



11-1-1990

People v. Patterson: California's Second Degree Felony-Murder Doctrine at the Brink of Logical Absurdity

M. Susan Doyle

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Law Commons](#)

Recommended Citation

M. S. Doyle, *People v. Patterson: California's Second Degree Felony-Murder Doctrine at the Brink of Logical Absurdity*, 24 Loy. L.A. L. Rev. 195 (1990).

Available at: <https://digitalcommons.lmu.edu/llr/vol24/iss1/7>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

**PEOPLE V. PATTERSON: CALIFORNIA'S SECOND
DEGREE FELONY-MURDER DOCTRINE AT
"THE BRINK OF LOGICAL
ABSURDITY"**

I. INTRODUCTION

Felony-murder has been attacked as a concept "grossly misplaced in a legal system which recognizes the degree of mental culpability as the appropriate standard for fixing criminal liability."¹ This is because the underlying principle of criminal law is that criminal liability for causing a particular result is justified only where some culpable mental state with respect to that result exists.² Under the doctrine of felony-murder, however, it is unnecessary to prove intent to kill or an intent to act with conscious disregard for life.³ In contrast, an essential element of the crime of murder is to act with malice aforethought.⁴ This is equivalent to an intent to kill or an intent with conscious disregard for life to com-

1. Note, *The Felony-Murder Rule: In Search of a Viable Doctrine*, 23 CATH. LAW. 133, 160 (1977).

In *People v. Washington*, the California Supreme Court acknowledged the substantial body of legal scholarship which had concluded that the doctrine incorporates an artificial concept of strict criminal liability that "erodes the relations between criminal liability and moral culpability." 62 Cal. 2d 777, 783, 402 P.2d 130, 134, 44 Cal. Rptr. 442, 446 (1965).

The *Model Penal Code* attempts to eliminate the fictitious connection which links the culpability of committing an ordinary felony to that required for murder. MODEL PENAL CODE § 210.2(1)(b) (1985). The *Code* requires that the minimum culpability for murder be greater than reckless killing. *Id.* In addition to being reckless, the killing must be committed under circumstances manifesting extreme indifference to the value of human life. *Id.* *Model Penal Code* section 210.2(1)(b) provides:

(1) Except as provided in Section 210.3(1)(b), criminal homicide constitutes murder when

. . . .

(b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are *presumed* if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit, robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.

Id. (emphasis added).

The *Model Penal Code* suggests that killing in the course of a dangerous felony should be merely presumptive of the culpability required for homicide. *Id.* Thus, if the presumption is rebutted, the killing in the course of a felony should be treated no differently than other killings.

2. See MODEL PENAL CODE § 2.02 (1985).

3. *People v. Satchell*, 6 Cal. 3d 28, 43, 489 P.2d 1361, 1372, 98 Cal. Rptr. 33, 44 (1971).

4. CAL. PENAL CODE § 187 (West 1988).

mit acts likely to kill.⁵ Nonetheless, recognizing public sentiment favoring tough penalties for criminal activity, it seems that legislators do not want to appear to advocate a position considered "soft on crime."⁶

The goal of the felony-murder rule is to deter criminals from committing felonies with unnecessary violence which might result in death.⁷ To effectuate this goal, the felony-murder rule ascribes malice aforethought to the felon who kills in the perpetration of an inherently dangerous felony.⁸ In this way, the felony-murder doctrine allows courts to hold criminals liable for all fatalities that occur during the commission of a felony without requiring the state to establish a culpable mental state.⁹

First degree felony-murder is a statutory crime that applies to deaths that occur during felonies such as robbery, burglary or rape.¹⁰ Second degree felony-murder, on the other hand, is a judicially-created crime which refers to deaths that occur during lesser felonies such as vehicular homicide.¹¹ Both first and second degree felony-murder, though, treat the intent to commit the underlying felony as a substitute for the *mens rea* required to support a murder conviction.¹²

In recent years, the California Supreme Court has characterized the second degree felony-murder doctrine as both "anachronistic"¹³ and "disfavored."¹⁴ Specifically, the court has stated that second degree felony-murder "remains . . . a judge-made doctrine without any express basis in the Penal Code"¹⁵ and suggested the need for legislative action clarifying the parameters and application of the doctrine.¹⁶

5. See *People v. Thomas*, 41 Cal. 2d 470, 476-77, 261 P.2d 1, 5 (1953) (Traynor, J., concurring); see also CAL. PENAL CODE §§ 187-189 (West 1988). Murder is defined as the unlawful killing of a human being with malice aforethought. CAL. PENAL CODE § 187.

6. Note, *supra* note 1, at 161.

7. *People v. Burroughs*, 35 Cal. 3d 824, 833, 678 P.2d 894, 900, 201 Cal. Rptr. 319, 325 (1984).

8. *Satchell*, 6 Cal. 3d at 43, 489 P.2d at 1372, 98 Cal. Rptr. at 44.

9. *People v. Dillon*, 34 Cal. 3d 441, 497, 668 P.2d 697, 733, 194 Cal. Rptr. 390, 426 (1983) (Bird, C.J., concurring).

10. CAL. PENAL CODE § 189.

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

12. Note, *supra* note 1, at 133; see also *Satchell*, 6 Cal. 3d at 43, 489 P.2d at 1372, 98 Cal. Rptr. at 44.

13. *People v. Phillips*, 64 Cal. 2d 574, 583 n.6, 414 P.2d 353, 360 n.6, 51 Cal. Rptr. 225, 232 n.6 (1966).

14. *People v. Henderson*, 19 Cal. 3d 86, 92, 560 P.2d 1180, 1183, 137 Cal. Rptr. 1, 4 (1977).

15. *Dillon*, 34 Cal. 3d at 472 n.19, 668 P.2d at 715 n.19, 194 Cal. Rptr. at 408 n.19.

16. *Id.* The footnote states in pertinent part:

We recognize that from the standpoint of consistency the outcome of [case precedent] analysis leaves much to be desired. Although the misdemeanor-manslaughter rule is plainly a creature of statute, we reach the same conclusion as to the first degree felony-murder rule only by piling inference on inference; and the second de-

The court has previously exhibited its disfavor with the felony-murder doctrine by placing restrictions on the application of second degree felony-murder.¹⁷ One of these restrictions is that the felony involved must be "inherently dangerous."¹⁸ If the felony is not inherently dangerous, then the court cannot apply the second degree felony-murder rule.¹⁹ Another restriction is that when determining whether the felony is inherently dangerous, the court must consider the statute codifying the felony "in the abstract"²⁰ and "in its entirety."²¹

The court's continued uneasiness with the felony-murder doctrine recently manifested itself in the sharply divided decision of *People v. Patterson*.²² In *Patterson*, the issue was whether the felony-murder doctrine should apply to a defendant who furnished cocaine to a person who died by ingesting it.²³ Having noted that the state legislature declined the supreme court's suggestion to reconsider the application of first and second degree felony-murder,²⁴ the court again imposed its own limitations on the use of the doctrine.²⁵ The court's opinion reflects the difficulties the California second degree felony-murder doctrine presents in its application and raises questions about the doctrine's viability.

The California Supreme Court in *Patterson*, in a four to three decision, held that a drug dealer can be prosecuted for second degree felony-murder only in circumstances where there is a *high probability* that furnishing the drug would prove fatal.²⁶ The previous standard for charging second degree felony-murder, which the appellate court had applied, had been whether a *substantial risk* that someone would be killed existed at the time the felony was committed.²⁷ By creating this "high probability"

gree felony-murder rule remains, as it has been since 1872, a judge-made doctrine without any express basis in the Penal Code. A thorough legislative reconsideration of the whole subject would seem to be in order.

Id. (citations omitted).

17. See *infra* notes 57-119 and accompanying text.

18. *People v. Ford*, 60 Cal. 2d 772, 795, 388 P.2d 892, 907, 36 Cal. Rptr. 620, 635, cert. denied, 377 U.S. 940 (1964).

19. *Id.*

20. See *infra* notes 72-91 and accompanying text.

21. See *infra* notes 92-119 and accompanying text.

22. 49 Cal. 3d 615, 778 P.2d 549, 262 Cal. Rptr. 195 (1989).

23. *Id.* at 617, 778 P.2d at 551, 262 Cal. Rptr. at 197.

24. *Id.* at 621, 778 P.2d at 554, 262 Cal. Rptr. at 200.

25. See *infra* notes 165-99, 265-309 and accompanying text for a discussion of the *Patterson* court's limitations on the use of the second degree felony-murder doctrine.

26. *Patterson*, 49 Cal. 3d at 618, 778 P.2d at 551, 262 Cal. Rptr. at 197.

27. *Id.* at 628-29, 778 P.2d at 559, 262 Cal. Rptr. at 205 (Lucas, C.J., concurring and dissenting). Chief Justice Lucas wrote:

We recently set forth in *People v. Burroughs*, another second degree felony murder case, the correct and proper test for determining the inherent dangerousness of an

standard, the *Patterson* court virtually eliminated felony-murder prosecutions for drug fatalities since few drug-related offenses pose a high probability of death.²⁸

Although the court appeared to try to limit the application of the second degree felony-murder rule by creating this new, stricter standard of inherent dangerousness, the court ironically expanded application of the rule by concluding that the statute proscribing furnishing cocaine did not need to be considered in its entirety to determine whether its violation was inherently dangerous.²⁹ The well-established rule prior to *Patterson* required that the statute be considered "in the abstract" and "in its entirety" to determine whether the defendant's crime was inherently dangerous.³⁰ Applying this rule, the appellate court in *Patterson* held that furnishing cocaine was not inherently dangerous since there are various non-dangerous methods of violating the statute proscribing furnishing cocaine.³¹ The supreme court, however, considered only the individual offense actually committed by Patterson and not the entire statute without expressly overturning the previous rule.³² In this way, the new, higher standard of inherent dangerousness effectively swallowed up the court's expansion of second degree felony-murder's application created by the abandonment of the viewed in it's entirety standard. The

offense. There, we referred to a felony "inherently so dangerous that by its very nature, it cannot be committed without creating a *substantial risk* that someone will be killed."

Id. (quoting *People v. Burroughs*, 35 Cal. 3d 824, 833, 678 P.2d 894, 900, 201 Cal. Rptr. 319, 325 (1984)). The Chief Justice continued, "[T]his formulation was not the creation of the *Burroughs* court. As one commentator has observed, citing English cases from 1887 and 1898, at common law the second degree felony murder rule was 'limited by the requirement that the commission of a felony involve *substantial human risk.*'" *Id.* (quoting Pike, *Second Degree Murder in California*, 9 S. CAL. L. REV. 112, 118 (1936)).

28. Chief Justice Lucas, vigorously dissenting to this new standard, asserted that the majority's "unrealistic, unwise and unprecedented" ruling would effectively bar most, if not all, second degree felony-murder charges in deaths resulting from cocaine, heroin and other illicit substances. *Patterson*, 49 Cal. 3d at 628, 778 P.2d at 558, 262 Cal. Rptr. at 204 (Lucas, C.J., concurring and dissenting). Chief Justice Lucas also noted that, in applying the previous standard,

the relevant question would be whether furnishing a particular drug such as cocaine or heroin created a substantial risk of death. Although that test may be difficult for the prosecution to meet, the majority's alternative test will entirely foreclose the possibility of a murder charge in all of these cases.

Id. at 629, 778 P.2d at 559, 262 Cal. Rptr. at 205 (Lucas, C.J., concurring and dissenting).

29. See *infra* notes 169-92, 268-92 and accompanying text.

30. *Patterson*, 49 Cal. 3d at 630, 778 P.2d at 560, 262 Cal. Rptr. at 206 (Mosk, J., concurring and dissenting). See *infra* notes 72-119 and 257-61 for a discussion of cases creating and applying this requirement.

31. *People v. Patterson*, 247 Cal. Rptr. 885, 894-95 (1988) (depublished from official reporter), *rev'd*, 49 Cal. 3d 615, 778 P.2d 549, 262 Cal. Rptr. 195 (1989).

32. *Patterson*, 49 Cal. 3d at 625, 778 P.2d at 556, 262 Cal. Rptr. at 202.

high probability standard will preclude the application of the doctrine to most, if not all, drug furnishing cases.³³ Thus, the California Supreme Court has retained the felony-murder doctrine in conjunction with drug-furnishing offenses, but it may have done so fictitiously.

This Note discusses the historical development of felony-murder and second degree felony-murder in California prior to and including *People v. Patterson*.³⁴ This Note traces the origins of California's unique "viewed in the abstract" and "in its entirety" requirements which preclude consideration of the particular facts surrounding the commission of a felony in determining whether felony-murder can be premised on a defendant's crime.³⁵ Next, in analyzing the reasoning in *Patterson* in light of precedent, this Note illustrates why the supreme court should have allowed the appellate court's dismissal of the murder charge to stand.³⁶ In particular, this analysis demonstrates that the supreme court's reasoning was inconsistent with its own rules governing application of the second degree felony-murder doctrine³⁷ and that the *Patterson* court's opinion illustrates the muddled state of the law governing the applicability of the felony-murder doctrine. This Note then demonstrates how the decision of the divided court in *Patterson* shows that the second degree felony-murder doctrine is unworkable and, therefore, this Note proposes reform.³⁸ Specifically, this Note proposes that the second degree felony-murder doctrine should be codified by the legislature and the specific crimes upon which a charge of second degree felony-murder can be based should be enumerated.

II. HISTORICAL BACKGROUND OF FELONY-MURDER

Under early common law, one whose conduct brought about an unintended death in the commission or attempted commission of a felony was guilty of murder.³⁹ This was true regardless of whether the nature of the felony involved was dangerous or whether death would ordinarily occur from the defendant's conduct during the commission or attempted commission of the felony.⁴⁰ The rationale underlying the common law approach was that all homicides were criminal regardless of the mental

33. Carrizosa, *High Court OKs Murder Charges for Drug Deaths*, L.A. Daily J., Sept. 8, 1989, at 1, col. 2.

34. See *infra* notes 39-199 and accompanying text.

35. See *infra* notes 72-119 and accompanying text.

36. See *infra* notes 251-319 and accompanying text.

37. See *infra* notes 251-319 and accompanying text.

38. See *infra* notes 320-47 and accompanying text.

39. 2 W. LAFAVE & A. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 7.5 (1986).

40. *Id.*

state of the actor⁴¹ and therefore, like all felonies, were punishable by death.⁴² As relatively minor offenses became classified as felonies, however, the felony-murder rule was limited to alleviate its harshness.⁴³

In the 1887 case of *Regina v. Serné*,⁴⁴ an English court limited the felony-murder doctrine by requiring that the defendant's conduct in committing the felony involve an act of violence.⁴⁵ The court reasoned that "any act known to be dangerous to life, and likely in itself to cause death done for the purpose of committing a felony which caused death, should be murder."⁴⁶ Courts in England further limited the felony-murder doctrine by requiring that the death be a natural and probable consequence of the defendant's conduct in committing the felony.⁴⁷

In the United States, the law of felony-murder varies from state to

41. *People v. Burroughs*, 35 Cal. 3d 824, 838, 678 P.2d 894, 903, 201 Cal. Rptr. 319, 328 (1984) (Bird, C.J., concurring) (citing R. MORELAND, *THE LAW OF HOMICIDE* 1-4 (1952)); see also Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815, 823 (1980) (culpability distinctions based upon actor's state of mind were ignored under early common law); Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 977-81 (1932) (in recorded law prior to twelfth century, criminal intent was not recognized as indispensable requisite for criminality).

42. See 2 F. POLLACK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 488 (2d ed. 1909).

43. W. LAFAVE & A. SCOTT, JR., *supra* note 39, § 7.5. For example, by the 13th century, an accidental killing, while not subject to acquittal, would entitle the person convicted to a royal pardon. Perkins, *A Re-examination of Malice Aforethought*, 43 YALE L.J. 537, 539-40 (1934); see also Sayre, *supra* note 41, at 980.

