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CAPITAL FELONY MERGER

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Capital felony murder statutes continue to enable states to sentence criminal defendants to death. These are often individuals who possessed no intent to kill and, in some cases, did not kill. These statutes remain constitutionally dubious under the basic principles of the Eighth Amendment, but the United States Supreme Court's evolving standards of decency doctrine has proved an ineffective tool to remedy these injustices.

This Article proposes a novel doctrinal approach by which the Court could promote more consistent sentencing outcomes in felony murder cases. Specifically, the Article argues for the adoption of a constitutional felony merger doctrine that "merges" the crimes of felony murder and first-degree murder in capital cases. Just as felony murder cannot serve as a tool by which prosecutors can convert second-degree assault killings into first-degree murders, felony murder should also not serve as a tool to convert noncapital crimes into capital ones.

In Part I, the Article describes the use of capital felony murder and explains its constitutional infirmities under the Eighth Amendment. Part II explains the Supreme Court's failed attempts to apply the Eighth Amendment to capital felony murder cases and why the Court's doctrine remains an ineffective tool to remedy these injustices. In Part III, the Article proposes a new constitutional merger doctrine for capital felony murder cases. Finally, in Part IV, the Article makes the case for adopting a capital felony merger doctrine and explores its consequences.

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INTRODUCTION

During the past half-century, felony murder has remained one of the most criticized crimes in U.S. academic circles.[1] At the heart of this criticism rests its lack of a mens rea requirement related to the homicide in question.[2] Still, the crime of felony murder persists[3] and, perhaps more significantly, remains punishable by the death penalty.[4]

Dating back to its common law origins, the criminal law has categorized homicides as either murder or manslaughter based on the mental state (mens rea) of the killer.[5] Generally speaking, in cases where the killer exhibits malice, the crime is murder; in cases where the killer does not exhibit malice, the crime is the less serious manslaughter.[6] The offender's mens rea[7]

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[1] For a brief summary of early criticism, see Jeane Hall Seibold, Note, *The Felony-Murder Rule: In Search of a Viable Doctrine*, 23 CATH. LAW. 133, 134 n.1 (1978) ("The felony-murder doctrine has been the subject of vitriolic criticism for centuries."); *see also* George P. Fletcher, *Reflections on Felony-Murder*, 12 SW. U. L. REV. 413, 417 (1980); James J. Hippard, *The Unconstitutionality of Criminal Liability Without Fault: An Argument for a Constitutional Doctrine of Mens Rea*, 10 HOUS. L. REV. 1039, 1045 (1973); Maynard E. Pirsig, *Proposed Revision of the Minnesota Criminal Code*, 47 MINN. L. REV. 417, 427–28 (1963) (The felony murder rule is "highly punitive and objectionable as imposing the consequences of murder upon a death wholly unintended."); Frederick J. Ludwig, *Foreseeable Death in Felony Murder*, 18 U. PITT. L. REV. 1176 (1958); Norval Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50 (1956). *But see* David Crump & Susan White Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL'Y 359 (1985).

[2] The most common example relates to a robbery where the robber accidentally kills someone during the robbery and receives the same punishment as if he premeditated the killing. *See, e.g.*, People v. Washington, 402 P.2d 130, 133–35 (Cal. 1965); SAMUEL H. PILLSBURY, JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER 106, 108 (1998).

[3] *See generally* PAUL H. ROBINSON & TYLER SCOT WILLIAMS, MAPPING AMERICAN CRIMINAL LAW 45–52 (2018) (describing the current use of felony murder in the United States and showing that forty-three of fifty states use a traditional form of felony murder); *see also* State v. Maldonado, 645 A.2d 1165, 1171 (N.J. 1994); People v. Howard, 104 P.3d 107, 111 (Cal. 2005); Crump & Crump, *supra* note 1 (noting the persistence of felony murder despite consistent scholarly criticism).

[4] *Summary of State Death Penalty Statutes*, DEATH PENALTY INFO. CTR. (2021) [hereinafter *Summary of State Death Penalty Statute*], https://deathpenaltyinfo.org/facts-and-research/crimes-punishable-by-death/summary-of-state-death-penalty-statutes.

[5] *See, e.g.*, People v. Mendoza, 664 N.W.2d 685, 692 (Mich. 2003) ("[T]he only element distinguishing murder from manslaughter is malice."); 4 WILLIAM BLACKSTONE, COMMENTARIES *199 (stating that malice aforethought is the "grand criterion which now distinguishes murder from other killing"); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 504–05 (7th ed. 2015).

[6] DRESSLER, *supra* note 5, at 504–08.

[7] For a basic overview of the concept of mens rea, see for example, JEROME HALL, GENERAL PRINCIPLES OF THE CRIMINAL LAW 70–104 (2d ed. 1960); DRESSLER, *supra* note 5, at 117–45; Stephen J. Morse, *Inevitable Mens Rea*, 57 HARV. J.L. & PUB. POL'Y 51 (2003);

therefore defines a critical element of the categorization and corresponding punishment for homicide crimes.[8]

Closely related to the concept of mens rea is the act of homicide itself—the actus reus.[9] Homicide requires a defendant to act[10] in a way that actually and proximately causes the death of a human being.[11] As it is impossible to

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Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815 (1980); Rollin M. Perkins, *A Rationale of Mens Rea*, 52 HARV. L. REV. 905 (1939); Frances Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 974 n.2 (1932) [hereinafter Sayre, *Mens Rea*].

[8] Historically, criminal law rests on the idea that one must intend to commit a criminal act to be guilty of a crime. *See, e.g.*, Elonis v. United States, 135 S. Ct. 2001, 2009 (2015) (explaining that the "central thought" of U.S. criminal law is that a defendant must be "blameworthy in mind" to be guilty); BLACKSTONE, *supra* note 5, at *21 ("[A]s a vi[c]ious will without a vi[c]ious act is no civil crime, so, on the other hand, an unwarrantable act without a vi[c]ious will is no crime at all."). There is, of course, an exception to this—strict liability crimes, in which the act itself is enough to establish a crime. But such crimes are limited to public welfare crimes and the Supreme Court explicitly disfavors strict liability outside of that context. *See, e.g.*, Morissette v. United States, 342 U.S. 246, 250 (1952) (reading a mens rea standard into a federal statute); United States v. U.S. Gypsum Co., 438 U.S. 422, 438 (1978) (explaining that statutes without a mens rea standard have a "generally disfavored status" and indicating an interpretive presumption in favor of a mens rea standard, even when a statute is silent). For a deeper exploration of the presumption against strict liability crimes and strict liability generally, see Arthur Leavens, *Beyond Blame—Mens Rea and Regulatory Crime*, 46 U. LOUISVILLE L. REV. 1 (2007); Morse, *supra* note 7; John Shepard Wiley, Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021 (1999); Kenneth W. Simons, *When Is Strict Liability Just?*, 87 J. CRIM. & CRIMINOLOGY 1075 (1997) [hereinafter Simons, *When is Strict Liability Just?*]; Douglas N. Husak, *Varieties of Strict Liability*, 8 CAN. J.L. & JURIS. 189 (1995) [hereinafter Husak, *Varieties of Strict Liability*]; Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107 (1962); Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731 (1960); Frances Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933) [hereinafter Sayre, *Public Welfare Offenses*].

[9] *See generally* MICHAEL S. MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW (1993); DRESSLER, *supra* note 5, at 85–116; Paul H. Robinson, *Should Criminal Law Abandon the Actus Reus-Mens Rea Distinction?*, *in* ACTION AND VALUE IN CRIMINAL LAW 187 (Stephen Shute, John Gardner & Jeremy Horder eds., 1993); Albin Eser, *The Principle of "Harm" in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests*, 4 DUQ. L. REV. 345 (1965).

[10] Under most statutes, criminal acts must be voluntary. For a discussion of the voluntariness requirement generally, see Ian P. Farrell & Justin F. Marceau, *Taking Voluntariness Seriously*, 54 B.C. L. REV. 1545 (2013); Douglas N. Husak, *Rethinking the Act Requirement*, 28 CARDOZO L. REV. 2437 (2007); Deborah W. Denno, *Crime and Consequences: Science and Involuntary Acts*, 87 MINN. L. REV. 269 (2002); Larry Alexander, *Reconsidering the Relationship Among Voluntary Acts, Strict Liability, and Negligence in Criminal Law*, 7 SOC. PHIL. & POL'Y 84 (1990); Michael S. Moore, *Responsibility and the Unconscious*, 53 S. CAL. L. REV. 1563 (1980).

[11] *See generally* HALL, *supra* note 7, at 247–95; H. L. A. HART & TONY HONORÉ, CAUSATION IN THE LAW (2d ed. 1985); Sanford H. Kadish, *The Criminal Law and the Luck of*

download the subjective intent from a killer's mind, juries and judges often infer the mens rea by examining the killer's behavior.[12]

A corollary concept, the offender's culpability, can also play a role in distinguishing between murder and manslaughter. Culpability refers to the individual's blameworthiness for the homicide.[13] The category[14] of mens rea[15]—the degree to which an individual intended to kill—can often correspond to the level of blame ascribed to the killer.[16]

But the concepts of mens rea and culpability can diverge in criminal law. In strict liability crimes,[17] for instance, the offender's culpability relates only to the actus reus; the mens rea is irrelevant.[18] With the exception of public welfare crimes, the Supreme Court disfavors strict liability crimes,

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the Draw, 84 J. CRIM. L. & CRIMINOLOGY 679 (1994); Michael S. Moore, *Causation*, *in* 1 ENCYCLOPEDIA OF CRIME & JUSTICE 150 (Joshua Dressler ed., 2d ed. 2002); DRESSLER, *supra* note 5, at 181–99; Paul K. Ryu, *Causation in Criminal Law*, 106 U. PA. L. REV. 773 (1958); Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1974).

[12] *See, e.g.*, State v. Myers, 81 A.2d 710, 714 (N.J. 1951); State v. Thompson, 578 So. 2d 1151, 1154 (La. Ct. App. 1991).

[13] According to Professor Dressler, culpability overlaps with mens rea when it concerns the moral blameworthiness of the individual's conduct as distinguished from the individual's actual intent. DRESSLER, *supra* note 5, at 118; *see also* Melanie Myers, *Felony Killings and Prosecutions for Murder: Exploring the Tension Between Culpability and Consequences in the Criminal Law*, 3 SOC. & LEGAL STUD. 149 (1994).

