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California's Three Tiered Approach to Temper The Injustice of the Unlawful Act Involuntary Manslaughter Rule

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I. Constructive Homicide Scheme

Despite criticism regarding their homicide culpability for less than the usual required intent, the California homicide scheme contains four “constructive” ways to support homicide convictions. The intent usually required for murder culpability is malice aforethought.¹ Express malice is the intent to kill.² As to first degree murder, express malice is required in addition to willfulness, deliberation and premeditation. Second degree murder usually requires express or implied malice. Implied malice is manifest in the conscious disregard of a high likelihood of death.³ Under this conventional approach, involuntary manslaughter requires criminal negligence. That occurs when the defendant consciously disregards a high likelihood of danger.⁴

Constructive rules of intent spread across all three offenses. As to murder, there exists the first degree felony murder rule, and the second degree felony murder rule. As to involuntary manslaughter, the non-inherently dangerous felony

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³Cal. Penal Code § 188 (West 1999), e.g., People v. Dellinger, 49 Cal.3d 1212, 1218-19, 783 P.2d 200, 203, 204, 264 Cal.Rptr. 841, 843-45 (1989),31 Cal.4th 673, 74 P.3d 748, People v. Martinez, 31 Cal.4th 673, 683, 74 P.3d 748, 754.
manslaughter rule and the unlawful act involuntary manslaughter rule. The first
degree felony murder rule and the unlawful act manslaughter rule are established
by statute. Case law created the other rules.

The first degree felony murder rule statutorily sets out a list of felonies
whose intent, lesser than malice, supports a conviction for first degree murder.
Basically, when the defendant intends to commit one of the enumerated offenses,
as opposed to intent to kill, the result is first degree murder according to the
statute.⁵ Though limited to a large degree because of the perceived injustice in
many cases, case law has upheld the rule, reasoning that the legislature created the
statute and it is for the legislature to change it.⁶ Still, this rule has been harshly
criticized strongly both in case law and by commentators.⁷

The second degree murder rule is a creature of case law. This rule imposes
second degree murder only on crimes inherently dangerous in the abstract.⁸

Finally, another rule closely associated to the second degree murder rule and also
court created, imposes involuntary manslaughter liability for deaths resulting from

⁶E.g., People v. Dillon 34 Cal.3d 411, 463-468, 668 P.2d 697, 709 194 Cal.Rptr. 390, 402-
⁴⁰⁴ (1983).
⁷E.g., People v. Phillips (1966) 64 Cal.2d 574, 582, 585, 51 Cal.Rptr. 225, 234, 414 P.2d
353, 362 (1966), People v. Washington, 62 Cal.2d 777, 783, 44 Cal.Rptr. 442, 446-447, 402 P.2d
130, 134-135 (1965), George P. Fletcher, Reflections On Felony-Murder, 12 Southwestern U.L.
Rev. 413 (1981).
⁸People v. Burroughs, 35 Cal.3d 824, 826-835, 678 P.2d 894, 895-900, 201 Cal.Rptr. 319,
320-326 (1984), disapproved on other grounds in People v. Blakeley, 23 Cal.4th 82, 89, 96, 999
P.2d 675, 678-679, 96 Cal.Rptr.2d 451, 455-56 (2000), People v. Phillips 64 Cal.2d 574, 580,
non-dangerous felonies. These are offenses which do not reach the level of danger necessary under the second degree felony murder rule.\(^9\) The latter rule has been criticized as “non-statutory” manslaughter and hence a violation of Penal Code section 6 (West 1999), which provides that no act or commission is criminal, except as provided by law.\(^10\)

**II. Statutory Basis For The Unlawful Act Involuntary Manslaughter Rule**

The statutory offense alternatively labeled as the “unlawful act manslaughter rule” or “misdemeanor manslaughter rule” bypasses the usual mental state of criminal negligence for liability in much the same way as the first degree murder rule bypasses the mental state of malice. The primary difference is that this scheme, a part of the common law for centuries, does rely on felonies to support murder culpability, but allows involuntary manslaughter liability based on a violation of any offense less than a felony, primarily misdemeanors.\(^11\) Unlike the first degree murder rule, the unlawful act manslaughter rule does not enumerate specific offenses that may be used as predicate offenses. The rule applies in two

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contexts: vehicular and non-vehicular. The vehicular version is broken down further to driving a vehicle without gross negligence, driving under the influence without gross negligence, driving with gross negligence.\textsuperscript{12}

\textbf{III. Debate Whether The Unlawful Act Manslaughter Rule Is Just}

The tension in this context places on one side the value society puts on life. In contrast, critics argue that defendants who manifest the same conduct are punished in a significantly more aggravated manner leading to gross injustice

\textsuperscript{12}Manslaughter is the unlawful killing of a human being without malice. It is of three kinds:
(a) Voluntary . . .
(b) Involuntary-In the commission of an unlawful act not amounting to felony or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution or circumspection. This subdivision shall not apply to acts committed in the driving of a vehicle.
(c) Vehicular-
(1) Except as provided in Section 191.5, driving a vehicle in the commission of an unlawful act, not amounting to a felony, and with gross negligence; or driving a vehicle in the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence.
(2) Except as provided in paragraph (3), driving a vehicle in the commission of an unlawful act, not amounting to a felony, but without gross negligence; or driving a vehicle in the commission of a lawful act which might produce death, in an unlawful manner, but without gross negligence.
(3) Driving a vehicle in violation of Section 23140 (alcohol related reckless driving), 23152 (driving under the influence or with a blood alcohol level at or over .08%), or 23153 (driving under the influence or with a blood alcohol at or over .08% causing bodily injury) of the Vehicle Code and in the commission of an unlawful act, not amounting to felony, but without gross negligence; or driving a vehicle in violation of Section 23140, 23152, or 23153 of the Vehicle Code and in the commission of a lawful act which might produce death, in an unlawful manner, but without gross negligence.
(4) . . .

under the rule. Not surprisingly, commentators and courts have struggled a great deal in debating this issue philosophically.

At the base of support for the rule is the argument that the rule represents an appropriate societal response to criminal conduct, regardless of how minor, leading to a victim’s death. In theory, this argument is premised on the irreparable nature of the harm and result attributed to the defendant’s conduct. Such is reflective of society’s value of human life. Despite the intent of the defendant that falls short of that usually required for involuntary manslaughter, society is injured to as great a degree and therefore, the defendant should be punished accordingly.

13 Dean Sanford H. Kadish pointed out that society’s value of life is only the beginning point of any analysis that addresses criminal culpability. Sanford H. Kadish, Respect for Life and Regard Rights in the Criminal Law, Thalheimer Lecture, Address at Johns Hopkins (April 24, 1975) published at 64 Cal.L.Rev. 871 (1976). In his approach, he initially breaks down the parties that are killed and the policy issues as to each: the aggressor, private persons and innocent bystanders. 871 Cal. L. Rev. 873-871. Additionally, he observes that although some dispute exists, capital punishment is “an accepted part of our jurisprudence.” 871 Cal.L.Rev. 874 n. 6 (omitting citations). He next assesses each category set out above in addition to bystanders and culpability through omissions. Approaching each category, Dean Kadish examines rights by of the perpetrator to respond to situations and to society to respond to the perpetrator’s act of killing. Perhaps the most interesting issue he raises is the social utility of allowing a person to kill one person for sake of keeping more than one person alive. 871 Cal.L.Rev. 890-897. As an example, Kadish questions whether there some point where a life should be offset by social utility such completing a building project that can never be completed in order to save one life and the plans anticipated multiple deaths in construction. 871 Cal.L.Rev. 894-896. Commenting that setting out the issues is difficult in itself, Dean Kadish acknowledges that they are not easily answered and are at the “core of the great controversies of moral philosophy. 871 Cal.L.Rev. 901.

