Taming the Felony-Murder Rule

Nancy Hoffman
TAMING THE FELONY-MURDER RULE

INTRODUCTION

Like an uncaged lion, the felony-murder rule has a propensity for running wild. The rule has been effectively caged in California over the years by a number of important decisions. However, a recent case, *People v. Earl,* left the cage door ajar. The court in *Earl* upheld a conviction of first degree murder arising from the felony-murder rule. The felony underlying the conviction was burglary in the first degree, resulting from the theft of store items valued at $20.

The purpose of this comment is to show that a decision such as the one in *Earl* is an anachronism. Instead of a limiting application of the statutory felony-murder rule, the *Earl* court chose a construction which substantially broadens its effect. The holding singularly fails to follow the lead of the California Supreme Court which heretofore has circumscribed the felony-murder rule within specific judicial confines.

1. At common law an accidental or unintentional homicide committed in the perpetration of, or attempt to perpetrate, a felony is murder. The malice necessary to make the killing murder is constructively imputed by the malice incident to the initial felony. Such a homicide is known as felony-murder. 40 AM. JUR. 2d Homicide § 72 (1968). The felony-murder rule is codified in California in CAL. PEN. CODE § 189 (West 1972) which states:

   All murder which is perpetrated by means of a bomb, poison, lying in wait, torture, or by any other kind of wilful, 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.

   As used in this section, "bomb" includes any device, substance, or preparation, other than fixed ammunition or fireworks regulated under Part 2 (commencing with Section 12500) of Division 11 of the Health and Safety Code, which is designed to cause an explosion and is capable of causing death or serious bodily injury.


4. CAL. PEN. CODE § 460 (West 1972) states in pertinent part:

   Every burglary of an inhabited dwelling house, trailer coach as defined by the Vehicle Code, or building committed in the nighttime, and every burglary, whether in the daytime or nighttime, committed by a person armed with a deadly weapon, or who while in the commission of such burglary arms himself with a deadly weapon, or who while in the commission of such burglary assaults any person, is burglary of the first degree.

5. *People v. Nichols,* 3 Cal. 3d 150, 474 P.2d 673, 89 Cal. Rptr. 721
The common-law felony-murder rule provided that if a person killed another while doing or attempting to do an act amounting to a felony, the killing was murder. The theory of the rule was that the commission or attempt to commit a felony showed sufficient malice aforethought to qualify the killing as murder. Existence of the rule was thought to deter felons from killing negligently or accidentally.

In 1872 the California legislature effectively narrowed the common-law felony-murder rule, promulgating section 189 of the Penal Code. Under the statutory felony-murder rule only killings occurring during the perpetration of arson, burglary, robbery and rape were murders in the first degree. Subsequently section 189, the felony-murder statute, was amended to include mayhem and acts punishable under section 288 of the Penal Code. Additionally, felonies not specified in section 189 continued to evoke the felony-murder rule by judicial fiat, but only to support a finding of second degree murder.


6. Most jurisdictions have enacted statutes providing that a homicide perpetrated during the commission, or attempted commission, of any felony, or of certain specified felonies, shall be deemed murder in the first degree. See 40 AM. JUR. 2d Homicide § 72 (1968).

7. Id.


All murder which is perpetrated by means of poison, lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery or burglary, is murder of the first degree; and all other kinds of murder are of the second degree.

10. CAL. PEN. CODE § 288 (West 1972) states:

Any person who shall wilfully and lewdly commit any lewd or lascivious act including any of the acts constituting other crimes provided for in part one of this code upon or with the body, or any part or member thereof, of a child under the age of fourteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child, shall be guilty of a felony and shall be imprisoned in the State prison for a term of from one year to life.

11. Inasmuch as section 189 did not specifically state that it was dispensing with the element of malice aforethought required for murder as defined in section 187 of the Penal Code, section 189 could have been construed as a classification statute distinguishing murders in the first and second degrees. But the possibility of such a restricted view of section 189 was quickly abandoned. The California Supreme Court in People v. Milton, 145 Cal. 169, 171, 78 P. 549, 550 (1904) clarified the felony-murder rule. The court determined that a
In recent years the California Supreme Court has taken a restrictive view of when the statutory and second degree felony-murder rules should apply. A fundamental limitation placed on the second degree felony-murder rule is that the court must find the underlying felony inherently dangerous to human life before the felony can result in the application of the rule. In addition, other judicial limitations have been placed on the second degree rule and on the statutory rule. This comment will review each of these limitations. Then People v. Earl will be analyzed to show how it unnecessarily leaves a dangerous bit of the statutory rule unmuzzled with the anomalous result that a felony not inherently dangerous to human life can precipitate a first degree murder conviction.

**Judicial Restrictions on the Felony-Murder Rule**

Before proceeding to an analysis of the Earl case, four significant judicial limitations on the felony-murder rule will be explained. These limitations are: (1) The felony-murder rule applies only to a killing by the perpetrator of the underlying felony. (2) The felony-murder rule does not apply when the underlying felony is an integral part or "included in fact" within the homicide. (3) The definition of arson for purposes of the felony-murder rule has been significantly narrowed. (4) The second degree felony-murder rule applies only to felonies inherently dangerous to human life.

The Rule Applies Only to a Killing by the Perpetrator of the Underlying Felony

In 1965 the California Supreme Court, in People v. Washington, limited the scope of the felony-murder rule to killings occurring during the perpetration of a felony enumerated in section 189 would be murder.


committed by the felon. In Washington, while the defendant and an accomplice were attempting to rob a service station, the station attendant shot and killed the accomplice. Initially, the court reaffirmed that all killings, whether accidental or purposeful, committed in the perpetration of one of the felonies listed in section 189, are murders of the first degree. Significantly, the court concluded that the felony-murder doctrine ascribes malice aforethought only to the felon who kills in the perpetration of an inherently dangerous felony. The court reasoned that, if the killing was not committed by the felon or his accomplice, it was not a killing committed to perpetrate the felony. The killing in Washington was committed to thwart a felony. Therefore, to include such killings within section 189 would expand the meaning of murder committed in the perpetration of a felony beyond common understanding.1

Applying the reasoning in Washington, the court of appeal in People v. Jennings16 held that it is not murder if an accomplice kills himself accidentally while engaged in the commission of the crime of arson. Consequently, his principal may not be charged with first degree murder because the act of accidentally killing oneself does not constitute "unlawful killing" within the meaning of Penal Code section 187—even if committed during the perpetration of an inherently dangerous felony.17 The court's decision was consistent with the perception of the felony-murder doctrine as a device to protect the public, not the lawbreaker, from accidental or negligent killings. Furthermore, to rule otherwise would have required an unreasonable extension of the definition of murder, since the killing was not "of another person." Yet had the court not been following the limiting precedent enunciated in Washington, it might have viewed the killing as murder by the surviving co-felon and upheld a charge of first degree murder predicated on the felony-murder rule.

