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Felony-Murder Rule a Doctrine at Constitutional Crossroads

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THE FELONY-MURDER RULE: A DOCTRINE AT CONSTITUTIONAL CROSSROADS

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INTRODUCTION

Few legal doctrines have been as maligned and yet have shown as great a resiliency as the felony-murder rule. Criticism of the rule constitutes a lexicon of everything that scholars and jurists can find wrong with a legal doctrine: it has been described as "astonishing" and "monstrous,"[1] an unsupportable "legal fiction,"[2] "an unsightly wart on the skin of the criminal law,"[3] and as an "anachronistic remnant" that has " 'no logical or practical basis for existence in modern law.' "[4] Perhaps the most that can be said for the rule is that it provides commentators with an extreme example that makes it easy to illustrate the injustice of various legal propositions.[5]

Despite the widespread criticism, the felony-murder rule persists in the vast majority of states.[6] Most states have attempted to limit the rule's potential harshness either by limiting the scope of its operation[7] or by providing affirmative defenses.[8] Such patchwork

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1 3 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 57, 65 (1883).

2 State v. Harrison, 90 N.M. 439, 442, 564 P.2d 1321, 1324 (1977).

3 Packer, *Criminal Code Revision*, 23 U. TORONTO L.J. 1, 4 (1973).

4 People v. Aaron, 409 Mich. 672, 689, 299 N.W.2d 304, 307 (1980) (quoting Moreland, *Kentucky Homicide Law With Recommendations*, 51 KY. L.J. 59, 82 (1962)).

5 *See, e.g.*, Saltzman, *Strict Criminal Liability and the United States Constitution: Substantive Criminal Law Due Process*, 24 WAYNE L. REV. 1571, 1578 (1978) (felony murder as example of vicarious liability that "entail[s] the heaviest penalties"); G. FLETCHER, RETHINKING CRIMINAL LAW 276-85 (1978) (felony-murder rule as a "formal test of liability"); Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1383-87 (1979) (felony murder used to illustrate problems with proof beyond a reasonable doubt requirement).

6 Only three states no longer use the felony-murder rule. MODEL PENAL CODE § 210.2 commentary at 40 (Official Draft 1980). Kentucky and Hawaii have abolished the rule by statute. HAWAII REV. STAT. §§ 707-701 (1972); KY. REV. STAT. § 507.020 (1975). Michigan has eliminated the rule by judicial decision. People v. Aaron, 409 Mich. 672, 299 N.W.2d 304 (1980).

7 Ohio has limited the rule's operation to involuntary manslaughter. OHIO REV. CODE ANN. § 2903.04 (Page 1982). Ohio, however, has retained the doctrine of "imputed intent," which operates similarly to the felony-murder rule by presuming that an individual who joins another in committing a violent crime has agreed to all acts neces-

attempts to mitigate the rule's harshness, however, have been legitimately criticized because "they do not resolve [the rule's] essential illogic."[9] Limiting the scope of the rule's operation, for instance, merely increases the probability that defendants convicted under the rule are guilty of some form of homicide. Our criminal justice system, however, does not purport to convict on the basis of a mere probability of guilt; rather, it requires the jury to find guilt beyond a reasonable doubt.[10] Moreover, because of difficulties of proof, the affirmative defenses have proved to be of little practical value to defendants charged with felony murder.[11] The United States thus remains virtually the only western country still recognizing a rule

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sary to carry out the crime. *See, e.g.*, State v. Lockett, 49 Ohio St. 2d 48, 358 N.E.2d 1062 (1976), *rev'd on other grounds* 438 U.S. 586 (1978). *See also* Taylor v. Superior Court, 3 Cal. 3d 578, 582, 477 P.2d 131, 133, 91 Cal. Rptr. 275, 177 (1970).

Commonly used restrictions include: enumerating the felonies which invoke the rule, limiting the rule to felonies that are dangerous to life, requiring proximate causation, and downgrading the offense of felony murder. Adlerstein, *Felony-Murder in the New Criminal Codes*, 4 AM. J. CRIM. L. 249, 251-57 (1975-76); *see also* MODEL PENAL CODE § 210.2 commentary at 33-36 (Official Draft 1980); People v. Aaron, 409 Mich. 672, 699-700, 299 N.W.2d 304, 312-16 (1980).

The Model Penal Code would establish a rebuttable presumption of recklessness and indifference where a killing occurred during the commission of one of the enumerated felonies. MODEL PENAL CODE § 210.2(1)(b) (Official Draft 1980). Only New Hampshire, however, has adopted the rebuttable presumption formulation. N.H. REV. STAT. ANN. § 630:1-b (1974). For a discussion of the Model Penal Code formulation, see *infra* notes 147-77 and accompanying text.

8 New York's affirmative defense provision is typical, providing the defendant a defense where he:

> (a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and
> (b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and (c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and
> (d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

N.Y. PENAL LAW § 125.25 (McKinney 1975). Colorado, Connecticut, Maine, North Dakota and Washington have enacted similar statutes. COLO. REV. STAT. § 18-3-102(2) (1973); CONN. GEN. STAT. ANN. § 53a-54c (West Supp. 1984); N.D. CENT. CODE § 12.1-16-01.3 (1976); WASH. REV. CODE ANN. § 9A.32.030(1)(c) (1977). An amendment to the federal code has been proposed that would provide a broader defense, allowing the defendant to defend on the basis that the killing was not a reasonably foreseeable consequence of the defendant's act. S. 1437, 95th Cong., 2d Sess § 1601(c) (1978).

9 MODEL PENAL CODE § 210.2 commentary at 36 (Official Draft 1980).

10 *Id.* at 37. One court has observed that "[t]o the extent that these modifications reduce the scope and significance of the common law doctrine, they also call into question the continued existence of the doctrine itself." People v. Aaron, 409 Mich. 672, 707, 299 N.W.2d 304, 316 (1980).

11 Adlerstein, *supra* note 7, at 264, 267 (noting the difficulty of meeting all the requirements). One commentator, however, has viewed the codification of affirmative defenses as having "important symbolic value [that] should be seen as but the beginning of law reform." Fletcher, *Reflections on Felony-Murder*, 12 SW. U.L. REV. 413, 420 (1981).

which makes it possible "that the most serious sanctions known to law might be imposed for accidental homicide."[12]

The felony-murder rule's continued vitality despite articulate criticisms of both its rationale and its results indicate that a policy analysis alone will not abate its use. Two constitutional doctrines that have recently emerged from Supreme Court decisions suggest, however, that the rule contains not only theoretical defects, but also contravenes due process and eighth amendment protections.

In Part I, this Article will examine the two possible conceptualizations of the felony-murder rule: either the rule serves as a means of presuming malice to find a homicide, or it constitutes a distinct form of homicide based upon the intent to commit the underlying felony. Depending upon which conceptualization a court adopts, the felony-murder rule's constitutionality must be examined either as a presumption or as a form of strict liability.

Part II will analyze the felony-murder rule as a presumptive device in the context of Supreme Court cases dealing with presumptions in criminal cases. The analysis will demonstrate that when the felony-murder rule operates as a presumption, it conclusively shifts the burden of proof to the defendant, thereby violating the due process guarantees articulated by the Court in cases beginning with *In re Winship*[13] and most recently expanded upon in *Sandstrom v. Montana*.[14]

Part III will examine the alternative explanation of the felony-murder rule, that it constitutes a distinct form of homicide, in light of Supreme Court cases requiring proof of mens rea for each element of serious, nonregulatory crimes. Under this conceptualization, the felony-murder rule runs afoul of both eighth amendment and due process guarantees.

Previous constitutional attacks on the felony-murder rule have been few[15] and have challenged the constitutionality of only one conceptualization of the rule, allowing the court to avoid the constitutional issue merely by adopting the alternative conceptualization. These prior constitutional challenges may have failed in part because they generally preceded recent Supreme Court cases in the

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12 Jeffries & Stephan, *supra* note 5, at 1383. England, where the doctrine originated, abolished the felony-murder rule in 1957. The Homicide Act, 1957, 5 & 6 Eliz. 2, ch. 11 § 1. The rule apparently never existed in France or Germany. Fletcher, *supra* note 11, at 415.

13 397 U.S. 358 (1970).

14 442 U.S. 510 (1979).

15 Fletcher, *supra* note 11, at 425. Professor Fletcher raises the possibility of equal protection and sixth amendment problems with the felony-murder rule, but does not raise the arguments presented in this article. *Id.*

due process and eighth amendment areas.[16]

The analysis developed in this Article, in contrast, does not allow a conceptual escape route. If a court chooses to characterize the felony-murder rule as a presumption, it must confront the due process questions raised by shifting the burden of proof to the defendant and usurping the jury function. If the court rejects the presumption conceptualization, it must then face the constitutional infirmities of imposing strict liability for a serious, nonregulatory crime. Therefore, under either approach a court must articulate the rule's rationale and attempt to justify it from both policy and constitutional perspectives. The Article also explores recent developments in the use of presumptions in criminal cases and the restrictions on strict liability crimes.

I

THE CONCEPTUAL BASIS OF THE FELONY-MURDER RULE

A. The Rule's Historical Development

The origins of the felony-murder rule are disputed. Some commentators contend that the rule was first used in a sixteenth century case to attribute malice to an individual for the murderous act of a co-felon.[17] Others trace the founding of the rule to a "blunder" by Lord Coke in extrapolating a statement by Bracton on unlawful killing into a basis for finding murder from the commission of a felony.[18] Professor Fletcher offers yet a third view, which finds the origins of the rule in Foster's discussion of transferred felonious intent in *Discourse of Homicide*,[19] with only a "nominal link" to Coke, Hale, and Hawkins.[20]

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16 The Supreme Court has not directly addressed the constitutionality of the felony-murder rule. In Lockett v. Ohio, 438 U.S. 586, 602 (1978), Chief Justice Burger, joined by three other Justices, stated: "That states have authority to make aiders and abettors equally responsible, as a matter of law, with principles, or to enact felony-murder statutes is beyond constitutional challenge." Chief Justice Burger's dicta, however, was undermined in Enmund v. Florida, 458 U.S. 782 (1982), where the Court held that imposing the death penalty on a nontriggerman for felony murder violated the eighth amendment. *See infra* notes 180-212 and accompanying text.

17 Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50, 58 (1956). Morris cites Lord Dacre's case, Moore 86, 72 Eng. Rep. 458 (K.B. 1535), for this proposition.

18 *See* Recent Development, *Criminal Law: Felony-Murder Rule—Felon's Responsibility for Death of Accomplice*, 65 COLUM. L. REV. 1496, 1496 n.2 (1965).

19 M. FOSTER, DISCOURSE OF HOMICIDE 258 (1762).

20 G. FLETCHER, *supra* note 5, at 278-83. According to Fletcher, Foster's theory of "transferred felonious intent" was expounded upon by Blackstone and East into the felony-murder rule later adopted by American legislatures. *Id.* at 283. Fletcher sees Coke, Hale, and Hawkins as concerned with the excuse of *per infortunium* for unlawful acts, and not with the idea of underlying felonious intent as a basis for murder. *Id.* at 278-82.

The purpose of the felony-murder rule at common law is also vague. It is frequently argued that the rule's purpose was not fully articulated because all felonies at common law were punished by death and, therefore, the rule had little practical impact.[21] Further research has revealed, however, that execution rates varied widely according to the felony.[22] One suggested purpose is that the rule served as a means of more severely punishing incomplete or attempted felonies, which were only misdemeanors at common law, if a killing occurred. The rule thus enabled the courts to impose the same punishment as if the felony had succeeded.[23] This purpose, of course, has little relevance in modern criminal justice systems, which recognize attempted felonies as serious punishable crimes.

Whatever the felony-murder rule's justification at common law, courts have attempted to provide the rule with a contemporary rationale. These post hoc rationalizations fall into four general categories: deterrence, transferred intent, retribution, and general culpability.

B. Deterrence

The deterrence rationale consists of two different strains. The first approach views the felony-murder rule as a doctrine intended to deter negligent and accidental killings during commission of felonies.[24] Proponents argue that co-felons will dissuade each other from the use of violence if they may be liable for murder.[25] Justice Holmes attempted to justify the rule on this basis by arguing that the rule would be justified if experience showed that death resulted disproportionately from the commission of felonies.[26] Holmes ad-

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21 MODEL PENAL CODE § 210.2 commentary at 31 n.74 (Official Draft 1980); 3 J. STEPHEN, *supra* note 1, at 75-76. The use of the death penalty in England for a wide variety of crimes has been attributed to the inadequacy of law enforcement at the time, making severe punishments necessary as a deterrent. Molnar, *Criminal Law Revision in Georgia*, 15 MERCER L. REV. 399, 400 (1964).

22 1 L. RADZINOWICZ, HISTORY OF ENGLISH CRIMINAL LAW 155 (1948) (noting that in 1810, 60% of convicted murders were executed, compared to only 15% of those convicted for robbery). Fletcher characterizes the argument that the felony-murder rule had no great impact because all felonies were capital crimes as "an example where arguing from the law on the books, rather than the practice of the courts, can easily lead us astray. It simply false to say that it made no difference whether one was convicted of larceny or of murder . . . ." Fletcher, *supra* note 5, at 283.

23 *See* MODEL PENAL CODE § 210.2 commentary at 31 n.74 (Official Draft 1980).

24 Note, State v. Jackson*: A Solution to the Felony-Murder Rule Dilemma*, 9 N.M. L. REV. 433, 440 (1979). *See also* People v. Washington, 62 Cal. 2d 777, 781, 402 P.2d 130, 133, 44 Cal. Rptr. 442, 445 (1965) ("purpose of felony-murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit").

25 Adlerstein, *supra* note 7, at 250.

26 Still the law is intelligible as it stands. . . .
Now, if experience shows, or is deemed by the law-maker to show, that

ded the caveat that "I do not . . ., however, mean to argue that the rules under discussion arose on the above reasoning, any more than that they are right, or would be generally applied in this country."[27]

The second view focuses not on the killing, but on the felony itself, and endorses the felony-murder rule as a deterrent to dangerous felonies.[28] From this perspective, punishing both accidental and deliberate killings that result from the commission of a felony is "the strongest possible deterrent" to "undertaking inherently dangerous felonies."[29]

Both of the deterrence justifications are logically flawed and neither has proven to have a basis in fact. The illogic of the felony-murder rule as a means of deterring killing is apparent when applied to accidental killings occurring during the commission of a felony. Quite simply, how does one deter an unintended act?[30] A similar deterrence problem arises when the felony-murder rule is used to convict the defendant for murder when a third party, such as the victim or a policeman, committed the killing. The defendant has no control over the acts of the third party and thus the rule cannot deter this sort of killing.[31] Moreover, any potential deterrence effect on unintentional killings is further reduced because few felons either will know that the felony-murder rule imposes strict liability

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> somehow or other deaths which the evidence makes accidental happen disproportionately often in connection with other felonies, or with resistance to officers, or if on any other ground of policy it is deemed desirable to make special efforts for the prevention of such deaths, the law-maker may consistently treat acts which, under the known circumstances, are felonious, or constitute resistance to officers, as having a sufficiently dangerous tendency to be put under a special ban. The law may, therefore, throw on the actor the peril, not only of the consequences forseen by him, but also of consequences which, although not predicted by common experience, the legislator apprehends.

See O.W. HOLMES, THE COMMON LAW 58-59 (1881).

27 *Id.* at 59.

28 *See* People v. Washington, 62 Cal.2d 777, 790, 402 P.2d 130, 139, 44 Cal. Rptr. 442, 451 (1965) (Burke, J., dissenting) (purpose of felony-murder rule is to deter felons from undertaking inherently dangerous felonies). This proposed basis of the felony-murder rule is apparently the minority view. *See* Note, *The Merger Doctrine as a Limitation on the Felony-Murder Rule: A Balance of Criminal Law Principles*, 13 WAKE FOREST L. REV. 369, 374 (1977) ("[M]ost jurisdictions have characterized the purpose [of the Rule] to be not the deterrence of the underlying felony itself, but the deterrence of negligent or accidental killing during the perpetration of a felony.").

