

2009 TEACHER'S UPDATE

to

**CALIFORNIA CRIMINAL LAW:
CASES AND PROBLEMS
(2nd Edition)**

by Steven F. Shatz

Dear Colleague,

The 2009 Teacher's Update supplements the Teacher's Manual for the casebook with notes on the new cases and problems contained in the 2009 Supplement to the casebook and other developments in the last five years. I hope you find this material useful, and I welcome your comments, questions and suggestions. I can be reached at shatzs@usfca.edu.

Steven F. Shatz
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CHAPTER 1 - INTRODUCTION

Problem 2A (Supp. p. 3)

Defendant would argue: that a sentence of 28 years to life for late registration is grossly disproportionate; that it is a harsher sentence than he would have received in any other state; and that it is the same sentence he would have received in California for a violent felony such as rape or kidnapping. He would distinguish *Ewing* on the ground that his third strike was not a *malum in se* crime, but a mere regulatory offense. The prosecution would respond that the sentence is not for the final crime, but for Defendant's whole course of criminal activity, including lewd act with a child and attempted rape (the crimes which triggered the registration requirement), far more serious crimes than Ewing's theft-related priors.

(source: *Gonzalez v. Duncan*, 551 F.3d 875 (9th Cir. 2008) – Eighth Amendment violation)

Problem 3 (p. 55)

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the Federal Sentencing Guidelines violated the Sixth Amendment insofar as they permitted the sentencing court to increase a defendant's sentence on the basis of facts found by the judge on a preponderance of evidence standard, rather than by a jury on a standard of proof beyond a reasonable. The Court did not invalidate the Guidelines for all purposes, but instead held:

“[T]he Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly. The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing. The courts of appeals review sentencing decisions for unreasonableness.”

543 U.S. at 264. In *Kimbrough v. United States*, 552 U.S. 85, 128 S.Ct. 558 (2007), the Court held that a departure from the (now advisory) Guidelines in a crack cocaine case could be justified on the ground that the crack/powder disparity yields a sentence greater than necessary to achieve the Guidelines' purposes.

CHAPTER 2 - ACT (ACTUS REUS)

Powell v. Texas (p. 94)

In *Powell*, Justice White, who cast the fifth vote for the majority, suggested that he might have found an Eighth Amendment violation if the evidence had shown that the defendant was a chronic alcoholic who was not homeless by choice. 392 U.S. at 551. In *People v. Kellogg*, 119 Cal.App.4th 593 (2004), the Court of Appeal addressed that very situation and, in a 2-1 decision, rejected a homeless alcoholic's Eighth Amendment challenge to his conviction for being intoxicated in public (P.C. § 647(f)). By contrast, in *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), the Ninth Circuit held (2-1) that the following Los Angeles ordinance was unconstitutional if enforced at all times and places against homeless individuals:

“No person shall sit, lie or sleep in or upon any street, sidewalk or other public way. The provisions of this subsection shall not apply to persons sitting on the curb portion of any sidewalk or street while attending or viewing any parade ...; nor shall the provisions of this subsection supply [sic] to persons sitting upon benches or other seating facilities provided for such purpose by municipal authority by this Code ...”

The *Jones* opinion was subsequently vacated and the case dismissed as moot when the parties reached a settlement. 505 F.3d 1006 (9th Cir. 2007).

Problem 8 (p. 113)

In *People v. Holloway*, 78 Cal. Rptr.3d 770 (2008) (depublished), the Court of Appeal addressed the question whether the defendant – convicted of various offenses, including driving under the influence, arising out of two accidents he had caused – was entitled to an instruction on involuntary intoxication. The evidence was that the defendant was taking several prescription medicines, which had been causing him to act erratically, and that he was under the influence of three medicines, all central nervous system depressants, at the time of the accident. The court held that it was error not to give the instruction.

CHAPTER 3 - MENTAL STATE (MENS REA)

Problem 10A. (Supp. p. 7)

Defendant would argue that no assault was committed because he never shot the gun or even chambered a round and he never aimed the gun at Officer. Consequently, a reasonable person could not conclude that a battery would naturally and probably result from his conduct. The prosecution would respond that Defendant was pointing his gun at a place where he thought Officer would appear, presumably for the purpose of shooting Officer, so, had the facts been as Defendant thought they were, a battery would have occurred.

