

Justice Peters and the Criminal Law

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When first invited to participate in this tribute to Justice Raymond E. Peters, I hesitated.¹ After all, I had not closely followed his career as a jurist, nor did I have any special familiarity with his opinions or judicial philosophy. But I was intrigued by the opportunity to study the justice who only recently in writing the opinion in *People v. [another] Norman Abrams*² commented that the issues turned “largely upon the credibility of petitioner” and then proceeded to reject all of the petitioner’s contentions.³

Reading the opinions, both majority and dissenting, written by a single justice over a limited period of time is an instructive exercise. Although it may not give any longterm historical perspective into the evolution of the man’s judicial philosophy, it will reveal his stance on some of the more important legal issues of the time. It may also provide some insight into the degree to which that justice possesses the qualities that a jurist ought to have—qualities such as independence of mind, craftsmanship, imagination and breadth of vision. On all of these counts, Justice Peters scores well.

That he possesses these qualities is best demonstrated by a close examination of his opinions. In Part I, therefore, I review a number of his dissents on constitutional criminal procedure. Although he has written numerous majority opinions in this area,⁴ it is clearly in the vigor and independence of his dissents that he is at his best. It is much more difficult to get a clear impression of Justice Peters from his opinions on substantive criminal law. Consequently in Part II, I have contented myself with taking the opportunity to use two of his recent opinions on felony-murder as a vehicle to make some suggestions for correcting an existing imbalance in the California law of homicide.

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1. The *California Law Review* was kind enough to provide on short notice all citations to opinions by Justice Peters in the criminal law area since 1965.

2. 67 Cal. 2d 821, 433 P.2d 731, 63 Cal. Rptr. 723 (1967).

3. If Justice Peters was correct in his assessment of the credibility of the petitioner, it may not suffice for me simply to deny that I am he. Cf. *Psalms* 116:11.

4. *People v. Davis*, 66 Cal. 2d 175, 424 P.2d 682, 57 Cal. Rptr. 130 (1967); *People v. Buchanan*, 63 Cal. 2d 880, 409 P.2d 957, 48 Cal. Rptr. 733 (1966); *People v. Stockman*, 63 Cal. 2d 494, 407 P.2d 277, 47 Cal. Rptr. 365 (1965).

I

JUSTICE PETERS AND CONSTITUTIONAL CRIMINAL PROCEDURE

In the past decade and a half, both the Supreme Court of the United States and the Supreme Court of California have been active in developing new and significant constitutional standards to protect the criminal accused. Often a California high court decision has been the advance guard of a related United States Supreme Court case—either anticipating or perhaps even influencing a new federal constitutional development.⁵ There also have been instances where a landmark federal opinion protective of the individual has been written in the wake of the reversal of a California supreme court decision.⁶ Nevertheless, a majority of the California court has usually joined in decisions such as *People v. Cahan*,⁷ *People v. Martin*,⁸ *People v. Aranda*,⁹ and *People v. Dorado*,¹⁰ establishing doctrines which favor the rights of criminal defendants.

These general doctrines may, however, be less protective of the individual than at first appears. There may be no reason for complaint by those who cry out that the courts are hamstringing law enforcement. Indeed, it may be that civil libertarians should be the ones to complain if the courts appear to establish protections that turn out on close inspection to be ephemeral. The real impact of these various constitutional standards depends, in large measure, on how trial and appellate courts interpret and apply the series of subsidiary doctrines that operate to qualify the basic constitutional standards. Thus it is the judicial handling of issues such as waiver, prejudicial error, standing, retroactivity, fruit-of-the-poisonous-tree, that really determines the impact of the basic rules established in *Mapp v. Ohio*,¹¹ *Escobedo v. Illinois*,¹² *People v. Dorado*,¹³ *Miranda v. Arizona*,¹⁴ *Griffin v. California*,¹⁵ *United States v. Wade*¹⁶ and similar cases.

5. *E.g.*, *People v. Dorado*, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169, *cert. denied*, 381 U.S. 937 (1965).

6. *E.g.*, *Griffin v. California*, 380 U.S. 609 (1965), *reversing* 60 Cal. 2d 182, 383 P.2d 432, 32 Cal. Rptr. 24 (1963).

7. 44 Cal. 2d 434, 282 P.2d 905 (1955).

8. 45 Cal. 2d 755, 290 P.2d 855 (1955).

9. 63 Cal. 2d 518, 407 P.2d 265, 47 Cal. Rptr. 353 (1965).