The Church and canon law also created distinctions among homicides. *Burroughs*, 35 Cal. 3d at 839, 678 P.2d at 904, 201 Cal. Rptr. at 329 (Bird, C.J., concurring). The fundamental philosophy of canon law emphasized the importance of subjective moral blameworthiness in assessing the degree of criminal culpability. *Id.* The Church refused to impose capital punishment on clerics accused of felonies. Note, *Felony Murder as a First Degree Offense: An Anachronism Retained*, 66 YALE L.J. 427, 428-29 (1957). "Benefit of clergy," as this practice was known, became a means of mitigating the common law's harsh approach to all homicides regardless of mental state. Sayre, *supra* note 41, at 996-97.

In the 15th and 16th centuries, a series of statutes were enacted which abolished the "benefit for clergy" if certain of the more culpable homicides were committed. *Id.* These more culpable homicides, called murder, were distinguished as having been committed with malice aforethought. Perkins, *supra*, at 543-44. All other homicides, for which benefit of clergy was still available, developed into the crime of manslaughter. *Id.*

44. 16 Cox Crim. Cas. 311 (Q.B. 1887).

45. *Id.* at 313, quoted in S. KADISH & M. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES* 277 (3d ed. 1975).

46. *Id.*

47. *Regina v. Horsey*, 176 Eng. Rep. 129, 131 (Assiz. 1862) (defendant committed arson, accidentally burning tramp to death in barn; jury instructed to convict for murder only if death was natural and probable consequence of defendant's act in setting fire; if tramp entered barn after fire was set, his death was not natural and probable consequence.) See W. LAFAVE & A. SCOTT, JR., *supra* note 39, § 7.5.

state.⁴⁸ Many jurisdictions, however, limit the rule in one or more of the following ways: (1) by permitting its use only as to certain types of felonies;⁴⁹ (2) by strictly interpreting the requirement of proximate or legal cause; (3) by narrowing the time period during which the felony is in the process of commission; or, (4) by requiring that the underlying felony be independent of the homicide.⁵⁰ The felony-murder doctrine is typically based upon felonies which either inherently endanger human life⁵¹ or which existed at common law.⁵²

In California, felony-murder is statutorily defined by degree.⁵³ Section 189 of the California Penal Code delineates several categories of first-degree murder, including felony-murder, and provides that all other kinds of murder are in the second degree.⁵⁴

48. See generally Adlerstein, *Felony-Murder in the New Criminal Codes*, 4 AM. J. CRIM. L. 249 (1976) (statutory taxonomy of felony-murder law in United States).

49. The majority of jurisdictions restrict the application of the felony-murder rule to specific enumerated felonies. W. LAFAVE & A. SCOTT, JR., *supra* note 39, § 7.5; see ALA. CODE § 13A-6-2 (Supp. 1982); ALASKA STAT. § 11.41.110 (Supp. 1989); CAL. PENAL CODE § 189 (West 1988); COLO. REV. STAT. § 18-3-102(1)(b) (Supp. 1986); DEL. CODE ANN. tit. 11, § 636(a)(6) (Supp. 1988); D.C. CODE ANN. § 22-2401 (1989); FLA. STAT. ANN. § 782.04(1)(a) (West Supp. 1990); IDAHO CODE § 18-4003(d) (1987); IND. CODE ANN. § 35-42-1-1(a)(2) (Burns Supp. 1990); LA. REV. STAT. ANN. § 14:30.1 (West Supp. 1990); MD. CRIM. LAW CODE ANN. §§ 408-410 (Supp. 1989); MICH. STAT. ANN. § 28.548 (Callaghan 1982); NEB. REV. STAT. § 28-303 (1989); NEV. REV. STAT. § 200.030(1)(b) (Supp. 1989); N.Y. PENAL LAW § 125.25(3) (McKinney 1987); N.D. CENT. CODE § 12.1-16-01(1)(c) (1985); OHIO REV. CODE ANN. § 2903.01(B) (Anderson 1987); OKLA. STAT. ANN. tit. 21, § 701.7B (West Supp. 1990); OR. REV. STAT. § 163.115(1)(b) (1987); R.I. GEN. LAWS § 11-23-1 (1981); S.C. CODE ANN. § 16-3-20(c)(a)(1) (Law. Co-op. Supp. 1989); UTAH CODE ANN. §§ 76-5-202(1)(d) to -203(1)(d) (Supp. 1990); VT. STAT. ANN. tit. 13, § 2301 (Supp. 1989); VA. CODE ANN. §§ 18.2-31 to -33 (Supp. 1990); WASH. REV. CODE ANN. § 9A.32.030(c) (1988); W. VA. CODE § 61-2-1 (1989); WYO. STAT. § 2-101 (1988).

50. W. LAFAVE & A. SCOTT, JR., *supra* note 39, § 7.5.

51. *People v. Washington*, 62 Cal. 2d 777, 780, 402 P.2d 130, 133, 44 Cal. Rptr. 442, 445 (1965) ("The felony-murder doctrine ascribes malice aforethought to the felon who kills in the perpetration of an inherently dangerous felony.")

52. The common-law felonies are rape, sodomy, robbery, burglary, arson, mayhem, and larceny. W. LAFAVE & A. SCOTT, JR., *supra* note 39, § 7.5.

53. See CAL. PENAL CODE § 189 (1988).

54. *Id.* California Penal Code section 189 provides in pertinent part:

All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree.

Id. The Crime Victims' Justice Reform Act, also known as Proposition 115, was approved by California voters on June 5, 1990. L.A. Times, June 7, 1990, at A26, col. 2. The Act amended section 189 to add five new offenses to the list of crimes leading to first degree felony-murder. *Review of Proposed Ballot Initiative "Crime Victims' Justice Reform Act" Proposition 115,*

A. *The Development of Second Degree Felony-Murder in California*

Unlike first degree felony-murder, there is no precise statutory definition of second degree felony-murder.⁵⁵ Second degree felony-murder has, however, been defined by the California Supreme Court as a "homicide that is a direct causal result of the commission of a felony inherently dangerous to human life [other than the felonies enumerated in section 189 of the California Penal Code that may give rise to first degree felony-murder]."⁵⁶ Since defining second degree felony-murder, the California Supreme Court has restricted its application by imposing four strict limitations: (1) the felony must be "inherently dangerous";⁵⁷ (2) the cause of death must be independent of the underlying felony;⁵⁸ (3) the felony must be inherently dangerous when "viewed in the abstract";⁵⁹ and, (4) the criminal statute must be inherently dangerous when considered "in its entirety."⁶⁰

1. The "inherently dangerous" standard

The first of the four limitations involves determining what is an "inherently dangerous" felony. Under common law, the commission of a felony subject to the second degree felony-murder doctrine had to involve substantial human risk.⁶¹ More recently, the California Supreme Court similarly defined an "inherently dangerous" felony as one that by its very nature cannot be committed without creating a substantial risk that someone will be killed.⁶² Accordingly, the court has adopted the common law.

CRIM. L. NEWS, June 1990, at 1, 8 (Special Edition). These include: kidnapping, train-wrecking, sodomy, oral copulation, and any act punishable under Penal Code section 299. *Id.*

55. See CAL. PENAL CODE § 189 (West 1988).

56. *People v. Ford*, 60 Cal. 2d 772, 795, 388 P.2d 892, 907, 36 Cal. Rptr. 620, 635, *cert. denied*, 377 U.S. 940 (1964). The underlying felonies in *Ford* were possession of a firearm by an ex-felon and kidnapping, which were both held to be inherently dangerous. *Id.*

57. *Id.*

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

59. *People v. Phillips*, 64 Cal. 2d 574, 414 P.2d 353, 51 Cal. Rptr. 225 (1966); *People v. Williams*, 63 Cal. 2d 452, 406 P.2d 647, 47 Cal. Rptr. 7 (1965).

60. *People v. Burroughs*, 35 Cal. 3d 824, 678 P.2d 894, 201 Cal. Rptr. 319 (1984); *People v. Henderson*, 19 Cal. 3d 86, 560 P.2d 1180, 137 Cal. Rptr. 1 (1977); *People v. Lopez*, 6 Cal. 3d 45, 489 P.2d 1372, 98 Cal. Rptr. 44 (1971).

61. Pike, *What Is Second Degree Murder in California?*, 9 S. CAL. L. REV. 112, 118 (1935). The "substantial risk of human death" standard was first expressed in *Regina v. Serné*, 16 Cox Crim. Cas. 311 (Q.B. 1887). *Id.*

62. *Burroughs*, 35 Cal. 3d at 833, 678 P.2d at 900, 201 Cal. Rptr. at 325.

2. The "independent felony" limitation

The scope of the second degree felony-murder doctrine was further restricted in *People v. Ireland*.⁶³ In *Ireland*, the supreme court determined that a felony may not serve as the basis for a felony-murder charge if the act which constituted the felony caused the victim's death.⁶⁴ In other words, the cause of the death must be independent of the underlying felony. Under this approach, if the underlying felony is part of a continuous course of conduct culminating in homicide, the underlying felony is said to merge into the homicide and is not considered a separate felony upon which the felony-murder rule can be predicated.⁶⁵ For example, a person who commits assault with a deadly weapon cannot be charged with felony-murder even if the assault caused the victim's death.⁶⁶

In *Ireland*, the defendant shot and killed his wife.⁶⁷ The defendant was convicted of second degree felony-murder.⁶⁸ On appeal, the defendant challenged a jury instruction on second degree felony-murder based on assault with a deadly weapon.⁶⁹ The California Supreme Court refused to allow the crime of assault with a deadly weapon to predicate a felony-murder conviction, stating:

To allow such use of the felony-murder rule would effectively preclude the jury from considering the issue of malice aforethought in all cases wherein homicide has been committed as a result of a felonious assault—a category which includes the

63. 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969).

64. *Id.* at 539, 450 P.2d at 590, 75 Cal. Rptr. at 198.

65. *See id.* at 539-40, 450 P.2d at 590, 75 Cal. Rptr. at 198; *see also* Note, *supra* note 1, at 144.

66. *Ireland*, 70 Cal. 2d at 539-40, 450 P.2d at 590, 75 Cal. Rptr. at 198.

67. *Id.* at 527-28, 450 P.2d at 582-83, 75 Cal. Rptr. at 189.

68. *Id.* at 525, 450 P.2d at 581, 75 Cal. Rptr. at 189.

69. *Id.* at 538, 450 P.2d at 589, 75 Cal. Rptr. at 197. The jury instruction on murder provided in part: "[T]he unlawful killing of a human being with malice aforethought is murder of the second degree . . . when the killing is a direct causal result of the perpetration or attempt to perpetrate a felony inherently dangerous to human life, such as an assault with a deadly weapon. *Id.* The trial court then gave an instruction on the crime of assault with a deadly weapon. *Id.*

On review, the supreme court concluded that the jury might have understood the instruction to mean that it should find defendant guilty of second degree murder if it *first* found that defendant harbored malice aforethought and *then* found that the homicide had occurred in the perpetration of the crime of assault with a deadly weapon. *Id.* at 539, 450 P.2d at 589, 75 Cal. Rptr. at 197. Alternatively, the jury might have understood that it should find the defendant guilty of second degree murder if it found only that the homicide was committed in the perpetration of the crime of assault with a deadly weapon. *Id.* The latter understanding is the correct meaning of the felony-murder doctrine because it would not have required the jury to find malice aforethought. *Id.* at 539, 450 P.2d at 589-90, 75 Cal. Rptr. at 197-98.

great majority of all homicides. This kind of bootstrapping finds support neither in logic nor in law.⁷⁰

The effect of the *Ireland* ruling was to remove violent felonies of the assaultive variety from the reach of the felony-murder doctrine.⁷¹

3. The "viewed in the abstract" standard

In 1965, the supreme court further limited application of second degree felony-murder by adding the requirement that the felony be "viewed in the abstract."⁷² This requirement was presented in a footnote in *People v. Williams*,⁷³ which read: "In determining whether the trial court properly instructed on felony murder we look to the elements of the felony in the abstract, not the particular 'facts' of the case."⁷⁴ In *Williams*, the murder conviction was based on the felony of conspiracy to illegally possess a narcotic drug.⁷⁵ The court held that it was not an inherently dangerous felony viewed in the abstract.⁷⁶ Although the *Williams* court gave no rationale for this requirement, the "viewed in the abstract" analysis has been defended as necessary to prevent the trier-of-fact from concluding that, because someone was killed in the course of the commission of the felony, that felony must be inherently dangerous.⁷⁷

The "viewed in the abstract" requirement was applied and explained in *People v. Phillips*.⁷⁸ In *Phillips*, the defendant, a chiropractor, was tried for murder following the death of his patient from cancer.⁷⁹ The defendant had convinced his patient to undergo chiropractic treatment in

70. *Id.* at 539, 450 P.2d at 590, 75 Cal. Rptr. at 198.

71. *People v. Patterson*, 247 Cal. Rptr. 885, 888 (1988) (depublished from official reporter), *rev'd*, 49 Cal. 3d 615, 778 P.2d 549, 262 Cal. Rptr. 195 (1989).

72. *Williams*, 63 Cal. 2d at 458 n.5, 406 P.2d at 650 n.5, 47 Cal. Rptr. at 10 n.5 (1965).

73. 63 Cal. 2d 452, 406 P.2d 647, 47 Cal. Rptr. 7 (1965).

74. *Id.* at 458 n.5, 406 P.2d at 650 n.5, 47 Cal. Rptr. at 10 n.5.

75. *Id.* at 455, 406 P.2d at 648, 47 Cal. Rptr. at 8.

76. *Id.* at 458, 406 P.2d at 650, 47 Cal. Rptr. at 10.

77. *Burroughs*, 35 Cal. 3d at 830, 678 P.2d at 897-98, 201 Cal. Rptr. at 322-23. The *Burroughs* court reasoned:

This form of analysis is compelled because there is a killing in every case where the rule might potentially be applied. If in such circumstances a court were to examine the particular facts of the case prior to establishing whether the underlying felony is inherently dangerous, the court might well be led to conclude the rule applicable despite any unfairness which might redound to the defendant by so broad an application: the existence of the dead victim might appear to lead inexorably to the conclusion that the underlying felony is exceptionally hazardous. We continue to resist such unjustifiable bootstrapping.

Id.

78. 64 Cal. 2d 574, 414 P.2d 353, 51 Cal. Rptr. 225 (1966).

79. *Id.* at 577, 414 P.2d at 356, 51 Cal. Rptr. at 228.

lieu of surgery.⁸⁰ The defendant was charged with second degree felony-murder based on the crime of grand theft by false pretenses.⁸¹

In determining whether the offense of grand theft was inherently dangerous in the abstract, the court considered the statutory definition of grand theft.⁸² Consequently, the court refused to consider the entire course of the defendant's conduct, including misrepresentations that he could cure the cancer patient without surgery, thereby persuading the patient to forego traditional medical care.⁸³ The California Supreme Court held that the crime of grand theft, viewed in the abstract, was not inherently dangerous to human life since it could be committed without substantial risk of death.⁸⁴ The court, therefore, acquitted Phillips.⁸⁵

Considering the defendant's conduct, the crime of grand theft may have been considered inherently dangerous because of the substantial risk that someone who is not surgically treated for cancer will die.⁸⁶ According to the court, however, to consider the entire course of the defendant's conduct would impermissibly substitute the factual elements of his actual conduct for the statutory definition of the offense.⁸⁷

The court also rejected the prosecution's attempt to fragment the defendant's course of conduct and apply the felony-murder rule to *any* segment of that conduct which may be considered dangerous to life.⁸⁸ The court reasoned that if such fragmentation of the defendant's course of conduct were allowed, the application of felony-murder would be expanded to encompass not only specific offenses which are independently dangerous to life, but also *any* felony during which the defendant may have acted in a manner dangerous to life.⁸⁹ To accept the prosecution's approach would require the court to reject its holding in *Williams* that

80. *Id.* at 577-78, 414 P.2d at 356, 51 Cal. Rptr. at 228.