(source: *People v. Chance*, 44 Cal.4th 1164, 189 P.3d 971 (2008) – assault conviction upheld)

Note: The Constitutionality of Excluding Psychiatric Testimony (Supp. p. 7)

In light of *Clark*, the *Wells* rule, barring “capacity” evidence on the issue of guilt was constitutional and, in fact, the legislature could have barred all mental disease evidence at the guilt phase as well.

In re Jorge M. (p. 153)

The California Supreme Court has continued to wrestle with how to determine, without guidance from the legislature, the appropriate *mens rea* for *malum prohibitum* crimes. In *People v. Salas*, 37 Cal.4th 967 (2006), the defendants were charged with sale of unregistered securities, a felony, and claimed that they had a good faith belief that the securities came within an exemption for sales to no more than 35 persons all of whom had a prior business relationship with the sellers. The trial court instructed that their belief was irrelevant, and, since the evidence was that they sold to 48 persons, they were convicted. The supreme court held that the defendants should have been allowed to defend on the grounds of their good faith belief, but that, since a defendant has the burden of proof as to any exemption, the defendants here would have the burden of establishing that they were not negligent in believing that the securities were exempt. *People v. King*, 38 Cal.4th 617 (2006) presented a fact situation similar to that in *Jorge M.*. The defendant was convicted of violating P.C. § 12020(a)(1), a wobbler, on evidence that he possessed a short-barreled rifle (less than 26 inches in overall length). The trial court had not instructed that the prosecution had the burden of proving the defendant’s guilty knowledge, despite the defendant’s claim that he did not know the length of the rifle. Justice Kennard, who dissented in *Jorge M.*, wrote the opinion for a unanimous court, holding that an element of the crime, as to which the

prosecution had the burden of proof, was the defendant's actual knowledge of the shortness of the rifle. She distinguished *Jorge M.* on the ground that, unlike the situation in that case, requiring proof of a defendant's actual knowledge as to the shortness of the rifle would "not impose an unduly heavy burden on the prosecution." (*Id.* at 643)

Problem 16 (p. 162)

After analyzing the factors set out in *Jorge M.*, the California Supreme Court agreed with the Court of Appeal that the crime was a strict liability public welfare offense. Nonetheless, relying on *People v. Vogel*, 46 Cal.2d 798 (1956), the court went on to hold that the defendant would be allowed to assert an *affirmative* defense of reasonable mistake of fact. *In re Jennings*, 34 Cal.4th 254 (2004).

CHAPTER 4 - THE DEFENSE CLAIM OF "REASONABLE MISTAKE"

Problem 20 (p. 187)

The California Supreme Court dismissed its grant of review in light of its decision in *People v. Leal*, 33 Cal.4th 999 (2004) (holding that "duress" in the context of forcible lewd acts on a child includes any threat of hardship to the victim but acknowledging that "duress" for purposes of the rape statutes is narrower since "hardship" is excluded from the definition of duress under those statutes). See *People v. Minsky*, 105 P.3d 115 (Cal. 2005).

Problem 22A (Supp. p. 9)

Defendant would argue that the state was estopped to prosecute her because City Attorney advised her that her proposed conduct was legal, she relied on that advice, and it would be unfair now to prosecute her. The prosecution would respond that Defendant cannot assert the estoppel defense because City Attorney, as attorney for the city council and therefore for Defendant, was not an independent government official charged with administering the law.

(source: *People v. Chacon*, 40 Cal.4th 558, 150 P.3d 755 (2007) – defense rejected)

CHAPTER 6 - HOMICIDE: UNINTENTIONAL KILLINGS

Problem 31A (Supp. p. 11)

Defendant would argue that, since the fetus would not have survived, he is not guilty of ending a life or potential life and that a life without the possibility of parole sentence for the killing of a non-survivable fetus is cruel and unusual punishment. The prosecution would respond that the murder statute punishes killing a fetus, not just taking a "life," and killing a fetus is an appropriate aggravating factor for a first degree murder case, warranting a higher sentence.

(source: *People v. Valdez*, 126 Cal.App.4th 575, 23 Cal.Rptr.3d 909 (2005) – conviction and sentence upheld)

Additional Problem (p. 254)

Defendant got in a fight with Girlfriend and strangled her to death. An autopsy revealed that she was 12 weeks pregnant, but Defendant did not know, and could not reasonably have known (because of Girlfriend's obesity), of the pregnancy. Defendant is charged with first degree murder of Girlfriend and second degree murder of the fetus. What are the arguments as to whether he is guilty of murdering the fetus?

