

VI. THE FELONY-MURDER DOCTRINE*

A. Introduction

California Penal Code section 187 defines murder as “the unlawful killing of a human being, or a fetus, with malice aforethought.”¹ The phrase “malice aforethought” is a term of art, which connotes a number of different mental states that render a homicide particularly heinous, thus constituting murder.²

California law divides murder into two degrees, each distinguished by a different *mens rea*.³ A killing committed with the purpose and specific intent to kill based on willfulness, deliberation, and premeditation constitutes first-degree murder.⁴ Second-degree

* Sections A-C are authored by Clayton T. Tanaka: J.D. Candidate, May 2004, Loyola Law School; B.S., Civil Engineering, University of California, Los Angeles. I thank God for my wife Kathy, who is worth far more to me than anything in this world, for her love, patience, and unconditional support throughout my involvement in this piece. Sections D-E are authored by Larry M. Lawrence, II.

1. CAL. PENAL CODE § 187 (West 1998 & Supp. 2003).

2. See SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW & ITS PROCESSES CASES & MATERIALS 386 (6th ed. 1995) (citing to Report of the Royal Commission on Capital Punishment, 1945–1953, 25–28 (1953)); California Penal Code § 188 defines “malice” in both express and implied forms. See CAL. PENAL CODE § 188. Malice is express when there is a manifestation of “deliberate intention unlawfully to take away the life of a fellow creature . . .” *Id.* Malice is implied when “no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.” *Id.*

3. See DOUGLAS DALTON & PATRICIA KNIGHTEN, CALIFORNIA CRIMINAL LAW § 5.5[A] (2002) (stating first-degree murder is divisible into three different categories: (1) deliberate and premeditated murder, (2) statutory first-degree murder, and (3) first-degree felony murder); See also *id.* § 5.6[A]. (stating second-degree murder may be proved based on one of three theories, including: (1) unpremeditated murder with express malice, (2) implied malice murder, and (3) second-degree felony-murder).

4. See *id.* § 5.5[B] (“Deliberation” refers to careful weighing of considerations in forming a course of action, and “premeditation” means thought over in advance); see also *id.* § 5.5[C] (stating [Cal. Penal Code] § 189 also enumerates certain acts to be conclusive evidence of premeditation as a matter of law, including killing by means of a destructive device or explosive, armor-piercing ammunition, poison, torture, lying in wait, or drive-by shooting).

murder, on the other hand, does not have the requirement of a specific intent to kill. Proof of purpose to kill without premeditation, or implied malice based on proof of recklessness constitutes second-degree murder.⁵ Although a sufficiently culpable mens rea is the distinguishing criterion in most homicide cases, there is controversy surrounding its definition because some killings are heinous, yet do not fall into either one of these categories.⁶

The felony-murder doctrine is an alternative theory of murder that does not involve the aforementioned mens rea requirements.⁷ The rule is triggered when a killing is committed in perpetration of certain felonies, and it “operates to posit the existence of that crucial mental state [for murder].”⁸ Specifically, the felony-murder doctrine replaces the first-degree murder requirement of purpose to kill and premeditation.⁹ For second-degree murder, it replaces the requirement of express purpose to kill without premeditation or provocation, or the proof of recklessness under the implied malice murder doctrine.¹⁰ Moreover, the felony-murder doctrine renders irrelevant whether the killing was intentional or accidental.¹¹

California Penal Code section 189 codifies the first-degree felony-murder doctrine.¹² The statute explicitly proscribes the

5. See *id.* § 5.6[A].

6. See KADISH & SCHULHOFER, *supra* note 2, at 396. It is plausible that other jurisdictions did not adopt the term “malice” into their homicide statutes because of potential problems with such an amorphous and limited definition. See 18 PA. CONS. STAT. §§ 2501–05 (1998 & Supp. 2002); see also N.Y. PENAL LAW §§ 125–125.25 (McKinney 1998 & Supp. 2003).

7. See 3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW ELEMENTS §§ 134, 174 (3d ed. 2000) [hereinafter WITKIN CAL. CRIM. LAW ELEMENTS].

8. *People v. Satchell*, 6 Cal. 3d 28, 43, 489 P.2d 1361, 1372, 98 Cal. Rptr. 33, 44 (1971) (overruled on other grounds by *People v. Flood*, 18 Cal. 4th 470, 490 n.12, 957 P.2d 869, 882 n.12, 76 Cal. Rptr. 2d 180, 193 n.12 (1998)).

9. See CAL. PENAL CODE § 189; DALTON & KNIGHTEN, *supra* note 3, § 5.5[A]–[B].

10. See *People v. Hansen*, 9 Cal. 4th 300, 308, 885 P.2d 1022, 1025, 36 Cal. Rptr. 2d 609, 613 (1994); DALTON & KNIGHTEN, *supra* note 3, § 5.6[A]–[B]; see also CALIFORNIA JURY INSTRUCTIONS No. 8.30 (6th ed. 1996) (jury instructions on unpremeditated murder with express malice) [hereinafter CALJIC]; see also *id.* No. 8.31 (jury instructions on implied malice murder).

11. See *People v. Coefield*, 37 Cal. 2d 865, 868, 236 P.2d 570, 572 (1951); WITKIN CAL. CRIM. LAW ELEMENTS, *supra* note 7, § 135.

12. CAL. PENAL CODE § 189; see also *People v. Dillon*, 34 Cal. 3d 441, 465, 668 P.2d 697, 710, 194 Cal. Rptr. 390, 403 (1983).

felonies that are subject to this rule.¹³ Under the felony-murder doctrine, a killing, whether intentional or unintentional, is murder if committed in the perpetration of certain felonies.¹⁴

While governed by similar principles as the first-degree felony-murder rule, the second-degree felony-murder doctrine has a much more restrictive application because it is a common law rule that reflects the court's disfavor of the rule.¹⁵ As a result, the second-degree felony-murder doctrine only applies to felonies that are "inherently dangerous to human life."¹⁶ A felony is deemed to be "inherently dangerous to human life" when, viewed in the abstract and not to the particular circumstances of a case, there is "a high probability that it will result in death."¹⁷

The California Supreme Court has further sought to limit the felony-murder doctrine's application to second-degree murder by adopting the "merger" rule.¹⁸ Under this rule, the felony-murder doctrine is inapplicable to cases where assault is the underlying

13. Those felonies include "arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, [torture, sodomy, lewd or lascivious acts, oral copulation, or forcible acts of sexual penetration]" CAL. PENAL CODE § 189.

14. See WITKIN CAL. CRIM. LAW ELEMENTS, *supra* note 7, §§ 134, 174. For a discussion on what constitutes a "perpetration of felony," see *supra* Part VI.B.1.c (underlying felony and the killing as part of one continuous transaction).

15. See *Dillon*, 34 Cal. 3d at 462, 472 n.19, 668 P.2d at 708, 716 n.19, 194 Cal. Rptr. at 401, 408 n.19 (characterizing the felony-murder doctrine as "an almost universally disfavored rule" and that "the second degree felony-murder rule remains, as it has been since 1872, a judge-made doctrine without any express basis in the Penal Code"); DALTON & KNIGHTEN, *supra* note 3, § 5:6[C].

16. See *Hansen*, 9 Cal. 4th at 308, 885 P.2d at 1025, 36 Cal. Rptr. 2d at 612.

17. See *id.* at 309, 885 P.2d at 1026, 36 Cal. Rptr. 2d at 613; *People v. Williams*, 63 Cal. 2d 452, 458, 406 P.2d 647, 650, 47 Cal. Rptr. 7, 10 (1965). When determining whether a felony is "inherently dangerous to human life," the felony should be viewed in the abstract, rather than according to the particular circumstances in which the felony was committed.

18. See *People v. Ireland*, 70 Cal. 2d 522, 539-40, 450 P.2d 580, 590-91, 75 Cal. Rptr. 188, 198-99 (1969); see also *People v. Wilson*, 1 Cal. 3d 431, 462 P.2d 22, 82 Cal. Rptr. 494 (1969) (extending the merger doctrine to first-degree felony-murder, where the underlying felony was based on burglary with the intent to assault with a deadly weapon).

felony.¹⁹ The rationale for such a rule is to ensure that prosecutors prove the necessary mens rea for murder.²⁰ The second-degree felony-murder doctrine is thus limited to non-assault felonies that are inherently dangerous to human life.²¹

1. The purpose of the felony-murder doctrine

Under the felony-murder doctrine, a killing, whether intentional or unintentional, is murder if committed in the perpetration of certain felonies.²² Although the common law felony-murder rule had a seemingly limitless application,²³ courts today apply it solely to “deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit.”²⁴

In *People v. Washington*, the defendant and an accomplice were robbing a gasoline station when an employee fired a revolver at the accomplice, mortally wounding him.²⁵ The trial court convicted the defendant for the murder of his accomplice under the felony-murder doctrine.²⁶ On appeal, the California Supreme Court rejected the defendant’s argument that the purpose of the felony-murder doctrine was to prevent the underlying felonies.²⁷ Instead, the court stated that the purpose of the felony-murder doctrine was to “deter felons from killing negligently or accidentally by holding them strictly liable for killings they commit.”²⁸ The court held that the felony-murder doctrine did not apply because the killing was not committed

19. See *Hansen*, 9 Cal. 4th at 312–16, 885 P.2d at 1028–31, 36 Cal. Rptr. 2d at 615–18.

20. See *Ireland*, 70 Cal. 2d at 539, 450 P.2d at 590, 75 Cal. Rptr. at 198.

21. See *Hansen*, 9 Cal. 4th at 312–16, 885 P.2d at 1028–31, 36 Cal. Rptr. 2d at 615–18.

22. See WITKIN CAL. CRIM. LAW ELEMENTS, *supra* note 7, §§ 134, 174. For a discussion on what constitutes a “perpetration of felony,” see discussion *supra* Part VI.B.1.c (underlying felony and the killing part of one continuous transaction).

23. In common law, the potentially limitless application of the felony-murder doctrine was never challenged because practically all felonies were punishable by death. See *People v. Aaron*, 299 N.W. 2d 304 (1980).

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

25. See *id.* at 779, 402 P.2d at 132, 44 Cal. Rptr. at 444.

26. See *id.*

27. See *id.* at 781, 402 P.2d at 133, 44 Cal. Rptr. at 445.

28. See *id.*

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by the defendant or by his accomplice but rather by their victim.²⁹ The court reasoned that punishing the defendant for a killing committed by the victim would undermine the purpose of the felony-murder doctrine.³⁰

Today, the felony-murder doctrine applies only to deter negligent or accidental killings.³¹ This limited application reflects the court's disfavor towards the potentially harsh consequences of the doctrine, especially under the common law.³² As the court demonstrated in *Washington*, defendants are only liable for the killings they commit and not for those committed by their victims or by the police.³³

2. Application of the felony-murder doctrine

The felony-murder doctrine applies to both first-degree and second-degree murders.³⁴ Although the rule achieves the same results under both types of murders, the basis from which these applications result is distinct.

California Penal Code section 189 codifies the first-degree felony-murder doctrine, which is triggered when a killing occurs during the commission of one of the felonies enumerated in the statute.³⁵ Prosecutors are free to invoke the rule so long as the perpetrator showed an independent purpose for the commission of the proscribed felony.³⁶

The second-degree felony-murder rule, on the other hand, has a more limited application. Unlike its first-degree counterpart, the second-degree felony-murder doctrine is a common law doctrine. Courts disfavor the rule and generally restrict its potentially broad application solely to non-assault felonies that are "inherently dangerous to human life."³⁷

29. *See id.*

30. *See id.*

31. *See id.*

32. *See Dillon*, 34 Cal. 3d at 462–63, 472, 668 P.2d at 708–09, 716, 194 Cal. Rptr. at 401–02, 408.

33. *See Washington*, 62 Cal. 2d at 781, 402 P.2d at 133, 44 Cal. Rptr. at 445.

34. *See id.*

35. *See* CAL. PENAL CODE § 189 (West 1998 & Supp. 2003).

36. *See id.*

37. *Hansen*, 9 Cal. 4th at 304, 885 P.2d at 1023, 36 Cal. Rptr. 2d at 610.

A comparative analysis of the first-degree and second-degree felony-murder rules reveals a glimpse of the tension between the will of the court and the people of California. Despite the California Supreme Court's distaste towards the rule, the felony-murder doctrine has enjoyed wide-spread public support because it seemingly produces morally justifiable results.³⁸

B. First-Degree Felony-Murder Doctrine

California Penal Code section 189 states that a willful, deliberate, or premeditated killing is a first-degree murder.³⁹ However, a first-degree conviction is still possible without proving a purpose to kill, if the killing took place during the commission of one of the enumerated felonies in section 189.

