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People v. Dillon: Felony Murder in California

INTRODUCTION

The felony murder rule allows for a conviction of murder upon a showing that a death occurred during the commission of certain felonies.¹ The rule has come into increasing disfavor with both the courts and the commentators. Many courts have limited the rule in application and only enforce it grudgingly.² The critics point out that there is not always a logical connection between the commission of a qualifying felony and a resulting death.³ Where there is no link, the rule punishes a chance occurrence.⁴

Recently in *People v. Dillon*,⁵ the California Supreme Court, in a landmark decision, determined that under certain circumstances, a life sentence imposed upon a first degree felony murder conviction may be cruel and unusual.⁶ *Dillon* raises questions about the continued viability of the felony murder doctrine in California and creates uncertainty as to what penalties will be deemed cruel and unusual.⁷ This Note will discuss the historical development and contemporary form of the felony murder doctrine. It will also relate the doctrine to the concept of cruel and unusual punishment. The facts and holding of *Dillon* will be analyzed in these contexts to determine the potential impact of the case. This Note will then conclude with an examination of needed legislative action.

I. HISTORY OF THE FELONY MURDER RULE

The felony murder doctrine is derived, in one form or another,

1. CAL. PENAL CODE § 189 (West 1983).

2. R. PERKINS, CRIMINAL LAW § 1, at 44 (2d ed. 1969) [hereinafter cited as PERKINS].

3. Felony murder is based upon the idea that the commission of felonies creates a high risk of homicide. "The problem derives from regarding the commission of the felony as conclusive on the question whether the defendant acted recklessly toward the victim." Fletcher, *Reflections on Felony Murder*, 12 SW. U.L. REV. 413, 415 (1980-1981) [hereinafter cited as Fletcher, *Reflections*].

4. Where, for example, a defendant had taken all possible precautions to avoid harm to others and an unforeseeable accidental homicide occurred.

5. 34 Cal. 3d 441, 668 P.2d 697, 194 Cal. Rptr. 390 (1983).

6. *Id.* at 450, 668 P.2d at 719, 194 Cal. Rptr. at 412.

7. The California Supreme Court somewhat narrowed this question in a case decided several months after *Dillon*. In this decision, they held that an intent to kill must be established before a defendant may be penalized under California's felony murder special circumstances provision. This holding precludes both the death penalty and life imprisonment without possibility of parole, absent such a finding. *Carlos v. Superior Court*, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983), *see infra* notes 129-33 and accompanying text.

from English common law.⁸ The exact origins are unclear.⁹ It was first enunciated by Lord Coke in 1797.¹⁰ Lord Coke wrote, "If the act be unlawful it is murder."¹¹ This absolute conception was successively limited in England¹² until abolished by statute in 1957.¹³ At the time of its origin, all felonies were subject to capital punishment,¹⁴ while attempted felonies were only misdemeanors.¹⁵ Thus, the rule merely placed upon the perpetrator of an attempted felony the same liability he faced if the crime had been successful. For completed felonies, where the punishment was death, he faced no additional jeopardy because of the rule. However, since today felonies are generally not capital offenses, that is no longer the case. Therefore, the original purpose of the rule appears no longer to exist.¹⁶

II. CONTEMPORARY TREATMENT OF FELONY MURDER

A majority of American jurisdictions observe some form of the felony murder doctrine.¹⁷ Widespread criticism has, however, resulted in substantial limitation of the rule in many states. Three states have abolished it altogether, Hawaii and Kentucky by statute¹⁸ and Michigan by judicial abrogation.¹⁹ A number of other states have retained the rule, but considerably lessened its impact by reducing the resulting degree of homicide.²⁰ Under these schemes

8. Comment, *Constitutional Limitations Upon the Use of Statutory Criminal Presumptions and the Felony Murder Rule*, 46 Miss. L.J. 1021 (1975).

9. *People v. Aaron*, 409 Mich. 672, 689, 299 N.W.2d 304, 307 (1980).

10. *Id.* at 692-93, 299 N.W.2d at 309.

11. Lord Coke wrote, "If the act be unlawful it is murder. As if A meaning to steale a Deere in the Park of B, shooteth at a Deere, and by the glance of the arrow killeth a boy, that is hidden in a bush: this is murder, for that the act was unlawfull" E. COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 56 (1797 & photo. reprint 1979).

12. PERKINS, *supra* note 2, at 38-39.

13. Fletcher, *Reflections*, *supra* note 3, at 415.

14. Under English common law a felony was defined in terms of which crimes were punished by forfeiture. The felon lost "life and member and all he had." The common law felonies were felonious homicide, mayhem, arson, rape, robbery, burglary, larceny, prison breach, and rescue of a felon. PERKINS, *supra* note 2, at 11.

15. Under English common law a misdemeanor was defined as a crime that was not a felony or treason. Therefore, a failed felony, by itself, would not subject the defendant to the death penalty. PERKINS, *supra* note 2, at 11.

16. PERKINS, *supra* note 2, at 44.

17. Adlerstein, *Felony Murder in the New Criminal Codes*, 4 AM. J. CRIM. L. 249, 250 (1975-1976) [hereinafter cited as Adlerstein, *Criminal Codes*]; Comment, *Michigan Supreme Court Abrogates Common Law Felony Murder Rule*, 15 SUFFOLK U.L. REV. 1306, 1311 (1981); Note, *The Felony Murder Rule: In Search of a Viable Doctrine*, 23 CATH. LAW. 133, 134 (1978) [hereinafter cited as Note, *Felony Murder*].

18. Note, *Felony Murder*, *supra* note 17, at 137.

19. *People v. Aaron*, 409 Mich. 672, 299 N.W.2d 304 (1980).

20. Louisiana, New Hampshire, New York, and Pennsylvania have reduced felony murder to second degree murder, Maine and Wisconsin to third degree murder, and

the defendant may only be liable for second degree murder,²¹ third degree murder,²² or manslaughter.²³ Other jurisdictions limit the circumstances under which the rule may be applied. Although there are many variations, three general types predominate.²⁴

The first requires that the underlying felony be dangerous to human life.²⁵ This is commonly accomplished by listing covered felonies in the statute and limiting these to dangerous offenses.²⁶ A second limitation requires that the underlying felony be independent of the felony murder.²⁷ This is to prevent an act which is actually a part of the homicide from being used as a basis for a felony murder prosecution. It has been noted that absent this qualification, every homicide could be made a felony murder on the basis of the included manslaughter.²⁸ The third type of limitation commonly placed on the felony murder rule reduces the number of situations in which a defendant is held liable for killings by third parties.²⁹ For example, under some versions of the felony murder rule, a defendant has been held liable for murder where a co-felon was killed by a police officer. These types of restrictions have all been adopted by the California Supreme Court and will be discussed further below.

