section 25 of the Act of 1850 to section 192 was not intended to change the law of manslaughter, much less to change the law of murder by abrogating the common law felony-murder rule. Any statute that "embodies the material portions" of predecessor statutes would not change the law in such a substantial manner.[128]

The difficulty with this construction of the note is that new Section 192 retained only the unlawful act manslaughter rule and negligent homicide provisions of old Section 25. It omitted Section 25's reference to felony murder. Moreover, the new sections of the 1872 code defining murder at most retain first degree felony murder and exclude second degree felony murder by omitting Section 25's reference to felony murder.[129]

To bolster its construction of the note, the Court cites felony murder cases decided after the enactment of the 1872 penal code that in turn cite *People v. Doyell*.[130] A felony murder case, *Doyell* arose under the 1850 penal code but was decided after the 1872 code was enacted.[131] It held that "[w]henever one, in doing an act with the design of committing a felony, takes the life of another, even accidentally, this is murder."[132] However, the Court's reliance on *Doyell* is problematical. As the Court itself admits, *Doyell* was construing Section 25.[133] Nonetheless, the Court concluded:

> [T]he Legislature's replacement of the proviso language of section 25 of the Act of 1850 with the shorthand language "not amounting

127 *Reprinted* in People v. Chun, 45 Cal.4th 1172, 1187, 203 P.3d 425, 433, 91 Cal. Rptr.3d 106, 116 (2009).

128 *See* People v. Chun, 45 Cal.4th 1172, 1187, 203 P.3d 425, 433, 91 Cal.Rptr.3d 106, 116 (2009).

129 *See* Cal. Penal Code §§ 187-189.

130 48 Cal. 85 (1874).

131 *Id.* at 86.

132 *Id.* at 94.

133 *See id.*

> to a felony" in section 192 did not imply an abrogation of the common law felony-murder rule. The "abandoned and malignant heart" language of both the original 1850 law and today's section 188 contains within it the common law second degree felony-murder rule. The willingness to commit a felony inherently dangerous to life is a circumstance showing an abandoned and malignant heart. The second degree felony-murder rule is based on statute and, accordingly, stands on firm constitutional ground.[134]

As a federal matter, however, that ground may not be as firm as the Court thinks.

F. SECOND DEGREE FELONY MURDER: INFERENCE v. PRESUMPTION v. VALID EXERCISE OF THE POLICE POWER

As has been discussed, the Court has construed the term "an abandoned and malignant heart" as a mental state characterized by the conscious creation of homicidal risks. "[M]alice," the Court has held, "may be implied when a person, knowing that his conduct endangers the life of another, nonetheless acts deliberately with conscious disregard for life."[135] As an evidentiary matter, a jury can infer that a defendant acted with a conscious disregard for life from evidence that at the time he inflicted the fatal blow he was committing a felony that strikes jurors as inherently dangerous to human life. Take the case of a defendant who is prosecuted for murder because he furnished heroin of an unusually high strength to a victim who died of an overdose. A jury could legally convict him of implied malice murder if it found that he was aware of the substantial homicidal risk the heroin posed to the victim. Even if the prosecution lacked direct evidence that the defendant was aware of the strength of the heroin (through an admission, for example), a jury could infer his knowledge from other evidence, for example, his years dealing dangerous controlled substances, including heroin. Under the California Evidence Code, "An inference is

134 People v. Chun, 45 Cal.4th 1172, 1187, 203 P.3d 425, 434, 91 Cal.Rptr.3d 106, 116 (2009).

135 People v. Watson, 30 Cal.3d 290, 296, 637 P.2d 279, 282, 179 Cal.Rptr. 43, 47 (1989).

a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action."[136] A jury convicting the defendant of implied malice murder would simply be deducing his mental state from the evidence that he was aware of the homicidal risks of using unusually strong heroin as a result of his experience as a drug dealer.

A California appellate court would not reverse the defendant's conviction on the ground that the evidence was insufficient to support the conviction for implied malice murder. In reviewing a sufficiency challenge, the appellate court must view the evidence in the light most favorable to the judgment.[137] If viewing the evidence in this light the court concludes that a reasonable jury could infer the defendant's mental state, the court would have to affirm the judgment.[138] The only federal constitutional limitation on the jury's fact finding in this respect was imposed by the United States Supreme Court in *Barnes v. United States*.[139] As a matter of due process, a judge should not instruct the jurors that they may draw an inference, unless the judge finds that the prosecution's evidence, if believed, could move reasonable jurors to draw the inference.[140] Since the federal constitutional test is the same as the state sufficiency test, the Constitution is hardly a bar to a jury's power to find criminal mental states from circumstantial evidence.