The first-degree felony-murder doctrine has been the law in California since 1872.⁴⁰ Despite its long history in California criminal jurisprudence, it has generally remained unchallenged except for the special circumstance issue under California Penal Code section 190.2.⁴¹

38. See SAMUEL H. PILLSBURY, *JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER* 108 (1998).

39. See CAL. PENAL CODE § 189.

40. See *id.* When the California legislature enacted its first criminal law statute in 1850, it codified the felony-murder rule as a proviso to its section on involuntary manslaughter, and elevated a killing “in the commission of an unlawful act, [that was] committed in the prosecution of felonious intent, [to] murder.” Stats. 1850, ch. 99, p. 231, § 21, *amended by* Stats. 1856, c. 139, p. 219, § 2. At that time, there was only one degree of murder and was punishable by death. *Id.* By 1856, when the legislature divided the murder statute into two degrees, the felony-murder doctrine appeared as a proviso to the involuntary manslaughter statute. See Stats. 1856, ch. 139, p. 219, § 2. Any killing that occurred during perpetration of a felony was elevated to murder. See *id.* Then, § 2 was analyzed to determine the degree of murder. However, when California adopted the Penal Code in 1982, it dropped the proviso from its manslaughter statute but retained the degree-fixing language of § 2, which reappeared as first-degree murder under California Penal Code § 189. although it is arguable that the felony-murder doctrine ceased to exist in 1872 as a statutory doctrine, the present legislative intent reflected the belief that § 189 is a codification of the first-degree felony-murder rule. See *Dillon*, 34 Cal. 3d at 458, 668 P.2d at 706, 194 Cal. Rptr. at 399.

41. A defendant, who is convicted of first-degree felony-murder may be punished by death or life imprisonment in state prison without the possibility of parole if the predicate felony falls under one of the special circumstances listed in Cal. Penal Code § 190.2. See, e.g., *People v. Gutierrez*, 28 Cal. 4th

1. Elements of the first-degree felony-murder doctrine

First-degree felony-murder is an alternative theory to willful, deliberate, or premeditated murder. A killing, if committed during the perpetration of certain felonies, can qualify as first-degree murder.⁴² This qualification is irrespective of whether the killing was intentional or unintentional.⁴³ These felonies include “arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking,” torture, sodomy, lewd or lascivious acts, oral copulation, or forcible acts of sexual penetration.⁴⁴

a. specific intent to commit felony enumerated under California Penal Code section 189

The first-degree felony-murder rule eliminates the showing of purpose to kill or premeditation—ordinary elements of first-degree murder.⁴⁵ The felony-murder rule holds a defendant strictly liable for a killing caused by the defendant during the commission of a section 189 felony, regardless of whether the killing was intentional or accidental.⁴⁶ The only criminal intent required under this rule is the specific intent to commit the predicate or underlying felony.⁴⁷

1083, 52 P.3d 572, 124 Cal. Rptr. 2d 373 (2002) (explaining the validity of § 190.2 in general); *People v. Michaels*, 28 Cal. 4th 486, 49 P.3d 1032, 122 Cal. Rptr. 2d 285 (2002) (illustrating the validity under an equal protection challenge); *Pulley v. Harris*, 465 U.S. 37 (1984) (discussing the validity under a cruel and unusual punishment challenge). *See generally* WITKIN CAL. CRIM. LAW ELEMENTS, *supra* note 7, § 450 (explaining the felonies for which special circumstances may apply).

42. *See* CAL. PENAL CODE § 189 (West 1998 & Supp. 2003); WITKIN CAL. CRIM. LAW ELEMENTS, *supra* note 7, § 134.

43. *See* WITKIN CAL. CRIM. LAW ELEMENTS, *supra* note 7, § 134

44. CAL. PENAL CODE § 189 (“All murder . . . which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 286, 288, 288a, or 289 . . . is murder of the first degree.”) (West 2002); *see also* CAL. PENAL CODE § 206 (torture); CAL. PENAL CODE § 286 (sodomy); CAL. PENAL CODE § 288 (lewd or lascivious acts); CAL. PENAL CODE § 288(a) (oral copulation); CAL. PENAL CODE § 289 (forcible acts of sexual penetrations); CALJIC, *supra* note 10, No. 8.21. *See generally* WITKIN CAL. CRIM. LAW ELEMENTS, *supra* note 7, § 134 (explaining which felonies are predicate offenses for first-degree felony-murder).

45. *See Dillon*, 34 Cal. 3d at 475, 668 P.2d at 717–18, 194 Cal. Rptr. at 410.

46. *See* WITKIN CAL. CRIM. LAW ELEMENTS, *supra* note 7, § 134.

47. *See id.*

People v. Coefield presents a good illustration of an application of the felony-murder rule to an accidental killing.⁴⁸ There, one of the defendant's robbery accomplices was trying to beat the victim with a gun when he accidentally shot and killed the attendant of a liquor store.⁴⁹ The California Supreme Court upheld the first-degree felony-murder conviction because "the only criminal intent which the prosecution had to show was a specific intent to rob . . . it was not required to prove a deliberate or premeditated killing or to prove any intent to kill."⁵⁰

In *People v. Cantrell*, the court ruled that the intent to kill was irrelevant in the determination of first-degree murder under the felony-murder doctrine.⁵¹ There, the defendant was engaged in lewd sexual acts with a twelve-year-old boy.⁵² When the boy began screaming, the defendant reacted by choking the boy to death.⁵³ The trial court convicted him of engaging in both lewd and lascivious acts under California Penal Code section 288, and first-degree felony-murder.⁵⁴ The defendant appealed the murder conviction, contesting that he lacked the mental capacity to deliberately or intentionally strangle the victim.⁵⁵ Three psychiatrists testified that the defendant reacted compulsively to the boy's yelling and struggling, and that the defendant had no power to control himself due to his mental condition.⁵⁶ The California Supreme Court stated that evidence of defendant's capacity to kill would only be relevant if it was necessary to establish his ability to premeditate and to harbor a purpose to kill.⁵⁷ By upholding the first-degree felony-murder

48. See 37 Cal. 2d 865, 236 P.2d 570.

49. See *id.* at 867, 236 P.2d at 571.

50. *Id.* at 869, 236 P.2d at 573.

51. 8 Cal. 3d 672, 504 P.2d 1256, 105 Cal. Rptr. 792 (1973).

52. See *id.* at 679, 504 P.2d at 1260, 105 Cal. Rptr. at 796.

53. See *id.*

54. See *id.* at 688, 504 P.2d at 1266-67, 105 Cal. Rptr. at 802-03.

55. See *id.* at 677, 504 P.2d at 1258, 105 Cal. Rptr. at 794. Subsequent to *Cantrell*, the California Legislature barred the diminished capacity defense and any evidence of mental disease, mental defect, or mental disorder for the purpose of negating intent to kill or premeditation by enacting § 28 of the Penal Code. See CAL. PENAL CODE § 28(a)-(b).

56. See *id.* at 679, 504 P.2d at 1260, 105 Cal. Rptr. at 796.

57. See *id.* at 688, 504 P.2d at 1266, 105 Cal. Rptr. at 802.

conviction, the court reinforced the concept of only requiring criminal intent to commit the particular felony.⁵⁸

Circumstantial evidence can establish the specific intent to commit the underlying felony.⁵⁹ In *People v. Moore*, the California Supreme Court held that although there was no actual testimony of rape, circumstantial evidence supported such a finding. The evidence showed the defendant's obvious desire and purpose to have sexual intercourse with the victim, her refusal to go with the defendant for that purpose, her nude body found with contusions around the sex organs, and the fact that her clothing had been torn off.⁶⁰

Similarly, in *People v. Memro*, the California Supreme Court sustained a first-degree felony-murder conviction based on a violation of California Penal Code section 288.⁶¹ There, the defendant admitted to killing a seven-year-old boy because the boy attempted to leave when the defendant disrobed him and began taking pictures of him.⁶² The defendant did not attempt to have sex with the boy until after the boy was dead.⁶³ However, evidence of the defendant's sexual interest in youths, including a confession in which he described wanting to photograph and have sex with the boy, was sufficient for "a rational jury [to] . . . infer that he planned to act on his sexual interest in young boys by performing a lewd or lascivious act with [the victim]."⁶⁴

In contrast, the California Supreme Court rejected a first-degree felony-murder conviction in *People v. Craig*.⁶⁵ There, evidence of

58. *See id.*; *see also* *People v. Hernandez*, 47 Cal. 3d 315, 346, 763 P.2d 1289, 1307, 253 Cal. Rptr. 199, 216 (1988) (the California Supreme Court stated that it has "required as part of the felony-murder doctrine that the jury find the perpetrator had the specific intent to commit one of the enumerated felonies, even where that felony is a crime such as rape.").

59. *See* WITKIN CAL. CRIM. LAW ELEMENTS, *supra* note 7, § 157.

60. 48 Cal. 2d 541, 544-47, 310 P.2d 969, 971-73 (1957).

61. 11 Cal. 4th 786, 861-62, 905 P.2d 1305, 1346, 47 Cal. Rptr. 2d 219, 260 (1995).

62. *See id.*

63. *See id.* For an explanation as to the significance of defendant's argument that the sexual act took place after the killing, *see* discussion *supra* Part VI.B.1.c (underlying felony and the killing as part of one continuous transaction).

64. *Memro*, 11 Cal. 4th at 862, 905 P.2d at 1346, 47 Cal. Rptr. 2d at 260.

65. 49 Cal. 2d 313, 316 P.2d 947 (1957).

the victim's torn clothes, slightly spread legs, multiple contusions, and lacerations on the abdominal area were not enough to demonstrate that the killing was committed in the attempt to commit rape or during the commission of rape.⁶⁶ Instead, the court based its decision on the fact that there was no evidence on the clothing or body of a sexual act, no blood on the defendant's trousers, and medical testimony revealed that the victim died from strangulation around the neck.⁶⁷

These cases demonstrate that the first-degree felony-murder doctrine applies as an alternative theory to first-degree premeditated murder, regardless of whether the killing was accidental, as in *Coeffield*, or whether the prosecution fell just short of proving intent, as in *Cantrell*.⁶⁸ As the statutory language of section 189 indicates, a killing is first-degree murder if the underlying offense is one of the enumerated felonies.⁶⁹ Thus, the only relevant intent in a first-degree felony-murder analysis is whether the specific intent to commit the predicate felony existed. The prosecution can establish such specific intent by circumstantial evidence.

*b. must prove elements of the underlying felony
beyond a reasonable doubt*

In order to raise the first-degree felony-murder theory, the defendant must have committed one of the enumerated felonies under section 189. As in any felony, the jury must find all the elements of that independent felony proven beyond a reasonable doubt.⁷⁰

66. *See id.* at 319, 316 P.2d at 951.

67. *See id.* at 316, 318–19, 316 P.2d at 949, 950.

68. *See, e.g.,* *People v. Morlock*, 46 Cal. 2d 141, 292 P.2d 897 (1956) (defendant's killing of A when he intended to kill P was irrelevant because the killing took place during the perpetration of a robbery); *People v. Johnson*, 38 Cal. App. 3d 1, 112 Cal. Rptr. 834 (1974) (defendant's contention that he did not personally fire the shot which killed the victim was irrelevant because he personally used the revolver in the commission of aiding and abetting a crime).

69. *See* CAL. PENAL CODE § 189 (West 1998 & Supp. 2003).

70. *See Coeffield*, 37 Cal. 2d at 870, 236 P.2d at 573; *People v. Hart*, 20 Cal. 4th 546, 609, 976 P.2d 683, 721, 85 Cal. Rptr. 2d 132, 170 (1999); *People v. Ainsworth*, 45 Cal. 3d 984, 1016, 755 P.2d 1017, 1037, 248 Cal. Rptr. 568, 587 (1988); *People v. Whitehorn*, 60 Cal. 2d 256, 264, 383 P.2d 783, 788, 32 Cal. Rptr. 199, 203 (1963).

In *People v. Granados*, the defendant was prosecuted for the murder of his wife's young daughter, who was struck in the head with a machete and died from resulting injuries.⁷¹ The victim was discovered partially nude, suggesting that she may have been molested.⁷² However, there was no evidence of contusion, laceration, or seminal fluid on the victim's private parts.⁷³ At trial, the prosecution did not pursue a first-degree felony-murder conviction because it could not prove the mens rea requirement for murder.⁷⁴ Instead, it sought a first-degree murder conviction based on the theory that the defendant had killed the victim while committing a lewd or lascivious act.⁷⁵

The California Supreme Court instructed that in order to sustain a first-degree felony-murder conviction, the jury must first determine that the defendant committed the underlying felony beyond a reasonable doubt.⁷⁶ There, the trial court committed prejudicial error by not instructing the jury that they must first determine that the underlying felony was committed beyond a reasonable doubt before they could find the defendant guilty based on the felony-murder doctrine.⁷⁷ As a result, the court modified the defendant's first-degree murder conviction to a second-degree murder conviction.⁷⁸

In order to invoke the first-degree felony-murder doctrine, the prosecution must demonstrate that the defendant was, in fact, engaged in one of the enumerated felonies. Thus, the prosecution must first prove the occurrence of an enumerated felony beyond a reasonable doubt before showing that the killing and the felony were part of one continuous transaction.

*c. underlying felony and the killing part
of one continuous transaction*

The first-degree felony-murder rule does not require a strict causal relationship between the underlying felony and the

71. 49 Cal. 2d 490, 492–93, 319 P.2d 346, 348–49 (1957).

72. *See id.* at 497, 319 P.2d at 351.

73. *See id.*

74. *See id.*

75. *See id.*

76. *See id.* at 495–96, 319 P.2d at 350.

