

Part I

INTRODUCTION TO THE COURSE

0002

[ST: 1] [ED: 10000] [REL: 2009S]

Composed: Fri Jul 24 02:16:15 EDT 2009

XPP 8.1C.1 Patch #5 LS000000 nllp 3120 [PW=468pt PD=684pt TW=348pt TD=588pt]

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Chapter 1

INTRODUCTION

B. THREE FUNDAMENTAL PRINCIPLES OF AMERICAN CRIMINAL LAW

Page 53: after *Problem 2*, add the following problem:

Problem 2A. Under California's Sex Offender Registration Act, a convicted sex offender must register with the Chief of Police where he or she is living and must register any change of residence within five working days. (P.C. § 290(b)) The registrant must annually update his or her registration within five working days of his or her birthday. (P.C. § 290.012(a)) A violation of these registration requirements is a felony. Defendant previously had been convicted of possession of cocaine, lewd act with a child and attempted rape (one incident) and robbery and had served three prison terms. In May, Defendant changed his residence and registered with the police department. The following February, Defendant had a birthday, but failed to update his registration. Three months later, within a year of his prior registration, Defendant updated his registration. Defendant was convicted of a violation of P.C. § 290.012(a) for failing to update his registration in February, and he was sentenced to 28 years to life under California's Three Strikes Law (25 to life for the third strike plus a year each for his prior prison terms). Only seven states authorize a recidivist sentence of longer than 10 years, and California is the only state that mandates a life sentence with a mandatory prison term of 25 years for noncompliance with a registration requirement. What are the arguments as to whether the sentence violates the Eighth Amendment?

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Part II

DEFINING CULPABLE CONDUCT

0006

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Chapter 3

MENTAL STATE (MENS REA)

Page 137: before the note on the Model Penal Code and Assault, add the following problem:

Problem 10A. Defendant had an outstanding felony warrant. Officer, informed that Defendant was at home and was armed with a handgun, went to Defendant's house in uniform to arrest him. Defendant ran from the house with Officer in pursuit. Officer saw that Defendant was carrying a handgun and twice shouted, "Sheriff's Department, stop." However, Defendant continued to run and disappeared around the front end of a trailer on a neighbor's property. Officer went around the back of the trailer, and peering around the corner, saw Defendant facing toward the front of the trailer with his gun hand extended. Officer aimed his gun at Defendant and ordered him to drop his weapon. Defendant dropped his gun and again took off running. He was arrested, and a subsequent examination of his gun revealed that the safety was off and the gun had 15 rounds in the magazine, but that there was no round in the firing chamber and Defendant would have had to pull back on a slide mechanism to chamber a round. Defendant is charged with assault with a firearm on a peace officer (P.C. § 245(d)(1)). What arguments should be made regarding Defendant's guilt?

Page 144: after Problem 14, add the following note:

The Constitutionality of Excluding Psychiatric Testimony. The court in *Wetmore* suggests that the exclusion of psychiatric evidence on diminished capacity might violate due process. (See n.6.) In *Clark v. Arizona*, 548 U.S. 735, 126 S.Ct. 2709 (2006), the Supreme Court addressed such a challenge. An Arizona rule barred consideration of expert witnesses' testimony about a defendant's mental incapacity due to mental disease or defect on the issue of *mens rea*. The Court, in a 6-3 decision, upheld the rule, concluding that the state had good reasons for adopting it: (1) to deny the defendant the opportunity to circumvent the proof and presumption rules of the insanity defense; and (2) to limit the use of a kind of psychiatric evidence, which experts themselves find controversial, which has the potential to mislead the fact-finder and which creates the danger that such evidence will be accorded greater certainty than experts claim for it.

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Chapter 4

THE DEFENSE CLAIM OF “REASONABLE MISTAKE”

B. MISTAKE OF LAW

Page 197: after *Problem 22*, add the following problem:

Problem 22A. Defendant was a member of City’s city council, and she desired to be appointed to the vacant position of city manager. However, City had an ordinance providing that any council member was ineligible for city employment while on the council and for one year after leaving the council. Defendant notified the other members of the council of her interest in the job and of her proposed salary and terms, and she consulted with City Attorney regarding whether the ordinance could be repealed or whether it was required by state law and whether it would be legal for a council member to become city manager. City Attorney advised Defendant and the council that the ordinance could be repealed and that it would be legal to employ Defendant. The council (without defendant being present) voted to repeal the ordinance and directed City Attorney to meet with Mayor and Defendant about her terms. City Attorney reported back to the council about Defendant’s terms, and the council, altering some of the terms, authorized her hiring. City Attorney drafted the employment contract, which Defendant signed. Defendant is now charged with violating Government Code § 1090 (prohibiting members of legislative bodies having a financial interest in any contract made by the body). What arguments should be made on Defendant’s defense of entrapment by estoppel?

0010

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Chapter 6

HOMICIDE: UNINTENTIONAL KILLINGS

A. THE MENS REA OF UNINTENTIONAL HOMICIDES

Page 254: substitute for *People v. Burden*, the following problem and case:

Problem 31A. Defendant shot and killed Victim, unaware that Victim was pregnant. Defendant was charged with first degree murder of Victim and second degree murder of the fetus (P.C. §§ 187–189) and with a multiple murder special circumstance (P.C. § 190.2(a)(3)). At trial, Defendant had sought, unsuccessfully, to present medical evidence to the effect that the fetus would not have survived past the second trimester because of a fatal medical condition. Defendant was convicted and the special circumstance found true, and he was sentenced to life imprisonment without possibility of parole. On appeal, what arguments might Defendant make to challenge the conviction and sentence?

PEOPLE v. KNOLLER

41 Cal.4th 139, 158 P.3d 731 (2007)

KENNARD, J.

On January 26, 2001, two dogs owned by defendant Marjorie Knoller and her husband, codefendant Robert Noel, attacked and killed Diane Whipple in the hallway of an apartment building in San Francisco. Defendant Knoller was charged with second degree murder (Pen.Code, § 189) and involuntary manslaughter (§ 192, subd. (B)); codefendant Noel, who was not present at the time of the attack on Whipple, was charged with involuntary manslaughter but not murder. Both were also charged with owning a mischievous animal that caused the death of a human being, in violation of § 399.

After a change of venue to Los Angeles County, a jury convicted defendants on all counts. Both moved for a new trial. (See § 1181, subd. 6 [a trial court may grant a new trial when “the verdict or finding is contrary to law or evidence”].) The trial court denied Noel’s motion. It granted Knoller’s motion in part, giving her a new trial on the second degree murder charge, but denying her motion for a new trial on the other two crimes of which she was convicted (involuntary manslaughter and possession of a mischievous animal that causes death).

With respect to Knoller, whose conviction of second degree murder was based on a theory of implied malice, the trial court took the position that, to be guilty of that crime, Knoller must have known that her conduct involved a *high probability of resulting in the death of another*. Finding such awareness lacking, the trial court granted Knoller’s motion for a new trial on the second degree murder conviction.

• • • •

The Court of Appeal reversed the trial court's order granting Knoller a new trial on the second degree murder charge. It remanded the case to the trial court for reconsideration of the new trial motion in light of the Court of Appeal's holding that implied malice can be based simply on a defendant's conscious disregard of the risk of *serious bodily injury to another*. In all other respects, the Court of Appeal affirmed the convictions of both defendants.

Both defendants petitioned this court for review. We granted only Knoller's petition, limiting review to two questions: "(1) Whether the mental state required for implied malice includes only conscious disregard for human life or can it be satisfied by an awareness that the act is likely to result in great bodily injury," and "(2) Whether the trial court abused its discretion in granting Knoller's motion for new trial under Penal Code section 1181[, subdivision 6]."

With respect to the first issue, we reaffirm the test of implied malice we set out in *People v. Phillips* (1966) 64 Cal.2d 574 and reiterated in many later cases: Malice is implied when the killing is proximately caused by "an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life." In short, implied malice requires a defendant's awareness of engaging in conduct that endangers the life of another — no more, and no less.

Measured against that test, it becomes apparent that the Court of Appeal set the bar too low, permitting a conviction of second degree murder, based on a theory of implied malice, if the defendant knew his or her conduct risked causing death *or serious bodily injury*. But the trial court set the bar too high, ruling that implied malice requires a defendant's awareness that his or her conduct had a *high probability* of resulting in death, and that granting defendant Knoller a new trial was justified because the prosecution did not charge codefendant Noel with murder. . . .

I. FACTS AND PROCEEDINGS

[In 1998, Pelican Bay State Prison inmates, Schneider and Bretches, members of the Aryan Brotherhood prison gang, set up a business with two women outside the prison to buy, raise and breed Presa Canario dogs. This breed tends to be very large, and it is "a gripping dog," used and bred for combat and guarding. The defendants are attorneys who represented one of the two women in a lawsuit over the dogs, and in the resolution of the lawsuit, the defendants acquired two of the Presa Canario dogs, Hera and Bane. Noel took the dogs to a veterinarian for examination and vaccinations and was subsequently warned by him that the dogs were huge and untrained and undisciplined and were therefore dangerous. In April, 2000, the defendants brought Hera to their sixth-floor apartment in San Francisco, and in September, 2000, they brought Bane.

[Between the time Noel and Knoller brought the dogs to their apartment and the date of the mauling of Whipple, there were about 30 incidents of the two dogs being out of control, threatening humans and other dogs. One neighbor was bitten, and several people, including a postal worker, had the dogs snarl and

A. THE MENS REA OF UNINTENTIONAL HOMICIDES

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lunge at them. The dogs attacked other dogs, and Noel was seriously injured, requiring surgery and the insertion of steel pins in his hand, when he was bitten by one of the dogs while breaking up a dogfight. Noel and Knoller had trouble controlling the dogs, Knoller admitting in a letter to Schneider that she did not have the upper body strength to handle Bane and was having trouble with Hera. Noel and Knoller ignored all advice they received regarding handling the dogs, including advice from a dog trainer to have the dogs trained and to use a choke collar.]

Mauling victim Diane Whipple and her partner Sharon Smith lived in a sixth-floor apartment across a lobby from defendants. Smith encountered defendants' two dogs as often as once a week. In early December 2000, Whipple called Smith at work to say, with some panic in her voice, that one of the dogs had bitten her. Whipple had come upon codefendant Noel in the lobby with one of the dogs, which lunged at her and bit her in the hand. Whipple did not seek medical treatment for three deep, red indentations on one hand. Whipple made every effort to avoid defendants' dogs, checking the hallway before she went out and becoming anxious while waiting for the elevator for fear the dogs would be inside. She and Smith did not complain to apartment management because they wanted nothing to do with defendants Knoller and Noel.

On January 26, 2001, Whipple telephoned Smith to say she was going home early. At 4:00 p.m., Esther Birkmaier, a neighbor who lived across the hall from Whipple, heard dogs barking and a woman's "panic-stricken" voice calling, "Help me, help me." Looking through the peephole in her front door, Birkmaier saw Whipple lying facedown on the floor just over the threshold of her apartment with what appeared to be a dog on top of her. Birkmaier saw no one else in the hallway. Afraid to open the door, Birkmaier called 911, the emergency telephone number, and at the same time heard a voice yelling, "No, no, no" and "Get off." When Birkmaier again approached her door, she could hear barking and growling directly outside and a banging against a door. She heard a voice yell, "Get off, get off, no, no, stop, stop." She chained her door and again looked through the peephole. Whipple's body was gone and groceries were strewn about the hallway. Birkmaier called 911 a second time.

At 4:12 p.m., San Francisco Police Officers Sidney Laws and Leslie Forrestal arrived in response to Birkmaier's telephone calls. They saw Whipple's body in the hallway; her clothing had been completely ripped off, her entire body was covered with wounds, and she was bleeding profusely. Defendant Knoller and the two dogs were not in sight.

The officers called for an ambulance. Shortly thereafter, defendant Knoller emerged from her apartment. She did not ask about Whipple's condition but merely told the officers she was looking for her keys, which she found just inside the door to Whipple's apartment.

[Whipple died, having suffered over 77 discrete injuries to her body. The medical examiner stated that, although earlier medical attention would have increased Whipple's chances of survival, she might have died anyway because she had lost one-third or more of her blood at the scene.]

[At trial,] Codefendant Noel did not testify, but he presented evidence of positive encounters between the two dogs and veterinarians, friends, and neighbors. Defendant Knoller did testify in her own defense. She referred to herself, her husband, and Pelican Bay prisoner Schneider as the “triad,” and she spoke of Schneider as her “son.” The two dogs had become a focal point in the relationship. She denied reading literature in the apartment referring to the vicious nature of the dogs. She thought the dogs had no personality problems requiring a professional trainer. She denied receiving or otherwise discounted any warnings about the two dogs’ behavior and she maintained that virtually all the witnesses testifying to incidents with the dogs were lying. She said she never walked both dogs together. Ordinarily, she would walk Hera and codefendant Noel would walk Bane, because she had insufficient body strength to control Bane. But after Noel was injured while breaking up a fight between Bane and another dog, Knoller would sometimes walk Bane, always on a leash. She said she had just returned from walking Bane on the roof of the apartment building, and had opened the door to her apartment while holding Bane’s leash, when Bane dragged her back across the lobby toward Whipple, who had just opened the door to her own apartment. The other dog, Hera, left defendants’ apartment and joined Bane, who attacked Whipple. Knoller said she threw herself on Whipple to save her. She denied that Hera participated in the attack. She acknowledged not calling 911 to get help for Whipple.

Asked whether she denied responsibility for the attack on Whipple, Knoller gave this reply: “I said in an interview that I wasn’t responsible but it wasn’t for the — it wasn’t in regard to what Bane had done, it was in regard to knowing whether he would do that or not. And I had no idea that he would ever do anything like that to anybody. How can you anticipate something like that? It’s a totally bizarre event. I mean how could you anticipate that a dog that you know that is gentle and loving and affectionate would do something so horrible and brutal and disgusting and gruesome to anybody? How could you imagine that happening?”

In rebuttal, the prosecution presented evidence that the minor character of defendant Knoller’s injuries — principally bruising to the hands — indicated that she had not been as involved in trying to protect mauling victim Whipple as she had claimed. Dr. Randall Lockwood, the prosecution’s expert on dog behavior, testified that good behavior by a dog on some occasions does not preclude aggressive and violent behavior on other occasions, and he mentioned the importance of training dogs such as Bane and Hera *not* to fight.

The jury found Knoller guilty of second degree murder; it also found both Knoller and Noel guilty of involuntary manslaughter and owning a mischievous animal that caused the death of a human being. Both defendants moved for a new trial. The trial court denied Noel’s motion. We quote below the pertinent statements by the trial court in granting Knoller’s motion for a new trial on the second degree murder count.

The trial court observed: “The law requires that there be a subjective understanding on the part of the person that on the day in question — and I do not read that as being January 26th, 2001 because by this time, with all of the information that had come out dealing with the dogs, the defendants were fully

A. THE MENS REA OF UNINTENTIONAL HOMICIDES

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on notice that they had a couple of wild, uncontrollable and dangerous dogs that were likely going to do something bad. [¶] Is the ‘something bad’ death? That is the ultimate question in the case. There is no question but that the something bad was going to be that somebody was going to be badly hurt. I defy either defendant to stand up and tell me they had no idea that those dogs were going to hurt somebody one day. *But can they stand up and say that they knew subjectively — not objectively and that’s an important distinction — that these dogs were going to stand up and kill somebody?*” (Italics added.)

The trial court continued: “I am guided by a variety of principles. One of them is that public emotion, public outcry, feeling, passion, sympathy do not play a role in the application of the law. The other is that I am required to review all of the evidence and determine independently rather than as a jury what the evidence showed. I have laid out most of the evidence as it harms the defendants in this case. Their conduct from the time that they got the dogs to the time — to the weeks after Diane Whipple’s death was despicable.”

. . .

The trial court went on: . . . When you take everything as a totality, *the question is whether or not as a subjective matter and as a matter of law Ms. Knoller knew that there was a high probability that day, or on the day before on the day after,—I reject totally the argument of the defendants that she had to know when she walked out the door—she was going to kill somebody that morning. The Court finds that the evidence does not support it.*” (Italics added.)

The trial court concluded it had “no choice, . . . taking the Legislature’s scheme, the evidence that was received, as despicable as it is, but to determine not that [defendant Knoller] is acquitted of second degree murder but to find that on the state of the evidence, *I cannot say as a matter of law that she subjectively knew on January 26th that her conduct was such that a human being was likely to die.*” (Italics added.)

The trial court mentioned another consideration: “The Court also notes a great troubling feature of this case that Mr. Noel was never charged [with murder] as Ms. Knoller was. In the Court’s view, given the evidence, Mr. Noel is more culpable than she. Mr. Noel personally knew that she could not control those dogs. He could not control those dogs. Mr. Noel was substantially haughtier than she was. In brushing off all of the incidents that happened out in the street, Mr. Noel knew as a theological certainty that that dog, which had recently been operated on, was taking medication that had given it diarrhea, was going to go out into the hallway or out into the street possibly, at the hands of Ms. Knoller. He . . . left her there to do that. [¶] . . . And yet Mr. Noel was not charged [with murder]. Equality of sentencing and the equal administration of justice is an important feature in any criminal court. That played a role as well.” The trial court then granted defendant Knoller’s motion for a new trial on the second degree murder count.

. . . .

II. THE ELEMENTS OF IMPLIED MALICE

Murder is the unlawful killing of a human being, or a fetus, with malice aforethought. (§ 187, subd. (a).) Malice may be express or implied. (§ 188.) At issue here is the definition of “implied malice.”

Defendant Knoller was convicted of second degree murder as a result of the killing of Diane Whipple by defendant’s dog, Bane. Second degree murder is the unlawful killing of a human being with malice aforethought but without the additional elements, such as willfulness, premeditation, and deliberation, that would support a conviction of first degree murder. Section 188 provides: “[M]alice may be either express or implied. It is express when there is manifested a deliberate intention to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.”

The statutory definition of implied malice, a killing by one with an “abandoned and malignant heart” (§ 188), is far from clear in its meaning. Indeed, an instruction in the statutory language could be misleading, for it “could lead the jury to equate the malignant heart with an evil disposition or a despicable character” (*People v. Phillips*) instead of focusing on a defendant’s awareness of the risk created by his or her behavior. “Two lines of decisions developed, reflecting judicial attempts ‘to translate this amorphous anatomical characterization of implied malice into a tangible standard a jury can apply.’” (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, quoting *People v. Protopappas* (1988) 201 Cal.App.3d 152.) Under both lines of decisions, implied malice requires a defendant’s awareness of the risk of death to another.

The earlier of these two lines of decisions, as this court observed in *Nieto Benitez*, originated in Justice Traynor’s concurring opinion in *People v. Thomas* (1953) 41 Cal.2d 470, which stated that malice is implied when “the defendant for a base, antisocial motive and with wanton disregard for human life, does an act that involves a high degree of probability that it will result in death.” (We here refer to this as the *Thomas* test.) The later line dates from this court’s 1966 decision in *People v. Phillips*: Malice is implied when the killing is proximately caused by “an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.” (The *Phillips* test.)

In *People v. Watson* (1981) 30 Cal.3d 290, we held that these two definitions of implied malice in essence articulated the same standard. Concerned, however, that juries might have difficulty understanding the *Thomas* test’s concept of “wanton disregard for human life,” we later emphasized that the “better practice in the future is to charge juries solely in the straightforward language of the ‘conscious disregard for human life’ definition of implied malice,” the definition articulated in the *Phillips* test. (*People v. Dellinger* (1989) 49 Cal.3d 1212.) The standard jury instructions thereafter did so. . . .

III. THE COURT OF APPEAL'S TEST FOR IMPLIED MALICE

As discussed in the preceding part, the great majority of this court's decisions establish that a killer acts with implied malice only when acting with an awareness of *endangering human life*. This principle has been well settled for many years, and it is embodied in the standard jury instruction given in murder cases, including this one. The Court of Appeal here, however, held that a second degree murder conviction, based on a theory of implied malice, can be based simply on a defendant's awareness of the risk of causing *serious bodily injury* to another.

[The court distinguished three cases relied on by the Court of Appeal, concluding that neither *People v. Conley* (1966) 64 Cal.2d 310, nor *People v. Poddar* (1974) 10 Cal.3d 750 addressed the issue presented in the instant case and that any language in *People v. Coddington* (2000) 23 Cal.4th 529 suggesting that knowledge of the likelihood of serious bodily injury permits an inference of implied malice, was inconsistent, not only with the holding in that case, but also with the court's views expressed in other decisions.]

. . . We conclude that a conviction for second degree murder, based on a theory of implied malice, requires proof that a defendant acted with conscious disregard of the danger to human life. In holding that a defendant's conscious disregard of the risk of serious bodily injury suffices to sustain such a conviction, the Court of Appeal erred.

IV. THE TRIAL COURT'S GRANT OF A NEW TRIAL ON THE SECOND DEGREE MURDER CHARGE

We now turn to the second issue raised by the petition for review — whether the trial court abused its discretion in granting defendant Knoller a new trial on the second degree murder charge. Such an abuse of discretion arises if the trial court based its decision on impermissible factors or on an incorrect legal standard.

In granting Knoller a new trial, the trial court properly viewed implied malice as requiring a defendant's awareness of the danger that his or her conduct will result in another's *death* and not merely in serious bodily injury. But the court's ruling was legally flawed in other respects. As we explain below, the trial court based its ruling on an inaccurate definition of implied malice, and it inappropriately relied on the prosecutor's failure to charge codefendant Noel with murder.

As discussed earlier in part II, this court before its decision in *People v. Dellinger*, had defined implied malice in two similar but somewhat different ways. . . .

Here, the trial court properly instructed the jury in accordance with the *Phillips* test. But when the court evaluated defendant Knoller's new trial motion, it relied on language from the *Thomas* test, and as explained below, its description of that test was inaccurate. The court stated that a killer acts with implied malice when the killer "*subjectively knows*, based on everything, that the conduct that he or she is about to engage in has a *high probability of death*

to another human being” and thus the issue in this case was “whether or not as a *subjective* matter and as a matter of law Ms. Knoller *knew* that there was a *high probability*” that her conduct would result in someone’s death. (Italics added.) But “high probability of death” is the *objective*, not the *subjective*, component of the *Thomas* test, which asks whether the defendant’s act or conduct “involves a high probability that it will result in death.” The *subjective* component of the *Thomas* test is whether the defendant acted with “a base, antisocial motive and with wanton disregard for human life.” Nor does the *Phillips* test require a defendant’s awareness that his or her conduct has a *high probability* of causing death. Rather, it requires only that a defendant acted with a “conscious disregard for human life”

As just shown, in treating the objective component of the *Thomas* test as the subjective component of that test, the trial court applied an erroneous definition of implied malice in granting defendant Knoller a new trial on the second degree murder charge.

[The court also was troubled by the fact that the trial judge seemed to base his grant of a new trial at least in part on the different treatment received by the co-defendant Noel. Without deciding whether such consideration was ever appropriate, the court held that it was not appropriate in this case because the differential charging was justified because the defendant was present and nominally in control of the dogs at the time of the killing and Noel was not.]

V. CONCLUSION AND DISPOSITION

In sum, the trial court abused its discretion in granting defendant Knoller a new trial on the second degree murder charge. That court erroneously concluded both that Knoller could not be guilty of murder, based on a theory of implied malice, unless she appreciated that her conduct created a high probability of someone’s death, and that a new trial was justified because the prosecution did not charge codefendant Noel with murder. It is uncertain whether the trial court would have reached the same result using correct legal standards. Moreover, the Court of Appeal, in reversing the trial court’s order, also erred, mistakenly reasoning that implied malice required only a showing that the defendant appreciated the risk of serious bodily injury. Under these circumstances, we conclude that the matter should be returned to the trial court to reconsider its new trial order in light of the views set out in this opinion.

Chapter 7

HOMICIDE: KILLINGS IN THE COMMISSION OF ANOTHER CRIME

A. FELONY-MURDER

Page 316: substitute for *People v. Hansen* and *Problem 47*, the following case:

PEOPLE v. CHUN,
45 Cal.4th 1172, 203 P.3d 425 (2009)

CHIN, J.

In this murder case, the trial court instructed the jury on second degree felony murder with shooting at an occupied vehicle under Penal Code section 246 the underlying felony.¹ We granted review to consider various issues concerning the validity and scope of the second degree felony-murder rule.

We first discuss the rule's constitutional basis. Although the rule has long been part of our law, some members of this court have questioned its constitutional validity. We conclude that the rule is based on statute, specifically section 188's definition of implied malice, and hence is constitutionally valid.

