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Realism and Reasonableness in Statutory Interpretation: People v. Anderson

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Notes

Realism and Reasonableness in Statutory Interpretation: *People v. Anderson*

by
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The California Supreme Court decision in *People v. Anderson*[1] will gravely impact the rights of criminal defendants prosecuted for felony murder.[2] Upon reconsidering an earlier interpretation of the California death penalty initiative,[3] the *Anderson* court ruled that intent to kill was not a prerequisite for the imposition of capital punishment after a conviction of first degree felony murder.[4]

While *Anderson* is important for its effect on California death penalty law, its greater significance lies in the court's new approach to statutory interpretation. In reconsidering a prior interpretation of the death penalty statute, the court departed from the traditional method of statutory interpretation, which requires the court to focus only on the statutory language itself and on the historical context in which it was passed. Instead, the *Anderson* court viewed the statute from a "realistic" perspective,[5] and considered material that is traditionally outside the scope of statutory interpretation. By using a realistic standard, the court reached the opposite conclusion as to the proper interpretation of the death penalty statute than that reached by the court four years earlier.

Several problems may result from the unlimited use of a realistic method of statutory interpretation by courts. The use of the realistic standard may upset the distribution of power between the legislature and the judiciary by giving a court too much discretion to determine current

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1. 43 Cal. 3d 1104, 742 P.2d 1306, 240 Cal. Rptr. 585 (1987).

2. The felony murder doctrine holds a felon strictly liable for all deaths, intentional or accidental, that occur during the commission of a dangerous felony. *See, e.g.*, CAL. PENAL CODE § 190.2(a)(17) (West 1988) (Murder committed while defendant was engaged in, or was an accomplice in, the commission of a felony is a special circumstance, the penalty for which includes the death penalty or life imprisonment without parole.).

3. *Id.* §§ 190-190.9.

4. *Anderson*, 43 Cal. 3d at 1145, 742 P.2d at 1330, 240 Cal. Rptr. at 609.

5. *Id.*; *see infra* notes 117-21 and accompanying text.

social, political, and legal attitudes. The standard also may undermine uniformity and certainty in the administration of criminal justice because the realistic standard is inherently flexible and subjective. Furthermore, the *Anderson* standard may create arbitrary distinctions between criminal defendants. In order to curb the negative effects of the realistic method of statutory interpretation, this Note proposes five conditions that should be met prior to use of this model.

Section I outlines the traditional method of statutory interpretation. This section first discusses the underlying principles of statutory interpretation, and examines the traditional rules used by the courts. It then demonstrates that the California courts consistently have followed the traditional method of statutory interpretation, and analyzes the application of this method in *Carlos v. Superior Court.*[6] In *Carlos* the California Supreme Court promulgated the prevailing interpretation of the death penalty statute which later was reversed in *Anderson.*

Section II examines *People v. Anderson* and focuses on the method of interpretation used by the majority of the court. A discussion of the dissenting opinion reveals how the majority departed from the traditional rules of statutory interpretation. Section III analyzes the realistic standard used by the *Anderson* court, and explores the negative implications of the court's new approach to statutory interpretation. Finally, section IV suggests a set of conditions that should be met before a court may use the *Anderson* model to interpret penal statutes.

I. The Traditional Method of Statutory Interpretation

A. The Principles of Statutory Interpretation

The traditional rules of statutory interpretation[7] developed as a loose body of legal guidelines[8] designed to help a judge ascertain the meaning of statutory language.[9] Several principles underlie these rules.

6. 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983).

7. Technically, interpretation and construction are distinguishable.

> A rule of construction is one which either governs the effect of an ascertained intention, or points out what the court should do in the absence of express or implied intention, while a rule of interpretation is one which governs the ascertainment of the meaning of the maker of the instrument. . . . These two terms are, however, commonly used interchangeably.

BLACK'S LAW DICTIONARY 734 (5th ed. 1979); *accord* 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 45.05 (4th rev. ed. 1984).

8. While this Note does not discuss the history of statutory interpretation, a lengthy and detailed account of this history can be found in Blatt, *The History of Statutory Interpretation: A Study in Form and Substance,* 6 CARDOZO L. REV. 799 (1985).

9. The rules of interpretation guide the judge's inquiry into the meaning of the language when the statute was passed. "To interpret is to discover meaning and significance. It does not concern the meaning and significance of what some person intends to say, but of what is actually said." Kohler, *Judicial Interpretation of Enacted Law,* in THE SCIENCE OF LEGAL

The most fundamental principle is the maintenance of the proper distribution of power between the legislature and the courts. The power of the courts is limited to the interpretation of a statute, and the courts "should recognize that the legislature is supreme and must be followed. . . . The courts should be controlled by these principles of power distribution and seek to perpetuate them."[10] In short, the courts should avoid judicial legislation as much as possible.[11] The rules of interpretation are designed to guide the judge in interpreting, not making the law, thereby ensuring that the judiciary plays its proper role.[12]

A second principle underlying the traditional rules of statutory interpretation is based upon an economic theory of legislation. This theory postulates that statutes are essentially public contracts, which are made between interest groups and the legislature.[13] Because the ordinary method of enforcement in the private market—legal sanctions—is not available to enforce public contracts or statutes, "the role of the independent judiciary is to assure interest groups that their statutory bargains will be fulfilled."[14] The traditional rules of interpretation, by focusing on the original intent of the statute, facilitate the practice of interest group politics and promote stability in the legislative arena.[15] Thus, the judiciary becomes the "efficient enforcement mechanism for legislative deals."[16]

A third principle underlying the rules is the promotion of certainty and uniformity in the interpretation of statutes.[17] The traditional rules of statutory interpretation provide a specific method that judges consistently should apply when resolution of a case requires statutory interpretation. This method helps ensure that the interpretive approach will be similar in each case, thereby promoting the equitable and uniform administration of justice. In addition, the rules inhibit a judge from making

METHOD: SELECT ESSAYS BY VARIOUS AUTHORS 187 (1969); *see also* Johnstone, *An Evaluation of the Rules of Statutory Interpretation,* 3 U. KAN. L. REV. 1, 1 (1954), *reprinted in* 3 J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 817, 817 (4th rev. ed. 1986) ("The ostensible purpose of every rule is to clarify statutory meaning.").

10. Johnstone, *supra* note 9, at 821.

11. *But see* R. DWORKIN, LAW'S EMPIRE 314-54 (1986); Eskridge, *Dynamic Statutory Interpretation,* 135 U. PA. L. REV. 1479, 1480 (1987); Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed,* 3 VAND. L. REV. 395, 399-400 (1950).

12. Professor Johnstone asserts that the judiciary should defer to the limitations imposed by the separation of powers doctrine and that the courts "should recognize that the legislature has become the most important lawmaker on major policy questions." Johnstone, *supra* note 9, at 822.

13. *See* Landes & Posner, *The Independent Judiciary in an Interest-Group Perspective,* 18 J.L. & ECON. 875, 877-79 (1975).

14. Eskridge, *supra* note 11, at 1511.

15. *See id.* at 1511-12.

16. *Id.* at 1511.

