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AN UNCONSTITUTIONAL FICTION: THE FELONY-MURDER RULE AS APPLIED TO THE SUPPLY OF DRUGS

James Wong and Kent Louie were looking for a good time in Chinatown, and around nine o'clock they got lucky. Two young women agreed to join them. The women, however, wanted some heroin first, so they gave their new companions money and asked them to purchase the drug. After the men obliged, both women injected themselves, and everyone proceeded to a hotel. The next morning, only one of the women woke up. James and Kent, it turned out, had really not been lucky at all; both were tried, convicted and sentenced for felony-murder.¹

Although the men probably did not know it, their case was not that unusual. Six jurisdictions have held that a person is a murderer if he supplies illegal drugs to another person who later dies of an overdose.² Five of the six have relied on the traditional felony-murder

¹ *People v. Wong*, 35 Cal. App. 3d 812, 111 Cal. Rptr. 314 (1973).

² See *People v. Poindexter*, 51 Cal. 2d 142, 330 P.2d 763 (1958) (conviction of second degree murder affirmed where defendant sold heroin to deceased); *Martin v. State*, 377 So. 2d 706 (Fla. 1979) (conviction of first degree murder affirmed where defendant sold heroin to deceased through intermediary); *State v. Forsman*, 260 N.W.2d 160 (Minn. 1977) (conviction of third degree murder affirmed where defendant sold deceased heroin and thereafter injected him); *Sheriff of Clark County v. Morris*, 99 Nev. 109, 659 P.2d 852 (1983) (had indictment alleged facts regarding defendant's conduct or presence during defendant's ingestion of the drug, second degree murder would have lain for defendant's sale of chloral hydrate to deceased); *State v. Randolph*, 676 S.W.2d 943 (Tenn. 1984) (reversed the dismissal of second degree murder charges against three defendants in the line of sale of heroin to deceased); *Heacock v. Commonwealth*, 228 Va. 397, 323 S.E.2d 90 (1984) (conviction of second degree murder affirmed where defendant supplied cocaine to deceased).

These six states (California, Florida, Minnesota, Nevada, Tennessee, and Virginia) are among only eight jurisdictions in which felony-murder prosecutions have arisen based on the drug supplier-overdose pattern. The two states that have refused to impose such liability are Arizona and Kansas. See *State v. Dixon*, 109 Ariz. 441, 511 P.2d 623 (1973) (on certified question, court held that second degree felony-murder would not lie against a seller of heroin where a purchaser voluntarily and out of the presence of the seller took an overdose); *State v. Mauldin*, 215 Kan. 956, 529 P.2d 124 (1974) (dismissal of murder charge affirmed; charge was based on

rule, holding that supplying drugs is a felony and the overdose is caused by the commission of that felony.³ The sixth jurisdiction has adopted a statutory variation of the felony-murder rule which is addressed specifically to drug suppliers.⁴

This Note will establish why such applications of the felony-murder rule are contrary to longstanding legal and constitutional principles.

defendant's sale of heroin to the deceased).

There is little reason to believe, however, that this type of liability will remain limited to those states that have adopted it thus far. Five states have already adopted statutes which are expressly directed at drug suppliers. *See infra* note 21. Interestingly, one of the states is Arizona, whose legislature apparently acted in response to the *Dixon* court's refusal to apply the felony-murder rule.

Moreover, there have been several manslaughter convictions in other jurisdictions based on factual situations nearly identical to the felony-murder cases. *See People v. Hopkins*, 101 Cal. App. 2d 704, 226 P.2d 74 (1951) (manslaughter charge reinstated where defendant furnished heroin bought with deceased's money); *Silver v. State*, 13 Ga. App. 722, 725, 79 S.E. 919, 921 (1913) (defendant who supplied morphine properly convicted of manslaughter); *State v. Thomas*, 118 N.J. Super. 377, 288 A.2d 32 (manslaughter conviction affirmed where defendant sold heroin to the deceased), *cert. denied*, 60 N.J. 513, 291 A.2d 374 (1972); *State v. Warwick*, 16 Wash. App. 205, 555 P.2d 1386 (1976) (manslaughter conviction affirmed where defendant supplied MDA to the deceased). Because manslaughter (other than misdemeanor-manslaughter) actually may require more culpability with respect to death than felony-murder, nothing prevents additional states from charging felony-murder if their murder statutes would permit it in the context of this type of felony.

³ California, Minnesota, Nevada, Tennessee, and Virginia have acted under their traditional felony-murder doctrines. *See People v. Cline*, 270 Cal. App. 2d 328, 334, 75 Cal. Rptr. 459, 463 (1969) (second degree murder conviction affirmed where defendant "committed the felony of furnishing a restricted dangerous drug without a prescription, an act which . . . directly and proximately caus[ed] the death"); *State v. Forsman*, 260 N.W.2d 160, 164 (Minn. 1977) (third degree murder conviction affirmed where supplying heroin was a felony upon or affecting a person which caused the death); *Sheriff of Clark County v. Morris*, 659 P.2d 852, 859 (Nev. 1983) (second degree murder will lie where defendant feloniously furnished chloral hydrate which immediately and directly caused an overdose death); *State v. Randolph*, 676 S.W.2d 943, 946 (Tenn. 1984) (sale of heroin is an inherently dangerous felony punishable as murder when an overdose death results); *Heacock v. Commonwealth*, 228 Va. 397, 404-05, 323 S.E.2d 90, 94 (1984) (second degree murder conviction affirmed where defendant's supply of cocaine was an inherently dangerous felony causally related to the death).

⁴ Florida law provides that anyone who distributes an opium preparation, which includes heroin and morphine, is guilty of first degree murder if a death proximately results from the ingestion of the drug. FLA. STAT. ANN. § 782.04 (West Supp. 1984). For the text of the Florida statute, see *infra* note 21. In *Martin v. State*, 377 So. 2d 706 (Fla. 1979), the defendant was convicted of first degree murder under this statute because he sold heroin to someone who in turn gave it to the deceased, who subsequently died because of the drug.

First, regardless of the felony committed by a drug supplier, the act of supplying the drug does not legally cause a user's overdose and death. Second, those courts that use the felony-murder rule violate the constitutional guarantee of due process of law by failing to prove the causation element of the crime beyond a reasonable doubt. Finally, by treating drug suppliers as murderers, and thereby requiring that they be punished as severely as those who either intend or legally cause the deaths of others, the courts necessarily impose a disproportionate sentence in violation of the eighth amendment prohibition of cruel and unusual punishment.

I. THE APPLICATION OF THE FELONY-MURDER RULE TO DRUG SUPPLIERS

Blackstone concisely summarized the common-law doctrine of felony-murder: "If one intends to do another felony, and undesignedly kills a man, this is also murder."⁵ As this description indicates, felony-murder is, in effect, a strict-liability crime.⁶ The state need not prove the malice aforethought component of ordinary murder⁷ once it has shown the defendant's intent to commit the underlying felony.⁸ The

⁵ 4 W. BLACKSTONE, COMMENTARIES *200-01.

⁶ "Liability is strict, in the sense that no inquiry need be made into the culpability of any of the actors as to the death; their culpability for the underlying felony is sufficient." P. LOW, J. JEFFRIES, JR. & R. BONNIE, CRIMINAL LAW 861 (1982).

⁷ "At common law and traditionally in the United States murder is homicide committed with malice aforethought." R. PERKINS & R. BOYCE, CRIMINAL LAW (3d ed. 1982) (citations omitted). Citing a number of cases, Professors Perkins and Boyce describe actual malice, as opposed to the implied malice of felony-murder, as an intent to kill or to inflict great bodily injury or a wanton and willful disregard of unreasonable human risk where there is no justification, excuse or mitigation. *Id.* at 57-60; see also *United States v. Wharton*, 433 F.2d 451, 454 (D.C. Cir. 1970) ("At common law, murder was unlawful homicide done with 'malice aforethought'").

⁸ The rationale for this aspect of felony-murder has taken two different forms. Some courts have stated flatly that no mens rea with respect to death is required. See, e.g., *People v. Root*, 524 F.2d 195, 198 (9th Cir. 1975) (felony-murder does not require intent to kill), *cert. denied*, 423 U.S. 1076 (1976); *State v. Nowlin*, 244 N.W.2d 596, 604 (Iowa 1976) (felony-murder is category of murder not requiring intent). Other courts have held that malice aforethought may be imputed from the intent to commit the underlying felony. See, e.g., *Ex parte Bates*, 461 So. 2d 5, 6-7 (Ala. 1984) (homicide is "deemed" committed with malice); *Shanahan v. United States*, 354 A.2d 524, 526 (D.C. App. 1976) (malice implied from commission of the underlying felony).

The courts likely will increasingly invoke the mens rea rationale because the

causation element of ordinary murder, however, remains intact.⁹

Over the years, the felony-murder rule has been almost universally condemned. Many commentators have argued that while felony-murder had a certain logic when all felonies were punishable by death, the rule has no place in a system that recognizes various degrees of blameworthiness.¹⁰ Others have questioned the historical origins of the rule.¹¹ Still others have complained that the rule's presumption of intent is obviously a fiction.¹²

In spite of these criticisms, forty-one states and the District of Columbia still adhere to some version of the felony-murder rule.¹³

"imputation" approach works as a conclusive presumption, which the Supreme Court has said violates due process. *Sandstrom v. Montana*, 442 U.S. 510, 523 (1979); see also Roth & Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 460-71 (1985) (arguing that felony-murder convictions based on "imputation" are unconstitutional).

⁹ See *infra* note 24 and accompanying text.

¹⁰ See Roth & Sundby, *supra* note 8, at 449-50; see also MODEL PENAL CODE § 210.2 commentary at 31 n.74 (Official Draft 1980) (explaining why code drafters abolished the rule); 3 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 65-76 (1883) (concluding that the rule was a legal fiction the purpose of which was never truly articulated).

¹¹ See, e.g., G. FLETCHER, RETHINKING CRIMINAL LAW 278-83 (1978) (the rule represents an inappropriate extension of the doctrine of transferred felonious intent by English scholars); Recent Development, *Criminal Law: Felony-Murder Rule--Felon's Responsibility for Death of Accomplice*, 65 COLUM. L. REV. 1496, 1496 n.2 (1965) (notes the theory that Lord Coke "blundered" in extrapolating a statement made by Bracton on unlawful killing into a basis for finding murder from the commission of a felony).

¹² See, e.g., J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 260 (2d ed. 1960) (felony-murder "continues to supply an easy rationalization of untenable judgments"); Recent Development, *California Rewrites Felony-Murder Rule*, 18 STAN. L. REV. 690, 690 n.1 (1966) (the rule has "several 'heads' of its own, each willing to consume one of the accused's defenses by presuming a needed element"); see also *Tarrence v. Commonwealth*, 265 S.W.2d 40, 51 (Ky. 1953) (the rule involves an implication of law "contrary to the real fact of the case as it appears in evidence"), *cert. denied*, 348 U.S. 899 (1954).

All this is not to say that no one has risen to the rule's defense, just that the defenders are limited in number. See, e.g., Crump & Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL'Y 359, 396 (1985) (the rule serves the widespread public perception that a felony involving death is a "qualitatively different crime"); Note, *A Survey of Felony Murder*, 28 TEMP. L.Q. 453, 466 (1955) ("[I]f a man through the commission of a crime of violence contributes substantially to the death of another, there is no injustice in declaring that contribution murder.").

¹³ For a breakdown of the states that currently have felony-murder statutes, see *infra* notes 14-17. The nine states that have abolished felony-murder have taken

The circumstances in which the rule applies, however, vary widely. Many jurisdictions restrict the application of felony-murder to those felonies specifically enumerated in their statutory versions of the rule.¹⁴

different paths in doing so. Three states have interpreted their statutes, which appear to require no mens rea with respect to death, to require ordinary culpability regardless of whether the death occurs within the course of the enumerated felonies. *See* *People v. Aaron*, 409 Mich. 672, 728, 299 N.W.2d 304, 326 (1980) (interpreting MICH. COMP. LAWS ANN. § 750.316 (1968)); *State v. Davis*, 305 N.C. 400, 426, 290 S.E.2d 574, 590 (1982) (interpreting N.C. GEN. STAT. § 14-17 (1981)); *State v. Doucette*, 143 Vt. 573, 582, 470 A.2d 676, 682 (1983) (interpreting VT. STAT. ANN. tit. 13, § 2301 (Supp. 1985)). Five states have legislatively overturned the rule. *See* ARK. STAT. ANN. § 41-1503 (1977) (requiring that the killing be intentional, knowing or with extreme indifference); DEL. CODE ANN. tit. 11, §§ 635, 636 (1979 & Supp. 1984) (requiring that the killing be at least negligent); HAWAII REV. STAT. § 707-701 (1976) (requiring that the killing be intentional or knowing); KY. REV. STAT. § 507.020 (1984) (requiring that the killing be intentional, knowing or with extreme indifference); OHIO REV. CODE ANN. §§ 2903.01 to .02 (Baldwin 1979 & Supp. 1985) (requiring that the killing be purposeful). The last state, New Hampshire, has followed the MODEL PENAL CODE, which adopts a rebuttable presumption of recklessness when someone commits a felony. N.H. REV. STAT. ANN. § 630:1-b (1974).