14 Wilner, Unintentional Homicide In The Commission Of Unlawful Act, 87 U.Pa.L.Rev. 811, 815 (discusses the strong support of this reasoning in this context by Blackstone, Hale, Foster and Holmes among others.)

15 Although with qualification, it could be argued that the law of homicide is meant to prevent behavior that might cause death. The simple reason is that the dominant purpose of
Those who argue this view cite the basic rule of criminal law that a defendant is responsible for the natural and probable consequences of his or her acts. Further in California, causation limitations on the application to the rule, to be discussed infra, avoids injustice in its application. With this requirement of causation, the rule reflects society’s retribution for the full extent of the harm reasonably linked to the conduct of the defendant.

Death is an irreparable loss to society and the defendant receives his “just desserts” in suffering homicide liability. The commission of an unlawful act, homicide law is the protection of life. Herbert Wechsler & Jerome Michael, A Rationale of the Law of Homicide, 37 Colum. L. Rev. 701, 729, 731 (1937). In the context of the unlawful act manslaughter rule, criminal culpability is established with the commission of the unlawful act. Still, the conduct alone should not exclusively define the seriousness of the offense, but it should be considered in the light of the harm caused. A. Von Hirsch, Doing Justice: Choices of Punishments 79-80 (1976), c.f., Paul H. Robinson, A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability, 23 UCLA L. Rev. 266 (1975) (bases criminal law jurisdiction on the condition precedent of societal harm), but c.f., George P. Fletcher, The Right Deed for the Wrong Reason: A Reply To Mr. Robinson, 23 UCLA L. Rev. 293 (1975).

Interestingly, one commentator suggests that the common law rule “transcends” the idea of responsibility for the natural and probable consequences of the act. This commentator attributes the rule to the common law’s confusion in finding implied malice, the irreparable nature of the loss and the emphasis placed on property offenses. Wilner, Unintentional Homicide in the Commission of an Unlawful Act, 87 U. Pa. L. Rev. 811, 814-17 (1939) c.f., James L. Focht, Proximate Cause in the Law Of Homicide With Special Reference To California Cases, 12 Cal. L. Rev. 19, 46-48 (1938) (if there is liability for a misdemeanor, death should be the proximate cause of the misdemeanor), Wechsler & Michael, A Rational of the Law of Homicide, 37 Colum. L. Rev. 701, 744-745 (1937) (where the ends are unlawful, the dangerous means involved are obviously unjustifiable).

The “just desserts” argument is directly descended from Immanuel Kant. He argued that an equilibrium must be maintained in society, with a societal harm caused by an offender having to be counter-balanced by the offender’s punishment. Thus, the punishment increases proportionally where the harm increases. This school of thought has been labeled “retributivism.” In contrast, the retributivests’ primary opposition have come a utilitarian school of thought descended from Jersey Bentham. The utilitarians reason that the primary purpose of criminal law is deterrence. Their basic reasoning is that punishment should not be based on the loss involved, but the conduct of the individual. Deterrence would be lost if the punishment for
whether misdemeanor or infraction, resulting in a foreseeable death requires culpability proportional to that irreparable harm.18

In contrast, criticism of the rule is premised on the obvious concern is that it imposes excessive liability for a defendant and punishment out of proportion with his or her relatively minor criminal conduct. Oliver W. Holmes’ statement regarding the felony murder rule is especially apt here: (in a case that applies the felony-murder rule to larceny) “is to prevent stealing, it would be better to hang

specific conduct is based on the unexpected result of that conduct. As such, imposing a special liability for death, as the rule does, would fail to serve the interests of society. See E. Pincoffs, The Rationale of Legal Punishment 1-25, 86-90 (1966) (discussing both schools of thought). Likewise, it should be noted that the reasoning of the latter view has been accepting by at least one California appellate court. In dealing with criminal negligent involuntary manslaughter, there is no intent to kill, hence it is impossible to attempt to commit involuntary manslaughter in that context. People v. Broussard, 76 Cal. App.3d 193, 197, 76 Cal.Rptr. 664, 666). This is because one cannot intend to cause death in being reckless, as reckless does not rise to the level of intent to kill or a conscious disregard of a high likelihood of death resulting in implied malice. Extending this reasoning to the unlawful act manslaughter rule, a defendant violating a misdemeanor does not manifest a conscious disregard of a high likelihood of death. A defendant in this context intends and commits a misdemeanor and death follows as an unintended and unexpected result. As such, the unlawful act rule merely deters misdemeanors, yet imposes manslaughter liability on the unlucky few who commits a misdemeanor resulting in death.18 Interestingly, an apparently clear statute in the Penal Code becomes confusing when applied to the debate regarding the rule. California’s sentencing policy is set out in section 1170(a)(1) (West Supp. 2007): “the Legislature finds and declares that the purpose of imprisonment for crime is punishment. The purpose is best served by terms proportionate to the seriousness of the offense.” This policy cannot be applied to the argument here absent clarification as a confusing bit of semantics in this context. The problem is the question of the precise definitions of “punishment” and “seriousness” of the crime. This statement of public policy does not answer the question of whether the “punishment” based on the proportional seriousness of the crime is based on the underlying misdemeanor or the resulting death. C.f. Robert A. Pussley, Retribution: A Just Basis For Criminal Sentences, 7 Hofstra L. Rev. 379, 393, 398-400 (1979) (retribution is a balancing of defendant’s culpability and the harm done) with Weschsler & Michael, A Rationale For The Law Of Homicide 701, 749-50 (1937) (“We must be content to endeavor to deter by law the creation of risks that most men feel they are creating, or else to make particular acts unlawful regardless of the risks they create or the results they have in particular cases”).
one thief in every thousand by lot.”\textsuperscript{19} Specifically, as to the unlawful act manslaughter rule:

The flaw in the concept is that a person may be convicted of unlawful-act manslaughter even though the person’s conduct does not create a perceptible risk of death. Thus, a person is punished for the fortuitous result, the death, although the jury never has to determine whether, the person was at fault with respect to the death. The concept violates the important principle that a person’s criminal liability for an act should be proportioned to his or her moral culpability for that act. The wrongdoer should be punished for the unlawful act and for homicide if he or she is at fault with respect at fault with respect to the death, but should not be punished for a fortuitous result merely because the act was unlawful.

State v. Pray 378 A.2d 1322, 1324 (Me. 1977), accord, Jabich v. People, 58 Colo. 175, 179, 143 P. 1092, 1094 (1914), State v. Brown, 205 S.C. 514, 519, 32 S.E.2d 825, 827 (1945).