17. Johnstone, *supra* note 9, at 822.

arbitrary and purely discretionary decisions[18] because the judge must justify the reasoning underlying an interpretation in accordance with the rules.[19]

B. The Traditional Rules of Statutory Interpretation

The principles of statutory interpretation are embodied in a set of rules that provide for a multilevel inquiry. The primary rule of statutory construction under the traditional model states that if a statute is "clear and unambiguous on its face," the courts must not engage in statutory interpretation.[20] This rule requires judges to construe the "words and grammar in the light of ordinary meanings and of the relationship of the statutory provisions within the statute as a whole."[21] From this proposition, it follows that courts may interpret only statutes that are reasonably susceptible to more than one interpretation and are therefore of doubtful meaning.[22]

If it is established that a statutory ambiguity exists,[23] the next interpretive step is to ascertain the legislative intent at the time the statute was

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18. A basic objective of the rules of statutory interpretation is the creation of certainty in the law, which "prevents the unbridled discretion of the judiciary." *Id.* The traditional rules of statutory interpretation promote certainty because the judge must base her decision upon a standardized set of guidelines. The rules aid the judge in both the process and the articulation of her reasoning. "Courts should fairly and accurately present the real reasons for their decisions. This makes their opinions more useful as precedent, gives a better basis for healthy and effective criticism, and increases the likelihood that the courts will carefully think through their decisions." *Id.* at 823.

19. J. SUTHERLAND, *supra* note 7, § 45.02.

20. *Id.*

The meaning of the language in a particular statute may not always be self-evident because the words themselves have no inherent meaning. One article illustrated this point. A sign read "DO NOT GHOTI OFF BRIDGE." The author demonstrated that, if the "GH" was pronounced as in the word "enough," the "O" as in "women," and the "TI" as in "initiate," it becomes "apparent that the sign proscribes an activity commonly pursued with a rod and reel." Colton, *The Use of Canons of Statutory Construction: A Case Study from Iowa or When Does "GHOTI" Spell "FISH"?,* 5 SETON HALL LEGIS. J. 149, 149 n.1 (1982).

21. Tate, *The Judge's Function and Methodology in Statutory Interpretation,* 7 S.U.L. REV. 147, 152 (1981).

22. *See* J. SUTHERLAND, *supra* note 7, § 45.02.

23. Most commentators are unwilling to stop at the language of the statute itself. An otherwise clear and unambiguous statute may become ambiguous in light of its application to an unforeseen factual context. *See* Tate, *supra* note 21, at 152. Professor Levi stated that "[i]t is only folklore which holds that a statute if clearly written can be completely unambiguous and applied as intended to a specific case." Levi, *An Introduction to Legal Reasoning,* 15 U. CHI. L. REV. 501, 505 (1948). When a court does assert that a statute is clear and unambiguous and therefore requires no interpretation, in reality, it reflects one of two situations: the statute already has been construed by the court on an earlier occasion, or the judge is interpreting the statute based upon his "own uninstructed and unrationalized impression" of its proper meaning. J. SUTHERLAND, *supra* note 7, § 45.02.

passed.[24] The resource materials used for this task commonly are classified into two distinct categories: "extrinsic" and "intrinsic" aids.

Extrinsic aids, which consist of background information concerning the text of the statute, are used widely as the first step in inquiring about legislative intent.[25] The legislative history[26] usually is the most illuminating tool in ascertaining intent, but committee reports,[27] floor debate,[28] and repealed statutes[29] often are useful as well. All of these aids guide the judge in ascertaining the legislature's intent *at the time the statute was passed,*[30] and do not inquire into the subsequent history or public acceptance of the law.[31]

Intrinsic aids, or "canons of construction,"[32] also are used to ascertain legislative intent.[33] Intrinsic aids "derive [a statute's] meaning from the internal structure of the text and conventional or dictionary meanings of the terms used in it."[34] They are not positive rules of law but

24. J. HURST, DEALING WITH STATUTES 32 (1982); *see also* J. SUTHERLAND, *supra* note 7, § 45.05 ("An overwhelming majority of judicial opinions considering statutory issues are written in the context of legislative intent. The reason for this lies in an assumption that an obligation to construe statutes so that they carry out the will, real or attributed, of the lawmaking branch of the government is mandated by principles of separation of powers."). *But see* Radin, *Statutory Interpretation,* 43 HARV. L. REV. 863, 870 (1930) ("[T]he intention of the legislature is undiscoverable in any real sense. . . . The chances that of several hundred men each will have exactly the same . . . situations in mind [are]. . . infinitesimally small."); *id.* at 885 (The traditional techniques of statutory interpretation lead to arbitrary and irrational results and should be abandoned in favor of a system based on a calculus of the probable consequences of alternate interpretations).

25. For an extensive listing of the various types of extrinsic aids, see Johnstone, *supra* note 9, at 818.

26. Materials relating to legislative history and intent largely remain unpublished at the state level. For an excellent research tool and source of legislative intent in California, see *Review of Selected California Legislation,* PAC. L.J. (published annually). *See also* White, *Sources of Legislative Intent in California,* 3 PAC. L.J. 63 (1972) (guide to locating the material and establishing legislative intent).

27. J. SUTHERLAND, *supra* note 7, §§ 48.06-.08.

28. Lane, *Legislative Process and Its Judicial Renderings: A Study in Contrast,* 48 U. PITT. L. REV. 639, 652 (1987).

29. J. SUTHERLAND, *supra* note 7, § 51.04.

30. Timing proved to be a key element in the comparison between the traditional methodology of statutory interpretation and the method used by the *Anderson* court. Because the *Anderson* court looked to current realities to ascertain legislative intent, the court was able to overrule recent precedent interpreting the same statute. *See infra* notes 75-96 and accompanying text.

31. "Inalterably excluded from any list of potentially reliable items of legislative history are post-enactment statements of any character. These statements are never the object of legislative attention and are always tempered by the political context that evolves subsequent to the time in which the dispute over the statute arose." Lane, *supra* note 28, at 658.

32. The terms "canons of construction" and "rules of construction" denote the same concept, and are used interchangeably in this Note.

33. *See* J. HURST, *supra* note 24, at 56-57.

34. J. SUTHERLAND, *supra* note 7, § 45.14.

provide "suggestions leading up to the probable meaning where it has been carelessly or inartificially expressed."[35] They are "axioms of experience,"[36] and more accurately describe the manner in which the judge reaches a conclusion than a prescribed method of reasoning.[37]

The canons of construction have developed into a vast body of law, and, despite academic criticisms,[38] are used widely in the courts.[39] Because the canons are often utilized as guidelines in ascertaining legislative intent, the "courts do not feel themselves at liberty to disregard the rules which may be applicable to the given case, unless for very special reasons."[40]

In sum, the traditional method of statutory interpretation consists of two basic steps. First, the judge must determine whether the language of the statute is clear and unambiguous. If so, the court must not engage in statutory interpretation. If an ambiguity exists, however, the court should attempt to ascertain the intent of the legislature, using both extrinsic and intrinsic aids.

C. Statutory Interpretation in California

Over the years, California courts generally have adhered to the traditional method of statutory interpretation. First, the courts have looked to the language of a statute to determine if it was ambiguous.[41] If an ambiguity existed, the courts then have attempted to ascertain the intent of the legislature,[42] using both extrinsic[43] and intrinsic[44] aids. *Car-*

35. H. BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS 7 (1896); *see supra* note 9 and accompanying text.

36. F. FRANKFURTER, SOME REFLECTIONS ON THE READING OF STATUTES 27 (1947).

37. *See* Tate, *supra* note 21, at 152 n.2.

38. Intrinsic aids recently have been the subject of much debate. "It has been *fashionable* in recent years to belittle the worth of the rules and canons pertaining to the use of intrinsic aids." J. SUTHERLAND, *supra* note 7, § 45.14 (emphasis added); *accord* R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 227 (1975). For example, Professor Llewellyn criticized the efficacy of the canons, asserting that "there are two opposing canons on almost every point." Llewellyn, *supra* note 11, at 401. He illustrated this point by listing 28 canons of construction matched by an equal number of canons that were contradictory. *Id.* at 401-06.

39. "The appellate courts of all the states have used substantially all of these rules at one time or another." Johnstone, *supra* note 9, at 817.