The "Included in Fact" Limitation

The "included in fact" limitation prohibits the use of the felony-murder rule when the felony forms an integral part of the homicide. For example, if the felonious intent of a burglary is assault with a deadly weapon and a killing results from that assault, the burglary will be viewed as included in fact within the homicide. Since there was but one act and intent, the felony-

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15. 62 Cal. 2d at 781, 402 P.2d at 135, 44 Cal. Rptr. at 446.
17. CAL. PEN. CODE § 187 (West 1972) defines murder as follows: "Murder is the unlawful killing of a human being with malice aforethought."
murray rule will not apply. It would be improper for a court to instruct the jury that the assault serves the felonious intent requirement for burglary and that the burglary raises the homicide resulting from the assault to first degree murder.

In *People v. Ireland*, a 1969 decision of far-reaching importance, the California Supreme Court first applied the “included in fact” limitation. The *Ireland* holding was that a second degree felony-murder instruction should not be given when it is based upon a felony which is an integral part of the homicide. The second degree felony-murder instruction had been given by the trial court although the only underlying felony was the assault with a deadly weapon which caused the killing. The court noted that, if the felony-murder rule applied to all cases in which the homicide has been committed as a result of a felonious assault, juries would be precluded from considering the issue of malice in the great majority of homicides.

Later in 1969, in *People v. Wilson*, the California Supreme Court imposed the “included in fact” limitation on the statutory felony-murder rule, thereby significantly curbing its effect. The *Wilson* court reversed a first degree murder conviction based on a burglary. An integral part of the crime of burglary is intent to commit petty theft or any felony. The defendant in *Wilson* intended to commit an assault with a deadly weapon. Because of this felonious intent the defendant's entry into his wife's apartment was a burglary. The assault was also an integral part of the ensuing homicide.

Justice Mosk, speaking for the court, concluded that a burglary based on intent to commit an assault with a deadly weapon is included within a charge of murder and cannot support a felony-murder instruction. To conclude otherwise would have allowed the use of an element of the homicide as the underlying

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18. 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969).
19. *Id.* at 539, 450 P.2d at 590, 75 Cal. Rptr. at 198.
20. The jury was given an instruction based upon CALJIC No. 305 (revised 1958). The instruction given provided in relevant part:
   
   . . . the unlawful killing of a human being with malice aforethought is murder of the second degree in any of the following cases: . . . Three, 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.

70 Cal. 2d at 538, 450 P.2d at 589, 75 Cal. Rptr. at 197.
21. 70 Cal. 2d at 539, 450 P.2d at 590, 75 Cal. Rptr. at 198.
23. *Id.* at 438, 462 P.2d at 26, 82 Cal. Rptr. at 498.
25. The decision was 6-1, McComb, J., dissenting.
26. 1 Cal. 3d at 442, 462 P.2d at 29, 82 Cal. Rptr. at 501.
felony to support the felony-murder rule—a bootstrap approach already rejected in *People v. Ireland*. It should be remembered that the felony-murder rule substitutes the malicious intent to commit a felony *other than* murder for the malice and premeditation required for murder. Therefore, unless there is a felony clearly distinct from the killing there is no logic in applying the felony-murder rule. The court stressed that the purpose of the felony-murder rule is to deter felons from killing negligently or accidentally. When a person enters a building with an intent to assault a victim with a deadly weapon, the felony-murder rule has no prophylactic effect. That doctrine can serve its purpose only when applied to a felony *independent* of the homicide. The rule does not purport to deter those bent on murder; it is meant to prevent killings by those engaged in felonies which need not result in murder.

The *Wilson* court had little difficulty applying the reasoning of *Ireland*, which dealt with a court-made rule, to the statutory felony-murder rule, declaring that "the statutory source of the rule does not compel us to apply it in disregard of logic and reason." Moreover, the court in *Wilson* stated that other jurisdictions which have adopted the "included in fact" limitation have done so in the face of similar statutes codifying the felony-murder rule. The

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27. *Ireland* expressly overruled *People v. Talbot*, 64 Cal. 2d 691, 414 P.2d 633, 51 Cal. Rptr. 417 (1966) and *People v. Hamilton*, 55 Cal. 2d 881, 362 P.2d 473, 13 Cal. Rptr. 649 (1961) insofar as those cases held that a felony-murder instruction could be predicated upon a burglary when the felonious intent for the burglary was intent to commit an assault with a deadly weapon.

28. 1 Cal. 3d at 440, 462 P.2d at 28, 82 Cal. Rptr. at 500.

29. The *Wilson* court did not suggest that there could not be relevant differences between crimes committed inside dwellings and those committed outside. The court recognized that persons within dwellings are in greater peril from intruders bent on stealing or engaging in other felonious conduct. However, the court observed that where the intended felony of the "burglar" is an assault with a deadly weapon, the likelihood of homicide from the lethal weapon is not significantly increased by the site of the assault. 1 Cal. 3d at 441, 462 P.2d at 28, 82 Cal. Rptr. at 500.

30. 1 Cal. 3d at 441, 462 P.2d at 29, 82 Cal. Rptr. at 501, *citing* County of Sacramento v. Hickman, 66 Cal. 2d 841, 841 n.6, 428 P.2d 593, 598 n.6, 59 Cal. Rptr. 609, 614 n.6 (1967).

31. The "included in fact" limitation is incorporated within the merger doctrine. This doctrine entails the concept that only felonies independent of the homicide can support a felony-murder instruction; felonies that are an integral part of the homicide are merged in the homicide. The *Ireland* court did not say that the limitations it would apply would assume the exact outlines and proportions of the merger doctrine enunciated in other jurisdictions but that the reasoning underlying that doctrine is basically sound and therefore should be applied to the extent that it is consistent with the laws and policies of this state.