Next we reconsider the contours of the so-called merger doctrine this court adopted in *People v. Ireland* (1969) 70 Cal.2d 522, 450 P.2d 580 (*Ireland*). After reviewing recent developments, primarily some of our own decisions, we conclude the current state of the law in this regard is untenable. We will overrule some of our decisions and hold that all assaultive-type crimes, such as a violation of section 246, merge with the charged homicide and cannot be the basis for a second degree felony-murder instruction. Accordingly, the trial court erred in instructing on felony murder in this case. . . .

. . .

I. FACTS AND PROCEDURAL HISTORY

We take our facts primarily from the Court of Appeal's opinion.

Judy Onesavanh and Sophal Ouch were planning a party for their son's birthday. Around 9:00 p.m. on September 13, 2003, they and a friend, Bounthavy Onethavong, were driving to the store in Stockton in a blue Mitsubishi that Onesavanh's father owned. Onesavanh's brother, George, also drives the car. The police consider George to be highly ranked in the Asian Boys street gang (Asian Boys).

¹ All further statutory citations are to the Penal Code unless otherwise indicated.

That evening Ouch was driving, with Onesavanh in the front passenger seat and Onethavong behind Ouch. While they were stopped in the left turn lane at a traffic light, a blue Honda with tinted windows pulled up beside them. When the light changed, gunfire erupted from the Honda, hitting all three occupants of the Mitsubishi. Onethavong was killed, having received two bullet wounds in the head. Onesavanh was hit in the back and seriously wounded. Ouch was shot in the cheek and suffered a fractured jaw.

Ouch and Onesavanh identified the Honda's driver as "T-Bird," known to the police to be Rathana Chan, a member of the Tiny Rascals Gangsters (Tiny Rascals), a criminal street gang. The Tiny Rascals do not get along with the Asian Boys. Chan was never found. The forensic evidence showed that three different guns were used in the shooting, a .22, a .38, and a .44, and at least six bullets were fired. Both the .38 and the .44 struck Onethavong; both shots were lethal. Only the .44 was recovered. It was found at the residence of Sokha and Mao Bun, brothers believed to be members of a gang.

Two months after the shooting, the police stopped a van while investigating another suspected gang shooting. Defendant was a passenger in the van. He was arrested and subsequently made two statements regarding the shooting in this case. He admitted he was in the backseat of the Honda at the time; T-Bird was the driver and there were two other passengers. Later, he also admitted he fired a .38-caliber firearm. He said he did not point the gun at anyone; he just wanted to scare them.

Defendant, who was 16 years old at the time of the shooting, was tried as an adult for his role in the shooting. He was charged with murder, with driveby and gang special circumstances, and with two counts of attempted murder, discharging a firearm from a vehicle, and shooting into an occupied vehicle, all with gang and firearm-use allegations, and with street terrorism. At trial, the prosecution presented evidence that defendant was a member of the Tiny Rascals, and that the shooting was for the benefit of a gang. Defendant testified, denying being a member of the Tiny Rascals or being involved in the shooting.

The prosecution sought a first degree murder conviction. The court also instructed the jury on second degree felony murder based on shooting at an occupied motor vehicle (§ 246) either directly or as an aider and abettor. The jury found defendant guilty of second degree murder. It found the personal-firearm-use allegation not true, but found that a principal intentionally used a firearm and the shooting was committed for the benefit of a criminal street gang. The jury acquitted defendant of both counts of attempted murder, shooting from a motor vehicle, and shooting at an occupied motor vehicle. It convicted defendant of being an active participant in a criminal street gang.

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II. DISCUSSION

A. The Constitutionality of the Second Degree Felony-murder Rule

Defendant contends California's second degree felony-murder rule is unconstitutional on separation of power grounds as a judicially created doctrine with no statutory basis. To explain the issue, we first describe how the doctrine fits in with the law of murder. Then we discuss defendant's contention. We will ultimately conclude that the doctrine is valid as an interpretation of broad statutory language.

Section 187, subdivision (a), defines murder as "the unlawful killing of a human being, or a fetus, with malice aforethought." Except for the phrase "or a fetus," which was added in 1970 . . . , this definition has been unchanged since it was first enacted as part of the Penal Code of 1872. Murder is divided into first and second degree murder. (§ 189.) "Second degree murder is the unlawful killing of a human being with malice, but without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first degree murder. (§§ 187, subd. (a), 189)." (*People v. Hansen* (1994) 9 Cal.4th 300, 885 P.2d 1022.)

Critical for our purposes is that the crime of murder, as defined in section 187, includes, as an element, malice. Section 188 defines malice. It may be either express or implied. It is express "when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature." (§ 188.) It is implied "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (*Ibid.*) This definition of implied malice is quite vague. Trial courts do not instruct the jury in the statutory language of an abandoned and malignant heart. Doing so would provide the jury with little guidance. "The statutory definition of implied malice has never proved of much assistance in defining the concept in concrete terms." (*People v. Dellinger* (1989) 49 Cal.3d 1212, 783 P.2d 200.) Accordingly, the statutory definition permits, even requires, judicial interpretation. We have interpreted implied malice as having "both a physical and a mental component. The physical component is satisfied by the performance of an act, the natural consequences of which are dangerous to life. The mental component is the requirement that the defendant knows that his conduct endangers the life of another and . . . acts with a conscious disregard for life." (*People v. Patterson* (1989) 49 Cal.3d 615, 778 P.2d 549 (lead opn. of Kennard, J.) (*Patterson*).)²

A defendant may also be found guilty of murder under the felony-murder rule. The felony-murder rule makes a killing while committing certain felonies murder without the necessity of further examining the defendant's mental state. The rule has two applications: first degree felony murder and second degree felony murder. We have said that first degree felony murder is a "creation of statute" (i.e., § 189) but, because no statute specifically describes it, that second

² For ease of discussion, we will sometimes refer to this form of malice by the shorthand term, "conscious-disregard- for-life malice." *Patterson*, *supra*, had no majority opinion. Unless otherwise indicated, all further citations to that case are to Justice Kennard's lead opinion.

degree felony murder is a “common law doctrine.” (*People v. Robertson* (2004) 34 Cal.4th 156, 95 P.3d 872 (*Robertson*)). First degree felony murder is a killing during the course of a felony specified in section 189, such as rape, burglary, or robbery. Second degree felony murder is “an unlawful killing in the course of the commission of a felony that is inherently dangerous to human life but is not included among the felonies enumerated in section 189. . . .” (*Robertson, supra*.)

In *Patterson*, Justice Kennard explained the reasoning behind and the justification for the second degree felony-murder rule: “The second degree felony-murder rule eliminates the need for the prosecution to establish the *mental* component [of conscious-disregard-for-life malice]. The justification therefor is that, when society has declared certain inherently dangerous conduct to be felonious, a defendant should not be allowed to excuse himself by saying he was unaware of the danger to life because, by declaring the conduct to be felonious, society has warned him of the risk involved. The *physical* requirement, however, remains the same; by committing a felony inherently dangerous to life, the defendant has committed an act, the natural consequences of which are dangerous to life, thus satisfying the physical component of implied malice.” (*Patterson, supra*.)

The second degree felony-murder rule is venerable. It “has been a part of California’s criminal law for many decades. Because of this, we declined to reconsider the rule in *Patterson*. . . .

But some former and current members of this court have questioned the rule’s validity because no statute specifically addresses it. [Citing: Chief Justice Bird concurring in *People v. Burroughs* (1984) 35 Cal.3d 824, 678 P.2d 894; Justice Brown dissenting in *Robertson* and concurring and dissenting in *People v. Howard* (2005) 34 Cal.4th 1129, 104 P.3d 107; Justices Werdegar, dissenting, and Moreno, concurring, in *Robertson*; Justice Panelli, concurring and dissenting in *Patterson*.]

In line with these concerns, defendant argues that the second degree felony-murder rule is invalid on separation of powers grounds. As he points out, we have repeatedly said that “the power to define crimes and fix penalties is vested exclusively in the legislative branch.” (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 917 P.2d 628.) Defendant asks rhetorically, “How, then, in light of the statutory abrogation of common law crimes and the constitutional principle of separation of powers, does second degree felony murder continue to exist when this court has repeatedly acknowledged that the crime is a judicial creation?”

This court has never directly addressed these concerns and this argument, or explained the statutory basis of the second degree felony-murder rule. We do so now. We agree with Justice Panelli that there are no nonstatutory crimes in this state. Some statutory or regulatory provision must describe conduct as criminal in order for the courts to treat that conduct as criminal. (§ 6.) But, as we explain, the second degree felony-murder rule, although derived from the common law, is based on statute; it is simply another interpretation of section 188’s abandoned and malignant heart language.

Many provisions of the Penal Code were enacted using common law terms that must be interpreted in light of the common law. For example, section 484 defines theft as “feloniously” taking the property of another. The term “feloniously”—which has little meaning by itself—incorporates the common law requirement that the perpetrator must intend to permanently deprive the owner of possession of the property. Accordingly, we have looked to the common law to determine the exact contours of that requirement. Thus, the intent-to-permanently-deprive requirement, although nonstatutory in the limited sense that no California statute uses those words, is based on statute. The murder statutes are similarly derived from the common law. “It will be presumed . . . that in enacting a statute the Legislature was familiar with the relevant rules of the common law, and, when it couches its enactments in common law language, that its intent was to continue those rules in statutory form.” (*Keeler v. Superior Court*, 2 Cal.3d 619, 470 P.2d 617 [looking to the common law to determine the exact meaning of “human being” under section 187].)

Even conscious-disregard-for-life malice is nonstatutory in the limited sense that no California statute specifically uses those words. But that form of implied malice is firmly based on statute; it is an interpretation of section 188’s abandoned and malignant heart language. Similarly, the second degree felony-murder rule is nonstatutory in the sense that no statute specifically spells it out, but it is also statutory as another interpretation of the same “abandoned and malignant heart” language. We have said that the “felony-murder rule eliminates the need for proof of malice in connection with a charge of murder, thereby rendering irrelevant the presence or absence of actual malice, both with regard to first degree felony murder and second degree felony murder.” (*Robertson, supra.*) But analytically, this is not precisely correct. The felony-murder rule renders irrelevant *conscious-disregard-for-life* malice, but it does not render malice itself irrelevant. Instead, the felony-murder rule “acts as a substitute” for conscious-disregard-for-life malice. (*Patterson, supra.*) It simply describes a different form of malice under section 188. “The felony-murder rule imputes the requisite malice for a murder conviction to those who commit a homicide during the perpetration of a felony inherently dangerous to life.” (*Hansen, supr.*)

[Justice Chin reviewed the history of the murder statutes leading up to the adoption of the 1872 Penal Code, as had the court in *People v. Dillon*. However, Justice Chin concluded that the court’s analysis in *Dillon* was not entirely correct and that its statement, “the Legislature’s decision not to reenact the felony-murder provision of section 25 in the 1872 codification implied an intent to abrogate the common law felony-murder rule that the section had embodied since 1850,” was dicta and was incorrect. Rather, he read the history to show that the Legislature had understood the common law felony-murder rule to be continued under the new code. This view is supported by the fact that the Code Commissioners’ notes accompanying the 1872 adoption of the Penal Code “provide no hint of an intent to abrogate the felony-murder rule.” Further, no contemporaneous case, or indeed any case prior to *Dillon*, suggested that the failure to reenact section 25 had repealed the felony-murder rule.]

B. The Merger Rule and Second Degree Felony murder

Although today we reaffirm the constitutional validity of the long-standing second degree felony-murder rule, we also recognize that the rule has often been criticized and, indeed, described as disfavored. For these reasons, although the second degree felony-murder rule originally applied to all felonies, this court has subsequently restricted its scope in at least two respects to ameliorate its perceived harshness.

First, “[i]n *People v. Ford* (1964) 60 Cal.2d 772, 388 P.2d 892, the court restricted the felonies that could support a conviction of second degree murder, based upon a felony-murder theory, to those felonies that are ‘inherently dangerous to human life.’” (*Hansen, supra.*) Whether a felony is inherently dangerous is determined from the elements of the felony in the abstract, not the particular facts. This restriction is not at issue here. Section 246 makes it a felony to “maliciously and willfully discharge a firearm at an . . . occupied motor vehicle. . . .”³ “As used in this section, ‘inhabited’ means currently being used for dwelling purposes, whether occupied or not.” In *Hansen, supra*, we held that shooting at an “inhabited dwelling house” under section 246 is inherently dangerous even though the inhabited dwelling house does not have to be actually occupied at the time of the shooting. That being the case, shooting at a vehicle that is actually occupied clearly is inherently dangerous.

But the second restriction — the “merger doctrine”—is very much at issue. The merger doctrine developed due to the understanding that the underlying felony must be an independent crime and not merely the killing itself. Thus, certain underlying felonies “merge” with the homicide and cannot be used for purposes of felony murder. The specific question before us is how to apply the merger doctrine in this case. In this case, the Court of Appeal divided on the question and on how to apply our precedents. But the majority and dissent agreed on one thing — that the current state of the law regarding merger is “muddled.” We agree that the scope and application of the merger doctrine as applied to second degree murder needs to be reconsidered. To explain this, we will first review the doctrine’s historical development. Then we will discuss what to do with the merger doctrine and, ultimately, conclude that the trial court should not have instructed on felony murder.

1. Historical Review

[Justice Chin reviewed the court’s “muddled” history with regard to second degree felony-murder and the merger rule. The seminal case was *Ireland*, where the court found that the underlying felony — assault with a deadly weapon — merged. The court held that a felony would merge when the felony was an “integral part” of the homicide. In *People v. Mattison* (1971) 4 Cal.3d

³ In its entirety, section 246 provides: “Any person who shall maliciously and willfully discharge a firearm at an inhabited dwelling house, occupied building, occupied motor vehicle, occupied aircraft, inhabited housecar, as defined in Section 362 of the Vehicle Code, or inhabited camper, as defined in Section 243 of the Vehicle Code, is guilty of a felony, and upon conviction shall be punished by imprisonment in the state prison for three, five, or seven years, or by imprisonment in the county jail for a term of not less than six months and not exceeding one year.

177, 481 P.2d 193, the defendant, who was a prison inmate, was charged with murder because he sold methyl alcohol to another inmate who died from methyl alcohol poisoning. The court found that the underlying felony — mixing poison with food, drink or medicine with the intent that it be taken — did not merge because the court found that the felony was committed with a “collateral and independent felonious design.” In *People v. Smith* (1984) 35 Cal.3d 798, 678 P.2d 886, the defendant was convicted of the murder of her daughter, with the underlying felony being felony child abuse. The court applied the merger doctrine because, as to felony child abuse of the assaultive variety, the court could “conceive of no independent purpose” for the felony. In *Hansen, supra*, the underlying felony was shooting into an inhabited dwelling house. The court, rejecting both *Ireland’s* “integral part of the homicide” test, and *Mattison’s* “collateral and independent felonious design” test, held that the felony did not merge, using language seeming to restrict to merger doctrine to assaultive felonies. In *Robertson, supra*, the underlying felony was discharging a firearm in a grossly negligent manner. The defendant claimed he fired into the air in order to frighten away several men who were burglarizing his car. The court stating that the *Mattison*, “collateral purpose” test provided the “most appropriate framework” for deciding the merger issue, held that the felony did not merge. Finally, in *People v. Randle* (2005) 35 Cal.4th 987, 111 P.3d 987, the underlying felony again was discharging a firearm in a grossly negligent manner. However, the defendant in *Randle* admitted that he shot at the victim, allegedly to rescue a third person who was being attacked. The court found that the fact that the defendant intended to shoot the victim distinguished the case from *Robertson* and required application of the merger doctrine because the shooting lacked an independent felonious purpose.]

2. Analysis

The current state of the law regarding the *Ireland* merger doctrine is problematic in at least two respects.

First, two different approaches currently exist in determining whether a felony merges. *Hansen, supra*, which we have never expressly overruled, held that a violation of section 246, at least when predicated on shooting at an inhabited dwelling house, *never* merges. *Robertson, supra* and *Randle, supra*, held that a violation of section 246.3 *does* merge unless it is done with a purpose collateral to the resulting homicide. If *Hansen*, on the one hand, and *Robertson* and *Randle* on the other hand, are all still valid authority, the question arises which approach applies here. This court has never explained whether *Hansen* retains any viability after *Robertson* and *Randle* and, if so, how a court is to go about determining which approach to apply to a given underlying felony.

Second, *Randle*, when juxtaposed with *Robertson*, brings into sharp focus the anomaly that we noted in *Robertson* and accepted as inherent in the second degree felony-murder rule, and that we noted in *Hansen* and avoided by concluding that the merger rule never applies to shooting at an inhabited dwelling house. In combination, *Robertson* and *Randle* hold that, when the *Hansen* test does not apply (i.e., at least when the underlying felony is a violation of 246.3), the underlying felony merges, and the felony-murder rule

does *not* apply, if the defendant intended to shoot *at* the victim (*Randle*), but the underlying felony does not merge, and the felony-murder rule *does* apply, if the defendant merely intended to frighten, perhaps because he believed the victim was burglarizing his car (*Robertson*). This result is questionable for the reasons discussed in the separate opinions in *Robertson*. Moreover, as we discuss further below, the *Robertson* and *Randle* approach injected a factual component into the merger question that did not previously exist.

In light of these problems, we believe we need to reconsider our merger doctrine jurisprudence. As Justice Werdegar observed in her dissenting opinion in *Robertson*, “sometimes consistency must yield to a better understanding of the developing law.” In considering this question, we must also keep in mind the purposes of the second degree felony-murder rule. We have identified two. The purpose we have most often identified “is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit.” (*People v. Washington* (1965) 62 Cal.2d 777, 402 P.2d 130.) Another purpose is to deter commission of the inherently dangerous felony itself. (*Robertson, supra* [“the second degree felony-murder rule is intended to deter both carelessness in the commission of a crime and the commission of the inherently dangerous crime itself”].)

We first consider whether *Hansen* has any continuing vitality after *Robertson*, and *Randle, supra*. In *Robertson* and *Randle*, we unanimously rejected the *Hansen* test, at least when the underlying felony is a violation of section 246.3. Although *Hansen* avoided the problems inherent in the *Robertson* approach by simply stating the felony at issue will never merge, we see no basis today to resurrect the *Hansen* approach for a violation of section 246.3. Indeed, doing so would arguably be inconsistent with *Hansen’s* reasoning. *Hansen* explained that most homicides do not involve violations of section 246, and thus holding that such homicides do not merge would not “subvert the legislative intent.” But most fatal shootings, and certainly those charged as murder, do involve discharging a firearm in at least a grossly negligent manner. Fatal shootings, in turn, are a high percentage of all homicides. Thus, holding that a violation of section 246.3 never merges would greatly expand the range of homicides subject to the second degree felony-murder rule. We adhere to *Robertson* and *Randle* to the extent they declined to extend the *Hansen* approach to a violation of section 246.3.

But if, as we conclude, the *Hansen* test does not apply to a violation of section 246.3, we must decide whether it still applies to *any* underlying felonies. The tests stated in *Hansen* and in *Robertson* and *Randle* cannot both apply at the same time. If *Hansen* governs, the underlying felony will *never* merge. If *Robertson* and *Randle* governs, the underlying felony will *always* merge unless the court can discern some independent felonious purpose. But we see no principled basis by which to hold that a violation of section 246 never merges, but a violation of section 246.3 does merge unless done with an independent purpose. We also see no principled test that another court could use to determine which approach applies to other possible underlying felonies. . . . The *Robertson* and *Randle* test and the *Hansen* test cannot coexist. Our analysis in *Robertson* and *Randle* implicitly overruled the *Hansen*

test. We now expressly overrule *Hansen* to the extent it stated a test different than the one of *Robertson* and *Randle*.

But the test of *Robertson* and *Randle* has its own problems that were avoided in *Hansen* but resurfaced when we abandoned the *Hansen* test. Our holding in *Randle* made stark the anomalies that Justices Kennard and Werdegar identified in *Robertson*. On reflection, we do not believe that a person who claims he merely wanted to frighten the victim should be subject to the felony-murder rule (*Robertson*), but a person who says he intended to shoot at the victim is not subject to that rule (*Randle*). Additionally, *Robertson* said that the intent to frighten is a collateral *purpose*, but *Randle* said the intent to rescue another person is not an independent purpose but merely a *motive*. It is not clear how a future court should decide whether a given intent is a purpose or merely a motive.

The *Robertson* and *Randle* test presents yet another problem. In the past, we have treated the merger doctrine as a legal question with little or no factual content. Generally, we have held that an underlying felony either never or always merges (e.g., *People v. Smith*, *supra* [identifying certain underlying felonies that do not merge]), not that the question turns on the specific facts. Viewed as a legal question, the trial court properly decides whether to instruct the jury on the felony-murder rule, but if it does so instruct, it does not also instruct the jury on the merger doctrine. The *Robertson* and *Randle* test, however, turns on potentially disputed facts specific to the case. In *Robertson*, the defendant claimed he merely intended to frighten the victim, which caused this court to conclude the underlying felony did not merge. But the jury would not necessarily have to believe the defendant. Whether a defendant shot *at* someone intending to injure, or merely tried to frighten that someone, may often be a disputed factual question.

Defendant argues that the factual question whether the defendant had a collateral felonious purpose — and thus whether the felony-murder rule applies — involves an element of the crime and, accordingly, that the *jury* must decide that factual question. When the merger issue turns on potentially disputed factual questions, there is no obvious answer to this argument. Justice Kennard alluded to the problem in her dissent in *Robertson* when she observed that “the jury never decided whether he had that intent [to frighten].” Because this factual question determines whether the felony-murder rule applies under *Robertson* and *Randle*, and thus whether the prosecution would have to prove some other form of malice, it is not clear why the jury should not have to decide the factual question.

To avoid the anomaly of putting a person who merely intends to frighten the victim in a worse legal position than the person who actually intended to shoot at the victim, and the difficult question of whether and how the jury should decide questions of merger, we need to reconsider our holdings in *Robertson* and *Randle*. When the underlying felony is assaultive in nature, such as a violation of section 246 or 246.3, we now conclude that the felony merges with the homicide and cannot be the basis of a felony-murder instruction. An “assaultive” felony is one that involves a threat of immediate violent injury. In determining whether a crime merges, the court looks to its elements and not the facts of the

case. Accordingly, if the elements of the crime have an assaultive aspect, the crime merges with the underlying homicide even if the elements also include conduct that is not assaultive. For example, in *People v. Smith, supra*, the court noted that child abuse under section 273a “includes both active and passive conduct, i.e., child abuse by direct assault and child endangering by extreme neglect.” Looking to the facts before it, the court decided the offense was “of the assaultive variety,” and therefore merged. It reserved the question whether the nonassaultive variety would merge. Under the approach we now adopt, both varieties would merge. This approach both avoids the necessity of consulting facts that might be disputed and extends the protection of the merger doctrine to the potentially less culpable defendant whose conduct is not assaultive.

This conclusion is also consistent with our repeatedly stated view that the felony-murder rule should not be extended beyond its required application. We do not have to decide at this point exactly what felonies are assaultive in nature, and hence may not form the basis of a felony-murder instruction, and which are inherently collateral to the resulting homicide and do not merge. But shooting at an occupied vehicle under section 246 is assaultive in nature and hence cannot serve as the underlying felony for purposes of the felony-murder rule.

[The court went on to find that the instructional error was harmless.]

BAXTER, J., concurring and dissenting,

I concur in the majority’s decision to reaffirm the constitutional validity of the long-standing second degree felony-murder rule. Ever since the Penal Code was enacted in 1872, and going back even before that, to California’s first penal law, the Crimes and Punishments Act of 1850, the second degree felony-murder rule has been recognized as a rule for imputing malice under the statutory definition of implied malice (§ 188) where the charge is second degree murder. As the majority explains, “The willingness to commit a felony inherently dangerous to life is a circumstance showing an abandoned and malignant heart. The second degree felony-murder rule is based on statute and, accordingly, stands on firm constitutional ground.”

Although the majority reaffirms the constitutional validity of the second degree felony-murder rule, they go on to render it useless in this and future cases out of strict adherence to the so-called “merger rule” announced in *People v. Ireland* (1969) 70 Cal.2d 522, 450 P.2d 580 (*Ireland*). Under the merger rule, no assaultive-type felony can be used as a basis for a second degree felony-murder conviction. The single rationale given in *Ireland* for the merger rule was that to allow assaultive type felonies to serve as a basis for a second degree felony-murder conviction “would effectively preclude the jury from considering the issue of malice aforethought in all cases wherein homicide has been committed as a result of a felonious assault . . . a category which includes the great majority of all homicides. This kind of bootstrapping finds support neither in logic nor in law.”

In the 40 years since the *Ireland* court announced its sweeping “merger rule,” this court has struggled mightily with its fallout in an attempt to redefine the contours of the venerable second degree felony-murder rule. The history of

A.