¹⁴ *See* ALASKA STAT. § 11.41.110(a)(3) (1985) (person who causes death of anyone other than a participant in course of arson, kidnapping, sexual assault, escape, burglary or robbery commits murder in second degree); ARIZ. REV. STAT. ANN. § 13-1105(A)(2) (Supp. 1985) (person who causes death of another in attempting to commit sexual conduct with a minor, sexual assault, child molestation, narcotics offenses, kidnapping, burglary, arson, robbery, escape, or child abuse commits first degree murder); COLO. REV. STAT. § 18-3-102(1)(b) (1978) (person who causes death of anyone other than a participant in the course of arson, robbery, burglary, kidnapping, or sexual assault commits first degree murder); CONN. GEN. STAT. §§ 53a-54b(6), -54c (Supp. 1985) (person is guilty of capital felony if he illegally sells cocaine, heroin, or methadone and a person dies as a direct result of the use thereof, and person who causes death of anyone other than a participant in the course of robbery, burglary, kidnapping, sexual assault, or escape is guilty of felony-murder); D.C. CODE ANN. § 22-2401 (1981) (person who kills another in the perpetration of arson, rape, robbery, mayhem or kidnapping commits first degree murder); IND. CODE ANN. § 35-42-1-1(2) (Burns 1985) (person who kills another while committing arson, burglary, child molestation, criminal deviate conduct, kidnapping, rape, or robbery commits murder); LA. REV. STAT. ANN. § 14:30.1(2) (West Supp. 1985) (person who kills another in course of rape, arson, burglary, kidnapping, escape, or robbery commits second degree murder even though he has no intent to kill or harm); ME. REV. STAT. ANN. tit. 17A, § 202(1) (1983) (person who causes death of another in commission of murder, robbery, burglary, kidnapping, arson, rape, gross sexual misconduct, or escape commits felony-murder if the death is a reasonably foreseeable consequence); MISS. CODE ANN. §§ 97-3-19(1)(c), -27 (1972 & Supp. 1985) (person who kills another while committing rape, burglary, kidnapping, arson, robbery, sexual battery, statutory rape, or unnatural nonconsensual intercourse commits capital murder, and killings without malice while person is engaged in any other felony shall be manslaughter);

Some jurisdictions require that the felony be "inherently dangerous."¹⁵ Other states limit the rule to "forcible" felonies.¹⁶ Finally,

NEB. REV. STAT. § 28-303(2) (1979) (person who kills another in perpetration of sexual assault, arson, robbery, kidnapping, hijacking, or burglary commits first degree murder); N.J. STAT. ANN. 2C:11-3(a)(3) (West 1982) (person who causes death of another in commission of robbery, sexual assault, arson, burglary, kidnapping, or escape commits murder); N.Y. PENAL LAW § 125.25(3) (McKinney Supp. 1985) (person who causes death of one other than a participant in course of robbery, burglary, kidnapping, arson, rape, sodomy, sexual abuse, or escape commits second degree murder); N.D. CENT. CODE § 12.1-16-01(1)(c) (1985) (person who causes death of another in course of treason, robbery, burglary, kidnapping, felonious restraint, arson, gross sexual imposition, or escape commits murder); OR. REV. STAT. § 163.115(1)(b) (1985) (person who causes death of one other than a participant in course of arson, criminal mischief, burglary, escape, kidnapping, robbery, any felony sexual offense, or compelling prostitution commits murder); UTAH CODE ANN. § 76-5-203 (1)(d) (Supp. 1985) (person who causes the death of anyone other than a participant in the commission of robbery, rape, sodomy, sexual assault, arson, burglary, or kidnapping commits second degree murder); WYO. STAT. § 6-2-101(a) (1977) (person who kills another in commission of sexual assault, arson, robbery, burglary, escape, resisting arrest, administration of poison, or kidnapping commits first degree murder).

¹⁵ *People v. Cline*, 270 Cal. App. 2d 328, 330-31, 75 Cal. Rptr. 459, 461 (1969) (interpreting CAL. PENAL CODE § 189 (West 1970)) (inherently dangerous felonies not explicitly covered by the first degree murder statute are implicitly covered under the second degree catchall provision); *State v. Lashley*, 233 Kan. 620, 632, 664 P.2d 1358, 1369 (1983) (interpreting KAN. STAT. ANN. § 21-3401 (1981)) (to invoke felony-murder rule, there must be proof homicide was committed in perpetration of felony inherently dangerous to human life); *State v. Harrison*, 90 N.M. 439, 442, 564 P.2d 1321, 1324 (1977) (interpreting N.M. STAT. ANN. § 30-2-1(A)(2) (1978)) (of the lesser-degree felonies, only those inherently dangerous may be used for a conviction of felony-murder); *Wade v. State*, 581 P.2d 914, 916 (Okla. Crim. 1978) (interpreting OKLA. STAT. ANN. tit. 21, § 708.2 (West 1983)) (to be convicted of felony-murder, the underlying felony must be inherently or potentially dangerous to human life, as determined by both the elements of and circumstances surrounding the offense); *State v. Noren*, 125 Wis. 2d 204, 208-09, 371 N.W.2d 381, 384 (1985) (interpreting Wis. STAT. ANN. § 940.02(2) (1984)) (felonies which are inherently or foreseeably dangerous to human life give rise to felony-murder).

Alabama has included the "inherently dangerous" limitation in the text of its statute. ALA. CODE § 13A-6-2(a)(3) (1982) (person who causes death of another in course of felony clearly dangerous to human life commits murder).

¹⁶ See ILL. ANN. STAT. ch. 38, § 9-1(a)(3) (Smith-Hurd Supp. 1985) (person who performs acts which cause death while committing a forcible felony commits murder); MINN. STAT. ANN. §§ 609.185(2)-(3), .19(2) (West Supp. 1986) (person who causes death of another while committing forcible criminal sexual conduct, robbery, kidnapping, arson, tampering with a witness or escape commits first degree murder, and in the course of any other felony of force or violence, the murder is second degree); MONT. CODE ANN. § 45-5-102(1)(b) (1985) (person who causes death of another while committing any felony involving the use or threat of physical force or violence is guilty of murder).

several states still adhere to the common-law rule, which applies to *any* felony.¹⁷

After eliminating those jurisdictions that either apply the felony-murder rule exclusively to code-enumerated felonies which do not

¹⁷ See FLA. STAT. ANN. § 782.04 (1)(a)(2)-3), .04(4) (West Supp. 1984) (person who kills another in course of drug trafficking, arson, sexual battery, robbery, burglary, escape, child abuse, aircraft piracy, or bombing commits first degree murder, and person who kills another in course of any other felony commits third degree murder); O.C.G.A. § 16-5-1(c) (1984) (person who causes death of another in commission of a felony irrespective of malice commits murder); IDAHO CODE § 18-4003 (d),(g) (1979) (murders committed in commission of arson, rape, robbery, burglary, kidnapping, or mayhem are of first degree, and all other murders are of second degree); IOWA CODE ANN. §§ 707.2(2), .3 (West 1979) (person who kills another while participating in a forcible felony commits first degree murder, and all other murders are of second degree); MD. ANN. CODE art. 27, §§ 410, 411 (1982) (murder committed in perpetration of rape, sexual offenses, sodomy, mayhem, robbery, burglary kidnapping, storehouse breaking, or daytime housebreaking is of first degree, and all other murder is of second degree); MASS. GEN. LAWS ANN. ch. 265, § 1 (West 1970) (murder committed in commission of a crime punishable by death or life imprisonment is of first degree, and all other murder is of second degree); NEV. REV. STAT. §§ 200.010 to .030 (1985) (murder committed in perpetration of sexual assault, kidnapping, arson, robbery, burglary or sexual molestation, escape or resisting arrest is of first degree, and all other murder, including killings caused by the sale of a controlled substance to a minor, is second degree); PA. STAT. ANN. tit. 18, §§ 2502(b), (c), (d) (Purdon 1983) (murder committed while engaged in robbery, rape, deviate sexual intercourse by force, arson, burglary, or kidnapping is of second degree, and all other murder is of third degree); S.C. CODE ANN. § 16-3-10 (Law Co-op. 1985) (murder is the killing of any person with malice aforethought, either express or implied); S.D. CODIFIED LAWS ANN. §§ 22-16-4, -9 (Supp. 1985) (murder committed in the perpetration of arson, rape, robbery, burglary, kidnapping, or unlawful use of a destructive device or explosive is of the first degree, and all other murder is of second degree); TENN. CODE ANN. §§ 39-2-202(a), -211(a), (b) (1982 & Supp. 1985) (murder committed in perpetration of arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful use of an explosive is of first degree, and all other murder, including deaths proximately caused by drugs illegally supplied, is of second degree); TEX. PENAL CODE ANN. § 19.02(a)(3) (Vernon 1974) (person who commits a clearly dangerous act that causes death of another in course of a felony commits first degree murder); VA. CODE §§ 18.2-32, -33 (1982) (murder in the commission of arson, rape, forcible sodomy, inanimate object sexual penetration, robbery, burglary, or abduction is of the first degree, and a killing in the perpetration of any other felony is second degree); WASH. REV. CODE ANN. §§ 9A.32.030(1)(c), 9A.32.050 (1977) (person who causes death of another in course of robbery, rape, burglary, arson, or kidnapping commits first degree murder, and one who causes death in commission of any other felony commits second degree murder); W. VA. CODE § 61-2-1 (1984) (murder committed in course of arson, rape, burglary, or robbery is of first degree and all other murder is of second degree).

include drug sales¹⁸ or forcible felonies,¹⁹ which would seem not to include drug sales, there are twenty-three jurisdictions that could prosecute a drug supplier for felony-murder should an overdose occur.²⁰ Five of these jurisdictions have enacted statutes which expressly provide that a drug supplier is guilty of murder if the person to whom he supplied the illegal drug dies of an overdose.²¹ The remaining eighteen jurisdictions could either classify drug sales as "inherently dangerous" felonies, as does California,²² or simply apply their statutory versions of the common-law rule, which do not exclude drug sales in the definition of felonies giving rise to murder.²³

II. THE ABSENCE OF CAUSATION IN FELONY-MURDER PROSECUTIONS BASED ON DRUG SALES

In the eighteen jurisdictions that could apply their general felony-murder rule to the overdose context, and perhaps those jurisdictions which have statutes expressly addressing drug sales (the requirements of those recent statutes still being in doubt), the state must prove that the defendant *caused* a death.²⁴ Traditionally, this has meant that the

¹⁸ See *supra* note 14.

¹⁹ See *supra* note 16.

²⁰ See *supra* notes 15, 17 and *infra* note 21.

²¹ ARIZ. REV. STAT. ANN. § 13-1105 (Supp. 1985) ("A person commits first degree murder if [he] commits or attempts to commit . . . narcotics offenses under § 13-3406 [supplying of dangerous drugs] and in the course of an in furtherance of such offense . . . causes the death of any person."); CONN. GEN. STAT. § 53a-54b(6) (1985) (person is guilty of a capital felony if convicted of "the illegal sale, for economic gain, of cocaine, heroin or methadone to a person who dies as a direct result of the use by him of such cocaine, heroin or methadone"); FLA. STAT. ANN. § 782.04 (West Supp. 1984) ("[U]nlawful killing . . . which results from the unlawful distribution of opium . . . , when such drug is proven to be the proximate cause of the death of the user, is murder in the first degree and constitutes a capital felony . . ."); NEV. REV. STAT. § 200.010 (1985) ("Murder is the unlawful killing of a human being . . . caused by a controlled substance which was sold to a minor . . ."); TENN. CODE ANN. § 39-2-211(b) (Supp. 1985) ("Death which results from the unlawful distribution of opium . . . , when such drug is proven to be the proximate cause of the death of the user shall be deemed at least murder in the second degree.").

²² See *supra* note 15 and accompanying text.

²³ See *supra* note 17 and accompanying text.