Federal due process concerns are elevated, however, when the jury's fact finding takes the form, not of inferences, but presumptions. This would be the case, for example, if in the case under consideration the judge were to instruct the jurors as follows:

> Evidence has been introduced that the defendant has been a dealer in heroin and other dangerous controlled substances for a number of years. If you find these facts to be true beyond a reasonable doubt, then you must find that the defendant consciously

---

136 Cal. Evid. Code § 600(b).

137 *See*, e.g., People v. Johnson, 26 Cal.3d 557, 577-578, 606 P.2d 738, 750-751, 162 Cal.Rptr. 431, 433-444 (1980).

138 *Id.*

139 412 U.S. 837 (1973).

140 *See id.* at 843.

> disregarded the homicidal risk he posed by furnishing heroin to the victim.[141]

This instruction describes a conclusive presumption.[142] It tells the jurors that if they find one set of facts, they must find another. This kind of presumption violates due process because it relieves the prosecution from having to prove the presumed fact (the accused's mental state) beyond a reasonable doubt, it impermissibly withdraws the issue of the existence of the presumed fact from the jury, and it prevents the defendant from raising a reasonable doubt about the existence of the presumed fact.[143]

In light of these due process considerations, the California Supreme Court's language in *Chun* justifying the second degree felony murder rule is troubling. The Court emphasized that a defendant's "willingness to commit a felony inherently dangerous to life is a circumstance showing an abandoned and malignant heart."[144] Clearly, the Court did not have inferences in mind. If the judge merely instructed the jurors to convict the

---

141 For purposes of this jury instruction, it is assumed that furnishing heroin is a felony inherently dangerous to human life in the abstract and that its use as the predicate felony is not barred by *Ireland*. For an extended discussion of these points, see text accompanying note 58 *supra*.

142 *See* Cal. Evidence Code § 600.

143 *See* Francis v. Franklin, 471 U.S. 307, 313 (1985). *See generally* M. Méndez, Evidence: The California Code and the Federal Rules — A Problem Approach § 18.07 at 707 (Thomson-West 4th ed. 2008).

144 People v. Chun, 45 Cal.4th 1172, 1187, 203 P.3d 425, 434, 91 Cal.Rptr.3d 106, 116 (2009). It is not absolutely clear, however, that the Court necessarily had recklessness with respect to the death element in mind when it observed that the defendant's "willingness to commit a felony inherently dangerous to life is a circumstance showing an abandoned and malignant heart." In its *Chun* opinion, the Court declined to equate the mental state of second degree felony murder with the kind of recklessness called for by the term "abandoned and malignant heart."

> We have said that the "felony-murder rule eliminates the need for proof of malice in connection with a charge of murder, thereby rendering irrelevant the presence or absence of actual malice, both with regard to first degree felony murder and second degree felony murder." [Citations omitted.] But analytically, this is not precisely correct. The felony-murder rule renders irrelevant *conscious-disregard-for-life* malice, but it does not render malice itself irrelevant. Instead, the felony-murder rule "acts as a substitute" for conscious-disregard-for-life malice. [Citations omitted.] It simply describes a different form of malice under section 188. "The felony-murder rule imputes the requisite malice for a murder conviction to those who commit a homicide during

accused of murder only if they found, among other matters, his reckless state of mind beyond a reasonable doubt, the conviction would not rest on the felony murder doctrine.

Instead, the Court appears to be saying that, if believed by the jury, evidence of a defendant's "willingness to commit a felony inherently dangerous to life" is conclusive proof of his awareness and conscious disregard of the homicidal risk.[145] An instruction directing the jurors to find this mental state if they find beyond a reasonable doubt that the defendant displayed a willingness to commit the felony would constitute an impermissible conclusive presumption. Such a dire outcome, if possible, should be avoided.

One way to do so is by returning to the felony murder model. Under the model, the death element at Common Law and in California is predicated on strict liability. It has no mental state.[146] Setting aside the distinction between first and second degree felony murder, to convict someone of felony murder a California prosecutor has to prove only the mens rea and actus reus of the underlying felony, a death, and the most basic ("but for") causal connection between the commission or attempted commission of the felony and the death.[147] Because the death element has no mental state,

---

the perpetration of a felony inherently dangerous to life." (*Hansen, supra*, 9 Cal.4th at p. 308, 36 Cal.Rptr.2d 609, 885 P.2d 1022.)

People v. Chun, 45 Cal.4th 1172, 1184, 203 P.3d 425, 431-432, 91 Cal.Rptr.3d 106, 114 (2009) (italics in the original). The Court, however, fails to specify exactly what mental state is imputed.