[14] The Model Penal Code, for instance, uses four categories of mens rea: purposely, knowingly, recklessly, and negligently. MODEL PENAL CODE § 2.02 (Am. L. Inst. 1962).

[15] Note that this does not mean that the defendant must be aware that the conduct in question is illegal. Ignorance of the law is generally not an excuse. United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 563 (1971); People v. Marrero, 507 N.E.2d 1068, 1069 (N.Y. 1987). *See generally* HALL, *supra* note 7, at 382–414; Kenneth W. Simons, *Ignorance and Mistake of Criminal Law, Noncriminal Law, and Fact*, 9 OHIO ST. J. CRIM. L. 487 (2012); Dan M. Kahan, *Ignorance of the Law Is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127 (1997); Ronald A. Cass, *Ignorance of the Law: A Maxim Reexamined*, 17 WM. & MARY L. REV. 671 (1976).

[16] Morissette v. United States, 342 U.S. 246, 251 (1952) (referring to mens rea as an "evil-meaning mind"); Elonis v. United States, 135 S. Ct. 2001 (2015) (explaining that a defendant must be "blameworthy in mind" to be guilty); BLACKSTONE, *supra* note 5, at *21 (1769) (referring to mens rea as a "vi[c]ious will"); Frances Bowes Sayre, *The Present Signification of Mens Rea in the Criminal Law*, *in* HARVARD LEGAL ESSAYS 399, 402 (1934) (referring to mens rea as "a general immorality of motive").

[17] *See generally* Leavens, *supra* note 8; Morse, *supra* note 7; Wiley, Jr., *supra* note 8; Simons, *When Is Strict Liability Just?*, *supra* note 8; Husak, *Varieties of Strict Liability*, *supra* note 8; Packer, *supra* note 8; Wasserstrom, *supra* note 8; Sayre, *Public Welfare Offenses*, *supra* note 8.

[18] *See* sources cited *supra* note 17.

often choosing to infer a mens rea requirement even where a statute does not contain one explicitly.[19]

Felony murder, though, provides a counterexample to the Court's veneration of the mens rea requirement, and it does so in the context of the serious crime of homicide.[20] Felony murder is a strict liability crime with respect to the criminal homicide in question.[21] In most jurisdictions, to be guilty of felony murder, an individual must have committed a felony, the commission of which caused someone to die.[22]

There typically is no required mens rea with respect to the homicide in a felony murder case, only the intent to commit the felony.[23] With felonies involving multiple defendants, an individual can also commit felony murder without causing death in a proximate or meaningful way—i.e., literally pulling the trigger—as long as the individual participates in the felony.[24] On its face, the felony operates as a kind of constructive malice that justifies elevating the homicide to first-degree murder.

As explored below, there are a number of rationales for felony murder statutes, but the concept of culpability rests at the center of the analysis.[25] To justify felony murder, the commission of the underlying felony must, in some way, give rise to a level of culpability that allows the mens rea of the felony to substitute for the mens rea of the homicide. For example, a person must rob a bank in a manner that makes them culpable in the death of the security guard at the hands of their accomplice or the police.

The problem becomes that these statutes create an umbrella of murder under which cases of disparate levels of culpability receive the same

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[19] *See, e.g.*, United States v. U.S. Gypsum Co., 438 U.S. 422 (1978) (explaining that statutes without a mens rea have a "generally disfavored status" and indicating an interpretive presumption in favor of a mens rea, even when a statute is silent); *Morissette*, 342 U.S. at 250 (1952) (reading a mens rea standard into a federal statute). This principle pre-dates the Court. *See, e.g.*, Sayre, *Mens Rea*, *supra* note 7, at 974 n.2 ("The general rule of English law is, that no crime can be committed unless there is mens rea. It is a sacred principle of criminal jurisprudence, that the intention to commit the crime, is of the essence of the crime, and to hold, that a man shall be held criminally responsible for an offense, of the commission of which he was ignorant at the time, would be intolerable tyranny.") (citations omitted).

[20] MODEL PENAL CODE § 210.2 cmt. 30 (AM. L. INST. 1980); *see* BLACKSTONE, *supra* note 5, at *200–01 ("And if one intends to do another felony, and undesignedly kills a man, this is also murder."); State v. Williams, 24 S.W.3d 101, 110 (Mo. Ct. App. 2000).

[21] *See* sources cited *supra* note 20.

[22] ROBINSON & WILLIAMS, *supra* note 3, at 53; sources cited *supra* note 20.

[23] *See* ROBINSON & WILLIAMS, *supra* note 3, at 53 ("[The felony murder] rule essentially imputes to the defendant the standard culpability required for murder . . . based on his commission of the underfelying felony.").

[24] *See* discussion *infra* Part I.B.2.

[25] *See* ROBINSON & WILLIAMS, *supra* note 3, at 53.

punishment.[26] Felony murder can encompass both a premeditated killing of a personal enemy and the heart attack of a bystander witnessing a theft crime in which the defendant had no intent to kill.[27] This difference may be more pronounced in states that separate murder into degrees, with felony murder often receiving the same categorization as the most serious murders.[28]

The end run around mens rea that felony murder statutes allow is especially striking where felony murder can lead to the death penalty. Indeed, it is troubling to think that states have executed—and likely will continue to execute—individuals that never intended to kill.

The Eighth Amendment,[29] which bars cruel and unusual punishments, offers a possible bulwark against such anomalous uses of state power.[30] On its face, it seems "cruel and unusual" to execute an individual that did not intend to kill or killed accidentally. Even worse, imposing a death sentence on someone not directly involved in the killing seems like an excessive[31] and outrageously rare[32] occurrence. This becomes particularly true in light of the Supreme Court's teaching that only the worst homicides should be eligible for the death penalty.[33]

Despite this logic, the Supreme Court has not resolved the capital felony murder problem because of its Eighth Amendment evolving standards of decency doctrine, which examines punishments categorically using objective and subjective indicia.[34] The structure of this constitutional test is incongruent with the mens rea problem presented by felony murder statutes.

Further, the Court's recent shift to the right makes the expansion of the Eighth Amendment evolving standards of decency doctrine with respect to

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[26] *See generally* sources cited *supra* note 1.

[27] *See* ROBINSON & WILLIAMS, *supra* note 3, at 55.

[28] *Id.*, at 57.

[29] U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[30] *See* discussion *infra* Parts I.A., II.

[31] "Excessive" is a synonym for "cruel" under the Eighth Amendment. *See* John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 968–69 (2011). For a more extensive discussion of the current and future development of the Eighth Amendment, see generally MEGHAN J. RYAN & WILLIAM W. BERRY III, THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT (2020).

[32] "Rare" is a synonym for "unusual" under the Eighth Amendment. *See* John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1767 (2008) [hereinafter Stinneford, *Original Meaning of "Unusual"*].

[33] *See* discussion *infra* Part I.A.

[34] *See* discussion *infra* Parts II.A., II.B.

felony murder unlikely in the near future.[35] Nonetheless, both conservatives and liberals would, in theory, welcome a more consistent application of criminal sentencing in capital felony murder cases even though they might differ as to the scope and nature of punishments.

To that end, this Article proposes a novel doctrinal approach by which the Court could promote more consistent sentencing outcomes in felony murder cases. Specifically, the Article argues for the adoption of a constitutional merger doctrine that "merges" the crimes felony murder and first-degree murder in capital cases. Just as felony murder cannot serve as a tool by which prosecutors can convert second-degree assault killings into first-degree murders, felony murder should also not serve as a tool to convert noncapital crimes into capital ones.

In Part I, the Article describes the use of capital felony murder and explains its constitutional infirmities under the Eighth Amendment. Part II explores the Supreme Court's failed attempts to apply the Eighth Amendment evolving standards of decency doctrine to capital felony murder cases and why the Court's doctrine remains an ineffective tool to remedy these injustices. In Part III, the Article proposes a new constitutional merger doctrine for capital felony murder cases. Finally, in Part IV, the Article makes the case for adopting the capital felony merger doctrine.

I. THE CONSTITUTIONAL PROBLEMS WITH CAPITAL FELONY MURDER

To assess the relationship of the constitution to capital felony murder, it is instructive to consider the crime's origins. The origins of felony murder remain murky[36] but, as with many criminal law rules, derive in part from the English common law.[37] At common law, felony murder was a malice crime, but the malice was implied, not express.[38] The implied malice related to the

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[35] *See, e.g.*, Bucklew v. Precythe, 139 S. Ct. 1112, 1134 (2019) (upholding a brutal, torturous execution); Michael D. Shear, *Supreme Court Justice Anthony Kennedy Will Retire*, N.Y. TIMES (June 27, 2018), https://www.nytimes.com/2018/06/27/us/politics/anthony-kennedy-retire-supreme-court.html [https://perma.cc/66KS-EBRL].

[36] *See* Fletcher, *supra* note 1, at 421 (1981) (describing the "historical roots" of felony-murder as "tenuous and ill defined"); Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 449–50, 492 (1985) (discussing "disputed origins" of the rule and stating that the doctrine arose from "obscure historical origins").

[37] *See* Paul James, *The Felony Murder Doctrine*, 1 CRIM. L. Q. 33, 33 (1962); *but see* Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 63 (2004) (arguing that the existence of an English common law felony murder rule is a myth).

[38] Hale referred to them as "malice in fact" and "malice in law." James, *supra* note 37, at 36; *see also* 3 STEPHEN, HISTORY OF CRIMINAL LAW OF ENGLAND 21, 57 (1883) (exploring the intersection between malice and felony murder).

commission of the underlying felony.[39] This meant that the malice required for murder came from the nature of the felony, not the nature of the homicide.[40] As the penalty for any felony crime was death, the intellectual gap between malice based on the felony and malice based on the homicide did not really exist.[41] The presence of felonious malice, whether in the commission of a felony during which a death occurred or in the actual homicide, resulted in the same penalty: death.[42]

Over time, a sentencing gap emerged as states limited the death penalty to only rapes and homicides,[43] while punishing other felonies with imprisonment.[44] This meant that felony murder convictions, as capital homicide crimes, could rest on a mens rea, an actus reus related to a nonhomicide felony, or both. This was true even though the underlying felonies could not result in a death sentence.

The British response to the changing norms with respect to felony sentencing was to abolish the crime of felony murder.[45] In the United States, however, capital felony murder persists in most death penalty states.[46] Indeed, this tradition has morphed into the present statutory norm in most capital states, where the crime of felony murder makes one eligible for the death penalty.[47]

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[39] *See* Myers, *supra* note 13, at 150; James, *supra* note 37, at 37.

