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Why California's Second-Degree Felony-Murder Rule is Now Void for Vagueness

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by EVAN TSEN LEE*

Introduction

For years, justices on the California Supreme Court ("CSC") have engaged in public soul-searching about whether to overrule the state's second-degree felony-murder doctrine.[1] Now there is a powerful external reason for the CSC to revisit the question: The United States Supreme Court ("USSC") has just struck down the so-called "residual clause" of the federal three-strikes statute as unconstitutionally vague. Although the immediate intuition of experienced judges and lawyers will be to deny that this decision has any application to the felony-murder rule, this Article will show that, from the standpoint of vagueness, the two provisions are materially indistinguishable.

On June 26, 2015, the USSC handed down *Johnson v. United States,* in which the Court found that the so-called "residual clause" of the "violent felony" provision in the Armed Career Criminal Act ("ACCA")[2] is void for vagueness.[3] The ACCA mandates long sentences for felons-in-possession-of-a-firearm if they have previously been convicted of three "violent felonies."[4] The residual clause contained an alternative definition of violent felony that included any felony involving conduct that presented a "serious potential risk of

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1. *See* People v. Sarun Chun, 45 Cal. 4th 1172, 1182–83 (2009) (upholding the rule's constitutionality, but also chronicling individual justices' past expressions of doubts about the rule's constitutionality).

2. 18 U.S.C. § 924(e) (2006).

3. Johnson v. United States, 135 S. Ct. 2551, 2557 (2015).

4. 18 U.S.C. § 924(e)(2).

physical injury."[5] The *Johnson* Court held that the constitutional problem with the residual clause was that the analysis of risk was not based on actual facts, but on *hypothetical* facts.[6] In other words, under the residual clause, a court had to imagine the "ordinary" commission of the felony in question and then ask whether that set of hypothetical facts presented a serious risk of injury.[7] The result was that defendants were deprived of any meaningful advance notice of which felonies would eventually be denominated "violent" and which ones would not.

In striking down the residual clause, Justice Scalia's majority opinion was careful and narrow. After all, there are many state and federal criminal laws that hinge criminality or sentence enhancements on the presence of "unreasonable risk" or "substantial risk" or something similar.[8] Think about involuntary manslaughter, which in most states amounts to criminally negligent homicide.[9] The defendant killed the victim by way of conduct that presented a substantial risk of death of which a reasonable person in the actor's situation should have been aware. If *Johnson* had held that any statute criminalizing conduct based on "risk" was vague, it would have augured a massive rewrite of criminal codes.

Instead, Justice Scalia's *Johnson* opinion performed a precise surgical excision. Under well-established ACCA case law, the supposed "violent felony" in question must be analyzed "categorically" and not based on the defendant's real conduct.[10] Put differently, analysis under the residual clause is a totally abstract analytical exercise. It is abstract in two senses: the determination of how much risk is "serious" presents an abstract question, and the determination of what facts the "ordinary" commission of a given felony involves also presents an abstract question. This is in contrast to, say, involuntary manslaughter analysis, which presents an abstract question tied to a concrete one: the question of what constitutes a "substantial risk" or "unreasonable risk" of death is abstract, but the precise facts of the case are concrete.

5. *Id.* at § 924(e)(2)(B).
6. *Johnson*, 135 S. Ct. at 2557–60.
7. *Id.* at 2557–58.
8. *Id.* at 2561.
9. *See* Wayne R. LaFave, CRIMINAL LAW § 15.4 at 838–39 (5th ed. 2010).
10. Taylor v. United States, 495 U.S. 575, 600 (1990).

Even narrow rationales have some logical compass, however, and *Johnson*'s rationale completely envelops California's very peculiar second-degree felony-murder rule. Under longstanding CSC precedent, a felony must be "dangerous to human life" in order to qualify as a predicate for second-degree felony-murder in California.[11] That itself does not distinguish the rule from those in other states, which also require that felonies be dangerous before they may trigger felony-murder. What makes the California rule unique is that it requires the felony to be "inherently" dangerous, meaning that it must be dangerous to human life no matter how it is committed. In every other state, the felony must be "foreseeably" dangerous based on the *actual factual circumstances* of the case. In California, the dangerousness of the predicate felony is measured abstractly; in every other state, it is measured concretely, based on the facts of the case. Over the decades, the CSC has varied the abstractness of its dangerousness inquiry, sometimes employing what I will call a "minimum conduct"[12] (that is, least risky conduct) standard, other times employing an "ordinary commission" standard. For vagueness purposes under the rule of *Johnson*, however, it doesn't matter. Abstract is abstract. And abstract, when it forms the field of reference for a determination of risk in criminal law, is unconstitutional.

This Article will briefly review the history of USSC vagueness precedents, culminating in *Johnson*. It will then briefly review the history of the inherently dangerous felony limitation on the second-degree felony-murder rule in California.[13] By then, it will be abundantly clear why California's current second-degree felony-murder rule is unconstitutionally vague. There is a very simple fix available to the CSC, which is to adopt the "actual facts" standard of foreseeable dangerousness employed by every other state that has an

11. *See infra* notes 95–185 and accompanying text.

12. I use the term "minimum conduct" because that is the term used in immigration law when the categorical approach is used to determine whether prior convictions qualify for either federal sentencing enhancement or removal. *See, e.g.*, Martinez v. Mukasey, 551 F.3d 113, 118 (2d Cir. 2008) ("[T]he singular circumstances of an individual petitioner's crimes should not be considered, and only the minimum criminal conduct necessary to sustain a conviction under a given statute is relevant." (quoting Gertsenshteyn v. Mukasey, 544 F.3d 137, 143 (2d Cir. 2008))).

13. California's second-degree felony-murder rule has other limitations as well. *See* People v. Chun, 45 Cal. 4th 1172 (2009), for an explication of California's "merger" rule. *See* People v. Washington, 40 Cal. Rptr. 791 (1964), for an example of California's "agency" doctrine.

unenumerated felony-murder doctrine. However, the Article will further argue that the foreseeable dangerousness rule essentially creates a category of "criminally negligent murder" without openly admitting it. It has the effect of encouraging juries to overcome their doubts about whether the government has adequately proved conscious disregard for human life by in essence telling them that negligence is good enough in any event. The time is ripe for the CSC to do the right thing—to overrule the second-degree felony-murder rule and to fall back onto the murder statute that the California Legislature has actually written.

I. The Law of Vagueness

Johnson is the latest word on vagueness and thereby becomes the focal point for any subsequent vagueness analysis. It is nonetheless worth a brief look at from whence vagueness as a constitutional doctrine sprang.[14]

A. Origins

The early cases focused on lack of notice. *United States v. Reese*,for example, involved federal criminal charges against Kentucky officials alleged to have discriminated against a black voter.[15] The Court struck down the criminal statute on the ground that, literally construed, it authorized punishment for more than just race discrimination. This overbreadth rendered the statute not "appropriate legislation" to enforce the Fifteenth Amendment.[16] In so holding, the Court stated, "Laws which prohibit the doing of things, and provide a punishment for their violation, should not have a double meaning."[17] "If the legislature undertakes to define by statute a new offense," continued the Court, "and provides for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with

14. Although there are many law review articles on vagueness, they tend to focus exclusively on applications of vagueness analysis to particular statutes or on the relationship of vagueness to other constitutional doctrines. The most helpful general article on vagueness is Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279 (2003). The *locus classicus,* now somewhat dated, in Anthony Amsterdam's student note, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U. PA. L. REV. 67 (1960).

15. United States v. Reese, 92 U.S. 214 (1875).

16. *Id.* at 221–22.

17. *Id.* at 220.

certainty when he is committing a crime."[18] *Reese* thus confirms that the law of vagueness as a restriction on the enforcement of criminal statutes came into being as the result of the advent and spread of *malum prohibitum* offenses. A crime *malum in se* gave notice of its illegality by its obvious immorality; a crime *malum prohibitum* did not.

Another example of a *malum prohibitum* offense is a criminal antitrust statute. In *International Harvester Co. of America v. Kentucky*, the defendant corporation was prosecuted and fined for violating state price-fixing conspiracy laws.[19] Justice Holmes' opinion reversing the convictions is worth excerpting, not only because it is Holmes, but also because it eerily presages *Johnson*:

> [F]or it shows how impossible it is to think away the principal facts of the case as it exists, and say what would have been the price in an imaginary world.... The reason is not the general uncertainties of a jury trial, but that the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind.
>
> We regard this decision as consistent with *Nash v. United States* [229 U.S. 373 (1913)] in which it was held that a criminal law is not unconstitutional merely because it throws upon men the risk of rightly estimating a matter of degree,—what is an undue restraint of trade. That deals with the actual, not with an imaginary condition other than the facts.... To compel them to guess, on peril of indictment, what the community would have given for them if the continually changing conditions were other than they are, to an uncertain extent; to divine prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess.[20]

18. *Id.*

19. Int'l Harvester Co. of America v. Kentucky, 229 U.S. 373 (1914).

20. *Id.* at 223.

International Harvester is not on all fours with *Johnson,* as it concerns the difficulty of predicting the imaginings of purchasers, not the imaginings of judges. Still, *International Harvester* creates an intellectual template for *Johnson* in that it finds constitutional fault with a criminal statute for forcing citizens to gauge the criminality of their contemplated acts on a hypothetical, rather than factual, predicate. As with *Johnson*, the ultimate problem was lack of sufficient notice.

Eventually, the Court's vagueness analysis made the leap from statutes gauging criminality based on hypothetical facts to statutes that were simply too open-ended in their liability standards. In *United States v. L. Cohen Grocery Co.,* the defendant company was punished under a criminal rate-fixing statute that "made unlawful for any person willfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries . . . ."[21] Chief Justice White stated:

> Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below in its opinion to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury.[22]

In *Connally v. General Construction Co.,* the defendant company had been punished for violating a state minimum-wage law decreeing, "[N]ot less than the current rate of per diem wages in the locality

21. United States v. L. Cohen Grocery Co., 255 U.S. 81, 89 (1920).

22. *Id.*

where the work is performed shall be paid . . . ."[23] The Court found it unconstitutionally vague:

> We are of opinion that this provision presents a double uncertainty, fatal to its validity as a criminal statute. In the first place, the words "current rate of wages" do not denote a specific or definite sum . . . . The 'current rate of wages' is not simple, but progressive—from so much (the minimum) to so much (the maximum), including all between; and to direct the payment of an amount which shall not be less than one of several different amounts, without saying which, is to leave the question of what is meant incapable of any definite answer.
>
> . . . .
>
> In the second place, additional obscurity is imparted to the statute by the use of the qualifying word 'locality.' Who can say, with any degree of accuracy, what areas constitute the locality where a given piece of work is being done? . . . . It is said that this question is settled for us by the decision of the state Supreme Court on rehearing in *State v. Tibbetts*. But all the court did there was to define the word "locality" as meaning "place," "near the place," "vicinity," or "neighborhood." Accepting this as correct, as of course we do, the result is not to remove the obscurity, but rather to offer a choice of uncertainties. The word "neighborhood" is quite as susceptible of variation as the word "locality." Both terms are elastic and, dependent upon circumstances, may be equally satisfied by areas measured by rods or by miles.[24]

Whether or not one agrees with *Connally*—and agreement is made harder by the fact that the labor commissioner gave explicit warning to the company that its wages were too low and would be prosecuted if it did not raise them by at least forty cents per hour—it solidly reaffirmed that criminal proscriptions would be rendered

23. Connally v. General Constr. Co., 269 U.S. 385, 388 (1926).

24. *Id.* at 393–95.

unenforceable if they were uncertain in multiple aspects. That dynamic of uncertainty-compounding-uncertainty deprived criminal laws of sufficient notice to satisfy due process.

Perhaps *Connally*, which ignored the actual notice given by the commissioner to the company, in some way presaged the vagueness doctrine's eventual turn toward a focus on the dangers of arbitrary enforcement. It is possible to view *Connally* as resting on the unarticulated major premise that a vague statute offends due process even if the defendant at bar had a chance to avoid prosecution, so long as the statute effectively gave law enforcement *carte blanche* in deciding whom to go after. The fact that the General Construction Company had actual notice may not (in the Court's mind) have overcome the fact that the commissioner was essentially free to go after any wage-paying employer in the jurisdiction because the measure of liability in the statute could be manipulated almost infinitely.

Whether or not *Connally* foreshadows it, the vagueness doctrine's move toward a focus on arbitrary enforcement certainly manifested itself in *Papachristou v. City of Jacksonville.*[25] There, the Court found a loitering ordinance void for vagueness "both in the sense that it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, and because it encourages arbitrary and erratic arrests and convictions."[26] Arbitrary enforcement as a ground for vagueness was also apparent in *Grayned v. City of Rockford,* which, in rejecting a vagueness challenge to a municipal anti-noise ordinance, noted that the law "contains no broad invitation to subjective or discriminatory enforcement."[27] "As always, enforcement requires the exercise of some degree of police judgment, but, as confined, that degree of judgment here is permissible," wrote Justice Marshall for the Court.[28]

It became clear in *Kolender v. Lawson* that the notice and arbitrary enforcement prongs of the vagueness doctrine constituted independently sufficient reasons for finding a criminal law unconstitutional.[29] Striking down a California loitering statute that required an individual to produce a "credible and reliable" form of

25. Papachristou v. City of Jacksonville, 405 U.S. 156 (1969).

26. *Id.* at 162.

27. Grayned v. City of Rockford, 408 U.S. 104, 113 (1972).

28. *Id.* at 114.