81. *Id.* at 580-81, 414 P.2d at 358-59, 51 Cal. Rptr. at 230-31. A conviction for grand theft requires proof that the victim relied on defendant's representations and that he actually parted with value. *Id.* at 582, 414 P.2d at 359, 51 Cal. Rptr. at 231; *see also* CAL PENAL CODE § 487 (West Supp. 1990).

82. *Phillips*, 64 Cal. 2d at 583, 414 P.2d at 361, 51 Cal. Rptr. at 233. Grand theft is defined under CAL. PENAL CODE § 487 (West Supp. 1990). Section 487 reads in part: "When the money, labor or real or personal property taken is of a value exceeding four hundred dollars (\$400) . . . then the same shall constitute grand theft." *Id.*

83. *Phillips*, 64 Cal. 2d at 583, 414 P.2d at 361, 51 Cal. Rptr. at 233.

84. *Id.* at 581, 414 P.2d at 359, 51 Cal. Rptr. at 231.

85. *Id.*

86. The treatment of choice for malignant eye cancer, from which the defendant suffered, is surgical removal of the malignant tissue. McBride, Vallantyne, Hersh, McMurtrey, Rutledge & Smith, *Cancer of the Eye*, in *CANCER PATIENT CARE* 437, 485 (1976).

87. *Phillips*, 64 Cal. 2d at 581, 414 P.2d at 359, 51 Cal. Rptr. at 231.

88. *Id.* at 583-84, 414 P.2d at 361, 51 Cal. Rptr. at 233.

89. *Id.*

the felony-murder doctrine was limited to felonies which were independently inherently dangerous to life.⁹⁰ The *Phillips* court concluded: "We have been, and remain, unwilling to embark on such an uncharted sea of felony murder."⁹¹

4. The viewed "in its entirety" requirement

In three cases subsequent to *Phillips*, the California Supreme Court, applying the "viewed in the abstract" analysis, established that the statutory definition of the offense must be viewed in its entirety as opposed to examining the portion of the statute actually violated in the case at bar.⁹² In *People v. Lopez*,⁹³ the California Supreme Court reversed the defend-

90. *Id.* at 584, 414 P.2d at 361, 51 Cal. Rptr. at 233.

91. *Id.* Only one year after *Williams*, the court ignored its new "viewed in the abstract" rule in *People v. Ford*, 65 Cal. 2d 41, 416 P.2d 132, 52 Cal. Rptr. 228 (1966), *cert. denied*, 385 U.S. 1018 (1967). At his first trial, Ford had been convicted of first degree murder, but the judgment was reversed because of errors in the instructions for first degree murder. *People v. Ford*, 60 Cal. 2d 772, 775, 388 P.2d 892, 895, 36 Cal. Rptr. 620, 623 (1963) (en banc), *cert. denied*, 377 U.S. 940 (1964). At the time of reversal, the court had not yet decided *Williams*. The court held that, as charged, the homicide was, as a matter of law, at least murder in the second degree. *Id.* at 795, 388 P.2d at 908, 36 Cal. Rptr. at 636. In reaching this conclusion, Justice Schauer pointed out that a homicide that is a direct causal result of the commission of an inherently dangerous felony, other than the felonies enumerated in section 189 of the California Penal Code, constitutes second degree murder. *Id.* He then ruled that the underlying felonies of kidnapping and possession of a concealable weapon by an ex-felon were inherently dangerous. *Id.*

The murder charge was retried and again the jury found Ford guilty and imposed the death penalty. *Ford*, 65 Cal. 2d at 44, 416 P.2d at 134, 52 Cal. Rptr. at 230. Ford appealed this judgment. *Id.* In the interim between Ford's appeal from his first trial and this second appeal, the supreme court had ruled in *Williams* that the underlying felony must be inherently dangerous in the abstract in order to support a felony-murder charge. 63 Cal. 2d at 458 n.5, 406 P.2d at 650 n.5, 47 Cal. Rptr. at 10 n.5. Nonetheless, during review of Ford's appeal from his felony-murder conviction at his second trial, the court relied on Justice Schauer's pre-*Williams* discussion of the inherent dangerousness of kidnapping and possession of a concealable weapon by an ex-felon to affirm the conviction. The court, consequently, did not analyze the felonies in the abstract. *Id.* at 57-58, 416 P.2d at 142-43, 52 Cal. Rptr. at 238-39. The court cited to Justice Schauer's conclusion of the inherent dangerousness of kidnapping and possession of a concealable weapon by an ex-felon to uphold the second degree felony-murder conviction. *Id.* Justice Schauer's analysis of the inherent dangerousness of the underlying felonies had preceded the new "in the abstract" requirement of *Williams* and should not have been accepted summarily during a post-*Williams* review of Ford's conviction of second degree felony-murder.

92. See *Burroughs*, 35 Cal. 3d at 830, 678 P.2d at 898, 201 Cal. Rptr. at 323; *Henderson*, 19 Cal. 3d at 95, 560 P.2d at 1185, 137 Cal. Rptr. at 6; *Lopez*, 6 Cal. 3d at 51-52, 489 P.2d at 1376, 98 Cal. Rptr. at 48.

93. 6 Cal. 3d 45, 489 P.2d 1372, 98 Cal. Rptr. 44 (1971). *Lopez* was convicted of second degree murder and first degree robbery. *Id.* at 47, 489 P.2d at 1373, 98 Cal. Rptr. at 45. The testimony at trial established that approximately three days after escaping from county jail, a prisoner with whom the defendant had escaped broke into a house to obtain food, killed the occupant and assaulted his wife. *Id.* at 48, 489 P.2d at 1373, 98 Cal. Rptr. at 45-46. Then, the

ant's second degree murder conviction⁹⁴ which had been based upon the felony of escape from a county penal facility.⁹⁵ The court held that the felony was not, when considered in the abstract, an offense inherently dangerous to human life and, therefore, could not be used as the basis for a felony-murder conviction or instruction.⁹⁶ The court reasoned:

[T]he crime of escape proscribed by [the statute] comprehends a multitude of sins. It applies to the man who is tardy in returning from a work furlough as well as to the man who obtains a contraband weapon and decides to shoot his way out of jail It applies to those who, like this defendant, fashion a rope from blankets, climb down it, and steal into the woods as well as to those who strangle a guard to obtain his key. We cannot conclude that those who commit nonviolent escapes such as those here suggested thereby perpetrate an offense which should logically serve as the basis for the imputation of malice aforethought in a murder prosecution. Because section 4532 draws no relevant distinction between such escapes and the more violent variety, it proscribes an offense which, considered in the abstract, is not *inherently* dangerous to human life and cannot properly support a second degree felony-murder instruction.⁹⁷

The court applied the same reasoning as in *Lopez* in *People v. Henderson*⁹⁸ and again reversed felony-murder convictions.⁹⁹ The court found that the trial court had erred in giving to the jury a second degree felony-murder instruction based on the defendants' commission of the felony of false imprisonment.¹⁰⁰ The court held that the offense of false

defendant and his fellow escapee took food, clothing and money from the house. *Id.* at 48, 489 P.2d at 1374, 98 Cal. Rptr. at 46. The two were captured shortly thereafter. *Id.*

94. *Id.* at 53, 489 P.2d at 1377, 98 Cal. Rptr. at 49. Lopez was convicted of second degree murder, but in addition to the general second degree murder instruction, the trial court gave a second degree felony-murder instruction. *Id.* at 49, 489 P.2d at 1374, 98 Cal. Rptr. at 46. The court reversed the second degree murder conviction after concluding that the trial court's giving of the second degree felony-murder instruction constituted error warranting reversal. *Id.* at 52-53, 489 P.2d at 1377, 98 Cal. Rptr. at 49.

95. See CAL. PENAL CODE § 4532 (West Supp. 1990).

96. *Lopez*, 6 Cal. 3d at 51, 489 P.2d at 1376, 98 Cal. Rptr. at 48.

97. *Id.* at 51-52, 489 P.2d at 1376, 98 Cal. Rptr. at 48.

98. 19 Cal. 3d 86, 560 P.2d 1180, 137 Cal. Rptr. 1 (1977).

99. *Id.* at 94-95, 560 P.2d at 1184-85, 137 Cal. Rptr. at 5-6.

100. *Id.* at 90, 560 P.2d at 1182, 137 Cal. Rptr. at 3. The defendants used a shotgun, a pistol and a club to restrain a man they accused of stealing a television set. *Id.* at 91-92, 560 P.2d at 1182-83, 137 Cal. Rptr. at 3-4. When the accused thief attempted to escape, one of the defendants inadvertently discharged his weapon and a bystander was fatally wounded. *Id.* at 92, 560 P.2d at 1183, 137 Cal. Rptr. at 4.

imprisonment, in the abstract, was not a felony inherently dangerous to human life and, therefore, did not warrant a second degree felony-murder instruction.¹⁰¹ The court, in determining whether the offense of felony false imprisonment was inherently dangerous, provided a two-step analysis:

First, we conclude that the primary element of the offense, namely the unlawful restraint of another's liberty, does not necessarily involve the requisite danger to human life. The aspect of confinement . . . does not necessarily involve a hazard to the victim's life. "The wrong may be committed by acts or by words, or both, and by merely operating upon the will of the individual or by personal violence, or both . . ."

Second, we consider whether the factors elevating the offense [of false imprisonment] to a felony render [it] inherently dangerous to human life. It is manifest that the four factors of violence, menace, fraud, or deceit do not all involve conduct which is life endangering [T]he felony offense viewed as a whole in the abstract is not inherently dangerous to human life.¹⁰²

The *Henderson* court implied that there could be situations in which the statute need not be considered in its entirety. In reviewing the legislative intent of the statute encompassing felony false imprisonment, the court said it found no basis for severing false imprisonment by violence or menace from the offense of felony false imprisonment stating, "[t]he Legislature has not drawn any relevant distinctions between violence, menace, fraud, or deceit. . . . The Legislature has not evinced a particular concern for violent as opposed to nonviolent acts of false imprisonment."¹⁰³ Courts have interpreted this language to mean that if a court finds evidence of legislative intent to distinguish between the offenses grouped within a statute, the individual offenses, rather than the entire statute, are to be considered in the abstract to determine the inherent dangerousness of the offense.¹⁰⁴ Nonetheless, in the cases following *Henderson* and prior to *People v. Patterson*,¹⁰⁵ courts performing the "inherently dangerous" analysis did not consider any statute other than in its

101. *Id.* at 94-95, 560 P.2d at 1184-85, 137 Cal. Rptr. at 5-6.

102. *Id.* at 93-94, 560 P.2d at 1184, 137 Cal. Rptr. at 5 (footnote omitted) (quoting *People v. Agnew*, 16 Cal. 2d 655, 660, 107 P.2d 601, 603 (1940)).

103. *Id.* at 95, 560 P.2d at 1185, 137 Cal. Rptr. at 6.

104. *See, e.g.*, *People v. Patterson*, 49 Cal. 3d 615, 624-25, 778 P.2d 549, 556, 262 Cal. Rptr. 195, 202 (1989).

105. 49 Cal. 3d 615, 778 P.2d 549, 262 Cal. Rptr. 195 (1989).

entirety.¹⁰⁶

The California Supreme Court presented its third and most extensive explanation of the "viewed in the abstract" notion in *People v. Burroughs*.¹⁰⁷ In reviewing the conviction, based upon the defendant's felonious unlicensed practice of medicine,¹⁰⁸ the California Supreme Court applied the two-step analysis developed in *Henderson*.¹⁰⁹ It looked first to the primary element of the offense at issue, then to the "factors elevating the offense to a felony, to determine whether the felony, taken in the abstract, was inherently dangerous to human life."¹¹⁰ The court stated, "In this examination we are required to view the statutory definition of the offense as a whole, taking into account even nonhazardous ways of violating the provisions of the law which do not necessarily pose a threat to human life."¹¹¹ At the second level of analysis, the court concluded that infliction of great bodily harm could be other than inherently dangerous to human life.¹¹² The court reasoned that a broken arm or leg, although painful and debilitating, does not jeopardize the life of

106. *See id.* at 630-33, 778 P.2d at 560-62, 262 Cal. Rptr. at 206-08 (Mosk, J., concurring and dissenting).

107. 35 Cal. 3d 824, 678 P.2d 894, 201 Cal. Rptr. 319 (1984). The defendant, Burroughs, was a "self-styled healer" who was unlicensed to practice medicine and whose treatment of a patient suffering from leukemia allegedly caused the patient to die of a massive hemorrhage. *Id.* at 827-28, 678 P.2d at 896, 201 Cal. Rptr. at 321. The prescribed treatment had consisted of an unorthodox diet, exposure to colored light and massages by defendant Burroughs. *Id.* When the patient's condition began to deteriorate rapidly, Burroughs assured the patient that all was going according to plan and persuaded him to postpone the medical tests urged by his doctor. *Id.* at 828, 678 P.2d at 896, 201 Cal. Rptr. at 321. Additionally, Burroughs administered deep abdominal massages and told the patient he would soon recuperate. *Id.* The patient did not recover, but began to suffer from convulsions and vomiting. *Id.* at 828, 678 P.2d at 896, 201 Cal. Rptr. at 321. He eventually died of a massive hemorrhage of the mesentery in the abdomen. *Id.* Evidence at trial strongly suggested the hemorrhage was the result of the massages performed by Burroughs. *Id.* Burroughs was convicted of felony-murder since the patient's death resulted directly from his felonious unlicensed practice of medicine. *Id.* The unlicensed practice of medicine is proscribed in CAL. BUS. & PROF. CODE § 2053 (West 1990).

108. *See* CAL. BUS. & PROF. CODE § 2053.

109. *Burroughs*, 35 Cal. 3d at 830, 678 P.2d at 898, 201 Cal. Rptr. at 323; *see also supra* notes 98-106 and accompanying text.

110. *Burroughs*, 35 Cal. 3d at 830, 678 P.2d at 898, 201 Cal. Rptr. at 323.

111. *Id.* The primary element of the offense was the treatment of the sick without a license. *Id.* The court reasoned that treatment of the sick is not inherently dangerous because there are possible treatments of the sick which are harmless. *Id.* For example, a patient suffering from the common cold or a sprained finger could be treated with an admonishment to rest in bed and drink fluids or to apply ice to mild swelling. *Id.*

112. *Id.* at 831, 678 P.2d at 898, 201 Cal. Rptr. at 323. At the second level of analysis, the court noted the statutory element which elevates the crime of practicing medicine without a license to a felony includes " 'circumstances or conditions which cause or create a risk of great bodily harm, serious mental or physical illness, or death.' " *Id.* (quoting CAL. BUS. & PROF. CODE § 2053 (West 1990)).

the victim.¹¹³

The court accordingly held that committing the felony of practicing medicine without a license, in the abstract, does not inevitably pose a danger to human life and, therefore, could not serve as a predicate for a finding of murder absent proof of malice.¹¹⁴ Thus, Burroughs' second degree felony-murder conviction was reversed.¹¹⁵

The rule established in *Lopez*, *Henderson*, and *Burroughs* is unequivocal:¹¹⁶ if a statute prohibits several different types of conduct or methods of commission of a crime, violation of the statute will not support a conviction for second degree felony-murder if any means by which the crime may be committed is not inherently dangerous to human life.¹¹⁷ The *Burroughs* court acknowledged that few offenses will qualify for second degree felony-murder under its analysis.¹¹⁸ In fact, *Burroughs*, *Henderson* and *Lopez* removed non-violent felonies from the reach of the felony-murder rule insofar as such felonies are incorporated in statutes that make a great variety of acts felonious, including those acts which are not inherently dangerous to human life.¹¹⁹

B. *The Application of Felony-Murder to Drug Offenses*

Prior to *People v. Patterson*,¹²⁰ the second degree felony-murder doctrine sometimes arose in cases involving drug offenses.¹²¹ Each of the cases held that a second degree murder charge could be founded upon the furnishing of illegal, dangerous drugs since the courts concluded that the drug offenses were inherently dangerous to life.¹²² None of the courts considered the statute proscribing the drug offenses in the abstract or in

113. *Id.*

114. *Id.* at 832, 678 P.2d at 899, 201 Cal. Rptr. at 324.