[40] *See* Myers, *supra* note 13, at 150; James, *supra* note 37, at 37.

[41] James, *supra* note 37, at 37–38.

[42] *Id.*

[43] In the modern, post-*Furman* era, state governments and the federal government reserve the death penalty exclusively for homicides, except in rare situations. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 413 (2008) (finding death sentences for child rape unconstitutional under the Eighth Amendment and categorizing non-homicide crimes that could be constitutional); Coker v. Georgia, 433 U.S. 584 (1977) (finding death sentences for rape unconstitutional under the Eighth Amendment). As the Court in *Kennedy* explained,

> Our concern here is limited to crimes against individual persons. We do not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State. As it relates to crimes against individuals, though, the death penalty should not be expanded to instances where the victim's life was not taken.

Kennedy, 554 U.S. at 413.

[44] *See generally* Harry Elmer Barnes, *The Historical Origin of the Prison System in America*, 12 J. CRIM. L. & CRIMINOLOGY 35 (1921).

[45] *See* James, *supra* note 387, at 38–39.

[46] Twenty-six of the twenty-eight death penalty states use capital felony murder. ROBINSON & WILLIAMS, *supra* note 3, at 55–57; *see* discussion *supra* Part I.B.1.

[47] ROBINSON & WILLIAMS, *supra* note 3, at 55–57; *Aggravating Factors by State*, DEATH PENALTY INFO. CTR. (2021) [hereinafter *Aggravating Factors by State*], https://deathpenaltyinfo.org/facts-and-research/crimes-punishable-by-death/aggravating-factors-by-state.

The justifications for felony murder[48] fall into several categories: deterring criminal conduct, reaffirming the sanctity of human life, transferring intent between individuals, and easing the state's burden of proof.[49] Proponents most often defend felony murder by arguing that it deters felonious behavior[50] by seriously punishing any deaths that occur during the commission of felonies.[51] According to Justice Oliver Wendell Holmes, the law should place the punishment on the individual committing the felony as a risk of engaging in such conduct, even when the death is accidental.[52]

A corollary to this argument is the sanctity of human life argument, which justifies felony murder on the grounds that committing a felony that results in death is more serious than other felonies[53] and, thus, deserves a more serious punishment.[54] It requires suspension of a core principle driving criminal law punishments—intent—by replacing it with the harm caused as the determinant of the outcome.[55]

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[48] Most courts have embraced felony murder. *See* Crump & Crump, *supra* note 1. Although, many have argued that there is no adequate justification for felony murder. *See, e.g.*, MODEL PENAL CODE § 210.2 cmt. 37 (AM. L. INST. 1980) ("Principled argument in favor of felony-murder doctrine is hard to find."); State v. Maldonado, 645 A.2d 1165, 1171 (N.J. 1994) ("The ancient rule . . . has been bombarded by intense criticism and constitutional attack."); Roth & Sundby, *supra* note 36, at 446 ("Criticism of the rule constitutes a lexicon of everything that scholars and jurists can find wrong with a legal doctrine . . . .").

[49] DRESSLER, *supra* note 5, at 518–21.

[50] The weight of the authority with respect to death penalty deterrence suggests that it does not deter crime. John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 794 (2005) (noting that "existing evidence for deterrence is surprisingly fragile"). *See generally* Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751 (2005) (arguing that the weight of the evidence shows that capital punishment does not deter murder). *But see* Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703 (2005) (arguing that executions are morally required if they deter murders). Part of the explanation for this may be the long period of time between the conviction and the execution—typically more than a decade. *See generally* Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-on Sentence*, 46 CASE WESTERN L. REV. 1 (1995).

[51] People v. Washington, 402 P.2d 130, 133 (Cal. 1965). The mens rea disconnect—the intent to commit the crime as opposed to the intent to kill—is probably the most common rejoinder to this argument. DRESSLER, *supra* note 5, at 519; *infra* note 125 and accompanying text.

[52] OLIVER WENDELL HOLMES, THE COMMON LAW 59 (1881).

[53] This argument in a way provides a death-is-different argument from the victim's perspective as opposed to the defendant's, meaning that the difference in outcome—death—makes a higher punishment warranted, irrespective of intent.

[54] Crump & Crump, *supra* note 1, at 361–69.

[55] To be fair, just deserts retribution incorporates both principles—culpability of the criminal actor and harm caused by the conduct. *See generally* ANDREW VON HIRSCH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES (2005). But

The next justification for felony murder relates to transferred intent—the intent to commit a felony is sufficient to provide a basis for murder.[56] This view rests on the idea that possessing a criminal intent satisfies the mens rea concern about not imposing strict liability; there is some criminal intent, even if not to kill.[57]

Finally, some justify felony murder as a tool to ease the burden on prosecutors in homicide cases.[58] Rather than charging individuals with first-degree murder and having to prove intent, prosecutors can charge individuals with felony murder. The effect is an easier ability to achieve a plea agreement, but it does not bear as much on the death penalty itself. In other words, prosecutors will charge the death penalty as an incentive to convince the defendant to plead guilty to avoid the risk of execution.

It is also worth noting, partially in light of the felony murder doctrine's dubious mens rea requirement, that states have placed some limits on felony murder. First, the felony must be inherently dangerous.[59] Some states catalogue specific crimes in their statutes;[60] other states limit the application of statutes to certain crimes based on the abstract danger of the felony.[61]

Second, courts impose a *res gestae* requirement on felony murder, meaning that the death must occur *during* the commission of the crime.[62] This requirement has time, distance, and causation requirements and ensures a link between the crime and the death.[63]

Finally, and most importantly for purposes of this Article, courts impose an independent felony merger requirement.[64] Where the felony is not independent of the act of killing, the two concepts merge, and felony murder cannot serve as a tool to otherwise increase the degree of murder in a case.[65]

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the effect is to move toward a scheme of strict liability, which is perhaps acceptable for a public welfare crime, but not as much for homicide.

[56] State v. O'Blasney, 297 N.W.2d 797, 798 (S.D. 1980); DRESSLER, *supra* note 5, at 520.

[57] *See supra* note 8 and accompanying text.

[58] DRESSLER, *supra* note 5, at 521.

[59] People v. Burroughs, 678 P.2d 894, 900 (Cal. 1984); Fisher v. State, 786 A.2d 706, 727 (Md. 2001); DRESSLER, *supra* note 5, at 521–22.

[60] ROBINSON & WILLIAMS, *supra* note 3, at 59 n.6, 60 n.8, 61 n.11, 62 n.13; *Summary of State Death Penalty Statutes*, *supra* note 4.

[61] People v. Patterson, 778 P.2d 549, 558 (Cal. 1989); State v. Anderson, 666 N.W.2d 696, 701 (Minn. 2003); DRESSLER, *supra* note 5, at 521–22.

[62] State v. Leech, 790 P.2d 160, 163 (Wash. 1990); DRESSLER, *supra* note 5, at 525–27.

[63] State v. Griffin, 112 P.3d 862, 870 (Kan. 2005); People v. Gillis, 712 N.W.2d 419, 432–33 (Mich. 2006); DRESSLER, *supra* note 5, at 525–27.

[64] People v. Chun, 203 P.3d 425 (Cal. 2009); Lewis v. State, 22 So. 3d 753, 184–85 (Fla. Dist. Ct. App. 2010); DRESSLER, *supra* note 5, at 523–24.

[65] *See* discussion *infra* Part III.A.

For instance, if an individual assaults another person and the force of their assault kills the person, the crime cannot be a felony murder. This is because the act of killing and the felony of assault were the same act; there was no independent felony. As discussed in Part III, this concept provides the model for the capital felony merger doctrine this Article proposes.

A. THE NARROWING THE CLASS OF MURDERERS REQUIREMENT

At its core, capital felony murder warrants strong objections because it contradicts the Supreme Court's modern reasoning concerning the death penalty and the scope of acceptable punishments under the Eighth Amendment. In its landmark decision in *Furman v. Georgia*,[66] the Court struck down the death penalty as applied under the Eighth Amendment.[67] The *per curiam* decision in *Furman* found that the death penalty, as applied, violated the Eighth Amendment as a cruel and unusual punishment.[68] This decision had the practical effect of striking down the death penalty nationally.

Although two justices rejected the death penalty as a per se unconstitutional punishment,[69] the controlling part of the concurring opinions centered on the death penalty's constitutional infirmity because states applied it in an arbitrary and random manner.[70] In other words, the Eighth Amendment requires, at the very least, that states impose death sentences in a manner that is not arbitrary and random.[71]

In five separate opinions, the majority justices enunciated two principles central to any evaluation of whether the death penalty, as applied, is constitutional—(1) death is different;[72] and (2) the Eighth Amendment

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[66] 408 U.S. 238 (1972) (per curiam).

[67] *Id.*

[68] *Id.*

[69] *Id.* at 286 (Brennan, J., concurring); *id.* at 314 (Marshall, J., concurring).

[70] *Id.* at 309 (1972) (Stewart, J., concurring) (likening the death penalty to being struck by lightning because it was "so wantonly and so freakishly imposed"); *id.* at 293 (Brennan, J., concurring) ("Indeed, [the administration of the death penalty] smacks of little more than a lottery system."); *id.* at 313 (White, J., concurring) ("[T]he death penalty is exacted with great infrequency even for the most atrocious crimes . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.").

[71] As Justice Brennan explained:

> No one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison. Crimes and criminals simply do not admit of a distinction that can be drawn so finely as to explain, on that ground, the execution of such a tiny sample of those eligible.

Id. at 294 (Brennan, J., concurring).

[72] Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 370 (1995) (crediting Justice Brennan as the originator of this line of argument); *see also Furman*,

requires states to provide some intelligible principle to separate the homicide crimes eligible for the death penalty from those that are not.[73] Over time, the Court clearly established both principles in its cases.[74] These principles apply in all capital contexts, whether the charged crime is first-degree murder or felony murder.

The "death is different"[75] concept, elucidated in *Furman*,[76] served as the basis for the Court drawing an Eighth Amendment bright line that accords capital cases much higher constitutional scrutiny than noncapital cases.[77] The Court considers the death penalty to be a different, higher form of punishment because it is the most severe punishment that the state can impose—the taking of a human life.[78] The death penalty is also different, according to the Court, because it constitutes an irrevocable punishment; there is no way to

408 U.S. at 286 (Brennan, J., concurring) ("Death is a unique punishment in the United States."); Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 118 (2004) (discussing the Court's death-is-different jurisprudence).