Thus, the criticism of the rule focuses on the fact that defendant’s conduct very rarely creates a risk of death as established by the fact it is designated a misdemeanor or an infraction. Hence, if death occurs, there should not be homicide liability as it is a rare aberration.

IV. California’s General Approach To The Rule

There is a presumption that the plain language of a statute constitutes the proper construction of a statute. As set out in the original language of its enactment, read without qualification, the unlawful act manslaughter rule appears to markedly unfair in nature.20 If the California courts applied it literally, it would

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20As will discussed infra, the current state of the law in California is not the inherent danger of the offense, but the how dangerous the offense had been committed. The former has been the widely accepted basis of a predicate offense in nearly all jurisdictions, including California, retaining the act until California focused on the conduct in committing the unlawful act. Interestingly, there has been a third view in this context. In Queen v. Bruce, 2 Cox.C.C. 262 (1847), the court held that the determination is based on the object of the unlawful act.
be a very simple matter of proving a misdemeanor or even of an infraction with a related death regardless of how far removed from the unlawful act. With that showing, an offense would rise from a county jail offense or even a small fine, to a state prison sentence for the felony of involuntary manslaughter. The language of the statute as adopted in the original penal code gave no indication it meant anything more than that rule said on its face.\textsuperscript{21}

Despite the clear line of authority regarding the construction of statutes’ plain language, yet another seemingly conflicting line rule of statutory construction must be considered here. In contrast to the plain language approach, California courts have also explained: “The rule of the common law, that penal codes are to be strictly construed, has no application to this Code. All of its provisions are to be construed according to the fair import of their terms with a view to affect its objects and to promote justice.”\textsuperscript{22} Promoting justice appears to specifically suggest

\textsuperscript{21}It is a basic tenant of statutory construction that the plain language of a statute controls its application. The words of a statute must be given their ordinary meaning. \textit{E.g.}, People v. Weidert, 39 Cal.3d 836, 843, 705 P.2d 380, 384-385, 218 Cal.Rptr. 57, 61 (1985), Solberg v. Superior Court, 19 Cal.3d 182, 198, 561 P.2d 1148, 1158, 137 Cal.Rptr. 460, 470 (1977). “[I]f no ambiguity, uncertainty, or doubt about the meaning of a statute appears, the provision is to be applied to its terms without further judicial construction.” \textit{In re Antiles}, 33 Cal.3d 805, 811, 662 P.2d 910, 914, 191 Cal.Rptr. 452, 456 (1983) \textit{overruled on other grounds in In re Joyner}, 48 Cal.3d 487, 495, 769 P.2d 967, 972, 256 Cal.Rptr. 785, 790 (1989) It is true that if language is found to be ambiguous, the statute must be construed to benefit the criminal defendant. \textit{E.g.}, Keeler v. Superior Court, 2 Cal.3d 619, 631, 470 P.2d 617, 624, 87 Cal.Rptr. 481, 488 (1970). However, the unlawful manslaughter rule set out in Penal Code section 192 is clear on its face. The legislature adopted this law with original penal code and therefore, no case law existed that could be construed as applicable to the construction of the statute. Stats. 1850, c. 99, p. 231, § 22.

\textsuperscript{22}Cal. Penal Code § 4 (West 1999); \textit{E.g.}, Sekt v. Justice Court, 26 Cal.2d 297, 303, 159 P.2d 11, 17 (1945), People v. Rabe, 202 Cal. 409, 415, 261 P. 303, (1927), People v. Black, 45
that the unlawful act misdemeanor rule should not be read literally, but that courts should construct its terms in a just manner. As will be discussed infra, California courts have focused on the phrase “in the commission of,” in several contexts, to find constructions with justice. Additionally, there is also a rule that construction in favor of defendants that supports this approach.\(^{23}\) As result of these conflicts in the rules of construction, the courts have used their construction of the statute to temper the language of the statute in an attempt to focus on justice in application of the rule.

Before analysis of the rule, the approaches California courts have not taken in this context should be considered. First, neither California, nor the legislature took the obvious approach to mitigating the harshness of this rule through abolition of the statute. Nearly two thirds of the other states recognized the criticisms set out above rejecting the rule limiting involuntary manslaughter to deaths caused by reckless conduct.\(^{24}\)

\(^{23}\)The California Supreme Court acknowledged the basic rule, but declined to follow it in People v. Avery, 27 Cal.4th 49, 58, 38 P.3d 1, 6, 115 Cal.Rptr.2d 403, 408-409 (2002). The Avery court distinguished this rule in a manner limiting its application: “[A]lthough true ambiguities are resolved in defendant’s favor, an appellate court should not strain to interpret a penal statute in defendant’s if it can fairly discern a contrary legislative intent.” Id. at 58, 38 P.3d at 6, 115 Cal.Rptr.2d at 408-409. One must question this reasoning as it effectively removes a defendant’s presumption regarding statutory construction in most cases. See People v. Farell 28 Cal.App.2d 87, 94, 113 P. 746, 750-751 (1941).

Secondly, the California courts have expressly rejected the heavily criticized malum in se/mala prohibitum distinction\(^{25}\) in the application of the rule. Many states have taken that approach.\(^{26}\) Instead,\(^{27}\) the California courts have focused on the “in commission of the act” language of the statute. This has focused attention to the mental state of the defendant, the nature of the unlawful act, and proximate cause to limit the harsh application of the unmodified rule. This article will explain the California court’s slow, but progressive, intervention into the use and limitations of the rule to render a more just result utilizing these factors.

V. Criminal Intent

\(^{25}\)This distinction is imprecise. For example, some courts define malum in se from a historical perspective, while others define the term as something naturally evil to a civilized society. \textit{Cf.}, People v. Townsend, 214 Mich. 267, 272-73, 183 N.W. 177, 178-179 (1921) (in determining drunkenness is malum in se, one court had to include Noah and 12\(^{th}\) century China in its analysis), State v. Horton, 139 N.C. 588, 592, 51 S.E. 945, 946 (1905), Silver v. State, 13 Ga.App. 722, 725-26, 79 S.E. 919, 921-922 (1913) (depends on individual conception and environment). Oddly, one commentator, in assessing the rule, makes the bald statement that an unlawful act must be \textit{malum in se}. 2 Charles E. Torcia, Wharton’s Criminal Law, § 168, at 372 (15\(^{th}\) ed. 1994). Ignoring the contrary approach of California, the inconsistency of the results would render the application of this distinction irrelevant.

\(^{26}\)\textit{E.g.}, Commonwealth v. Mink, 123 Mass. 422, 429 (1877) (victim died while attempting to stop defendant from committing suicide, although attempted suicide is not crime, it is malum in se act), State v. McIver, 175 N.C. 761, 765-66, 94 S.E. 682, 684 (1917), State v. McNichols, 188 Kan. 582-589, 389 P.2d 467, 470-472 (1961), see James J. Robinson, \textit{Manslaughter by Motorists}, 22 Minn.L.Rev. 755, 778 (1938), Moreland, Law of Homicide, 188, 193-194 (1952) (some commentators utilize the malum in se approach based in part on the questionable thesis that all such offenses are dangerous in themselves).