115. *Id.* at 833, 678 P.2d at 900, 201 Cal. Rptr. at 325.

116. *People v. Patterson*, 247 Cal. Rptr. 885, 892 (1988) (depublished from official reporter), *rev'd*, 49 Cal. 3d 615, 778 P.2d 549, 262 Cal. Rptr. 195 (1989).

117. *Id.*

118. *Burroughs*, 35 Cal. 3d at 832-33, 678 P.2d at 899, 201 Cal. Rptr. at 324.

119. *Patterson*, 247 Cal. Rptr. at 890.

120. 49 Cal. 3d 615, 778 P.2d 549, 262 Cal. Rptr. 195 (1989).

121. *See, e.g.*, *People v. Poindexter*, 51 Cal. 2d 142, 330 P.2d 763 (1958) (death resulting from felony of furnishing narcotics to minor constitutes second degree felony-murder); *People v. Taylor*, 112 Cal. App. 3d 348, 169 Cal. Rptr. 290 (1980) (furnishing heroin to victim who dies after ingesting it constitutes second degree felony-murder); *People v. Cline*, 270 Cal. App. 2d 328, 75 Cal. Rptr. 459 (1969) (death resulting from felony of furnishing, selling or administering narcotics to minor constitutes second degree felony-murder). All of the cases arose before the creation of the "in its entirety" requirement.

122. *See Poindexter*, 51 Cal. 2d at 149, 330 P.2d at 767; *Taylor*, 112 Cal. App. 3d at 356, 169 Cal. Rptr. at 294; *Cline*, 270 Cal. App. 2d at 333-34, 75 Cal. Rptr. at 463.

their entirety.¹²³

The earliest of these cases was *People v. Poindexter*,¹²⁴ decided in 1958. *Poindexter* involved a defendant convicted of second degree felony-murder based on the felony of furnishing narcotics to a minor.¹²⁵ The defendant had sold thirty-five dollars worth of heroin to the victim who later died of narcotics poisoning after ingesting it.¹²⁶ The California Supreme Court upheld the trial court's determinations that the sale of heroin is an act dangerous to human life and death resulting from the commission of the felony of furnishing, selling or administering narcotics to a minor constituted second degree felony-murder.¹²⁷ *Poindexter* was decided prior to *People v. Williams*¹²⁸ and the development of the "viewed in the abstract" analysis; therefore, the court did not consider the statute in its entirety or in the abstract when determining the inherent dangerousness of furnishing narcotics to a minor.¹²⁹

In *People v. Cline*,¹³⁰ although decided after *Williams* and *People v. Phillips*,¹³¹ the court disregarded the "viewed in the abstract" analysis. In *Cline*, the underlying felony was violation of California Health and Safety Code section 11912,¹³² which prohibits furnishing or administering any restricted dangerous drug without the prescription of a physician.¹³³ The defendant had furnished the victim with phenobarbital pills which resulted in the victim's death.¹³⁴ Relying on the facts before it, rather than analyzing the statute in the abstract, the appellate court concluded that furnishing a controlled substance was inherently dangerous to human life. The defendant was, therefore, found guilty of both the drug offense and second degree felony-murder.¹³⁵

*People v. Taylor*¹³⁶ was another case in which furnishing heroin supported application of the felony-murder rule and the court again disre-

123. See *supra* notes 72-91 and accompanying text for a discussion of the "viewed in the abstract" analysis.

124. 51 Cal. 2d 142, 330 P.2d 763 (1958).

125. *Id.* at 144, 330 P.2d at 765.

126. *Poindexter*, 51 Cal. 2d at 145-46, 330 P.2d at 765-66.

127. *Id.* at 149, 330 P.2d at 767.

128. 63 Cal. 2d 452, 406 P.2d 647, 47 Cal. Rptr. 7 (1965).

129. *See id.*

130. 270 Cal. App. 2d 328, 75 Cal. Rptr. 459 (1969).

131. 64 Cal. 2d 574, 414 P.2d 353, 51 Cal. Rptr. 225 (1966).

132. CAL. HEALTH & SAFETY CODE § 11912 (repealed 1972) (current version at CAL. HEALTH & SAFETY CODE §§ 11352, 11379 (West 1975 & Supp. 1990)).

133. *Cline*, 270 Cal. App. 2d at 331, 75 Cal. Rptr. at 462; *see* CAL. HEALTH & SAFETY CODE § 11352 (West 1975 & Supp. 1990).

134. *Cline*, 270 Cal. App. 2d at 329-30, 75 Cal. Rptr. at 460.

135. *Id.* at 333-34, 75 Cal. Rptr. at 463.

136. 11 Cal. App. 3d 57, 89 Cal. Rptr. 697 (1970).

garded the "viewed in the abstract" analysis. After reviewing its opinion in *Poindexter* and the appellate court's resolution of *Cline*, the supreme court stated: "It thus appears to be the law, at present, that the mere furnishing of heroin is a felony inherently dangerous to human life which will . . . support a felony-murder conviction."¹³⁷ The court rejected Taylor's argument that the rule of *Williams* and *Phillips* requiring the felony to be considered "in the abstract" precluded the offense of furnishing heroin from constituting an underlying felony to a felony murder charge.¹³⁸ The court erroneously stated that that very point had been considered in *Cline* and rejected.¹³⁹

To summarize, none of the felony-murder drug cases was resolved based upon an analysis of the entire offense in the abstract. Consequently, the issue of whether furnishing or administering narcotics is inherently dangerous had never been resolved using the "viewed in the abstract and in its entirety" formulation prior to *Patterson*. As it stood at the time *Patterson* arose, the rule of second degree felony-murder could be articulated as follows: second degree felony-murder ascribes malice aforethought to a felon who killed in the perpetration of an inherently dangerous felony (other than the current six felonies enumerated in section 189 of the California Penal Code)¹⁴⁰ unless the underlying felony was part of a continuous course of conduct culminating in death.¹⁴¹ An "inherently dangerous" felony was a felony that by its very nature could not be committed without creating a "substantial risk" that someone

137. *Id.* at 59, 89 Cal. Rptr. at 698.

138. *Id.*

139. *Id.* Before *Patterson*, the most recent California Supreme Court case applying felony-murder doctrine to a drug-furnishing offense was *People v. Edwards*, 39 Cal. 3d 107, 702 P.2d 555, 216 Cal. Rptr. 397 (1985). The second degree felony-murder charge rested upon the felony of furnishing and/or administering heroin in violation of CAL. HEALTH & SAFETY CODE § 11352 (West 1975 & Supp. 1990). The defendant, Edwards, and his girlfriend, neither of whom had ever tried heroin, met another couple who suggested they buy some. *Edwards*, 39 Cal. 3d at 111, 702 P.2d at 557, 216 Cal. Rptr. at 399. Edwards and his girlfriend agreed to share the cost of the heroin with their acquaintances who injected Edwards and the victim with the drug. *Id.* Edwards' girlfriend died soon after of heroin poisoning. Edwards was convicted of second degree felony-murder after the jury decided he had furnished the heroin to his girlfriend. *Id.* at 112, 702 P.2d at 558, 216 Cal. Rptr. at 400. The court reversed the felony-murder conviction and held that copurchasers of narcotics are not guilty of furnishing narcotics to one another. *Id.* at 117, 702 P.2d at 561, 216 Cal. Rptr. at 403-04. Thus, the court decided the case without ruling whether violation of section 11352 is inherently dangerous.

140. *People v. Burroughs*, 35 Cal. 3d 824, 833, 678 P.2d 894, 900, 201 Cal. Rptr. 319, 325 (1984); see CAL. PENAL CODE § 189 (West 1988).

141. See *People v. Ireland*, 70 Cal. 2d 522, 539, 450 P.2d 580, 590, 75 Cal. Rptr. 188, 198 (1969).

would be killed.¹⁴² In determining whether the underlying felony could serve as a predicate for felony murder, the court looked to the elements of the felony in the abstract, not the particular facts of the case.¹⁴³ In applying the "viewed in the abstract" analysis, the statutory definition of the offense was viewed as a whole, as opposed to examining the portion of the statute actually violated in the case at bar.¹⁴⁴

III. STATEMENT OF THE CASE: *PEOPLE V. PATTERSON*

A. *The Facts*

On the night of November 25, 1985, Jennie Licerio and her friend Carmen Lopez were with Sandy Patterson in his motel room.¹⁴⁵ The three drank "wine coolers," inhaled "lines" of cocaine furnished by Patterson¹⁴⁶ and smoked "coco puffs."¹⁴⁷ Licerio became ill and died of acute cocaine intoxication within hours of ingesting the cocaine.¹⁴⁸

The state charged Patterson with murder,¹⁴⁹ possession of cocaine¹⁵⁰ and possession of cocaine for sale.¹⁵¹ Patterson was additionally charged with three counts of violating section 11352 of the California Health and Safety Code¹⁵² for "willfully, unlawfully and feloniously transport[ing], import[ing] into the State of California, sell[ing], furnish[ing], administer[ing], and giv[ing] away, and attempt[ing] to import into the State of California and transport[ing] a controlled substance, to-wit: cocaine."¹⁵³

In the superior court, Patterson moved to dismiss the murder count on the basis that the evidence presented at the preliminary hearing did not establish probable cause to believe he had committed murder.¹⁵⁴ In opposition to the motion, the People relied on the second degree felony-

142. *Burroughs*, 35 Cal. 3d at 833, 678 P.2d at 900, 201 Cal. Rptr. at 325.

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

144. *Burroughs*, 35 Cal. 3d at 830, 678 P.2d at 898, 201 Cal. Rptr. at 323.

145. *People v. Patterson*, 49 Cal. 3d 615, 618, 778 P.2d 549, 551, 262 Cal. Rptr. 195, 197 (1989).

146. *Id.* at 618, 778 P.2d at 551-52, 262 Cal. Rptr. at 197-98.

147. *Id.* At trial, "coco-puffs" were defined as hand-rolled cigarettes containing a mixture of tobacco and cocaine. *Id.*

148. *Id.* at 618, 778 P.2d at 552, 262 Cal. Rptr. at 198.

149. *Id.*; see CAL. PENAL CODE § 187 (West 1988).

150. *Patterson*, 49 Cal. 3d at 618, 778 P.2d at 552, 262 Cal. Rptr. at 198; see CAL. HEALTH & SAFETY CODE § 11350 (West 1975 & Supp. 1990).

151. *Patterson*, 49 Cal. 3d at 618, 778 P.2d at 552, 262 Cal. Rptr. at 198; see CAL. HEALTH & SAFETY CODE § 11351 (West 1975 & Supp. 1990).

152. CAL. HEALTH & SAFETY CODE § 11352 (West 1975 & Supp. 1990).

153. *Patterson*, 49 Cal. 3d at 618, 778 P.2d at 552, 262 Cal. Rptr. at 198.

154. *Id.*

murder doctrine and argued that by furnishing cocaine, Patterson had committed an inherently dangerous felony that justified application of the rule.¹⁵⁵ The court, however, dismissed the murder charge.¹⁵⁶ The trial judge announced that he had considered the elements of the particular crime committed by Patterson in the abstract and concluded that furnishing cocaine was not an inherently dangerous act.¹⁵⁷ Patterson then entered a negotiated plea of guilty to the three counts of violating section 11352 of the Health and Safety Code.¹⁵⁸

The People appealed the dismissal of the murder charge.¹⁵⁹ The California Court of Appeal affirmed the lower court's decision, even though the trial court's dismissal of the second degree felony-murder charge was based on consideration of the facts of Patterson's particular crime, furnishing cocaine, rather than on section 11352 viewed in the abstract and in its entirety.¹⁶⁰

Precedent compelled the appellate court to analyze section 11352 in its entirety to determine whether Patterson had committed an inherently dangerous felony.¹⁶¹ The court concluded that section 11352 could be violated in ways not inherently dangerous to human life such as trans-

155. *Id.* at 619, 778 P.2d at 552, 262 Cal. Rptr. at 198.

156. *Id.* Patterson had moved to dismiss the murder count on the basis that furnishing cocaine is not an inherently dangerous felony. *People v. Patterson*, 247 Cal. Rptr. 885, 886 (1988) (depublished from official reporter), *rev'd*, 49 Cal. 3d 615, 778 P.2d 549, 262 Cal. Rptr. 195 (1989). The motion was denied. *Id.* However, when the case was reassigned for trial, in an off-the-record conference with both counsel, the trial court indicated it did not believe defendant had committed an inherently dangerous felony, and, if facts similar to those presented at the conference were presented at trial, the court would be inclined to grant a defense motion for a judgment of acquittal on the murder charge at the close of the prosecution's case. *Patterson*, 49 Cal. 3d at 619 n.1, 778 P.2d at 552 n.1, 262 Cal. Rptr. at 198 n.1. The parties then went on record and the prosecutor suggested that the court dismiss the murder charge on its own motion from which the People could appeal. *Id.* The trial judge announced he had considered the elements of the offense of furnishing cocaine in the abstract, and in his opinion, the offense was not an inherently dangerous act. *Id.* at 619, 778 P.2d at 552, 262 Cal. Rptr. at 198. The court then dismissed the murder charge on its own motion in the interest of justice. *Id.* The minute order failed, however, to detail any reasons for the dismissal. *Patterson*, 247 Cal. Rptr. at 886.

157. *Patterson*, 247 Cal. Rptr. at 886.

158. *Patterson*, 49 Cal. 3d at 619, 778 P.2d at 552, 262 Cal. Rptr. at 198.

159. *Id.* The district attorney appealed pursuant to section 1238(a)(8) of the California Penal Code. *Id.*; see CAL. PENAL CODE § 1238(a)(8) (West Supp. 1990). That section provides for a prosecution appeal from "[a]n order or judgment dismissing or otherwise terminating the action before the defendant has been placed in jeopardy or where the defendant has waived jeopardy." § 1238(a)(8).

160. *Patterson*, 247 Cal. Rptr. at 886.

161. *Id.* at 889. The appellate court based its decision on a series of supreme court cases which held that, to determine a felony's inherent dangerousness, the statute as a whole had to be examined. *See, e.g.*, *People v. Burroughs*, 35 Cal. 3d 824, 678 P.2d 894, 201 Cal. Rptr. 319 (1984); *People v. Henderson*, 19 Cal. 3d 86, 560 P.2d 1180, 137 Cal. Rptr. 1 (1977); *People v.*

porting or offering to transport controlled substances.¹⁶² Although in the present case the defendant had violated the statute by furnishing cocaine to the victim, viewing the statute in the abstract, a violation of section 11352 could not be characterized as an inherently dangerous felony because furnishing cocaine is not necessarily inherently dangerous.¹⁶³

Upon review of the appellate court's opinion, a divided California Supreme Court reversed the lower court's decision and directed the court to remand the matter to the trial court for further proceedings consistent with the supreme court's opinion.¹⁶⁴

B. Reasoning of the Court

1. The majority opinion

Justice Kennard, writing for the majority in *People v. Patterson*,¹⁶⁵ stated that the appellate court had interpreted second degree felony-murder precedent too broadly.¹⁶⁶ The established rule in California, as announced in *People v. Williams*,¹⁶⁷ was that, to determine whether a felony is inherently dangerous to human life under the second degree felony-murder doctrine, the court must consider " 'the elements of the felony in the abstract, not the particular 'facts' of the case.' "¹⁶⁸

The supreme court reaffirmed the "viewed in the abstract" rule but held that the appellate court had erred in considering section 11352 of the California Health and Safety Code¹⁶⁹ as a whole.¹⁷⁰ The court reasoned that "[i]n determining whether the defendant had committed an inherently dangerous felony, the court should have considered only the particular crime at issue, namely, furnishing cocaine, and not the entire

Lopez, 6 Cal. 3d 45, 489 P.2d 1372, 98 Cal. Rptr. 44 (1971). See *supra* notes 72-119 and accompanying text for a discussion of these cases.