[73] Walton v. Arizona, 497 U.S. 639, 652–53 (1990); Zant v. Stephens, 462 U.S. 862, 870 (1983); Gregg v. Georgia, 428 U.S. 153, 195, 198 (1976).

[74] The Court has long held that "death is different." *See, e.g.*, Ring v. Arizona, 536 U.S. 584, 616–17 (2002) (Breyer, J., concurring) (explaining as "death is not reversible," DNA evidence that the convictions of numerous persons on death row are unreliable is especially alarming); Spaziano v. Florida, 468 U.S. 447, 460 n.7 (1984) ("[T]he death sentence is unique in its severity and in its irrevocability . . . ."); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (Brennan, J., concurring) (noting that death differs from life imprisonment because of its "finality"); *Gregg*, 428 U.S. at 187 (noting that "[t]here is no question that death as a punishment is unique in its severity and irrevocability").

[75] In recent years, the Court has expanded the category of "different" cases to include juvenile life without parole sentences. *See* Montgomery v. Louisiana, 577 U.S. 190 (2016) (applying the Court's decision in *Miller* retroactively and reaffirming the principle that juveniles are different); Miller v. Alabama, 567 U.S. 460 (2012) (proscribing mandatory juvenile life without parole sentences under the Eighth Amendment); Graham v. Florida, 560 U.S. 48 (2010) (barring the imposition of juvenile life without parole sentences on individuals for non-homicide crimes).

[76] *See* sources cited *supra* note 72.

[77] Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1145 (2009) (acknowledging the Court's different treatment of capital cases). *See generally* Douglas A. Berman, *A Capital Waste of Time? Examining the Supreme Court's "Culture of Death,"* 34 OHIO N. U. L. REV. 861 (2008).

[78] Some have argued that life without parole constitutes a more severe punishment, but the Court has been consistent in its view.

undo its infliction.[79] The imposition of a death sentence is final because the inmate dies.[80]

In *Gregg v. Georgia*[81] and its companion cases,[82] the Court reinstated the death penalty and emphasized the second principle—that a constitutional capital punishment system must narrow the class of murderers eligible for the death penalty.[83] According to the plurality, the states that had constitutional systems used some legislative tool, such as aggravating factors[84] or jury questions,[85] as a basis for separating out the "worst of the worst" murderers who would be eligible for the death penalty from garden-variety murderers that would not be.[86]

The debate between Justices Stevens and Scalia in *Walton v. Arizona* concerning the nature of individualized sentencing consideration underscores the importance of the narrowing principle.[87] In *Walton*, Scalia argued that requiring individualized sentencing determinations was contradictory to the narrowing principle *Gregg* required.[88] Specifically, Scalia claimed that considering each case individually after narrowing the class of murderers based on aggravating factors[89] effectively reintroduced the arbitrariness and

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[79] *See supra* note 74. This is not an insubstantial concern. There have been one hundred and sixty-five individuals exonerated from death row after being found innocent. *Innocence*, DEATH PENALTY INFO. CTR. (2021), https://deathpenaltyinfo.org/policy-issues/innocence [https://perma.cc/BF5X-KZUL].

[80] *See supra* note 74.

[81] 428 U.S. 153 (1976).

[82] The Court decided four other cases on the same day as *Gregg*, upholding Florida's and Texas's death penalty statutes and striking down North Carolina's and Louisiana's death penalty statutes. Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

[83] *Gregg*, 428 U.S. at 206–07.

[84] *Id.*; *Proffitt*, 428 U.S. at 259–60.

[85] *Jurek*, 428 U.S. at 276–77.

[86] *Gregg*, 428 U.S. at 206–07.

[87] Walton v. Arizona, 497 U.S. 639, 656–73 (Scalia, J., concurring in part); *id.* at 708 (Stevens, J., dissenting).

[88] *Id.* at 656–73 (Scalia, J., concurring in part). Scalia colorfully explained,

> To acknowledge that 'there perhaps is an inherent tension' between this line of cases and the line stemming from *Furman*, is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II. And to refer to the two lines as pursuing 'twin objectives,' is rather like referring to the twin objectives of good and evil. They cannot be reconciled.

Id. at 664 (internal citations omitted).

[89] Interestingly, felony murder serves as an aggravating factor in most jurisdictions. *See Aggravating Factors by State*, *supra* note 47.

randomness that the Court sought to eliminate.[90] By contrast, Stevens explained that assessing the individualized characteristics of each offender complimented, as opposed to undid, the narrowing of those individuals eligible for the death penalty.[91] The one thing the Justices agreed upon, however, was the primacy of the narrowing principle as a constitutional requirement needed to address the Eighth Amendment problem of random and arbitrary capital sentencing outcomes that *Furman* highlighted.[92]

B. THE FLAWED ELEMENTS OF CAPITAL FELONY MURDER

Because the Eighth Amendment compels a high level of defendant culpability prior to issuing a death sentence, execution is reserved for only the most serious felons—those with aggravated murder convictions. The constitutionality of felony murder statutes should rest, at least in part, on satisfying this premise. In practice, however, the traditional elements of capital felony murder diverge from this ideal.

In most jurisdictions, felony murder is categorized as first-degree murder.[93] In an overwhelming majority of capital jurisdictions, felony murder can yield the death penalty as a form of aggravated murder, often with the underlying felonies counting as aggravating factors.[94]

A close examination of the elements of felony murder suggests states should reach the opposite conclusion and decide that felony murder should never be a capital crime.[95] Felony murder, by itself, does not constitute aggravated murder even though most state statutes indicate otherwise.[96] Specifically, the act and intent requirements of felony murder and their

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[90] *Walton*, 497 U.S. at 656–73 (Scalia, J., concurring in part).

[91] *Id.* at 708 (Stevens, J., dissenting).

[92] It is not clear that any of the *Furman* problems have actually been solved. *See* Glossip v. Gross, 135 S. Ct. 2726 (2015) (Breyer, J., dissenting) (cataloging all of the many flaws with the modern death penalty in the United States, including arbitrariness); Walker v. Georgia, 555 U.S. 979 (2008) (Stevens, J., dissenting from denial of certiorari); *see also* William W. Berry III, *Unusual Deference*, 70 FLA. L. REV. 315 (2018) [hereinafter Berry, *Unusual Deference*]. Indeed, three justices have renounced the death penalty after initially affirming it. *See generally* William W. Berry III, *Repudiating Death*, 101 J. CRIM. L. & CRIMINOLOGY 439 (2011) [hereinafter Berry, *Repudiating Death*].

[93] *See* ROBINSON & WILLIAMS, *supra* note 3, at 56–57; *see generally* GUYORA BINDER, FELONY MURDER (2012).

[94] *Aggravating Factors by State*, *supra* note 47; *Summary of State Death Penalty Statutes*, *supra* note 4.

[95] When I say capital crime here, I mean that all felony murders should not be eligible for the death penalty. Juries increasingly choose not to sentence individuals to death for death-eligible crimes, instead choosing life-without-parole sentences as an alternative. Of course, life without parole constitutes its own kind of death sentence.

[96] *See Summary of State Death Penalty Statutes*, *supra* note 4.

relationship to the purposes of punishment indicate that felony murder does not possess any of the narrowing qualities required under the Court's jurisprudence. The commission of a felony during which a death occurs does not indicate any particular severity of killing at all. A felony murder could involve a premeditated cold-blooded murder that warrants a first-degree murder conviction, but it could also involve a negligent killing in which one of the felony murderers did not kill anyone. Additionally, it is not clear that a death sentence for felony murder would satisfy any of the traditional theories of punishment.[97]

Before looking specifically at each felony murder element, one caveat is necessary, which relates to the proposal in Part III. First-degree murders—ones with a purposeful mens rea and ones where the defendant in question committed the homicide—can be part of the class of cases that fall under the heading of felony murder. For instance, an individual that rapes and kills a significant other as part of a premeditated plan commits "felony murder," but the same facts could also give rise to first-degree murder without the felony murder doctrine. The point is that the category of felony murder is over-inclusive because it relies on different parameters and, thus, includes some cases that fit the *Furman–Gregg* class of death-eligible cases as well as some cases that, without the felony murder doctrine, might not even qualify as murder.

1. Mens Rea

Traditionally, felony murder does not require any mental state with respect to the homicide.[98] It only requires the intent to commit the underlying felony.[99] A survey of state statutes shows that this approach still prevails, at least with respect to the majority of jurisdictions.[100] Twenty-eight states[101]—

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[97] *See* discussion *infra* Part II.A.2. It is not clear that a felony murderer would deserve the death penalty (retribution) or that imposing such a sentence could diminish the number of felony murders (deterrence) because in some cases, there would be no intent to kill.

[98] *See generally* BINDER, *supra* note 93.

[99] *Id.*

[100] ROBINSON & WILLIAMS, *supra* note 3, at 54.

[101] *Id.* at 54, 56–57. The states are: Alaska, Arizona, Colorado, Connecticut, District of Columbia, Florida, Georgia, Indiana, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, New York, North Carolina, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Utah, Washington, West Virginia, Wisconsin, and Wyoming.

nineteen of which are death penalty jurisdictions[102]—impose no culpability requirement at all for felony murder cases.[103] These jurisdictions allow felony-murder convictions for individuals who cause a human being's death during the course of committing felonies, including individuals who were not negligent and individuals who reasonably believe that their participation in the felony does not impose risk of death.[104]

For instance, Georgia's felony murder statute provides: "A person commits the offense of murder when, in the commission of a felony, he or she causes the death of another human being irrespective of malice."[105] Similarly, the Tennessee felony murder statute provides that first-degree murder includes:

> A killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, act of terrorism, arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse, aggravated child neglect, rape of a child, aggravated rape of a child or aircraft piracy . . . .[106]

These statutes and other similar statutes make clear that there is no mens rea requirement with respect to the homicide element of a felony murder conviction.

Two additional categories of states impose a minimal mens rea requirement, rising above strict liability, but barely. Eight states,[107] five of which impose the death penalty,[108] presume malice when the dangerous consequences of the defendant's actions were foreseeable.[109] This

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[102] *State by State*, DEATH PENALTY INFO. CTR. (2021) [hereinafter *State by State*], https://deathpenaltyinfo.org/state-and-federal-info/state-by-state [https://perma.cc/5DDE-33DK] (last visited May 19, 2021).

