People v. Sarun Chun – In Its Latest Battle With Merger Doctrine, Has the California Supreme Court Effectively Merged Second-Degree Felony Murder Out of Existence?

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In July of 2009, in the latest salvo in its long struggle to limit California's second-degree felony-murder doctrine, the California Supreme Court announced its decision in *People v. Sarun Chun*.[1] The decision's two holdings at once undercut the doctrine's use in criminal prosecutions and entrench second-degree felony murder in California law. First, after more than forty years of dicta to the contrary, the Court held that second-degree felony-murder doctrine was statutory and not, as was previously understood, judicially created. At the same time, the Court limited the scope of felony murder by interpreting anew its "merger doctrine"—the Court-made exception to felony murder in which certain underlying felonies "merge" with a resulting homicide,[2] precluding a felony-murder charge.

Chun, the latest of many changes to merger doctrine since it was first announced in 1969 in *People v. Ireland*, dramatically reinterprets the way merger functions in second-degree felony-murder prosecutions. Under the new *Chun* standard, all felonies that contain an "assaultive" element merge per se with the resulting homicide and may no longer serve as the basis of a felony-murder charge. Much like the related "inherently dangerous felony" limitation for felony murder, the Court's new test is intended to create predictability for the practitioner, since judicial determinations of merger will now be based on the face of the statute, and no longer on the particular facts of a defendant's

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

2. "Homicide" is used in this article in its technical form, meaning the death of an individual at the hands of another. The use of the word "homicide" is never meant to connote the criminal liability of the offender.

case. However, the Court's holding that second-degree felony murder is a creature of statute threatens to undermine the very limitations the Court has placed on the doctrine's use. In attempting to definitively settle the doctrinal debates over merger, the Court has succeeded in severely limiting second-degree felony murder's use, but it has also set the stage to lose judicial control over felony murder outright.

This Note seeks to provide both a descriptive reading of the *Chun* decision's effect on the merger doctrine for the practitioner, and a predictive analysis of the decision's implications on the future of second-degree felony murder in California. Part I places the Court's decision in *Chun* in historical context. The development of limitations on second-degree felony murder, both the requirement that the underlying felony be inherently dangerous to human life, and the idea that certain underlying felonies merge with a homicide and thus preclude the doctrine's application, is integral to understanding the Court's concerns in its new decision.

Part II addresses the *Chun* decision itself, describing how the Court failed to provide an adequate analytical framework for applying its new merger doctrine. The *Chun* decision holds that when an underlying felony is "assaultive in nature" that crime merges with the homicide and so cannot be the basis for a felony-murder instruction, yet fails to state precisely how such a determination is to be reached.[3] In Part III, this Note thus attempts to derive an appropriate definition of "assaultive" from the Court's scant direction. Utilizing the Court's explications on the elements of the crime of felony assault, and analyzing the statutory language of the three crimes listed in *Chun* as containing an "assaultive" element, this Note posits an analytical framework for future application of the new merger doctrine.

In Part IV, the Note looks forward in two ways. First, it examines those inherently dangerous felonies that have been the subject of previous second-degree felony-murder prosecutions to determine which of these known felonies merge under *Chun*'s new merger test. In so doing, it becomes clear the Court's *Chun* decision creates far more questions than answers, as the Court's definition of felony assault and *Chun*'s examples of felonies with an "assaultive element" diverge. It is apparent that *Chun* has severely limited the scope of second-degree felony murder, but also exacerbated the disconnect between culpability and criminal liability in those felonies that still do not merge.

Second, Part IV surveys the practical and analytical fallout of the *Chun* decision, noting that the Court has effectively tied its hands, and perhaps completely eliminated its ability to limit second-degree felony murder in the future. I posit that the *Chun* decision could impel California's legislature to create a new second-degree felony-murder statute, or to expand the statutorily enumerated felonies supporting first-degree murder. Most dangerously, the

3. *Chun*, 45 Cal. 4th at 1200.

Chun Court's reasoning that California's second-degree felony murder as it existed at common-law is codified in the murder statute risks a successful challenge to any judicially-created limits on second-degree felony murder. While the Court has succeeded in further limiting the application of felony murder, directly addressing the often illogical and harsh effects of the doctrine's application, it may have unwittingly opened the door to a more robust felony-murder law in California in the future.

I. MURDER IN CALIFORNIA—A PRIMER

California's murder statute has changed little since it was codified in 1850 and separated into first and second degrees in 1856.[4] In its current form, the California Penal Code defines murder in three sections. Section 187 states that murder is "the unlawful killing of a human being, or a fetus, with malice aforethought."[5] Section 188 elaborates on malice.[6] Malice is "express" when the defendant has "manifested a deliberate intention" to take the life of the victim. Malice can also be "implicit" "when no considerable provocation appears, or when the circumstances . . . show an abandoned and malignant heart."[7] Lastly, section 189 divides murder into two degrees. All murder that is premeditated, or committed by certain enumerated means, is murder of the first degree, carrying with it the possibility of a capital charge.[8] Section 189 also lists several felonies that may support a first-degree felony-murder charge if a death occurs during their commission.[9] All other murders that are not included in the definition of first-degree murder are murders of the second degree.[10]

A further discussion of the intent requirement in section 188 is useful before turning to felony murder in order to understand more fully felony murder's departure from traditional intent requirements. Express malice—i.e., "manifest and deliberate intention"—is plain in its meaning; the offender must intend to cause the death of the victim.[11] Deliberate and premeditated killing, which is first-degree murder, is most simply described as express malice plus deliberate planning.[12] Implied malice—defined as the possession of an

4. *See Chun*, 45 Cal. 4th at 1184-85 (noting that much of the language of the murder statute, such as the phrase "abandoned and malignant heart," is a vestige of the original 1850 codification of the criminal laws).

5. CAL. PENAL CODE § 187 (West 2009).

6. CAL. PENAL CODE § 188 (West 2009).

7. *Id.*

8. CAL. PENAL CODE § 189 (West 2009) (The means of killing which constitute first degree murder are those "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, [or] torture.").

9. *Id.*

10. *Id.*

11. § 188.

12. *See* CALIFORNIA JURY INSTRUCTIONS-CRIMINAL No. 8.20 (2009) [hereinafter CALJIC].

abandoned and malignant heart—has been long construed by the Court principally to embrace "conscious-disregard-for-life malice."[13] Such malice is demonstrated when an individual intentionally engages in an act dangerous to human life knowing the danger involved in the act.[14]

To these traditional definitions has been added another concept of murder—felony murder. Felony murder holds an individual responsible for deaths that occur during the commission of a felony regardless of malice aforethought. In other words, the doctrine applies strict liability to any death resulting from the commission of certain felonies, converting all such deaths to murder. Importantly, the use of the doctrine frees a prosecutor from proving the express or implied malice otherwise necessary to support a murder conviction. All that must be demonstrated is that the offender is guilty of the underlying felony and that a death occurred as a result of the commission of that felony.[15]

The felony-murder doctrine is commonly believed[16] to be derived from British common law[17] and was employed in California before and after the codification of the Penal Code.[18] In its modern form, the California Supreme Court has justified the doctrine, stating, "[W]hen society has declared certain inherently dangerous conduct to be felonious, a defendant should not be allowed to excuse himself by saying he was unaware of the danger to life because, by declaring the conduct to be felonious, society has warned him of the risk involved."[19] Applying strict liability to any death occurring during the commission of certain felonies deters individuals from engaging in risky conduct.[20]

Some members of the California Supreme Court, reflecting a larger academic debate about the efficacy of felony murder, have repeatedly criticized the second-degree felony-murder doctrine. At the mildest, the doctrine has been described as "disfavored," necessitating judicial limitations to its use. [21] Members of the Court hostile to the rule have described felony murder as "the last vestige of an archaic and indiscriminate philosophy still present in our

13. *Chun*, 45 Cal. 4th at 1184.

14. CALJIC No. 8.31 (2009).

15. Prosecutors must still prove some degree of intent, but only whatever intent is necessary to convict the defendant of the underlying felony.

16. The common perception amongst legal scholars that felony-murder was an aspect of British common law at the time of independence has been sharply criticized. *See* Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59 (2004) (describing the lack of case law or other legal sources from 18th Century Britain that point to the existence of a felony-murder rule).

17. Despite the uncertainty surrounding felony murder's origin, it was nevertheless adopted in Great Britain by the middle of the 19th Century. It has since been abandoned. *See id.* at 100-07; People v. Burroughs, 35 Cal. 3d 824, 843-45 (1984) (Bird, C.J., concurring).

18. *Chun*, 45 Cal. 4th at 1182-84.

19. *Id*. at 1182 (quoting People v. Patterson, 49 Cal.3d at 615, 626 (1989)).

20. *See* People v. Sears, 2 Cal. 3d 180, 187 (1970).

21. People v. Smith, 35 Cal. 3d 798, 803 (1984).

modern system of criminal law."[22] The Court, when applying limitations to the doctrine, has "recognized that the rule is much censured because it anachronistically resurrects from a bygone age a 'barbaric' concept that has been discarded in the place of its origin" [23] and has upheld limitations "because 'in almost all cases in which it is applied it is unnecessary' and 'it erodes the relation between criminal liability and moral culpability.'"[24] Indeed, periodically over the past forty years, several members of the Court have called for judicial abolition of second-degree felony murder outright.[25]

In California, felony-murder can be either of the first degree or the second degree. First-degree felony murder, which may carry a capital sentence, attaches to deaths resulting from the commission of one of nine enumerated felonies in section 189.[26] Because the California legislature evinced a particular concern with these felonies' dangerousness by enumerating them in the Penal Code, the Court announced in *People v. Farley*, decided after *Chun*, that no judicially created felony-murder limitations, particularly merger, apply to first-degree felony-murder charges.[27] Second-degree felony murder attaches to any death resulting from a commission of a non-enumerated felony "inherently dangerous to human life."[28]

In contrast to first-degree felony murder, which is specifically codified in section 189, dicta by the Court prior to the *Chun* decision described second-degree felony murder in California as a crime of judicial implication. According to the pre-*Chun* decisions, felony murder was an "artificial concept" which, since the codification of the Penal Code, was "a judge-made doctrine without any express basis [in statute]."[29] As a judge-made doctrine, the Court twice limited second-degree felony murder by, first, allowing felony-murder's strict liability to attach only to "inherently dangerous" felonies, and second by applying the "merger" doctrine.

However, the Court in *Chun*, facing a direct challenge to the constitutionality of felony-murder as a "judicially created doctrine with no statutory basis" on separation of powers grounds, held second-degree felony

22. *Burroughs*, 35 Cal. 3d at 851 (Bird, C.J., concurring).