162. *Patterson*, 247 Cal. Rptr. at 893-94.

163. *Id.* at 894-95.

164. *Patterson*, 49 Cal. 3d at 618, 778 P.2d at 551, 262 Cal. Rptr. at 197. Justice Kennard wrote the majority opinion. *Id.* at 617, 778 P.2d at 551, 262 Cal. Rptr. at 197. Justice Lucas wrote a separate concurring and dissenting opinion in which Justices Eagleson and Kaufman concurred. *Id.* at 627, 778 P.2d at 558, 262 Cal. Rptr. at 204 (Lucas, C.J., concurring and dissenting). Justice Mosk wrote a separate concurring and dissenting opinion in which Justice Broussard concurred. *Id.* at 630, 778 P.2d at 560, 262 Cal. Rptr. at 206 (Mosk, J., concurring and dissenting). Justice Panelli also wrote a separate concurring and dissenting opinion. *Id.* at 641, 778 P.2d at 567, 262 Cal. Rptr. at 213 (Panelli, J., concurring and dissenting).

165. 49 Cal. 3d 615, 778 P.2d 549, 262 Cal. Rptr. 195 (1989).

166. *Id.* at 620, 778 P.2d at 553, 262 Cal. Rptr. at 199.

167. 63 Cal. 2d 452, 458 n.5, 406 P.2d 647, 650 n.5, 47 Cal. Rptr. 7, 10 n.5 (1965).

168. *Patterson*, 49 Cal. 3d at 622, 778 P.2d at 554, 262 Cal. Rptr. at 200 (quoting *People v. Williams*, 63 Cal. 2d 452, 458 n.5, 406 P.2d 647, 650 n.5, 47 Cal. Rptr. 7, 10 n.5 (1965)).

169. CAL. HEALTH & SAFETY CODE § 11352 (West 1975 & Supp. 1990).

170. *Patterson*, 49 Cal. 3d at 625, 778 P.2d at 556, 262 Cal. Rptr. at 202.

group of offenses included in the statute but not involved here."¹⁷¹

The court purported to distinguish the situation in *Patterson* from prior cases which had held that in determining whether an offense was inherently dangerous, the court should examine the statute in its entirety and not the particular facts of the case at hand.¹⁷² The majority determined that the prior cases, *People v. Lopez*,¹⁷³ *People v. Henderson*¹⁷⁴ and *People v. Burroughs*,¹⁷⁵ involved statutes that proscribed "an essentially single form of conduct"¹⁷⁶ or "primary element"¹⁷⁷ whereas section 11352 grouped together a number of related but distinct crimes.¹⁷⁸

The majority reasoned that, although the statute violated in *People v. Lopez*, section 4532 of the California Penal Code,¹⁷⁹ "comprehends a multitude of sins,"¹⁸⁰ it proscribes in essence one offense: escape.¹⁸¹ It also observed that, in *People v. Henderson*, the offense of felony false imprisonment codified in section 236 of the California Penal Code¹⁸² has a primary element, the unlawful restraint of another's liberty.¹⁸³ Lastly, the *Patterson* court found that, in *People v. Burroughs*, the primary element of section 2053 of the California Business and Professions Code¹⁸⁴ is the practice of medicine without a license.¹⁸⁵

The *Patterson* majority reasoned that when a statute has no primary element but instead groups together a variety of offenses, the statute need not be considered as a whole if there is a basis for severing the various types of conduct it prohibits.¹⁸⁶ The majority concluded that section 11352 is such a statute.¹⁸⁷ The majority pointed out that section 11352

171. *Id.* at 620, 778 P.2d at 553, 262 Cal. Rptr. at 199.

172. *Id.* at 623-24, 778 P.2d at 555, 262 Cal. Rptr. at 201. See *supra* notes 93-119 and accompanying text for a discussion of these cases.

173. 6 Cal. 3d 45, 489 P.2d 1372, 98 Cal. Rptr. 44 (1971). See *supra* notes 93-97 and accompanying text for a discussion of this case.

174. 19 Cal. 3d 137, 560 P.2d 1180, 137 Cal. Rptr. 1 (1977). See *supra* notes 98-106 and accompanying text for a discussion of this case.

175. 35 Cal. 3d 824, 678 P.2d 894, 201 Cal. Rptr. 319 (1984). See *supra* notes 107-15 and accompanying text for a discussion of this case.

176. *Patterson*, 49 Cal. 3d at 623, 778 P.2d at 555, 262 Cal. Rptr. at 201.

177. *Id.* at 624, 778 P.2d at 556, 262 Cal. Rptr. at 202.

178. *Id.*

179. CAL. PENAL CODE § 4532 (West Supp. 1990).

180. *Patterson*, 49 Cal. 3d at 624, 778 P.2d at 556, 262 Cal. Rptr. at 202.

181. *Id.*

182. CAL. PENAL CODE § 236 (West 1988).

183. *Patterson*, 49 Cal. 3d at 624, 778 P.2d at 556, 262 Cal. Rptr. at 202.

184. CAL. BUS. & PROF. CODE § 2053 (West 1990).

185. *Patterson*, 49 Cal. 3d at 624, 778 P.2d at 556, 262 Cal. Rptr. at 202.

186. *Id.*

187. *Id.* at 625, 778 P.2d at 556, 262 Cal. Rptr. at 202.

incorporates "more than 100 different controlled substances."¹⁸⁸ The court asserted that to separately prohibit acts, such as transporting, importing, selling, furnishing and administering drugs, the legislature would be required to enact hundreds of individual statutes.¹⁸⁹ The majority then concluded that the various offenses were included in one statute by the legislature "for the sake of convenience."¹⁹⁰ For this reason, the court held that the offense of furnishing cocaine could be severed from the other offenses set forth in the statute and its inherent dangerousness considered separately and in the abstract.¹⁹¹ According to the majority, the determination of whether a defendant who furnishes cocaine commits an inherently dangerous felony should not turn on the dangerousness of each and every offense set forth in the statute but should turn on the danger to life inherent in the transportation or administering of cocaine.¹⁹²

The majority declined to rule on whether the offense of furnishing cocaine was sufficiently dangerous to life to constitute an inherently dangerous felony.¹⁹³ The majority felt that the task of evaluating the evidence on this issue was more appropriate for the trial court.¹⁹⁴ Consequently, the supreme court remanded the matter to the trial court to determine whether the crime of furnishing cocaine was inherently dangerous and an offense upon which felony-murder charges could be based.¹⁹⁵

To assist the trial court on remand, the majority defined the meaning of the term "inherently dangerous to human life" for purposes of the second degree felony-murder doctrine as a felony in which there is a "high probability" that its commission will result in death.¹⁹⁶ The majority indicated that the "high probability" definition of "inherently dangerous to life" in the context of second degree murder was well-established,¹⁹⁷ citing a series of California Supreme Court cases in which the standard had been applied.¹⁹⁸ According to the court, a less-strin-

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 627, 778 P.2d at 558, 262 Cal. Rptr. at 204.

197. *Id.* at 626, 778 P.2d at 558, 262 Cal. Rptr. at 204.

198. *Id.* at 627, 778 P.2d at 558, 262 Cal. Rptr. at 204 (citing *People v. Davenport*, 41 Cal. 3d 247, 710 P.2d 861, 221 Cal. Rptr. 794 (1985); *People v. Watson*, 30 Cal. 3d 290, 637 P.2d 279, 179 Cal. Rptr. 43 (1981); *People v. Poddar*, 10 Cal. 3d 750, 518 P.2d 342, 111 Cal. Rptr.

gent standard would "inappropriately expand the scope of the second degree felony-murder rule."¹⁹⁹

2. Chief Justice Lucas' concurring and dissenting opinion

Chief Justice Lucas, concurring with the majority decision,²⁰⁰ agreed that the court should reinstate the murder charge against Patterson.²⁰¹ In support, the Chief Justice cited previous California cases in which the felony-murder doctrine was applied to drug furnishing offenses.²⁰²

Chief Justice Lucas dissented, however, from the majority's definition of an inherently dangerous crime as one which poses a high probability of death.²⁰³ He called Justice Kennard's new formulation of the standard for determining inherent dangerousness "unrealistic, unwise and unprecedented."²⁰⁴ Chief Justice Lucas would have applied the substantial risk standard instead, recognizing that inherent dangerousness was not defined in any prior drug-furnishing cases.²⁰⁵ He relied on other second degree felony-murder cases and concluded that the established test in California is whether "by its very nature, [the felony] cannot be committed without creating a *substantial risk* that someone will be killed" ²⁰⁶

The Chief Justice further criticized the majority of the court, noting that with "one broad, gratuitous stroke, the majority has precluded application of the second degree felony-murder doctrine to most, if not all, drug furnishing offenses (as well as many nondrug offenses), thereby

910 (1974); *People v. Conley*, 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966); *People v. Washington*, 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965); and *People v. Thomas*, 41 Cal. 2d 470, 261 P.2d 1 (1953)).

199. *Id.*

200. Justices Eagleson and Kaufman also joined in Chief Justice Lucas' concurrence. *Patterson*, 49 Cal. 3d at 630, 778 P.2d at 560, 262 Cal. Rptr. at 206 (Lucas, C.J., concurring and dissenting).

201. *Id.* at 627, 778 P.2d at 558, 262 Cal. Rptr. at 204 (Lucas, C.J., concurring and dissenting).

202. *Id.* at 627-28, 778 P.2d at 558-59, 262 Cal. Rptr. at 204-05 (Lucas, C.J., concurring and dissenting) (citing *People v. Mattison*, 4 Cal. 3d 177, 185, 481 P.2d 193, 198-99, 93 Cal. Rptr. 185, 190-91 (1971) (furnishing methyl alcohol); *People v. Taylor*, 11 Cal. App. 3d 57, 63, 89 Cal. Rptr. 697, 699 (1970) (furnishing heroin)).

203. *Id.* at 628, 778 P.2d at 558, 262 Cal. Rptr. at 204 (Lucas, C.J., concurring and dissenting).

204. *Id.* (Lucas, C.J., concurring and dissenting).

205. *Id.* (Lucas, C.J., concurring and dissenting).

206. *Id.* at 628-29, 778 P.2d at 559, 262 Cal. Rptr. at 205 (Lucas, C.J., concurring and dissenting) (quoting *People v. Burroughs*, 35 Cal. 3d 824, 833, 678 P.2d 894, 900, 201 Cal. Rptr. 319, 325 (1984)).

overruling or disapproving, *sub silentio*, several prior cases²⁰⁷ of this court and the Court of Appeal."²⁰⁸ Chief Justice Lucas felt the new "high probability of death" standard was particularly inopportune in light of the current "serious 'crack' cocaine crisis of epidemic proportions" ²⁰⁹

Chief Justice Lucas stated that the majority's "high probability of death" standard may be appropriate for measuring whether a defendant's conduct should warrant an independent murder charge based on implied malice.²¹⁰ He emphasized, however, that use of this standard is inappropriate for determining whether felonious conduct should bootstrap a resulting death into a murder charge.²¹¹ The Chief Justice reasoned that implied malice should not be "imported into felony murder, where the commission of the felony itself acts as a substitute for malice."²¹²

Chief Justice Lucas criticized the majority's holding as an anomaly, observing that first degree felony-murder²¹³ encompasses such offenses as burglary, robbery, rape or child molestation, none of which, when viewed in the abstract, involves a high probability of death.²¹⁴ Chief Justice Lucas reasoned that if a first degree murder charge can be based on an offense not involving a high probability of death, the lesser charge of second degree murder can be based on similar offenses, "so long as the requisite substantial risk of death can be demonstrated."²¹⁵

The Chief Justice stressed that the purpose of the felony-murder

207. See, e.g., *People v. Poindexter*, 51 Cal. 2d 142, 330 P.2d 763 (1958) (furnishing narcotics to a minor); *People v. Taylor*, 112 Cal. App. 3d 348, 169 Cal. Rptr. 290 (1980) (furnishing heroin); *People v. Cline*, 270 Cal. App. 2d 328, 75 Cal. Rptr. 459 (1969) (furnishing phenobarbital).

208. *Patterson*, 49 Cal. 3d at 628, 778 P.2d at 558, 262 Cal. Rptr. at 204 (Lucas, C.J., concurring and dissenting) (emphasis added).

209. *Id.* at 628, 778 P.2d at 559, 262 Cal. Rptr. at 205 (Lucas, C.J., concurring and dissenting).

210. *Id.* at 629, 778 P.2d at 559, 262 Cal. Rptr. at 205 (Lucas, C.J., concurring and dissenting). Section 187 of the California Penal Code provides that "[m]urder is the unlawful killing of a human being . . . with malice aforethought." CAL. PENAL CODE § 187(a) (West 1988). Malice may be express or implied, and implied malice is present "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." *Id.* § 188.

211. *Patterson*, 49 Cal. 3d at 629, 778 P.2d at 559, 262 Cal. Rptr. at 205 (Lucas, C.J., concurring and dissenting).

212. *Id.* (Lucas, C.J., concurring and dissenting).

213. CAL. PENAL CODE § 189 (West 1988).

214. *Patterson*, 49 Cal. 3d at 629, 778 P.2d at 560, 262 Cal. Rptr. at 206 (Lucas, C.J., concurring and dissenting).

215. *Id.* (Lucas, C.J., concurring and dissenting).

rule is to deter the commission of inherently dangerous felonies.²¹⁶ He argued that this purpose is advanced by deterring offenses bearing only a substantial risk of death, as well as those involving a high probability of death.²¹⁷

3. Justice Mosk's concurring and dissenting opinion

Justice Mosk concurred both in the result and with the majority's definition of an inherently dangerous felony as a felony carrying a high probability that death will occur.²¹⁸ Justice Mosk opined that the high probability standard "will contribute to greater fairness and proportion in the application of the second degree felony-murder rule."²¹⁹ Justice Mosk dissented, however, from the majority's fragmentation of section 11352 of the Health and Safety Code²²⁰ to consider the distinct felony of furnishing cocaine.²²¹ He argued that the correct analysis is whether a violation of section 11352, when considered in its entirety, is a felony inherently dangerous to human life.²²²

Justice Mosk first discussed prior second degree felony-murder cases in which the felony offense, as defined by statute, embraced a variety of both violent and nonviolent conduct.²²³ In *People v. Phillips*,²²⁴ the California Supreme Court had refused to fragment the defendant's course of conduct in order to apply the felony-murder rule to any segment of that conduct considered dangerous to life.²²⁵ According to the *Phillips* court,

216. *Id.* at 629, 778 P.2d at 559, 262 Cal. Rptr. at 205 (Lucas, C.J., concurring and dissenting).

217. *Id.* (Lucas, C.J., concurring and dissenting). Chief Justice Lucas cited *People v. Taylor*, in which the court stated "knowledge that the death of a person to whom heroin is furnished may result in a conviction for murder should have some effect on the defendant's readiness to do the furnishing." 11 Cal. App. 3d 57, 63, 89 Cal. Rptr. 697, 701 (1970), quoted with approval in *People v. Mattison*, 4 Cal. 3d 177, 185, 481 P.2d 193, 198-99, 93 Cal. Rptr. 185, 190-91 (1971).

218. *Patterson*, 49 Cal. 3d at 640, 778 P.2d at 567, 262 Cal. Rptr. at 213 (Mosk, J., concurring and dissenting). Justice Broussard and Justice Panelli also joined in Justice Mosk's concurrence and dissent. However, Justice Panelli wrote a separate opinion. *Id.* at 641, 778 P.2d at 567, 262 Cal. Rptr. at 213 (Panelli, J., concurring and dissenting). See *infra* notes 245-250 and accompanying text for a discussion of his opinion.