145 This is apparently the view of Justice Baxter, who concurred in *Chun*: "Put in terms of the modern definition of implied malice, where one commits a felony inherently dangerous to human life without legal justification or defense, then under operation of the second degree felony-murder rule, a homicide resulting therefrom *is* a killing 'proximately result[ing] from an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.' " *See id*. at 45 Cal.4th at 1209, 203 P.3d at 449, 91 Cal.Rptr.3d 106 at 135. (Baxter, J. concurring and dissenting) (italics in the original; some internal quotation marks omitted).

146 Occasionally, the Court has recognized that no mental state attaches to the death element of the second degree felony murder rule. *See, e.g.,* People v. Patterson, 49 Cal.3d 615, 626, 778 P.2d 549, 557, 262 Cal.Rptr. 195, 203 (1989). The rule "eliminates the need for the prosecution to establish the *mental* component." *Id*. (italics in the original).

147 California has replaced the "but for" causation in fact concept with more elaborate wording, but substantively the concept remains the same, and in the standard jury instruction it is still entitled "The But For Test." *See* CALJIC 3.40.

there is no danger that applying the felony murder rule would relieve the prosecution of having to prove the defendant's recklessness or deprive the defendant of the opportunity to contest the existence of this mental state. The only question is whether California can convict someone of murder without having to prove at least recklessness.

The answer depends on whether California can do so in the exercise of its police powers under the federal Constitution. The answer is "yes." The United States Supreme Court has long held that under the Constitution it is the states, not the federal government, that have plenary power to regulate crime.[148] Unless a state's exercise of its power invades a right or interest protected by the Constitution (e.g., the right of unmarried adults to engage in consensual sex),[149] the Court will generally uphold the state statute.[150] Accordingly, if the California Legislature chooses to permit the mens rea of the underlying felony to suffice for felony murder, it is free to do so.

The only limitation that the United States Supreme Court has imposed on the use of felony murder relates not to conviction of this offense but to its punishment. Under the Eighth Amendment's proscription of cruel and unusual punishments, a state may not impose the death penalty upon a murderer convicted under its felony murder rule, unless it proves that the murderer was at least reckless with respect to the death.[151]

The murder statutes of some states allow for conviction even if the assailant did not intend to kill the victim (express malice) or consciously disregard the homicidal risk to the victim (implied malice), but merely wished to inflict serious bodily injury.[152] None of these statutes has been invalidated on the federal ground that they exceed the state's police powers. The California Supreme Court can thus avoid serious due process claims by jettisoning the fiction that those who commit felonies that are inherently dangerous to

148 *See, e.g.,* Screws v. United States, 325 U.S. 91, 109 (1945) ("Our National government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States.").

149 *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

150 *See id.*

151 *See* Enmund v. Florida, 458 U.S. 782, 797 (1982); *see also* Tyson v. Arizona, 81 U.S. 137, 157 (1987).

152 *See, e.g.,* Section 9-1 of the Illinois Criminal Code, 720 ILCS 5/9-1; *see generally*, W. LAFAVE & A. SCOTT, CRIMINAL LAW § 7.4 at 620 (West 2d ed. 1986).

human life are necessarily aware of the homicidal risks they pose and, instead, emphasize the legislature's goal simply to punish as murderers those who kill while committing or attempting to commit felonies which as a matter of law are inherently dangerous to human life in the abstract.

G. FIRST DEGREE FELONY MURDER

The problem with first degree felony murder in California is not the absence but the *presence* of felony murder language in its penal code. After setting out the actus reus (Section 187) and mens rea (Section 188) of murder, the legislature in Section 189 declares that "[a]ll murder" that is committed in the perpetration or attempted perpetration of enumerated felonies is "murder of the first degree."[153] A plain reading of this provision reveals that it is simply a degree-fixing statute. Murders committed under the enumerated circumstances are murder of the first degree. Under this construction, it is obvious that the state has to prove that the defendant acted with express or implied malice. Unlike second degree felony murder, the death element is not predicated on strict liability — the element requires proof of malice.

A fundamental canon of statutory construction provides that in interpreting a statute a court should not resort to legislative history when the statute is free of any ambiguity and its meaning is plain.[154] Section 189 is neither ambiguous nor is its meaning unclear. Yet, the California Supreme Court declined to apply this most basic rule of statutory construction to this provision. In *People v. Dillon*[155] the Court in effect held that the legislature intended "homicides" not murder when it used the term "murder" in connection with the enumerated felonies. By so holding, the Court rejected the claim that Section 189 was simply a degree-fixing statute and preserved the state's first degree felony murder rule.

How the Court reached this surprising conclusion is worth recounting. The Court began by examining the legislative history of Section 189

153 *See* CAL. PENAL CODE § 189.

154 *See, e.g.*, People v. Farley, 46 Cal.4th 1053, 1118, 210 P.3d 361, 408, 96 Cal. Rptr.3d 191, 248 (2009) (holding that where the statutory language is clear and free of any ambiguities, the court has no authority to impose its own interpretation).

