The *Dillon* Dilemma: Finding Proportionate Felony-Murder Punishments

In *People v. Dillon*,[1] the California Supreme Court upheld the constitutionality of California's felony-murder rule, but nonetheless found that the defendant's sentence of life imprisonment for first-degree felony murder constituted "cruel and unusual punishment." This Comment will argue that by applying a proportionality analysis to Dillon's first-degree felony-murder sentence, the court opened the much-criticized felony-murder rule to constitutional attack in most of its applications. Whenever the rule is needed to perform its intended function—the deterrence of accidental and negligent felony killing—its application results in unconstitutional penalties.

Part I of this Comment summarizes the facts of *Dillon* and the plurality opinion.[2] Part II examines the preexisting law of felony murder and prior applications of the constitutional prohibition against cruel or unusual punishment. Part III argues that the felony-murder rule, which imposes penalties without regard to culpability, is inconsistent with a constitutional requirement that penalties be proportionate to culpability. Consequently, courts can refuse to apply the felony-murder rule in many cases on the ground that the penalty is disproportionate to the defendant's conduct. This Comment concludes that the supreme court should declare the felony-murder rule void because its inherent disproportionality renders it incapable of constitutionally performing its intended function.

I
PEOPLE V. DILLON

A. The Facts

On October 17, 1978, seventeen-year-old Norman Jay Dillon and seven companions attempted to steal marijuana from a small secluded farm guarded by Dennis Johnson and his brother. On a previous visit to the farm, Dillon had encountered Dennis Johnson who had threatened him with a shotgun. In planning the robbery, Dillon had advocated the use of force, if necessary, and he carried a .22-caliber

1. 34 Cal. 3d 441, 668 P.2d 697, 194 Cal. Rptr. 390 (1983).

2. The designation "plurality opinion" may be somewhat misleading. Only three justices signed the lead opinion, but a majority of justices supported each part.

semiautomatic rifle. The others carried shotguns or other weapons.[3]

Dillon and his companions crossed posted barricades, evaded a tin-can alarm system, split into pairs and spread around the field. Further progress was impeded for almost two hours by the presence of one of the Johnson brothers tending the marijuana plants. On two occasions, Dillon and his partners heard a shotgun fired.[4] As Dillon and three others waited near the marijuana field discussing their next move, Dennis Johnson circled behind them. They heard him coming through the bushes, and saw that he was carrying a shotgun. As Johnson drew near, Dillon began rapidly firing his rifle at him. When Johnson fell, Dillon and his companions fled. Johnson, who had suffered nine bullet wounds, died a few days later.[5]

A jury convicted Dillon of attempted robbery and first-degree felony murder.[6] The supreme court upheld the attempted-robbery conviction, but modified the first-degree felony-murder judgment to second-degree murder on the ground that the punishment for first-degree murder was disproportionate.

B. The Opinion

1. The Nature of California's Felony-Murder Rule

After affirming Dillon's conviction for attempted robbery, the California Supreme Court conducted an exhaustive analysis of the nature and constitutionality of California's felony-murder rule. Noting that the Michigan Supreme Court had recently abolished Michigan's common law felony-murder rule,[7] the court sought to determine whether

3. People v. Dillon, 34 Cal. 3d 441, 451-52, 668 P.2d 697, 700-01, 194 Cal. Rptr. 390, 393-94 (1983).

4. *Id.* at 451-52, 668 P.2d at 701, 194 Cal. Rptr. at 394. One of Dillon's companions had accidently discharged his shotgun twice.

5. *Id.* at 452, 668 P.2d at 701, 194 Cal. Rptr. at 394.

6. *Id.* at 450, 668 P.2d at 700, 194 Cal. Rptr. at 393. The court of appeal reversed the attempted-robbery and felony-murder convictions on the ground that "to the extent that the use of force constituted a contingent element of the plan," the defendant had attempted larceny rather than robbery. People v. Dillon, 1 Crim. 20281, slip op. at 6-7 (Cal. Ct. App. Jan. 19, 1981) (unpublished), *rev'd*, People v. Dillon, 34 Cal. 3d 441, 668 P.2d 697, 194 Cal. Rptr. 390 (1983). Unlike robbery, larceny will not support a first-degree felony-murder conviction. *See infra* notes 47-48 and accompanying text. Thus, once the robbery conviction was reversed, the first-degree murder conviction also had to be reversed.

7. *Dillon*, 34 Cal. 3d at 462, 668 P.2d at 708, 194 Cal. Rtpr. at 401. The Michigan Supreme Court abolished Michigan's felony-murder rule in People v. Aaron, 409 Mich. 672, 299 N.W.2d 304 (1980). After reviewing the history of the felony-murder doctrine in England and the United States, the *Aaron* court noted that the concepts "murder," "malice," and "felony murder" had not been codified in Michigan, and that each concept was, therefore, governed by the common law. *Id.* at 713-17, 299 N.W.2d at 319-23. Thus, since the rule was judicially created, *id.* at 723, 299 N.W.2d at 324, it could be judicially abrogated, *id.* at 733, 299 N.W.2d at 328-29. The court further held that Michigan's degree-fixing statute, which provides that *murders* committed during

California's felony-murder rule is of judicial or statutory origin.[8] The court reviewed the legislative history of the relevant provisions of the Penal Code, and concluded, despite the equivocal nature of the evidence,[9] that California's felony-murder rule is "a creature of statute" which cannot be abolished by judicial action.[10] Therefore, the court declined to follow the Michigan Supreme Court in abrogating the felony-murder rule.

The court then turned to Dillon's constitutional attack on the felony-murder rule. Dillon argued that the felony-murder rule raises a presumption of malice from the intent to commit the underlying felony and thus impermissibly relieves the prosecution of the burden of proving every element of first-degree murder.[11] Under standards set by the United States Supreme Court, a presumption that relieves the prosecutor of the burden of proving every element of a criminal offense violates due process.[12] Accordingly, the court acknowledged that such a

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the course of certain felonies are murders in the first degree, could not automatically transform *all* killings so committed into first-degree murders. *Id.* at 717-19, 299 N.W.2d at 321-22.

8. *Dillon*, 34 Cal. 3d at 464-72, 668 P.2d at 710-15, 194 Cal. Rptr. at 403-08. Dillon had asked the court to abolish the felony-murder rule as an exercise of its power to "conform the common law to contemporary conditions and enlightened notions of justice." *Id.* at 462, 668 P.2d at 708, 194 Cal. Rptr. at 401. The court does not have the power to modify statutory law, however, and must defer to the legislature unless a statute is invalid. *See id.* at 463, 668 P.2d at 709, 194 Cal. Rptr. at 402.

9. When the legislature enacted the Penal Code in 1872, it deleted without explanation the section of the Code's precursor that had contained the felony-murder rule. *See id.* at 467, 668 P.2d. at 712, 194 Cal. Rptr. at 405. The *Dillon* court noted that in its comment to § 455 of the Penal Code, the Code Commission had stated:

> The text omits the clause . . . which provides that "should the lives of any person be lost in consequence of [arson] the offender shall be deemed guilty of murder, and shall be indicted and punished accordingly." This provision is surplusage, for the killing in that case is in the perpetration of arson, and falls within the definition of murder in the first degree.—See Sec. 189 ante.

Id. at 471, 668 P.2d at 714, 194 Cal. Rptr. at 407 (quoting CAL. PENAL CODE § 455 note (Canfield 1872)) (emphasis omitted). While the court found that this reading of § 189 was erroneous, it concluded that the commission's and, therefore, the legislature's belief that § 189 codified the felony-murder rule was controlling. *Dillon*, 34 Cal. 3d at 471-72, 668 P.2d at 714-15, 194 Cal. Rptr. at 407-08. *See infra* text accompanying notes 45-53.

10. *Dillon*, 34 Cal. 3d at 471-72, 668 P.2d at 714-15, 194 Cal. Rptr. at 407-08.

11. *Id.* at 472, 668 P.2d at 715-16, 194 Cal. Rptr. at 408-09. Ordinarily, to obtain a murder conviction, the prosecution must prove that the defendant killed with malice aforethought. The felony-murder rule, however, allows first-degree murder convictions where the prosecution proves only that the defendant killed someone while having the specific intent to commit an enumerated felony. The effect is to allow convictions without independent proof of malice. *See infra* note 12; *infra* text accompanying notes 26-29, 42-44.

12. *See* Mullaney v. Wilbur, 421 U.S. 684 (1975); *In re* Winship, 397 U.S. 358 (1970). In *Winship*, the Supreme Court held that the prosecution must prove every element of a criminal offense beyond a reasonable doubt in order to obtain a criminal conviction. 397 U.S. at 364. In *Mullaney*, the Court held that where the statutory scheme distinguished murder from manslaughter based on the absence of heat of passion, it was a denial of due process to shift to the defendant the burden of proving that he acted in the heat of passion. 421 U.S. at 703-04. And, in Sandstrom v. Montana, 442 U.S. 510 (1979), the Court rejected the use of both conclusive and rebuttable

presumption would be unconstitutional, but it found that Dillon's view of the felony-murder rule was incorrect.

Addressing the issue "for the first time,"[13] the court held that the presumption of malice raised by the felony-murder rule is not a *true* presumption, but is instead a *conclusive* presumption.[14] Reasoning that a conclusive presumption is actually a substantive rule of law,[15] the court concluded that malice is not an element of felony murder.[16] Thus the court ruled that the felony-murder rule does not violate due process and is constitutional.[17]

2. *The Proportionality of Felony-Murder Penalties*

Despite its decision to uphold the constitutionality of the felony-murder rule, the court held that the penalty for first-degree felony murder may sometimes violate California's constitutional prohibition against cruel or unusual punishment.[18] The court reviewed the techniques it has developed for determining the proportionality of criminal penalties, and found it particularly appropriate in this case to examine the nature of the offense and the offender.[19]

In examining the nature of the offense, the court gave great weight to the defendant's testimony. It characterized the shooting as a result of Dillon's panic and fear for his own life. The court quoted Dillon's statements that he pulled the trigger nine times in reaction to this fear, and pointed to testimony by a clinical psychologist that Dillon had probably blocked out the reality of the situation and reacted without thinking.[20]

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presumptions to prove elements of a criminal offense. *Id.* at 521-24. Thus, it is a denial of due process to relieve the prosecution of the burden of proving the defendant's state of mind by instructing the jury that the law presumes a person intends the ordinary consequences of his voluntary acts. *Id.* at 520-23.

13. Although the court cited several cases indicating that malice is implied, imputed, or conclusively presumed, it concluded that these cases had not addressed the constitutional question whether malice is an element of felony murder. *Dillon*, 34 Cal. 3d at 473-74 & n.20, 668 P.2d at 716-17 & n.20, 194 Cal. Rptr. at 409-10 & n.20.

14. *Id.* at 474, 668 P.2d at 716-17, 194 Cal. Rptr. at 409-10. A true presumption, as defined by the *Dillon* court, is one that shifts to the defendant the burden of disproving or providing evidence tending to disprove the fact that is presumed. *Id.*; *see also* CAL. EVID. CODE § 606 (West 1966). A conclusive presumption, on the other hand, cannot be rebutted at all. *Id.* § 620.