23. *Smith*, 35 Cal. 3d at 803 (quoting People v. Phillips, 64 Cal. 2d 574, 583 n.6 (1966).

24. *Id.* (citing People v. Washington, 62 Cal. 2d 777, 783 (1965); People v. Dillon, 34 Cal. 3d 441, 463 (1983)).

25. *See Chun*, 45 Cal. 4th at 1213-16 (Moreno, J., concurring and dissenting); People v. Robertson, 34 Cal. 4th 156, 191 (2004) (Brown, J., dissenting) ("Because the second degree felony-murder rule is suspect I believe it would not be missed if we abandoned it."); *Patterson*, 49 Cal. 3d at 641-642 (Panelli, J., concurring and dissenting); *Burroughs*, 35 Cal. 3d at 852-854 (Bird, C.J., concurring).

26. These felonies include arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, and intentionally discharging a firearm from a motor vehicle at another person outside the vehicle with the intent to cause death. CAL. PENAL CODE § 189 (West 2009).

27. People v. Farley, 46 Cal. 4th 1053, 1120 (2009).

28. People v. Ford, 60 Cal. 2d 772, 795 (1964).

29. *Burroughs*, 35 Cal. 3d at 837 (Bird, C.J., concurring) (citations omitted).

murder for the first time to be a creature of statute.[30] Agreeing that there are "no nonstatutory crimes" in California, the Court held second-degree felony murder to be an interpretation of section 188's "abandoned and malignant heart" language.[31] Rather than address the soundness of the Court's reasoning in this regard, this Note assesses the implications of this part of the *Chun* decision for judicial limitation on second-degree felony murder. As background, the next section examines the evolution of the second-degree felony-murder limitations in California prior to the *Chun* decision.

II. THE CALIFORNIA SUPREME COURT'S LIMITATIONS ON SECOND-DEGREE FELONY MURDER

For forty years, the Court has walked a tightrope between maintaining a viable second-degree felony-murder doctrine and limiting the harshness of the doctrine's strict liability. The Court adopted two mechanisms to control the scope of second-degree felony murder: the "inherently dangerous felony" rule and the "merger" rule. Over these forty years, however, both rules have proved unstable. The rules, enacted to impose greater judicial control over second-degree felony murder's use, have suffered from continuous technical and conceptual reformulation by the Court. The Court's struggle with defining inherent dangerousness is described below before this Note turns to *Chun*'s effect on merger.

A. The "Inherently Dangerous Felony" Limitation

The first significant limit the California Supreme Court imposed on the felony-murder doctrine was to limit second-degree felony murder only to those felonies that are "inherently dangerous to human life."[32] At its most basic, the doctrine looks to the crime as defined by statute and asks whether the commission of that crime, in general, involves conduct that endangers life. However, precisely defining the inherently dangerous felony limitation on felony murder has plagued the Court. Despite the analytical difficulties involved, a closer examination of this doctrine is helpful in two ways: First, "inherent dangerousness" defines the metes and bounds of crimes against which to test *Chun*'s new merger analysis; Second, the type of textual reading employed by the Court in its inherent dangerousness jurisprudence informs the

30. *Chun*, 45 Cal. 4th at 1183.

31. *Id.*

32. People v. Ford, 60 Cal. 2d 772, 795 (1964). There is some suggestion that British common law required that a felony involve "substantial human risk" before it could be support a second-degree felony murder charge. *See* James A. Pike, *What Is Second Degree Murder in California?*, 9 S. CAL. L. REV. 112, 118 (1936). However, the California Supreme Court has suggested no such limitation existed before *Ford*. *See Chun*, 45 Cal. 4th 1188 ("[A]lthough the second degree felony-murder rule *originally applied to all felonies*, this court has *subsequently* restricted its scope in at least two respects [e.g., inherently dangerous felony and merger] to ameliorate its perceived harshness.") (emphasis added).

analysis which must be undertaken now for merger.

This first limitation on the second-degree felony murder-doctrine's application was adopted by the California Supreme Court in *People v. Ford* in 1964. In *Ford*, the Court stated the strict liability of felony murder applied in all cases where the homicide "is a direct causal result of the commission of a felony *inherently dangerous to human life.*"[33] The Court in *Ford* adopted the rule in rejecting the defendant's claim that the trial court erred in failing to instruct the jury on a lesser manslaughter charge stemming from his shooting of a police officer in the course of a kidnapping.[34] According to the Court, the death of the officer in the commission of a felony inherently dangerous to human life (kidnapping) was a homicide for which strict liability applied.[35] While *Ford* dealt with *extending* the reach of felony murder, subsequent Court decisions reframed the inherently dangerous felony requirement as a substantive *limitation* on felony murder. *Ford* was quickly followed by *People v. Williams* in which the Court elaborated that a felony's inherent dangerousness was to be analyzed "in the abstract" by looking at the elements of the felony itself and not at the facts of the case.[36] The question of precisely what goes into this abstract analysis, however, has plagued the Court since.

Early application of the inherently dangerous felony limitation was largely without Supreme Court guidance. *Ford*, in formally adopting the rule, stated without elaboration that both kidnapping and possession of a concealable weapon by an ex-felon were inherently dangerous.[37] The majority also favorably cited three earlier cases identifying felonies inherently dangerous to human life. Those three decisions held that administering narcotics to a minor, abortion, and drunk driving were each inherently dangerous to human life.[38] In contrast, in *Williams*, the Court held conspiracy to possess methedrine (a narcotic) without a prescription was "surely not" inherently dangerous.[39] That same year in *People v. Phillips*, the Court held grand theft was insufficient to support a felony-murder conviction.[40] Throughout these early cases, though, the Court consistently failed to give insight into its mode of analysis.

33. *Ford*, 60 Cal. 2d at 795 (citations omitted) (emphasis added).

34. *Id.*

35. *Id.*

36. People v. Williams, 63 Cal. 2d 452, 458 n.5 (1965).

37. *Ford*, 60 Cal. 2d. at 795.

38. *Id.* (citing People v. Poindexter, 51 Cal. 2d 142 (1958); People v. Powell, 34 Cal. 2d 196 (1949); People v. McIntyre, 213 Cal. 50 (1931)).

39. *Williams*, 63 Cal. 2d at 458.

40. People v. Phillips, 64 Cal. 2d at 577-78, 583 (The defendant, a chiropractor, claimed he could cure an eight-year-old girl of a fast-growing eye cancer without surgery. After several treatments, her cancer nevertheless progressed and she died. The defendant was charged with felony murder, with grand-theft serving as the underlying felony. The State conceded the crime of grand theft in-and-of itself was not inherently dangerous. However, the State urged the Court to incorporate the particular defendant's fraudulent conduct—characterized as "grand theft medical fraud"—in its determination of the dangerousness of the defendant's crime. The Court rejected this extension of the rule.).

Starting in the 1970s the California Supreme Court became more explicit in defining inherently dangerous felonies, turning to an analysis of the dangerousness of the crime on the face of the statute. In *People v. Satchell*, the Court reexamined the inherent dangerousness of possession of a concealable firearm by a felon.[41] Directing its attention to the "genus of crimes known as felonies" to determine if firearm possession by one convicted of "any crime within that genus" is inherently dangerous, the Court asked if the nature of possession of a firearm by felons "justifies the extreme consequence" of imputed malice demanded by the felony-murder doctrine.[42] Surveying the breadth of crimes categorized as felonies in the Penal Code, the answer for the Court was that it did not. Possession of a concealed firearm by the class of felons not convicted of "crimes against the person" did not "present[] a danger to human life so significantly more extreme than that presented by a non-felon similarly armed as to justify the imputation of malice to him."[43] Thus, because of the "vast number of situations" in which the Court could imagine it "grossly illogical to impute malice," possession of a concealed weapon by a felon could not be inherently dangerous to human life.[44]

People v. Lopez applied this more sophisticated analysis to the crime of escape.[45] Like the felony at issue in *Satchell*, the Penal Code section on escape "comprehend[ed] a multitude of sins," applying to violent and nonviolent escapes alike, drawing no "relevant distinction" between the two.[46] Particularly important, the burglary and assault committed during the course of the escape were not "so common as to be considered intrinsic" to the felony.[47] Contrasted with other felonies identified as inherently dangerous, such as setting fire to a motor vehicle (which tends to contain gasoline and thus poses a danger to bystanders), any danger from escape "arises only from the conduct of the escapee" and is not essential to the crime itself.[48]

Thus, the statutory elements of the offense and the myriad ways an offense can be committed are highly relevant to the inherently dangerous felony analysis. To that end, when the legislature has indicated multiple ways an offense can be committed, only a portion of which might involve a threat of injury (e.g., false imprisonment by violence, menace, fraud, or deceit), the Court has held that the felony should not support strict criminal liability.[49]

41. People v. Satchell, 6 Cal. 3d 28 (1971).
42. *Id.* at 40.
43. *Id.*
44. *Id.* at 40-41.
45. People v. Lopez, 6 Cal. 3d 45, 47-48 (1971) (Lopez and an accomplice had escaped from a county jail. Lopez's accomplice then burgled a house, assaulting the inhabitants and killing one of them. While Lopez himself was acquitted of the burglary and assault charges, he was found guilty of felony murder on an accomplice theory with the escape as the underlying felony.).
46. *Id.* at 51-52.
47. *Id.* at 52.
48. *Id.* (distinguishing People v. Nichols, 3 Cal. 3d 150 (1970)).
49. *See, e.g.*, People v. Henderson, 19 Cal. 3d 86, 93-95 (1977) (holding that false

However, this rule is not consistent. Felony child abuse has served as an underlying felony supporting a felony-murder charge despite the statute embracing both violent and nonviolent means of committing the crime.[50]

Additionally, when a statute has no "primary element," a court need not look at the statute as a "unitary entity," but may look to the "true legislative intent" to determine whether there is a basis for severing the forbidden conduct in the statute.[51] For example, Health and Safety Code section 11352 includes a myriad of drug offenses including both transportation and administration of illegal drugs.[52] Thus, in the context of a felony murder conviction based upon furnishing cocaine, a prohibited act encompassed in section 11352, the Court instructed the lower court on remand to analyze the *specific* criminal conduct encompassed by the general statute (e.g., furnishing cocaine) for inherent dangerousness.[53]

To add to this confused state of affairs, the California Supreme Court has waffled on the degree of dangerousness necessary to support inherent dangerousness. In *People v. Burroughs*, the Court adopted "substantial risk" of danger to human life as the standard.[54] However, without explicitly overruling *Burroughs*, the Court ruled in *People v. Patterson* that an act is inherently dangerous to human life when there is "a high probability that its commission will result in death."[55] Most recently, in *People v. Robertson*, the Court has adopted both standards at once, stating an offense is inherently dangerous if it creates "a substantial risk that someone will be killed, or carries a high probability that death will result."[56] Further, the Court favorably cited several decisions holding that high probability can be a less than fifty percent chance that a felony will result in death.[57] No subsequent case has alleviated the confusion in the Court's decisions.

imprisonment "does not necessarily involve the requisite danger to human life"); People v. Burroughs, 35 Cal. 3d 824, 832-33 (1984) (holding that the practice of medicine without a license is not inherently dangerous since the statute criminalizes both injurious and non-injurious violations).