219. *Patterson*, 49 Cal. 3d at 640, 778 P.2d at 567, 262 Cal. Rptr. at 213 (Mosk, J., concurring and dissenting).

220. CAL. HEALTH & SAFETY CODE § 11352 (West 1975 & Supp. 1990).

221. *Patterson*, 49 Cal. 3d at 630, 778 P.2d at 560, 262 Cal. Rptr. at 206 (Mosk, J., concurring and dissenting).

222. *Id.* (Mosk, J., concurring and dissenting).

223. *Id.* at 630-33, 778 P.2d at 560-62, 262 Cal. Rptr. at 206-08 (Mosk, J., concurring and dissenting).

224. 64 Cal. 2d 574, 414 P.2d 353, 51 Cal. Rptr. 225 (1966).

225. *Id.* at 583-84, 414 P.2d at 361, 51 Cal. Rptr. at 233. In *Phillips*, the defendant was convicted of second degree murder. *Id.* at 577, 414 P.2d at 356, 51 Cal. Rptr. at 228. A

to fragment the defendant's course of conduct and abandon the statutory definition of the felony would embark the court on "an uncharted sea of felony-murder."²²⁶ Felony-murder would apply to the perpetration of any felony during which the defendant endangered life rather than to the commission of felonies which by their nature are dangerous to life.²²⁷

In addition, Justice Mosk cited the trilogy of *People v. Lopez*,²²⁸ *People v. Henderson*,²²⁹ and *People v. Burroughs*²³⁰ for the previously well-established rule that, if a statute prohibits several different types of conduct or methods of commission, violation of the statute will not support a conviction for second degree felony-murder if any means by which the crime may be committed is not inherently dangerous to human life.²³¹ Justice Mosk stated that this same reasoning was applicable to the facts of *Patterson* since the California Legislature had not "drawn any relevant distinctions" between trafficking by furnishing cocaine and trafficking by importing, transporting or selling cocaine or any other controlled substance.²³²

Justice Mosk next reviewed the legislative history of section

second degree felony-murder instruction was given to the jury. *Id.* The underlying felony was grand theft. *Id.* at 580, 414 P.2d at 359, 51 Cal. Rptr. at 231. The court held that a felony-murder instruction could not be predicated on grand theft since, as the offense was defined in section 484 of the California Penal Code, it was not inherently dangerous to human life. *Phillips*, 64 Cal. 2d at 583-84, 414 P.2d at 361, 51 Cal. Rptr. at 233; see CAL. PENAL CODE § 484 (West 1988).

226. *Phillips*, 64 Cal. 2d at 584, 414 P.2d at 361, 51 Cal. Rptr. at 233.

227. *Id.*

228. 6 Cal. 3d 45, 489 P.2d 1372, 98 Cal. Rptr. 44 (1971). See *supra* notes 93-97 for a discussion of this case.

229. 19 Cal. 3d 86, 560 P.2d 1180, 137 Cal. Rptr. 1 (1977). See *supra* notes 98-106 and accompanying text for a discussion of this case.

230. 35 Cal. 3d 824, 678 P.2d 894, 201 Cal. Rptr. 319 (1984). See *supra* notes 107-15 and accompanying text for a discussion of this case.

231. *Patterson*, 49 Cal. 3d at 631-33, 778 P.2d at 561-62, 262 Cal. Rptr. at 207-08 (Mosk, J., concurring and dissenting).

232. *Id.* at 639, 778 P.2d at 567, 262 Cal. Rptr. at 213 (Mosk, J., concurring and dissenting) (quoting *People v. Henderson*, 19 Cal. 3d 86, 95, 560 P.2d 1180, 1185, 137 Cal. Rptr. 1, 6 (1977)). In *Henderson*, the court stated:

The Legislature has not drawn any relevant distinctions between violence, menace, fraud, or deceit Most significantly, the Legislature has not distinguished between false imprisonment effected by violence or menace on the one hand and false imprisonment effected by nonviolent methods of fraud or deceit on the other. The Legislature has not evinced a particular concern for violent as opposed to nonviolent acts of false imprisonment by separate statutory treatment, proscription, or punishment.

Henderson, 19 Cal. 3d at 95, 560 P.2d at 1185, 137 Cal. Rptr. at 6. See *supra* notes 98-106 and accompanying text for a complete discussion of *Henderson*.

11352.²³³ He concluded that the prohibited acts listed in section 11352²³⁴ should be read in unison since the legislature adopted the entire list at once, rather than piecemeal over the years.²³⁵ Further, he noted that section 11352 was adopted as part of a legislative plan called the California Uniform Controlled Substances Act²³⁶ which effectively replaced all the laws governing legal and illegal narcotics in California.²³⁷

Justice Mosk indicated that the legislative plan set forth six distinct aspects of conduct involving "hard" drugs, such as opium, heroin and cocaine, that the legislature chose to prohibit and separately punish.²³⁸ Justice Mosk reasoned that when section 11352 is viewed in the context of the legislative plan as a whole, it prohibits different ways of engaging in the same targeted criminal conduct—drug trafficking—and this crime is the same whether the transfer of the illegal narcotic is accomplished by selling, furnishing or administering it.²³⁹

In support of this conclusion, Justice Mosk pointed out that "it has long been held that when [a] statute enumerates a series of acts of which any one can constitute a violation, several or even all [of] the acts may properly be charged in one count because the statute nevertheless declares only 'one offense.'"²⁴⁰ Consistent with this reasoning, violation of any number of the acts listed in section 11352 constitutes a single violation of the statute.²⁴¹ Therefore, according to Justice Mosk, absent evidence of the legislature's particular concern for the single offense of furnishing cocaine, a court applying the "inherently dangerous" prong of the felony-murder analysis must consider whether violation of section

233. *Patterson*, 49 Cal. 3d at 634, 778 P.2d at 563, 262 Cal. Rptr. at 209 (Mosk, J., concurring and dissenting).

234. Section 11352 punishes "every person who transports, imports into [California], sells, furnishes, administers, or gives away" any of certain controlled substances without a valid prescription. CAL. HEALTH & SAFETY CODE § 11352.

235. *Patterson*, 49 Cal. 3d at 635, 778 P.2d at 563, 262 Cal. Rptr. at 209 (Mosk, J., concurring and dissenting).

236. Uniform Controlled Substances Act, ch. 1407, § 11352, 1972 Cal. Stat. 3013 (1972) (codified as amended at CAL. HEALTH & SAFETY CODE § 11352 (West 1975 & Supp. 1990)).

237. *Patterson*, 49 Cal. 3d at 635, 778 P.2d at 564, 262 Cal. Rptr. at 210 (Mosk, J., concurring and dissenting) (citing Uniform Controlled Substances Act, ch. 1407, 1972 Cal. Stat. 2986 (1972) (codified as amended at CAL. HEALTH & SAFETY CODE § 11352 (West 1975 & Supp. 1990))).

238. *Id.*

239. *Id.* at 637-38, 778 P.2d at 565, 262 Cal. Rptr. at 211 (Mosk, J., concurring and dissenting).

240. *Id.* at 638, 778 P.2d at 565, 262 Cal. Rptr. at 211 (Mosk, J., concurring and dissenting) (citation omitted).

241. *Id.* at 639, 778 P.2d at 566, 262 Cal. Rptr. at 212 (Mosk, J., concurring and dissenting).

11352 as a whole is inherently dangerous to human life.²⁴²

Justice Mosk concluded that he would affirm the judgment of the Court of Appeal that a violation of section 11352 cannot predicate a charge of second degree felony-murder.²⁴³ Violation of section 11352 as a whole is not so inherently dangerous that by its very nature it cannot be committed without creating a substantial risk that someone will be killed.²⁴⁴

4. Justice Panelli's concurring and dissenting opinion

Justice Panelli concurred with Justice Mosk's opinion and in the majority's "high probability" of death standard.²⁴⁵ His separate opinion, however, emphasized the need for legislative attention to the second degree felony-murder rule.²⁴⁶ He reasoned that the legislature has both the constitutional authority and the means to define what conduct constitutes second degree felony-murder and to establish appropriate punishments for such crimes.²⁴⁷ Justice Panelli expressed his unease with the court's constitutional authority to create a non-statutory crime or, alternatively, to increase the punishment for statutory crimes beyond that established by the legislature.²⁴⁸ Justice Panelli felt that this is what the court had done by defining "inherently dangerous felonies" as felonies

242. *Id.* at 640, 778 P.2d at 567, 262 Cal. Rptr. at 213 (Mosk, J., concurring and dissenting).

243. *Id.* (Mosk, J., concurring and dissenting).

244. *Id.* (Mosk, J., concurring and dissenting). Justice Mosk's conclusion employed the previous substantial risk standard although he concurred with the majority's adoption of the high probability standard. Presumably, Justice Mosk meant that violation of section 11352 as a whole is not so inherently dangerous that by its very nature it cannot be committed without creating a *high probability* of human death.

245. *Patterson*, 49 Cal. 3d at 641, 778 P.2d at 567, 262 Cal. Rptr. at 213 (Panelli, J., concurring and dissenting).

246. *Id.* (Panelli, J., concurring and dissenting).

247. *Id.* at 642, 778 P.2d at 568, 262 Cal. Rptr. at 214 (Panelli, J., concurring and dissenting).

248. *Id.* at 641, 778 P.2d at 567-68, 262 Cal. Rptr. at 213-14 (Panelli, J., concurring and dissenting) (citing *In re Brown*, 9 Cal. 3d 612, 624, 510 P.2d 1017, 1024, 108 Cal. Rptr. 465, 472-73 (1973) for the proposition that there are, or at least should be, no non-statutory crimes in California). See generally Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985) (proposition that lawmaking is essentially a legislative act).

When courts define crimes, such as second degree felony-murder, their action lies outside the ordinary scope of the judicial function. *Id.* at 202. In substantive criminal law, the relation between courts and legislatures is prescribed by three doctrines. The principle of legality, or *nulla poena sine lege*, condemns judicial crime creation. *Id.* at 189. The constitutional doctrine of void-for-vagueness prohibits unconditional legislative delegation of lawmaking authority to the judiciary. *Id.* The third doctrine, strict construction, requires that judicial resolution of residual uncertainty in the meaning of penal statutes be biased in favor of the accused. *Id.*

which create a high probability of human death.²⁴⁹ He wrote, "I am uneasy because we have traveled very close to the edge of our role as judges and have come perilously close to becoming legislators I am not quite convinced that the second degree felony-murder rule stands on solid constitutional ground."²⁵⁰

V. ANALYSIS

California's second degree felony-murder doctrine has reached "the brink of logical absurdity."²⁵¹ *People v. Patterson*²⁵² generated both substantial disagreement and unease among the supreme court justices about the proper application of the doctrine.²⁵³ The split among the justices on key issues of the doctrine reflects the difficulties with the doctrine as it currently stands. Unfortunately, the court missed the opportunity presented by *Patterson* to correct the problems arising from California courts' attempts to limit the scope of the felony-murder doctrine. As a result, California's second degree felony-murder doctrine is now more muddled and unworkable than ever.

A. *The Prior Standard*

As the law stood prior to *People v. Patterson*,²⁵⁴ second degree felony-murder could only be predicated upon an inherently dangerous felony.²⁵⁵ This was defined as a felony that could not be created without a *substantial risk* that someone would be killed.²⁵⁶ To determine whether the underlying felony was inherently dangerous, courts considered the elements of the felony in the abstract.²⁵⁷ Also, courts following the

249. *Patterson*, 49 Cal. 3d at 641, 778 P.2d at 567, 262 Cal. Rptr. at 213 (Panelli, J., concurring and dissenting).

250. *Id.* at 641, 778 P.2d at 567-68, 262 Cal. Rptr. at 213-14 (Panelli, J., concurring and dissenting).

251. *People v. Patterson*, 247 Cal. Rptr. 885, 889 (1988) (depublished from official reporter), *rev'd*, 49 Cal. 3d 615, 778 P.2d 549, 262 Cal. Rptr. 195 (1989). The appellate court in *Patterson* criticized California's requirement that application of the doctrine depend upon consideration of the entire statute, including offenses unrelated to the defendant's conduct. The court stated that "the contribution added by the *Burroughs-Henderson-Lopez* line of authority has essentially brought the viewed in the abstract requirement, and the second degree felony-murder rule itself, to the brink of logical absurdity." *Id.*

252. 49 Cal. 3d 615, 778 P.2d 549, 262 Cal. Rptr. 195 (1989).

253. *Id.* at 641, 778 P.2d at 567, 262 Cal. Rptr. at 213 (Panelli, J., concurring and dissenting).

254. 49 Cal. 3d 615, 778 P.2d 549, 262 Cal. Rptr. 195 (1989).

255. *See People v. Burroughs*, 35 Cal. 3d 824, 833, 678 P.2d 894, 900, 201 Cal. Rptr. 319, 325 (1984).

256. *See supra* notes 61-62 and accompanying text.

257. *See supra* notes 72-91 and accompanying text.

Burroughs-Henderson-Lopez "in its entirety" rule²⁵⁸ viewed the statute in its entirety to determine the inherent dangerousness of acts prohibited by the statute, unless evidence existed that the legislature intended to distinguish between various methods of violating the statute.²⁵⁹ In this examination, even nonhazardous ways of violating the statute were taken into account.²⁶⁰ Under the previous application of the text, if there were any means by which violation of the statute was not inherently dangerous to human life, violation of the statute could not predicate a second degree felony-murder charge.²⁶¹ Applying this test to the facts in *Patterson*, the proper conclusion would have been that the offense of furnishing cocaine, prohibited by section 11352 of the California Health and Safety Code,²⁶² is not an inherently dangerous felony.

Section 11352 can be violated not only by selling, furnishing or administering controlled substances, but also by transporting a drug or merely offering to transport or furnish it.²⁶³ The statute can also be violated if a motorist carries a small amount of cocaine with her or offers to do so without any intent to sell or furnish the drug.²⁶⁴ This particular means of violating section 11352 cannot reasonably be considered inherently dangerous; possessing cocaine while driving does not create a substantial risk to human life. Therefore, because section 11352 could be violated in a non-dangerous manner, it cannot predicate a second degree felony-murder charge.

B. *The Patterson Standard*

The majority in *People v. Patterson*²⁶⁵ held that, to determine whether Patterson had committed an inherently dangerous felony, the court need only consider the crime at issue, furnishing cocaine, and not the entire group of offenses included in section 11352 of the California

258. See *supra* notes 92-119 and accompanying text.

259. See *People v. Henderson*, 19 Cal. 3d 86, 95, 560 P.2d 1180, 1185, 137 Cal. Rptr. 1, 6 (1977).

260. *Burroughs*, 35 Cal. 3d at 830, 678 P.2d at 898, 201 Cal. Rptr. at 323.

261. *People v. Patterson*, 247 Cal. Rptr. 885, 892 (1988) (depublished from official reporter), *rev'd*, 49 Cal. 3d 615, 778 P.2d 549, 262 Cal. Rptr. 195 (1989).

262. CAL. HEALTH & SAFETY CODE § 11352 (West 1975 & Supp. 1990).

263. See *id.*

264. *Patterson*, 247 Cal. Rptr. at 893-94. Note that the particular manner in which Patterson violated section 11352 is not considered in this analysis. Violation of the statute is considered in the abstract and the circumstances surrounding Patterson's commission of the felony are irrelevant.

265. 49 Cal. 3d 615, 778 P.2d 549, 262 Cal. Rptr. 195 (1989).

Health and Safety Code.²⁶⁶ The court then defined the term "inherently dangerous felony" for purposes of the second degree felony-murder doctrine to mean an offense carrying a *high probability* that death will result.²⁶⁷ Consequently, the holding represents a departure from the standard for felony-murder as it stood prior to *Patterson* in two significant respects. The *Patterson* court ignored the requirement that a court view the statute in its entirety and also redefined the meaning of inherent dangerousness.