III. FELONY MURDER IN CALIFORNIA

California's first degree felony murder statute reads, in part: "All murder . . . which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, . . . is mur-

Alaska and Ohio to manslaughter. See also Note, *Felony Murder*, *supra* note 17, at 141-42.

21. *Id.*

22. *Id.*

23. *Id.*

24. Note, *Felony Murder*, *supra* note 17, at 137.

25. For example, larceny would not be likely to cause danger to human life and would therefore not be a felony which would trigger the felony murder rule. See generally PERKINS, *supra* note 2, at 41; W. LAFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* 547 (1972).

26. Additionally, some jurisdictions treat deaths occurring during felonies not in the first degree felony murder statute, as second degree felony murders. However, the courts often rule that this only applies to dangerous to human life felonies. Adlerstein, *Criminal Codes*, *supra* note 17, at 252. California is an example of a state which follows this pattern. See *infra* notes 30, 40-47 and accompanying text.

27. This is commonly called the merger doctrine. Note, *Felony Murder*, *supra* note 17, at 144; the California Supreme Court declined to adopt this term, but acknowledged that their objective was substantially the same. *People v. Ireland*, 70 Cal. 2d 522, 540, 450 P.2d 580, 590, 75 Cal. Rptr. 188, 198 (1969). See *infra* notes 48-51 and accompanying text (discussing the California rule).

28. PERKINS, *supra* note 2, at 43.

29. A defendant may find himself subject to a felony murder charge when a co-felon either kills or is killed or even when a third party is killed by another third party. Note, *Felony Murder*, *supra* note 17, at 152-53.

der of the first degree; and all other kinds of murder are of the second degree.”³⁰ Thus, “even without an intent to kill or injure, or an act done in wanton and willful disregard of the obvious likelihood of causing such harm, homicide is murder if it falls within the scope of the felony murder rule.”³¹ California also subscribes to a second degree felony murder rule. When a homicide occurs during the commission of a felony which is inherently dangerous to human life,³² and is not covered by the statute, it may be deemed to be second degree murder.³³ It has been held that while the first degree felony murder rule is a statutory creation, the second degree rule is a “judge-made doctrine without any express basis in the Penal Code.”³⁴ In order to appreciate the unique nature of the *Dillon* decision, it is helpful to consider here the California Supreme Court’s pre-*Dillon* position on the felony murder rule.

The court has unequivocally joined other courts in criticizing the rule.³⁵ It has stated that the rule “anachronistically resurrects from a bygone age a ‘barbaric’ concept that has been discarded in the place of its origin.”³⁶ The court has also observed “that in almost all cases in which it is applied it is unnecessary and that it erodes the relation between criminal liability and moral culpability.”³⁷ The California Supreme Court has also acted upon an express sentiment that the doctrine is “a highly artificial concept that deserves no extension beyond its required application.”³⁸ It has been noted, for example, that this unfavorable attitude has swayed the court’s thinking in determining just which felonies are inherently dangerous to human life.³⁹ The California court adopted a very narrow version of the rule, holding that a felony will be determined dangerous by looking at it “in the abstract” rather than at the “particular

30. CAL. PENAL CODE § 189 (West 1983).

31. PERKINS, *supra* note 2, at 37 (commenting on felony murder in general).

32. The California Supreme Court has stated that “only such felonies as are in themselves ‘inherently dangerous to human life’ can support the application of the felony murder rule.” The court directed that the assessment of the “peril to human life inherent to any given felony” be accomplished by looking “to the elements of the felony in the abstract, not the particular ‘facts’ of the case.” *People v. Phillips*, 64 Cal. 2d 574, 582, 414 P.2d 353, 360, 51 Cal. Rptr. 225, 232 (1966).

33. CAL. PENAL CODE § 189 (West 1983).

34. *People v. Dillon*, 34 Cal. 3d 441, 472 n.19, 668 P.2d 697, 715 n.19, 194 Cal. Rptr. 390, 408 n.19 (1983).

35. The California Supreme Court has continued this criticism in the post-*Dillon* case *Carlos v. Superior Court*, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983). See *infra* notes 129-33 and accompanying text.

36. *Phillips*, 64 Cal. 2d at 583 n.6, 414 P.2d at 360 n.6, 51 Cal. Rptr. at 232 n.6.

37. *People v. Washington*, 62 Cal.2d 777, 783, 402 P.2d 130, 134, 44 Cal. Rptr. 442, 446 (1965).

38. *Phillips*, 64 Cal. 2d at 582, 414 P.2d at 360, 51 Cal. Rptr. at 232. (footnote omitted).

39. Annot., 50 A.L.R. 3d 397, 409 (1973), See *infra* notes 41-47 and accompanying text (examples of this type of case).

facts of the case.”⁴⁰ As an illustration, possession of a concealed firearm by an ex-felon⁴¹ and a felony false imprisonment were deemed not inherently dangerous.⁴² In *People v. Henderson*,⁴³ the court decided that false imprisonment was not “inherently dangerous to human life,” within the meaning of the second degree felony murder doctrine.⁴⁴ In this case, the two defendants had held a third man at gun point. During a struggle, the gun discharged killing a woman standing nearby.⁴⁵ In determining that false imprisonment should not be used as the underlying felony for a felony murder instruction, the court looked to the statute.⁴⁶ Because the legislature, in defining the crime of false imprisonment, included conduct both violent and nonviolent, the crime “viewed as a whole in the abstract is not inherently dangerous to human life.”⁴⁷

The court also limited the California felony murder rule to independent felonies in *People v. Ireland*,⁴⁸ when it held that felony murder cannot be “based upon a felony which is an integral part of the homicide and which the evidence produced by the prosecution shows to be an offense included *in fact* within the offense charged.”⁴⁹ The court refused to allow the prosecution to “bootstrap” into murder the lesser crime of assault committed when a husband shot his wife under mitigating circumstances.⁵⁰ The court also made this rule applicable to a technical burglary i.e. entering a dwelling, where the sole object of the entry was to commit the felony of assault.⁵¹

The court has additionally limited defendant liability for killings done by a third party. In *People v. Washington*⁵² they addressed liability for killings committed by a victim while resisting a crime. The defendant’s accomplice had been shot and killed by the victim of the robbery. The court refused to allow this act to be tied to the

40. See *supra* note 32.

41. *People v. Satchell*, 6 Cal. 3d 28, 489 P.2d 1361, 98 Cal. Rptr. 33 (1971).