FELONY-MURDER

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our “muddled” case law on the subject is accurately recounted in painstaking detail in the majority opinion. . . .

. . .

In the end, this case presented us with a clear opportunity to finally get this complex and difficult issue right. The majority’s recognition and unequivocal pronouncement, in part II.A of its opinion — that the second degree felony-murder rule is simply a rule for imputing malice under section 188—furnishes the missing piece to this complex and confusing legal jigsaw puzzle. With that clear pronouncement of the second degree felony-murder rule’s true nature and function firmly in hand, I would go on to reach the following logical conclusions with regard to the long-standing tension between that rule and *Ireland’s* merger doctrine.

First, when a homicide has occurred during the perpetration of a felony inherently dangerous to human life, a jury’s finding that the perpetrator satisfied all the elements necessary for conviction of that offense, without legal justification or defense, *is* a finding that he or she acted with an “abandoned and malignant heart” (i.e., acted with malice) within the meaning of section 188. Put in terms of the modern definition of implied malice, where one commits a felony inherently dangerous to human life without legal justification or defense, then under operation of the second degree felony-murder rule, a homicide resulting therefrom *is* a killing “proximately result[ing] from an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.” (*People v. Dellinger* (1989) 49 Cal.3d 1212, 783 P.2d 200.)

Once it is understood and accepted that the second degree felony-murder rule is simply *a rule for imputing malice* from the circumstances attending the commission of an inherently dangerous felony during which a homicide occurs, no grounds remain to support the sole rationale offered by the *Ireland* court for the merger doctrine — that use of an assaultive-type felony as the basis for a second degree felony-murder instruction “effectively preclude[s] the jury from considering the issue of malice aforethought in all cases wherein homicide has been committed as a result of a felonious assault.” (*Ireland, supra.*) The majority’s holding in part II.A of its opinion makes clear it understands and accepts that the second degree felony-murder rule is but a means by which juries impute malice under the Legislature’s statutory definition of second degree implied malice murder. The majority’s holding in part II.B of its opinion nonetheless fails to follow through and reach the logical conclusions to be drawn from the first premise, and instead simply rubberstamps the *Ireland* court’s misguided belief that the second degree felony-murder rule improperly removes consideration of malice from the jury’s purview.

Second, when a jury convicts of second degree murder under the second degree felony-murder rule, it *has* found the statutory element of malice necessary for conviction of murder. (§§ 187, 188.) Hence, there are no constitutional concerns with regard to whether the jury is finding all the elements of the charged murder, or is not finding all the “facts” that can

increase punishment where the defendant is convicted of second degree murder in addition to conviction of the underlying inherently dangerous felony.

Third, our recognition today that the second degree felony-murder rule is simply a rule under which the jury may impute malice from the defendant's commission of inherently dangerous criminal acts, thereby undercutting the very rationale given by the *Ireland* court for the merger rule, should logically *eliminate* any impediment to the use of inherently dangerous felonies — such as the violation of section 246 (maliciously and willfully shooting at an occupied vehicle) at issue in this case — as the basis for an instruction on second degree felony murder.

The majority's holding, in contrast, works just the opposite result. Prior to this court's decision in *Ireland*, this court had already restricted the felonies that could support a second degree felony-murder conviction to those "inherently dangerous to human life." (*People v. Ford* (1964) 60 Cal.2d 772, 388 P.2d 892.) The justification for the imputation of implied malice under these circumstances is that, "when society has declared certain inherently dangerous conduct to be felonious, a defendant should not be allowed to excuse himself by saying he was unaware of the danger to life." (*People v. Patterson* (1989) 49 Cal.3d 615, 778 P.2d 549.) Hence, whatever felonies may remain available for use in connection with the second degree felony-murder rule after today's holding will both have to qualify as inherently dangerous felonies, and not be "assaultive in nature" or contain any elements that have "an assaultive aspect." I fail to see how the second degree felony-murder rule, thus emasculated, will continue to serve its intended purposes of "deter[ring] felons from killing negligently or accidentally" while "deter[ring] commission of the inherently dangerous felony itself."

In sum, the majority has turned the second degree felony-murder rule on its head by excluding *all felonies* that are "assaultive in nature," including a violation of section 246, in whatever form, from future use as a basis for second degree felony-murder treatment. In reaching its holding, the majority has rejected decades of sound felony-murder jurisprudence in deference to *Ireland's* merger rule, a doctrine grounded on a single false premise, that use of the second degree felony-murder rule improperly insulates juries from the requirement of finding malice and thereby constitutes unfair "bootstrapping."

. . .

[Justice MORENO, in his concurring and dissenting opinion, argued that, although the majority's reformulation of the merger rule was an "improvement," the second degree felony-murder rule was "deeply flawed" and should be abolished.]

Chapter 9

PROPERTY CRIMES

A. THEFT

Page 372: before *People v. Green*, add the following problem:

Problem 51A. Defendant tried to pay for a purchase at Store by using a forged check. Clerk became suspicious and took the check to the office to talk with Supervisor. After a few minutes, Defendant entered the office, seized the check from Clerk and left. Defendant is now charged, *inter alia*, with grand theft from the person (P.C. §§ 484, 487) for taking the check back. What are the arguments as to whether Defendant is guilty of the charge or any lesser included offense?

Page 391: before *Problem 54*, add the following note:

“Constructive possession” of property. The court in *Hayes* assumed that Pederson, as the bookkeeper for the company, was in possession of the company’s property. The California Supreme Court has since held that every employee on duty at the time of a robbery of the employer’s business is in “constructive possession” of the employer’s property and therefore is a victim of the robbery. See *People v. Scott*, 45 Cal.4th 743, 200 P.3d 837 (2009). As a result a defendant may be convicted of as many counts of robbery as there are employees on duty.

B. BURGLARY

Page 411: prior to the notes, add the following problem:

Problem 58A. Defendant and Wife were having marital problems, and one morning, Wife kicked Defendant out of their house. Later in the morning, Wife gave Neighbor a suitcase, \$50 and a note to deliver to Defendant and asked him to collect a set of house keys from Defendant. The note told Defendant to “get a job, be accountable, and talk to me.” Neighbor delivered the items to Defendant, collected the keys and returned the keys to Wife. That night, Defendant broke into the house, sexually assaulted Wife and kidnapped her. Defendant is charged with various crimes, including burglary (P.C. § 459). What arguments should be made on the burglary charge?

0032

[ST: 1] [ED: 10000] [REL: 2009S]

Composed: Fri Jul 24 02:16:27 EDT 2009

XPP 8.1C.1 Patch #5 LS000000 nllp 3120 [PW=468pt PD=684pt TW=348pt TD=588pt]

VER: [LS000000-Local:16 Jul 09 14:28][MX-SECNDARY: 18 Jul 09 08:51][TT: 25 Jun 09 10:01 loc=usa unit=03120-supp01]

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Chapter 10

INCHOATE CRIMES

A. ATTEMPT

Page 435: before *People v. Berger*, add the following case:

PEOPLE v. SMITH
37 Cal.4th 733, 124 P.3d 730 (2005)

BAXTER, J.

The defendant in this case challenges the sufficiency of the evidence to support his conviction of two counts of attempted murder where he fired a single bullet into a slowly moving vehicle, narrowly missing a mother and her infant son. The evidence showed that the mother, who was known to defendant and was driving, and her baby, who was secured in a car seat directly behind her, were each in defendant's line of fire when he fired a single .38-caliber round at them from behind the car as it pulled away from the curb. The bullet shattered the rear windshield, narrowly missed both the mother and baby, passed through the mother's headrest, and lodged in the driver's side door.

On appeal, defendant contends his conviction of the attempted murder of the baby must be reversed for lack of substantial evidence that he harbored the requisite specific intent to kill the child. We disagree. Under the applicable deferential standard of review, we conclude the evidence is sufficient to support the jury's verdict finding defendant acted with intent to kill the baby as well as the mother. The fact that only a single bullet was fired into the vehicle does not, as a matter of law, compel a different conclusion. Accordingly, the judgment of the Court of Appeal shall be affirmed.

FACTS AND PROCEDURAL BACKGROUND

On the afternoon of February 18, 2000, Karen A. drove her boyfriend, Renell T., Sr. (Renell), to a friend's house on Greenholme Lane in Sacramento. She was driving her four-door Chevy Lumina, with Renell seated in the front passenger seat and their three-month-old baby, Renell T., Jr., secured in a rear-facing infant car seat in the backseat directly behind her. She parked alongside the curb on the street in front of the house, and Renell got out of the car. As Karen waited in the car to make sure Renell's friend was home, she saw defendant approaching from behind. Karen recognized defendant as a former friend. She had last spoken to him during a telephone conversation eight to nine months earlier during which he had told her the next time he saw her he would "slap the s_ out of [her]."

Defendant walked up to the open front passenger window of Karen's car, looked inside and said, "Don't I know you, bitch?" Overhearing the statement,

Renell turned around from the walkway leading to the house and said, “Well, you don’t know me.” As Renell walked back toward the car, defendant lifted his shirt to display a handgun tucked in his waistband. Renell said, “It is cool,” and backed away from defendant. According to Karen, a group of men on the street corner began approaching the car, and as Renell was entering the vehicle through the front passenger door, defendant and the other men began hitting him.

As soon as Renell was securely inside the car, Karen started to pull away from the curb. After driving about one car length, she looked in her rearview mirror and saw defendant standing “[s]traight behind” her holding a gun. She heard a single gunshot, and although she did not see defendant pull the trigger, he was the only person she had seen with a gun. The bullet shattered the rear windshield, narrowly missed both Karen and the baby, passed through the driver’s headrest, and lodged in the driver’s side door. As soon as Karen reached a place of safety, she stopped to check the baby for injuries. He was screaming, his face covered with pieces of broken glass.

. . .

[Defendant’s testimony — that it was Renell, not he, who had the gun and that Defendant did not fire at the car — was evidently disbelieved by the jury which found him guilty of attempted murder of Karen A., attempted murder of the baby, shooting at an occupied vehicle, child endangerment and assault with a firearm.]

DISCUSSION

Defendant does not challenge his conviction of the attempted murder of Karen. A. But he argues his conviction of the attempted murder of the baby must be reversed because, as stated in his opening brief, “only a single attempted murder conviction was possible on the facts here.” Specifically, defendant asserts that the fact that he fired only one bullet into the vehicle reflects his intent to kill only one victim — Karen A. He urges that “there was no proof of animus toward the baby,” and argues his conviction of the attempted murder of that victim must be reversed for lack of substantial evidence that he harbored specific intent to kill the child.

In reviewing a sufficiency of evidence claim, the reviewing court’s role is a limited one. “The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” (*People v. Ochoa* (1993) 6 Cal.4th 1199, 864 P.2d 103.)

“Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. Thus, if the verdict is supported by

substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder." (*Id.*)

We first consider the mental state required for conviction of attempted murder. "The mental state required for attempted murder has long differed from that required for murder itself. Murder does not require the intent to kill. Implied malice — a conscious disregard for life — suffices." (*People v. Bland* (2002) 28 Cal.4th 313, 48 P.3d 1107 (*Bland*).) In contrast, "[a]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Lee* (2003) 31 Cal.4th 613, 74 P.3d 176.) Hence, in order for defendant to be convicted of the attempted murder of the baby, the prosecution had to prove he acted with specific intent to kill that victim.

Intent to unlawfully kill and express malice are, in essence, "one and the same." (*People v. Saille* (1991) 54 Cal.3d 1103, 820 P.2d 588.) To be guilty of attempted murder of the baby, defendant had to harbor express malice toward that victim. Express malice requires a showing that the assailant "either desires the result, i.e., death, or knows, to a substantial certainty, that the result will occur." (*People v. Davenport* (1985) 41 Cal.3d 247, 710 P.2d 861.)

The mental state required for *attempted* murder is further distinguished from the mental state required for murder in that the doctrine of "transferred intent" applies to murder but not attempted murder. (*Bland, supra.*) "In its classic form, the doctrine of transferred intent applies when the defendant intends to kill one person but mistakenly kills another. The intent to kill the intended target is deemed to transfer to the unintended victim so that the defendant is guilty of murder." (*Id.*) In contrast, the doctrine of transferred intent does not apply to attempted murder: "To be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else." (*Bland, supra.*) Whether the defendant acted with specific intent to kill "must be judged separately as to each alleged victim." (*Id.*)

. . .

Applying these principles to the facts at hand, and viewing the evidence in the light most favorable to the People, presuming the existence of every fact the jury could reasonably deduce from the evidence in support of the judgment, we conclude the evidence is sufficient to support defendant's conviction of the attempted murder of the baby.

The relevant facts are these: Karen A. and her boyfriend Renell arrived on the scene with their three-month old son, Renell T., Jr. Karen was driving; the baby was in a car seat directly behind her. Karen testified she and defendant were former friends; defendant claimed she was his ex-girlfriend. Defendant appeared and approached the vehicle, looked in through the open passenger's window, and said to Karen, "Don't I know you, bitch?" Defendant testified he saw the baby seated in the backseat directly behind Karen. Renell, who had exited from the vehicle but heard defendant's comment, approached defendant, who lifted his shirt to reveal a handgun tucked in his waistband. An altercation commenced between Renell, defendant, and several other males standing at the

scene. Renell managed to reenter the vehicle, and Karen started to pull away from the curb. She testified defendant was the only one who had a gun and that he fired a single shot into the vehicle from a position directly behind it and a distance of approximately one car length as she was pulling away from the curb. The slug recovered from the driver's side door evidenced that defendant shot into the vehicle with a powerful .38-caliber handgun.

The bullet's trajectory is clearly marked in numerous photographic exhibits admitted into evidence at trial and transmitted to this court as part of the appellate record. We know from the trajectory of the bullet that it was fired from a position directly behind the car, consistent with Karen's testimony. The large-caliber bullet missed both the baby and the mother by a matter of inches as it shattered the rear windshield, passed through the mother's headrest, and lodged in the driver's side door. Although the mother was physically unharmed, the screaming baby's face was "full of glass pieces" from the shattered rear windshield.

. . .

On these facts, we conclude a rational jury could find beyond a reasonable doubt that defendant intended to kill the baby as well as the mother. Defendant suggests in his brief on the merits that "there was no proof of [his] animus toward the baby." But his very act of discharging a firearm into the car from close range and narrowly missing both mother and baby could itself support such an inference. Indeed, given defendant's claim at trial that Karen was his ex-girlfriend, and given the circumstance that she had just arrived on the scene with a new boyfriend and their baby, the jury could well have inferred that defendant felt "animus" toward both the mother and her baby when he started shooting. In any event, even if defendant subjectively believed he had a particular reason or cause to shoot at the mother, that does not preclude a finding that he also harbored express malice toward the baby when he fired into the vehicle with both victims directly in his line of fire. Defendant's assertion on appeal—that his motive to kill Karen but not the baby establishes his intent to kill her but precludes a finding that he also harbored express malice toward the baby—is without support in the facts or the law.

Defendant further argues that "[he] fired from a point very near the car, and thus a 'high potential for accuracy' existed." He asks this court to infer from that circumstance that "the fact that the baby was *not* hit, under such conditions of accuracy, tends to prove the baby was *not* a target." In light of the deferential standard of review that applies to this sufficiency of evidence claim, we must reject his interpretation of the evidence.

. . .

In urging the Court of Appeal to reverse his conviction of the attempted murder of the baby on grounds of insufficient evidence, defendant asserted that this court's opinion in *Bland, supra*, "provide[s] the essential key for analysis of the sufficiency of the evidence issue here." He argued to the court that *Bland* "makes it perfectly clear that only one count of attempted murder can stand on these facts" because, according to defendant, here there was "no evidence whatsoever that [defendant] had any motive or intent to kill the baby, himself,"

and *Bland*'s kill zone exception does not apply because "[t]his is not a bomb-on-the-airplane case or a rocket-propelled-grenade case or a hail-of-bullets case; this is a single-shot case."

Defendant misreads this court's decision in *Bland*. *Bland*'s "kill zone" theory does not preclude a conclusion that defendant's act of firing a single bullet at Karen and her baby, both of whom were in his direct line of fire, can support two convictions of attempted murder under the totality of the circumstances shown by the evidence. *Bland* simply recognizes that a shooter may be convicted of multiple counts of attempted murder on a "kill zone" theory where the evidence establishes that the shooter used lethal force designed and intended to kill everyone in an area around the targeted victim (i.e., the "kill zone") as the means of accomplishing the killing of that victim. Under such circumstances, a rational jury could conclude beyond a reasonable doubt that the shooter intended to kill not only his targeted victim, but also all others he knew were in the zone of fatal harm. As we explained in *Bland*, "This concurrent intent [i.e., 'kill zone'] theory is not a legal doctrine requiring special jury instructions. . . . Rather, it is simply a reasonable inference the jury may draw in a given case: a primary intent to kill a specific target does not rule out a concurrent intent to kill others."

. . .

Defendant's display of hostility toward Karen A. surely constituted some evidence that he had a motive to shoot at her, which in turn was probative of whether he intended to kill her. But the fact that defendant displayed "overt hostility" toward Karen A. moments before the shooting was not the *only* evidence that he shot at her with intent to kill. Defendant's very act of discharging a lethal firearm at her from close range "in a manner that could have inflicted a mortal wound" (*People v. Chinchilla* (1997) 52 Cal.App.4th 683, 60 Cal.Rptr.2d 761) is itself evidence sufficient to support an inference of intent to kill.

The question whether the evidence was sufficient to support defendant's conviction of the attempted murder of the baby must be analyzed in the same way. The physical evidence showed both Karen A. and her baby were directly in defendant's line of fire; the testimonial evidence established defendant had looked into the open passenger window of the vehicle moments before the shooting and knew the baby was positioned in the backseat directly behind her. The bullet missed both the mother *and* the baby by inches. Although there was evidence that defendant exhibited overt animosity toward Karen A., which is probative of whether he acted with intent to kill her, the facts also support an inference that defendant intended to kill the baby as well. The infant was the offspring of Karen A. and her current boyfriend, the baby's father, all three of whom had just arrived on the scene only moments before defendant's hostile verbal exchange with the mother, his physical altercation with the father, and his determination to shoot at the mother and child as the vehicle pulled away from the curb. The jury could have concluded that because defendant viewed Karen A. as his former girlfriend, he harbored animosity toward the child she had with her current boyfriend.

Viewing the record in the light most favorable to the conviction obtained by the prosecution below, we conclude the evidence is sufficient to support defendant's conviction of the attempted murder of the baby. The fact that only a single bullet was fired into the vehicle, or that defendant exhibited overt animosity toward the mother but not the baby moments before the shooting, does not, as a matter of law, compel a different result.

CONCLUSION

The judgment of the Court of Appeal is affirmed, and the matter remanded to that court for further proceedings consistent with the views expressed herein.

WERDEGAR, J., dissenting, joined by MORENO, J.

I respectfully dissent. In my view, defendant's conviction for the attempted murder of Renell T., Jr., is unsupported by substantial evidence.

Defendant fired a single bullet into a moving car, narrowly missing the driver and her infant son, after quarreling with the driver and the driver's boyfriend. There was ample evidence to support the jury's finding defendant was trying to kill the driver. The evidence was ample also that he acted recklessly, or even with conscious disregard for life, as to the baby. The evidence was insufficient, however, to permit the jury to infer beyond a reasonable doubt that defendant *intended to kill the baby*, with whom, as far as the evidence showed, defendant had no quarrel at all. The majority struggles to articulate grounds for upholding the second attempted murder conviction. In the course of that struggle, the majority loses sight of the crucial difference between implied malice, or conscious disregard for life, and express malice, which is the specific intent to kill a person.

The majority reasons that because both Karen and her son were in the line of defendant's fire, and therefore defendant's single shot could have killed either, the jury could infer he intended to kill both. That defendant had displayed overt hostility toward Karen and none at all toward the baby is, in the majority's view, immaterial because conviction of attempted murder does not require proof of a motive for killing. The majority is of course correct that intent may ordinarily be inferred from action. But to support the inference that defendant intended to kill the infant, the majority points to no aspect of defendant's action other than that he placed the infant's life in danger by shooting in his direction. The majority thus permits knowing endangerment, which establishes at most *implied* malice, to serve, by itself, as proof beyond a reasonable doubt of intent to kill. This result is contrary to fundamental concepts of California homicide law recognized in the majority opinion and discussed further below, in particular the distinction between implied and express malice and the requirement that the latter be proven as an element of attempted murder.

. . .

DISCUSSION

The only question before the court is the sufficiency of evidence to prove defendant attempted to kill Renell T., Jr., Karen and Renell's three-month-old infant. . . .

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Lee* (2003) 31 Cal.4th 613, 74 P.3d 176.) "The mental state required for attempted murder has long differed from that required for murder itself." (*People v. Bland* (2002) 28 Cal.4th 313, 48 P.3d 1107.) For murder, malice may be express or implied. "Malice is *express* when the killer harbors a deliberate intent to unlawfully take away a human life. Malice is *implied* when the killer lacks an intent to kill but acts with conscious disregard for life, knowing such conduct endangers the life of another." (*People v. Lasko* (2000) 23 Cal.4th 101, 999 P.2d 666; § 188.) To be guilty of attempted murder, the defendant must harbor express malice; implied malice will not suffice. Express malice, or intent to kill, requires more than knowingly placing the victim's life in danger: it requires at the least that the assailant either "desire the result," i.e., death, or "know, to a substantial certainty, that the result will occur." (*People v. Davenport* (1985) 41 Cal.3d 247, 710 P.2d 861.)

We also "distinguish between a completed murder and attempted murder regarding transferred intent." (*Bland, supra.*) "In its classic form, the doctrine of transferred intent applies when the defendant intends to kill one person but mistakenly kills another. The intent to kill the intended target is deemed to transfer to the unintended victim so that the defendant is guilty of murder." (*Id.*) Transferred intent, however, does not apply to attempted murder: "To be guilty of attempted murder, the defendant must instead intend to kill the alleged victim, not someone else." (*Id.*) Thus the defendant's mental state "must be judged separately as to each alleged victim." (*Id.*) Thus defendant's specific intent to kill Karen, which was adequately proven by the evidence, does not "transfer" to provide the specific intent to kill her baby; the prosecution was required to prove defendant's mental state as to the baby individually.

In determining whether the prosecution met its burden, the test is whether a rational jury could have found beyond a reasonable doubt that defendant harbored the requisite specific intent to kill the baby. In his briefing, the Attorney General posited two factual theories to support the conviction: (1) that defendant actually targeted and thus intended to kill the baby, and (2) that defendant had the concurrent intent to kill the baby's mother, his primary target, and the baby, a nontargeted person.

Actual Targeting

The Attorney General contends the evidence is sufficient to support the conviction for the attempted murder of the baby on a theory of actual targeting because defendant knew the baby was seated directly behind Karen when he fired a bullet into the vehicle. The majority agrees.

. . .

The majority's argument reduces to this claim: from defendant's knowledge of the baby's location and his shooting in the direction of both Karen and the baby, the jury could reasonably infer defendant intended to kill them both. In so reasoning, the majority stretches the meaning of intent to kill so far as to make it indistinguishable from the conscious disregard for life that constitutes implied malice. If conscious disregard of a risk of death—shown here by defendant's act of firing in the baby's direction—suffices to support an inference of intent to kill, no difference is discernable between the two types of malice.

As we held in *Bland, supra*, intent to kill does not “transfer” from victim to victim for purposes of attempted murder; to prove defendant attempted to kill the baby, the prosecution had to prove he intended to kill *the baby*. Intent to kill Karen is insufficient for this charge. Defendant's evident lack of motive for killing the baby, in contrast to his marked animosity toward Karen, is critical not because motive is an element of the crime, but because his lack of motive as to the baby points to the only rational answer to the question, whom did defendant in firing his single shot actually target and intend to kill?

The majority reasons that defendant's act of firing in the child's direction, thereby placing the child's life at serious risk, shows defendant harbored animus toward the child, from which the jury could find he desired the child's death. But if, as the majority argues, the act of placing a person's life at risk, in itself, shows the intent to kill that person, nothing differentiates the two types of malice, a conclusion contrary to the fundamental California law of homicide embodied in section 188. The suggestion that endangerment also shows animus adds nothing to the analysis, for the inference of intent to kill is still being drawn from the act of endangerment.

In short, the majority would sanction an inference of intent to kill solely from an act knowingly endangering the victim. But, as noted earlier, intent to kill requires that the assailant either “desire” the victim's death or “know, to a substantial certainty, that the result will occur.” (*Davenport, supra*.) Here there was no evidence, other than his act endangering the baby, that defendant *desired* the baby dead. Nor was defendant's means of attack so powerful that it made *substantially certain* the death of both Karen and her infant son. If, as the majority would have it, proof of knowing endangerment suffices to support a finding of intent to kill—without any evidence the assailant either wanted to kill the victim or acted so as to make the victim's death substantially certain—then the distinction between implied and express malice has been effectively obliterated.