77. *See id.*

78. *See id.* at 497–98, 319 P.2d at 351.

homicide.⁷⁹ However, the mere existence of a felony and a killing in a particular set of facts does not automatically trigger the felony-murder doctrine because the killing must occur during perpetration of that felony.⁸⁰ The homicide is committed in the perpetration of the felony if the killing and the felony are parts of one continuous transaction.⁸¹

In *People v. Hudson*, the defendant and the victim were heading back to town together after spending the night drinking. During the trip, the defendant assaulted the victim, killing him.⁸² The defendant then took the victim's wallet and drove away.⁸³ At trial, there was a factual issue as to whether the defendant had formed his intent to rob before or after he attacked and killed the victim.⁸⁴ The trial court refused to instruct the jury that the felony-murder doctrine applied only if the defendant formed his intent to rob before or during the killing.⁸⁵ The California Supreme Court reversed the conviction holding that the trial court erred in its refusal because the evidence did not show beyond a reasonable doubt that the defendant had formed the intent to rob before or during the attack.⁸⁶

79. See *Whitehorn*, 60 Cal. 2d at 264, 383 P.2d at 788, 32 Cal. Rptr. at 204.

80. See *id.*

81. See *id.*; *Hart*, 20 Cal. 4th at 609, 976 P.2d at 721, 85 Cal. Rptr. 2d at 170 (defendant was convicted of first-degree murder for engaging in crimes of rape, sodomy, and oral copulation); *Ainsworth*, 45 Cal. 3d at 1016, 755 P.2d at 1037 (defendant was convicted of first-degree murder for robbery and kidnapping); *Whitehorn*, 60 Cal. 2d at 264, 383 P.2d at 787, 32 Cal. Rptr. at 203 (defendant was convicted of first-degree murder for rape and murder).

82. 45 Cal. 2d 121, 122, 287 P.2d 497, 497 (1955).

83. See *id.*

84. See *id.* at 126–27, 287 P.2d at 500–01. Here, the issue as to whether the defendant formed his intent to rob the victim before or after the killing was close. See *id.* There was no indication that the defendant prepared the robbery before he killed the victim. See *id.* at 126, 287 P.2d at 500. Still, the prosecution had a valid argument when it contested that the defendant's intent rose after he knocked the victim down, but before he dealt the fatal blow. See *id.*

85. See *id.* at 125, 287 P.2d at 499–500. Specifically, the defendant offered the instruction, “If you find that [defendant] . . . had not formed an intention to rob [victim] until after he struck [victim], dragged his body into the ditch then you are instructed that [victim] was not killed by [defendant] in the perpetration of or attempt to perpetrate the crime of robbery.” *Id.*

86. See *id.* at 127, 287 P.2d at 500–01.

In *People v. Anderson*, the court further refined the requisite nexus between the predicate felony and the killing.⁸⁷ The case involved the killing of a ten-year-old girl, whose entire body contained more than sixty cuts and wounds.⁸⁸ Several of the wounds, including a laceration extending from the rectum through the vagina were post-mortem.⁸⁹ Evidence revealed that the defendant had torn off the victim's clothes, but there was no trace of seminal fluid.⁹⁰ At trial, the prosecution contended that the defendant committed murder in the perpetration or attempt to perpetrate lewd or lascivious acts under California Penal Code section 288. The California Supreme Court clarified its earlier statement in *Hudson*, stating:

[T]he evidence must establish that the defendant harbored the felonious intent either prior to or during the commission of the acts which resulted in the victim's death; evidence which establishes that the defendant formed the intent only after engaging in the fatal acts cannot support a verdict of first-degree murder based on section 189.⁹¹

The court reversed the first-degree felony-murder conviction because the prosecution failed to present any evidence that the defendant formed sexual feeling or engaged in any kind of lewd conduct towards the victim.⁹²

In *People v. Ainsworth*, a witness saw the defendant and his accomplice approach the victim's vehicle and then drive away with the victim sitting between them.⁹³ Police later found the victim's abandoned car with a bullet casing inside. The bullet casing contained both the defendant's fingerprints and the victim's blood.⁹⁴ Months later, authorities discovered the victim's body with a .45 caliber copper-coated slug in her hip, which was consistent with the bullet casing found in the car.⁹⁵ The California Supreme Court upheld the first-degree felony-murder conviction, stating that there

87. 70 Cal. 2d 15, 447 P.2d 942, 73 Cal. Rptr. 550 (1968).

88. *See id.* at 21–22, 447 P.2d at 945, 73 Cal. Rptr. at 553.

89. *See id.*

90. *See id.*

91. *Id.* at 34, 447 P.2d at 953, 73 Cal. Rptr. at 561.

92. *See id.* at 31, 447 P.2d at 951–52, 73 Cal. Rptr. at 559–60.

93. 45 Cal. 3d at 994, 755 P.2d at 1022, 248 Cal. Rptr. at 572.

94. *See id.* at 995, 755 P.2d at 1022, 248 Cal. Rptr. at 573.

95. *See id.* at 996, 755 P.2d at 1023, 248 Cal. Rptr. at 574.

“was ample evidence to support the jury’s finding that the death occurred in the perpetration of the robbery.”⁹⁶

These cases demonstrate that although a first-degree felony-murder conviction does not require a strict causal relationship between the felony and the killing, the killing cannot be merely incidental. However, the courts are unclear about the extent of continuity required between the felonious act and the killing.

The courts have held that the first-degree felony-murder doctrine applies only if the defendant formed the requisite intent to commit the underlying felony before or during the killing.⁹⁷ In *Ainsworth*, eyewitness testimony of the robbery before the victim’s death sufficiently established that the felony and the killing were part of one continuous transaction.⁹⁸ In contrast, the facts of *Hudson* and *Anderson* are problematic to those relying on the felony-murder theory. In those cases, in spite of the overwhelming evidence, the court ruled that the evidence did not establish the defendant’s intent to commit the felonies.⁹⁹

d. burglary based on the intent to commit a felonious assault precludes the first-degree felony-murder doctrine

The merger doctrine typically applies to assault-related felonies in the second-degree felony-murder context.¹⁰⁰ For a burglary based on intent to commit felonious assault, the merger doctrine precludes the application of the felony-murder doctrine, despite the fact that burglary is one of the enumerated felonies under section 189.¹⁰¹

In *People v. Wilson*, the killing occurred during a burglary.¹⁰² The only basis for the felonious entry was assault with a deadly weapon.¹⁰³ The California Supreme Court extended the merger

96. *Id.* at 1016, 755 P.2d at 1037, 248 Cal. Rptr. at 587.

97. *See Anderson*, 70 Cal. 2d at 34, 447 P.2d at 953, 73 Cal. Rptr. at 561.

98. *See Ainsworth*, 45 Cal. 3d at 994, 755 P.2d at 1022, 248 Cal. Rptr. at 572.

99. *See Hudson*, 45 Cal. 2d at 121, 287 P.2d at 497; *Anderson*, 70 Cal. 2d at 22, 447 P.2d at 945, 73 Cal. Rptr. at 553.

100. *See discussion infra* Section C.1.d.

101. *See Wilson*, 1 Cal. 3d at 442, 82 Cal. Rptr. at 501, 462 P.2d at 29–30.

102. *See id.* at 440, 82 Cal. Rptr. at 499, 462 P.2d at 28.

103. *See id.*

doctrine in the context of the first-degree felony-murder doctrine, stating that the assault is an “integral part of the homicide.”¹⁰⁴

Burglary is one of the felonies enumerated under section 189. Nevertheless, the merger rule precludes the felony-murder doctrine for unlawful entries based on the intent to assault.¹⁰⁵ Here, the “integral part of the homicide” language suggested that the court would merge other felonies subject to the first-degree felony-murder rule.¹⁰⁶ However, recent California Supreme Court cases have limited the merger doctrine solely to assault felonies.¹⁰⁷ Thus, a burglary with the intent to commit assault is one of the very few exceptions to the otherwise strict application of the first-degree felony-murder rule.

2. Application of the first-degree felony-murder doctrine to provocative acts

Under the common law, the application of the felony-murder doctrine was potentially limitless since its application relieved the prosecution of having to prove deliberation or premeditation. The potential breadth of this application was particularly evident in cases where the defendant’s perpetration of felonies provoked victims or law enforcement officials into killing another.

The California Supreme Court’s opinion in *People v. Washington* reflects a view of the felony-murder doctrine that is decidedly narrower than the view according to the common law.¹⁰⁸ *Washington* involved a defendant and his accomplice who robbed a gasoline station.¹⁰⁹ The accomplice pointed a gun at the attendant, but the attendant responded by firing his own gun at the accomplice, killing him.¹¹⁰ The court held that, despite provoking the attendant

104. *See id.*

105. *See id.* at 442, 462 P.2d at 29, 82 Cal. Rptr. at 501.

106. *See Hansen*, 9 Cal. 4th at 313–14, 885 P.2d at 1029, 36 Cal. Rptr. 2d at 616.

107. *See, e.g., People v. Malfavon*, 102 Cal. App. 4th 727, 125 Cal. Rptr. 2d 618 (2002) (merger rule is triggered only when the underlying felony was assault); *People v. Johnson*, 15 Cal. App. 4th 169, 175, 18 Cal. Rptr. 2d 650, 654 (court recognized that the “underlying felony must have a purpose other than the assault for the felony-murder rule to apply”).

108. *Washington*, 62 Cal. 2d at 777, 402 P.2d at 130, 44 Cal. Rptr. at 442.

109. *See id.* at 779, 402 P.2d at 132, 44 Cal. Rptr. at 444.

110. *See id.*

into killing his accomplice, the first-degree felony-murder rule did not apply to the defendant because he did not commit the killing in perpetration or attempt to perpetrate robbery.¹¹¹ The court interpreted section 189 as requiring that the felon or his accomplice commit the killing.¹¹² To consider the acts of the victim as those of the accomplice “would expand the meaning of the words ‘murder . . . which is committed in the perpetration . . . [of] robbery . . .’ beyond common understanding.”¹¹³ The *Washington* decision reversed *People v. Harrison*, where the court of appeal applied the first-degree felony-murder doctrine under the similar circumstances of defendants provoking a robbery victim into firing a gun that accidentally shot and killed another victim.¹¹⁴

This provocative act scenario is distinguishable from cases involving agency or proximate cause issues, where the first-degree felony-murder doctrine is still applicable.¹¹⁵ Defendants are responsible for both intentional and unintentional killings during the commission of a section 189 felony, including situations where the victim was not the intended target of the killing. The first-degree felony-murder doctrine further applies to killings that the accomplice caused during the commission of a felony. Thus, the courts draw the line when anyone other than the defendant or an accomplice—e.g., a victim, a police officer, or any other involved person—is provoked, and kills.

3. Challenges to the first-degree felony-murder doctrine

While both courts and scholars have criticized the felony-murder doctrine as an artificial concept, worthy of only a narrow application, the first-degree felony-murder doctrine is a statutory concept that is the law in California. Because of this fact, there have been very few challenges made against the felony-murder doctrine itself.

People v. Dillon represents one of the few decisions involving challenges to the first-degree felony-murder doctrine.¹¹⁶ The trial

111. *See id.* at 781, 402 P.2d at 133, 44 Cal. Rptr. at 445.

112. *See id.*

113. *Id.*

114. 176 Cal. App. 2d 330, 345, 1 Cal. Rptr. 414, 424–25 (1959).

115. *See* discussion Agency and Proximate Cause in Felony-Murder *infra* Section D.

116. 34 Cal. 3d 441, 668 P.2d 697, 194 Cal. Rptr. 390 (1983).

court convicted the defendant of first-degree felony-murder and attempted robbery.¹¹⁷ On appeal, the defendant contended that the first-degree felony-murder doctrine was an uncodified common law rule that the court should abolish.¹¹⁸ Moreover, the defendant argued that even if the felony-murder rule were a statutory doctrine, it unconstitutionally presumes the existence of purpose to kill.¹¹⁹

The California Supreme Court reviewed the “dubious origins” of the felony-murder doctrine, which revealed that section 189, as originally enacted, may have been merely a degree-fixing statute and not a codification of the first-degree felony-murder rule.¹²⁰ However, the court held that its “shaky . . . historical foundation” was irrelevant because the legislature has treated section 189 as a codification of the first-degree felony-murder doctrine.¹²¹ Accordingly, the courts could not judicially abolish the rule.¹²²

The California Supreme Court also rejected the defendant’s constitutional challenge, stating that the felony-murder doctrine does not presume purpose to kill, because as a matter of law, it is not an element of felony-murder.¹²³ Because the rule does not presume purpose to kill, it neither unconstitutionally denies due process nor makes an irrational connection “between the fact proved (here, felonious intent) and the fact presumed (malice).”¹²⁴

The first-degree felony-murder rule is a statutory doctrine that is codified under section 189 of the Penal Code. Despite the objections to the felony-murder doctrine, the court cannot judicially abrogate the rule because it is a legislative creation.

117. *See id.* at 450, 668 P.2d at 700, 194 Cal. Rptr. at 393.

118. *See id.* at 462, 668 P.2d at 708, 194 Cal. Rptr. at 401.

119. *See id.*

120. *See id.* at 462–63, 668 P.2d at 708–09, 194 Cal. Rptr. at 401–02.

121. *Id.* at 471–72, 668 P.2d at 715, 194 Cal. Rptr. at 408.

