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IRELAND AT FORTY: HOW TO RESCUE THE FELONY-MURDER RULE'S MERGER LIMITATION FROM ITS MIDLIFE CRISIS

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The felony-murder rule, which holds a defendant strictly liable for all deaths caused in the commission of a predicate felony, has long ranked among the criminal law's most controversial doctrines. [1] Many courts have construed the felony-murder rule narrowly to confine its reach. California's rule divides into degrees: homicides ***2** committed in the course of certain enumerated felonies are first degree murder, [2] whereas homicides committed in the course of other, “inherently dangerous” felonies are second degree murder. [3] The second degree rule, not grounded in statute, seems especially controversial, [4] and thus “ripe for reexamination.” [5]

One popular restriction of the rule is the merger exception. Its application varies from state to state, but it essentially precludes certain offenses from serving as the predicate felony. In a span of 12 1/2 months during 1969 and 1970, the California Supreme Court developed the state's version of the exception in three cases: People v. Ireland, [6] which excluded assaults from serving as predicate felonies, People v. Wilson, [7] which excluded burglaries committed for the purpose of assaulting the victim, and People v. Sears, [8] which excluded burglaries committed to assault someone other than the eventual victim. This trilogy broadly defined the merger limitation and thereby substantially restricted the felony-murder rule's reach. Although many states adopted

some version of a merger rule resembling Ireland's, only Alaska followed the rule espoused in Wilson, [9] and even it rejected the Sears holding.

After forty years, this sharp constriction of the felony-murder rule warrants review. If nothing else, the negative reception accorded Wilson and Sears casts doubt upon the California Supreme Court's perception that these holdings followed inexorably from Ireland. Subsequent developments in California law, including some concerning the felony-murder rule directly, warrant reexamining Ireland itself.

Although this article primarily cites California law, the proper scope of the felony-murder rule is of general legal concern. California, with the largest and most-cited body of caselaw, has set many trends in the development of criminal law generally and the felony-murder rule specifically. [10] The reshaping of California's felony-murder rule will therefore resound nationwide.

Part I of this article reviews the Ireland trilogy. Part II examines both Sears and the more recent case of People v. Scott, [11] which contradicts Sears' foundation. [12] Part II asserts that even if the merger doctrine should apply to burglaries based on intent to commit an assault, it should not apply when the ultimate victim was not the target of the intended assault. Part III contrasts Wilson with its New York counterpart, People v. Miller, [13] and concludes, as does every other state outside Alaska, that the merger bar ought not apply to burglaries, even where the intended felony is assault. ***3** Even if Wilson was sound when decided, subsequent decisions of both the California Legislature and Supreme Court have since eroded its rationale.

Finally, Part IV examines Ireland and the basic doctrine. This Part asserts the felony-murder rule can serve its deterrent purpose against offenders whose intent is to injure but not kill, as recent Supreme Court dicta apparently recognized. [14] Furthermore, in light of the felony-murder rule's expanded purpose to deter both unintentional homicides and the underlying felonies themselves, [15] the merger rule sweeps too broadly. The Part ultimately recommends a version of the compromise adopted in Georgia and Maryland, whereby malice is presumed from the commission of an aggravated assault, but the defendant retains the opportunity to rebut the presumption through mitigating evidence. [16]

The advent of determinate sentencing has magnified the significance of the issue. In 1970, the offense for which the defendant was convicted was almost immaterial; after all, both second degree murder and aggravated assault [17] could be punished by life imprisonment. [18] Today, as the disparity of consequences is much greater, so too, is the need for doctrinal clarity. [19]

I. The Ireland Trilogy

The California Supreme Court began restricting application of the felony-murder rule in the 1960's. In 1951, the Court had declared the felony-murder rule "was adopted for the protection of the community and its residents, not for the benefit of the lawbreaker." [20] In the following decade, however, the Court emphasized the injustice created by the rule, which "erodes the relation between criminal liability ***4** and moral culpability." [21] The Court therefore held the rule inapplicable where the victim fired the fatal shot, in self-defense. [22]

Ireland further constricted the rule's scope. After an evening of drinking, Patrick Ireland shot his wife at close range. [23] The trial court's instruction authorized a second-degree murder conviction if the jury found Ireland committed the homicide in perpetrating an assault with a deadly weapon. [24] The Supreme Court rejected this result as extending the rule "beyond any rational function that it is designed to serve." [25] Allowing assault (or manslaughter) to serve as a predicate felony would essentially eliminate the crime of manslaughter. The prosecution could almost always assert a predicate crime of assault, and its causing death would allow the felony-murder rule both to establish malice and bar the mitigating defenses that may reduce a

murder to manslaughter. Accordingly, the court found the assault "merged" into the homicide, and allowed Ireland to introduce potentially mitigating evidence (of "diminished capacity") that could reduce the crime to manslaughter. [26]

Wilson followed nine months after Ireland. Armed with a shotgun, Rufus Wilson broke into his estranged wife's apartment building. After letting one of his wife's guests leave, he shot others, and shot her in the chest from less than one foot away, saying, "Sorry it had to end like this." [27] In two trials, Wilson suffered convictions for, inter alia, two counts of murder. [28] The Supreme Court reversed both convictions. The murder conviction for the guest's death violated Ireland directly because the jury was instructed that Wilson's aggravated assault could support application of the felony-murder rule. [29]

The Court then extended Ireland in reversing Wilson's conviction for the first degree murder of his wife. Not only assault but also burglary was an improper predicate felony, if the purpose of the burglary was assault.
In Ireland, we rejected the bootstrap reasoning involved in taking an element of a homicide and using it as the underlying felony in a second degree felony-murder instruction. We conclude that the same bootstrapping is involved in instructing a jury that the intent to assault makes the entry burglary and that the burglary raises the homicide resulting from the assault to first degree murder without proof of malice aforethought and premeditation. [30]

***5** Although burglary is not a lesser included offense of murder, the Court found the burglary based on intent to assault was "included in fact" in the homicide and thus could not be the predicate felony. [31]

Sears extended the merger rule to burglaries based on an intent to assault anyone. [32] Unlike the Ireland and Wilson defendants, Earl Sears did not kill his wife, although he tried. Sears entered his estranged wife's home and beat her nonfatally. [33] When his stepdaughter intervened, Sears fatally stabbed her. The Court quoted Ireland and Wilson extensively in barring a felony-murder conviction for the stepdaughter's death. The People had cited favorable authority from New York in contending the assault upon the wife was independent and collateral from the stepdaughter's killing. [34] The California Supreme Court, however, declined to distinguish the killing of an intended victim from the killing of an unintended victim in assessing liability.
It would be anomalous to place the person who intends to attack one person and in the course of the assault kills another inadvertently or in the heat of battle in a worse position than the person who from the outset intended to attack both persons and killed one or both. [35]

Sears thus established the principle that the extent of an offender's liability would not depend upon which victim he killed. "Where a defendant assaults one or more persons killing one, his criminal responsibility for the homicide should not depend upon which of the victims died but should be the greatest crime committed viewing each victim of the attack individually and without regard to which in fact died." [36]

After Sears, it appeared as if even felonies like armed robbery and rape might merge with the homicide, effectively nullifying the felony-murder doctrine. The California Supreme Court declined to go so far in disfavoring the doctrine, but it has gone further than any other state in using the merger exception to restrict the felony-murder rule. Both the decisions of other state courts and those of the California Supreme Court itself have increasingly eroded the trilogy's foundation.

II. Sears: The Perceived Culpability Anomaly

The last case in Ireland-Wilson-Sears trilogy was the most extreme, and is thus the most vulnerable to criticism. Even assuming the validity of Ireland and Wilson, Sears conflicts with both general felony-murder principles (section A) and ***6** subsequent caselaw (section B). An "unintended victim" homicide does not warrant inclusion within the merger exception.

A. Sears Found Anomalous the Felony-Murder Rule's Very Purpose: Deterring Inadvertant Homicides

Sears conflicts with the policy of applying the felony-murder rule where the underlying felony is collateral to and independent of the killing.[37] The rationale of the general doctrine is that strict liability for unintended killings will prompt the careful commission of felonies (and perhaps deter them altogether) to avoid an incidental killing.[38] Such carefulness is not possible where death is the very purpose of the crime.[39] Accordingly, strict liability can deter from killing a burglar who intends to steal, but not a burglar who intends to kill. Nevertheless, Sears resembled the thief rather than the intentional killer, because his killing (the stepdaughter) was unintended, just as it would have been had his purpose for the burglary been theft. As the thief could be deterred from killing anyone through strict liability, Sears could have been deterred from killing anyone else (besides his wife) during the burglary; it was only her death that was intended and thus undeterrable. The killing of the stepdaughter was as unplanned and inadvertent as any homicide covered generally by the felony-murder rule.

Some states therefore expressly recognize attempted murder as a predicate felony for the application of the rule.[40] As attempted murder is a more culpable offense than lesser felonies like burglary, there can be no objection to its inclusion among a state's enumerated felonies.

New York and Alaska both recognized that the special basis for the merger exception, the undeterrability of the intentional killer, did not apply where the victim was unintended. Alaska's rejection of the merger exception was statutory,[41] but the New York courts based their decisions on the purpose of the rule.[42]

The facts of People v. Wagner[43] resembled those of Sears. The defendant attacked the intended victim (Saddlemire), when the eventual victim (Basto) came to her rescue.[44] Saddlemire then escaped but Basto was killed.[45] The New York court found that although the felony-murder rule could not apply based on the assault against Basto, as it was "an ingredient of the subsequent killing,"[46] the "homicide had its inception, and was committed, when the felonious assault upon Lulu Saddlemire ***7** was still in progress. That was an independent felony."[47] Although the felony-murder rule could not deter the defendant from killing his intended victim Saddlemire, it could deter him from killing the unintended victim, the bystander Basto.