32. 1 Cal. 3d at 442, 462 P.2d at 29, 82 Cal. Rptr. at 501, *citing* State v. Severns, 158 Kan. 453, 148 P.2d 488 (1944); *People v. Moran*, 246 N.Y. 100, 158 N.E. 35 (1927); *People v. Wagner*, 245 N.Y. 143, 156 N.E. 644 (1927); *People v. Hüter*, 184 N.Y. 237, 77 N.E. 6 (1906); *State v. Branch*, 244 Ore. 97,
mere existence of a felony-murder statute was not sufficient reason for the court to refrain from a limiting construction of the felony-murder doctrine.

The court's approach in Wilson and Ireland was followed in People v. Sears. In Sears the defendant entered the cottage of his estranged wife intending to assault her and his stepdaughter, thereby committing a burglary before the fatal assault. The court, reiterating the logic of Wilson and Ireland, held that the giving of the felony-murder instruction was error in this case since the defendant was guilty of burglary only because he entered the cottage with intent to commit the assault.

The parameters of the "included in fact" limitation have not been clearly defined. One commentator suggests the court may be led to treat forcible rapes, robberies, and larcenous burglaries in the same manner as it did the burglaries based on assault in Wilson and Sears. Such treatment would eliminate most of the statutory felony-murder rule because only homicides committed in the perpetration of arson, mayhem, or child molestation would still be first degree felony murders. Although it is not clear if the court will extend the "included in fact" limitation, it is at least apparent that the limitation is a viable one that is arguably available for additional taming of the felony-murder rule.

Limiting the Definition of Arson for Purposes of the Felony-Murder Rule

The decision in People v. Nichols involved an interpretation of the meaning of arson in section 189, the statutory felony-murder rule. The defendant argued that the court erred in instructing the jury that a killing which results from the burning of a motor vehicle is murder in the first degree. He contended that the burning of a motor vehicle, a violation of the Penal Code, is not arson within the meaning of section 189.

34. Note, supra note 33, at 1069.
35. See CAL. PEN. CODE § 189 (West 1972).
36. 3 Cal. 3d 150, 474 P.2d 673, 89 Cal. Rptr. 721 (1970).
37. CAL. PEN. CODE § 449a (West 1972) reads:
Any person who wilfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of any barn, cock, crib, rick or stack of hay, corn, wheat, oats, barley or other grain or vegetable product of any kind; or any field of standing hay or grain of any kind; or any pile of coal, wood or other fuel; or any pile of planks, boards, posts, rails or other lumber; or any streetcar, railway
The *Nichols* court first traced the history of the law of arson in California.\(^\text{98}\) In 1872, with the adoption of the Penal Code, the legislature retreated from an earlier, broad definition of arson\(^\text{30}\) and restricted the crime to the burning of buildings capable of affording shelter to human beings.\(^\text{40}\) Only a killing committed in the perpetration of arson as then defined by the Penal Code triggered the first degree felony-murder rule of section 189.\(^\text{41}\) In 1929 the legislature completely revised the arson chapter of the Penal Code. Section 447a\(^\text{42}\) defined arson as the willful and malicious burning of a dwelling house or its outbuildings; section 448a\(^\text{43}\) made it a felony to burn buildings which were not dwelling houses; and section 449a\(^\text{44}\) made it a felony to burn motor vehicles or any personal property of another.

The acts proscribed by section 448a have been held to be arson by the California Supreme Court.\(^\text{45}\) The court has also held that a violation of section 448a is arson within the meaning of the first degree felony-murder rule.\(^\text{46}\) However, in determining the legislature's intent with respect to section 449a (the burning of motor vehicles), the *Nichols* court had no clear guidelines. To

\(38.\) 3 Cal. 3d at 159-60, 474 P.2d at 678-79, 89 Cal. Rptr. at 726-27.
\(39.\) The definition of arson, the burning of the dwelling house and outbuildings of another, was broadened to include the burning of other buildings and standing crops. Deaths occurring in consequence of arson were to be deemed murder. Cal. Stats. (1850), ch. 99, § 56, at 234-35; Cal. Stats. (1856), ch. cx, § 5, at 132; ch. cxxxix, § 2, at 219.
\(42.\) Cal. Stats. (1929), ch. 25, § 1, at 46 provided:
Any person who wilfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of any dwelling house, or any kitchen, shop, barn, stable or other outhouse that is parcel thereof, or belonging to or adjoining thereto . . . shall be guilty of arson.
\(43.\) Cal. Stats. (1929), ch. 25, § 2, at 46 provided:
Any person who wilfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of a barn, stable, garage or other building, whether the property of himself or another, not a parcel of a dwelling house; or any shop, storehouse, warehouse, factory, mill or other building, whether the property of himself or another; or any church, meeting house, courthouse, workhouse, school, jail or other public building, or any public bridge, shall upon conviction thereof be sentenced to the penitentiary for not less than one or more than ten years.
\(44.\) See CAL. PEN. CODE § 449a (West 1972).
find that section 449a was not intended to be included within the meaning of arson, the court resolutely waded through the intricacies of statutory analysis. Examination of the arson statutes by the court disclosed that prior to 1929 vessels and boats were defined as buildings capable of sheltering human beings; anyone who willfully and maliciously burned a vessel or boat committed arson and was guilty of first degree murder if death resulted. But the 1929 amendments placed vessels and boats in section 449a along with stacks of grains and vegetables.47 The Nichols court acknowledged that such placement could mean that the legislature believed the burning of property in that section was as dangerous to human life as the burning of vessels and boats. However, the comparatively lenient punishment given for violations of that section (one to three years imprisonment) belies that view. The lenient punishment was persuasive evidence to the court in Nichols that the legislature considered violations of that section less dangerous to life than the burning of buildings prohibited by sections 447a and 448a which are punishable by from two to twenty years imprisonment. Moreover, the court was cognizant that in 1959 the legislature removed trailer coaches from section 449a and placed them in section 447a.48 The court found in this enactment an implication that the burning of motor vehicles is not arson. Furthermore, the prohibitions of section 449a overlapped certain burnings (for example, burning a haystack) termed malicious mischief by section 600.49 The court found it unreasonable to presume the legislature intended the death penalty to apply to accidental killings committed in the burning of a stack of hay, wheat, or a pile of boards.50 Therefore, the court concluded the legislature did not intend the word "arson", as used in the first degree felony-murder provisions of section 189, to apply to the burning of those items enumerated in section 449a. The