122. *See id.* at 472 n.19, 668 P.2d at 715 n.19, 194 Cal. Rptr. at 408 n.19.

123. *See id.* at 475, 668 P.2d at 718, 194 Cal. Rptr. at 411.

124. *See id.* at 476. Other jurisdictions have also addressed the constitutionality of the felony-murder doctrine. *See* *Ulster County Court v. Allen*, 442 U.S. 140, 165 (1979) (citing *Leary v. United States*, 395 U.S. 6, 36 (1969) which addressed the constitutionality of the felony-murder doctrine); *Tot v. United States*, 319 U.S. 463, 467–68 (1943).

C. Second-Degree Felony-Murder

“All kinds of murders other than those specified as first degree are murders of the second degree.”¹²⁵ Second-degree felony-murder is an alternative to unpremeditated murder with express purpose to kill, or implied malice murder.¹²⁶ It is similar to first-degree felony-murder, where the killing occurs during the perpetration of a felony, except that the underlying felony is not one of the felonies enumerated under section 189.¹²⁷

While the second-degree felony-murder doctrine has the same effect as its first-degree counterpart, the second-degree felony-murder doctrine is limited in its application. At first glance, the second-degree felony-murder rule appears broad because it potentially applies to any felony that results in a killing, and it is not limited solely to statutorily enumerated felonies.¹²⁸ However, the elements of the second-degree felony-murder doctrine suggest otherwise.

The second-degree felony-murder doctrine is a common law rule, and its many strictures reflect the court’s disfavor of the felony-murder theory in general.¹²⁹ Some courts believe that the doctrine wrongly convicts people for murder without having to prove the standard mens rea requirement.¹³⁰

125. DALTON & KNIGHTEN, *supra* note 3, § 5:6[A] (2002); see CAL. PENAL CODE § 189 (West 2002); CALJIC, *supra* note 10, No. 8.30 (“Murder of the second-degree is [also] the unlawful killing of a human being with malice aforethought when the perpetrator intended unlawfully to kill a human being but the evidence is insufficient to prove deliberation and premeditation”).

126. See DALTON & KNIGHTEN, *supra* note 7, § 5:6[A]; see also CALJIC, *supra* note 10, No. 8.30 (jury instructions on second-degree express malice murder); *Id.* No. 8.31 (jury instructions on second-degree implied malice murder).

127. See WITKIN CAL. CRIM. LAW ELEMENTS, *supra* note 7, § 174.

128. See *id.*

129. See *Dillon*, 34 Cal. 3d at 472 n.19, 668 P.2d at 715 n.19, 194 Cal. Rptr. at 408 n.19 (characterizing the felony-murder doctrine as “an almost universally disfavored rule” and that “the second-degree felony-murder rule remains, as it has been since 1872, a judge-made doctrine without any express basis in the Penal Code”).

130. See, e.g., *Washington*, 62 Cal. 2d at 783, 402 P.2d at 134, 44 Cal. Rptr. at 446 (“felony-murder rule has been criticized on the grounds that in almost all cases in which it is applied it is unnecessary and that it erodes the relation between criminal liability and moral culpability”).

1. Elements of the second-degree felony-murder doctrine

The second-degree felony-murder doctrine applies if a killing occurred during the perpetration of an inherently dangerous felony.¹³¹ Whether a felony is inherently dangerous is a question of law for the courts to decide based on the felony in its abstract, rather than the particular facts of the case. Even if the predicate felony is determined to be inherently dangerous, the felony-murder doctrine does not apply if that felony merges with the resulting homicide.

a. felony must be inherently dangerous

The second-degree felony-murder doctrine applies only if the killing resulted from the perpetration of a felony that is inherently dangerous.¹³² An act is inherently dangerous to human life when there is “a high degree of probability that it will result in death.”¹³³ This requirement is considerably narrower than in the past, when killings perpetrated during any felony were deemed to be murder.¹³⁴

In *People v. Ford*, for example, the defendant kidnapped his wife and another person.¹³⁵ When a deputy sheriff stopped the defendant in his car and ordered him to hand over his gun, the defendant fired at the officer, killing him.¹³⁶ In affirming the trial court’s refusal to issue a manslaughter instruction, the California Supreme Court stated that, as a matter of law, “[a] homicide that is a direct causal result of the commission of a felony inherently dangerous to human life (other than [those] felonies enumerated in Cal. Penal Code section 189) constitutes at least a second-degree murder.”¹³⁷ The court observed that at the time of the shooting, the

131. See discussion, *supra* Section B.1.c.

132. See *Patterson*, 49 Cal. 3d at 626–27, 778 P.2d at 558, 262 Cal. Rptr. at 204.

133. *People v. Davenport*, 41 Cal. 3d 247, 262, 710 P.2d 861, 869, 221 Cal. Rptr. 794, 802 (1985); *People v. Thomas*, 41 Cal. 2d 470, 480, 261 P.2d 1, 22 (1953).

134. See, e.g., *People v. Poindexter*, 51 Cal. 2d 142, 330 P.2d 763 (1958) (second-degree felony-murder conviction based on administering narcotics to a minor upheld) (overruled on another ground by *Patterson*, 49 Cal. 3d at 625, 778 P.2d at 557, 262 Cal. Rptr. at 203); *People v. Powell*, 34 Cal. 2d 196, 208 P.2d 974 (1949) (second-degree felony-murder conviction based on abortion upheld).

135. 60 Cal. 2d at 782–83, 388 P.2d at 899, 36 Cal. Rptr. at 627.

136. See *id.*

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

defendant was still in the commission of kidnapping, which was “inherently dangerous to human life, and ‘the killing had a direct causal relationship to the [crimes] being committed.’”¹³⁸ Thus, under the felony-murder rule, the homicide qualified as being at least a second-degree murder.¹³⁹

While the *Ford* court only observed that a killing resulting from the commission of an inherently dangerous felony deserves at least a second-degree conviction, it did not make the second-degree conviction an absolute requirement.¹⁴⁰ The California Supreme Court eventually approved this formulation.¹⁴¹ For example, in *People v. Williams*, the defendants stabbed the victim to death during an affray with the victim, who was a methedrine supplier.¹⁴² The California Supreme Court reversed the trial court’s instruction requiring the jury to find the defendants guilty of second-degree felony-murder if they found that the killing occurred during a conspiracy to obtain methedrine.¹⁴³ The court stated that although the purpose of the felony-murder rule, which is “to deter felons from killing negligently or accidentally . . . may be well served with respect to felonies such as robbery or burglary . . . it has little relevance to a felony which is not inherently dangerous.”¹⁴⁴

138. *Ford* at 795, 388 P.2d at 907, 36 Cal. Rptr. at 636 (quoting *People v. Robillard*, 55 Cal. 2d 88, 98 (1960)).

139. *See id.* Today, § 207 kidnapping is one of the enumerated felonies under § 189, and any killing during such felony invokes the first-degree felony-murder rule. *See* CAL. PENAL CODE § 189 (West 2002). Here, the court also applied the second-degree felony-murder doctrine under conviction of § 12021, for possession of a concealable weapon by an ex-felon. *See id.* However, commission of a § 12021 crime does not trigger the second-degree felony-murder doctrine today because of the California Supreme Court’s holding in *Satchell*, where the court stated that the “mere possession *in itself*—ignore[es] the propensities and conduct of the possessor—is essentially neutral in its intentional aspect and should not serve as the basis for the imputation of malice.” 6 Cal. 3d at 43, 489 P.2d at 1372, 98 Cal. Rptr. at 44.

140. *See Ford* at 795–96, 388 P.2d at 907–08, 36 Cal. Rptr. at 635–36.

141. *See, e.g., Washington*, 62 Cal. 2d at 780, 402 P.2d at 133, 44 Cal. Rptr. at 445 (the court stated that “the felony-murder doctrine ascribes malice aforethought to the felon who kills in the perpetration of an inherently dangerous felony”); *Williams*, 63 Cal. 2d at 457, 406 P.2d at 630, 47 Cal. Rptr. at 10 (1965) (the court referring to *Washington* as the case in which it approved the “*Ford* formulation”).

142. 63 Cal. 2d 452, 406 P.2d 647, 47 Cal. Rptr. 7 (1965).

143. *See id.* at 455, 406 P.2d at 648, 42 Cal. Rptr. at 8.

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

Conversely, the court reasoned that “[i]f the felony is not inherently dangerous it is highly improbable that the potential felon will be deterred” because “he will not anticipate that any injury or death might arise solely from the fact that that he will commit the felony.”¹⁴⁵ The court held that the felony, conspiracy to possess methedrine, was not inherently dangerous.¹⁴⁶

Therefore, the courts rely on the inherently dangerous analysis because it is consistent with the goal of the felony-murder doctrine, which is to deter felons from killing negligently or accidentally while committing a felony. As such, a great majority of cases involving second-degree felony-murder now focus on whether the underlying felony is inherently dangerous to human life.¹⁴⁷

b. felony must be analyzed in the abstract

In deciding whether the underlying felony was inherently dangerous to human life, the courts look to the elements of the felony in the abstract, not to the facts surrounding a particular killing. The Supreme Court imposed this view-in-the-abstract approach in order to prevent the circumstances surrounding the death of the victim

145. *Id.*

146. *See id.* at 458, 406 P.2d at 650, 74 Cal. Rptr. at 10.

147. Cases where courts deemed that the predicate felonies were inherently dangerous include the following: *Hansen*, 9 Cal. 4th 300, 885 P.2d 1022, 36 Cal. Rptr. 609 (shooting at an inhabited dwelling); *People v. Clem*, 78 Cal. App. 4th 346, 92 Cal. Rptr. 2d 727 (2000) (grossly negligent discharge of firearm); *People v. James*, 62 Cal. App. 4th 244, 74 Cal. Rptr. 2d 7 (1998) (manufacturing methamphetamine); *People v. Johnson*, 15 Cal. App. 4th 169, 18 Cal. Rptr. 2d 650 (1993) (reckless driving to elude a peace officer); *People v. Morse*, 2 Cal. App. 4th 620, 3 Cal. Rptr. 2d 343 (1992) (reckless possession of a bomb). On the contrary, the courts deemed the following cases as not inherently dangerous: *People v. Smith*, 62 Cal. App. 4th 1233, 72 Cal. Rptr. 2d 918 (1998) (extortion); *People v. Taylor*, 6 Cal. App. 4th 1084, 8 Cal. Rptr. 2d 439 (1992) (furnishing PCP); *People v. Caffero*, 207 Cal. App. 3d 678, 255 Cal. Rptr. 22 (1989) (child abuse); *People v. Burroughs*, 35 Cal. 3d 824, 678 P.2d 894, 201 Cal. Rptr. 319 (1984) (practice of medicine without a license) (overruled on another ground by *People v. Blakeley*, 23 Cal. 4th 82, 89, 999 P.2d 675, 679, 96 Cal. Rptr. 2d 451, 455 (2000)); *People v. Henderson*, 19 Cal. 3d 86, 560 P.2d 1180, 137 Cal. Rptr. 1 (1977) (false imprisonment) (overruled on another ground by *Flood*, 18 Cal. 4th at 490 n.12, 957 P.2d at 882 n.12, 76 Cal. Rptr. 2d at 193 n.12); *Satchell*, 6 Cal. 3d 28, 489 P.2d 1361, 98 Cal. Rptr. 33 (possession of a firearm by a felon).

from swaying the courts into applying the second-degree felony-murder doctrine.

In *People v. Williams*, the California Supreme Court elaborated on the view-in-the-abstract approach.¹⁴⁸ In holding that a conspiracy to possess methedrine is not inherently dangerous, the majority rejected prior decisions in which courts determined the inherent danger of a felony based on (1) the particular circumstances of a case; and (2) whether the resulting death was “an expectable incident of the felony.”¹⁴⁹

In *People v. Burroughs*, the California Supreme Court reversed the second-degree felony-murder conviction of the defendant, a self-proclaimed “healer,” who treated the victim without a medical license.¹⁵⁰ There, the California Supreme Court explained that the *Williams* court’s viewed-in-the-abstract analysis is necessary because every case that potentially applies the second-degree felony-murder rule involves a killing.¹⁵¹ The majority feared that courts would apply the rule simply because “the existence of the dead victim might appear to lead inexorably to the conclusion that the underlying felony is exceptionally hazardous.”¹⁵²

In determining the inherent dangerousness of a felony, the courts impose a viewed-in-the-abstract approach in order to prevent courts from imposing their normative views, which could lead to potentially

148. *Williams*, 63 Cal. 2d at 457, 406 P.2d at 649, 47 Cal. Rptr. at 9.

149. *See id.* In *People v. Pulley*, 225 Cal. App. 2d 366, 37 Cal. Rptr. 376 (1964) (overruled by *Williams*, 63 Cal. 2d at 458, 406 P.2d at 650, 47 Cal. Rptr. at 10), the defendants were driving a stolen vehicle at seventy to eighty miles an hour, while evading a pursuit by a traffic officer. They killed a man when their car ran a red light and collided into traffic and cars proceeding with the green light. *See id.* at 368, 37 Cal. Rptr. at 377. In rejecting the defendant’s contention that the felony-murder doctrine should be limited with respect to felonies that are not dangerous to human life, the court of appeals reviewed the particular facts involved in the case, rather than viewing the elements in the abstract. The court observed that, “[b]y any reasonable standard, stealing and driving a stolen car and endeavoring to escape pursuing officers with the stolen car, entering an intersection against all rules of the road at seventy to eighty miles per hour and crashing with other cars lawfully proceeding therein, is highly dangerous.” *Id.* at 373, 37 Cal. Rptr. at 380. It concluded that, in such circumstance, death was “not a freak coincidence, but an expectable incident of the felony.” *Id.*

150. 35 Cal. 3d at 826, 678 P.2d at 895, 201 Cal. Rptr. at 320.