The majority's reasoning potentially opens the door to an unlimited number of attempted murder convictions based on a single act intended to kill a single person — without proof the defendant used means intended to create a kill zone around the target. How, one must ask, is the number of attempted murder convictions arising from a single shot limited under the majority's reasoning? If assailant D shoots a handgun once at close range in the direction of a targeted victim, V1, who is standing in a close crowd of strangers, V2 through V10, could a jury find D intended to kill all 10 victims, even in the absence of evidence D had any reason to want V2 through V10 dead? To the suggestion D bore no animus against anyone but V1, the majority would presumably respond that “his

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very act of discharging a firearm into the [crowd] from close range and narrowly missing [V2 through V10] could itself support such an inference.” The majority’s reasoning cannot be correct, for it results in the absurd conclusion that an assailant has tried to murder everyone his act endangers.

. . .

Despite claiming evidence of motive is unnecessary in these circumstances, the majority repeatedly suggests defendant might have wanted to kill Karen and Renell’s baby because, according to him, Karen was his former girlfriend (rather than just a friend as she testified). The jury, however, obviously did not believe defendant’s version of events; if they had, they would not have convicted him at all. Even defendant’s testimony, moreover, fails to support the inference the majority puts forward; defendant testified his argument with Karen the day before the confrontation with Renell arose because Karen was reluctant to give him a ride in her car, as she sometimes did. His testimony indicates he was angry at *Karen* for her reluctance and for the language she used toward him in the ensuing argument. Nothing suggests he was angry with or about the baby she had recently had with Renell.

The inference the majority would draw as to why defendant might wish to harm the infant is thus entirely speculative. It *could* be true (if one disbelieves Karen and believes defendant as to their prior relationship), but no evidence to that effect appears in the record. Speculation does not constitute substantial evidence.

Finally, even indulging this speculation and assuming defendant wanted to kill Renell T., Jr., because he was another man’s son, in order to find defendant intended to kill both Karen and the baby one would also have to infer he intended somehow to hit and kill both with his single shot. Though the majority does not fully articulate its factual theory, its repeated invocation of the “large-caliber” bullet used here is presumably intended to suggest defendant intended to shoot Karen *through* her baby. Of course, a single bullet *can* hit and even kill two people, but here (where the baby presented a notably small target and the bullet would, in addition, have had to traverse the infant car seat and the driver’s seat without deflection) there was no evidence defendant was capable, or believed himself capable, of such a feat of marksmanship. Again, an appellate court’s speculation cannot substitute for evidence at trial.

Concurrent Intent to Kill

Although the majority purports not to rely on this point, the Attorney General alternatively contends the evidence is sufficient to support defendant’s conviction for the attempted murder of the baby on a concurrent intent theory because defendant intentionally created a “kill zone,” from which the jury could reasonably infer he concurrently intended to kill both Karen, his intended target, and her baby.

We have explained that multiple attempted murder convictions may be sustained on a “kill zone,” or “concurrent intent,” theory when the evidence shows the defendant used lethal force of a type and extent calculated to kill

everyone in an area, including but not limited to the victim shown to be the defendant's primary target, as a means of accomplishing the killing of the primary target. Under these circumstances, the fact finder could rationally infer the defendant intended to kill not only his or her primary target, but also concurrently intended to kill all those in the zone of fatal harm. (*Bland, supra.*) A kill zone, or concurrent intent, analysis, therefore, focuses on (1) whether the fact finder can rationally infer from the type and extent of force employed in the defendant's attack on the primary target that the defendant intentionally created a zone of fatal harm, and (2) whether the nontargeted alleged attempted murder victim inhabited that zone of harm.

In *Bland*, we illustrated the operation of the kill zone, or concurrent intent, theory of attempted murder with several examples: "[A]n assailant who places a bomb on a commercial airplane intending to harm a primary target on board ensures by this method of attack that all passengers will be killed. Similarly, consider a defendant who intends to kill A and, in order to ensure A's death, drives by a group consisting of A, B, and C, and attacks the group with automatic weapon fire or an explosive device devastating enough to kill everyone in the group. The defendant has intentionally created a 'kill zone' to ensure the death of his primary victim, and the trier of fact may reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim." In *Bland* itself, we explained, the evidence strongly supported an inference of concurrent intent to kill: the defendant and a fellow gang member intentionally created a zone of fatal harm when they fired a "flurry of bullets" into a fleeing car, justifying convictions for attempted murder of the passengers.

Here, defendant did not fire multiple shots at Karen; he fired one bullet in Karen's direction at a distance of about a car's length from the rear of the moving vehicle. By firing a single shot, defendant did not use a type or degree of force reasonably calculated to kill everyone in the vehicle. Defendant's method of attack was not comparable to the "kill zone" examples and decisions we cited in *Bland*: detonating a bomb on a commercial airplane, using an explosive device or automatic weapon fire against a group of people, spraying wall-piercing bullets at occupied houses or mailing poisoned candy to a household. Nor was defendant's method of attack comparable to the firing of multiple gunshots into a fleeing car by the defendant in *Bland* itself. That the bullet came close to hitting Karen *and* her baby does not, without more, establish that by firing a single shot in the direction of Karen, his intended target, defendant intentionally created a zone of fatal harm around Karen such that he may be deemed to have intended to ensure her death by killing the baby as well.

The Attorney General, nevertheless, insists defendant intentionally created a zone of fatal harm by firing one bullet into the car because "[t]he baby and Karen were positioned in the car in such a way that [defendant], firing from the rear, could not have killed Karen without shooting through the baby first." This argument finds no support in the record; the evidence shows neither that the bullet necessarily had to pass through the baby to kill Karen, nor that the ammunition defendant used was of a kind likely to kill two persons in the manner the Attorney General suggests.

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Although the majority disavows any reliance on the kill zone theory, the import of the majority opinion is that an act aimed at killing one person creates a kill zone that includes everyone who *could* have been killed by the act, regardless of whether the assailant used means actually calculated to kill everyone in the target's vicinity. If a single shot with a handgun constitutes not only an attempt on the life of a person at whom the jury could find the shot was actually aimed, but also an attempt on the life of anyone else nearby, the careful analysis in *Bland* was unnecessary: the limited concurrent intent theory of *Bland* would be obviated, subsumed in a much broader endangerment theory.

The majority's expansion of attempted murder liability to cover mere endangerment is unnecessary in order to ensure assailants are appropriately punished for acts that place victims' lives in danger. Unjustified shooting in other people's direction, even when not intended to kill them, will ordinarily subject the shooter to liability for assault or a related offense. Here, as noted, defendant was convicted of assault with a firearm, child endangerment and shooting at an occupied vehicle in addition to the attempted murder counts. . . .

CONCLUSION

Because the record contains no substantial evidence from which a jury rationally could infer either that defendant actually targeted Karen's child, as well as Karen, when he shot once at the car, or that he employed a means of attack calculated to kill everyone surrounding Karen, the evidence is insufficient to show defendant had the specific intent to kill the infant, as required to sustain a conviction for attempted murder. Defendant's conviction on that count should therefore be reversed.

Page 444: substitute for *People v. Adami*, the following case:

PEOPLE v. SUPERIOR COURT (DECKER)

41 Cal.4th 1, 157 P.3d 1017 (2007)

BAXTER, J.

Defendant and real party in interest Ronald Decker has been charged with the attempted willful, deliberate, and premeditated murder of his sister, Donna Decker, and her friend, Hermine Riley Bafiera. According to the evidence offered at the preliminary hearing, Decker did not want to kill these women himself — as he explained, “he would be the prime suspect” and “would probably make a mistake somehow or another”—so he sought the services of a hired assassin.

Decker located such a person (or thought he did).^a He furnished the hired assassin with a description of his sister, her home, her car, and her workplace,

^a [[Decker had contacted Russell Wafer, a gunsmith, and informed Wafer that he was looking for someone to kill a certain victim and would pay \$35,000 for the job, along with a \$3,000 “finder's fee”

as well as specific information concerning her daily habits. He also advised the assassin to kill Hermine if necessary to avoid leaving a witness behind. Decker and the hired assassin agreed on the means to commit the murder, the method of payment, and the price. The parties also agreed that Decker would pay \$5,000 in cash as a downpayment. Before Decker handed over the money, the assassin asked whether Decker was “sure” he wanted to go through with the murders. Decker replied, “I am absolutely, positively, 100 percent sure, that I want to go through with it. I’ve never been so sure of anything in my entire life.” All of these conversations were recorded and videotaped because, unknown to Decker, he was talking with an undercover police detective posing as a hired assassin.

Decker does not dispute that the foregoing evidence was sufficient to hold him to answer to the charge of solicitation of the murder of Donna and Hermine but argues that this evidence was insufficient to support a charge of their attempted murder. The magistrate and the trial court, believing themselves bound by *People v. Adami* (1973) 36 Cal.App.3d 452 (*Adami*), reluctantly agreed with Decker and dismissed the attempted murder charges. The Court of Appeal disagreed with *Adami* and issued a writ of mandate directing the respondent court to reinstate the dismissed counts. We granted review to address the conflict and now affirm.

. . .

Discussion

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Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. The uncontradicted evidence that Decker harbored the specific intent to kill his sister (and, if necessary, her friend Hermine) was overwhelming. Decker expressed to both Wafer and Holston his desire to have Donna killed. He researched how to find a hired assassin. He spent months accumulating cash in small denominations to provide the hired assassin with a downpayment and had also worked out a method by which to pay the balance. He knew the layout of his sister’s condominium and how one might enter it surreptitiously. He had tested the level of surveillance in the vicinity of her home and determined it was “not really that sharp.” He chronicled his sister’s daily routine at both her home and her office. He offered Holston recommendations on how his sister should be killed and what materials would be necessary. And, at both meetings with Holston, he insisted that Hermine, if she were present, be killed as well, so as to prevent her from being a witness.

The controversy in this case, as the parties readily concede, is whether there was also a direct but ineffectual act toward accomplishing the intended killings. For an attempt, the overt act must go beyond mere preparation and show that the killer is putting his or her plan into action; it need not be the last proximate

to Wafer. After telling Decker that he thought he could find someone, Wafer called the Sheriff’s Department and spoke with Detective Wayne Holston. The two agreed to set up a “sting” operation with Holston posing as the “assassin.”]

or ultimate step toward commission of the crime or crimes, nor need it satisfy any element of the crime. However, as we have explained, “[b]etween preparation for the attempt and the attempt itself, there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made.” (*People v. Murray* (1859) 14 Cal. 159.) “[I]t is sufficient if it is the first or some subsequent act directed towards that end after the preparations are made.” (*People v. Memro* (1985) 38 Cal.3d 658.)

As simple as it is to state the terminology for the law of attempt, it is not always clear in practice how to apply it. As other courts have observed, “[m]uch ink has been spilt in an attempt to arrive at a satisfactory standard for telling where preparation ends and attempt begins. Both as fascinating and as fruitless as the alchemists’ quest for the philosopher’s stone has been the search, by judges and writers, for a valid, single statement of doctrine to express when, under the law of guilt, preparation to commit a crime becomes a criminal attempt.” (*Minsheu v. State* (Ala.Crim.App. 1991) 594 So.2d 703.) Indeed, we have ourselves observed that “none of the various ‘tests’ used by the courts can possibly distinguish all preparations from all attempts.” (*People v. Memro, supra.*)

Although a definitive test has proved elusive, we have long recognized that “[w]henever the design of a person to commit crime is clearly shown, slight acts in furtherance of the design will constitute an attempt.” (*People v. Anderson* (1934) 1 Cal.2d 687 [attempted robbery]). Viewing the entirety of Decker’s conduct in light of his clearly expressed intent, we find sufficient evidence under the slight-acts rule to hold him to answer to the charges of attempted murder.

. . .

. . . [A]t the time Decker handed Holston the downpayment on the murder, Decker’s intention was clear. It was equally clear that he was “actually putting his plan into action.” (*People v. Dillon* (1983) 34 Cal.3d 441.) Decker had secured an agreement with Holston to murder Donna (and, if necessary, her friend Hermine); had provided Holston with all the information necessary to commit the crimes; had given Holston the \$5,000 downpayment; and had understood that “it’s done” once Holston left with the money. These facts would lead a reasonable person to “believe a crime is about to be consummated absent an intervening force”—and thus that “the attempt is underway.” Indeed, as Justice Epstein noted for the Court of Appeal, “[t]here was nothing more for Decker to do to bring about the murder of his sister.” Although Decker did not himself point a gun at his sister, he did aim at her an armed professional who had agreed to commit the murder.⁴

As contrary authority, Decker relies on *Adami*, which affirmed the dismissal of an attempted murder charge on similar facts, and relies also on the small number of out-of-state majority and minority opinions that have followed

⁴ Decker does not argue here that the attempted murder charges must be dismissed because, notwithstanding Decker’s own conduct, Detective Holston never intended to commit the murders.

Adami. In *Adami*, the defendant sought to have his wife killed because she had stolen money from him. He agreed on a price with an undercover police agent posing as an assassin and supplied the agent with a photograph of the victim, a description of the victim and her residence and vehicles, and other pertinent information. The defendant gave the police agent \$500 as a downpayment and announced he was not going to change his mind. *Adami* declared that these acts “consisted solely of solicitation or mere preparation” and concluded, in accordance with the “weight of authority,” that “solicitation alone is not an attempt.”

We perceive several flaws in *Adami*’s analysis.

First, the opinion makes no mention of the slight-acts rule, which has long been the rule for attempted crimes in California. Indeed, *Adami*’s progeny make no pretense of reconciling their analysis with the slight-acts rule and instead explicitly reject it.

Decker argues that the slight-acts rule should not be applied to the crime of attempted murder, but his argument lacks legal or logical support. Our adoption of the slight-acts rule in *People v. Anderson, supra*, was supported by a citation to *Stokes v. State* (Miss. 1908) 46 So. 627, which is “[o]ne of the leading cases in the United States on attempt to commit a crime” (*Duke v. State* (Miss. 1976) 340 So.2d 727) and which (like the present case) involved a defendant who hired another to perform a murder. The cases on which Decker relies thus conflict not only with California law, but also with the “fairly general agreement . . . that slight acts are enough when the intent to murder is clearly shown.” (Annot., What Constitutes Attempted Murder (1974) 54 A.L.R.3d 612.) Indeed, where (as here) the crime involves concerted action — and hence a greater likelihood that the criminal objective will be accomplished — there is a *greater* urgency for intervention by the state at an *earlier* stage in the course of that conduct. Had Decker struck an agreement with and paid earnest money to a real hired killer, he could have been prosecuted for conspiracy to commit murder, which is punishable to the same extent as the completed crime of first degree murder. Because of the fortuity that Decker’s hired killer was actually an undercover detective, Decker faces the much less serious charge of attempted murder. Neither Decker nor the dissent has offered any reason for us create an exception to the slight-acts rule for attempted murder, especially in *Stokes*’s classic formulation where the attempt involves concerted action with others, merely so that Decker’s maximum potential punishment may be further reduced.

Second, *Adami* has misconceived the issue under these circumstances to be “whether the solicitation itself was sufficient to establish probable cause to believe that defendant attempted the murder.” Decker similarly expends considerable effort to convince us that “solicitation of another to commit a crime is an attempt to commit that crime if, but only if, it takes the form of urging the other to join with the solicitor in perpetrating that offense, not at some future time or distant place, but here and now, and the crime is such that it cannot be committed by one without the cooperation and submission of another.” But a solicitation requires only that a person invite another to commit or join in an enumerated crime (including murder) with the intent that the crime be

committed. (Pen.Code, § 653f.) The solicitation is complete once the request is made and is punishable “irrespective of the reaction of the person solicited.” (*In re Ryan N.* (2001) 92 Cal.App.4th 1359.) In this case, the solicitation was complete early in Decker’s first conversation with Holston, when he asked Holston to kill Donna. But the People do not contend that this request was sufficient to prosecute Decker for attempted murder. They argue instead that the solicitation, in combination with Decker’s subsequent conduct, revealed his plan to have Holston murder Donna (and, if necessary, her friend Hermine) and that Decker put this plan into operation no later than the point at which he completed the agreement with Holston, finalized the details surrounding the murders, and paid Holston \$5,000 in earnest money.

The issue, then, is not whether “solicitation alone” is sufficient to establish an attempt, but whether a solicitation to commit murder, combined with a completed agreement to hire a professional killer and the making of a downpayment under that agreement, can establish probable cause to believe Decker attempted to murder these victims. A substantial number of our sister states have held that it can. [citing cases from Arizona, Georgia, Louisiana, Nebraska, New Hampshire, New York, Virginia, Washington and West Virginia]. Additional jurisdictions have held that a solicitation to murder, in combination with a completed agreement to hire a professional killer and further conduct implementing the agreement, can similarly constitute an attempted murder. We find these authorities persuasive.

Third, *Adami* mistakenly assumes that there can be no overlap between the evidence that would tend to prove solicitation to murder and that which would tend to prove attempted murder. Indeed, Decker asserts that these are “mutually exclusive crimes.” But it could not be plainer, as Chief Justice Holmes put it, that while “preparation is not an attempt,” nonetheless “some preparations may amount to an attempt.” (*Commonwealth v. Peaslee* (Mass. 1901) 59 N.E. 55, italics added.) Conduct that qualifies as mere preparation and conduct that qualifies as a direct but ineffectual act toward commission of the crime exist on a continuum, “since all acts leading up to the ultimate consummation of a crime are by their very nature preparatory.” (*State v. Sunzar* (N.J.Super. 1999) 751 A.2d 627.) The difference between them “is a question of degree.” (*Commonwealth v. Peaslee, supra*) There is thus no error in resting a finding of attempted murder in part on evidence that *also* tends to establish solicitation to commit murder and vice versa. After all, even under Decker’s analysis, evidence of a solicitation to commit murder can tend to support a finding of attempted murder if the defendant then “provides the hit man the instrument or other means to procure the death.” Decker offers no principled basis for a different result when the hit man already has a weapon and the defendant instead begins payment under the contract to kill.

Fourth, we reject the contention, endorsed by Decker and by *Adami*’s progeny, that there is “no persuasive reason” why a solicitation to commit murder “should be treated differently under the law merely because part of the agreed upon fee has passed hands. There is no greater proximity, no significantly greater likelihood of consummation, and no act of a nature other than incitement or preparation inherent in the solicitation itself.” As the People

point out, though, a downpayment on a contract to murder serves the same purpose as a downpayment on any other type of contract. It evidences the solicitor's "seriousness of purpose" and makes the object of the contract "closer to fruition." It blinks reality to equate the threat posed by an individual who has merely invited another, perhaps unsuccessfully, to commit murder with the threat posed by an individual who has already reached an agreement with a hired killer to commit murder, finalized the plans, and made the downpayment under the contract to kill. But for Holston's status as an undercover detective, it is likely that Decker's conduct would have resulted in the murder of these victims. Where, as here, the defendant's intent is unmistakable, "the courts should not destroy the practical and common-sense administration of the law with subtleties as to what constitutes preparation and what constitutes an act done toward the commission of a crime." (*People v. Memro, supra.*)

The purpose of requiring an overt act is that until such act occurs, one is uncertain whether the intended design will be carried out. When, by reason of the defendant's conduct, the situation is "without any equivocality," and it appears the design will be carried out if not interrupted, the defendant's conduct satisfies the test for an overt act. Here, the record supported at least a strong suspicion that Decker's intent to have his sister (and, if necessary, her friend) murdered was unambiguous and that he had commenced the commission of the crime by doing all that he needed to do to accomplish the murders.

In finding the record sufficient to hold Decker to answer to the charges of attempted murder here, we do not decide whether an agreement to kill followed by a downpayment is *always* sufficient to support a charge of attempted murder. Whether acts done in contemplation of the commission of a crime are merely preparatory or whether they are instead sufficiently close to the consummation of the crime is a question of degree and depends upon the facts and circumstances of a particular case. A different situation may exist, for example, when the assassin has been hired and paid but the victims have not yet been identified. In this case, however, Decker had effectively done all that he needed to do to ensure that Donna and her friend were executed. Accordingly, he should have been held to answer to the charges of attempted murder. We disapprove *People v. Adami* to the extent it is inconsistent with this opinion.

Dissenting Opinion by WERDEGAR, J.

My colleagues hold that defendant's conduct in soliciting the murder of his sister, reaching an agreement with a hired assassin to do the killing, and making a downpayment under the agreement establishes probable cause to believe defendant himself attempted the murder. I respectfully dissent. "An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." (Pen.Code, § 21a.) Defendant's conduct in this case does not include "a direct but ineffectual act" done toward the murder's commission. Accordingly, he cannot be guilty of attempted murder.

As we have long recognized, the required act for an attempt under California law must be "directed towards immediate consummation" (*People v. Dillon*

A.

ATTEMPT

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(1983) 34 Cal.3d 441) of the crime attempted. As the majority details, defendant's conduct included numerous *indirect* acts toward accomplishing the murder of his sister: he sought the services of a hired assassin; he located a person (actually an undercover police detective) he thought would act as such; he furnished the supposed assassin with a description of his sister, her home, her car and her workplace, as well as specific information concerning her daily habits; he discussed how the murder would be done and how and when he would pay for the work, agreeing to furnish \$5,000 in cash as a downpayment; and, finally, just before he was arrested, he stated he was "absolutely, positively, 100 percent sure, that I want to go through with it" and urged the supposed assassin to do it "as fast as you can."

I agree with the majority that as evidence defendant harbored the specific intent to kill his sister, these facts are overwhelming. None of them, however, constitutes a *direct* but ineffectual act done toward the murder's commission. (Pen.Code, § 21a.) As the majority states, defendant "did not himself point a gun at his sister"; neither did he otherwise directly menace her. Instead, he relied on the person he thought had agreed to commit the murder to do the actual deed.⁵ The direct preparatory acts was the person he sought to engage as his agent-not the ultimate, intended victim of the scheme.

We previously have stated that for attempt, it must be "clear from a suspect's acts what *he* intends to do. . . ." (*People v. Dillon, supra*, italics added.) In this case, what defendant intended to do was have his sister killed *by someone else*. Defendant's own conduct did not include even "slight" acts toward actual commission of the murder. That he hired another, supplied him with information, and paid him a downpayment only highlights his intention not to perform the act himself.

The California cases the majority purports to rely on generally involve single actors, i.e., defendants who acted directly on their victims. These cases simply confirm that for attempt a defendant must have committed a direct act toward commission of the crime. Defendant here committed no direct act toward commission of the murder, since his scheme interposed a third party between himself and his intended victim, and the third party never acted. The majority goes astray in applying to this solicitation-of-murder case, where action by another person was required to effectuate (or attempt) the intended killing, principles applicable when an offense is intended and attempted by a single individual.

Although defendant's conduct went beyond the minimum required for solicitation, for purposes of attempt law his arrangements constitute mere preparation. Reprehensible as they were, his acts "did not amount to any more

⁵ Although the majority asserts defendant "did aim at [his sister] an armed professional who had agreed to commit the murder," the armed professional referred to (i.e., the detective) only *pretended* to agree so that in fact there was no agreement, though defendant thought there was. This absence of actual agreement presumably is why the case was not prosecuted as a conspiracy. (See *People v. Jurado* (2006) 38 Cal.4th 72, 120 ["A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act "by one or more of the parties to such agreement" in furtherance of the conspiracy"].)

than the mere arrangement of the proposed measures for [the] accomplishment” of the crime. (*People v. Adami* (1973) 36 Cal.App.3d 452.) This is because, as a logical matter, they did no more than “leave the intended assailant only in the condition to commence the first direct act toward consummation of the defendant’s design.” To do all one can to motivate and encourage another to accomplish a killing — even to make a downpayment on a contract to kill — while blameworthy and punishable, is neither logically nor legally equivalent to attempting the killing oneself. In concluding to the contrary, the majority blurs the distinction between preparation and perpetration the Legislature intended by requiring that an attempt include a direct act. (Pen.Code, § 21a.) The majority’s supportive reasoning likewise conflates the two separate elements of attempt, specific intent and direct act: “Viewing the entirety of [defendant’s] conduct *in light of his clearly expressed intent*, we find sufficient evidence under the slight-acts rule to hold him to answer to the charges of attempted murder.” As a court, we are not authorized to ignore the statutory requirements.

The majority’s criticisms of *Adami* are unpersuasive. The majority faults *Adami* for not mentioning the slight acts rule, but since the *Adami* court concluded no “appreciable fragment of the crime charged was accomplished,” the rule had no application. Nor, contrary to the majority’s account, did *Adami* assume that evidence of solicitation cannot also be evidence of attempt. *Adami* simply held that hiring a murderer, planning the murder, and making a downpayment logically constitute “solicitation or mere preparation,” not attempted murder.