10. 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169, *cert. denied*, 381 U.S. 937 (1965).

11. 367 U.S. 643 (1961).

12. 378 U.S. 478 (1964).

13. 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965).

14. 384 U.S. 436 (1966).

15. 380 U.S. 609 (1965).

16. 388 U.S. 218 (1967).

In this area Justice Peters has made a significant mark as a dissenter. It is possible to find a Peters dissent on practically every one of these issues.¹⁷ For while a majority of the California supreme court has often been willing in particular cases to limit the scope of a protection for the accused, Justice Peters has consistently and persistently opted for those applications of the subsidiary doctrines that are most protective of the accused. For so doing, it is appropriate to describe him—using a term much maligned today—as the most liberal member of the court on which he sits.

In a lovely series of lonely dissents,¹⁸ reminiscent of Brandeis, Murphy and Rutledge, Douglas and an earlier Black, Justice Peters often scolds the majority for their niggardly interpretations of the relevant doctrines. Many of these dissents involve no disagreement between him and the majority on basic principles. Rather, they involve a different reading of the constitutional significance of particular facts. His dissents, for example, in *People v. Hines*¹⁹ and *People v. Modesto*²⁰ fall into this category.

In *People v. Hines* Justice Peters sharply disagreed with the rest of the court in construing the significance of facts in an *Escobedo-Dorado* context. The defendant had walked into a police station voluntarily to confess, and the police had “talked” with him for 55 minutes. On appeal the majority of the California court held that the officers’ purpose was not to elicit a confession but rather to eliminate the possibility that the defendant was mentally disturbed or a fraud.²¹ Justice Peters sharply disagreed with this construction of the facts and went as far as to label the majority opinion “misleading.”²² When other officers entered into the interrogation, in his view the accusatory stage began. Since in the latter portion of his confession the defendant made particularly prejudicial statements and these may have

17. *E.g.*, *People v. Lookadoo*, 66 Cal. 2d 307, 425 P.2d 208, 57 Cal. Rptr. 608 (1967) (waiver); *People v. Jacobson*, 63 Cal. 2d 319, 405 P.2d 555, 46 Cal. Rptr. 515 (1965) (prejudicial error); *People v. Varnum*, 66 Cal. 2d 808, 427 P.2d 772, 59 Cal. Rptr. 108 (1967) (standing); *People v. Rollins*, 65 Cal. 2d 681, 423 P.2d 221, 56 Cal. Rptr. 295 (1967) (retroactivity); *People v. Mathis*, 63 Cal. 2d 416, 406 P.2d 65, 46 Cal. Rptr. 785 (1965) (fruit-of-the-poisonous-tree).

18. For example, in addition to *Hines*, *Modesto*, *Varnum*, and *Lara*, discussed *infra*, see *People v. Lookadoo*, 66 Cal. 2d 307, 425 P.2d 208, 57 Cal. Rptr. 608 (1967); *People v. Rollins*, 65 Cal. 2d 681, 423 P.2d 221, 56 Cal. Rptr. 295 (1967); *People v. Carrillo*, 64 Cal. 2d 387, 412 P.2d 377, 50 Cal. Rptr. 185 (1966); *People v. Graves*, 64 Cal. 2d 208, 411 P.2d 114, 49 Cal. Rptr. 386 (1966); *People v. Jacobson*, 63 Cal. 2d 319, 405 P.2d 555, 46 Cal. Rptr. 515 (1965).

19. 66 Cal. 2d 348, 425 P.2d 557, 57 Cal. Rptr. 757 (1967).

20. 66 Cal. 2d 695, 427 P.2d 788, 59 Cal. Rptr. 124 (1967).

21. 66 Cal. 2d 348, 353, 425 P.2d 557, 560, 57 Cal. Rptr. 757, 760 (1967).

22. 66 Cal. 2d at 359, 425 P.2d at 564, 57 Cal. Rptr. at 764.

influenced the jury to impose the death penalty,²³ Justice Peters urged reversal of the conviction.