\(^{27}\)People v. Cox, 23 Cal.4th 665, 675-676, 2 P.3d 1189, 1196, 97 Cal.Rptr.2d 647, 656 (2003), People v. Mitchell, Cal.2d 678, 683, 166 P.2d 10, 13 (1946), \textit{c.f.}, State v. Phelps, 242 N.C. 540, 544-545, 89 S.E.2d 132, 135-136 (1955), State v. Cope, 204 N.C. 28, 31, 167 S.E. 456, 458 (1929), \textit{see generally} Henry M. Hart, Jr., \textit{The Aims Of Criminal Law}, 23 Law & Contemp. Prob. 401, 416 (1958) (any conduct that community has condemned as unjustifiable is morally blame worthy and hence, actor is a criminal and unlawful)
A. Stuart

California Penal Code section 20 (West 1999) requires “[i]n every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence.” Section 20 proved definitive in a prosecution regarding an unlawful act manslaughter rule prosecution involving a strict liability criminal offense in People v. Stuart, 47 Cal.2d 167, 302 P.2d 5 (1956). In Stuart, the defendant pharmacist placed sodium nitrite into a prescription by accident.\textsuperscript{28} A storage bottle had been mislabeled due to no fault of the defendant.\textsuperscript{29} A child took the medication and died.\textsuperscript{30}

The trial court convicted the defendant under the unlawful act manslaughter rule with the predicate crime of violation of Health and Safety Code section 26280.\textsuperscript{31} That offense is a strict liability offense for selling adulterated or misbranded drugs.\textsuperscript{32}

In reversing the conviction, the California Supreme Court, reasoned that Penal Code section 20 must apply to the predicate act required in Penal section 192 as no express exclusion is stated in the manslaughter statute.\textsuperscript{33} Because section 20 applied, the Stuart court further reasoned that the unlawful act must be performed

\textsuperscript{28}47 Cal.2d at 170-171, 302 P.2d 7-9.
\textsuperscript{29}Id.
\textsuperscript{30}Id. at 170, 302 P.3d at 7.
\textsuperscript{31}Id. at 172, 302 P.3d at 8-9.
\textsuperscript{32}Id.
\textsuperscript{33}Id. at 172-73, 302 P.3d 8-9.
with at least general criminal intent.\textsuperscript{34} The \textit{Stuart} court acknowledged that strict liability could support misdemeanor liability, because public welfare justified it.\textsuperscript{35} However, the \textit{Stuart} court held that strict liability statutes cannot be utilized as the predicate offense in the application of the unlawful act manslaughter rule as it would serve no public interest in view of section 20.

\textsuperscript{34}Id. at 173, 302 P.3d at 9.
\textsuperscript{35}Id. at 172, 302 P.3d 8-9.
B. Neff

In *People v. Neff*, 117 Cal.App.2d 772, 257 P.2d 47 (1953), a jury convicted a hotel manager of involuntary manslaughter after being instructed on both unlawful act involuntary manslaughter and reckless conduct involuntary manslaughter. As to the unlawful act manslaughter rule, the jury considered a predicate act of several violations of the Health and Safety code regulating the maintenance and the types of gas heaters required. Because the heaters had been in poor condition, two hotel guests died of gas poisoning.

The *Neff* court held one statute unconstitutionally vague and found that the defendant had no duty under the other statutes in his capacity as the manager of the hotel. The court reversed the conviction holding neither a predicate act, nor reckless conduct, has been proven. As with *Stuart*, the *Neff* court held that a public safety statute cannot be considered in a vacuum in this context. In relation to the unlawful manslaughter rule, the defendant had no opportunity to modify his conduct as the predicate acts carried what amounted to strict liability. In those circumstances, no public policy would be served as the aggravated punishment would not serve the rationale of strict liability crimes.

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36 *Id.* at 772, 779, 257 P.2d at 47, 51.
39 *Id.* at 779-82, 257 P.2d at 51-53.
40 *Id.* at 786, 257 P.2d at 55.
41 *C.f.*, Siberry v. State, 149 Ind. 684, 691, 39 N.E. 936, 937-938 (1895) (in contrast, court found sufficient if defendant only committed unlawful act of free will).
VI. Predicate Acts Must Be Committed In A Dangerous Manner

A. The Debate Regarding Dangerousness Of Predicate Offenses

Until relatively recent rulings of the California Supreme Court clearly settling the issue, a long line of authority held that any inherently dangerous offense qualified as a predicate act under the rule. A significant line of authority blindly utilized certain offenses it considered inherently dangerous as predicate offenses. As these courts rendered no explanation for their use of these predicate acts, it appears to have based solely on their prior history of their use by prior courts as predicate offenses. This reasoning became progressively strained as courts would do what previous had done and those courts had done what yet previous courts had done.

The first clear break with this cycle came when the Stuart court made clear that a predicate offense must be dangerous to life. That language caused some confusion in later authority as this added to the view an offense need only be inherently dangerous to qualify for use as a predicate act. Some courts took the minority view that predicate acts must be committed in a dangerous manner as to being inherently dangerous. The tension in this context led up to the holdings of

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117 Cal.App.2d at 173, 302 P.3d at 9. The California Supreme Court invoked and relied on this reasoning nearly sixty years later in People v. Cox, 23 Cal.4th at 671, 2 P.3d at 1192, 97 Cal.Rptr.2d at 652. The Cox court explained that although the section 20 analysis had been subsequently understood by most California courts, the Stuart court’s analysis of the danger of the predicate statute has been misunderstood by an entire line of authority. That misunderstanding will be addressed infra.
People v. Wells, 12 Cal.4th 979, 50 Cal.Rptr.2d 699, 911 P.2d 1374 (1996) and
People v. Cox, 23 Cal.4th 665, 97 Cal.Rptr.2d 647, 2 P.3d 1189 (2000). The Wells
and Cox courts settled the issue by rejecting the approach of the inherent
dangerousness of the offense in favor of a requirement the predicate act must be
committed in a dangerous manner. A court’s use of a predicate offense would no
longer be based on the particular offense, but the conduct of the defendant.

B. Firearms Cases

There is a long line of cases utilizing firearms offenses as the predicate
offense in this context. Many of those cases utilize a violation of Penal Code
section 417, brandishing a firearm, as the predicate misdemeanor. The obvious
reason is because firearms have a great potential for harm.

In People v. McGee, the California Supreme Court neither explained
whether it relied on inherent danger of the brandishing charge or the dangerous

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43 Every person who, except in self-defense, in the presence of any other person,
draws or exhibits any firearm, whether loaded or unloaded, in a rude, angry or
threatening manner, or who in any manner uses the same in any fight or quarrel is
guilty of a misdemeanor punishable by imprisonment in the county jail for a term
of not less than three months and not to exceed six months, or by both
imprisonment and a fine not exceeding five hundred dollars ($500).

44 E.g., People v. Lee, 20 Cal.4th 47, 60-61, 971 P.2d 1001, 1008-09, 82 Cal.Rptr.2d 625,
787 (1969) (section 417), People v. Alfreds, 251 Cal.App.2d 666, 669-70 (1967) (grabbing or
catching shotgun and pointing it in victim’s direction with accidental discharge).