29. Kolender v. Lawson, 461 U.S. 352 (1983).

identification upon law enforcement demand, Justice O'Connor stated the general rule for vagueness as follows: "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[30] The "credible and reliable" clause of the loitering ordinance failed the second prong of that rule. "[T]he statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest," stated Justice O'Connor.[31] She continued: "An individual, whom police may think is suspicious but do not have probable cause to believe has committed a crime, is entitled to continue to walk the public streets 'only at the whim of any police officer' who happens to stop that individual under" the ordinance.[32]

More recently, in *City of Chicago v. Morales*, the Court invalidated Chicago's "Gang Congregation Ordinance" on an anti-arbitrary enforcement rationale.[33] That rather peculiar ordinance required four elements to be met before a violation could be found:

> First, the police officer must reasonably believe that at least one of the two or more persons present in a public place is a criminal street gang membe[r]. Second, the persons must be loitering, which the ordinance defines as remain[ing] in any one place with no apparent purpose. Third, the officer must then order all of the persons to disperse and remove themselves from the area. Fourth, a person must disobey the officer's order.[34]

Because the ordinance had no requirement of a harmful purpose, and because it applied to non-gang members as well as suspected

30. *Id.* at 357 (citing Village of Hoffman Estates v. Flipside, 455 U.S. 489 (1982) (finding that an ordinance requiring a license for a retailer of marijuana paraphernalia was not vague in the context of a pre-enforcement challenge where there was not a clear showing of the danger of arbitrary enforcement)).

31. *Id.* at 358.

32. *Id.*

33. City of Chicago v. Morales, 527 U.S. 41 (1999).

34. *Id.* at 47.

gang members, it effectively left complete discretion to the police to arrest almost anyone. Zeroing in on the ordinance's definition of loitering as "to remain in any one place with no apparent purpose," Justice Stevens parroted the finding of the Illinois Supreme Court—that this definition "provides absolute discretion to police officers to decide what activities constitute loitering."[35] This invitation to arbitrary enforcement, along with the ordinance's failure to give adequate notice of what was prohibited and what was not,[36] led the Court to find that the ordinance was unconstitutionally vague.

From this brief survey, one can see that the vagueness doctrine began with an exclusive focus on whether the law in question provided adequate notice to the ordinary citizen of what was prohibited and what was permitted. It eventually expanded to include a prong focusing on whether the language of the statute or ordinance invited arbitrary or selective enforcement. Although the Court never abandoned the notice prong of the vagueness doctrine, it is fair to say that later decisions paid more attention to the arbitrary enforcement prong.

B. Johnson v. United States

It was thus a bit surprising that Justice Scalia's opinion in *Johnson* said almost nothing about arbitrary enforcement. Perhaps the Court believed that beat cops do not exercise any discretion when it comes to sentencing enhancement statutes—though it seems quite likely that they do think about such things when deciding whether to pick up known ex-convicts for firearm possession. Moreover, under the residual clause, federal prosecutors did have discretion to plead certain prior felony convictions that they had not been able to shoehorn into the other definitions of "violent felony" or "serious drug offense."[37] There was an arbitrary enforcement argument to be made, if the Court had wanted to make it.

Some academics have criticized the arbitrary enforcement prong of the vagueness doctrine. Noting the indispensability of beat cop discretion in the just enforcement of everyday ordinances, Professor Albert Hill has argued that widespread condemnation of laws on the basis of arbitrary enforcement would have the unfortunate effect of

35. *Id.* at 61 (quoting City of Chicago v. Morales, 687 N.E.2d 53, 63 (Ill. 1997)).

36. *Morales*, 527 U.S. at 60 ("[T]he entire ordinance fails to give the ordinary citizen adequate notice of what is forbidden and what is permitted.").

37. 18 U.S.C. § 924(e)(1) (2006).

encouraging the blanket enforcement of, for example, traffic laws.[38] Professor Debra Livingston has argued that limiting police discretion by making statutes more clear is "hopeless," noting that some extremely broad laws are nonetheless clear, and that such laws will always leave police with broad discretion.[39] Andrew Goldsmith has suggested that these critiques might be addressed by limiting the arbitrary enforcement prong to statutes that particularly invite arbitrary enforcement rather than to all statutes.[40] It is possible that the *Johnson* Court's omission of any discussion of the arbitrary enforcement prong reflects doubts about its correctness, but intelligent speculation may have to await more clues.

Johnson began its analysis with *Kolender*'s statement of the rule, which has become the black-letter law. "Our cases establish that the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement," stated Justice Scalia.[41] Without further elaboration of this rule, he then stated that the law of vagueness applies "not only to statutes defining elements of crimes, but also to statutes fixing sentences."[42]

The Court then went straight into a description of the so-called "categorical approach" to determining whether prior convictions qualify under the ACCA. The landmark decision is *Taylor v. United States,* in which the defendant's alleged third strike was a Missouri burglary conviction.[43] Burglary is enumerated in § 924(e)(2),[44] so one

38. Alfred Hill, *Vagueness and Police Discretion: The Supreme Court in a Bog*, 51 RUTGERS L. REV. 1289, 1307 (1999). Another example used by Professor Hill, blanket enforcement of domestic violence laws, probably would not engender as widespread societal outrage as with traffic laws.

39. Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 593 (1997).

40. Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279 (2003).

41. Johnson v. United States, 135 S. Ct. 2551, 2556 (2015) (citing Kolender v. Lawson, 461 U.S. 352, 357–58 (1983)).

42. *Id.* at 2557 (citing United States v. Batchelder, 442 U.S. 114, 123 (1979)).

43. Taylor v. United States, 495 U.S. 575, 578 (1990).

44. 18 U.S.C. § 924(e)(2)(B)(ii) (2006) (stating in pertinent part: "[T]he term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife or destructive device that would be punishable by imprisonment for such a term if committed by an adult, that—is *burglary*, arson, or extortion, involves the use of explosives, or

might think that there would be no question as to whether the conviction qualified. But the *Taylor* Court explained that the analysis was not so simple. The courts could not simply take a nominal approach to burglary—that is, could not simply count the conviction as burglary on the ground that Missouri called it burglary.[45] After all, every state has its own burglary statute, with major variations regarding which places can be burglarized. Congress could not have wanted all sorts of different statutes counted as burglary simply because the state legislatures chose to use that label.[46]

Thus, the *Taylor* Court adopted a generic form of burglary for ACCA analysis. If a state version of burglary contained all the elements of this generic federal target, then convictions under that statute would count as burglary; if not, then not. But the adoption of a generic federal form of burglary quickly provoked another issue, namely, how to determine whether a given conviction meets the elements in the generic form. For example, *Taylor*'s generic form of burglary requires that the place of the burglary be a fixed structure and not a car, boat, or airplane.[47] Yet in some states people can be convicted of "burglary" for unlawfully entering cars, boats, or airplanes with the intent to commit crimes therein. Do those convictions count?

There are two principal methods of making that determination. One would be to look at the real conduct—the actual facts—underlying the burglary conviction. If, for example, the defendant's lawyer admitted at the plea hearing that the place of the burglary was a house or a store, then the conviction would count. Or if something else in the record showed that the place of the burglary was a fixed structure, then the conviction would count. In the real world, however, the record does not always contain competent evidence of the precise nature and place of the burglary, which means the "real conduct" or "actual facts" approach would often require mini-trials of old convictions to determine the applicability of the ACCA.[48]

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otherwise involves conduct that presents a serious potential risk of physical injury to another . . . ." (emphasis added)).

45. *Taylor*, 495 U.S. at 592 ("We think that 'burglary' in 924(e) must have some uniform definition independent of the labels employed by the various States' criminal codes.").

46. *Id.* at 590–91.

47. *Id.* at 599 ("building or structure").

48. *Id.* at 601. *See also* Descamps v. United States, 133 S. Ct. 2276, 2287 (2013).

Eschewing this method as impractical, *Taylor* instead adopted a categorical approach.[49] With respect to burglaries, courts are to examine the state statute of conviction. If the statute permits convictions for burglaries of places other than fixed structures, then all convictions under that statute are categorically disqualified (even if it is clear that this particular burglary took place in a fixed structure). In this way, federal sentencing courts are not required to retry cases, many of which were commited long ago and far away.

So far, so good. But the exact *Taylor* approach was not available to the courts in residual clause cases because the residual clause enumerates no felonies, such as burglary or extortion. It is not possible for courts to develop a "generic" version of a residual clause felony, because such a felony could be any felony presenting a "serious potential risk of physical injury to another."[50] Therefore, a "minimum conduct" approach as used in *Taylor* was not possible. If the residual clause were to be treated on a categorical basis, as with the rest of the ACCA, then it would have to be on an "ordinary commission" approach. That is, courts would have to determine what the ordinary commission of the felony in question looks like. What facts underlie the ordinary commission of driving under the influence? What facts underlie the ordinary commission of attempted burglary? What facts underlie the ordinary commission of using a motor vehicle to elude a police officer? Once such hypothetical facts were determined, they could be tested to determine whether they presented the "serious potential risk" of injury.

There is, however, an inherent arbitrariness to imagining the ordinary commissions of felonies. In *James v. United States,* where the question was whether attempted burglary in Florida posed a serious potential risk of injury, the Court said yes, reasoning that the ordinary attempted burglary may be *more* dangerous than the ordinary completed burglary because the typical attempted burglary that is actually prosecuted has ended in "confrontation with a property owner or law enforcement officer."[51] In *Chambers v. United States,* the felony at issue was failure to report to a penal institution under Illinois law.[52] The majority concluded that this felony did not

49. *Taylor*, 495 U.S. at 590.

50. 18 U.S.C. § 924(e)(2)(B)(ii) (2006).

51. James v. United States, 550 U.S. 192, 204 (2007), *overruled by* Johnson v. United States, 135 S. Ct. 2551 (2015).

52. Chambers v. United States, 555 U.S. 122, 127 (2009).

fall within the residual clause, in large part because "an individual who fails to report would seem unlikely, not likely, to call attention to his whereabouts by simultaneously engaging in additional violent and unlawful conduct."[53] In *Sykes v. United States,* the felony at issue was vehicular flight from a police officer under Indiana law.[54] The Court imagined the following scenario as typical:

> It is well known that when offenders use motor vehicles as their means of escape they create serious potential risks of physical injury to others. Flight from a law enforcement officer invites, even demands, pursuit. As that pursuit continues, the risk of an accident accumulates. And having chosen to flee, and thereby commit a crime, the perpetrator has all the more reason to seek to avoid capture.[55]

In theory, statistics could have made the "ordinary commission" approach less arbitrary, and in fact the Court used them where available.[56] But availability proved to be the problem. The Court's data were coming from all different sources, with different gathering methodologies.[57] In dissent, Justice Scalia derided this eclectic approach to statistics. "The Court does not reveal why it chose one dataset over another. In sum, our statistical analysis in ACCA cases is untested judicial factfinding masquerading as statutory interpretation," he complained.[58] The available data was not nearly scomprehensive enough to take the arbitrariness out of the analysis—

53. *Id.* at 128.

54. Sykes v. United States, 131 S. Ct. 2267 (2011), *overruled by Johnson,* 135 S. Ct. 2551.

55. *Id.* at 2274.

56. *See Chambers,* 555 U.S. at 128–30; *Sykes,* 131 S. Ct. at 2274–76.

57. The *Sykes* Court relied on the following statistical sources: NAT'L CENTER FOR STATISTICS & ANALYSIS, FATALITIES IN MOTOR VEHICLE TRAFFIC CRASHES INVOLVING POLICE IN PURSUIT (2010); C. LUM & G. FACHNER, POLICE PURSUITS IN AN AGE OF INNOVATION AND REFORM (2008); SHANNON CATALANO, BUREAU OF JUSTICE STATISTICS, VICTIMIZATION DURING HOUSEHOLD BURGLARY (Sept. 2010); U.S. FIRE ADMINISTRATION, METHODOLOGY USED IN THE DEVELOPMENT OF THE TOPICAL FIRE RESEARCH SERIES, http://www.usfa.dhs.gov/downloads/pdf/tfrs/methodology.pdf (last visited by the Court June 3, 2011).

58. *Sykes,* 131 S. Ct. at 2286 (Scalia, J., dissenting).

a somber realization to which a majority[59] of the justices finally came in *Johnson*.[60]

In his *Johnson* majority opinion, Justice Scalia carefully explained that the residual clause was not vague merely because "serious potential risk" feels too subjective or open-ended. In its bid to save the residual clause, the government cited dozens of state and federal statutes using similar locutions: "substantial risk," "grave risk," and "unreasonable risk."[61] The government's implication was clear: if the Court were to declare the residual clause unconstitutionally vague, then all these similarly worded statutes would go down with it.

But Justice Scalia had a ready answer. The residual clause was vague because, given the categorical approach, it hinged the concept of risk onto hypothetical facts. It was not vague on the ground that the concept of risk is inherently vague. It was vague because the residual clause, viewed through the "ordinary commission" lens, required judges to imagine a set of facts and then to determine whether that imagined set of facts presented a serious risk of injury:

> Two features of the residual clause conspire to make it unconstitutionally vague. In the first place, the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime. It ties the judicial assessment of risk to a judicially imagined

59. Justice Alito alone would have saved the residual clause from vagueness by switching to an actual facts approach. He did not explain how such an approach could be carried out without the need of retrying the facts underlying prior convictions in many of the cases. *Johnson*, 135 S. Ct. at 2578–79 (Alito, J., dissenting).

60. I, along with two social scientist colleagues, searched diligently for a database or databases that could provide sufficient guidance to support a statistical analysis of "ordinary commission." *See* Evan T. Lee, Lynn A. Addington & Stephen D. Rushin, *Which Felonies Pose a "Serious Potential Risk of Injury" for Federal Sentencing Purposes?*, 26 FED. SENT'G. REP. 118 (Dec. 2013). Although our long and relatively fruitless search for such databases was not documented in the article, the research included emails to crime statistics agencies in all fifty states and to the Federal Bureau of Investigation, along with follow-up telephone calls to many of them. We were told by virtually every agency that injury statistics *for individual crimes* are generally not collected or tabulated. Based on this research, and acknowledging that agencies may treat injury data differently than fatality data, I am skeptical that a database presently exists that could support an empirical approach to determining which California felonies are "inherently dangerous to human life."