Similarly, in *People v. Modesto*, Justice Peters strongly chastised his brethren for holding that statements of the prosecutor were not prejudicial:

Repeatedly . . . [the prosecutor] commented on this failure of the defendant to explain adverse evidence against him. The prosecutor time and again impliedly argued that defendant could have explained but did not, thus at least implying that silence constitutes an admission. That argument was clearly erroneous and most prejudicial Can we affirmatively declare that there is no "reasonable possibility" that these repeated references could not have convinced at least one member of the jury to vote for first degree rather than some other reduced degree, and could not have induced at least one member of the jury to vote for the death penalty rather than life? Of course not.²⁴

In addition to construing facts having constitutional dimension most favorably to the accused, Justice Peters has in his dissents also consistently taken positions most protective of the defendant on legal issues relating to the application of subsidiary doctrines. In *People v. Varnum*²⁵ a majority of the court qualified the prevailing California rule, first announced in the context of a search and seizure case,²⁶ that a defendant has standing to object even though his own rights have not been invaded. The majority held that non-coercive questioning is not by itself unlawful and that the fifth and sixth amendment rights protected by *Escobedo*, *Dorado* and *Miranda* are violated only when the evidence is introduced against the person whose rights were violated.²⁷ Unlike the standing rule in search and seizure²⁸ and coerced confession²⁹ cases, a defendant thus has no standing to object to evidence obtained as a result of interrogation of another who was denied his *Escobedo-Dorado* or *Miranda* protections. The decision is far-reaching and illustrates how a majority of the California court has been tightening up on the breadth of application of recently formulated constitutional doctrine protective of accused persons.

Justice Peters labeled the majority opinion for what it is:

23. *Id.*

24. 66 Cal. 2d 695, 718-19, 427 P.2d 788, 803-04, 59 Cal. Rptr. 124, 139-40 (1967).

25. 66 Cal. 2d 808, 427 P.2d 772, 59 Cal. Rptr. 108 (1967).

26. *People v. Martin*, 45 Cal. 2d 755, 760-61, 290 P.2d 855, 856-57 (1955).

27. 66 Cal. 2d at 812, 427 P.2d at 775, 59 Cal. Rptr. at 111.

28. *People v. Martin*, 45 Cal. 2d 755, 760-61, 290 P.2d 885, 856-57 (1955).

29. *Cf. People v. Varnum*, 66 Cal. 2d 808, 812-13, 427 P.2d 772, 776, 59 Cal. Rptr. 108, 112 (1967).

If this holding is correct, then a big hole has been blown in the barriers erected by *Escobedo*, and its progeny The practical effects of such a holding cannot be minimized. What the majority have done is to attempt to turn a doctrine protective of constitutional rights into a rule of evidence I interpret [the] . . . words [of *Miranda*] as limitations on police activity—the majority do not. A conscientious police officer must, of course, try to obtain evidence by every lawful means. Now he is impliedly told by the majority that, where there are multiple suspects, he may . . . interrogate one suspect in violation of these rights in the hope of getting admissible evidence against the other suspects. The majority opinion can be interpreted as not only condoning but in effect encouraging such violation of fundamental constitutional rights.³⁰

No one can accuse Justice Peters of pulling his punches with his brethren.

In *People v. Lara*,³¹ defendant, a minor, had been given the *Escobedo-Dorado* warnings, and the issue was whether he had intelligently waived. In what was for him a lengthy dissent (twelve pages), Justice Peters rejected the “totality of circumstances” test advanced by the majority and argued that the issue was not coercion but rather the competency of the minor to waive his constitutional rights. He concluded that a minor is incompetent to waive his *Escobedo-Dorado* rights unless he is afforded the counsel and advice of an adult, parent, guardian, or other responsible person.³²

From a reading of these few dissenting opinions, Justice Peters appears not to be one who constantly attempts to balance the requirements of law enforcement against the protection of the accused. Rather he looks to what he perceives as the basic purpose of the constitutional protections involved and proceeds to apply the underlying doctrine in all of its rigor. In reading facts having a constitutional dimension he tends to adopt constructions most favorable to the accused. In taking doctrinal positions, he assumes that the police will take maximum advantage of any doctrinal loophole given to them. And he prefers clear precise standards protective of individual rights to murky tests the meaning of which must be developed on a case-by-case basis.

Examination of such a series of opinions inevitably raises questions about the value and function of the dissenting opinion.

30. 66 Cal. 2d at 816, 819, 427 P.2d at 778, 780, 59 Cal. Rptr. at 114, 116.

31. 67 Cal. 2d 365, 432 P.2d 202, 62 Cal. Rptr. 586 (1967). See also *In re Dennis M.*, 70 Adv. Cal. 460, 450 P.2d 296, 75 Cal. Rptr. 1 (1969).

32. 67 Cal. 2d at 396, 432 P.2d at 223, 62 Cal. Rptr. at 607.