1. The requirement that the statute be viewed in its entirety

The majority's consideration of only one element of section 11352 sharply contrasts with the *Burroughs-Henderson-Lopez* rule that the court must view the statutory definition of the offense in its entirety when determining the inherent dangerousness of a felony.²⁶⁸ Rather than overruling the previous decisions, however, Justice Kennard purported to distinguish the foregoing authorities on the ground that in each of these the statute proscribed a single course of conduct that can be committed in several ways.²⁶⁹ To support this interpretation, Justice Kennard characterized section 11352 as a statute that groups together, for legislative convenience, a number of related, but distinct crimes.²⁷⁰ This attempt to characterize section 11352 as a statute without a primary offense is unpersuasive for several reasons.

Justice Kennard asserted that section 11352 can be characterized as such because the elements of the crime of transporting a controlled substance are distinct from the elements of the crime of administering a controlled substance.²⁷¹ However, as Justice Mosk pointed out in his dissent, the elements of the two offenses are essentially identical.²⁷² The prosecution must prove that: (1) the defendant either transported or administered a controlled substance; (2) the defendant knew that the substance transported or administered was a controlled substance; and (3) the quantity transported or administered was sufficient to be used as a

266. *Id.* at 625, 778 P.2d at 556, 262 Cal. Rptr. at 202; *see* CAL. HEALTH & SAFETY CODE § 11352 (West 1975 & Supp. 1990).

267. *Patterson*, 49 Cal. 3d at 618, 778 P.2d at 551, 262 Cal. Rptr. at 197.

268. *People v. Burroughs*, 35 Cal. 3d 824, 830, 678 P.2d 894, 898, 201 Cal. Rptr. 319, 323 (1984); *People v. Henderson*, 19 Cal. 3d 86, 94, 560 P.2d 1180, 1184, 137 Cal. Rptr. 1, 5 (1977); *People v. Lopez*, 6 Cal. 3d 45, 51, 489 P.2d 1372, 1376, 98 Cal. Rptr. 44, 48 (1971).

269. *Patterson*, 49 Cal. 3d at 623-25, 778 P.2d at 555-56, 262 Cal. Rptr. at 201-02.

270. *Id.* at 623-25, 778 P.2d at 555-56, 262 Cal. Rptr. at 199-200.

271. *Id.* at 624, 778 P.2d at 556, 262 Cal. Rptr. at 202.

272. *Id.* at 633-34, 778 P.2d at 562-63, 262 Cal. Rptr. at 208-09 (Mosk, J., concurring and dissenting).

controlled substance.²⁷³

Justice Kennard also stated that the legislature included "more than 100 different controlled substances" into section 11352 in order to avoid having to enact hundreds of individual statutes.²⁷⁴ She reasoned that because the statute encompasses a number of offenses merely "for the sake of convenience,"²⁷⁵ the various offenses could be severed in order to consider their inherent dangerousness individually.²⁷⁶ Justice Kennard offered no support for this proposition, thus leading Justice Mosk to criticize the conclusion as "sheer speculation."²⁷⁷

In fact, the legislative history of section 11352 of the Health and Safety Code reveals that the section was drafted to target a single criminal conduct: trafficking in illegal narcotics.²⁷⁸ Section 11352 was enacted as part of a legislative plan called the California Uniform Controlled Substances Act.²⁷⁹ Chapter six of the Act listed six distinct types of conduct that the California Legislature chose to prohibit and punish separately.²⁸⁰ When section 11352 is construed, as it must

273. *Id.* (Mosk, J., concurring and dissenting); see also CALIFORNIA JURY INSTRUCTIONS—CRIMINAL CALJIC No. 12.02 & Use Note (5th ed. 1988).

274. *Patterson*, 49 Cal. 3d at 625, 778 P.2d at 556, 262 Cal. Rptr. at 202.

275. *Id.*

276. *Id.*

277. *Id.* at 634, 778 P.2d at 563, 262 Cal. Rptr. at 209 (Mosk, J., concurring and dissenting).

278. *Id.* (Mosk, J., concurring and dissenting).

279. Ch. 1407, 1972 Cal. Stat. 2986 (1972) (codified as amended at CAL. HEALTH & SAFETY CODE §§ 11000-11651 (West 1975 & Supp. 1990)).

280. *Patterson*, 49 Cal. 3d at 635, 778 P.2d at 564, 262 Cal. Rptr. at 210 (Mosk, J., concurring and dissenting); see Uniform Controlled Substances Act, ch. 1407, §§ 11350-11384, 1972 Cal. Stat. 2986, 3011-24 (codified as amended at CAL. HEALTH & SAFETY CODE §§ 11350-11383 (West 1975 & Supp. 1990)). These six types of conduct are currently codified at CAL. HEALTH & SAFETY CODE §§ 11350-11355 (West 1975 & Supp. 1990). In brief, the six sections provide for the following:

Section 11350: crime—for anyone to possess a controlled substance; penalty: two to ten years' imprisonment.

Section 11351: crime—for anyone to possess a controlled substance for sale; penalty—five to fifteen years.

Section 11352: crime—for anyone to import or transport, sell, give away or administer a controlled substance or to offer or attempt the same; penalty—five years to life.

Section 11353: crime—for an adult (1) to induce a minor to violate the Uniform Controlled Substances Act or (2) to employ a minor to peddle a controlled substance or (3) to sell or give a controlled substance to a minor; penalty—ten years to life.

Section 11354: crime—for a minor to do to a minor any of the acts prohibited in the previous section; penalty—up to five years.

Section 11355: crime—for anyone to sell or furnish a nonnarcotic material while falsely representing it to be a controlled substance; penalty—jail up to one year or prison up to ten years.

CAL. HEALTH & SAFETY CODE §§ 11350-11355 (West 1975 & Supp. 1990).

be,²⁸¹ in the context of the Uniform Controlled Substances Act, the legislative intent of the section appears to be “to prohibit all forms of trafficking in illegal narcotics”²⁸² By incorporating numerous controlled substances into section 11352, the legislature addressed the principle ways that illegal drugs are trafficked.²⁸³ Thus, the statute is targeted at one offense rather than at several acts of criminal conduct.

The penalty provisions of section 11352 also support the view that section 11352 prohibits essentially one course of conduct rather than a number of related, but distinct crimes.²⁸⁴ The punishment is identical for each act that section 11352 prohibits.²⁸⁵ This single penalty for the conduct prohibited reinforces the unitary nature of the targeted criminal conduct of drug trafficking.²⁸⁶

Finally, applying the reasoning of the California Supreme Court in *People v. Henderson*,²⁸⁷ there is no evidence of a legislative intent to distinguish between the various methods of violating the statute.²⁸⁸ Nor has the legislature “evinced a particular concern” for furnishing cocaine as opposed to other forms of trafficking in that drug “by [providing] separate statutory treatment, proscription, or punishment.”²⁸⁹ Consequently, *Henderson* and its progeny dictate that section 11352 be considered unitary in nature and considered in its entirety in order to determine whether a violation of the statute is an inherently dangerous felony.²⁹⁰

In light of the foregoing, Justice Kennard’s characterization of section 11352 as distinguishable from statutes in cases treating such statutes as a whole must fail. Just as the statutes in *Burroughs*, *Henderson*, and *Lopez* proscribe a single course of conduct that can be committed in sev-

281. “A statute must be construed ‘in the context of the entire statutory system of which it is a part, in order to achieve harmony among the parts.’” *People v. Woodhead*, 43 Cal. 3d 1002, 1009, 741 P.2d 154, 157, 239 Cal. Rptr. 656, 659 (1987) (quoting *People v. Shirakow*, 26 Cal. 3d 301, 307, 605 P.2d 859, 864, 162 Cal. Rptr. 30, 34 (1980)).

282. *Patterson*, 49 Cal. 3d at 636, 778 P.2d at 564, 262 Cal. Rptr. at 210 (Mosk, J., concurring and dissenting).

283. *Id.* (Mosk, J., concurring and dissenting).

284. *Id.* at 637, 778 P.2d at 565, 262 Cal. Rptr. at 211 (Mosk, J., concurring and dissenting).

285. See CAL. HEALTH & SAFETY CODE § 11352.

286. *Patterson*, 49 Cal. 3d at 637, 778 P.2d at 565, 262 Cal. Rptr. at 211 (Mosk, J., concurring and dissenting).

287. 19 Cal. 3d 86, 560 P.2d 1180, 137 Cal. Rptr. 1 (1977).

288. *Id.* at 95, 560 P.2d at 1185, 137 Cal. Rptr. at 6.

289. *Patterson*, 49 Cal. 3d at 640, 778 P.2d at 567, 262 Cal. Rptr. at 213 (Mosk, J., concurring and dissenting) (quoting *People v. Henderson*, 19 Cal. 3d 86, 95, 560 P.2d 1180, 1185, 147 Cal. Rptr. 1, 6 (1977)).

290. *Id.* (Mosk, J., concurring and dissenting).

eral ways, so too does section 11352. It is not, as Justice Kennard proposed,²⁹¹ a statute that groups together a number of related, but distinct, crimes for legislative convenience. The legislature designed the statute to combat one problem: drug trafficking.²⁹² The entire statute must be considered, therefore, when determining the inherent dangerousness of its violation and, if there is any non-dangerous method of violating the statute, the statute should not predicate application of the felony-murder doctrine.

2. The "high probability" standard

Justice Kennard's second misconstruction of precedent involved the "inherently dangerous" requirement. The supreme court redefined the meaning of "inherently dangerous to human life" as "high probability of death."²⁹³ Interestingly, the court felt it necessary to set forth for the trial court what the supreme court characterized as a "well-established" definition.²⁹⁴ In fact, the high probability definition is not well-established in the context of felony-murder. The definition of "inherently dangerous" for purposes of felony-murder previously enunciated by the California Supreme Court was substantial risk of death.²⁹⁵ This latter definition originated from the common-law definition first expressed in the 1887 English case, *Regina v. Serné*.²⁹⁶

The majority indicated that it borrowed its "high probability of death" standard from second degree felony-murder cases involving implied malice.²⁹⁷ A defendant is said to have acted with implied malice when he or she "(1) intentionally committed an act with a high probability that it would result in death, and (2) [he or she] subjectively appreciated the risk created by [his or her] act."²⁹⁸ In his dissent, Chief Justice Lucas criticized the court's application of the implied malice standard observing that "[n]otions of implied malice have never before been imported into felony murder, where the commission of the felony itself

291. *Id.* at 623-25, 778 P.2d at 555-56, 262 Cal. Rptr. at 201-02.

292. *See Review of Selected 1972 California Legislation*, 4 PAC. L.J. 378 (1973).

293. *See supra* notes 196-99 and accompanying text.

294. *Patterson*, 49 Cal. 3d at 626, 778 P.2d at 558, 262 Cal. Rptr. at 204.

295. *Burroughs*, 35 Cal. 3d at 833, 678 P.2d at 900, 201 Cal. Rptr. at 325.

296. *See Pike, supra* note 61, at 118; *see also Regina v. Serné*, 16 Cox Crim. Cas. 311 (Q.B. 1887).

297. *Patterson*, 49 Cal. 3d at 629, 778 P.2d at 559, 262 Cal. Rptr. at 205 (Lucas, C.J., concurring and dissenting).

298. *People v. Patterson*, 247 Cal. Rptr. 885, 896 n.11 (1988) (depublished from official reporter), *rev'd*, 49 Cal. 3d 615, 778 P.2d 549, 262 Cal. Rptr. 195 (1989) (quoting *California ex. rel. Department of Transp. v. Superior Court*, 37 Cal. 3d 847, 856, 693 P.2d 804, 810, 210 Cal. Rptr. 219, 224-25 (1985)).

acts as a substitute for malice."²⁹⁹

Although distinct, the felony-murder doctrine does involve elements of implied malice. For example, implied malice has both a physical and a mental component.³⁰⁰ As explained in *People v. Watson*,³⁰¹ malice may be implied when the defendant commits an act with a wanton disregard for human life, the natural consequences of which are dangerous to life.³⁰² The second degree felony-murder doctrine eliminates the need for the prosecution to establish the mental component required for implied malice in that the doctrine itself acts as a substitute for the mental component of malice.³⁰³ The physical requirement of implied malice and felony-murder, however, is the same.³⁰⁴ Felony-murder requires that the defendant has committed an inherently dangerous felony, that is, an act, the natural consequences of which are dangerous to life.³⁰⁵

Justice Kennard concluded that because the physical component of implied malice and felony-murder are the same, satisfaction of the mental component should be measured by the same standard.³⁰⁶ That is, the "high probability" standard of implied malice should be employed in the felony-murder context to determine when an act is sufficiently dangerous to support the application of the felony-murder rule. Arguably, the previous standard of "substantial risk" satisfied the rule's purpose of deterring the commission of inherently dangerous felonies.³⁰⁷ The new, stricter "high probability" standard, however, better serves that purpose.³⁰⁸ The higher the probability that death will occur, the more likely the felon will be aware of the risk, and thus be deterred. Further, a stricter standard for application of the felony-murder rule comports with California courts' desire to limit the felonies for which felons can be held

299. *Patterson*, 49 Cal. 3d at 629, 778 P.2d at 559-60, 262 Cal. Rptr. at 205-06 (Lucas, C.J., concurring and dissenting).

300. *Id.* at 626, 778 P.2d at 557, 262 Cal. Rptr. at 203; *see also* CAL. PENAL CODE § 188 (West 1988).

301. 30 Cal. 3d 290, 637 P.2d 279, 179 Cal. Rptr. 43 (1981).

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

303. *Patterson*, 49 Cal. 3d at 626, 778 P.2d at 557, 262 Cal. Rptr. at 203.

304. *Id.*

305. *Id.* at 626, 778 P.2d at 557-58, 262 Cal. Rptr. at 203-04.

306. *Id.* at 627, 778 P.2d at 558, 262 Cal. Rptr. at 204. Justice Kennard wrote: "[B]y analogy to the established definition of the term 'dangerous to life' in the context of the implied malice element of second degree murder . . . for purposes of the second degree felony-murder doctrine, an 'inherently dangerous felony' is an offense carrying 'a high probability' that death will result." *Id.*

307. *Id.* at 628-29, 778 P.2d at 559-60, 262 Cal. Rptr. at 205-06 (Lucas, C.J., concurring and dissenting).

308. *Patterson*, 247 Cal. Rptr. at 896 n.11.

strictly liable for murder under the rule.³⁰⁹

C. *The Effect of Patterson*

The effect of *Patterson* on second degree felony-murder in California is unclear. Because the majority failed to explain how courts are to determine whether an entire statute must be considered when determining the inherent dangerousness of a defendant's conduct, lower courts are left in the dark regarding how to apply the *Patterson* ruling in future felony-murder cases. Prior to *Patterson*, the rule was clear even though it sometimes produced unpalatable results; if the statute could be violated in any nondangerous manner, no violation of the statute could support a felony-murder charge.³¹⁰ The new test turns on a determination of legislative intent to distinguish between offenses collected within a single statute.³¹¹ Judicial interpretation of legislative intent often poses a formidable task and produces haphazard and unpredictable results.³¹²

One clear effect of the *Patterson* ruling, however, is that the lower courts may no longer be guided by the principle that the felony-murder doctrine should be given the narrowest possible application consistent with its ostensible purpose of deterring felons from committing their crimes in life-threatening manners.³¹³ When faced with the felony-murder doctrine on previous occasions, the California Supreme Court stated that the strict liability doctrine "deserves no extension beyond its required application."³¹⁴ Justice Kennard's strained attempt to legitimately allow felony-murder charges to be premised on a violation of section 11352 of the California Health and Safety Code³¹⁵ reflects the present court's willingness to expand the possible application of the felony-murder doctrine. Rather than applying the *Lopez-Henderson-Burroughs* "in its entirety" rule to section 11352 to conclude that felony-

309. *Id.* The appellate court noted that deterrence is better served where the felon can 'anticipate' that death might result from his conduct. *Id.* According to the appellate court, "[p]enal sanctions should not turn on a criminal's ability to read and analyze the statutory elements of Penal Code sections; it should focus attention on the risk to the victims of the contemplated crime." *Id.*

310. *See supra* notes 92-119 and accompanying text.