29 People v. Washington, 62 Cal.2d at 790-91, 402 P.2d at 139, 44 Cal. Rptr. at 444 (Burke, J., dissenting).

30 Comment, *Merger and the Felony-Murder Rule*, 20 U.C.L.A. L. REV. 250, 258-59 n.41 (1972) (noting that it is difficult to see how felony-murder rule could deter accidental homicide).

31 Note, *The Constitutionality of Imposing the Death Penalty for Felony Murder*, 15 HOUS. L. REV. 356, 377 (1978) (no deterrent possible if victim or police commit homicide); *see also*, Note, *supra* note 24, at 440.

for resulting deaths[32] or will believe that harm will result from commission of the felony.[33] Finally, statistical evidence has not borne out Holmes's proposed justification that a disproportionate number of killings occur during felonies.[34]

The purpose of deterring the commission of dangerous felonies through the felony-murder rule also lacks a legitimate basis. First, considerable doubt exists that serious crimes are deterred by varying the weight of the punishment.[35] Second, the rule from this perspective uses the sanctions for murder to deter felonies, and "it is usually accepted as wiser to strike at the harm intended by the criminal rather than at the greater harm possibly flowing from his act which was neither intended nor desired by him."[36] Where the killing is unintended, it would be far more sensible to enhance the sentence for conduct over which the felon had control, such as the carrying of a deadly weapon, rather than automatically to elevate the killing to murder. Finally, as with the other deterrence rationale, the felony-murder rule can have no deterrent effect if the felon either does not know how the rule works or does not believe a killing will actually result.[37]

The deterrence rationale, no matter how formulated, thus provides little justification for the felony-murder rule. The rule's scope encompasses situations, such as an accidental killing, where no deterrence is possible. The lack of a deterrent effect because the defendant does not have killing as an objective also highlights the felony-murder rule's potential to punish a defendant who had no subjective culpability. Yet, the punishment of a killing as murder where subjective culpability is lacking clashes with modern definitions of murder. The Model Penal Code, for example, requires some degree of subjective culpability for a killing to be classified as murder: either a purposeful[38] or knowing[39] killing, or a killing re-

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32 *Id.* at 376-78 (felon is not likely to know that if homicide results from felony, state will be relieved of burden of proving premeditation and malice aforethought).

33 Note, *supra* note 31, at 377 (due to small percentage of felonies in which death occurs, felon assumes homicide will not result during his felony).

34 For instance, only one-half of one percent of all robberies result in homicide. The statistical data is summarized in Enmund v. Florida, 485 U.S. 782, 799-800 nn. 23-24 (1982).

35 Morris, *supra* note 17, at 67 (theory of deterrence of serious crimes by harsher punishments is greatly in doubt).

36 *Id.*; *see also* People v. Washington, 62 Cal. 777, 781, 402 P.2d 130, 133, 44 Cal. Rptr. 442, 445 (1965) ("It is contended . . . that another purpose of the felony-murder rule is to prevent the commission of robberies. Neither the common law rationale of the rule nor the Penal Code supports this contention.").

37 *See supra* notes 32-33 and accompanying text.

38 The Model Penal Code defines "purposefully" in terms of having as a "conscious object" the prohibited conduct or result. MODEL PENAL CODE § 2.02(2)(a)(i) (Proposed

sulting from extreme recklessness.[40] Negligent homicide, in contrast, is treated as a lesser felony, and accidental homicide is not classified as a felony at all.[41]

C. Transferred Intent and Constructive Malice: The Felony-Murder Rule's Presumption of Culpability

The felony-murder rule may be conceptualized as a theory of "transferred or constructive intent."[42] This theory posits that the intent to commit the felony is "transferred" to the act of killing in order to find culpability for the homicide. The rule thus serves "the purpose of . . . reliev[ing] the state of the burden of proving premeditation or malice."[43]

Judges and commentators have criticized the transferred intent theory of felony murder as "an anachronistic remnant"[44] that operates "fictitiously"[45] to broaden unacceptably the scope of murder.[46]

Official Draft 1962). Section 210.2(1)(a) defines murder as purposefully committed homicide.

39 Under the Model Penal Code, a person acts "knowingly" if he is aware that the prohibited conduct or attendant circumstance exists, or if he is "aware that it is practically certain that his conduct will cause [the prohibited] result." MODEL PENAL CODE § 2.02(2)(b)(ii) (Proposed Official Draft 1962).

40 Reckless behavior under the Model Penal Code involves both subjective and objective elements. The actor must "consciously disregard . . . a substantial and unjustifiable risk," and such disregard must constitute a "gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." *Id.* § 2.02(2)(c).

The Code's emphasis on culpability is reflected in its treatment of reckless homicide. Reckless homicide constitutes manslaughter, a felony of tbe second degree. MODEL PENAL CODE § 210.3(1)(a), (2) (Official Draft 1980). To constitute murder, one not only must act recklessly, but also "under circumstances manifesting extreme indifference to the value of human life." *Id.* § 210.2(1)(b). The added element of "extreme indifference" thus highlights the subjective element of "conscious disregard"—the more egregious the circumstances that the actor is ignoring, the greater his culpability.

41 Negligence under tbe Model Penal Code is an objective standard: "A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct." MODEL PENAL CODE § 2.02(2)(d) (Proposed Official Draft 1962). The standard is different, however, from tort negligence, because the Model Penal Code requires "a gross deviation from the standard of care." *Id.* The Code's general disapproval of defining criminal activity where a subjective mental state is not involved is evident in § 2.02(3), which provides that the culpability required for a material element of a crime, if not stated, is purposeful, knowing or reckless conduct. Negligent homicide is punished as a felony of the third degree. MODEL PENAL CODE § 210.4 (Official Draft 1980).

42 State v. O'Blasney, 297 N.W.2d 797, 798 (S.D. 1980).

43 Comment, *An Assault Resulting in Homicide may be Used to Invoke the Felony-Murder Rule*, 13 GONZ. L. REV. 268, 271 (1977).

44 Note, *Recent Extensions of Felony-Murder Rule*, 31 IND. L.J. 534, 535 (1956).

45 Fletcher, *supra* note 11, at 413.

46 People v. Aaron, 409 Mich. 672, 714, 299 N.W.2d 304, 319 (1980); *see also* Recent Development, *supra* note 18, at 1500 (felony-murder rule is "artificial construction of *mens rea*"); Note, *Felony Murder As a First Degree Offense: An Anachronism Retained,* 66

The very concept of transferred intent has been criticized as having "no proper place in criminal law."[47]

More fundamentally, the theory simply does not apply to felony murder. Stated in its classic form, the transferred intent theory applies where "if A by malice aforethought strikes at B and missing him strikes C whereof he dies, though he never bore any malice to C yet it is murder, and the law transfers the malice to the party slain."[48] Such a result is justified because "[t]he general mental pattern is the same whether the malicious endeavor was to kill B or to kill C."[49] Just as firmly entrenched in the law, however, is the principle that "where the state of mind which prompted the action does not constitute the particular *mens rea* required by law for the offense charged,"[50] the doctrine of transferred intent is inapplicable.[51]

The inapplicability of transferred intent to felony murder becomes evident when the crime's two different mens rea elements are examined: the intent to commit the felony and the culpability for the killing. The mental patterns are thus distinct and separate; for example, the intent to burglarize cannot be equated with the malice aforethought required for murder.[52] The non-transferability of cul-

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YALE L.J. 427, 432 (1947) (felony murder broadens scope of first degree murder by supplying proof of mental state in law that may not exist in fact).

47 R. PERKINS, CRIMINAL LAW 921 (1982).

48 1 HALE, PLEAS OF THE CROWN 466.

49 R. PERKINS, *supra* note 47, at 922.

50 *Id.* at 923.

51 *See, e.g.*, Regina v. Pembliton, 2 L.R.-Cr. Cas. Res. 119, 12 Cox C.C. 607 (1874) (defendant intentionally throwing stone at people but breaking window accidentally did not have proper mens rea for charge of malicious injury to property); Regina v. Faulkner, 1877 Ir. R. 8, 13 Cox C.C. 550 (Ireland 1877) (sailor intending to steal rum but accidentally setting ship on fire did not have proper mens rea for charge of maliciously setting ship on fire). *See also* R. PERKINS, *supra* note 47, at 923 (where felon's state of mind does not constitute particular mens rea required by law for offense charged, the courts repudiate the notion of transferred intent).

52 G. FLETCHER, *supra* note 5, at 282. ("There is no authority whatever for the principle that any felonious intent is sufficient to constitute malice aforethought.").

As part of the Comprehensive Crime Control Act of 1984, Congress amended the federal felony-murder rule to also include killings occurring during the commission of "escape, murder, kidnaping, treason, espionage, sabotage," Comprehensive Crime Control Act, Pub. L. No. 98-473, § 1004, 98 Stat. 1976, 2138 (1984); the federal rule had previously only included the offenses of "arson, rape, burglary, or robbery." 18 U.S.C. § 1111 (1982).

The Senate Judiciary Committee's explanation for including murder aptly demonstrates the inapplicability of the transferred intent theory to felony murder:

> Murder is included in the list to cover a situation in which the defendant acts in the heat of passion in an attempt to kill A, but instead kills B. The Committee believes that the danger to innocent persons presented in this type of situation is so severe that the defendant should be charged with first degree murder even though if he had killed A he could only be charged with second degree murder.

S. REP. No. 225, 98th Cong., 1st Sess. 311, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 310. In the Committee's example, the defendant's subjective culpability for the

pability is even more evident where the felony-murder rule allows elevation of the killing to first degree murder.[53] In such a situation, the rule equates the intent to commit the felony with premeditation and deliberation, specific mental states that require proof of particular acts and thoughts.[54]

"Constructive malice" is closely related to the concept of transferred intent and is also frequently used to describe the operation of the felony-murder rule.[55] Neither the literature nor the case law clearly articulates the distinction between transferred intent and constructive malice. Of course, if the distinction rests only on semantics, then the fallacies of using the transferred intent theory to explain felony murder would apply equally to constructive malice.

Constructive malice, however, appears to be more akin to the legal concept of a presumption. Whereas transferred intent would allow the mental state required for Act A to substitute for the mental state required for Act B, constructive malice would "impute" or presume the mental state required for Act B from the commission of

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requisite felony offense, second degree murder, by admission does not correlate with the mens rea required for first degree murder if felony murder is not involved. 18 U.S.C. § 1111 ("willful, deliberate, malicious, and premeditated"). The lack of correlation becomes even more evident when the felony offense involved does not involve contemplation of the taking of a human life.

53 Certain states interpret their felony-murder rules as requiring that malice aforethought be proved, but permit the rule to elevate the murder to first degree murder without proof of deliberation or premeditation. The rule is thus seen as "merely a particular statutorily prescribed method for showing the mental elements of deliberation and premeditation." State v. Williams, 285 N.W.2d 248, 270 (Iowa 1979).

Iowa's recent history with the felony-murder rule highlights the struggle to conceptualize felony murder. In State v. Nowlin, 244 N.W.2d 596 (Iowa 1976), the Iowa Supreme Court held that the felony-murder rule as incorporated by statute served only to elevate killings in the perpetration of designated felonies to first degree murder. *Id.* at 604. Malice aforethought, therefore, still had to be shown to find murder. *Id.*; *see also*, State v. Galloway, 275 N.W.2d 736, 738 (Iowa 1979) (effect of Iowa's statute is to make murders which occur in perpetration of named felonies first-degree murder). In a later case, however, the court held that "[m]alice . . . may be implied from the commission of a felony which results in death." State v. Taylor, 287 N.W.2d 576, 578 (Iowa 1980). The Iowa Supreme Court thus employs a formalistic approach: it makes a showing of malice aforethought a prerequisite for murder in every case, but allows the use of the felony-murder rule to show such malice, as well as the deliberation and premeditation required for first degree murder.

54 *See, e.g.*, People v. Anderson, 70 Cal. 2d 15, 447 P.2d 942, 73 Cal. Rptr. 550 (1968). The *Anderson* court outlined three factors to consider in finding premeditation and deliberation: planning activity, motive, and the manner of the killing. The court noted that "the legislative classification of murder into two degrees would be meaningless if 'deliberation' and 'premeditation' were construed as requiring no more reflection than . . . the mere formation of a specific intent to kill." *Id.* at 26. The irony of using felony murder to elevate a killing to first degree murder is that felony murder may not even involve the specific intent to kill required to find second degree murder. *See* Note, *supra* note 46, at 432 ("felony murder broadens the scope of first degree murder by supplying proof of a mental state in law tbat may not exist in fact").

55 *See, e.g.*, State v. O'Blasney, 297 N.W.2d 797, 798 (S.D. 1980).

Act A.[56] The felony-murder rule thus acts as a "*mens rea*-imposing mechanism."[57]

As a form of constructive malice, the felony-murder rule is viewed as conclusively presuming homicidal mens rea from the commission of the felony.[58] This approach allows the courts to avoid characterizing felony murder as a strict liability crime, because, at least in theory, the mens rea for the homicide is formally retained

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56 *See* Pryor v. Rose, 724 F.2d 525, 530 (6th Cir. 1984) (en banc) ("The Tennessee courts have held . . . that the felony-murder provision allows willfulness, deliberation, malice and premeditation to be supplied by the commission of the underlying felony."); Bizup v. Tinsley, 211 F.Supp. 545, 549 (D. Colo. 1962) ("Thus, in felony-murder, malice is imputed, whereas in ordinary murder it must be demonstrated. Logically, this is a problem of proof . . . ."); Amlotte v. State, 456 So. 2d 448, 449 (Fla. 1984) ("State of mind is immaterial for the felony is said to supply the intent."); Note, *supra* note 28, at 372 & n.15 (felony-murder rules impute state of mind necessary for first degree murder conviction).

57 Morris, *supra* note 17, at 61.

58 *See, e.g.*, Crum, *Causal Relations and the Felony-Murder Rule*, 1952 WASH. U.L.Q. 191, 210 (1952) (proposing that the rule be changed to eliminate conclusive character of inference of intent); Note, *supra* note 31, at 366 (felony-murder rule is used to create conclusive presumption of intent); Comment, *supra* note 30, at 255 (malice is conclusively presumed under felony-murder rule); Note, *The California Supreme Court Assaults the Felony-Murder Rule*, 22 STAN. L. REV. 1059, 1059 (1970) (felony-murder rule as conclusive presumption); Comment, *Constitutional Limitations Upon the Use of Statutory Criminal Presumptions and the Felony-Murder Rule*, 46 MISS. L.J. 1021, 1036 (1975) ("the [conclusive] presumption is not mentioned in the statute itself but is rather the underlying rationale which surfaces upon analysis by the courts").

The term "presumption" is a broad one. A true presumption is an evidentiary device that enables the trier of fact to conclude that the ultimate fact (the fact to be proved) exists from proof of a basic fact. A presumption thus aids a prosecutor in a criminal case by allowing a jury to find the elements of a crime by presuming their existence from the proof of the basic facts. *See* C. MCCORMICK, EVIDENCE 811 (2d ed. 1972).

Courts and commentators, however, have recognized several different types of presumptions. A "conclusive presumption" requires the trier of fact to find the existence of the ultimate fact upon proof of the basic fact without a chance of rebuttal by the defendant. Therefore, a "conclusive presumption," is not actually an evidentiary device, but a substantive rule of law, because it allows the basic fact to serve as the basis of conviction. *See* Note, *After* Sandstrom: *The Constitutionality of Presumptions that Shift the Burden of Production—Muller v. State, 94 Wis. 2d 450, 289 N.W.2d 570 (1980)*, 1981 WIS. L. REV. 519, 521 n.1 & n.6.

On the other end of the spectrum are "permissive inferences," which do not affect the burden of proof, but raise mere inferences which the trier of fact is free to either reject or accept. Permissive inferences are not true presumptions either, as the trier of fact is not required to rely upon them, but may treat them simply as other pieces of evidence to consider. *See* Ulster County Court v. Allen, 442 U.S. 140 (1979).