What becomes clear upon examination of Peters' dissents is that some of these opinions are of less general significance than others and that he does not appear to take into account such significance in determining whether or not to write his opinion. Thus, when Justice Peters in dissent simply disagrees with the majority's reading of the facts and their legal significance—*Hines* and *Modesto* are illustrative—his dissenting opinion serves limited functions only. It may satisfy the individual need of the Justice to make his views public. It may provide some solace, however slight, for the defendant languishing in prison and his counsel. It may also serve as a reminder to the public that these constitutional issues involve close and difficult questions about which honest and reasonable men can disagree and to the police that the court often sides with them. And finally, it may remind the rest of the court that Justice Peters is looking over their shoulder. But such opinions have no particular precedent value nor will they, like some of the classic Holmes-Brandeis or Black-Douglas opinions, later become majority opinions.

To be distinguished, however, are those opinions involving not merely particular applications of existing doctrine but establishment or rejection of new principles. Thus his opinion in *Lara* may have much greater impact than opinions in such cases as *Hines* or *Modesto*. The United States Supreme Court considered a case last term that might have raised the *Lara* issue but dismissed the case without passing on the merits.³³ The implications of *In re Gault*³⁴ for the *Miranda* issue remain unresolved on the federal level, where Peters' *Lara* dissent may yet find vindication.

His dissent in *People v. Varnum*, too, initially appears to be of the stuff of which a future majority opinion is made. In my view, he makes the much better argument both as a matter of doctrinal analysis—the majority opinion by Justice Traynor is surprisingly formalistic and conceptual—and in his treatment of the practical implications of the decision. Justice Peters himself anticipates ultimate adoption of his view by the United States Supreme Court: "I am convinced that the United States Supreme Court will not and should not permit such a contraction of its purposes."³⁵ I fear, however, that this is a forlorn hope on his part, for the federal standing rule is and always has been much less liberal than that of California.³⁶ The

33. *In re Whittington*, 391 U.S. 341 (1968).

34. 387 U.S. 1 (1967).

35. 66 Cal. 2d at 816, 427 P.2d at 778, 59 Cal. Rptr. at 114.

36. In *Jones v. United States*, 362 U.S. 257 (1960), the argument that the California standing rule of *People v. Martin* ought to be applied under the United States Constitution was

chances that at this date the United States Supreme Court will adopt a rule giving standing to all seem very slim. Indeed, it seems likely that the California court's belief that it could haul in the sails of *Escobedo-Dorado* and *Miranda* without fear of reversal by the United States Supreme Court had a significant role in the majority's decision.

Here lies, perhaps, the major lesson to be learned from this reading of Justice Peters' dissents. Whereas the majority of the court appears in recent cases concerning police interrogation to have been heavily influenced in its liberal opinions by what it anticipates the United States Supreme Court will do and seems to adopt relatively conservative positions on issues on which it has no concern about reversal by that Court. Justice Peters' liberal views in this area are pure and clearly spring from within himself.

II

JUSTICE PETERS AND THE CALIFORNIA FELONY-MURDER RULE

California law relating to murder today stands in an anomalous state of imbalance. Where, in a case of first degree murder, the prosecution proceeds on the theory that the defendant premeditated and deliberated or, in a case of second degree murder, the defendant intentionally or recklessly killed, the door is open to the defense to introduce psychiatric and other evidence relating to the accused's state of mind at the time and the circumstances leading up to the commission of the offense. In a series of cases³⁷ the California supreme court has expanded and developed this possibility, sometimes straining statutory language and prior doctrine to an extreme in order to reach a desired and, in my judgment, desirable result. The effect of these decisions is that in homicide cases where mens rea is in issue the trier of fact is likely in the guilt trial to get a view of the whole man and the entire picture surrounding the commission of the homicide. The possibility of amelioration of the crime and avoidance of a death penalty is substantially increased.

Where, however, the theory of the prosecution is that the accused committed murder—either first or second degree—because the homicide was perpetrated in the course of a felony, in the guilt trial

made in petitioner's brief, but was not mentioned by the Court in its opinion. Brief for Petitioner at 22-23. See also *Alderman v. United States*, 394 U.S. 165 (1969).