Sears rejected the New York case law based on a culpability analysis. The Sears court found it anomalous to impute malice to someone who intended to kill one person but instead killed another, but not to impute malice to someone who intended to kill both people.[48] But the very point of the felony-murder rule is to deter inadvertent killings. If the purported anomaly of imputing malice to inadvertent homicides but not intentional homicides barred application of the rule in single-victim cases, the rule would cease to apply. The Sears court's essential objection was not to the application of the felony-murder rule to its distinctive facts ("intended killing, unintended victim"), but to the rule itself.[49]

B. The California Supreme Court Has Since Rejected Sears' Premise Outside the Felony-Murder Context

In People v. Scott, the Court rejected Sears' foundation, the purported anomaly of increasing an offender's liability where the victim is someone other than the target.[50] If Sears had killed his wife as planned, the merger exception would have precluded felony-murder liability. The Court thus announced the general position that the extent of liability should not turn on which victim was killed.

Where a defendant assaults one or more persons killing one, his criminal responsibility for the homicide should not depend upon which of the victims died but should be the greatest crime committed viewing each victim of the attack individually and without regard to which in fact died. This result is reached in application of existing principles of transferred intent, and it is unnecessary to resort to the felony-murder rule.[51]

As a straightforward application of transferred intent principles, Sears found the defendant's liability would not increase because he killed an unintended victim, but would be the same as if he killed his target. [52]

The Court reshaped those transferred intent principles in 1996. The Scott defendants shot at the intended victim(s) in a public park but instead killed a bystander. [53] Sears would have imposed the same liability on the defendant regardless of which victim died, but Scott held otherwise. The Scott court implicitly recognized that if the intended victim had died, there could be only an intentional murder ***8** conviction but not one for attempted murder. [54] However, because an unintended victim died, Scott allowed liability for both the intentional murder of the actual victim and the attempted murder of the intended victim. [55] In other words, liability depended upon which victim died.

The Scott court justified its outcome by observing "In their attempt to kill the intended victim, defendants committed crimes against two persons." [56] Six years later, the Supreme Court again upheld the rule that allowed greater liability where an unintended victim is killed, notwithstanding the objection that this result "reward[s] the defendant with good aim and punish[es] the one with bad aim." [57] The assailant with poor aim creates a greater danger to bystanders than one with good aim and therefore warrants greater liability, even though both hypothetical defendants maintain the same intent (to kill one person). [58] Just as the felony-murder rule's strict liability for unintended deaths may deter both the careless commission of felonies and the felonies themselves, the transferred intent doctrine's strict liability for unintended consequences may have the salutary effect of deterring the commission of assaultive crimes in the presence of bystanders, or perhaps altogether. [59]

Whereas Sears emphasized the accidental killer's limited culpability, Scott instead focused on the danger to the public. [60] This shift in emphasis was not an isolated occurrence, it has been a common theme of the post-Ireland Court (and Legislature). As the following changes to the law show, California has responded to increases in crime by severely punishing especially dangerous conduct, even where the offender does not specifically intend the consequences. For instance, California no longer recognizes intoxication or diminished capacity as a defense to murder [61] following the recognition that,

In the forum of conscience, there is no doubt considerable difference between a murder deliberately planned and executed by a person of unclouded intellect, and the reckless taking of life by one infuriated by intoxication; but human laws are based upon considerations of policy, and look rather to the maintenance of personal security and social order, than to an accurate discrimination as to the moral qualities of individual conduct. [62]

***9** Likewise, a defendant no longer must intend to kill to be guilty of special circumstance murder, [63] or voluntary manslaughter; the conscious disregard for life, combined with the performance of an objectively dangerous act, justifies a conviction for voluntary manslaughter. [64] An unpremeditated implied malice murder committed with a firearm is now punished more severely than a premeditated express malice murder committed without one. [65] In other words, greater objective danger now compensates for the lesser subjective intent. [66]

The Supreme Court appears to have overruled Sears sub silentio. Whereas Sears construed the scope of the merger exception based on general transferred intent principles, Scott and Bland have since refined those principles. [67] The Court has thus rejected Sears' premise that liability must remain constant regardless of which (intended or unintended) victim died. The Court has now endorsed what Sears deemed "anomalous." This trend reflects the Court's shifting priorities, away from protecting offenders from disproportionate punishment and toward protecting citizens from undeserved harm.

III. Wilson: Location, Location, Location

Wilson stands on slightly firmer ground than Sears. Whereas California is the only state to apply the merger limitation where a burglary-assault results in the death of an unintended victim, one other state follows Wilson's conclusion that the merger exception applies when the burglary-assault results in the death of the intended victim. [68] Contrariwise, fourteen jurisdictions that generally recognize a merger exception reject its application to burglaries based on assault. The courts of Arizona, [69], Colorado, [70] the District of Columbia, [71] Florida, [72] Georgia, [73] Kansas, [74] Maryland, [75] Massachusetts, [76] Michigan, [77] Mississippi, [78] Nevada, [79] New York, [80] and ***10** Oregon [81] have all found the felony-murder rule and not the merger exception applies in such cases.

Three grounds support this conclusion. First, unlike second degree felony-murders based on assault, the felony-murder rule's application to burglaries enjoys express statutory endorsement. [82] Second, assaults committed in a residence present greater danger to the victim (and others) than those committed elsewhere. [83] Third, and most importantly, the law recognizes the special significance of the home location in (1) grading offenses; (2) recognizing defenses; and (3) applying the felony-murder rule. [84] Although the Wilson court believed its result followed inexorably from Ireland, the cases' substantial differences warrant a different result.

A. Application of the Felony-murder Rule to Burglary Enjoys Express Statutory Endorsement

The most basic distinction between Wilson and Ireland is the statutory ground for felony-murder liability. California Penal Code section 189 expressly includes burglary as a predicate felony, and section 459 encompasses unlawful entry "with intent to commit . . . any felony." "'The first degree felony-murder rule is a creature of statute' that this court may not judicially abrogate 'merely because it is unwise or outdated."' [85] In Finke v. State, [86] the Maryland Court of Special Appeals rejected a policy argument for extending the merger rule to burglaries based on intent to murder (where, a fortiori, the rule cannot deter), due to the statutory basis of such felony-murder convictions.

That argument is interesting and might even be persuasive were it not for the fact that Md. Code Ann., art. 27, § 410, expressly provides that felony murder includes murder committed in the perpetration of daytime housebreaking as defined in art. 27, § 30(b) and, as we have seen, § 30(b) includes breaking a dwellinghouse "with intent to commit murder or felony therein." [87]

The statutory endorsement from Penal Code sections 189 and 459 warrants a distinction between felony-murder based on burglary and felony-murder based on assault.

***11** B. Assaults Committed Inside the Home Pose Special Danger to the Victim(s)

The California Supreme Court believed Wilson followed inexorably from Ireland. The Wilson court needed to minimize the distinctive factor of location to reach its result.

Persons within dwellings are more likely to resist and less likely to be able to avoid the consequences of crimes committed inside their homes. However, this rationale does not justify application of the felony-murder rule to the case at bar. Where the intended felony of the burglar is an assault with a deadly weapon, the likelihood of homicide from the lethal weapon is not significantly increased by the site of the assault. Furthermore, the burglary statute in this state includes within its definition numerous structures other than dwellings [e.g. barns, warehouses, mines] as to which there can be no conceivable basis for distinguishing between an assault with a deadly weapon outdoors and a burglary in which the felonious intent is solely to assault with a deadly weapon. [88]

The most widely cited decision countering Wilson was the decision of New York's high court in People v. Miller. [89] Courts from other jurisdictions have often cited its entire concluding paragraph, which, like any good realtor, emphasized location could be determinative.

[T]he Legislature, in including burglary as one of the enumerated felonies as a basis for felony murder, recognized that persons within domiciles are in greater peril from those entering the domicile with criminal intent, than persons on the street who are being subjected to the same criminal intent. Thus, the burglary statutes prescribe greater punishment for a criminal act committed within the domicile than for the same act committed on the street. Where, as here, the criminal act underlying the burglary is an assault with a dangerous weapon, the likelihood that the assault will culminate in a homicide is significantly increased by the situs of the assault. When the assault takes place within the domicile, the victim may be more likely to resist the assault; the victim is also less likely to be able to avoid the consequences of the assault, since his paths ofretreat and escape may be barred or severely restricted by furniture, walls and other obstructions incidental to buildings. Further, it is also more likely that when the assault occurs in the victim's domicile, there will be present family or close friends who will come to the victim's aid and be killed. Since the purpose of the felony-murder statute is to reduce the disproportionate number of accidental [homicides occurring during enumerated felonies], the Legislature, in enacting the burglary and ***12** felony-murder statutes, did not exclude from the definition of burglary, a burglary based upon the intent to assault. [90]

California law should follow Miller instead of Wilson. Not only does Miller more accurately observe the danger posed by home-centered assaults, Miller is more consistent with California law.

C. The Law Considers the Location of the Crime in Evaluating Liability

The Wilson court found the residential location of a burglary too insignificant a factor to distinguish the case from Ireland and its general rule against imputing malice based on assault. [91] In many other respects, however, both the Legislature and Supreme Court have deemed the residential location of a crime significant enough to support enhanced liability. [92]

1. The California Legislature Considers Location in Grading Offenses

The special significance of location affects the grading of offenses. In California, like New York, “burglary statutes prescribe greater punishment for a criminal act committed within the domicile than for the same act committed on the street.” [93] Notwithstanding Wilson's finding “no conceivable basis for distinguishing between an assault with a deadly weapon outdoors and a burglary in which the felonious intent is solely to assault with a deadly weapon,” [94] the California Legislature (like most others) has made the distinction. [95] The outdoor assault is punishable by two, three or four years in prison [96] whereas the “residential” assault with a deadly weapon is punishable by three, five or seven years in prison. [97] More dramatically, a theft committed outside is punishable by a maximum of one year in prison if grand [98] or six months if petty, [99] whereas the same theft is punishable by a term of two, four, or six years if committed (or attempted) inside a residence. [100]

Location is especially significant for the felony-murder rule's potential application. It is entirely possible that no homicide liability whatsoever will attach to a street larceny that results in the victim's death. [101] By contrast, an offender's home entry with larcenous intent that results in the victim's death will support first degree ***13** murder liability, regardless of how “safely” or “carefully” it is committed. [102] Miller therefore more accurately describes California law than does Wilson: in grading offenses, location matters.