(source: *People v. Pool*, 166 Cal.App.4th 904, 83 Cal.Rptr.3d 186 (2008) – held that strangling the mother no different than shooting the mother in *Taylor*, so murder conviction of the fetus upheld)

People v. Knoller (Supp. p. 11)

This case represents the court’s most recent clarification of the meaning of “conscious disregard for life” standard

- ◆ The court holds that, while the *objective* component of implied malice requires that the defendant have engaged in conduct with a high probability of death, the *subjective* component does require that the defendant have been aware that there was a high probability of death. At the same time, the subjective component is not satisfied by the defendant’s awareness only of the risk of serious bodily injury.

Further Discussion:

- Although the court holds that the prosecution need not prove that the defendant was aware of a *high probability* of death in order to prove the subjective component of implied malice, the court does not specify what it is that the prosecution does need to prove to meet the subjective component. Does the prosecution need to prove: that the defendant thought that death was likely? that there was a significant risk of death, but it was not likely? that death was a remote possibility?
- Do the facts support a finding of implied malice even under the correct standard? At what point in time did Knoller act with conscious disregard for human life – when she chose to walk (or even keep) a dangerous dog or when she omitted to care for Whipple after the attack? As to the former theory, the defendant argued that, while the dogs had caused minor injuries to people, there was no indication that they would kill a person, and, as to the latter theory, it is not clear that her failure to seek help contributed to Whipple’s death.

Additional Problem (after *People v. Knoller*)

Defendant and Father were the parents of six children, including one-year-old Son. They were separated, and there was a court order prohibiting Father from being at the apartment or having contact with the children unless a third person (other than Defendant) was present. Despite the court orders, Defendant sometimes allowed Father to stay at the apartment. On one of those occasions, at 7:00 in the evening, Son was crying, and Defendant saw Father throw him against the wall. Son stopped crying. In the middle of the night, Son being crying again, and Father punched him in the chest. When Defendant protested, Father told her not to get involved. Defendant then witnessed Father hit Son numerous times. At 6:00 a.m., Father told Defendant to go to bed and he would watch Son. Defendant went to bed, and, an hour later, Son was dead. In the opinion of the pathologist, Son had died from a combination of suffocation, the blunt force injuries he suffered and an overdose of children’s medicine. Defendant is charged with second degree murder (P.C. §§ 187-189). What are the arguments as to whether she is guilty on a theory of implied malice?

(source: *People v. Rolon*, 160 Cal.App.4th 1206, 73 Cal.Rptr.3d 358 (2008) – held that the defendant could be guilty of second degree murder either as a principal for her failure to act to prevent the death or as an aider and abettor of Father)

Problem 34 (p. 271)

People v. Brady, 129 Cal.App.4th 1314, 29 Cal.Rptr.3d 286 (2005), is another case where a defendant's reckless conduct on the ground led to a subsequent fatal collision between two pilots responding to the emergency. Defendant and a co-defendant were staying in a trailer in a heavily wooded area (and apparently were manufacturing methamphetamine). Defendant lit an outdoor fire in a fire ring to heat water for a bath, but a piece of paper caught fire and blew out of the ring and ignited a grass fire. Defendant tried unsuccessfully to put out the fire and then fled with the co-defendant. Forestry officials were alerted to the small forest fire and called in air support to drop fire retardant. After making a number of runs, one pilot suddenly approached the drop point from the wrong direction and at the wrong altitude and crashed into another pilot making a drop. Both pilots were killed. The defendants were charged with murder and other crimes, and were convicted of unlawfully causing a fire resulting in great bodily injury (P.C. § 452(a)), with the enhancement that the victims were emergency personnel (P.C. 452.1(a)). The Court of Appeal affirmed Defendant's conviction, rejecting his challenges to the proof and instructions on causation and the trial court's refusal to admit evidence of the errant pilot's recklessness.

Problem 35 (p. 272)

In *People v. Calhoun*, 40 Cal.4th 398, 150 P.3d 220 (2007), a similar drag racing case where one of the racers struck and killed third parties, the California Supreme Court assumed that the defendant, whose car did not strike the victims, was guilty of vehicular manslaughter as an aider and abettor of the other racer.

CHAPTER 7 - HOMICIDE: KILLINGS IN THE COMMISSION OF ANOTHER CRIME

People v. Smith (p. 311)

The court discusses *People v. Wilson*, 1Cal.3d 431 (1969), which held that the merger rule applied to burglary-murder cases when the burglary involved an entry to commit an aggravated assault. *Wilson* was recently overruled in *People v. Farley*, 46 Cal.4th 1053 (2009), where the court held that the legislature's decision to make burglary a basis for first degree felony-murder could not be limited by a court-created doctrine.