155 34 Cal.3d 441, 668 P.2d 697, 194 Cal.Rptr. 390 (1983).

and explaining why its history showed that Section 189 appeared to be only a degree-fixing provision. The 1850 penal code did not divide murder into first and second degrees. All murder was punishable by death. In 1856 when the legislature amended the code to divide murder into degrees, the new provision provided that only those homicides resulting from the commission or attempted commission of the felonies specified in the amendment were murder of the first degree; homicides resulting from the commission or attempted commission of other felonies remained murder of the second degree. Thus, according to the *Dillon* Court, the 1856 amendment was designed to serve as a degree-fixing provision.[156]

When the legislature replaced the 1850 penal code with the 1872 code, it omitted that portion of Section 25 creating the felony murder rule. According the *Dillon* Court, when the legislature deletes an express provision of a statute, "it is ordinarily to be presumed" that the legislature "intended a substantial change in the law."[157] "Under this principle, the Legislature's decision not to reenact the felony-murder provision of section 25 in the 1872 codification implied an intent to abrogate the common law felony-murder rule that the section had embodied since 1850."[158] Such an abrogation, of course, supports the claim that Section 189 is only a degree-fixing provision.

The *Dillon* Court also noted that, aside from a few grammatical changes, the wording of Section 189 is identical to that of the 1856 amendment. "In these circumstances, the code itself decreed the proper construction of section 189: 'The provisions of this Code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof, and not as new enactments.' (Pen. Code, § 5.)"[159] In other words, the new code itself requires that Section 189 be given the same construction as that of its 1856 predecessor: that of being a degree-fixing provision.

In addition, the *Dillon* Court cited another rule of statutory construction. "[W]hen a statute defines the meaning to be given to one of its terms, that meaning is ordinarily binding on the courts. [Citations omitted.] It is presumed the word was used in the sense specified by the Legislature,

156 *See id.*

157 *Id.* at 467, 668 P.2d at 712, 194 Cal.Rptr. at 405.

158 *Id.*

159 *Id.*

and the statute will be construed accordingly."[160] According to the *Dillon* Court, this rule of statutory construction requires the Court to give to "murder" in Section 189 the meaning specified in Sections 187 and 188.[161] These define "murder" as the killing of a human with malice, either express or implied. To the *Dillon* Court, such a construction means that Section 189 is a degree-fixing provision.[162]

Finally, the *Dillon* Court cited a fourth rule of statutory construction to support the claim that Section 189 is a degree-fixing provision. "[I]t is generally presumed that when a word is used in a particular sense in one part of a statute, it is intended to have the same meaning if it appears in another part of the same statute. [Citations omitted]. This rule would seem to apply a fortiori to section 189, where in a single compound sentence the Legislature used the word 'murder' only once but with two referents . . . : the section defined first degree murder as all 'murder' (1) which is committed by certain listed methods or (2) which is committed during certain listed felonies. As noted above . . . , in the first half of this sentence the word 'murder' means an unlawful killing committed *with malice aforethought;* under the foregoing rule, the same word would have had the same meaning in the second half of the same sentence (i.e., murder during the listed felonies)."[163]

In light of these persuasive arguments, why did the Court nonetheless conclude that Section 189 retains the felony murder rule with regard to the enumerated felonies? By finding that in its note to Section 189 the commissioners who drafted the new penal code mistakenly assumed that its predecessor (the 1856 amendment) created a felony murder rule and not just a degree-fixing provision. According to the Court:

> It no longer matters that the commission may have misread pre-1872 law on this point; what matters is (1) the commission apparently *believed* that its version of section 189 codified the felony-murder rule as to the listed felonies, and (2) the Legislature adopted section 189 in the form proposed by the commission. "When a statute proposed by the California Code Commission for inclusion in the Penal Code of 1872 has been enacted by the

160 *Id.* at 468, 668 P.2d at 712, 194 Cal.Rptr. at 405.

161 *Id.* (italics in the original).

162 *Id.*

163 *Id.* at 468, 668 P.2d at 713, 194 Cal.Rptr. at 406 (italics in the original).

> Legislature without substantial change, the report of the commission is entitled to great weight in construing the statute and in determining the intent of the Legislature." [Citations omitted.] If we assume the 1872 Legislature drew the inferences that the Attorney General now asks us to draw regarding the intent of the commission, the quoted rule compels us to conclude that the Legislature acted with the same intent when it adopted section 189.
>
> Nothing in the ensuing history of section 189 . . . suggests that the Legislature acted with any different intent when it subsequently amended the statute in various respects, most recently in 1981. We infer that the Legislature still believes, as the code commission apparently did in 1872, that section 189 codifies the first degree felony-murder rule. That belief is controlling, regardless of how shaky its historical foundation may be.[164]

In *Chun*, the California Supreme Court took advantage of the vagueness of a term ("abandoned and malignant heart") to infuse it with the second degree felony murder doctrine. In *Dillon*, the Court disregarded the plain meaning of an unambiguous term ("murder") to give it a meaning that not only contravenes its own rules of statutory construction but is based on an admittedly "shaky" historical foundation. In both instances, the Court obviously was trying to preserve the felony murder rule. An intriguing question is why the Court took these extraordinary measures when it has repeatedly expressed serious doubts about the utility and logic of the felony murder rule.[165] We will return to this question after examining the place of the felony murder rule in the California law of murder.