151. *See id.* at 830, 678 P.2d at 898, 201 Cal. Rptr. at 323.

152. *Id.*

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prejudicial results. Moreover, fairness requires the court to objectively construe the underlying statute, especially because all potential felony-murder doctrine issues involve a dead victim. Thus, the courts are to analyze each statutory offense objectively.

c. the inherent dangerousness of each statutory offense is determined separately

In order to determine whether an underlying felony is inherently dangerous, courts examine the statutory definition of the applicable felony. As such, the question of whether a felony is inherently dangerous is a matter of statutory construction.

In *Burroughs*, the court held that the inherent dangerousness of a felony is determined by the statutory definition as a whole, “taking into account even nonhazardous ways of violating the provisions of the law which do not necessarily pose a threat to human life.”¹⁵³ The court examined the language of California Business and Professions Code section 2053,¹⁵⁴ and held the conduct at issue was not inherently dangerous because “one may violate the proscription against the felonious practice of medicine without a license and yet not necessarily endanger human life.”¹⁵⁵

153. *Id.* However, the inherent dangerousness of a statute having multiple offenses may be analyzed separately based on the particular offense, which is the basis for the application of the second-degree felony-murder doctrine. See *Patterson*, 49 Cal. 3d at 625, 778 P.2d at 556, 262 Cal. Rptr. at 202.

154. CAL. BUS. & PROF. CODE § 2053 (West 2002) states:

Any person who willfully, under circumstances or conditions which cause or create a risk of great bodily harm, serious physical or mental illness, or death, practices or attempts to practice, or advertises or holds himself or herself out as practicing, any system or mode of treating the sick or afflicted in this state, or diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other physical or mental condition of any person, without having at the time of so doing a valid, unrevoked and suspended certificate as provided in this chapter, or without being authorized to perform that act pursuant to a certificate obtained in accordance with some other provision of law, is punishable by imprisonment in the county jail for not exceeding one year or in the state prison.

155. *Burroughs*, 35 Cal. 3d at 830, 678 P.2d at 898, 201 Cal. Rptr. at 323; see also *Henderson*, 19 Cal. 3d 86, 560 P.2d 1180, 137 Cal. Rptr. 1 (holding that Cal. Penal Code § 237, false imprisonment, is not inherently dangerous because it is effectuated by *either* violence, menace, fraud or deceit); *People v. Lopez*, 6 Cal. 3d 45, 51, 489 P.2d 1372, 1376, 98 Cal. Rptr. 44, 48 (1971)

The court of appeal faced a similar issue in *People v. Caffero*.¹⁵⁶ There, the defendants were charged with second-degree felony-murder after their infant daughter died from an E. coli infection that resulted from a lack of proper hygiene.¹⁵⁷ The second-degree felony-murder charge was based on the felony child abuse provision in Penal Code section 237(a)(1). Relying on *Burroughs*, the court of appeal stated that if a statute may be violated by conduct that does not endanger human life, it is not inherently dangerous to human life.¹⁵⁸ It held that section 237(a)(1) is implicated in a wide range of circumstances, including either life-threatening *or* non-life-threatening circumstances.¹⁵⁹

The California Supreme Court further elaborated on the issue of statutory construction in *People v. Patterson*.¹⁶⁰ The case involved a defendant who furnished cocaine to the victim, who died after ingesting it.¹⁶¹ The defendant faced a second-degree felony-murder charge for furnishing cocaine, a felony under California Health and Safety Code section 11352.¹⁶² The court found that more than one-hundred controlled substances fell within the confines of section 11352, and the legislature did not proscribe separate statutes for each of the offenses because it appeared to be more convenient.¹⁶³ For a statute having multiple offenses, the court held that “each offense set forth in the statute should be examined separately to determine its inherent dangerousness.”¹⁶⁴ In remanding the case, the court instructed the trial court to determine whether the commission of the

(court held that Cal. Penal Code § 4352 is not inherently dangerous because it constitutes “a multitude of sins” including both violent and nonviolent type of escape).

156. 207 Cal. App. 3d 678, 255 Cal. Rptr. 22 (1989).

157. *See id.* at 681–82, 255 Cal. Rptr. at 24.

158. *See id.*

159. *See id.* at 683, 255 Cal. Rptr. at 25. Cal. Penal Code § 273(a)(1) shares the same grammatical structure found significant in *Burroughs* in that it separates the life-threatening risk, ‘death,’ from the non-life-threatening risk, ‘great bodily harm,’ with the disjunctive “or.” *Id.*

160. 49 Cal. 3d 615, 778 P.2d 549, 262 Cal. Rptr. 195 (1989).

161. *See id.* at 617, 778 P.2d at 551, 262 Cal. Rptr. at 197.

162. *See id.*

163. *See id.* at 625, 778 P.2d at 556, 262 Cal. Rptr. at 202.

164. *Id.*

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statutory offense at issue involved “a *high probability* that it will result in death.”¹⁶⁵

The California Court of Appeal cases *People v. Johnson*,¹⁶⁶ *People v. Sewell*,¹⁶⁷ and *People v. Sanchez*,¹⁶⁸ all involve second-degree felony-murder charges based on the defendant’s attempt to elude a pursuing police officer. In *Johnson* and *Sewell*, the underlying felony involved California Vehicle Code section 2800.2.¹⁶⁹ In each case, the court stated that conduct under section 2800.2 is an inherently dangerous felony because its key element is the “willful or wanton disregard for the safety of persons or property.”¹⁷⁰ In *Sanchez*, however, the court came to the opposite conclusion when they determined that section 2800.3, a statute that amended and replaced section 2800.2, did not make conduct within its purview inherently dangerous.¹⁷¹ There, the court found that the statutory language of section 2800.2 differed significantly from the wording of section 2800.3 in that section 2800.3 covered a wide range of circumstances, including conduct that proximately caused death *or* serious bodily injury.¹⁷²

Burroughs and *Caffero* demonstrate that a determination of inherent dangerousness depends on statutory construction.¹⁷³ Each case shows that a statute makes conduct inherently dangerous if its language shows a possibility of violation by an act that does not produce a high probability of death. The statutory interpretation in *Patterson* was distinguishable from these cases because *Patterson*

165. *Id.* at 627, 778 P.2d at 558, 262 Cal. Rptr. at 209.

166. 15 Cal. App. 4th 169, 172–73, 18 Cal. Rptr. 2d 650, 652–53 (1993).

167. 80 Cal. App. 4th 690, 95 Cal. Rptr. 2d 600 (2000).

168. 86 Cal. App. 4th 970, 103 Cal. Rptr. 2d 809 (2001).

169. *See Sewell*, 80 Cal. App. 4th at 693, 95 Cal. Rptr. 2d at 602 (stating that Cal. Vehicle Code § 2800.2 makes it a felony for a person who “flees or attempts to elude a pursuing peace officer in violation of Section 2800.1 . . . and the pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property”) (emphasis omitted); *Johnson*, 15 Cal. App. 4th at 173, 18 Cal. Rptr. 2d at 653.

170. *Johnson*, 15 Cal. App. 4th at 173, 18 Cal. Rptr. 2d at 653.

171. *See Sanchez*, 86 Cal. App. 4th at 977, 103 Cal. Rptr. 2d at 813–14 (stating that Cal. Vehicle Code § 2800.3 makes it a felony when “willful flight or attempt to elude a pursuing peace officer in violation of Section 2800.1 proximately causes death or serious bodily injury to any person.”).

172. *See id.* at 980, 103 Cal. Rptr. 2d at 815.

173. *See Burroughs*, 35 Cal.3d at 830, 678 P.2d at 898, 201 Cal.Rptr. at 323; *Caffero*, 207 Cal. App. 3d at 683, 255 Cal. Rptr. at 25.

involved a single statute that proscribed multiple offenses. In contrast, *Burroughs* and *Caffero* examined statutes that proscribed one offense that could be committed by numerous different acts, including acts that are not inherently dangerous.¹⁷⁴ Finally, *Johnson*, *Sewell*, and *Sanchez* represent a series of cases where the inherent dangerousness of a felony depends on the precise statutory language. Note that although each defendant in the cited cases essentially acted in the same manner, the second-degree felony-murder doctrine was inapplicable against one of them because the statutory language altered the inherency of its danger.¹⁷⁵

Courts depend on the statutory language of the underlying offense to objectively determine the inherently dangerous nature of a felony. Despite the fact that fairness requires a determination of the inherent danger, cases such as *Johnson*, *Sewell*, and *Sanchez* reveal that the felony-murder doctrine can produce rather arbitrary results. Because of this possibility, courts reluctantly apply the felony-murder doctrine and place limitations on it, such as the merger doctrine.

d. the “merger” rule precludes the application of the felony-murder doctrine if the underlying felony is assault

Even if the predicate felony is inherently dangerous to human life, the court may preclude the application of the felony-murder doctrine if the felony “merged” with the resulting homicide.¹⁷⁶ The court’s adoption of the merger doctrine has spurred a renewed debate over the second-degree felony-murder doctrine, despite its present limitations.

As the merger doctrine developed in other jurisdictions, it established that the felony-murder doctrine does not apply where the only underlying felony is assault.¹⁷⁷ In such a circumstance, the

174. *See id.*

175. *See Sewell*, 80 Cal. App. 4th at 693, 95 Cal. Rptr. 2d at 602; *Johnson*, 15 Cal. App. 4th at 173, 18 Cal. Rptr. 2d at 653; *Sanchez*, 86 Cal. App. 4th at 977, 980, 103 Cal. Rptr. 2d at 813–15.

176. *See People v. Ireland*, 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969).

177. *See Hansen*, 9 Cal. 4th at 311, 885 P.2d at 1028, 36 Cal. Rptr. 2d at 615; *see also* *People v. Huter*, 184 N.Y. 237 (1906) (court held that the defendant’s alleged killing of an officer while resisting arrest for burglary was

assault is regarded as having merged with the resulting homicide.¹⁷⁸ The merger doctrine singles out assault because homicide generally results from the commission of an assault, and if assault constituted one of the underlying felonies for felony-murder, the distinction between first and second-degree murder would be obliterated.¹⁷⁹ Any application of the felony-murder doctrine based on assault would relieve the prosecution of having to prove mens rea in a majority of homicide cases.¹⁸⁰ Thus, as one commentator noted, the inapplicability of the merger rule 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

In *People v. Ireland*, the defendant was convicted of second-degree murder after he shot and killed his wife during a dispute.¹⁸² On appeal, the defendant contended that the trial court erred by giving the jury a second-degree felony-murder instruction based on assault with a deadly weapon.¹⁸³ The California Supreme Court agreed with the defendant, stating that the use of the felony-murder doctrine in this situation extends the doctrine “beyond any rational function that [it] is designed to serve.”¹⁸⁴ The court explained that because a great majority of homicides result from felonious assault, use of the felony-murder doctrine unnecessarily “bootstraps” the

assault in the second-degree and that the act merged with the homicide); *Buel v. People*, 18 Hun 487 (3d Dep’t 1879), aff’d 78 N.Y. 492 (1879) (where the defendant unintentionally killed the victim while raping her, the court denied his contention that the felony merged with the homicide because the two felonies were “so distinct that they [could] not be included in the same indictment”).

178. *See id.*

179. *See id.*; see also Note, *The Doctrine of Merger in Felony-Murder and Misdemeanor—Manslaughter*, 35 ST. JOHN’S L. REV. 109, 117 (1960) (describing that, in New York, the merger rule was adopted “[i]n order to properly preserve the distinction between the degrees of murder and between murder and manslaughter”).

180. *See Hansen*, 9 Cal. 4th at 311, 885 P.2d at 1028, 36 Cal. Rptr. 2d at 615.

181. *Id.* at 312, 885 P.2d at 1028, 36 Cal. Rptr. 2d at 615.

182. 70 Cal. 2d at 527, 450 P.2d at 582, 75 Cal. Rptr. at 190.

183. *See id.* at 538, 450 P.2d at 589, 75 Cal. Rptr. at 197.