47. 3 Cal. 3d at 161-62, 474 P.2d at 680-81, 89 Cal. Rptr. at 728-29.
48. Cal. Stats. (1959), ch. 1462, §§ 1, 2, at 3756-57. In so doing the legislature made punishment for burning a trailer coach far more severe than for setting fire to other types of vehicles. The apparent reason the legislature made such a distinction was that the term "trailer coach," as defined in section 635 of the Vehicle Code was limited to a "vehicle, other than a motor vehicle, designed for human habitation." Therefore, a vehicle expressly intended for use as a dwelling place was included in section 447a.
49. Section 600 was renumbered 449b and amended by Cal. Stats. (1966), 1st Exec. Sess., ch. 58, § 6, at 443. It apparently did not seem reasonable to the Nichols court that the mere renumbering of section 600 to 449b manifested an intention that the offense, for 94 years considered malicious mischief, would now constitute arson.
50. For purposes of determining whether the legislature intended the burning of a motor vehicle to constitute arson within the meaning of the first degree felony-murder rule of section 189, the court stated it could not sever that specific act from the other acts prohibited by the statute. 3 Cal. 3d at 162 n.10, 474 P.2d at 681 n.10, 89 Cal. Rptr. at 729 n.10.
court admitted the conclusion was not free from doubt but reiterated that all reasonable doubts as to the proper interpretation and construction of a criminal statute must be resolved in favor of the defendant. 51

Artful use of the legislative history of arson enabled the Nichols court to cage a felony which would otherwise have allowed the felony-murder rule to roam freely within the broad confines of the law of arson. This caging by the court did not result, however, in a reversal of conviction for murder. The court viewed the felony of burning a motor vehicle in the abstract, declaring it to be a felony inherently dangerous to human life, and applied the second degree felony-murder rule.52

The Second Degree Felony-Murder Rule Applies Only to Felonies Inherently Dangerous to Human Life

The decision in People v. Washington58 demonstrated that the imputation of malice from the underlying felony to the homicide has to have some plausible basis. The Washington court viewed the felony-murder doctrine as a highly artificial concept to be extended only with caution. From this perspective the court in People v. Phillips54 refused to authorize a second degree felony-murder instruction when the underlying felony was grand theft.55 The Phillips court, applying the reasoning of People v. Williams,67 ruled that only felonies inherently dangerous to human life can support application of the felony-murder rule. In assessing the peril to human life inherent in any felony, the teaching of Williams was that the felony should be viewed in the abstract, not in relation to the facts of a particular case.57 The Phillips decision declared it would not assess the factual elements of the defendant's conduct to see if his crime was inherently dangerous because such fragmentizing of the defendant's conduct would widen the application of the second degree felony-murder rule be-

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52. 3 Cal. 3d at 163, 474 P.2d at 681, 89 Cal. Rptr. at 729.
54. 64 Cal. 2d 574, 414 P.2d 353, 51 Cal. Rptr. 225 (1966).
55. The defendant, a doctor of chiropractic, allegedly caused removal of a cancer sufferer from the hospital by representing that he could cure the cancer without surgery. He was found guilty, inter alia, of felony grand theft, a violation of Penal Code § 484.
56. 63 Cal. 2d 452, 460 P.2d 647, 47 Cal. Rptr. 7 (1965).
57. The Williams holding disapproved any contrary implications in People v. Pulley, 225 Cal. App. 2d 366, 37 Cal. Rptr. 376 (1964). Pulley held that a second degree felony-murder instruction was properly based on a violation of Vehicle Code § 10851 (automobile theft) because the theft in question led to a high speed chase and a collision which took the life of the victim.
Not only would the felony-murder rule be evoked by specific felonies which are inherently dangerous but by any felony during which the defendant endangered life. Since grand theft, viewed in the abstract, was not considered inherently dangerous by the Phillips court, it could not justify a second degree felony-murder instruction.

Two recent California Supreme Court decisions, People v. Satchell and People v. Lopez, follow the sound reasoning of Phillips and Williams. In Satchell, the court held that violation of a statute prohibiting the possession of a concealable weapon by one previously convicted of a felony is not a felony inherently dangerous to human life. Therefore, the giving of the second degree felony-murder instruction was error. The court emphasized the People v. Washington interpretation of the scope of the felony-murder rule and declined to extend the rule beyond what it considered to be a rational purpose. This interpretation acknowledged the substantial body of legal scholarship which has concluded that the felony-murder doctrine not only "erodes the relationship between criminal liability and moral culpability" but also is usually unnecessary for conviction.