61. Supplemental Brief for Respondent, Johnson v. United States, 135 S. Ct. 2551 (2015), No. 13-7120.

> "ordinary case" of a crime, not to real-world facts or statutory elements. How does one go about deciding what kind of conduct the "ordinary case" of a crime involves? "A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?" To take an example, does the ordinary instance of witness tampering involve offering a witness a bribe? Or threatening a witness with violence? Critically, picturing the criminal's behavior is not enough; as we have already discussed, assessing "potential risk" seemingly requires the judge to imagine how the idealized ordinary case of the crime subsequently plays out . . . .
>
> At the same time, the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony. It is one thing to apply an imprecise "serious potential risk" standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction. By asking whether the crime "*otherwise* involves conduct that presents a serious potential risk," moreover, the residual clause forces courts to interpret "serious potential risk" in light of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives. These offenses are "far from clear in respect to the degree of risk each poses." Does the ordinary burglar invade an occupied home by night or an unoccupied home by day? Does the typical extortionist threaten his victim in person with the use of force, or does he threaten his victim by mail with the revelation of embarrassing personal information? By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.[62]

62. *Johnson*, 135 S. Ct. at 2557–58 (citations omitted).

Justice Scalia then cited the Court's own interpretive struggles with the residual clause as an independent ground for finding vagueness:

> This Court has acknowledged that the failure of "persistent efforts . . . to establish a standard" can provide evidence of vagueness. Here, this Court's repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause confirm its hopeless indeterminacy. . . .
>
> . . . .
>
> It has been said that the life of the law is experience. Nine years' experience trying to derive meaning from the residual clause convinces us that we have embarked upon a failed enterprise.[63]

Thus, *Johnson*'s vagueness analysis turns on one main factor and two factors of lesser importance. The main factor is the intersection of risk and hypothetical facts. The less important factors are (1) juxtaposition to enumerated felonies, inviting comparison; and (2) repeated judicial failures to craft a principled and objective standard. It is not clear *how much* less important these secondary factors are, but for purposes of the California second-degree felony-murder rule it doesn't matter. All three factors are abundantly present in California's "inherently dangerous felony" rule as it currently exists.

With respect to juxtaposition to enumerated felonies, *Johnson* says the following:

> What is more, the inclusion of burglary and extortion among the enumerated offenses preceding the residual clause confirms that the court's task also goes beyond evaluating the chances that the physical acts that make up the crime will injure someone. The act of making an extortionate demand or breaking and entering into someone's home does not, in and of itself, normally cause physical injury. Rather, risk of injury arises because the extortionist might engage in violence after making his demand or because the burglar might

63. *Id.* at 2558, 2560 (citation omitted).

> confront a resident in the home after breaking and entering.[64]

In other words, the unpredictability of the residual clause is compounded by the inclusion of enumerated felonies as comparitors because it requires a court to gauge the risk of those comparitors as well—something that cannot be done without comprehensive statistics.

C. California Case Law on Vagueness

It is certainly the prerogative of a state supreme court to construe individual rights under its state constitution more broadly than the federal Supreme Court does under the federal Constitution. Thus, the CSC could interpret article I, section 7 of the California Constitution to provide a more robust protection against vague criminal statutes than do federal precedents. As it happens, though the CSC's vagueness precedents closely track those of the USSC; the CSC has really not had much original to say about vagueness. Therefore, we need not spend a great deal of time surveying California vagueness law.

One of the leading cases is *Williams v. Garcetti*.[65] There, the CSC rejected vagueness and overbreadth challenges to a California statute authorizing misdemeanor punishment for any one who "commits any act or omits any duty causing, encouraging, or contributing to the dependency or delinquency of a minor."[66] An amendment to the statute provided that, for the purposes of the quoted section, parents or guardians "shall have the duty to exercise reasonable care, supervision, protection, and control" over their children.[67] The issue before the CSC was whether the amendment made the statute unconstitutionally vague. The Court stated:

> The constitutional interest implicated in questions of statutory vagueness is that no person be deprived of "life, liberty, or property without due process of law," as assured by both the federal Constitution (U.S. Const., Amends. V, XIV) and the California

64. *Id.* at 2557 (emphasis deleted).

65. Williams v. Garcetti, 5 Cal. 4th 561 (1993).

66. CAL. PEN. CODE § 272 (2015).

67. *Garcetti*, 5 Cal. 4th at 565.

> Constitution (Cal. Const., art. I, § 7). Under both constitutions, due process of law in this context requires two elements: a criminal statute must "be definite enough to provide (1) a standard of conduct for those whose activities are proscribed and (2) a standard for police enforcement and for ascertainment of guilt."[68]

This statement of the rule mimics the USSC's black-letter statement in *Kolender* and in subsequent cases.[69] The first prong focuses on notice to the ordinary citizen: The statute's language must set forth some ascertainable standard to which the citizen can conform his or her behavior. "Vague laws may trap the innocent by not providing fair warning," the *Garcetti* Court explained.[70] The second prong focuses on avoiding arbitrary enforcement. If the statute contains no standard for enforcement, it can be said to invite arbitrary or selective enforcement. The Court elaborated, "[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."[71] Given that the statute only authorized punishment upon proof of criminal negligence, which requires a gross deviation from normal care, the statute's standard of "reasonable" care and supervision was not unconstitutionally vague.[72]

Another oft-cited CSC case concerning vagueness is *People v. Superior Court (Caswell)*,[73] which involved a state loitering statute: any person "who loiters in or about any toilet open to the public for the purpose of engaging in or soliciting any lewd or lascivious or any

68. *Id.* at 567 (citing Walker v. Super. Ct., 47 Cal.3d 112, 141 (1988) and Kolender v. Lawson, 461 U.S. 352, 357 (1983)).

69. *See, e.g.*, *Kolender*, 461 U.S. at 357; City of Chicago v. Morales, 687 N.E.2d 53, 63 (Ill. 1997).

70. *Garcetti*, 5 Cal. 4th at 567.

71. *Id.* at 567–68 (1993) (quoting Cranston v. City of Richmond, 40 Cal. 3d 755, 763 (1985)).

72. *Id.* at 574. The Court also concluded that the statute did not invite arbitrary enforcement. "Although the amendment calls for sensitive judgment in both enforcement and adjudication, we would not be justified in assuming that police, prosecutors, and juries are unable to exercise such judgment." *Id.* at 577.

73. People v. Super. Ct. (*Caswell*), 46 Cal. 3d 1361 (1988).

unlawful act" is guilty of a misdemeanor.[74] Again, the Court stated that the test for vagueness involves a notice aspect and an arbitrary enforcement aspect. "First, a statute must be sufficiently definite to provide adequate notice of the conduct proscribed," the Court stated.[75] "Second, a statute must provide sufficiently definite guidelines for the police in order to prevent arbitrary and discriminatory enforcement."[76]

With respect to notice, the Court stressed that this loitering statute contains a specific intent requirement. Without the requisite "purpose of engaging in or soliciting" a lewd, lascivious, or unlawful act, there could be no liability. The word "loiter" might be susceptible to multiple interpretations. However, the requirement of specific intent prevents truly innocent people from doubting their liability. "Persons of ordinary intelligence need not guess at the applicability of the section; so long as they do not linger for the proscribed purpose, they have not violated the statute," the Court stated.[77]

Regarding arbitrary enforcement, the Court distinguished *Kolender*. The need to produce "reliable and credible" evidence upon police demand, made the loitering ordinance in *Kolender* subject to the "personal standards of each individual law enforcement officer."[78] By contrast, the loitering ordinance involved in *Caswell* vested "no such discretion with law enforcement." "A person is subject to arrest under the provision only if his or her conduct gives rise to probable cause to believe that he or she is loitering in or about a public restroom with the proscribed illicit intent," the Court stated.[79]

There are, of course, other CSC cases involving challenges to statutes and ordinances on vagueness grounds.[80] Unsurprisingly, they

74. CAL. PEN. CODE § 647(d) (2015).

75. *Caswell*, 46 Cal. 3d at 389.

76. *Id.* at 390.

77. *Id.* at 391.

78. *Id.* at 394.

79. *Id.*

80. *See, e.g.*, People v. Heitzman, 9 Cal. 4th 189 (1994) (elderly abuse statute not vague); Burg v. Municipal Court, 35 Cal. 3d 57 (1983) (driving under the influence statute not vague); *but see* People v. Barksdale, 8 Cal. 3d 320 (1972) (provision in Therapeutic Abortion Act that employed "substantial risk" standard was unconstitutionally vague). Although the statute in *Barksdale* bears a superficial resemblance to the residual clause's "serious potential risk" provision, it is only superficial, as the abortion law did not involve the kind of double or compounded uncertainty upon which Justice Scalia's *Johnson* opinion rests.

all hew closely to the USSC precedents surveyed earlier. They do not add appreciably to the nuance in vagueness analysis, but rather, merely apply the established standards to different statutes and ordinances. It is time to examine the precise way in which California's second-degree felony-murder rule runs afoul of vagueness law, and *Johnson* in particular.

II. California's Second-Degree Felony-Murder Rule

A. The Structure of CPC Sections 187–89

California's murder statute spans several provisions. Both the first-degree and second-degree felony-murder doctrines involve some form of inference from the structure of the statute; neither is set forth in so many words.[81] Section 187 states, "Murder is the unlawful killing of another human being, or fetus, with malice aforethought."[82] Section 188 defines malice as follows: "Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart."[83] Felony-murder, then, is a form of implied malice murder.

Section 189 states as follows:

> All murder which is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, 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, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle

81. *See* People v. Dillon, 34 Cal. 3d 441, 472 (1983) (characterizing the CSC first-degree felony-murder rule as the product of "piling inference upon inference").

82. CAL. PEN. CODE § 187 (2015).

83. CAL. PEN. CODE § 188 (2015).

> with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree.[84]

As a matter of first impression, section 189 appears purely as a grading provision. Section 187 holds the actual proscription of primary conduct, making killings with "malice" punishable as murder. Section 189 contains an exhaustive list of "murder[s]" that are to be punished as first-degree, with a residual clause stating that "[a]ll other kinds of murders" are to be punished as second-degree. If section 189 stated that "all *killing* which is perpetrated by" various means "is murder of the first-degree," then the first-degree felony-murder rule would be explicit. By the same token, if it said that "all other kinds of *killings*" are second-degree murders, there would be no need to infer anything. But section 189 does not say that; it limits its scope to whatever is already made "murder" by section 187.

The interpretation of section 189 has, however, long ceased to be a matter of first impression. At least as far back as 1983, in *People v. Dillon*, the CSC established that the first-degree felony-murder rule is a creation of statute and that the second-degree felony-murder rule is the product of common law.[85] While acknowledging that the first-degree felony-murder rule results from "piling inference upon inference," the Court squarely held that the rule is created by statute.[86] At the same time, the Court characterized the second-degree felony-murder rule as a "judge-made doctrine without any express basis in the Penal Code."[87] Prior to that, in 1966, the CSC had tacitly admitted that the second-degree felony-murder rule was a creature of common law: "Despite defendant's contention that the Penal Code does not expressly set forth any provision for second degree felony murder and that, therefore, we should not follow any such doctrine here, the concept lies imbedded in our law."[88]

The common law status of the second-degree felony-murder rule has been confirmed more recently. In 2005, the Court handed down *People v. Howard,* in which it held that driving in willful or wanton

84. CAL. PEN. CODE § 189 (2015).

85. *Dillon*, 34 Cal. 3d at 472.

86. *Id.*

87. *Id.*

88. People v. Phillips, 64 Cal. 2d 574, 582 (1966), *overruled by* People v. Flood, 18 Cal. 4th 470 (1998).

disregard of the safety of others while fleeing a police officer is not inherently dangerous to human life for purposes of the second-degree felony-murder rule.[89] "Because the second degree felony-murder rule is a court-made rule, it has no statutory definition,"[90] stated Justice Kennard for the Court. The Court had said as much the year before: "The second-degree felony-murder rule is a common law doctrine."[91]

But in 2009 the Court abruptly changed course. In *People v. Sarun Chun*, the CSC offered an historical explanation for the conclusion that the second-degree felony-murder rule is a statutory creation after all.[92] "[T]he second degree felony-murder rule, although derived from the common law, is based on statute; it is simply another interpretation of section 188's abandoned and malignant heart language,"[93] stated Justice Chin for the Court. He continued:

> Even conscious-disregard-for-life malice is nonstatutory in the limited sense that no California statute specifically uses those words. But that form of implied malice is firmly based on statute; it is an interpretation of section 188's abandoned and malignant heart language. Similarly, the second degree felony-murder rule is nonstatutory in the sense that no statute specifically spells it out, but it is also statutory as another interpretation of the same "abandoned and malignant heart" language. We have said that the "felony-murder rule eliminates the need for proof of malice in connection with a charge of murder, thereby rendering irrelevant the presence or absence of actual malice, both with regard to first degree felony murder and second degree felony murder." But analytically, this is not precisely correct. The felony-murder rule renders irrelevant *conscious-disregard-for-life* malice, but it does not render malice itself irrelevant. Instead, the felony-murder rule "acts as a substitute" for

89. People v. Howard, 34 Cal. 4th 1129 (2005).

90. *Id.* at 1135.

91. People v. Robertson, 34 Cal. 4th 156 (2004), *overruled by* People v. Sarun Chun 45 Cal. 4th 1172 (2009).

92. People v. Sarun Chun, 45 Cal. 4th 1172 (2009).

93. *Id.* at 1183.

> conscious-disregard-for-life malice. It simply describes a different form of malice under section 188. "The felony-murder rule imputes the requisite malice for a murder conviction to those who commit a homicide during the perpetration of a felony inherently dangerous to life."
>
> . . . .
>
> . . . The "abandoned and malignant heart" language of both the original 1850 law and today's section 188 contains within it the common law second degree felony-murder rule. The willingness to commit a felony inherently dangerous to life is a circumstance showing an abandoned and malignant heart. The second degree felony-murder rule is based on statute and, accordingly, stands on firm constitutional ground.[94]

Since 2009, then, the second-degree felony-murder rule has been regarded as a creation of statute—or, more accurately, as a statutory codification of common law. In my view, the reasoning of *Chun* is less than airtight; what makes the Court think that the "abandoned and malignant heart" language does not apply only to the felony-murders explicitly enumerated in section 189? *Chun* may well be correct that "abandoned and malignant heart" denotes a form of malice less "express" than intent to kill and therefore, that it encompasses *some* form of felony-murder. But to conclude that it includes *second-degree* felony-murder, with the open-ended possibility of courts finding new statutory predicates undreamed of by the Legislature, rather than only the legislatively prescribed predicates set forth in section 189, is quite a leap. At the most, what *Chun* shows is that the interpretation of "abandoned and malignant heart" as including felony-murder is a permissive reading. It certainly does not demonstrate that such an interpretation is a mandatory reading. To set aside so many cases holding to the contrary is a *tour de force* indeed.