42. *People v. Henderson*, 19 Cal. 3d 86, 560 P.2d 1180, 137 Cal. Rptr. 1 (1977).

43. *Id.*

44. *Id.* at 94, 560 P.2d at 1184, 137 Cal. Rptr. at 5.

45. *Id.* at 91-92, 560 P.2d at 1182-83, 137 Cal. Rptr. at 3-4.

46. *Id.* at 96, 560 P.2d at 1186, 137 Cal. Rptr. at 7; See also CAL. PENAL CODE § 237 (West Supp. 1983) which provides in part: “If . . . false imprisonment be effected by violence, menace, fraud, or deceit, it shall be punishable by imprisonment in the state prison.”

47. *Henderson*, 19 Cal. 3d at 94, 560 P.2d at 1184, 137 Cal. Rptr. at 5.

48. 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969). A husband, distraught over his wife’s affairs with other men, shot and killed her. The court refused to allow a felony murder conviction when the underlying felony relied upon was assault with a deadly weapon.

49. *Id.* at 539, 450 P.2d at 590, 75 Cal. Rptr. at 198.

50. *Id.*

51. *People v. Wilson*, 1 Cal. 3d 431, 462 P.2d 22, 82 Cal. Rptr. 494 (1969).

52. 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965).

defendant via the felony murder rule.⁵³ It held that such a killing could not be considered to have been "committed by him in the perpetration" of a felony within the meaning of the statute.⁵⁴ This limitation, however, was not made applicable to instances where a defendant initiated a gun battle, because there is a clear connection between this act and a resulting death.⁵⁵

The majority of the California Supreme Court has thus expressed a consistent dislike of the felony murder rule.⁵⁶ Their antipathy may explain their willingness to break new ground in the context of the doctrine. The facts of *Dillon* and the court's holding should be read with this in mind.

IV. THE FACTS OF *DILLON*

The defendant in *Dillon* was a seventeen year old rural California high school student. The deceased, Dennis Johnson, grew illegal marijuana on a farm in the area.⁵⁷ When the defendant learned of Johnson's farm he made two abortive attempts to rob him.⁵⁸ The first raid, carried out with several friends, resulted in Johnson warning the group off at gun point. The defendant and his brother abandoned a second attempt when they heard a shotgun blast.⁵⁹ The third and fatal attempt was highly organized. A total of eight boys participated; they equipped themselves with maps, harvesting tools, rope, guns, and other weapons and equipment. However, they became separated, several boys were chased by dogs, and one boy accidentally fired his shotgun.⁶⁰ During this confusion Johnson, who was carrying a shotgun approached Dillon. There is no evidence that the defendant was threatened. He testified, however, that he

53. *Id.* at 781 402 P.2d at 133, 44 Cal. Rptr at 445.

54. *Id.*

55. The court observed that when a defendant acts with "complete disregard for human life" "it is unnecessary to imply malice by invoking the felony murder doctrine." *Id.* at 782, 402 P.2d at 134, 44 Cal. Rptr. at 446 (footnotes omitted). Thus, a defendant who initiates a gun battle during a robbery will be criminally liable for any deaths even without the felony murder rule.

The court recently applied this reasoning to uphold a first degree murder conviction. The defendant's accomplice had been shot by the police following a high speed chase. The court found that the defendant's participation and use of a gun, during the chase, was malicious conduct. It was held to be the proximate cause of the accomplice's death. *People v. Caldwell*, 36 Cal. 3d 210, 681 P.2d 274, 203 Cal. Rptr. 433 (1984).

56. This dislike has again been expressed by the court, in the post-*Dillon* case *Carlos v. Superior Court* 35 Cal. 3d 131, 672 P.2d 862, 197 Cal Rptr. 79 (1983). *See infra* notes 129-33 and accompanying text.

57. The court in *Dillon* refused to accept an argument that because marijuana was illegal, it was not subject to theft. They found that "prohibiting possession of an item . . . does not license criminals to take it . . ." *People v. Dillon*, 34 Cal. 3d 441, 456-57 n.5, 668 P.2d 697, 704 n.5, 194 Cal. Rptr. 390, 397 n.5 (1983).

58. *Id.* at 451-52, 668 P.2d at 700-01, 194 Cal. Rptr. at 393-94.

59. *Id.*

60. *Id.*

believed that his friends had been shot and he feared for his own life. He shot Johnson nine times, killing him.⁶¹

V. THE COURT'S HOLDING

The court upheld the constitutionality of the felony murder statute, rejecting the notion that the rule creates a presumption of malice, thus violating due process requirements.⁶² However, they went on to find that "in some first degree felony murder cases this Procrustean penalty may violate the prohibition of the California Constitution against cruel or unusual punishments."⁶³ *Dillon* represents a departure for the California Supreme Court. The court had previously confined its efforts to placing mechanical limitations on the rule's operation. However, in *Dillon* the court addresses one of the fundamental problems inherent in the rule itself; the rule can lead to a punishment which "not only fails to fit the crime, 'it does not fit the criminal.'"⁶⁴

The Supreme Court cited a 1976 case, as controlling.⁶⁵ In *In re Lynch*,⁶⁶ it was declared that "a punishment may violate . . . the California Constitution if . . . it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity."⁶⁷ The *Dillon* court based its analysis for determining proportionality on two "techniques" which had been identified in *Lynch*. First, "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society," must be examined.⁶⁸ The court found the following elements concerning this point of particular significance: 1) the defendant was immature and did not fully comprehend what he was doing when he shot Johnson;⁶⁹ 2) both the judge and jury felt that the punishment they were compelled to impose

61. *Id.*

62. The court held that "as a matter of law malice is not an element of felony murder," and that therefore the statute does not violate due process by creating a presumption of malice. This conceptual approach avoids the transfer of the malice from the underlying felony to the murder as done in some jurisdictions. It also makes the rule somewhat more arbitrary and subject to a cruel and unusual attack. This is because, to some extent, the culpability for the underlying felony is also isolated from the culpability for the murder. *Id.* at 475-76, 668 P.2d at 717-18, 194 Cal. Rptr. at 410-11.