37. *People v. Bassett*, 69 Adv. Cal. 121, 443 P.2d 777, 70 Cal. Rptr. 193 (1968); *People v. Conley*, 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966); *People v. Wolff*, 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964); *People v. Gorshen*, 51 Cal. 2d 716, 336 P.2d 492 (1959).

the defense generally may not introduce psychiatric evidence bearing on mens rea. This hinders the presentation of a complete picture to the trier of fact. Can anyone doubt that the chances that a maximum conviction will be obtained are significantly greater where the jury gets no evidence in the guilt phase as to what really made the defendant do what he did? Can anyone doubt that given a choice, a prosecutor who desires to increase the chances of obtaining a maximum conviction and penalty will choose the felony-murder route if such a foundation for the prosecution can be squeezed out of the facts?

The doctrinal developments which have led to the expanded use of psychiatric testimony in homicide cases involving a question of mens rea have ameliorated one-half of California's law of murder. But at the same time it has inevitably led to an increased tendency for prosecutors to gravitate toward the use of felony-murder theory. The imbalance thus created ought to be corrected. It is necessary to establish the same potential for presentation of psychiatric evidence in felony-murder prosecutions as is now available in homicide prosecutions involving mens rea. In the absence of legislative action on the subject, the challenge is to find a basis in existing California homicide doctrine for such a development and if there is none readily apparent, to develop it by the same type of judicial creativity used to develop the role of psychiatric testimony in other homicide prosecutions.³⁸ Two of Justice Peters' opinions may have laid the groundwork for such a doctrinal development.

In his first trial the defendant in *People v. Ford*³⁹ had been convicted of burglary, possession of a concealable weapon, robbery, two counts of kidnapping, assault with a dangerous weapon, and murder in the first degree. Upon his first appeal, conviction on all counts, except for those for burglary and murder, was affirmed. The judgment on the murder count was reversed because of an error in instructions relating to intoxication.⁴⁰ The information charged

38. In *People v. Conley*, Chief Justice Traynor held that a finding of provocation under California Penal Code section 192 was not the sole means for reducing murder to voluntary manslaughter. Since the statute had been enacted before the concept of diminished capacity had been developed, the fact that the statute defined only one kind of voluntary manslaughter—"upon a sudden quarrel or heat of passion"—was not determinative. Malice could be negated by a showing of diminished capacity such that the defendant was not able to comprehend his duty to govern his actions in accord with the duty imposed by law. Although one may applaud the potential impact of the *Conley* doctrine, it is hard to describe it as anything other than creative jurisprudence.

39. 65 Cal. 2d 41, 416 P.2d 132, 52 Cal. Rptr. 228 (1966).

40. 65 Cal. 2d at 45, 416 P.2d at 134, 52 Cal. Rptr. at 230.

murder with premeditation and malice aforethought, and at the first trial the prosecution proceeded on a premeditation-deliberation theory. Both the defense and prosecution introduced substantial evidence on the issue. At the second trial the prosecutor appeared to proceed upon a felony-murder rather than a premeditation-deliberation theory—a change in theory that was possible under California law despite the absence of felony-murder allegations in the formal charge.⁴¹ Although the defendant at the second trial introduced substantial psychiatric testimony tending to indicate that he lacked capacity to premeditate and deliberate because of psychological stress of long duration, poor capacity of mind and emotion, malnourishment and intoxication, the prosecution introduced no psychiatric evidence. The prosecution probably changed its theory of the case out of a fear that the jury would reject the evidence of premeditation-deliberation.⁴²

On the second appeal, Justice Peters concluded from the psychiatric evidence introduced in the second trial that the defendant was unable to and did not premeditate his acts.⁴³ The Justice also refused to uphold a first degree murder conviction based on the felony-murder theory. There was no doubt that the defendant had committed several felonies at a point close in time to the homicide. Indeed, the second trial involved a relatively rare felony-murder situation since the defendant had been convicted of these felonies in a previous trial. The court held that the prosecution could rely on such prior felony convictions as *res judicata* in the second murder trial.⁴⁴ They did not have to be relitigated. With one exception—robbery—these felonies were not enumerated in section 189 of the California Penal Code and thus could not form a basis for a first degree conviction. Justice Peters concluded that the robbery had been terminated prior to the homicide. Since the defendant had committed the homicide during the course of nonenumerated although dangerous felonies, however, there was ample support for a conviction of second degree murder.⁴⁵

Ford is an unusual case—perhaps the exception that illustrates

41. "It has long been settled that in view of our simplified nature of pleading in criminal cases, a jury may be instructed on felony-murder theories where the information charges murder with premeditation and malice aforethought." *Id.* at 50, 416 P. 2d at 137, 52 Cal. Rptr. at 233.