15. *Dillon*, 34 Cal. 3d at 474, 668 P.2d at 717, 194 Cal. Rptr. at 410 (relying on CAL. EVID. CODE § 620 comment (West 1966)). The felony-murder rule conclusively presumes that a defendant who has killed in the course of a felony has done so with the malice aforethought required for murder. This, in effect, establishes as a substantive rule of law that the elements of felony murder are the intent to commit a felony and a resulting death. *See infra* text accompanying notes 26-29.

16. *Dillon*, 34 Cal. 3d at 475, 668 P.2d at 717-18, 194 Cal. Rptr. at 410.

17. *Id.* at 476, 668 P.2d at 718, 194 Cal. Rptr. at 411.

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

19. *Id.* at 479, 668 P.2d at 720, 194 Cal. Rtpr. at 413.

20. *Id.* at 482-83, 668 P.2d at 722-23, 194 Cal. Rptr. at 415-16.

Having thus characterized the shooting as spontaneous, the court examined Dillon's character. The court emphasized the expert testimony regarding Dillon's immaturity, and his inability to appreciate the reality of his situation. Calling attention to Dillon's youth and his lack of a criminal record, the court noted that the trial judge and jury had recommended that Dillon be committed to the Youth Authority rather than sentenced to a prison term.[21] The court found it significant that Dillon's sentence was much more severe than either the judge or jury had contemplated. Moreover, the court found the sentence of life imprisonment without eligibility for the Youth Authority too severe when compared to what it characterized as Dillon's "attenuated individual culpability."[22]

The court also commented briefly on a second technique for proportionality analysis—one that involves a comparison of the challenged penalty with the penalties for more serious offenses. The court noted that Dillon could not have received a more severe punishment even if he had committed the most aggravated form of planned and deliberate murder, and found it indicative of disproportionality that a less serious offense was punished as harshly as a more serious one.[23] After comparing Dillon's prison sentence to the relatively light sentences his coconspirators had received,[24] the court modified the judgment by reducing it to second-degree murder and remanded the case to the trial court for resentencing.[25]

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21. *Id.* at 483-86, 668 P.2d at 723-26, 194 Cal. Rptr. at 416-19.

22. *Id.* at 486-89, 668 P.2d at 725-26, 727, 194 Cal. Rptr. at 419, 420.

23. *Id.* at 487 n.38, 668 P.2d at 726 n.38, 194 Cal. Rptr. at 419 n.38.

24. The only adult member of the group was put on three years' probation with one year in county jail after pleading "no contest" to charges of conspiracy to commit robbery and being an accessory after the fact to a felony. Five of the six minors, not including Dillon, were made wards of the court; one was detained in a juvenile education and training project, and the other four were put on probation and sent home. The remaining member of the group was granted immunity for giving evidence against the others. *Id.* at 488 & n.40, 668 P.2d at 727 & n.40, 194 Cal. Rptr. at 420 & n.40.

25. *Id.* at 489, 668 P.2d at 727, 194 Cal. Rptr. at 420.

All of the justices agreed that the defendant's actions constituted attempted robbery and that the felony-murder rule is constitutional. However, the portions of the plurality opinion finding that the felony-murder rule is statutory in nature and finding Dillon's punishment too severe for his conduct were so controversial that they generated six separate concurring and dissenting opinions.

While none of the justices voted to abrogate the first-degree felony-murder rule, three justices expressed dissatisfaction with Justice Mosk's justification for finding that the rule was statutory. Justice Kaus would have emphasized a "century of precedent" as well as the "rather slender legislative history" in precluding judicial abrogation of the rule. *Id.* at 490, 668 P.2d at 728, 194 Cal. Rptr. at 421 (Kaus, J., concurring). Justice Broussard, who concluded that the rule was not statutory, nevertheless felt that the "long-continued pattern of precedent and legislative reliance" would weigh heavily against repudiation of the felony-murder rule. *Id.* at 503-04, 668 P.2d at 738, 194 Cal. Rptr. at 431 (Broussard, J., concurring and dissenting). Justice Reynoso expressed gen-

II
THE FELONY-MURDER RULE AND THE CONCEPT OF PROPORTIONALITY

A. Felony Murder

1. The Common Law Felony-Murder Rule

Under the common law felony-murder rule, one who causes a death during the commission or attempted commission of a felony is guilty of murder.[26] Some courts have justified the rule by reasoning that the felon's intent to commit a felony supplies the evidence of premeditation or intent to kill necessary to support the murder charge.[27]

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eral dissatisfaction with the reasoning of the entire felony-murder discussion, and concurred only in the result. *Id.* at 489, 668 P.2d at 728, 194 Cal. Rptr. at 421 (Reynoso, J., concurring).

Chief Justice Bird joined the plurality opinion, but posed several questions regarding the constitutionality of the felony-murder rule. She suggested that the felony-murder doctrine would become vulnerable to constitutional attack should the United States Supreme Court declare a constitutional mens rea requirement for first-degree murder. She also expressed doubts that felony-murder punishments were consistent with the eighth amendment's prohibition against cruel and unusual punishment. Finally, she pointed out that California's second-degree felony-murder rule is judge made, and encouraged the court to abolish that portion of the " 'barbaric' anachronism." *Id.* at 494, 497-98, 668 P.2d at 731, 733-34, 194 Cal. Rptr. at 424, 426-27 (Bird, C.J., concurring).

Four of the seven justices supported the court's sentence proportionality analysis. The other justices (Broussard, Kaus, and Richardson) disagreed with the majority's characterization of the killing as merely a "benign 'response to a suddenly developing situation.' " *Id.* at 500, 668 P.2d at 735, 194 Cal. Rptr. at 428 (Richardson, J., dissenting) (quoting Justice Mosk's opinion, *id.* at 488, 668 P.2d at 727, 194 Cal. Rptr. at 420). Consequently, they found contentions that the sentence was shockingly disproportionate to the offense unpersuasive. *Id.* at 490, 494, 668 P.2d at 728, 730, 194 Cal. Rptr. at 421, 423 (Kaus, J., concurring); *id.* at 501, 668 P.2d at 735, 194 Cal. Rptr. at 428 (Richardson, J., concurring and dissenting); *id.* at 504, 668 P.2d at 738, 194 Cal. Rptr. at 431 (Broussard, J., concurring and dissenting). Justices Broussard and Richardson would have affirmed the judgment of first-degree murder. *Id.* at 502, 668 P.2d at 736-37, 194 Cal. Rptr. at 430 (Richardson, J., concurring and dissenting); *id.* at 504, 668 P.2d at 738, 194 Cal. Rptr. at 431 (Broussard, J., concurring and dissenting).

While Justice Kaus did not believe that the sentence was disproportionate, he agreed, nevertheless, with the court's reduction of the judgment. He noted the jury's reluctance to convict for first-degree felony murder and gave effect to the jury's apparent desire to nullify the law. While he did not advocate a routine instruction informing every jury of its power to ignore the law, Justice Kaus suggested that when a jury indicates a desire to nullify, it should be told that it may do so without fear of legal sanction. *Id.* at 490-93, 668 P.2d at 728-30, 194 Cal. Rptr. at 421-23 (Kaus, J., concurring).

26. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 71, at 545 (1972). Although many jurisdictions have modified the rule by limiting its application to dangerous felonies, *see infra* text accompanying notes 31-35, some statutes still state the rule in its broadest form, *e.g.*, KAN. STAT. ANN. § 21-3401 (1981): "Murder in the first degree is the killing of a human being . . . committed in the perpetration or attempt to perpetrate any felony." *But see* State v. Lashley, 233 Kan. 620, 631, 664 P.2d 1358, 1369 (1983) (limiting application of the statute to cases in which the felony is "one inherently dangerous to human life").

27. *See, e.g.*, State v. McCowan, 226 Kan. 752, 602 P.2d 1363 (1979), *cert. denied*, 449 U.S. 844 (1980):

[P]remeditated murder and felony murder are not different offenses. The statute merely

Other courts have recognized felonious intent as just one form of, or a substitute for, the malice aforethought usually required for murder.[28] Whatever explanation is advanced, the result is the same—a felon may be convicted of felony murder on a showing that (1) he committed or attempted to commit a felony, and (2) as a proximate result of that felony, a death occurred.[29]

Courts have often stated that the purpose of the felony-murder rule is to deter felons from accidentally or negligently killing in the course of felonies by holding them strictly liable for the results of their dangerous conduct.[30] Consistent with that purpose, many courts have limited the scope of the rule to felonies that are dangerous to human life.[31] Some courts make this determination on the facts of the particu-

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provides alternative methods of proving the deliberation and premeditation required for a conviction of first degree murder . . . .

A prosecution under the felony murder rule merely changes the type of proof necessary to establish a violation of the statute. Proof that a homicide was committed in the perpetration of a felony is tantamount to the premeditation and deliberation which otherwise would be necessary to constitute murder of the first degree.

Id. at 759, 602 P.2d at 1370-71 (citations omitted); *see also* State v. Clayton, 109 Ariz. 587, 598, 514 P.2d 720, 731 (1973) (act of committing felony supplies premeditation); State v. Clark, 204 Kan. 38, 44, 460 P.2d 586, 590 (1969) ("killer's malignant purpose is established by proof of the collateral felony"); Simpson v. Commonwealth, 293 Ky. 831, 832, 170 S.W.2d 869, 869 (1943) (intent to perpetrate felony supplies elements of malice and intent to murder). LaFave and Scott reject this type of reasoning as "pure fiction," and suggest that it is better to recognize felony murder as a category of murder separate from intent-to-kill murder. W. LAFAVE & A. SCOTT, *supra* note 26, § 71, at 545 n.2.

28. *See, e.g.*, People v. Cantrell, 8 Cal. 3d 672, 688, 504 P.2d 1256, 1266-67, 105 Cal. Rptr. 792, 802-03 (1973) (elements of premeditation and malice are eliminated and only criminal intent required is specific intent to commit felony), *overruled on other grounds by* People v. Flannel, 25 Cal. 3d 668, 603 P.2d 1, 160 Cal. Rptr. 84 (1979) *and* People v. Wetmore, 22 Cal. 3d 318, 583 P.2d 1308, 149 Cal. Rptr. 265 (1978); Payne v. State, 81 Nev. 503, 506, 406 P.2d 922, 924 (1965) (character of felony thought to justify omission of the requirements of premeditation and deliberation), *cert. denied*, 391 U.S. 927 (1968); Commonwealth v. Simpson, 436 Pa. 459, 463, 260 A.2d 751, 754 (1970) (commission of felony "imbues" killing with malice, making killing murder).

LaFave and Scott suggest that the rationale for the rule is that the felon is a "bad person with a bad state of mind, [who] has caused a bad result," and who therefore should not be heard to complain if he is punished as if he intended the results of his conduct. W. LAFAVE & A. SCOTT, *supra* note 26, § 71, at 560. Professor Fletcher explains the felony-murder doctrine as the product of two outmoded ways of thinking about criminal responsibility. One method focuses on the taint that inheres in causing human death. The other focuses on the felon's initial wrongdoing and involves the concept of a lowered threshold of moral responsibility for the resulting death. *See* Fletcher, *Reflections on Felony-Murder*, 12 SW. U.L. REV. 413, 426-27 (1981).