50. People v. Northrop, 132 Cal. App. 3d 1027 (1982); People v. Shockley, 79 Cal. App. 3d 669 (1978). *See Chun*, 45 Cal. 4th at 1200 (listing felony child abuse as a statute that will now merge per se without discussing whether it meets the requirements of inherent dangerousness). *But see* People v. Lee, 234 Cal. App. 3d 1214, 1229 (1991) (holding that a violation of section 273a, called "felony child endangerment" by the court, not inherently dangerous to human life).

51. *Patterson*, 49 Cal. 3d at 624 (quoting *Henderson*, 19 Cal. 3d at 95).

52. CAL HEALTH & SAFETY CODE § 11352 (West 2009).

53. *Patterson*, 49 Cal. 3d at 625.

54. *Burroughs*, 35 Cal. 3d at 833.

55. *Patterson*, 49 Cal. 3d at 618; *see also id.* at 628 (Lucas, C.J. dissenting) ("With that one broad, gratuitous stroke, the majority [by adopting the "high probability" standard] has precluded application of the second degree felony-murder doctrine to most, if not all, drug furnishing offenses.").

56. People v. Robertson, 34 Cal.4th 156, 166-67 (2004) (citations omitted).

57. *Id.* (citing People v. Hansen, 9 Cal. 4th 300, 309, 322 (1994) (Kennard, J., concurring and dissenting); People v. Clem, 78 Cal. App. 4th 346, 349 (2000)).

B. The Merger Doctrine

The Court's struggle in defining inherently dangerous felonies has been eclipsed by its greater struggle in limiting the use of felony murder through the merger doctrine. Introduced in 1969 in *People v. Ireland*, the merger doctrine addressed a practical quandary of felony murder: As the majority of homicides are a result of an assault, can the crime of assault serve as the underlying felony for application of felony murder, vitiating the need to prove the defendant's state of mind?[58] For the California Supreme Court the merger doctrine was an opportunity to further cabin felony murder's strict liability.

In *Ireland*, the defendant had been convicted of second-degree murder in the death of his wife.[59] After a long period of marital discord, during which the defendant's wife had several extramarital affairs, the defendant shot and killed her in their home.[60] However, the defendant claimed to have no memory of the incident.[61] The underlying felony supporting the defendant's felony-murder conviction was the assault with a deadly weapon (the gun) that immediately preceded the shooting of his wife.[62] Thus, as the Court pointed out, the use of the felony-murder doctrine allowed the prosecution to substitute proving the "malice aforethought" of second-degree murder with the less onerous task of demonstrating the intent required to prove assault with a deadly weapon.[63] In other words, by using assault with a deadly weapon to support a felony-murder charge, the prosecution did not need to prove that the defendant either intended to kill his wife or knew that his actions could certainly lead to her death.[64]

For a penal system gradated according to relative moral culpability, the kind of "bootstrapping" presented by the felony-murder charge in *Ireland* extended the felony-murder rule "beyond any rational function that it [was] designed to serve."[65] Using conduct that was "an integral part of the homicide" and "included in fact within the offense charged"[66] to support a felony-murder charge would free the jury from considering malice in a "great majority of all homicides."[67] Therefore, the Court ruled that any felony which was "included in fact" with an accidental death would thereafter merge with the homicide, and could not serve as a basis for a felony-murder charge.[68]

58. People v. Ireland, 70 Cal. 2d 522 (1969).
59. *Id.* at 525.
60. *Id.* at 525-27.
61. *Id.* at 527.
62. *Id.* at 538.
63. *Id.*
64. *Id.*
65. *Id.* at 539 (quoting People v. Washington, 62 Cal. 2d 777, 783 (1965)).
66. The Court explained an offense is "necessarily included" in an offense charged "when the lesser offense either [is] embraced within the statutory definition of the greater or [is] embraced within the specific allegations of accusatory pleading." *Id.* at 540, n.14 (citing People v. Marshall, 48 Cal. 2d 394 (1957)) (emphasis removed).
67. *Id.* at 539.
68. *Id.* (emphasis removed).

This original formulation of the merger doctrine, however, was applied only a handful of times after *Ireland*. In *People v. Wilson* the Court held that a first-degree felony-murder conviction[69] based upon burglary was improper where the underlying felonious intent of the burglary[70] was to commit the assault leading to the homicide.[71] For the Court, where "the entry would be nonfelonious but for the intent to commit the assault," and the assault itself was integral and included-in-fact with the charged offense, the burglary merged.[72]

This reasoning was extended in 1970 in *People v. Sears*.[73] There the defendant, similar to the defendant in *Wilson*, had burgled a dwelling with the intent to assault his wife, and in the course of that burglary killed his wife's daughter.[74] The Court, looking to the deterrence rationale for the felony-murder rule, reasoned that when the underlying intent of a defendant is to assault another with a dangerous weapon, the likelihood of homicide does not increase because of the site of the assault.[75] Thus, attaching strict liability to a burglary motivated by the intent to commit assault would lack any deterrent effect.[76] Further, the Court was unwilling to place a burglar who "kills another inadvertently or in the heat of battle in a worse position than the person who from the outset intended to attack both persons and killed one."[77] The Court determined that merger would be applied without relation to which victim died, and instead, using the principles of transferred intent, should be applied with regard to the "greatest crime committed viewing each victim of the attack individually."[78]

1. The Rise of Collateral Intent

The included-in-fact era of merger doctrine proved short-lived. Indeed, already in *Sears* the California Attorney General argued that the Court should not look at the elements of the crime, but at the mens rea of the defendant.[79] This alternative formulation, collateral intent, adopted at the time in New York, did not turn on the elements of the crime, but rather looked to the intent of the

69. The application of the merger doctrine to first-degree felony murder was expressly overruled in *Farley*. People v. Farley, 46 Cal. 4th 1053, 1120 (2009).

70. Burglary is defined as entering a structure with the intent to commit a felony therein. CAL. PENAL CODE § 459 (West 2009).

71. People v. Wilson, 1 Cal. 3d 431, 440 (1969).

72. *Id.*

73. People v. Sears, 2 Cal. 3d 180 (1970).

74. *Id.* at 182-84.

75. *Id.* at 187.

76. *Id.* at 189.

77. *Id.*

78. *Id.*

79. The Attorney General argued that while the assaultive intent of the burglary would merge into the homicide of the defendant's wife, the death of the stepdaughter was collateral to the killing of the wife. *Id.* at 188 (citing People v. Moran, 158 N.E. 35 (N.Y. 1927); People v. Wagner, 156 N.E. 644 (N.Y. 1927)).

offender.[80] Whether a felony-murder conviction was proper turned on a factual determination of whether the perpetrator's "thought or purpose" was commission of a crime distinct from the homicide itself.[81] The Court, however, declined to adopt the collateral intent standard in *Sears*, stating such an interpretation of merger was "untenable in the light of ordinary principles of culpability."[82]

Applying *Ireland*'s included-in-fact test outside of the assault context, however, proved conceptually difficult for the courts. In *People v. Taylor*, decided the same year as *Sears*, the California Court of Appeal for the Second District was asked if furnishing heroin could serve as an underlying felony for a felony-murder conviction.[83] The defendant argued the offense of furnishing heroin in this case was an integral part of, and included in fact with, the resulting death, and thus merged under the *Ireland* rule.[84] Unwilling to posit that the California Supreme Court "intended to abolish second degree felony murder," the court assumed that there "are situations where a felony inherently dangerous to human life can be the direct cause of a homicide without . . . being an integral part thereof and included in fact therein."[85] In supporting its conclusion that furnishing heroin was such an offense, the court noted approvingly that under New York law the defendant's intent in providing the drug would likely be viewed as collateral to the resulting death.[86] The collateral intent itself, therefore, demonstrated the offense was not an integral part of the homicide under *Ireland*.[87]

In 1971, a year after its rejection of collateral intent in *Sears*, the California Supreme Court stepped towards an embrace of the approach in *People v. Burton*.[88] *Burton* involved a first-degree felony-murder conviction with robbery as the underlying felony.[89] The defendant argued that the underlying felony for a felony-murder charge of armed robbery, which is the taking of property "accomplished by means of force or fear," was necessarily included in the resulting homicide because of its assaultive element.[90] Armed robbery, the defendant argued, thus included assault with a deadly weapon as a

80. This formulation of the merger doctrine has different names throughout the cases, most often "collateral and independent felonious design." I have adopted the term "collateral intent," however, as a descriptive shorthand for this article.

81. *Moran*, 158 N.E. at 36.

82. *Sears*, 2 Cal. 3d at 189.

83. People v. Taylor, 11 Cal. App. 3d 57 (2d Dist. 1970).

84. *Id.* at 59-60.

85. *Id.* at 64.

86. *Id.* at 60-62 (analyzing People v. Huter, 77 N.E. 6 (N.Y. 1906); People v. Wagner, 156 N.E. 644 (N.Y. 1927); *Moran*, 158 N.E. 35).

87. *Id.* at 63.

88. People v. Burton, 6 Cal. 3d 375 (1971).

89. *Id.* at 378.

90. *Id.* at 386 (citing CAL. PENAL CODE § 211).

necessary element.[91]

In its answer to this theory, the Court took umbrage with an interpretation that would "eliminate the application of the felony-murder rule to all unlawful killings which were committed by means of a deadly weapon." The Court did not overrule *Ireland*, yet, in upholding the felony-murder charge, found determinative that there was "an *independent felonious purpose* [to robbery], namely . . . to acquire money or property belonging to another."[92] However, this did not represent a full embrace of collateral intent as a test for second-degree felony murder. It was critical to the Court's holding that robbery is included in the enumerated felonies of section 189's definition of first-degree felony murder.[93] For the Court, what set the enumerated felonies (e.g., robbery, rape) apart from the non-enumerated inherently dangerous felonies was the collateral intent involved in each enumerated felony.[94] The Court's earlier decision in *Wilson* applying merger to burglary (an enumerated felony) was distinguished as a holding limited to "one small area of conduct" where the intent of the burglary was the commission of an assault.[95]

The Court fully embraced the Court of Appeal's *Taylor* decision the following year in *People v. Mattison*.[96] *Mattison* involved the death of a prison inmate who was sold what turned out to be methyl alcohol (which is poisonous to the human body) by the defendant, who was working in the prison's medical laboratory.[97] The defendant, following *Ireland*, argued the underlying felony on which the prosecution had based the felony-murder charge—administering poison with the intent to injure (section 347)[98]—was included in fact in the inmate's death.[99] As the intent element of the offense was assaultive in nature, Mattison argued that *Ireland* directly applied.