Confronted with statutory language and judicial precedent contrary to its conclusion, the majority relies on out-of-state cases. Several of these interpret attempt statutes distinguishable from our own. Others involve more than a completed agreement with a hired killer, including a direct act *toward the victim*. The remaining cases are in my view mistaken for the same reason the majority is mistaken: they implicitly allow that a defendant may be guilty of attempt when no direct act toward the commission of the crime has been done. Courts in some other jurisdictions have, as the majority fails to acknowledge, maintained the distinction between preparation and attempt in cases similar to this.

Had the supposed assassin hired to kill defendant’s sister actually attempted to kill her, defendant would be punishable under Penal Code section 31 as a principal in the offense, either as an aider and abettor or as a coconspirator. But in this case, neither defendant nor the supposed assassin took a direct act toward commission of the offense. Defendant’s conduct was confined to encouraging and enabling his intended agent to kill (or attempt to kill), but the detective with whom he dealt took no such action. There was no attempt.

For the foregoing reasons, I dissent.

Part III

AFFIRMATIVE DEFENSES

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[ST: 1] [ED: 10000] [REL: 2009S]

Composed: Fri Jul 24 02:16:34 EDT 2009

XPP 8.1C.1 Patch #5 LS000000 nllp 3120 [PW=468pt PD=684pt TW=348pt TD=588pt]

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Chapter 12

AFFIRMATIVE DEFENSES — CHOICE OF EVILS

A. SELF-DEFENSE

Page 538: after *Problem 77* and in lieu of *Problem 78* (p. 542), add the following case:

PEOPLE v. RANDLE

35 Cal.4th 987, 111 P.3d 987 (2005)

BROWN, J.

The central question presented by this case is whether one who kills in the actual but unreasonable belief he must protect another person from imminent danger of death or great bodily injury is guilty of voluntary manslaughter, and not murder, because he lacks the malice required for murder. In other words, should California recognize the doctrine of *imperfect defense of others*? We conclude the answer is, yes.

I. FACTUAL AND PROCEDURAL BACKGROUND

The homicide victim Brian Robinson lived with his parents and his cousin, Charles Lambert. Late one evening, as Robinson drove up to their home, he saw defendant getting out of Lambert's car, holding a large stereo speaker he had just stolen from it.

Robinson confronted defendant, saying he was going to "beat your ass." Defendant pulled a .25-caliber pistol from his pocket and fired it several times. Defendant and his cousin Byron W., who had helped him break into Lambert's car, then fled on foot. Byron retained a backpack full of Lambert's stereo equipment.

Defendant claimed he fired after Robinson "reached for his hip." However, he did not claim he thought Robinson was reaching for a gun or other deadly weapon. Moreover, Byron testified Robinson approached them with a cup or bottle in his hand. Defendant and Byron agreed it was some sort of object made of glass that Robinson threw at them after defendant fired the pistol.

Defendant gave conflicting accounts as to his aim. On the one hand, he claimed he "fired the gun in the air." On the other hand, he earlier testified, "I shot at him."

Defendant testified he heard Robinson say something about getting a gun himself, and that he heard two loud bangs behind them as they fled. Byron testified he also heard gunshots as they ran. There was no evidence to

corroborate these claims.

Robinson went into his house and roused Lambert. The two men got into a truck and pursued defendant and Byron. Defendant eluded them, but they caught Byron.

According to Lambert's testimony, he and Robinson took turns beating Byron with their fists. After Byron fell to the ground, Robinson kicked him. Lambert pulled Robinson off Byron. Having recovered the stolen stereo equipment, they returned to the truck. However, Robinson jumped out of the truck and began beating Byron again. As he did, Robinson yelled at Lambert to "get pops," meaning Robinson's father; Lambert drove off to do so. While Lambert was present, the beating of Byron lasted "[p]robably five, ten minutes."

Byron testified his assailants hit and kicked him. One of them stomped on his chest, stepped on his head, and kicked him in the mouth. The beating continued for five minutes. One of the men spoke of putting Byron in the truck and taking him into the hills. Byron was bleeding from the mouth; his nose was broken. He was hollering his lungs out. He thought he was going to die. He was being beaten when defendant cried out, "Get off my cousin." Byron's assailant continued beating him, and then defendant opened fire. Defendant, Byron believed, saved his life.

Defendant testified he ran away, but then backtracked in search of Byron. He heard someone yelling for help and someone else saying, "I'm going to kill this little nigger." Coming closer, defendant saw someone beating Byron. Defendant shouted, "Stop. Get off my cousin." Byron's assailant glanced at defendant, but then resumed beating Byron. Defendant testified he fired his gun to make the man stop beating Byron.

Two prior statements defendant had made, one to the police and the other to a deputy district attorney, were played for the jury. According to defendant's statement to the police, Robinson was beating Byron when defendant first shot at him. Defendant was, he said, "mainly thinking about getting him off my little cousin." However, defendant admitted shooting at Robinson after Robinson started running away. In his statement to the deputy district attorney, defendant said he warned Robinson to get off Byron, shot once in the air, and then when Robinson did not respond, shot at him. Again, defendant admitted shooting at Robinson while he was running away. Defendant added he ceased firing because he ran out of ammunition.

Sharalyn Lawrence and Jennifer Wellington witnessed the beating from Lawrence's upstairs window. They could see that Byron was "being really hurt." Still, for a couple of minutes they were undecided what they should do. "I am like, this is Oakland," Wellington testified; "what do you do [?]" Finally, hearing Byron cry out, "Somebody help me," Lawrence telephoned 911, reporting a man "getting his ass beat." She said an ambulance should be dispatched. Defendant shot Robinson after Lawrence called 911 to report Byron was being badly beaten.

A.

SELF-DEFENSE

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As previously stated, although defendant and Byron testified Robinson was still beating Byron when defendant fired the shots, defendant, in his statements to the police and the deputy district attorney, said he fired one shot at Robinson while Robinson was running away. The testimony of Wellington and Lawrence tends to support the view that defendant shot at Robinson after Robinson stopped beating Byron and while he was running away. Wellington so testified, and Lawrence's testimony, while not very clear on this point, suggested that at least some of the shots were fired as Robinson was running away.

The cause of Robinson's death was a bullet wound in the abdomen. The bullet was a .25 caliber. It entered Robinson's lower right chest or upper abdomen and lodged in the left side of his abdomen. Robinson was not wounded in the back.

At trial, defendant asked for an instruction on imperfect defense of another. The trial court denied the request. After deliberating five days, the jury convicted defendant of second degree murder (Pen.Code, §§ 187, 189)⁶ and automobile burglary (§ 459). . . .

. . .

II. DISCUSSION

A. Imperfect Defense of Others

Again, the central question presented by this case is whether one who kills in the actual but unreasonable belief he must protect another person from imminent danger of death or great bodily injury is guilty of voluntary manslaughter, and not murder, because he lacks the malice required for murder.

Defendant contends such a person is guilty, under the doctrine of imperfect defense of others, of only voluntary manslaughter, and that the trial court prejudicially erred in refusing his request to instruct the jury on the doctrine.

The Attorney General contends (1) California has not recognized the doctrine of imperfect defense of others; (2) even assuming California does recognize the doctrine, defendant was not entitled to invoke it because he created the circumstances leading to the killing; and (3) in any event, any error in refusing to give the requested instruction was harmless here.

1. *Whether California recognizes the doctrine*

[The Court reviewed the development and rationale of the law of imperfect self-defense. See *In re Christian S.* [Chapter 5].]

Defendant contends that the defense of others, like self-defense, has an imperfect form. That is, defendant contends, if a killing is committed by someone who actually but unreasonably believes he is acting under the necessity of defending another person from imminent danger of death or great bodily

⁶ All further statutory references are to the Penal Code.

injury, then the killing is voluntary manslaughter, not murder, because the killer is not acting with malice.

[Defendant relied on dicta in the court's decision in *People v. Michaels* (2002) 28 Cal.4th 486, 49 P.3d 1032, where the court addressed a claim that an instruction on imperfect defense of others should have been given *sua sponte*, *i.e.*, even though not requested by the defendant, but found the doctrine not well-established at the time of the trial and of "doubtful" applicability on the facts.]

Again, as we said in *Michaels*, the doctrine of imperfect defense of others "follows logically from the interplay between statutory and decisional law." The doctrine is based on statute in that (1) malice is required for murder (§ 187) and (2) perfect self-defense and perfect defense of others are complete defenses to charges of murder (§ 197). One who kills in imperfect self-defense — in the actual but unreasonable belief he must defend himself from imminent death or great bodily injury — is guilty of manslaughter, not murder, *because he lacks the malice required for murder*. For the same reason, one who kills in imperfect defense of others-in the actual but unreasonable belief he must defend another from imminent danger of death or great bodily injury-is guilty only of manslaughter.

The Attorney General contends that, contrary to *Michaels*, California has rejected the doctrine of imperfect defense of others. California has done so, the Attorney General argues, by treating the reasonableness requirement differently for self-defense than for defense of others. In self-defense, the Attorney General notes, reasonableness is determined from the point of view of a reasonable person in the defendant's position. The jury must consider all the facts and circumstances it might expect to operate on the defendant's mind. In defense of others, the Attorney General asserts, reasonableness is determined, not from the point of view of the defendant, but rather from the point of view of the person the defendant was seeking to defend. That is, the California rule for defense of others, the Attorney General argues, is the alter ego rule, under which one who attempts to defend another person steps into the shoes of the other person, and so acts at his peril if that person was in the wrong.

The Attorney General bases his argument on his construction of section 197, on his interpretation of the case law, and on his reading of public policy. He is, we conclude, mistaken in every respect.

a. *Section 197*

Section 197 provides in pertinent part: "Homicide is also justifiable when committed by any person in any of the following cases: 1. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; [] . . . [] 3. When committed in the lawful defense of such person, or of a wife or husband, parent, child, master, mistress, or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished; but such person, or the person in whose behalf the defense was made, if he was the assailant or engaged in mutual combat, must

really and in good faith have endeavored to decline any further struggle before the homicide was committed.”

Section 197, the Attorney General argues, impliedly rejects the doctrine of imperfect defense of others. His argument runs as follows: The statutory basis of the doctrine of self-defense is subdivision 3, while the statutory basis of the doctrine of defense of others is subdivision 1. Section 197, subdivision 3 expressly incorporates a reasonable person standard: “when there is *reasonable ground to apprehend* a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished. . . .” (Italics added.) Since subdivision 1 does not expressly incorporate such a reasonableness standard, the Attorney General argues, the Legislature must have intended, with regard to defense of others, to adopt the alter ego rule.

A problem with the Attorney General’s argument is that section 197 does not compartmentalize the doctrines of self-defense and defense of others as neatly as that. Subdivision 1, which the Attorney General characterizes as the defense-of-others provision, may also be read as including self-defense. No reason appears why the phrase “any person,” which occurs both in the stem of section 197 and in subdivision 1, would not cover oneself as well as others. Under section 197, subdivision 1, a homicide is justifiable when committed by “any person” “resisting any attempt to murder *any person*, or to commit a felony, or to do some great bodily injury upon *any person*.” (Italics added.)

On the other hand, subdivision 3, which the Attorney General characterizes as the self-defense provision, also expressly covers the defense of others, albeit others in specified relationships with the person who comes to their defense. Under this provision, a homicide is justifiable when committed by any person “in the lawful defense of such person, *or of a wife or husband, parent, child, master, mistress, or servant of such person*, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished. . . .” (§ 197, subd. 3, italics added.)

Moreover, the Attorney General’s argument — that the Legislature must have intended to adopt the alter ego rule for defense of others because it did not expressly incorporate a reasonable person standard in subdivision 1—finds no support in the legislative history of section 197.

Section 197, enacted in 1872, was based on the Crimes and Punishment Act of 1850. Under the Crimes and Punishment Act, a reasonable person standard governed defense of others as well as self-defense. Both of the defenses were covered by section 29. “Justifiable homicide is the killing of a human being *in necessary self-defence, or in defence of habitation, property, or person*, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony. . . .” The applicability of the reasonable person standard to section 29 was made clear in the next section. “A bare fear of any of these offences, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of *a reasonable person*, and that the party killing really acted under the influence of those fears, and not in a spirit of revenge.”

There is no reason to believe the Legislature, by enacting section 197, intended to substitute the alter ego standard for the reasonable person standard with regard to defense of others. To the contrary, the code commissioners noted: “The commission have modified the language [of specified sections of the Crimes and Punishment Act of 1850], making it accord, in many respects, with that of the New York Penal Code [Field’s Draft] 260, 261, and 262. *The legal effect, however, has not been changed.*” (Italics added.)

b. *Case law*

The Attorney General also misreads our cases. He asserts: “Early California cases observe that one who kills in the defense of another steps into the shoes of the person defended for purposes of evaluating a claim that homicide was justified. ‘A person interfering in a difficulty in behalf of another simply steps in the latter’s shoes; he may lawfully do in another’s defense what such other might lawfully do in his own defense but no more. . . .’ (*People v. Will* (1926) 79 Cal.App. 101, 248 P. 1078) [(*Will*)], citing *People v. Travis* (1880) 56 Cal. 251 [(*Travis*)]. . . .”

By calling to our attention the fact that *Will* cites *Travis*, the Attorney General implies that our decision in *Travis* supports the passage he quotes from the Court of Appeal’s opinion in *Will*. However, it does not. In *Travis*, Wirt Travis was convicted of manslaughter for killing A.G. Hill. Wirt, along with his sister Georgia and their brother John, attended a social function also attended by Hill. Georgia walked out, explaining to Wirt that she could not remain in the hall with Hill because he had impugned her virtue. Wirt so informed his brother John. The two of them went back into the hall and took seats apart from one another but near Hill. John hit Hill. Hill drew a pistol on John. Wirt then shot Hill in the back, killing him.

Wirt claimed he acted in defense of John, believing Hill was about to shoot John. His claimed fear had some basis. A witness testified that Hill had previously told him, “the first thing he was going to do with them boys [the Travis brothers], he would commence killing them, if he got in a row with them.” While the witness did not tell the Traveses of Hills threat against them, they may well have heard of it because the witness had told “fifty or sixty [other] people,” and word like that presumably traveled fast in Forestville in 1878.

Contrary to the Attorney Generals argument, *Travis* does *not* stand for the proposition that the reasonableness of a claim of defense of others is tested from the point of view of the person the defendant was seeking to defend. Indeed, in *Travis*, we upheld a jury instruction to the effect that Wirt’s killing of Hill would have been justifiable if the jury had found that Wirt shot Hill in order to prevent Hill from shooting John, “if that was necessary to prevent [Hill] from executing his design; provided there was, *or appeared to the defendant to be*, imminent danger to the life or limb of his brother from the hostile and threatening attitude of Hill.” John was closely related to Wirt. However, their relationship as brothers was not one of the relationships specified in subdivision 3 of section 197, in that John was not Wirt’s “wife or husband, parent, child, master,

mistress, or servant.”⁷ While acknowledging some courts had adopted the alter ego rule, Perkins states the “sound” view was that one coming to the defense of others “is protected by the usual mistake-of-fact doctrine and may act upon the situation as it reasonably seems to be.” He adds: “Most of the codes that deal separately with the defense of another seem to leave no trace of the view that one who goes to the aid of another ‘acts at his peril’ with reference to the right of that person to receive such aid. . . .” Nevertheless, we upheld a jury instruction that focused on Wirt’s point of view, and not upon the point of view of the brother he was seeking to defend.

People v. Will, supra, 79 Cal.App. 101, 248 P. 1078, is disapproved insofar as it is inconsistent with the views expressed herein.

c. Public policy

The Attorney General’s public policy argument is that the doctrine of imperfect self-defense is “an open invitation to assaults, not just upon undercover officers effectuating arrests, but upon innocent bystanders in many situations not the least of them being mob violence and gang warfare.” However, the controlling public policy decision here was made by the Legislature when it decided the unlawful killing of a human being without malice is manslaughter, not murder. (§ 192.)

2. Whether defendant may invoke the doctrine

The Attorney General, relying on *In re Christian S.* (1994) 7 Cal.4th 768, 872 P.2d 574, contends defendant is not entitled to invoke the doctrine of imperfect defense of others because he created the circumstances leading to the killing. In *Christian S.*, we observed, “It is well established that the ordinary self-defense doctrine—applicable when a defendant *reasonably* believes that his safety is endangered—may not be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical assault or the commission of a felony), has created the circumstances under which his adversary’s attack or pursuit is legally justified. It follows, a fortiori, that the imperfect self-defense doctrine cannot be invoked in such circumstances. For example, the imperfect

⁷ Perkins explains the origins and evolution of such catalogues of relationships in statutory provisions covering self-defense and defense of others. “The privilege of using force in defense of others, as a separate privilege, developed partly by accident. It had its roots in the law of property. The privilege of one to protect what was ‘his’ was extended to include the protection of his wife, his children and his servants. In the course of time this privilege outgrew the property analogy and came to be regarded as a ‘mutual and reciprocal defence.’ The household was regarded as a group, any member of which had a privilege to defend any other member. ‘A man may defend his family, his servants or his master, whenever he may defend himself.’ Even this concept of the privilege was outgrown and it came to include the members of one’s immediate family or household and any other ‘whom he is under a legal or socially recognized duty to protect.’ Thus a conductor was privileged to defend his passenger, and a man privileged to defend a lady friend whom he was escorting at the moment. The present position, which represents a merging of the privilege of crime prevention with the privilege of defending others, is that one may go to the defense of a stranger if that person is the innocent victim of an unlawful attack.” (Perkins & Boyce, *Criminal Law* (3d ed. 1982) Self-Defense, § 5.)

self-defense doctrine would not permit a fleeing felon who shoots a pursuing police officer to escape a murder conviction even if the felon killed his pursuer with an actual belief in the need for self-defense.”

. . .

The Attorney General’s argument fails because although defendant’s criminal conduct certainly set in motion the series of events that led to the fatal shooting of Robinson, the retreat of defendant and Byron and the subsequent recovery of the stolen equipment from Byron extinguished the *legal justification* for Robinson’s attack on Byron.

The record supports the conclusion that Robinson was taking the law into his own hands, meting out the punishment he thought Byron deserved, and not making a citizen’s arrest as the Attorney General claims.⁸ While Robinson may well have had a right to pursue Byron for the purpose of recovering Lambert’s stolen property, and to use reasonable force to retrieve it, the beating of Byron by Robinson and Lambert went well beyond any force they were entitled to use. Moreover, after they recovered the stolen stereo equipment and returned to their truck, Robinson jumped out of the truck and began beating Byron again. At that point Robinson’s use of force was completely unjustified, and it was at that point, or shortly thereafter, that defendant shot Robinson.

While we hold defendant’s conduct did not create circumstances legally justifying Robinson’s attack on Byron, we should not be understood as condoning it in any respect. By making two fateful choices defendant triggered an escalating series of events that transformed the most mundane of property crimes into a fatal shooting. When he set out to burglarize cars, defendant chose to arm himself. When he was surprised in the act of burglary, defendant chose to use the weapon. Whether, during that initial confrontation, he fired the pistol at Robinson, or fired in the air, as he variously testified, he raised the stakes enormously.

[The court found that the failure to instruct on the doctrine was prejudicial, *i.e.*, that it is reasonably probable a result more favorable to defendant would have been reached had the jury been properly instructed.]

[Concurring opinion of BAXTER, J. omitted]

⁸ Had Robinson and Lambert been attempting to effect a citizen’s arrest, the use of reasonable force may have been permitted. (§§ 835, 837) However, none of the witnesses, not even Lambert, suggested the beating was incidental to a citizen’s arrest. Indeed, Lambert testified that Robinson, in renewing the beating, yelled at him to “get pops,” not “get the police.” According to Byron, one of his assailants spoke of taking him, not to a police station, but into the hills. According to defendant, someone said, “I’m going to kill this little nigger.”

C. NECESSITY AND DURESS

Page 566: between the two notes, add the following problem:

Problem 79A. Defendant, an ex-felon, picked up Friend to accompany him on a trip to visit his brother in the hospital. A week earlier he had encouraged Friend to buy and carry with her a gun to protect herself from her ex-husband. Friend had the gun with her, and she also had a six-pack of “strawberry daiquiris,” which they began to consume. When they arrived at the hospital, Defendant informed Friend that she couldn’t take the gun inside, and she put it in the glove compartment of the car. On their way out of the hospital 45 minutes later, Defendant noticed that Friend was stumbling and talking funny and giggling inappropriately. Defendant decided that he should not return the gun to her in her condition, so he put it in his pocket. A short time later, Defendant was pulled over for suspected drunk driving and subsequently arrested for possession of the gun. Defendant is now charged with being a felon in possession of a gun. (P.C. § 12021(a).) What are the arguments as to whether Defendant can defend on the basis of necessity?

0062

[ST: 1] [ED: 10000] [REL: 2009S]

Composed: Fri Jul 24 02:16:40 EDT 2009

XPP 8.1C.1 Patch #5 LS000000 nllp 3120 [PW=468pt PD=684pt TW=348pt TD=588pt]

VER: [LS000000-Local:16 Jul 09 14:28][MX-SECNDARY: 18 Jul 09 08:51][TT: 25 Jun 09 10:01 loc=usa unit=03120-supp01]

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Chapter 13

AFFIRMATIVE DEFENSES — EXCUSES

B. INSANITY

Page 596: substitute for the present note, the following:

The Constitution and the Insanity Defense. In *Skinner*, Justice Grodin based his analysis, in part, on the understanding that “the insanity defense, in some formulation, is required by due process” and that eliminating the *second* prong of the *M’Naghten* test might be unconstitutional as a violation of due process or the prohibition on cruel and unusual punishments. The Supreme Court has not addressed the former proposition, but, in recent years, four states — Idaho, Kansas, Montana and Utah — have eliminated the insanity defense. In *Clark v. Arizona*, 548 U.S. 735, 126 S.Ct. 2709 (2006), the Court considered the constitutionality of a state’s definition of insanity. Arizona’s definition of insanity eliminates the *first* prong of the *M’Naghten* test. The Court rejected the defendant’s due process challenge to the definition. Does the *Clark* holding suggest that the Court would also uphold an insanity test which eliminated the *second* prong of the *M’Naghten* test?

0064

[ST: 1] [ED: 10000] [REL: 2009S]

Composed: Fri Jul 24 02:16:41 EDT 2009

XPP 8.1C.1 Patch #5 LS000000 nllp 3120 [PW=468pt PD=684pt TW=348pt TD=588pt]

VER: [LS000000-Local:16 Jul 09 14:28][MX-SECNDARY: 18 Jul 09 08:51][TT: 25 Jun 09 10:01 loc=usa unit=03120-supp01]

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Part IV

VICARIOUS LIABILITY

0066

[ST: 1] [ED: 10000] [REL: 2009S]

Composed: Fri Jul 24 02:16:42 EDT 2009

XPP 8.1C.1 Patch #5 LS000000 nllp 3120 [PW=468pt PD=684pt TW=348pt TD=588pt]

VER: [LS000000-Local:16 Jul 09 14:28][MX-SECNDARY: 18 Jul 09 08:51][TT: 25 Jun 09 10:01 loc=usa unit=03120-supp01]

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Chapter 15

SCOPE OF VICARIOUS LIABILITY

Page 660: substitute for the Note, the following note:

Withdrawal. Once there has been an agreement to commit a crime and an overt act by one of the parties toward commission of the crime, all of the parties are guilty of conspiracy irrespective of their subsequent actions or the success of the conspiracy. As is the case with regard to attempts [Chapter 10], once a crime is committed, subsequent actions of the defendant cannot “undo” the crime. However, a conspirator, or an accomplice who has contributed aid toward the commission of a crime, may avoid liability for any subsequent crime by his or her confederates by withdrawal from the conspiracy or aided crime prior to its commission. The California Supreme Court has never determined what constitutes a sufficient withdrawal, but the current standard jury instructions require that, for withdrawal as a conspirator, “there must be an affirmative and good faith rejection or repudiation of the conspiracy which must be communicated to the other conspirators of whom [the defendant] has knowledge” (CALJIC 6.20) and, for withdrawal as an accomplice, the defendant must do two things: “First, [the defendant] must notify the other principals known to [the defendant] of [the defendant’s] intention to withdraw from the commission of [the crime]; second, [the defendant] must do everything in [the defendant’s] power to prevent its commission.” (CALJIC 3.03) Although the defendant has the burden of raising the issue of withdrawal, the prosecution bears the ultimate burden of proving beyond a reasonable doubt that the defendant did not withdraw prior to the commission of the crime. *People v. Fiu*, 165 Cal.App.4th 360, 81 Cal.Rptr.3d 32 (2008).