29. People v. Scheer, 184 Colo. 15, 21, 518 P.2d 833, 835 (1974) ("All that is necessary to sustain the [felony-murder] charge is that a life be taken during the course of a felony in which the defendant was engaged."); Commonwealth v. Geiger, 475 Pa. 249, 255, 380 A.2d 338, 340 (1977) (Commonwealth required only to prove that death of victim occurred while defendant was engaged in perpetration of felony).

30. *See, e.g.*, People v. Washington, 62 Cal. 2d 777, 781, 402 P.2d 130, 133, 44 Cal. Rptr. 442, 445 (1965); State v. Lashley, 233 Kan. 620, 631, 664 P.2d 1358, 1369 (1983); Payne v. State, 81 Nev. 503, 506, 406 P.2d 922, 924 (1965).

31. The rationale for limiting the rule to dangerous felonies is that in order for the potential felon to be deterred he must foresee the possibility of death or injury resulting from the commis-

lar case by asking whether the crime was committed in a way that involved foreseeable danger to human life.[32] In other jurisdictions, including California, the felony-murder rule applies only to felonies that are considered "inherently dangerous" when viewed in the abstract.[33] These approaches can overlap, [34] and courts sometimes treat the terms "foreseeably dangerous" and "inherently dangerous" as if they were interchangeable.[35]

The felony-murder rule is of questionable origin, and has been criticized since the nineteenth century as inconsistent with prevailing notions of justice.[36] As more refined standards of culpability have developed, courts and commentators have come to recognize that the intent to commit a felony is not equivalent to the other mental states associated with murder.[37] The presumed relationship between feloni-

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sion of the felony. *See* Sheriff, Clark County v. Morris, 659 P.2d 852, 859 (Nev. 1983) (citing People v. Cline, 270 Cal. App. 2d 328, 75 Cal. Rtpr. 459 (1969)). In many states, the felonies to which the first-degree felony-murder rule applies are enumerated by statute. *See, e.g.*, CAL. PENAL CODE § 189 (West Supp. 1984) (arson, rape, robbery, burglary, mayhem, and lewd and lascivious acts upon the body of a child under the age of 14 years); NEV. REV. STAT. § 200.030 (1957) (sexual assault, kidnapping, arson, robbery, burglary, and sexual molestation of a child under age 14). In those jurisdictions, the question whether a felony is dangerous to human life arises only in the context of prosecutions for second-degree felony murder. *See, e.g.*, People v. Ford, 60 Cal. 2d 772, 795, 388 P.2d 892, 907, 36 Cal. Rptr. 620, 635 (1964) ("A homicide that is a direct causal result of the commission of a felony inherently dangerous to human life (other than the six felonies enumerated in Pen. Code, § 189) constitutes at least second degree murder.").

32. *See, e.g.*, State v. Thompson, 280 N.C. 202, 211, 185 S.E.2d 666, 672 (1972): "[A]ny unspecified felony is within the purview of [the felony-murder statute] if the commission or attempted commission thereof creates any substantial foreseeable human risk and actually results in the loss of life. This includes, but is not limited to, felonies which are inherently dangerous to life."

33. Under this approach the court does not look at the facts of the particular case, but considers, instead, whether the offense as defined by statute or common law usually involves a risk to human life. *See, e.g.*, State v. Underwood, 228 Kan. 294, 303, 615 P.2d 153, 163 (1980) (possession of firearm when viewed in abstract not inherently dangerous to human life); Sheriff, Clark County v. Morris, 659 P.2d 852, 859 (Nev. 1983) (felony that would support application of second-degree felony-murder rule would have to be inherently dangerous when viewed in abstract). *See also infra* note 61.

34. Jenkins v. State, 230 A.2d 262 (Del. 1967) (both the nature of the felony and the circumstances of its commission are relevant); State v. Smith, 225 Kan. 796, 801, 594 P.2d 218, 222 (1979) (rejecting purely abstract approach "in favor of testing both the crime itself and the manner in which it was committed for dangerous characteristics").

35. *See, e.g.*, Sheriff, Clark County v. Morris, 659 P.2d 852, 857-58 (Nev. 1983) (using the terms "inherently dangerous" and "foreseeably dangerous" interchangeably, but adopting the "inherently dangerous" approach).

36. *See Recent Developments, Criminal Law: Felony-Murder Rule—Felon's Responsibility for Death of Accomplice*, 65 COLUM. L. REV. 1496, 1496 & nn.1-2 (1965). For detailed historical accounts of the development of the felony-murder doctrine in England and the United States, see People v. Burroughs, 35 Cal. 3d 824, 838-50, 678 P.2d 894, 903-12, 201 Cal. Rptr. 319, 328-37 (1984) (Bird, C.J., concurring); People v. Aaron, 409 Mich. 672, 689-713, 299 N.W.2d 304, 307-19 (1980).

37. *See* W. LAFAVE & A. SCOTT, *supra* note 26, § 71, at 554. Commentators first recognized that the intent to commit a felony is not equivalent to the specific intent to kill required for first-

ous intent and malice aforethought has become even more attenuated as legislatures have expanded the scope and number of offenses classified as felonies.[38] Moreover, empirical evidence does not support the notion that those felonies typically classified as dangerous actually result in a significant number of deaths.[39]

As dissatisfaction with the felony-murder rule has increased, a growing number of jurisdictions have abolished the rule by statute or by judicial action.[40] Legislatures in other jurisdictions have made efforts to bring the doctrine into conformance with modern notions of justice.[41] Recent attacks have focused on the violation of due process inherent in the presumption of malice embodied in the rule.[42] Some

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degree murder. *See, e.g.*, Note, *Felony Murder as a First Degree Offense: An Anachronism Retaincd*, 66 YALE L.J. 427, 433 (1957) (advocating abolition of the first-degree felony-murder rule). More recently, commentators have recognized that the intent to commit a felony is not always enough to show even recklessness—the threshold mental state otherwise necessary for murder of either degree. *See, e.g.*, Fletcher, *supra* note 28, at 415 (problem with felony-murder rule derives from regarding commission of felony as conclusive on whether defendant acted recklessly); *see also* People v. Aaron, 409 Mich. 672, 728, 299 N.W.2d 304, 326 (1980) (intent to commit a felony does not constitute a sufficient mens rea to establish the crime of murder).

38. Many of today's felonies were considered misdemeanors or minor felonies at common law. *See* R. PERKINS & R. BOYCE, CRIMINAL LAW 14-15 (3d ed. 1982). Burglary is perhaps the best example of an enumerated felony with a modern scope unanticipated at the time the felony-murder rule was enacted. At that time the Penal Code defined burglary as a breaking and/or entering *at night*, any "house, room, apartment, or tenement, or any tent, vessel, water craft, or railroad car," with the intent to commit grand larceny, petit larceny, or any felony. CAL. PENAL CODE § 459 (Canfield 1872). Thus the burglaries anticipated by the drafters of the felony-murder rule included only those that occurred at night, in places where people were likely to be sleeping, and where the sanctity of a dwelling would be threatened. Daytime burglaries were called "housebreaking" and were not subject to the first-degree felony-murder rule. *Id.* § 461. The legislature manifested its determination that these offenses involved substantially different degrees of culpability and danger to society by the vast difference in the punishments it assigned to each. Burglary was punishable by a prison term of one to 15 years, while housebreaking was subject to a maximum term of five years. *Id.* §§ 460, 462.

39. *See* Enmund v. Florida, 458 U.S. 782, 799-800 & nn.23-24 (1982), where the Supreme Court considered statistical evidence that revealed that robbery does not increase significantly the risk of death; *see also* W. LAFAVE & A. SCOTT, *supra* note 26, § 71, at 560 n.79 (available statistics demonstrate that accidental killings do not occur disproportionately often, even in connection with the so-called inherently dangerous felonies).

40. The rule has been abolished in England where it originated. Homicide Act, 1957, 5 & 6 Eliz. II, ch. 11, § 1. Alaska, Hawaii, and Kentucky have abolished the felony-murder rule by statute, requiring that the killing be intentioual or knowing. *See* ALASKA STAT. § 11.41.100 (1983); HAWAII REV. STAT. § 707-701 & commentary (1976); KY. REV. STAT. § 507.020 (Supp. 1984). And, in Michigan, the judiciary abrogated the rule in People v. Aaron, 409 Mich. 672, 299 N.W.2d. 304 (1980).

41. Arkansas and New Hampshire require proof of recklessness in addition to commission of a felony. *See* ARK. STAT. ANN. § 41.1502 (1977); N.H. REV. STAT. ANN. §§ 630:1, :1-a, :1-b (1974). The Model Penal Code allows a rebuttable presumption of malice to be raised by the commission of a felony. MODEL PENAL CODE § 201.2 (Tent. Draft No. 9, 1959). And in Ohio, a death proximately resnlting from an attempt to commit a felony is involuntary manslaughter. OHIO REV. CODE ANN. § 2903.04 (1982).

42. *See supra* notes 11-16 and accompanying text; *see also* Westberry v. Murphy, 535 F.2d 1333 (1st Cir. 1976); State v. Bradley, 210 Neb. 882, 317 N.W.2d 99 (1982); James v. State, 637

jurisdictions have responded to this criticism by requiring that prosecutors prove malice.[43] But most courts that have considered the question have upheld the constitutionality of the rule by declaring that malice is not an element of felony murder.[44]

2. *California's Felony-Murder Rule*

In California, the felony-murder rule has a statutory history that dates back to 1850. Section 25 of "An Act Concerning Crimes and Punishments" provided: "[W]here [an] involuntary killing shall happen in the commission of an unlawful act, which . . . is committed in the prosecution of a felonious intent, the offence shall be deemed and adjudged to be murder."[45] At the time California enacted section 25, there was only one degree of murder, the penalty for which was death.[46] In 1856, the legislature amended section 21, the penalty provision of the Act, to provide for two degrees of murder. Murders committed in the course of certain felonies,[47] along with those that were "willful, deliberate, and premeditated," or committed by certain means, constituted murders of the first degree. All other murders were of the second degree.[48] Thus, sections 21 and 25 were complementary: section 25 classified all felony homicides as murder and section 21 elevated specific felony homicides to murder in the first degree.

In 1872 the Act was superseded by the California Penal Code which retained most of the Act's language. The degree-fixing function of section 21 of the Act was preserved in section 189 of the Penal Code.[49] However, the legislature failed to reenact the felony-murder provision of section 25.[50] Under accepted principles of statutory construction this omission would warrant an inference that the legislature

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P.2d 862 (Okla. 1981). The California Supreme Court declined to reach this issue in People v. Haskett, 30 Cal. 3d 841, 640 P.2d 776, 180 Cal. Rptr. 640 (1982), and People v. Ramos, 30 Cal. 3d 553, 639 P.2d 908, 180 Cal. Rptr. 266 (1982).