Explicitly adopting the *Taylor* rule, the Court disagreed.[100] According to the Court, the legislative intent in adopting section 347, was to evince "[the legislature's] concern for the dangers involved in such conduct." According to the Court, the application of the second-degree felony-murder rule in such instances "serves further to deter such dangerous conduct."[101] As the sale of methyl alcohol was not done with the intent to cause the injury leading to

91. *Id.*
92. *Id.* at 387.
93. *Id.* at 386-87.
94. *Id.* at 388.
95. *Id.*
96. People v. Mattison, 4 Cal. 3d 177 (1971).
97. *Id.* at 180-81.
98. "Every person who willfully mingles any poison with any food, drink or medicine, with intent that the same shall be taken by any human being to his injury, is guilty of a felony." *Id.* at 184 (quoting CAL. PENAL CODE § 347 (West 1970)).
99. *Id.* at 185.
100. *Id.* at 185-86.
101. *Id.* at 186.

death,[102] the defendant's *independent design* to furnish alcohol for financial gain did not merge and properly supported the felony-murder charge.[103]

The Court's next major merger decision further moved away from the per se rule originally adopted in *Ireland* and towards a fact-specific inquiry. In *People v. Smith*, the Court held felony child abuse[104] did not necessarily merge even if assaultive in nature.[105] The *intent* of the abuse was the determinative factor in deciding if the behavior merged. When the defendant "*willfully* inflicts unjustifiable physical pain on a child," the felony-murder rule failed because it was "difficult to see" how application of the doctrine would "deter negligent or accidental killings that may occur in the course of committing [the] felony."[106] However, if the defendant had a collateral intent motivating the abuse, then the underlying deterrent principles of felony-murder succeeded. So, when the underlying conduct, as in *Smith*, was the severe beating of a child leading to that child's death, the felony merged, as the Court could "conceive of no independent purpose" to child abuse of the assaultive variety.[107] However, if the abusive conduct was, for example, malnutrition and dehydration resulting in death, the felony did not merge because the abusive conduct was "not related to the assault causing the murder."[108] The underlying *purpose* of the defendant's conduct, rather than a determination that the physical conduct was included-in-fact in the resulting death, thus became the definitive test in merger doctrine.

2. A Confused State of Affairs

While the merger doctrine appeared to be settled largely in the jurisprudence, it was not necessarily so in the minds of the justices. In 1994, the Court made a confusing, but temporary, retreat from collateral intent in *People v. Hansen*.[109] The defendant in *Hansen* fired a gun into the house of a man who had stolen forty dollars from the defendant after promising the

102. If the alcohol was supplied with the intent to cause the injury leading to death, the murder would be elevated to first degree under section 189. CAL. PENAL CODE § 189 (West 1971) ("All murder which is perpetrated by means of a destructive device or explosive, *poison*, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing . . . is murder in the first degree.") (emphasis added).

103. *Mattison*, 4 Cal. 3d at 185-86.

104. The Court observed that the felony child abuse statute could be violated in a wide variety of ways. It noted that "[t]wo threshold considerations, however, govern all types of conduct prohibited by [the felony child abuse statute]: first, the conduct must be willful; second, it must be committed 'under circumstances or conditions likely to produce great bodily harm or death.'" People v. Smith, 35 Cal. 3d 798, 806 (1984) (citing CAL. PENAL CODE § 273a(1))).

105. *Id.* at 806-07.

106. *Id.* at 807.

107. *Id.* at 806.

108. *Id.* at 808 (distinguishing People v. Shockley, 79 Cal. App. 3d 669, 676 (1978)) (internal quotations omitted) (emphasis removed).

109. People v. Hansen, 9 Cal. 4th 300 (1994).

defendant he would help him buy drugs.[110] According to the defendant, after the man had failed to return with the drugs, he went to the man's apartment, knocked on the doors and windows and heard no answer.[111] The defendant left, obtained a gun, returned in his car and, believing no one was home, fired from his car at the apartment, inadvertently killing a child who was inside.[112]

Under the collateral intent theory, the *Hansen* defendant's offense would not merge because his purpose in firing was to "leave [his] calling card" and not to injure anyone in the apartment.[113] However, the majority, led by Justice George, went even further in holding that the underlying offense of firing at an inhabited dwelling[114] would *never* merge no matter the underlying intent of the defendant.[115] For the majority, applying felony murder to a homicide resulting from a violation of the statute "would serve the fundamental rationale of the felony-murder rule," as "[t]he 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 . . . ."[116] Even though the Penal Code's definition of "inhabited" did not require the occupants of a home to be inside at the time of the shooting, adopting a per se rule for all discharges of firearms into inhabited dwellings would "provid[e] notice to persons inclined [to commit the crime] . . . that such persons will be guilty of murder should their conduct result in the all-too-likely fatal injury of another . . . ."[117]

The test for merger used by the *Hansen* Court was neither the *Ireland* "integral part" language, nor the collateral intent test of *Taylor*, but rather a functionalist examination of whether application of felony-murder in relation to a particular underlying felony furthered the purpose of the felony-murder rule.[118] The purpose of the merger limitation in *Ireland* was to simply limit the use of felony murder "in circumstances where the only underlying (or 'predicate') felony committed by the defendant was assault."[119] Since most homicides did not result from violations of section 246, "application of the felony-murder doctrine in [the *Hansen* context would not improperly] . . . 'preclud[e] the jury from considering the issue of malice aforethought.'"[120] This use of felony murder, thus, did not "frustrate the Legislature's deliberate calibration of punishment for assaultive conduct resulting in death, based upon

110. *Id.* at 305-06.
111. *Id.* at 305.
112. *Id.* at 306.
113. *Id.* at 311.
114. CAL. PENAL CODE § 246 (West 2009) ("Any person who shall maliciously and willfully discharge a firearm at an inhabited dwelling house, occupied building, occupied motor vehicle, occupied aircraft, inhabited housecar, . . . or inhabited camper . . . is guilty of a felony . . . .").
115. People v. Hansen, 9 Cal. 4th 300, 316 (1994).
116. *Id.* at 310-11.
117. *Id.* at 311.
118. *Id.* at 314-15.
119. *Id.* at 311 (emphasis removed).
120. *Id.* at 315 (quoting People v. Ireland, 70 Cal. 2d 522, 539 (1969)).

the presence or absence of malice aforethought."[121]

The *Hansen* analysis was abandoned, although not overruled, ten years later when the Court returned to the collateral intent test in *People v. Robertson*.[122] The defendant in *Robertson* claimed he had "fired [a gun] upwards into the air" in order to scare off vandals who were removing hubcaps from his car and, in the process, shot one in the back as he fled.[123] The majority opinion written by *Hansen*'s author, (now Chief) Justice George, returned to the collateral intent test and held that the defendant's stated intent to scare away the vandals was the determinative fact in supporting a felony-murder charge.[124] The majority, without elaborating, distinguished the *Hansen* decision as involving a situation in which application of the collateral-intent analysis "may have its drawbacks," but stated, nevertheless, that collateral intent "provides the most appropriate framework to determine whether, under the facts of the present case, the trial court properly instructed the jury."[125]

The decision garnered a lengthy dissent by Justice Kennard who, while praising the return to collateral intent, highlighted the inherent injustice of the state of merger doctrine.[126] For Justice Kennard, the "defendant would have been better off had he testified to firing at the victim *intending to hit him*," since the felony murder rule's strict liability foreclosed all common-law defenses.[127] For example, Justice Kennard argued, if an abused woman shot an angry boyfriend intending to hurt him, she could claim imperfect self-defense and have her crime reduced to voluntary manslaughter.[128] If, however, the woman stated that her intention was to merely scare her abuser, and the death was unintentional, she would be guilty of second-degree felony murder since her underlying intent would be collateral to the death, barring merger of the underlying felony.[129]

Justice Kennard would have held that the shooting in *Robertson*, while done with the intent to scare, was not committed with a collateral intent. She argued that the intent to scare a person by shooting at the person "is not independent of the homicide because it is, in essence, nothing more than the intent required for an assault, which is not considered an independent felonious purpose."[130] In other words, the lesser intent of scaring a victim (an assault) is necessarily included in the greater harm that occurs as a result of that intent.[131]

121. *Id.*
122. People v. Robertson, 34 Cal. 4th 156, 171 (2004).
123. *Id.* at 162.
124. *Id.* at 171.
125. *Id.*
126. *Id.* at 177-84 (Kennard, J., dissenting).
127. *Id.* at 180 (Kennard, J., dissenting).
128. *Id.* at 181 (Kennard, J., dissenting).
129. *Id.* (Kennard, J., dissenting).
130. *Id.* at 183 (Kennard, J., dissenting) (citing *Williams*, 26 Cal. 4th 779) (emphasis removed).
131. *Id.* (Kennard, J., dissenting).

Justice Werdegar was equally troubled with the state of the Court's merger doctrine. While she agreed with a return to the collateral intent test, she had come to realize that "sometimes consistency must yield to a better understanding of the developing law."[132] Citing Justice Kennard's hypotheticals, Justice Werdegar concluded that "it simply cannot be the law" that a defendant who intended to injure his victim was allowed a defense barred to one who had no intent.[133] Accordingly, the collateral-intent test could only logically apply to inherently dangerous nonassaultive conduct resulting in death.[134] All assaultive conduct, no matter what the intent, should merge.[135]

The case of *People v. Randle*, decided the year after *Robertson*, presented further doctrinal difficulties.[136] There, the defendant fired his gun to scare the homicide victim, who was beating the defendant's cousin.[137] When the victim started to run away, Randle admitted to shooting at him.[138] The trial court, based upon Randle's "purpose" of rescuing his cousin when he shot at the victim as he ran away, allowed the pursuit of a felony-murder charge by the State.[139] The Supreme Court ruled that the trial court erred in issuing felony-murder instructions because the offense of discharging a firearm in a grossly negligent matter merged with the homicide.[140] Distinguishing *Robertson*, the Court held that since the defendant admitted he shot *at* the victim as he ran away there was no collateral purpose, unlike the situation in Robinson, where the defendant's collateral purpose in firing into the air was to scare the individuals burglarizing his car.[141] Put another way, "[d]efendant's claim that he shot Robinson in order to rescue [his cousin] simply provided a *motive* for the shooting; it was not a purpose independent of the shooting."[142] Thus, a felony-murder charge was improper.