2. The California Legislature Considers Location in Recognizing Defenses

The Legislature likewise considers location in recognizing the defenses available to a criminal defendant. The felony-murder rule has the dual effect of eliminating (1) the People's burden to prove malice and (2) the defendant's opportunity to negate it through a mitigating defense. [103] Perfect self-defense is a defense to an underlying assault, [104] and therefore to felony murder as well. [105] In fact, when the Court endorsed the merger rule in Ireland, the defendant's main objection was not that the rule established the element of malice but that it "substantially eviscerated" his defense of diminished capacity. [106]

Concerns about precluding mitigating defenses [107] do not apply in the burglary context. [108] The defenses of heat of passion and imperfect self-defense apply only in homicide cases. [109] In Wilson-like cases, where the fatal assault occurs after an unlawful home entry, the defenses of imperfect self-defense and heat of passion are therefore unavailable as defenses to the underlying burglary charge. The Court of Appeal has expressly rejected an imperfect self-defense claim for a homicide committed by a home invader. [110]

Insofar as [prior law] can be read as granting home invaders the right of imperfect self-defense to resist attempts at forcible eviction by a residential homeowner, such a construction is no longer tenable in light of section 198.5. [111]

That section, titled "The Home Protection Bill of Rights," "wrought a fundamental shift of emphasis," so "[t]he question of proportionality is thus tilted in favor of the homeowner." [112] In short, this post-Wilson (1984) legislation recognizes location matters.

Ireland's concern about precluding mitigating defenses therefore has no force in the burglary context. (Heat of passion likewise is not a defense to burglary, only ***14** homicide.) [113] Whereas a defendant in a nonresidential assault-homicide case needs the opportunity to present mitigating defenses, this mitigating evidence has no place in a burglary-murder prosecution.

3. The Supreme Court Considers Location in Applying the Felony-murder Rule

The significance of location has received judicial as well as legislative recognition, specifically regarding application of the felony-murder rule. In 1970, the California Court of Appeal extended the merger rule in People v. Wesley, [114] where the defendant shot at an inhabited dwelling [115] and killed an unanticipated victim. [116] The Wesley court held that the felony of shooting at an inhabited dwelling merged into the homicide, as would assault with a deadly weapon, and the court therefore reversed the felony-murder conviction. [117] Wesley attached no significance to the location of the shooting.

In People v. Hansen, [118] however, the Supreme Court disapproved Wesley and found location determinative. The Hansen defendant, angered by an apparent drug swindle, fired from his car at the swindler's residence. [119] Although the swindler was away, the shot killed a thirteen-year-old girl. [120] The Court held the felony-murder rule applied "to deter this type of reprehensible conduct, which has created a climate of fear for significant numbers of Californians even in the privacy of their own homes." [121] Although the merger doctrine would have applied had Hansen assaulted his victim on the street, the Hansen court rejected the assertion of merger and affirmed the felony-murder conviction. [122]

The shift from Wesley (1970) to Hansen (1994) resembles the shift from Sears (1970) to Scott (1996). [123] The Court now places more emphasis on the danger to the public than it did in 1970. [124] Even if assaults in the home are no more culpable than assaults committed elsewhere, as Wilson contended, the former are more dangerous, as Miller asserted. In recent years, the California Supreme Court has found such added danger justifies disparate punishment. [125]

***15** The Wilson court simply overlooked the residential nature of the crime: [the burglary-murder] "instruction permitted the jury to find defendant guilty of second degree murder if they found only that the homicide was committed in the perpetration of the crime of assault with a deadly weapon." [126] Wilson thus equated an outdoor assault with a burglary-assault by deeming location irrelevant. But in grading offenses, restricting offenses and applying the felony-murder rule, both the Legislature and this Court have found location determinative. Wilson's faulty premise that location is immaterial warrants re-examination.

IV. Ireland: Proportionate Punishment and Prevention

Ireland is less vulnerable to criticism than Sears and Wilson. Whereas the latter two cases are national outliers, many states have some kind of merger doctrine. [127] Nevertheless, after four decades, one may reconsider the merger exception's application, if not its absolute existence.

The post-Ireland caselaw has run a "fitful and erratic course." [128] A violation of section 246 (shooting at an inhabited dwelling or occupied vehicle) may [129] or may not [130] serve as a predicate felony. The Supreme Court has likewise divided on whether there is merger for a section 246.3 (discharge of a firearm in a grossly negligent manner) violation. [131] The Court has articulated different rationales for maintaining the merger doctrine, and accordingly, different tests in applying it. [132]

Section A reviews the major cases and their facts. Section B contrasts the two tests applied by the Court, finding both inadequate. Section C offers the hybrid model followed by Georgia and Maryland as preferable to either of the recently applied standards.

A. The Past: Post-Ireland Caselaw

Ireland and the cases applying it have shaped the contours of the merger rule in California. Their description facilitates a review of the Court's past direction and discussion of its ideal future course.

After drinking heavily, the defendant in Ireland shot his wife twice from close range. [133] The Supreme Court held that a felony-murder conviction could not derive from the underlying felony of assault with a deadly weapon [134] because it was an "integral part of the homicide" and "included in fact within the offense charged." [135]

***16** In People v. Mattison, [136] the underlying felony was administering poison with intent to injure. [137] The Mattison court recalled People v. Taylor, [138] where the defendant furnished heroin to the victim, who overdosed. The Court of Appeal in Taylor affirmed a felony-murder conviction, noting the "underlying felony was committed with a 'collateral and independent felonious design.'" [139] Taylor was unlike Ireland because "the felony was not done with the intent to commit injury which would cause death." The Supreme Court found Mattison's facts "very similar" to Taylor's, [140] and thus concluded the poisoning offense was neither "'an integral part of'" nor "'included in fact within the offense'" of homicide. [141] However, unlike the heroin provision in Taylor, the Mattison felony included as an element the "intent to injure." [142]

Child abuse was the underlying felony in People v. Smith. [143] The Smith court found the felony, as in Ireland, "included in fact" and "integral" to the homicide, and rejected any possibility of an independent purpose for the abuse, as "the purpose here was the very assault that resulted in death." [144] This test, however, appeared to conflate the intent to kill with the intent to commit assault, which itself may involve lesser purposes, like injury or intimidation.

Such intimidation may have been the purpose of the underlying felony in People v. Hansen: shooting at an inhabited dwelling. [145] The defendant, angered by an apparent drug swindle, fired from his car at the swindler's apartment but

unexpectedly killed a thirteen-year-old girl there. [146] The facts, however, arguably supported the characterization that, as in Smith, the crime's purpose was "the very assault that resulted in death." [147]

The Hansen court recognized the doctrinal dilemma. Ireland's "integral part of the homicide" test would unfortunately,
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). [148]

***17** The Court was critical, however, of the Taylor/Mattison "collateral and independent felonious design" rule, which could create the following "anomalous result."
[A] felon who acts with a purpose other than specifically to inflict injury upon someone--for example, with the intent to sell narcotics for financial gain, or to discharge a firearm at a building solely to intimidate the occupants--is subject to greater criminal liability for an act resulting in death than a person who actually intends to injure the . . . victim. [149]

Hansen ultimately authorized application of the felony-murder rule, because it would not subvert the legislative intent underlying the malice requirement. As most homicides did not occur through section 246 violations, "application of the felony-murder doctrine in the present context will not have the effect of 'preclude[ing] the jury from considering the issue of malice aforethought . . . [in] the great majority of all homicides.'" [150]

People v. Robertson [151] may have been the most controversial, with the Court's opinion drawing three separate dissenting opinions. [152] The defendant claimed he shot at a group of automobile burglars to scare them away. [153] The Court returned to the collateral purpose test of Mattison, while recognizing "the collateral purpose rationale may have its drawbacks in some situations." [154] The intent to frighten away the burglars was a valid collateral purpose justifying application of the rule. [155] The dissenting justices objected that this application of the felony-murder rule placed defendants in a worse position when they shoot with the intent to miss and scare a victim than when they shoot with intent to hit and kill him. [156]

The majority emphasized the nature of the felony in justifying the imputation of malice, recalling that the Legislature enacted section 246.3 to deter the practice of randomly discharging firearms into the air to celebrate festive occasions. [157] The "statute 'presupposes that there are people in harm's way.'" [158] As with the shooting at an inhabited dwelling at issue in Hansen, discharge of a firearm in a grossly negligent manner can endanger random bystanders rather than a targeted individual (as in a conventional Ireland assault). In contrast to Hansen, however, the Robertson victim was not an unforeseen (child) bystander but the very target of the intended intimidation. [159]

***18** The next case, also involving section 246.3, apparently limited the scope of Robertson: the defendant in People v. Randle [160] shot at his victim in an attempt to rescue the defendant's cousin. [161] The Court found this direct aim precluded an independent purpose (as appeared in Robertson), and thus imposed the merger bar. [162] The trial court's erroneous instruction to the jury that it could convict the defendant of felony-murder based on the section 246.3 violation warranted reversal of Randle's murder conviction. [163]

The Randle analysis obscured the critical fact that the fatal shot was definitely not fired during a section 246.3 violation, although one occurred before the fatal shooting. As the victim was beating his cousin, Randle fired into the air to scare away the assailant, an act that would support a section 246.3 conviction. [164] He then fired by aiming directly at the target.