63. *Id.* at 477, 668 P.2d at 719, 194 Cal. Rptr. at 412 (citing CAL. CONST. art. 1, § 17).

64. *Id.* at 479, 668 P.2d at 721, 194 Cal. Rptr. at 414 (citation omitted).

65. *Id.* at 477, 668 P.2d at 719, 194 Cal. Rptr. at 412.

66. 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).

67. *Id.* at 424, 503 P.2d at 930, 105 Cal. Rptr. at 226.

68. *Dillon*, 34 Cal. 3d at 479, 668 P.2d at 720, 194 Cal. Rptr. at 413. (citation omitted)

69. A psychologist offered expert testimony that the defendant "was immature in a number of ways: intellectually, he showed poor judgment and planning; socially he functioned 'like a much younger child'; emotionally, he reacted 'again, like a much

was overly harsh and counterproductive;⁷⁰ 3) the defendant acted in a panic, responding “to a suddenly developing situation that defendant perceived as putting his life in immediate danger”;⁷¹ and 4) the defendant had not been in trouble with the law before this incident.⁷²

The second technique used by the court was a comparison of the penalty imposed in relation to “those prescribed in the same jurisdiction for more serious crimes.”⁷³ On this point, the *Dillon* court observed that when two crimes are compared, and the lesser is punished more severely, the unfairness is very clear.⁷⁴ It is, however, also unfair when crimes of varying gravity receive the same punishment. The court noted the following on this issue: 1) although there were extensive mitigating circumstances in this case, the defendant received the same punishment that he would have received for a “cold blooded” premeditated murder;⁷⁵ and 2) his accomplices, who were party to the conspiracy to commit the robbery, received only “petty chastisements.”⁷⁶

In analysing the *Lynch* techniques, the court provided additional indicators for the trial court to use in assessing the culpability of a defendant.⁷⁷ They directed the lower courts to consider the “totality of the circumstances surrounding the commission of the offense. . . including such factors as its motive, the way it was committed, the extent of the defendant’s involvement, and the consequences of his acts.”⁷⁸ In addition, a court should assess the individual, considering “such factors as . . . age, prior criminality,

younger child’ by denying the reality of stressful events and living rather in a world of make-believe.” *Id.* at 483, 668 P.2d at 723, 194 Cal. Rptr. at 416.

70. *Id.* at 484-85, 668 P.2d at 724-25, 194 Cal. Rptr. at 417-18.

71. *Id.* at 488, 668 P.2d at 727, 194 Cal. Rptr. at 420.

72. *Id.*

73. The court also found the third *Lynch* technique, comparing the sentence with penalties in other jurisdictions for the same offense, was not needed in every case. They explained that not all techniques must be invoked in order to find a sentence disproportionate. They did not apply it in *Dillon*. *Id.* at 487 n.38, 668 P.2d at 726 n.38, 194 Cal. Rptr. at 419 n.38 (citation omitted).

74. *Id.*

75. Because of the defendant’s minority, the death penalty was not a possibility. *Id.* at 487, 668 P.2d at 726, 194 Cal. Rptr. at 419.

76. The court noted that the other boys had both armed themselves and helped to plan the robbery. They were therefore “coconspirators” or “at the very least . . . aiders and abettors and hence principals in the commission of . . . the killing.” Four of the other boys merely received probation, one was placed in a juvenile education and training project, and the sole adult received one year in the county jail and three years probation. The court stated that these sentences, representing “the proverbial slap on the wrist,” underscored “the excessiveness of defendant’s punishment” *Id.* at 488, 668 P.2d at 727, 194 Cal. Rptr. at 420.

77. *Id.* at 479, 668 P.2d at 720, 194 Cal. Rptr. at 413.

78. *Id.* at 479, 668 P.2d at 720, 194 Cal. Rptr. at 413-14.

personal characteristics, and state of mind."⁷⁹

On this basis, the court ordered the conviction reduced to second degree murder.⁸⁰ Although the court identified a number of tests to guide lower courts in applying *Dillon*, it remains unclear just how those tests will apply to facts different from those in *Dillon*. The form of *Dillon*'s effect is more likely to draw from the concept of cruel and unusual punishment than from prior developments of the felony murder rule. This is because *Dillon* does not alter the mechanical application of the rule by redefining it. Instead, it prevents application of the rule when the outcome would be so unjust as to be cruel and unusual.

VI. CRUEL AND UNUSUAL PUNISHMENT

In order to anticipate *Dillon*'s ultimate impact, it is instructive to consider the history and development of the ban on cruel and unusual punishment. The phrase first appeared in 1688 in the English Bill of Rights.⁸¹ Many commentators conclude that the objective was to eliminate the then common punishments such as "branding, burning, and disemboweling."⁸² An alternate theory holds that the intent was merely to prevent the courts from exceeding their legal authority.⁸³ The American founding fathers included a prohibition against cruel and unusual punishment in the eighth amendment of the Constitution.⁸⁴ There has been considerable debate as to the intended meaning of the concept of cruel and unusual punishment.⁸⁵ However, the United States Supreme Court has generally identified four factors to be considered in determining if a sentence violates the eighth amendment. First, "whether the method of punishment is inherently cruel or severe" Second, "whether the punishment is excessive, disproportionate, or unnecessary" Third, "whether the punishment is unacceptable to society" Fourth, "whether the punishment is being inflicted arbitrarily"⁸⁶

79. *Id.* at 479, 668 P.2d at 721, 194 Cal. Rptr. at 414.

80. The court held that the second degree murder conviction was necessary because *Dillon* had intentionally killed with no adequate legal provocation. They also affirmed an attempted robbery conviction. *Id.* at 489, 668 P.2d at 727, 194 Cal. Rptr. at 420.