The issue facing the Court following *Robertson*'s return to the old merger rule was, thus, twofold. First, *Hansen/Robertson* produced an untenable split in the case-law: when the defendant had negligently discharged a firearm, the collateral-intent test applied, but when the defendant had negligently discharged a firearm *at an inhabited dwelling*, the offense, per se, did not merge. Second, and more troubling, was that forty years of merger doctrine

132. *Id.* at 185 (Werdegar, J., dissenting).
133. *Id.* (Werdegar, J., dissenting).
134. *Id.* (Werdegar, J., dissenting).
135. *Id.* (Werdegar, J., dissenting).
136. People v. Randle, 35 Cal. 4th 987 (2005).
137. *Id.* at 91.
138. *Id.* at 92.
139. *Id.* at 93.
140. *Id*.
141. *Id.* at 1005; *Robertson*, 34 Cal. 4th at 171.
142. *Randle*, 35 Cal. 4th at 1005. The court additionally held the defendant could pursue the common-law defense of imperfect self-defense of others on remand. *Id.* at 990. As noted, *supra*, if the felony-murder charge was maintained, the defendant would be barred from presenting this defense.

had created a situation in which defendants were often in a worse position if they never intended to cause death than if they had and could offer a plausible mitigation defense.[143] Responding to these concerns, the Court's decision in *Chun* appears to have returned merger doctrine largely to the standard originally adopted in *Ireland* but, in fact, has broadened the merger limitation, perhaps to the point of effectively eliminating second-degree felony murder altogether.

III. THE *CHUN* SOLUTION TO THE MERGER DILEMMA

Chun, like *Robertson* and *Hansen*, involved the negligent discharge of a firearm, this time at an occupied vehicle.[144] The defendant, a member of a street gang, had been a passenger in a car that opened fire at the car of a rival gang, killing a passenger of the second car.[145] The defendant admitted to being in the car and firing a weapon.[146] However, he stated that he had not shot at any passenger in the second car, but had intended only to scare the occupants.[147] On appeal from his murder conviction, the Court of Appeal held that this statement should have been suppressed at trial and, since the statement was the only evidence of the defendant's collateral intent, it was reversible error to instruct the jury on second-degree felony murder in the statement's absence.[148]

The California Supreme Court's decision first addressed the *Hansen/Robertson* doctrinal split. After reviewing the history of the merger doctrine, the Court could come up with no principled reason to continue the merger doctrine distinction between negligent discharge of a firearm (applying collateral intent) and negligent discharge at an inhabited structure (applying a per se rule).[149] Further, it could find no logical way to place negligent discharge at an inhabited vehicle into either the *Hansen* or *Robertson* category.[150] Accordingly, the Court recognized *Hansen* as an aberration and expressly overruled it.[151]

However, while this holding solved the first issue facing the Court, it did not address the second, more troubling problem with merger. The collateral-intent test created illogical results where the less culpable faced the most liability. Further, collateral intent often turned on difficult questions of fact that may properly be the province of the jury to decide.[152] So, for example, in

143. E.g., provocation, self-defense, imperfect self-defense, necessity, etc.
144. People v. Chun, 45 Cal. 4th 1172, 1179 (2009).
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at 1180.
149. *Id.*
150. *Id.* at 1197.
151. *Id.* at 1198-99.
152. *Id.* at 1199.

Robertson, the defendant claimed he was merely trying to frighten the victim, which the Court found to be a collateral intent precluding application of merger.[153] However, "the jury would not necessarily have [had] to believe the defendant" and could have found the defendant did *not* possess any collateral intent.[154] "Whether a defendant shot *at* someone intending to injure, or merely tried to frighten that someone, may often be a disputed factual question," and thus should properly be within the province of the jury to decide.[155] The Court could find no "obvious answer to [the] argument" that application of the collateral-intent test vested the decision of application of felony murder incorrectly.[156]

Placing the question of the assignment of fact-finding aside, the Court in *Chun* also worried that the fine distinction between "intent" and "motive" characterized by the contrast of *Robertson* and *Randle* was "not clear."[157] The Court noted that in *Robertson*, where the defendant had fired a gun "up in the air," killing a vandal he was confronting, the intent to frighten was deemed a "collateral *purpose*," while in *Randle*, where the defendant had shot at his cousin's assaulters as they fled, the intent involved was simply an extension of the defendant's self-defense of his cousin and, thus, "merely a *motive*."[158] How, then, should a fact-finder determine what was in the mind of the defendant, and second, how must the fact-finder decide how to classify that state of mind? These nagging concerns reinforced the Court's conclusion that the collateral intent theory had proved both evidentially problematic and legally unworkable.

The Court's solution is striking. In a holding that appeared to move the Court back to its original *Ireland* decision,[159] the Court ruled that "[w]hen the underlying felony is *assaultive in nature* . . . , we now conclude that the felony merges with the homicide and cannot be the basis of a felony-murder instruction."[160] Unlike the original *Ireland* test, however, a court no longer looks to the facts of the case to determine if the felony is included in fact in the homicide, but rather to the statutory "elements of the crime."[161] If the crime includes an "assaultive aspect," it merges, "even if the elements also include conduct that is not assaultive."[162] So, violations of section 246 and 246.3, grossly negligent discharge of a firearm, and firing at a vehicle or an inhabited

153. People v. Robertson, 34 Cal. 4th 156, 161-62, 173 (2004).
154. *Chun*, 45 Cal. 4th at 1199 (quoting Robertson, 34 Cal. 4th at 183 (Kennard, J. dissenting)).
155. *Id.*
156. *Id.*
157. *Chun*, 45 Cal. 4th at 1199.
158. *Id.*
159. *See id.* at 1211 (Baxter, J., concurring and dissenting).
160. *Id.* at 1200.
161. *Id.*
162. *Id.*

dwelling, all merge.[163] Likewise, the Court noted that felony child abuse of the nonassaultive variety would now merge, because of the assaultive behavior also proscribed by the statute.[164] Like a finding of inherent dangerousness, a trial court looks to the statutory language and decides, per se, whether the statute merges for the sake of felony murder.[165] For the Court, this new merger doctrine would ensure that felony murder would not be "extended beyond its required application": deterring felons from killing negligently or accidentally and deterring inherently dangerous felonies.[166]

A. A New Unclear Standard

The vastly simplified merger doctrine under *Chun* now turns on a single question: Does the inherently dangerous felony underlying a second-degree[167] felony-murder charge have, anywhere within the pertinent statute, an assaultive element?[168] If the answer is yes, the offense merges with the homicide and precludes a felony-murder charge. If the answer is no, a felony-murder charge can stand.

How, though, is "assaultive" precisely defined? The *Chun* decision fails to explain this crucial element in the new merger analysis.[169] In announcing the analysis, *Chun* cited favorably another recent decision, *People v. Chance*, as supplying the appropriate standard for defining an assaultive element.[170] However, a closer look at *Chance* reveals that the holding of that case does not define assaultive, but instead deals with the actus reus necessary to maintain an assault charge. Further, the *Chun* Court cited three statutes—Penal Code sections 246 (discharge of a firearm at an occupied house/car), 246.3 (grossly negligent discharge of a firearm at a person), and 273a (felony child abuse)—as all containing an assaultive element without providing any insight as to how this conclusion was reached.[171]

B. Discerning "Assaultive"

The new *Chun* merger doctrine turns on determination of whether a crime is "assaultive in nature" based on an examination of the underlying statute.[172] This section attempts to discover the probable meaning of assaultive through an

163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *See* People v. Farley, 46 Cal. 4th 1053, 1120 (2009) (holding that the merger doctrine no longer applies to first-degree felony murder).
168. *Chun*, 45 Cal. 4th at 1200.
169. *Id.* ("We do not have to decide at this point exactly what felonies are assaultive in nature.").
170. *Id.* (citing People v. Chance, 44 Cal. 4th 1164, 1167-68 (2008)).
171. *Id.* at 1197-2000.
172. *Id.* at 1200.

examination of the evidence the *Chun* court provided as to the phrase's meaning. First, it analyzes the *Chance* decision, which the Court cites as defining "assaultive."[173] And second, it considers each of the three crimes that the *Chun* Court enumerates as assaultive in nature to distill the characteristics of an assaultive crime. In the absence of further guidance from the Court, working through these three statutes to determine a likely definition of assaultive provides a preliminary analytical framework which practitioners may apply to predict whether a particular crime will merge with a homicide.

1. People v. Chance: Defining Assault.

The defendant in *Chance* was charged with assault on a peace officer during a foot chase between the officer and the defendant.[174] At the culmination of the chase, the defendant hid behind an RV and pointed his handgun in the direction from which he believed the officer would appear.[175] The officer, however, approached the defendant from a different direction and discovered the defendant, gun drawn, facing away from him.[176] Fearing for his life, the officer told the defendant to drop his weapon.[177] The defendant tossed his gun and ran before ultimately being apprehended.[178]

The issue before the Court was whether, under the statutory definition of the crime of assault, the defendant had, first, "unlawfully attempt[ed]" and, second, had a "present ability" to commit a violent injury when he was discovered by the officer.[179] The Court rejected the defendant's contention that he had no "present ability" to inflict injury on the officer because, to do so, he would have had to turn, aim, and chamber a round before firing.[180] The Court held that "present ability" simply meant that an individual have the "ability to inflict injury on the present occasion," even if several steps were necessary before an injury was possible.[181]

The definition of "present ability" in *Chance*, unfortunately, does not aid in discerning the meaning of "assaultive" in the context of *Chun* because the very firearm statutes that *Chun* cites as containing an assaultive element can be carried out without committing an assault. *Chance* cites positively the case of *People v. Licas*.[182] In *Licas*, the Court held the offense of assault with a deadly weapon (defined analogously to assault) was not a lesser included offense of

173. *Id.*
174. *Chance*, 44 Cal. 4th at 1168-69.
175. *Id.* at 1168.
176. *Id.*
177. *Id.*
178. *Id.* at 1169.
179. *Id.* at 1167-68 (citing CAL. PENAL CODE § 240 (West 2008)).
180. *Id.* at 1169.
181. *Id.* at 1171.
182. People v. Licas, 41 Cal. 4th 362 (2007).

the crime of shooting at a person from a vehicle,[183] as the latter crime did not require that the offender have a "present ability" to cause harm.[184] Although the shooting *at* a person from a vehicle denotes an intent to hit that person, it is not necessary that the person being shot at *be in range*.[185] Thus, the "present ability" element of assault was missing.[186]

This creates a seeming contradiction. Under *Licas*, the offense of discharging a firearm from a motor vehicle at a person is not an assault.[187] However, the crime at issue in *Chun* was discharging a firearm at an occupied vehicle (and thus at a person), and the Court determined that the crime was "assaultive in nature" even though, following the *Licas* logic, the occupied vehicle, and thus its occupant, need not be in range.[188] Indeed, *Licas* cited approvingly a Court of Appeal case that found assault not to be a lesser-included offense of section 246 (the underlying felony in *Chun*).[189]

It may be, then, that "assaultive" requires something less than the present ability required in "assault." Analytically, practitioners will have to make some assumptions about how to bridge this gap in the Court's reasoning until it offers further illumination. The clearest way to analyze a statute like section 246 is to presume the underlying felony is assaultive if the statute can satisfy the proximity requirement of assault by either actually or constructively requiring the presence of another. Thus, section 246 is assaultive in nature because it proscribes action that meets the definition of assault if the purported victim is assumed to be "in range," even though it also applies liability to behavior that cannot be assault. In other words, the Court assumes sufficient physical proximity of a victim for the sake of the proximity requirement of "assaultive" whenever it is possible through the language of the statute that the statute can be violated in this fashion. Only this reading *of Chun* can distinguish why shooting at an occupied vehicle does not necessarily include the offense of assault, yet the conduct is assaultive.