58. 64 Cal. 2d at 583, 414 P.2d at 361, 51 Cal. Rptr. at 233.
60. 6 Cal. 3d 45, 489 P.2d 1372, 98 Cal. Rptr. 44 (1971).
61. CAL. PEN. CODE § 12021 (West 1972) provides in pertinent part:
   (a) Any person who is not a citizen of the United States and any person who has been convicted of a felony under the laws of the United States, of the State of California, or any other state, government, or country, or who is addicted to the use of any narcotic drug, who owns or has in his possession or under his custody or control any pistol, revolver, or other firearm capable of being concealed upon the person is guilty of a public offense, and shall be punishable by imprisonment in the state prison not exceeding fifteen years, or in a county jail not exceeding one year or by a fine not exceeding five hundred dollars ($500), or by both.
62. The opinion notes that the jury was given the following CALJIC instruction on second degree felony murder:
   The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs as a direct causal result of the commission of or attempt to commit a felony inherently dangerous to human life, namely the crime of possession of a concealable firearm by a felon, and where there was in the mind of the perpetrator the specific intent to commit such crime, is murder of the second-degree. The specific intent to commit the crime of possession of a concealable firearm by a felon and the commission of or attempt to commit such crime must be proved beyond a reasonable doubt. (The italicized words were added by the court as indicated by the instruction form to fit the circumstances of the particular case.)
63. 62 Cal. 2d 777, 783, 402 P.2d 130, 134, 44 Cal. Rptr. 442, 446 (1965).
64. In an article discussing the need for revision of the Penal Code, the late Stanford law professor, Herbert Packer, suggested the felony-murder rule is unnecessary in almost all cases in which it is applied. He maintained that conviction in those cases can be predicated on the normal rules pertaining to mur-
To apply the Washington doctrine in *Satchell*, the court had to overcome the hurdle presented by previous decisions which unequivocally stated that the carrying of a concealed weapon by a felon would support a second degree felony-murder instruction.\(^6\) The court relied on *People v. Williams*\(^6\) and *People v. Lovato*\(^7\) to make the leap necessary for its ultimate holding. The victim in *Williams* was an illegal supplier of methedrine who was killed with a knife during an affray which occurred after the defendants demanded he pay a debt either in methedrine or money. The jury was given a second degree felony-murder instruction based on the crime of conspiracy to possess methedrine without a prescription. The California Supreme Court held that the instruction was erroneous because the subject felony, viewed in the abstract, is not inherently dangerous.\(^6\) In *Lovato* the issue was whether the possession of a concealable firearm by an alien\(^6\) is inherently dangerous to human life. The court of appeal held it is not.

Coupling the rationale of *Williams* with the holding of *Lovato*, the *Satchell* court concluded that the existence of a previous conviction of any felony, which thus makes the defendant criminally liable for possession of a concealed weapon, could not logically determine whether a current homicide was committed with malice.\(^50\) The court observed that there are a number of
der and accomplice liability. He concluded that in a small residuum of cases there may be a substantial question whether the rule reaches a rational result or at least distracts attention from more relevant criteria. Packer, *The Case for Revision of the Penal Code*, 13 STAN. L. REV. 252, 259 (1961).


66. 63 Cal. 2d 452, 406 P.2d 647, 47 Cal. Rptr. 7 (1965).


68. 63 Cal. 2d at 458, 406 P.2d at 650, 47 Cal. Rptr. at 10.


70. 6 Cal. 3d at 40-41, 489 P.2d at 1369-70, 98 Cal. Rptr. at 41-42. Section 12021 of the Penal Code provides in part that any person who has been convicted of a felony is guilty of a public offense if he carries a concealed firearm. *CAL. PEN. CODE § 12021* (West 1972). Because a violation of section 12021 is punishable as either a misdemeanor or a felony, the *Satchell* court focused on the previous felony conviction which makes possession of a concealed weapon a punishable offense. 6 Cal. 3d at 40 n.18, 489 P.2d at 1369 n.18, 98 Cal. Rptr. at 41 n.18. In so doing, the court did not determine whether the particular felony of which the defendant was convicted was inherently dangerous, but rather whether felonies generally could be considered acts so inherently dangerous to human life as to impute malice for purposes of the felony-murder doctrine. *Id.* at 39-40, 489 P.2d at 1369, 98 Cal. Rptr. at 41.
felonies which do not manifest a propensity on the part of the perpetrator for acts dangerous to human life.\textsuperscript{71} The statute prohibiting possession of a concealable weapon does not specify which felonies will invoke the statute; apparently any felony will do.\textsuperscript{72} The court explicitly rejected any assumption that every armed felon presents a significantly greater danger to human life than a non-felon similarly armed.\textsuperscript{73} Absent such an assumption, the imputation of malice to the armed felon could not be justified. Therefore, the court felt compelled to conclude that the carrying of a concealed weapon by one previously convicted of a felony is not an act inherently dangerous to human life and will not support a second degree felony-murder instruction.\textsuperscript{71}

\textit{People v. Lopez,}\textsuperscript{75} decided the same day as \textit{Satchell}, applied similar reasoning, holding that escape from a county or city penal facility is not an offense inherently dangerous to human life. Here, as in \textit{Satchell}, the court averred that the decision did not hinder the prosecution from proving that the killing was done with malice aforethought and therefore was murder. The court simply excised the short-cut provided by the felony-murder doctrine. Without that doctrine, the crucial mental state of malice aforethought must be demonstrated to the trier of fact instead of being imputed from commission of the underlying felony.

Limiting utilization of the second degree felony-murder rule to felonies inherently dangerous in the abstract has the potential of curtailing the second degree rule so that its impact will be increasingly diminished. There are few felonies that courts will be willing to label as inherently dangerous. When a felony is so described the court’s finding can be challenged for failing to follow the \textit{Williams} rule of viewing the felony in the abstract. Such taming of the second degree felony-murder rule will improve the administration of criminal justice by strictly limiting an artificial means of imputing malice.

\textbf{RECENT DECISION FAILS TO LIMIT APPLICATION OF THE FELONY-MURDER RULE}

\textbf{Background}

In \textit{People v. Earl}\textsuperscript{76} the court of appeal upheld application of the statutory felony-murder rule when the underlying felony was burglary. The decision recognized that the California Su-

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\bibitem{71} 6 Cal. 3d at 40, 489 P.2d at 1369, 98 Cal. Rptr. at 41-42.
\bibitem{72} See \textit{CAL. PEN. CODE} § 12021 (West 1972).
\bibitem{73} 6 Cal. 3d at 40, 489 P.2d at 1370, 98 Cal. Rptr. at 42.
\bibitem{74} \textit{id.} at 41, 489 P.2d at 1371, 98 Cal. Rptr. at 43.
\bibitem{75} \textit{id.} at 45, 489 P.2d at 1372, 98 Cal. Rptr. at 44.
\bibitem{76} 29 Cal. App. 3d 894, 105 Cal. Rptr. 831 (1973).
\end{thebibliography}
Supreme Court has taken a restrictive view in interpreting both the judicial and statutory felony-murder rules. Moreover, the Earl court found the defendant's argument against applying the rule to be rational. The court felt constrained, however, by expressions of the supreme court in People v. Talbot and by the legislature. Justice Brown found persuasive the dictum in Talbot which stated that the crime of burglary referred to in section 189 is the same as presently set forth in section 459. Although the Earl court admitted it would be in keeping with the basic principle of the felony-murder rule to allow its application only to burglaries of an inherently dangerous type, the court concluded such a narrowing of the rule must be undertaken by the legislature or by the supreme court. Therefore, the court of appeal reached a conclusion which it apparently would have preferred to avoid—one that allows a broad application of the felony-murder rule.