Problem 45 (p. 316)

In *People v. Howard*, 34 Cal.4th 1129 (2005), the California Supreme Court concluded that a violation of § 2800.2 was not inherently dangerous to life because "willful or wanton disregard" was so broadly defined as to encompass the commission of clearly non-dangerous Vehicle Code violations, e.g., driving an unregistered vehicle.

People v. Chun (Supp. p. 19)

In response to the attacks on the second degree felony-murder rule in general (as having no statutory basis) and to the "merger" rule in particular (for the inconsistencies created by *People v. Hansen* (p. 316) and subsequent cases), the court undertakes yet another reformulation of the two rules.

- ◆ Despite the fact that, in the past 25 years, various justices had declared (without contradiction) that the second degree felony-murder rule was a common law doctrine that had no statutory basis, the court now holds that the felony-murder rule has a statutory basis in Penal Code § 188's definition of implied malice. According to the court, there

are two forms of implied malice: (1) reckless disregard of a high probability of death; and (2) intentional commission (or attempted commission) of a felony dangerous to life. The court justifies this formulation as an explication of the common law term “abandoned and malignant heart” in the statute.

- ◆ The court goes on to reject the application of the second degree felony-murder rule in this case on the ground that the underlying felony, shooting into an occupied vehicle (P.C. § 246), merges. The court finds that the state of the law on the merger rule is problematic for several reasons: (1) the court has been inconsistent in its formulation of the rule; (2) the rule leads to anomalous results: the felony merges when the killing is intentional, but not when it is accidental; (3) application of the rule requires fact-finding, presumably by the jury. The court then restates the rule as follows: “When the underlying felony is assaultive in nature, . . . the felony merges with the homicide and cannot be the basis of a felony-murder instruction.” The court finds that § 246 is assaultive in nature, as is any crime with elements that have “an assaultive aspect,” even if the elements also include conduct that is not assaultive. Justice Baxter, dissenting from this aspect of the holding, argues that: (1) the majority’s reformulation of the felony-murder rule as an aspect of implied malice entirely undercuts the rationale supporting the merger rule (which was adopted to prevent the prosecution from avoiding the obligation to prove malice); and (2) the second degree felony-murder rule is effectively eviscerated because very few inherently dangerous felonies will not have an “assaultive aspect.”

Further Discussion:

- In *People v. Washington* (p. 293), the California Supreme Court stated that the purpose of the felony-murder rule was “to deter felons from killing negligently or accidentally,” and it was not to deter the commission of the felony itself. The court reiterated this understanding in a number of subsequent cases, *e.g.*, *People v. Smith* (p. 311). Here the court says both purposes support the felony-murder rule. How can the rule operate to deter a defendant from committing a felony where the defendant does not intend to kill and is not aware of the risk of death?
- Does the holding in *Chun* have any implications for the first degree felony-murder rule? Although the court in *Chun* notes that *Dillon* held there was a statutory basis for the first degree felony-murder rule (P.C. § 189), if the felony-murder rule is in fact contained in the definition of implied malice, it would seem to be both illogical and unlikely that the legislature would also have inserted the felony-murder rule into P.C. § 189. If the statutory basis for the felony-murder rule is P.C. § 188, then P.C. § 189 would be, what to all appearances it is, simply a degree-setting statute. However, if the first degree felony-murder rule is a form of implied malice, is it also subject to the “dangerous to life” limitation discussed in *Chun*? If so, that would bar application of the felony-murder rule for at least some felonies, most clearly burglary, listed in P.C. § 189.

CHAPTER 9 - PROPERTY CRIMES

Problem 51A (Supp. p. 31)

Defendant would argue that, in taking back the check, he was reclaiming his property since Clerk was not going to use the check for the intended purpose and, further, that the check, being forged, had no value. The prosecution would respond that Defendant could not assert a claim of right to illegal property, and, even if the check was not worth the amount on its face, the paper had some

intrinsic value.

(source: *People v. Cuellar*, 165 Cal.App.4th 833, 81 Cal.Rptr.3d 252 (2008) – theft conviction upheld)

Note: “Constructive possession” of property (Supp. p. 31)

While any employee present may have constructive possession of the employer’s property, to prove a robbery of that employee, the prosecution must still prove the other elements of robbery as to that employee, *i.e.*, that the property was taken by force or fear.