This is not, however, the place for a complete reexamination of *Chun* and its holding that second-degree felony-murder has a statutory pedigree. This Article's primary conclusion is that the CSC must now do *something* about the inherently dangerous felony rule

94. *Id.* at 1187–88 (citations omitted).

within second-degree felony-murder, in the wake of *Johnson*. If a majority of justices believe that the rule must be saved by switching to a "real conduct" or "actual facts" approach to "inherently dangerous felony," then that will cure the constitutional problem. One can agree with my diagnosis that the current rule has become unconstitutionally vague, yet disagree with my preferred remedy, that the second-degree felony-murder doctrine be overruled. Thus, I leave fuller consideration of the second-degree felony-murder's pedigree to another day.

B. The "Inherently Dangerous Felony" Doctrine

An unrestricted version of the felony-murder rule would be harsh indeed. If, for example, someone suffered a fatal heart attack from the shock of witnessing someone else commit a crime of grand theft, mail or wire fraud, perjury, or even felony trespass, the felon might be guilty of murder. A death following one of these felonies seems less than foreseeable, and perhaps the prosecutor would exercise discretion not to charge murder in such a circumstance, or perhaps the jury would decline to convict of murder. But the criminal law should not leave it entirely to prosecutors and juries to make sure that defendants undeserving of punishment for murder do not in fact receive that punishment. The dangerous felony requirement smoothens the harsh edge off the basic felony-murder rule.

The origin of the dangerous felony requirement in America is sometimes attributed to reception from English common law.[95] The original English rule is said to have held a defendant liable for felony-murder without regard to whether the underlying felony was dangerous.[96] The earliest CSC cases tended toward silence as to *why* various felonies qualified as predicates for the felony-murder rule. The 1914 decision in *People v. Wright*, for example, held that death resulting from an illegal abortion was second-degree felony-murder.[97] There was no mention of why abortion qualified as a predicate felony. In 1931, in *People v. McIntyre*, the Court assumed that driving under the influence qualified as a predicate for second-degree felony-

95. *See* WAYNE R. LAFAVE, CRIMINAL LAW 785–86 § 14.5(a) (5th ed. 2010).

96. *Id.* at 785. *But see* Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59 (2004) (calling the harsh original rule a myth).

97. People v. Wright, 167 Cal. 1 (1914).

murder.[98] Again, there was no analysis of why driving under the influence counted as a predicate.

People v. Poindexter demonstrates that the CSC's original approach to inherent dangerousness was to focus on the actual facts of the case.[99] The defendant had furnished heroin to a minor, who died. The Court stated, "Here there was uncontroverted testimony that [the victim] died from narcotics poisoning, and that taking a shot of heroin was an act dangerous to human life."[100] It is hard to know how seriously to take this sentence. Taken literally, the Court is saying that it was proper for the trial court to allow testimony on whether a shot of heroin is dangerous to human life, which would mean that the dangerousness question was treated as a question of actual adjudicative fact, not as an "abstract" question of law. On the other hand, it could have been a slip of the pen; the deadly quality of narcotics overdoses have long been well known.

Although *People v. Williams*[101] is sometimes credited with the beginning of the abstract approach to inherent dangerousness in California,[102] the first real explication of it appears in *People v. Phillips*.[103] The *Phillips* Court stated:

> We have held . . . that only such felonies as are in themselves "inherently dangerous to human life" can support the application of the felony murder rule. We have ruled that in assessing such peril to human life inherent in any given felony "we look to the elements of the felony in the abstract, not the particular 'facts' of the case."[104]

The Court was not required to explain why the underlying felony at bar, grand theft, was not inherently dangerous to human life, as the prosecution had conceded the point. The prosecution did, however,

98. People v. McIntyre, 213 Cal. 50 (1931).

99. People v. Poindexter, 51 Cal. 2d 142 (1958).

100. *Id.* at 149.

101. People v. Williams, 63 Cal. 2d 452 (1965). *See* People v. Patterson, 49 Cal. 3d 615, 621 (1989) (attributing the abstract test to *Williams*).

102. *See* People v. Satchell, 6 Cal. 3d 28, 38–39 (1971), *overruled by* People v. Flood, 18 Cal. 4th 470 (1998).

103. People v. Phillips, 64 Cal. 2d 574 (1966), *overruled by* People v. Flood, 18 Cal. 4th 470 (1998).

104. *Id.* at 582 (citation omitted).

argue for what would have amounted to an "actual facts" approach, to which the Court replied:

> Admitting that grand theft is not inherently dangerous to life, the prosecution asks us to encompass the entire course of defendant's conduct so that we may incorporate such elements as would make his crime inherently dangerous. In so framing the definition of a given felony for the purpose of assessing its inherent peril to life the prosecution would abandon the statutory definition of the felony as such and substitute the factual elements of defendant's actual conduct. In the present case the Attorney General would characterize that conduct as "grand theft medical fraud," and this newly created "felony," he urges, clearly involves danger to human life and supports an application of the felony murder rule.
>
> To fragmentize the 'course of conduct' of defendant so that the felony murder rule applies if any segment of that conduct may be considered dangerous to life would widen the rule beyond calculation. It would then apply not only to the commission of specific felonies, which are themselves dangerous to life, but to the perpetration of any felony during which defendant may have acted in such a manner as to endanger life.[105]

By the time of *Phillips*, it was clear that the proper approach for determining dangerousness was "abstract." But *which* abstract approach? There are two possible abstract approaches: a "minimum conduct" (i.e., least risky conduct) approach or an "ordinary commission" approach.[106] The minimum conduct approach takes a

105. *Id.* at 583–84.

106. I use the term "minimum conduct" because that term is often used in federal sentencing and immigration law to describe the categorical approach toward determining whether prior convictions qualify for either federal sentencing enhancement or removal. *See, e.g.*, Mendez v. Mukasey, 547 F.3d 345, 348 (2d Cir. 2008) (looking to the "minimum criminal conduct necessary to satisfy the essential elements of the crime"); Amouzadeh v. Winfrey, 467 F.3d 451, 455 (5th Cir. 2006) (considering "the minimum criminal conduct necessary to sustain conviction under the statute" (citation omitted)).

theoretical view: "What is the minimum conduct (in terms of dangerousness) that would nonetheless satisfy the essential elements of the offense?" By contrast, the other approach takes an empirical view: "What does the ordinary commission of this offense look like?"

The minimum conduct approach carries an inherent arbitrariness in its application. What, for example, is the minimum conduct (least risky or least culpable conduct) that nonetheless satisfies the essential elements of driving under the influence? Presumably, the minimum "influence" is the mere threshold of the blood alcohol requirement, .08%. But what kind of "driving"? Driving while observing all other traffic laws? How fast? Driving thirty-five miles per hour (mph) in a thirty-five mph zone? Or, if thirty-two mph in a thirty-five mph zone is marginally safer, does that then become the "minimum conduct"? Does the driving take place in heavy traffic, or on desolate back roads? Night or day? Good weather or bad? Skilled driver or unskilled? Practiced at driving under the influence or novice?

The "ordinary commission" approach has its own arbitrariness problems. What does the ordinary or typical commission of an offense look like? This inquiry dredges up problems similar to those of the minimum conduct approach, as there is simply no non-arbitrary way of saying what is ordinary or typical. The one escape from that arbitrariness would be comprehensive statistics. If we knew what percentage of driving under the influence crimes resulted in the death of another person, there would be no need to imagine any facts. But once we had a percentage, how would we know whether it was high enough to qualify as "inherently dangerous"?

The subsequent cases bear out these difficulties predictably. In 1971, the CSC decided three cases involving an issue of inherent dangerousness. In *People v. Satchell,* the predicate felony was possession of a concealable weapon by an ex-felon.[107] During a street fight, the defendant retreated to his car, only to produce a sawed-off shotgun. One blast killed the defendant. He was convicted of second-degree murder, after the trial court had instructed the jury on felony-murder. Before convicting, the jury asked the trial judge multiple questions about the law of second-degree felony-murder, suggesting that its verdict may have been based on a felony-murder theory.[108] The CSC focused its review on the various offenses for which a felon-in-possession might have been previously convicted. A

107. *Satchell*, 6 Cal. 3d at 32.

108. *Id.* at 33.

convicted murderer or drug dealer might be more dangerous with a concealable firearm than, say, a tax cheat. The Court provided many examples of prior convictions that would not suggest enhanced dangerousness in the possessor of a firearm.[109]

Another 1971 decision, *People v. Mattison*, involved poisoning.[110] The defendant and victim were prison inmates. The victim was an alcoholic and the defendant worked in the prison medical laboratory. The defendant procured eight ounces of methyl alcohol and provided it to the victim, who consumed it and died. After being instructed on first-degree murder by poisoning, second-degree extreme recklessness murder, second-degree felony-murder, and involuntary manslaughter, the jury convicted defendant of second-degree murder.[111]

On appeal, the defendant argued that he had to have been guilty of either first-degree murder or nothing. If he poisoned the defendant on purpose, it had to have been first-degree murder; if the poisoning was an accident, he had to be acquitted.[112] The CSC rejected this argument, finding that there was insufficient evidence to prove beyond a reasonable doubt that the defendant had the intent to kill or conscious disregard of a high probability of death. However, the defendant was convicted of violating Penal Code 347, which made it a felony to "wilfully mingle[] any poison with food, drink, or medicine, with intent that the same shall be taken by any human being to his injury."[113] The CSC found that the jury was entitled to find him guilty of second-degree murder on a felony-murder theory. Although the Court's main focus was on the issue of whether the poisoning was "integral to" and "included in fact" within the

109. *Id.* at 42 n.19 ("See, for example, Corporations Code, sections 3019-3021, 25540 et seq. (fraudulent and deceptive acts relating to corporations); Elections Code, sections 12000 et seq., 14403, 15280, 17090 et seq., 29100 et seq., 29130 et seq., 29160, 29180, 29400, 29430, 29431 (elections offenses); Financial Code, section 18857.1 (unauthorized sale of investment certificates); Government Code, section 9050 et seq. (interference with the legislative process), section 9908 (crimes of legislative representatives); Insurance Code, section 556 (false or fraudulent insurance claim), section 833 (crimes in the issuance of insurance securities); Military and Veterans Code, section 421 (conversion of military property); Public Resources Code, section 5190 (interest of park commissioner in park contract); Vehicle Code, section 4463 (false evidence of registration").

110. People v. Mattison, 4 Cal. 3d 177 (1971).

111. *Id.* at 181–82.

112. *Id.* at 184.

113. *Id.*

homicide,[114] it further noted that the Legislature regarded Penal Code 347 as a dangerous felony. "By making it a felony to administer poison with the intent to cause any injury," the Court stated, "the Legislature has evidenced its concern for the dangers involved in such conduct, and the invocation of the second degree felony-murder rule in such cases when unforeseen death results serves further to deter such dangerous conduct."[115]

In a third 1971 decision, *People v. Lopez*, the CSC held that escape from prison was not inherently dangerous to human life, but again offered no reasoning to support that conclusion.[116] In *People v. Nichols,* decided in 1970, the CSC found arson of a motor vehicle to be inherently dangerous to human life.[117] Its entire analysis of the inherent dangerousness issue consisted of the following sentence: "Certainly the burning of a motor vehicle, which usually contains gasoline and which is usually found in close proximity to people, is inherently dangerous to human life."[118] Thus, as of 1971, *Satchell* was still the only CSC case discursive in its analysis of the test for an inherently dangerous felony.

The CSC would not discuss the inherently dangerous felony test again until *People v. Burroughs* in 1984.[119] The victim, diagnosed with terminal leukemia, submitted to "treatments" by the defendant, who held himself out as a "healer."[120] The treatments included a special lemonade, exposure to colored lights, and deep abdominal massages.[121] The massages caused massive hemorrhaging, excruciating pain, and eventual death. The defendant was convicted of second-degree felony-murder on the basis of the predicate felony of practicing medicine without a license "under circumstances or conditions which cause or create a risk of great bodily harm, serious mental or physical illness, *or death.*"[122] The Court, per Justice Grodin,

114. *Id.*; *accord* People v. Ireland, 70 Cal. 2d 522 (1969) ("[A] second degree felony-murder instruction may not properly be given when it is based upon a felony which is an integral part of the homicide and which the evidence produced by the prosecution shows to be an offense included *in fact* within the offense charged.").

115. *Mattison*, 4 Cal. 3d at 186.

116. People v. Lopez, 6 Cal. 3d 45 (1971).

117. People v. Nichols, 3 Cal. 3d 150 (1970).

118. *Id.* at 163.

119. People v. Burroughs, 35 Cal. 3d 824 (1984).

120. *Id.* at 896–98.

121. *Id.* The defendant also insisted that the victim cut off any contact with his conventional physician.