H. THE PLACE OF THE FELONY MURDER RULE IN THE LAW OF MURDER

In the absence of a felony murder rule, California prosecutors would have to prove malice in order to secure a murder conviction. Under California's murder formulation, prosecutors would have to prove express or implied

164 *Id.* at 471, 668 P.2d at 715, 194 Cal.Rptr. 390, at 408 (italics in the original).

165 *See, e.g.*, People v. Phillips, 64 Cal.2d 574, 582-583, 414 P.2d 353, 360, 51 Cal. Rptr. 225, 232) (1966).

malice in connection with the death.[166] Express malice would require them to offer evidence that the accused's purpose was to kill the victim.[167] Implied malice would require them to offer evidence that the accused acted recklessly.[168] As pointed out earlier, recklessness is a compound concept. It involves the creation of substantial and unjustifiable homicidal risks. It also requires proof that the accused appreciated the existence of the risk but chose to disregard it.[169] Obviously, when a felon who does not seek to take human life is engaged in committing a felony that exposes others to a substantial homicidal risk, he will be reckless in the legal sense only if he appreciates and disregards the risk. It is immaterial that he sincerely hopes that no one will be injured, much less killed. He is being punished as a murderer because he engaged in conscious homicidal risk creation: he consciously created and disregarded a homicidal risk that, unfortunately for him and his victim, materialized.

From a moral perspective, a murder conviction is justified if the crime of murder is reserved for those who show an extreme indifference to the value of human life.[170] As has been explained, the killer who is most indifferent to the value of human life is the killer whose object is to take life, that is, the purposeful killer. A killer, who does not wish to take human life, but who persists in a course of conduct he believes is substantially or practically certain to result in death is likewise highly indifferent to the value of human life. This is why reckless killers are treated as murderers under the California Penal Code[171] and by the codes of many other states.[172]

The purpose of the felony murder rule is to extend this moral reprobation to felons who are neither purposeful nor reckless with respect to the death of their victims. The rule elevates what would otherwise be negligent homicides and even non-criminal homicides to murder. This is why

166 *See* Cal. Penal Code §§ 186-187.

167 *See id.*

168 *See id.*

169 *See* text accompanying note 26 *supra*.

170 This is the view of the California Legislature. Murder, depending on its degree, is punishable by a term of years, life imprisonment, and even death. *See* Cal. Penal Code §§ 190-190.2.

171 *See* Cal. Penal Code § 187.

172 *See generally* W. LaFave & A. Scott, Criminal Law § 7.4 at 617 (West 2d ed. 1986); *see also* MPC § 210.2(1).

the California courts have emphasized that the purpose of the rule is to condemn as murderers those who kill negligently or accidentally while committing or attempting to commit specified felonies.[173] It is precisely because the rule includes accidental killings that we can say that the death element is predicated on strict liability. This is why some California courts emphasize that, under the California formulation of the rule, felons who kill while committing or attempting to commit a felony are held strictly liable for the homicide.[174]

A California prosecutor can bypass the need to prove malice by relying on the felony murder rule. Setting aside the limitations that the California Supreme Court has imposed on the rule, all the prosecutor has to prove is the mens rea and actus reus of the underlying felony, a death, and a causal connection between the commission or attempted commission of the felony and the death.

Unfettered use of the felony murder rule would, of course, undermine the moral determination that only those who kill maliciously should be punished as murderers. As has been discussed, in the case of second degree felony murder, the California courts have responded to this danger by requiring the use only of felonies that are inherently dangerous to human life in the abstract.[175] Felons who engage in such dangerous conduct should be condemned as murderers even if they did not want to kill or were unaware of the homicidal risks posed by their misconduct. But a problem with this rationale is that felons who engage in misconduct that is dangerous to human life may well be aware of the homicidal risks inherent in their conduct. It is precisely in these situations where prosecutors may have access to circumstantial evidence of implied malice. Such access diminishes the need for the felony murder rule and explains why the California Supreme

173 *See* People v. Washington 62 Cal.2d 777, 781, 44 Cal.Rptr. 442, 445, 402 P.2d 130, 133 (1965).