I said “Get off my cousin.” That's when I brandished the pistol and shot one time in the air. And then he just stood there and looked at me like he didn't care so I shot again. [P] Q. Now when you shot, when you shot the next time where was the gun pointed? [P] A. It was pointed towards him. [P] Q. Ok. And then what did the guy do after you shot the second time when it was pointed at him? [P] A. He ran. [P] Q. And what did you do after he ran? [P] A. I fired the gun one last time, he ducked, then he got back up and then when I tried to fire again it was just, the gun wouldn't click. It was out of bullets. [165]

A section 246.3 violation would have supported a felony-murder conviction if the first shot, fired “in the air,” had proved fatal. If the Court, however, inferred from the victim's subsequent running that a subsequently-fired bullet caused the death, then the victim would not have been killed during a section 246.3 violation, but during a conventional aggravated assault. Under such facts, Ireland, not Robertson, would be the apposite precedent.

Central to Randle's significance, therefore, is the simple factual determination that one of the later shots killed the victim. If there had been a basis for finding the first shot killed him, [166] the felony-murder instruction based on a section 246.3 violation would have been proper. The Supreme Court implicitly rejected that possibility. The trial court therefore erred in reading a section 246.3-based felony-murder instruction, not because Randle's aiming at the victim during the fatal shot precluded a felony-murder conviction, but because it precluded a section 246.3 conviction.

***19** Two months after Randle came People v. Blair. [167] The Court there upheld a death sentence, but provided some interesting dicta. The defendant assigned error to the trial court's failure to read a second degree felony murder instruction based on his violating section 347, as in Mattison. Unlike the Mattison, court, however, the Blair court recognized a section 347 violation encompassed an intent to injure. [168] Such intent to injure, the Court found, could support a felony-murder instruction: “[D]efendant was entitled to an instruction on second degree felony murder if there was evidence from which reasonable jurors could have concluded that defendant intended only to injure [the victim] when he poisoned her.” [169] The Court found insufficient evidence “of an intent merely to injure,” [170] but the analysis hinted that the intent to injure nonfatally could be a proper collateral purpose to support application of the felony-murder rule. [171]

In People v. Bejarano, [172] the Court of Appeal applied Randle to impose the merger bar where the defendant violated section 246 by shooting into an occupied vehicle. [173] Bejarano fired at passengers in an Oldsmobile, but inadvertently killed a bystander driving a Honda. [174] The Bejarano court construed the Randle evidence as showing: “The defendant admitted that he committed the section 246.3 violation solely by shooting at the victim, that is, he appeared to intend to commit the injury resulting in death.” [175] This construction seems erroneous. Nothing in Randle indicates the defendant ever referred to “the section 246.3 violation.” [176] More to the point, Randle violated section 246.3 not “by shooting at the victim,” but by the prior shot, which he fired “in the air.” [177]

The Supreme Court recently granted review of two cases of felony-murder convictions based on a shooting at an occupied vehicle in violation of section 246. [178] These cases will likely review the apparent inconsistency between Hansen and Bejarano.

***20 B. The Court's Standards for Applying Merger**

A major reason for the uneven application of the merger doctrine is the shifting basis for its application. The Court has applied both a “great majority” and “collateral purpose” test for determining the scope of the merger bar. Neither test perfectly implements the rule.

1. “Great Majority”

Ireland considered the purpose of merger to be the preservation of the overall mens rea hierarchy for homicide cases. [179] "To allow such use of the felony-murder [in assault cases] rule would effectively preclude the jury from considering the issue of malice aforethought in all cases wherein homicide has been committed as a result of a felonious assault--a category which includes the great majority of all homicides." [180] As the Court more recently observed, "One commentator explains that the merger rule applied to assaults is supported by the policy of preserving some meaningful domain in which the Legislature's careful gradation of homicide offenses can be implemented. [181]

This concern of the Hansen court, the preservation of the Legislature's calibration of punishment based upon the offender's culpability, [182] prompted rejection of the collateral purpose test.

> [A] felon who acts with a purpose other than specifically to inflict injury upon someone--for example, with the intent to sell narcotics for financial gain, or to discharge a firearm at a building solely to intimidate the occupants--is subject to greater criminal liability for an act resulting in death than a person who actually intends to injure the . . . victim. [183]

The Court instead focused on the principle that the use of certain inherently dangerous felonies "as the predicate felony supporting application of the felony-murder rule will not elevate all felonious assaults to murder or otherwise subvert the . . . (P.) Legislature's deliberate calibration of punishment for assaultive conduct based upon the presence or absence of malice aforethought." [184] Hansen authorized felony-murder liability because "[m]ost homicides do not result from violations of section 246." [185]

It is relatively simple for courts to apply the merger exception under such a rationale. It applies (and thus precludes felony-murder liability) where the underlying ***21** felony is aggravated assault. [186] It would not apply, however, to any other felony, as they all involve a distinctive fact not present in the "great majority of homicides." As Hansen noted, most homicides do not involve shooting at an inhabited dwelling:

> Most homicides do not result from violations of section 246, and thus, unlike the situation in People v. Ireland, supra, 70 Cal.2d 522, 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 . . . [in] the great majority of all homicides." (Id., at p. 539.) [187]

Likewise, most homicides do not involve poison, children, or the grossly negligent discharge of firearms. For this reason, New York has limited its merger doctrine to lesser included offenses. [188]

Of the above-described cases, therefore, only Ireland warrants application of the merger limitation under this rationale; Mattison, Smith, Hansen, Robertson and Bejarano do not. As most homicides do not involve a burglary, this rationale is also inconsistent with Wilson (and Sears) and its application of the merger exception to burglary-homicides.

On the other hand, as the Legislature creates more distinct assaultive crimes, whose special facts justify punishment beyond a conventional aggravated assault, the combined number of "exceptional" cases could, in the aggregate, outnumber the number of homicides caused by section 245 violations. Furthermore, the "great majority" test violates Hansen's expressed concern that the felony-murder rule not apply only to less culpable offenses. For example, a violation of section 246.3 is subject to a maximum of one year's imprisonment, whereas a section 245 violation involves a sentence of two, three or four years, [189] which apparently reflects the Legislature's deeming the latter the more serious offense. Since Hansen, the Court has returned to the "collateral purpose" test. [190]

2. "Collateral Purpose"

In several cases, the Court has required prosecutors to establish the defendant committed the felony with a purpose "collateral and independent" to the infliction of the fatal wound. [191] This test derives from the felony-murder rule's purported inability to protect human life during assaults: "In Ireland, we reasoned that a man assaulting another with a deadly weapon could not be deterred by the second degree felony-murder rule, since the assault was an integral part of the homicide." [192] This ***22** inability was overstated in 1969, and appears even more exaggerated in light of the Hansen/Robertson recognition that the felony-murder rule exists not only to deter negligent and accidental killings during felonies but also to deter the commission of the felonies themselves.

The felony-murder rule may have lacked deterrent capability in Ireland, but that case was factually exceptional. The defendant shot his wife from close range, and his defense to the charge of murder was his diminished capacity, not his lacking an intent to kill. The Ireland assault, it therefore appears, involved an intent to kill, rather than the intent to intimidate (as in Hansen and Robertson) or to injure (Mattison and Smith), harbored by later defendants. In such cases, the felony-murder rule can deter felons, both from killing inadvertently and from committing the felonies themselves. As most aggravated assaults [193] do not involve an intent to kill, the Court's uncritical acceptance of Ireland's analysis in later cases has substantially reduced the felony-murder rule's deterrent potential.

The felony-murder rule can deter homicides committed during intimidation-assaults. If one purposely shoots at the victim to scare him, the rule's strict liability can ensure the offender will exhibit "carefulness" in committing the crime, just as the rule purportedly does for other violent felonies like rape or robbery. The law essentially warns the shooter that hitting and killing the individual (or anyone else) will result not in a conviction for manslaughter, but for murder, punishable by life in prison. This prospect will certainly "encourage the prudent handling of firearms," [194] by ensuring the offender aims carefully to make sure he does not hit anyone.

The rule can also deter the offender from committing the intimidation-assault in the first place.
By providing notice to persons inclined to willfully discharge a firearm at an inhabited dwelling--even to those individuals who would do so merely to frighten or intimidate the occupants, or to "leave their calling card"--that such persons will be guilty of murder should their conduct result in the all-too-likely fatal injury of another, the felony-murder rule may serve to deter this type of reprehensible conduct, which has created a climate of fear for significant numbers of Californians even in the privacy of their own homes. [195]

Accordingly, the felony-murder rule could have a deterrent effect in cases of intimidation-assault like Hansen and Robertson. This deterrent effect obtains regardless of whether the case involves a section 245 aggravated assault or a felony involving distinctive facts, such as shooting at an inhabited dwelling or occupied vehicle.

***23** Assaults committed to injure are likewise deterrable. "Dangerous assaults . . . are instances where there is the greatest need to motivate an actor to be careful not to cause death." [196] The Court's analysis has unfortunately conflated the consequences of injury and death, and thus precluded the intent to injure from serving as a collateral and independent purpose. The Mattison court observed, "the felony was not done with the intent to commit injury which would cause death." [197] This sentence supports the construction that the word "intent" related to the phrases "to commit injury," and "which would cause death." In other words, the death was intended. Smith, however, described "the purpose here [as] the very assault that resulted in death," [198] which suggests the only purpose was the assault, with the consequence of death being possibly unintended or even undesired. This latter formulation broadened the reach of the merger rule considerably, by precluding application of the felony-murder rule when the defendant intended to injure the victim nonfatally.

The Blair dicta [199] may signal the Court's recognition that Smith overreached. The conclusion that potential felony-murder liability cannot deter an individual committing assault from killing her victim is grounded in policy rather than fact. For example, the Smith defendant and her boyfriend severely abused her two-year-old daughter for the purpose of "discipline." [200] The defendant did not intend the girl's death (she even eventually took her to the hospital), but admitted "she 'beat her too hard.'" [201]

When the Court decided Smith, the law was particularly ineffective in deterring homicides during assaults. Since 1977, California has punished both aggravated assault and involuntary manslaughter by the same sentencing range of two, three, or four years. [202] In other words, a child beater suffered no greater punishment if the victim died than if she survived. [203] The law provided the defendant with no tangible deterrent to stop a beating, or to seek medical treatment to save the victim's life, other than the possibility that a jury would discount the defendant's denials and find that she must have realized the danger (and thus acted with implied malice). [204] However, if the law instead permitted conviction of Smith for murder because she beat the child "too hard," a future parent seeking to "discipline" her child through beating would likely take greater care to make sure the beating was not so "hard," or that the child received medical care in time. Just as the law can "encourage the prudent ***24** handling of firearms by punishing reckless imprudence in the handling and discharge of such weapon," [205] the law can encourage the prudent provision of "discipline" by punishing reckless imprudence in its provision.