46 31 Cal.2d 229, 187 P.2d 706 (1947)
manner of gun use. In *McGee*, the death occurred as a result of the defendant firing a pistol.\(^{47}\) The *McGee* court held that even if the defendant had fired the gun only to frighten, he would be guilty.\(^{48}\)

Although the *McGee* court did not identify Penal Code section 417 as the predicate misdemeanor, it did so in *People v. Carmen*.\(^{49}\) The Carmen court reversed a murder conviction due to the trial court’s failure to instruct the jury on the lesser included offense of unlawful act manslaughter. In *Carmen*, the defendant testified that he stumbled and accidentally discharged his rifle killing the victim.\(^{50}\) He further testified he had no intent to kill the victim.\(^{51}\) The *Carmen* court reasoned that even if the defendant had accidentally discharged the rifle, section 417 could form the basis of an involuntary manslaughter in that case.\(^{52}\) The California Supreme Court used virtually the same reasoning in a later accidental death due to a “hair trigger on a firearm\(^{53}\). McGee and Carmen are consistent with a large amount case law in this context.

Another repetitive firearms situation exists where the rule that has been utilized is excessive force in self-defense. These circumstances involve non-

\(^{47}\) *Id.* at 235, 187 P.2d at 710.
\(^{48}\) *Id.* at 235, 238, 187 P.2d at 710-12.
\(^{49}\) 36 Cal.2d 768, 228 P.2d at 281.
\(^{50}\) *Id.* at 772, 228 P.2d at 284.
\(^{51}\) *Id.*
\(^{52}\) *Id.* at 774-75, 228 P.2d at 285-86.
\(^{53}\) *People v. Southack*, 39 Cal.2d 578, 248 P.2d 12 (1952) (the court found that criminal negligence would apply in the alternative).
deadly force being met with deadly force. In *People v. Clark*, the defendant shot the victim who approached him in a “menacing” manner. The *Clark* court held that the defendant had no right to use deadly force in self-defense and this could be used as a predicate act for the conviction of involuntary manslaughter. Other cases have dealt with firearms related predicate acts other than brandishing.

C. Assault And Battery Cases

Assault and Battery cases have constituted a large percentage of the prosecutions under the unlawful act involuntary manslaughter rule. Many courts approached the issue with little or no analysis regarding the appropriate use of assault and battery as a predicate offense. Over this same period, courts have held

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56 Id. at 376,
57 Id. at 382, 181 Cal.Rptr. at 688. Although the Clark court did not specifically refer to the unlawful act misdemeanor rule, it cited People v. Jackson, 202 Cal.App.2d 179, 20 Cal.Rptr. 592 (1962). The Jackson court held that excessive force in self-defense can constitute the predicate act under the rule. 202 Cal.App.2d at 182-83, 20 Cal.Rptr. at 594. Cf., People v. Honshell, 10 Cal. 83 (1858) (forcibly evicting real estate from person in possession), People v. Wild, 60 Cal.App.3d 829, 832-33, 131 Cal.App. 713, 715 (1976) (excessive and deadly force used in apprehending victim committing vandalism sufficient to support manslaughter conviction).

58 For example, the accidental discharge of a firearm forming the basis of an assault and battery to established the predicate act in People v. Hashaway, 67 Cal.App.2d 554, 570-71, 155 P.2d 101, 108 (1945). The court made a distinction between brandishing and firearm use in People v. Read, 142 Cal.App.3d 900, 191 Cal.Rptr. 305 (1983). The Read court held that violation of Penal Code section 12022.5 could not be used as a predicate act, but could be used as an enhancement. 142 Cal.App.3d at 907, 191 Cal.Rptr. at 308, see also People v. McManis, 26 Cal.App.3d 608, 614, 102 Cal.Rptr. 889, 892 (1972), (trial court committed error in failing to give inherently dangerous jury instruction).

59 People v. Mann, 64 Cal. 211-13, 3 P. 650-52 (1884) (“2 or 3 blows of the fist” fracturing victim’s skull), People v. Denomme, 6 Cal.Unrep. 227, 229-30, 56 P. 98, 99 (1899) (defendant struck victim a number of times which caused victim to die of a “rupture of the heart”), People v. Mullen, 7 Cal.App. 547, 547, 549, 94 P. 867, 867-68 (1908) (defendant struck victim causing a fracture of victim’s temporal bone located in head), People v. Stokes, 11 Cal.App. 760, 760-61,
that the assault and battery need not be severe.\textsuperscript{59} This long line of authority established assault and battery as an universally acceptable predicate act, with little or no limitation. Hence, under this reasoning, even minimally dangerous acts of assault and battery, \textsuperscript{60} could be used as a predicate act.\textsuperscript{61}

For example, in \textit{People v. Clark},\textsuperscript{62} the defendant challenged his conviction

\begin{quote}
\end{quote}
based on a predicate offense of assault and battery. The defendant argued assault and battery are not inherently dangerous to life. The court’s limited reasoning consisted solely of the observation that assault and battery often are used as a predicate act in this context. In passing, the court did cite People v. Williams as controlling.

Williams provided very little reasoning for the Clark court to follow. In Williams, the California Supreme Court impliedly ruled that assault and battery are sufficient predicate acts. According to Williams, the trial court committed non-reversible error when using battery as a predicate act, but failed to define battery for the jury. Williams specifically referred to battery as an “inherently dangerous to life misdemeanor.”

63 As will be discussed infra, the inherently dangerous standard has been rejected by the California Supreme Court. Regardless, a very long line of authority either used that standard or more often did not reach that portion of the analysis in their holdings accepting many predicate acts as a matter of course.

64 130 Cal.App.3d 371, 181 Cal.Rptr. 682.
65 Id.
66 13 Cal.3d 559, 531 P.2d 778, 119 Cal.Rptr. 210 (1975)
67 130 Cal.App.3d 382-83, 181 Cal.Rptr. at 688-89.
68 Id. at 562-64, 531 P.2d at 78-81, 119 Cal.Rptr. at 212-13.
69 “This instruction must be supplemented by defining the inherently-dangerous-human-life misdemeanor or misdemeanors involved and by specifying what conduct under the evidence could constitute such misdemeanor or misdemeanors.” Id. at 562, 531 P.2d at 780, 119 Cal.Rptr. at 212. (citations omitted). This statement of the Williams court is directly contrary to the California Supreme Court’s decisions in People v. Wells, 12 Cal.4th 979, 911 P.2d 1374, 50 Cal.Rptr.2d 699, (1996) and People v. Cox, 23 Cal.4th 665, 2 P.3d 1189, 97 Cal.Rptr.2d 647 (2000), see fn. 54 infra. The Cox court acknowledged “a line of early line of intermediate appellate courts” predating Stuart that held assault and battery could automatically act as a predicate offense in this context. 23 Cal.4th at 676, 2 P.3d at 1496, 97 Cal.Rptr. at 675. However, the Cox court did not explain the Williams reasoning that post-dated Stuart. For those reasons, it is unclear how Williams can be reconciled with Wells and Cox. Still, the Cox court specifically held that the nearly automatic acceptance assault and battery as a predicate act did
As discussed in the gun cases *supra*, the rule has been applied in situations of excessive force in self-defense. In *People v. Glenn*,\textsuperscript{70} the defendant stabbed the victim with a knife following an argument.\textsuperscript{71} The defendant testified he thought the victim had pursued him to attack him from his rear.\textsuperscript{72} Inconsistently, he claimed he stabbed the victim in a reflex action or stabbed him in self-defense.\textsuperscript{73} Either way, he testified he did not intend to kill the victim.\textsuperscript{74} The *Glenn* court held that the defense case supported a finding both of reckless conduct manslaughter and an unlawful act manslaughter case based on excessive self-defense. As such, it reversed the conviction for failure to instruct the jury on both theories of involuntary manslaughter.\textsuperscript{75}