122. *Id.* at 830 (emphasis added).

reaffirmed that inherent dangerousness must be viewed in the abstract by analyzing the elements of the predicate felony, not by looking at the defendant's actual conduct. If the jury were to ask whether the felony was inherently dangerous based on the actual facts, "the existence of the dead victim might appear to lead inexorably to the conclusion that the underlying felony is exceptionally hazardous."[123]

According to the *Burroughs* Court, the abstract test called for a determination of whether the predicate offense "possibly could be committed without creating [danger to human life]."[124] This was the minimum conduct approach—what is the minimum conduct, in terms of danger creation, that nonetheless constitutes a violation of the statute? Here, the Court concluded, there were numerous ways to be guilty of practicing medicine without a license that presented minimal or no risk to human life. "One can certainly conceive of treatment of the sick or afflicted which has quite innocuous results—the affliction at stake could be a common cold, or a sprained finger, and the form of treatment an admonition to rest in bed and drink fluids or the application of ice to mild swelling," stated the Court.[125]

Turning to the phrase "risk of great bodily harm," the Court stated, "a broken arm or leg would constitute serious bodily injury—and by implication, great bodily harm as well. While painful and debilitating, such bone fractures clearly do not, by their nature, jeopardize the life of the victim."[126] Finally, referring to the phrase "mental illness," the Court stated:

> It is not difficult, for example, to envision one who suffers from delusions of grandeur, believing himself to be the President of the United States. An individual who purports without the proper license to be able to treat such a person need not be placing the patient's life in jeopardy, though such treatment, if conducted, for example, without expertise, may lead to the need for more serious psychiatric attention.[127]

123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 831.
127. *Id.* at 832.

Note that the *Burroughs* Court eschewed any attempt to ascertain the ordinary or typical commission of practicing medicine without a license. *Burroughs* thus adopts the "minimum conduct" (least risky conduct) approach to inherently dangerous felonies and is consistent with *Satchell*—but inconsistent with the "ordinary commission" test employed in *Nichols.*

People v. Patterson, handed down in 1989, swings back toward the ordinary commission approach, albeit somewhat opaquely.[128] The victim, Jenny Licerio, had been using cocaine on a daily basis for about six months before her death. On the night she died, Licerio was partying with defendant Patterson and another friend. Patterson furnished the cocaine, which was ingested in multiple forms. Licerio died from acute cocaine intoxication.

Patterson pleaded guilty to three counts of violating California Health & Safety Code section 11352(a), which states:

> [E]very person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport (1) any controlled substance . . . shall be punished by imprisonment . . . for three, four, or five years.[129]

Upon receiving Patterson's guilty plea to the section 11352(a) charges, the trial court dismissed the murder charge against him. The Court of Appeal affirmed the dismissal. Drawing on the minimum conduct analyses of *Satchell* and *Burroughs*, the Court of Appeals reasoned that some of the controlled substances covered by section 11352(a) are not inherently dangerous to human life.

The CSC reversed. Writing for the Court, Justice Kennard explained that whether a violation of section 11352(a) is inherently dangerous depends upon precisely which substance is involved. The proper factual field of reference is not just any substance covered by the provision, but instead the precise substance involved in the case. The Court insisted that it was using an "abstract" approach—it expressly rejected the government's argument in favor of an actual

128. People v. Patterson, 49 Cal. 3d 615 (1989).
129. CAL. HEALTH & SAFETY CODE § 11352(a).

facts approach.[130] The proper quantum or threshold of risk was "high probability,"[131] Justice Kennard stated. Does furnishing cocaine pose a high probability of death, viewed in the abstract? Answering that question would involve a statistical analysis, which should be performed in the first instance by a trial court on remand.

Ascertaining *Patterson*'s rule requires some parsing. The Court's primary focus was on the establishment of a "high probability" threshold of risk. The Court did not focus on the proper factual field of reference, except to say that, in the context of section 11352(a), the proper reference was the specific drug involved in the case at bar, and not all drugs covered by the statute.[132] On the surface, that latter holding appears as a limited form of "actual facts" or "real conduct" analysis, but the appearance is misleading. The Court adamantly insisted that it was sticking to an abstract approach, explicitly rejecting the government's plea for an actual facts approach. What the Court meant was that section 11352(a) is divisible, which is to say, it contains as many different offenses as substances it covers.[133] The correct factual field of reference was an abstract conception of the precise offense with which Patterson was charged—furnishing cocaine. The Court did not look at the particular way in which Patterson furnished the cocaine, but instead made it clear that statistical analysis should be conducted on remand.

The *Patterson* Court's endorsement of statistical analysis confirms two things. First, it demonstrates that the analysis is abstract, for society-wide statistics about the incidence of death involved in the ingestion of cocaine tells us very little about what happened in the case at bar. Second, endorsement of statistical analysis shows that the Court tacitly accepted an ordinary commission field of reference rather than a minimum conduct field of reference. A court truly concerned with minimum conduct, such as in *Satchell* or *Burroughs,* is not interested in statistics because they are not probative of the least dangerous manner in which the felony can be committed. A minimum conduct analysis necessarily involves

130. *Patterson*, 49 Cal. 3d at 620–21.

131. *Id.* at 618.

132. *Id.* at 625.

133. *Cf.* Descamps v. United States, 133 S. Ct. 2276, 2285 (2013) (holding that, when determining which prior convictions qualify as "violent felonies" under the federal Armed Career Criminal Act, courts may look at the facts only for the limited purpose of ascertaining which portion of a divisible criminal statute the defendant was actually convicted under).

conjuring hypotheticals designed to minimize risk, then asking whether that hypothesized minimized risk nonetheless breaks through the threshold for "inherent dangerousness to human life." That is why the Court in *Satchell* and *Burroughs* made no mention of statistics. *Patterson*, by contrast, did remand for trial court consideration of statistics, which can only be probative as to the "average" or "ordinary" commission of the offense in question.

The CSC stayed with the *Patterson* high-probability-in-the-ordinary-commission approach in *People v. Hansen.*[134] Hansen had given $40 to one Echaves, who had promised to procure some methamphetamine for Hansen. When Echaves never came back, Hansen went to Echaves' apartment and banged on the door several times. No one answered. Hours later, when Hansen still had not heard back from Echaves, he drove back to the apartment and shot at it from his car. One of the bullets struck and killed a girl who was sitting in the living room with her brother.[135]

Then-Justice George wrote for the Court, holding that shooting into an inhabited dwelling house was inherently dangerous to human life. From the opinion, it is very clear that the Court's factual field of reference consisted of ordinary commissions of the felony, not the minimum conduct necessary to commit the felony:

> The discharge of a firearm at an inhabited dwelling house—by definition, a dwelling "currently being used for dwelling purposes, whether occupied or not" (§ 246)—is a felony whose commission inherently involves a danger to human life. An inhabited dwelling house is one in which persons reside and where occupants "are generally *in* or *around* the premises." In firing a gun at such a structure, there always will exist a significant likelihood that an occupant may be present. Although it is true that a defendant may be guilty of this felony even if, at the time of the shooting, the residents of the inhabited dwelling happen to be absent the offense nonetheless is one that, viewed in the abstract—as shooting at a structure that currently is used for dwelling purposes—

134. People v. Hanson, 9 Cal. 4th 300 (1994), *overruled by* People v. Sarun Chun 45 Cal. 4th 1172 (2009).

135. *Id.* at 305–06.

> poses a great risk or "high probability" of death within the meaning of *Patterson*.[136]

It is critical to note that *Hansen* is not merely based on a common-sense view that shooting at an apartment could kill someone, for if the Court had followed the minimum conduct approach taken in *Satchell* or *Burroughs*, the result might well have been different. Is it not possible for a drug dealer to break into an apartment looking for someone who owes him money, search the apartment from stem to stern, and, finding no one there, fire a shot back into the apartment out of frustration? If that scenario is possible, can it fairly be said that that act of shooting into the apartment is dangerous to human life, given that the house was searched exhaustively and yet no one was found in there? One could not honestly say there is a *high probability* of killing someone in that situation. *Hansen* comes out differently because the Court was not interested in hypothesizing the minimum conduct necessary to violate Penal Code section 246. Rather, the Court was interested in the ordinary or average commission of that offense.[137]

By 2004, Justice George had become Chief Justice, but he was still writing for the Court on whether shooting offenses are inherently dangerous. In *People v. Robertson*, defendant Quincy Robertson was watching television with his family in his Oakland apartment when he heard a loud noise just outside.[138] He grabbed his gun and emerged to find four intoxicated youths stealing the hubcaps off his parked car. When they fled, Robertson fired a shot at them. As they continued to run, Robertson walked into the middle of the street, fired nine more rounds, striking one of them in the back of the head and killing him. According to one eyewitness, Robertson then "swaggered" back into the apartment building.[139] It was the third time someone had broken into or vandalized one of Robertson's parked vehicles.

The jury convicted Robertson of second-degree murder after being instructed that they could base such a verdict on a finding that he had violated Penal Code section 246.3, discharging a firearm in a grossly negligent manner. The CSC affirmed, agreeing with an earlier

136. *Id.* at 310 (citations omitted).

137. Justice George said nothing about homicide statistics for shooting into buildings, which probably are not gathered.

138. People v. Robertson, 34 Cal. 4th 156 (2004), *overruled by* People v. Sarun Chun 45 Cal. 4th 1172 (2009).

139. *Id.* at 162.

Court of Appeal decision holding section 246.3 inherently dangerous to human life. Chief Justice George stated:

> "The tragic death of innocent and often random victims . . . as the result of the discharge of firearms, has become an alarmingly common occurrence in our society—a phenomenon of enormous concern to the public." The [Court of Appeal] reasoned that the offense is inherently dangerous because it involves discharge of the highly lethal instrumentality of a firearm with gross negligence in a manner that "could result in injury or death to a person" (§ 246.3). It added that '[i]mminent deadly consequences [are] inherent in the act' [citation] even if the bullet fortuitously falls so as to injure and not kill." By its terms, the statute "presupposes that there are people in harm's way" and that a reasonable person in defendant's situation would have "reasonable grounds to suspect that people will be endangered.[140]

Robertson does not tell us much about the proper factual field of reference, as either mode of analysis ends up in the same place with this particular offense. Certainly the ordinary or average discharge of a firearm in a grossly negligent manner is dangerous to human life. Yet even the minimum (least risky or least culpable) conduct necessary to violate this statute is dangerous to human life, given that there must be (1) discharge of a firearm; and (2) it must be in a factual context where a reasonable person should have been aware of an extremely substantial risk that someone could be harmed. Not even a law professor could dream up a fact pattern in which someone fires a gun in a grossly negligent manner where it is extremely unlikely that an innocent person will be killed, for if it is extremely unlikely that the shot will harm anyone, it is not grossly negligent. Therefore, with respect to section 246.3, it does not matter which factual field of reference one uses; the result will be that the felony is inherently dangerous. The *Robertson* Court did not have to choose.

The CSC's next inherently dangerous felony decision was *People v. Howard.*[141] In the early morning hours of May 23, 2002, defendant

140. *Id.* at 168–69 (citations omitted).
141. People v. Howard, 34 Cal. 4th 1129 (2005).

Howard was stopped by officers of the California Highway Patrol for not having a rear license plate. As the officers alighted from their vehicle, Howard restarted his engine and sped off, precipitating a chase that reached ninety mph. During this chase through a rural area, Howard shut off his headlights, ran two stop signs, and crossed over to the wrong side of the road. When Howard got close to downtown Fresno, however, the officers ceased their pursuit, fearing an accident. But it was too late. Shortly after they gave up the chase, the officers saw Howard's Chevrolet Tahoe run a red light and collide with a car driven by Jeanette Rodriguez, who was killed. It turned out that the Tahoe had been stolen earlier in the day. Howard's blood was tested and showed a high level of methamphetamine. Victim Rodriguez's blood was also tested and found to contain both heroin and cocaine.[142]

The jury was instructed that it could convict Howard of second-degree felony-murder if it concluded that Rodriguez was killed during a violation of California Vehicle Code section 2800.2, which makes it a felony to "driv[e] in willful or wanton disregard for the safety of persons or property while fleeing from a pursuing peace officer." The trial court did not instruct on any other theory of malice, which is to say, it did not instruct on malice as conscious disregard of an extreme risk to human life (colloquially referred to as "implied malice murder"). If it were to convict for murder, then the jury would have to convict on a felony-murder theory. During its deliberations, the jury sent the trial judge a note asking, "It appears in the instructions if there is a guilty verdict [in section] 2800.2 then there must be a guilty verdict for [Penal Code section] 187, yes or no?"[143] The trial judge declined to answer the question and simply repeated the instructions on felony-murder and causation. The jury convicted Howard of second-degree murder and a violation of section 2800.2, which states:

> (a) If a person flees or attempts to elude a pursuing peace officer in violation of Section 2800.1 and the pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property, the person driving the vehicle, upon conviction, shall be punished by imprisonment in the state prison, or by confinement in the county jail. . . . The court may also

142. *Id.* at 1132–33.
143. *Id.* at 1134.

> impose a fine . . . or may impose both that imprisonment or confinement and fine.
> (b) For purposes of this section, a willful or wanton disregard for the safety of persons or property includes, but is not limited to, driving while fleeing or attempting to elude a pursuing peace officer during which time either three or more violations that are assigned a traffic violation point count under Section 12810 occur, or damage to property occurs.[144]

Zeroing in on the definition of "willful or wanton disregard" as including driving in a manner that involves three traffic violation points, the CSC concluded that a violation of section 2800.2 is not inherently dangerous to human life:

> Violations that are assigned points . . . [that] can be committed without endangering human life include driving an unregistered vehicle owned by the driver, driving with a suspended license, driving on a highway at slightly more than 55 miles per hour when a higher speed limit has not been posted, failing to come to a complete stop at a stop sign, and making a right turn without signaling for 100 feet before turning.[145]

In other words, if a person flees a pursuing police officer by driving an unregistered vehicle fifty-six mph in a fifty-five mph zone and later signals for a right turn only ninety-nine feet before turning, that conduct constitutes "willful disregard for safety of persons or property" *as a matter of law*. Obviously, driving in such a manner is not inherently dangerous to human life.

It is painfully clear that the CSC's approach to the inherent dangerousness issue in *Howard* was abstract, as it completely ignored the wildly reckless abandon of the defendant's actual driving. It is equally clear that the *Howard* Court abjured "ordinary commission" of section 2800.2 as a field of reference for its dangerousness analysis. Although it is impossible, without comprehensive statistics, to say exactly what the "ordinary" or "average" section 2800.2 violation looks like, it most certainly does not involve driving fifty-six mph and

144. *Id.* at 1137.
145. *Id.* at 1137–38 (citations omitted).

signaling for right turns a tad late. The *Howard* Court employed a minimum conduct field of reference, which is to say, it imagined the least risky conduct that nonetheless would constitute a section 2800.2 violation, then deemed those hypothetical facts not to be inherently dangerous to human life.