The other types of presumptions shift either the burden of proof or the burden of production to the defendant. These are true presumptions, as the jury is required to use the presumption unless the defendant meets the proper burden of disproving its validity. The Supreme Court has labelled burden shifting presumptions "mandatory presumptions," because the trier of fact is required to rely on the presumption unless rebutted. *Id.* at 157-58. However, the Supreme Court has not clearly defined the extent to which presumptions that shift the burden of production are mandatory. *See infra* notes 168-73 and accompanying text.

separate and apart from the mens rea for the felony.[59] Conceptualizing the rule as a conclusive presumption also avoids the problems of applying the transferred intent theory, because it recognizes that the mens rea required for the felony and for the murder are distinct.

Nevertheless, the conclusive presumption approach has its own flaws, because "[p]roof of the underlying intent [for the felony] bears little relationship to the likelihood that the killing was premeditated."[60] Furthermore, the use of a conclusive presumption in the criminal law context raises grave constitutional questions.[61] In the end, the felony-murder rule is "just a conclusion and not a reason for reaching that conclusion."[62]

D. Retribution and General Culpability: A Strict Liability View of the Felony-Murder Rule

Courts and commentators viewing the felony-murder rule as a conclusive presumption retain a separate mens rea element for the homicide, which is irrebuttably attributed to the defendant from the commission of the felony. An alternative approach is to view the rule as not requiring a separate mens rea element for the homicide, but as justifying conviction for murder simply on the basis that the defendant committed a felony and a killing occurred.[63]

Courts adopting this view see felony murder as a distinct form of homicide: "[T]he elements of felony-murder are simply the intentional commission of a felony and the killing of a human being in the course thereof."[64] The justifications advanced for this concep-

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59 Morris, *supra* note 17, at 60. "[T]he *mens rea* or 'malice' necessary for the felony is in every instance different from the *mens rea* or 'malice aforethought' required for murder; but for certain killings the law will allow the latter to be conclusively proved from the former." *Id.*

60 Comment, *supra* note 58, at 1037; *see also supra* notes 30-31 and accompanying text.

61 *See infra* notes 121-31 and accompanying text.

62 Gegan, *Criminal Homicide in the Revised New York Penal Code*, 12 N.Y.L.F. 565, 586 (1966).

63 *See* Comment, *supra* note 58, at 1038 (according to this rationale, "the legislature is not creating a crime in which the requisite *mens rea* is presumed; the legislature is creating a new crime in which premeditation or malice aforethought is simply not an element"). *See also* GA. CODE § 16-5-1(c) (1984) ("A person also commits the offense of murder when, in the commission of a felony, he causes the death of another human being irrespective of malice.").

64 Westberry v. Mullaney, 406 F. Supp. 407, 417 (S.D. Me.), *aff'd*, 535 F.2d 1333 (1st Cir. 1976). In the recent case of People v. Dillon, 34 Cal.3d 441, 668 P.2d 697, 194 Cal. Rptr. 390 (1983), the California Supreme Court candidly recognized that "if the effect of the felony-murder rule on malice is indeed a 'presumption,' it is a 'conclusive' one." *Id.* at 474, 668 P.2d at 716-17, 194 Cal. Rptr. at 410. The court avoided the problems of conclusive presumptions by characterizing California's felony-murder rule as " 'a rule of substantive law . . . and not merely an evidentiary shortcut to finding malice.' " *Id.* at 475, 668 P.2d at 718, 194 Cal.Rptr. at 411 (quoting People v. Stamp, 2

tualization are deterrence of the underlying felony,[65] and the notion that the felon has exhibited an "evil mind" justifying severe punishment.

The "evil mind" theory of felony murder finds its roots in seventeenth and eighteenth century English notions of criminology.[66] Mens rea was a less developed concept and judges focused on the harm resulting from a defendant's illegal act, rather than the maliciousness of his intent.[67] The felony-murder rule thus partly operated on an unarticulated rationale that one who does bad acts cannot complain about being punished for their consequences, no matter how unexpected. Moreover, the felony-murder rule conceived from an "evil mind" perspective comported with the retribution theory of punishment prevailing at the time of the rule's development, which focused on the resulting harm, not on the actor's mental state, in deciding the appropriate punishment.[68] A convict, therefore, bore responsibility for his felony and for any harmful result arising from the crime regardless of his specific intentions.[69]

Continued reliance on a general culpability theory to justify the

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Cal. App. 3d 203, 210, 82 Cal. Rptr. 598, 602 (1969), *cert. denied sub nom.* Stamp v. California, 400 U.S. 819 (1970)). *See also* Whalen v. United States, 445 U.S. 684, 686 (1980) (District of Columbia felony-murder statute "does not require proof of an intent to kill [,only] proof of a killing and of the commission or attempted commission of [a] specified felon[y]"); Guam v. Sablan, 584 F.2d 340, 341 (9th Cir. 1978); Guam v. Root, 524 F.2d 195, 198 (9th Cir. 1975), *cert. denied,* 423 U.S. 1076 (1976) ("abandoned and malignant heart" in commission of felony is all that is required); People v. Aaron, 409 Mich. 672, 741, 299 N.W.2d 304, 332 (1980) (Ryan, J., concurring in part, dissenting in part) (felony murder does not contain malice element, but only requires commission of felony and killing); People v. Sturgis, 86 A.D.2d 775, 488 N.Y.S.2d 61, 62 (1982); State v. Wanrow, 91 Wash. 2d 301, 311, 588 P.2d 1320, 1325 (1978) ("The intent necessary to prove the felony-murder is the intent necessary to prove the underlying felony."); State v. Peyton, 29 Wash. App. 701, 719, 630 P.2d 1362, 1373 (1981); State v. Sims, 248 S.E.2d 843 (W. Va. 1978) ("[T]he common law created [felony murder] so as not to include the element that the homicide has to be committed with malice or an intent to kill.").

65 State v. O'Blasney, 297 N.W.2d 797, 798 (S.D. 1980); *see also supra* text accompanying notes 29, 35-37.

66 Case Comment, 24 RUTGERS L. REV. 591, 593-96 (1970).

67 *Id.* at 594.

68 *Id.*; *see also* G. FLETCHER, *supra* note 5, at 284-85. Fletcher agrees that the felony-murder rule is a remnant of the "harm-oriented" approach to the early common law that has given way to a contemporary "act-oriented approach" which focuses on culpability for the particular act. Fletcher also suggests that the idea of "tainting" is a possible "subconscious prop" of felony murder. The concept of tainting, which dates back to the nineteenth century, revolves around the idea that the felon is somehow tainted by the fact a death occurred, and the state must act to expunge the taint. *Id.* at 426-27.

69 W. LA FAVE & A. SCOTT, CRIMINAL LAW 560 (1972) ("The rationale [is] that one who commits a felony is a bad person with a bad state of mind, and he has caused a bad result, so that we should not worry too much about the fact that the fatal result . . . was quite different and a good deal worse than the bad result he intended.").

felony-murder rule has been described as a rather "primitive rationale"[70] and as "a tribute to the tenacity of legal conceptions rooted in simple moral attitudes."[71] The "evil mind" theory conflicts with the basic premise that "the criminal law is concerned not only with guilt or innocence in the abstract but also with the degree of criminal liability."[72] Although the general culpability rationale was perhaps sufficient as long as a general intent of wrongdoing established malice aforethought,[73] it conflicts with the progressive trend of categorizing homicide according to the degree of culpability.[74] Indeed, the felony-murder rule viewed from a general culpability perspective effectively eliminates a mens rea element in convicting a felon for a killing occurring during the commission of a felony, and results in the rule operating as a strict liability crime: the occurrence of a killing is punished as murder regardless of the defendant's culpability.[75]

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70 W. LA FAVE & A. SCOTT, *supra* note 69, at 554.

71 J. HALL, PRINCIPLES OF CRIMINAL LAW 455 (1947).

72 Mullaney v. Wilbur, 421 U.S. 684, 697-98 (1975).

73 One reason legislatures and courts are reluctant to abandon the felony-murder rule is that the rule "represents a formal approximation of extremely reckless homicide." Fletcher, *supra* note 11, at 415. In many cases where the felony-murder rule is invoked, the defendant is probably guilty of either intentional or extremely reckless homicide. *See* MODEL PENAL CODE § 210.2 commentary at 36-37 (Official Draft 1980); Fletcher, *supra* note 11, at 415-16. Nevertheless, the rule is overinclusive, because it encompasses many killings where the felon is either not guilty of homicide, G. FLETCHER, *supra* note 5, at 276, or the degree of homicide does not correspond with the felon's level of culpability. Saltzman, *supra* note 5, at 1578. Moreover, our system of criminal justice assigus "criminal liability . . . to individuals, not generalities. . . . Criminal punishment should be premised . . . on something more than a probability of guilt." MODEL PENAL CODE § 210.2 commentary at 37 (Official Draft 1980).

74 *See supra* notes 38-41 and accompanying text; MODEL PENAL CODE § 210.1 commentary at 6 (Official Draft 1980); *see also id.* § 210.2, at 37-9; People v. Aaron, 409 Mich. 672, 708-13, 299 N.W.2d 304, 316-319 (1980).

Professor Morris objects to a "unitary conception" of malice for the felony and homicide as "absurd," because "the difference between involuntary manslaughter and common law murder entirely disappears." Morris, *supra* note 17, at 61. Professor Morris is correct about the absurdity of the result, but the "unitary conception" appears to have had some basis at common law. *See supra* notes 17-23 and accompanying text; *see also* MODEL PENAL CODE § 210.2 comment at 31 ("[The felony-murder rule] may have made sense under the [early] conception of *mens rea* as something approaching a general criminal disposition . . . .").

75 The "evil mind" rationale does not strictly comport with the idea of strict liability, as some type of general culpability for the homicide is attributed to the felon. The basis of the rationale, however, is the same, as it assigns criminal liability without regard to the level of culpability involved; an accidental killing, therefore, is punished in most jurisdictions as if it were an intentional, deliberate and premeditated murder. The imposition of criminal penalties where no specific finding of culpability has been made violates the same principles that prohibit punishing acts which the actor did not intend. In neither case did the defendant necessarily act with a state of mind justifying the punishment.

Jeffries & Stephen, *supra* note 5, distinguish between a categorical approach to the felony-murder rule and a "package" approach. The categorical approach views the

Two basic conceptualizations of the felony-murder rule emerge from the foregoing examination of the rule's proffered purposes. Both the transferred intent-constructive malice and the strict liability theories have been widely criticized on policy grounds, yet they continue to be cited by the courts as justifications for the rule. Recently developed constitutional doctrines in the areas of due process and the eighth amendment, however, have elevated the policy criticisms of these theories to the level of constitutional infirmities.

II

PRESUMPTIONS, DUE PROCESS, AND THE FELONY-MURDER RULE

The transferred intent-constructive malice theory of felony murder, as noted above,[76] operates in practice as a conclusive presumption: the mens rea required for murder is irrebuttably presumed from the defendant's mens rea in committing the felony. The Supreme Court has recently ruled that conclusive presumptions are unconstitutional, because they relieve the government of its burden of proving every element of the crime and because they violate the defendant's presumption of innocence. When applied to the felony-murder rule, these Supreme Court decisions demonstrate the rule's injustice in imposing punishment for a homicide without a

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homicide as distinct from the felony, which would make the imposition of penalties for the homicide on the basis of the felony a classic strict liability offense because no independent basis for punishing the homicide would exist. *Id.* at 1383-84. They dismiss the categorical approach, however, as having a "certain sense of unreality." *Id.* at 1384. Their preferred analysis is a "package approach," which views the homicide as an adjunct of the underlying crime and makes the focus not proof of culpability, but whether the aggregate penalties are proportionate to the blameworthiness so as to not violate the eighth amendment. *Id.* at 1384.

The authors are correct as to the technical distinction between the two views and the applicability of the eighth amendment, but they incorrectly assume that the "package" approach makes culpability for the homicide apart from the felony irrelevant. Other commentators have properly noted that strict liability principles are still applicable because the rule eliminates inquiry as to what level of culpability, if any, is involved: "The strict-liability aspect [of felony murder] . . . makes any homicide murder . . ., regardless of whether it was accidental, negligent or intentional." Note, *supra* note 58, at 1059 fn.3.

Another commentator has used felony murder as an example of "vicarious liability," because the rule "may impose liability on a defendant who was only negligent, and sometimes not even negligent, even though more culpability is required for each element of the underlying offense." Saltzman, *supra* note 5, at 1578. Saltzman thus includes felony murder as an example "[i]n addition to strict criminal liability . . . where the common law does not adhere to the doctrine of *mens rea*." *Id.* Where the vicarious liability aspect of felony murder makes a felon responsible for a killing done by another party during the felony, however, the rule resembles absolute liability, not strict liability, as neither actus reus nor mens rea is required.

76 *See supra* notes 42-62 and accompanying text.

specific finding of culpability, and suggest that the rule's continued use violates fundamental constitutional principles.

A. The Supreme Court's Standards of Due Process

In *In Re Winship,*[77] the Supreme Court held for the first time that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[78] The Court determined that the "beyond a reasonable doubt" standard "provid[ed] concrete substance for the presumption of innocence."[79]

The Court elaborated on the meaning of *Winship* in *Mullaney v. Wilbur.*[80] In *Mullaney,* the Court unanimously held that the state must prove each essential element of the crime beyond a reasonable doubt.[81] Because Maine law defined murder as requiring malice aforethought,[82] which necessarily included the absence of "heat of passion," the Court concluded that the state could not shift the burden to the defendant to prove that he acted in the heat of passion without violating the due process guarantees of *Winship.*[83]

The Court confined the potential ramifications of *Mullaney* in *Patterson v. New York.*[84] In *Patterson,* the Court upheld a statutory scheme which made severe emotional distress an affirmative defense to murder. The *Patterson* Court held that *Mullaney* should not be read to require the state to prove beyond a reasonable doubt the presence or absence of every fact affecting either the blameworthiness of the defendant or the severity of punishment.[85] Instead, *Mul-*

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77 397 U.S. 358 (1970).

78 *Id.* at 364. In *Winship,* the Supreme Court reversed the conviction of a 12 year old boy for larceny because the conviction rested upon a mere preponderance of the evidence. The Court held that the New York statute permitting conviction of juveniles based on a preponderance of the evidence was unconstitutional.

79 *Id.* at 363.

80 421 U.S. 684 (1975).

81 *Id.* at 698.

82 ME. REV. STAT. ANN. tit. 17, § 2651 (1964), current version at ME. REV. STAT. ANN. tit. 17A, § 201 (1983 & Supp. 1984).

83 421 U.S. at 700-04. The trial court had instructed the jury that once the state proved that the defendant had acted intentionally and unlawfully, malice aforethought was conclusively implied unless the defendant proved by a preponderance of the evidence that he had acted in the heat of passion upon sudden provocation. The state claimed that malice was not an element of felonious homicide, but the Court noted that malice was the only distinction between murder and manslaughter with their significantly different penalties. *Id.* at 691-92, 698.

84 432 U.S. 197 (1977). Interestingly, the Court disavowed any intention of overruling *Mullaney.*

85 *Id.* at 214-15. The Court was unwilling to read *Mullaney* too broadly in part because that might "discourage Congress from enacting pending legislation to change the felony-murder rule by permitting the accused to prove by a preponderance of the evi-

laney was seen as prohibiting only the "shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed."[86] Because New York defined murder simply as an intentional killing,[87] the state could properly make severe emotional disturbance a mitigating factor which the defendant could prove as an affirmative defense.[88] The Court, therefore, adopted a formalistic approach which focused upon how the state defined the crime. The Court noted, however, that the Constitution limited the states' power to define the elements of a crime.[89]

The tension between *Mullaney* and *Patterson* is best characterized as a dispute over how to delineate the limits of a state's power to define the "essential facts" of a crime. *Mullaney* placed these limits beyond the state's legislative power by outlining two crucial criteria: whether the facts have been viewed in the Anglo-American legal tradition as being of great legal importance in defining the crime and whether the facts make a substantial difference in the punishment imposed or the stigma involved.[90] Facts with these characteristics are facts " 'necessary to constitute the crime with which [the accused] is charged,' "[91] and the state bears the burden of proving them beyond a reasonable doubt.[92] In such a case, the state's options are limited to abolishing the use of the factors in defining the crimes,[93] creating new affirmative defenses,[94] or shifting the burden of production to the defendant while the state retains the burden of persuasion.[95] The *Mullaney* Court thus established substantive rules restricting the state's power to define crimes without shouldering the burden of persuasion.