There is one additional consideration in these earlier minor assault and battery cases. They do not fall within the justification of the rule. As explained *supra*, the primary policy underlying the rule is society’s respect for the person’s right to life and conduct taking a life requires punishment proportional to society’s loss. In contrast, one of the arguments against the rule is that a random set of circumstances in the commission of a minor offense should be the basis of felony involuntary manslaughter. As such, it would clearly be unjust where a minor

\textsuperscript{70}229 Cal.App.3d 1461, 280 Cal.Rptr. 609 (1991)  
\textsuperscript{71}Id. at 1463-64, 280 Cal.Rptr. at 610, 610.  
\textsuperscript{72}Ibid.  
\textsuperscript{73}Id. at 1464, 280 Cal.Rptr. at 610, 610.  
\textsuperscript{74}Ibid.  
\textsuperscript{75}Id. at 1467, 280 Cal.Rptr. at 612-613.
assault and battery can result in a felony homicide in contrast to a brutal assault
and battery results in a misdemeanor conviction simply due to the victim living
through the ordeal. Until California courts later began to consider issues, such as
the manner in which the predicate act had been performed or even the intrinsic
nature of the predicate act, these assault and battery cases highlighted the knee-jerk
reaction\textsuperscript{76} in this context. Neither public safety, nor danger to life are necessarily
even a consideration in the analysis of many of these cases. This history
demonstrates the arguably chance nature\textsuperscript{77} of the unlawful act manslaughter rule.

D. Miscellaneous Cases

At least two California cases have applied the unlawful act manslaughter
rule to defendants who assisted victims in procuring or taking controlled
substances.

In \textit{People v. Wong},\textsuperscript{78} the defendant supplied narcotics to a minor victim who
subsequently overdosed.\textsuperscript{79} The \textit{Wong} court impliedly found a possible underlying

\textsuperscript{76}One example would be myopic reasoning found in \textit{People v. Tophia}, 167 Cal.App.2d 39, 334 P.2d 133 (1959). In that case, the court ignored the issue of foreseeablelicity and read the statute literally with little consideration of the particular facts of the case. In \textit{Tophia}, the defendant took a gun to a bar intending to sell it and did not realize it had been loaded. \textit{Id.} at 42, 334 P.2d at 135. Attacked by a man with a knife, the defendant used the gun as a club to protect himself. \textit{Ibid.} The gun accidentally discharged killing someone in the building across the street. \textit{Ibid.} The \textit{Tophia} court reasoned that the use of gun as a club established a predicate offense of assault as the victim’s death occurred “in the course of the assault.” \textit{Id.} at 45, 334 P. 136-37.

Although the court did affirm on the alternate grounds of reckless involuntary manslaughter, the \textit{Tophia} court did not exhibit even a basic understanding of the predicate offense necessary under the unlawful act misdemeanor rule or the proximate course required under criminal law.

\textsuperscript{77}See \textit{State v. Pray} 378 A.2d 1322, 1324 (Me. 1977) (quoted \textit{supra}).

\textsuperscript{78}35 Cal.App.3d 812, 111 Cal.Rptr. 314 (1973)

\textsuperscript{79}\textit{Id.} at 822, 111 Cal.Rptr. at 322.
unlawful act with violation of section 272 of the penal code\textsuperscript{80} by contributing to the delinquency of a minor.\textsuperscript{81} By affirming the conviction of involuntary manslaughter,\textsuperscript{82} Wong also affirmed jury instruction using contributing as the predicate offense.\textsuperscript{83} The instructions premised the defendant’s manslaughter culpability\textsuperscript{84} on his aiding and abetting\textsuperscript{85} in violation of section 272.\textsuperscript{86}

In \textit{People v. Hopkins},\textsuperscript{87} the defendant “tied off” the victim as the victim injected heroin into his arm.\textsuperscript{88} The victim died of an overdose.\textsuperscript{89} The \textit{Hopkins} court utilized aiding and abetting the statute prohibiting heroin use as the predicate offense.\textsuperscript{90}

\textit{Wong} and \textit{Hopkins} illustrate two misdemeanors differing in their nature. \textit{Wong} utilized a statute as a predicate offense not specifically designed to protect public safety, but created to protect the general welfare of children.\textsuperscript{91} With its

\begin{itemize}
\item \textsuperscript{80}Cal Penal Code § 272 (West Supp. 2007).
\item \textsuperscript{81}Id. at 833, 11 Cal.Rptr. at 833, 111 Cal.Rptr. 328-29.
\item \textsuperscript{82}Id. at 837, 111 Cal.Rptr. at 332.
\item \textsuperscript{83}Id. at 835, fn.2, 111 Cal.Rptr. at 331, fn.2.
\item \textsuperscript{84}The Wong court based its holding on alternative grounds. The court reasoned that the requirements of first and second degree murder had been met. Thus, the court reasoned that the defendant had committed involuntary manslaughter as a lesser included offense. 35 Cal.App.3d at 829-830, 111 Cal.Rptr. 327.
\item \textsuperscript{85}Cal. Penal Code § 32 (West 1999).
\item \textsuperscript{86}Id. at 835, 111 Cal.Rptr. at 331.
\item \textsuperscript{87}101 Cal.App.2d 704, 226 P.2d 74 (1951).
\item \textsuperscript{88}Id. at 705-06, 22 P.2d at 75-76.
\item \textsuperscript{89}Ibid.
\item \textsuperscript{90}Cal. Penal Code § 11550 (West 1999), 226 P.2d at 76-77, 101 Cal.App.2d at 706.
\item \textsuperscript{91}Section 272 only says that criminal liability comes with acts or omissions tending to bring a minor within the statutes dealing with neglected children, with children who violate status offenses (offenses only because of age), and children who commit adult offenses. Because courts are allowed to shape section 272 around the needs of children of the children, no specific
violation, a heightened moral culpability does not automatically follows with the blame that is associated with a violation of public safety statute which specifically forbids the harm that is prohibited. In contrast, the violation of penal code section 11550 relied on a statute specifically representing a response to a specific danger to the public.\textsuperscript{92}