[103] ROBINSON & WILLIAMS, *supra* note 3, at 56–57; *see, e.g.*, CONN. GEN. STAT. ANN. § 53a-54c; D.C. CODE ANN. § 22-2101; FLA. STAT. ANN. § 782.04; MD. CODE ANN., CRIM. LAW § 2-201; MO. ANN. STAT. § 565.021; OKLA. STAT. ANN. tit. 21, § 701.7; *see also* BINDER, *supra* note 93, at 183–89 (sorting the nation's jurisdictions by what culpability requirement is required for felony murder liability).

[104] ROBINSON & WILLIAMS, *supra* note 3, at 53.

[105] GA. CODE ANN. § 16-5-1(c) (West 2020).

[106] TENN. CODE ANN. § 39-13-202 (West 2020).

[107] ROBINSON & WILLIAMS, *supra* note 3, at 56. The states are California, Idaho, Iowa, Mississippi, Nevada, Rhode Island, South Carolina, and Virginia.

[108] *See State by State*, *supra* note 102.

[109] ROBINSON & WILLIAMS, *supra* note 3, at 56; CAL. PENAL CODE § 189; IDAHO CODE ANN. §§ 18-4001, 4003; IOWA CODE ANN. § 707.1; MISS. CODE ANN. § 97–3–19(c); NEV. REV. STAT. § 200.010; R.I. GEN. LAWS § 11–23–1; S.C. CODE ANN. § 16-3-10; VA. CODE ANN. § 18.2–33; People v. Chun, 203 P.3d. 425 (Cal. 2009); People v. Washington, 402 P.2d 130 (Cal. 1965); State v. Lankford, 781 P.2d 197, 203 (Idaho 1989); State v. Heemstra, 721 N.W.2d 549, 554 (Iowa 2006); State v. Ragland, 420 N.W.2d 791 (Iowa 1988) (overruled on other grounds); State v. Taylor, 287 N.W.2d 576, 577 (Iowa 1980); State v. Bennett, 503

foreseeability standard is tantamount to requiring a mens rea of mere negligence. Other states, meanwhile, impute malice to the killer even when he could not have foreseen the danger, making the "malice" offense no more than a strict liability offense.[110] Although there is some variety among these jurisdictions, they are consistent in setting their mens rea threshold at negligence or below.[111]

The second group of manslaughter-mens rea states—six jurisdictions,[112] of which two are death penalty states[113]—requires a mens rea of negligence to convict an individual of felony murder.[114] There is some variation in the mechanics of these statutes, but they are consistent in turning some crimes that would be negligent homicide or involuntary manslaughter into felony murder.[115] Notably, Texas is among these states, and Texas is responsible for a third of all of executions nationwide since *Furman*.[116] There are several

N.W.2d 42, 45 (Iowa Ct. App. 1993); Boyd v. State, 977 So. 2d 329 (Miss. 2008); Lee v. State, 759 So. 2d 390 (Miss. 2000); Nay v. State, 167 P.3d 430, 434 (Nev. 2007); Labastida v. State, 986 P.2d 443 (Nev. 1999); In re Leon, 410 A.2d 121, 124 (R.I. 1980); Lowry v. State, 657 S.E.2d 760 (S.C. 2008); State v. Norris, 328 S.E.2d 339, 342 (S.C. 1985) (overruled on other grounds); Gore v. Leeke, 199 S.E.2d 755 (S.C. 1973); RALPH KING ANDERSON, JR., S.C. REQUESTS TO CHARGE-CRIMINAL § 2–1 (2d ed. 2012) (jury instructions on murder); RALPH KING ANDERSON, JR., S.C. REQUESTS TO CHARGE-CRIMINAL § 2–3 (2d ed. 2012) (jury instructions on felony murder); Wooden v. Commonwealth, 284 S.E.2d 811, 814, (Va. 1981); Cotton v. Commonwealth, 546 S.E.2d 241, 243 (Va. Ct. App. 2001); *accord* Kennemore v. Commonwealth, 653 S.E.2d 606, (Va. Ct. App. 2007); *see also* BINDER, *supra* note 93, at 183–89 (describing these jurisdictions as conditioning felony murder on malice, which is characterized by "the imposition of danger").

110 BINDER, *supra* note 93, at 186–89.

111 ROBINSON & WILLIAMS, *supra* note 3, at 56.

112 *Id.* The states are Alabama, Delaware, Maine, New Jersey, Pennsylvania, and Texas. *Id. See* ALA. CODE § 13A-6-1; *id.* § 13A-6-2 (Official Commentary, 256); *id.* § 13A-2-4(b); DEL. CODE ANN. tit.11, §§ 635–36; ME. REV. STAT. ANN. tit.17-A, § 202; N.J. STAT. ANN. §§ 2C:2-2–3; 18 PA. CONS. STAT. § 302(a); *id.* §§ 2501–2; TEX. PENAL CODE ANN. § 6.02 (2005); *id.* § 19.01 (1993); Witherspoon v. State, 33 So. 3d 625 (Ala. Crim. App. 2009); *Ex parte* Mitchell, 936 So. 2d 1094 (Ala. Crim. App. 2006); Lewis v. State, 474 So. 2d 766 (Ala. Crim. App. 1985); State v. Martin, 573 A.2d 1359, 1375 (N.J. 1990); Commonwealth v. Hassine, 490 A.2d 438, 454, (Pa. Super. Ct. 1985); State v. Rodriguez, 953 S.W.2d 342 (Tex. App. 1997); State v. Kuykendall, 609 S.W.2d 791 (Tex. Crim. App. 1980).

113 *See State by State*, *supra* note 102.

114 ROBINSON & WILLIAMS, *supra* note 3, at 56.

115 *Id.*

116 *Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR. (2021), https://deathpenaltyinfo.org/executions/executions-overview/number-of-executions-by-state-and-region-since-1976 [hereinafter *Executions by State and Region Since 1976*].

examples of Texas executing individuals convicted of felony murder who did not kill.[117]

Two other jurisdictions, Illinois and North Dakota,[118] require a slightly higher mens rea—recklessness[119]—for felony murder.[120] Neither state has retained the death penalty.[121]

Finally, seven jurisdictions,[122] including two capital states,[123] have essentially rejected the felony murder rule.[124] In these states, the presence of a felony does not expand murder beyond its traditional mens rea requirements: purposeful or knowing killing, or, in some cases, extreme recklessness.[125]

Collectively, twenty-five of the twenty-seven capital states allow for felony murder convictions for crimes with a nonmurder mens rea of negligence or strict liability.[126] But "death is different," so the consequence of a death sentence makes the substitution of the felony mens rea for the homicide mens rea especially objectionable. Indeed, the degree to which a state's intentional killing of a prisoner is legitimate should rest on the degree to which the prisoner himself intended to kill their victims.

Professors Binder, Weisberg, and Fissell have correctly argued that states should require a minimum mens rea of recklessness to impose the death

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[117] *See Executed But Did Not Directly Kill Victim*, DEATH PENALTY INFO. CTR. (2021), https://deathpenaltyinfo.org/executions/executions-overview/executed-but-did-not-directly-kill-victim (providing a partial list of such cases).

[118] ROBINSON & WILLIAMS, *supra* note 3, at 55–56.

[119] *See generally* Guyora Binder, Brenner Fissell & Robert Weisberg, *Capital Punishment of Unintentional Felony Murder*, 92 NOTRE DAME L. REV. 1141 (2017) [hereinafter Binder, Fissell & Weisberg, *Unintentional Felony Murder*]; Guyora Binder, Brenner Fissell & Robert Weisberg, *Unusual: The Death Penalty for Inadvertent Killing*, 93 IND. L.J. 549 (2018).

[120] *See* 720 ILL. COMP. STAT. 5/9-1(a)(3) (2010); *id.* 5/9-1(a)(2) (2010); *id.* 5/2-8 (1996); *id.* 5/9-1 (1961); N.D. CENT. CODE § 12.1-16-01 (1993); *id.* § 12.1-02-02.3 (1973); *id.* § 12.1-02-02.1, 2.2 (1973); People v. Guest, 503 N.E.2d 255 (Ill. 1986); People v. McEwen 157, 510 N.E.2d 74, 79 (Ill. App. Ct. 1987).

[121] *See State by State*, *supra* note 102.

[122] ROBINSON & WILLIAMS, *supra* note 3, at 55. The states are Arkansas, Hawaii, Kentucky, Michigan, New Hampshire, New Mexico, and Vermont.

[123] *See State by State*, *supra* note 102.

[124] ARK. CODE ANN. § 5-10-102 (2006); *id.* § 5-10-103 (2006); HAW. REV. STAT. § 707-701 (2006) (no felony murder rule); KY. REV. STAT. ANN. § 507.020 (1984) (no felony murder rule); N.H. REV. STAT. ANN. § 630:1-b (1974); *id.* § 626:7(2) (1971); N.M. STAT. § 30-2-1 (1978); People v. Aaron, 299 N.W.2d 304, 316 (Mich. 1980); State v. Ortega, 817 P.2d 1196, 1205 (N.M. 1991); State v. Doucette, 470 A.2d 676, 680 (Vt. 1983); BINDER, *supra* note 93, at 183–89.

[125] DRESSLER, *supra* note 5, at 508–17.

[126] *See State by State*, *supra* note 102; ROBINSON & WILLIAMS, *supra* note 3, at 56.

penalty.[127] If one takes *Furman* and *Gregg* seriously, though, perhaps the threshold should be even higher. *Gregg* commands that the law should narrow the class of homicides eligible for the death penalty. The threshold for murder—extreme recklessness—should not qualify a case for the death penalty in most circumstances. Instead, a presumption against death-eligibility should exist for cases where the offender's mens rea falls below the purposeful threshold. If any case warrants the death penalty under the Supreme Court's current framework,[128] the individual in question's mens rea should exhibit premeditation or some similar level of intentionality in most cases. If anything, the state's mens rea, which engages in an intentional, premeditated killing when it executes someone, should not exceed the executed individual's mens rea. To be sure, one should not receive a death sentence for an accidental killing.

2. Actus Reus

The mens rea issue, though a central complaint against felony murder, is not the only doctrinal flaw of capital felony murder. The actus reus element also can, in some situations, make felony murder statutes even less just.