40. H. BLACK, *supra* note 35, at 7.

41. *See, e.g.*, Long Beach Police Officers Ass'n v. City of Long Beach, 46 Cal. 3d 736, 741, 759 P.2d 504, 507, 250 Cal. Rptr. 869, 872 (1988); Committee of Seven Thousand v. Superior Court, 45 Cal. 3d 491, 501, 754 P.2d 708, 713, 247 Cal. Rptr. 362, 367 (1988); People v. Overstreet, 42 Cal. 3d 891, 895, 726 P.2d 1288, 1289, 231 Cal. Rptr. 213, 214 (1986); Solberg v. Superior Court, 19 Cal. 3d 182, 198, 561 P.2d 1148, 1158, 137 Cal. Rptr. 460, 470 (1977); *In re* Marriage of Chapman, 205 Cal. App. 3d 253, 258-59, 252 Cal. Rptr. 359, 362 (1988); County of Fresno v. Clovis Unified School Dist., 204 Cal. App. 3d 417, 426-27, 251 Cal. Rptr. 170, 176 (1988).

42. *See, e.g., Long Beach Police Officers Ass'n,* 46 Cal. 3d at 741, 759 P.2d at 507, 250

los v. Superior Court[45] provides an example of the California Supreme Court's application of traditional statutory interpretation.

In *Carlos,* the defendant was charged with murder during the commission of a robbery, or felony murder, which is categorized as a special circumstance and, thus, is punishable by death under the death penalty statute.[46] Although Carlos was a participant in the robbery, he was not present during the gun battle that resulted in the death of a bystander.[47] The defendant petitioned the California Supreme Court for a writ of prohibition to bar his trial on the felony murder special circumstance because the evidence failed to show he intended to kill or aid in a killing. The court issued the writ,[48] and examined the statute to determine its applicability to the defendant. The court, in an opinion by Justice Broussard, held that proof of intent to kill or to aid in a killing was required of both a principal and an accomplice charged with the felony murder special circumstance, and therefore the death penalty statute was not applicable to Carlos.[49]

The court began its analysis by examining the text of the 1978 death penalty statute.[50] The statute provides that:

Cal. Rptr. at 872; People v. Woodhead, 43 Cal. 3d 1002, 1007, 741 P.2d 154, 156, 239 Cal. Rptr. 656, 658 (1987); *In re* Lance W., 37 Cal. 3d 873, 889, 694 P.2d 744, 754, 210 Cal. Rptr. 631, 641 (1985); Sand v. Superior Court, 34 Cal. 3d 567, 570, 668 P.2d 787, 789, 194 Cal. Rptr. 480, 482 (1983); People *ex rel.* Younger v. Superior Court, 16 Cal. 3d 30, 40, 544 P.2d 1322, 1328, 127 Cal. Rptr. 122, 128 (1976); CAL. CIV. PROC. CODE § 1859 (West 1983) ("In the construction of a statute the intention of the Legislature . . . is to be pursued, if possible . . . .").

43. *See, e.g., Long Beach Police Officers Ass'n,* 46 Cal. 3d at 743, 759 P.2d at 508, 250 Cal. Rptr. at 873 (legislative history and statutory context); People v. Jeffers, 43 Cal. 3d 984, 993, 741 P.2d 1127, 1132, 239 Cal. Rptr. 886, 891 (1987) (history of statute and historical circumstances of its enactment); People v. Davenport, 41 Cal. 3d 247, 266, 710 P.2d 861, 872, 221 Cal. Rptr. 794, 805 (1985) (use of ballot pamphlet); *Lance W.,* 37 Cal. 3d at 888, 694 P.2d at 753, 210 Cal. Rptr. at 640 (same).

44. *See, e.g., Davenport,* 41 Cal. 3d at 264, 710 P.2d at 870, 221 Cal. Rptr. at 794 (statute construed as constitutional if possible); People v. Weidert, 39 Cal. 3d 836, 848, 705 P.2d 380, 387, 218 Cal. Rptr. 57, 63 (1985) (construe criminal statute in favor of defendant); People v. Davis, 29 Cal. 3d 814, 828-29, 633 P.2d 186, 193-94, 176 Cal. Rptr. 521, 528-29 (1981) (construe ambiguous statute in favor of defendant; do not read statute literally if this would bring result inconsistent with intent of legislature); Tos v. Mayfair Packing Co., 160 Cal. App. 3d 67, 79, 206 Cal. Rptr. 459, 466-67 (1984) (adopt narrowest construction of criminal statute's penalty clause).

45. 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983).

46. CAL. PENAL CODE § 190.2 (West 1988) authorizes the imposition of capital punishment if special circumstances are alleged and found to be true. Felony murder, including murder committed during the perpetration of a robbery, is a special circumstance permitting the penalty of death. *Id.* § 190.2(a)(17)(i).

47. *Carlos,* 35 Cal. 3d at 137, 672 P.2d at 866, 197 Cal. Rptr. at 83.

48. *Id.* at 136, 672 P.2d at 865, 197 Cal. Rptr. at 82.

49. *Id.* at 153-54, 672 P.2d at 877, 197 Cal. Rptr. at 95. Justice Broussard was joined by five Justices: Chief Justice Bird, and Justices Mosk, Kaus, Reynoso, and Karesh. Only Justice Richardson dissented.

50. The California death penalty initiative was approved by the voters on November 7,

> The penalty for a defendant found guilty of murder in the first degree shall be death . . . in any case in which one or more of the following special circumstances has been charged and specifically found . . . to be true: . . . (17) The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies . . . .[51]

The court concluded that the statutory language was ambiguous on its face and required interpretation.[52] The court then proceeded to the next step: ascertaining the intent of the legislature. To do this, the court employed both extrinsic and intrinsic aids.

The court first turned to extrinsic aids. Because the statute was passed by initiative (Proposition 7), the court sought to ascertain the intent of the framers and the electorate (rather than the legislature). The voter pamphlet[53] and the ballot arguments[54] were used as the court's primary extrinsic aids. In the *Argument Against Proposition 7,* the opponents argued that "[u]nder Proposition 7, a man or a woman could be sentenced to die for lending another person a screwdriver to use in a burglary, if the other person accidentally killed someone during the burglary . . . [even if the man or woman] had no intention that anyone be

1978. The measure was introduced to the people in Proposition 7, and proposed to do three things. First, the proposition increased the penalties for first and second degree murder. Second, the initiative expanded the list of special circumstances, which if found on the particular facts would result in a sentence of either death or life imprisonment without the possibility of parole. Third, the proposition revised the existing law concerning mitigating and aggravating circumstances. *Analysis by Legislative Analyst,* in CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION 32 (1978) [hereinafter BALLOT PAMPHLET].

51. CAL. PENAL CODE § 190.2(a)(17) (West 1988).

52. The court determined that the statute was ambiguous for two reasons: (1) the expanded list of felonies in § 190.2 no longer corresponded to felonies listed in the general felony murder provision, *Id.* § 189, thereby leading to anomalous results; and (2) the language used in § 190.2(b), the accomplice liability provision, was inherently ambiguous when read in conjunction with subdivision (a)(17), the felony murder provision. *Carlos,* 35 Cal. 3d at 140-42, 672 P.2d at 868-69, 197 Cal. Rptr. at 85-87.

53. "[T]he California courts have often referred to the analysis and arguments in the voters' pamphlet as an aid to ascertaining the intention of the framers and the electorate." *Carlos,* 35 Cal. 3d at 143, 672 P.2d at 870, 197 Cal. Rptr. at 87 (citing Carter v. Commission on Qualifications of Judicial Appointments, 14 Cal. 2d 179, 185, 93 P.2d 140, 144 (1939)); *accord In re* Lance W., 37 Cal. 3d 873, 888 n.8, 694 P.2d 744, 753 n.8, 210 Cal. Rptr. 631, 640 n.8 (1985).