²⁴ Five states (Alabama, Georgia, Texas, Washington, and Wisconsin) expressly refer to "causing the death of another" in their statutory definitions of felony-murder. See *supra* notes 15, 17. Six more states (Iowa, Missouri, New Mexico, Rhode Island, South Carolina, and Virginia) refer simply to "killing" in their statutes, see *supra*

defendant's act must have been not only the cause-in-fact, but also the proximate cause of death.²⁵ The purported findings of causation in the overdose cases, however, are more a statement on the morality of drug use than a conclusion of law.²⁶ Although the cases may support a finding of cause-in-fact, proximate cause does not exist where the user's voluntary act intervenes and his overdose is unforeseeable.

notes 15, 17, but the definition of "killing" has long embodied a causation requirement. *See, e.g.*, *State v. Cheatham*, 340 S.W.2d 16, 19 (Mo. 1960) (person is not criminally responsible for a killing unless his act was the cause of the deceased's death); *State v. Nelson*, 65 N.M. 403, 411, 338 P.2d 301, 306 (in a felony-murder case, the state must show a causal connection between the felony and the homicide), *cert. denied*, 361 U.S. 877 (1959); *see also* G. WILLIAMS, *TEXTBOOK OF CRIMINAL LAW* 378 (2d ed. 1983) ("[K]illing means conduct causing death."). Similarly, the courts of the seven other states (California, Idaho, Maryland, Massachusetts, Pennsylvania, South Dakota, and West Virginia) which only refer to "murder" in their felony-murder statutes, *see supra* notes 15, 17, have held that causation is a required element of "murder." *See, e.g.*, *People v. Sam*, 71 Cal. 2d 194, 211, 454 P.2d 700, 710, 77 Cal. Rptr. 804, 814 (1969) (causation is necessary to prove murder); *Mumford v. State*, 19 Md. App. 640, 644, 313 A.2d 563, 566 (1974) (to sustain conviction for felony-murder, there must be direct causal connection between the homicide and the felony).

In those states with statutes expressly directed to drug sales, it remains unclear whether a strict causation requirement will be imposed. The statutes, reproduced *supra* note 21, seem to be worded precisely to avoid a requirement that the defendant's sale have caused the overdose; they focus instead on whether the buyer's use of the illegal drug was the proximate cause of his death. In *Martin v. State*, 377 So. 2d 706 (Fla. 1979), the only case reported under any of the statutes, the defendant attacked this ambiguity on vagueness grounds. The Florida court rejected the attack without discussion, however, and did not resolve the question of whether causation is required. *Id.* at 707. Regardless of whether these state legislatures intended to eliminate the causation requirement, a causation element may still be constitutionally mandated. *See infra* notes 84-139 and accompanying text.

²⁵ *See infra* notes 34-37 and accompanying text.

²⁶ The courts consistently fail to engage in any analysis of causation in the overdose cases. One would not even know that causation was an element of felony-murder were it not for the courts' summary conclusions that causation is present. *See, e.g.*, *People v. Wong*, 35 Cal. App. 3d 812, 829, 111 Cal. Rptr. 314, 327 (1973) (second degree murder conviction affirmed where overdose was "direct causal result" of inherently dangerous felony of supplying heroin); *Martin v. State*, 377 So. 2d 706, 708 (Fla. 1979) (proper to impose felony-murder liability for the "distribution of heroin causing death"); *Heacock v. Commonwealth*, 228 Va. 397, 404-05, 323 S.E.2d 90, 94 (1984) (causal relationship sufficient for murder established where defendant distributed inherently dangerous drug to the victim who took it and subsequently died); *State v. Warwick*, 16 Wash. App. 205, 210-11, 555 P.2d 1386, 1390 (1976) (causation sufficient to establish manslaughter where defendant supplied MDA powder).

A. Cause-in-Fact

Courts have long agreed that the first task in determining legal causation is purely factual.²⁷ While the approach has been given different labels, such as the "theory of condition,"²⁸ the sine qua non test,²⁹ and the "but for" test,³⁰ the inquiry is the same: if the condition in question (the defendant's act) were removed, would the result be the same? If so, it cannot be said that the conduct was the cause-in-fact.³¹

When this test is applied to the overdose cases, causation in fact arguably is present. Had the defendant not supplied the drug to the deceased, he would not have overdosed from that particular quantity of drug. This conclusion overlooks the fact that, in most cases, if the user does not find drugs in one place, he will locate them in another.³² Even so, as a scientific proposition, it is enough to say that had that quantity not been available, the user either would not have injected himself or would have injected himself with a substance that might not have killed him.³³

²⁷ See J. HALL, B. GEORGE, JR. & R. FORCE, *CRIMINAL LAW AND PROCEDURE* 146 (3d ed. 1976); R. PERKINS & R. BOYCE, *supra* note 7, at 771-74.

²⁸ Ryu, *Causation in Criminal Law*, 106 U. PA. L. REV. 773, 787-88 (1958).

²⁹ R. PERKINS & R. BOYCE, *supra* note 7, at 772.

³⁰ G. WILLIAMS, *supra* note 24, at 379-81.

³¹ The courts most commonly phrase the inquiry as whether the defendant's conduct was a cause "but for," or "without," which the death would not have occurred. See, e.g., *State v. Wiley*, 144 Ariz. 525, 540, 698 P.2d 1244, 1259 (1985) (defendant's kidnapping was an act "but for" which the death would not have occurred); *People v. Bowman*, 669 P.2d 1369, 1379 (Colo. 1983) (defendant's arson was an act "but for" which death of firefighter would not have occurred); *Commonwealth v. Rhoades*, 379 Mass. 810, 825, 401 N.E.2d 342, 351 (1980) (instructions should have required that defendant's arson was an act "without which" firefighter's death from heart attack would not have occurred). Professors LaFave and Scott describe cause-in-fact as follows: "In order that conduct be the actual cause of a particular result it is almost always sufficient that the result would not have happened in the absence of the conduct; or putting it another way, that 'but for' the antecedent conduct the result would not have occurred." W. LAFAVE & A. SCOTT, JR., *HANDBOOK ON CRIMINAL LAW* 249 (1972).

³² At least in urban areas, heroin is relatively easy to obtain. There are certain blocks where sellers post themselves, and buyers actually shop around among the sellers for good bargains or especially high quality drugs. See D. WALDORF, *CAREERS IN DOPE* 76-77 (1973); Beschner & Brower, *The Scene*, in *LIFE WITH HEROIN* 21-27 (1985).

³³ Because the outcome without the defendant's conduct is impossible to predict, it really cannot be said that cause-in-fact is not present. Even if it could be assumed

B. Proximate Cause

More than cause-in-fact, however, is necessary to establish criminal responsibility. Because a but-for inquiry would affirm causation in almost every instance,³⁴ the law has developed a stricter definition of causation. Usually called "proximate cause," and sometimes just "legal cause,"³⁵ this concept singles out those events and conditions that are sufficiently connected to the proscribed result to be identified on both scientific and moral grounds as the "cause."³⁶ As this description indicates, the courts have long allowed proximate cause to reflect the instinct of the community and therefore have shied away from precisely defining the term. Nonetheless, two limiting principles have emerged: (1) intervening cause; and (2) foreseeability.³⁷

that the user would find drugs elsewhere and that he would overdose from those, the result would not, strictly speaking, be the same: his death would result from the ingestion of a "different" drug.

Professor Ryu cites a German case in which a similar argument was rejected. The defendant was charged with transporting certain people to a Nazi concentration camp, and he argued unsuccessfully that they would have been taken there in any event by other people. Ryu, *supra* note 28, at 787 n.70 (citing *S. v. K. (I. Strafsenat)*, Jan. 5, 1951, 1 *Entscheidungen des Bundesgerichtshofes in Strafsachen* 22).

³⁴ Professor Williams argues that but-for causation takes us back to Adam and Eve because without them, defendants would not be here to perform the more immediate causes of deaths. G. WILLIAMS, *supra* note 24, at 379. Professors Hart and Honore present an equally illustrative example: when arson is committed, pure but-for causation would hold the match manufacturer responsible. Hart & Honore, *Causation in Law*, 72 *LAW Q. REV.* 58, 86 (1956).

³⁵ See, e.g., P. LOW, J. JEFFRIES & R. BONNIE, *supra* note 6, at 845; R. PERKINS & R. BOYCE, *supra* note 7, at 776. Professor Williams invokes yet a third descriptive label, "imputable cause," for it "indicate[s] the value-judgment involved." G. WILLIAMS, *supra* note 24, at 381-82.

³⁶ In the legal context, it is said, we are "interested solely in imputing a result to a criminal conduct." Ryu, *supra* note 28, at 783. To engage in this imputation, the courts have essentially sought to justify their findings by reference either to scientific or physical principles, or to moral principles, whichever fits the context of the case. See *infra* notes 44-45 and accompanying text.

Professor Hall recognizes this when he writes of the three steps involved in finding criminal causation: the sine qua non inquiry, the test of effective or substantial contribution, and the evaluation of mens rea that inevitably occurs, whether explicit or not. J. HALL, *supra* note 12, at 282-83. Professor Ryu's conclusion is much the same. "No evaluation can be sound unless it is based upon scientific grounds," and yet "[r]esponsibility arising from the establishment of causation in criminal law ranges, depending upon the nature of the crime involved, from subjective culpability to an objective symbol of the actor's contribution to the result." Ryu, *supra* note 28, at 805.

³⁷ The majority of courts clearly recognize that proximate cause is essential to

Under the intervening cause approach, the court first determines whether the proscribed result follows in logical order from the defend-

any criminal statute, including felony-murder. *See, e.g.*, State v. Lawson, 144 Ariz. 547, 559, 698 P.2d 1266, 1278 (1985) (felony-murder requires but-for and proximate causation); State v. Bowman, 669 P.2d 1369, 1379 (Colo. 1983) (absence of proximate cause is a defense to felony-murder); State v. Wall, 94 N.M. 169, 171-72, 608 P.2d 145, 148 (1980) (proximate cause is an essential element of felony-murder). A minority of courts, however, have refused to require proximate cause in the felony-murder context. *See, e.g.*, People v. Gunnerson, 74 Cal. App. 3d 370, 378, 141 Cal. Rptr. 488, 493 (1977) (no strict requirement of causation between a killing and the commission of a felony); State v. Covington, 290 N.C. 313, 327, 226 S.E.2d 629, 639-40 (1976) (no requirement that underlying felony proximately caused the death). These courts, however, seem to have confused the "res gestae" concept, which defines the scope of the felony, with causation.

The res gestae of the felony has been defined as "not only the actual facts of the transaction and the circumstances surrounding it, but the matters immediately antecedent to and having a direct causal connection with it, as well as acts immediately following it and so closely connected with it as to form in reality a part of the occurrence." State v. Fouquette, 67 Nev. 505, 529, 221 P.2d 404, 417 (1950), *cert. denied*, 341 U.S. 932 (1951). The res gestae doctrine directs the court to ask whether the conduct of the defendant at the time he caused the death was *conduct* causally related to the felony. *See, e.g.*, State v. Hearn, 228 Kan. 693, 695, 619 P.2d 1157, 1159 (1980) (flight from a crime may be considered part of res gestae of the crime and a killing during flight may constitute felony-murder).

In other words, the doctrine explains what is meant by the typical language of felony-murder statutes, such as "in the commission of" and "in furtherance of" a felony. *See supra* notes 14-17. It does not supplant the causation requirement. Yet those courts rejecting proximate cause as an element of felony-murder blur the two requirements and, as a result, satisfy themselves with but-for causation. *See, e.g.*, People v. Mitchell, 61 Cal. 2d 353, 361-62, 392 P.2d 526, 531, 38 Cal. Rptr. 726, 731-32 (1964) (proof of strict causal relationship not required, sufficient to show that felony and homicide were parts of continuous transaction), *cert. denied*, 384 U.S. 1007 (1966); State v. Schwensen, 237 Or. 506, 516, 392 P.2d 328, 334 (1964) (must be such legal relation between the killing and the crime that the killing can be said to have occurred as part of the perpetration or in furtherance of it). This conclusion is unsound for a number of reasons.