43. *See, e.g.*, State v. Galloway, 275 N.W.2d 736 (Iowa 1979); People v. Aaron, 409 Mich. 672, 299 N.W.2d 304 (1980); State v. Millette, 112 N.H. 458, 299 A.2d 150 (1972).

44. *See Dillon*, 34 Cal. 3d at 476 n.22, 668 P.2d at 718 n.22, 194 Cal. Rptr. at 411 n.22, and the cases cited therein.

45. An Act Concerning Crimes and Punishments, 1850, ch. 99, § 25, 1850 Cal. Stat. 231.

46. *Id.* § 21.

47. The felonies originally listed were arson, robbery, rape and burglary. CAL. PENAL CODE § 189 (Canfield 1872). The statute now also lists mayhem and lewd and lascivious conduct with a child under the age of 14 years. *Id.* (West Supp. 1984).

48. Act of Apr. 19, 1856, ch. 139, 1856 Cal. Stat. 219. The new section provided in part:

> All murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree . . . .

49. CAL. PENAL CODE § 189 & note (Canfield 1872).

50. *See Dillon*, 34 Cal. 3d at 467, 668 P.2d at 712, 194 Cal. Rtpr. at 405.

no longer intended to punish accidental and negligent felony homicides as murders.[51] Nevertheless, the courts have long assumed that section 189 of the Penal Code serves the function of both section 21 and section 25 of the Act.[52] Thus, a felon who causes a death during the commission or attempted commission of an enumerated felony is guilty of first-degree murder, whether or not the killing would otherwise constitute murder.[53]

Section 190.2 of the current Penal Code designates felony murder as one of nineteen special circumstances allowing imposition of the death penalty or life imprisonment without parole for first-degree murder.[54] Applying the statute to cases involving unintended killings would be consistent with the court's interpretation of felony murder under section 189. However, in *Carlos v. Superior Court*,[55] the supreme court held that the state must prove an intent to kill before subjecting a defendant to a felony-murder special-circumstance finding and the corresponding severe penalties of section 190.2.[56]

The California Supreme Court has often joined the vociferous condemnation of the felony-murder rule, labeling the doctrine a "highly artificial concept that deserves no extension beyond its required

51. *See* People v. Valentine, 28 Cal. 2d 121, 142, 169 P.2d 1, 14 (1946) ("It is ordinarily to be presumed that the Legislature by deleting an express provision of a statute intended a substantial change in the law."); *see also Dillon*, 34 Cal. 3d at 467-68, 668 P.2d at 712-13, 194 Cal. Rptr. at 405-06 (applying principles of statutory construction before disregarding those principles to find a statutory basis for the felony-murder rule).

52. *See, e.g.*, People v. Washington, 62 Cal. 2d 777, 780-81, 402 P.2d 130, 133, 44 Cal. Rptr. 442, 445 (1965) (felony-murder doctrine is incorporated in § 189). Any remaining questions on this point were resolved by the *Dillon* court. *See supra* notes 8-10 and accompanying text.

53. Where the felony-murder rule allows defendants to be convicted of murder for accidental or negligent killings, it classifies what otherwise would be nonmurders as murders. *See infra* text accompanying notes 90-97.

54. CAL. PENAL CODE § 190.2 (West Supp. 1984), which provides in relevant part:

(a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in the state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found . . . to be true:

. . . .

(17) The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies: . . .

(i) Robbery . . .
(ii) Kidnapping . . .
(iii) Rape . . .
(iv) Sodomy . . .
(v) The performance of a lewd or lascivious act upon the person of a child under the age of 14 . . .
(vi) Oral copulation [with a child] . . .
(vii) Burglary in the first or second degree . . .
(viii) Arson . . .
(ix) Train wrecking . . . .

55. 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983).

56. *Id.* at 153-54, 672 P.2d at 877, 197 Cal. Rptr. at 95.

application."[57] The court has recognized criticisms that the rule "anachronistly resurrects from a bygone age a 'barbaric concept' "[58] and "erodes the relation between criminal liability and moral culpability."[59] In response to these criticisms, the court has held that the rule will be applied only to the extent necessary to accomplish its ostensible purpose—"to deter those engaged in felonies from killing negligently or accidentally."[60] Consistent with this purpose, the court has restricted the scope of the rule to those felonies enumerated by statute or considered "inherently dangerous" to human life.[61] Furthermore, the court has developed a "merger doctrine" under which a felony that is also the act which resulted in death—for example, assault with a deadly weapon—may not serve as the predicate for a felony-murder charge.[62] Finally, it has limited felons' liability for third-party killings by allowing convictions for felony-murder only in cases where the defendant or an accomplice caused the death.[63]

B. Sentence Proportionality

1. The Federal Standard

The eighth amendment to the United States Constitution prohibits the imposition of "cruel and unusual punishments." The United States Supreme Court has determined that this prohibition applies not only to punishments that are cruel in their method, but also to those that are excessive for the offense committed.[64] While past decisions leave open the possibility that the Court will find an inordinately long prison term

57. People v. Phillips, 64 Cal. 2d 574, 582, 414 P.2d 353, 360, 51 Cal. Rptr. 225, 232 (1966).

58. *Id.* at 583 n.6, 414 P.2d at 360 n.6, 51 Cal. Rptr. at 232 n.6.

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

60. People v. Satchell, 6 Cal. 3d. 28, 34, 489 P.2d 1361, 1365, 98 Cal. Rptr. 33, 37 (1971); *see also* People v. Henderson, 19 Cal. 3d 86, 92-93, 560 P.2d 1180, 1183, 137 Cal. Rptr. 1, 4-5 (1977) (discussing scope of felony-murder rule).

61. *See* People v. Henderson, 19 Cal. 3d 86, 560 P.2d 1180, 137 Cal. Rptr. 1 (1977) (false imprisonment not "inherently dangerous" for purpose of felony-murder rule); People v. Lopez, 6 Cal. 3d 45, 489 P.2d 1372, 98 Cal. Rptr. 44 (1971) (escape not "inherently dangerous" felony); *see also supra* note 33 and accompanying text.

62. People v. Wilson, 1 Cal. 3d 431, 462 P.2d 22, 82 Cal. Rptr. 494 (1969); People v. Ireland, 70 Cal. 2d 522, 540, 450 P.2d 580, 590, 75 Cal. Rptr. 188, 198 (1969).

63. People v. Antick, 15 Cal. 3d 79, 539 P.2d 43, 123 Cal. Rptr. 475 (1975). The court still is willing to recognize liability for third-party killings where the defendant or his accomplice initiates a gun battle, *e.g.*, Carlos v. Superior Court, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983), or where the defendant takes a hostage who is killed by a third party while being used by the defendant as a shield, *e.g.*, Pizano v. Superior Court, 21 Cal. 3d 128, 577 P.2d 659, 145 Cal. Rptr. 524 (1978). Yet these cases do not require application of the felony-murder rule, because the defendant's (or his accomplice's) conduct is evidence of a conscious disregard for a risk to human life—that is, the malice aforethought necessary for murder.

64. Weems v. United States, 217 U.S. 349 (1910).

unconstitutional,[65] it has generally been anxious to preserve for legislatures the role of determining criminal sanctions.[66] The Court has largely confined its analysis to cases involving extraordinary penalties, qualitatively different from long terms of years—those involving loss of life or permanent curtailment of civil liberties.[67] Therefore, a defendant sentenced to a definite term of years has little hope that a court will find his sentence disproportionate under the federal standard.[68]

Since the eighth amendment applies to the states through the fourteenth amendment,[69] sentences applied in state criminal prosecutions must conform to both federal and state proportionality requirements. In *Solem v. Helm*,[70] the Supreme Court articulated a three-pronged test to guide states in assessing whether a penalty is proportionate to a defendant's culpability.[71] The Court advised state tribunals (1) to examine objectively the gravity of the offense and the harshness of the penalty; (2) to compare the sentences imposed on other criminals in the same jurisdiction to determine whether more serious crimes are subject to the same penalty or to less serious penalties; and (3) to compare the sentences imposed in other jurisdictions for commission of the same crime.[72]

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65. *See id.* at 381-82. In *Weems*, the Court held that 15 years of hard labor followed by the lifetime loss of citizenship privileges constituted cruel and unusual punishment for making a false entry on a public document. *Id.* at 381. Later decisions have viewed this punishment as something more that just a long term of years. *See, e.g.*, Solem v. Helm, 103 S. Ct. 3001, 3018 (1983) (Burger, C.J., dissenting); Rummel v. Estelle, 445 U.S. 263, 273-74 (1980); *see also infra* text accompanying note 67.

66. Solem v. Helm, 103 S. Ct. 3001, 3009-10 & n.16 (1983) (substantial deference must be accorded legislature); Rummel v. Estelle, 445 U.S. 263, 272-76 (1980) (courts should be "reluctan[t] to review legislatively mandated terms of imprisonment," and "successful challenges to the proportionality of particular sentences" should be "exceedingly rare"); *accord* Hutto v. Davis, 454 U.S. 370, 374 (1982). This deference to legislative judgment is reflected in a general reluctance to strike down penalties within the limits of a valid and constitutional statute.

67. The United States Supreme Court has applied the eighth amendment to strike down punishments involving death, Enmund v. Florida, 458 U.S. 782 (1982); *cadena temporal*, which entails a long prison term of hard labor followed by lifetime loss of many civil rights, Weems v. United States, 217 U.S. 349 (1910); loss of citizenship, Trop v. Dulles, 356 U.S. 86 (1958); and life imprisonment without parole, Solem v. Helm, 103 S. Ct. 3001 (1983).

68. *Compare* Solem v. Helm, 103 S. Ct. 3001 (1983) (finding life imprisonment without possibility of parole cruel and unusual for series of minor felonies), *with* Rummel v. Estelle, 445 U.S. 263 (1980) (upholding a sentence of life imprisonment with possibility of parole for a series of minor felonies). The *Solem* majority was able to distinguish *Rummel* by finding the sentence of life imprisonment without parole qualitatively different from life imprisonment where the defendant could be paroled. 103 S. Ct. at 3015. The Chief Justice, however, found this distinction to be without merit. *Id.* at 3017-21 (Burger, C.J., dissenting).

69. Robinson v. California, 370 U.S. 660 (1962).

70. 103 S. Ct. 3001 (1983).

71. The term "culpability" is not a static concept, and courts may use the expression in ways that create confusion. In general, the term refers to the degree of guilt associated with particular conduct under a particular set of circumstances. *See infra* notes 87-88 and accompanying text.

72. *Solem*, 103 S. Ct. at 3010. Applying these criteria in *Solem*, the Court held that the

2. California Law

Article 1, section 17 of the California Constitution also prohibits "cruel or unusual punishments." In *In re Lynch*,[73] the California Supreme Court held that a punishment violates this prohibition if "it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity."[74] Striking down a penalty as disproportionate for the first time, the *Lynch* court established three techniques for proportionality analysis similar to those subsequently adopted by the United States Supreme Court in *Solem v. Helm*.[75] The only significant difference between the two tests is that California courts enjoy broader discretion to tailor the analysis to a specific defendant by considering the particular defendant's redeeming personality traits.[76]

Both federal and California courts examine the manner in which the defendant committed the charged offense, and the resulting degree of danger or actual harm. In undertaking this analysis they consider the seriousness or triviality of the offense, the presence or absence of violence, the defendant's motive, and the extent of injury to the victim or society.[77] Courts may also review the defendant's past criminal history and weigh other factors indicative of the defendant's danger to

defendant who had been convicted for uttering a false check for $100 and who had six other minor felony convictions could not be sentenced to life imprisonment without possibility of parole. *Id.* at 3012-16.