311. *See supra* notes 186-92 and accompanying text.

312. *See, e.g.,* *People v. Patterson*, 49 Cal. 3d 615, 778 P.2d 549, 262 Cal. Rptr. 195 (1989). The *Patterson* court was split five to two on whether section 11352 of the California Health and Safety Code encompassed severable offenses or a single, primary element. *Id.*

313. This principle was enunciated in *People v. Henderson*, 19 Cal. 3d 86, 93, 560 P.2d 1180, 1183, 137 Cal. Rptr. 1, 4 (1977).

314. *People v. Dillon*, 34 Cal. 3d 441, 463, 668 P.2d 697, 709, 194 Cal. Rptr. 390, 402 (1983) (quoting *People v. Phillips*, 64 Cal. 2d 574, 582, 414 P.2d 353, 360, 51 Cal. Rptr. 225, 232 (1966)).

315. CAL. HEALTH & SAFETY CODE § 11352 (West 1975 & Supp. 1990).

murder cannot be premised on that statute because the statute can be violated in a nondangerous manner, Justice Kennard distinguished the facts of *Patterson* from previous authority in order to apply the felony-murder doctrine to the crime of furnishing cocaine.³¹⁶

There is at least one other clear effect of the *Patterson* ruling. Drug dealers can be prosecuted under *Patterson* for second degree felony-murder if one of their customers dies of a cocaine overdose.³¹⁷ Prosecutors must still prove, however, that selling, giving away or otherwise furnishing a controlled substance creates a "high probability" that death will result.³¹⁸ As Chief Justice Lucas pointed out, this new requirement will be virtually impossible to meet because drugs such as cocaine and heroin are not known to be so dangerous that death is a highly probable result.³¹⁹ Thus, despite Justice Kennard's strained attempt to enable second degree felony-murder prosecutions of drug dealers, her high probability standard will effectively preclude convictions for such crimes.

VI. RECOMMENDATION

As reflected by the sharply divided court in *People v. Patterson*,³²⁰ application of the judge-made doctrine of second degree felony-murder is difficult, if not unworkable. The majority opinion of *Patterson* has confused the application of an already muddled doctrine. If second degree felony-murder is to remain viable in California, the doctrine requires substantial reform. The reform should bring California's second degree felony-murder rule in line with the underlying principle of our criminal law

316. *Patterson*, 49 Cal. 3d at 623-24, 778 P.2d at 555-56, 262 Cal. Rptr. at 201-02.

317. Defendants may be prosecuted for felony-murder under section 11352 of the California Health and Safety Code if they sell, furnish, give away, or administer any number of controlled substances to someone whose death results from ingesting those controlled substances. CAL. HEALTH AND SAFETY CODE § 11352; see also *Patterson*, 49 Cal. 3d at 625, 778 P.2d at 556, 262 Cal. Rptr. at 202.

318. See *Patterson*, 49 Cal. 3d at 627, 778 P.2d at 558, 262 Cal. Rptr. at 204.

319. *Id.* at 628, 778 P.2d at 559, 262 Cal. Rptr. at 205 (Lucas, C.J., concurring and dissenting). California prosecutors were also quick to criticize the *Patterson* "high probability" standard which represented a rebuff to a coalition of state and local prosecutors who had sought a new weapon in the war against drugs by asking the court to give them more leeway to bring murder charges when death resulted from narcotics. See Carrizosa, *supra* note 33, at 1, col. 2. Michael D. Schwartz, a Ventura prosecutor who represented the California District Attorneys Association as amicus curiae in the case, said that the court had "virtually eliminated" felony-murder prosecutions for drug fatalities unless a drug dealer knowingly provides a fatal overdose or a fatally tainted substance. Hager, *Court Limits Murder Charge in Drug Deaths*, L.A. Times, Sept. 8, 1989, at A1, col. 4. San Francisco Deputy District Attorney Thomas J. Borris said, "I guess it becomes a battle of the experts." Borris conceded, "The problem is if 'high probability' means there's more than a fifty percent chance that a person who takes cocaine is going to die, I can't prove that." Carrizosa, *supra* note 33, at 1, col. 2.

320. 49 Cal. 3d 615, 778 P.2d 549, 262 Cal. Rptr. 195 (1989).

that criminal liability is proportionate to mental culpability.³²¹

A. *The Need for Legislative Action*

As Justice Panelli stated, there should not be any non-statutory crimes in California.³²² Yet, second degree felony-murder has no express basis in the Penal Code³²³ and is thus a non-statutory crime.³²⁴ The crimes upon which a second degree felony-murder conviction should be premised should be legislatively determined and enumerated in the California Penal Code.

Although California courts have repeatedly expressed the need for legislative action,³²⁵ namely, codification of crimes upon which second degree felony-murder can be predicated, the legislature has not responded. The California Supreme Court, however, need not wait for legislative reform. This is because the second degree felony-murder rule remains judge-created and judge-preserved and it is within the power of the supreme court to overturn the second degree felony-murder rule.³²⁶ Alternatively, the court should not apply the rule until the legislature enumerates the crimes to which it may be applied.

Reform of second degree felony-murder should include the elimination of the requirement that the felony, as defined by statute, be viewed "in the abstract" and "in its entirety" to determine the inherent dangerousness of the crime. The *Patterson* court judicially eliminated this requirement, but this elimination should be codified because it is this requirement that is at the heart of the problem with second degree felony-murder.³²⁷

B. *The "Viewed in the Abstract" and "In Its Entirety" Requirements Should Be Rejected*

As *People v. Patterson*³²⁸ illustrates, application of the "viewed in

321. MODEL PENAL CODE § 2.02 (1985).

322. *People v. Patterson*, 49 Cal. 3d 615, 641, 778 P.2d 549, 568, 262 Cal. Rptr. 195, 214 (1989) (Panelli, J., concurring and dissenting).

323. *People v. Burroughs*, 35 Cal. 3d 824, 837, 678 P.2d 894, 903, 201 Cal. Rptr. 319, 328 (1984) (Bird, C.J., concurring).

324. See *Patterson*, 49 Cal. 3d at 641, 778 P.2d at 568, 262 Cal. Rptr. at 214 (Panelli, J., concurring and dissenting).

325. *Id.*; see also *People v. Dillon*, 34 Cal. 3d 441, 472 n.19, 668 P.2d 697, 715 n.19, 194 Cal. Rptr. 390, 408 n.19 (1983).

326. *Dillon*, 34 Cal. 3d at 503, 668 P.2d at 738, 194 Cal. Rptr. at 430 (Broussard, J., concurring and dissenting).

327. *People v. Patterson*, 247 Cal. Rptr. 885, 895 (1988) (depublished from official reporter), *rev'd*, 49 Cal. 3d 615, 778 P.2d 549, 262 Cal. Rptr. 195 (1989).

328. 49 Cal. 3d 615, 778 P.2d 549, 262 Cal. Rptr. 195 (1989).

the abstract" and "in its entirety" requirements³²⁹ are haphazard and unpredictable, and may lead to inequitable results.³³⁰

This requirement originated out of fear that the existence of a dead body might lead a trier-of-fact automatically to conclude that the underlying felony was inherently dangerous.³³¹ By imposing the "viewed in the abstract" limitation, the courts hoped to limit the reach of the disfavored felony-murder doctrine.³³² But in so doing, the concept widened the gap between criminal responsibility and moral culpability by allowing many otherwise culpable defendants to escape felony-murder prosecution even though they had engaged in highly dangerous conduct.³³³ For example, a defendant who personally injects a controlled substance of unknown potency into another is beyond the reach of the felony-murder rule simply because the statute prohibiting such conduct, section 11352 of the California Health and Safety Code, can be violated by the relatively harmless act of *offering* to transport the same controlled substance.³³⁴ At the same time, less reprehensible criminal conduct might trigger use of the rule simply because the underlying felony statute was more narrowly drawn by the legislature and appears to proscribe inherently dangerous acts when viewed in the abstract. Thus, application of the felony-murder doctrine turns on how broadly or narrowly a statute is drafted, not on the dangerousness of the defendant's conduct.³³⁵

The "in the abstract" requirement is unique to California.³³⁶ In contrast, most states consider both the nature of the felony and the cir-

329. See *supra* notes 72-119 for a discussion of the development and application of these requirements.

330. The Court of Appeals for the Fourth District of California commented that application of the rule is so haphazard and unpredictable that it arguably poses a serious equal protection and due process problem with respect to those defendants to whom it is applied. *People v. Patterson*, 247 Cal. Rptr. 885, 888 (1988) (depublished from official reporter), *rev'd*, 49 Cal. 3d 615, 778 P.2d 549, 262 Cal. Rptr. 195 (1989). An analysis of the equal protection and due process problems with respect to felony-murder is beyond the scope of this Note.

331. See *supra* notes 72-91 and accompanying text for a discussion of the creation of the "in the abstract" requirement.

332. See *People v. Burroughs*, 35 Cal. 3d 824, 837, 678 P.2d 894, 902, 201 Cal. Rptr. 319, 327 (1984); *People v. Dillon*, 34 Cal. 3d 441, 463, 668 P.2d 697, 709, 194 Cal. Rptr. 390, 402 (1983).

333. See *supra* notes 72-115 for a discussion of cases in which the defendants' conduct was dangerous but the felony-murder convictions were reversed because the statutes violated were held to be not inherently dangerous when viewed in the abstract.

334. CAL. HEALTH & SAFETY CODE § 11352 (West 1975 & Supp. 1990).

335. The appellate court in *Patterson* stated that "remarkably, any consideration of [whether or not furnishing cocaine is a felony inherently dangerous to life viewed in the abstract] is entirely unnecessary to our decision; only the least dangerous manner of violating Health and Safety Code section 11352 is of interest." *Patterson*, 247 Cal. Rptr. at 889.

336. Note, *supra* note 1, at 141.

cumstances of its commission to determine whether there is inherent danger in the commission of the crime.³³⁷ This approach recognizes that one who is perpetrating a felony which, in the abstract, seems not to involve any element of human risk, may either resort to a dangerous method of committing such felony or make use of dangerous force to prevent others from interfering with its commission.³³⁸

The purpose of the felony-murder rule is to furnish an added deterrent to the perpetration of felonies which by their nature create a foreseeable risk of death.³³⁹ As the California Supreme Court explained, during the commission of inherently dangerous felonies, the potential felon can anticipate that an injury or death might arise solely from the fact that he will commit a felony.³⁴⁰ It seems equally true that during the commission of a seemingly innocuous felony, the potential felon can anticipate that an injury or death might arise if he commits the felony in a dangerous manner. If the felon would be deterred by a foreseeable risk of death, it is irrelevant for purposes of deterrence whether that risk stems from the nature of the felony itself or the dangerous manner in which it is committed. To determine, therefore, whether a particular felony is inherently dangerous—creates a foreseeable risk of death—both the nature and the circumstances surrounding its commission should be considered.³⁴¹

A consideration of both the nature of the felony and the circumstances surrounding its commission is preferable to California's in the abstract and in its entirety approach because it satisfies the deterrence purpose of the felony-murder rule without expanding the gap between criminal responsibility and moral culpability. Under the proposed approach, application of the felony-murder doctrine would no longer turn on statutory construction. Appropriately, the dangerousness of the defendant's conduct and the risk to human life would determine the doctrine's application.

337. *Id.*; see, e.g., *People v. Auilar*, 59 Ill. 2d 95, 319 N.E.2d 514 (1974) (consideration of particular circumstances surrounding commission of felony is permitted); *People v. Wilder*, 411 Mich. 328, 266 N.W.2d 847 (1978) (jury may consider facts and circumstances of perpetration of felony); *People v. Bradley*, 541 N.Y.S.2d 460, 150 A.D.2d 592 (1988) (surrounding circumstances may be considered to convict for felony-murder).

338. See R. PERKINS & R. BOYCE, *CRIMINAL LAW* 66 (3d ed. 1982).

339. *Burroughs*, 35 Cal. 3d at 833, 678 P.2d at 900, 201 Cal. Rptr. at 325.

340. *People v. Williams*, 63 Cal. 2d 454, 457 n.4, 406 P.2d 647, 650 n.4, 47 Cal. Rptr. 7, 10 n.4 (1965).

341. See *Jenkins v. State*, 230 A.2d 262, 269 (Del. 1967). *People v. Golson*, 32 Ill. 2d 398, 207 N.E.2d 68 (1965), *cert. denied*, 384 U.S. 1023 (1966); *State v. Williams*, 284 N.C. 67, 199 S.E.2d 409 (1973); see also *Gore v. Leeke*, 261 S.C. 308, 199 S.E.2d 755 (1973), *cert. denied*, 416 U.S. 958 (1974).

Fear of “unjustifiable bootstrapping”³⁴² simply because a death occurred during the commission of the felony is not a sufficient reason to withhold consideration of the circumstances surrounding the death. The appellate court in *Patterson* criticized the fear of “plac[ing] too little faith in our jury system.”³⁴³ As the court explained, in implied malice cases, juries are asked to make similar evaluations and presumably are able to do so fairly.³⁴⁴

For these reasons, consideration of the circumstances surrounding the commission of the felony, in addition to the nature of the felony itself, represents a more sound approach to the application of the felony-murder doctrine than does the “viewed in the abstract” and “in its entirety” provisions. Therefore, the “in the abstract” and “in its entirety” requirements should be abolished in California.

VII. CONCLUSION

Despite widespread criticism of felony-murder, the doctrine continues to survive, at least in theory, in California. However, the doctrine has developed without statutory guidelines, resulting in the prosecution of felons for felony-murder without regard to their moral culpability.³⁴⁵ The *Patterson* opinion does little to clear up the state of confusion surrounding California’s second degree felony-murder doctrine. What the opinion seems to offer with one hand—namely, the ability to sever seemingly dangerous crimes from broad statutes so that the particular offense can be considered when determining the inherent dangerousness of the defendant’s crime—it takes away with the other: the high probability standard of inherent dangerousness is more difficult to meet than the previous substantial risk standard.

Legislators, acting under political pressure, are understandably reluctant to abolish the felony-murder rule altogether for fear that they might appear soft on crime. The need to reform the doctrine, however, is apparent if second degree felony-murder is to be rescued from its current, precarious position at “the brink of logical absurdity.”³⁴⁶ The California Legislature should act to clarify the scope of second degree felony-murder and to bring the doctrine into line with well-accepted criteria of individual accountability and proportionate punishment. Specifically, the

342. *Burroughs*, 35 Cal. 3d at 830, 678 P.2d at 898, 201 Cal. Rptr. at 323.

343. *Patterson*, 247 Cal. Rptr. at 896.

344. *Id.*; see also *People v. Protopappas*, 201 Cal. App. 3d 152, 246 Cal. Rptr. 915 (1988).

345. See *People v. Patterson*, 247 Cal. Rptr. 885, 895 (1988) (depublished from official reporter), *rev’d*, 49 Cal. 3d 615, 778 P.2d 549, 262 Cal. Rptr. 195 (1989).

346. *Id.* at 889.

legislature should codify second degree felony-murder and enumerate the crimes to which it may be applied. In the alternative, the California Supreme Court should reassess and eliminate its requirements that the offense, as defined by statute, be viewed in the abstract and in its entirety to determine the inherent dangerousness of the crime and, thus, the applicability of the felony-murder rule.

*M. Susan Doyle**

* The author wishes to thank Professor Samuel Pillsbury for his suggestions and comments. The author also wishes to thank Linda Cauley for her assistance. Special thanks to David G. Doyle for his encouragement and extraordinary patience throughout the preparation of this Note.