First, it must be remembered that felony-murder, by definition, does away with any intent requirement. If, in addition, only but-for causation is required, the logical extreme carries us light-years away from the purpose of the criminal law. Second, it may well be that the courts concluded that only but-for causation was necessary on the basis of the famous Pennsylvania third-party cases, since overruled, which were somewhat difficult to explain under traditional principles of intervening cause and foreseeability. For example, in Commonwealth v. Almeida, 362 Pa. 596, 68 A.2d 595 (1949), *cert. denied*, 339 U.S. 924 (1950), the court had held that a robber was responsible for the shooting death of a second policeman by a first policeman trying to stop the robbery. *Id.* at 607, 68 A.2d at 601. In another case, however, the same court held that a robber could not be held liable for the justifiable shooting by a policeman of his co-felon. Commonwealth v. Redline, 391 Pa. 486,

ant's act. For example, when a defendant shoots another person, that person's death is clearly the direct result of the defendant's gunshot.³⁸ If the conduct of others is necessary for the proscribed result to occur, however, intervening causes are present, and the court must then determine whether the intervening causes are dependent or independent.³⁹ A dependent intervening cause occurs when the defendant's conduct *induces* the intervening cause, and its dependence will render the defendant liable.⁴⁰ An independent intervening cause, on the other hand, results when the intervening cause was not so induced, and its independence will relieve the defendant of liability.⁴¹

Under the foreseeability approach, the focus is more on the defendant's culpability. The inquiry is whether a reasonable man could have foreseen the proscribed result as a natural and probable consequence of his conduct.⁴² The consequence must be one of *appreciable prob-*

510, 137 A.2d 472, 483 (1958). Thus, some courts may have determined that but-for causation was present in the first case but not in the second, and that reconciling the cases meant requiring only cause-in-fact. Then, by the time Commonwealth *ex rel. Smith v. Myers*, 438 Pa. 218, 237, 261 A.2d 550, 559 (1970), overruled *Almeida* and expressly required proximate cause in its two-pronged sense, the lax causation requirement had become an established part of Pennsylvania's case law. See LAFAYE & SCOTT, *supra* note 31, at 265.

Finally, and most importantly, the courts which require only but-for causation for felony-murder do not explain why the clear majority of statutes embodying the rule use precisely the same phrase, "causes the death of any person," to set forth the element necessary for both malice murder and felony-murder. See the statutes cited *supra* notes 14-17. If indeed the word "causes" has different meanings in the two contexts, due process and the reasonable doubt standard may be violated with regard to the whole concept of felony-murder. See *infra* notes 84-107 and accompanying text.

³⁸ Even with direct causes, however, there can be intervening acts of a sort. For example, after a defendant squeezes the trigger, the mechanical operation of the gun must follow. Yet we do not commonly think of the gun's operation as an intervening act. R. PERKINS & R. BOYCE, *supra* note 7, at 788 (the causal connection is considered to be "direct for juridical purposes even though many intervening causes might be recognized by a physicist").

³⁹ The terms "dependent" and "independent" are used here for clarity, although the author realizes that dependent causes may also be labelled "concurrent" or "inefficient," and independent causes "supervening" or "efficient."

⁴⁰ See *infra* notes 47-48 and accompanying text.

⁴¹ See *infra* notes 49-50 and accompanying text. One court has described independent intervening causes as follows: "If it appears that . . . another cause intervened, with which [the defendant] was in no way connected, and but for which death would not have occurred, such supervening cause is a defense to the charge of homicide." State v. Bowman, 669 P.2d 1369, 1379 (Colo. 1983).

⁴² See State v. Chambers, 53 Ohio App. 2d 266, 272, 373 N.E.2d 393, 397 (1977)

ability, or criminal responsibility will not be found.⁴³

These principles are, of course, not mutually exclusive. Courts have at times referred to both, and at others just to one.⁴⁴ Most often, the theories are used as a check on one another to find causation. The defendant may induce an intervening cause, though he could not have foreseen it, or he may foresee a fatal consequence though he does not induce the intervening cause to occur.⁴⁵ In the overdose context, however, the supplying of the drug is not the proximate cause of the user's death under either theory.

1. *Intervening Cause.* The familiar metaphor of a "chain of causation"⁴⁶ helps illustrate why the user's choice to ingest the drug precludes a finding of legal causation in the overdose cases. In a chain of events, a dependent intervening cause is an event attached to, or induced by, the event before it. For example, impulsive acts by victims in order to escape a danger presented by the defendant are dependent intervening causes.⁴⁷ Suicides to escape pain may also be dependent

(defendant responsible for policeman's shooting of co-felon because he set in motion "a sequence of events, the foreseeable consequences of which were known or should have been known to him at the time"); *In re Leon*, 122 R.I. 548, 555, 410 A.2d 121, 125 (1980) (defendant who set fire responsible for the foreseeable consequence that the victim died of burns and smoke inhalation).

⁴³ McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149, 186 (1925) (first describing the foreseeability standard as one of "appreciable probability"); see also R. PERKINS & R. BOYCE, *supra* note 7, at 817 (foreseeability does not require that "the intervention [be] more likely to occur than not; and on the other hand it implies more than that someone might have imagined it as a theoretical possibility").

⁴⁴ Compare *Crawford v. State*, 252 Ga. 552, 552, 314 S.E.2d 880, 881 (1984) (intervening cause approach) and *People v. Fuller*, 91 Ill. App. 3d 922, 929-30, 415 N.E.2d 502, 507-08 (1980) (foreseeability approach) with *State v. Wiley*, 144 Ariz. 525, 540, 698 P.2d 1244, 1259 (1985) (discussing intervening cause and foreseeability) and *State v. Chambers*, 53 Ohio App. 2d 266, 272, 373 N.E.2d 393, 396-97 (1977) (discussing intervening cause and foreseeability).

⁴⁵ For example, it might not have been foreseeable that a woman in terror from an assault would jump from an upstairs window, but her act was induced by the defendant's act. See *Whiteside v. State*, 115 Tex. Crim. 274, 277, 280, 29 S.W.2d 399, 400, 402 (1930). Conversely, although the act of a driver in running over someone left unconscious in the road may not have been induced by the defendant who left the person in the road, it certainly was foreseeable. *People v. Kibbe*, 35 N.Y.2d 407, 413, 362 N.Y.S.2d 848, 851-52, 321 N.E.2d 773, 776 (1974), *aff'd sub nom. Henderson v. Kibbe*, 431 U.S. 145 (1977).

⁴⁶ See Hart & Honore, *supra* note 34, at 86 (discussing the "chain of causation" concept).

⁴⁷ See, e.g., *Sanders v. Commonwealth*, 244 Ky. 77, 82, 50 S.W.2d 37, 39-40

causes.⁴⁸

Conversely, independent intervening causes exist when a person's voluntary, deliberate and unreasonable act follows the defendant's conduct.⁴⁹ The dangerous act of one who has the time and ability to deliberate on his reaction to the defendant's deeds unreasonably breaks the chain of causation.⁵⁰ Interestingly, none of the courts imposing felony-murder liability for the supply of drugs alone has truly grappled with the user's choice to ingest them.⁵¹

Had the courts addressed the user's choice, the conflict between intervening cause principles and the reality of drug use would have been apparent. A finding that the user's ingestion is a dependent cause would require either that the supplier somehow induced his "victim" to consume the drug, or that, for some other reason, the user's intervening act of ingestion was not voluntary and deliberate, but im-

(1932) (defendant responsible for wife's jump from moving car to escape his threats with a knife); *Letner v. State*, 156 Tenn. 68, 76, 299 S.W. 1049, 1052 (1927) (where boy jumped into river following defendant's gunshots at his boat, his act was a dependent intervening cause of the drowning of two others); *Whiteside v. State*, 115 Tex. Crim. 274, 277, 280, 29 S.W.2d 399, 403 (1930) (where wife jumped in terror from upstairs window to escape her husband's brutal assault, her act was dependent intervening cause).

⁴⁸ See, e.g., *People v. Lewis*, 124 Cal. 551, 559, 57 P. 470, 473 (1899) (victim's cutting his own throat in despair over mortal wound inflicted by defendant was dependent intervening cause); *Stephenson v. State*, 205 Ind. 141, 189, 179 N.E. 633, 650 (1932) (where young woman who had been kidnapped and seriously assaulted seized an opportunity to take poison, her act was considered a dependent intervening cause of her death).

⁴⁹ See, e.g., *Hendrickson v. Commonwealth*, 85 Ky. 281, 287, 3 S.W. 166, 168 (1887) (conviction reversed because wife's unreasonable flight into freezing weather after crippled husband's threat should have been considered independent intervening cause of death); *State v. Preslar*, 48 N.C. 421, 428 (1856) (wife's unreasonable flight into freezing weather while husband slept, complicating injuries sustained during earlier beating, was independent intervening cause of death).

⁵⁰ One recent, albeit incredible, case suggests that the length of time alone prior to a victim's voluntary intervening act is not determinative of whether it was deliberate and unreasonable. See *United States v. Guillette*, 547 F.2d 743, 749 (2d Cir. 1976) (deceased who rigged a booby trap to protect himself from the defendant's violent attempts on his life was in fact murdered by the defendant when the device exploded), *cert. denied*, 434 U.S. 839 (1977).

⁵¹ Only one court, and that one considering a manslaughter conviction, has even discussed the question: "The act of the user in administering the drug to himself we consider at most to be a concurrent rather than an independent intervening cause." *State v. Thomas*, 118 N.J. Super. 377, 380, 288 A.2d 32, 34 (affirming manslaughter conviction for supply of heroin), *cert. denied*, 60 N.J. 513, 291 A.2d 374 (1972).

pulsive.⁵² While the courts have thus far seemed willing to accept such propositions at face value,⁵³ the law should recognize them as myths.

Drug suppliers do not induce users to ingest illegal drugs. Numerous studies of heroin use indicate that neither occasional users nor addicts are persuaded or even encouraged by those who make the drug available to them.⁵⁴ Those wanting the drug seek the source, not vice versa.⁵⁵ This pattern is especially true in the overdose cases, for often the "supplier" has not been a traditional supplier at all, but a friend either sharing the substance or purchasing it with money given him by the "victim."⁵⁶

Moreover, even in the case of addicts, their choice to take the drug on a given occasion is entirely voluntary and deliberate.⁵⁷ For many,

⁵² See *supra* notes 47-48 and accompanying text.

⁵³ See, e.g., *State v. Thomas*, 118 N.J. Super. 377, 380, 288 A.2d 32, 34 (the defendant "must have been aware of an addict's unreasoned craving for the drug"), *cert. denied*, 60 N.J. 513, 291 A.2d 374 (1972).

⁵⁴ A landmark study of juvenile drug use in New York City suggested this conclusion as early as 1964. The authors write: "[P]ushers in high-use gangs tend to 'lay off' their most vulnerable acquaintances—fellow gang members who have recently returned from hospitalization or imprisonment . . ." I. CHEIN, D. GERARD, R. LEE & E. ROSENFELD, *THE ROAD TO H* 376 (1964) [hereinafter cited as I. CHEIN]. The more recent studies have overwhelmingly confirmed, on a broader basis, that the concept of the predatory pusher is erroneous. See L. HUNT & C. CHAMBERS, *THE HEROIN EPIDEMICS* 126 (1976) ("A group of peer users may virtually compel their initiator to obtain heroin for them."); J. KAPLAN, *THE HARDEST DRUG* 25, 27 (1983) ("[S]ellers of heroin use considerably less pressure and inducement to market their wares than do most marketers of automobiles . . ."); D. WALDORF, *CAREERS IN DOPE* 29 (1973) ("Drug sellers do not have to tempt or entice persons to use drugs . . ."); Morris, *Not the Cause, Nor the Cure: Self-Image and Control Among Inner-City Black Male Heroin Users*, in *LIFE WITH HEROIN* 139 (1985) (the men studied "seem to be saying that their use of heroin [as a habit] is a matter of choice").

⁵⁵ See *supra* note 54. One of the most recent studies of heroin use in the major urban areas reveals that there are simply pockets throughout the cities on which those seeking heroin converge at certain times of the day. Beschner & Brower, *The Scene*, in *LIFE WITH HEROIN* 21-29 (1985) (describing the urban "marketplace" for drugs and an addict's typical day); see also D. WALDORF, *supra* note 54, at 29 ("[D]rug users usually seek out the seller.").

⁵⁶ See, e.g., *People v. Wong*, 35 Cal. App. 3d 812, 822, 111 Cal. Rptr. 314, 322 (defendants purchased heroin for the deceased, with her money, and were found to have feloniously supplied it); *Heacock v. Commonwealth*, 228 Va. 397, 401, 323 S.E.2d 90, 92 (1984) (defendant shared cocaine with a number of people at a party).