Under the Model Penal Code, withdrawal from a conspiracy is accomplished by advising the other conspirators of the defendant’s abandonment or informing law enforcement authorities of the existence of the conspiracy and defendant’s participation. MPC § 5.03(7). Unlike the situation in California, the withdrawing defendant even may avoid conviction of conspiracy if the defendant “thwart[s] the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.” MPC 5.03(5). Is this a better rule?

Page 676: substitute for *People v. Woods*, the following case and problem:

PEOPLE v. MEDINA

___ Cal.4th ___, 209 P.3d 105, 2009 Cal.LEXIS

CHIN, J.

In this case, a verbal challenge by defendants (members of a street gang) resulted in a fistfight between defendants and the victim (a member of another street gang). After the fistfight ended, one of the defendants shot and killed the victim as he was driving away from the scene of the fight with his friend. The jury found the gunman guilty of murder and attempted murder of the friend, as

the actual perpetrator, and two other participants in the fistfight guilty of those offenses as aiders and abettors. The Court of Appeal affirmed the gunman's convictions, but reversed the participants' convictions. It held there was insufficient evidence that the nontarget offenses of murder and attempted murder were a natural and probable consequence of the target offense of simple assault which they had aided and abetted.

Because a rational trier of fact could have concluded that the shooting death of the victim was a reasonably foreseeable consequence of the assault, on the facts of this case, we reverse the judgment of the Court of Appeal relating to the nonshooting defendants.

I. FACTS AND PROCEDURAL HISTORY

On the evening of January 2, 2004, Manuel Ordenes and his wife Amelia Rodriguez continued their New Year's celebration with a party at their home in Lake Los Angeles, California. Their neighbors Kirk and Abraham, a friend, Lisa, and Jason Falcon were present at their house. Jose Medina ("Tiny"), George Marron, and Raymond Vallejo, self-described members of the Lil Watts gang, were also present. Although Falcon was not identified as a gang member, he was always with Medina, Marron, and Vallejo. Ordenes had formerly been a member of the Lennox gang, a Lil Watts rival, although the two gangs were not rivals in the Lake Los Angeles area. Everyone was drinking alcohol and using methamphetamine.

Around 11:00 p.m., Ernie Barba drove to Ordenes's house with his friend, Krystal Varela, to pick up a CD. Barba went to the house, while Varela stayed at the car. When Ordenes or Rodriguez answered the door, Barba asked, "What's up?" On direct examination, Ordenes stated he heard aggressive voices inside the house saying, "Where are you from?" Later on cross-examination, he clarified that he heard Vallejo say, "Who is that?" and then ask Barba, "Where are you from?" From his experience as a former gang member, Ordenes knew that when a gang member asks another gang member "where are you from?" he means "what gang are you from?" a question which constitutes an "aggression step." He also knew that, if the inquiring gang member was an enemy, the question could lead to a fight or even death. If that gang member had a weapon, he would use it. Wanting to avoid problems in his house, and concerned that somebody was going to get killed, Ordenes ordered, "Take that into the streets, go outside, don't disrespect the house."

Medina, Marron, Vallejo, and Falcon left the house and joined Barba on the front porch. Once outside, Medina, Marron, and Vallejo approached Barba and continued to ask, "Where are you from?" Barba replied, "Sanfer," signifying a San Fernando Valley gang. Vallejo responded, "Lil Watts." Medina remarked, "What fool, you think you crazy?" Vallejo then punched Barba. Medina and Marron joined in the fight. According to Ordenes, Barba, even though outnumbered, defended himself well and held his own against the three attackers. All three "couldn't get [Barba] down." Krystal Varela confirmed that Barba was defending himself well.

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Ordenes attempted to break up the fight and pull the attackers off Barba, but Falcon held him back. Eventually, Ordenes was able to pull Barba away and escort him to his car which was parked in front of the house. Barba got into the driver's seat, while Krystal Varela got into the passenger seat. At the car, Ordenes advised Barba to leave.

Varela heard someone in the yard say, "get the heat," which she understood to mean a "gun." Barba closed the driver's side door and drove off. As Ordenes was walking back to his house, he heard Lisa yell from the doorway, "Stop, Tiny. No, stop." Amelia Rodriguez then saw Medina walk into the middle of the street and shoot repeatedly at Barba's car as it drove away. Lisa, who was standing next to Rodriguez, yelled, "Tiny, you know you're stupid. Why you doing that? There's kids here. You f'd up." Barba died of a gunshot wound to the head.

The prosecution charged Medina, Marron, Vallejo, and Falcon with first degree murder (Pen.Code, § 187, subd. (a)) and with attempted willful, deliberate, premeditated murder (§§ 664, 187, subd. (a)). Under the prosecution's theory at trial, Medina was guilty as the actual perpetrator, while Marron, Vallejo, and Falcon were guilty as aiders and abettors.

At trial, Hawthorne Police Officer Christopher Port testified as the prosecution's gang expert. Officer Port was assigned to the gang intelligence unit and was familiar with the Lil Watts gang, a violent street gang from Hawthorne. He testified that Lil Watts gang members primarily committed narcotics offenses involving possession and sales, vandalism, and gun-related crimes, including assaults with firearms and semiautomatic firearms, drive-by shootings, and homicides. The police had identified defendants Medina and Vallejo as members of the Lil Watts gang, based on field contacts and their gang tattoos. The police considered Marron to be "affiliated" with the Lil Watts gang, having seen him with Lil Watts gang members, including Medina and Vallejo.

Officer Port testified that the Lake Los Angeles area where Ordenes lived is considered a "transient area for gangs." When a new gang member arrives there, he feels a need to establish himself by demanding respect, which is "the main pride" of a gang member. Officer Port testified that gang members view behavior that disrespects their gang as a challenge and a "slap in the face" which must be avenged. Gang members perceive that, if no retaliatory action is taken in the face of disrespectful behavior, the challenger and others will view the gang member and the gang itself as weak. According to Officer Port, violence is used as a response to disrespectful behavior and disagreements and as a means to gain respect.

Officer Port stated that, when a gang member asks another person, "where are you from?" he suspects that person is in a gang and wants to know what gang he claims as his. In response to hypothetical questions, Officer Port opined that when Barba responded "Sanfer," he was claiming membership in that gang, and that the Lil Watts gang members had viewed Barba's response as disrespectful and had started a fight to avenge themselves. Officer Port stated that a gang member who asks that question could be armed and probably would be prepared to use violence, ranging from a fistfight to homicide. He explained, "In the gang world problems or disagreements aren't handled like you and I

would handle a disagreement. . . . When gangs have a disagreement, you can almost guarantee it's going to result in some form of violence, whether that be punching and kicking or ultimately having somebody shot and killed.”

Ordenes testified that it is important for a gang to be respected and, above all, feared by other gangs. Once a gang is no longer feared, its members lose respect, are ridiculed, and become vulnerable and subject to attack by other gangs. He stated that death is sometimes an option exercised by gang members as a way to maintain respect. Ordenes further stated there are a lot of gang members occupying their “turfs” with guns.

The jury acquitted codefendant Falcon, but found defendants Medina, Marron, and Vallejo guilty as charged . . .

The Court of Appeal affirmed Medina's conviction, but reversed the convictions of Marron and Vallejo on the ground there was insufficient evidence that the nontarget crimes of murder and attempted murder were a reasonably foreseeable consequence of simple assault, the target offense they had aided and abetted.

We granted the Attorney General's petition for review regarding the reversals of Marron's and Vallejo's judgments.

II. DISCUSSION

The Attorney General argues that, when the facts are viewed as a whole, there is substantial evidence to support the murder and attempted murder convictions of defendants Marron and Vallejo. We agree.

. . .

It is undisputed that Marron and Vallejo knowingly and intentionally participated in the fistfight that preceded the shooting, that Medina alone shot the victim, and that the jury convicted Marron and Vallejo of murder and attempted murder as aiders and abettors under the natural and probable consequences doctrine.

“A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime. The latter question is not whether the aider and abettor *actually* foresaw the additional crime, but whether, judged objectively, it was *reasonably* foreseeable.” (*People v. Mendoza* (1998) 18 Cal.4th 1114, 959 P.2d 735.) Liability under the natural and probable consequences doctrine “is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.” (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 26 Cal.Rptr.2d 323.)

“[A]lthough variations in phrasing are found in decisions addressing the doctrine—‘probable and natural,’ ‘natural and reasonable,’ and ‘reasonably foreseeable’—the ultimate factual question is one of foreseeability.” (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 96 P.3d 30.) Thus, “[a] natural and

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probable consequence is a foreseeable consequence . . .”(Ibid.) But “to be reasonably foreseeable [t]he consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough. . . .” (*People v. Nguyen, supra.*) A reasonably foreseeable consequence is to be evaluated under all the factual circumstances of the individual case and is a factual issue to be resolved by the jury.

. . .

In examining the whole record in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found that the shooting of the victim was a reasonably foreseeable consequence of the gang assault in this case. Medina, Marron, and Vallejo, members of the Lil Watts gang, repeatedly challenged Barba by asking, “Where are you from?” When Barba responded, “Sanfer,” Vallejo declared he was a member of another gang, “Lil Watts.” Medina remarked, “What fool, you think you crazy?” Apparently viewing Barba’s response as disrespectful behavior, Medina, Marron, and Vallejo then attacked Barba.

The Court of Appeal emphasized there was no evidence that the assailants used weapons or were armed during the fistfight, or that the two gangs involved were in the midst of a “war” or had been involved in prior altercations. It further stressed that the shooting occurred after the fistfight had ended. However, the Court of Appeal’s analysis ignores the testimony of the gang expert, Officer Port, and of Ordenes, and other evidence.

According to Ordenes, a gang member’s query “where are you from?” means “what gang are you from?” and is a verbal challenge, which (depending on the response) could lead to a physical altercation and even death. Officer Port affirmed that a gang member who asks, “where are you from?” could be armed and probably would be prepared to respond with violence, ranging from a fistfight to homicide. As a former gang member, Ordenes foresaw precisely that result. He feared that somebody might get killed after Vallejo verbally challenged Barba, and, because of that fear, ordered defendants to “take that into the streets.”

Once the fight ensued, the three men could not get Barba down. Despite being attacked and outnumbered by three aggressors, Barba defended himself well and held his own. Ordenes interrupted the fistfight while Barba was performing well and before the three attackers could vindicate themselves. Given the gang-related purpose of the initial assault and the fact that, despite being outnumbered, Barba exhibited strength against three aggressors who could not avenge themselves in response to what they considered disrespectful behavior by Barba, the jury could reasonably have found that a person in defendants’ position (i.e., a gang member) would have or should have known that retaliation was likely to occur and that escalation of the confrontation to a deadly level was reasonably foreseeable as Barba was retreating from the scene.

The record supports that implicit finding by the jury. First, according to the testimony, gang members emphasize the need for respect, primarily in the form of fear. Officer Port testified that gang members view behavior that disrespects their gang as a challenge and “slap in the face” which must be avenged. Gang

members perceive that, if no retaliatory action is taken in the face of disrespectful behavior, the challenger and other people will view the gang member and the gang itself as weak. Ordenes, a former gang member, confirmed that once a gang is no longer feared, its members lose respect, are ridiculed, and become vulnerable and subject to attack by other gangs. According to Officer Port, violence is used as a response to disrespectful behavior and disagreements, and as a means to gain respect. Ordenes confirmed that gang members consider death as a means to maintain respect in some circumstances.

Second, the record reveals that Lil Watts was a violent street gang that regularly committed gun offenses. Officer Port testified that Lil Watts members were involved “in all sorts of gun charges,” including assaults with firearms, semiautomatic firearms, drive-by shootings, and homicides. Ordenes affirmed that many gang members occupied their turfs with guns. Regarding this specific incident, Ordenes ordered the Lil Watts gang members outside because he was concerned that somebody would be killed. Thus, because Lil Watts members had challenged a rival gang member, the jury could reasonably have inferred that, in backing up that challenge, a Lil Watts member either would have been armed or would have or should have known a fellow gang member was or might be armed.

Third, although there was no evidence the two gangs involved had an ongoing rivalry, Officer Port stated that the Lake Los Angeles area is considered a “transient area for gangs” where newly arrived gang members demand respect to establish themselves in that territory. Ordenes testified that members of Lil Watts, Sanfer, and Pacoima (another gang) live in the Lake Los Angeles area. Thus, escalating the violence with a gun was a foreseeable way for a Lil Watts gang member to exact revenge for Barba’s initial disrespect and his later show of strength against the three aggressors, thereby establishing Lil Watts’s turf domination in the neighborhood.

Fourth, although Vallejo argues that the fistfight and shooting were not one uninterrupted event, but rather two separate incidents, the evidence showed that Medina, Marron, and Vallejo did not consider the fight to be over and that the shooting resulted directly from that fight. Eyewitnesses testified that the events happened very quickly, in a matter of seconds, not minutes. After Ordenes had broken up the fight, someone yelled, “get the heat,” just before the shooting. . . .

. . .

Although there was no direct evidence of who specifically ordered, “get the heat,” there was circumstantial evidence regarding the identity of the declarant. That evidence revealed that one of the gang participants actually knew that at least one fellow gang member had a gun. It was unlikely that Medina yelled “get the heat” to himself. Other evidence established that Rodriguez, like her husband, ordered the men to take their dispute outside because she was concerned for her children; Rodriguez yelled for the men to stop fighting; Ordenes successfully broke up the fistfight; Ordenes’s neighbors Kirk and Abraham remained in the house during the fight; and Ordenes’s friend, Lisa,

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tried to stop the shooting when she yelled from the doorway, “Stop, Tiny. No, stop.” That evidence reflects that the people at the party other than defendants either wanted the fighting to end or were not present during the fighting, and had no reason to want Barba shot. In addition, Medina, Marron, Vallejo, and Falcon fled before the police arrived. The jury could reasonably have concluded that one of the Lil Watts members yelled, “get the heat,” and that either Medina was asking his companions for a gun, or a companion was telling him to get out a gun.⁹ “[O]ur role on appeal is a limited one.” (*People v. Ochoa* (1993) 6 Cal.4th 1199, 864 P.2d 103.) Under the substantial evidence rule, we must presume in support of the judgment the existence of every fact that the trier of fact could reasonably have deduced from the evidence. Thus, if the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant reversal of the judgment. The fact that at least two of the gang members knew a gun was available at the scene is further evidence that gun violence was foreseeable.

Thus, the evidence shows there was a close connection between the failed assault against Barba (in which Marron, Vallejo, and Medina directly participated) and the murder of Barba; Medina shot Barba because he disrespected Lil Watts; and the shooting and death were “not an unreasonable result to be expected from the [assault].” (*People v. Martinez* (1966) 239 Cal.App.2d 161, 48 Cal.Rptr. 521.)

. . .

The dissenting opinion examines Ordenes’s and Officer Port’s testimony relating to the consequences of the challenge “Where are you from?” and concludes that, at most, they believed that a homicide was a possible, not probable, consequence of that challenge. The dissent emphasizes that Ordenes’s actions in ordering the gang members out of his house and breaking up the fight further reflects that Ordenes did not foresee that the verbal challenge would *probably* result in a homicide.

Although the dissent (echoing the Court of Appeal) emphasizes that the shooting was not a *probable* consequence of the verbal challenge, the ultimate factual question is one of reasonable foreseeability, to be evaluated under *all* the factual circumstances of the case. The precise consequence need not have been foreseen. Even if Ordenes had not actually pinpointed, from the verbal challenge alone, the precise form of ensuing violence, he did foresee that the verbal confrontation by the Lil Watts gang members would likely escalate into some type of physical violence. Officer Port agreed that the challengers would be prepared to use physical violence.

⁹ The dissenting opinion argues that it was equally reasonable for the jury to have concluded that Medina himself shouted for a gun, his companions did not know what he was talking about, and when no one responded, he retrieved the gun himself. Nevertheless, the dissent does not dispute that, in view of all the evidence presented at trial, the jury could have reasonably concluded that one of the Lil Watts gang members yelled, “get the heat,” and that either Medina was asking for and received a gun from a companion, or a companion was telling Medina to get out a gun.

Nor was it required that Vallejo and Marron “must have known Medina was armed.” The issue is “whether, under all of the circumstances presented, a reasonable person in the defendant’s position would have *or should have known* that the [shooting] was a reasonably foreseeable consequence of the act aided and abetted by the defendant.” (*People v. Nguyen, supra.*)

Contrary to the dissent’s suggestion, there was more here than just verbal challenges by gang members. There was evidence that Barba refused to succumb to the gang assault despite being substantially outnumbered and defendants were unable to avenge themselves because of Barba’s show of strength; gang culture (in which defendants were involved) emphasizes respect, fear, and retaliatory violence in the face of disrespectful behavior; Lil Watts was a violent street gang that regularly committed gun offenses; and a Lil Watts gang member had ready access to a gun at the scene. Even if the three aggressors did not intend to shoot Barba when they verbally challenged him, or at the start of the fistfight, it was or should have been reasonably foreseeable to these gang members that the violence would escalate even further depending on Barba’s response to their challenge. Thus, given the fact that defendants were unable to avenge themselves for the perceived multiple instances of disrespectful behavior by Barba, the jury could reasonably have found that defendants would have or should have known that retaliation was likely to occur and that escalation of the confrontation to a deadly level was reasonably foreseeable as Barba was retreating from the scene.

Accordingly, viewing the whole record in the light most favorable to the prosecution, we find there was sufficient evidence to support the murder and attempted murder convictions of defendants Marron and Vallejo.

. . .

MORENO, J., dissenting, joined by KENNARD and WERDEGAR, JJ.

I dissent. In my view, the Court of Appeal reached the correct conclusion when it reversed the convictions of defendants Marron and Vallejo. I agree with the Court of Appeal that insufficient evidence supported those convictions based on the theory that the shooting of Barba by defendant Medina was a natural and probable consequence of the assault on Barba in which Marron and Vallejo participated. The Court of Appeal did not reach this conclusion lightly. The court applied the deferential substantial evidence standard of review to its inquiry. It also recognized the grim reality that disputes between gang members are in a different category from disputes between civilians. “As gang violence has become more prevalent and innocent bystanders have become victims of the violence in ever increasing numbers, our courts have recognized that a dispute between two neighbors and one between two gang members can lead to different consequences.” Nonetheless, the Court of Appeal determined that even in the context of gang violence there was insufficient evidence to support the jury’s verdict as to Vallejo and Marron.

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What the Court of Appeal found was that the “only piece of evidence that might support an inference that someone other than Medina knew the shooting would take place was Varela’s testimony that she heard someone say, ‘Get the heat,’ just prior to the sound of gunfire.” To this, I would add the majority opinion’s assertion — echoed by the Attorney General at argument — that both Ordenes and Port, the gang expert, testified, in effect, that a homicide is a reasonably foreseeable consequence of the challenge, “Where are you from?” I disagree with the majority’s characterization of this evidence.

The majority opinion places enormous weight on the “Get the heat” testimony and goes to some lengths to establish, circumstantially, that the person who uttered this statement must have been either Vallejo or Marron. That analysis proceeds, however, from an ipse dixit assumption: “It was unlikely that Medina yelled ‘get the heat’ to himself.” Medina was the one person in this episode who knew there was a gun somewhere because he used it to kill the victim. It is not unlikely, therefore, that Medina yelled out, “Get the heat.” But this does not necessarily imply that his codefendants must have known Medina had a gun with him. It only establishes that Medina, who was evidently quite angry that the attack on Barba had been broken up, shouted for a gun, not that anyone knew what he was talking about. It is just as reasonable to conclude that he shouted this command and, when no one responded, he got the gun himself. Indeed, this conclusion is more consistent with the testimony of Rodriguez that, after everyone scattered, Medina stepped out into the street with the gun and fired it.

The other bit of evidence on which the majority relies is testimony regarding the consequences of the challenge, “Where are you from?” The majority asserts: “According to Ordenes, a gang member’s query ‘where are you from?’ means ‘what gang are you from?’ and is a verbal challenge, which (depending on the response) could lead to a physical altercation and even death. Officer Port affirmed that a gang member who asks ‘where are you from?’ could be armed and probably would be prepared to respond with violence, ranging from a fistfight to homicide. As a former gang member, Ordenes foresaw precisely that result. He feared that somebody might get killed after Vallejo verbally challenged Barba and, because of that fear, ordered defendants to ‘take that into the streets.’”

An examination of the reporter’s transcript belies the majority’s characterization of this evidence. What the transcript discloses is that both Ordenes and Port — and the former with considerable prodding from the prosecutor — were, at most, describing possible — not probable — consequences. For example, what Ordenes actually said, based on his experience as a gang member, was that the question, “Where are you from?” “would go on to a fight or whatever. [¶][Q.] Or what? [¶][A.] Or whatever else would happen. [¶][Q.] What other things *could* happen from that? [¶][A.] Well, death. [¶][Q.] Death as by how? [¶][A.] Whatever. Whatever you can use. [¶][Q.] Okay. So if you have a weapon- [¶][A.] You would use it.”(Italics added.)

Thus, in my view, Ordenes’s testimony describes a possible event, not a probable one, that might occur if weapons were present (but Ordenes did not testify that he knew or even suspected any of the defendants in this case were

armed). The gang expert's testimony was equally attenuated. The expert testified that if the question "Where are you from?" was answered unsatisfactorily, "it's some form of misunderstanding that can go into some physical altercation. They *can* go from a fistfight to disrespecting each other . . . verbally and all the way as far [as] homicide." (Italics added.)

Like Ordenes, then, the expert did no more than describe a range of possible results from a fistfight to verbal insults and, perhaps somewhere down the line, a killing, although how far down the line was not elucidated. Moreover, when the expert was asked, "when a gang member usually asks that question to someone else, in your experience are they usually armed?" the expert replied, "They *can* be. It's my opinion that if you're going to ask that question, that you're probably prepared to be in *some form of altercation* following the answer." (Italics added.) "Some form of altercation," of course, is exactly what happened in this case—a fistfight. It does not necessarily encompass a homicide.¹⁰

Nor do I agree that Ordenes's testimony about his concern when he told defendants and Barba to take their dispute outside the house was because he foresaw a probable homicide. It was the prosecutor who raised this specter: "[Q.] Okay. And when you heard somebody say, 'Where are you from,' did that start to concern you a little bit? [¶][A.] Yes, it did. [¶][Q.] Okay. And is that for the reasons you just stated right now, that you *knew* that somebody was going to get killed? [¶][A.] *For the reason that I didn't want no problems to my house* and also that reason too. [¶][Q.] Okay. So what happened after you heard the words, 'Where are you from?' [¶][A.] I said, 'Take that into the streets, go outside, *don't disrespect the house.*'" (Italics added.)

Again, despite the prosecutor's prodding, Ordenes's testimony is not evidence that he reasonably foresaw a homicide as a consequence of the challenge. Instead, his testimony evinced a concern that he did not want a fight—a fistfight or some other physical altercation—inside his house where there were women and children. That this domestic concern, rather than fear of a probable homicide, was behind his command for the men to leave his house is reflected in his wife's testimony. Rodriguez also told the men to leave the house because, as she testified, "they were kind of getting loud, so I told—they had my front door open and it was cold, so I told them to take that outside because my kids are in back asleep, and then I closed the door."

Moreover, Ordenes's conduct after ordering the men out is not consistent with the majority's interpretation of his testimony. Had he suspected a killing was in the offing, one would think he would have done something to protect himself from getting caught in the crossfire, but he did not. Rather, he followed

¹⁰ The majority highlights Port's general testimony that the "Lil Watts" gang participated in crimes involving firearms, and concludes: "[B]ecause Lil Watts members had challenged a rival gang member, the jury could reasonably infer that, in backing up that challenge, a Lil Watts member either would have been armed or would have or should have known a fellow gang member was or might be armed." I disagree with the conclusion that it can be reasonably inferred from Port's testimony that, because some gang members participated on some occasions in gun-related crimes, these particular defendants must have known Medina was armed in the specific circumstances of this case — where members from two gangs, who were *not* rivals, met at a party house in neutral territory.

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the men outside, broke up their fight and walked Barba to his car, telling him, “Just get in the car, just leave, I’ll take care of it.” These are not the acts or the words of someone who is fearful that a killing is imminent. They are the acts and words of someone who is prepared for a low-level altercation that can be smoothed over eventually once the participants have been separated. Thus, I disagree with the majority’s characterization of Ordenes’s testimony as reflecting a fear “that somebody might get killed after Vallejo verbally challenged Barba. . . .”