42. On the first appeal Justice Schauer stated, "While there is enough evidence in the record of premeditation and deliberation . . . to preclude us from reducing the crime to second degree murder on this appeal, that evidence is such that if the jury had been properly instructed on the issue of intoxication . . . their verdict conceivably might have been for the lesser degree." *People v. Ford*, 60 Cal. 2d 772, 795, 388 P.2d 892, 908, 36 Cal. Rptr. 620, 636 (1964).

43. 65 Cal. 2d at 51, 416 P.2d at 138, 52 Cal. Rptr. at 234.

44. *Id.* at 50-51, 416 P.2d at 137-38, 52 Cal. Rptr. at 233-34.

45. *Id.* at 57, 416 P.2d at 142, 52 Cal. Rptr. at 238.

the rule. In what turned out to be a felony-murder prosecution, there was extensive psychiatric evidence, such as is normally only available in a premeditation-deliberation case. The court was able to reduce the crime to second degree without difficulty since several nonenumerated felonies had also clearly been proved. The case illustrates how, where facts permit, the felony-murder theory does have limited doctrinal flexibility, permitting reduction to a lesser form of criminal homicide.⁴⁶

In *People v. Wilson*,⁴⁷ Justice Peters used another doctrinal avenue to reduce a felony-murder charge. The defendant had been charged with two counts of murder and two counts of assault with a deadly weapon with intent to commit murder. The jury was instructed as to first degree felony-murder on the theory that the homicide may have been committed in the course of a burglary based upon a breaking and entering with intent to commit a felony—in this case the charged assault with a deadly weapon with intent to murder. Justice Peters ruled that the defendant was entitled to an instruction that if the jury found that the defendant entered the apartment without the intent to murder⁴⁸ his entry would not have constituted a burglary, and he could not be convicted of murder.⁴⁹

In a second ruling, Justice Peters held that there had been error in the denial of instructions on unconsciousness as a complete defense to the charge of homicide.⁵⁰ Although its significance is far from clear, this holding may be a groundbreaking development presaging more adequate judicial handling of the mens rea requirements for felony-murder. Under the language of Justice Peters' opinion it appears that a defendant's unconsciousness at the time of the homicide is a defense to a felony-murder charge. Thus, if Wilson was in the course of a burglary up to the time he killed but at the moment of the homicide was unconscious, he would not be guilty of felony-murder; indeed he would not be guilty of any homicide offense. That conclusion may be justified on the ground that at the moment of the homicide no burglary was taking place because the defendant was unconscious. But it may not even be necessary to consider that issue.

46. The court has been developing other new bases for amelioration. See, e.g., *People v. Phillips*, 64 Cal. 2d 574, 414 P.2d 353, 51 Cal. Rptr. 225 (1966); *People v. Washington*, 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965). Also see the discussion of the very recent case of *People v. Ireland*, 70 Adv. Cal. 557, 450 P.2d 580, 75 Cal. Rptr. 188 (1969), in note 70 *infra*.

47. 66 Cal. 2d 749, 427 P.2d 820, 59 Cal. Rptr. 156 (1967).

48. There was evidence to support this conclusion. *Id.* at 760, 427 P.2d at 827, 59 Cal. Rptr. at 163.

49. *Id.* at 758, 427 P.2d at 826, 59 Cal. Rptr. at 162.

50. *Id.* at 761, 427 P.2d at 828, 59 Cal. Rptr. at 164.

Justice Peters cites section 26, subdivision five of the California Penal Code for the proposition "that a defendant cannot be adjudged guilty of any crime with which he is charged if he committed the act while unconscious."⁵¹ That proposition so stated would seem to preclude liability for any form of criminal homicide if indeed the defendant killed while unconscious.