81. Annot. 33 A.L.R. 335, 349 (1970).

82. Note, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U. L. REV. 846, 847 (1961) [hereinafter cited as Note, *Cruel and Unusual Punishment*].

83. *Furman v. Georgia*, 408 U.S. 238, 318 (1971) (Marshall, J., concurring).

84. U.S. CONST. amend. VIII provides: "Excessive bail shall not be required, nor excessive fines be imposed, nor cruel and unusual punishments inflicted."

85. This debate is however beyond the scope of this article. For a discussion of this topic see generally Note, *Cruel and Unusual Punishment*, *supra* note 82.

86. Annot. 33 L. ED. 2D 932, 942 (1972).

Despite these broad principles, the concrete application of the concept of cruel and unusual has proven elusive. As Justice Burger stated in *Furman v. Georgia*, "the ban on 'cruel and unusual punishments' is one of the most difficult to translate into judicially manageable terms."⁸⁷ The requirement of proportionality has been particularly difficult to pin down.⁸⁸ The *Lynch* techniques discussed above have been used to determine proportionality.⁸⁹ In *Dillon*, the court noted that what constitutes disproportionate punishment is "a question of degree. The choice of fitting and proper penalties is not an exact science."⁹⁰ In essence, the determination of disproportionality is a process of weighing the seriousness of the crime against the severity of the penalty imposed. Because an extreme imbalance is what is required, the courts have little trouble finding harsh sentences for less serious crimes cruel and unusual.

However, as the gravity of the crime increases, the margin for legislative error in determining punishment for a crime decreases. Therefore, the courts have been reluctant to second guess the lawmakers in those situations. The United States Supreme Court noted this about felony sentences in *Hutto v. Davis*,⁹¹ "the excessiveness of one prison term as compared to another is invariably a subjective determination, there being no clear way to make any constitutional distinction between one term of years and a shorter or longer term of years."⁹² In *Hutto*, two consecutive twenty year sentences meted out for an intent to distribute and the distribution of nine ounces of marijuana was held not cruel and unusual.⁹³ Although the United States Supreme Court has treated the setting of punishments up to life imprisonment⁹⁴ as largely a legislative prerogative, they have created an exception for capital punishment. This is because of the unique and irrevocable nature of the death penalty.⁹⁵ This more restrictive attitude has had an effect upon the

87. *Furman v. Georgia*, 408 U.S. 238, 376 (1971) (Burger, C.J., dissenting).

88. Note, *Cruel and Unusual Punishment*, *supra* note 82, at 850.

89. *Dillon*, 34 Cal. 3d at 479, 668 P.2d at 720, 194 Cal. Rptr. at 413

90. *Id.* at 478, 668 P.2d at 720, 194 Cal. Rptr. at 413 (*citing Lynch*, 8 Cal. 3d at 423, 503 P.2d at 930, 105 Cal. Rptr. at 226).

91. 454 U.S. 370, (1982).

92. *Id.* at 373.

93. *Id.*

94. For example, the Court has held that no eighth amendment issue was raised by a life sentence imposed under the Texas recidivist law, where the defendant committed three nonviolent crimes for the amounts of \$80.00, \$28.36, and \$120.75. *Rummel v. Estelle*, 445 U.S. 263 (1980). *See contra Solem v. Helm*, 103 S. Ct. 3001 (1983) where the Supreme Court subsequently has held that a sentence of life imprisonment without possibility of parole imposed under a South Dakota recidivist statute similar to that examined by the court in *Rummel* was violative of the eighth amendment.

95. Although serious crimes generally raise little question as to the legislature's power to set punishments, the United States Supreme Court has created an exception to this for the death penalty. As Justice Stewart noted, "[t]he penalty of death differs from

felony murder doctrine. In *Enmund v. Florida*,⁹⁶ for example, the Court held that a defendant may not be condemned to death, under the felony murder rule, where the defendant "does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed."⁹⁷

California appears to be one of the first jurisdictions to hold that a noncapital murder sentence can be subject to a finding that the punishment was cruel and unusual.⁹⁸

VII. PROPORTIONALITY IN CALIFORNIA

California, like most states, has a constitutional provision prohibiting cruel and unusual punishments.⁹⁹ The *Dillon* decision is based on these state provisions.¹⁰⁰ Although the court in *Dillon* refers to the reasoning found in *Enmund v. Florida*,¹⁰¹ it is clear that *Enmund's* reasoning was based solely upon the unique nature of capital punishment.¹⁰² In addition to the extensive eighth amendment regulation of the death penalty, the California court has further limited capital punishment in felony murder cases.¹⁰³ Because of this, *Dillon* will impact mostly upon noncapital cases. It is therefore instructive to consider the crimes and punishments in the cases cited in *Dillon* as illustrative of the *Lynch* techniques, because all five were noncapital cases in which the sentences were deemed disproportionate.

The common thread linking these cases is that they involve relatively small crimes and most of the defendants faced long prison terms. For example, in *In re Lynch*,¹⁰⁴ the defendant served five years for exposing himself to a waitress in a drive-in restaurant. The court has also considered the circumstances of the crime when it was of a more serious nature. In *In re Foss*,¹⁰⁵ the petitioner had

all other forms of criminal punishment. . . . It is unique in its total irrevocability . . . its rejection of rehabilitation [and] its absolute renunciation of all that is embodied in our concept of humanity." *Furman v. Georgia*, 408 U.S. 238, 306 (1971).

96. 458 U.S. 782 (1982).

97. *Id.* at 797. In this case the defendant had been sentenced to death on evidence that he had been waiting in a car while his companions murdered an elderly couple.

98. The Supreme Court recently applied a proportionality analysis to a life sentence without possibility of parole imposed for the commission of a nonviolent felony in *Solem v. Helm*, 103 S. Ct. 3001 (1983). See generally Note, *Solem v. Helm: The Courts' Continued Struggle to Define Cruel and Unusual Punishment*, 21 CAL. W.L. REV. 590 (1985).

99. Annot. 33 A.L.R. 335, at 349 (1970).

100. *Dillon*, 34 Cal. 3d at 477, 668 P.2d at 719, 194 Cal. Rptr. at 412.

101. 458 U.S. 782 (1982).