⁵⁷ Indeed, those familiar with heroin use do not agree that even addicts' habits are involuntary, much less their choice to inject the drugs on a given occasion. "[I]t would be misleading to assume that [addicts] have relinquished control of their lives to heroin. It would be equally wrong to assume . . . that they are filled with self-

if not most, it is not their physical dependence, but their socio-psychological makeup, that leads them to become regular users.⁵⁸ A substantial number are able to successfully hold jobs,⁵⁹ to control their cravings long enough to avoid those who sell adulterated drugs,⁶⁰ and to experience periods of withdrawal voluntarily if their life situation calls for it.⁶¹ Many ultimately go off drugs such as heroin simply by "maturing out."⁶² The suppliers of drugs may be contributing the means by which users make poor choices, but they are not responsible for the occasional misfortune that follows a user's voluntary and deliberate act.

2. *Foreseeability.* In the overdose cases, the defendants could not have foreseen the user's death as a natural and probable consequence of their acts. Although overdose deaths do occur occasionally, they do not occur with the frequency that would justify a finding that they are foreseeable. The drug supply scenario is not comparable to situations where, for example, a felon is held to have foreseen the death of a policeman at the hands of his armed accomplice. Those

hatred because they use heroin." Morris, *supra* note 54, at 135. Another account based on surveys and interviews makes this even clearer: "What most people, professionals and laymen alike, don't realize about narcotic addicts is that most addicts, and particularly the young and short-term users, enjoy their experiences with heroin and wish to continue using it." D. WALDORF, *supra* note 56, at 66.

⁵⁸ "Most [addicts] have stopped for considerable periods more than once." J. KAPLAN, *supra* note 54, at 45-46. This statement suggests, and the studies have confirmed, that it is more such things as a feeling of association, a calming of frustration over unrealizable dreams, and the desire to stand out among one's peers that lead to addiction than it is physical dependence. See I. CHEIN, *supra* note 54, at 6-7 (addressing the distinction between the addictive personality and physical dependence); J. KAPLAN, *supra* note 54, at 49-50; D. WALDORF, *supra* note 54, at 12; Morris, *supra* note 54, at 139-42.

⁵⁹ A recent study of black male regular users of heroin in New York, Philadelphia, Washington, D.C., and Chicago reports that 29.5% are employed and 61% work legitimate jobs at least from time to time. Walters, "Taking Care of Business" Updated: A Fresh Look at the Daily Routine of the Heroin User, in LIFE WITH HEROIN 32, 37 (1985). These figures become especially significant when one considers the traditionally high unemployment rate of young urban black males.

⁶⁰ *Id.* at 39.

⁶¹ D. WALDORF, *supra* note 54, at 130-33; Morris, *supra* note 54, at 147.

⁶² "Maturing out" is the phenomenon where an addict decides, without any treatment, that he no longer wants to use the drug regularly or at all. Although the number has been difficult to monitor precisely because the former addicts did not seek treatment, it is reported to be substantial. See J.Q. WILSON, THINKING ABOUT CRIME 140 (1975).

situations, unlike the overdose cases, involve deaths within the range of *appreciable probability*.⁶³

The general perception that an overdose is a strong possibility every time a user ingests an illegal drug such as heroin is not accurate.⁶⁴ The 1984 report of the National Narcotics Intelligence Consumers Committee⁶⁵ placed the 1983 heroin addict population at 442,000.⁶⁶ Using the common definition of an addict as someone who injects at least once daily,⁶⁷ the number of addict injections in 1983 was well over 179 million. Of these injections, there were only 632 heroin or morphine-related deaths, and all of these were not necessarily the result of an overdose.⁶⁸ Assuming they were all overdose-related deaths,

⁶³ See *supra* notes 42-43 and accompanying text.

⁶⁴ See, e.g., *People v. Johnson*, 68 Misc. 2d 937, 939, 329 N.Y.S.2d 265, 266 (1972) (“[I]t is common knowledge, publicly gleaned in many daily news media reports, that frequent deaths occur to young persons from the injection of heroin, [especially] in the larger cities.”). Much of the stereotyping is understandable. By nature, the news media reports unusual events, and the aspect of the drug culture most likely to garner attention is the overdose, however isolated an event it may be. The same is true of the film industry, which has inundated the public with sensationalist movies such as *The Hustler*, *Superfly*, *The Mack*, and *Liquid Sky*. With regard to the risk of an injection, however, common sense can supply the answer. As the Pennsylvania Supreme Court has noted: “[A]lthough we recognize heroin is truly a dangerous drug, we also recognize that the injection of heroin into the body does not generally cause death. Unfortunately, there are thousands of individuals who use or abuse heroin daily.” *Commonwealth v. Bowden*, 456 Pa. 278, 284, 309 A.2d 714, 718 (1973).

⁶⁵ The members of the committee, which has been in existence since 1978, are representatives of several federal agencies with drug-related law enforcement, foreign and domestic policy, treatment and research, and intelligence responsibilities. NATIONAL NARCOTICS INTELLIGENCE CONSUMERS COMMITTEE, NARCOTICS INTELLIGENCE ESTIMATE: THE SUPPLY OF DRUGS TO THE U.S. ILLICIT MARKET FROM FOREIGN AND DOMESTIC SOURCES IN 1983 (WITH PROJECTIONS THROUGH 1984) ii (1984).

⁶⁶ *Id.* at 35. “The addict population remained concentrated in inner-city areas, and the average age of the addict was over 30 and increasing. Recidivism among the heroin using population continued.” *Id.*

⁶⁷ See L. HUNT & C. CHAMBERS, *supra* note 54, at 118; A. TREBACH, THE HEROIN SOLUTION 245 (1982); J. KAPLAN, *supra* note 54, at 34. This definition lends a conservative slant to the risk estimate associated with drug use because one daily is the minimum number of injections an “addict” will take.

⁶⁸ NNICC, *supra* note 65, at 35. The death figure is based on data from 24 Standard Metropolitan Statistical Areas participating in the Drug Abuse Warning Network, and no indication is given as to whether “heroin/morphine-related deaths” include hepatitis, malnutrition, or allergic reactions to substances used to “cut” the drug. See Stimmel, *Heroin: A Hazardous Escape from Reality*, N.Y.L.J., Dec. 6, 1971, at 26, col. 5. (“[S]udden death following heroin injection may not be related

however, the drug user in 1983 had only a .00035%, or 3.5 in a million, chance of death every time he injected himself.⁶⁹ If this risk qualifies as an appreciable probability, it is hard to imagine what risk would not.

Not only do the courts applying felony-murder in the overdose context misapprehend the statistical foreseeability of a user's death, they also ignore the possibility that the user intended to overdose or ingested an extremely dangerous amount of the drug.⁷⁰ Courts have never considered foreseeable a person's act of placing himself at extraordinary risk,⁷¹ yet the overdose cases reflect no recognition that

solely to the heroin but may represent a severe allergic reaction to one of the adulterants, as well as an additive effect of another abusive drug taken simultaneously.").

⁶⁹ The technique employed here will result in a different figure from year to year, but the range of risk proves to have been similarly low in the years for which data is available. According to the NNICC 1981 report, the estimated addict populations in the years 1977-80 were 495,000, 470,000, 420,000 and 450,000, respectively. NNICC, NARCOTICS INTELLIGENCE ESTIMATE, THE SUPPLY OF DRUGS TO THE U.S. MARKET FROM FOREIGN AND DOMESTIC SOURCES IN 1980 (WITH PROJECTIONS THROUGH 1984) 39 (1981). The heroin-related deaths during that period were reported to be 718, 612, 684 and 852, respectively. *Id.* at 17. The risks per injection in each of those years, then, were .000397%, .000356%, .000446%, and .000518%, respectively.

The risk of death from a single use of cocaine is probably even lower than that for heroin. The NNICC 1981 report estimated that there were at least ten million people who had used cocaine once in 1980. *Id.* at 44. During that year there were 96 overdose deaths. *Id.* at 42. Thus, assuming only three uses in 1980 by each of those ten million, the risk per use would be less than that for heroin. The problem with this calculation, however, is that while almost everyone who uses heroin injects it, cocaine is commonly consumed three different ways: "snorting," smoking, and injecting. *Id.* at 42-43. And a recent study has revealed that injection of cocaine may actually be much more toxic than injection of heroin. Bozarth & Wise, *Toxicity Associated with Long-Term Intravenous Heroin and Cocaine Self-Administration in the Rat*, 254 J. A.M.A. 81 (1985) (testing suggests that cocaine is a much more toxic compound than heroin when animals are given unlimited access to the drugs intravenously).

⁷⁰ The court's willingness to do so in one case is shocking. In *People v. Cline*, 270 Cal. App. 2d 328, 75 Cal. Rptr. 459 (1969), the "victim" ingested fifty-eight phenobarbital tablets, yet the court still held the drug supplier liable for the "victim's" death. *Id.* at 329, 75 Cal. Rptr. at 460. For an interesting study of the motivation of deliberate overdose "victims," see James & Hawton, *Overdoses: Explanations and Attitudes in Self-Poisoners and Significant Others*, 146 BRIT. J. PSYCHIATRY 481, 483 (1985) (while 41% of those who overdosed stated that their purpose was "to die," only 3% of those closest to them agreed).

⁷¹ See, e.g., *Carbo v. State*, 4 Ga. App. 583, 583, 62 S.E. 140, 141 (1908) (defendant who created a risk of explosion in a building was held not responsible for the

extraordinary responses are always possible when a user voluntarily chooses to ingest an illegal drug.⁷²

Instead, several courts, especially those of California, have substituted for any accepted foreseeability inquiry a simplistic labelling of drug sales as "inherently dangerous."⁷³ Apart from the fallacy of finding drug sales, as opposed to their *consumption*, inherently dangerous,⁷⁴ even the consumption itself is not inherently dangerous.⁷⁵ Although the lifestyle of an addict is dangerous, as is always the case when people choose to tempt fate over and over again, the quality of that lifestyle is not the issue.⁷⁶ The issue is whether the drug supplier

death of one who, fully apprised of the danger, entered the building anyway and died); *accord* Regina v. Horsey, 176 Eng. Rep. 129, 131-32 (1862) (defendant arsonist not liable for death of one who entered building in an apparent suicide attempt).

⁷² One British court, however, recently recognized this fact in its decision of a manslaughter case. In Regina v. Dalby, 1982 Crim. L. Rev. 439, the Court of Appeal quashed the conviction of a defendant who supplied Diconal to the deceased just before they both injected the substance. The court explained that "[t]he supply did not cause any direct injury to [the deceased]; it would have caused no harm unless [he] had subsequently used the drugs in a form and quantity which was dangerous." *Id.* at 440.

⁷³ See, e.g., People v. Taylor, 11 Cal. App. 3d 57, 59, 89 Cal. Rptr. 697, 698 (1970) (second degree murder affirmed where defendant committed inherently dangerous felony of furnishing heroin); State v. Randolph, 676 S.W.2d 943, 946 (Tenn. 1984) (second degree murder conviction would stand where defendant committed inherently dangerous felony of selling heroin); Heacock v. Commonwealth, 228 Va. 397, 404-05, 323 S.E.2d 90, 95 (1984) (second degree murder conviction affirmed where defendant committed inherently dangerous felony of supplying cocaine). An "inherently dangerous" felony has been defined as one which poses danger to human life. See, e.g., People v. Burroughs, 35 Cal. 3d 824, 828, 678 P.2d 894, 899, 201 Cal. Rptr. 319, 321 (1984) (felonious practice of medicine without a license is not inherently dangerous and will not support second degree felony-murder).

There is a special irony in the courts' willingness to end the inquiry in the overdose cases at a finding that drug sales are inherently dangerous: the requirement that any felony be inherently dangerous to warrant felony-murder was intended to be a limitation on a disfavored doctrine. See People v. Washington, 62 Cal. 2d 777, 783, 402 P.2d 130, 134, 44 Cal. Rptr. 442, 446 (1965) (Traynor, J.) ("Although [felony-murder] is the law in this state, it should not be extended beyond any rational function that it is designed to serve.") Yet because the application of the rule will have no deterrent effect in the overdose cases—the deaths are not foreseeable—the rule is clearly being extended beyond any rational function that it was designed to serve.

⁷⁴ Justice Spence of the California Supreme Court unwittingly recognized this when he wrote: "[T]aking a shot of heroin was an act dangerous to human life." People v. Poindexter, 51 Cal. 2d 142, 149, 330 P.2d 763, 767 (1958) (emphasis added) (holding defendant liable for *supplying* heroin to deceased).

⁷⁵ See *supra* notes 65-68 and accompanying text.

⁷⁶ Note the confusion on this point in Heacock v. Commonwealth, 228 Va. 397,

should have foreseen, on one particular occasion, not only the user's choice to take the drug, but the theoretical possibility that the user would overdose.