The second element to the definition of assault is that the present ability must be one to do "violent injury."[190] Even though the Court disapproved of the conceptual shorthand that an assault is merely an attempted battery, the interpretation of the requirements of a battery are, nevertheless, still relevant to an understanding of similar terms in an assault. Thus, a "violent injury" at common law "is not synonymous with bodily harm, but includes any wrongful

183. Willful and malicious discharge of a firearm *from* a motor vehicle *at* another person, CAL. PENAL CODE § 12034 (West 2009), should not be confused with willful and malicious discharge of a firearm *at* an occupied motor vehicle, CAL. PENAL CODE § 246 (West 2009).

184. *Licas*, 41 Cal. 4th at 367.

185. *Id.* at 370-71.

186. *Id.*

187. *Id.*

188. *Chun*, 45 Cal. 4th at 1200.

189. *Licas*, 41 Cal. 4th at 368-69 (citing *In re* Daniel R., 20 Cal. App. 4th 239 (1993)).

190. CAL. PENAL CODE § 240 (West 2009).

act committed by means of physical force against the person of another, even [if] only the feelings of such person are injured by the act."[191]

The third element of assault is the "unlawful attempt" requirement.[192] The *Chance* Court explained that, unlike a charge of criminal attempt, which requires a specific intent to commit the attempted crime, assault was a general intent crime, and required only proof the defendant had the intent necessary to commit an assault as defined.[193] Specifically, while assault had been described at times as an "inchoate battery," it could not be accurately described as an "attempted battery," requiring the *specific* intent to carry through with a battery.[194] Assault was, instead, its own general intent crime:

> [A] defendant guilty of assault must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct. He may not be convicted based on facts he did not know but should have known. He, however, need not be subjectively aware of the risk that a battery might occur.[195]

Further, unlike an attempted crime, which can be based upon actions remote to the commission of the ultimate crime, the actions that constitute an assault must be "immediately antecedent" to a possible battery.[196]

Chance, then, primarily describes assault as predicated upon a *factual* inquiry into the proximity of a defendant's actions to a possible battery and, secondarily, expands on the other statutory requirements of assault.[197] Divining what constitutes an "assaultive element" within the *statutory* definition of a crime, however, simply does not follow from *Chance*'s analysis. Without further elaboration by the Court, the exact effect of *Chance*'s holding on the *Chun* analysis remains unclear. Below, this paper attempts to parse the elements of the three statutes listed in *Chun* as containing an assaultive element in light of *Chance* in order to come to a better understanding of *Chun*'s new merger test.

2. Distilling "Assaultive" From Chun's Identified "Assaultive" Felonies

a. Grossly Negligent Discharge of a Firearm

California Penal Code section 246.3(a) states:

191. People v. Rocha, 3 Cal. 3d 893, 899 n.12 (1971) (quoting People v. Bradbury, 151 Cal. 675, 676-77 (1907) (internal quotations omitted)).

192. § 240.

193. People v. Chance, 44 Cal. 4th 1164, 1167 (2008) (citing People v. Colantuono, 7 Cal. 4th 206, 216 (1994); People v. Williams, 26 Cal. 4th 779, 782, 784-785 (2001)).

194. *Id.* at 1170 (citing *Colantuono*, 7 Cal. 4th at 216).

195. People v. Williams, 26 Cal. 4th 779, 788 (2001).

196. *Id.* at 786 (citing *Colantuono*, 7 Cal. 4th at 216).

197. *Chance*, 44 Cal. 4th at 1175-76.

> [A]ny person who [1] willfully [2] discharges a firearm in a [3] grossly negligent manner which could result in injury or death to a person is guilty of a public offense and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment in the state prison.[198]

These three elements, taken together, appear to exhibit the necessary elements of assault as described by the Court in *Chance*—i.e., that the defendant be aware of the facts that would lead a reasonable person realize a battery would result from the defendant's actions.[199] First, "willful" requires a state of mind in which the actor intends to commit the act.[200] Additionally, "gross negligence" requires that a reasonable person would know that such actions were likely to be dangerous to human life or could have resulted in death.[201] Thus, the "unlawful intent" requirement that the defendant intend actions which a reasonable person would know could result in a battery appears to be contained within the statutory language.

Further, since the discharge must be accomplished in a way that "*could* result in injury or death" the action must necessarily be proximate to a possible battery upon that person.[202] Also, as stated above, while *Licas* implies assault is not included in fact in section 246.3 ("could result in injury," like shooting "at" a person, does not imply "present ability"), if one were to presuppose the physical proximity of the intended victim, "present ability" to injure is fulfilled. Thus, it appears in these ways section 246.3 contains an "assaultive" element.

The *Chun* test additionally threatens to create new problems of seeming overlap between the inherently dangerous doctrine and the merger doctrine, which must be addressed. Since a violation of section 246.3 is an "inherently dangerous felony," and thus must carry with it a "substantial risk" or "high probability" that death will occur, a violation of 246.3 must also satisfy the "present ability" prong of assault (e.g. that in committing the crime, a defendant would, by definition, have the ability to inflict serious injury). However, to use "inherent dangerousness" as a factor in evaluating the assaultive nature of an offense is tautological. All felonies supporting felony-murder would satisfy the "present ability" requirement. There is no indication that the Court meant for this to be the case and, as will be explained below in this Note's analysis of *Chun*'s application to other inherently dangerous felonies, the "present ability" requirement can serve as the determining factor for

198. CAL. PENAL CODE § 246.3 (West 2009) (Bracketed numbers represent my attempt to parse the statutes into their required elements for ease of analysis.).

199. *See Williams*, 26 Cal. 4th at 788.

200. CALJIC No. 1.20.

201. CALJIC No. 3.36 (To constitute gross negligence, "[t]he facts must be such that the consequences of the negligent act[s] could reasonably have been foreseen and it must appear that the [death] [danger to human life] was not the result of inattention, mistaken judgment or misadventure but the natural and probable result of an aggravated, reckless or flagrantly negligent act.").

202. § 246.3 (emphasis added).

merger. For these reasons, it is unlikely the *Chun* court intended to conflate the "inherently dangerous" inquiry and this aspect of the "assaultive element" test.

b. Discharge of a Firearm at an Inhabited Dwelling/Occupied Motor Vehicle.

California Penal Code section 246 states:

> Any person who shall [1] maliciously and willfully [2] discharge a firearm [3] at an inhabited dwelling house, occupied building, occupied motor vehicle, occupied aircraft, inhabited housecar, . . . or inhabited camper, . . . is guilty of a felony. . . . As used in this section, 'inhabited' means currently being used for dwelling purposes, whether occupied or not.[203]

Section 246 reads much like the related 246.3. However, it does not require gross negligence, which in terms of 246.3 completes the general intent requirement of assault (e.g. knowledge, or imputed knowledge, that one's actions would eventually result in a battery). It may be that since the majority of the targets of the discharge of a firearm in section 246 must be currently occupied,[204] gross negligence is an *implicit* element of the crime. Willfully and maliciously (e.g. with an intent to vex/injure)[205] firing at an occupied building, motor vehicle, etc., would necessarily include a reasonable foreseeability of injury if the individual knew the target to be occupied. However, there is nothing in the statute that requires such knowledge on behalf of the defendant—a defendant would violate section 246 if he willfully and maliciously discharged a firearm regardless of whether he knew the target to be occupied. As with the "present ability" requirement, then, it may be that the mens rea requirement, too, is met with an assumption the offender has knowledge that there is a victim present when such knowledge can be read into the text of the statute. Only in this way can the Court's *Chance* holding and "assaultive" align when looking at section 246.

Fulfillment of the "present ability" requirement employs a similar analysis as that under 246.3 above. Section 246 is less explicit as to the possible results of the shooting than 246.3, which includes a requirement that the firearm discharge "could result in injury or death." However, what is being shot at in section 246 is either actually (car) or constructively (house) occupied. Thus, the actual discharge of a weapon under section 246 would immediately precede a battery upon that occupant. Further, assuming, as must be assumed in section 246.3, the *physical* proximity of the victim, the "present ability" requirement is fulfilled. Even if this analysis does not logically hold with regard to shooting at inhabited structures, given the statute's definition of "inhabited," as section 246

203. CAL. PENAL CODE § 246 (West 2009) (numbering of elements of offense added).

204. The caveat that the definition of "inhabited" also includes a house not currently being used for dwelling purposes does not defeat merger if the statute otherwise contains an assaultive element.

205. CALJIC No. 1.22.

includes at least some clearly assaultive elements (e.g., shooting at an occupied car), the *entire* statute merges under *Chun*.

c. Felony Child Abuse

California Penal Code section 273a states:

> (a) Any person who, [1] under circumstances or conditions likely to produce great bodily harm or death, [2a] willfully causes or permits any child to suffer, or [2b] inflicts thereon [2c] unjustifiable physical pain or mental suffering, or [3a] having the care or custody of any child, [3b] willfully causes or permits the [3c] person or health of that child to be injured, or [4a] willfully causes or permits that child [4b] to be placed in a situation where his or her person or health is endangered, shall be [guilty of a felony].[206]

As described by the Court in *Chun* and *Smith*, section 273a is a clear situation in which the statute criminalizes both active and passive conduct.[207] *Chun* suggests only the active conduct contained within section 273a is classifiable as assaultive, but, under the new merger rule, all conduct under the statute now merges.[208]

The mental state required for an assault, in terms of the active conduct, is present. A willful infliction of physical pain includes the intent to engage in actions leading to physical harm that a reasonable person would understand to result in injury. The actual infliction of physical pain also necessarily includes the "present ability" to do so. Remembering also that the definition of "violent injury" in assault, as inherited through the common law, means merely any result of physical force against a person, the assaultive element of 273a is clearly revealed. Thus with the presence of an assaultive element within the statute, all conduct included therein—even "passive" abuse leading to death—merges with any resulting homicide.