54. The court stated that the analysis by the Legislative Analyst "merely reiterates an abridged version of the initiative, and extends no assistance as to the meaning of any ambiguous terms. The argument advanced by the proponents, however, offers some clues." *Carlos,* 35 Cal. 3d at 143, 672 P.2d at 870, 197 Cal. Rptr. at 87.

The court noted, however, that "[o]ne difficulty with relying on ballot arguments is that they are stronger on political rhetoric than on legal analysis." *Id.* at 143 n.11, 672 P.2d at 870 n.11, 197 Cal. Rptr. at 87 n.11.

killed."[55] In response to this argument, the proponents instructed the voters to turn back and read section (b), which "says that the person must have INTENTIONALLY aided in the commission of a murder to be subject to the death penalty under this initiative."[56] The court found that subdivision (b) expressly contained an intent requirement, and that the voter, when turning back to read subdivision (b) for clarification, would find that it applied to every person, including the "actual killer."[57] Thus, the court found that the "history of the initiative, as well as its wording, supported a construction limiting the felony murder special circumstances to persons who *intend* to kill or aid in a killing."[58]

Next, the court turned to intrinsic aids to determine whether this construction should govern. At this stage of the analysis, the court applied a fundamental rule used to construe penal statutes in California: " 'the [criminal] defendant is entitled to the benefit of every *reasonable* doubt' " in the interpretation of a statute.[59] The court emphasized the particular importance of this rule of construction in felony murder cases,[60] and concluded that "the statute does not permit punishment of an unintentional felony murder by death or life imprisonment without possibility of parole."[61]

55. Singer, Colley & Brown, *Argument Against Proposition 7,* in BALLOT PAMPHLET, *supra* note 50, at 35.

56. Briggs, Heller & Lowe, *Rebuttal to Argument Against Proposition 7,* in BALLOT PAMPHLET, *supra* note 50, at 35 (emphasis in original).

57. *Carlos,* 35 Cal. 3d at 144-45, 672 P.2d at 871, 197 Cal. Rptr. at 88.

58. *Id.* at 145, 672 P.2d at 871, 197 Cal. Rptr. at 89 (emphasis added).

59. *Id.* (quoting *Ex parte* Rosenheim, 83 Cal. 388, 391, 23 P. 372, 373 (1890)) (emphasis added). The rule in its entirety reads:

> While it is true [that] the rule of the common law that penal statutes are to be strictly construed has been abrogated by the code, which provides that "all its provisions are to be construed according to the fair import of their terms, with a view to effect its object and promote justice," it is also true that the defendant is entitled to the benefit of every reasonable doubt, whether it arise[s] out of a question of fact, or as to the true interpretation of words or the construction of language used in a statute . . . .

Rosenheim, 83 Cal. at 391, 23 P. at 373 (1890) (citing CAL. PENAL CODE § 4 (current version at West 1988)).

60. *Carlos,* 35 Cal. 3d at 146, 672 P.2d at 872, 197 Cal. Rptr. at 89.

61. *Id.* at 147, 672 P.2d at 872-73, 197 Cal. Rptr. at 90.

The court relied upon an additional rule of construction: "when faced with an ambiguous statute that raises serious constitutional questions, [a court] should endeavor to construe [the] statute in a manner which *avoids* any doubt concerning its validity." *Id.,* 672 P.2d at 873, 197 Cal. Rptr. at 90 (emphasis in original). This Note will not address the constitutionality issue in light of the recent United States Supreme Court decision, Tison v. Arizona, 481 U.S. 137 (1987). In *Tison,* 481 U.S. at 138, Justice O'Connor, writing for the Court, ruled that the eighth amendment did not prohibit the imposition of capital punishment as disproportionate to the crime for an accomplice in a felony murder if: (1) defendant's participation in the felony was major; and (2) defendant's mental state was one of reckless indifference. Because the absence of an intent requirement was constitutionally permissible for an accomplice, it follows that the actual killer need not have intent either. Although much of the reasoning of *Tison*

II. *People v. Anderson*

The *Carlos* holding and the court's use of the traditional method of statutory interpretation were abandoned by the California Supreme Court in *People v. Anderson*.[62] Using a "realistic" method of statutory interpretation, the *Anderson* court held that intent to kill is not an element of the felony murder special circumstance as applied to the actual murderer.[63] While the result in *Anderson* was undoubtedly a product of the change in composition of the California Supreme Court in the intervening four years,[64] the new method of statutory interpretation used to reach the court's result marks a dangerous departure from past precedent.

A. The Facts of *Anderson*

On March 4, 1979, James Anderson was riding in a car with his girlfriend, Sheila Anders, and her brother, Fred Anders. Fred, who was driving, pulled the car over when he saw two women stranded on the side of the road.[65] One of the women, Donna Coselman, accepted their offer of help and got into their car while her grandmother remained with the disabled vehicle. Donna was driven to an orange grove, where she later was found with a rope around her neck, dead from strangulation.[66] Sheila and Anderson were found near the grove that night and arrested. The grandmother's watch and purse were found on Sheila, and Sheila's purse contained Donna's wallet.[67] The next day, the police found the grandmother's body hanging from a tree in the grove with a rope around her neck.[68]

Although there were conflicting versions of the facts,[69] the defendant Anderson and Sheila Anders each were charged with two counts of murder. The prosecution alleged two special circumstances: multiple

appeared to be rejected in the subsequent case of Booth v. Maryland, 482 U.S. 496 (1987), *Tison* presently is the law and therefore renders a discussion of constitutional issues moot.

62. 43 Cal. 3d 1104, 742 P.2d 1306, 240 Cal. Rptr. 585 (1987).

63. *Id.* at 1142, 742 P.2d at 1330, 240 Cal. Rptr. at 609. The court also held that the prosecutor must prove intent to kill if the defendant is an aider or abettor. *Id.* at 1147, 742 P.2d at 1331, 240 Cal. Rptr. at 611. Thus, a court must instruct the jury that intent to kill is an element of felony murder special circumstance if there is evidence from which a jury could find that the defendant was an accomplice and not the actual killer.

64. In 1986, Chief Justice Rose Elizabeth Bird and Justices Joseph Grodin and Cruz Reynoso lost their seats on the California Supreme Court as a result of a judicial election on November 5. *See* Bottorff, *Lucas Considered a Likely Choice as Next Chief Justice: Governor to Remold Court After Rejection of Bird Colleagues,* L.A. Daily J., Nov. 6, 1986, at 1, col. 6.

65. *Anderson,* 43 Cal. 3d at 1115, 742 P.2d at 1309, 240 Cal. Rptr. at 588.

66. *Id.*

67. *Id.*

68. *Id.*

69. The defendant and Fred Anders offered different versions about the events of that night. Fred, who had notified the police initially, testified for the prosecution against Ander-

murder[70] and felony murder during the course of a robbery.[71] At trial, Sheila presented a diminished capacity defense and was convicted of second degree murder.[72] James Anderson was convicted of first degree murder, and both special circumstances were found to exist. The jury sentenced Anderson to death.[73] Anderson appealed the verdict of guilt because the trial court did not instruct the jurors on intent to kill in accordance with *Carlos v. Superior Court.*[74]

B. The Majority Opinion

Interestingly, Justice Mosk, who had joined the majority opinion in *Carlos,* wrote for the majority in *Anderson.*[75] Justice Mosk asserted that the court had a "duty" to reconsider the earlier interpretation of the 1978 death penalty initiative because two United States Supreme Court decisions,[76] subsequent to *Carlos,* brought one of the bases of the *Carlos* decision into question.[77] Thus, although the language of the statute and its historical background remained the same, the *Anderson* court ignored these key elements of traditional statutory interpretation and availed itself of the opportunity to reconsider *Carlos.*

The court began its analysis with the first step of traditional statutory interpretation: an examination of the statutory language. The court asserted that the plain meaning of the words in the felony murder provision did not require a finding of intent to kill: "If section 190.2(a)(17) [the felony murder special circumstance] is read alone, it does not require a finding of intent to kill: the plain language of the provision neither expressly nor impliedly demands such a finding."[78]

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son, and was not charged with any crime. *Id.* at 1116-17, 742 P.2d at 1310, 240 Cal. Rptr. at 589.