102. *Id.* at 798.

103. See *infra* notes 129-33 and accompanying text.

104. 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).

105. 10 Cal. 3d 910, 519 P.2d 1073, 112 Cal. Rptr. 649 (1974).

helped a police informant to secure heroin after the man told him that he was in pain from withdrawal.¹⁰⁶ The court felt that a sentence of ten years with no possibility of parole was excessive. Similarly, in *In re Rodriguez*,¹⁰⁷ the defendant had served twenty-two years for nonviolent child molestation.¹⁰⁸ He had an intelligence quotient of 68 and was not likely to present further danger to the community. The court found this cruel and unusual.¹⁰⁹ In *In re Grant*,¹¹⁰ the defendant had sold marijuana, with two previous convictions, and was sentenced to ten years without parole. The final case noted, *In re Reed*,¹¹¹ involved a challenge to the California requirement that sex crime offenders register with the police. The defendant had been sentenced to probation for having made a homosexual solicitation to an undercover vice officer.

Prior to the decision in *Dillon*, the California Supreme Court had thus applied California's own constitutional cruel and unusual punishment provision to cases of this nature. There are no fine distinctions involved here. The punishments are clearly disproportionate to the crimes. It is also obvious that they bear scant relation to an intentional murder. Unlike the above cases, *Dillon* involved a serious crime. As both Justice Richardson and Justice Broussard pointed out, *Dillon* armed himself for a robbery, expecting confrontation and then killed a man.¹¹² No other reported American case was found where a first degree felony murder life sentence had been deemed to be cruel and unusual. On the contrary, a number of state supreme courts have specifically found such sentences not cruel and unusual.¹¹³ Thus, *Dillon*, not only changed the felony murder rule, but also appears to carry the concept of cruel and unusual punishment into new territory.

The *Dillon* court acknowledged that "[t]he legislature is . . . accorded the broadest discretion possible in enacting penal statutes and in specifying punishment for crime . . ."¹¹⁴ Indeed, because of the separation of powers,¹¹⁵ judicial discretion has been the hall-

106. *Id.* at 918, 519 P.2d at 1077, 112 Cal. Rptr. at 653.

107. 14 Cal. 3d 639, 537 P.2d 384, 122 Cal. Rptr. 552 (1975).

108. *Id.* at 644, 537 P.2d at 387, 122 Cal. Rptr. at 555.

109. *Id.* at 656, 537 P.2d at 397, 122 Cal. Rptr. at 565.

110. 18 Cal. 3d 1, 553 P.2d 590, 132 Cal. Rptr. 430 (1976).

111. 33 Cal. 3d 914, 663 P.2d 216, 191 Cal. Rptr. 658 (1983).

112. *Dillon*, 34 Cal. 3d at 501, 504, 668 P.2d at 736, 738, 194 Cal. Rptr. at 429, 431.

113. *State v. Wall*, 304 N.C. 609, 286 S.E.2d 68 (1982); *State v. Goodseal*, 220 Kan. 487, 220 P.2d 279 (1976).

114. *Dillon*, 34 Cal. 3d at 478, 668 P.2d at 719, 194 Cal. Rptr. at 412 (quoting *People v. Anderson*, 6 Cal. 3d 628, 640, 493 P.2d 880, 888, 100 Cal. Rptr. 152, 160 (1972)).

115. The powers of the branches of government are separate. When the courts exceed their constitutional power to review sentences, they are in effect legislating and thus encroaching upon the area of another branch. "[T]he rule is that in the actual administration of the government Congress or the Legislature should exercise the legis-

mark of the enforcement of the ban on cruel and unusual punishments. The United States Supreme Court recognized this when they stated that "Eighth Amendment judgments should neither be nor appear to be merely the subjective views of individual justices."¹¹⁶ Consequently, cruel and unusual findings have typically been found only in cases involving trivial offenses or capital punishment.¹¹⁷ *Dillon* falls into neither category and therefore raises a question of judicial overreaching. The legislature has set life imprisonment as the punishment for a *Dillon* type of felony murder. Dillon's actual sentence would have carried an enhanced base term of twenty years, with a possibility of release with parole in seven years.¹¹⁸ Such a denial of legislative discretion may well amount to what Justice Richardson characterized as an "invasion . . . of the powers of the Legislature to define crimes and prescribe punishments"¹¹⁹ *Dillon*, however, does not apply to all felony murders. The court has only limited the felony murder doctrine's application in situations where the defendant lacks culpability. An examination of this requirement reveals a possible reason for the court's action. It may be explained by the concept of *mens rea*.

VIII. *MENS REA*

Dillon applies the concept of cruel and unusual punishment to the felony murder rule for the first time. Although the facts of the case may make this particular application questionable,¹²⁰ there is a logical connection between the two. The link is found in *mens rea*.¹²¹ A cruel and unusual analysis includes consideration of the defendant's mental state¹²² and this is precisely what the felony murder rule seeks to avoid. The California rule dispenses with the need to prove malice aforethought and premeditation in first degree felony

lative power, the President or the State executive, the Governor, the executive power, and the Courts or the judiciary the judicial power" *Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (per curiam) (quoting *Hampton & Co. v. United States*, 276 U.S. 394, 406 (1928)).

116. *Hutto v. Davis*, 454 U.S. 370, 373 (1982) (citing *Rummel v. Estelle*, 445 U.S. 263, 275 (1980)).

117. See *supra* notes 102-11 and accompanying text.

118. *Dillon*, 34 Cal. 3d at 499-500, 668 P.2d at 735, 194 Cal. Rptr. at 428.

119. *Id.* at 499, 668 P.2d at 734-35, 194 Cal. Rptr. at 427 (Richardson, J., concurring and dissenting).

120. There would, for example, be less of an issue of judicial overreaching if the death in *Dillon* had been accidental as opposed to willful.

121. A dictionary definition of *mens rea* is "[a] guilty mind; a guilty or wrongful purpose; a criminal intent." BLACK'S LAW DICTIONARY 889 (5th ed. 1979). It should be noted that "mens rea differs from crime to crime." For example "[i]n murder it is malice aforethought; in burglary it is the intent to commit a felony; . . . in uttering a forged instrument it is 'knowledge' that the instrument is false plus an intent to defraud." PERKINS, *supra* note 2, at 743.