Several courts outside of California have recognized this fallacy. The New York and Pennsylvania courts have refused to find the supply of heroin, without more, the legal cause of an overdose death.⁷⁷ Although the judges in those states evidence great concern over the supply and use of illegal drugs, they recognize that the theoretical risk of an overdose does not establish foreseeability.⁷⁸ Put simply, the public's feeling of repulsion for drug dealers is insufficient reason to ignore or expand beyond recognition the settled principles of legal causation.⁷⁹

III. THE CONSTITUTIONAL DEFECTS OF APPLYING FELONY-MURDER TO THE SUPPLY OF DRUGS

The application of the felony-murder rule in the overdose context violates the drug suppliers' constitutional rights. First, such an ap-

323 S.E.2d 90 (1984). One of the reasons given by the court for the foreseeability of the *death* is that cocaine is classified as a Schedule 2 controlled substance, meaning it has a "high potential for abuse" which 'may lead to severe psychic or physical dependence.'" *Id.* at 404, 323 S.E.2d at 94 (quoting VA. CODE § 54-524 (1982)). What connection there is between these facts and the foreseeability of death remains a mystery.

⁷⁷ See, e.g., *People v. Pinckney*, 38 A.D.2d 217, 219, 328 N.Y.S.2d 550, 552 (1972) ("Although it is a matter of common knowledge that the use of heroin can result in death, it is also a known fact that an injection of heroin into the body does not generally cause death."), *aff'd*, 32 N.Y.2d 749, 297 N.E.2d 523, 344 N.Y.S.2d 643 (1973); *Commonwealth v. Bowden*, 456 Pa. 278, 284, 309 A.2d 714, 718 (1973) (court "recognize[s] that the injection of heroin into the body does not generally cause death").

⁷⁸ One New York court, however, has recognized that facilitating heroin use by one under the influence of barbiturates may be deemed to cause a death because the chances of death under such circumstances are substantially increased. See *People v. Cruciani*, 44 A.D.2d 684, 685, 353 N.Y.S.2d 811, 813 (1974) (affirming manslaughter conviction of defendant who helped administer heroin), *aff'd*, 36 N.Y.2d 304, 327 N.E.2d 803, 367 N.Y.S.2d 758 (1975).

⁷⁹ Judge Shapiro, in *People v. Pinckney*, 38 A.D.2d 217, 328 N.Y.S.2d 550 (1972) was especially unimpressed with the prosecutor's arguments that overdose deaths are foreseeable. As he wrote in his concurring opinion:

[T]he proportion of such deaths to the number of times narcotics are currently being used by addicts and for legal medical treatment is not nearly great enough to justify an assumption by a person facilitating the injection of a narcotic drug by a user that the latter is running a substantial and unjustifiable risk that death will result from that injection.

Id. at 224, 328 N.Y.S. 2d at 557 (Shapiro, J., concurring).

plication of the rule infringes upon the drug suppliers' fourteenth amendment right to due process of law. Due process requires that the state prove the causation element of felony-murder beyond a reasonable doubt.⁸⁰ In the overdose cases, however, the courts are either failing to insist upon such proof or expanding causation to the point where the reasonable doubt standard is meaningless.⁸¹

Second, convicting drug suppliers of felony-murder violates the eighth amendment's prohibition of cruel and unusual punishment because equating them with murderers ensures that their sentences will be disproportionate to their actual crime. The Supreme Court has recognized that the eighth amendment requires courts to look beyond the labels assigned to offenses for the purpose of sentencing.⁸² Because such an inquiry will reveal that the conduct punished in the overdose cases is nothing more than drug distribution, the sentences imposed should accord with sentences imposed expressly for that crime.⁸³

A. Avoiding the Reasonable Doubt Standard: The Overdose Cases and the Requirements of Due Process

In its 1970 decision of *In re Winship*,⁸⁴ the Supreme Court first announced that due process requires proof beyond reasonable doubt in every criminal case. The rule had long existed in evidentiary law, Justice Brennan explained, but the Court found it necessary to raise it to a constitutional standard "[l]est there remain any doubt"⁸⁵ of

⁸⁰ See *infra* notes 84-102 and accompanying text.

⁸¹ See *infra* notes 106-07 and accompanying text. Although legal causation does not exist in the overdose cases, it is not possible, as a practical matter, to tell whether the trial courts are ignoring the requirement of legal cause or simply presenting the cases to juries in such a fashion that they cannot help but find that legal cause is present. The reported cases, which are necessarily from the appellate level, seem to indicate that the latter is the case, meaning that trial judges are allowing juries freedom to find causation on their own instincts. See *supra* notes 34-79 and accompanying text.

⁸² See *infra* notes 121-25 and accompanying text.

⁸³ See *infra* notes 131-39 and accompanying text.

⁸⁴ 397 U.S. 358 (1970). In *In re Winship*, the petitioner had been charged with delinquency, which required the state to show that the petitioner committed an act which, if done by an adult, would constitute a crime. Specifically at issue was whether the juvenile had stolen \$112.00 from a woman's purse. *Id.* at 360. Under New York law at that time, the proof of the offense need only be by a preponderance of the evidence, and in accord with that standard, the hearing judge had expressed his belief that a preponderance of the evidence warranted his finding of delinquency. *Id.*

⁸⁵ *Id.* at 364.

its proper role in fortifying the presumption of innocence.⁸⁶ The standard was not only to be applied generally, but was required with regard to "every fact necessary to constitute the crime with which [the defendant] is charged."⁸⁷

Five years later, the Court began to clarify what *In re Winship* meant by "every fact necessary" to prove the crime. In *Mullaney v. Wilbur*,⁸⁸ the petitioner challenged the constitutionality of the Maine homicide statute, which defined murder as requiring malice aforethought but had been interpreted to require that a defendant prove he did not act in the heat of passion if the offense was to be reduced from murder to manslaughter.⁸⁹ Because malice aforethought necessarily included the absence of the heat of passion, the petitioner argued, the effect of this requirement was to relieve the state of its burden of proving malice beyond a reasonable doubt.

The Court unanimously agreed.⁹⁰ Maine had rationalized the shift of the burden by claiming that the heat of passion issue arose only after the crime of felonious homicide had been established,⁹¹ but the Court found that such "formalism" was inappropriate when the distinction would result in the vastly different sentences imposed for murder and manslaughter:⁹²

⁸⁶ *Id.* at 363. Justice Brennan wrote: "The standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" *Id.* (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

⁸⁷ *Id.* at 364.

⁸⁸ 421 U.S. 684 (1975). In *Mullaney*, the petitioner had been convicted of murder on the basis of his own statement that he attacked the victim in a frenzy after the victim made a homosexual advance on him. *Id.* at 685.

⁸⁹ The Maine murder statute subsequently repealed provided: "Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life." ME. REV. STAT. ANN. tit. 17, § 2651 (1964). The Maine manslaughter statute provided: "Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought, . . . shall be punished by a fine of not more than \$1000 or by imprisonment for not more than 20 years . . ." ME. REV. STAT. ANN. tit. 17, § 2551 (1964). In practice, murder required that the state prove that the killing was intentional and without legal justification or excuse. The burden then shifted to the defendant to persuade the factfinder that he acted in the heat of passion or sudden provocation if the offense was to be reduced to manslaughter. See *State v. Lafferty*, 309 A.2d 647, 664-65 (Me. 1973).

⁹⁰ *Mullaney*, 421 U.S. at 703-04.

⁹¹ *Id.* at 696-97.

⁹² *Id.* at 697-99. The Court determined that "a State could undermine many of

The safeguards of due process are not rendered unavailable simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty. The fact remains that the consequences resulting from a verdict of murder, as compared with a verdict of manslaughter, differ significantly. Indeed, when viewed in terms of the potential difference in restrictions of personal liberty attendant to each conviction, the distinction established by Maine between murder and manslaughter may be of greater importance than the difference between guilt or innocence for many lesser crimes.⁹³

Based on Justice Powell's language above, many lower courts and commentators concluded that the Court was concerned with the *substance* of state crimes such as murder and manslaughter.⁹⁴ A year

the interests [*In re Winship*] sought to protect without effecting any substantive change in its law" if it were allowed to shift the traditional burdens of proof just by labelling the offense felonious homicide. *Id.* at 698. It was therefore more appropriate to look at the operation and effect of the state law than at the name. *Id.* at 699.

⁹³ *Id.* at 698. Justice Powell's discussion could not have described the overdose cases better. First, there is every reason to believe that it is only because the defendant is already stigmatized as a "pusher" that the courts worry little over the law of causation. Second, there is usually a significant difference in the punishments imposed for drug distribution and murder. On the federal level, for example, the average violator of the narcotics laws from 1982 to 1983 was sentenced to 63.8 months. 17 AD. OFFICE U.S. CTS. ANN. REP. H-21 (1983). The average person convicted of murder was sentenced to 151.8 months. *Id.* at H-15.

⁹⁴ See Angel, *Substantive Due Process And The Criminal Law*, 9 LOY. U. CHI. L.J. 61, 101 (1977) (reading *Mullaney* as a substantive decision would require that states include certain elements in their definitions of crime and not as affirmative defenses); Tushnet, *Constitutional Limitation of Substantive Criminal Law: An Examination of the Meaning of Mullaney v. Wilbur*, 55 B.U.L. REV. 775, 780 (1975) (asking why, if the Court were conducting a solely procedural review, was the Maine statute not upheld as creating a permissive presumption); Note, *Burdens of Persuasion in Criminal Proceedings: The Reasonable Doubt Standard After Patterson v. New York*, 31 U. FLA. L. REV. 385, 400 (1979) (*Mullaney*'s lengthy discussion of the historical requirements of murder and the role of the heat of passion seemed out of place if the decision were to be read as solely procedural); see also Low & Jeffries, *Dicta: Constitutionalizing the Criminal Law?*, Va. L. Wkly., Mar. 25, 1977, at 1, 3 (reading *Mullaney* as a substantive decision admits that the reasonable doubt standard limits state power to draw and interpret homicide statutes, and presumably statutes defining other crimes as well); Comment, *Affirmative Defenses in Ohio After Mullaney v. Wilbur*, 36 OHIO ST. L.J. 828, 835 (1975) (*Mullaney* clarifies that *In re*

later, however, in *Patterson v. New York*,⁹⁵ a majority of the Court insisted that a substantive interpretation of *Mullaney* was incorrect.⁹⁶ Although many commentators have described *Patterson* as a case involving a scheme identical to that struck down in *Mullaney*,⁹⁷ the Court found that the state had not unconstitutionally displaced its burden of proof.⁹⁸

In *Patterson*, the Court addressed a challenge to New York's murder statute, which required that "intent," rather than "malice aforethought," be proven beyond a reasonable doubt and labelled "emotional disturbance" an affirmative defense.⁹⁹ Beginning its opinion with the

Winship's requirement that state prove necessary "facts" actually means that the substance of a crime must be proven beyond a reasonable doubt).

The state courts, however, were split as to whether *Mullaney* was a substantive decision. Compare *People v. Long*, 83 Misc. 2d 14, 18, 372 N.Y.S.2d 389, 390-92 (Sup. Ct. 1975) (*Mullaney* does not bar assigning the burden of proof of entrapment to the defendant) and *State v. Williams*, 288 N.C. 680, 691, 220 S.E.2d 558, 566 (1975) (nothing in *Mullaney* indicates that a presumption of malice arising from the defendant's proximate causation of a death is unconstitutional) with *Evans v. State*, 28 Md. App. 640, 731, 349 A.2d 300, 345 (1975) (*Mullaney* does away with affirmative defenses generally, whether they involve mitigation or excuse), *aff'd*, 278 Md. 197, 362 A.2d 629 (1976) and *People v. Balogun*, 82 Misc. 2d 907, 911, 372 N.Y.S.2d 384, 387-88 (Sup. Ct. 1975) (murder statute unconstitutional because *Mullaney* requires that state prove absence of emotional disturbance as part of intent to kill).

⁹⁵ 432 U.S. 197 (1977). In *Patterson*, the petitioner had been convicted of second degree murder after he went to his father-in-law's house, found his estranged wife in a state of semi-undress in the company of another man, and shot the other man twice in the head. *Id.* at 198.

⁹⁶ *Id.* at 214-16. Justice White wrote for the majority:

Mullaney's holding, it is argued, is that the State may not permit the blameworthiness of an act or the severity of the punishment authorized for its commission to depend on the presence or absence of an identified fact without assuming the burden of proving the presence or absence of that fact, as the case may be, beyond a reasonable doubt. In our view, the *Mullaney* holding should not be so broadly read.

Id. at 214-15.