Stripped to its essence, what the majority holds is that the challenge “Where are you from?” is so provocative in the context of gang culture that any response up to and including murder is a reasonably foreseeable consequence of that utterance, so as to justify a murder conviction not only of the actual perpetrator but also of any other gang members involved in the target offense, whatever the surrounding circumstances. I cannot subscribe to such an expansive interpretation of the natural and probable consequences doctrine even in the context of gang violence, which no one doubts is a plague upon some of our state’s most vulnerable communities.

I must agree with the Court of Appeal: “Notwithstanding the violence which most gang confrontations spawn, on our facts, viewed objectively, we cannot conclude that an unplanned fight between unarmed combatants in front of a residence was reasonably likely to lead to a shooting resulting in death. In essence, the Attorney General is asking us to create a new theory of liability. An aider and abettor would be responsible for any crime that was a natural and *possible* consequence of the target crime. That, we cannot do.”

Neither can I.

Problem 96A. Defendant, Killer and other members of their gang, armed with guns, were in search of a rival gang member to retaliate for a previous shooting. They went to the apartment of Girlfriend, the rival’s girlfriend, and Roommate, and Defendant waited outside as a lookout while the others went inside. Killer and the others assaulted both women and shot Roommate in an effort to get information, and eventually left, stealing two tires from the apartment. While the gang members were loading the tires into their car, Killer noticed two men enter a car nearby. He drew his gun, loaded it and fired six shots at the car, killing one man and wounding the other. Defendant and Killer are charged, *inter alia*, with first degree murder (P.C. § 187-189), and the prosecution’s theory as to Defendant is that he aided and abetted Killer’s assaults on Girlfriend and Roommate and the murder was a natural and probable consequence of those assaults. Defendant has requested that the jury be instructed that, even if they find Killer guilty of first degree murder, they can find Defendant guilty of second degree murder or manslaughter. What are the arguments as to whether the court should give the requested instruction?

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[ST: 1] [ED: 10000] [REL: 2009S]

Composed: Fri Jul 24 02:16:49 EDT 2009

XPP 8.1C.1 Patch #5 LS000000 nllp 3120 [PW=468pt PD=684pt TW=348pt TD=588pt]

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Part V

THE DEATH PENALTY

0080

[ST: 1] [ED: 10000] [REL: 2009S]

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Chapter 16

THE DEATH PENALTY AND THE CONSTITUTION

Page 732: before the note on *The Federal Death Penalty*, add the following case:

KENNEDY v. LOUISIANA
___ U.S. ___, 128 S.Ct. 2641 (2008)^a

Justice KENNEDY delivered the opinion of the Court.

The National Government and, beyond it, the separate States are bound by the proscriptive mandates of the Eighth Amendment to the Constitution of the United States, and all persons within those respective jurisdictions may invoke its protection. Patrick Kennedy, the petitioner here, seeks to set aside his death sentence under the Eighth Amendment. He was charged by the respondent, the State of Louisiana, with the aggravated rape of his then-8-year-old stepdaughter. After a jury trial petitioner was convicted and sentenced to death under a state statute authorizing capital punishment for the rape of a child under 12 years of age. This case presents the question whether the Constitution bars respondent from imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in death of the victim. We hold the Eighth Amendment prohibits the death penalty for this offense. The Louisiana statute is unconstitutional.

I

Petitioner's crime was one that cannot be recounted in these pages in a way sufficient to capture in full the hurt and horror inflicted on his victim or to convey the revulsion society, and the jury that represents it, sought to express by sentencing petitioner to death. At 9:18 a.m. on March 2, 1998, petitioner called 911 to report that his stepdaughter, referred to here as L. H., had been raped. He told the 911 operator that L.H. had been in the garage while he readied his son for school. Upon hearing loud screaming, petitioner said, he ran outside and found L.H. in the side yard. Two neighborhood boys, petitioner told the operator, had dragged L.H. from the garage to the yard, pushed her down, and raped her. Petitioner claimed he saw one of the boys riding away on a blue 10-speed bicycle.

[When police arrived, they found L.H. bleeding profusely from the vaginal area. She had been very seriously injured and required emergency surgery. In the weeks following the rape, both petitioner and L.H. reiterated the story petitioner had first told to the police. Nevertheless, eight days after the rape, on

^a As amended on denial of rehearing. See _ U.S. _, 129 S.Ct. 1 (2008).

the basis of substantial evidence contradicting petitioner's story — including a call he made between 6:30 and 7:30 a.m. to ask a colleague how to get blood out of a white carpet because his daughter had “just become a young lady”— police arrested him. On June 22, 1998, L.H., for the first time, told her mother that petitioner had raped her.]

The State charged petitioner with aggravated rape of a child under La. Stat. Ann. § 14:42 and sought the death penalty. [The statute defined aggravated rape of a child as “anal or vaginal sexual intercourse” with a victim under the age of twelve years and, in combination with La. Code Crim.Proc. Art. 905.4 (aggravating circumstances), made one convicted of the crime death-eligible.]

The trial began in August 2003. L.H. was then 13 years old. She testified that she “woke up one morning and Patrick was on top of [her].” She remembered petitioner bringing her “[a] cup of orange juice and pills chopped up in it” after the rape and overhearing him on the telephone saying she had become a “young lady.” L.H. acknowledged that she had accused two neighborhood boys but testified petitioner told her to say this and that it was untrue.

The jury having found petitioner guilty of aggravated rape, the penalty phase ensued. The State presented the testimony of S. L., who is the cousin and goddaughter of petitioner's ex-wife. S.L. testified that petitioner sexually abused her three times when she was eight years old and that the last time involved sexual intercourse. She did not tell anyone until two years later and did not pursue legal action.

The jury unanimously determined that petitioner should be sentenced to death. The Supreme Court of Louisiana [distinguishing *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861 (1977)] affirmed.

. . .

We granted certiorari.

II

The Eighth Amendment, applicable to the States through the Fourteenth Amendment, provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” The Amendment proscribes “all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive.” *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242 (2002). The Court explained in *Atkins* and *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183 (2005), that the Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic “precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.” *Weems v. United States*, 217 U.S. 349, 30 S.Ct. 544 (1910). Whether this requirement has been fulfilled is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 but by the norms that “currently prevail.” *Atkins*. The Amendment “draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590 (1958) (plurality opinion). This is because “[t]he standard of extreme cruelty is not merely descriptive, but

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necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.” *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726 (1972) (Burger, C. J., dissenting).

Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule. As we shall discuss, punishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution. It is the last of these, retribution, that most often can contradict the law’s own ends. This is of particular concern when the Court interprets the meaning of the Eighth Amendment in capital cases. When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.

For these reasons we have explained that capital punishment must “be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’” *Roper* (quoting *Atkins*). Though the death penalty is not invariably unconstitutional, see *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909 (1976), the Court insists upon confining the instances in which the punishment can be imposed.

Applying this principle, we held in *Roper* and *Atkins* that the execution of juveniles and mentally retarded persons are punishments violative of the Eighth Amendment because the offender had a diminished personal responsibility for the crime. The Court further has held that the death penalty can be disproportionate to the crime itself where the crime did not result, or was not intended to result, in death of the victim. In *Coker*, for instance, the Court held it would be unconstitutional to execute an offender who had raped an adult woman. And in *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368 (1982), the Court overturned the capital sentence of a defendant who aided and abetted a robbery during which a murder was committed but did not himself kill, attempt to kill, or intend that a killing would take place. On the other hand, in *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676 (1987), the Court allowed the defendants’ death sentences to stand where they did not themselves kill the victims but their involvement in the events leading up to the murders was active, recklessly indifferent, and substantial.

In these cases the Court has been guided by “objective indicia of society’s standards, as expressed in legislative enactments and state practice with respect to executions.” *Roper*; see also *Coker* (plurality opinion) (finding that both legislatures and juries had firmly rejected the penalty of death for the rape of an adult woman); *Enmund* (looking to “historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made”). The inquiry does not end there, however. Consensus is not dispositive. Whether the death penalty is disproportionate to the crime committed depends as well upon the standards elaborated by controlling precedents and by the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose.

Based both on consensus and our own independent judgment, our holding is that a death sentence for one who raped but did not kill a child, and who did not intend to assist another in killing the child, is unconstitutional under the Eighth and Fourteenth Amendments.

III

A

The existence of objective indicia of consensus against making a crime punishable by death was a relevant concern in *Roper*, *Atkins*, *Coker*, and *Enmund*, and we follow the approach of those cases here. The history of the death penalty for the crime of rape is an instructive beginning point.

In 1925, 18 States, the District of Columbia, and the Federal Government had statutes that authorized the death penalty for the rape of a child or an adult. Between 1930 and 1964, 455 people were executed for those crimes. To our knowledge the last individual executed for the rape of a child was Ronald Wolfe in 1964.

In 1972, *Furman* invalidated most of the state statutes authorizing the death penalty for the crime of rape; and in *Furman's* aftermath only six States reenacted their capital rape provisions. Three States — Georgia, North Carolina, and Louisiana — did so with respect to all rape offenses. Three States — Florida, Mississippi, and Tennessee — did so with respect only to child rape. All six statutes were later invalidated under state or federal law.

Louisiana reintroduced the death penalty for rape of a child in 1995. Under the current statute, any anal, vaginal, or oral intercourse with a child under the age of 13 constitutes aggravated rape and is punishable by death. Mistake of age is not a defense, so the statute imposes strict liability in this regard. Five States have since followed Louisiana's lead: Georgia (1999); Montana (1997); Oklahoma (2006); South Carolina (2006); and Texas (2007). Four of these States' statutes [Montana, Oklahoma, South Carolina, Texas] are more narrow than Louisiana's in that only offenders with a previous rape conviction are death eligible. Georgia's statute makes child rape a capital offense only when aggravating circumstances are present, including but not limited to a prior conviction.

By contrast, 44 States have not made child rape a capital offense. As for federal law, Congress in the Federal Death Penalty Act of 1994 expanded the number of federal crimes for which the death penalty is a permissible sentence, including certain nonhomicide offenses; but it did not do the same for child rape or abuse. . . .

[Whether Georgia should be included in the list of states authorizing the death penalty for rape of a child and whether Florida should be excluded from the list is subject to dispute.]

Definitive resolution of state-law issues is for the States' own courts, and there may be disagreement over the statistics. It is further true that some States, including States that have addressed the issue in just the last few years,

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have made child rape a capital offense. The summary recited here, however, does allow us to make certain comparisons with the data cited in the *Atkins*, *Roper*, and *Enmund* cases.

When *Atkins* was decided in 2002, 30 States, including 12 noncapital jurisdictions, prohibited the death penalty for mentally retarded offenders; 20 permitted it. When *Roper* was decided in 2005, the numbers disclosed a similar division among the States: 30 States prohibited the death penalty for juveniles, 18 of which permitted the death penalty for other offenders; and 20 States authorized it. Both in *Atkins* and in *Roper*, we noted that the practice of executing mentally retarded and juvenile offenders was infrequent. Only five States had executed an offender known to have an IQ below 70 between 1989 and 2002; and only three States had executed a juvenile offender between 1995 and 2005.

The statistics in *Enmund* bear an even greater similarity to the instant case. There eight jurisdictions had authorized imposition of the death penalty solely for participation in a robbery during which an accomplice committed murder, and six defendants between 1954 and 1982 had been sentenced to death for felony murder where the defendant did not personally commit the homicidal assault. These facts, the Court concluded, “weigh[ed] on the side of rejecting capital punishment for the crime.”

The evidence of a national consensus with respect to the death penalty for child rapists, as with respect to juveniles, mentally retarded offenders, and vicarious felony murderers, shows divided opinion but, on balance, an opinion against it. Thirty-seven jurisdictions—36 States plus the Federal Government — have the death penalty. As mentioned above, only six of those jurisdictions authorize the death penalty for rape of a child. Though our review of national consensus is not confined to tallying the number of States with applicable death penalty legislation, it is of significance that, in 45 jurisdictions, petitioner could not be executed for child rape of any kind. That number surpasses the 30 States in *Atkins* and *Roper* and the 42 States in *Enmund* that prohibited the death penalty under the circumstances those cases considered.*

B

[Justice Kennedy rejected the argument that the failure of more states to make child rape a capital crime stemmed from the legislatures’ misreading of *Coker* as barring the death penalty for all non-homicide crimes. He pointed out that the *Coker* plurality several times described the issue and the Court’s holding as concerning only the constitutionality of the death penalty for rape of “an adult woman” or “adult female,” and he argued that there was no evidence that state legislatures were confused by the holding and that, had the legislatures looked for guidance to the courts, they would have found that “[t]he

* When issued and announced on June 25, 2008, the Court’s decision neither noted nor discussed the military penalty for rape under the Uniform Code of Military Justice. In a petition for rehearing respondent argues that the military penalty bears on our consideration of the question in this case. For the reasons set forth in the statement respecting the denial of rehearing, we find that the military penalty does not affect our reasoning or conclusions.

state courts that have confronted the precise question before us have been uniform in concluding that *Coker* did not address the constitutionality of the death penalty for the crime of child rape.”]

We conclude on the basis of this review that there is no clear indication that state legislatures have misinterpreted *Coker* to hold that the death penalty for child rape is unconstitutional. The small number of States that have enacted this penalty, then, is relevant to determining whether there is a consensus against capital punishment for this crime.

C

Respondent insists that the six States where child rape is a capital offense, along with the States that have proposed but not yet enacted applicable death penalty legislation, reflect a consistent direction of change in support of the death penalty for child rape. Consistent change might counterbalance an otherwise weak demonstration of consensus. But whatever the significance of consistent change where it is cited to show emerging support for expanding the scope of the death penalty, no showing of consistent change has been made in this case.

Respondent and its *amici* identify five States where, in their view, legislation authorizing capital punishment for child rape is pending. It is not our practice, nor is it sound, to find contemporary norms based upon state legislation that has been proposed but not yet enacted. There are compelling reasons not to do so here. Since the briefs were submitted by the parties, legislation in two of the five States [Colorado and Mississippi] has failed. In Tennessee, the house bills were rejected almost a year ago, and the senate bills appear to have died in committee. In Alabama, the recent legislation is similar to a bill that failed in 2007. And in Missouri, the 2008 legislative session has ended, tabling the pending legislation.

Aside from pending legislation, it is true that in the last 13 years there has been change towards making child rape a capital offense. This is evidenced by six new death penalty statutes, three enacted in the last two years. But this showing is not as significant as the data in *Atkins*, where 18 States between 1986 and 2001 had enacted legislation prohibiting the execution of mentally retarded persons. Respondent argues the instant case is like *Roper* because, there, only five States had shifted their positions between 1989 and 2005, one less State than here. But in *Roper*, we emphasized that, though the pace of abolition was not as great as in *Atkins*, it was counterbalanced by the total number of States that had recognized the impropriety of executing juvenile offenders. When we decided *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969 (1989), 12 death penalty States already prohibited the execution of any juvenile under 18, and 15 prohibited the execution of any juvenile under 17. Here, the total number of States to have made child rape a capital offense after *Furman* is six. This is not an indication of a trend or change in direction comparable to the one supported by data in *Roper*. The evidence here bears a closer resemblance to the evidence of state activity in *Enmund*, where we found a national consensus against the death penalty for vicarious felony murder despite eight jurisdictions having

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authorized the practice.

D

There are measures of consensus other than legislation. Statistics about the number of executions may inform the consideration whether capital punishment for the crime of child rape is regarded as unacceptable in our society. These statistics confirm our determination from our review of state statutes that there is a social consensus against the death penalty for the crime of child rape.

Nine States — Florida, Georgia, Louisiana, Mississippi, Montana, Oklahoma, South Carolina, Tennessee, and Texas — have permitted capital punishment for adult or child rape for some length of time between the Court's 1972 decision in *Furman* and today. Yet no individual has been executed for the rape of an adult or child since 1964, and no execution for any other nonhomicide offense has been conducted since 1963.

Louisiana is the only State since 1964 that has sentenced an individual to death for the crime of child rape; and petitioner and Richard Davis, who was convicted and sentenced to death for the aggravated rape of a 5-year-old child by a Louisiana jury in December 2007, are the only two individuals now on death row in the United States for a nonhomicide offense.

After reviewing the authorities informed by contemporary norms, including the history of the death penalty for this and other nonhomicide crimes, current state statutes and new enactments, and the number of executions since 1964, we conclude there is a national consensus against capital punishment for the crime of child rape.

IV

A

As we have said in other Eighth Amendment cases, objective evidence of contemporary values as it relates to punishment for child rape is entitled to great weight, but it does not end our inquiry. “[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.” *Coker* (plurality opinion). We turn, then, to the resolution of the question before us, which is informed by our precedents and our own understanding of the Constitution and the rights it secures.

It must be acknowledged that there are moral grounds to question a rule barring capital punishment for a crime against an individual that did not result in death. These facts illustrate the point. Here the victim's fright, the sense of betrayal, and the nature of her injuries caused more prolonged physical and mental suffering than, say, a sudden killing by an unseen assassin. The attack was not just on her but on her childhood. For this reason, we should be most reluctant to rely upon the language of the plurality in *Coker*, which posited that, for the victim of rape, “life may not be nearly so happy as it was” but it is not

beyond repair. We cannot dismiss the years of long anguish that must be endured by the victim of child rape.

It does not follow, though, that capital punishment is a proportionate penalty for the crime. The constitutional prohibition against excessive or cruel and unusual punishments mandates that the State's power to punish "be exercised within the limits of civilized standards." *Trop* (plurality opinion). Evolving standards of decency that mark the progress of a maturing society counsel us to be most hesitant before interpreting the Eighth Amendment to allow the extension of the death penalty, a hesitation that has special force where no life was taken in the commission of the crime. It is an established principle that decency, in its essence, presumes respect for the individual and thus moderation or restraint in the application of capital punishment.

To date the Court has sought to define and implement this principle, for the most part, in cases involving capital murder. One approach has been to insist upon general rules that ensure consistency in determining who receives a death sentence. See *California v. Brown*, 479 U.S. 538, 541, 107 S.Ct. 837 (1987) ("[D]eath penalty statutes [must] be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion" At the same time the Court has insisted, to ensure restraint and moderation in use of capital punishment, on judging the "character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S.280, 96 S.Ct. 2978 (1976) (plurality opinion).

The tension between general rules and case-specific circumstances has produced results not all together satisfactory. See *Tuilaepa v. California*, 512 U.S. 967, 114 S.Ct. 2630 (1994) ("The objectives of these two inquiries can be in some tension, at least when the inquiries occur at the same time"); *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047 (1990) (SCALIA, J., concurring in part and concurring in judgment) ("The latter requirement quite obviously destroys whatever rationality and predictability the former requirement was designed to achieve"). This has led some Members of the Court to say we should cease efforts to resolve the tension and simply allow legislatures, prosecutors, courts, and juries greater latitude. See *id.* (advocating that the Court adhere to the *Furman* line of cases and abandon the *Woodson-Lockett* line of cases). For others the failure to limit these same imprecisions by stricter enforcement of narrowing rules has raised doubts concerning the constitutionality of capital punishment itself. See *Baze v. Rees*, ___ U.S. ___, 128 S.Ct. 1520 (2008) (STEVENS, J., concurring in judgment); *Furman*, (White, J., concurring); *Callins v. Collins*, 510 U.S. 1141, 114 S.Ct. 1127 (1994) (Blackmun, J., dissenting from denial of certiorari).

Our response to this case law, which is still in search of a unifying principle, has been to insist upon confining the instances in which capital punishment may be imposed. See *Gregg* (joint opinion of Stewart, Powell, and Stevens, JJ.) (because "death as a punishment is unique in its severity and irrevocability," capital punishment must be reserved for those crimes that are "so grievous an affront to humanity that the only adequate response may be the penalty of

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death” (citing in part *Furman* (Brennan, J., concurring); *id.* (Stewart, J., concurring)).

Our concern here is limited to crimes against individual persons. We do not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State. As it relates to crimes against individuals, though, the death penalty should not be expanded to instances where the victim’s life was not taken. We said in *Coker* of adult rape:

“We do not discount the seriousness of rape as a crime. It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim. . . . Short of homicide, it is the ‘ultimate violation of self.’ . . . [But] [t]he murderer kills; the rapist, if no more than that, does not. . . . We have the abiding conviction that the death penalty, which ‘is unique in its severity and irrevocability,’ is an excessive penalty for the rapist who, as such, does not take human life.” (plurality opinion).

The same distinction between homicide and other serious violent offenses against the individual informed the Court’s analysis in *Enmund*, where the Court held that the death penalty for the crime of vicarious felony murder is disproportionate to the offense. The Court repeated there the fundamental, moral distinction between a “murderer” and a “robber,” noting that while “robbery is a serious crime deserving serious punishment,” it is not like death in its “severity and irrevocability.”

Consistent with evolving standards of decency and the teachings of our precedents we conclude that, in determining whether the death penalty is excessive, there is a distinction between intentional first-degree murder on the one hand and nonhomicide crimes against individual persons, even including child rape, on the other. The latter crimes may be devastating in their harm, as here, but “in terms of moral depravity and of the injury to the person and to the public,” *Coker*, they cannot be compared to murder in their “severity and irrevocability.”

In reaching our conclusion we find significant the number of executions that would be allowed under respondent’s approach. The crime of child rape, considering its reported incidents, occurs more often than first-degree murder. Approximately 5,702 incidents of vaginal, anal, or oral rape of a child under the age of 12 were reported nationwide in 2005; this is almost twice the total incidents of intentional murder for victims of all ages (3,405) reported during the same period. Although we have no reliable statistics on convictions for child rape, we can surmise that, each year, there are hundreds, or more, of these convictions just in jurisdictions that permit capital punishment. Cf. Brief for Louisiana Association of Criminal Defense Lawyers et al. as *Amici Curiae* 1-2, and n. 2 (noting that there are now at least 70 capital rape indictments pending in Louisiana and estimating the actual number to be over 100). As a result of existing rules, only 2.2% of convicted first-degree murderers are sentenced to death. But under respondent’s approach, the 36 States that permit the death penalty could sentence to death all persons convicted of raping a child less than

12 years of age. This could not be reconciled with our evolving standards of decency and the necessity to constrain the use of the death penalty.

It might be said that narrowing aggravators could be used in this context, as with murder offenses, to ensure the death penalty's restrained application. We find it difficult to identify standards that would guide the decisionmaker so the penalty is reserved for the most severe cases of child rape and yet not imposed in an arbitrary way. Even were we to forbid, say, the execution of first-time child rapists, or require as an aggravating factor a finding that the perpetrator's instant rape offense involved multiple victims, the jury still must balance, in its discretion, those aggravating factors against mitigating circumstances. In this context, which involves a crime that in many cases will overwhelm a decent person's judgment, we have no confidence that the imposition of the death penalty would not be so arbitrary as to be "freakis[h]," *Furman* (Stewart, J., concurring). We cannot sanction this result when the harm to the victim, though grave, cannot be quantified in the same way as death of the victim.

It is not a solution simply to apply to this context the aggravating factors developed for capital murder. The Court has said that a State may carry out its obligation to ensure individualized sentencing in capital murder cases by adopting sentencing processes that rely upon the jury to exercise wide discretion so long as there are narrowing factors that have some " 'common-sense core of meaning . . . that criminal juries should be capable of understanding.' " *Tuilaepa, supra*. The Court, accordingly, has upheld the constitutionality of aggravating factors ranging from whether the defendant was a " 'cold-blooded, pitiless slayer,' " *Arave v. Creech*, 507 U.S. 463, 113 S.Ct. 1534 (1993), to whether the "perpetrator inflict[ed] mental anguish or physical abuse before the victim's death," *Walton*, to whether the defendant " 'would commit criminal acts of violence that would constitute a continuing threat to society,' " *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). All of these standards have the potential to result in some inconsistency of application.

As noted above, the resulting imprecision and the tension between evaluating the individual circumstances and consistency of treatment have been tolerated where the victim dies. It should not be introduced into our justice system, though, where death has not occurred.

Our concerns are all the more pronounced where, as here, the death penalty for this crime has been most infrequent. We have developed a foundational jurisprudence in the case of capital murder to guide the States and juries in imposing the death penalty. Starting with *Gregg*, we have spent more than 32 years articulating limiting factors that channel the jury's discretion to avoid the death penalty's arbitrary imposition in the case of capital murder. Though that practice remains sound, beginning the same process for crimes for which no one has been executed in more than 40 years would require experimentation in an area where a failed experiment would result in the execution of individuals undeserving of the death penalty. Evolving standards of decency are difficult to reconcile with a regime that seeks to expand the death penalty to an area where standards to confine its use are indefinite and obscure.

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B

Our decision is consistent with the justifications offered for the death penalty. *Gregg* instructs that capital punishment is excessive when it is grossly out of proportion to the crime or it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes.

As in *Coker*, here it cannot be said with any certainty that the death penalty for child rape serves no deterrent or retributive function. This argument does not overcome other objections, however. The incongruity between the crime of child rape and the harshness of the death penalty poses risks of overpunishment and counsels against a constitutional ruling that the death penalty can be expanded to include this offense.