122. See *supra* note 69 and accompanying text.

murder. "[T]he only criminal intent required is the specific intent to commit the particular felony."¹²³ Other jurisdictions define their statutes as including a conclusive presumption of *mens rea*, arising upon a showing that the felony was committed.¹²⁴

Both forms of the rule free the prosecution from the burden of proving *mens rea*. This has been attacked because it can create strict criminal liability.¹²⁵ It has been observed that "[t]he felony murder rule completely ignores the concept of determination of guilt on the basis of individual misconduct" which is "the most basic principle of the criminal law"¹²⁶ The felony murder doctrine, by basing culpability for murder on liability for the underlying felony, creates "additional punishment [which] is therefore gratuitous . . . in terms of what must be proved at trial"¹²⁷

It is possible, as Justice Bird pointed out in her concurring opinion, that *Dillon* will develop into a requirement of *mens rea* for felony murder.¹²⁸ However, the court passed up an opportunity to move in this direction in their first post-*Dillon* felony murder case. In *Carlos v. Superior Court*,¹²⁹ the court specifically found that the evidence was not sufficient to prove that the defendant had an intent to kill.¹³⁰ However, no mention was made of a *Dillon* issue.¹³¹ Thus, it appears that a lack of intent alone will not trigger a finding of cruel and unusual punishment. In *Carlos*, the defendant's accomplice engaged in a gun battle during which a bystander was killed. The defendant, however, had fled the scene.¹³² The *Carlos* court held that it must be established that a defendant intended to kill before he can be sentenced to death or life imprisonment without possibility of parole for a felony murder.¹³³ Thus, while the

123. *Dillon*, 34 Cal. 3d at 475, 668 P.2d at 718, 194 Cal. Rptr. at 411.

124. Note, *Felony Murder*, *supra* note 17, at 153.

125. *Id.* at 144.

126. *People v. Aaron*, 409 Mich. 672, 708, 299 N.W.2d 304, 316-17 (1980).

127. MODEL PENAL CODE § 210.2 Comment 6 (1980).

128. *Dillon*, 34 Cal. 3d at 495-96, 668 P.2d at 733-34, 194 Cal. Rptr. at 426-27.

129. 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983).

130. *Id.* at 154, 672 P.2d at 877, 197 Cal. Rptr. at 95.

131. The defendant did not challenge the felony murder charge, only the felony murder special circumstances allegation. Therefore, the defendant had not raised a *Dillon* issue in his appeal. However, it would seem logical for the court to have at least commented on the issue, if they had intended that *Dillon* create a *mens rea* requirement in a *Carlos* type situation. *Id.* at 138, 672 P.2d at 866, 197 Cal. Rptr. at 83.

132. The defendant had been armed when he and his partner robbed a store. However, upon exiting the store, he fled while his partner engaged in a shoot out with an off-duty police officer. The officer's daughter was killed, evidently by a bullet from her father's gun. The defendant returned with a car and aided the partner's escape. *Id.* at 137, 672 P.2d at 865-66, 197 Cal. Rptr. at 83.

133. The defendant had been charged with first degree murder under the felony murder statute, CAL. PENAL CODE § 189 (West 1983). Additionally, the prosecution sought to subject him to enhanced punishment, death or life imprisonment without pos-

court appears committed to a continued paring away of the felony murder doctrine, *Dillon* may be only a limited means of reaching their objective.

IX. EFFECT OF *DILLON*

The key question raised by *Dillon* is what the court's new threshold of acceptable disproportionality will be. *Carlos* may indicate that proportionality may not be an issue in the majority of felony murder cases. Although the tests identified in the case provide some direction, they create no bright line. Given the court's well documented hostility to the felony murder rule, it is predictable that they will be open to a liberal construction of their opinion. In *Carlos*, they stated that their intention is to insure that the concept of "strict criminal liability incorporated in the felony murder doctrine be given the narrowest possible application consistent with [detering] those engaged in felonies from killing negligently or accidentally."¹³⁴ It would appear that although *Dillon* will give little succor to the hardened criminal, it will prevent the harshest results of the felony murder rule. The few appellate cases which have applied *Dillon* seem to be following this pattern. Only one case, *People v. Beheler*,¹³⁵ has modified a sentence as cruel and unusual. The defendant was blameless by almost every standard enumerated in *Dillon*. In the remaining cases where a *Dillon* argument has been raised, the defendant's actions or history indicated a pattern of criminality.¹³⁶ The courts found no difficulty denying relief.

sibility of parole, under CAL. PENAL CODE § 190.2 (West 1983). This section designates under what "special circumstances" a defendant may be so punished. One of the circumstances listed is felony murder. Thus, a defendant may face the underlying murder charge and also be subject to harsher punishment, on the basis of the commission of the same felony. *Id.* at 153-54, 672 P.2d at 877, 197 Cal. Rptr. at 95.

134. *Id.* at 146, 672 P.2d at 872, 197 Cal. Rptr. at 89-90.

135. 153 Cal. App. 3d 242, 200 Cal. Rptr. 195 (1984). The defendant's first degree murder conviction was reduced to voluntary manslaughter on the following facts: the defendant 1) was drunk to the point of stupor during the planning and execution of the crime, 2) may have been asleep when the triggerman, who received six years, did the shooting, 3) immediately reported the crime and cooperated with the police, and 4) had no criminal record.

136. Three of the defendants raising a *Dillon* argument patently had no legitimate claim to relief from this source. They had varying criminal records and had behaved like hardened criminals before, during and after the murders. *People v. Darwiche*, 152 Cal. App. 3d 630, 199 Cal. Rptr. 806 (1984); *People v. Munoz*, 157 Cal. App. 3d 999, 204 Cal. Rptr. 217 (1984); *People v. Harpool*, 155 Cal. App. 3d 877, 202 Cal. Rptr. 467 (1984).

The defendant in *People v. Laboa*, 158 Cal. App. 3d 115, 204 Cal. Rptr. 181 (1984) presented a closer question. He had been in another room when his accomplice accidentally shot the victim. However, the court found dispositive a knowing participation in an armed robbery coupled with a criminal record. They declined to modify the first degree murder sentence.