Facts of the Case

At about 3:15 p.m. on December 5, 1969 a police officer saw Milton Earl and Jimmie Lee Terrell walking together in the direction of a department store. At about 4:00 p.m. John Tapp, the proprietor of a nearby service station, saw a black youth leave the office portion of his gas station which was near the store. At 5:00 p.m. Tapp noticed that a loaded gun which he had earlier placed in a desk drawer was missing. Tapp recalled no one else in the office during this time except the black youth he noticed walking toward the department store after leaving the station.

Also at about 4:00 p.m., Earl and Terrell were seen entering the department store together and soon thereafter approaching the jewelry department. Earl remained at the jewelry counter looking at watches while Terrell went to the men's department where he put on a leather jacket. The clerk at the watch counter suspected Earl had taken some watches. When she was called to

77. Id. at 899, 105 Cal. Rptr. at 835.
78. 64 Cal. 2d 691, 414 P.2d 633, 51 Cal. Rptr. 417 (1966).
79. CAL. PEN. CODE § 189 (West 1972).
80. 29 Cal. App. 3d at 900, 105 Cal. Rptr. at 835-36.
81. Id., 105 Cal. Rptr. at 836.
82. A petition for hearing by the supreme court from the decision of the California court of appeal was filed, No. 15149 (Feb. 13, 1973), to settle questions of law relating to the felony-murder rule. The hearing was denied March 8, 1973.
83. The facts are compiled from appellant's and respondent's opening briefs in the original direct appeal to the California Supreme Court from imposition of the death penalty.
84. Both Earl and Terrell are black.
the telephone, Earl went to the men's department and was later observed leaving a fitting room with bulky looking pants.

Terrell went toward the exit door wearing a leather jacket. The guard at the door took Terrell, who immediately admitted taking a watch and a jacket, to the office. Another guard was assigned to the door.

Earl then approached this guard and asked whether he had seen a man with a brown hat. A witness nearby said he heard someone shouting, "Help me, help me!" and then saw the guard on the ground and observed Earl fire three shots at him. Earl then ran from the scene pursued by several employees who caught him. After the police arrived and arrested him, a search of his person disclosed a watch, bearing the department store's tag, in his rear pocket and a second pair of pants worn under his outside pants. Neither he nor Terrell had money or a membership card for making purchases. The guard died of a bullet wound in the brain.

Earl appealed his conviction of first degree murder, for which he received the death penalty, and the convictions of burglary in the first degree and attempted kidnapping. The automatic appeal to the supreme court was transferred to the court of appeal because of the decision in People v. Anderson holding the death penalty unconstitutional.

The Reasoning of the Court

In response to Earl's contention that there was not sufficient evidence to establish that he entered the department store with the specific intent to commit theft, the court stated the basic proposition that a person who enters a store with the intent to commit theft is guilty of burglary. Although the existence of the specific intent charged at the time of entering a building is necessary to constitute burglary, this element is rarely capable of direct proof and usually must be inferred from all of the facts and circumstances disclosed by the evidence. The court concluded that even though commission of a theft in a store is insufficient alone to establish a prima facie case of burglary, taken with the other circum-

85. After the shooting Earl attempted to commandeer a car in the parking lot.
86. 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972). In this landmark case the supreme court held that the death penalty is cruel and unusual punishment and therefore prohibited by the CAL. CONST. art. I, § 6. See Comment, Anderson and the Judicial Function, 45 S. CAL. L. REV. 739 (1972).
87. See CAL. PEN. CODE § 459 (West 1972).
stances of the case, it is clear that, if Earl was able to form any intent upon entering the store, it was an intent to steal.  

Earl contended that the felony-murder rule should not apply because shoplifting would not have been a burglary as originally defined by Penal Code section 189. The definition of burglary at that time made it a crime which could be said to be inherently dangerous to human life. Earl noted that it is this key element of danger that connects all crimes in section 189. The legislature, he maintained, did not intend to include in that section the act of petty theft, which is a property crime not ordinarily presenting any danger of physical harm to people. Earl contended it would be unreasonable to presume that the legislature would indirectly expand the felony-murder rule to include non-dangerous activities that have been added to the burglary statute. The legislature has amended section 189, but in doing so only the most dangerous type of activities have been added.

Justice Brown admitted application of the felony-murder rule can lead to an illogical result. If a person formed the intent to commit a theft before entering the store, he could be convicted of first degree murder under the statutory felony-murder rule. By contrast, if he aimlessly entered the store and later committed theft, he could not be convicted even of second degree murder unless the prosecution could prove the element of malice and intent to kill. In the latter situation, no quick route to conviction would be provided by use of the felony-murder rule. To obtain a second degree murder conviction the prosecution would have to provide proof of malice and intent to kill.

89. Appellant had attacked the conviction of burglary, arguing that the evidence showed he was incapable of forming the intent to steal at the time of entry because he was under the influence of drugs. The court found little corroborative evidence to show he had taken the drugs, noted that the appellant's actions were not inconsistent with behavior of persons acting with unimpaired capacity, and concluded that in the face of the reasonable inferences that could be drawn from the total circumstances, it cannot be said that as a matter of law appellant lacked the specific intent to steal when he entered the store. 29 Cal. App. 3d at 897-98, 105 Cal. Rptr. at 833-34.

90. The 1872 statute provided:

> Every person who, in the night-time, forcibly breaks and enters, or who without force enters through any open door, window, or other aperture, any house, room, apartment, tenement, or any tent, vessel, water craft, or railroad car, with the intent to commit grand or petty larceny, or any felony, is guilty of burglary.