Although most felony murder statutes require that the individual in question commit the homicide or otherwise cause the death,[129] complicity statutes open the door to felony murder convictions for individuals who did not act in a way that caused the homicide.[130] In the capital context, this can allow a state to execute an individual who did not kill and did not intend to kill.[131]

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[127] *See* sources cited *supra* note 119.

[128] As indicated above, this Article is operating within the practical confines of the current system. As I have argued elsewhere, the death penalty should be abolished. *See* William W. Berry III, *The European Prescription for Ending the Death Penalty*, 2011 WISC. L. REV. 1003 (2011); Berry, *Repudiating Death*, *supra* note 92.

[129] ROBINSON & WILLIAMS, *supra* note 3.

[130] *See generally* Joseph Trigilio & Tracy Casadio, *Executing Those Who Do Not Kill: A Categorical Approach to Proportional Sentencing*, 48 AM. CRIM. L. REV. 1371 (2011).

[131] For a discussion of the Court's Eighth Amendment jurisprudence on this issue, see *infra* Part II.

Complicity doctrine in this context[132] can take two forms—(1) aiding and abetting, and (2) conspiracy.[133] When an individual aids and abets another, complicity law holds the individual liable for the conduct of the other person if he assists the other person in the commission of an offense.[134] Accessory liability thus extends the actus reus requirement to those who participate and help, including acts they did not commit.[135] This accessory doctrine can implicate individuals that did not participate in the killing and would otherwise fall outside of the felony murder statute's actus reus requirements.

Similarly, conspiracy statutes can cast a wide net over individuals and attribute the conduct of co-conspirators to them.[136] The basis for this broadening of liability lies in the agreement to participate in the criminal conspiracy.[137] Once an individual agrees to participate, the individual can be liable for all of his co-conspirators' criminal conduct done in furtherance of the conspiracy.[138] Perhaps the most extensive version of such liability is *Pinkerton* liability, which makes an individual liable for all his co-conspirators' acts even where the criminal conduct goes beyond the original conspiracy agreement, as long as it is a reasonable and probable consequence.[139]

The actus reus problem with complicity and conspiracy statutes mirrors the mens rea problem previously discussed. Felony murder statutes typically require an individual to cause the death of another, but complicity and conspiracy both diminish this requirement. To the extent an individual actively aids and abets another in killing—such as by physically subduing a victim so the other can stab the victim to death—the intellectual leap may not be that significant as the accomplice is acting to cause the death of the victim.

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[132] Complicity law, like felony murder, has seen its share of criticism. *See, e.g.*, GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW §§ 8.5–8.8 (1978); GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART §§ 118–41 (2d ed. 1961); Douglas Husak, *Abetting a Crime*, 33 L. & PHIL. 41 (2014); Michael Heyman, *Losing All Sense of Just Proportion: The Peculiar Law of Accomplice Liability*, 87 ST. JOHN'S L. REV. 129 (2013); Michael S. Moore, *Causing, Aiding, and the Superfluity of Accomplice Liability*, 156 U. PA. L. REV. 395 (2007); Robert Weisberg, *Reappraising Complicity*, 4 BUFF. CRIM. L. REV. 217 (2000); Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91 (1985); Sanford H. Kadish, *Complicity, Cause, and Blame: A Study in the Interpretation of Doctrine*, 73 CALIF. L. REV. 323 (1985).

[133] *See* DRESSLER, *supra* note 5, at 461.

[134] *See id.*

[135] *See id.*

[136] *See id.*

[137] *See id.*

[138] *See id.*

[139] Pinkerton v. United States, 328 U.S. 640 (1946).

But the complicity doctrine encompasses much more. The modern application includes the various iterations of common law complicity—accessory before the fact, accessory after the fact, principal in the second degree—and simplifies it to focus on assistance in the commission of the crime.[140]

Where an individual actively helps in some way, he becomes an accomplice and faces the same liability as the principal actor. What felony murder does to this doctrine is limit the requirement to helping with the felony, but not necessarily the killing. If an individual is an accessory to a bank robbery, and the principal kills during the robbery, the accomplice is guilty of felony murder. Just as felony murder statutes typically only require a mens rea for the underlying felony, accomplice liability under a felony murder statute typically relates only to the act of assisting in the felony's commission.

Another notable wrinkle with complicity law relates to its lack of a causation requirement. An accomplice is liable for the primary individual's conduct even if his assistance was causally unnecessary to the commission of the offense.[141] For example, a getaway driver's service may not be necessary to commit the crime, but the driver would be an accomplice irrespective of the causal connection between the assistance and the commission of the crime.

This rule undermines the requirement of felony murder statutes that an individual cause the victim's death.[142] If one is an accomplice, one can be liable of felony murder even though one's actions did not cause the felony crime, much less the death.[143] So, if a defendant assists another in the commission of a crime, even if the assistance was not necessary to commit the crime, he is an accessory and faces the same criminal liability as the principal. And if someone dies during the commission of the crime, the accessory has committed felony murder despite not proximately killing anyone or helping another kill anyone.

Conspiracy liability for felony murder can go even further than complicity. In the case of complicity, there exists at least some requirement of assisting in the felony; with conspiracy, in many cases, the only affirmative acts that statutes require is an agreement to participate in a crime and a substantial step toward acting on that agreement. The conspiracy

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[140] *See, e.g.*, PAUL MARCUS, LINDA A. MALONE, CARA H. DRINAN & WILLIAM W. BERRY III, CRIMINAL LAW 221–66 (2021).

[141] DRESSLER, *supra* note 5, at 472; State *ex rel.* Martin, Att'y Gen. v. Tally, 15 So. 722, 738–39 (Ala. 1893).

[142] ROBINSON & WILLIAMS, *supra* note 3, at 53.

[143] DRESSLER, *supra* note 5, at 472.

doctrine thus can ensnare individuals who have not taken any affirmative act toward causing the death of another.

This is not to say that the conspiracy doctrine has no place in criminal law. Rather, it is problematic in the context of capital felony murder because death is different. As such, imposing death for such indirect participation seems a bridge too far. It may not be unreasonable to punish an individual for participation in a conspiracy that leads to the death of another. But, where the acts of the individual do not proximately cause a person's death, capital felony murder should constitute a cruel and unusual punishment.

Finally, some states apply felony murder statutes where a defendant's accomplice or co-conspirator is the sole person to die during the felony—even at the hands of the police.[144] Most jurisdictions follow the agency rule that an individual can only be liable for deaths caused by his agents and do not allow felony murder liability for a killing by a nonfelon, but some states do not follow this rule.[145] The agency rule approach makes sense—a bank robber surely does not intend for the police or a security guard to kill his accomplice. Further, it is unlikely that a killing by a nonfelon is within the *res gestae* of the commission of the felony and, likewise, would be unlikely to have any significant deterrent effect.[146]

The felony murder crime's actus reus and its likelihood of capturing individuals that did not participate in the homicide through complicity or conspiracy contravenes *Furman*'s and *Gregg*'s death-is-different principle. That principle aims to impose heightened scrutiny before making a homicide eligible for the death penalty for accomplices and co-conspirators. Again, extending criminal liability to such individuals may be appropriate, but imposing the death penalty seems extreme for those who did not kill or otherwise cause the death of the victim. Because death is such a unique and severe punishment, the felony murder doctrine should not include cases where one would only satisfy the actus reus for murder using complicity or conspiracy.

As with mens rea, the alternative methods of establishing actus reus also add individuals to the class of criminal actors eligible for the death penalty. Rather than help to separate the most culpable offenders from the rest, these actus reus doctrines can, in individual cases, undermine the constitutional narrowing requirement.

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[144] DRESSLER, *supra* note 5, at 527–28. An example of this would be a police killing of one's co-felon during a robbery.

[145] *See* State v. Sophophone, 19 P.3d 70, 74–76 (Kan. 2001); State v. Canola, 374 A.2d 20, 29–30 (N.J. 1977); Davis v. Fox, 735 S.E.2d. 259, 262 (W. Va. 2012). *But see* State v. Oimen, 516 N.W.2d 399, 407–08 (Wis. 1994).

[146] DRESSLER, *supra* note 5, at 528.

Given the tension between felony murder and the Eighth Amendment's principles, it is possible for the Supreme Court to limit capital felony murder to address these issues. In the next Section, the Article explores the Court's application of its evolving standards of decency doctrine to capital felony murder.

II. THE COURT'S FAILED EIGHTH AMENDMENT FELONY MURDER JURISPRUDENCE

After *Gregg*, the Supreme Court established its evolving standards of decency doctrine as a tool to assess whether a particular category of punishment was cruel and unusual.[147] In *Trop v. Dulles*, the Court held that "[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[148] Relying on its death-is-different mantra, the Court applied this principle in capital cases to assess the constitutionality of death sentences under particular circumstances.[149]

A. THE EVOLVING STANDARDS DOCTRINE

The evolving standards of decency doctrine subsequently became the basis for categorically excluding the imposition of the death penalty under the Eighth Amendment for certain crimes—rape[150] and child rape[151]—and for certain individuals—intellectually disabled[152] and juveniles.[153] The

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[147] Kennedy v. Louisiana, 554 U.S. 407 (2008) (finding the death sentences for child rape unconstitutional); Roper v. Simmons, 543 U.S. 551 (2005) (finding death sentences for juvenile offenders unconstitutional); Atkins v. Virginia, 536 U.S. 304 (2002) (finding death sentences for intellectually disabled offenders unconstitutional); Tison v. Arizona, 481 U.S. 137 (1987) (narrowing the holding from *Enmund*); Enmund v. Florida, 458 U.S. 782 (1982) (finding death sentences for some felony murders unconstitutional); Coker v. Georgia, 433 U.S. 584 (1977) (finding death sentences for rape unconstitutional).

[148] Trop v. Dulles, 356 U.S. 86, 101 (1958); *see also* Stinneford, *Original Meaning of "Unusual," supra* note 32 (explaining that the original meaning of the Eighth Amendment was that it would evolve over time); Weems v. United States, 217 U.S. 349, 366 (1910).

[149] *See* cases cited *supra* note 147.

[150] *Coker*, 433 U.S. 584 (1977).

[151] *Kennedy*, 554 U.S. 407 (2008).