73. 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).

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

75. 103 S. Ct. 3001 (1983); *see supra* text accompanying note 72. Under the *Lynch* analysis the court first examines "the nature of the offense and/or offender, with particular regard to the degree of danger both present to society." *Lynch*, 8 Cal. 3d at 425, 503 P.2d at 930, 105 Cal. Rptr. at 226; *see also infra* text accompanying notes 77-79. Next the court compares the challenged penalty with the punishments prescribed in California for different, more serious, crimes. A penalty that is more severe than those prescribed for more serious offenses draws suspicion. 8 Cal. 3d at 426, 503 P.2d at 932, 105 Cal. Rptr. at 228. Applying the third technique, the court compares the challenged penalty with the punishment prescribed for the same offense in other jurisdictions. The court is likely to strike down penalties that are inordinately long or severe in comparison to those prescribed for the same offense in other states. *Id.* at 427, 503 P.2d at 932, 105 Cal. Rptr. at 228.

76. *Compare* the objective factors listed by the United States Supreme Court in *Solem*, 103 S. Ct. at 3011, *see infra* note 87, *with* the factors considered by the California Supreme Court in *In re* Rodriguez, 14 Cal. 3d 639, 537 P.2d 384, 122 Cal. Rptr. 552 (1975) *and* in People v. Dillon, 34 Cal. 3d 441, 668 P.2d 697, 194 Cal. Rptr. 390 (1983). In *Rodriguez*, the court noted that the defendant was meek and cooperative, and stressed that his offense could be explained by his low intelligence and feelings of sexual inadequacy. 14 Cal. 3d at 655 & n.19, 537 P.2d at 395-96 & n.19, 122 Cal. Rptr. at 563-64 & n.19. In *Dillon*, the court was impressed by the defendant's youth and immaturity. 34 Cal. 3d at 488, 668 P.2d at 727, 194 Cal. Rtpr. at 420. The United States Supreme Court necessarily exercises more limited discretion to declare a given state's criminal punishments unconstitutional because the Court must accommodate the greatly varied penal philosophies and criminal systems of 50 states.

77. Solem v. Helm, 103 S. Ct. 3001, 3011 (1983); *In re* Lynch, 8 Cal. 3d 410, 425-26, 503 P.2d 921, 930-31, 105 Cal. Rptr. 217, 226-27 (1972).

society.[78] In addition, a California court may consider the defendant's age, his status as a drug addict, his character, and other subjective factors peculiar to the defendant.[79]

In applying the *Lynch* test, the California Supreme Court has shown a greater willingness than the United States Supreme Court to overturn statutory punishments. In *Lynch*, the court held that life imprisonment is too severe a penalty for second-offense indecent exposure.[80] The court noted that: (1) the harm caused by the offense was minimal and the typical offender was nonviolent; (2) the penalty for second-offense indecent exposure was more severe than the penalties for arson, assault with intent to commit rape or sodomy, and several other more serious crimes; and (3) most states punish the same offense by no more than a short jail term and/or a small fine.[81] In other cases, the court has used this three-tiered approach to find a twenty-two year sentence too long for lewd conduct with a child,[82] preclusion of parole for ten years disproportionate to the crime of furnishing heroin,[83] and registration as a sex offender inappropriate for a defendant guilty of soliciting lewd and dissolute conduct.[84] Thus, the court may not only scrutinize the length of prison terms, but it may apply proportionality analysis to virtually any type of criminal sanction.[85]

C. Proportionality for Homicide Offenses

1. Measuring Culpability Outside of the Felony-Murder Rule

Recognizing that punishment must bear some correlation with fault, courts endeavor to assign punishments that match defendants' levels of culpability.[86] "Culpability" is a concept that has no rigid

78. *Solem*, 103 S. Ct. at 3011; *Lynch*, 8 Cal. 3d at 425, 503 P.2d at 930-31, 105 Cal. Rptr. at 226-27.

79. *See, e.g., In re* Rodriguez, 14 Cal. 3d 639, 537 P.2d 384, 122 Cal. Rptr. 552 (1975) (defendant relatively young and of low intelligence); *In re* Foss, 10 Cal. 3d 910, 519 P.2d 1073, 112 Cal. Rptr. 649 (1974) (addict furnishing heroin to feed habit less culpable than dealer selling to reap profit), *disapproved on other grounds*, People v. White, 16 Cal. 3d 791, 549 P.2d 537, 129 Cal. Rptr. 769 (1976).

80. 8 Cal. 3d at 438-39, 503 P.2d at 940, 105 Cal. Rptr. at 236.

81. *Id.* at 429-36, 503 P.2d at 933-39, 105 Cal. Rptr. at 229-35.

82. *In re* Rodriguez, 14 Cal. 3d 639, 537 P.2d 384, 122 Cal. Rptr. 552 (1975).

83. *In re* Foss, 10 Cal. 3d 910, 519 P.2d 1073, 112 Cal. Rptr. 649 (1974), *disapproved on other grounds*, People v. White, 16 Cal. 3d 791, 549 P.2d 537, 129 Cal. Rptr. 769 (1976); *see also In re* Grant, 18 Cal. 3d 1, 553 P.2d 590, 132 Cal. Rptr. 430 (1976) (preclusion of parole for 10 years disproportionate punishment for sale of marijuana).

84. *In re* Reed, 33 Cal. 3d 914, 663 P.2d 216, 191 Cal. Rptr. 658 (1983).

85. In the examples given above, the court reviewed not only the length of the sentence or the time before parole eligibility, but also considered the proportionality of a penalty that involved lifelong registration as a sex offender. The nature of incarceration was a factor in *Dillon*, where the court was concerned that the defendant would be sent to prison rather than committed to the Youth Authority.

86. *See* Solem v. Helm, 103 S. Ct. 3001, 3006-07, 3011 (1983); *see also id.* at 3006 ("The

meaning,[87] but two salient factors predominate legal determinations of criminal culpability: the mental state of the offender and the magnitude of the crime or harm caused to the victim and society.[88] The latter feature is static for all homicides; in every case the harm caused is of the highest magnitude—the loss of a human life. Therefore, the measurement of culpability for homicide is based largely on an assessment of the defendant's mental state.[89] Premeditated and deliberate homicides are considered the most reprehensible and are classified as murders of the first degree; unpremeditated intentional homicides and those committed with conscious recklessness are murders of the second degree; and inadvertent or careless homicides are not considered murder, but are punished less severely as involuntary manslaughter.[90]

Since the late sixteenth century, the distinction between willful and accidental homicide has been the basis for treating a person who has killed by misadventure differently from one who has killed intentionally. Accidental killings include those that are faultless or careless,

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principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence."); Weems v. United States, 217 U.S. 349, 367 (1910) ("[I]t is a precept of justice that punishment for crime should be graduated and proportioned to offense.").

87. In Solem v. Helm, for example, the Supreme Court found several factors relevant to a discussion of culpability. The factors included the harm caused or threatened to the victim or society, whether the crime was violent or nonviolent, whether the defendant caused physical injury to a person as opposed to causing damage to property, the absolute magnitude of the crime, and whether the crime was an attempt as opposed to a completed crime. 103 S. Ct. 3001, 3011 (1983). The *Dillon* opinion discussed other, more subjective factors such as the defendant's personality, the jury's reaction to him, and the light sentences given his accomplices. *See supra* text accompanying notes 21-22, 24; *infra* text accompanying notes 105-13. It is not clear whether the *Dillon* court found all of these factors necessary to an assessment of Dillon's culpability, or whether some of the factors were presented as further justification for the court's decision.

88. Most of the factors enunciated by the *Solem* Court relate in some way to the magnitude of the crime or harm caused to the victim or society. *See supra* note 87. The danger that a defendant represents to society is also based to some extent on the magnitude of the crimes he has committed or is expected to commit. That factor, however, is used not to determine the crime for which the defendant may be convicted, but is considered in ascertaining what punishment the defendant should receive among those assigned for his offense.

89. As used here, the term "mental state" refers to the defendant's state of mind with respect to the homicide. The intent to commit a felony is, of course, a "mental state" that is often artificially transferred to the homicide under the felony-murder rule. *See supra* text accompanying notes 27-28. The problem with using that process to determine the defendant's culpability for the homicide is that the defendant's actual mental state cannot be consistently equated with any of the other mental states associated with criminal homicide. *See supra* note 37.

90. W. LAFAVE & A. SCOTT, *supra* note 26, §§ 73, 78; *see also infra* text accompanying notes 91-93; *infra* note 92. Not every state divides murder into two degrees or makes the distinctions between first- and second-degree murder in the same manner. *See, e.g.*, 18 PA. CONS. STAT. ANN. § 2502 (Purdon 1983) (dividing murder into three degrees: premeditated murder, felony murder, and all other murders). However, the division of murder into two degrees is very common, and these distinctions enjoy a fairly broad base of support. *See* W. LAFAVE & A. SCOTT, *supra* note 26, § 73 (discussing the division by most states of murder into two degrees).

while willful killings include those that are intentional or reckless.[91] The Model Penal Code further refines this standard, classifying homicides as purposeful, knowing, reckless, or negligent.[92] Truly faultless homicides—those that occur inadvertently under lawful circumstances—are not subject to criminal punishment.[93]

2. *California's Penal Code*

The California Penal Code adopts the foregoing distinctions between the various mental states. It defines murder as "the unlawful killing of a human being, or a fetus, with malice aforethought."[94] Malice aforethought involves mental states associated with a high degree of culpability: willful premeditation, intent to kill, or a conscious disregard for an unreasonable risk to human life.[95] Thus, murder requires a conscious decision to take, or at least risk, human life. The higher the level of consciousness of the decision, the higher the degree of culpability, and the greater the severity of the punishment imposed. California punishes first-degree murder, which involves willful premeditation, by death, life imprisonment without possibility of parole, or twenty-five years to life in prison. Second-degree murder, which includes intentional and reckless homicides, is punishable by fifteen years to life.[96]

Involuntary manslaughter, on the other hand, involves the lowest degree of culpability generally thought necessary for criminal liability—gross or criminal negligence.[97] Unlike murder punishments,

91. *See generally* Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815 (1980).

92. MODEL PENAL CODE §§ 2.02(2), 210.1 (Proposed Official Draft 1962). The Code describes a homicide as murder if it is committed "purposely or knowingly" or "recklessly under circumstances manifesting extreme indifference to the value of human life." *Id.* § 210.2. A negligent homicide is equivalent to involuntary manslaughter—that is, one committed under circumstances involving a "gross deviation from the standard of care that a reasonable person would observe in the actor's situation." *Id.* §§ 2.02(2)(d), 210.4. The Code also distinguishes homicides involving ordinary recklessness from those involving recklessness manifesting extreme indifference to human life and designates the former manslaughter. *Id.* §§ 210.2, 210.3.