91. Section 189 was amended in 1873 to include mayhem. Code Amend. (1873-74), ch. 614, § 16, at 427. In 1949, acts punishable under section 288 were included within the enumerated felonies. Cal. Stats. (1949), 1st Exec. Sess., ch. 16, § 1, at 30. A 1969 amendment added "a bomb" as a means of perpetrating a murder of the first degree. Cal. Stats. (1969), ch. 923, § 1, at 1852. It is certainly arguable, however, that violations of section 288 do not fall within the classification of the most dangerous type of activities. See note 10 supra.
Although the Earl court agreed it would be reasonable to limit application of the felony-murder rule to certain classes of burglaries, the court concluded that such a decision must be undertaken by the legislature or by the supreme court. This conclusion by the Earl court is vulnerable because it is based on the erroneous assumptions that (1) the scope of felonies enumerated in section 189 is not open to interpretation; (2) stare decisis demands that dictum in People v. Talbot be followed.

A CRITICAL ANALYSIS OF THE COURT'S REASONING

The Court Failed to Interpret Legislative Intent

The scope of felonies enumerated in section 189 is arguably an open question because the California Supreme Court has already limited the breadth of one such felony, arson, by determining the intent of the legislature. An interpretation of legislative intent would have allowed the Earl court to limit the scope of burglary for purposes of section 189. The readily ascertainable abundance of historical facts used by the Nichols court to cage the scope of arson was equally available to the Earl court for confining the scope of burglary. A review of the law of burglary in California demonstrates significant changes since 1872. A court could reasonably conclude that the legislature did not intend all aspects of burglary as it is defined today to call forth the felony-murder rule.

In 1872 when Penal Code section 189 was first enacted, many crimes were punishable as felonies which in no way involved the definitional element of danger to human life. Thus in enacting section 189 the legislature sought to limit the felony-murder rule to enumerated felonies which were, by definition, inherently dangerous. One of the felonies which the legislature included in the original section 189 was burglary. At that time burglary was a crime defined as occurring in the nighttime and involving entry of a "house, room, apartment, or tenement, or any tent, vessel, watercraft, or railroad car of another."

Inclusion of burglary within the confines of the felony-murder rule as it was defined by statute in 1872 was justified. The requirement that the defendant intend to commit a serious crime

92. 29 Cal. App. 3d at 900, 105 Cal. Rptr. at 836.
93. This court determination was based on the actual wording of Penal Code § 189 and dictum in People v. Talbot, 64 Cal. 2d 691, 414 P.2d 633, 51 Cal. Rptr. 417 (1966). See 29 Cal. App. 3d at 900, 105 Cal. Rptr. at 836.
94. 64 Cal. 3d 691, 703, 414 P.2d 633, 642, 51 Cal. Rptr. 417, 426 (1966).
96. Id. at 158-62, 474 P.2d at 678-81, 89 Cal. Rptr. at 726-29.
at night, and break into a dwelling house of another created a factual situation highly dangerous to any human being involved. However, since 1872 the crime of burglary has been expanded to include many activities which are not by definition inherently dangerous. In 1875 and 1876 Penal Code section 459 was amended to include within the definition of burglary any method of entry whether in the daytime or night; added to the list of protected structures were shops, warehouses, stores, mills, barns, stables, outhouses or other buildings. Mines were added as protected areas in a 1913 amendment. In 1947 the statute was amended to include trailer coaches and automobiles (if the doors are locked) as well as aircraft.\(^9\) Clearly the emphasis of the statute has changed from protecting human beings in their dwellings from forcible entries to protecting property interests without regard to human beings or the use of force in the manner of entry.\(^9\)

In \textit{Earl} the defendant was involved in a characteristically non-dangerous crime—shoplifting. It cannot reasonably be inferred that when the legislature enacted the felony-murder rule in 1872 it intended to include within its ambit killings which occur in the perpetration or attempted perpetration of such non-violent types of crimes. The legislature was limiting, not expanding, the felony-murder rule by enacting section 189.\(^{10}\) Subsequent amendments to section 189 have expanded it by adding more felonies\(^{10}\) but no amendment has specifically defined the scope of burglary.

To arrive at a reasonable result in a given case, a court is often pulled into the quagmire of determining legislative intent. How the court extricates itself can be of critical importance. There are basic precepts that guide a court when it is faced with such a predicament. It is well settled that statutory interpretation should be reasonable.\(^{10}\) In addition, the legislature’s intention should not be presumed to include harsh, absurd or unjust consequences,\(^{10}\) and the interpretation must consider the original purpose and object of the legislation.\(^{10}\) Had the \textit{Earl} court followed these precepts it would have found it incongruous to presume that

\(^{98}\) Id.


\(^{100}\) Prior to the enactment of section 189, murder committed during the perpetration of \textit{any} felony evoked the felony-murder rule. Section 189 limited application of the rule to felonies enumerated in that section.

\(^{101}\) See note 91 supra.


\(^{103}\) Artukovich v. Astendorf, 21 Cal. 2d 329, 131 P.2d 831 (1942); \textit{In re Haines}, 195 Cal. 605, 612-13 (1925).

\(^{104}\) H.S. Mann Corp. v. Moody, 144 Cal. App. 2d 310, 320, 301 P.2d 28, 35
the legislature intended to include the expanded "property-protecting" provisions of section 459 in section 189 when the original purpose of the latter section was to confine the felony-murder doctrine. Furthermore, legislative amendments to section 189 have added only the most dangerous felonies. The court quoted the comment in Talbot that both sections 189 and 459 of the Penal Code have been amended more than once since their enactment. The implication may be that the legislature would have narrowed the scope of burglary for purposes of section 189 had it so chosen, and failure to do so signifies a contrary intent.

This conclusion is totally unwarranted. The legislature may not have been aware of the need to act. It may have assumed that the felony-murder rule was being applied narrowly to burglaries since the application of the rule had been generally restricted by judicial fiat. A failure of the legislature to act simply does not compel the assumption that the legislature intends a broad definition of burglary for purposes of section 189.

In the Earl case it is possible that the jury would have concluded that there was no malice aforethought in the commission of the homicide because there was no clear showing that the killing was deliberate and premeditated. Without the felony-murder instruction a first degree murder conviction was unlikely. To predicate a harsh result on a questionable assumption of legislative intent is unjust. The Earl court would have been faithful to legislative intent and to the supreme court's restrictive view of the felony-murder rule had it limited application of the rule to burglaries as defined in 1872.

(1956). The court reasoned that to correctly ascertain the intention of the legislature it must consider the historical background and evident objective of the statute.