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Looking then at the analytical steps taken to try to identify the "assaultive" element of the three statutes mentioned in *Chun*, a clearer definition of "assaultive" can be found. First, a statute must contain a mens rea element in which the offender had actual knowledge of his actions, characterized as "willful" in all three statutes. Next, the actions of that offender must, in the mind of a reasonable person, lead to injury. In the case of section 246.3, this is satisfied by the "gross negligence" standard. In section 246, the occupied nature of the vehicle or structure being fired at would lead a

206. CAL. PENAL CODE § 273a (West 2009) (numbering of elements of offense added).

207. People v. Chun, 45 Cal. 4th 1172, 1200 (2009) (citing People v. Smith, 35 Cal. 3d 798, 806 (1984)).

208. *Id.*

reasonable person to know that such action would lead to injury if, as with the "present ability" requirement, we assume the actor knew the vehicle or structure was occupied. Third, there must be some sort of temporal proximity between the actions described in the statute and the "battery" which is to occur. In section 246, the requirement that the discharge of the firearm "could" result in injury or death is a direct temporal connection to a battery. In section 246.3, the firing of a weapon "at" an occupied vehicle or structure implies this temporal connection. Lastly, as sections 246 and 246.3 can be violated in fact without the "present ability" prong of assault being met,[209] for the purpose of analysis I have assumed "assaultive" presupposes physical proximity of the victim in its analysis of the "present ability" element. With this assumption, both sections 246 and 246.3, for the same reason there is temporal proximity to a battery in both sections, pass the physical proximity prong of "present ability." On its face, section 273a per se requires both temporal and physical proximity.

IV. THE IMPLICATIONS OF *CHUN*

A. Application to Known Inherently Dangerous Felonies

Since *Ford*, only crimes that the courts determine are inherently dangerous can support a second-degree felony-murder charge.[210] Applying the framework proposed above, this section applies the meaning of assaultive developed in the previous section to a non-exhaustive list of crimes California courts have identified as inherently dangerous to determine which of those crimes include an assaultive element and, thus, merge under the Court's new *Chun* doctrine.

1. California Penal Code section 347(a)(1)—Poisoning or adulterating food, drink, medicine, pharmaceutical products, spring, well, or reservoir.

> Every person who [1a] willfully [2a] mingles any poison or harmful substance with any food, drink, medicine, or pharmaceutical product or who [1b] willfully [2b] places any poison or harmful substance in any spring, well, reservoir, or public water supply, where the person [3] knows or should have known that the same would be taken by any human being to his or her injury, is guilty of a felony . . . .[211]

Here, the willful action of poisoning with knowledge or purported

209. *See* People v. Licas, 41 Cal. 4th 362, 367 (2007).

210. As the Court's *Farley* decision exempts enumerated felonies altogether from the merger doctrine, it is unnecessary to evaluate those crimes. People v. Farley, 46 Cal. 4th 1053, 1120 (2009).

211. CAL. PENAL CODE § 347 (2009) (numbering of elements of offense added). *See* People v. Mattison, 4 Cal. 3d 77, 184 (1971) (establishing that poisoning constitutes an inherently dangerous felony).

knowledge of possible injury as a result of that poison, fulfills the basic mental state requirement of assault as described above. There is a question, though, as to whether this offense is temporally proximate enough to a resulting battery to constitute a full assault. Specifically, unlike the three offenses listed in *Chun*, section 347 does not explicitly or constructively *require* the presence of another person.

However, according to *Chance*, temporal proximity is not determinative.[212] "[I]t is a defendant's action enabling him to inflict a present injury that constitutes the actus reus of assault. There is no requirement that the injury would necessarily occur as the very next step in the sequence of events, or without any delay."[213] The poisoned food or other substance, in order to satisfy the statute, *will be* (as opposed to "could be") taken by a human being. This, if considered in conjunction with the presumption of the physical proximity of the victim, would fulfill the "present ability" requirement of assault. If this is true, then, violations of section 347 are "assaultive in nature" and would now merge per se with a resulting death.[214]

2. California Penal Code section 12303.2—Possession of destructive devices or explosives in or near certain places.

> Every person who [1] recklessly or maliciously [2] has in his possession [3] any destructive device or any explosive on a public street or highway, in or near any theater, hall, school, college, church, hotel, other public building, or private habitation, in, on, or near any aircraft, railway passenger train, car, cable road or cable car, vessel engaged in carrying passengers for hire, or other public place ordinarily passed by human beings is guilty of a felony . . . .[215]

The California Jury Instructions for section 12303.2 defines "maliciously" as: "a wish to vex, annoy or injure another person, or an intent to do a wrongful act. However, there need be no actual intent to physically injure, intimidate or terrify others."[216] "Recklessly" in the statute means "an intentional act done with a conscious disregard for the rights and safety of others."[217] "Conscious disregard" suggests that an actor should have known his actions would endanger the "safety of others." The mens rea element in section 12303.2 is less clear than those, above, which require willful action. Remembering, however, that assault requires only that the offender have knowledge of his own actions and only requires a reasonable person to understand the possible

212. *Chance*, 44 Cal. 4th at 1171-72.
213. *Id.* at 1172.
214. *Chun*, 45 Cal. 4th at 1200.
215. CAL. PENAL CODE § 12303.2 (West 2009) (numbering of elements of offense added). *See* People v. Morse, 2 Cal. App. 4th 620, 646 (1992) (holding that section 1230.2 constitutes an inherently dangerous crime).
216. CALJIC No. 12.55.2.
217. *Id.*

injurious effects of those actions, section 12303.2 does fulfill the intent requirement of assaultive.[218] A reckless act, as defined in the statute, is an "intentional act" which suggests that the actor know of his own actions.[219] "Conscious disregard," again, suggests a reasonable person would know that his actions could lead to the injury of others.[220]

However the "present ability" element of an assaultive crime appears to be lacking for section 12303.2. It is true that while the destructive device or explosive need not be immediately detonable, like a firearm that needs to be cocked and pointed before inflicting injury, the possession of such a device provides the *ability* to do injury. But even more so than section 347, the question of whether the ability to injure through a violation of section 12303.2 is "present" is unclear. While section 347 requires that the poisoned substance "would" be ingested by another, section 12303.2 does not require that the places by which the explosive device is possessed be occupied and, in the case of public places, requires, at most, only that it be "ordinarily passed" by human beings. In other words, there is no human presence actually or constructively required by section 12303.2 to which to apply the presumption of physical proximity. Thus, even adopting the liberal interpretation of "present ability" in the assaultive context proposed above, it is likely section 12303.2 does *not* merge with a resulting homicide.

3. California Health and Safety Code section 11379.6—Manufacturing, compounding, converting, producing, deriving, processing or preparing by chemical extraction or independently by means of chemical synthesis enumerated controlled substances.

> Except as otherwise provided by law, every person who [1] manufactures, compounds, converts, produces, derives, processes, or prepares, [2] either directly or indirectly by chemical extraction or independently by means of chemical synthesis, [3] [an enumerated controlled substance, including methamphetamine] shall be [guilty of a felony].[221]

The inherent dangerousness of this offense, as the court explained in *Patterson*, is analyzed with respect to the particular narcotic at issue.[222] Thus, the appellate court in *People v. James* concluded that the dangers inherent in cooking methamphetamine in violation of section 11379.6 rendered the crime

218. People v. Williams, 26 Cal. 4th 779, 788 (2001).

219. § 12303.2.

220. *Id.*

221. CAL. HEALTH & SAFETY CODE § 11379.6 (West 2009) (numbering of elements of offense added). *See* People v. James, 62 Cal. App. 4th 244, 260-71 (applying the California Supreme Court's guidelines from *Patterson* to conclude that manufacturing methamphetamines is inherently dangerous) (applying People v. Patterson, 49 Cal. 3d 615 (1989)).

222. *See Patterson*, 49 Cal. 3d at 624-25.

inherently dangerous.[223] Importantly, though, the statute does not require that any injury occur. Further, there is no intent requirement in section 11379.6, and the statute does not require that possibility of injury be reasonably foreseeable.[224] Without the requisite mental state required for assault, violations of this statute could not be considered "assaultive."

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Applying the framework derived from *Chance* and the three known "assaultive" felonies, we can see the process for distilling an inherently dangerous felony statute to determine if it contains an "assaultive" element. No single element of the suggested "assaultive" test appears to be controlling in analyzing statutory language. It is just as likely for a merger determination to hinge upon the reasonable knowledge of injury as the "present ability" requirement. Pulling back, however, it becomes clear that the more facially dangerous the felony—from firearm and assault offense, to administering poison, to possessing explosives and finally to manufacturing and/or distributing certain drugs—the more likely the offense is now to merge. The Court, then, has succeeded in severely limiting the application of second-degree felony murder. But it has exacerbated the disconnect between culpability and liability that was precisely the impetus for *Chun*'s merger reformulation.

B. Chun's Practical Implications

1. The Effect on Felony-Murder Prosecutions

Looking at inherently dangerous felonies in California through the prism of *Chun*, we can see it is primarily the dangerous firearm offenses that will per se merge under the new test. However, it is offenses involving firearms that result in the vast majority of homicides. As the Court has now limited the use of second-degree felony murder to rare, extremely reckless acts such as possession of explosives near a building or public place or certain drug offenses, the effect is the de facto elimination of the majority of felony-murder prosecutions in California.

In *Chun*, then, more than any decision over the past forty years, the Court succeeds in limiting the use of second-degree felony murder and prohibiting the "bootstrapping" of felony murder to assaultive conduct disapproved of in the Court's original *Ireland* decision.[225] However it does not solve, and ultimately exacerbates, the core conceptual problem of second-degree felony murder, which is that the relative *culpability* of those to whom the doctrine applies is

223. *James*, 62 Cal. App. 4th at 265-71.

224. § 11379.6.