70. *See* CAL. PENAL CODE § 190.2(a)(3) (West 1988).

71. *See id.* § 190.2(a)(17)(i).

72. *Anderson,* 43 Cal. 3d at 1117-18, 742 P.2d at 1311, 240 Cal. Rptr. at 590.

73. *Id.* at 1118, 742 P.2d at 1311, 240 Cal. Rptr. at 590.

74. *Id.* at 1138, 742 P.2d at 1325, 240 Cal. Rptr. at 604.

75. The majority opinion was joined by Justices Panelli, Arguelles, and Eagleson. Justice Lucas wrote a separate concurring opinion. Justice Kaufman concurred, and dissented on a separate issue. Justice Broussard concurred in the reversal of the penalty, and dissented as to the remainder of the opinion.

76. Tison v. Arizona, 481 U.S. 137 (1987); Cabana v. Bullock, 474 U.S. 376 (1986). In his dissent, Justice Broussard asserted that the majority found support for its decision to reconsider *Carlos* from "insignificant dictum" in *Cabana,* and a "mistaken footnote" in *Tison. Anderson,* 43 Cal. 3d at 1155, 742 P.2d at 1336, 240 Cal. Rptr. at 616 (Broussard, J., dissenting).

77. *Anderson,* 43 Cal. 3d at 1141, 742 P.2d at 1327, 240 Cal. Rptr. at 606.

78. *Id.* The text of Penal Code § 190.2(a)(17) reads in relevant part:

> The penalty for a defendant found guilty of murder in the first degree shall be death . . . in any case in which one or more of the following special circumstances has been charged and specifically found . . . to be true: . . . (17) The murder was committed while the defendant was engaged in or was an accomplice in the commission of,

Next, the court considered the felony murder special circumstance in conjunction with section 190.2(b), the provision for accomplice liability.[79] The majority stated that its "reading of the felony-murder special circumstance is not undermined but merely modified by the addition of an exception to the general rule that intent to kill is not required."[80] Even though the felony murder special circumstance was prefaced by language including both the actual killer and the accomplice,[81] the court proffered two reasons why section 190.2(b) "*must* nevertheless be read to govern the liability of the aider and abettor *only*."[82] First, the provision used words that "generally and traditionally describe the involvement" of an accomplice, not the actual killer.[83] Second, if the provision were read to require intent to kill, such requirement would "render superfluous the express intent requirement that some of [the special circumstances] already contain."[84]

The court then used an extrinsic aid, language from the voter pamphlet, to support its position that section 190.2(b), with its intent requirement, only governs accomplice liability.[85] The same ballot arguments cited in *Carlos* were quoted in *Anderson* to support the contrary position.[86]

Accordingly, the court concluded that the felony murder special circumstance was not ambiguous: "on further reflection we *now believe* that [the] premise [that section 190.2(a)(17) was ambiguous] was mistaken: given a fair reading, section 190.2(a)(17) provides that intent is not an

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attempted commission of, or the immediate flight after committing or attempting to commit the following felonies . . . .

CAL. PENAL CODE § 190.2(a)(17) (West 1988). The list of felonies includes, among others, kidnapping, robbery, rape, sodomy, burglary, and arson. *Id.*

79. *Anderson*, 43 Cal. 3d at 1141, 742 P.2d at 1327, 240 Cal. Rptr. at 606. Subdivision (b) reads:

> Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term of life without the possibility of parole . . . .

CAL. PENAL CODE § 190.2(b).

80. *Anderson*, 43 Cal. 3d at 1142, 742 P.2d at 1327, 240 Cal. Rptr. at 607.

81. *See supra* note 79.

82. *Anderson*, 43 Cal. 3d at 1142, 742 P.2d at 1328, 240 Cal. Rptr. at 607 (emphasis added).

83. *Id.*

84. *Id.*

85. The court cited the legislative analysis section of the voter pamphlet, stating that it "clearly implies that section 190.2(b) governs the liability of the aider and abettor and provides that the aider and abettor is death-eligible if he is proved to have acted with the intent to kill." *Id.* at 1143, 742 P.2d at 1328, 240 Cal. Rptr. at 608 (citing *Analysis by Legislative Analyst*, in BALLOT PAMPHLET, *supra* note 50, at 32).

86. *Id.* This is significant because the ballot argument apparently can support two reasonable, albeit contrary, interpretations. For the text of the argument, see *supra* text accompanying notes 55-56. *See supra* note 22 and accompanying text.

element of the felony-murder special circumstance."[87] Furthermore, when the felony murder provision was "given a fair reading in conjunction with section 190.2(b), the provision can *realistically* be read only to require intent to kill for the aider and abettor but not for the actual killer."[88]

Under the traditional method of statutory interpretation, once the court found the statutory language to be unambiguous, the court's analysis of the statute would end. The *Anderson* majority, however, continued its discussion of the felony murder special circumstance, stating that "even if the provision were ambiguous, we *now believe* that an application of the rules of construction we used in *Carlos* would not change our reading."[89] The court then examined the rule of construction that entitles a defendant to the benefit of every reasonable doubt in the interpretation of a statute.[90] Curiously, the court stated that the "canon entitles the defendant only to the benefit of every *realistic* doubt,"[91] and dismissed the canon as inapplicable because the court "no longer [has] any *realistic* doubt as to the meaning . . . of the felony murder special circumstance."[92] The court did not cite any precedent[93] for this change in the canon's language.[94]

Based upon the foregoing analysis, the majority overruled *Carlos,* and held that intent to kill is not a requirement of the felony murder

87. *Anderson,* 43 Cal. 3d at 1143, 742 P.2d at 1329, 240 Cal. Rptr. at 608 (emphasis added).

88. *Id.* at 1145, 742 P.2d at 1330, 240 Cal. Rptr. at 609 (emphasis added). In contrast, the *Carlos* court sought a *reasonable* interpretation of the statute. *See* Carlos v. Superior Court, 35 Cal. 3d 131, 143, 672 P.2d 862, 870, 197 Cal. Rptr. 79, 87 (1983).

89. *Anderson,* 43 Cal. 3d at 1145, 742 P.2d at 1330, 240 Cal. Rptr. at 609 (emphasis added).

90. *See supra* text accompanying note 59.

91. *Anderson,* 43 Cal. 3d at 1145, 742 P.2d at 1330, 240 Cal. Rptr. at 609 (emphasis in original).

92. *Id.* at 1146, 742 P.2d at 1330, 240 Cal. Rptr. at 610 (emphasis in original).

93. The court did cite several cases after it made this change: United States v. Raynor, 302 U.S. 540 (1938) and People v. Hallner, 43 Cal. 2d 715, 277 P.2d 393 (1954). The court cited *Hallner* and *Raynor* for the proposition that penal statutes should be interpreted to give a "fair" import to the statutory language. *Anderson,* 43 Cal. 3d at 1145-46, 742 P.2d at 1330, 240 Cal. Rptr. at 609-10. The cases, however, do not support this substitution of "realistic" for "reasonable."