Problem 58A (Supp. p. 31)

Defendant will argue that his entry violated no possessory right of Wife since he was part owner of the home, Wife had no court order or other legal authority to bar him from entering, and he had only been absent from the home for a day. The prosecution will respond that by voluntarily leaving and returning his keys to Wife, Defendant gave up his possessory interest in the home, and, therefore, he violated Wife’s possessory rights when he entered.

(source: *People v. Gill*, 159 Cal.App.4th 149, 70 Cal.Rptr.3d 850 (2008) – burglary conviction upheld)

CHAPTER 10 - INCHOATE CRIMES

People v. Smith (Supp. p. 33)

The issue in the case is whether Smith, who, from behind a car, fired a single shot at the driver of a car, can be guilty of two counts of attempted murder because the driver’s baby was a car seat behind the driver’s seat.

- ◆ As the dissent points out, the Attorney General argued two theories: (1) that the defendant targeted and intended to kill the baby; and (2) that the defendant had a concurrent intent to kill both the driver and the baby. The majority accepts the former theory, holding that, even though the defendant intended to kill the driver and had no *motive* to kill the baby, his intent also to kill the baby could be inferred from his deliberate firing, his awareness of the baby’s location and the trajectory of the bullet. The dissent argues that, although the evidence might establish that the defendant acted with reckless disregard as to the baby, all the evidence points to the fact that he intended to kill the driver, not the baby. Further, it would be mere speculation to suggest that the defendant intended to kill both by shooting a bullet through the baby at the driver.

Further Discussion:

- The dissent explains the court’s “kill zone” (concurrent intent) theory under which a defendant who intends to kill a single person, but who uses force likely to kill others in the vicinity – putting a bomb on an airliner, firing at a group with a hail of bullets – will be presumed to have intended to kill everyone in the kill zone and will be guilty of multiple counts of attempted murder.

People v. Superior Court (Decker) (Supp. p. 43)

The defendant concedes that he had the intent to kill his sister and that he solicited a supposed “assassin” to do the killing. The issue is whether his conversations with the “assassin,” including his making a down payment on the killing, constituted an attempt to commit murder.

- ◆ The court holds that the defendant, whose intent to kill was manifest, did sufficient acts to

constitute an attempt because even “slight acts” are sufficient when intent is clear and, in any event, the defendant did “all that he needed to do to accomplish the murders.” Justice Werdegar, in dissent, argues, in effect, that when a defendant solicits another to commit a crime and has no intent to participate in the commission of the crime himself, he cannot be guilty of an attempt unless the person solicited attempts the crime.

Further Discussion:

- The court says that solicitation alone does not constitute an attempt and that solicitation plus payment does not always constitute an attempt. Since payment would clearly constitute at least a “slight act” toward the commission of the crime, is the court suggesting that a different standard applies when the crime is to be committed by another? How should a jury be instructed in the *Decker* situation?
- What is the point of footnote #4? It seems to suggest that defendant might have been successful had he argued that the “assassin” had no intention of committing the murders. However, as will be discussed later in the chapter, factual impossibility is no defense to an attempt charge.

Additional Problem (after *People v. Rubin*, p. 451)

Students might be presented with the following problem raising First Amendment issues:

Student was a troubled 15-year old who had transferred into High School two weeks previously. On Friday, at the end of his English class, he approached Mary, whom he did not know, and asked, “Is there a poetry club here?” He then handed her two sheets of paper and asked her to read them. On the top page was written, “These poems describe me and my feelings. Tell me if they describe you and your feelings.” On the second page, under a label, “Dark Poetry,” was written the following poem:

FACES

Who are these faces around me?
Where did they come from?
They would probably become the next doctors or lawyers or something.
All really intelligent and ahead in their game.
I wish I had a choice on what I want to be like they do.
All so happy and vagrant.
Each original in their own way.
They make me want to puke.
For I am Dark, Destructive & Dangerous.
I slap on my face of happiness, but inside I am evil!!
For I can be the next kid to bring guns to kill students at school.
So, Parents, watch your children cuz I'm BACK!