93. Robinson, *supra* note 91, at 835-36.

94. CAL. PENAL CODE § 187 (West Supp. 1984).

95. *See generally* People v. Conley, 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966).

96. CAL. PENAL CODE § 190 (West Supp. 1984).

97. *Id.* § 192; *see also id.* § 20 (West 1970) ("[I]n every crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence."). Gross negligence is not enough to constitute the implied malice necessary for murder. *See* People v. Watson, 30 Cal. 3d 290, 637 P.2d 279, 179 Cal. Rptr. 43 (1981), explaining the difference as follows:

> *[G]ross negligence* . . . has been defined as the exercise of so slight a degree of care as to raise a presumption of conscious indifference to the consequences. On the other hand, *malice* may be implied when a person, knowing that his conduct endangers the life of another, nonetheless acts deliberately with conscious disregard for life. Though these definitions bear a general similarity, they are not identical. Implied malice contemplates a subjective awareness of a higher degree of risk than does gross negligence, and involves an element of wantonness which is absent in gross negligence.
>
> Furthermore, . . . [a] finding of gross negligence is made by applying an *objective*

which are severe and indeterminate, the punishment for manslaughter is finite and relatively mild. The base terms for involuntary manslaughter are two, three and four years.[98] Thus, the significant difference in mental state and corresponding reduction in associated culpability is reflected by a substantial quantitative and qualitative difference in punishment.

III
DILLON AND THE DEMISE OF CALIFORNIA'S FELONY-MURDER RULE

The *Dillon* decision is significant because it indicates that a court may invoke the state constitutional prohibition against cruel or unusual punishment to expand greatly the role of sentence proportionality analysis in California. The new approach allows a court unprecedented discretion in adjusting criminal sanctions to fit its own notions of just punishment.[99] The California Supreme Court has indicated that it is willing to examine the proportionality of noncapital penalties, even where the gravity of the defendant's offense is very serious and his conduct results in death. Moreover, the court has given to critics of the felony-murder rule new hope that the rule's demise may yet be at hand.

A. The Dillon *Approach to Proportionality Analysis*

Dillon signals a departure from the court's previous practice of limiting proportionality analysis to cases involving clearly disproportionate punishment. It is the first time that the court has indicated that its analysis under the first *Lynch* technique will go beyond a gross assessment of the seriousness of the conduct as measured against the severity of the punishment.

In prior cases, the disparity between the gravity of the conduct and the severity of the penalty has been fairly obvious. In *Lynch*, a trivial offense—indecent exposure—was punished by a very severe penalty—life imprisonment.[100] In *In re Reed*, a trivial offense—soliciting lewd and dissolute conduct from an undercover officer—was punished by

test: if a *reasonable person* in defendant's position would have been aware of the risk involved, then the defendant is presumed to have had such an awareness. However, a finding of implied malice depends upon a determination that the defendant *actually appreciated* the risk involved, i.e., a *subjective* standard.

Id. at 296-97, 637 P.2d at 283, 179 Cal. Rptr. at 47 (emphasis in original) (citations omitted).

98. CAL. PENAL CODE § 193 (West Supp. 1984).

99. As Justice Richardson noted, the court had never before modified a conviction without finding error. In his view, "modification of the judgment in reliance on the cruel or unusual punishment clause constitute[d] an unwarranted invasion . . . of the powers of the Legislature . . . and of the Governor." *Dillon*, 34 Cal. 3d at 499, 668 P.2d at 734-35, 194 Cal. Rptr. at 427 (Richardson, J., concurring and dissenting).

100. *In re* Lynch, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972). The penalty was an

the stigma of lifelong registration as a sex offender.[101] And in *In re Grant*, *In re Foss*, and *People v. Schueren*, the offenses were of medium severity while the punishments were extremely harsh.[102] Even in *In re Rodriguez*, where the offense—child molestation—was fairly serious, the life-maximum sentence was clearly disproportionate to the defendant's nonviolent conduct.[103]

In *Dillon*, by contrast, the state attempted to punish a very serious offense—intentional robbery murder—with a very severe penalty—life imprisonment. Thus, a gross characterization of Dillon's conduct was not sufficient to show that the penalty was shockingly disproportionate. Consequently, the court needed to refine its analysis. It conceded that the offense was very serious, but noted that it was not the most serious offense the defendant might have committed. Yet, the punishment imposed was the most severe that the particular defendant could have received.[104] The decision thus signaled that the California Constitution requires a fairly precise fit between the crime, the criminal, and the punishment.

Dillon also reveals that the court may support its proportionality analysis with considerations other than those traditionally associated with sentencing decisions. Although jury sympathy has been a factor in capital punishment decisions,[105] the jury generally does not have a role in other sentencing determinations.[106] Yet jury sympathy was an

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indeterminate one year to life in prison which the court considered a life sentence for the purpose of determining its constitutionality. *Id.* at 415-18, 503 P.2d at 924-26, 105 Cal. Rptr. at 220-22.

101. *In re* Reed, 33 Cal. 3d 914, 663 P.2d 216, 191 Cal. Rptr. 658 (1983).

102. *In re* Grant, 18 Cal. 3d 1, 553 P.2d 590, 132 Cal. Rptr. 430 (1976) (minimum term of 10 years for sale of marijuana); *In re* Foss, 10 Cal. 3d 910, 503 P.2d 1073, 112 Cal. Rptr. 649 (1974) (minimum term of 10 years for second offense of furnishing heroin where minimum term for third offense of murder was 9 years), *disapproved on other grounds*, People v. White, 16 Cal. 3d 791, 796 n.3, 549 P.2d 537, 541 n.3, 129 Cal. Rptr. 769, 773 n.3 (1976) (stating that the *Foss* court had miscalculated the minimum term); People v. Schueren, 10 Cal. 3d 553, 516 P.2d 833, 111 Cal. Rptr. 129 (1973) (life-maximum sentence for assault with a deadly weapon where maximum penalty for assault with a deadly weapon with intent to commit murder was 14 years).

103. *In re* Rodriguez, 14 Cal. 3d 639, 537 P.2d 384, 122 Cal. Rptr. 552 (1975) (life-maximum, 22 years served for nonviolent child molestation).

104. *Dillon*, 34 Cal. 3d at 487, 668 P.2d at 726, 194 Cal. Rptr. at 419.

105. Prior to the 1978 death penalty initiative, sentencing of defendants convicted of first degree murder was governed by former § 190.1 of the Penal Code, which provided that "[t]he determination of the penalty of life imprisonment [or death] shall be *in the discretion* of the court or jury." CAL. PENAL CODE § 190.1 (West 1970) (emphasis added) (repealed by initiative 1978). Under current law, the trier of fact is instructed to "consider, take into account and be guided by" evidence of aggravating and mitigating circumstances, and must impose a sentence of death if "the aggravating circumstances outweigh the mitigating circumstances." CAL. PENAL CODE § 190.3 (West Supp. 1984). The jury may still consider any sympathy factors raised by the evidence. People v. Easley, 34 Cal. 3d 858, 876, 671 P.2d 813, 824, 196 Cal. Rptr. 309, 320 (1983) (error to instruct jury during penalty phase of capital case that it must not be "influenced by pity" or "swayed by mere sentiment [or] sympathy" for the defendant).

106. Under California's prior system of indeterminate sentences, the term of imprisonment

important factor in the *Dillon* court's decision.[107] The court also expressed concern that Dillon had received a more severe penalty than he or the jury had expected.[108] But sentencing authorities do not traditionally consider the defendant's expectations when fixing punishment. Finally, the court placed emphasis on the relatively light sentences received by Dillon's accomplices.[109] While disparity of sentencing is a problem in the field of criminal procedure,[110] it is not ordinarily a problem of constitutional dimension, particularly where the defendant is more culpable than his accomplices.[111] The disparity in this case can be explained by Dillon's greater level of participation in both the attempted robbery and the killing, by the exercise of prosecutorial discretion, and by the results of the other defendants' plea bargaining.[112]

Most significantly, *Dillon* seems to indicate that a strong showing of disproportionality based on a subjective assessment of the defendant's personal characteristics may compensate for a weak or questionable showing under other aspects of the *Lynch* analysis. Only the court's subjective assessment of Dillon's character and the danger that he presented to society yielded a strong indication that his punishment might be too severe.[113] The court did not support by reference to the Penal Code or any other authority its determination that intentional robbery murder is less serious than unaggravated premeditated murder.[114] But, assuming that this determination is valid, once the intent to

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was not fixed initially by the trial court or the jury, CAL. PENAL CODE § 1168 (West 1970) (repealed 1978), but was determined after the expiration of the minimum term by the Board of Prison Terms and Paroles. *Id.* at historical note. The authority to fix terms of imprisonment is now vested in the trial court, subject to statutory limitations and the sentencing rules of the Judicial Council. *See generally* CAL. PENAL CODE §§ 1170-1170.8 (West Supp. 1984).

107. *Dillon*, 34 Cal. 3d at 484-85, 668 P.2d at 724-25, 194 Cal. Rptr. at 417-18.

108. *Id.* at 486, 668 P.2d at 725-26, 194 Cal. Rptr. at 419. Although the trial court committed Dillon to the Youth Authority, the court of appeal held in People v. Superior Court (Dillon), 115 Cal. App. 3d 687, 185 Cal. Rptr. 290 (1981), that at the time of his offense Dillon was ineligible for the Youth Authority as a matter of law.

109. *Dillon*, 34 Cal. 3d at 448, 668 P.2d at 727, 194 Cal. Rptr. at 420.

110. The shift to determinate sentencing in California was, in part, aimed at the elimination of this problem. *See* CAL. PENAL CODE § 1170 (West Supp. 1984) (stating that the elimination of sentence disparity is one of the purposes of the statute).

111. *See, e.g.*, Hedrick v. United States, 357 F.2d 121, 124 (10th Cir. 1966) (five-year sentence for tax fraud not cruel and unusual punishment for accountant where codefendant client sentenced to only five months); McGowen v. State, 221 Tenn. 442, 454, 427 S.W.2d 555, 560 (1968) (five-year sentence for arson not cruel and unusual punishment under Tennessee Constitution where codefeudant received six-month sentence). In both of these cases, as in *Dillon*, there was evidence tending to show that the defendant had conceived the crime.

112. *See supra* note 24.

113. *Dillon*, 34 Cal. 3d at 486, 668 P.2d at 725, 194 Cal. Rptr. at 419.

114. In fact, § 190.2 seems to contradict this assessment by including intentional robbery murder, but not unaggravated premeditated murder, among the special circumstances that authorize imposition of the death penalty. CAL. PENAL CODE § 190.2 (West Supp. 1984); *see supra* note 54 and accompanying text. However, the *Dillon* court's interpretation finds some support in

kill is shown, the intent to commit robbery arguably raises the defendant's culpability to a level close to that of premeditation. Consequently, despite the majority's mild characterization of the facts, an examination of the offense revealed a relatively close correlation between the seriousness of the conduct and the severity of the punishment.