174 *See, e.g.,* People v. Stamp, 2 Cal.App.3d 203, 209-210, 82 Cal.Rptr. 598, 602-603 (1969).

175 *See, e.g.,* People v. Patterson, 49 Cal.3d 615, 621, 778 P.2d 549, 553, 262 Cal.Rptr. 195, 199 (1989), *citing* People v. Ford, 60 Cal.2d 772, 795, 388 P.2d 892, 907, 36 Cal.Rptr. 620, 635 (1964) and People v. Williams, 63 Cal.2d 452, 458, 406 P.2d 647, 650, 47 Cal. Rptr. 7, 10 (1965).

Court has observed that "in almost all cases in which [the felony murder rule] is applied it is unnecessary."[176]

As has also been discussed, the California courts have responded to the threat posed by an unfettered use of the felony murder rule by excluding assaults as the predicate felony.[177] Most deaths are the result of some kind of assault. If prosecutors were permitted to use the assault as the predicate felony, malice would play an insignificant role in identifying those killers meriting condemnation as murderers. From a moral perspective, *Farley* is thus a singularly unfortunate decision. By holding the *Ireland* limitation inapplicable to the felonies enumerated in Section 189, the California Supreme Court has opened the door wider to murder convictions without the need for the state to prove malice.

In its earlier *Wilson* decision, the Court had justified applying *Ireland* to first degree felony murder by observing that a rule designed to punish as murderers negligent and accidental killers would not deter a killer who entered a building for the purpose of assaulting his victim.[178] Killers intent on achieving their assaultive goal simply could not be deterred by a rule that would be triggered by their unlawful entry into the building.[179] But in exempting the enumerated felonies in Section 189 from the *Ireland* limitation, the *Farley* Court concluded that despite its earlier findings in *Wilson*, the first degree felony murder rule retained a deterrent effect.[180] According to the Court, a would-be burglar-batterer may be deterred from killing the victim if he knows that if he enters the building with the intent to assault

---

176 *See* People v. Washington, 62 Cal.2d 777, 783, 402 P.2d 130, 134, 44 Cal.Rptr. 442, 446 (1965).

177 *See* text accompanying note 67 *supra*.

178 *See* People v. Wilson, 1 Cal.3d 431, 440, 462 P.2d 22, 28, 82 Cal.Rptr. 494, 499-500 (1969), *overruled by* People v. Farley, 46 Cal.4th 1053, 210 P.3d 361, 96 Cal.Rptr.3d 191 (2009).

179 This is why at one time the California courts held that under *Ireland* the homicide had to be independent of the felony, irrespective of whether the prosecution was relying on the second or first degree felony murder rule. *See, e.g.,* People v. Chun, 45 Cal.4th 1172, 1188, 203 P.3d 425, 434, 91 Cal.Rptr.3d 106, 117 (2009) and cases cited therein. Accordingly, felonious conduct (such as assaults or entries into buildings for the purpose of assaulting an occupant) that was integral to the homicide "merged" with the homicide and could not serve as the predicate felony. *See id.*

180 *See* People v. Farley, 46 Cal.4th 1053, 1118-1120, 210 P.3d 361, 409-410, 96 Cal. Rptr.3d 191, 248-249 (2009).

the victim he will be convicted of first degree burglary-murder if the victim dies.[181] This defense, however, overlooks a point the California courts have emphasized repeatedly. The primary purpose of the felony murder rule is not to deter the commission of the underlying felony but "to deter felons from killing negligently or accidentally by holding them strictly liable for killings they commit."[182]

But is this claim plausible? Accidental harms are not foreseeable. This is why the Penal Code exempts persons who commit harms "through misfortune or by accident" from the criminal sanction.[183] If even a reasonable felon could not have foreseen the death, how can the felony murder rule deter an accidental killing that occurs during the commission or attempted commission of the felony?

The negligence justification for the rule poses problems as well. Negligence is the failure to appreciate a risk that would have been apparent to reasonable persons in similar circumstances. How can one be deterred from committing a killing if one cannot appreciate the homicidal risk in the first place? Whether the availability of the criminal sanction deters the truly negligent has been questioned. The framers of the Model Penal Code expressed serious reservations about using negligence as a basis of culpability:

> Of the four kinds of culpability defined [purpose, knowledge, recklessness, and negligence], there is, of course, least to be said for treating negligence as a sufficient basis for imposing criminal liability. Since the actor is inadvertent by hypothesis, it has been argued that the "threat of punishment for negligence must pass him by, because he does not realize that it is addressed to him." So too it has been urged that education or corrective treatment not punishment is the proper social method for dealing with persons with inadequate awareness, since what is implied is not a moral defect. Hall, Principle of Criminal Law 245. We think, however, that this is to over-simplify the issue. Knowledge that conviction and sentence, not to speak of punishment, may follow conduct that inadvertently creates improper risk supplies men with an additional

---

181 *See id.*

182 *See* People v. Washington 62 Cal.2d 777, 781, 44 Cal.Rptr. 442, 445, 402 P.2d 130, 133 (1965) and cases cited therein.