Furthermore, even if the felony-murder rule cannot deter the perpetrator once he has commenced the assault, it can deter him from committing the assault in the first place. Smith directly tied the inability of the felony-murder rule to deter to its (formerly) limited scope.

We reiterate that the ostensible purpose of the felony-murder rule is not to deter the underlying felony, but instead to deter negligent or accidental killings that may occur in the course of committing that felony. (Id., at p. 781.) When a person willfully inflicts unjustifiable physical pain on a child under these circumstances, it is difficult to see how the assailant would be further deterred from killing negligently or accidentally in the course of that felony by application of the felony-murder rule. [206]

Since Smith, however, the Supreme Court has concluded that the purpose of the felony-murder rule is to deter both negligent or accidental killings and the underlying felonies themselves. [207] "When the danger is foreseeable, it is rational to expect a felon to take precautions not to kill accidentally or negligently---or to forgo commission of the hazardous felony altogether." [208] This redefinition of the scope of the felony-murder rule warrants a reevaluation of the scope of its merger exception.

Imputing malice to assaults that cause the victim's death can thus deter the commission of underlying assaults. [209] Prior to 2008, assaults that resulted in death were punished as involuntary manslaughter, [210] with a sentence of two, three, or four years. [211] Imputing malice, and thereby authorizing the consequent indeterminate sentence of life imprisonment, to an assault committed for the purpose of injury would have a substantial deterrent effect. The principle, perhaps most dramatically demonstrated in The Merchant of Venice, [212] drew the attention of the Court as far back as Mattison: "'[K]nowledge that the death of a person to whom heroin is furnished may result in a conviction for murder should have some effect on the defendant's readiness to do the furnishing.'" [213] Both in deterring the injury-assault and in demanding care in its commission, the felony-murder rule can serve a deterrent effect in cases like Smith and Mattison.

Therefore, the felony-murder rule could serve a deterrent purpose if applied to aggravated assault. The only kind of assault that may not be amenable to deterrence is ***25** that committed with the intent to kill. As an intent to kill by itself establishes express malice, any imputation of malice through the felony-murder doctrine is simply superfluous. In sum, presuming malice from the commission of any inherently dangerous felony, including aggravated assault, will deter both unintended killings and the underlying felonies themselves.

The collateral purpose test, therefore, like the great majority test, is an imperfect standard for distinguishing offenses that may serve as predicate felonies for the felony-murder rule and those that may not. The Hansen court first questioned the collateral purpose test, observing that it imputed malice to crimes like selling narcotics for financial gain, but not felonies like assault with the intent to injure, which are more dangerous and culpable. [214] The Court recently reiterated this point in People v. Ramirez. [215] The Court endorsed the argument of the defendant (the infamous "Night Stalker"), that the felony-murder rule would apply if he entered the victim's residence with the intent to commit larceny, but not if his intent was to commit assault or murder. [216]

The Court's practice of limiting the second degree felony-murder rule to cases involving a collateral purpose therefore warrants reevaluation. It fails to impose punishment according to culpability, as the imputation of malice occurs only for less culpable crimes. [217] It further fails to achieve the deterrent effect of which the felony-murder is presumably capable. The Court should construe the merger exception in a way that both maximizes the felony-murder rule's deterrent function and preserves the "Legislature's deliberate calibration of punishment for assaultive conduct based upon the presence or absence of malice aforethought." [218]

C. A Proposal for the Future

1. The Proposal

The felony-murder rule can protect human life by deterring both underlying felonies and their commission in a dangerous manner. Applying the rule to all inherently dangerous felonies could thus maximize its deterrent effect, thereby preventing the commission of many felonies and the commission of many others under especially dangerous circumstances. On the other hand, the California Supreme Court has understandably refused to impute malice in all cases, because that would "effectively preclude the jury from considering the issue of malice aforethought in all cases wherein homicide has been committed as a result of a felonious assault--a category which includes the great majority of all homicides." [219] The solution to this ***26** conflict is to adopt a version of the "modified merger" rule followed in Georgia [220] and Maryland, [221] whereby malice is presumed from the commission of an inherently dangerous felony, but the defendant retains the opportunity to offer mitigating evidence of provocation or imperfect self-defense.

The Georgia and Maryland positions differ slightly. Georgia imputes malice to assaults causing death, but the mitigating evidence may lead to a reduction of the homicide from murder to voluntary manslaughter. [222] By contrast, although Maryland allows the commission of an aggravated assault to support a felony-murder conviction, [223] the mitigation evidence may serve as a defense to the assault itself. [224] Either way, a defendant may not be guilty of murder if the killing is mitigated by a recognized defense.

Both versions of the modified merger rule accord with People v. Garcia, which holds that deaths caused by inherently dangerous felonies are either second degree murder (without merger), or voluntary manslaughter (with merger). [225] The law has long considered the presence or absence of heat of passion (and, more recently, imperfect self-defense) as the distinction between more culpable second degree murder and the less culpable voluntary manslaughter. Accordingly, whether malice is express, implied, or imputed (through the felony-murder rule), the presence or absence of the mitigating factors properly distinguishes murder from manslaughter.

Under California's felony-murder doctrine, however, it is the nature of the underlying felony that determines whether the homicide involves malice or not. This not only creates an inconsistency with general homicide law but also fosters anomalies regarding culpability. A burglary with intent to commit larceny will conclusively establish malice (with no opportunity for mitigating evidence), whereas a burglary with intent to commit assault with a firearm will not establish malice at all. [226] Although the prescribed terms of imprisonment indicate the Legislature deems section 245 violations (aggravated assault) to

be more serious than violations of 246.3 (discharge of a firearm in a grossly negligent manner), commission of the former will not support a showing of malice when the victim dies, whereas the latter offenses will establish malice conclusively. The modified merger rule eliminates these anomalies. No longer would malice be imputed only for the least dangerous and least culpable felonies. [227]

There is some justification for finding the presence or absence of malice from the nature of the underlying felony committed. As a general rule, homicides committed during felonies other than assault are less likely to warrant mitigation (due to heat of passion or imperfect-self defense) than those occurring during straight ***27** aggravated assaults. For example, such felonies are more likely to harm unintended bystanders (due to poor aim, mistaken identity, or collateral consequences) [228]. [229] In the aggregate, therefore, section 246 and section 246.3 violations may be better candidates for precluding the mitigating defenses as a matter of law, as they are less likely to apply as a matter of fact. Notably, Georgia and Maryland authorize mitigating evidence only in assault cases. [230]

General likelihoods, however, have exceptions. The offenses described in section 246 and 246.3, could conceivably warrant mitigation through heat of passion or imperfect self-defense. For example, an individual may imperfectly perceive the need for self-defense where the perceived assailant is in a vehicle. (Indeed, the vehicle may aggravate the threat due to both its mobility and shield capacity.) Likewise, one of the hypotheticals in Justice Kennard's Robertson dissent describes a woman who, in an apparent heat of passion, confronts her daughter's rapist. [231] If she shot the rapist with intent to hit him, she could assert heat of passion to reduce the level of her offense to voluntary manslaughter. [232] By contrast, if she shot in a grossly negligent manner to scare him, the law would deprive her of an opportunity to introduce mitigating evidence. [233] Although the proxy use of the felony may generally preclude mitigation in cases where it should be unavailable, the better rule would consider the facts of each individual case to determine the presence of or absence of malice.

This would far more effectively implement the “Legislature's deliberate calibration of punishment for assaultive conduct based upon the presence or absence of malice aforethought” [234] than current law. Currently, the law distinguishes murder from manslaughter based upon factors that are often irrelevant to culpability (whether the victim was in his vehicle or in an alley), or factors that seem inversely proportional to culpability (whether the offender intended to hit or miss the victim [235]). A modified merger rule would return the focus to the offender's culpability.

Consider two hypothetical killers. Amy observes Victor commit a provocative act inside the screen door of his home, and she shoots him dead. Ben confronts Victoria walking down the street, and, without any provocation, violently swings his ax and kills her. Under current felony-murder principles, Amy is guilty of murder, [236] Ben is not. [237] Under a modified rule, however, Amy will be guilty of voluntary manslaughter but Ben will be guilty of murder.

***28** The law would thus align criminal liability and moral culpability by authorizing the consideration of mitigating evidence when inherently serious felonies result in death. Currently, such evidence has no effect, regardless of whether merger applies or not. Where the merger bar does not apply, all defendants who commit an inherently dangerous felony, both those who act in imperfect self-defense or a heat of passion and those who act without such mitigation, are guilty of second degree murder. Likewise, where the merger bar does not apply, all defendants are guilty of voluntary manslaughter, regardless of whether they acted in imperfect self-defense or a heat of passion. [238] The proposal would end this anomaly.

The proposal offers some benefit to both prosecutors and defendants. On the one hand, the “offensive” imputation of malice will relieve prosecutors of the burden of proving express or implied malice, although the (intentional) commission of an inherently dangerous felony will likely establish these elements anyway. On the other, defendants will retain the opportunity to counter the prosecution's showing by offering mitigating evidence. From Ireland to Robertson, it was this “defensive” preclusion of mitigating evidence that drew judicial objection. [239] Only four years before Ireland, the Court accepted the offensive imputation of malice from the commission of an assault with a deadly weapon as a given.