The showing of disproportionality under the second *Lynch* technique was equally tenuous. The court could not find a more serious crime that was punished less severely, and instead noted that Dillon's punishment was as severe as it would have been for a more serious crime.[115] Finally, the court made no attempt to show disproportionality under the third technique.[116]

The *Dillon* analysis allows courts a degree of flexibility and discretion that potentially could affect any area of criminal law where liability is not closely related to individual culpability. In the past, the court has used proportionality analysis to mitigate the effects of harsh indeterminate penalties applied to wide ranges of conduct.[117] This problem has largely disappeared because of the legislative shift to determinate sentences.[118] However, proportionality analysis will continue to have an impact on accomplice liability and conspiracy cases, where liability often exceeds the scope of intended or actual participation.[119]

Of course, the most significant contribution of the *Dillon* decision is its indication that proportionality analysis applies to felony murder at all. Prior to *Dillon*, courts might have assumed that a person committing a designated or inherently dangerous felony creates a high

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Pennsylvania's criminal statutes where premeditated murder is murder of the first degree and felony murder is murder of the second degree. 18 PA. CONS. STAT. ANN. § 2502 (Purdon 1983).

115. *Dillon*, 34 Cal. 3d at 487 n.38, 668 P.2d at 726 n.38, 194 Cal. Rptr. at 419 n.38.

116. *Id.*

117. *See, e.g., In re* Rodriguez, 14 Cal. 3d 639, 537 P.2d 384, 122 Cal. Rptr. 552 (1975) (one year to life); People v. Schueren, 10 Cal. 3d 553, 516 P.2d 833, 111 Cal. Rptr. 129 (1973) (six months to life); *In re* Lynch, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972) (one year to life).

118. *See generally* CAL. PENAL CODE § 1170 (West Supp. 1984) (legislature finds that elimination of sentence disparity best achieved by determinate sentences fixed by statute).

119. Under California law, all persons "concerned in the commission of a crime" are considered principals and are liable for punishment as such. CAL. PENAL CODE § 31 (West 1970). Thus, common law distinctions between principals of the first and second degree, aiders and abettors, and accessories before the fact are immaterial. The term "accessory" is limited to those who do not participate directly in the crime, but who aid, harbor or conceal a principal after a felony has been committed with the intent that the principal avoid or escape arrest. *Id.* § 32. In addition, each member of a criminal conspiracy is criminally liable for all acts of his coconspirators committed pursuant to the common design or plan, People v. Weiss, 50 Cal. 2d 535, 563, 327 P.2d 527, 543-44 (1958), *disapproved on other grounds*, People v. Johnson, 26 Cal. 3d 557, 606 P.2d 738, 162 Cal. Rptr. 431 (1980); People v. Harper, 25 Cal. 2d 862, 871, 156 P.2d 249, 254 (1945), even if those acts were unintended or forbidden by the conspirator. People v. Beaumaster, 17 Cal. App. 3d 996, 1003, 95 Cal. Rptr. 360, 364 (1971).

enough risk to deserve harsh punishment.[120] *Dillon* precludes this abstract rationale for enhanced punishment by focusing on individual conduct and the actual circumstances of the crime. *Dillon* directs courts to consider "the totality of the circumstances surrounding the commission of the offense . . . including such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his acts."[121] This approach should bring felony-murder penalties into line with those that would be imposed if the felony-murder rule were not applied. Thus, the degree-fixing aspect of the felony-murder rule can no longer apply automatically. In *Dillon*, the court allowed the defendant to be punished only for second-degree murder, the crime for which he presumably would have been convicted absent application of the first-degree felony-murder rule.[122]

The *Dillon* approach could also require changes in enforcement of the felony-murder rule. The rule now applies only to enumerated felonies and to those that have been designated as "inherently dangerous."[123] Given *Dillon*'s emphasis on actual conduct, courts may limit the rule even further—precluding its application even in cases where the crime in the abstract is inherently dangerous unless the defendant's *actual conduct* is dangerous. This limitation would be most significant to felons killing accidentally or negligently in the course of minor burglaries or unarmed robberies. *Dillon*'s focus on individual culpability and the defendant's involvement suggests that felony-murder accomplices must be punished according to their participation in the killing, not just their involvement in the underlying felony. Moreover, if proportionate sentencing requires courts to consider the totality of the circumstances, defenses that would not ordinarily apply in felony-murder

120. This is, in fact, one of the justifications advanced by early California courts for the felony-murder rule. Rather than holding that malice was not an element of felony murder, the courts held that the intent to commit a dangerous felony was equivalent to a reckless disregard for human life. *See, e.g.*, People v. Milton, 145 Cal. 169, 171-72, 78 P. 549, 550 (1904) (malice of an abandoned and malignant heart is shown by the very nature of the felony). At best, such a theory supports only a limited version of the felony-murder rule. As the California Supreme Court recently noted,

> "[I]nstead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life, and likely in itself to cause death done for the purpose of committing a felony which caused death, should be murder."

People v. Burroughs, 35 Cal. 3d 824, 842-43, 678 P.2d 894, 907, 201 Cal. Rptr. 319, 332 (1984) (Bird, C.J., concurring) (reversing second-degree felony-murder conviction for death resulting from felonious unlicensed practice of medicine) (quoting Regina v. Serne, 16 Cox Crim. Cas. 311, 313 (Eng. 1887)).

121. *Dillon*, 34 Cal. 3d at 479, 668 P.2d at 720, 194 Cal. Rptr. at 413-14.

122. It is not clear that Dillon would have been convicted of second-degree murder because the jury did not reach that issue. However, the jury would have had difficulty ignoring the evidence that the killing was intentional, whether or not it was induced by panic.

123. *See supra* notes 33, 61 and accompanying text.

cases, such as self-defense, accident, or heat of passion, may now be available. In *Dillon*, for example, the court considered Dillon's apparent panic in deciding to mitigate his punishment, even though he was attempting to commit a felony against his victim.[124]

As the *Dillon* court acknowledged, " 'in almost all cases in which [the felony-murder rule] is applied it is unnecessary.' "[125] Most such cases involve an intentional or reckless killing already amounting to murder. In cases where the killing is accidental or negligent, the rule results in harsh penalties that bear little relation to the defendant's culpability. Consequently, should the court apply the *Dillon* analysis to felony-murder cases in general, it would find that where the rule is necessary to secure conviction, the resulting penalty inevitably will be disproportionate and therefore unconstitutional.

B. Implications of the Dillon *Analysis*

Dillon, then, advocates a refined proportionality analysis under the first *Lynch* technique. This refined approach requires a close correlation between the court's assessment of the defendant's culpability and the assigned punishment. *Dillon* also allows a finding of disproportionate punishment under the second *Lynch* technique if there is a more serious offense that is punished as severely, even if more serious offenses are not punished less severely. The *Dillon* test thus lowers the threshold for a finding of disproportionality.

The requisite correlation between culpability and punishment and the lowered threshold for a finding of disproportionate punishment dislodge the basic underpinnings of the felony-murder rule. After *Dillon*, the state may not, consistent with California's prohibition against cruel or unusual punishment, punish as murderers felons who commit what would otherwise be involuntary manslaughter. Since the purpose of the felony-murder rule is to punish involuntary manslaughter as murder, the rule is inconsistent with California's constitution and should be declared void.

It is not immediately apparent that *Dillon* stands for the principle that only acts that are otherwise murder can be punished as felony murder. *Dillon* involved a killing that was already murder; the court did not have to decide what punishment is appropriate where the killing involves less culpable mental states. Moreover, the court held that malice is not an element of felony murder, and malice is the basis of distinction between murder and less serious homicides. Thus, eliminat-

124. 34 Cal. 3d at 488, 668 P.2d at 727, 194 Cal. Rptr. at 420.

125. *Id.* at 463, 668 P.2d at 709, 194 Cal. Rptr. at 402 (quoting People v. Washington, 62 Cal. 2d 777, 783, 402 P.2d 130, 134, 44 Cal. Rptr. 442, 446 (1965)).

ing malice as an element of felony murder seems to clear the way for punishing nonmurders as murder.

Yet, despite its rejection of a malice requirement, the court based its modification of Dillon's conviction largely on an assessment of his mental state. The court did not allow Dillon's felonious intent to bridge the gap between intent to kill and premeditation. The *Dillon* court held, in effect, that an intentional killing that results in part from panic should not be punished as first-degree murder, even if it occurs during an attempt to commit an enumerated felony. Thus, *Dillon* at least supports the proposition that a felony killing that results from accident, negligence, or even gross negligence should not be punished as first-degree murder.

Dillon does not explicitly prevent courts from merely lowering the judgment in such cases from first- to second-degree murder. However, the *Dillon* decision suggests that courts should require a sufficient showing of culpability with respect to the homicide before allowing imposition of any murder penalties. Since all homicides result in the loss of human life, the culpability associated with a particular homicide is virtually synonymous with the defendant's mental state.[126] The significant difference in the mental state required for murder compared to that associated with involuntary manslaughter results in a substantial difference in culpability. The intent to commit the underlying felony cannot eliminate this difference. Consequently, the penalties for murder are grossly disproportionate when the defendant has committed what otherwise amounts to involuntary manslaughter.

1. Applying the Dillon *Standard*

Two cases, not decided by the California Supreme Court, will illustrate the difference that the *Dillon* proportionality analysis can make. Consistent with *Dillon*'s first technique, the examination will focus on the defendants' levels of culpability, and will compare the normal range of punishment for that level of culpability with the punishment actually received. Under the second *Dillon* technique, the defendants' punishments will be balanced against the punishments received for comparable and more serious crimes.[127]

a. People v. Stamp

The prototypical example of an accidental felony-murder case is *People v. Stamp*.[128] In *Stamp*, the defendants had robbed an amusement company while armed with a gun and a blackjack. In the course

126. *See supra* text accompanying note 89.

127. The third technique will not be used because it was not used by the *Dillon* court.

128. 2 Cal. App. 3d 203, 82 Cal. Rptr. 598 (1969), *cert. denied*, 400 U.S. 819 (1970).

of the robbery, they forced everyone to lie down on the floor and, as they left, told the victims to stay there so that no one would "get hurt."[129] The defendants left the scene without shooting or striking anyone. Nevertheless, fifteen minutes after the robbery, an obese sixty-year-old victim with a history of heart disease died of a heart attack. The defendants were convicted of first-degree felony murder and given life sentences.[130]

An examination of the defendants' conduct reveals that they acted no worse than most other bank robbers and they engaged in no gratuitous violence. Once the notion that all armed robberies pose an unreasonable risk to human life is discarded,[131] it cannot be said that the defendants in *Stamp* consciously took or risked human life. Their culpability, based on conduct and mental state, is less than that associated with murder. The only objective basis upon which to find them more culpable than other bank robbers is that they caused greater, though unforeseeable, harm to the victim.