183 *See* Cal. Penal Code § 26(5).

> motive to take care before acting, to use their faculties and draw on their experience in gauging the potentialities of contemplated conduct. To some extent, at least, this motive may promote awareness and thus be effective as a measure of control. Certainly legislators act on this assumption in a host of situations and it seems to us dogmatic to assert that they are wholly wrong. Accordingly, we think that negligence, as here defined, cannot be wholly rejected as a ground of culpability which may suffice for purposes of penal law, though we agree that it should not be generally deemed sufficient in the definition of specific crimes, and it often will be right to differentiate such conduct for the purposes of sentence.[184]

The framers' skepticism of negligence as a sufficient basis for imposing criminal liability led them to adopt a rule disfavoring its use. Under the Model Penal Code, a court may not use negligence unless it is expressly prescribed by the legislature.[185]

The negligence rationale offered by the California Supreme Court poses other problems. Sometimes, the felons are not the killers. A resisting victim or a responding police officer may kill a felon (or even a bystander inadvertently). In its classic formulation, the surviving felons are still guilty of felony murder. But for their commission or attempted commission of the felony, the death would not have occurred. To prevent these outcomes, some jurisdictions apply an "agency" limitation.[186] The person delivering the fatal blow must have been acting on behalf of the felons. Resisting victims and responding police officers are clearly not their agents. California uses a different limitation. The homicide must have been committed to further the felony.[187] Because resisting victims and responding police officers are attempting to thwart, not further, the felony, the result is that in California the fatal blow must be inflicted by one of the felons.

Though this limitation is sensible, it fails to square with the rationale offered most often by the California Supreme Court to justify the felony

---

184 MPC Commentary to § 2.02, Tent. Draft No. 4 at 126-127 (1955).

185 *See* MPC § 2.02(3).

186 *See, e.g.,* State v. Canola, 73 N.J. 206, 211, 374 A.2d 20, 23 (1977).

187 *See* People v. Washington, 62 Cal.2d 777, 781, 402 P.2d 130, 133, 44 Cal.Rptr. 442, 445 (1965).

murder rule — to deter felons from killing accidentally or negligently.[188] How can fatal actions designed to promote the commission of the felony be negligent or accidental? If the felon who inflicts the fatal blow did so to further the felony, most likely he will be guilty of express or implied malice murder and no need exists to resort to the felony murder rule. Whether his accomplices are also guilty of murder will be determined by California's rules governing accomplice liability. Under California's complicity rules, they will be guilty of murder if they either foresaw or should have foreseen their crime partner's fatal actions.[189] Under the rules pertaining to accomplice liability for conspirators, they too will be guilty of murder if their crime partner killed to further the conspiracy (commit the felony) and they either foresaw or should have foreseen his fatal actions.[190] In either case, resort to the felony murder rule would be unnecessary.[191]

To be sure, the Court emphasized in *Chun* that the felony murder rule serves another purpose — to deter the felons from committing the underlying felony.[192] Acknowledging that the rule has this secondary purpose makes the Court's defense of the rule more plausible. Although felons cannot be deterred from committing killings they cannot anticipate, they might be deterred from committing the felony in the first place if they know they can be charged with murder for any accidental or negligent homicides that might occur during the commission or attempted commission of the felony. But as has been pointed out, that is an empirical question, and in *Chun* the Court offered no such evidence to support its claim.[193] Moreover, the existence of another deterrence purpose does not dispel other doubts about the overall utility and logic of the rule.

---

188 *See* People v. Chun, 45 Cal.4th 1172,1198, 203 P.3d 425,441, 91 Cal.Rptr.3d 106, 125 (2009).

189 *See* People v. Beeman, 35 Cal.3d 547, 560, 674 P.2d 1318, 1326, 199 Cal.Rptr. 60, 68 (1984).

190 *See* People v. Croy, 41 Cal.3d 1, 12 n.5, 710 P.2d 392, 398 n.5, 221 Cal.Rptr. 592, 597 n.5 (1985).

191 As must be apparent, accomplice rules that elevate negligent homicide to murder present problems similar to those presented by the felony murder rule.

192 *See* People v. Chun, 45 Cal.4th 1172,1198, 203 P.3d 425,441, 91 Cal.Rptr.3d 106, 125 (2009).