That brings us, finally, to the most recent major CSC decision on the second-degree felony-murder rule, *People v. Sarun Chun.*[146] Chun, a gang member, fired shots from his vehicle into another vehicle he knew was owned by a rival gang member. Someone else in Chun's vehicle also fired shots into the other vehicle. The other vehicle had darkened windows and, unbeknownst to Chun and his confederate, was actually occupied by the rival gang member's sister and her friend. The sister was killed, and it was not clear who had fired the fatal shot.[147] Chun was convicted of second-degree murder after the jury had been instructed that it could convict him of second-degree felony-murder based on the underlying felony of shooting into an occupied vehicle as either a principal or aider and abettor.[148]

As noted earlier, *Chun* was a path-breaking decision on second-degree felony-murder in California because it held, contrary to decades of precedent, that the second-degree felony-murder rule is mandated by statute.[149] *Chun* also broke new ground on another important front, which is the so-called "merger" limitation on second-degree felony-murder. Starting with *People v. Ireland*, the CSC had refused to allow the operation of the second-degree felony-murder rule where the underlying felony was "integral to" and "included in fact" within the resulting homicide.[150] In *Ireland*, the jury was instructed that it could convict of second-degree felony-murder if the killing was the "direct causal result of the perpetration of . . . assault with a deadly weapon."[151] The defendant had shot and killed his wife point blank while he was heavily intoxicated.[152] The CSC found that the instruction was erroneous because the assault was integral to and included in fact within the resulting homicide.[153] It was up to the jury to decide whether the defendant, under the circumstances, really

146. People v. Sarun Chun 45 Cal. 4th 1172 (2009).
147. *Id.* at 1179.
148. *Id.* (citing CAL. PENAL CODE § 246). Curiously, the jury acquitted Chun of shooting into an occupied vehicle.
149. *See supra* text accompanying notes 99–137.
150. People v. Ireland, 70 Cal. 2d 522, 539 (1969).
151. *Id.* at 538.
152. *Id.*
153. *Id.* at 539.

intended to kill his wife or whether it was instead a kind of manslaughter. The prosecution should not have been permitted to "bootstrap" the assault into murder if there was no independent proof of malice aforethought.[154]

As chronicled by the *Chun* opinion, so began a long and tortured trail of decisions regarding the scope of the *Ireland* rule (also referred to as California's version of the "merger" doctrine[155]). This utterly perplexing series of decisions is beyond the scope of this Article. Suffice it to say that *Chun* repudiated these confusing decisions and settled on a simple definition of the merger rule, namely, that a felony may not serve as a predicate for a second-degree felony-murder conviction if the felony is "assaultive in nature."[156]

But if *Chun* augured a sea change in the merger limitation on second-degree felony-murder, it did absolutely nothing to change the law regarding the inherently dangerous felony limitation. "This restriction is not at issue here," Justice Chin's opinion for the Court flatly stated.[157] Relying on *Hansen*'s finding that shooting into an inhabited dwelling house was inherently dangerous, Justice Chin concluded that shooting into an occupied motor vehicle is also self-evidently inherently dangerous.[158] *Chun,* then said nothing new about the inherently dangerous felony.

Let us now take stock of the case law on inherently dangerous felonies. As a preliminary matter, it should be noted that the abstract approach to this doctrine breaks down into two parts: (1) the proper factual field of reference (i.e., minimum conduct or ordinary commission); and (2) the threshold of risk that qualifies as inherently dangerous. The law on the latter is relatively clear. In *Patterson*, the CSC carefully explained that the correct threshold of risk is "high probability."[159] It is true that the *Howard* opinion recites the threshold as "substantial risk,"[160] but it makes no acknowledgement of the apparent discrepancy, much less any reasoned explanation for it.

154. *Id.*

155. *Id.* at 539; *see also id.* at n.15 (collecting authorities on the merger doctrine from other states).

156. *Chun*, 45 Cal. 4th at 1200–01. Of course, there is still the possibility that certain felonies will be in a gray area between "assaultive" and "non-assaultive," but this rule is considerably less confusing than the prior law.

157. *Id.* at 1188.

158. *Id.*

159. People v. Patterson, 49 Cal. 3d 615, 618 (1989).

160. People v. Howard, 34 Cal. 4th 1129, 1135 (2005).

In the absence of any such explanation, it is best to assume that the "high probability" standard still governs.

Unfortunately, the first part of the existing abstract approach to inherent dangerousness is not clear at all. Three decisions—*Satchell, Burroughs,* and *Howard*—clearly come down on the side of minimum conduct as the proper field of reference. Three other decisions—*Patterson, Hansen,* and *Nichols*—clearly come down on the side of ordinary commission as the proper reference. *Chun* could also be counted as an ordinary commission case, but it gives no reasoning except to suggest that *Hansen* was virtually on all fours. None of these cases has ever overruled any of the others on the inherently dangerous felony point. Thus, technically, they are all good law.

The scorecard, in terms of which felonies have been determined inherently dangerous and which have not, is decidedly mixed. Felonies that have been held inherently dangerous to life include shooting at an inhabited dwelling,[161] poisoning with intent to injure,[162] arson of a motor vehicle,[163] grossly negligent discharge of a firearm,[164] manufacturing methamphetamine,[165] kidnapping,[166] and reckless or malicious possession of a destructive device.[167] Felonies that have been held *not* inherently dangerous to life include practicing medicine without a license under conditions creating a risk of great bodily harm, serious physical or mental illness, or death,[168] false imprisonment by violence, menace, fraud, or deceit,[169] possession of a concealable firearm by a convicted felon,[170] possession of a sawed-off shotgun,[171] escape,[172] grand theft,[173] conspiracy to possess methedrine,[174]

161. People v. Hansen, 9 Cal. 4th 300 (1994), *overruled by* People v. Sarun Chun 45 Cal. 4th 1172 (2009).

162. People v. Mattison, 4 Cal. 3d 177 (1971).

163. People v. Nichols, 3 Cal. 3d 150 (1970).

164. People v. Robertson, 34 Cal. 4th 156 (2004), *overruled by* People v. Sarun Chun 45 Cal. 4th 1172 (2009).

165. People v. James, 62 Cal. App. 4th 244, 271 (1998).

166. People v. Greenberger, 58 Cal. App. 4th 298, 377 (1997); People v. Pearch, 229 Cal. App. 3d 1282, 1299 (1991).

167. People v. Morse, 2 Cal. App. 4th 620, 646 (1992).

168. People v. Burroughs, 35 Cal. 3d 824 (1984).

169. People v. Henderson, 19 Cal. 3d 86, 92–96 (1977), *overruled by* People v. Flood, 18 Cal. 4th 470 (1998).

170. People v. Satchell, 6 Cal. 3d 28, 38–39 (1971), *overruled by* People v. Flood, 18 Cal. 4th 470 (1998).

171. *Id.* at 41–43.

172. People v. Lopez, 6 Cal. 3d 45 (1971).

173. People v. Phillips, 64 Cal. 2d 574 (1966), *overruled by* People v. Flood, 18 Cal. 4th 470 (1998).

extortion,[175] furnishing phencyclidine,[176] and child endangerment or abuse.[177] If there is a discernable pattern here, it is subtle indeed.

This recitation reminds one of Justice Scalia's in *Johnson*. From 2007 to 2011, the USSC reviewed four cases presenting the question of which state felonies posed a "serious potential risk of physical injury" within the meaning of the ACCA residual clause. First, the Court held that attempted burglary in Florida does present a serious potential risk of physical injury.[178] Then, it held that driving under the influence in New Mexico does not present a serious potential risk of injury.[179] Next, the Court held that failure to report to a penal institution in Illinois does not present a serious potential risk.[180] In 2011, the Court held that vehicular flight from a law enforcement officer in Indiana does present a serious potential risk.[181] In *Johnson*, the government asked the Court to deem possession of a short-barreled shotgun in Minnesota a serious potential risk of injury. The Court despaired of finding a workable test to determine serious potential risk, asked the parties to brief the question of vagueness, and finally declared the clause vague. The Court declared its residual clause jurisprudence a failed enterprise:

> This Court has acknowledged that the failure of "persistent efforts . . . to establish a standard" can provide evidence of vagueness. Here, this Court's repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause confirm its hopeless indeterminacy.
>
> . . . .
>
> [C]ommon sense is a much less useful criterion than it sounds . . . . How does common sense help a federal court discern where the "ordinary case" of vehicular flight in Indiana lies along this spectrum [of risk]? Common sense has not even produced a consistent

174. People v. Williams, 63 Cal. 2d 452 (1965).
175. People v. Smith, 62 Cal. App. 4th 1233, 1236–38 (1998).
176. People v. Taylor, 6 Cal. App. 4th 1084, 1099 (1992).
177. People v. Lee, 234 Cal. App. 3d 1214, 1229 (1991).
178. James v. United States, 550 U.S. 192, 195 (2007), *overruled by* Johnson v. United States, 135 S. Ct. 2551 (2015).
179. Begay v. United States, 553 U.S. 137, 147–48 (2008).
180. Chambers v. United States, 555 U.S. 122, 128–30 (2009).
181. Sykes v. United States, 131 S. Ct. 2267 (2011), *overruled by Johnson*, 135 S. Ct. 2551.

> conception of the degree of risk posed by each of the four enumerated [ACCA] crimes; there is no reason to expect it to fare any better with respect to thousands of unenumerated crimes.[182]

The seeming unpredictability of results under the residual clause was not by itself what led the USSC to declare the clause vague. It was also the fact that the Court had tried so many different approaches and failed with all of them. The Court had tried comparing felonies not enumerated in the ACCA to felonies that were enumerated. It tried fashioning a test—"purposeful, aggressive and violent." It tried statistics. It tried statistics plus "common experience."[183]

Every one of these approaches fell short. The felonies enumerated in the ACCA were too disparate, risk-wise, to provide guidance (burglary, extortion, arson, and "use of explosives," the last of which isn't even the name of a felony at all). The "purposeful, aggressive, and violent" test had no basis in the text of the ACCA. The statistical approach failed because there simply was not the kind of comprehensive database required to draw meaningful conclusions, and "common experience" is only persuasive to the degree that everybody experiences the world the same way.

By swapping a few choice words, Justice Scalia could well have been writing an opinion declaring California's inherently dangerous felony doctrine a failed enterprise. Before the 1960s, California ascertained dangerousness by looking at the actual facts. Then it switched to an "abstract" approach with no rationalization or articulation of any field of reference or threshold of risk. Then it adopted minimum conduct as a field of reference, but still no articulation of threshold. Then, without repudiating minimum conduct, it flipped to an ordinary commission field of reference. Then it articulated "high probability" as a threshold. Finally, in its last two decisions, it used minimum conduct for one and ordinary commission for the other, as well as articulating "substantial risk" as a threshold. "What sets ACCA apart from those statutes—and what confirms its incurable vagueness—is our repeated inability to craft a

182. *Johnson*, 135 S. Ct. at 2558–59 (citation omitted).
183. *Sykes*, 131 S. Ct. at 2278 (Thomas, J., concurring).

principled test out of the statutory text" stated Justice Scalia.[184] Precisely.

C. Application of Vagueness Analysis to the Felony-Murder Rule

The rationale of *Johnson* wholly and precisely encompasses California's current inherently dangerous felony doctrine. According to *Johnson,* the residual clause's core infirmity was that it anchored risk to hypothetical facts—that is, that the measurement of risk was based on an idealized version of the felony. From a vagueness standpoint, the problem with such a rule is that neither the concept of risk nor hypothetical facts is attached to anything concrete. To use a mechanical metaphor, it would be to connect one pivoting joint to another pivoting joint, with neither joint attached to anything stationary. Both the residual clause of ACCA and the inherently dangerous felony doctrine in California do *exactly* that. Furthermore, while I appreciate the lawyerly intuition that the residual clause of ACCA and the inherently dangerous felony rule seem like very different laws, intuitions must not be acted upon in the face of hard logic. If we are to treat the two situations differently, we must be able to articulate some meaningful basis for differential treatment. When someone serving life in California prison for second-degree felony-murder now articulates a precise reason why *Johnson* applies to the inherently dangerous felony doctrine—namely, that in both situations the measurement of risk is hinged to a hypothesized version of facts—it is not enough for the system to respond, "Well, it's just not the same thing. They feel different. So you will spend the rest of your life in prison." This Article has made what might be called a *prima facie* showing that the ACCA residual clause and the inherently dangerous felony doctrine share the same constitutional infirmity. The burden now shifts to the government to explain precisely why the comparison is inapt. Intuition, no matter how strong or widely shared, is not an adequate rebuttal. Let us, then, explore five possible grounds upon which these two doctrines might be distinguished for vagueness purposes.

One possible ground of distinction would be that felony-murder differs from a mandatory minimum sentence because the very notion of felony-murder recognizes that felons give up any standing to complain about their treatment when they commit the underlying felony and thereby kill someone. A second possible argument would

184. *Id.* at 2287 (Scalia, J., dissenting).

be that "inherent dangerousness" (felony-murder) is not the same thing as "serious potential risk" (the ACCA). A third possible ground of distinction would be that risk of death (felony-murder) is different from risk of physical injury (ACCA). A fourth possible ground of distinction is that the ACCA is a sentencing enhancement statute, whereas the felony-murder doctrine is a rule of liability. Finally, it could be argued that the residual clause in ACCA was compared to felonies explicitly enumerated elsewhere in ACCA, whereas there are no enumerated felonies that trigger second-degree felony-murder. Each one of these asserted distinctions fails.