Student had a blank face when he handed the poem to Mary. Upon reading the “Faces” poem, Mary became frightened, handed the poem back and left the campus in fear. Subsequently, Student handed the same poem to another student, Erin, whom he had spoken with on several occasions. Erin did not read the poem until Monday, when she was called into the principal’s office and asked to read it, at which time she became frightened. Student is charged with making criminal threats to Mary and Erin (P.C. § 422). What arguments should be made on whether the poem was a true threat and whether it was protected by the First Amendment?

(source: *In re George T.*, 33 Cal.4th 620 (2004) – holding that poem did not constitute a true threat)

CHAPTER 12 - AFFIRMATIVE DEFENSES – CHOICE OF EVILS

A. Self-defense

People v. Randle (Supp. p. 53)

In the course of overturning the defendant's conviction, the court addresses three questions: (1) What constitutes the affirmative defense of defense of another? (2) Is there a "partial defense" of imperfect defense of another? (3) Would the facts of this case support imperfect defense of another?

- ◆ Penal Code § 197(3) covers homicides committed in defense of a member of a defendant's household and states that a defendant has a defense based on a *reasonable belief* that the person being defended was entitled to use deadly force. The section might be read to imply that *reasonable belief* would not be sufficient to constitute a defense in the case of defense of non-household members, *i.e.* that, as to all others, the defendant has a defense only if the other person was in fact entitled to use deadly force. The court rejects this reading and holds that a defendant who reasonably believes another person is attacked with deadly force may use deadly force to defend him or her.
- ◆ The court holds that, if a person who unreasonably believes in the need to use deadly force in self-defense acts without malice (*In re Christian S.*), so too a person who unreasonably believes in the need to use deadly force in defense of another acts without malice and is only guilty of voluntary manslaughter.
- ◆ The Attorney General argued that defendant was not entitled to rely on defense of another (and therefore was not entitled to assert imperfect defense of another) because he and Byron W. were the initial wrongdoers, and he was the first to resort to deadly force when he fired his gun. The court explains that, after the initial encounter, defendant and Byron W. retreated, so that Robinson, although entitled to use reasonable force to recover the property or make an arrest, was not entitled to use deadly force against Byron W. If defendant unreasonably believed that Robinson was using deadly force, he was entitled to assert imperfect defense of another.

C. Necessity and Duress

Problem 79A (Supp. p. 61)

Defendant would argue that: Friend's possession of, or access to, a gun, given her drunken condition, posed an immediate and greater threat than Defendant's temporary possession of the gun; there were no reasonably available alternatives; and Defendant was not at fault in creating the situation. The prosecution would respond that: at the time Defendant took possession of the gun, there was no immediate threat since the gun was in the glove compartment; there were alternatives available to him, *e.g.*, staying at the hospital until Friend sobered up; and Defendant was at fault for creating the situation by allowing Friend to bring the gun and the daiquiris on the trip.

(source: *United States v. Kemp*, 546 F.3d 759 (6th Cir. 2008) – conviction upheld)

CHAPTER 13 - AFFIRMATIVE DEFENSES – EXCUSES

B. Insanity

Note: *The Constitution and the Insanity Defense* (Supp. p. 63)

As noted in *Skinner*, the second prong of *M’Naghten* is broader than, and subsumes, the first prong, so eliminating the second prong is a more drastic limitation, a return to the “wild beast” test. Therefore, assuming that some form of insanity test is required by due process, the Court’s decision in *Clark* does not necessarily signal that the Court would approve a return to the “wild beast” test.

Problem 88 (p. 608)

The California Supreme Court upheld the commitment. See *People v. Hurtado*, 28 Cal.4th 1179 (2002).

CHAPTER 14 - ACCOMPLICE AND CORPORATE VICARIOUS LIABILITY

A. Accomplice Liability

Note: *Assisted Suicide and the Constitution* (p. 646)

In *Gonzales v. Oregon*, 546 U.S. 243 (2006), a case involving the Oregon Death With Dignity Act, the Supreme Court held (6-3) that the United States Attorney General had exceeded his authority by issuing an Interpretive Rule under the federal Controlled Substances Act to the effect that using controlled substances to assist suicide was not a legitimate medical practice and dispensing or prescribing them for this purpose was unlawful.

CHAPTER 15 - SCOPE OF VICARIOUS LIABILITY

Note: *Withdrawal* (Supp. p. 67)

Assuming that the jury instructions are a correct statement of the law in California, an accomplice must do more to avoid liability for substantive crimes than a co-conspirator. Both have to notify the other participants of their withdrawal, but additionally the accomplice must attempt to thwart the commission of the aided crime. This distinction makes sense because the accomplice has done more to promote the substantive crime (giving actual aid rather than mere agreement) and so must do more to “undo” his/her participation. This may be the appropriate occasion to address the students’ confusion in attempting to distinguish between co-conspirators and accomplices by pointing out that in virtually all cases a defendant who is in one category is in the other. Most co-conspirators aid in the commission of the object crime, and most accomplices aid as a result of a prior agreement to commit the crime.