193 *See id.*

I. A FINAL MYSTERY (AND AN EXPLANATION AND A PLEA)

In light of the multiple problems attending the felony murder doctrine, one must wonder why it has survived. Part of the answer is that it has not escaped unscathed. Some jurisdictions have abolished the doctrine, including England where it originated.[194] Also, states that have adopted the approach elaborated by the American Law Institute have in essence abolished the doctrine. Under the Model Penal Code, criminal homicide is murder if it is committed recklessly under circumstances manifesting an extreme indifference to the value of human life.[195] "Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping, or felonious escape."[196] Although this language appears to use a conclusive presumption to create a felony murder rule, it must be read in conjunction with another provision of the Model Penal Code. Section 1.12(5) provides:

> When the Code establishes a presumption with respect to any fact which is an element of an offense, it has the following consequences: . . . (b) when the issue of the existence of the presumed fact is submitted to the jury, the Court shall charge that while the presumed fact must, on all the evidence, be proved beyond a reasonable doubt, the law declares that the jury may regard the facts giving rise to the presumption as sufficient evidence of the presumed fact.[197]

The effect of this provision is to convert what would otherwise be an unconstitutional conclusive presumption into a constitutional inference. A Model Penal Code judge would merely tell the jurors that they may, if they wish, take into account the evidence regarding the commission or attempted commission of the felony in determining whether the accused acted with an extreme indifference to the value of human life when he

194 *See, e.g.,* People v. Aaron, 409 Mich. 672, 698, 299 N.W.2d 304, 312 (1980).

195 *See* MPC § 210.2(1)(b).

196 *Id.*

197 MPC § 1.12(5).

engaged in conduct he was aware posed a substantial homicidal risk to human life. In California, that would be the equivalent of telling the jurors that they can consider the circumstances attending the felony in determining whether the accused acted with implied malice. In either case, resort to the felony murder rule would be unnecessary.

California, of course, has not abolished the rule. The California Supreme Court could have abolished the first degree felony murder rule in *Dillon* simply by applying the plain meaning canon of statutory construction. The Court chose not to do so, even though its review of the rule's legislative history disclosed serious flaws. With regard to the second degree felony murder rule, the Court could have abolished the rule in *Chun* on the ground that its creation was beyond its competence. In *Dillon*, which predates *Chun* by twenty-six years, the Court openly acknowledged that "the second degree felony-murder rule [had been], since 1872, a judge-made doctrine without any express basis in the Penal Code."[198] But in *Chun* the Court chose to find such a basis.

The Court's actions to preserve the second degree felony murder rule in *Chun* and the first degree felony murder rule in *Dillon* are even more surprising given its stinging criticism of the rule. The Court has acknowledged "that the felony murder doctrine expresses a highly artificial concept that deserves no extension beyond its required application" and that the rule "has been subjected to severe and sweeping criticism."[199] The Court is also aware that "in almost all cases in which [the rule] is applied it is unnecessary and that it erodes the relation between criminal liability and moral culpability."[200]

If in the Court's view the felony murder rule is of questionable utility and logical validity, why has the Court taken such extraordinary steps to preserve it? In the end, the answer lies in the Court's belief that it should not impose its policy preferences where the legislature has spoken. The Court believes that it has some latitude to impose restrictions on the second

198 People v. Dillon, 34 Cal.3d 441, 472 n.19, 668 P.2d 697, 715 n.19, 194 Cal.Rptr. 390, 408 n.19 (1983).

199 People v. Phillips, 64 Cal.2d 574, 582-583, 414 P.2d 353, 360, 51 Cal.Rptr. 225, 232) (1966).

200 People v. Washington, 62 Cal.2d 777, 783, 402 P.2d 130, 134, 44 Cal.Rptr. 442, 446 (1965).

degree murder rule because of its duty to clarify vague statutory terms (e.g., "an abandoned and malignant heart"). But in the case of the first degree felony murder rule, the Court believes that it has no authority to impose limitations where the legislature has spoken clearly. Whether California should retain the first or second degree felony murder rule is a matter the Court believes California law entrusts to the legislature.[201]

Sisyphus was a mythological king who, as punishment for his misdeeds, was ordered by the gods to roll a heavy stone up a hill. His punishment became eternal as each time Sisyphus approached the crest, the stone would roll back down. Twenty-six years have elapsed since the Court said that "[a] thorough legislative reconsideration of the whole [felony murder] subject would seem to be in order."[202] Until the legislature acts, the Court, like Sisyphus, will continue to face the seemingly endless task of trying to make sense of the contradictions, uncertainties, and other mysteries that surround the felony murder rule. ✯

---

201 *See* People v. Dillon, 34 Cal.3d 441, 472 n.19, 668 P.2d 697, 715 n.19, 194 Cal. Rptr. 390, 408 n.19 (1986).

202 *Id*. at 472 n.19, 668 P.2d at 715 n.19, 194 Cal.Rptr. at 408 n.19 (1986).