Justice Peters' conclusion that unconsciousness is a defense to a felony-murder charge may not be surprising. More importantly, in reaching it, he used key words that have a reminiscent ring and may herald further developments in this area. He stated several times that defendant's unconsciousness claim was that he was "incapable of forming the necessary intent to constitute first degree murder,"⁵² that "the word 'intent' in . . . [section 20] means wrongful intent,"⁵³ that the failure to give the unconsciousness instruction "permitted the finding of implied malice without regard to a determination as to defendant's ability to formulate the requisite specific intent."⁵⁴

This repeated reference to "intent" in the context of an opinion that deals with the case as if it involves only a felony-murder theory⁵⁵ is certainly unclear. What intent, particularly what specific intent does unconsciousness negate? Is the intent involved that of the underlying felony or might Justice Peters here be laying the foundation for the judicial development of some more sophisticated mens rea concepts in the felony-murder arena? At present, mens rea and related notions are only relevant in a felony-murder trial where a question is raised whether the accused had the mens rea necessary for the underlying felony or where there is a claim that he was unconscious (or insane) at the time of the crime. Thus, as Justice Peters correctly noted in *Ford*:

"[M]anslaughter instructions may not be necessary in a case in which diminished capacity . . . [is] relied on by the defense if the felony-murder rule is involved."⁵⁶

There are two new doctrinal avenues that Justice Peters' *Wilson* opinion may be hinting at and that the court might pursue to open up

51. *Id.* at 761, 427 P.2d at 828, 59 Cal. Rptr. at 164 (emphasis added).

52. *Id.* at 760, 427 P.2d at 828, 59 Cal. Rptr. at 164.

53. *Id.*

54. *Id.* at 761, 427 P.2d at 830, 59 Cal. Rptr. at 166.

55. There is no clear indication in the opinion that the question of degree was also submitted to the jury on a premeditation theory, although that seems likely on the facts of the case. Justice Peters mentions the word "premeditation" only once in the opinion and there in an ambiguous context. He may have been referring to the premeditation issue when he spoke of intent, but if so, he certainly obscured the reference.

56. 65 Cal. 2d 41, 58, 416 P.2d 132, 142-43, 52 Cal. Rptr. 228, 238-39 (1966).

the doors of diminished capacity to those charged with felony-murder. In connection with the inquiry into intent, often specific intent such as in robbery and burglary, that is already permitted under accepted doctrine, the court might begin to apply more freely concepts it already uses in the premeditation-deliberation area. The court thus might ask whether the accused "maturely and meaningfully"⁵⁷ intended the conduct constituting the underlying felony, what was the quantum of moral turpitude and depravity in that intent⁵⁸ or what was "the extent of his understanding."⁵⁹ If in connection with appropriate psychiatric testimony on these matters the issue of intent were submitted to a jury under proper instructions, it might find that the defendant had not committed the underlying felony. If the jury so found, the possibilities that they would convict only of manslaughter would increase, although a murder conviction might still be possible if there were evidence of premeditation of the homicide in the record⁶⁰ or if another felony not involving the same intent but sufficient to support a second degree conviction⁶¹ had been proved.

Such a development in the law of felony-murder would not be very far-reaching. Justice Peters' opinion in *Wilson* may, however, point toward a second, much more innovative handling of the intent issue in felony-murder cases. It is clear under existing law in California that any killing occurring during the course of and causally related to a sufficient felony is murder; if the felony is enumerated in section 189 of the Penal Code it is murder in the first degree. Thus as stated in an instruction given in *Wilson* (and not disapproved by Justice Peters):

"Murder which is committed in the perpetration of . . . [a specified

57. See *People v. Wolff*, 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964).

58. *Id.*

59. *Id.*

60. It would be rather odd to conclude that the defendant had not had meaningful intent for the underlying felony but nevertheless could have premeditated the homicide. However, compare *Wilson*, where Justice Peters concluded that although the defendant was entitled to an instruction on unconsciousness on the homicide charge, based upon his testimony, "There is no evidence to show that defendant was unconscious during the time he committed the assaults" 66 Cal. 2d at 764, 427 P.2d at 830, 59 Cal. Rptr. at 166 (1967).

61. In *Wilson*, Justice Peters found in the defendant's testimony a basis for negating the specific intent of the underlying felony. In the absence of that intent the conduct involved amounted to a misdemeanor and thus provided a basis only for manslaughter. A felony sufficient to sustain a second degree conviction must be inherently dangerous to life. In *Ford*, Justice Peters ruled that the homicide had been perpetrated in the course of the felonies of kidnapping and possession of a concealable weapon by an ex-felon and was second degree murder.

felony], is murder of the first degree, whether the murder was *intentional, unintentional or accidental*.’⁶²