94. The *Anderson* court discussed a second canon: " 'when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, . . . by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.' " *Anderson,* 43 Cal. 3d at 1146, 742 P.2d at 1330, 240 Cal. Rptr. at 610 (citing United States v. Delaware & Hudson Co., 213 U.S. 366, 407-08 (1909)). Again, the court changed the word "reasonabl[e]" to "realistic," and emphasized the change. *See id.* ("the statute must be *realistically* susceptible of two interpretations"). Because a discussion of the constitutional issues presented is outside the scope of this Note, *see supra* note 61, the court's application of this canon will not be discussed.

special circumstance.[95] Specific intent must be proved only when the defendant is an accomplice and not the actual killer.[96] This analysis, however, prompted a scathing dissent by Justice Broussard.

C. The *Anderson* Dissent

Justice Broussard wrote a harshly critical dissent from the majority's discussion of the felony murder special circumstance. His criticism of the majority's decision to overrule the *Carlos* interpretation of the 1978 death penalty initiative focused upon two points: (1) the majority's disregard of the principle of stare decisis; and (2) the majority's departure from the accepted principles of statutory construction.

(1) Stare Decisis

Justice Broussard began his dissent by extolling the benefits of stare decisis: "Periodically, when the political winds gust in a new direction, it becomes necessary to remind all concerned of the virtues of a steady course. As lawyers and judges, we sometimes deliver our reminder in Latin: stare decisis."[97] Justice Broussard saw the majority's decision to overrule *Carlos* and its progeny[98] as departing from this principle in several respects.

First, Justice Broussard asserted that it is "rare for this court to overrule a recent precedent construing a statute."[99] When the legislature or, in this case the electorate, disapproves of a court's interpretation of a particular statute, the situation may be remedied by taking action to overturn the judicial interpretation.[100] The absence of legislative or initiative action subsequent to the *Carlos* interpretation suggested to Justice Broussard that "there is no consensus among either the Legislature or

95. *Anderson,* 43 Cal. 3d at 1147, 742 P.2d at 1331, 240 Cal. Rptr. at 611.

96. *See id.*

97. *Id.* at 1152, 742 P.2d at 1335, 240 Cal. Rptr. at 614 (Broussard, J., dissenting).

98. Thirteen decisions followed the *Carlos* interpretation of the 1978 death penalty initiative: People v. Ratliff, 41 Cal. 3d 675, 715 P.2d 665, 224 Cal. Rptr. 705 (1986); People v. Hamilton (Bernard), 41 Cal. 3d 408, 710 P.2d 981, 221 Cal. Rptr. 902 (1985), *rev'd on other grounds sub nom.* California v. Hamilton, 476 U.S. 1301 (1986); People v. Silbertson, 41 Cal. 3d 296, 709 P.2d 1321, 221 Cal. Rptr. 152 (1985); People v. Fuentes, 40 Cal. 3d 629, 710 P.2d 240, 221 Cal. Rptr. 440 (1985); People v. Guerra, 40 Cal. 3d 377, 708 P.2d 1252, 220 Cal. Rptr. 374 (1985); People v. Chavez, 39 Cal. 3d 823, 705 P.2d 372, 218 Cal. Rptr. 49 (1985); People v. Hayes, 38 Cal. 3d 780, 699 P.2d 1259, 214 Cal. Rptr. 652 (1985); People v. Boyd, 38 Cal. 3d 762, 700 P.2d 782, 215 Cal. Rptr. 1 (1985); People v. Anderson (Stephen), 38 Cal. 3d 58, 694 P.2d 1149, 210 Cal. Rptr. 777 (1985); People v. Armendariz, 37 Cal. 3d 573, 693 P.2d 243, 209 Cal. Rptr. 664 (1984); People v. Turner, 37 Cal. 3d 302, 690 P.2d 669, 208 Cal. Rptr. 196 (1984); People v. Ramos, 37 Cal. 3d 136, 689 P.2d 430, 207 Cal. Rptr. 800 (1984); People v. Whitt, 36 Cal. 3d 724, 685 P.2d 1161, 205 Cal. Rptr. 810 (1984).

99. *Anderson,* 43 Cal. 3d at 1165, 742 P.2d at 1343, 240 Cal. Rptr. at 623 (Broussard, J., dissenting).

100. *See id.* at 1165, 742 P.2d at 1343-44, 240 Cal. Rptr. at 623.

the voters that an unintentional murderer should be executed."[101] He argued that the court should not take such action on its own initiative.[102]

Second, the intent to kill instruction had been given in all capital cases after the *Carlos* decision was rendered in 1983. Since that time, there were "no complaint[s] that such instructions [had] led to confusion, inefficiency, or brought about mistaken or unjust verdicts."[103]

Third, the decision to overrule *Carlos* created an arbitrary distinction between defendants.[104] Some criminal defendants tried before the 1983 *Carlos* decision received an intent to kill instruction.[105] Others did not, and consequently appealed. The unfortunate pre-1983 defendants, whose appeals had not been resolved prior to the *Anderson* decision, would not receive the benefit of the *Carlos* instruction. Such a distinction could mean the difference between life or death.[106]

Finally, Justice Broussard asserted that the court should not overrule a line of precedent simply because the makeup of the court had changed.[107] "Imagine, for example, the chaos if some years in the future a newly constituted California Supreme Court, taking its view of stare decisis from the present decision, were to overrule the present decision and reinstate *Carlos,* thus invalidating most death penalty judgments rendered in the interim."[108]

(2) Statutory Construction

Justice Broussard's main objection to the majority's approach to the interpretation of the death penalty statute focused on their substitution of the word "reasonable" for "realistic" in the canon of statutory construction that requires penal statutes, reasonably susceptible to more than one interpretation, to be interpreted in the defendant's favor.[109] The majority asserted that the 1978 death penalty initiative was "realistically" susceptible of only one meaning, that is, intent to kill was not required for the actual killer.[110] Justice Broussard asserted, however, that "[a]nyone familiar with the principles of statutory construction will recognize that

101. *Id.*

102. *See id.*

103. *Id.*

104. *See id.*

105. Some trial judges, anticipating the *Carlos* decision, gave such an instruction in pre-*Carlos* cases. *See id.*

106. *See id.* at 1166, 742 P.2d at 1344, 240 Cal. Rptr. at 624.

107. *See id.* at 1153, 742 P.2d at 1335, 240 Cal. Rptr. at 615. Justice Broussard is referring to the California judicial election of 1986. *See supra* note 64.

108. *Anderson,* 43 Cal. 3d at 1153 n.4, 742 P.2d at 1335 n.4, 240 Cal. Rptr. at 614 n.4.

109. *Id.* at 1156-57, 742 P.2d at 1334-35, 240 Cal. Rptr. at 617-18; *see supra* notes 59, 90-94 and accompanying text.

110. *Anderson,* 43 Cal. 3d at 1145, 742 P.2d at 1330, 240 Cal. Rptr. at 609.

something is wrong with this assertion—the word 'realistically' does not belong."[111]

Justice Broussard cited a list of cases to highlight the use of the word "reasonable" in the canon of construction. None of these cases, however, used the word "realistic" when applying the canon.[112] He also pointed out that the majority did not explain the difference between the two standards, and indicated that "standing alone, the word ['realistic'] carries ominous overtones of judicial submission to political realities."[113]

Because the majority did not elucidate the significance of the substitution of "realistic" for "reasonable," Justice Broussard ignored the change and analyzed the statute from a reasonableness perspective.[114] He found the statute to be ambiguous on its face, and determined that the felony murder special circumstance had more than one reasonable interpretation.[115] Since more than one reasonable interpretation existed, according to Justice Broussard, the majority should have followed precedent and chosen the *Carlos* interpretation.[116]

Justice Broussard's dissent presented forceful arguments against the majority's decision to overrule *Carlos*. This Note now will explore the possible ominous implications of the *Anderson* decision suggested in Justice Broussard's dissent.