People v. Medina (Supp. p. 67)

This case is the California Supreme Court’s latest word on, and perhaps the most expansive interpretation of, the “natural and probable consequences” doctrine. Defendants Medina, Marron and Vallejo, members of the Lil Watts street gang, participated in a fistfight with the victim, a member of a rival gang. Subsequently, Medina retrieved a gun and shot the victim as he was driving away. Marron and Vallejo, along with Medina were convicted of first degree murder.

◆ The court holds that, since gangs in general (and the Lil Watts gang in particular) regularly

engage in violence with guns, and since gang culture requires gang members to confront members of another gang, verbally and physically, to gain their respect or defend the gang's turf, it was reasonably foreseeable – and was foreseen by the owner of the house and by someone else who called for a gun – that the fistfight would escalate into a murder. The dissent argues that the murder was not a “probable” consequence of the fistfight since there was no credible evidence that anyone but Medina knew that he had a gun, and the gang expert and homeowner only testified that murder was one of many possible consequences.

Further Discussion:

- The court divides over how “probable” murder has to be to hold accomplices liable and how probable it was on these facts. As to the legal standard, it is clear that the prosecution does not have to prove that a murder was more likely than not, but presumably something more than a mere possibility is required. Is a 10% chance that a murder will occur enough to make it “probable”? A 1% chance? As to how probable murder was on these facts, should the prosecution have been required to, or the defense have been permitted to, introduce evidence as to how often gang confrontations result in murders?
- The key to the holding is that Marron and Vallejo were members of a violent street gang, and, consequently, that, irrespective of what they actually knew about Medina and the presence of the gun, they, as gang members, should have foreseen the possibility of a murder from an unarmed fistfight. (That must have been the reasoning of the jury as well since they acquitted Falcon, who participated in the fistfight by preventing the homeowner from breaking it up, and who almost certainly knew about gang culture, but who was not himself a member of the gang.) If it is Marron's and Vallejo's gang membership that makes them liable for the murder, are they really being held on a conspiracy theory rather than for their aid in the fistfight? If so, would another gang member who stood by and watched the fight or a gang member who remained in the house also be guilty of murder?

Problem 96A (Supp. 77)

This problem is of course the *Woods* case, replaced by *Medina*. Defendant would argue that, even though he might be guilty of a lesser homicide, he cannot be guilty of first degree murder since it was unforeseeable that Killer would commit a premeditated murder of a stranger. The prosecution would respond that, under the natural and probable consequences doctrine, all that has to be foreseen is that a homicide of some sort would take place from beatings and a robbery, at which point Defendant is liable for whatever form of homicide Killer committed.

(source: *People v. Woods*, 8 Cal.App.4th 1570, 11 Cal.Rptr.2d 231 (1992) – defendant entitled to instruction on second degree murder)

CHAPTER 16 - THE DEATH PENALTY AND THE CONSTITUTION

Kennedy v. Louisiana (Supp. p. 81)

The Court holds (5-4) that, in cases of crimes against individuals, the Eighth Amendment prohibits imposition of the death penalty except as to homicides. The Court, in form at least, reaches this conclusion by applying the two-part test developed in its earlier proportionality cases.

- ◆ Justice Kennedy, writing for the majority, finds that there is a strong national consensus against the death penalty for child rape – 44 states and the Federal Government rejecting the death penalty and only six states allowing it – a stronger consensus even than supported the Court's rejection of the death penalty in *Enmund*, *Atkins* and *Roper*. Kennedy also points out

that there have been no executions for child rape since 1964 and that the defendant is one of only two people sentenced to death for child rape since *Furman*. Justice Alito, writing for the dissenters, disputes the significance of the fact that only six states authorize the death penalty for child rape, pointing out that those six states represent a very recent trend produced by the dramatic increase in reported child sexual abuse and that other states would have adopted similar statutes but for their confusion over scope of the *Coker* decision. He dismisses the paucity of death sentences for child rape on the ground that the statutes are all new, and he cites the fact that two out of the four juries in Louisiana deciding the penalty under the new law voted for death. [These last two points seem dubious. While three of the state statutes were enacted in the past two years, the Louisiana and Montana statutes are more than ten years old, and Georgia's is nine years old, surely enough time for prosecutions to have been brought. And the fact that two out of four juries brought in death verdicts says nothing about the acceptability of the death penalty for child rape absent information about how many cases there were where the prosecution could have sought the death penalty and did not.]