In contrast, the *Patterson* Court broadly interpreted the state's power to define a crime. According to *Patterson,* the state need only prove beyond a reasonable doubt "all of the elements *included in the*

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dence the affirmative defense that the homicide committed was neither a necessary nor a reasonably foreseeable consequence of the underlying felony." *Id.* at 215 n.15.

86 *Id.* at 215.

87 N.Y. PENAL LAWS § 125.25(i) (McKinney 1975).

88 *Patterson,* 432 U.S. at 205-06.

89 *Id.* at 210.

90 *Mullaney,* 421 U.S. at 692-701; *see also Patterson,* 432 U.S. at 226 (Powell, J., dissenting) (reviewing analysis used by *Mullaney* majority).

91 *Patterson,* 432 U.S. at 221 (Powell, J., dissenting) (quoting *In re* Winship, 397 U.S. 358, 364 (1970)).

92 *Mullaney,* 421 U.S. at 698.

93 *Patterson,* 432 U.S. at 228.

94 *Id.* at 229-30.

95 *Id.* at 230-31. Justice Powell properly noted, however, that some limits exist on shifting the burden of production to the defendant in a criminal case. *Id.* at 230 n.16. *See also infra* notes 168-71 and accompanying text.

definition of the offense of which the defendant is charged."[96] The judicial focus then becomes what "*the State deems so important* that it must be either proved or presumed."[97] Consistent with the changed focus from *Mullaney*, the *Patterson* majority analyzed the issue in terms of "elements" rather than "facts," connoting a much more elastic approach to the problem of definition.

Furthermore, *Patterson* apparently placed only very basic constitutional limits on the state's power to define crimes. Indeed, as its example of a state exceeding these limits, the Court stated that "[i]t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime."[98] This example clearly contravenes even the most restrictive definition of a defendant's presumption of innocence. The Court's failure to describe more narrowly a state's power to define crimes implies that few constitutional limits restrict that power.

Mullaney and *Patterson* constitute the two extremes on a continuum delineating the limits on a state's power to define crimes. Both extremes have shortcomings. By focusing on Anglo-American legal tradition, *Mullaney*'s approach fails to include within its constitutional strictures "new" substantive crimes with significant punishments and stigma. Similarly, this historical approach would impede modern penal law reform and innovation by "exalting the traditional law of crimes and fixing its content as a normative standard for constitutional adjudication."[99] For instance, this approach would impede reform where a legislature desired to provide previously unavailable affirmative defenses which affected a "fact" of the crime.[100] In such a situation, a legislature either would have to forego the innovation or abandon its "traditional" formulation of the crime to avoid assuming the evidentiary burden.[101]

Patterson's danger lies in its failure to place any meaningful constitutional limits on a state's power to define crimes. The *Patterson* majority spoke of "obvious constitutional limits,"[102] but the majority's approach "allows a legislature to shift, virtually at will, the bur-

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96 432 U.S. at 210 (emphasis added).

97 *Id.* at 215 (emphasis added).

98 *Id.* at 210 (quoting McFarland v. American Sugar Ref. Co., 241 U.S. 79, 86 (1916)). The Court also stated that "[t]he legislature [could not] 'validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt.' " 432 U.S. at 210 (quoting Tot v. United States, 319 U.S. 463, 469 (1943)).

99 Jeffries & Stephan, *supra* note 5, at 1364.

100 *Patterson*, 432 U.S. at 214 n.15 (suggesting that historical approach might jeopardize legislative proposal to provide affirmative defense to federal felony-murder rule).

101 *Id.* at 228 (Powell, J., dissenting) (asserting that state could abolish distinction between murder and manslaughter, and treat all unjustifiable homicide as murder).

102 *Id.* at 210.

den of persuasion with respect to any factor in a criminal case, so long as it is careful not to mention the nonexistence of that factor in the statutory language that defines the crime."[103] In criticizing the majority decision, Justice Powell asserted that a

> state statute could pass muster under the only solid standard that appears in the Court's opinion if it defined murder as mere physical contact between the defendant and the victim leading to the victim's death, but then set up an affirmative defense leaving it to the defendant to prove that he acted without culpable *mens rea.* The State, in other words, could be relieved altogether of responsibility for proving *anything* regarding the defendant's state of mind, provided only that the face of the statute meets the Court's drafting formulas.[104]

Although the example is an extreme one,[105] it highlights the difficulty of deriving any meaningful constitutional limits from the *Patterson* majority's holding.

The courts and commentators, however, generally have not read *Patterson* as granting legislatures the degree of discretion that Justice Powell feared.[106] For example, one court interpreted *Patterson* as making *Mullaney* a procedural due process case which protected a substantive value:

> *Patterson* left intact the functional analysis applied by the *Mullaney* Court . . . . [T]he federal courts are not bound to accept blindly a State's characterization of its own law. Instead, they look to see if the truth of an "affirmative defense" is logically inconsistent with the truth of an essential element of the crime, as the crime's elements are defined by the State.[107]

The protected substantive value is derived from the elements of the crime that the state could not constitutionally disregard in imposing criminal liability, or from the elements that the state has chosen to incorporate in its definition of the offense.[108] Even after *Patterson*, therefore, a "constitutional floor for the substantive criminal

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103 *Id.* at 223 (Powell, J., dissenting).

104 *Id.* at 224 n.8 (Powell, J., dissenting) (emphasis in original).

105 Justice Powell had "no doubt that the Court would find some way to strike down a formalistically correct statute as egregious as the one hypothesized . . . [b]ut [the *Patterson*] ruling suggests no principled basis for concluding that such a statute falls outside the 'obvious' constitutional limits the Court invokes." *Id.* at 225 n.9 (citation omitted).

106 *But see* Allen, *The Restoration of* In Re Winship: *A Comment on Burdens of Persuasion in Criminal Cases After* Patterson v. New York, 76 MICH. L. REV. 30, 54 (1977) (concluding that *Patterson* Court implicitly overruled *Mullaney*); Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1312-30 (1977) (asserting that Constitution leaves legislatures free to choose criteria for criminal conviction and punishment).

107 Holloway v. McElroy, 632 F.2d 605, 626 n.33 (5th Cir.1980).

108 *Patterson*, 432 U.S. at 210, 215.

law"[109] presumably exists. Although *Patterson* provides little guidance as to where the constitutional line is drawn, commentators have turned to fundamental concepts such as actus reas, mens rea, and fairness in describing the line's location.[110]

B. Presumptions and Due Process

In *Ulster County Court v. Allen*,[111] the Court attempted to resolve the issues concerning the use of presumptions in criminal proceedings that had been raised by the holdings in *Winship, Mullaney,* and *Patterson*.[112] The Court held that "the ultimate test of any device's constitutional validity in any given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt."[113] The Court distinguished permissive and mandatory presumptions on the basis of their effect on the factfinder.

The Court defined a permissive presumption as one that "allows-but does not require-the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant."[114] The Court restricted the defendant's challenge of a permissive presumption to a showing that "under the facts of the case, there is no rational way the trier could make the connection permitted by the inference."[115] The Court's rationale for such a limited attack was that the presumption affected the trier of fact only to the extent that the presumption was so irrational that it allowed the "factfinder to make an erroneous factual determination."[116] Thus, for a permissive presumption to be constitutional, the presumed fact need only follow "more likely than not" on the facts of the case from proof of the basic fact.[117]

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109 Jeffries & Stephan, *supra* note 5, at 1365.

110 *Id.* at 1370-79 (constitutional minima of actus reus, mens rea, and proportionality). Another commentator suggests extending substantive due process analysis to include the "question of whether the statutory scheme is fair, utilizing a classic balancing approach." Ranney, *Presumptions in Criminal Cases: A New Look at an Old Problem*, 41 MONT. L.REV. 21, 37 (1980); *see also infra* notes 214-45 (discussing limits on defining strict liability crimes).

111 442 U.S. 140 (1979).

112 *See supra* note 58 (discussing various types of presumptions).

113 *Allen*, 442 U.S. at 156 (citing *Winship* and *Mullaney* as precedent).

114 *Id.* at 157.

115 *Id.*

116 *Id.*

117 The Court first articulated the "more likely than not" standard in Leary v. United States, 395 U.S. 6, 32-36 (1969). *See also* Turner v. United States, 396 U.S. 398 (1970) (applying more likely than not standard to permissive presumption). The test was derived from a line of cases dealing with presumptions starting with Tot v. United States, 319 U.S. 463 (1943), and extending through Roviaro v. United States, 353 U.S. 53

The Court found mandatory presumptions to be "far more troublesome."[118] The Court held that such presumptions required facial examination because the factfinder "*must* find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts."[119] The Court found that the presumption in *Allen* was a permissive one, and, therefore, did not discuss the appropriate standard to be used in analyzing a mandatory presumption. The majority suggested, however, that "since the prosecution bears the burden of establishing guilt, it may not rest its case entirely on a [mandatory] presumption [that shifts the burden of persuasion] unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt."[120]

Two weeks after the *Allen* decision, a unanimous Court in *Sandstrom v. Montana*[121] expressly held conclusive presumptions to be unconstitutional. The trial judge in *Sandstrom* had instructed the jury that " '[t]he law presumes that a person intends the ordinary consequences of his voluntary acts.' "[122] In finding this instruction unconstitutional, the Court reasoned that such a presumption relieved the state of its burden of proving an element of the crime, the defendant's intent, in violation of *Winship*, *Mullaney*, and *Patterson*.[123] The Court further relied upon *Morissette v. United States*[124] and *United States v. United States Gypsum Co.*[125] in articulating two particular con-

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(1957), United States v. Ramano, 382 U.S. 136 (1965), and United States v. Gainey, 380 U.S. 63 (1965). Some judges and commentators have condemned the standard as conflicting with the "beyond a reasonable doubt" standard articulated in *Winship*. *See, e.g.*, Ranney, *supra* note 110, at 32-33 & n.50.

118 *Allen*, 442 U.S. at 157.

119 *Id.* (emphasis in original). The Court further distinguished mandatory presumptions that shift the burden of production from those that shift the burden of persuasion. *Id.* at 157 n.16. The Court stated that presumptions considered in prior cases fit almost uniformly in the former category, and suggested that if the burden of production were "extremely low," the presumption might operate only as a permissive inference. *Id. See also* discussion *infra* notes 168-71 and accompanying text.

120 *Allen*, 442 U.S. at 167. Justice Powell, dissenting, declined to reach the issue of whether the "beyond a reasonable doubt standard" should be used in analyzing mandatory presumptions that shift the burden of persuasion. Instead, Justice Powell would have invalidated the presumption in *Allen* on the basis of a facial analysis showing that the presumed fact was not "more likely than not" to be true. *Id.* at 174. He also noted that the Court in *Allen* distinguished between permissive and mandatory presumptions for the first time. *Id.* at 170 n.3. Justice Powell believed that the majority was essentially "applying an unarticulated harmless error-standard." *Id.* at 177.

121 442 U.S. 510 (1979).

122 *Id.* at 515.

123 *Id.* at 520-24.

124 342 U.S. 246 (1952). In *Morissette*, the Supreme Court reversed the defendant's conviction for converting government property because the trial judge did not permit the jury to decide whether the defendant had the requisite criminal intent.

125 438 U.S. 422 (1978).

stitutional infirmities inherent in conclusive presumptions.

First, a conclusive presumption "*would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime.*"[126] To require that the state need only prove the basic fact (in *Sandstrom*, causing the death) for the jury mandatorily to find the ultimate fact (Sandstrom's intent to kill) would emasculate *Winship*'s requirement that every element be proved beyond a reasonable doubt, and *Mullaney*'s mandate that the state carry the burden of proof.[127] The presumption would "effectively eliminate intent as an ingredient of the offense,"[128] thereby relieving the state of its burden of persuasion.

Second, the Court reasoned that a conclusive presumption would invade the factfinding function of the jury.[129] The Court noted that "in a criminal case the law assigns [the factfinding function] solely to the jury,"[130] and to require a jury to find the ultimate fact solely on the basis of the presumption would relieve the jury of that function.[131]

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126 *Sandstrom*, 442 U.S. at 522 (quoting Morissette v. United States, 342 U.S. 246, 274-75 (1952)) (emphasis added by Court).

127 *See id.* at 523-54.

128 *Id.* at 522 (quoting Morissette v. United States, 342 U.S. 246, 275 (1952)).

129 *Id.* at 523. The Court quoted United States v. United States Gypsum Co., 438 U.S. 422, 446 (1978) in support of this proposition.

130 *Sandstrom*, 442 U.S. at 523.

131 The Supreme Court recently considered whetber an instruction violating *Sandstrom* could constitute harmless error. Connecticut v. Johnson, 460 U.S. 73 (1983). The Court divided evenly over the issue, with Justice Stevens concurring in the judgment but declining to reach the issue because the state court had declined to decide it. The four Justices in the plurality would have narrowly limited the situation where a *Sandstrom* instruction could constitute harmless error (e.g., where the defendant conceded guilt) and strongly reaffirmed the necessary role of the jury as a factfinder when a conclusive presumption is involved. *Id.* at 86 & n.15.

The dissent believed that a conclusive presumption does not take the question of intent away from the jury, because a jury first must determine that the prosecution has proven the basic facts before the jury can apply the presumption. *Id.* at 96 (Powell, J., dissenting). The dissent also argued that the issue is not whether the jury could have or did rely upon the conclusive presumption, but "whether the evidence was so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption." *Id.* at 97 n.5. *See also* Lamb v. Jeruigan, 683 F.2d 1332, 1341 n.14 (11th Cir. 1982) (affirming conviction on grounds that evidence was overwhelming and that erroneous presumption instruction was harmless), *cert. denied*, 460 U.S. 1024 (1983). The dispute between the two opinions thus focuses on *how* the verdict was reached. Whereas four Justices would reject a "harmless error" analysis because a reviewing court could not be certain that the jury affirmatively made a finding of intent without aid of the presumption, the dissenters seem content with a finding that the jury's guilty verdict was substantiated by all the evidence, regardless of whether it relied on the conclusive presumption.

Although the dissent's position may be defensible if the primary concern is merely whether the defendant was guilty, its conclusion that the intent issue is still left to the jury, despite the conclusive presumption, is not tenable. The dissent relied partly on the fact that the judge instructed that the issue of intent was ultimately left to the jury. 460

In addition, the *Sandstrom* Court discussed the state's alternative characterization of the presumption as one shifting the burden of persuasion rather than as a conclusive presumption.[132] Citing *Mullaney* and *Patterson,* the Court held that a presumption that shifted the burden of persuasion was also unconstitutional because such a presumption would relieve the state of its obligation to prove every element of the offense beyond a reasonable doubt.[133]

By holding that presumptions shifting the burden of persuasion were per se unconstitutional, the *Sandstrom* Court contradicted the dicta in *Allen* that suggested that such a presumption would be constitutional if it satisfied a "beyond a reasonable doubt" standard.[134] Surprisingly, the *Sandstrom* Court did not even mention the language in *Allen,*[135] and it discussed the question briefly as if no doubt could exist that a presumption shifting the burden of persuasion was unconstitutional.[136] The Court based its holding primarily on *Mullaney* and characterized the instruction in *Mullaney* that the burden was on the defendant to show he acted in heat of passion as "a presumption [shifting the burden of persuasion which] was found constitutionally deficient."[137]

The intriguing effect of *Sandstrom* on *Allen* is that it renders the *Allen* Court's discussion of mandatory presumptions meaningless to the extent that the discussion suggested a standard of review for mandatory presumptions.[138] A possible exception could exist for

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U.S. at 101. However, the judge also instructed the jury that the law required them to conclusively presume that the defendant intended the natural and necessary consequences of his act. *Id.* at 78. Therefore, assuming, as we must, that the jury followed the judge's instructions and applied the conclusive presumption upon finding the basic fact (simply that the act was committed by the defendant), the issue of intent was not left for the jury to decide. *See* People v. Garcia, 36 Cal. 2d 539, 550, 684 P.2d 826, 831, 205 Cal. Rptr. 265, 270 (1984) (instruction taking issue completely from jury is reversible error per se). *But see* State v. Bolin, 678 S.W.2d 40, 45 (Tenn. 1984) (overwhelming evidence made *Sandstrom*-type error harmless beyond reasonable doubt).