[152] Moore v. Texas, 137 S. Ct. 1039 (2017) (finding Texas's method for determining which criminal offenders are intellectually disabled unconstitutional); Hall v. Florida, 572 U.S. 701 (2014) (finding Florida's method for determining which criminal offenders are intellectually disabled unconstitutional); *Atkins*, 536 U.S. 304 (finding death sentences for intellectually disabled offenders unconstitutional).

[153] The Court extended its categorical exceptions for juveniles to include juvenile life without parole (JWLOP), barring mandatory JLWOP sentences and JLWOP sentences for

Court's application of the evolving standards doctrine involves a two-part test. First, the Court examines the objective indicia of societal consensus with respect to the punishment at issue.[154] This inquiry involves examining the states' practices, as permitted by state statutes, in allowing the kind of punishment in the context in question—i.e., how many states allow the execution of juvenile offenders.[155] The Court has also relied on other objective indicia such as jury verdicts, the direction of change within legislatures, and international norms, but state-counting of statutes remains the primary inquiry.[156]

One way to think of this objective inquiry is as a way to measure unusualness.[157] If as society evolves a particular punishment becomes disfavored and its use becomes rarer, the Court can deem the practice unconstitutionally rare, such that allowing its continued imposition would subject the individual to an unusual punishment.

On its face, this approach to measuring unusualness makes sense. The approach, however, results in the Court's abdication of its role under the Constitution as a protector of counter-majoritarian rights.[158] The Bill of Rights, including the Eighth Amendment, serves as a limit upon the exercise of government power.[159] With the incorporation of the Eighth Amendment, this includes state power.[160]

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non-homicide crimes. Miller v. Alabama, 567 U.S. 460 (2012); Graham v. Florida, 560 U.S. 48 (2010); Roper v. Simmons, 543 U.S. 551 (2005).

[154] *Kennedy*, 554 U.S. at 419–26; *Roper*, 543 U.S. at 564–68; *Atkins*, 536 U.S. at 311–17.

[155] *Kennedy*, 554 U.S. at 419–26; *Roper*, 543 U.S. at 564–68; *Atkins*, 536 U.S. at 311–17.

[156] *See, e.g.*, *Atkins*, 536 U.S. at 311–12; *Roper*, 543 U.S. at 563–67.

[157] William W. Berry III, *Eighth Amendment Presumptive Penumbras (and Juvenile Offenders)*, 106 IOWA L. REV. 1, 19 n.103 (2020).

[158] This approach is not without analogs among other constitutional provisions. *See generally* Corinna Barrett Lain, *The Unexceptionalism of Evolving Standards*, 57 UCLA L. REV. 365 (2009). But it contains the fundamental flaw that it populates a counter-majoritarian standard—the Eighth Amendment—with majoritarian consensus. *See* Berry, *Unusual Deference*, *supra* note 92, at 324–25.

[159] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (striking down a statute criminalizing contraception); Roe v. Wade, 410 U.S. 113 (1973) (striking down a statute limiting abortion); Burch v. Louisiana, 441 U.S. 130 (1979) (striking down a statute allowing a non-unanimous jury verdict); Lawrence v. Texas, 539 U.S. 558 (2003) (striking down a statute criminalizing sodomy. Justia has compiled a list of almost a thousand such cases. *See State Laws Held Unconstitutional*, JUSTIA, https://law.justia.com/constitution/us/state-laws-held-unconstitutional.html [http://perma.cc/M2DP-VM5E] (last visited May 19, 2021); *see also* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002).

[160] Timbs v. Indiana, 139 S. Ct. 682 (2018) (incorporating the excessive fines clause of the Eighth Amendment); Robinson v. California, 370 U.S. 660 (1962) (incorporating the cruel and unusual punishment clause of the Eighth Amendment).

If the purpose of the Eighth Amendment, at least in part, is thus to protect individuals against majoritarian interference with the right to be free from cruel and unusual punishments, then it becomes problematic to determine the meaning of the constitutional provision by extrapolating from the majority practice. In other words, the counter-majoritarian constitutional provision loses its ability to protect against majoritarian overreach when the majority behavior defines the scope of those protections.[161]

An example is instructive. If all states decided to punish jaywalking by public stoning followed by crucifixion, the punishment would not be unusual. The statutes in question that provided for this draconian punishment would satisfy the objective inquiry of the evolving standards as the majority practice despite its clear excessive and torturous mode of punishment. Using a majoritarian approach will be insufficient to protect individual constitutional rights—including being free from cruel and unusual punishments—from the whims of the majority.

The second part of the inquiry under the evolving standards doctrine is a subjective inquiry, where the Court "brings its own judgment to bear."[162] In doing so, the Court looks to the applicable purposes of punishment—primarily retribution and deterrence in these capital cases[163]—to assess whether the punishment practice in question is appropriate. This inquiry arguably serves as a proxy to measure cruelty. A punishment that does not meet any legitimate purpose of punishment must be excessive or otherwise cruel.

Instead of justifying the use of capital felony murder, the evolving standards of decency reveal the extent of the problems discussed in Part I. As such, applying the evolving standards to capital felony murder blunts the Eighth Amendment's effectiveness in providing clear guidance about capital felony murder statutes' constitutionality.

1. Objective Indicia of National Consensus

With respect to the objective indicia, the felony murder rule enjoys national popularity with forty-three states using some form of the rule.[164] The

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[161] *See generally* William W. Berry III, *Evolved Standards, Evolving Justices?* 96 WASH. U. L. REV. 105 (2018).

[162] Coker v. Georgia, 433 U.S. 584, 597 (1977).

[163] The other two purposes of punishment—incapacitation and rehabilitation—seem less applicable to capital punishment and have not been part of the Court's evolving standards application. *See* William W. Berry III, *Ending Death by Dangerousness*, 52 ARIZ. L. REV. 889 (2010); Meghan J. Ryan, *Death and Rehabilitation*, 46 U.C. DAVIS L. REV. 1231 (2013).

[164] ROBINSON & WILLIAMS, *supra* note 3, at 55–57; discussion, *supra* Part I.B.

overwhelming consensus, as discussed above, is to apply a strict liability or negligence approach to felony murder homicides.[165]

Although considering the state statutes as similar—all strict liability or negligence with respect to homicide—would not on its face betray the arbitrariness in outcomes that concerned the *Furman* and *Gregg* courts, the disparity among cases within the category of felony murder would create such a disparity, particularly as compared to other first-degree murder cases.

Because felony murder encompasses an extensive and varied range of kinds of homicide, looking to the objective indicia of the prevalence of felony murder statutes becomes an ineffective measure of whether handing down death sentences for particular felony murders is rare. As discussed below, the Court has attempted to provide some parameters in *Enmund*[166] and *Tison*,[167] but these do not narrow the felony murders that are eligible for the death penalty in a significant enough way to meet *Furman*'s and *Gregg*'s requirements.

2. The Purposes of Punishment

Even more troubling is the apparent disconnect between felony murder convictions and the purposes of punishment under the Court's subjective inquiry. Simply put, while some felony murders might satisfy the purposes of retribution, deterrence, or both, it is evident that many others do not. As such, the evolving standards doctrine is again an ineffective tool to use in applying the Eighth Amendment to felony murder.

To begin, it is necessary to assess whether any of the purposes of punishment justify the death penalty's imposition for felony murder. For some, it is not clear that any of the purposes of punishment support the death penalty under any circumstance.[168]

The purpose of retribution, in its just deserts iteration, holds that the criminal offender shall receive a punishment no more and no less than what he deserves.[169] For some, no crime rises to the level that it entitles the state to kill the offender; no offender deserves death.[170] Under such a view, the death penalty is an excessive punishment.[171]

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[165] ROBINSON & WILLIAMS, *supra* note 3, at 56–57; discussion, *supra* Part I.B.

[166] Enmund v. Florida, 458 U.S. 782 (1982).

[167] Tison v. Arizona, 481 U.S. 137 (1987).

[168] Furman v. Georgia, 408 U.S. 238, 314 (1972) (Marshall, J., concurring).

[169] *See generally* VON HIRSCH & ASHWORTH, *supra* note 55.

[170] Dan Markel, *State Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 410 (2005) [hereinafter Markel, *State Be Not Proud*].

[171] *See id.*

Construed more broadly, if retribution also includes the need to satisfy democratic norms by effectively communicating censure to an offender, the death penalty likewise may be excessive.[172] In this conception, the point is the censuring of the offender, and the death penalty is not necessary to achieve such a communication. The penalty may even be inconsistent with the democratic ideals the state seeks to communicate.[173]

Alternatively, if one's conception of retribution is merely revenge, it is more difficult to make the argument that the death penalty is an excessive punishment.[174] Rather, one would need to argue, as Justice Marshall did in *Furman*, that revenge in itself is an improper motive for punishment.[175]

Similarly, one may conclude that the death penalty does not deter future crime. Certainly, the social science evidence points in this direction—the most one can say in favor of deterrence is that the evidence is inconclusive about whether the death penalty actually deters future crime.[176]

Some have argued that the method by which states use the death penalty in the United States, including a gap of a decade or more between the crime and the imposition of the death penalty, contributes to the death penalty's lack of deterrent value.[177] Others insist, despite evidence to the contrary, that the death penalty does deter and failing to use the death penalty as a punishment is immoral because of its deterrent value.[178]

Putting aside these debates about the nature of retribution and deterrence generally, this Section asks whether, assuming, as the Court has, that retribution and deterrence provide valid justifications for the death penalty itself, such purposes can support the imposition of the death penalty for the crime of felony murder.

a. Retribution

With respect to felony murder, it is not clear that the crime deserves death. By definition, a felony murder is a death that results from and occurs during the commission of a crime. The implication is that the risk taken by

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[172] Panetti v. Quarterman, 551 U.S. 930, 948–50 (2007); *see also* Dan Markel, *Executing Retributivism:* Panetti *and the Future of the Eighth Amendment*, 103 NW. U. L. REV. 1163 (2009); Markel, *State Be Not Proud*, *supra* note 170.

[173] VON HIRSCH & ASHWORTH, *supra* note 55; Markel, *State Be Not Proud*, *supra* note 170.

[174] If the goal is to take revenge, the death penalty will accomplish this end. LEX TALIONIS.

[175] Furman v. Georgia, 408 U.S. 238, 314 (1972) (Marshall, J., concurring).

[176] Donohue & Wolfers, *supra* note 50, at 794 (noting that "existing evidence for deterrence is surprisingly fragile"); Steiker, *supra* note 50.

[177] Kozinski & Gallagher, *supra* note 50.