This has clearly been the law in California since the early decision in *People v. Milton*.⁶³ It means that in a felony-murder case the only mens rea in issue is that of the underlying felony. The malice required by the definition of murder in section 187 is presumed because of the existence of the felony. Suppose, however, building on the foundation laid by Justice Peters’ opinion in *Wilson*, the court were to overrule *Milton* and require that malice—apart from the felony—must be present. Such a ruling, although marking a significant change in existing law, would be more consonant with the language of sections 187 to 189 of the Penal Code. Indeed, existing law is difficult to square with the language of those sections. For the language of section 187 requires the presence of malice for murder, and malice is specifically defined in section 188: “It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.”⁶⁴

Unless one is willing to make the great leap in analysis made by the *Milton* court—i.e., “The malice of the abandoned and malignant heart is shown from the very nature of the . . . [felony]”⁶⁵—one cannot, from the mere fact that the homicide occurred in the course of a felony, find a basis for a murder conviction under the express language of the California statutes. One can certainly argue that had the legislature intended to make the mere presence of a felony a basis for a murder conviction it would have said so. The question of whether the presence of a felony was involved in the homicide was certainly before it insofar as it made the presence of particular felonies a basis for a first degree conviction. The language of section 189 also supports the proposed interpretation for it refers to “All murder . . . committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem”⁶⁶ Under the prevailing interpretation the same felony very oddly is used twice analytically in connection with section 189 felony-murder prosecutions—first to raise the homicide to murder and second to raise it to the first degree category.

I do not mean to suggest that simply because the interpretation of the felony-murder rule advanced here is more consistent with the language of the relevant Penal Code sections it should be adopted by

62. 66 Cal. 2d at 756, 427 P.2d at 825, 59 Cal. Rptr. at 161 (1967) (emphasis added).

63. 145 Cal. 169, 78 P.549 (1904).

64. CAL. PEN. CODE § 188 (West 1966).

65. 145 Cal. 169, 172, 78 P. 549, 551 (1904).

66. CAL. PEN. CODE § 189 (West 1966).

the court. The contrary interpretation adopted in *Milton* has been the law too long to be so easily rejected. But were the court otherwise inclined to do so, it could support an overruling of *Milton* with a persuasive argument based upon the statutory language. It would certainly require less straining of statutory language than was involved in other decisions of this type.⁶⁷

What would be the implications of such a revised felony-murder rule? Under the proposed interpretation, malice—apart from the felony—would have to be present in order to obtain a conviction for murder.⁶⁸ Either an intentional killing or one involving an abandoned and malignant heart (presumably a high degree of recklessness) would be required. That a homicide occurred in connection with a felony would be of evidentiary weight on the recklessness issue.⁶⁹ The defendant, however, would be entitled—as he is in nonfelony murder prosecutions—to introduce testimony, expert or other, on the malice issue, and to receive a jury instruction on the malice question. That an enumerated felony were involved, however, would still provide a basis for raising a murder to the first degree level.

As a result, felony-murder would no longer be an offense of strict liability. The trier of fact would be required to make an inquiry regarding the accused's subjective state of mind relating to the killing. The prosecutor would carry the same burden of proof as to *mens rea* that he has in nonfelony murder prosecutions, and a diminished capacity defense would be available. The existing imbalance between the approach to the two principal bases for obtaining murder convictions in this state would thus be corrected.

Perhaps it is too much to see in Justice Peters' *Wilson* opinion the intention to initiate such a development. It would be appropriate, however, to find in the work of a Justice who has demonstrated so well his doctrinal competence, courage, and judicial integrity in constitutional criminal procedure the groundwork for such an important doctrinal development in substantive criminal law.⁷⁰

67. See note 38 *supra*.

68. A major consequence thus would be to wipe out the category of second degree felony-murder. Cf. Pike, *What Is Second Degree Murder in California*, 9 S. CAL. L. REV. 112 (1936).

69. Compare the approach taken in MODEL PENAL CODE § 210.2(1)(b) (proposed official draft 1962).

70. That the entire court may be moving in the direction of so limiting the felony-murder rule is indicated by the very recent opinion in *People v. Ireland*, 70 Adv. Cal. 557, 450 P.2d 580, 75 Cal. Rptr. 188 (1969) (Sullivan, J.). The court adopted the New York rule and held that a second degree felony-murder instruction may not properly be given when it is based upon a felony such as assault with a deadly weapon which is "an integral part of the homicide and which constitutes an offense included therein." Significantly the court stated that a contrary interpretation "In the circumstances of the instant case . . . would eviscerate the entire defense, which was based upon principles of diminished capacity and was directed in significant part toward negation of the element of malice aforethought." *Id.* at 574, 450 P.2d at 590, 75 Cal. Rptr. at 198.