184. *Id.* at 539, 450 P.2d at 590, 75 Cal. Rptr. at 198 (quoting *People v. Washington*, 62 Cal. 2d 777, 783 (1965)).

requisite mens rea for murder without ever having to consider it.¹⁸⁵ In adopting the merger doctrine for the first time, the court held that “second-degree felony-murder instruction may not properly be given when it is based upon a felony which is an integral part of the homicide and which the evidence produced by the prosecution shows to be an offense included in fact within the offense charged.”¹⁸⁶

Subsequent decisions following *Ireland* tested the applicability of the merger doctrine for various felonies.¹⁸⁷ For example, in *People v. Landry*, similar to *Ireland*, the underlying felony was assault with a deadly weapon.¹⁸⁸ There, the defendant was assaulting the victim’s friend with a gun when the victim appeared.¹⁸⁹ The defendant’s accomplice, who was next to the defendant, shot and killed the victim.¹⁹⁰ Relying on *Ireland*, the California Court of Appeal held that the merger doctrine precluded a second-degree felony-murder instruction against the defendant.¹⁹¹

In the companion cases *People v. Schockley*¹⁹² and *People v. Smith*,¹⁹³ both involving child abuse felonies, the courts further demarcated the line between felonies that merge and felonies that do not merge. In *Schockley*, the defendant was tried for second-degree felony-murder based on willful cruelty and endangerment after she

185. *See id.*

186. *Id.* (emphasis added). Although the *Ireland* court did not specify how they derived the phrase “integral part of the homicide,” it appears to have been derived from the law review article: *The Doctrine of Merger in Felony—Murder and Misdemeanor—Manslaughter*, *supra* note 179, at 118.

187. *See, e.g.*, *People v. Mahle*, 273 Cal. App. 2d 309, 78 Cal. Rptr. 360 (1969) (where the defendant had been convicted of second-degree murder for stabbing his wife to death while intoxicated); *see also* *People v. Carlson*, 37 Cal. App. 3d 349, 112 Cal. Rptr. 321 (1974) (where the defendant had been convicted of voluntary manslaughter and second-degree murder for the killing of an unborn child and mother, where the death of the fetus was caused by the death of the mother); *People v. Jenkins*, 275 Cal. App. 2d 545, 80 Cal. Rptr. 257 (1969) (where the defendant had been convicted of second-degree murder for shooting the victim to death even though he claimed to have an abnormal mental condition).

188. 212 Cal. App. 3d 1428, 261 Cal. Rptr. 254 (1989).

189. *See id.* at 1431, 261 Cal. Rptr. at 255.

190. *See id.*

191. *See id.* at 1438–39, 261 Cal. Rptr. at 260.

192. 79 Cal. App. 3d 669, 145 Cal. Rptr. 200 (1978).

193. 35 Cal. 3d 798, 678 P.2d 886, 201 Cal. Rptr. 311 (1984) (overruled on another ground by *People v. Felix*, 22 Cal. 4th 651, 657, 995 P.2d 186, 190, 94 Cal. Rptr. 2d 54, 59 (2000)).

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malnourished and dehydrated her infant son to death.¹⁹⁴ The Court of Appeal held that the felony did not merge with the killing because it is “based on an independent felony not related to the assault causing murder”¹⁹⁵ However, the California Supreme Court in *Smith* applied the merger rule because the underlying felony involved a child beating.¹⁹⁶

When the *Ireland* court adopted the merger doctrine, the amorphous “integral part of the homicide” language raised growing speculation that the courts would apply the merger doctrine to all felonies closely related to a homicide, and thereby circumscribe the felony-murder doctrine.¹⁹⁷ Despite this concern, the cases following *Ireland* failed to expand the scope of the merger rule because all the cases where the underlying felony had merged with the resulting homicide involved assaultive felonies. Although it seemed plausible that a felony unrelated to assault could be characterized as “an integral part of the homicide,” the courts have never extended the *Ireland* doctrine beyond the context of assault.¹⁹⁸

The California Supreme Court sought to clarify this issue in *People v. Mattison*.¹⁹⁹ The defendant in *Mattison* was a prisoner who supplied methyl alcohol to an alcoholic inmate. The methyl alcohol subsequently killed the inmate.²⁰⁰ The California Supreme Court rejected the defendant’s contention that the merger rule precluded the application of the second-degree felony-murder doctrine.²⁰¹ The court explained that the merger rule did not apply because the defendant had not committed the felonious act with the

194. See *Schockley*, 79 Cal. App. 3d at 673, 145 Cal. Rptr. at 201.

195. *Id.* at 676, 145 Cal. Rptr. at 203.

196. See *Smith*, 35 Cal. 3d at 801, 678 P.2d at 887, 201 Cal. Rptr. at 312.

197. See *Hansen*, 9 Cal. 4th at 313–14, 885 P.2d at 1029, 36 Cal. Rptr. 2d at 616.

198. See *id.*

199. 4 Cal. 3d 177, 481 P.2d 193, 93 Cal. Rptr. 185 (1971).

200. See *id.* at 180–81, 481 P.2d at 195, 93 Cal. Rptr. at 187. The defendant was charged with second-degree felony-murder based on Cal. Penal Code § 347 (West 1999 & Supp. 2003) for willfully furnishing poisonous substance. See CAL. PENAL CODE § 189 (West 2002) (killing by means of a poisonous substance, based on willfulness, deliberation or premeditation, is first-degree murder; without the necessary mens rea for murder, it is second-degree murder based on the felony-murder doctrine).

201. See *Mattison*, 4 Cal. 3d at 185–86, 481 P.2d at 198–99, Cal. Rptr. at 190.

intent to commit an injury that would result in death.²⁰² The court concluded that the application of the felony-murder rule was proper because the underlying felony was committed with a “collateral and independent felonious design.”²⁰³

People v. Hansen is the California Supreme Court’s latest pronouncement on the merger rule.²⁰⁴ The case involved a defendant who fired a handgun repeatedly at an apartment building striking a child occupant and killing her.²⁰⁵ The defendant was found guilty of second-degree felony-murder based on discharging a firearm at an inhabited dwelling.²⁰⁶ On appeal, the defendant contended that the second-degree felony-murder instruction was erroneous because the felony had merged with the resulting homicide.²⁰⁷ The California Supreme Court examined the “integral part of the homicide” language in *Ireland* and the “collateral and independent felonious design” language of *Mattison*.²⁰⁸ The majority rejected *Ireland’s* “integral part of the homicide” language as the determinative test in the existence of merger.²⁰⁹ The court stated that this language would preclude the felony-murder rule from applying to felonies that are most likely to result in death, making the felony-murder doctrine inapplicable to felonies where the perpetrator can foresee the likelihood that death may result, negligently or accidentally.²¹⁰ This in turn would undermine the purpose of the felony-murder doctrine, deterring felons from killing negligently or accidentally.

However, the court did not adopt *Mattison’s* language either because “a felon who acts with a purpose other than specifically to inflict injury upon someone . . . is subject to greater criminal liability for an act resulting in death than a person who actually intends to injure the person of the victim.”²¹¹ Rather, the court looked at whether the use of certain inherently dangerous felonies “as the predicate felony supporting application of the felony-murder rule

202. *See id.*

203. *Id.*

204. 9 Cal. 4th 300, 885 P.2d 1022, 36 Cal. Rptr. 2d 609 (1994).

205. *See id.* at 306, 885 P.2d at 1024, 36 Cal. Rptr. 2d at 611.

206. *See id.* at 307, 885 P.2d at 1025, 36 Cal. Rptr. 2d at 612.

207. *See id.*

208. *See id.* at 312–16, 885 P.2d at 1028–32, 36 Cal. Rptr. 2d at 615–19.

209. *See id.* at 314, 885 P.2d at 1030, 36 Cal. Rptr. 2d at 617.

210. *See id.*

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

[would] elevate all felonious assaults to murder or otherwise subvert the legislative intent.”²¹² The majority held that most homicides do not result from violations of willfully discharging a firearm at a dwelling house. Furthermore, a second-degree felony-murder instruction would not preclude the jury from “considering the issue of malice aforethought in the great majority of all homicides.”²¹³ Although the *Hansen* court did not explicitly state that the merger doctrine applies only to assaultive felonies, the lower courts have interpreted the decision as placing such a limitation.²¹⁴

The *Hansen* court’s conclusion suggests a reversal of its predecessor courts’ narrow application of the disfavored felony-murder doctrine.²¹⁵ The majority’s limitation on the merger rule makes the felony-murder rule less restrictive; in spite of all the past criticism.²¹⁶

2. Challenges made against the second-degree felony-murder doctrine

Since 1872, the second-degree felony-murder doctrine existed in California as “a judge-made doctrine without any express basis in the Penal Code.”²¹⁷ The felony-murder doctrine has endured much

212. *Id.*

213. *Id.*

214. *See, e.g.,* *People v. Malfavon*, 102 Cal. App. 4th 727, 125 Cal. Rptr. 2d 618 (2002) (merger rule triggers only when the underlying felony was assault); *People v. Baker*, 74 Cal. App. 4th 243, 87 Cal. Rptr. 2d 803 (1999) (citing the *Hansen* court’s test for the merger rule); *see also, Johnson*, 15 Cal. App. 4th at 175, 18 Cal. Rptr. 2d at 654 (court recognized that the “underlying felony must have a purpose other than the assault for the felony-murder rule to apply”).

215. *See Hansen*, 9 Cal. 4th at 314, 885 P.2d at 1030, 36 Cal. Rptr. 2d at 617.

216. *See generally* Gerald F. Uelmen, *California Courts: The Lucas Legacy*, 1996 CAL. LAWYER 29 (May 1996). Chief Justice Lucas, who presided over the *Hansen* case, but more importantly who presided over the California Supreme Court after Justice Bird was removed from the bench, is considered to have “brought strong law-and-order credentials to the anointed task of ‘righting’ a court some perceived as having slipped off the deep left end.” *Id.* Chief Justice Lucas is also described to be “deferential to legislative authority,” and “preached judicial restraint,” seeing the “judicial creativity [of his predecessors] as the problem, rather than the solution.” *Id.*

217. *Dillon*, 34 Cal. 3d at 472 n.19, 668 P.2d at 715 n.19, 194 Cal. Rptr. at 408 n.19 (1983). This is not to suggest that there is absolutely no statutory basis, because Penal Code § 189 has a catch-all provision, where “[a]ll kinds of

criticism, as it has been characterized by the courts as anachronistic, disfavored, unnecessarily applied in almost all cases, and eroding “the relation between criminal liability and moral culpability.”²¹⁸ Nevertheless, the California Supreme Court has refused all invitations to abolish the felony-murder doctrine because “the concept [is] imbedded in our law.”²¹⁹

In *People v. Dillon*, the California Supreme Court reaffirmed the first-degree felony-murder rule.²²⁰ The holding suggested that the legislature reconsider the subject of first-degree and second-degree felony-murder doctrine.²²¹ In *Burroughs*, the court referred to the *Dillon* decision and suggested that although the issue regarding the continued “vitality” of the second-degree felony-murder rule was at stake in neither *Dillon* nor *Burroughs*, they would review the rule if it were raised for review.²²² However, the court rescinded its invitation when it heard the *Patterson* case, declining the defendant’s invitation to determine the continued vitality of the rule.²²³

At one point, the California Supreme Court seemed inclined to review the validity of the second-degree felony-murder doctrine and to abrogate it. However, the *Patterson* court’s refusal to review the doctrine reveals the California Supreme Court’s reluctance to further limit the felony-murder doctrine. The felony-murder doctrine is firmly rooted within California law and it is unlikely that this doctrine will undergo many further changes without legislative action.

murders other than those specified as first-degree murders are murders of the second-degree.” DALTON & KNIGHTEN, *supra* note 3, § 5.6[A].

218. *Washington*, 62 Cal. 2d at 783, 402 P.2d at 134, 44 Cal. Rptr. at 446; *see also Burroughs*, 35 Cal. 3d at 829, 768 P.2d at 897, 201 Cal. Rptr. at 322; *Henderson*, 19 Cal. 3d at 92, 560 P.2d at 1183, 137 Cal. Rptr. at 4;. Indeed, the Model Penal Code has eliminated the “strict liability aspects of the traditional felony-murder doctrine but at the same time recogniz[ed] the probative significance of the concurrence of homicide and a violent felony.”

219. *People v. Phillips*, 64 Cal. 2d 574, 582, 414 P.2d 353, 360, 51 Cal. Rptr. 225, 232 (1966) (overruled on other grounds by *Flood*, 18 Cal. 4th at 490 n.12, 957 P.2d at 882 n.12, 76 Cal. Rptr. 2d at 193 n.12).

220. 34 Cal. 3d at 472, 668 P.2d at 715, 194 Cal. Rptr. at 408 (1983).

221. *See id.* at 472 n.19, 668 P.2d at 715 n.19, 194 Cal. Rptr. at 408 n.19.

222. *See Burroughs*, 35 Cal. 3d at 829 n.3, 768 P.2d at 897 n.3, 201 Cal. Rptr. at 322 n.3.

223. *See Patterson*, 49 Cal. 3d at 621, 778 P.2d at 554, 262 Cal. Rptr. at 200.

D. Agency and Proximate Cause in Felony-Murder

The most difficult part of felony-murder is determining how far liability should extend under the doctrine.²²⁴ Should liability be imposed upon a defendant whose co-felon does the actual killing? What if a bystander commits the killing? Should a defendant be liable when the person killed is a co-felon, or is a co-felon's death of too little concern to impose liability at all? Because no intent to kill is required before imposing liability under felony-murder, the element of causation is paramount.²²⁵ This reliance on causation has made answering the previous questions critical, but at the same time exceedingly difficult.

This Section examines the agency doctrine within the context of felony-murder. It begins by defining "agency" and explaining its role within felony-murder in California homicide law. Sub-section one examines the role of the felony-murder doctrine in killings by a co-felon, and sub-section two examines the role of the felony-murder doctrine in killings by a third party, such as the victim.