A final case side-stepped the *Dillon* issue by focusing on the fact that the fourteen

These cases illustrate that *Dillon* addresses what is probably the major drawback of the rule. This is that a relatively blameless defendant receives the same severe punishment as a hardened killer. Indeed, *Dillon* illustrates the truth of the saying that "hard cases make bad law," which has been identified as "[a] phrase used to indicate judicial decisions which, to meet a case of hardship to a party, are not entirely consistent with the true principle of the law."¹³⁷ In *Dillon*, neither the judge nor the jury wanted to sentence the boy to life imprisonment. The Supreme Court of California has provided a much needed safety valve. Ironically, by eliminating the rule's most unjust results, the court may have reduced legislative incentive to make needed changes. This would be unfortunate because policy considerations indicate that such action may still be needed.

X. POLICY CONSIDERATIONS

Criticism of the felony murder rule is not a new development. In 1881 Justice Holmes, commenting on the rule, declared that "it would do better to hang one thief in every thousand by lot."¹³⁸ Although unpopular, the rule has nevertheless exhibited a staying power.¹³⁹

In *Dillon*, the court once again calls for legislative reconsideration of the first degree felony murder rule.¹⁴⁰ There are a number of arguments which support this position. Even if the more extreme applications of the rule have been eliminated, the basic criticisms still apply. As Justice Bird observed, "the defendants are in reality punished for the commission of the underlying felony,"¹⁴¹ if the death was unintended, non negligent and fortuitous. In those cases where the death was otherwise, the rule is superfluous. In England,

year old defendant had been committed to the California Youth Authority. Because the actual period of confinement is set by the Youth Offender Board, the court held that review should be had by petition for writ of habeas corpus, rather than by direct appeal. *In re Deatrick A.*, 155 Cal. App. 3d 340, 202 Cal. Rptr. 64 (1984).

137. BLACK'S LAW DICTIONARY 646 (5th ed. 1979).

138. Justice Holmes posed a hypothetical situation where a man, planning to shoot chickens in order to steal them, accidentally kills the owner, whose presence was unknown to him. He stated about this, "[i]f the object of the [felony murder] rule is to prevent such accidents, it should make accidental killing with firearms murder, not accidental killing in the effort to steal; while if its object is to prevent stealing, it would do better to hang one thief in every thousand by lot." O. HOLMES, THE COMMON LAW 58 (1881).

139. Many states revised their homicide laws to conform to United States Supreme Court death penalty requirements. Thus, there has been a deliberate retention of the felony murder rule in many jurisdictions. Note, *Felony Murder*, *supra* note 17, at 135-36.

140. *Dillon*, 34 Cal. 3d at 472, 668 P.2d at 715, 194 Cal. Rptr. at 408.

141. *Id.* at 498, 668 P.2d at 734, 194 Cal. Rptr. at 427.

the abolition of the rule had little effect on conviction rates.¹⁴² Additionally, there is no basis to believe that the commission of a specified felony increases the chance of accidental homicides.¹⁴³ Thus, the evidence tends to show that the rule serves little practical purpose.

If this is the case, the legislature would do well to follow the course suggested by the court and abolish the rule. However, this would be a politically unpopular action because it lowers criminal sanctions. A more palatable expedient has been suggested by the drafters of the Model Penal Code. They would replace the rule with a nonbinding presumption of malice when a death occurs during the commission of a felony.¹⁴⁴ Although this idea has not been well received,¹⁴⁵ California, as a leading state in legal reform, would be a logical place for it to take root.

Justice Bird also points out that the court's logical course is to do their part by eliminating the second degree felony murder rule. Having determined that it is of judicial rather than statutory origin, this action is within their power.¹⁴⁶ This would not only be consistent with their expressed sentiments, but might serve to prod legislative action by isolating the first degree rule.

CONCLUSION

This Note has described the *Dillon* holding¹⁴⁷ and discussed its potential impact on California's felony murder rule.¹⁴⁸ An examination of the history¹⁴⁹ and contemporary treatment of the rule¹⁵⁰ has revealed a pattern of criticism and successive limitation.¹⁵¹ *Dillon*, like prior limitations, will operate to remove some of the harshness from the felony murder rule.¹⁵² However, the *Dillon* court's invocation of the concept of cruel and unusual punishment in the context of the felony murder doctrine is a unique development.¹⁵³ Although there may be reason to question such an application on the facts of the case, the underlying rationale has merit.¹⁵⁴ The *Dillon* rule should provide the means for separating the relatively

142. Note, *Felony Murder*, *supra* note 17, at 159.

143. MODEL PENAL CODE § 210.2 Comment 6 (1980).

144. *Id.*

145. Note, *Felony Murder*, *supra* note 17, at 143.

146. *Dillon*, 34 Cal. 3d at 494, 668 P.2d at 731, 194 Cal. Rptr. at 424.

147. See *supra* notes 62-80 and accompanying text.

148. See *supra* notes 135-38 and accompanying text.

149. See *supra* notes 8-16 and accompanying text.

150. See *supra* notes 17-55 and accompanying text.

151. *Id.*

152. See *supra* note 135 and accompanying text.

153. See *supra* note 113 and accompanying text.

154. See *supra* note 120 and accompanying text.

blameless defendant from those deserving harsh sentences.¹⁵⁵

The felony murder doctrine is intended to deter offenders from killing negligently or accidentally during the commission of felonies.¹⁵⁶ However, the critics attack the logic of a rule which purports to deter unintended events by threat of punishment.¹⁵⁷ Indeed, studies have raised doubts as to the rule's practical effect.¹⁵⁸ The critics also argue that the rule runs counter to the American philosophy of determining criminal liability, because it tends to remove the necessity of proving an intent to kill.¹⁵⁹

A number of states have eliminated or sharply curtailed the rule.¹⁶⁰ The California Supreme Court has recommended a fresh legislative appraisal of the felony murder rule.¹⁶¹ Given the marginal utility of the rule and the many criticisms of it, such a reconsideration is warranted.

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155. *See supra* note 135 and accompanying text.

156. *See supra* note 134 and accompanying text.

157. *See supra* note 141 and accompanying text.

158. *See supra* notes 142-43 and accompanying text.

159. *See supra* notes 125-27 and accompanying text.

160. *See supra* notes 18-23 and accompanying text.

161. *See supra* note 140 and accompanying text.