E. California Supreme Court Settles The Issue Of Inherently Dangerous Predicate Act Or Predicate Act Done Dangerously

Since the language in \textit{Stewart} stating the underlying offense must be dangerous, the California Supreme Court finally and expressly settled whether the predicate act must be dangerous in the abstract or as committed. The California Supreme Court rejected the predicate offense rule of the offense being dangerous in the abstract as utilized in the second degree murder rule.\textsuperscript{93} Instead, the California Supreme Court in \textit{People v. Cox}\textsuperscript{94} and \textit{People v. Wells}\textsuperscript{95} expressly [societal harm can be identified as the harm to be prevented by the statute.\textsuperscript{92}Under the previous approach under the unlawful act rule, it is significant that the predicate act had been inherently dangerous. As such, under that previous analysis of inherent danger, section 272 would not qualify as a predicate offense, but section California Penal Code 11550 (West 1999) would qualify. However, under the standard of the manner in which the offense had been violated, as opposed to inherent danger, both statutes would qualify as a predicate act under the unlawful act rule.\textsuperscript{93}\textsuperscript{C.f.,} People v. Burroughs, 35 Cal.3d at 830, 833, 678 P.2 at 898, 900, 201 Cal.Rptr. at 323, 325 (felony practice of medicine not inherently danger to life), People v. Henderson, 19 Cal.3d at 93-96, 560 P.2d at 1183-86, 137 Cal.Rptr. at 4-7 (felony false imprisonment not inherently dangerous to life).\textsuperscript{94}23 Cal.4th 665, 2 P.3d 1189, 97 Cal.Rptr.2d 647 (2000).\textsuperscript{95}12 Cal.4th 979, 911 P.2d 1374, 50 Cal.Rptr.2d 699, (1996). The Wells court dealt with one misdemeanor and five infractions as predicate acts including: reckless driving; failure to keep to the right side of the road; failure to obey “mountain roadway” rules; unsafe turn; failure to obey maximum speed law; and failure to obey basic speed law.\textsuperscript{25}
determined the manner in which the predicate unlawful act had been committed and not dangerous in the abstract is the standard to be used in this context. Cox and Wells explained they amplified the holding in People v. Stuart in these cases.

Surprisingly, an excellent example of the holding of Wells and Cox predated those cases in People v. Hansen. In Hansen, the court dealt with a prosecution for violation of Penal Code section 191.5, subdivision (a) which includes the elements of driving under the influence and gross negligence. The defendant drove under the influence, violated the speed limit driving at eighty miles per hour, and swerved between lanes. When getting in the car, the victim got into the backseat in a position that did not allow her to put on her seat belt. The

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96 Contra, Moreland, Law of Homicide 55 (1952) (rule breaks down unless unlawful is synonymous with inherently dangerous).
97 This reasoning is suspect as the Stuart court specifically said in dictum that the predicate act must be dangerous to life. Although it could indicate that it requires an assessment of the manner the predicate act is committed, “dangerous to life” would seem to indicate an assessment of the intrinsic nature of the predicate act.
98 It should be noted that reasoning of the reversed court of appeal and trial court in Cox is inexplicable. The trial court instructed the jury that the predicate offense of battery is an inherently dangerous offense as a matter of law and further proof of the predicate offense is unnecessary. 23 Cal.4th at 669, 2 P.3d at 1192, 97 Cal.Rptr.2d at 650. Division Five of the Second Appellate District affirmed this action by the trial court. The California Supreme Court’s ruling in Wells had been decided in 1996. At the time of the appeal in Cox, this point of law had been clearly settled by the California Supreme Court in Wells. The decisions in Cox by the trial court and affirmed by Division Five of the Second Appellate District, apparently oblivious of supreme court precedent, held otherwise. This approach, contrary to supreme court precedent, made it through two levels of the criminal court system in the Cox case. One has to wonder about the remedies, if any, for the unknown number of cases that did not have the benefit of Cox that got affirmed in appellate court here and other trial and appellate courts that did not have fortune of having review granted in the California Supreme Court as the defendant in Cox.
99 10 Cal.App.4th at 1066, 12 Cal.Rptr.2d at 884.
100 See fn.2 supra.
101 10 Cal.App.4th at 1066-70, 12 Cal.Rptr.2d at 884.
102 Id. at 1068, 12 Cal.Rptr.2d at 885.
defendant subsequently had a collision killing the victim.\textsuperscript{103} At trial, a portion of the prosecution’s argument focused on the violation of the seatbelt law\textsuperscript{104} as an unlawful act under the charge.\textsuperscript{105}

The *Hansen* court first explained that the seatbelt violation could be a factor as to the gross negligence issue.\textsuperscript{106} Still, because of the issues raised at trial, it had to address whether a seatbelt violation could be used as a predicate unlawful act under the charge.\textsuperscript{107} After some discussion of the violation of the seatbelt law in a civil negligence context, the *Hansen* court reasoned in the context of defendant’s other conduct, the seatbelt violation could be a predicate unlawful act when considered with the defendant’s other conduct.\textsuperscript{108} The significant holding of this case is *sub silencio*, the *Hansen* court held that the seatbelt violation could qualify as an unlawful act due to the dangerous manner of its violation.

*Cox* directly overruled\textsuperscript{109} *People v. Wright*\textsuperscript{110} and *People v. Ramsey*.\textsuperscript{111} As an example, *Wright*’s reasoning, as have other cases, clearly conflicted with the

\textsuperscript{103}Id. at 1069, 12 Cal.Rptr.2d at 886.
\textsuperscript{105}10 Cal.4th at 1073, 12 Cal.Rptr.2d at 889.
\textsuperscript{106}Id. at 1076, 12 Cal.Rptr.2d at 891.
\textsuperscript{107}Ibid.
\textsuperscript{108}Id. at 1078, 12 Cal.Rptr.2d at 892.
\textsuperscript{109}23 Cal.4th at 671, 97 Cal.Rptr. at 652, 2 P.2d at 1193.
\textsuperscript{110}60 Cal.App.3d 6, 131 Cal.Rptr. 311 (1976).
\textsuperscript{111}17 Cal.App.3d 731, 95 Cal.Rptr. 231 (1971).
reasoning in Cox.\textsuperscript{112} Wright involved the use of misdemeanor child abuse\textsuperscript{113} as the predicate offense in this context.\textsuperscript{114} The Wright court reasoned because the statute expressly excluded circumstances other than those likely to cause great bodily harm or death, the statute could not be used as a predicate offense under the unlawful act rule.\textsuperscript{115} The Wright court’s clear error came in its reasoning that the predicate act must be inherently dangerous to qualify under the rule. Wright relied not on conduct, but on the statute’s terms that stated it is not dangerous. Thus, Wright reasoned directly contrary to reasoning of Cox which held the only consideration of the predicate unlawful act in this context is whether the predicate act had been committed in a dangerous manner. As set out supra, many of the firearms and assault cases erred in the same manner echoing the Wright case’s error.

In the context of the permissible predicate act, California courts have limited the bald language of “unlawful act” in the statute. As demonstrated by the extensive lines of authority related to assault and battery and the firearm cases, without some rationale intervention, justice could not help but become random in the application of this rule.

\textsuperscript{112}Some cases do not clearly indicate what standard they use as to dangerousness, and appear to be willing to utilize any unlawful act. \textit{E.g.}, People v. Escarcega, 273 Cal.App. 853, 857, 78 Cal.Rptr. 785 (1969) (disturbing the peace),

\textsuperscript{113}California Penal Code § 273a, subbed.(2) (West 1999)

\textsuperscript{114}60 Cal.App.3d at 12, 131 Cal.Rptr. at 315.