No doubt the animating force behind the felony-murder rule is an intuition that those who commit felonies forfeit their right to the niceties of the mens rea doctrine when they kill someone. It is sometimes said that the felony-murder rule deters killings precisely because of its simplicity: you do the crime and you kill someone, you do the time. If you commit a serious offense, we do not want to hear that you "didn't mean to kill anyone." However reputable or disreputable this intuition may be, it does not distinguish the felony-murder rule from the residual clause of the ACCA. The ACCA is a federal three-strikes statute. It operates on the basis of a highly analogous popular intuition about deterring crime: three strikes and you're out. You commit three felonies, we do not want to hear any arguments about whether they were technically "violent" or not. You have forfeited your right to complain. Yet that did not stop the Supreme Court from holding the residual clause unconstitutionally vague.

And for good reason. Congress may not delete someone's constitutional right to adequate notice of what a criminal statute covers. The ACCA might have more deterrence potential if it were exempt from the constitutional rule against vague statutes, but it does not matter. Similarly, the second-degree felony-murder rule might deter more people if it were exempted from the vagueness doctrine, but that move is simply out of bounds. The Legislature may delete the mens rea requirement from a criminal offense, so long as that does not violate the Constitution. The courts have (rightly or wrongly) decided that the felony-murder rule does not violate the Constitution on the ground that it lacks a requirement of mental culpability with respect to the killing. But the Legislature may not delete the requirement of constitutionally adequate notice for any offense.

The second asserted ground of distinction requires little response because both "dangerousness" and "risk" denote probabilistic concepts. The CSC has always treated dangerousness as the question of likelihood that an actor's commission of a given felony would bring about the death of another human being. The USSC has treated residual clause risk as the likelihood that an actor's commission of a given felony would bring about physical injury to another human being. Neither inquiry involves any normative consideration, as in whether the danger/risk was unjustifiable. In either case, it is assumed that the criminality of the conduct makes it per se unjustifiable. The inquiry with both dangerousness and risk is purely predictive, not qualitative in any way. For vagueness purposes—that is, for the purpose of providing notice to actors—dangerousness and risk are materially indistinguishable.

Nor does the third asserted ground require much analysis. There is no meaningful difference, vagueness-wise, between risk of death and risk of physical injury. It is true that death is unambiguous (putting aside cessation of brain activity/persistent vegetative state controversies), while the existence or nonexistence of physical injury can be contested in concrete cases. But this argument completely ignores the case law. The USSC's residual clause jurisprudence has never had any problem with defining physical injury, in the abstract or in concrete situations. Instead, the USSC's problem has been defining "serious potential risk" in the abstract—just as the CSC's problem has been defining "inherent dangerousness" in the abstract. There is no distinction to be made between risk of death and risk of injury, from a notice standpoint. People in California have no more ability to predict which felonies will be held inherently dangerous to human life than people throughout the United States could predict which felonies posed a "serious potential risk" of physical injury—and for the exact same reason. No one can accurately predict how much imagination judges are going to employ in hypothesizing facts.[185]

The fourth asserted distinction is the easiest to dispatch. Yes, the ACCA residual clause is a rule of sentencing, while the second-degree felony-murder rule (which subsumes within it the inherently dangerous felony limitation) is a substantive rule of criminal law. One governs the degree of punishment while the other governs

185. *Cf.* Gonzalez v. Duenas-Alvarez, 549 U.S. 183, 193 (2007) ("[T]o find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language.").

liability. But if this distinction has any purchase at all, it cuts in *favor* of finding vagueness here. Surely actors are no *less* entitled to clear notice about the boundaries of substantive criminal liability rules than they are about sentencing rules. If we were to recognize a distinction between the two, actors would be *more* entitled to notice about liability rules.[186] In *Johnson* itself, the Court stated that the due process doctrine of vagueness "appl[ies] not only to statutes defining elements of crimes, but also to statutes fixing sentences."[187] In support of that proposition the Court cited *United States v. Batchelder,* which stated that "vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute."[188]

The fifth asserted ground of distinction is that the ACCA residual clause was made unique by its juxtaposition to specifically enumerated felonies, which further complicated the risk analysis. Section 924(e)(2)(B) states:

> [T]he term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .[189]

The focus here is on subsection (ii). It expressly designates burglary, arson, extortion, and felonies involving use of explosives as "violent," thus making them count toward the three strikes that

186. Compare Chapman v. United States, 500 U.S. 453, 467–68 (1991) (suggesting that vagueness scrutiny for sentencing statutes is less exacting than for primary criminal conduct statutes, and stating, "[t]his is particularly so since whatever debate there is would center around the appropriate sentence and not the criminality of the conduct.")

187. *Johnson,* 135 S. Ct. at 2557.

188. United States v. Batchelder, 442 U.S. 114, 123 (1979).

189. 18 U.S.C. § 924(e)(2)(B) (West 2006).

trigger a mandatory minimum sentence. The enumeration of those four felonies is followed by the residual or "otherwise" clause, which includes any other felonies that involve conduct presenting a serious potential risk of physical injury to another.

In *Johnson,* Justice Scalia's opinion for the Court mentioned this juxtaposition of enumerated and unenumerated felonies as a factor contributing to the vagueness of the residual clause:

> By asking whether the crime "*otherwise* involves conduct that presents a serious potential risk," moreover, the residual clause forces courts to interpret "serious potential risk" in light of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives. These offenses are far from clear in respect to the degree of risk each poses. Does the ordinary burglar invade an occupied home by night or an unoccupied home by day? Does the typical extortionist threaten his victim in person with the use of force, or does he threaten his victim by mail with the revelation of embarrassing personal information? By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.[190]

This structural feature of the ACCA—placing enumerated felonies next to a residual clause, and thereby complicating the risk analysis—is nearly identical to California Penal Code section 189. As noted above, the structure of section 189 is to enumerate certain situations, most of them commissions of underlying felonies, in which a murder is first-degree, and then to declare that all other murders are second-degree. In other words, section 189's second-degree murder provision *is itself a residual clause*:

> All murder which is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed

190. *Johnson,* 135 S. Ct. at 2558 (citation omitted) (emphasis added).

> 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, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. *All other kinds of murders are of the second degree.*[191]

The last sentence of section 189 is a residual clause, and it creates exactly the same problem that plagued the ACCA residual clause in terms of gauging risk. When a court asks whether an unenumerated felony is inherently dangerous, it performs that analysis in the shadow of section 189's many enumerated felonies. But how often do those enumerated felonies end up in a killing? Justice Scalia used burglary as an example of the difficulty of gauging risk in the abstract. Occupied home at night or unoccupied home in the daytime? In the absence of comprehensive statistics,[192] there is simply no nonarbitrary answer to that question. Yet section 189 specifically enumerates burglary, just as the ACCA residual clause does. Indeed, the risk analysis for enumerated felonies in section 189 is worse, because it includes *attempts* to commit all those enumerated felonies as well as successful commissions of the felonies. If it is hard to gauge the risk of injury or death in an abstract burglary, how hard is it to gauge the risk of injury or death in an attempted burglary? The mind reels.

One potential confusion must be avoided. In *Johnson,* the Court stated that it would not be vague for a statute to measure risk off of real-world facts or "statutory elements."[193] One might get the impression from this statement that California's inherently dangerous felony doctrine is therefore valid because the abstract approach to determining dangerousness is based on an analysis of statutory

191. CAL. PENAL CODE § 189 (West 2015) (emphasis added).
192. And comprehensive statistics do not exist. *See Johnson,* 135 S. Ct. at 2557.
193. *Id.*

elements. But that is plainly not what the *Johnson* Court meant. In order to see this, one must return to the text of the ACCA.

The relevant portion of the statute has three parts. The first part, section 924(e)(2)(B)(i), defines a violent felony as any felony that "has as an element . . . the use of physical force against the person of another." The second part, which is the first clause of section 924(e)(2)(B)(ii), specifically denominates as violent felonies four particular offenses—burglary, extortion, arson, and use of explosives. The third part, the residual clause, which is the second clause of section 924(e)(2)(B)(ii), includes any other felony whose conduct involves a serious potential risk of injury. When Justice Scalia refers to "statutory elements" being an acceptable, non-vague mode of analysis, he does not mean the kind of elemental analysis that California courts perform in the abstract approach to determining inherently dangerous felonies. He means the kind of elemental analysis involved in section 924(e)(2)(B)(i)—that is, literally, does the element of force appear in the statute defining the underlying felony?

So, what is the difference? Under section 924(e)(2)(B)(i), the question is whether the text of a statute contains the word "force." Traditional rape statutes contained the term force; some of the modern ones do not. This kind of analysis is as determinative as it gets in the law. Even if section 924(e)(2)(b)(i) extends to case law reading a force requirement into a statute that lacks an explicit mention of the word, the analysis is highly determinative for constitutional purposes. However unrealistic, one is presumed to know the judicial gloss on criminal statutes.

The elemental analysis in California's inherently dangerous felony cases, on the other hand, is not highly determinative. The question there is not whether "inherent dangerousness" is a formal element of the underlying felony; it is whether the formal elements of the underlying felony can be said, at a minimum, to require conduct that can fairly be characterized as inherently dangerous to human life. If the inherently dangerous felony cases pivoted on whether the statute contained the word "danger" or "dangerous," they would have no vagueness problem. If they pivoted on the presence or absence of the word "risk," they would not be vague. Even if the inherently dangerous felony cases pivoted on whether judicial gloss had read "danger" or "risk" into a statute, they would not be sufficiently vague to violate due process.

Under the minimum conduct cases like *Satchell*, *Burroughs*, and *Howard,* the question is whether one could imagine any plausible set

of facts which: (1) satisfies the essential elements of the offense; and (2) does not pose a "high probability" of killing someone. This is anything but bright-line analysis, for it contains two open-ended inquiries. Which hypothetical facts are "plausible" is an inherently subjective inquiry, as is the question of what constitutes a "high probability." Both inquiries are subject to significant disagreement among reasonable judges, which is exactly what has happened. The result is a near total lack of predictability—and, therefore, notice to actors—of which felonies will be found inherently dangerous.

The "ordinary commission" cases like *Patterson* and *Hansen* are no less arbitrary. In *Patterson,* the CSC remanded to the trial court to consider "medical articles and reports" offered by the government to prove that furnishing cocaine is inherently dangerous to human life.[194] Although I have been unable to find a record of what happened on remand, it is extremely doubtful whether the government actually produced comprehensive statistics on what happens when one person furnishes cocaine to another person. Doubtless there are plenty of "medical articles and reports"[195] documenting the frequency of fatal cocaine overdoses, but that would not have been sufficient to resolve the legal question. The government would have had to have produced comprehensive statistical evidence of *how often* people have fatal overdoses after ingesting cocaine that has been furnished to them in violation of California Health & Safety Code section 11352. In other words, a report confirming that x number of people died from cocaine overdoses in any given year would not satisfy the government's burden. The relevant question would be: In what percentage of cases involving violations of section 11352 do people die? If 100 people died of cocaine overdoses in a year, that seems like a lot; but if 100,000,000 cocaine transactions in violation of section 11352 occurred that year, that amounts to .000001, which is infinitesimal. On the other hand, if the 100 fatalities came from 10,000 transactions, that amounts to .01, which is fairly frequent. It is extremely doubtful whether the government could have produced statistics at that level of granularity.

It is the double whammy of uncertainty that made the residual clause unconstitutional, and which makes the abstract approach to the inherently dangerous felony doctrine equally unconstitutional. Using an abstract approach to imagine facts that are *then* gauged for some

194. People v. Patterson, 49 Cal. 3d 615, 625 (1989).
195. *Id.*

threshold of risk amounts to an abstraction of an abstraction. It is not merely to ask what *Hamlet* would have looked like if Shakespeare had been born to sharecroppers in Mississippi; it is then to ask whether contemporary literary critics would have liked it. However fun that might be at a cocktail party, that kind of hyper-imaginative exercise cannot produce the minimal predictability and notice necessary to satisfy due process in the criminal law. As things currently stand, the second-degree felony-murder rule in California is unconstitutionally vague.

III. The "Actual Facts" Approach

This Article has demonstrated the need for action of some kind. In theory, that action could come from the California Legislature. The Legislature could proactively amend its homicide statute to codify the second-degree felony-murder rule with an explicit "actual facts" approach to determining which felonies are dangerous enough to qualify. That would be constitutional. Or it could codify the second-degree felony-murder rule with an exhaustive list of felonies that qualify. That would be constitutional. Or it could explicitly abrogate the second-degree felony-murder rule.

Political action in the absence of judicial action is, however, extremely unlikely. The responsibility of remedying the current constitutional infirmity of the second-degree felony-murder rule will almost certainly fall on the courts—ultimately, the CSC. The CSC does not have the option of creating an exhaustive list of felonies that qualify as predicates for the operation of the second-degree felony-murder rule. That would be to encroach on legislative prerogative. That leaves two remaining options: switching to an "actual facts" approach or abolishing the second-degree felony-murder rule altogether. Candor requires me to acknowledge that, unlike my argument about the constitutionality of the abstract approach to determining dangerous felonies, I have no claim that logic requires any choice between these two remedial options. Nothing more than logic is required to demonstrate the fatal inconsistency of the abstract approach to dangerous felonies under *Johnson*, which is legally binding on California. However, logic requires only that *something* be done about the current rule—it does not dictate what that something is. With that disclaimer, I now proceed to offer a few brief thoughts about the "actual facts" or "actual conduct" approach.

Let us begin with the critical observation that, although the Legislature is unlikely to do anything until the courts act, the Legislature will always have the last say on whether or not to have a second-degree felony-murder rule—if it wants to have that say. If the CSC strikes the current rule down as void for vagueness and does not replace it, the Legislature could react by adding a section to the homicide statute explicitly codifying the second-degree felony-murder rule and listing all the felonies that support it, or, more likely, explicitly requiring an "actual facts" approach to determining which felonies are sufficiently dangerous. Thus, with respect to remedy, the Court need not be concerned about displacing legislative prerogative. There is no occasion here for deference to the Legislature. No matter which option the CSC chooses, it will not destroy the Legislature's ability to have the last word. The CSC should therefore exercise its best independent judgment about what remedial course to take.