⁹⁷ See, e.g., *id.* at 222 (Powell, J., dissenting) ("[T]he effect on the defendant of New York's placement of the burden of persuasion is exactly the same as Maine's."); Note, *Voluntary Manslaughter After Patterson: An Analysis of Ohio Law*, 33 CLEV. ST. L. REV. 513, 531 (1984-85) (by ignoring fact that the statutes involved in *Patterson* and *Mullaney* operated the same way, *Patterson* seemed to be encouraging the clever statutory craftsmanship it expressly prohibited). Indeed, a lower New York court which played no role in the *Patterson* case saw *Mullaney* as necessarily rendering the New York scheme unconstitutional. See *People v. Balogun*, 82 Misc. 2d 907, 911, 372 N.Y.S.2d 384, 387-88 (Sup. Ct. 1975).

⁹⁸ *Patterson*, 432 U.S. at 207.

⁹⁹ The statute provided specifically:

statement that "preventing and dealing with crime is much more the business of the States than it is of the Federal Government,"¹⁰⁰ the Court concluded that the New York legislature's use of the word "intent" indicated that it had not intended to include lack of emotional disturbance in its definition of murder.¹⁰¹ Because the New York court had adhered to the state's definition of murder, which only required proof of intent, Patterson's murder conviction could stand.¹⁰²

In the wake of *Patterson*, many commentators insisted that the decision effectively overruled *Mullaney* by focusing on formal definitions rather than on the blameworthiness and culpability at the heart of the *Mullaney* holding.¹⁰³ The overdose cases, however, present a

A person is guilty of murder in the second degree when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter

N.Y. PENAL LAW § 125.25 (McKinney 1975).

¹⁰⁰ *Patterson*, 432 U.S. at 201 (citing *Irvine v. California*, 347 U.S. 128, 134 (1954) (plurality opinion)).

¹⁰¹ *Id.* at 209. The *Patterson* majority apparently did not feel that intent and emotional disturbance were mutually exclusive: "To recognize at all a mitigating circumstance does not require the State to prove its nonexistence in each case in which the fact is put in issue. . . ." *Id.* Maine's statute in *Mullaney* was distinguishable, the Court held, because findings of both malice and heat of passion were contradictory; thus, the effect of the burden shift had been to presume malice. *Id.* at 214-15.

¹⁰² *Id.* at 205. The effect of the holding, then, was that due process required a look no further than the state's definition of a crime for facts which the state must prove beyond a reasonable doubt. The Court also took pains to say that the reasonable doubt standard and affirmative defenses had existed side by side for quite some time and had not "le[d] to such abuses or to such widespread redefinition of crime and reduction of the prosecution's burden that a new constitutional rule was required." *Id.* at 211. At the same time, however, the Court's rather cryptic remark that "there are obviously constitutional limits beyond which the States may not go in this regard" seemed to reserve to it some say in what the states could deem criminal. *Id.* at 210.

¹⁰³ See, e.g., Dutile, *The Burden of Proof in Criminal Cases: A Comment on the Mullaney-Patterson Doctrine*, 55 NOTRE DAME LAW. 380, 382-83 (1979); Roth & Sundby, *supra* note 8, at 463; Note, *supra* note 95, at 405. Dutile's illustration of *Patterson*'s logical extreme is striking. He suggests that without the blameworthiness

context in which the *Patterson* and *Mullaney* decisions can be reconciled. From *Patterson* comes the principle that as long as a state includes a certain element in its definition of an offense, that element must be proven beyond a reasonable doubt.¹⁰⁴ In the overdose cases, this means that causation must be proven beyond a reasonable doubt, for at least five of the six jurisdictions that have found drug suppliers guilty of felony-murder have treated causation as an essential element of the offense.¹⁰⁵

From *Mullaney* comes the principle that a state cannot alter an element of an offense in a given situation simply because a threshold level of culpability has been found; to do so circumvents the reasonable doubt standard in violation of the fourteenth amendment guarantee of due process.¹⁰⁶ Yet this is precisely what the courts convicting drug suppliers of felony-murder are doing. Aware that causation, an essential element of felony-murder, must be proven beyond a reasonable doubt, these courts depart from traditional legal principles of intervening cause and foreseeability and find causation simply because the drug supplier committed a felony.¹⁰⁷ This "formalism,"

focus of *Mullaney*, the following statute would pass constitutional muster under *Patterson*:

§ 1: Whoever is present in any private or public place is guilty of a felony punishable by up to 5 years imprisonment.

§ 2: It shall be an affirmative defense for the defendant to prove, to a preponderance of the evidence, that he was not robbing a bank.

Dutile, *supra*, at 383. Although this example seems incredible, there is nothing in *Patterson* to suggest that the Court would interfere other than its mysterious remark that there are "obviously constitutional limits beyond which the States may not go." *Patterson*, 432 U.S. at 210.

¹⁰⁴ See *supra* notes 95-102 and accompanying text.

¹⁰⁵ See *supra* note 24 and accompanying text. With respect to the sixth jurisdiction, Florida, it remains unclear whether or not causation is regarded as an element of the offense because the statute under which felony-murder has been applied is so new, and the only decision thus far interpreting it is ambiguous in that regard. See *supra* note 24.

¹⁰⁶ See *supra* notes 88-93 and accompanying text. The *Mullaney* Court made clear its focus on circumvention of the standard when it recognized: "On rare occasions the Court has re-examined a state-court interpretation of state law when it appears to be an 'obvious subterfuge to evade consideration of a federal issue.'" 421 U.S. at 691 n.11 (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 129 (1945)). Although the court did not invoke the "obvious subterfuge" line of cases directly in *Mullaney*, for the Maine statute did not appear *intended* to frustrate due process, *id.*, the reference itself suggests that the *Mullaney* holding was based on an *incidental* frustration of the reasonable doubt standard.

¹⁰⁷ See *supra* notes 34-79 and accompanying text.

permitting causation to be an entirely discretionary concept that may vary from case to case, is incompatible with *Mullaney's* interpretation of due process.

B. Equating Drug Suppliers with Murderers: A Cruel and Unusual Comparison

Those courts which deem drug suppliers murderers, whether they base the convictions on an expanded concept of legal causation or fail altogether to require causation,¹⁰⁸ also violate the suppliers' eighth amendment rights.¹⁰⁹ Although it appeared for many years that the Supreme Court would limit the eighth amendment prohibition to only cruel and unusual forms of punishment, the Court held in 1983 that a disproportionate prison sentence alone could violate the eighth amendment.¹¹⁰ In *Solem v. Helm*,¹¹¹ Justice Powell wrote for the majority: "[c]ourts are competent to judge the gravity of an offense, at least on a relative scale."¹¹² When this evaluation

¹⁰⁸ See *supra* note 81.

¹⁰⁹ The eighth amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. In one of the earliest eighth amendment cases, cruel and unusual punishments were described as those "which by their excessive length or severity are greatly disproportioned to the offenses charged." *Weems v. United States*, 217 U.S. 349, 371 (1910) (quoting *O'Neil v. Vermont*, 144 U.S. 323, 340 (1892) (Field, J., dissenting)).

¹¹⁰ See *infra* notes 111-32 and accompanying text.

¹¹¹ 463 U.S. 277 (1983).

¹¹² *Id.* at 292. Most of the earlier eighth amendment cases relied upon by the *Solem* Court to justify its proportionality review involved the death penalty or factors in addition to excessive sentences which rendered them cruel and unusual. See, e.g., *Furman v. Georgia*, 408 U.S. 238 (1972) (arbitrary imposition of death penalty unconstitutional); *Robinson v. California*, 370 U.S. 660 (1962) (sentence of ninety days for the "crime" of narcotics addiction alone unconstitutional); *Weems v. United States*, 217 U.S. 349 (1910) (sentence of fifteen years of hard labor in chains unconstitutional).

Several cases prior to *Solem* had, however, indicated that, in a proper case, the disproportionality of a sentence could cause it to be vacated. See, e.g., *Hutto v. Davis*, 454 U.S. 370, 374 & n.3 (1982) (per curiam) (recognizing that some prison sentences may be unconstitutionally disproportionate); *Rummel v. Estelle*, 445 U.S. 263, 274 n.11 (1980) (same). In *Coker v. Georgia*, 433 U.S. 584 (1977), the Court had enunciated a test which, although the case involved the death penalty, swept broadly; punishment is unconstitutional if "it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." *Id.* at 592.

is undertaken in the overdose cases, any sentence treating the drug suppliers as murderers emerges as cruel and unusual.¹¹³

In *Solem*, the Court determined that a sentence of life imprisonment without parole imposed solely on the fact of recidivism constituted cruel and unusual punishment.¹¹⁴ To reach its result, the Court cited several earlier cases in which the seriousness of a crime had been evaluated. In *Robinson v. California*,¹¹⁵ for example, the Court had determined that drug addiction was a mere status that warranted no criminal sanctions whatsoever.¹¹⁶ Likewise, the Court in *Enmund v. Florida*¹¹⁷ had found that the death penalty could not be imposed where a defendant convicted of felony-murder had not actually killed, attempted to kill, or intended to kill.¹¹⁸ In these and the other cases cited,¹¹⁹ the *Solem* majority observed, the Court had been able to

¹¹³ See *infra* notes 131-39 and accompanying text.

¹¹⁴ *Solem*, 463 U.S. at 303. Jerry Helm, the petitioner in *Solem*, had been convicted of seven felonies. Three of the convictions were for third degree burglary, one was for obtaining money under false pretenses, one was for grand larceny, one was for driving while intoxicated, and the final conviction was for uttering a "no account" \$100 check. *Id.* at 279-81. Although, as the Court pointed out, he would have been sentenced at most to five years and \$5000 for the last crime standing alone, Helm was given life imprisonment without parole under three South Dakota statutes. *Id.*

¹¹⁵ 370 U.S. 660 (1962).

¹¹⁶ *Id.* at 665-67. The *Robinson* Court found that drug addiction was an illness which, without more, should not give rise to criminal sanctions. Justice Stewart wrote for the majority: "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Id.* at 667. As this indicates, *Robinson* is one of those rare instances in which the Court has employed the Constitution to reach the states' substantive definitions of crime.

¹¹⁷ 458 U.S. 782 (1982).

¹¹⁸ *Id.* at 788. Petitioner, Earl Enmund, had been convicted of first degree felony-murder and sentenced to death on the theory that he had waited in a car as two others robbed and shot an elderly Florida couple. The Court found that only eight jurisdictions would impose the death penalty solely because the defendant somehow participated in a robbery in the course of which a murder was committed, *id.* at 792, and further that since 1954 there were only six cases out of 362 where a nontriggerman felony-murderer was executed. *Id.* at 794. On the basis of statistics such as these, the Court concluded that the death penalty was cruel and unusual in Enmund's case. Recently, the Supreme Court reaffirmed the principles of *Enmund*. See *Cabana v. Bullock*, 106 S. Ct. 689, 693 (1986).

¹¹⁹ In addition to the cases cited within the text, *Solem* cited *Weems v. United States*, 217 U.S. 349, 363, 365 (1910) (defendant's crime had been falsification of a public document, and the Court found that the petty offense did not warrant fifteen years of *cadena temporal*, or hard labor in chains) and *Coker v. Georgia*, 433 U.S. 584, 598 (1977) (Court compared rape to murder, and concluded that only the latter warranted the death penalty). *Solem*, 463 U.S. at 291.

evaluate the harshness of the penalty vis-a-vis the gravity of the offense involved.¹²⁰

The *Solem* Court suggested several criteria that should guide such an evaluation. First, the sentencing courts should focus on the *gravity of the offense*.¹²¹ The labels assigned to the offense, however, are not conclusive.¹²² Instead, the courts should, among other things, determine whether the acts giving rise to the conviction involved violence or the threat of violence,¹²³ and whether the defendant committed the crime maliciously, intentionally, recklessly or negligently.¹²⁴ In Jerry Helm's case, the Court found that the prior acts leading to his recidivism conviction were "relatively minor" because they were all non-violent property crimes.¹²⁵

Second, the sentencing courts should evaluate the *harshness of the penalty*.¹²⁶ To determine the harshness, the *Solem* Court instructed the lower courts to focus on the penalties imposed for other crimes in the same jurisdiction,¹²⁷ and the penalties imposed for the same crime in other jurisdictions.¹²⁸ The Court found that Helm's punish-

¹²⁰ *Solem*, 463 U.S. at 292.

¹²¹ *Id.* at 290-91.