\textsuperscript{115}Id. at 10-11, 131 Cal.Rptr. at 314-15.
VII. Proximate Cause

In *People v. Penny*, the defendant violated the misdemeanor offense requiring a license to practice cosmetology. Additionally, the defendant had violated the misdemeanor prohibiting the use of a facial solution containing greater than ten percent phenol.

The *Penny* court held that the licensing offense could not be utilized as the predicate offense, but that the phenol offense could be used. The *Penny* reasoning approached the issue of causation in two contexts. Death is not reasonably foreseeable based on the failure to obtain a cosmetology license. However, death is a reasonable foreseeable result of the use of phenol intoxication. As the *Penny* court explained: “(the homicide must be the) probable consequence flowing from the unlawful act.” for the unlawful act misdemeanor rule to apply.

In *People v. Morgan*, the court refused to accept the defendant’s argument that the tort proximate causation rules did not apply and affirmed a conviction in a

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116 44 Cal.2d 861, 285 P.2d 926 (1955)
117 Id. at 863-865, 285 P.2d at 928-29.
119 44 Cal.2d at 868, 285 P.2d 930.
120 Id. at 868, 285 P.2d at 930, quoting People v. Derrick, 86 Cal.App. 542, 261 P. 756 (1927). In Derrick, the trial court convicted the defendant of involuntary manslaughter based on the misdemeanor of unlawful assembly. *Id.* at 546-548, 261 P. At 757-758. A very boisterous party involving a large amount of alcohol took place. *Id.* at 544-545, 261 P. at 756- 57. During the course of the party, an argument between a husband and wife took place. The husband got shot by accident. *Id.* at 545, 261 P. 757. The appellate court reversed the convictions of the defendants who attended the party.
death resulting from a pre-existing heart condition.\textsuperscript{122} Although the Morgan court refused to accept the argument, the issue of causation should have been satisfied in a large part due to the facts that the attack had been directed at the victim in close proximity. Hence, as in Penny, the death “flowed from the act. This in contrast to the defendant in People v. Sophia\textsuperscript{123} where the defendant directed his attack toward a person other than the victim and not been in proximity of the victim.\textsuperscript{124}

The reasoning in People v. Butts\textsuperscript{125} is consistent with the reasoning with Penny. In Butts, the defendant had been convicted under the unlawful act rule following his participation in a brawl involving several people.\textsuperscript{126} The Butts court reversed the conviction reasoning that the fatal stabbing, not involving the defendant, did not flow from the defendant’s act of participating in the brawl where defendant had been unaware that any weapons would be used.\textsuperscript{127}

In People v. Barnard,\textsuperscript{128} the conviction utilized a predicate act of conspiracy to violate former section 2141 of the California Business and Professions Code.\textsuperscript{129} Additionally, the defendant had been convicted under a criminal negligence manslaughter theory.\textsuperscript{130} The Barnard court reasoned: “(the prosecutor must do)

\textsuperscript{122}Id. at 606, 79 Cal.Rptr. at 913.
\textsuperscript{123}See fn.78 supra.
\textsuperscript{124}Ibid.
\textsuperscript{125}236 Cal.App.817, 42 Cal.Rptr. 362 (1965)
\textsuperscript{126}Id. at 823-25, 836-37, 47 Cal.Rptr. at 366-67, 373-74.
\textsuperscript{127}Id. at 836-37, 46 Cal.Rptr. at 734.
\textsuperscript{128}222 Cal.App.2d 567, 35 Cal.Rptr. 401 (1963)
\textsuperscript{129}Id. at 585-587, 592, 35 Cal.Rptr. at 412-14, 417.
\textsuperscript{130}Id. at 588-91, 35 Cal.Rptr. at 414-16.
more than establish mere coincidence between such an act, and the fact of death. It must establish a ‘casual connection’ between the violation and the loss of life.”

As such, the Barnard court reversed the conviction as the trial court failed to sua sponte instruct the jury on proximate cause.

Hence, California courts have used the basic rule of proximate cause to further temper the unjust nature of the bald application of the rule. Without this simple application of causation rules, as warned by critics of the rule, involuntary manslaughter liability would not be premised on conduct, but on unexpected variables that are associated randomly occur.

VIII. Conclusion

The task of the judge is to make a principle living, not by deducing from its rules to be, like the Freshman’s hero, ‘immortal for a great number of years,’ but by achieving thoroughly the less ambitious but more useful labor of giving a fresh illustration of the intellectual application of the principle to a concrete cause, producing a workable and just result.

On its face, the rule’s application would be blind to the proportionality

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131 Id. at 590-91, 35 Cal.Rptr. at 416, (citations omitted).
132 Id. at 590-91, 595-96, 35 Cal.Rptr. at 416, 419.
134 Cf., In Re Heigho, 18 Idaho 566, 110 P. 1029, 1030-32 (1910) (defendant struck another person in face, victim, the person struck’s mother in law watched episode and suffered fatal heart attack), State v. Ayers, 478 N.W.2d 606, 608 (Iowa 1991) (defendant sold gun to minor without permit, minor accidentally shot and killed girlfriend while showing gun off), Todd v. State, 594 So.2d 802, 805-806 (Fla.App. 1992) (defendant stole money from church collection plate, member of church pursued them in car, hit tree and died of cardiac arrest.
135 Roscoe Pound, Mechanical Jurisprudence, 8 Colum. L.Rev. 109, 126 (1908)
between the conduct and the culpability of a perpetrator. Although the most logical response would be abolition of the rule, but the legislature has refused to intervene. It would be far more just to limit involuntary manslaughter liability to criminal negligence. Unfortunately, this is unlikely to happen as demonstrated by the analogous first degree murder rule.

The failure of the legislature to temper or abolish this rule has forced the California courts to narrowly construe the rule to a point of possibly violating the “plain language rule” of statutory construction. Still, the courts merely responded to the obvious random injustice that would be result of bald application of its terms.\footnote{The form California July Instruction states:}

The defendant is charged [in Count ____ ] with involuntary manslaughter. To prove that the defendant is guilty of this crime, the People must prove that: 1. The defendant(committed a crime that posed a high risk fo death or great bodily harm because of the way in which it was committed/ [or] committed a lawful act, but acted with criminal negligence]; and The defendant’s acts caused the death of another person.

[The People allege that the defendant committed the following crime[s] <insert misdemeanor[s]/[infractions/noninherently (felony/felonies)> Instruction(s).]

[The People [also] allege that the defendant committed the following lawful[s] with criminal negligence: ________ <insert act[s] alleged>.] Instruction[s] __________ tells[s] you what the People must prove in order to prove that the defendant committed <insert misdemeanor[s]/infractions[s]/non inherent felony.]

[Criminal negligence involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with criminal negligence when: 1. He or she acts in a reckless way that creates a high risk of death or great bodily injury; AND a reasonable person would have known that acting in that way would create such}
addressing the intent, predicate act and proximate cause components through case law, leaving culpability far more proportional to the defendant’s conduct. To a large degree the California appellate courts have been successful.

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a risk. In other words, a person with criminal negligence when the way he or she acts is so different from the way an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference in the consequences of that act.]

[An act causes death if the death is the direct, natural, and probable consequence of the is one that a reasonable person would know is likely to happen if nothing usual intervenes. In deciding whether a consequence is a natural and established by the evidence.]

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