III. Implications of the *Anderson* Realistic Standard of Statutory Interpretation

A. The Realistic Method

Under the traditional method of statutory interpretation, a judge's inquiry is limited to the text of the statute and evidence of the historical context in which the statute was passed.[117] The realistic approach to statutory interpretation adopted by the *Anderson* majority, however, broadens the scope of a court's inquiry. Instead of confining the analysis of a statute to the context in which it was passed, the realistic standard permits a court to consider current realities, that is, social, political, and legal changes and attitudinal shifts since the passage of the statute. A

111. *Id.* at 1156, 742 P.2d at 1338, 240 Cal. Rptr. at 617 (Broussard, J., dissenting).

112. *See id.* at 1157, 742 P.2d at 1338, 240 Cal. Rptr. at 617 (citing People v. Garfield, 40 Cal. 3d 192, 200, 707 P.2d 258, 264, 219 Cal. Rptr. 196, 202 (1985); People v. Davis, 29 Cal. 3d 814, 828, 633 P.2d 186, 193, 176 Cal. Rptr. 521, 528 (1981); People v. King, 22 Cal. 3d 12, 23, 582 P.2d 1000, 1006, 148 Cal. Rptr. 409, 415 (1978); Bowland v. Municipal Court, 18 Cal. 3d 479, 488, 556 P.2d 1081, 1084, 134 Cal. Rptr. 630, 633 (1976)).

113. *Id.* at 1157 n.12, 742 P.2d at 1338 n.12, 240 Cal. Rptr. at 617 n.12.

114. *See id.*

115. *Id.* at 1158-60, 742 P.2d at 1338-40, 240 Cal. Rptr. at 618-19.

116. *Id.* at 1160, 742 P.2d at 1340, 240 Cal. Rptr. at 619.

117. *See supra* note 20-24 and accompanying text.

comparison between "reasonableness" and "realism" illustrates this point.

A reasonableness standard encourages a court to focus on what is fair and just under the circumstances.[118] In order to be fair and just, the court must conduct its analysis in a manner as objective as possible. The court's inquiry is limited to objective facts and materials: the language of the statute and its legislative history.[119] Perhaps more importantly, by limiting the court's inquiry to determining the original intent of the legislature, use of the reasonableness standard prevents courts from considering present societal and political values.

A realistic standard, however, allows more subjectivity and judicial discretion to enter into the statutory analysis. The focus of the inquiry no longer is limited to the original intent of the legislature because that intent, if ascertainable, may not reflect current realities. A realistic standard permits dynamic statutory interpretation, that is, the court can consider the language of the statute, its historical context, and the "present societal, political, and legal context."[120]

Thus, when interpreting a statute, the court may consider far more material under a realistic standard than under a reasonableness standard. The concern is no longer solely with what is reasonable, that is, fair and just, but also with what currently reflects reality. Dynamic statutory interpretation takes the various socio-political changes of any given time period into account, and incorporates such changes into the law.

In *Anderson,* the court acknowledged the changing social and political attitudes towards the death penalty. The court's eyes had been opened by a recent judicial election that substantially altered the makeup of the California Supreme Court. A bitter campaign had focused primarily upon the court's then restrictive application of the death penalty initiative, and nearly half of the Justices were voted out of office.[121] The election results suggested that the public disfavored a limited application of the death penalty statute. Thus, the newly elected court acted consist-

118. "Reasonable" is defined as "fair, proper, just, moderate, suitable under the circumstances." BLACK'S LAW DICTIONARY 1138 (5th ed. 1979).

119. *See supra* notes 20-24 and accompanying text. Intrinsic aids are included in the inquiry because they aid in the interpretation of the language of the statute. *See supra* notes 32-37 and accompanying text.

120. Eskridge, *supra* note 11, at 1479.

121. *See* Roberts, *Special Interests Mainly Financing High Court Races,* L.A. Daily J., Oct. 24, 1986, at 1, col. 6 (" 'The death penalty issue is what the public is basing its decision on' " (quoting Debbie Goff of Crime Victims for Court Reform)); Chance, *Public Views Mixed on Bird, Reynoso, Grodin,* L.A. Daily J., Oct. 10, 1986, at 2, col. 4 (nearly half of those who said they intended to vote against Bird cited her position on the death penalty as their reason); Jost, *Beating an Issue to Death,* L.A. Daily J., Oct. 6, 1986, at 2, col. 6 (Governor George Deukmejian opposed Reynoso, Grodin, and Bird because their votes in death penalty cases lacked objectivity.); *see supra* note 64.

ently with political realities and attitudinal changes, and overruled the narrow *Carlos* interpretation of the felony murder special circumstance.

B. The Negative Implications of the Realistic Standard

Unlimited application of the realistic approach to statutory interpretation will cause several problems in the development and administration of criminal law in California.

(1) The Distribution of Power

The realistic standard threatens to upset the distribution of power between the legislature and the judiciary by enabling the judiciary to encroach upon the lawmaking function of the legislature. The realistic standard permits the judge to draw upon an enormous body of sources in her search for a realistic interpretation of a statute. The judge may consider current social and political realities in addition to the text of the statute and its legislative history. Ultimately, this method gives too much discretion to the interpreting judge. Realities will vary from person to person, even from day to day. Thus, the judge essentially may interpret the statute to reach almost any result she desires. In effect, the judge may *make* the law, rather than merely interpret it, and in that sense usurp the role of the legislature.

The dynamic method of statutory interpretation also permits the legislature and the electorate to exert undue influence on the judiciary. As in *Anderson,* political or societal disfavor of a particular policy or ruling may coerce the court into reaching a particular result or reversing itself, especially when the judges may be voted out of office. Such pressure encroaches upon the independence of the judiciary, and permits the legislature and the electorate to exert its influence over the exercise of the judicial function.

(2) Certainty and Uniformity in the Administration of Criminal Justice

The *Anderson* approach to statutory interpretation may have a negative effect on the administration of criminal justice because the realistic standard is inherently flexible and subjective. Unlimited application of this standard to penal statutes would render the criminal law uncertain and impede the uniform administration of the law.

Due process requires that a criminal defendant have fair notice that his conduct is deemed criminal and what the punishment is for such conduct. " 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.' "[122] This due process

122. Keeler v. Superior Court, 2 Cal. 3d 619, 633-34, 470 P.2d 617, 626, 87 Cal. Rptr. 481, 490 (1970) (quoting Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939)).

requirement ensures that the criminal law is certain and foreseeable, so that a criminal defendant may be warned that his conduct constitutes a crime with attendant penalties.[123]

This basic due process requirement cannot be met when a law is constantly subject to new interpretation. For example, in *Anderson* the realistic approach to statutory interpretation permitted the unforeseeable judicial enlargement of the application of the death penalty to unintentional criminal conduct. Although the defendant in *Anderson* was aware that his behavior was criminal, he was not given fair notice of the penalties that attached if he were convicted. Moreover, because the *Anderson* court did not indicate the limits of the realistic approach, the dynamic method of statutory interpretation potentially could be used to enlarge the penalties under almost any penal statute. This use of the realistic approach would undermine the certainty in the criminal law that is required by due process.