Historically, courts have used the agency theory²²⁶ as a way of establishing causation.²²⁷ Originally, this doctrine was borrowed from the conspiracy doctrine.²²⁸ When courts first applied the

224. See Michelle S. Simon, *Whose Crime Is It Anyway?: Liability for the Lethal Acts of Nonparticipants in the Felony*, 71 U. DET. MERCY L. REV. 223, 224 (1994).

225. *Id.*

226. Agency is a fiduciary relation established when one person acts on behalf of another. An example of the agency theory appears in *Commonwealth v. Campbell*, 89 Mass. 541 (1863). The defendant was involved in a riot, and the court considered whether the defendant could be guilty of felony-murder when another person was killed by a soldier who was resisting the riot's attack. *Id.* at 542-46. In defining the scope of agency within felony-murder, the court held that "a person engaged in the commission of an unlawful act is legally responsible for all of the consequences which may naturally or necessarily flow from it, and that, if he combines and confederates with others to accomplish an illegal purpose, he is liable . . . for the acts of each and all who participate with him . . ." *Id.* at 543-44.

227. For a discussion of causation, see *supra* Part V.

228. See Simon, *supra* note 224, at 226-34. In the conspiracy doctrine, a co-conspirator's liability is limited to only those acts that are committed in furtherance of the conspiracy. They are not responsible for any acts that were committed outside of those planned by the conspirators. These outside acts were seen as destroying the agency relationship between the parties, severing vicarious liability.

conspiracy doctrine, liability was limited to those situations that involved a killing in furtherance of the felony.²²⁹ As such, if a bystander did the killing, no liability would be imposed because the killing did not further the purpose of the felons in the commission of the crime.²³⁰ Therefore, the identity of the killer became the threshold issue for liability under the felony-murder doctrine, and the killer's identity moved to the forefront in importance.²³¹

This theory of agency has been used by a majority of the states.²³² However, recently courts have begun moving towards a proximate-cause theory of liability.²³³ This approach shifts the threshold issue to whether the killing was a foreseeable result of the commission of the felony.²³⁴ This theory appears to have been borrowed from tort law, where a defendant may be liable if the injury suffered by the plaintiff was foreseeable.²³⁵ However, the defendant would not be liable if there was an intervening event that broke the chain of causation.²³⁶

California goes one step further by requiring only a causal relationship. In *People v. Stamp*, the court imposed felony-murder liability noting that "[t]he doctrine is not limited to those deaths which are foreseeable."²³⁷ Rather, the conviction rested on the direct causal relationship between the felony and the murder.²³⁸ In *Stamp*, the victim died of a heart attack shortly after the defendants committed a robbery.²³⁹ On appeal, the defendants argued that the felony-murder doctrine should not have been applied because the killing had not occurred in perpetration of the felony.²⁴⁰ Rather, the

229. *See id.*

230. *See id.* Indeed, if a bystander did the killing, it often is in resistance of the felony, and not in furtherance of it.

231. *See* KADISH & SCHULHOFER, *supra* note 2, at 472–80.

232. *See* State v. Branson, 487 N.W. 2d 880 (Minn. 1992); State v. Bonner, 411 S.E. 2d 598 (N.C. 1992); State v. Hoang, 755 P.2d 7 (Kan. 1988).

233. *See* KADISH & SHULHOFER, *supra* note 2, at 471–72.

234. *See id.*

235. *See* Simon, *supra* note 224. *See generally*, Note, *Felony-murder: A Tort Law Reconceptualization*, 99 HARV. L. REV 1918, 1918–20 (1986) (comparing the felony-murder rule to tort law).

236. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 42, 43 (5th ed. 1984).

237. 2 Cal. App. 3d 203, 210, 82 Cal. Rptr. 598, 603 (1969).

238. *See id.* at 209, 82 Cal. Rptr. at 601.

239. *See id.* at 207, 82 Cal. Rptr. at 600.

240. *See id.*

killing was perpetrated after the robbery had already occurred. The California Court of Appeal disagreed and held that the felony-murder doctrine was not limited to foreseeable deaths. The felony-murder rule would apply as long as the killing was a “direct causal result” of the felony.²⁴¹

1. Agency: killings by a co-defendant

The felony-murder rule is invoked when a defendant kills another during the perpetration of a felony.²⁴² However, problems arise when a co-felon commits the murder. How far should liability extend? This has led to the development of agency within the context of felony-murder.

California courts have repeatedly held that all co-felons involved in the commission of a crime are equally responsible for a murder that is committed by one of them during the perpetration of the felony.²⁴³ This approach appears to have been first adopted by the California courts in *People v. Vasquez*.²⁴⁴ There, a man had been shot to death during the robbery of a store.²⁴⁵ Vasquez admitted to being involved in the robbery but testified that another robber had fired the shot without his approval.²⁴⁶ Vasquez appealed his conviction, but the court held him responsible for the homicides committed by his associates because they were “in furtherance of the common purpose . . . of the robbery.”²⁴⁷

Shortly after *Vasquez*, in the similar case of *People v. Olsen*, the court held that “[i]f a number of persons conspire together to commit a felony, and take the life of another person . . . it is murder in all, although only one may have inflicted the fatal blow.”²⁴⁸

241. *See id.* at 210, 82 Cal. Rptr. at 603.

242. *See supra*, Part VI.B.

243. *See* *People v. Gilbert*, 22 Cal. 2d 522, 140 P.2d 9 (1943); *People v. Martin*, 12 Cal. 2d 466, 85 P.2d 880 (1938); *People v. Boss*, 210 Cal. 245, 290 P. 881 (1930); *People v. Perry*, 195 Cal. 623, 234 P. 890 (1925).

244. 49 Cal. 560 (1875); *see also* *People v. Smithson*, 79 Cal. App. 4th 480, 94 Cal. Rptr. 2d 170 (2000) (holding that a defendant, if his accomplice in the robbery killed his victim by accident, should be convicted of first-degree murder).

245. *See Vasquez*, 49 Cal. 560–61 (1875).

246. *See id.*

247. *Id.* at 562.

248. 80 Cal. 122, 124, 22 P. 125, 126 (1889).

This doctrine continues to be followed by the California courts. Indeed, the California Supreme Court highlighted the deep entrenchment of agency within the felony-murder doctrine in *People v. Martin*.²⁴⁹ There, the defendant appealed his murder conviction, claiming that although he did drive his co-felon to the scene of the crime, he should not be held responsible for the murder because he did not assist his co-felon in the commission of the murder.²⁵⁰ The California Supreme Court denied his appeal stating:

It is, of course, *the well-settled law in California* that if a human being is killed by any one of several persons jointly engaged at the time of such killing in the perpetration of or an attempt to perpetrate the crime of robbery, whether such killing is intentional or unintentional, or accidental, each and all of such persons so jointly engaged in the perpetration of, or attempt to perpetrate such crime of robbery, are guilty of murder of the first-degree.²⁵¹

Thus, the agency doctrine had become a deeply-rooted, integral part of California felony-murder law.²⁵²

a. in furtherance requirement

The California courts have been inconclusive about the scope of complicity required to impose liability. This has resulted in two conflicting formulations of the scope of the felony-murder rule when applied to killings committed by co-felons. One line of cases—sometimes referred to as the *Vasquez* approach—takes the view that the killing by a co-felon must be “in furtherance of the common purpose.”²⁵³ This is consistent with language from the California Supreme Court’s earlier cases, such as *Vasquez* and *Olsen*.²⁵⁴ However, the other line of cases takes a broader view, simply requiring the killer and the accomplice to be jointly engaged in a

249. 12 Cal. 2d 466, 85 P.2d 880 (1938).

250. *See id.* at 472, 85 P.2d at 883–84.

251. *Id.* (emphasis added).

252. *See People v. Washington*, 62 Cal. 2d 777, 782, 402 P.2d 130, 133 (1965).

253. *Vasquez*, 49 Cal. at 560; *see also Olsen*, 80 Cal. at 122, 22 P. at 125; *Washington*, 62 Cal. 2d at 777, 402 P.2d at 130 (holding that liability for felony-murder requires a killing by a co-felon that is in furtherance of the common purpose).

254. *See Vasquez*, 49 Cal. at 560; *Olsen*, 80 Cal. at 122, 22 P. at 125.

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felony at the time of the killing.²⁵⁵ This approach was adopted by the California Supreme Court in *People v. Perry*.²⁵⁶

In *Perry*, the defendant was tried and convicted of robbery and felony-murder.²⁵⁷ On appeal, the defendant challenged the instructions given to the jury.²⁵⁸ The court denied his appeal, stating that it was not error to instruct the jury that “if a human being is killed by any one of several persons jointly engaged at the time of such killing in the perpetration of [a felony], whether such killing is intentional or unintentional . . . all . . . engaged in the perpetration of [the felony], are guilty of murder of the first degree.”²⁵⁹ This instruction did not include an “in furtherance” clause, even though the court acknowledged that other cases had included such language.²⁶⁰ The language used by this court was adopted in other cases,²⁶¹ resulting in a divergent approach to the scope of complicity.²⁶² This caused confusion about the requirements for imposing felony-murder on co-felons who did not commit the killing.

The California Court of Appeal attempted to reconcile the two complicity rules in *People v. Cabalero*.²⁶³ There, the defendant was participating in a robbery when one of his co-felons, Dasalla, killed a third member of the group out of anger.²⁶⁴ On appeal, the defendants argued that they could not be held liable for the killing committed by Dasalla because the killing had not been committed in furtherance of

255. See *People v. Perry*, 195 Cal. 623, 234 P. 890 (1925); see also *People v. Martin*, 12 Cal. 2d 466, 85 P.2d 880 (1938) (requiring the killer and the accomplice to be jointly engaged in the felony at the time of killing).

256. See *Perry*, 195 Cal. at 633, 234 P. at 894.

257. See *id.* at 626, 234 P. at 891.

258. See *id.* at 637–38, 234 P. at 896.

259. *Id.*

260. See *id.*

261. See generally *People v. Witt*, 170 Cal. 104, 148 P. 928 (1915) (finding that any killing in furtherance of a felony is first-degree murder); *People v. Raber*, 168 Cal. 316, 143 P. 317 (1914) (stating that a killing done in perpetration of robbery is murder); *People v. Milton*, 145 Cal. 169, 173, 78 P. 549, 554 (1904) (holding that omitting the words “without any design to effect death” from the felony-murder statute makes “any killing, while engaged in the perpetration of a felony, murder in the first-degree”).

262. See *Perry*, 195 Cal. at 623, 234 P. at 890; *Washington*, 62 Cal. 2d at 777, 402 P.2d at 130.

263. 31 Cal. App. 2d 52, 87 P.2d 364 (1939).

264. See *id.* at 54, 87 P.2d at 365.

the felony.²⁶⁵ The court acknowledged that there was indeed a line of cases suggesting that the defendants could not be held liable for killings not in furtherance of the felony.²⁶⁶ Nonetheless, the court upheld the defendant's conviction, stating that the *Perry* line of cases allowed for the imposition of the felony-murder rule when the killing occurred *during* the commission of the felony.²⁶⁷

The court was attempting to reconcile the two approaches into one cohesive rule.²⁶⁸ Even though this rule has encountered a great deal of criticism from commentators, it remains good law.²⁶⁹ The critics of the rule charge that it removes the causal requirement from felony-murder and replaces it with "mere coincidence of time and place."²⁷⁰ Commentators argue that the rule is too broad.²⁷¹ It is easy to think of a situation where two conspirators, Felon A and Felon B, are committing a felony and while committing the felony, Felon A sees his girlfriend on a date with another man. He shoots them both out of rage. Applying the *Cabaltero* rationale, Felon B would be liable under the felony-murder rule because the killing occurred *during* the commission of a felony, despite a lack of causal relationship between his activities and the killing of the victims.²⁷² The *Cabaltero* approach has resulted in a further widening of the scope of complicity that allows for the application of the felony-murder doctrine.

b. defendant joins co-felon after killing occurred

Although a felon is liable for killings committed by co-felons during the commission of a crime, it was not clear whether liability extended to co-felons who joined the felonious enterprise after the

265. *See id.* at 60–61, 87 P.2d at 368.

266. *See id.*

267. *See id.* at 61–62, 87 P.2d at 368–69.

268. *See id.*

269. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* (2nd ed. 1986) (criticizing the felony-murder doctrine as substituting the "mere coincidence of time and place" for what should be a required causal relationship between planned felony and killing). There has been a lot of criticism of the felony-murder rule in general. However, a detailed discussion of this criticism and its merits is beyond the scope of this article.

270. *Id.* § 7.5.

271. *See id.*

272. *See Cabaltero*, 31 Cal. App. 2d at 52, 87 P.2d at 364.