- ◆ In bringing the Court's "own judgment to bear" on the question, Justice Kennedy expresses doubts that the penalty serves the penological purposes of retribution (because the child rapist is not as depraved as the murderer and does not do as much harm) or deterrence (because of the problem of underreporting of child rape and the risk of encouraging rapists to kill). However, Justice Kennedy adduces other arguments – only loosely related to the issue of penological purpose – against finding the death penalty constitutional: the breadth of the death penalty if applied to child rape and the difficulty of locating narrowing principles, the risk of wrongful convictions (a concern previously raised in *Atkins*), the potential harm to the child victim and the questionable morality of enlisting the child in the pursuit of the death penalty. Justice Alito dismisses most of the majority's arguments as having nothing to do with an Eighth Amendment proportionality test, eschews (as does the majority) any discussion of whether the death penalty has a deterrent effect in this context and rejects the majority's retribution analysis. He argues that a child rapist is more depraved than some murderers on whom a death sentence may be imposed and that the harm to the victim, and therefore to society as a whole, is great.

Further Discussion:

- The decision describes the issue in the case as being "whether the death penalty is disproportionate to the crime," applies the Court's two-part proportionality analysis and cites to the Court's prior proportionality cases, but is that the whole of the Eighth Amendment argument that Justice Kennedy is making? It seems that he also is arguing that allowing the death penalty for child rape would run afoul of *Furman* itself by creating too great a risk of arbitrariness. His concern seems to be that extending the death penalty to a new category of cases – a category larger than the category of death-eligible murderers – with no already devised limiting factors, and where procedural aspects of the cases in that category create a higher than normal risk arbitrary or erroneous imposition of the death penalty threatens to undo the Court's narrowing jurisprudence developed over the last thirty-five years. It is this concern for sanctioning too broad a death penalty that may account for the majority's decision to draw a bright line barring the death penalty for non-homicidal crimes in lieu of a narrower decision holding this statute unconstitutional but leaving open the possibility of permitting the death penalty for the kinds of more aggravated versions of child rape suggested by Justice Alito.

- Curiously, both opinions cite to the relative indefiniteness of the narrowing aggravators approved in *Arave v. Creech*, 507 U.S. 463 (1993), *Walton v. Arizona*, 497 U.S. (1990) and *Jurek v. Texas*, 428 U.S. 262 (1976) in support of their positions. Justice Kennedy, citing the potential of the standards “to result in some inconsistency of application,” appears to be saying that the Court has already approved a relatively broad death penalty and therefore should not go further. In contrast, Justice Alito argues that there should be no problem for the states to come up narrowing aggravators for child rape at least as definite as those already approved by the Court.
- Justice Kennedy cites the unreliability of child witnesses and the likelihood that the victim will be the only percipient witness to the crime as a reason for finding an Eighth Amendment violation – is this a proper factor in an Eighth Amendment analysis? As Justice Alito points out, the concern does not seem to fit within a proportionality analysis. However the concern does seem relevant to the Court’s holding that the Eighth Amendment requires “heightened reliability” in the determination of guilt and punishment in a death penalty case. See *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).
- Justice Kennedy, repeating his formulation from *Panetti v. Quarterman*, 551 U.S. 930 (2007), links retribution to the judgment, not only of the community, but also of “the surviving family and friends of the victim” as to whether the death penalty must be imposed. He goes on to state that the question is whether the death penalty “balances” the wrong to the victim and then discusses whether the victim’s “hurt is lessened” by a death sentence. Is this victim-centered view of retribution appropriate, or is retribution judged by a community standard?
- What are the implications of this decision, if any, for the constitutionality of the death penalty as applied to particular forms of murder? On the one hand, the Court appears to have drawn a bright line between murder and non-homicide crimes, suggesting the decision has no implications for murder. On the other hand, Justice Kennedy points out the lack of a “unifying principle” to the Court’s death penalty jurisprudence and seems to express misgivings about the breadth of the death penalty. He also twice distinguishes child rape from *intentional* murder, as if to suggest that *unintentional* murder also may not justify the death penalty.