Nevertheless, the fact that the victim died does not, by itself, justify treating the offense as murder, because the law does not treat all unlawful killings as murder. The death occurred under unlawful circumstances, but it was still accidental. Absent the felony-murder rule, these defendants probably would have been convicted of robbery and involuntary manslaughter. Under normal sentencing rules, the penalty for robbery using a firearm—seven years—would be increased by one year for involuntary manslaughter to a total penalty of eight years.[132] Thus, the first *Dillon* technique reveals that life imprisoument is a disproportionate penalty.

Under the second *Dillon* technique, the court would compare the defendants' sentences with those for comparable and for more serious

129. *Id.* at 207-08, 82 Cal. Rptr. at 601.

130. *Id.* at 207, 82 Cal. Rptr. at 600.

131. *See supra* note 39.

132. This calculation assumes that neither defendant had a prior criminal history. It also ignores the traces of the felony-murder rule that appear throughout the California Penal Code, including qualifications in the definition of involuntary manslaughter that refer to unlawful conduct "not amounting to a felony." CAL. PENAL CODE § 192 (West Supp. 1984). Consecutive sentences for multiple felonies are determined by adding a base term equal to the term for the most sevcrely punished crime (including enhancements) to a subordinate term determined by adding one-third of the middle term of each additional felony. *Id.* § 1170.1. In this case the upper term for robbery (two, three or five years) is enhanced by two years for use of a firearm and added to one-third the middle term for involuntary manslaughter (two, three or four years). *Id.* §§ 193, 213, 12,022.5. The Code allows a felon's sentence to be enhanced by three years where his victim suffers great bodily injury. *Id.* § 12,022.7 (West 1982). An appropriate alternative to the felony-murder rule might be a five-year sentence enhancement for an accidental or negligent death resulting from the commission of a felony. Reckless and intentional deaths would continue to be punished as murder even without the felony-murder rule. *See supra* text accompanying notes 94-95.

crimes. A premeditated killing would receive the same penalty,[133] and an intentional but unpremeditated killing during a kidnapping would receive less severe punishment.[134] Thus, the second technique also reveals that the punishment is disproportionate.

b. People v. Fuller

The rigid technicalities of the felony-murder rule may result in highly anomalous sentencing. *People v. Fuller*[135] is a case in point. In *Fuller* the two defendants had burglarized four Dodge vans in a car lot and stolen the spare tires. Police spotted them leaving the scene of the crime, and a high-speed chase ensued. The defendants drove through a red light, causing a fatality.[136] Because flight from a crime is considered part of the crime,[137] the court of appeal held that the defendants could be prosecuted for first-degree felony murder.[138]

Under the first *Dillon* technique, it is clear that the defendants, like the defendants in *Stamp*, did not have the mental state necessary for murder. The felony that they had committed was a second-degree burglary involving no danger to human life. The killing resulted from negligent driving by one of the defendants.[139] While a court might conclude that negligent driving involves more culpability when done to evade the police, second-degree burglary is not always treated as a felony,[140] and escape will not otherwise support a felony-murder convic-

133. CAL. PENAL CODE § 189 (West Supp. 1984).

134. Since kidnapping is not one of the felonies enumerated in § 189 of the Penal Code, an unpremeditated murder committed during a kidnapping is second-degree murder. *Id.*

135. 86 Cal. App. 3d 618, 150 Cal. Rptr. 515 (1978).

136. *Id.* at 621-22, 150 Cal. Rptr. at 516.

137. Flight following the commission of a felony is considered part of the felony as long as the felon has not reached a place of temporary safety. People v. Salas, 7 Cal. 3d 812, 821-22, 500 P.2d 7, 14, 103 Cal. Rptr. 431, 437-38 (1972), *cert. denied*, 410 U.S. 939 (1973).

138. *Fuller*, 86 Cal. App. 3d at 628, 150 Cal. Rptr. at 520.

139. The trial court and the court of appeal disagreed as to whether there was enough evidence of reckless driving to convict the defendants of second-degree murder. *Compare id.* at 628-29, 150 Cal. Rptr. at 520-21 (stating that the defendants could be charged with second-degree murder), *with id.* at 621, 150 Cal. Rptr. at 516 (indicating that the trial court had dismissed the murder charge and amended the information to substitute a vehicular-manslaughter charge).

140. *See* CAL. PENAL CODE §§ 17, 461 (West Supp. 1984). Section 17 defines a felony as any offense punishable by death or imprisonment in state prison for more than one year. Section 461 allows second-degree burglary to be punished by imprisonment in state prison, or by a jail term of one year or less. When the lower penalty is assigned, second-degree burglary is considered a misdemeanor. *See also In re* Kenneth H., 33 Cal. 3d 616, 619, 659 P.2d 1156, 1158, 189 Cal. Rptr. 867, 869 (1983) (indicating that second-degree burglary can be treated as a felony or misdemeanor). A death resulting from the commission of a misdemeanor ("unlawful act not amounting to a felony") is involuntary manslaughter. CAL. PENAL CODE § 192 (West Supp. 1984). Given the insignificant difference in the levels of culpability for many minor felonies and misdemeanors, there is no justification for treating a resulting death as murder in one case and as involuntary manslaughter in another.

tion.[141] Moreover, the court acknowledged that the punishment seemed inappropriate, and stated that it had reached its decision only by rigid application of precedent.[142]

Application of the second *Dillon* technique confirms a finding of disproportionality. Had the defendants been fleeing from a more serious crime not considered inherently dangerous—grand larceny, for example—they would have been guilty of only vehicular manslaughter.[143] In fact, if the defendants had been in a high-speed chase after stealing the *vans* rather than the spare tires, the grand-theft charge would not have supported a felony-murder conviction.[144] The maximum penalty for vehicular manslaughter is six years and for grand theft is one year in prison.[145] Thus the penalties for first-degree murder are disproportionate to the culpability of the *Fuller* defendants.

2. *Drawing the Line Between Murder and Manslaughter*

There are, of course, cases in which it is not clear that the defendant committed manslaughter instead of murder. That is, the more reckless the defendant's behavior, the more appropriate a second-degree murder penalty becomes. Further, if the killing appears intentional or premeditated, first-degree murder penalties are appropriate. The felony-murder doctrine is most problematic with close cases. If an offense is "almost" murder, is it then consistent with our notions of justice to impose murder punishments?

A look at our system of justice outside the context of felony murder is instructive. Under no other circumstance is a murder penalty imposed for involuntary manslaughter. Instead, a defendant's behavior must support an inference of "wanton disregard for [an unreasonable risk to] human life" before even second-degree murder penalties are considered appropriate.[146]

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141. *See* People v. Lopez, 6 Cal. 3d 45, 489 P.2d 1372, 98 Cal. Rptr. 44 (1971) (felony-murder rule does not apply to prison escapes).

142. People v. Fuller, 86 Cal. App. 3d 618, 626-28, 150 Cal. Rptr. 515, 519-20 (1978).

143. Grand larceny is not an "inherently dangerous" felony and it is not subject to the felony-murder rule. People v. Phillips, 64 Cal. 2d 574, 414 P.2d 353, 51 Cal. Rptr. 225 (1966). Burglary, which is classified as inherently dangerous, originally referred only to breaking into a dwelling house at night. *See supra* note 38.

144. *See* People v. Fuller, 86 Cal. App. 3d 618, 626, 150 Cal. Rptr. 515, 519 (1978).

145. CAL. PENAL CODE §§ 193, 489 (West Supp. 1984). Like second-degree burglary, vehicular manslaughter and grand theft can be punished by one year or less in county jail and can, therefore, be treated as misdemeanors. *Id.* §§ 193, 461, 489; *see also supra* note 140.

146. *See* CALIFORNIA JURY INSTRUCTIONS CRIMINAL [CALJIC] 8.10 (West 1979 & Supp. 1984) (defining murder as an unlawful killing with malice aforethought); *id.* 8.11 (brackets omitted):

> Malice is express when there is manifested an intention unlawfully to kill a human being.
>
> Malice is implied when the killing results from an intentional act involving a high

Dillon implies that the same distinction is appropriate in the context of felony-murder punishments. If the totality of circumstances surrounding a homicide indicates that the defendant consciously subjected a human life to unreasonable risk, then murder punishments are justified. If the defendant's conduct does not suggest recklessness or an intent to kill, then the defendant's culpability is insufficient to invoke murder penalties.

Thus, the felony-murder rule is, as courts and commentators have often stated, unnecessary where it is appropriate, and inappropriate where it is necessary for a murder conviction.[147] The court will have a constitutional basis for declaring the rule void once it acknowledges that the felony-murder rule is not merely a barbaric anachronism, but that it invariably results in disproportionate penalties whenever its use is necessary.

The California Supreme Court has often declared that the felony-murder rule has but one purpose—to deter felons from killing in the course of felonies by holding them strictly responsible for murder when a death results from their actions.[148] The rule cannot accomplish this purpose unless its application results in penalties for felony homicides that are appreciably more severe than the penalties that otherwise would result. Yet the *Dillon* court has forbidden this result by requiring that felony-murder punishments conform to the notion of proportionate punishment that applies in other contexts. The court has declared, in effect, that the felony-murder rule can no longer serve its intended purpose without violating the state constitution.

CONCLUSION

The *Dillon* decision is paradoxical. *Dillon* rejects judicial abrogation of the felony-murder rule and finds the rule valid under a due-process challenge, while simultaneously laying the groundwork for its destruction on another constitutional basis. Moreover, *Dillon* points out the incompatibility of the felony-murder rule with the constitu-

degree of probability that it will result in death, which act is done for a base, anti-social purpose and with a wanton disregard for human life.

147. *See* MODEL PENAL CODE § 201.2 comment 4 (Tent. Draft No. 9, 1959); Packer, *The Case for Revision of the Penal Code*, 13 STAN. L. REV. 252, 259 (1961); *see also supra* text accompanying notes 36-44.

148. *See, e.g.*, People v. Washington, 62 Cal. 2d 777, 781, 402 P.2d 130, 133, 44 Cal. Rptr. 442, 445 (1965) ("The purpose of the felony-murder rule is to deter felons from killing negligently or accidently by holding them strictly responsible for killings they commit."); *see also* People v. Satchell, 6 Cal. 3d 28, 34, 489 P.2d 1361, 1365, 98 Cal. Rptr. 33, 37 (1971) (the concept of "strict criminal liability . . . in the felony-murder doctrine [should] be given the narrowest possible application consistent with its ostensible purpose—which is to deter those engaged in felonies from killing negligently or accidentally . . . ."); *accord* People v. Henderson, 19 Cal. 3d 86, 92-93, 560 P.2d 1180, 1183, 137 Cal. Rptr. 1, 4 (1977).

tional requirement that punishment be proportionate to the crime. The felony-murder rule results in disproportionate punishment because that is its very purpose. It ignores the differences in culpability that are at the heart of the assignment of homicide penalties. *Dillon*'s message is that those differences must be considered, even where the felony-murder rule is applied, in order to keep punishments within constitutional limits. If the *Dillon* analysis is carried to its logical conclusion, the court must find that the felony-murder rule cannot constitutionally apply to the class of crimes for which it was enacted. Hence, the court should declare the rule void.

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