132 The Court analyzed both conclusive and burden of persuasion shifting presumptions because the jury could have viewed the instruction either way. *Sandstrom,* 442 U.S. at 524.

133 *Id.*

134 *Allen,* 442 U.S. at 167. Because the *Allen* court found the presumption in issue to be a permissive inference, its treatment of a mandatory presumption shifting the burden of persuasion was dicta. *See also id.* at 169 n.2 (Powell, J., dissenting) (expressing no opinion on constitutionality of presumptions shifting burden of persuasion).

135 Earlier in the *Sandstrom* opinion, the Court found *Allen* inapplicable as it "did not . . . involve presumptions of the conclusive or persuasion-shifting variety." 442 U.S. at 520 n.9.

136 The Court discussed the issue in a brief summary of the holdings in *Mullaney* and *Patterson. Id.* at 524.

137 *Id.* The *Mullaney* Court did not discuss whether such a presumption might be valid if it satisfied the "beyond a reasonable doubt" standard.

138 The *Allen* Court stated that a mandatory presumption was "generally examined . . . on its face to determine the extent to which the basic and elemental facts coincide."

mandatory presumptions shifting only the burden of production,[139] but *Sandstrom*'s inescapable import is that both conclusive presumptions and mandatory presumptions shifting the burden of persuasion violate *Winship* and its progeny.

C. The Felony-Murder Rule and Due Process After *Sandstrom v. Montana*

Sandstrom casts serious doubt upon the constitutionality of the transferred intent-constructive malice theory of the felony-murder rule. Under this theory, the rule retains a separate mens rea for the felony and the homicide, but irrebuttably imputes the mens rea required for the homicide from that necessary for the felony.[140]

This theoretical scheme is indistinguishable from the operation of the conclusive presumption that was invalidated in *Sandstrom*. In *Sandstrom,* the Court observed: "Upon finding proof of one element of the crime (causing death), and of facts insufficient to establish the second (the voluntariness and 'ordinary consequences' of defendant's action), Sandstrom's jurors could reasonably have concluded that they were directed to find against defendant on the element of intent."[141] Likewise, under the felony-murder rule, once a jury finds proof of the basic fact of a killing during the commission of a felony, even without any proof of culpability for the homicide, it also must find that the defendant possessed the mens rea required for murder.

In short, the felony-murder rule has the same two constitutional infirmities found in *Sandstrom*. The *Sandstrom* Court reaffirmed in

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442 U.S. at 158. The analysis would thus focus not on the facts of the case before the Court, but on a facial analysis "based on the presumption's accuracy in the run of cases." *Id.* at 159.

After *Sandstrom,* facial analysis of presumptions, however, may not ever be necessary. If the presumption is a permissive inference, it is reviewed as applied, and if it is a mandatory presumption, it would be invalid under *Sandstrom* either because it is conclusive or because it shifts the burden of proof.

The one possible reconciliation of *Sandstrom* and *Allen* is that the *Allen* Court characterized prior mandatory presumption cases as "almost uniformly fit[ting] into the . . . subclass [of presumptions shifting only the burden of production], in that they never totally removed the ultimate burden of proof beyond a reasonable doubt from the prosecution." *Id.* at 158 n.16. Even mandatory presumptions shifting the burden of production, however, may be unconstitutional after *Sandstrom*. *See Sandstrom*, 442 U.S. at 516 n.5; *infra* notes 168-71 and accompanying text.

139 The Court did not directly address the questions raised by a presumption that shifts only the burden of production, because it rejected the state's characterization of the jury instruction as shifting only the burden of production. 442 U.S. at 515-16. In a footnote, the Court observed, however, that failure to meet the burden of production for a defendant cannot have the effect of a directed verdict on the defendant. *Id.* at 516 n.5. *See generally infra* notes 168-71 and accompanying text.

140 *See supra* notes 42-57 and accompanying text.

141 442 U.S. at 523.

constitutional terms that the presumption of innocence "*extends to every element of the crime.*"[142] Because the transferred intent-constructive malice theory formally retains a mens rea element for a homicide, the presumption of innocence must apply to the homicide aspect of the rule. Yet, the felony-murder rule completely bypasses the presumption of innocence as to this element upon proof of a *different* element, the occurrence of a killing during the commission of a felony.

Similarly, the felony-murder rule, like the jury instruction in *Sandstrom,* invades the factfinding function of the jury. Whether the mens rea element for the homicide under the felony-murder rule is defined as requiring recklessness or intent,[143] the jury is not required to make an affirmative finding of the defendant's culpability. Instead, the jury is allowed only to deliberate on whether a killing occurred during the commission of a felony. Upon its finding of that fact, the rule requires the jury to find automatically that the defendant had a culpable state of mind.[144]

Apparently, no court has considered expressly the felony-murder rule in light of *Sandstrom.* After *Mullaney,* challenges to the felony-murder rule succeeded only in forcing courts to interpret their respective versions of the rule as requiring no mens rea element for the homicide.[145] Challenges based upon *Sandstrom* similarly would

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142 *Id.* at 522 (quoting Morissette v. United States, 342 U.S. 246, 274-75 (1952)) (emphasis in original).

143 *See supra* notes 38-40. Jurisdictions that have not adopted the Model Penal Code formulation frequently characterize the requisite culpability in terms of the common law concept of malice. *See, e.g.,* State v. Wanrow, 91 Wash. 2d 301, 306, 588 P.2d 1320, 1322 (1978) (en banc) (theoretical basis of felony murder is that "general malice" may be inferred from felonious intent).

144 Although the felony-murder rule is used in different ways by different states, *see supra* notes 7-9, 53-56 and accompanying text, the Alabama statute is typical of many today:

> (a) A person commits the crime of murder if:
>
> . . . .
>
> (3) He commits or attempts to commit arson in the first degree, burglary in the first or second degree, escape in the first degree, kidnapping in the first degree, rape in the first degree, robbery in any degree, sodomy in the first degree or any other felony clearly dangerous to human life and, in the course of and in furtherance of the crime that he is committing or attempting to commit, or in immediate flight therefrom, he, or another participant if there be any, causes the death of any person.

ALA. CODE § 13A-6-2(a)(3) (1982). The statute thus requires a jury to find murder upon finding a killing during one of the enumerated felonies, regardless of the defendant's actual culpability.

145 *See, e.g.,* People v. Root, 524 F.2d 195, 198 (9th Cir. 1975), *cert. denied,* 423 U.S. 1076 (1976) (felony-murder statute does not require intent to kill); Westberry v. Mullaney, 406 F. Supp. 407, 415-17 (D. Me. 1976) (noting "significant constitutional challenge" if intent to kill is element of felony murder, but finding whether killing "intended or even accidental" to be irrelevant), *aff'd sub nom.* Westberry v. Murphy, 535 F.2d 1333

require a court either to eliminate a mens rea element for the homicide aspect of felony murder[146] or to find the rule an unconstitutional conclusive presumption of the ultimate fact of culpability for the killing.

D. The Model Penal Code and the Rebuttable Presumption Approach

The drafters of the Model Penal Code would have preferred to abolish felony murder, "but such a course was thought impolitic, given the weight of prosecutive opposition."[147] The Code instead provides that criminal homicide constitutes murder when:

> [I]t is committed recklessly under circumstances manifesting ex-

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(1st Cir.), *cert. denied sub nom.* Westberry v. Oliver, 429 U.S. 889 (1976); People v. Dillon, 34 Cal. 3d. 441, 475, 668 P.2d 697, 718, 194 Cal. Rptr. 390, 411 (1984) (felony murder does not require malice or premeditation, only specific intent to commit particular felony); State v. Nowlin, 244 N.W.2d 596, 604 (Iowa 1976) (felony murder is "category" of first degree murder not requiring wilfulness, deliberation, and premeditation); State v. Wanrow, 91 Wash. 2d 301, 311-12, 588 P.2d 1320, 1325 (1978) (en banc) (due process not violated because felony murder does not presume intent); State v. Sims, 248 S.E.2d 834, 843 (W. Va. 1978) (felony murder does not require malice, premeditation or intent).

The concurring opinion in People v. Aaron, 409 Mich. 672, 299 N.W.2d 304 (1980), noted that if the felony-murder rule is a conclusive presumption it might "unconstitutionally dilute the 'beyond a reasonable doubt' standard." *Id.* at 742 n.15, 299 N.W.2d at 333 n.15. The opinion avoided this issue, however, by characterizing the felony-murder rule as a distinct crime without a mens rea element for the killing. *Id.* at 740-41, 299 N.W.2d at 332.

In Lockett v. Ohio, 438 U.S. 586 (1978), Justice White, in a separate opinion, noted a similar problem with the Ohio "imputed intent" law, which operates in a manner similar to the felony-murder rule:

> Of course, the facts of both of these cases [*Lockett* and Bell v. Ohio, 438 U.S. 637 (1978)] might well permit the inference that the petitioners did in fact intend the death of the victims. But there is a vast difference between permitting a factfinder to consider a defendant's willingness to engage in criminal conduct which poses a substantial risk of death in deciding whether to infer that he acted with a purpose to take life, and defining such conduct as an ultimate fact equivalent to possessing a purpose to kill as Ohio has done. . . . Indeed, the type of conduct which Ohio would punish by death requires at most the degree of *mens rea* defined by the ALI Model Penal Code (1962) as recklessness: conduct undertaken with knowledge that death is likely to follow.

Id. at 627-28 (citations omitted). The Supreme Court of Ohio, however, subsequently suggested that the presumption of intent in murder cases involving aiders and abetters operates only as an inference. State v. Scott, 61 Ohio St. 2d 155, 400 N.E.2d 375 (1980). *Cf.* Clark v. Jago, 676 F.2d 1099 (6th Cir. 1982) (imputed intent instruction under Ohio law violates *Sandstrom* where not made clear that defendant himself must have purpose to kill), *cert. denied*, 104 S. Ct. 2360 (1984).

146 When a court eliminates a mens rea element for a homicide under felony murder, defendants may attempt a constitutional attack based on strict liability. *See infra* notes 178-251 and accompanying text.

147 Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1446 (1968); *see also* Crum, *supra* note 58, at 210 (advocating rebuttable presumption to replace conclusive inference of intent to kill).

> treme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.[148]

This presumption goes to an element of homicide as defined by the Code, and, therefore, it is governed by section 1.12(5):

> When the Code establishes a presumption with respect to any fact which is an element of an offense, it has the following consequences:
>
> (a) when there is evidence of the facts which give rise to the presumption, the issue of the existence of the presumed fact must be submitted to the jury, unless the Court is satisfied that the evidence as a whole clearly negatives the presumed fact; and
>
> (b) when the issue of the existence of the presumed fact is submitted to the jury, the Court shall charge that while the presumed fact must, on all the evidence, be proved beyond a reasonable doubt, the law declares that the jury may regard the facts giving rise to the presumption as sufficient evidence of the presumed fact.[149]

The Code commentary indicates that although the draftees abandoned felony murder as an independent basis of liability, they retained the rule "as a concession to the facilitation of proof."[150] Furthermore, the drafters considered the presumption to be merely permissive:

> As Section 1.12(5) specifies, the presumption [leaves] the prosecution the burden of persuasion beyond a reasonable doubt that the defendant acted recklessly and with extreme indifference. The jury may, however, regard the facts giving rise to the presumption as sufficient evidence of the required culpability unless the court determines that the evidence as a whole clearly negatives that conclusion. The presumption may, of course, be rebutted by the defendant or may simply not be followed by the jury. In either of these cases, the defendant may be liable for manslaughter or negligent homicide, as these crimes are defined in Sections 210.3 and 210.4. If the presumption is not rebutted and if the jury finds, with or without its aid, that the requisite extreme indifference in fact existed beyond a reasonable doubt, then the appropriate conviction is murder.[151]

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148 MODEL PENAL CODE § 210.2(1)(b) (Official Draft 1980).

149 *Id.* § 1.12(5).

150 *Id.* § 210.2 commentary at 30.

151 *Id.*

1. *The Model Penal Code Rule: Conclusive Presumption or Presumption Shifting the Burden of Persuasion*

The Code's presumption approach to felony murder has been the least successful of its recommendations for penal code reform.[152] Although the Code's presumption approach is an admirable attempt at reform, it still fails the constitutional tests articulated in *Sandstrom* and *Allen*. *Sandstrom* dictates that a determination of the type of presumption involved "depends upon the way in which a reasonable juror could have interpreted the instruction."[153] The Model Penal Code section providing for the presumption states that "[s]uch recklessness and indifference *are* presumed"[154] if the circumstances described occur. Hearing such language, a reasonable juror could easily conclude that the instruction mandates a finding of recklessness and indifference.

Nor does the Code's presumption language save the provision. Section 1.12(5)(b) states that "the law declares that the jury may regard the facts giving rise to the presumption as sufficient evidence of the presumed fact."[155] The phrase "the law declares" thus describes the presumption in mandatory presumption terms. Concededly, the commentary makes clear that the drafters intended that the presumption be permissive.[156] In *Sandstrom,* however, the Supreme Court rejected the state supreme court's characterization of the presumption at issue as only shifting the burden of production because a reasonable jury could have interpreted it either as conclusive or as shifting the burden of persuasion.[157] The Code drafters' intentions are no more controlling than the state supreme court's characterization in *Sandstrom*. The Code's presumption, when viewed from a reasonable juror's perspective, therefore, could effectively shift the burden of persuasion to the defendant. Such a shifting would violate the principles of *Mullaney* and *Winship,* regardless of the drafters' intentions.

Moreover, even if the presumption does not facially shift the burden of persuasion, the Code's application of the presumption is not a "permissive inference" as defined by the Supreme Court's holding in *Allen*. The Court drew "the distinction between a permissive presumption on which the prosecution is entitled to rely as one not necessarily sufficient part of its proof and a mandatory presump-

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152 Fletcher, *supra* note 11, at 415. Only New Hampshire has adopted the Code's approach. N.H. REV. STAT. ANN. § 630.1-b (1974).

153 442 U.S. at 514; *see also Allen*, 442 U.S. at 157-63.

154 MODEL PENAL CODE § 210.2(1)(b) (emphasis added).

155 *Id.* § 1.12(5)(b).

156 *See supra* text accompanying note 151.

157 442 U.S. at 516-17.

tion which the jury must accept even if it is the sole evidence of an element of the offense."[158] The Court concluded that "[a]s long as it is clear that the presumption is *not the sole and sufficient basis for a finding of guilt*, it need only satisfy the [more likely than not] test described in *Leary*."[159]

The Code's supposed permissive inference, however, does not clearly provide that the felony-murder presumption cannot constitute "the sole and sufficient basis for a finding of guilt." Indeed, the Code specifies that "the law declares that the jury may regard the facts giving rise to the presumption *as sufficient evidence of the presumed fact*,"[160] and under the Code's felony-murder statute, the presumed fact is the defendant's culpability. Thus, a jury relying solely on the felony-murder presumption could find the defendant guilty of murder under the Code; such a presumption is not permissive under the definition outlined in *Allen*.

Likewise, the Code's presumption does not satisfy the rationale underlying *Allen*'s treatment of permissive inferences. The *Allen* Court required that a permissive presumption satisfy only the "more likely than not" standard because such a presumption is only one piece of evidence in the prosecutor's case.[161] As the foregoing analysis demonstrates, however, the Code's felony-murder presumption can serve as the only piece of evidence in convicting the defendant of murder.