105. See note 91 supra.


107. Furthermore, other jurisdictions have limited the felony-murder rule in the face of statutes codifying the rule. See, e.g., cases cited at note 32 supra. For example, in New York the statute provided that an unpremeditated killing was first degree murder if committed by one engaged in the perpetration of any felony. N.Y. PEN. CODE § 183, as amended, N.Y. PEN. LAW § 1044 (McKinney 1967). Nevertheless, the New York courts have interpreted that language to include only felonies independent of the homicide which do not merge therein. People v. Wagner, 245 N.Y. 143, 156 N.E. 644 (1927); People v. Hüter, 184 N.Y. 237, 77 N.E. 6 (1906).

The California Supreme Court followed the same rationale in People v. Wilson, 1 Cal. 3d 433, 462 P.2d 22, 82 Cal. Rptr. 494 (1969). See text accompanying notes 23-26 supra.

108. Such a holding would not have precluded the court from applying the second degree felony-murder rule if it determined that the particular type of burglary, viewed in the abstract, is inherently dangerous. It is not clear that such a conclusion would be reached. Considering the reasoning of Satchell and Lopez it is more likely that the supreme court would expect the prosecution to
Reliance on People v. Talbot\textsuperscript{109} Was Erroneous

In addition to feeling constrained by legislative enactment and intent, the court in \textit{Earl} assumed that \textit{People v. Talbot} prevented it from reaching a different conclusion. An argument similar to that made in \textit{Earl} had been advanced in \textit{Talbot}. However, in \textit{Talbot} the victim was killed when the assailant entered a dwelling house with several felonious intents including, \textit{inter alia}, robbery. The activity in \textit{Talbot} was clearly of a dangerous nature and existence of malice was obvious from the facts of the murder itself.\textsuperscript{110} The conviction could have been founded on the basis of premeditated, deliberate murder as easily as on murder committed in the perpetration of a burglary. Therefore, the automatic finding of malice from application of the felony-murder rule was of little consequence.\textsuperscript{111} Unlike the situation in \textit{Earl}, there is every reason to suppose that the result would have been a conviction of first degree murder had the felony-murder rule not been used.

More importantly, the \textit{Talbot} court specifically found that the burglary therein would have been defined as burglary in 1872.\textsuperscript{112} Unquestionably, the felony-murder rule was correctly utilized in \textit{Talbot}. But what if the burglary would not have been so defined in 1872? Dictum in the \textit{Talbot} decision suggested that the crime of burglary referred to in section 189 of the Penal Code is the same as presently set forth in section 459.\textsuperscript{113} This dictum appears to be based on questionable application of an 1898 California Supreme Court decision that a felony-murder instruction is correct as a matter of law when the defendant enters a house with the intent to kill.\textsuperscript{114} Although this holding was persuasive for application of the felony-murder rule to the facts of \textit{Talbot}, it does not address itself to the scope of burglary for the purposes of section 189. It is inexplicable why Justice Brown

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  \item demonstrate the required mental state of malice aforethought without resorting to any felony-murder rule short-cut. See text accompanying notes 61-64 and 75 supra.
  \item 64 Cal. 2d 691, 414 P.2d 633, 51 Cal. Rptr. 417 (1966).
  \item The facts of the case were that Talbot had planned to "roll" the victim for the money he was to receive upon his forthcoming release from the service. Talbot planned to gouge out the victim's eyes if he was recognized. Subsequently Talbot changed his plans and talked of running the victim down by car. Then an accomplice attempted to gas the victim in his bedroom. When Talbot entered the bedroom and found the victim was still conscious, he went outside, returned with a wrench-type object made of steel, and struck the victim six or seven times. He also stabbed him with a knife which he had concealed on his person before coming to the house.
  \item See note 64 supra.
  \item 64 Cal. 2d 691, 704, 414 P.2d 633, 642, 51 Cal. Rptr. 417, 426 (1966).
  \item \textit{Id.} at 705, 414 P.2d at 642, 51 Cal. Rptr. at 426.
  \item See \textit{People v. Miller}, 121 Cal. 343, 347, 53 P. 816, 818 (1898).
\end{itemize}
chose to follow the questionable dictum of Talbot instead of the trenchant judgments of recent supreme court cases. The Earl court should have held that application of the felony-murder rule was error.

**CONCLUSION**

The dangers intrinsic in the Earl decision are readily apparent. If burglary as presently defined in section 459 will activate section 189 as a matter of law, any shoplifter who kills can easily be found guilty of first degree murder, even if he enters a store unarmed, so long as he enters with the intent to commit grand or petty theft. Considering the clear statement of the California Supreme Court in People v. Washington\(^{115}\) that the felony-murder rule should not be extended to situations where it does not serve a rational function, such a result runs counter to the current view of the felony-murder doctrine.

The supreme court has repeatedly applied the qualifying principle espoused in Washington in such a way as to insure that the "highly artificial concept" of strict criminal liability implicit in the felony-murder doctrine be given narrow application consistent with its purpose.\(^{116}\) The ostensible purpose of the felony-murder rule is to deter those engaged in felonies from killing negligently or accidentally. This purpose can be effectively served by applying the second degree felony-murder rule to burglaries the court determines are inherently dangerous to human life. But the harshness of applying the statutory felony-murder rule to all burglaries should have been avoided. The Earl decision sanctions the proliferation of that rule beyond any boundary originally intended when it was first codified in California as a restrictive device. Furthermore, the Earl holding fails to recognize the increasing reluctance of the supreme court to predicate findings of murder on such an artificial device as the felony-murder rule.\(^{117}\)

*Nancy Hoffman*\(^*\)

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115. 62 Cal. 2d 777, 783, 402 P.2d 130, 134, 44 Cal. Rptr. 442, 446 (1965).
117. The California Supreme Court may have refused to grant a hearing in the Earl case because it considered the harshness of the felony-murder rule to have been mitigated somewhat by the abolition of capital punishment. It should be noted that in the recently enacted amendments to the Penal Code which institute a mandatory death penalty for certain crimes, only burglary of an inhabited dwelling house entered with an intent to commit grand or petit larceny or rape is punishable by death. Senate Bill 450 § 5(b)(3)(v) enacted Sept. 24, 1973 (effective Jan. 1, 1974).

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