When it is proved that defendant assaulted decedent with a dangerous weapon in a manner endangering life and resulting in death and the jury concludes that the evidence did not create in their minds a reasonable doubt whether defendant's act may have been justified or its criminal character mitigated by the influence of passion (e.g., of terror, People v. Logan, 175 Cal. 45, 48, 49 . . .) then no further proof of malice or of intent to kill is required to support a verdict of guilty of second degree murder. [240]

Properly applied, the modified rule will not reduce the protection provided by the felony-murder rule to innocent bystanders. [241] A defendant has no provocation defense under modified merger when he kills a bystander. [242] Therefore, the general practice of imposing murder liability on defendants like Hansen, whose assaultive crimes claim unintended bystander victims, will not substantially change.

In sum, the proposal will benefit some defendants and disadvantage others. It will reduce the liability of offenders like the hypothetical Amy, who commit inherently dangerous felonies under mitigating circumstances. It will enhance the liability of offenders like the hypothetical Ben, who commit aggravated assault without any mitigation circumstances. The rule will not necessarily produce murder convictions for more defendants, just more culpable ones.

***29** 2. The Objection

Critics might object that the proposal would dilute extant principles of malice. Outside the felony-murder rule, the law requires either an intent to kill or a conscious disregard for human life; in other words, the offender must subjectively perceive the danger to human life. [243] The presence or absence of such awareness distinguishes between second degree murder and involuntary manslaughter. If convictions were possible without such awareness, it would apparently abrogate the offense of involuntary manslaughter.

The proposal, however, would not eliminate the offense of involuntary manslaughter. In fact, after Garcia, it would not even affect the offense of involuntary manslaughter, as every aggravated assault that did not result in death is now at least a voluntary manslaughter. [244] Therefore, fatal aggravated assaults are already punishable as voluntary manslaughter, an offense that, outside the felony-murder context, requires either an intent to kill or a conscious disregard for human life.

Under the traditional mens rea illustration of the distinction between murder and manslaughter, negligence cannot support a murder conviction.

The most usual illustration of this doctrine is the instance of workmen throwing stones and rubbish from a house, in the ordinary course of their business, by which a person underneath happens to be killed. If they deliberately saw the danger, or betrayed consciousness of it, whence a general malignity of heart might be inferred, and yet gave no warning, it will be murder, on account of the gross impropriety of the act. If they did not look out, or not till it was too late, and there was even a small probability of persons passing by, it will be manslaughter. But if it had been in a retired place, where there was no probability of persons passing by, and none had been seen on the spot before, it seems to be no more than accidental death. [245], [246]

The law has thus always distinguished between the individual who perceived the threat of harm and proceeded anyway (with a “conscious” disregard), and one who failed to perceive the danger. The former commits (second degree) murder; the latter is guilty of (involuntary) manslaughter.

The modified merger rule would not alter this distinction. Aggravated assault is not a crime that can be committed through negligence, no matter how gross. [247] In People v. Williams, the defendant asserted that he fired a “warning shot” but did not see the children in the immediate vicinity. [248] The Supreme Court precluded an assault (with a firearm) conviction unless the defendant was aware of the presence of potential victims.

***30** In other words, a defendant guilty of assault must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct. He may not be convicted based on facts he did not know but should have known. [249]

Just as the stone-throwing worker is not guilty of murder where he does not see the endangered pedestrian, Williams could not be guilty of aggravated assault if he did not see the children.

California actually authorizes murder convictions in numerous contexts where the offender perceives the facts creating the danger, even if he does not perceive the full danger. In People v. Smith, [250] the Court declined to impute malice and a consequent second degree murder conviction for the mother who fatally beat her child. Under post-Smith legislation, however, an offender is subject to the same punishment as one who commits first degree murder (25 years to life imprisonment), [251] wherever she "assaults the child by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in the child's death . . . ." [252] Accordingly, one defendant charged with and convicted of actually objected to the failure to instruct on second degree felony-murder as a lesser included offense. [253] Similarly, one who intentionally commits the wrong of mayhem will be guilty of first degree murder where his assaultive conduct results in death, with no opportunity for mitigation. [254]

The natural and probable consequences doctrine authorizes murder liability where the victim's death is reasonably foreseeable, even if the offender neither intends the death nor subjectively perceives its likelihood. [255] A defendant's conspiring to commit assault may support his liability for first degree murder when the victim dies, so long death is a natural and probable consequence of the assault. [256] "If one advises another to beat a man and the latter dies as the result of the beating, it is murder, and the adviser is an accessory to the murder." [257] A fortiori, murder liability is proper when the offender not only advises the beating but personally inflicts it -and thus controls its magnitude.

As in the accomplice/coconspirator context, the intent to commit the inherently dangerous felony (e.g. aggravated assault) supports murder liability. "[T]he very foreseeability of this danger has led courts to conclude that the defendant's claim that he or she "didn't mean to do it" should not be heard, once the mental state ***31** necessary to the underlying offense has been proved." [258] The intent to commit the inherently dangerous felony distinguishes the culpability involved from the negligence present in involuntary manslaughter: "when society has declared certain inherently dangerous conduct to be felonious, a defendant should not be allowed to excuse himself by saying he was unaware of the danger to life because, by declaring the conduct to be felonious, society has warned him of the risk involved." [259]

There is a natural analogy between the felony-murder rule and section 22, which implies malice where, due to voluntary intoxication, a killer does not perceive the grave danger caused by his conduct. [260] Such intoxicated offenders are still subject to deterrence because, "where drunkenness is the proximate condition of the offender, the deterrent force of the criminal law operates to prevent the man from getting drunk in the first place." [261] Intoxicated offenders therefore may not offer their unawareness of the risk as a defense:

> [A]wareness of the potential consequences of excessive drinking on the capacity of human beings to gauge the risks incident to their conduct is by now so dispersed in our culture that we believe it fair to postulate a general equivalence between the risks created by the conduct of the drunken actor and the risks created by his conduct in becoming drunk. [262]

For this reason, "if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such awareness is immaterial. [263]

Comparable (if not stronger) logic supports finding malice from the intentional commission of an inherently dangerous act. Society's declaration that certain inherently dangerous conduct is felonious warns the offender, and precludes the defense that he was unaware of the risk. [264] Both self-induced intoxication and inherently dangerous felonies are discrete, deterrable wrongs; the commission of either establishes malice.

The effect of drunkenness. . . on men's actions . . .is . . . known to everyone, and it is as much the duty of men to abstain from placing themselves in a condition from which such danger to others is to be apprehended as it is to abstain from firing into a crowd, or doing any other act likely to be attended with dangerous or fatal consequences. [265]

As the failure to perceive a risk will not provide a valid defense against a charge of murder where the offender intentionally engaged in the wrongful conduct of severe ***32** intoxication, a fortiori, it will not be a defense where the offender intentionally committed an inherently dangerous felony.

The modified merger rule will maximize both fairness and public safety. The proposal maximizes fairness by restoring "the relation between criminal liability and moral culpability." [266] Current felony-murder law defines the presence of absence of malice without regard for the mitigating factors that distinguish second degree murder from voluntary manslaughter in every other homicide. The law makes this selection based on the underlying felony committed, often in inverse proportion to its seriousness, so that malice is imputed to those who intend lesser offenses (burglary with intent to steal, selling narcotics for financial gain) but not to those who intend more dangerous offenses (burglary with intent to commit assault or murder, assault with a firearm) to inflict serious injury. [267]

At the same time, current imposition of the merger bar minimizes the potential deterrent effect of the felony-murder rule, to the substantial detriment of public safety. For assaults like the one in Ireland, committed with an intent to kill, express malice exists, rendering any further imputation meaningless. On the other hand, the prospect of murder liability can deter those who commit assault with a lesser intent, whether to intimidate or injure, from committing their assaults in a lethal manner, [268] or from committing them at all. [269]

V. Conclusion

Forty years ago, the California Supreme Court developed the merger doctrine. The Court successively applied this restriction to assaults (Ireland), burglaries committed for the purpose of assaulting the victim (Wilson), and burglaries committed for the purpose of assaulting anyone (Sears). These decisions surely served to restrict the operation of the felony-murder rule, but it is debatable whether the cases properly restricted the rule "beyond any purpose it was intended to serve."

The rule's purpose is protecting public safety through deterrence. When the Court decided the trilogy, that deterrence lay only in the prevention of negligent and accidental killings in the course of dangerous felonies. In recent years, the Court has expanded the deterrence model to encompass the commission of the felonies themselves.

This expanded concept of deterrence is only one of numerous changes in the legal landscape since the Court decided Ireland, Wilson and Sears. Regarding Sears, the California Supreme Court has since rejected its premise that the straightforward application of transferred intent principles compelled equal treatment for the killing of intended or unintended victims. Regarding Wilson, both the Legislature and the ***33** Supreme Court have deemed location determinative in shaping liability, both offensively and defensively. Additionally, nearly every other state in the Union has rejected its conclusion. Perhaps most importantly, the California Supreme Court itself has increasingly emphasized the imperative of public safety as a fundamental consideration in evaluating penal liability. These changes warrant re-examining, and disapproving, both Sears and Wilson.

In accordance with section 189, the felony-murder rule should apply to killings committed during burglaries, whatever their intended purpose.

There is a logical basis revising the merger rule recognized in Ireland. In light of the felony-murder rule's expanded deterrent role, applying the rule to assaults will protect public safety, both by inducing the careful commission of assaults, and deterring them altogether. A modified merger rule, in which the rule establishes malice, but permits the introduction of mitigating evidence, may best balance the competing interests of protecting public safety and ensuring offenders are punished commensurate with their culpability.

Footnotes

a1 Of Counsel, John L. Dodd & Associates. As a California Supreme Court Chambers Attorney, the author participated in the Court's determination of People v. Bland, 28 Cal. 4th 313 (2002). The author wishes to thank the WSU Law Review, especially editors Amity Hartman and Thomas Reilly, for all their efforts in preparing the article for publication.

1 See People v. Washington, 62 Cal. 2d 777, 783 (1965).

2 Cal. Penal Code § 189.

3 People v. Robertson, 34 Cal. 4th 156, 166 (2004).

4 Id. at 174-176 (Moreno, J., concurring), 191 (Brown, J., dissenting).

5 Id. at 185 (Werdegar, J., dissenting).

6 70 Cal. 2d 522 (1969).