Once the mandatory nature of the Code's presumption is recognized, its unconstitutionality becomes evident. The *Allen* Court concluded that "since the prosecution bears the burden of establishing guilt, it may not rest its case entirely on a [mandatory] presumption unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt."[162] As noted above,[163] the *Sandstrom* Court went one step further and held that, because the effect of a mandatory presumption is to relieve the state of its burden of proving every element beyond a reasonable doubt, such presumptions violate the holdings of *Winship*, *Mullaney*, and *Patterson*.[164] The Code's presumption has just this effect. The prosecution, without proffering any additional evidence, could rely solely on the presumption to convict a defendant. Accordingly, the Code's felony-murder rule creates a mandatory presumption that conflicts with *Sandstrom*.

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158 442 U.S. at 166 (footnote omitted).
159 *Id.* at 167 (emphasis added).
160 MODEL PENAL CODE § 1.12(5)(b) (Official Draft 1980) (emphasis added).
161 442 U.S. at 160, 167.
162 *Id.* at 167.
163 *See supra* notes 134-39 and accompanying text.
164 *See supra* note 136 and accompanying text.

Finally, even assuming that *Allen*'s "beyond a reasonable doubt" standard retains some vitality after *Sandstrom*, the Code's presumption still would be unconstitutional. *Allen* suggests that presumptions that serve as the sole basis of conviction must be analyzed facially to determine whether they meet the "beyond a reasonable doubt" standard.[165] The felony-murder rule, however, has been condemned widely for lacking any necessary correlation between culpability and outcome.[166] When the rule as incorporated by the Code is subjected to a facial analysis, its failure to satisfy the beyond a reasonable doubt standard in particular cases becomes evident.[167]

2. *The Model Penal Code Rule: Presumption Shifting The Burden of Production*

The Code's presumption also might be characterized as shifting the "burden of production," whereby the defendant need not disprove the presumption, but need only present "some" evidence, after which the presumption disappears. As with presumptions shifting the burden of persuasion, the *Allen* and *Sandstrom* Courts apparently came to conflicting conclusions as to the proper standard of review for presumptions shifting the burden of production. How-

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165 442 U.S. at 159-60. A facial analysis requires that the presumption satisfy the beyond a reasonable doubt standard apart from and notwithstanding any other evidence presented in the case. This approach is required because the presumption is not merely another piece of evidence, but potentially the sole basis of conviction.

166 "If one fact emerges prominently . . . it is the uncertainty and unpredictability encountered in the assessment of what level of personal criminal culpability will be punished as felony-murder." Note, *supra* note 31, at 371. The most commonly cited example of the irrationality of the felony-murder rule is where a defendant is held liable for a victim killing a co-felon. *See, e.g.*, Morris, *supra* note 17.

In Lockett v. Ohio, 438 U.S. 586, 627 (1978), Justice White noted the potential incongruity between culpability and outcome in the felony-murder context. Justice Marshall also observed in *Lockett* that "[w]hether a death results in the course of a felony (thus giving rise to felony-murder liability) turns on fortuitous events that do not distinguish the intention or moral culpability of the defendants." 438 U.S. at 620 (Marshall, J., concurring in judgment).

167 Hypotheticals can easily be posed that refute the rule's justification for convicting a defendant of murder. *See, e.g.*, Fletcher, *supra* note 11, at 414:

> Suppose that an arsonist carefully checks the premises for signs of human life before setting fire, yet as the blaze erupts, an independently motivated burglar breaks into the house and perishes. One would be hard-pressed to regard the arsonist as having acted recklessly toward the unexpected burglar. Or suppose that an unarmed burglar encounters an occupant with a weak heart; though the burglar attempts to calm the occupant, the latter dies of shock. It is obvious that in some cases a felon might be reckless in taking the risk of homicide; but in other cases he might be free from significant fault in bringing on the death.

Fletcher concludes: "The point is that the [Model Penal Code] presumption does not always hold, and when it does not, there is no reason to regard a killing in the course of a felony as different from other killings." *Id.*

ever, because neither case directly dealt with presumptions shifting the burden of production, their treatments of such presumptions are dicta.

The *Allen* Court suggested that a mandatory presumption that imposes "an extremely low burden of production—e.g., being satisfied by 'any' evidence" might be analyzed more properly as a permissive presumption.[168] The Court apparently reasoned that because the prosecution retained the burden of persuasion, and because the defendant need only provide "any" evidence in rebuttal to overcome the presumption, "it may well be that its impact is no greater than that of a permissive inference . . . ."[169]

Two weeks later, however, the Court in *Sandstrom* unanimously took a stronger stance:

> We also note that the effect of a failure to meet the production burden is significantly different for the defendant and prosecution. When the prosecution fails to meet it, a directed verdict in favor of the defense results. Such a consequence is not possible upon a defendant's failure, however, as verdicts may not be directed against defendants in criminal cases.[170]

Of course, when a defendant does not meet the burden of production and the mandatory presumption requires a finding of guilt, the very effect is a directed verdict against the defendant.

The *Sandstrom* Court's implied disapproval of mandatory presumptions that shift the burden of production is consistent with the principles of *Winship* and *Mullaney*.[171] Such presumptions invade the factfinding function of the jury, because the jury is *required* to find the defendant guilty unless the defense presents evidence that overcomes the presumption. Furthermore, although *theoretically* the prosecution retains the burden of persuasion on the elements of the crime, the *effect* is to relieve it of its burden because it can rely solely

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168 *Allen*, 442 U.S. at 158 n.16; *see also* Mullaney v. Wilbur, 421 U.S. 684, 703 n.31 (1975).

169 *Allen*, 442 U.S. at 158 n.16.

170 442 U.S. at 516 n.5 (citations omitted). Justice Powell noted that presumptions shifting the burden of production raise constitutional questions if they do not satisfy the beyond a reasonable doubt standard. *Allen*, 442 U.S. at 169 n.2 (Powell, J., dissenting).

171 *Cf.* Note, *Presumptive Intent Jury Instructions After* Sandstrom, 1980 WIS. L. REV. 366, 374 (presumptions that place production burden on defendant raise significant constitutional questions). *But see* Jeffries & Stephan, *supra* note 5, at 1334 (viewing the burden of production as a "permissible housekeeping device;" the article, however, preceded *Allen* and *Sandstrom*).

Justice Powell, dissenting in *Patterson*, suggested that the burden of production generally could be shifted without offending due process. 432 U.S. at 230-31 (Powell, J., dissenting). Justice Powell also noted, however, that "outer limits" exist. *Id.* at 230 n.16. Moreover, Justice Powell suggested in his *Allen* dissent that presumptions shifting the burden of production may have to meet a beyond a reasonable doubt standard. *See supra* note 170.

on the presumption for a conviction. A presumption shifting the burden of production thus still negates the defendant's presumption of innocence, because if the defendant does not introduce any evidence, the presumption by its own force will result in a "directed verdict" against him. This effect occurs whether the defendant must come forth with "some" or "any" evidence to meet the burden of production.

The language of the Code's presumption is particularly likely to result in a directed verdict against the defendant. The judge must give the presumption instruction "unless the Court is satisfied that the evidence as a whole *clearly negatives* the presumed fact."[172] The burden of "*clearly negat[ing]*" the presumed fact is a far cry from the "any evidence" standard of *Allen*. The Code in essence requires that the defendant disprove the presumption by a preponderance of the evidence. In other words, the defendant must bear the burden of persuasion or risk that the jury will rely on the presumption to convict.[173] The Code's presumption, therefore, even when judged by *Allen*'s more lenient standards, has much greater impact than a permissive inference.

3. *The Model Penal Code Rule: A Permissive Inference*

If the Code's presumption were clearly reworded to operate only as a permissive inference that placed no burden of proof on the defendant, it would satisfy the *Allen* test merely by showing a rational connection between the proven fact and the presumed fact. That is, on the facts of a given case, the presumed fact of "reckless[ness] under circumstances manifesting extreme indifference to the value of human life"[174] would have to follow "more likely than not"[175] from the basic fact of a killing that occurred during the course of one of the enumerated felonies.[176]

When reduced to a permissive inference, the felony-murder rule enters the realm of reason. The defendant's recklessness and extreme indifference become mere inferences that a jury may draw from the proven facts of a case. A jury would be justified in making these types of inferences where the facts warranted, whether or not the court instructed it to do so. The facts still must supply a "ra-

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172 MODEL PENAL CODE § 1.12(5)(a) (Official Draft 1980) (emphasis added).

173 The presumption invalidated in *Mullaney v. Wilbur*, for example, required that the defendant prove "heat of passion" by a preponderance of the evidence to negate an inference of intent. 421 U.S. 684, 691-92 (1975).

174 MODEL PENAL CODE § 210.2(1)(b) (Official Draft 1980).

175 *Allen*, 442 U.S. at 165-66; Leary v. United States, 395 U.S. 6, 36 (1969).

176 MODEL PENAL CODE § 210.2(1)(b) (Official Draft 1980).

tional connection,"[177] of course, between the killing during the course of the enumerated felony and the defendant's culpability, but the connection is not required, nor must the defendant affirmatively disprove his culpability.

III
EIGHTH AMENDMENT AND DUE PROCESS REQUIREMENTS OF CULPABILITY

Some courts have avoided the prohibitions of *Mullaney* and *Sandstrom* by construing the felony-murder rule as not requiring intent or malice aforethought.[178] These courts, however, generally have failed to consider the constitutional implications of imposing severe penalties for a crime without a mens rea element.[179] The Supreme Court recently has addressed this issue in two closely related lines of cases, and these holdings indicate that imposition of severe punishments for nonregulatory crimes without a finding of culpability violates constitutional guarantees of the eighth amendment and the due process clause.

A. Eighth Amendment Guarantees Against Disproportionate Punishments and Felony Murder

In *Enmund v. Florida,*[180] the Supreme Court held that the imposition of the death penalty for a nontriggerman convicted of felony murder violates the eighth amendment prohibition of cruel and unusual punishment. Justice White, writing for the majority, stressed two factors in holding the punishment unconstitutional: the lack of

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177 The "rational connection" test is merely another term for the "more likely than not" test. *See Allen*, 442 U.S. at 165-66.

178 *See* cases cited *supra* notes 64 and 145. *See also* Comment, *supra* note 58, at 1037-38 (noting some courts consider felony murder to be new crime in which neither premeditation nor malice is an element).

179 The two cases that address this issue have done so only indirectly and in a cursory fashion. In Guam v. Root, 524 F.2d 195 (9th Cir. 1975), *cert. denied,* 423 U.S. 1076 (1976), the defendant, a nontriggerman, argued that his sentence of life imprisonment was so disproportionate to his participation in the felony murder, that the sentence violated the eighth amendment. The Ninth Circuit rejected this argument as "frivolous" and noted that armed robbery is still punishable in several states by life imprisonment. *Id.* at 198. The court did not address directly the strict liability aspect of the felony-murder rule, but observed that the rule was within a legislature's constitutional powers. *Id.* at 197.

Guam v. Sablan, 584 F.2d 340 (9th Cir. 1978), also rejected an eighth amendment challenge by a nontriggerman. For purposes of eighth amendment analysis, the court distinguished between the death penalty cases, upon which the defendant relied, and noncapital cases. *Id.* at 341. The legitimacy of this distinction is now doubtful. *See infra* notes 186-205 and accompanying text. In *Sablan,* the Ninth Circuit, as in *Root,* iguored the strict liability aspect of felony murder.

180 458 U.S. 782, 788-801 (1982).

a legitimate penalogical justification and the lack of a justifiable retribution interest.

The Court found that the death penalty would not deter "one who does not kill and has no intention or purpose that life will be taken . . . . [I]f a person does not intend that life be taken . . . the possibility that the death penalty will be imposed for vicarious felony murder will not 'enter into the cold calculus that precedes the decision to act.' "[181] Justice White proceeded to analyze the statistical data and agreed with those "competent observers [who] have concluded that there is no basis in experience for the notion that death so frequently occurs in the course of a felony for which killing is not an essential ingredient that the death penalty should be considered as a justifiable deterrent to the felony itself."[182] The majority thus concluded that no legitimate deterrent effect justified imposing the death penalty for felony murder.

Justice White's second rationale was the lack of a retribution justification. He found it unconscionable to treat nontriggermen and triggermen alike because "[i]t is fundamental that 'causing harm intentionally must be punished more severely than causing the same harm unintentionally.' "[183] Relying on noncapital cases, Justice White asserted: "American criminal law has long considered a defendant's intention — and therefore his moral guilt — to be critical to 'the degree of [his] criminal culpability,' *Mullaney v. Wilbur* . . . and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing."[184] Justice White thus concluded that the defendant's punishment was impermissible because it was not "tailored to his personal responsibility and moral guilt."[185]

Prior to the Supreme Court's recent decision in *Solem v. Helm*,[186] the applicability of eighth amendment disproportionality analysis[187] to noncapital cases was in doubt. In *Rummel v. Estelle*,[188]

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181 *Id.* at 799 (quoting in part from Gregg v. Georgia, 428 U.S. 153, 186 (1976)).

182 *Id.* at 799. Justice White relied on the data collected by the ALI and other studies. He also noted that the deterrent effect of the death penalty for vicarious felony murder was lessened by the infrequency of its application. *Id.* at 800.

183 *Enmund*, 458 U.S. at 798 (quoting H. HART, PUNISHMENT AND RESPONSIBILITY 162 (1968)).

184 *Id.* at 800 (quoting Mullaney v. Wilbur, 421 U.S. 684, 698 (1975)). The Court cited Robinson v. California, 370 U.S. 660, 667 (1962) (punishing narcotics addiction violates eighth amendment) and Weems v. United States, 217 U.S. 349, 363 (1910) (invalidating statute making public official's false entry in public record a crime absent injury or intent to injure).

185 *Enmund*, 458 U.S. at 801.

186 103 S.Ct. 3001 (1983).

187 Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 938 (1974), formulated a four prong disproportionality test for prison sentences: (1) an examination of the nature of the crime; (2) an examination of the legislative purpose behind the

five Justices upheld a defendant's life sentence for his third conviction of a nonviolent property crime under a Texas recidivist statute. The language of the majority opinion gave wide latitude to legislatures in imposing noncapital sentences, based partly upon the Court's view of the eighth amendment as historically directed at forms of punishment and not at the "excessiveness" of the penalty.[189]

The holding of *Rummel* was reaffirmed in *Hutto v. Davis*,[190] which upheld the imposition of two consecutive twenty year prison terms and $10,000 fines for two counts of distribution of marijuana and possession with intent to distribute. The defendant had been in possession of approximately nine ounces of marijuana. The Court's brief opinion limited the application of the disproportionality test to prison sentences involving extreme situations, using the example of life imprisonment for overtime parking.[191] The *Hutto* Court concluded that "federal courts should be 'reluctan[t] to review legislatively mandated terms of imprisonment,' . . . and that 'successful challenges to the proportionality of particular sentences' should be 'exceedingly rare.' "[192] *Hutto* thus removed any doubt about the

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punishment; (3) a comparison of the sentence with punishments in other jurisdictions; and (4) a comparison of the sentence with other punishments in the same jurisdiction. *Id.* at 140-42.

188 445 U.S. 263 (1980). The defendant's three property crimes amounted to $230. *Id.* at 265-66.

189 The Court's historical argument is dubious in light of its previous holding in Weems v. United States, 217 U.S. 349 (1910). The *Weems* Court noted that:

> [The eighth amendment's] general language should not . . . be necessarily confined to the form that evil had theretofore taken. . . . [The eighth amendment is] directed, not only against punishments which inflict torture, "but against all punishments which by their excesssive length or severity are greatly disproportioned to the offenses charged."

Id. at 373, 371 (quoting O'Neil v. Vermont, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting)). The *Rummel* Court instead concentrated on the form of punishment in *Weems*, cadena temporal, as the relevant focus. The *Weems* Court, however, had noted: "[Cadena temporal] punishments come under the condemnation of the bill of rights, *both on account of their degree and kind.*" *Id.* at 377 (emphasis added).

The *Rummel* Court also criticized the disproportionality test's subjectivity, its intrusion on the legislative prerogative to define offenses and fix penalties, and the concerns with federalism that the test raised in holding state laws unconstitutional. *Rummel*, 445 U.S. at 281-82.