¹²² The *Solem* Court acknowledged Helm's habitual offender status as a concept distinct from each of his offenses, but it focused on the acts Helm had committed to *become* an habitual offender. *Id.* at 296-97. This inquiry "beyond the labels" corresponded with the analysis employed in *Enmund*, where the Court evaluated the degree of Enmund's participation rather than simply accept Florida's conclusion that he was a "felony-murderer," *Enmund*, 458 U.S. at 797-99. Similarly, in *Robinson*, the Court had concentrated on what the criminal label of "addiction" actually meant. *Robinson*, 370 U.S. at 667.

¹²³ *Solem*, 463 U.S. at 292-93.

¹²⁴ *Id.* at 293. The two criteria noted in the text, much like the longer list suggested in *Solem*, are "by no means exhaustive." *Id.* at 294. The list in the text is limited because the other criteria suggested by *Solem* (the magnitude in property value and the lesser included offense, attempt, and complicity distinctions) are not applicable in the overdose felony-murder concept.

¹²⁵ *Id.* at 296-97.

¹²⁶ *Id.* at 291.

¹²⁷ *Id.*

¹²⁸ *Id.* In *Pulley v. Harris*, 465 U.S. 37 (1984), decided seven months after *Solem*, the Court clarified that the eighth amendment does not require states to compare the sentences imposed for the *same* crime in the *same* jurisdiction. The Court acknowledged that some of its language in *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976), both involving the death penalty, may have led the lower courts to conclude that an intrajurisdictional proportionality review was required, but the Court found such an interpretation incorrect. An intrajuris-

ment of life imprisonment without parole was cruel and unusual in both respects. His sentence was disproportionate under the first prong because he was treated the same as those persons who had committed murder, second or third offense treason, first degree manslaughter, first degree arson, or kidnapping.¹²⁹ His sentence was disproportionate under the second prong because forty-eight of the fifty states would not have punished him so severely.¹³⁰

When a *Solem* analysis is applied to the overdose cases, it becomes clear that the drug suppliers, while they might be seriously punished, should not be punished as severely as murderers. In sharp contrast to the act of the ordinary murderer, the act of the drug supplier is not violent.¹³¹ The transaction is at most a commercial one.¹³² Al-

ditional review, the *Pulley* majority held, was but one of the ways a state could ensure that the death penalty was not being arbitrarily and capriciously imposed. *Pulley*, 465 U.S. at 44-46.

Interestingly, if the type of intrajudicial review rejected in *Pulley* were undertaken in the overdose cases, the results would reveal one of two flaws in these prosecutions. On the one hand, if drug suppliers whose products lead to death are not regularly being punished as murderers, then there is a problem of selective prosecution. On the other hand, if indeed there are not enough similarly situated defendants to establish selective prosecution, the government's insistence on the foreseeability of overdose deaths appears all the more questionable.

¹²⁹ *Solem*, 463 U.S. at 298.

¹³⁰ *Id.* at 299. Before proceeding with the application of *Solem* in the overdose context, it should be acknowledged that Justice Brennan devoted several paragraphs of the *Solem* opinion to the fact that Helms was ineligible for parole. The discussion was included primarily to refute South Dakota's argument that Helms' sentence was virtually the same as the recidivist's life sentence found constitutional in *Rummel v. Estelle*, 445 U.S. 263 (1980), just three years earlier. Justice Brennan distinguished the *Rummel* decision on the ground that Rummel was eligible for parole after only ten years. *Solem*, 463 U.S. at 300-02.

The distinction was indeed a fine one, but the lower courts have not limited *Solem's* application to its narrow facts. It is true that they have rarely found eighth amendment violations, but they have regularly undertaken a *Solem* analysis in a number of different contexts. See, e.g., *Rhoden v. Israel*, 574 F. Supp. 61, 65 (E.D. Wis. 1983) (17-year sentence for armed robbery not disproportionate under *Solem*); *State v. Hankins*, 686 P.2d 740, 746-47 (Ariz. 1984) (life sentence without parole for at least twenty-five years for felony-murder based on aggravated assault not disproportionate under *Solem*); *Commonwealth v. Marcus*, 16 Mass. App. 698, 701-03, 454 N.E.2d 1277, 1278-80 (1983) (mandatory five-year sentence imposed on recidivist heroin seller not disproportionate under *Solem*).

¹³¹ See *supra* notes 54-56 and accompanying text.

¹³² One of the most prominent examples of this can be found in *People v. Wong*, 35 Cal. App. 3d 812, 111 Cal. Rptr. 314 (1973). In *Wong*, the defendants were convicted and sentenced for murder because they bought heroin for the deceased

though a death eventually occurs, the user chooses to ingest the drug voluntarily.

Similarly, it cannot be said that the overdose defendants bear the same culpability as the ordinary murderer, or even the ordinary felony-murderer. For example, in one overdose case, the defendant supplied cocaine to a number of people at a party at which he also injected himself.¹³³ In another case, the defendant warned the user to reduce his dose because the defendant had not yet diluted the heroin.¹³⁴ The culpability characteristic of someone who deliberately shoots another person, or even of someone whose co-felon shoots another person during an armed robbery, cannot be ascribed to these suppliers of drugs.¹³⁵ If anything, the evidence in the overdose cases is contrary to any finding of intent or recklessness with respect to the taking of human life.¹³⁶

with her money. Prior to the overdose, the defendants slept with her and a girlfriend in a hotel room, and it was the defendants who summoned the authorities for assistance. *See Wong*, 35 Cal. App. 3d at 821, 111 Cal. Rptr. at 321.

Even in those cases where a defendant has benefited financially, there is nothing whatsoever to indicate that the exchange was violent. *See, e.g., Martin v. State*, 377 So. 2d 706 (Fla. 1979) (first degree murder conviction affirmed where defendant sold heroin through intermediary to someone he did not even know). To the extent that the courts are deeming drug transactions violent in some abstract sense, they are, again, relying on popular myth. *See supra* notes 54-56 and accompanying text.

¹³³ *Heacock v. Commonwealth*, 228 Va. 397, 401, 328 S.E.2d 90, 92 (1984).

¹³⁴ *State v. Randolph*, 676 S.W.2d 943, 944 (Tenn. 1984).

¹³⁵ In these situations, or even in situations where a defendant's gun misfires as he waves it about, it can be argued that the defendant has exhibited recklessness with respect to a potential death. When a defendant has accompanied someone carrying a gun, there is a somewhat natural presumption that his co-felon will use it if necessary to preserve his own life. *See Adlerstein, Felony-Murder in the New Criminal Codes*, 4 AM. J. CRIM. L. 249, 250 (1975-76) (felony-murder rule encourages felons to dissuade co-felons from intentional killing). The response of a resister who accidentally kills, for example, a hostage, can also arguably be foreseen. *See Pizano v. Superior Court*, 21 Cal. 3d 128, 577 P.2d 659, 145 Cal. Rptr. 524 (1978) (defendant properly convicted of murder where his co-felon took a hostage at gunpoint and a neighbor shot and killed the hostage). Similarly, guns misfire often enough that the use of them to commit felonies creates an inordinate risk of someone being shot. *See Fletcher, Reflections on Felony-Murder*, 12 SW. U. L. REV. 413, 425 (1981) (suggesting that the rationale has been that reckless homicide is implicit in the proof of the underlying felony). In contrast, the drug "suppliers" are often friends who share the drug or dealers who often direct the users on a proper dose. *See supra* note 56 and accompanying text.

¹³⁶ Common sense alone should suggest this conclusion: why would a supplier of drugs intentionally kill or even behave recklessly with respect to a user's death when apparently all he wants is his customer's return?

In truth, the overdose defendants have committed nothing more than a non-violent act of drug distribution which reflects no culpability with respect to the users' deaths. Under *Solem*, then, their sentences should be in a range less than the penalties imposed by the same jurisdiction for violent, culpable killings and equivalent to the penalties imposed by other jurisdictions for the offense of distribution.¹³⁷ This type of sentencing is not employed when the felony-murder rule is applied to drug suppliers. When the overdose defendants are sentenced as murderers, they are treated identically to others in their own jurisdiction who have intentionally and violently killed another human being,¹³⁸ and much more harshly than drug suppliers in other jurisdictions who will neither be treated nor sentenced as harshly as murderers.¹³⁹

¹³⁷ See *supra* notes 127-28 and accompanying text.

¹³⁸ Admittedly, the author has not undertaken an in-depth study of whether the same courts that fictionally find causation in the overdose cases then flip-flop on the issue and treat the lack of proximate cause as a mitigating circumstance calling for the minimum sentences imposed for murder. Even such a study, however, would not remedy the eighth amendment problem because *Pulley v. Harris*, 465 U.S. 37 (1984), narrowed the required intrajurisdictional proportionality review to sentences imposed for *other* crimes. See *supra* note 128. Thus, the eighth amendment question cannot be resolved until the defendants in the overdose cases are no longer equated with murderers.

Judge Posner, writing for the court in *United States v. Ambrose*, 740 F.2d 505 (7th Cir. 1984), *cert. denied*, 105 S.Ct. 3479 (1985), recognized this very idea when he wrote that sentencing ten defendants who aided and abetted the kingpins of a major Chicago narcotics enterprise on a par with the kingpins posed serious eighth amendment concerns under *Solem*. *Id.* at 510. Although the case was remanded because the court believed that the sentences did not comport with congressional intent, the court recognized that situations were certain to arise where the difference between a principal's and accomplice's culpability constitutionally required that they be given different sentences. *Id.*

¹³⁹ An extensive review of the states' sentencing provisions with respect to drug distribution is beyond the scope of this Note, although the vast difference in the average sentences for distributors and murderers on the federal level is set forth *supra* note 93. Moreover, to the extent that some states have imposed mandatory life sentences for drug distribution, any comparison with those sentences is questionable because those sentences themselves may be unconstitutional under a *Solem* analysis of the gravity of the offense. For example, some of the sentences for drug distribution which were upheld prior to *Solem* truly shock the conscience. See, e.g., *Castillo v. Harris*, 491 F. Supp. 33 (S.D.N.Y.), *aff'd*, 646 F.2d 559 (2d Cir. 1980) (mandatory life sentence with minimum of 15 years to serve for single sale of cocaine not unconstitutional); *People v. Keller*, 245 Cal. App. 2d 711, 54 Cal. Rptr. 154 (1966) (statutorily required life sentence for two sales of marijuana not unconstitutional);

CONCLUSION

Felony-murder convictions in the overdose cases reflect society's frustration over its inability to convince those who use drugs such as heroin or cocaine not to do so. By threatening the suppliers with murder convictions, the reasoning seems to go, the supply, and consequently the use, will decrease.¹⁴⁰ The fallacy in this reasoning, however, is that the suppliers likely will not be deterred, for they, unlike those who convict them, know that the chances of an overdose are much lower than generally perceived.¹⁴¹ The overdose cases consequently advance no principle other than revenge, or a vindication of the user's death. This principle, standing alone, does not justify the courts' application of the felony-murder rule if they must distort the law of causation, violate due process, and impose cruel and unusual punishment to do so.

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State v. Mitchell, 563 S.W.2d 18 (Mo. 1978) (statutorily required sentence of 7 years for \$5 sale of 11 grams of marijuana by one with no history of violent crime not unconstitutional). In contrast, now that *Solem* has given meaning to the eighth amendment, the courts are beginning to punish certain acts for what they actually are. See, e.g., United States v. Lewis, 759 F.2d 1316, 1335 (8th Cir.) (although constrained by pre-*Solem* case law and necessary deference to the legislature to uphold life without parole for running a major cocaine and marijuana distributorship, the court suggests that the district court reconsider the severity of the sentence), cert. denied, 106 S. Ct. 406 (1985); Whitmore v. Maggio, 742 F.2d 230, 233-34 (5th Cir. 1984) (case remanded for *Solem* evaluation of the offense where total of 125 years without parole imposed for two armed robberies).

¹⁴⁰ See, e.g., People v. Taylor, 11 Cal. App. 3d 57, 63, 89 Cal. Rptr. 697, 701 (1970) ("[K]nowledge that the death of a person to whom heroin is furnished may result in a conviction for murder should have some effect on the defendant's readiness to do the furnishing.").

¹⁴¹ See *supra* notes 64-72 and accompanying text. Significantly, the Supreme Court was unimpressed with a deterrence rationale even for felony-murder based on robbery. In *Enmund v. Florida*, 458 U.S. 782 (1982), the Court noted that the percentage of robberies accompanied by homicide has been quite low and quite consistent over the years, not exceeding .6%. *Id.* at 799 (citing MODEL PENAL CODE § 210.2 comment at 38 n.96). In the overdose cases, the risk of death accompanying the sale of drugs is approximately .00035%. See *supra* note 69 and accompanying text.