7 1 Cal. 3d 431 (1969).

8 2 Cal. 3d 180 (1970).

9 Kirby v. State, 649 P.2d 963, 970 (Alaska App. 1982).

10 Jake Dear and Edward Jessen, Followed Rates and Leading State Cases, 1940-2005, 41 U.C. Davis L. Rev. 683 (2007).

11 14 Cal. 4th 544 (1996).

12 Id. at 550-553.

13 297 N.E.2d 158 (N.Y. 1973).

14 People v. Blair, 36 Cal. 4th 686, 745-746 (2005).

15 Robertson, 34 Cal. 4th at 171.

16 Christian v. State, 951 A.2d 832, 847 (Mo. 2008).

17 Cal. Penal Code § 245 (a)(1) is violated by “Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury.” Subdivision (b)(2) is violated by any “Any person who commits an assault upon the person of another with a firearm.” An offender commits a simple assault when he is “aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct.” People v. Williams, 26 Cal. 4th 779, 788 (2002).

18 As of 1970, the Penal Code punished second degree murder by a term of five years to life imprisonment (§189), whereas aggravated assault was punishable by a term of six months to life imprisonment. At the time, manslaughter (voluntary or involuntary) was punishable by up to fifteen years' imprisonment. (§193).

19 Whereas second degree murder is punishable by fifteen years to life imprisonment (§189), aggravated assault and involuntary manslaughter are punishable by a term of two, three, or four years. (§245(a)(1)). It now appears that any assault with a deadly weapon that results in death is at least a voluntary manslaughter (punishable by a term of three, six, or eleven years' imprisonment). See People v. Garcia, 162 Cal. App. 4th 18, 31 (2008). It is not evident whether assaults committed with "force likely to produce great bodily injury" will likewise be punished as voluntary manslaughter when they result in death in post-Garcia prosecutions. People v. Murray, 167 Cal. App. 4th 1133, 1137 (2008) (prior to Garcia, prosecution charged assault with force likely to produce great bodily injury and involuntary manslaughter).

20 People v. Chavez, 37 Cal. 2d 656, 669 (1951).

21 Washington, 62 Cal. 2d at 783.

22 Id.

23 Ireland, 70 Cal. 2d at 527.

24 Id. at 539.

25 Id. (quoting Washington, 62 Cal. 2d at 783).

26 Id. at 539.

27 Wilson, 1 Cal. 3d at 434.

28 Id. at 433.

29 Wilson, 1 Cal. 3d at 437-438.

30 Id. at 441.

31 Id.

32 2 Cal. 3d at 188-189.

33 Id. at 183-184.

34 Id. at 188-189 (citing People v. Moran, 158 N.E. 35 (N.Y. 1927); People v. Wagner, 156 N.E. 644 (N.Y. 1927)).

35 Id. at 189.

36 Id.

37 People v. Randle, 35 Cal. 4th 987, 1005 (2005).

38 Robertson, 34 Cal. 4th at 171.

39 As to whether this logic ought to cover cases where only injury is intended, see Part IV.

40 State v. Jones, 896 P.2d 1077 (Kan. 1995); Millen v. Tenn., 988 S.W.2d 164 (Tenn. 1999).

41 Kirby, 649 P.2d at 970.

42 See Wagner, 156 N.E.at 645-647.

43 156 N.E. 644.

44 Id. at 646.

45 Id.

46 Id.

47 Id.

48 2 Cal. 3d at 189.

49 Id.

50 14 Cal. 4th at 550-553.

51 Sears, 2 Cal. 3d at 189.

52 Id.

53 Scott, 14 Cal. 4th at 547.

54 Id at 551. Six years later, the Court made this point explicitly in People v. Bland, 28 Cal. 4th 313, 331 (2002).

55 Scott, 14 Cal. 4th at 551.

56 Id.

57 Bland, 28 Cal. 4th at 331.

58 Mitchell Keiter, With Malice Toward All: The Increased Lethality of Violence Reshapes Transferred Intent and Attempted Murder Law, 38 U.S.F. L. Rev. 261, 275 (2004).

59 Id. at 273.

60 Scott, 14 Cal. 4th at 551; Keiter, supra n. 59, at 275.

61 Cal. Penal Code, §§ 22(b); 25(a).

62 People v. Wright, 35 Cal. 4th 964, 985-986 (2005) (Brown, J., concurring) (quoting People v. Blake, 65 Cal. 275, 277 (1884) (italics added) (quoting People v. Rogers, 18 N.Y. 9 (1858)).

63 People v. Anderson, 43 Cal. 3d 1104, 1147 (1987).

64 People v. Lasko, 23 Cal. 4th 101, 107-110 (2000); People v. Blakely, 23 Cal. 4th 82, 91, 107 (2000).

65 Cal. Penal Code, §§ 190(a); 12022.53(d).

66 See Keiter, supra n. 59, at 263-268.

67 See Bland, 28 Cal. 4th at 331; Scott, 14 Cal. 4th at 551; Keiter, supra n. 59, at 279-280 (transferred intent doctrine may impose additional liability beyond offender's intended harm where unintended victim is killed).

68 Kirby, 649 P.2d at 970.

69 State v. Miller, 520 P.2d 1113 (Ariz. 1974).

70 People v. Lewis, 791 P.2d 1152, 1153-1154 (Colo. App. 1989).

71 Blango v. United States, 373 A.2d 885, 887-889 (D.C. App. 1977).

72 Robles v. State, 188 So.2d 789, 792 (Fla. 1966).

73 Edge, 414 S.E.2d 463 at 466, fn. 3.

74 State v. Foy, 582 P.2d 281, 287-288 (Kan. 1978)

75 Finke v. State, 468 A.2d 353, 368-369 (Md. Spec. App. 1983).

76 Commonwealth v. Claudio, 634 N.E.2d 902, 904-907 (Mass. 1994).

77 U.S. v. Loonsfoot, 905 F.2d 116, 118-119 (6th Cir. 1990).

78 Smith v. State, 499 So.2d 750, 753-754 (Miss. 1986).

79 State v. Contreras, 46 P.3d 661, 661-664 (Nev. 2002).

80 People v. Miller, 297 N.E.2d 85, 86-88 (N.Y. 1973).

81 State v. Reems, 636 P.2d 913, 918-920 (Ore. 1981).

82 Cal. Penal Code § 189.

83 Wilson, 1 Cal. 3d at 440; Miller, 297 N.E.2d at 87-88.

84 See Section C, infra.

85 Robertson, 34 Cal. 4th at 175 (Moreno, J., concurring) (quoting People v. Dillon 34 Cal. 3d 441, 463 (1983)).

86 468 A.2d 353 (Md. Spec. App. 1983).

87 Id. at 368-369; see also Contreras, 46 P.3d 661, at 663-665 (Maupin, C.J., concurring).

88 Wilson, 1 Cal. 3d at 440-441.

89 297 N.E.2d 158.

90 Id. at 87-88 (italics added).

91 Wilson, 1 Cal. 3d at 441.

92 See Section C, infra.

93 Miller, 297 N.E.2d at 87.

94 Wilson, 1 Cal. 3d at 441.

95 See Cal. Penal Code §§ 245(a)(1), 461, 489, 490, 12022(b)(1).

96 Id. at § 245(a)(1).

97 Id. at §§ 461, 12022(b)(1).

98 Id. at § 489.

99 Id. at § 490.

100 Id. at § 461.

101 People v. Cox, 23 Cal. 4th 665, 676 (2000) (killing in commission of unlawful act is involuntary manslaughter only when act is dangerous to human life under the circumstances of its commission).

102 See People v. Hernandez, 169 Cal. App. 3d 282, 287 (1985) (felony-murder rule applies even where victim dies of personal medical dysfunction).

103 Robertson, 34 Cal. 4th at 165.

104 People v. Minifie, 13 Cal. 4th 1055, 1064 (1996).

105 Robertson, 34 Cal. 4th at 167-168.

106 Ireland, 70 Cal. 2d at 539, n.13.

107 See Robertson, 34 Cal. 4th at 181 (Kennard, J., concurring).

108 People v. Hardin, 85 Cal. App. 4th 625, 634 (2000).

109 Cal. Penal Code § 192(a); Flannel, 25 Cal. 3d at 674-680.

110 No burglary was charged in Hardin because the defendant did not intend to commit a felony therein. Hardin, 85 Cal. App. 4th at 627-628.

111 Id. at 633

112 Id.

113 Flannel, 25 Cal. 3d at 674-680.

114 People v. Wesley, 10 Cal. App. 3d 902 (1970) (disapproved in People v. Hansen 9 Cal. 4th 300, 316 (1994)).

115 Cal. Penal Code § 246 (shooting an inhabited dwelling violates California Penal Code section 246).

116 10 Cal. App. 3d at 904-905.

117 Id. at 907.

118 Hansen, 9 Cal. 4th 300.

119 Id. at 305-306.

120 Id. at 306.

121 Id. at 311 (emphasis added).

122 Id. at 316-317.

123 See supra Part II. B.

124 See Mitchell Keiter, Just Say No Excuse: The Rise and Fall of the Intoxication Defense, 87 J. Crim. L. & Criminology. 482, 490-491 (1997).

125 See supra nn. 61-67.

126 Wilson, 1 Cal. 3d at 437.

127 See e.g. supra n. 72-84.

128 Robertson, 34 Cal. 4th at 189 (Brown, J., dissenting).

129 Hansen, 9 Cal. 4th at 316.

130 People v. Bejarano, 149 Cal. App. 4th 975 (2007).

131 Compare Robertson, 34 Cal. 4th 144 with People v. Randle, 35 Cal. 4th 987.

132 People v. Chun, 155 Cal. App. 4th at 195 (Nicholson, J., dissenting), rev. grtd, 173 P.3d 415.

133 Ireland, 70 Cal. 2d at 527.

134 Cal. Penal Code § 245.

135 Ireland, 70 Cal. 2d at 539.

136 4 Cal. 3d 177 (1971).