The potential for unforeseeable judicial enlargement of the penalties for criminal conduct also could impede the uniform administration of justice. The law would be in a perpetual state of flux, depending upon the political and social realities that currently prevailed. As a result, criminal defendants would receive unequal treatment under the same penal statute because the application of the statute and its attendant penalties would shift with attitudinal changes. In addition, because the courts have no guidance about when to apply the dynamic method of statutory interpretation (if at all) and when to apply the traditional method, conflicting interpretations of the same penal law may emerge from different courts, further undermining the uniform application of the criminal law.

(3) Arbitrary Distinctions Between Criminal Defendants

The *Anderson* approach also created an arbitrary distinction between criminal defendants.[124] Pre*Carlos* defendants who did not receive the intent-to-kill instruction and whose appeals were pending at the time of the *Anderson* decision would not receive the benefit of the intent instruction. Those pre*Carlos* defendants whose appeals happened to be decided prior to *Anderson* did receive the benefit of the intent instruction. Such arbitrary distinctions between criminal defendants are undesirable, especially when the distinction randomly extends the application of the death penalty statute to include a new group of defendants.

If the *Anderson* approach is used to interpret all penal statutes in the future, further arbitrary distinctions between criminal defendants may result. For example, in five years the socio-political climate could demand that felony murder accomplices who had no intent to kill should be eligible for the death penalty. Using the dynamic method of statutory

123. *See id.* at 633, 470 P.2d at 626, 87 Cal. Rptr. at 490.

124. *See supra* notes 104-06 and accompanying text.

interpretation, the court would be able to overrule *Anderson* to the extent that intent to kill was required for accomplices, and enlarge the penalties for unintentional felony murder accomplices to include the death penalty. Thus, accomplices that were tried prior to this ruling would receive the benefit of the intent-to-kill instruction, thereby eliminating the possibility of the death penalty. Those accomplices who were tried the day after the new ruling could be executed for an unintentional murder that they did not even commit. Although changes in the criminal laws almost always produce anomalous results, such changes are the province of the legislature, and not the courts.

IV. Guidelines for the Application of the *Anderson* Realistic Standard to Penal Statutes

Although unlimited application of the dynamic method of statutory interpretation would be detrimental to the criminal justice system, the method may be useful in situations in which the legislature is unwilling or unable to respond efficiently to legal issues that demand swift resolution. Before a court employs this method, however, the following five conditions should be met:[125]

> (1) The old interpretation of a statute is clearly inconsistent with current realities;
>
> (2) The current realities reflect well established socio-political attitudinal changes, which the court must document by pointing to objective facts and materials;
>
> (3) There is little or no possibility of legislative reform;
>
> (4) The new interpretation does not expand or retract the application of the penal statute any more than is absolutely necessary;
>
> (5) Only the highest court may use the dynamic method of statutory interpretation.

Limiting the use of the dynamic method of statutory interpretation according to these guidelines will preserve the distribution of power between the legislature and judiciary because the conditions will restrict the unbridled discretion of the interpreting judge. Under the first two conditions, the judge must point to objective facts and materials to support his conclusion that the old interpretation is clearly inconsistent with current realities.[126] Furthermore, the judiciary may only act when there is little or no possibility of legislative reform, such as when the legislature refuses to reform a law despite continued public pressure to do so, or when legis-

125. These conditions loosely parallel Professor Schlesinger's formula for determining when a German court may apply a judge-made law that violates a statute. *See* R. SCHLESINGER, H. BAADE, M. DAMASKA & P. HERZOG, COMPARATIVE LAW: CASES—TEXT—MATERIALS 641-42 (5th ed. 1988).

126. Such objective materials could include sociological studies about current attitudinal changes, or law review or newspaper articles indicating change in the socio-political climate.

lative debate indicates that lack of consensus would quelch any reform attempts. The legislature may not exert undue influence over the judiciary because a statute may be interpreted dynamically only when all of the conditions are met.

The guidelines also will promote certainty in criminal law because there will be notice as to when the realistic standard will be used. Moreover, the guidelines will aid in the uniform administration of justice. Only the highest state court may utilize the standard, thereby eliminating the possibility of conflicting statutory interpretations from lower courts. Additionally, because the court must gather objective facts and materials to demonstrate current realities, the use of the standard will require the court to expend additional time and effort, further reducing use of the standard and the possibility of inconsistency.

Finally, if the courts adhere to these conditions, the use of the *Anderson* approach should not create arbitrary distinctions between criminal defendants. Although distinctions still may exist in limited situations, they will no longer be arbitrary. The court will have to meet a specific set of criteria before the *Anderson* standard may be applied. In all other cases, the traditional method of statutory interpretation should be used.

Clearly, these conditions had not been met in *Anderson.* There was no evidence that the *Carlos* interpretation requiring an intent to kill instruction for felony murderers was inconsistent with current realities. Although the campaign waged against the former California Supreme Court justices focused on the issue of the death penalty,[127] the propaganda used to persuade the public not to re-elect the Justices centered on egregious acts of intentional murder.[128] The emotional campaign did not attempt to persuade the public that the application of the death penalty statute should be expanded to include unintentional felony murderers. The *Anderson* court did not point to any objective facts or materials to support its conclusion that current socio-political attitudes mandated the imposition of capital punishment on unintentional felony murderers. Indeed, the legislature and the electorate had had four years to respond to the *Carlos* interpretation of the death penalty statute if they found its ruling objectionable. As Justice Broussard pointed out in his dissent,

127. *See supra* note 121.

128. *See* Chiang, *Anti-Bird Group Unveils Campaign Ads,* L.A. Daily J., Oct. 8, 1986, at 2, cols. 2-4. One television commercial showed a woman seated by a picture of a blonde-haired girl. "My daughter never got to her ballet lesson," the mother says. "But the man who kidnapped and killed her is still alive. Rose Bird, Cruz Reynoso, and Joseph Grodin overturned his death sentence as they have for so many other brutal killers." *Id.*; *see also Rose Elizabeth Bird: To Many, a Symbol of Frustration over Crime, Punishment,* L.A. Daily J., Oct. 27, 1986, at 5, col. 1 (bumper sticker spotted in Southern California read "Free the Night Stalker. Elect Rose Bird.").

there had been no complaints about the *Carlos* decision.[129] Because all of the proposed conditions were not met in *Anderson,* and because the *Carlos* interpretation was reasonable under traditional statutory interpretation, the court should have adhered to the principle of stare decisis.

Conclusion

In the landmark decision of *People v. Anderson,* the California Supreme Court held that intent to kill was no longer an element of the felony murder special circumstance for the actual killer. Perhaps the true significance of the decision, however, lies in the *Anderson* approach to statutory interpretation.

To reach the result in *Anderson,* the court departed from the traditional method of statutory interpretation. Instead, the court used a dynamic method of interpretation by substituting a realistic standard for a reasonable one. This change in perspective allowed the court to consider the current social and political climate when interpreting the California death penalty statute. The consideration of this additional material resulted in the overruling of *Carlos,* and the elimination of the intent to kill requirement for imposing the death penalty on felony murderers who actually kill.

The court's use of a realistic standard when interpreting penal statutes may be detrimental to the criminal justice system. The dynamic method of statutory interpretation may upset the distribution of power between the judiciary and the legislature, and may undermine the certainty and uniformity required by due process. Additionally, the *Anderson* method may create arbitrary distinctions between criminal defendants.

In order to curb these negative effects, the court should adhere to specific guidelines before invoking the dynamic method in the criminal context. Before a court may interpret a penal statute in light of current realities, it must find that the old interpretation is clearly inconsistent with current realities by pointing to objective facts and materials. Further, the court must show that there is little or no possibility of legislative reform, and that the new interpretation is not overly broad or restrictive. Finally, even when these conditions are met, only the highest state court should be allowed to utilize the *Anderson* method to interpret penal statutes.

129. *See supra* text accompanying note 103.