The illogic of the holding's deference to state legislatures if the penalties are disproportionate is ably demonstrated by Justice Brennan's observation in Furman v. Georgia, 408 U.S. 238, 269 (1972) (Brennan, J., concurring): "Judicial enforcement of the [eighth amendment] . . . cannot be evaded by invoking the obvious truth that legislatures have the power to prescribe punishments for crimes. That is precisely the reason the Clause appears in the Bill of Rights."

190 454 U.S. 370 (1982) (per curiam).

191 *Id.* at 374 n.3. The Court in *Rummel* had used the same extreme example to illustrate when the eighth amendment might apply to a term of years. 445 U.S. at 274 n. 11.

192 *Hutto*, 454 U.S. at 374 (quoting from *Rummel*, 445 U.S. at 274, 272).

Court's disapproval of examining prison sentences for "excessiveness" under the eighth amendment, except in extreme cases.[193]

In *Helm,* however, the majority explicitly rejected the state's argument that only capital cases were subject to the eighth amendment's prohibition against cruel and unusual punishment.[194] The petitioner in *Helm* had been sentenced to life imprisonment without parole after being convicted of his seventh nonviolent felony.[195] In overturning the sentence, Justice Powell, writing for the five justice majority, found that "[t]he principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence."[196] After reviewing prior noncapital cases to which the eighth amendment had been applied,[197] the Court concluded that "[t]here is no basis for the State's assertion

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193 Despite the strong language in *Rummel* prohibiting a disproportionality analysis, the Court implicitly used such an analysis to find that Rummel's punishment was not "grossly disproportionate." *Rummel,* 445 U.S. at 281. The status of a disproportionality analysis after *Rummel,* therefore, was not entirely clear to the lower courts. One court noted in this regard that

> [a]lthough stating that one could argue the proposition that the legislature has absolute discretion to fix the sentence of any felony, the [*Rummel*] majority did not then adopt it. Instead, without further mention of the proposition or extreme example, the Court upheld Rummel's sentence because the imposition of a life sentence for the offense involved served an obvious and substantial state interest and hence was not, in fact, grossly disproportionate.

Terrebone v. Blackburn, 646 F.2d 997, 1001-02 (5th Cir. 1981).

The case history of *Hutto* itself shows the reluctance of the lower courts to accept the full impact of *Rummel.* The district court in *Hutto,* relying on Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973) (discussed *supra* note 187), issued a writ of habeas corpus because the 40 year prison sentence was so grossly disproportionate to the possession of nine ounces of marijuana. Davis v. Zahradnick, 432 F. Supp. 444 (W.D. Va. 1977). The Fourth Circuit initially reversed. Davis v. Davis, 585 F.2d 1266 (4th Cir. 1978). After rehearing the case *en banc,* however, it affirmed the district court. Davis v. Davis, 601 F.2d 153 (4th Cir. 1979). The Supreme Court granted certiorari, vacated the judgment, and remanded in light of *Rummel.* Hutto v. Davis, 445 U.S. 947 (1980). The Fourth Circuit, however, again affirmed the issuance of the writ of habeas corpus, finding that even after *Rummel* such a disproportionate sentence was not permissible. Davis v. Davis, 646 F.2d 123 (1981). The Supreme Court again granted certiorari and reversed. Hutto v. Davis, 454 U.S. 370 (1982) (per curiam).

194 *Helm,* 103 S. Ct. at 3003.

195 The petitioner's prior crimes had consisted of three convictions for third degree burglary, one conviction for obtaining money under false pretenses, one conviction for grand larceny, and a third offense conviction for driving while intoxicated. All were nonviolent and in each alcohol had been a contributing factor. 103 S. Ct. at 3004-05. The conviction which gave rise to the appeal was for utterance of a "no account" check for $100; alcohol was again a contributing factor. *Id.* at 3005. The petitioner was given life imprisonment under South Dakota's recidivist statute. S.D. CODIFIED LAWS ANN. § 22-7-8 (1979) (amended 1981). South Dakota makes parole unavailable to an individual sentenced to life imprisonment. S.D. CODIFIED LAWS ANN. § 24-15-4 (1979).

196 *Helm,* 103 S.Ct. at 3006.

197 *Id.* at 3008-09. The Court relied on Weems v. United States, 217 U.S. 349 (1910). *See* Robinson v. California, 370 U.S. 660 (1962) (striking down 90 day sentence for crime of being addicted to narcotics); *supra* note 189.

that the general principle of proportionality does not apply to felony prison sentences. The constitutional language itself suggests no exception for imprisonment. . . . There is also no historical support for such an exception."[198] The Court expressly rejected the idea that *Rummel* had established that prison terms were "purely a matter of legislative prerogative."[199] Instead, the Court instituted a three-prong disproportionality analysis that looked at "objective criteria," specifically: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."[200]

A strongly worded dissent found the majority's "analysis completely at odds with the reasoning of our recent holding in *Rummel*, in which, of course, Justice POWELL dissented."[201] Finding no historical or constitutional basis for the majority's disproportionality analysis, the dissent accused the majority of overruling legislation they disagreed with under the guise of constitutional interpretation.[202]

Helm provides an important link between eighth amendment

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198 *Helm*, 103 S. Ct. at 3009 (footnote omitted).

199 *Id.* at 3009 n.14. The Court observed that

> [a]ccording to *Rummel v. Estelle*, "*one could argue* without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of sentence actually imposed is purely a matter of legislative prerogative. . . ." [445 U.S. at 274] (emphasis added). The Court did not adopt the standard proposed, but merely recognized that the argument was possible. To the extent that the State—or the dissent . . .—makes this argument here, we find it meritless.

Id. See also supra note 193. The *Helm* majority also attempted to confine *Rummel* to its particular facts, arguing:

> Contrary to the suggestion in the dissent . . . our conclusion today is not inconsistent with *Rummel v. Estelle*. The *Rummel* Court recognized—as does the dissent . . .—that some sentences of imprisonment are so disproportionate that they violate the Eighth Amendment. . . . Indeed, *Hutto v. Davis* . . . makes clear that *Rummel* should not be read to foreclose proportionality review of sentences of imprisonment. *Rummel* did reject a proportionality challenge to a particular sentence. But since the *Rummel* Court—like the dissent today—offered no standards for determining when an Eighth Amendment violation has occurred, it is controlling only in a similar factual situation. Here the facts are clearly distinguishable. Whereas *Rummel* was eligible for a reasonably early parole, Helm, at age 36, was sentenced to life with no possibility of parole.

Id. at 3016-17 n.32. *See also id.* at 3008-09 n.13 (refuting dissent's suggestion that majority ignored principle of stare decisis).

200 *Id.* at 3011. This is basically the same test developed by the Fourth Circuit in Hart v. Coiner, 483 F.2d 136-40 (4th Cir.), *cert. denied*, 415 U.S. 938 (1974), and used by lower federal courts prior to *Rummel*. *See supra* note 187.

201 *Helm*, 103 S. Ct. at 3017 (Burger, C.J., dissenting). Justice Powell had "reluctantly" concurred in the *Hutto* decision. Hutto v. Davis, 454 U.S. 370, 375 (Powell, J., concurring).

202 103 S. Ct. at 3022 (Burger, C.J., dissenting).

disproportionality analysis as developed in *Enmund* and the felony-murder rule in the non-death penalty context. *Helm* cited *Enmund* as an example of the Court considering "the gravity of the offense and the harshness of the penalty"[203] to determine the defendant's culpability. The *Helm* majority stated:

> Turning to the culpability of the offender, there are again clear distinctions that courts may recognize and apply. In *Enmund* the Court looked at the petitioner's lack of intent to kill in determining that he was less culpable than his accomplices . . . . Most would agree that negligent conduct is less serious than intentional conduct.[204]

Helm thus extended *Enmund*'s disproportionality analysis, which focused upon the relationship between a defendant's culpability and his punishment, into the noncapital offense context.[205]

Even without *Helm,* however, the holdings of *Rummel* and *Hutto* did not necessarily diminish the significance of the *Enmund* Court's analysis of felony murder. *Rummel* and *Davis* were concerned with

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203 *Id.* at 3010 (citation omitted).

204 *Id.* at 3011.

205 The Fifth Circuit has adopted a narrow reading of *Enmund,* limiting it to cases where the death penalty is imposed for felony murder and the defendant did not contemplate murder. In Skillern v. Estelle, 720 F.2d 839, 846 (5th Cir. 1983), the court stated:

> *Enmund* only prohibits, as a violation of the Eighth Amendment, the *execution* of a person for the uncontemplated (i.e., personally by him) act of an accomplice in the course of committing a non-capital felony upon which both were engaged. Nothing in *Enmund* or any other decision cited to us implicates any violation of rights guaranteed by the federal constitution by a state rule . . . by which the *guilt* of an accused for an offense committed by a confederate may nevertheless be established . . . by his criminal responsibility for the act or conduct of a confederate.

The Fifth Circuit would thus find *Enmund*'s proportionality principles inapplicable to a guilt finding based on felony murder. *Skillern,* 720 F.2d at 846.

Such a reading of *Enmund,* however, fails to account for the *Helm* Court's reliance on *Enmund* in a noncapital offense context. Moreover, the concepts of "guilt" for an offense and the "penalty" merge at the point where a conviction for an offense carries significantly greater penalties than could otherwise be imposed; for example, the difference between murder and manslaughter. *See, e.g.,* Mullaney v. Wilbur, 421 U.S. 684, 697-98. The felony-murder rule thus directly implicates proportionality principles at both the guilt and penalty phases by creating both the possibility that the defendant may be convicted of an otherwise unavailable charge (e.g. first degree murder) and that the defendant will receive a siguificantly harsher sentence.

The *Helm* Court did observe in a footnote that "clearly no sentence of imprisonment would be disproportionate for Enmund's crime." 103 S.Ct. at 3009 n.15. The comment may have been partly inspired by the facts of *Enmund,* because Enmund had planned the armed robbery. The comment, even if intended to cover felony murder generally, is dicta, and conflicts with the rationale of *Enmund* that culpability is the touchstone for imposing punishment. *See* People v. Dixon, 34 Cal. 3d 441, 481-82, 668 P.2d 697, 722-27, 194 Cal.Rptr. 390, 415-20 (1983) (relying in part on *Enmund* to reduce first degree felony-murder conviction to second degree because culpability did not justify first degree murder).

the proportionality of prison sentences to the severity of crimes which at least contained mens rea elements. In contrast, the *Enmund* Court's objection to the severity of the punishment was the absence of a finding of culpability. The majority's analysis in *Enmund* relied on cases not involving the death penalty to establish the proposition that "American criminal law has long considered a defendant's intention—and therefore his moral guilt—to be critical to 'the degree of [his] criminal culpability,' *Mullaney v. Wilbur*."[206] The majority's objection to imposing severe punishments for unintentional crimes, therefore, cannot logically be limited to death penalty cases. The defendant's lack of culpability offends the threshold principles of our criminal system whether the defendant is sentenced to death or a term of years. This is the principle that *Helm* reaffirmed in its discussion of *Enmund*.[207] It is defensible, on the other hand, to curtail review of what term of years is imposed for a crime that can be legitimately punished because a finding of culpability has taken place, as in *Rummel* and *Hutto*.[208]

The *Enmund* majority's discussion of culpability, although dealing with a nontriggerman, also extends to those whose actions directly but unintentionally lead to the victim's death. Although it may be a rare case where a defendant who directly caused the death of another would not have the requisite culpability to be convicted of murder, the Court's concern with severe punishment of unintentional crimes applies with equal force whether the defendant's actions or a co-felon's actions directly led to the victim's death.[209] The necessity of having the factfinder determine culpability exists, therefore, regardless of how the killing resulted during the commission of the felony.[210]

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206 458 U.S. at 800 (quoting *Mullaney*, 421 U.S. at 698). *See supra* notes 183-85 and accompanying text.

207 *Helm*, 103 S. Ct. at 3011.

208 Furthermore, Justice White's statement in *Lockett*, 438 U.S. at 627, concerning the potential problems of imposing punishment without a finding of culpability, *supra* note 145, is in accord with the general propositions that he outlined in *Enmund*.

209 Professor Fletcher, for instance, cites the examples of the "careful arsonist" who checks the premises carefully but, as he sets the blaze, causes the death of an "independently motivated burglar," and the concerned burglar who tries to calm a surprised occupant with a heart condition, but the occupant dies from shock. Fletcher, *supra* note 11, at 414. The actors in both examples caused the death, but lacked the requisite culpability for murder.

210 The dissent in *Enmund* objected because the majority's "holding interferes with state criteria for assessing legal guilt by recasting intent as a matter of federal constitutional law." 458 U.S. at 802 (O'Connor, J., dissenting). They found the defendant's culpability to be clear because the defendant admittedly initiated the robbery. *Id.* at 824 n.40. The dissent, however, acknowledged that mens rea is of some importance to the penal process, admitting that "while the type of *mens rea* of the defendant must be considered carefully in assessing the proper penalty, it is not so critical a factor in determining blameworthiness as to require a finding of intent to kill in order to impose the death

The *Enmund* majority's finding of the insufficiency of a deterrence rationale also applies to felony murders whether or not the death penalty is imposed. The data substantiating the infrequency of killings resulting from felonies did not distinguish between killings where the death penalty applied and killings where it did not.[211] Indeed, Justice White explained that for deterrence to be effective the penalty must enter into the defendant's contemplation; thus, by definition, deterrence is inapplicable whenever an unintentional killing occurs.[212] To impose sanctions reserved for intentional, premeditated, or extremely reckless homicides when the killing may have been accidental or negligent, therefore, has no rational deterrent justification because the defendant never possessed the state of mind at which the penalties are directed.

An eighth amendment analysis based upon *Enmund* dictates that punishment without a legitimate deterrent or retributive rationale violates the Constitution. The substance of this analysis recently has been extended by the Court in *Helm* to embrace noncapital felonies. The analysis focuses on the illegitimacy of imposing severe punishments where the trier of fact is not required to find culpability that would justify the sanctions. According to this analysis, the felony-murder rule with its disregard of the defendant's culpability is invalid.

B. Due Process Guarantees and Felony Murder

A closely related inquiry to the eighth amendment disproportionality analysis focuses on whether a legislature can impose severe punishments for nonregulatory crimes that do not have a mens rea element. Commentators have long criticized the Supreme Court for not developing a constitutional doctrine requiring culpability before criminal sanctions can be imposed.[213] The Court recently has begun to recognize substantive limits on legislatures' powers to dispose of mens rea elements.[214] These limitations suggest that those

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penalty for felony murder." *Id.* at 825. The dissent's objection, therefore, was directed at the difficulty of implementing an "intent to kill" standard of culpability for the death penalty, and not at the premise that culpability of some form must be present before imposing severe punishments.

211 *See* 458 U.S. at 799 n.23.

212 *See supra* notes 30-37 and accompanying text.

213 *See, e.g.*, Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107 (1962) (noting Supreme Court has failed to set adequate standards in considering validity of strict liability statutes); Saltzman, *supra* note 5 (urging that Supreme Court reject strict liability doctrine).

214 The Court has not explicitly elevated these limitations to constitutional status. Before United States v. United States Gypsum Co., 438 U.S. 422 (1978), some commentators argued that no constitutional ban on strict liability crimes existed. *See, e.g.*, Saltzman, *supra* note 5, at 1573-74. The lower courts and commentators have viewed *Gypsum*

courts and legislatures that define felony murder as a distinct crime without the elements of malice aforethought or premeditation must either abandon the felony-murder rule or redefine it to contain a mens rea element.