California stands alone in its exclusively abstract approach to the dangerous felony limitation on felony-murder. Most states have a felony-murder rule, and most of those states have a requirement that the underlying felony be dangerous to human life. Among these states, California alone takes a purely abstract approach. Other states that retain a felony-murder rule hold that the "foreseeable" dangerousness of the underlying felony is to be measured by the circumstances of the case at bar.[196]

To see this, consider some decisions from other state supreme courts. In *Commonwealth v. Matchett,* the Massachusetts Supreme Judicial Court reversed a second-degree felony-murder conviction based on extortion.[197] "We hold today that when a death results from the perpetration or attempted perpetration of the statutory felony of extortion, there can be no conviction of felony-murder in the second degree unless the jury find that the extortion involved circumstances demonstrating the defendant's conscious disregard of the risk to human life," stated the Court.[198]

196. Some courts have adopted what superficially appears to be a hybrid rule: i.e., that the underlying felony qualifies if it is dangerous either in the abstract or under the circumstances of the case. *See e.g.,* Jenkins v. State, 230 A.2d 262 (Del. 1967). On closer inspection, this amounts to nothing more than an actual-facts approach, at least if "abstract" means "minimum conduct." There can never be a case where the felony was not dangerous under the circumstances, yet was dangerous to human life in the abstract, for the minimum conduct version of the abstract test rules out felonies unless they are dangerous to human life in every possible circumstance.

197. Commonwealth v. Matchett, 436 N.E.2d 402 (Mass. 1982).

198. *Id.* at 410 (citation omitted).

In *Jenkins v. State,* where the predicate felony was fourth-degree burglary, the Delaware Supreme Court held, "It is the opinion of the Court... that the felony-second degree murder rule of this State should be limited to homicides proximately caused by the perpetration or attempted perpetration of felonies which are, by nature or circumstances, foreseeably dangerous to human life, whether such felonies be common law or statutory."[199] "Burglary in the fourth degree may, or may not, be foreseeably dangerous to human life, depending upon whether someone may be reasonably expected to be present in the building, and upon other circumstances of the case," the *Jenkins* Court reasoned.[200]

In *State v. Wallace,* the Supreme Judicial Court of Maine upheld a felony-murder conviction based on sodomy committed against an eight-year-old boy.[201] There, the Court held:

> [T]he felony-murder rule in Maine requires in addition to a causal relationship between the felony being committed, or attempted, and the death, proof beyond a reasonable doubt that the manner or method of its commission, or attempted commission, presents a serious threat to human life or is likely to cause serious bodily harm.[202]

The Court conceded that consensual adult sodomy is not necessarily dangerous to human life, but, "while force and violence are not necessarily involved in committing this crime, it may equally well be committed by the use of potentially deadly force."[203]

In *State v. Harrison,* the Supreme Court of New Mexico held that false imprisonment may qualify as a predicate felony for purposes of the felony-murder rule if the manner of its commission is dangerous.[204] In New Mexico, the legislature has denominated some felonies as first degree, while others are of lesser degree. A killing caused by the commission of a first-degree felony is automatically felony-murder without regard to whether the circumstances were

199. *Jenkins*, 230 A.2d at 269.
200. *Id.*
201. State v. Wallace, 333 A.2d 72 (Me. 1975).
202. *Id.* at 81.
203. *Id.* at 82.
204. State v. Harrison, 564 P.2d 1321 (N.M. 1977) (*superseded by* Tafoya v. Baca, 702 P.2d 1001 (N.M. 1985)).

dangerous.[205] In *Harrison,* however, the Court held that the same rule should not apply to killings caused by the commission of lesser-degree felonies. "[I]n a felony murder charge, involving a collateral lesser-degree felony, that felony must be inherently dangerous or committed under circumstances that are inherently dangerous," the Court stated.[206] Contrasting its holding with the California rule, the *Harrison* Court explained:

> Today the courts apply this test in two differing manners: (1) the felony is examined in the abstract to determine whether it is inherently dangerous to human life [citing *Satchell*] or (2) both the nature of the felony and the circumstances surrounding its commission may be considered to determine whether it was inherently dangerous to human life. We adopt the latter test.[207]

Further, in *State v. Thompson,* the North Carolina Supreme Court considered whether a killing caused by the commission of a felonious breaking and entering could support a verdict of first-degree felony-murder.[208] North Carolina's first-degree murder statute states that any murder committed "in the perpetration of or attempt to perpetrate any arson, rape, robbery, or burglary *or other felony* shall be deemed to be murder in the first degree."[209] In order for an unenumerated felony to serve as a predicate for first-degree murder in North Carolina, that felony must be either dangerous in the abstract or foreseeably dangerous under the circumstances:

> In our view, and we so hold, any unspecified felony is within the purview of G.S. § 14-17 if the commission or attempted commission thereof creates any substantial foreseeable human risk and actually results in the loss of life. This includes, but is not limited to, felonies which are inherently dangerous to life. Under this rule, any unspecified felony which is inherently

205. *Id.* at 1324 ("In felony murder cases where the felony is a first-degree felony such a presumption is appropriate, but not where the felony is of a lesser degree.").
206. *Id.*
207. *Id.* (citations omitted).
208. State v. Thompson, 185 S.E.2d 666 (N.C. 1972).
209. N.C. GEN. STAT. § 14-17 (West 2015).

> dangerous to human life, or foreseeably dangerous to human life due to the circumstances of its commission, is within the purview of G.S. § 14-17.[210]

The *Thompson* rule is essentially identical to the rule in *Harrison*, in the sense that a felony qualifies if it is either inherently (abstractly) dangerous or if it is foreseeably dangerous under the circumstances of the case. This superficially appears to be a "hybrid" rule, the "best of both worlds," because it includes both the abstract and actual fact approaches. But any hybrid quality is chimerical. The "addition" of the abstract approach to the ordinary commission approach actually adds nothing at all. In any case where, under the circumstances, the underlying felony was not foreseeably dangerous to human life, the felony will not be dangerous in the abstract either. Under the minimum conduct approach to abstraction, a felony is only inherently dangerous if *every imaginable instance* would be dangerous. By definition, if the case at bar presents a "non-dangerous" situation, then the minimum conduct test is not met. Under the ordinary commission approach to abstraction, a felony is only inherently dangerous if its ordinary, typical or average commission is dangerous. But if the defendant's conduct in the case at bar is not "foreseeably dangerous to human life," then again, virtually by definition, the ordinary commission of that felony is not dangerous. The term "foreseeable" is largely parasitic on the notion of ordinariness or typicality. An act is only foreseeably dangerous to human life if similar acts lead to death on at least a semi-regular basis.[211] Thus, the hybrid approach followed in *Harrison* and *Thompson* (and apparently in many other jurisdictions[212]) really amounts to nothing more than the actual facts approach.

Because the "hybrid" approach turns out to be little more than an actual facts approach, there is no vagueness problem with it. Such an approach is intellectually dishonest—it sounds like the best of both worlds when in fact it represents only one world—but it is not unconstitutional.

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210. *Thompson*, 185 S.E.2d at 672.

211. With the possible exception of brand new technologies, where no pattern of dangerousness has yet been established, but which plausibly have the potential to kill (such as Tasers, when they were new).

212. *See* STEPHEN A. SALTZBURG, ET AL., CRIMINAL LAW: CASES AND MATERIALS 342 (3d ed. 2008) (collecting authorities).

Conclusion

If the CSC were to swap the abstract approach out for an actual facts approach, it would solve the constitutional problem. But I believe that would be a mistake. The actual conduct test is intellectually dishonest and unfaithful to society's basic understanding of murder as the purposeful or extremely reckless taking of human life. It permits individuals to be punished for murder based on nothing more than negligence.

Murder is the most serious condemnation available to the criminal law. California has many grades of manslaughter, including voluntary manslaughter, involuntary manslaughter, and several grades of vehicular manslaughter, depending on just how intoxicated and/or reckless the driver. The epithet "murder" is reserved for killings brought about by more than carelessness or even recklessness. This is to say nothing of the severity of the punishment for murder in California, which is a mandatory life sentence. The judge has no discretion whatsoever after even a second-degree murder conviction. The formal mandatory sentence of "15 years to life" conceals the reality of this punishment, which would be more aptly explained as "life in prison, with the small possibility that the Board of Prison Terms (all political appointees) will grant parole at some point after the minimum term of years has been served." In fact, less than twenty percent of people sentenced to life in California are ever paroled,[213] and the only other ways for them to be released are to have their convictions overturned or to receive executive clemency.

If the conceptual paradigm of malice, and therefore murder, is an intentional killing, felony-murder is miles from that paradigm. What is colloquially referred to as "implied malice" or "conscious disregard" murder already represents a significant attenuation from the paradigm. To be convicted of this form of murder, the government must prove that the defendant acted in the face of a *conscious* disregard for the risk that a human being would be killed.[214] The defendant must have actually considered that risk and acted in spite of it. Note that conscious disregard of *some* risk of killing is not enough; it must be consciousness of a *high* risk, which distinguishes

213. *See* UNIVERSITY OF SOUTHERN CALIFORNIA: CALIFORNIA PAROLE PROCESS, http://uscpcjp.com/legal-overview/ (last visited Oct. 3, 2015).

214. People v. Knoller, 41 Cal. 4th 139, 170 (2007).

this form of murder from mere reckless homicide.[215] A killing in the face of a conscious disregard of a less-than-high risk of killing is involuntary manslaughter, which, in California, is punishable by two, three or four years in prison.[216]

The classic case of involuntary manslaughter is a criminally negligent killing.[217] In such a prosecution, the government need not prove that the defendant actually thought about the risk that his conduct might kill someone, it is enough that a hypothetical "reasonable person" in the defendant's situation would have thought about that risk and desisted from the conduct. When someone kills in this situation, the conduct is highly socially irresponsible, and it deserves both serious condemnation and punishment. As noted above, California law treats this as involuntary manslaughter.

Some second-degree felony-murders also meet the requirements for conscious disregard murder. Let them be judged by that standard.[218] It is wrong to lump criminally negligent killings in with conscious disregard killings, both because of the lack of required awareness in negligence and because of the lower risk threshold in negligence. Some felony-murders are nothing more than criminally negligent killings, so the government should not be permitted to get a felony-murder instruction that effectively serves to water down the "reasonable doubt" standard for the requisite mental element of conscious disregard murder. The government should sink or swim

215. People v. Coddington, 23 Cal.4th 529, 593 (2000) (*overruled by* Price v. Superior Court, 25 Cal. 4th 1046 (2001)). Although *Knoller* states the rule for conscious disregard murder without specifying a threshold of risk ("We conclude that a conviction for second degree murder, based on a theory of implied malice, requires proof that a defendant acted with conscious disregard of the danger to human life"), this must have been an inadvertent omission. The Court could not possibly have meant that a conscious disregard of the most infinitesimal chance of death could satisfy the standard. Such a mental state could not possibly qualify as "abandoned and malignant heart." CAL. PENAL CODE § 187 (West 2015).

216. CAL. PENAL CODE § 193(b) (West 2015).

217. CAL. PENAL CODE § 192(b) (West 2015), which defines non-vehicular manslaughter, states: "Involuntary—in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." The CSC has long held that this definition generally equates to a criminally negligent killing. *See* People v. Howk, 56 Cal. 2d 687, 703–04 (1961); People v. Penny, 44 Cal. 2d 861, 879 (1955).

218. As noted above, the Massachusetts Supreme Judicial Court has adopted an "actual facts" rule requiring that the defendant "consciously disregard the risk to human life." Depending on the required quantum of risk that the defendant must have perceived, this situates the Massachusetts felony-murder rule somewhere between reckless homicide and extreme recklessness murder. *See supra* notes 198–99 and accompanying text.

based on its ability to prove conscious disregard. Consciousness can be proven by circumstantial evidence, and usually is. Where the government cannot prove conscious disregard by direct or circumstantial evidence beyond a reasonable doubt, the conviction should be for no more than involuntary manslaughter. Such a killing should not be punishable by life in prison.

Even if one has no problem with the notion of negligent murder as a concept, there is a serious problem with the administration of the "actual facts" test. In the real world, it strongly invites circular reasoning. Once the jury has been walked through voluminous evidence on how the killing occurred, replete with photos of the corpse and detailed forensic analysis of the fatal wound(s), the instructions will then ask the jury whether the felon's conduct was "foreseeably dangerous" to human life. How likely is it that a jury, having effectively watched this killing take place in super-slow motion several times, will come to the conclusion that it was not foreseeably dangerous? As Justice Grodin stated in *Burroughs,* under an actual facts approach to dangerousness, "[T]he existence of the dead victim might appear to lead inexorably to the conclusion that the underlying felony is exceptionally hazardous."[219] Hindsight is 20/20.

A felony-murder rule supposedly limited by a "dangerous felony" requirement based on an "actual facts" approach is arguably worse than a felony-murder rule with no dangerous felony limitation at all. The implicit promise of a dangerous felony limitation is that the system contains a structural safeguard against punishing purely accidental killings as murder. This promise insulates the felony-murder rule against criticism. Yet the promise is illusory, for the fact of a killing "lead[s] inexorably" to the conclusion that the felony was conducted in a dangerous manner. The actual facts approach would thereby render the second-degree felony-murder rule politically opaque. It would obscure from the Legislature's view the reality that the felony-murder rule can, and inevitably will, be imposed in some cases involving purely accidental killings in which there was no *ex ante* foreseeability of a killing. In other words, the judicial adoption of an actual facts approach would hinder the political process from doing its job of evaluating the second-degree felony-murder rule for what it really is.

When I was in law school, one of my professors told us, "The job of academics is to look in dark corners and describe what we see." In

219. People v. Burroughs, 35 Cal. 3d 824, 830 (1984).

this dark corner of the criminal law, I see a rule that has been rendered unenforceable by new USSC precedent. I see a rule whose constitutionality could be saved only by flipping it to an approach that is grossly inconsistent with the paradigm concept of murder as the willful killing of another human being. I see a rule whose time is up.