The goal of retribution, which reflects society's and the victim's interests in seeing that the offender is repaid for the hurt he caused, does not justify the harshness of the death penalty here. In measuring retribution, as well as other objectives of criminal law, it is appropriate to distinguish between a particularly depraved murder that merits death as a form of retribution and the crime of child rape.

There is an additional reason for our conclusion that imposing the death penalty for child rape would not further retributive purposes. In considering whether retribution is served, among other factors we have looked to whether capital punishment "has the potential . . . to allow the community as a whole, including the surviving family and friends of the victim, to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed." *Panetti v. Quarterman*, 551 U.S. 930, 127 S.Ct. 2842 (2007). In considering the death penalty for nonhomicide offenses this inquiry necessarily also must include the question whether the death penalty balances the wrong to the victim.

It is not at all evident that the child rape victim's hurt is lessened when the law permits the death of the perpetrator. Capital cases require a long-term commitment by those who testify for the prosecution, especially when guilt and sentencing determinations are in multiple proceedings. In cases like this the key testimony is not just from the family but from the victim herself. During formative years of her adolescence, made all the more daunting for having to come to terms with the brutality of her experience, L.H. was required to discuss the case at length with law enforcement personnel. In a public trial she was required to recount once more all the details of the crime to a jury as the State pursued the death of her stepfather. And in the end the State made L.H. a central figure in its decision to seek the death penalty, telling the jury in closing statements: "[L. H.] is asking you, asking you to set up a time and place when he dies."

Society's desire to inflict the death penalty for child rape by enlisting the child victim to assist it over the course of years in asking for capital punishment forces a moral choice on the child, who is not of mature age to make that choice. The way the death penalty here involves the child victim in its enforcement can compromise a decent legal system; and this is but a subset of fundamental

difficulties capital punishment can cause in the administration and enforcement of laws proscribing child rape.

There are, moreover, serious systemic concerns in prosecuting the crime of child rape that are relevant to the constitutionality of making it a capital offense. The problem of unreliable, induced, and even imagined child testimony means there is a “special risk of wrongful execution” in some child rape cases. *Atkins*. This undermines, at least to some degree, the meaningful contribution of the death penalty to legitimate goals of punishment. Studies conclude that children are highly susceptible to suggestive questioning techniques like repetition, guided imagery, and selective reinforcement.

Similar criticisms pertain to other cases involving child witnesses; but child rape cases present heightened concerns because the central narrative and account of the crime often comes from the child herself. She and the accused are, in most instances, the only ones present when the crime was committed. And the question in a capital case is not just the fact of the crime, including, say, proof of rape as distinct from abuse short of rape, but details bearing upon brutality in its commission. Although capital punishment does bring retribution, and the legislature here has chosen to use it for this end, its judgment must be weighed, in deciding the constitutional question, against the special risks of unreliable testimony with respect to this crime.

With respect to deterrence, if the death penalty adds to the risk of non-reporting, that, too, diminishes the penalty’s objectives. Underreporting is a common problem with respect to child sexual abuse. [Citing studies showing that 88% of minor female rape victims did not report the rape to authorities] Although we know little about what differentiates those who report from those who do not report, one of the most commonly cited reasons for nondisclosure is fear of negative consequences for the perpetrator, a concern that has special force where the abuser is a family member. The experience of the *amici* who work with child victims indicates that, when the punishment is death, both the victim and the victim’s family members may be more likely to shield the perpetrator from discovery, thus increasing underreporting. As a result, punishment by death may not result in more deterrence or more effective enforcement.

In addition, by in effect making the punishment for child rape and murder equivalent, a State that punishes child rape by death may remove a strong incentive for the rapist not to kill the victim. Assuming the offender behaves in a rational way, as one must to justify the penalty on grounds of deterrence, the penalty in some respects gives less protection, not more, to the victim, who is often the sole witness to the crime. It might be argued that, even if the death penalty results in a marginal increase in the incentive to kill, this is counterbalanced by a marginally increased deterrent to commit the crime at all. Whatever balance the legislature strikes, however, uncertainty on the point makes the argument for the penalty less compelling than for homicide crimes.

Each of these propositions, standing alone, might not establish the unconstitutionality of the death penalty for the crime of child rape. Taken in sum, however, they demonstrate the serious negative consequences of making child rape a capital offense. These considerations lead us to conclude, in our

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independent judgment, that the death penalty is not a proportional punishment for the rape of a child.

V

Our determination that there is a consensus against the death penalty for child rape raises the question whether the Court's own institutional position and its holding will have the effect of blocking further or later consensus in favor of the penalty from developing. The Court, it will be argued, by the act of addressing the constitutionality of the death penalty, intrudes upon the consensus-making process. By imposing a negative restraint, the argument runs, the Court makes it more difficult for consensus to change or emerge. The Court, according to the criticism, itself becomes enmeshed in the process, part judge and part the maker of that which it judges.

These concerns overlook the meaning and full substance of the established proposition that the Eighth Amendment is defined by "the evolving standards of decency that mark the progress of a maturing society." *Trop* (plurality opinion). Confirmed by repeated, consistent rulings of this Court, this principle requires that use of the death penalty be restrained. The rule of evolving standards of decency with specific marks on the way to full progress and mature judgment means that resort to the penalty must be reserved for the worst of crimes and limited in its instances of application. In most cases justice is not better served by terminating the life of the perpetrator rather than confining him and preserving the possibility that he and the system will find ways to allow him to understand the enormity of his offense. Difficulties in administering the penalty to ensure against its arbitrary and capricious application require adherence to a rule reserving its use, at this stage of evolving standards and in cases of crimes against individuals, for crimes that take the life of the victim.

The judgment of the Supreme Court of Louisiana upholding the capital sentence is reversed. This case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE ALITO, with whom THE CHIEF JUSTICE, Justice SCALIA, and Justice THOMAS join, dissenting.

The Court today holds that the Eighth Amendment categorically prohibits the imposition of the death penalty for the crime of raping a child. This is so, according to the Court, no matter how young the child, no matter how many times the child is raped, no matter how many children the perpetrator rapes, no matter how sadistic the crime, no matter how much physical or psychological trauma is inflicted, and no matter how heinous the perpetrator's prior criminal record may be. The Court provides two reasons for this sweeping conclusion: First, the Court claims to have identified "a national consensus" that the death penalty is never acceptable for the rape of a child; second, the Court concludes, based on its "independent judgment," that imposing the death penalty for child rape is inconsistent with "the evolving standards of decency that mark the

progress of a maturing society.’” Because neither of these justifications is sound, I respectfully dissent.

I

A

I turn first to the Court’s claim that there is “a national consensus” that it is never acceptable to impose the death penalty for the rape of a child. The Eighth Amendment’s requirements, the Court writes, are “determined not by the standards that prevailed” when the Amendment was adopted but “by the norms that ‘currently prevail.’” (quoting *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242 (2002)). In assessing current norms, the Court relies primarily on the fact that only 6 of the 50 States now have statutes that permit the death penalty for this offense. But this statistic is a highly unreliable indicator of the views of state lawmakers and their constituents. As I will explain, dicta in this Court’s decision in *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861 (1977), has stunted legislative consideration of the question whether the death penalty for the targeted offense of raping a young child is consistent with prevailing standards of decency. The *Coker* dicta gave state legislators and others good reason to fear that any law permitting the imposition of the death penalty for this crime would meet precisely the fate that has now befallen the Louisiana statute that is currently before us, and this threat strongly discouraged state legislators — regardless of their own values and those of their constituents — from supporting the enactment of such legislation.

[Justice Alito argued that the *Coker* plurality’s summary — “We have the abiding conviction that the death penalty . . . is an excessive penalty for the rapist who, as such, does not take human life” — although dicta, implied that the death penalty for *any* rape would have been unconstitutional. He cited to state court opinions and commentators who, while recognizing the limits of the *Coker* holding, assumed that the logic of the decision would bar imposition of the death penalty for any non-homicide crime. He concluded that “the *Coker* dicta gave state legislators a strong incentive not to push for the enactment of new capital child-rape laws even though these legislators and their constituents may have believed that the laws would be appropriate and desirable,” and, in support of that point, he cited to opponents’ contentions that the recent Oklahoma and Texas child-rape bills were unconstitutional under *Coker*.]

C

Because of the effect of the *Coker* dicta, the Court is plainly wrong in comparing the situation here to that in *Atkins* or *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183 (2005). *Atkins* concerned the constitutionality of imposing the death penalty on a mentally retarded defendant. Thirteen years earlier, in *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934 (1989), the Court had held that this was permitted by the Eighth Amendment, and therefore, during the time between *Penry* and *Atkins*, state legislators had reason to believe that this Court would follow its prior precedent and uphold statutes allowing such punishment.

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The situation in *Roper* was similar. *Roper* concerned a challenge to the constitutionality of imposing the death penalty on a defendant who had not reached the age of 18 at the time of the crime. Sixteen years earlier in *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969 (1989), the Court had rejected a similar challenge, and therefore state lawmakers had cause to believe that laws allowing such punishment would be sustained.

When state lawmakers believe that their decision will prevail on the question whether to permit the death penalty for a particular crime or class of offender, the legislators' resolution of the issue can be interpreted as an expression of their own judgment, informed by whatever weight they attach to the values of their constituents. But when state legislators think that the enactment of a new death penalty law is likely to be futile, inaction cannot reasonably be interpreted as an expression of their understanding of prevailing societal values. In that atmosphere, legislative inaction is more likely to evidence acquiescence.

D

If anything can be inferred from state legislative developments, the message is very different from the one that the Court perceives. In just the past few years, despite the shadow cast by the *Coker* dicta, five States have enacted targeted capital child-rape laws. If, as the Court seems to think, our society is "[e]volving" toward ever higher "standards of decency," these enactments might represent the beginning of a new evolutionary line.

Such a development would not be out of step with changes in our society's thinking since *Coker* was decided. During that time, reported instances of child abuse have increased dramatically;² and there are many indications of growing alarm about the sexual abuse of children. In 1994, Congress enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, 42 U.S.C. § 14071, which requires States receiving certain federal funds to establish registration systems for convicted sex offenders and to notify the public about persons convicted of the sexual abuse of minors. All 50 States have now enacted such statutes. In addition, at least 21 States and the District of Columbia now have statutes permitting the involuntary commitment of sexual predators, and at least 12 States have enacted residency restrictions for sex offenders.

Seeking to counter the significance of the new capital child-rape laws enacted during the past two years, the Court points out that in recent months efforts to enact similar laws in five other States have stalled. These developments, however, all took place after our decision to grant certiorari in this case, which gave state legislators reason to delay the enactment of new legislation until the constitutionality of such laws was clarified. And there is no evidence of which I

² From 1976 to 1986, the number of reported cases of child sexual abuse grew from 6,000 to 132,000, an increase of 2,100%. By 1991, the number of cases totaled 432,000, an increase of another 227%. In 1995, local child protection services agencies identified 126,000 children who were victims of either substantiated or indicated sexual abuse. Nearly 30% of those child victims were between the age of four and seven. There were an estimated 90,000 substantiated cases of child sexual abuse in 2003.

am aware that these legislative initiatives failed because the proposed laws were viewed as inconsistent with our society's standards of decency.

On the contrary, the available evidence suggests otherwise. For example, in Colorado, the Senate Appropriations Committee in April voted 6 to 4 against Senate Bill 195, reportedly because it "would have cost about \$616,000 next year for trials, appeals, public defenders, and prison costs." Likewise, in Tennessee, the capital child-rape bill was withdrawn in committee "because of the high associated costs." . . . Thus, the failure to enact capital child-rape laws cannot be viewed as evidence of a moral consensus against such punishment.

E

Aside from its misleading tally of current state laws, the Court points to two additional "objective indicia" of a "national consensus," but these arguments are patent makeweights. The Court notes that Congress has not enacted a law permitting a federal district court to impose the death penalty for the rape of a child, but due to the territorial limits of the relevant federal statutes, very few rape cases, not to mention child-rape cases, are prosecuted in federal court. Congress' failure to enact a death penalty statute for this tiny set of cases is hardly evidence of Congress' assessment of our society's values.⁶

Finally, the Court argues that statistics about the number of executions in rape cases support its perception of a "national consensus," but here too the statistics do not support the Court's position. The Court notes that the last execution for the rape of a child occurred in 1964, but the Court fails to mention that litigation regarding the constitutionality of the death penalty brought executions to a halt across the board in the late 1960's. In 1965 and 1966, there were a total of eight executions for all offenses, and from 1968 until 1977, the year when *Coker* was decided, there were no executions for any crimes. The Court also fails to mention that in Louisiana, since the state law was amended in 1995 to make child rape a capital offense, prosecutors have asked juries to return death verdicts in four cases. In two of those cases, Louisiana juries imposed the death penalty. This 50% record is hardly evidence that juries share the Court's view that the death penalty for the rape of a young child is unacceptable under even the most aggravated circumstances.⁸

F

In light of the points discussed above, I believe that the "objective indicia" of our society's "evolving standards of decency" can be fairly summarized as follows. Neither Congress nor juries have done anything that can plausibly be interpreted as evidencing the "national consensus" that the Court perceives. State legislatures, for more than 30 years, have operated under the ominous shadow of the *Coker* dicta and thus have not been free to express their own

⁶ Moreover, as noted in the petition for rehearing, the Uniform Code of Military Justice permits such a sentence.

⁸ Of course, the other five capital child rape statutes are too recent for any individual to have been sentenced to death under them.

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understanding of our society's standards of decency. And in the months following our grant of certiorari in this case, state legislatures have had an additional reason to pause. Yet despite the inhibiting legal atmosphere that has prevailed since 1977, six States have recently enacted new, targeted child-rape laws.

I do not suggest that six new state laws necessarily establish a "national consensus" or even that they are sure evidence of an ineluctable trend. In terms of the Court's metaphor of moral evolution, these enactments might have turned out to be an evolutionary dead end. But they might also have been the beginning of a strong new evolutionary line. We will never know, because the Court today snuffs out the line in its incipient stage.

II

A

The Court is willing to block the potential emergence of a national consensus in favor of permitting the death penalty for child rape because, in the end, what matters is the Court's "own judgment" regarding "the acceptability of the death penalty." Although the Court has much to say on this issue, most of the Court's discussion is not pertinent to the Eighth Amendment question at hand. And once all of the Court's irrelevant arguments are put aside, it is apparent that the Court has provided no coherent explanation for today's decision.

In the next section of this opinion, I will attempt to weed out the arguments that are not germane to the Eighth Amendment inquiry, and in the final section, I will address what remains.

B

A major theme of the Court's opinion is that permitting the death penalty in child-rape cases is not in the best interests of the victims of these crimes and society at large. In this vein, the Court suggests that it is more painful for child-rape victims to testify when the prosecution is seeking the death penalty. The Court also argues that "a State that punishes child rape by death may remove a strong incentive for the rapist not to kill the victim," and may discourage the reporting of child rape.

These policy arguments, whatever their merits, are simply not pertinent to the question whether the death penalty is "cruel and unusual" punishment. The Eighth Amendment protects the right of an accused. It does not authorize this Court to strike down federal or state criminal laws on the ground that they are not in the best interests of crime victims or the broader society. The Court's policy arguments concern matters that legislators should-and presumably do-take into account in deciding whether to enact a capital child-rape statute, but these arguments are irrelevant to the question that is before us in this case. Our cases have cautioned against using "the aegis of the Cruel and Unusual Punishment Clause' to cut off the normal democratic processes," *Atkins* (Rehnquist, C. J., dissenting), in turn quoting *Gregg v. Georgia*, 428 U.S. 153, 96

S.Ct. 2909 (1976), (joint opinion of Stewart, Powell, and Stevens, JJ.), but the Court forgets that warning here.

The Court also contends that laws permitting the death penalty for the rape of a child create serious procedural problems. Specifically, the Court maintains that it is not feasible to channel the exercise of sentencing discretion in child-rape cases, and that the unreliability of the testimony of child victims creates a danger that innocent defendants will be convicted and executed. Neither of these contentions provides a basis for striking down all capital child-rape laws no matter how carefully and narrowly they are crafted.

The Court's argument regarding the structuring of sentencing discretion is hard to comprehend. The Court finds it "difficult to identify standards that would guide the decisionmaker so the penalty is reserved for the most severe cases of child rape and yet not imposed in an arbitrary way." Even assuming that the age of a child is not alone a sufficient factor for limiting sentencing discretion, the Court need only examine the child-rape laws recently enacted in Texas, Oklahoma, Montana, and South Carolina, all of which use a concrete factor to limit quite drastically the number of cases in which the death penalty may be imposed. In those States, a defendant convicted of the rape of a child may be sentenced to death only if the defendant has a prior conviction for a specified felony sex offense.

Moreover, it takes little imagination to envision other limiting factors that a State could use to structure sentencing discretion in child rape cases. Some of these might be: whether the victim was kidnapped, whether the defendant inflicted severe physical injury on the victim, whether the victim was raped multiple times, whether the rapes occurred over a specified extended period, and whether there were multiple victims.

The Court refers to limiting standards that are "indefinite and obscure," but there is nothing indefinite or obscure about any of the above-listed aggravating factors. Indeed, they are far more definite and clear-cut than aggravating factors that we have found to be adequate in murder cases. See, e.g., *Arave v. Creech*, 507 U.S. 463, 113 S.Ct. 1534 (1993) (whether the defendant was a "'cold-blooded, pitiless slayer'"); *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047 (1990) (whether the "'perpetrator inflict[ed] mental anguish or physical abuse before the victim's death'"); *Jurek v. Texas*, 428 U.S. 262, 269, 96 S.Ct. 2950 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (whether the defendant "'would commit criminal acts of violence that would constitute a continuing threat to society'"). For these reasons, concerns about limiting sentencing discretion provide no support for the Court's blanket condemnation of all capital child-rape statutes.

That sweeping holding is also not justified by the Court's concerns about the reliability of the testimony of child victims. First, the Eighth Amendment provides a poor vehicle for addressing problems regarding the admissibility or reliability of evidence, and problems presented by the testimony of child victims are not unique to capital cases. Second, concerns about the reliability of the testimony of child witnesses are not present in every child-rape case. In the case before us, for example, there was undisputed medical evidence that the victim

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was brutally raped, as well as strong independent evidence that petitioner was the perpetrator. Third, if the Court's evidentiary concerns have Eighth Amendment relevance, they could be addressed by allowing the death penalty in only those child-rape cases in which the independent evidence is sufficient to prove all the elements needed for conviction and imposition of a death sentence. There is precedent for requiring special corroboration in certain criminal cases. For example, some jurisdictions do not allow a conviction based on the uncorroborated testimony of an accomplice. A State wishing to permit the death penalty in child-rape cases could impose an analogous corroboration requirement.

C

After all the arguments noted above are put aside, what is left? What remaining grounds does the Court provide to justify its independent judgment that the death penalty for child rape is categorically unacceptable? I see two.

1

The first is the proposition that we should be "most hesitant before interpreting the Eighth Amendment to allow the *extension* of the death penalty." (emphasis added). But holding that the Eighth Amendment does not categorically prohibit the death penalty for the rape of a young child would not "extend" or "expand" the death penalty. Laws enacted by the state legislatures are presumptively constitutional, and until today, this Court has not held that capital child rape laws are unconstitutional. Consequently, upholding the constitutionality of such a law would not "extend" or "expand" the death penalty; rather, it would confirm the status of presumptive constitutionality that such laws have enjoyed up to this point. And in any event, this Court has previously made it clear that "[t]he Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling States from giving effect to altered beliefs and responding to changed social conditions." *Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680 (1991) (principal opinion).

2

The Court's final — and, it appears, principal — justification for its holding is that murder, the only crime for which defendants have been executed since this Court's 1976 death penalty decisions, is unique in its moral depravity and in the severity of the injury that it inflicts on the victim and the public. But the Court makes little attempt to defend these conclusions.

With respect to the question of moral depravity, is it really true that every person who is convicted of capital murder and sentenced to death is more morally depraved than every child rapist? Consider the following two cases. In the first, a defendant robs a convenience store and watches as his accomplice shoots the store owner. The defendant acts recklessly, but was not the triggerman and did not intend the killing. See, e.g., *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676 (1987). In the second case, a previously convicted child rapist kidnaps, repeatedly

rapes, and tortures multiple child victims. Is it clear that the first defendant is more morally depraved than the second?

The Court's decision here stands in stark contrast to *Atkins* and *Roper*, in which the Court concluded that characteristics of the affected defendants — mental retardation in *Atkins* and youth in *Roper*—diminished their culpability. Nor is this case comparable to *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368 (1982), in which the Court held that the Eighth Amendment prohibits the death penalty where the defendant participated in a robbery during which a murder was committed but did not personally intend for lethal force to be used. I have no doubt that, under the prevailing standards of our society, robbery, the crime that the petitioner in *Enmund* intended to commit, does not evidence the same degree of moral depravity as the brutal rape of a young child. Indeed, I have little doubt that, in the eyes of ordinary Americans, the very worst child rapists — predators who seek out and inflict serious physical and emotional injury on defenseless young children — are the epitome of moral depravity.

With respect to the question of the harm caused by the rape of child in relation to the harm caused by murder, it is certainly true that the loss of human life represents a unique harm, but that does not explain why other grievous harms are insufficient to permit a death sentence. And the Court does not take the position that no harm other than the loss of life is sufficient. The Court takes pains to limit its holding to “crimes against individual persons” and to exclude “offenses against the State,” a category that the Court stretches — without explanation — to include “drug kingpin activity.” But the Court makes no effort to explain why the harm caused by such crimes is necessarily greater than the harm caused by the rape of young children. This is puzzling in light of the Court's acknowledgment that “[r]ape has a permanent psychological, emotional, and sometimes physical impact on the child.” As the Court aptly recognizes, “[w]e cannot dismiss the years of long anguish that must be endured by the victim of child rape.”

The rape of any victim inflicts great injury, and “[s]ome victims are so grievously injured physically or psychologically that life *is* beyond repair.” *Coker* (opinion of Powell, J.). “The immaturity and vulnerability of a child, both physically and psychologically, adds a devastating dimension to rape that is not present when an adult is raped.” Meister, *Murdering Innocence: The Constitutionality of Capital Child Rape Statutes*, 45 Ariz. L.Rev. 197 (2003). Long-term studies show that sexual abuse is “grossly intrusive in the lives of children and is harmful to their normal psychological, emotional and sexual development in ways which no just or humane society can tolerate.” C. Bagley & K. King, *Child Sexual Abuse: The Search for Healing* (1990).

It has been estimated that as many as 40% of 7-to 13-year-old sexual assault victims are considered “seriously disturbed.” A. Lurigio, M. Jones, & B. Smith, *Child Sexual Abuse: Its Causes, Consequences, and Implications for Probation Practice*, 59 Sep Fed. Probation 69 (1995). Psychological problems include sudden school failure, unprovoked crying, dissociation, depression, insomnia, sleep disturbances, nightmares, feelings of guilt and inferiority, and self-destructive behavior, including an increased incidence of suicide.

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The deep problems that afflict child-rape victims often become society's problems as well. Commentators have noted correlations between childhood sexual abuse and later problems such as substance abuse, dangerous sexual behaviors or dysfunction, inability to relate to others on an interpersonal level, and psychiatric illness. Victims of child rape are nearly 5 times more likely than nonvictims to be arrested for sex crimes and nearly 30 times more likely to be arrested for prostitution.

The harm that is caused to the victims and to society at large by the worst child rapists is grave. It is the judgment of the Louisiana lawmakers and those in an increasing number of other States that these harms justify the death penalty. The Court provides no cogent explanation why this legislative judgment should be overridden. Conclusory references to "decency," "moderation," "restraint," "full progress," and "moral judgment" are not enough.

III

In summary, the Court holds that the Eighth Amendment categorically rules out the death penalty in even the most extreme cases of child rape even though: (1) This holding is not supported by the original meaning of the Eighth Amendment; (2) neither *Coker* nor any other prior precedent commands this result; (3) there are no reliable "objective indicia" of a "national consensus" in support of the Court's position; (4) sustaining the constitutionality of the state law before us would not "extend" or "expand" the death penalty; (5) this Court has previously rejected the proposition that the Eighth Amendment is a one-way ratchet that prohibits legislatures from adopting new capital punishment statutes to meet new problems; (6) the worst child rapists exhibit the epitome of moral depravity; and (7) child rape inflicts grievous injury on victims and on society in general.

The party attacking the constitutionality of a state statute bears the "heavy burden" of establishing that the law is unconstitutional. That burden has not been discharged here, and I would therefore affirm the decision of the Louisiana Supreme Court.

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