In *United States v. United States Gypsum Co.*,[215] the Court held that proof of the defendant's specific intent to fix prices was required for criminal convictions under the Sherman Anti-Trust Act.[216] The defendant had been convicted through the use of a conclusive presumption that effectively negated any requirement of proof of intent.[217] The *Gypsum* Court began with "the familiar proposition that '[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.' "[218] The Court then emphasized its "generally inhospitable attitude to non-*mens rea* offenses"[219] except in "limited circumstances."[220] These "limited circumstances" were regulatory crimes where inquiry into intent was unnecessary.[221] The Court found that the situation in *Gypsum* was not such a limited circumstance and expressed concern that the severe punishments of the Sherman Act were being used "not to punish conscious and calculated wrongdoing at odds with statutory proscriptions, but instead simply to *regulate* business practices regardless of the intent with which they were undertaken."[222]

The *Gypsum* Court based its reasoning primarily on *Morissette v. United States*,[223] in which the Court had first expressly articulated the importance of mens rea to our system of criminal law:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the

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and subsequent cases, however, as establishing an emerging constitutional doctrine of mens rea. *See* Erlinder, *Mens Rea, Due Process, and the Supreme Court: Toward a Constitutional Doctrine of Substantive Criminal Law*, 9 AM. J. CRIM. L. 163, 174 (1981); *see also* People v. Dillon, 34 Cal. 3d 441, 497 n.3, 668 P.2d 697, 733 n.3, 194 Cal. Rptr. 390, 426 n.3 (1983) (Bird, C.J., concurring) (arguing that there should be constitutional requirement of mens rea for homicide in felony-murder cases).

215 438 U.S. 422 (1978).

216 *Id.* at 443.

217 The presumption provided that the defendant's wrongful intent was established by proof of the prohibited act of affecting prices. *Id.* at 446.

218 *Id.* at 436 (quoting Dennis v. United States, 341 U.S. 494, 500 (1951)).

219 *Id.* at 438. The Court cited W. LA FAVE & A. SCOTT, *supra* note 69, and MODEL PENAL CODE § 2.05 (Tent. Draft 1953), both of which favor limiting strict liability crimes to offenses which neither involve imprisonment nor carry the consequences associated with a criminal conviction. *See* W. LA FAVE & A. SCOTT, *supra* note 69, at 222-23.

220 438 U.S. at 437.

221 *Id.* at 440-41.

222 *Id.* at 442 (emphasis in original); *see also id.* at 492 n.18.

223 342 U.S. 246 (1952).

> normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.[224]

Although *Morissette* did not directly address the limits on the legislature's power, the Court limited its approval of previous cases allowing strict liability offenses to " 'legislation whereby penalties serve as effective means of regulation.' "[225]

The cases cited in *Gypsum* support the principle that the legislature's power to eliminate a mens rea element is limited to the public welfare regulatory context.[226] Each of the cases cited involved a regulatory crime not recognized at the common law,[227] a distinction which the Court had noted.[228] Furthermore, even these "strict liability" cases retained some notion of culpability because they dealt with activities of an inherently dangerous nature, which would put the defendant on notice that his conduct was prohibited.[229] For example, in *Lambert v. California*,[230] the Court overturned a conviction

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224 *Id.* at 250-51. The Court in *Morissette* held that courts should not read the element of intent out of legislation, at least for "offenses incorporated from the common law." *Id.* at 262.

225 *Id.* at 259-60 (quoting United States v. Dotterweich, 320 U.S. 277, 280-81 (1943)); *see also* Erlinder, *supra* note 214, at 176 n.90.

226 438 U.S. at 437. The Court stated in full: "While strict-liability offenses are not unknown to the criminal law and do not invariably offend *constitutional requirements*, the limited circumstances in which Congress has created and this Court has recognized such offenses attest to their generally disfavored status." *Id.* at 437-38 (emphasis added) (citations omitted). The Court's reference to constitutional requirements in discussing the previous cases buttresses the argument that the Constitution limits a legislature's power to omit a mens rea element for nonregulatory crimes.

227 *See* United States v. Freed, 401 U.S. 601 (1971) (possession of unregistered hand grenades); United States v. Dotterweich, 320 U.S. 277 (1943) (shipping of adulterated drugs in violation of Federal Food, Drug and Cosmetic Act); United States v. Behrman, 258 U.S. 280 (1922) (companion case to *Balint*); United States v. Balint, 258 U.S. 250 (1922) (Narcotics Act of 1914 requiring that certain drugs be registered before being sold); and Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57 (1910) (violation of terms of permit to do business in state).

228 The Court in *Balint* explicitly distinguished between regulatory measures and *malum in se* crimes. 258 U.S. at 252. *See also* United States v. Freed, 401 U.S. at 607 (distinguishing between regulatory measures and crimes borrowed from common law).

229 The Court in *Balint* noted that it was dealing with cases where the defendant's "mere negligence may be dangerous to [the public], as in selling diseased food or poison." 258 U.S. at 252. *See also* United States v. Freed, 401 U.S. at 607. *See generally* Erlinder, *supra* note 214, at 182-84.

Shevlin is the only case cited by the *Gypsum* court which does not deal with inherently dangerous activities. In *Shevlin*, the corporation's logging activities violated the terms of their permit to do business within the state. Yet, even in *Shevlin* the Court observed that the company knowingly violated the permit's terms. 218 U.S. at 69.

230 355 U.S. 225 (1957).

for failing to abide by a city ordinance requiring convicted felons to register with the city because it was not the type of activity that would "alert the doer to the consequences of his deed."[231] Thus, the *Gypsum* Court's approval of prior cases that allowed the strict liability standard for regulatory crimes did not detract from the Court's holding that mens rea is a requirement outside the regulatory context.[232]

In several cases subsequent to *Gypsum,* the Court has required a finding of culpability for nonregulatory crimes. The Court in *Colautti v. Franklin* [233] struck down on vagueness grounds a statute that imposed criminal and civil liability for physicians who performed abortions on viable fetuses or on fetuses that the physician had reason to believe were viable. The Court noted that the statute's vagueness problems were exacerbated by the fact that the physician could be convicted "without regard to fault."[234] The Court also observed that "the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea.*"[235]

In *United States v. Bailey,*[236] Justice Rehnquist suggested that certain crimes, including murder, are distinguishable from other crimes because of the necessity of finding culpability:

> In certain narrow classes of crimes, however, heightened culpability has been thought to merit special attention. Thus, the statutory and common law of homicide often distinguishes, either in setting the "degree" of the crime or in imposing punishment, between a person who knows that another person will be killed as the result of his conduct and a person who acts with the specific purpose of taking another's life. Similarly, where a defendant is charged with treason, this Court has stated that the Government must demonstrate that the defendant acted with a purpose to aid the enemy. Another such example is the law of inchoate offenses

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231 *Id.* at 228.

232 Prior to *Gypsum,* Professor Saltzman viewed *Shevlin, Balint, Behrman, Dotterweich,* and *Freed* as establishing few, if any, substantive limits on strict liability offenses. Saltzman, *supra* note 5, at 1592-1615. Professor Erlinder, in contrast, reads the cases in light of *Gypsum* as allowing legislatures to dispose of a mens rea element in very limited situations. Erlinder, *supra* note 214, at 179-83. Erlinder suggests that the strict liability cases, if read closely, "actually required (1) proof that defendants purposely or knowingly sold or possessed certain items and (2) that defendants knew what the items were." *Id.* at 186; *see also* Jeffries & Stephan, *supra* note 5, at 1374-76.

233 439 U.S. 379 (1979).

234 *Id.* at 394.

235 *Id.* at 395. Professor Erlinder concludes that "[t]he plain implication of *Colautti* is that *mens rea* as an element of crime is closely related to due process doctrine either as an independent doctrine or as an appendage to vagueness analysis." Erlinder, *supra* note 214, at 178.

236 444 U.S. 394 (1980).

> such as attempt and conspiracy, where a heightened mental state separates criminality itself from otherwise innocuous behavior.[237]

Justice Rehnquist further noted that " 'strict liability' crimes are exceptions to the general rule that criminal liability requires an 'evil-meaning mind,' "[238] and quoted the Model Penal Code for the proposition that " 'clear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime.' "[239]

Justice Rehnquist's reliance on the Model Penal Code as a guideline for analyzing culpability[240] has been read by one commentator as establishing a constitutional doctrine of mens rea against which legislation must be tested.[241] Although Justice Rehnquist disclaimed any controlling effect of the Model Penal Code's culpability standards and cautioned against "hair-splitting distinctions,"[242] *Bailey* at a minimum establishes that culpability analysis is the starting point in reviewing legislation.[243] Furthermore, it is arguable in light of Justice Rehnquist's earlier comments that certain crimes might require "heightened culpability," that the opinion stands for the proposition that certain crimes must contain a mens rea element.[244]

Morissette, Gypsum and subsequent cases thus establish that a state's power to define strict liability crimes is limited, notwithstand-

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237 *Id.* at 405 (citations omitted).

238 *Id.* at 404 n.4.

239 *Id.* at 406 (quoting MODEL PENAL CODE § 2.05 (1)(a) commentary at 33 (Proposed Official Draft 1962)).

240 *Id.* at 403-04.

241 Erlinder, *supra* note 214, at 188.

242 444 U.S. at 406-07. Further caution in reading *Bailey* too broadly is warranted in light of Justice Rehnquist's dissent in *Gypsum*:

> The portions of [the majority's opinion] which I find most troubling are not those which expressly address the congressionally prescribed requirement of intent for criminal liability under the Sherman Act, but those which discourse at length upon the role of intent in the imposition of criminal liability in general, particularly those which might be taken to import any special constitutional difficulty if criminal liability is imposed without fault. While the Court emphasizes that its result is not constitutionally required, ante, at 437, the Court's broad policy statements may be misread by the lower courts. I also feel bound to say that while I am willing to respectfully defer to the views of the distinguished authors of American Law Institute's Model Penal Code, and to the authors of law review articles and treatises such as those sprinkled throughout the text of Part II of the Court's opinion, I have serious reservations about the undiscriminating emphasis and weight which the Court appears to give them in this case.

438 U.S. at 473 (Rehnquist, J., concurring in part and dissenting in part). It is intriguing in light of his comments in *Gypsum* that Justice Rehnquist relied heavily on the Model Penal Code in his *Bailey* opinion.

243 Erlinder, *supra* note 214, at 189.

244 *Id.*

ing *Patterson v. New York*'s broad mandate.[245] Although the limits are not precisely defined, they preclude the imposition of significant punishments for nonregulatory crimes unless the state has made a showing of the defendant's culpability. When the felony-murder rule is judged against this constitutional standard, its legitimacy again is cast into doubt.

C. Summary: The Felony-Murder Rule as a Strict Liability Offense and Constitutional Guarantees

Courts that conceptualize the felony-murder rule as imposing strict liability on the defendant for a homicide solely because it occurred in the course of a felony[246] violate the principles set forth in *Enmund* and *Gypsum*. If the killing was accidental, convicting and punishing the defendant for murder violates the eighth amendment's prohibition against disproportionate punishments. As the *Enmund* majority observed, "[i]t is fundamental [in American criminal law] that 'causing harm intentionally must be punished more severely than causing the same harm unintentionally.' "[247] Moreover, the felony-murder rule serves neither the deterrent nor retributive purposes that *Enmund* required before punishment could be imposed.[248]

Even if the felony-murder rule is envisioned as a "package," with the intent to commit the felony evidencing sufficient culpability for holding the felon responsible for the homicide,[249] the rule embodies constitutionally impermissible strict liability principles. The rule excuses the state from proving the defendant's culpability for murder, although a mens rea element is formally retained, and thus effectively eliminates the mens rea requirement in the same sense that the presumptions in *Morissette* and *Sandstrom* operated to eliminate the element of intent.[250] Furthermore, as the Model Penal Code language quoted by Justice Rehnquist in *Bailey* makes clear, it

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245 *See supra* notes 96-110 and accompanying text.

246 *See supra* note 64 and accompanying text.

247 458 U.S. at 798 (quoting H. HART, PUNISHMENT AND RESPONSIBLITY 162 (1968)).

248 *See supra* notes 181-85, 209-12 and accompanying text.

249 *See supra* note 75.

250 *E.g.*, Morissette v. United States, 342 U.S. 246, 274-75 (1952) ("A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense.") In People v. Dillon, 34 Cal. 3d 441, 668 P.2d 697, 194 Cal. Rptr. 390 (1983), Chief Justice Bird of the California Supreme Court in her concurrence expressed the view that "[the rule's] continued application would impermissibly conflict with a constitutional requirement of mens rea." *Id.* at 497, 668 P.2d at 733, 194 Cal. Rptr. at 426. Chief Justice Bird also recognized that the felony-murder rule in reality "punishe[s] . . . the commission of the underlying felony," and as such is a strict liability crime that violates the proportionality principles embodied in the eighth amendment. *Id.* at 498, 668 P.2d at 734, 194 Cal. Rptr. at 427.

is necessary to distinguish between the culpability required for the different elements of a crime.[251] The felony-murder rule, however, violates this principle, as it fails to distinguish between the mens rea required for murder and the intent to commit a felony.

Requiring proof of culpability for the separate act of killing may not change the result in many cases. If a defendant undertakes a dangerous felony, he probably has exhibited the extreme recklessness or malice aforethought necessary for a conviction of murder.[252] Our criminal system, however, has evolved to a point where probability or general evil intent alone will not justify legal shortcuts to a conviction for murder. As the concurring opinion in *People v. Aaron*, the case in which the Michigan Supreme Court abandoned the felony-murder rule, aptly stated:

> The basic infirmity of felony-murder lies in its failure to correlate, to any degree, criminal liability with moral culpability. It permits one to be punished for a killing, usually with the most severe penalty in the law, without requiring proof of *any* mental state with respect to the killing. This incongruity is simply more than we are willing to permit our criminal jurisprudence to bear.[253]

Gypsum now provides the constitutional basis for implementing this basic principle. Legislatures and courts may not create or sanction nonregulatory crimes without a finding of culpability for each element of the crime. When viewed as a distinct offense, felony murder inescapably runs afoul of this principle.

CONCLUSION

The felony-murder rule has been criticized almost from its inception as a harsh legal doctrine with insufficient policy justifications. Two basic conceptualizations of felony murder have emerged: the rule is viewed either as providing a conclusive presumption of the culpability required for murder, or as a distinct crime for which the killing does not have a separate mens rea element apart from the felony.

The Supreme Court's holding in *Sandstrom v. Montana* constitutionally prohibits conclusive presumptions because they violate a defendant's presumption of innocence and because they intrude upon the jury's duty to affirmatively find each element of the offense. The felony-murder rule violates both rationales of *Sandstrom*

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251 *See supra* note 239 and accompanying text.

252 Most critics of the felony-murder rule conclude that abolishing the rule will not affect a substantial number of cases. *See, e.g.*, MODEL PENAL CODE § 210.2 commentary at 37 (Official Draft 1980); People v. Aaron, 409 Mich. 672, 299 N.W.2d 304, 327 (1980); Jeffries & Stephan, *supra* note 5, at 1385.

253 409 Mich. at 744, 299 N.W.2d at 334.

when it operates as a conclusive presumption of the defendant's culpability for murder. The Model Penal Code's rebuttable presumption also fails to resolve the constitutional infirmity of the rule. The operative effect of the Code's presumption is that of a mandatory presumption, and as such, it does not meet the criteria of either *Ulster County Court v. Allen* or *Sandstrom*.

Those courts that have attempted to avoid the due process problems of mandatory presumptions have characterized the felony-murder rule as a distinct crime without a separate mens rea element for the homicide. The Supreme Court has recently indicated, however, that eighth amendment and due process restrictions limit the ability of legislatures and courts to create and sanction nonregulatory crimes that do not contain a requirement of culpability. In *Enmund v. Florida* and *United States v. United States Gypsum Co.*, the Court has noted that a relationship between culpability and punishment is intrinsic to our criminal system. The felony-murder rule violates this basic principle of our legal system when justified as a strict liability crime.

The felony-murder rule arose from obscure historical origins and has developed haphazardly into a harsh and unjust legal doctrine. It is perhaps fitting, therefore, that two separate lines of constitutional doctrines, developing independently, have come together in such a way that it is impossible to conceptualize felony murder in a manner that does not run afoul of constitutional guarantees. Courts and commentators have extensively documented the rule's weak policy justifications. This Article has demonstrated that the rule's infirmities have finally reached constitutional stature.