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killing had already occurred.²⁷³ This problem recently presented itself to the court in *People v. Pulido*.²⁷⁴

In *Pulido*, a cashier at a gas station was shot in the head during a robbery.²⁷⁵ The defendant, Pulido, claimed that it was his uncle, Aragon who had committed the murder.²⁷⁶ Pulido testified that on the night of the murder he and his uncle had been driving and his uncle stopped at a gas station to buy cigarettes.²⁷⁷ Pulido claimed to have heard gunshots, and when he ran into the gas station, he found the clerk dead.²⁷⁸ When he ran back to his car, his uncle followed him with the entire cash register.²⁷⁹ He then alleged that his uncle forced him to open the cash register and take the money inside.²⁸⁰ Despite Pulido's claims, the jury convicted him of robbery and felony-murder, but they could not decide if he in fact killed the clerk.²⁸¹

On appeal, Pulido argued that the court committed reversible error by failing to instruct the jury that in order to find him liable under felony-murder, they would have to find that he joined in the robbery before the killing occurred.²⁸² The court held that under both the *Vasquez* and *Perry* approach, an accomplice is not liable for a killing that preceded any intent to engage in a felony.²⁸³

Looking first at the *Vasquez* approach to the scope of accomplice liability for felony-murder, the court noted that liability under felony-murder only attaches to killings that are committed in

273. Depending on the court, the defendant may only be liable if the killing was committed in furtherance of the felony. See *supra*, Part VI.D.1.a for a more detailed discussion of this conflict.

274. 15 Cal. 4th 713, 936 P.2d 1235, 63 Cal. Rptr. 2d 625 (1997).

275. See *id.* at 717, 936 P.2d at 1237, 63 Cal. Rptr. 2d at 627.

276. See *id.*

277. See *id.* at 718, 936 P.2d at 1237–38, 63 Cal. Rptr. 2d at 627–28.

278. See *id.*

279. See *id.*

280. See *id.*

281. See *id.* at 719, 936 P.2d at 1238, 63 Cal. Rptr. 2d at 628.

282. See *id.* at 726, 936 P.2d at 1243, 63 Cal. Rptr. 2d at 633.

283. See *id.* at 721–22, 936 P.2d at 1239–40, 63 Cal. Rptr. 2d at 629–30. Although the court held that an accomplice was not liable for a killing that occurred before the accomplice joined the felonious enterprise, it nonetheless upheld the defendant's conviction because the trial court remedied the error in a instruction.

furtherance of a common purpose.²⁸⁴ Because the killing occurred before the defendant had joined in the felonious purpose, it could not have been committed to further that purpose.²⁸⁵ Furthermore, under the *Perry* approach, liability would not attach because “the killer and accomplice were not ‘jointly engaged at the time of such killing’ in [a felony].”²⁸⁶ Therefore, neither the *Vasquez* nor the *Perry* approach encompassed killings that occurred before joining the felonious enterprise.²⁸⁷

The court also pointed to the purpose behind the felony-murder rule as justification for its decision.²⁸⁸ The court believed that extension of felony-murder complicity to felons who join after the killing has occurred would violate the court’s prior holding that “conspirators are not liable for substantive crimes committed before their entry into the conspiracy.”²⁸⁹ Furthermore, the court believed that extending the rule would not further its deterrent function.²⁹⁰ It reasoned that if the purpose of the felony-murder doctrine was to deter negligent or accidental killings during the commission of a felony, then “punishing late joiners for earlier homicides committed by others [would] not deter the negligent or accidental commission of such homicides” because the late joiners would have no way of preventing the killing.²⁹¹ Although imposing liability would deter joining such enterprises, the court believed that the punishment that would be imposed would not be proportional to the crime, especially because the killing was not causally related to the acts of the co-felon.²⁹²

284. *See id.*; *Vasquez*, 49 Cal. at 560; *Olsen*, 80 Cal. at 122, 22 P. at 125; *Washington*, 62 Cal. 2d at 777, 402 P.2d at 133.

285. *See Pulido*, 15 Cal. 4th at 721–22, 936 P.2d at 1239–40, 63 Cal. Rptr. 2d at 629–30.

286. *Id.* at 722, 936 P.2d at 1241, 63 Cal. Rptr. 2d at 631.

287. *See id.*

288. *See id.* at 724–25, 936 P.2d at 1241–42, 63 Cal. Rptr. 2d at 632–33.

289. *Id.* at 725, 936 P.2d at 1242; *see also* *People v. Weiss*, Cal. 2d 535, 564–65, 327 P.2d 527, 544–45 (1958) (explaining that one who joins a conspiracy after its formation adopts the previous acts and declarations of the other conspirators).

290. *See Pulido*, 15 Cal. 4th at 725, 936 P.2d at 1242–43, 63 Cal. Rptr. 2d at 633.

291. *Id.*

292. *See id.*

c. co-felon kills a felon

Typically, it is the killing of a victim of the felony that results in prosecution under the felony-murder doctrine. However, there are situations where the killing is of a co-felon, by a felon. Situations where a co-felon has been killed by his accomplice have stirred much debate about whether the felony-murder doctrine should apply.²⁹³ This debate has resulted in a split among jurisdictions.²⁹⁴ California has decided to impose liability under the felony-murder doctrine.²⁹⁵

Imposition of liability for the killing of a co-felon by an accomplice first occurred in *People v. Cabalero*.²⁹⁶ As discussed above, Dasalla, one of the defendant's co-felons, killed a third member of the group out of anger.²⁹⁷ On appeal, the defendant argued both that the killing did not meet the requirements of felony-murder, and that the issue of whether it was accidental or intentional should have been submitted to the jury.²⁹⁸ The court turned to the specific language of prior cases defining the scope of felony-murder, which held that *any killing* committed by a co-felon in furtherance of the felony establishes liability.²⁹⁹ The court acknowledged that although there were no cases directly on point, the "language employed in the decisions . . . makes it clear that said section [189] was designed to include . . . any killing by one engaged in the commission of any of the specified felonies, regardless of the status of the person killed."³⁰⁰

The defendants attempted to bolster their position by pointing to *People v. Ferlin*.³⁰¹ There, the defendant conspired with another to burn his leased premises for insurance money.³⁰² During the

293. See Lawrence Newman & Lawrence Weitzer, *Duress, Free Will and the Criminal Law*, 30 S. CAL. L. REV. 313, 357–62 (1957).

294. See *id.*

295. See *People v. Cabalero*, 31 Cal. App. 2d 52, 58, 87 P.2d 364, 367 (1939).

296. *Id.* at 52, 87 P.2d at 364.

297. See *id.* at 56, 87 P.2d at 366.

298. See *id.* The court argued that the killing was governed by Cal. Penal Code § 187 and not § 189. Therefore, if the jury found that the co-felon was shot accidentally, he must be acquitted.

299. See *id.* at 58, 87 P.2d at 367.

300. *Id.*

301. 203 Cal. 587, 265 P.2d 230 (1928).

302. See *id.* at 589, 265 P.2d at 231–32.

perpetration of the felony, a co-conspirator accidentally burned himself to death.³⁰³ The jury convicted the defendant of felony-murder, but the California Supreme Court reversed, holding that the defendant was not liable under the felony-murder doctrine because the co-felon killed himself.³⁰⁴ However, the *Cabaltero* court was quick to distinguish the case.³⁰⁵ It noted that in *Ferlin*, the co-felon killed himself, but in *Cabaltero* the co-felon was killed by *another* co-felon.³⁰⁶ This distinction is what allowed for the imposition of the felony-murder rule under California Penal Code section 189.³⁰⁷

2. Killings by a victim or police officer

Courts have had difficulty applying the felony-murder doctrine in a variety of situations. However, one of the most difficult situations for the courts to sort out involves applying the felony-murder doctrine to killings perpetrated by third parties rather than accomplices of the defendant.³⁰⁸

When this issue first arose, the California courts appeared to treat it as an issue of causation, which led to the development and application of proximate cause theories of liability.³⁰⁹ One of the earliest applications of this approach can be found in *People v. Harrison*.³¹⁰

In *Harrison*, three men went into a store with the intent to rob it.³¹¹ While doing so, an employee of the store grabbed a gun and began shooting at the defendants.³¹² In the process, he ended up killing his employer who was also in the store.³¹³ The defendants were charged and convicted of robbery and felony-murder.³¹⁴ They appealed their conviction, arguing that because a co-felon had not

303. *See id.*

304. *See id.* at 596–98, 265 P.2d at 234–35.

305. *See Cabaltero*, 31 Cal. App. 2d at 59–60, 87 P.2d at 368.

306. *See id.*

307. *See id.*

308. *See* WHARTON'S CRIMINAL LAW § 69 (1998).

309. *See People v. Harrison*, 176 Cal. App. 2d 330, 334–35, 1 Cal. Rptr. 414, 417–18 (1959).

310. *See id.* at 345, 1 Cal. Rptr. at 425.

311. *See id.* at 331, 1 Cal. Rptr. at 415–416.

312. *See id.*

313. *See id.*

314. *See id.*

committed the killing, the felony-murder rule did not apply.³¹⁵ The court noted that at the time the case arose, there were no California cases on point.³¹⁶ Accordingly, the court turned to an examination of decisions reached by other states,³¹⁷ as well as an examination of tort law.³¹⁸ Ultimately, the court decided to follow the lead set by cases such as *Commonwealth v. Almeida* and *People v. Podlski* and applied tort principles of proximate cause.³¹⁹ The court stated that when the co-felons should reasonably foresee the likelihood of a killing by a non-participant during the commission of a felony, the co-felons are liable for the killing as if they committed it.³²⁰ The court stated that given the purposes of the felony-murder rule, there is no reason to differentiate between killings by a third party or by a co-felon.³²¹ “The killing was murder and it was committed in the perpetration of attempted robbery”³²² Therefore, because the defendants put in motion a chain of events that they should have foreseen, they are liable for the death of the victim, even though he was shot by a third party.³²³

However, a few years later in *People v. Washington*, the court revisited this issue and clarified the scope of its prior holding.³²⁴ In *Washington*, the defendant and a co-felon robbed a gas station.³²⁵ The owner of the gas station pulled out a revolver and shot the co-felon, killing him.³²⁶ The defendant was convicted of both robbery and felony-murder.³²⁷ He appealed the conviction, arguing that the rule of *Harrison* should be limited only to those situations where an innocent bystander is killed, and that it should not include cases

315. *See id.* at 331–32, 1 Cal. Rptr. at 416.

316. *See id.* at 332, 1 Cal. Rptr. at 416.

317. The court primarily examined *Commonwealth v. Almeida*, 68 A.2d 595 (Pa. 1949) (overruled in part by *Commonwealth ex rel. Smith v. Myers*, 438 Pa. 218 (1970)) and *People v. Podolski*, 52 N.W. 2d 201 (Mich. 1952). Both held that felons who provoke gunfire are guilty of first-degree murder even though the lethal bullet was fired by a third party.

318. *Harrison*, 176 Cal. App. at 343–44, 1 Cal. Rptr. at 424–25.

319. *See id.* at 345, 1 Cal. Rptr. at 425.

320. *See id.*

321. *See id.*

322. *Id.*

323. *See id.*

324. 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965).

325. *See id.* at 779, 402 P.2d at 132, 44 Cal. Rptr. at 444.

326. *See id.*

327. *See id.* at 779–780, 402 P.2d at 132–33, 44 Cal. Rptr. at 445.

where their accomplices are killed.³²⁸ The court rejected this distinction because it “would make the defendant’s criminal liability turn upon the marksmanship of victims and policemen. A rule of law cannot reasonably be based on such a fortuitous circumstance.”³²⁹ However, the court reconsidered *Harrison* in light of the purposes of the felony-murder rule.³³⁰

The court began by examining the function of the felony-murder doctrine.³³¹ California Penal Code section 189 ascribes malice aforethought to a felon who kills in the perpetration of a felony, allowing a jury to convict him of murder.³³² However, the court noted that when a killing is not committed by the felon, but rather by a third party, malice aforethought cannot be attributed to the felon because the killing was not committed in perpetration of the felony.³³³ Although *Harrison* attempted to attribute malice through the use of proximate cause, the court determined that this was not enough to meet the requirements of section 189.³³⁴ In examining the facts of *Washington*, the court noted that, “the killing was committed to thwart a felony. To include such killings within Section 189 [sic] would expand the meaning of the words ‘murder . . . which is committed in the perpetration . . . [of] robbery . . .’ beyond common understanding.”³³⁵ However, even though the court refused to apply the felony-murder rule in such circumstances, the decision does not preclude the state from attempting to attach liability through other theories of liability.³³⁶ Indeed, the court itself suggested that the defendant could still be found liable for the murder through doctrines such as vicarious liability and recklessness.³³⁷

328. *See id.* The broad rule in *Harrison* was based on decisions from Pennsylvania and Michigan. Ironically, both states have already limited the doctrine by holding that felons are not liable under felony-murder if a third party killed their accomplice.

329. *Id.* at 780, 402 P.2d at 132, 44 Cal. Rptr. at 444.

330. *See id.* at 781–84, 402 P.2d at 133–35, 44 Cal. Rptr. at 446.

331. *See id.*

332. *See id.* For a more detailed discussion of the relationship between the elements of murder and felony-murder, see *supra* Part VI.B.

333. *See id.*

334. *See id.*

335. *Id.* at 781, 402 P.2d at 133, 44 Cal. Rptr. at 445.

336. *See id.*

337. *See id.* An in-depth discussion of vicarious liability and recklessness is beyond the scope of this paper.

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E. Conclusion

The felony-murder rule continues to be met with a great deal of criticism. The removal of the intent requirement seems to be the most troubling aspect of this rule, especially when it creates the possibility that defendants may become liable for unforeseeable killings by third parties. Despite these concerns, the felony-murder rule continues to be enforced in California, although the scope of the rule is in flux.