137 Id. at 184-185 (quoting Cal. Penal Code § 347).

138 11 Cal. App. 3d 57 (1970).

139 Mattison, 4 Cal. 3d at 185 (quoting Taylor, 11 Cal. App. 3d 57, 63).

140 Id.at 185.

141 Id.

142 Id.

143 35 Cal. 3d 798, 801 (1984).

144 Id. at 807.

145 9 Cal. 4th at 304 (offense proscribed in Cal. Penal Code § 246, in the same set of offenses as assault and battery).

146 Id. at 305-306.

147 Smith, 35 Cal. 3d at 807.

148 Hansen, 9 Cal. 4th at 314.

149 Id. at 315.

150 Id. (quoting Ireland, 70 Cal. 2d at 539).

151 34 Cal. 4th 156 (2004).

152 See id. at 164-173.

153 Id. at 162.

154 Id. at 171 (quoting Hansen, 9 Cal. 4th at 315).

155 See id. at 171.

156 Id. at 183-192. Justice Brown's dissent quoted the Hansen text quoted in n. 152. Robertson, 34 Cal. 4th at 188 (Brown, J., dissenting).

157 Id. at 167.

158 Id. at 169 (quoting People v. Clem, 78 Cal. App. 4th 346, 353 (2000)).

159 34 Cal. 4th at 161-162.

160 35 Cal. 4th 987 (2005).

161 Id. at 1005.

162 Id.

163 Id. at 1006.

164 See Robertson, 34 Cal. 4th at 162.

165 Randle, 35 Cal. 4th at 1006.

166 Id. at 993. The bullet wound entered the chest or abdomen, not the back.

167 36 Cal. 4th 686.

168 Id at 745. This reversal is especially interesting because the statute changed in the opposite direction. The section 347 at issue in Mattison required a poisoning "with intent that the same shall be taken by any human being to his injury." Mattison, 3 Cal. 3d at 184 (italics added). When Blair was decided, the statute required only negligence regarding the victim's injury, not intent: "Every person who willfully mingles any poison ... where the person knows or should have known that the same would be taken by any human being to his injury." Blair, 36 Cal. 4th at 745.

169 36 Cal. 4th at 746.

170 Id.

171 Id.

172 149 Cal. App. 4th 975.

173 Id. at 987-993.

174 Id. at 979-980.

175 Id. at 989.

176 See 35 Cal. 4th at 992.

177 Id. at 1005.

178 People v. Jones, 157 Cal. App. 4th 580 (2007), rev. grtd. 180 P.3d 224 (2008); People v. Chun, 155 Cal. App. 4th 170 (2007), rev. grtd. 173 P.3d 415. From a sentencing perspective, a defendant convicted of violating section 246 is already subject to an enhancement of 25 years to life imprisonment when the shooting results in death. § 12022-53. This enhancement provision, which applies to murder but not manslaughter, has essentially decided the question of whether a defendant may offer mitigating evidence to escape an indeterminate life sentence.

179 Ireland, 70 Cal. 2d at 540.

180 Id. at 539.

181 Hansen, 9 Cal. 4th at 312 (citing Crump & Crump, In Defense of the Felony Murder Doctrine, 8 Harv. J. L. & Pub. Policy. 359, 379 (1985)).

182 See supra n. 22 (quoting Washington, 62 Cal. 2d at 783).

183 Hansen, 9 Cal. 4th at 315.

184 Id.

185 Id.

186 Cal. Penal Code § 245.

187 Hansen, 9 Cal. 4th at 315.

188 Robert Mauldin Elliot, The Merger Doctrine As A Limitation on the Felony-Murder Rule: A Balance of Criminal Law Principle, 13 Wake Forest L. Rev. 369, 391-92 (1977).

189 Cal Penal Code, §§ 245, 246.3.

190 Robertson, 34 Cal. 4th at 171.

191 Randle, 35 Cal. 4th at 1005.

192 Wilson, 1 Cal. 3d at 440.

193 Courts have not extended the “inherently dangerous” classification to simple assault. Hansen, 9 Cal. 4th at 312.

194 Robertson, 34 Cal. 4th at 172.

195 Hansen, 9 Cal. 4th at 310.

196 Robinson, Criminal Law 734 (1997).

197 Mattison, 4 Cal. 3d at 185. (Actually, as noted, the elements of the Mattison felony did include intent to injure).

198 Smith, 35 Cal. 3d at 807.

199 36 Cal. 4th at 745-746.

200 Id. at 801.

201 Id. at 802.

202 Cal. Penal Code §§ 245(a)(1), 193(b).

203 Indeed, in one recent case where the defendant fatally struck the victim, the court was able to impose a longer sentence by combining the aggravated assault punishment with a section 12022.7 injury enhancement than would have been possible had it sentenced on the involuntary manslaughter conviction alone. Murray, 167 Cal. App. 4th at 1137.

204 Cal. Penal Code section 273(a)(b) now imposes a sentence of 25 years to life under such circumstances.

205 Robertson, 34 Cal. 4th at 172.

206 Smith, 35 Cal. 3d at 807.

207 Robertson, 34 Cal. 4th at 166; Hansen, 9 Cal. 4th at 313.

208 Id. (emphasis added).

209 Roary v. State, 867 A.2d 1095, 1106 (Md. 2005).

210 Garcia, 162 Cal. App. 4th at 31.

211 Cal. Penal Code, § 193(b).

212 The Merchant of Venice, Act IV, scene i.

213 Mattison, 4 Cal. 3d at 185 (quoting Taylor, 11 Cal. App. 3d at 63).

214 Hansen, 9 Cal. 4th at 315.

215 39 Cal. 4th 398 (2006).

216 Id. at 462.

217 Id. at 462; Hansen, 9 Cal. 4th at 315.

218 Hansen, 9 Cal. 4th at 315.

219 Ireland, 70 Cal. 2d at 539.

220 See Edge, 414 S.E.2d 463 (Ga. 1992).

221 Christian v. State, 951 A.2d 832, 847 (Md. 2008).

222 Edge, 414 S.E.2d at 465.

223 Roary, 867 A.2d at 1102.

224 Christian, 951 A.2d at 847.

225 Garcia, 162 Cal. App. 4th at 31.

226 Ramirez, 39 Cal. 4th at 462.

227 Hansen, 9 Cal. 4th at 314-315.

228 See People v. Ochoa, 26 Cal. 4th 398 (2001).

229 Robertson, 34 Cal. 4th at 169 (citing Clem, 78 Cal. App. 4th at 352; Hansen, 9 Cal. 4th at 311).

230 Christian, 951 A.2d at 847; Edge, 414 S.E.2d at 465.

231 Robertson, 34 Cal. 4th at 181 (Kennard, J., dissenting).

232 Id.

233 Id.

234 Hansen, 9 Cal. 4th at 315.

235 This consideration of location is curious, as the Court has deemed location immaterial in the most dangerous context: residential burgleries. See Part III.

236 Id. at 316.

237 Ireland, 70 Cal. 2d at 539. Of course, the People may still establish express or implied malice.

238 Garcia, 162 Cal. App. 4th at 31. Of course, second degree murder liability remains possible where the prosecution can affirmatively establish express or implied malice. Cal. Penal Code, § 188.

239 Robertson, 34 Cal. 4th at 180-182 (Kennard, J., dissenting); at 185 (Werdegar, J., dissenting); Ireland, 70 Cal. 2d at 539.

240 Jackson v. Superior Court, 62 Cal. 2d 521, 526 (1965).

241 Robertson, 34 Cal. 4th at 169; Hansen, 9 Cal. 4th at 311.

242 Foster v. State, 444 S.E.2d 296, 297 (Ga. 1994).

243 People v. Knoller, 41 Cal. 4th 139, 152 (2007).

244 Garcia, 162 Cal. App. 4th at 28-29.

245 Tarvers v. State, 16 S.W. 1041, 1044 (Tenn. 1891).

246 Garcia, 162 Cal. App. 4th at 28-29.

247 People v. Williams, 26 Cal. 4th 779, 788 (2001).

248 Id. at 782-783.

249 Id. at 788.

250 35 Cal. 3d 798 (1984).

251 Cal Penal Code § 189.

252 Id. at § 273(a)(b).

253 People v. Stewart, 77 Cal. App. 4th 785, 796-798 (2000). As with felony-murder, section 273ab does not permit the introduction of mitigating evidence.

254 Cal. Penal Code, § 189.

255 People v. Prettyman, 14 Cal. 4th 248, 259-261 (1996); People v. Luparello, 187 Cal. App. 3d 410, 439-441 (1986).

256 Luparello, 187 Cal. App. 3d at 435-443; People v. King, 30 Cal. App. 2d 185, 204 (1938).

257 King, 30 Cal. App. 2d at 203 (citing, inter alia, 4 Blackstone Comm., p. 37; 1 Hale P. C., p. 617).

258 Robertson, 34 Cal. 4th at 172 (italics added).

259 People v. Patterson, 49 Cal. 3d 615, 626 (1989), italics added.

260 Mitchell Keiter, Just Say No Excuse: The Rise and Fall of the Intoxication Defense, 87 Journ. of Crim. L. 7 Criminol. 482, 508-513 (1997).

261 People v. Hoy, 158 N.W.2d 436, 440 (Mich. 1968).

262 Model Penal Code § 2.08 at 8-9 (Tentative Draft No. 9, 1959).

263 Id. at § 2.08(2) (1962).

264 Patterson, 49 Cal. 3d at 626.

265 State v. Vaughn, 232 S.E.2d 328, 331 (S.C. 1977) (quoting 22 C.J.S. Criminal Law § 66 (1961)).

266 Washington, 62 Cal. 2d at 783.

267 Ramirez, 39 Cal. 4th at 46; Hansen, 9 Cal. 4th at 315.

268 Robertson, 34 Cal. 4th at 172.

269 Id. at 166, 172; Hansen, 9 Cal. 4th at 311; Mattison, 4 Cal. 3d at 185.

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