225. People v. Chun, 45 Cal. 4th 1172, 1189 (2009) (citing People v. Ireland, 70 Cal. 2d 522, 539 (1969)).

often less than the culpability of those found guilty under traditional second-degree murder charges. Do we truly want those who cook methamphetamine to be held to a higher standard of strict culpability than those who kill in the heat of passion? It is even more illogical to hold such a thing when, as it is now, one who discharges a firearm with gross negligence and accidentally kills a person, in absence of proof of malice, is guilty of only involuntary manslaughter.

As criminal law has moved towards greater gradation in felony punishment relative to culpability, it is illogical for felony murder to continue to impute strict liability to certain crimes. Deterrence of dangerous behavior ceases to be a compelling reason to continue the application of felony murder when the behavior most likely to result in death—gun crime—now is categorically excluded from the doctrine's reach. By applying the assaultive-element test, the Court has limited felony murder to homicides that occur during the commission of inherently dangerous felonies in which, by their definition, death is *least* likely to be a foreseeable result. Individuals are unlikely to be deterred through cost-benefit analysis in situations where the "cost" is factually fleeting. In absence of the supposed behavioral benefits of this cost-benefit analysis, application of the rule has no basis besides retribution.

The *Chun* decision does not mean, however, that those who commit "assaultive" crimes will not be successfully prosecuted for murder. Prosecutors need only show in such a situation that the defendant exhibited a reckless disregard for human life sufficient for a second-degree murder conviction. It is not hard to believe that an average jury would view shooting a gun in the direction of another to be an act that the perpetrator knew or should have known could cause death or serious bodily injury and thus reflect a conscious disregard for life. At most, the burden on prosecutors now will be to contend with justification defenses that were previously barred under the strict liability of felony murder. Thus, the culpability of these offenders can be addressed through traditional second-degree murder prosecutions. The few remaining felony-murder prosecutions will, however, perpetuate the culpability dichotomy of felony murder, where only the less culpable class of offenders will face the doctrine's strict liability.

2. The Future of Felony Murder

The Court has, also, unintentionally crippled any future effort to judicially reform second-degree felony murder. By placing the doctrine *within* California's murder statute, the Court has foreclosed evolving the law away from a doctrine that the Court has often stated is disfavored.[226] A statutory basis for the doctrine opens the door to future challenges to the Court's power

226. People v. Smith, 35 Cal. 3d 798, 803 (1984).

to place *any* limits on second-degree felony murder. For if the common law felony murder doctrine was incorporated in statutory murder's "abandoned and malignant heart" language when the murder statute was originally adopted, how can any judicial limitation not present at codification later be adopted?[227] If the legislature spoke clearly when drafting the Penal Code, and has not revised the "abandoned and malignant heart" language since, the Court seemingly has no authority to limit the application of the statute.

In holding second-degree felony murder to be a creature of statute, the *Chun* Court agreed with critics of felony murder that there are no "nonstatutory crimes" in California.[228] To support its reading of felony murder into the "abandoned and malignant heart" language, the Court analogized to its interpretation of section 484 of the Penal Code, which criminalizes theft.[229] Because the statute prohibits "feloniously" taking the property of another without providing any definition of the term, the Court has relied on the common law "to determine the exact contours of that requirement"; applying the common law intent-to-permanently-deprive requirement even though the requirement is not spelled out in the statute.[230] Just as this definition of "feloniously" is an inherent aspect of the larceny statute inherited from common law, the Court stated that "felony murder" is inherent in section 188's expansive "abandoned and malignant heart" language.[231]

The Court's analogy to the larceny statute, however, cannot similarly support judicial limitations on felony murder. The intent-to-permanently-deprive limitation on larceny was based on the incorporation of the *common law* definition of larceny in the larceny statute. Unlike larceny, however, no such textual basis for merger *or* inherent dangerousness has ever been proposed by the Court. Indeed, the Court has stated these limitations are a *departure* from the harshness of the original doctrine.[232]

Further, unlike, for example, a holding that inserting a stolen bank card into an ATM could satisfy the entry requirement of a burglary charge,[233] neither merger nor inherent dangerousness can be justified as a limitation based

227. CAL. PENAL CODE § 188 (West 2009).

228. *Chun*, 45 Cal. 4th at 1183 (citing *Patterson*, 49 Cal.3d at 641) (Panelli, J., concurring and dissenting)).

229. CAL. PENAL CODE § 484 (West 2009).

230. *Chun*, 45 Cal. 4th at 1184.

231. *Id.*

232. *See Chun*, 45 Cal. 4th at 1188 ("Although today we reaffirm the constitutional validity of the long-standing second degree felony-murder rule, we also recognize that the rule has often been criticized and, indeed, described as disfavored. We have repeatedly stated . . . that the rule deserves no extension beyond its required application. For these reasons, *although the second degree felony-murder rule originally applied to all felonies, this court has subsequently restricted its scope in at least two respects to ameliorate its perceived harshness*.") (internal citations and quotations removed) (emphasis added).

233. People v. Ravenscroft, 198 Cal. App. 3d 639, 644-45 (1988), *overruled by* People v. Davis, 18 Cal. 4th 712 (1998).

on the application of a statute to modern circumstances. Both merger and inherent dangerousness are, by their terms, express practical limitations on the reach of felony murder based on the Court's *own* determination that felony murder should be tightly controlled. Certainly if there are no nonstatutory crimes, and at least no crimes that have not been incorporated into statute through the common law, there can be no nonstatutory or non-common-law *limitations* on prosecuting those crimes.

This fundamental tension in *Chun* is especially stark when looking at *Chun*'s companion case, *People v. Farley*, which holds that merger does not apply to the enumerated felonies supporting first-degree felony murder.[234] The Court in *Farley* distinguished the continuing application of merger to second-degree felony murder from the abrogation of merger in regards to first-degree felony murder by explaining that, unlike second-degree felony murder which was simply "another interpretation of section 188's 'abandoned and malignant heart' language," first-degree felony murder had an express statutory basis in section 189.[235] Finding "no ambiguity" in the language of section 189, the Court noted it could neither expand nor narrow a "clear and specific definition" of a crime, and held merger inapplicable to first-degree felony murder.[236] However, if the Court may not put any limitation on those enumerated felonies, it is illogical that the Court may impose any limitation on the remaining non-enumerated felonies when applied to second-degree felony murder prosecutions. As the California Supreme Court has stated, "the power to define crimes and fix penalties is vested exclusively in the legislative branch."[237]

Apart from these jurisprudential concerns, the new limitations presented by *Chun* could also spur the legislature to create a second-degree felony-murder statute with expressly enumerated felonies which, extending *Farley*, the Court would likely find to be outside all judicial limitations. More dangerously, *Chun* may, alternatively, cause the legislature to include the now merged felonies into the existing first-degree felony-murder statute, therefore exposing a larger number of defendants to capital sentences. If prosecutors, for whatever reason, fail to secure second-degree murder convictions for "assaultive" offenses which were previously included within second-degree felony murder, one can easily imagine law enforcement and District Attorney's offices lobbying Sacramento for more robust "get tough" policies in relation to those crimes.[238] The possibility of legislative reaction to eliminate any limitations on second-degree felony murder means that *Chun*, a decision that

234. People v. Farley, 46 Cal. 4th 1053, 1120 (2009).

235. Id. *at* 1118 (quoting *Chun*, 45 Cal. 4th at 1184).

236. *Id.* at 1118, 1119.

237. *Id.* at 1119 (quoting Keeler v. Superior Court, 2 Cal. 3d 619, 631 (1970)).

238. *See* Michael Vitiello, *California's Three Strikes and We're Out: Was Judicial Activism California's Best Hope?*, 37 U.C. DAVIS L. REV. 1025, 1102 (2004) (describing the risk of public and political backlash against California state judges that vote to undermine popular criminal justice policies).

sought to bring more parity between culpability and punishment may, ultimately, bring greater disparity.

CONCLUSION

People v. Chun has come closest to creating the sort of substantive limitation on the reach of second-degree felony murder that the Court originally attempted forty years ago in *People v. Ireland*. What is clear from this Note's attempt to distill and apply *Chun*'s "assaultive element" test is that the new merger doctrine will go a long way in eliminating the use of felony-murder's strict liability in the vast majority of homicide cases in California. However, the Court's new incarnation of the felony-murder merger doctrine still leaves many uncertainties in its application. In looking at the three statutory examples provided by the Court in *Chun*, it is clear *Chun*'s "assaultive element" shares some, but not all, of the traditional statutory elements of the crime of assault. However, the precise distinctions remain to be drawn.

While the *Chun* decision appears to be a victory for those who believe felony murder to be an outdated and unjust criminal doctrine, the Court's rationale in *Chun* could have troubling consequences. The reformulation of the merger doctrine appears to limit application of second-degree felony murder to those crimes where death is *least* foreseeable, and hence where individual culpability should be reduced. Under the most restrictive reading of this Note's proposed "assaultive" test, only inherently dangerous drug crimes will still fall outside the merger doctrine. Restricting felony murder to some of the least dangerous of the inherently dangerous felonies only exacerbates the doctrine's tendency to treat the less culpable to harsher sentences and thwarts the deterrence rationale that underpins the doctrine.

Further, if prosecutors are unable to secure convictions under traditional second-degree murder malice requirements for crimes now merged out of second-degree felony murder, it might be urged on the legislature to provide a solution. Given that *Farley* held merger may no longer apply to enumerated felonies in section 189, the legislature has two options. The first is to create a new second-degree felony-murder statute, enumerating crimes the legislature believes to warrant strict-liability, and thus vitiating any concerns about judicial limitations on the statute's applicability. The second is to add now-merged crimes to section 189's existing list—exposing former second-degree felony murder defendants to capital liability.

More alarming, however, are the possible ramifications of the second aspect of the *Chun* decision, which held second-degree felony murder to be an implication of section 188's "abandoned and malignant heart" language. This radical departure from the Court's previous dicta that second-degree felony murder was a crime of judicial implication, limits the Court's ability to further cabin second-degree felony murder and may undermine the Court's ability to impose *any* limitations to second-degree felony murder whatsoever. Both

merger and the inherently dangerous felony limitation on felony murder are doctrines based upon the Court's *own* determination of the appropriate reach of second-degree felony murder. These two doctrines differ fundamentally from other Court created limitations on criminal statutes, which are either derived from the understanding of the crime at common law or, are an extension of the statutory language to unforeseen situations.

With the Court's acknowledgment in *Farley* that it had no power to expand or reduce criminal liability through judicial rules, it appears *Chun* creates fertile ground on which a challenge to any limitations to second-degree felony murder can be based. By trying to preserve both the existence of second-degree felony murder andits own power to limit the doctrine's reach, the Court may have set the stage for the destruction of forty years of work, and has guaranteed the preservation, and possibly ensured the expansion, of this "disfavored" doctrine in California criminal law.