[178] Sunstein & Vermeule, *supra* note 50.

engaging in the criminal activity warrants the imposition of a higher level of punishment based on the criminal offender's culpability.

If the offender commits a premeditated murder, then the crime is simply a first-degree murder, not a felony murder.[179] As such, felony murder as explored here involves a death that occurs during the commission of a crime other than first-degree murder. With respect to retribution, then, the question becomes whether an offender deserves the death penalty for their criminal conduct during which a person died.

As discussed above, a felony murder conviction does not require that the offender commit the actual killing and likewise does not require that the offender intend that the victim die. For reasons discussed above, mostly related to deterrence, state felony murder statutes allow the death penalty's imposition because the conduct engaged in by the offender created the risk of death or engaged in the conduct that led to death. It is not clear that such situations mean that the offender deserves the death penalty.

b. No Intent

First, the severity of a homicide under criminal law has long related to the offender's intent. Criminal law treats intentional, premeditated killings far different from accidental killings. This is because one's mens rea bears directly upon their culpability as a criminal offender.

Just deserts retribution uses two primary indicia to assess the desert of a criminal offender. First, retribution looks to the harm caused by the offender. In the felony murder context, there must be some causal connection between the felony and the homicide. In some cases, the attenuated nature of this connection suggests that retribution might not support the death penalty.

Assume, for instance, that an individual decides to rob a bank by using a gun to threaten the teller. If a bystander suddenly has a heart attack and dies (and we assume that the stress the bank robber placed on the bystander caused the heart attack), the level of desert seems far less than if the robber had shot the bystander. The robber caused the death, but in an indirect manner. The more attenuated the causal connection, the weaker the case for the death penalty.

Perhaps more importantly, the second part of the just deserts inquiry—the offender's culpability—can face significant complications with respect to the death penalty. It is unlikely in many cases that offenders that intend to commit a crime during which a death happens to occur possess the same level of culpability as offenders who commit premeditated murder.

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[179] This is in part why the merger proposal in Part III is valuable and important.

As a result, the culpability gap between first-degree, premeditated murder and felony murder suggests that the death penalty is not appropriate for felony murder as a means of achieving the purpose of just deserts retribution. In other words, if just deserts retribution ordains a punishment that is no more and no less than what an offender deserves, the culpability gap between first-degree murder and felony murder suggests different punishments for different crimes.[180]

c. No Act

The purpose of retribution possesses even less of a connection to felony murder in cases where the defendant does not participate in the act of killing. Despite the common use of complicity and conspiracy as the basis for liability in such circumstances, it is an intellectual leap to suggest that being an accomplice or a co-conspirator to a felony makes an individual deserve the death penalty.

For retributive purposes, the key question should be the defendant's culpability. When a defendant does not act in a way that proximately causes death, it stretches credulity to state that they are culpable enough to deserve a death sentence.

d. Deterrence

Social science indicates that, at best, it is inconclusive whether the death penalty deters future crime.[181] Assuming, though, that the death penalty does deter crime, the theory of deterrence could justify the imposition of the death penalty in an individual case. Each case's underlying facts matter, however, as some felony murders fall short of the requirement of deterrence. This happens for two basic reasons: the mens rea problem explained above and the problem of marginal deterrence.

e. Capital Punishment May Deter the Felony, But It Cannot Deter the Death

Imposing a death sentence for felony murder has the potential to deter others from committing crimes. To the extent that one is considering committing a crime, knowing that the death penalty may be possible if an

[180] The problem with retribution as a purpose of punishment is that it cannot provide cardinal values for particular crimes; it can only arrange them ordinally. *See generally* VON HIRSCH & ASHWORTH, *supra* note 55. As such, it is impossible to say what punishment corresponds with what crime as a matter of just deserts retribution. One can, though, rank the crimes in such a way as to distribute punishments in order of culpability and harm.

[181] *See* sources *supra* note 177 and accompanying text.

accidental killing occurs might deter some individuals from committing a felony.

It will be unlikely, however, to deter other felony murders. This is because many felony murders involve unintentional killings. Once the felony commences, the ensuing death in many cases of felony murder does not involve conduct that the death penalty can deter. An easy example of this involves the bank teller that has a heart attack during the robbery. A felony murder execution might deter the robbery, but it cannot really deter the death if one decides to commit the robbery. In other words, there may be some justification here for deterrence of the felony, but the connection to the homicide is indirect at best. It is true that deterring the felony would deter the death, but in order to accomplish such an effect, one would need to use the death penalty as a sentence for all felony murders.

f. Any Deterrence Would Be Marginal at Best

With deterrence, there also exists the question of the degree to which increasing the sentence achieves additional deterrence. A twenty-year sentence might significantly deter some of the conduct that results in felony murder, but it is not clear that imposing the death penalty would significantly increase the deterrent effect. The increase in punishment in many cases achieves only marginal deterrence over other serious punishments.[182]

This is particularly true in states that do not actively use the death penalty but impose death sentences. If the leading cause of death for death row inmates is natural causes, the increase in deterrence achieved by a death sentence as opposed to a life without parole sentence will likely be negligible. The practical connection between the known outcome and the sentence can affect the deterrent value of a sentence. The significant decrease in the number of executions during the past decade[183] and the extensive temporal lag between the sentencing and the execution both suggest that the death penalty may have only marginal deterrent value as compared to life-without-parole sentences.[184]

B. THE EVOLVING STANDARDS OF FELONY MURDER CASES

The Supreme Court has considered the constitutionality of capital felony murder under the Eighth Amendment in two cases: *Enmund v. Florida* and *Tison v. Arizona*. *Enmund*'s effect was to establish some limit on the use of felony murder in capital cases, but *Tison* served to significantly

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[182] *See id.*

[183] *Executions by State and Region Since 1976*, *supra* note 116.

[184] Kozinski & Gallagher, *supra* note 50.

circumscribe *Enmund*'s effect. As explored, the cases fall short of articulating an Eighth Amendment answer to the problems raised in Part I.[185]

1. Enmund v. Florida

Enmund involved Sampson and Jeanette Armstrong robbing an elderly couple, Thomas and Eunice Kersey, one morning at the Kersey residence.[186] While Sampson Armstrong was holding Thomas Kersey at gunpoint, Eunice Kersey emerged from the house and shot Jeanette Armstrong.[187] Sampson Armstrong subsequently shot and killed both Thomas and Eunice Kersey.[188]

Earl Enmund was seen driving to and from the Kersey's neighborhood that morning and played a role as a getaway driver.[189] As the Florida Supreme Court explained, "[T]he only evidence of the degree of his participation is the jury's likely inference that he was the person in the car by the side of the road near the scene of the crimes."[190]

The jury convicted Enmund of first-degree felony murder and robbery, and the judge sentenced Enmund to death consistent with the jury's recommendation.[191] Specifically, the Court found four aggravating circumstances: Sampson Armstrong committed the capital felony while Enmund engaged in or was an accomplice to the commission of an armed robbery; Armstrong committed the capital felony for pecuniary gain; the murder was especially heinous, atrocious, or cruel; and a court previously convicted Enmund of a felony involving the use or threat of violence.[192] The trial court did not find any mitigating circumstances.[193] On appeal, the U.S. Supreme Court examined the validity of a death sentence based on a felony

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[185] There is a persuasive argument that the effect of *Enmund* and *Tison* is to set a mens rea floor of recklessness for capital felony murder, which would mitigate part of the problem. *See generally* Binder, Fissell & Weisberg, *Unintentional Felony Murder*, *supra* note 119 (arguing for a mens rea recklessness floor as a prerequisite for capital murder).

[186] Enmund v. Florida, 458 U.S. 782, 784 (1982).

[187] *Id.*

[188] *Id.*

[189] *Id.*

[190] *Id.* at 786.

[191] *Id.* at 784. Although not part of his case, Enmund's death sentence also would have violated the Sixth Amendment if not reversed on Eighth Amendment grounds. *See* Hurst v. Florida, 136 S. Ct. 616, 619 (2016) (requiring a jury imposition of a death sentence); *see also* Carissa Byrne Hessick & William W. Berry III, *Sixth Amendment Sentencing After* Hurst, 66 UCLA L. REV. 448 (2019).

[192] *Enmund*, 458 U.S. at 785 (citing FLA. STAT. §§ 921.141(5)(b), (d), (f), (h), (1981)). The Florida Supreme Court rejected the heinous aggravator, and found the pecuniary gain and robbery aggravators duplicative, but affirmed the sentence with the two aggravators and no mitigators. *Id.* at 787.

[193] *Id.* at 785.

murder conviction for an offender "who neither took life, attempted to take life, nor intended to take life."[194]

Enmund thus concerned the use of the death penalty for a felony murder conviction where the crime was robbery and another committed the killing.[195] Of the thirty-six jurisdictions that permitted the death penalty at the time, the Court noted that only eight jurisdictions authorized the death penalty for accomplices in felony murder robbery cases like *Enmund* without proof of additional aggravating circumstances.[196] In addition, another nine states allowed death sentences for felony murder accomplices where other aggravating factors were present.[197] The Court found that the legislative practice weighed "on the side of rejecting capital punishment for the crime at issue."[198]

In the second part of the evolving standards test, the *Enmund* Court brought its own judgment to bear and found that the death sentence was inappropriate for Enmund.[199] Specifically, the Court held that his criminal culpability did not rise to the level required by just deserts retribution to warrant a death sentence.[200] The Court similarly dismissed deterrence as a supporting rationale for a death sentence in *Enmund*'s case.[201] Finally, it is notable that *Enmund* appeared to focus only on the relevant facts of Enmund's case.[202] The Court did not explicitly create a categorical rule with respect to death sentences for felony murder convictions.[203]

Notice that the *Enmund* rule excluded cases where there was both no act and no mens rea related to the homicide in question. It did not extend to situations where one element was present but not the other. One can imagine capital felony murder being inappropriate where there is an act but no mens rea, such as where an individual accidentally kills someone during the commission of a felony. Or, in the corollary situation, the death penalty would also be improper where there is a mens rea but no act, such as when

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194 *Id.* at 787.

195 *Id.* at 783–85 (showing that Enmund did not kill or intend to kill).

196 *Id.* at 789.

197 *Id.* at 791.

198 *Id.* at 793 (footnote omitted). The Court also considered jury sentences, although a difficult proposition given the variety in felony murder cases and state felony murder laws. *Id.* at 794–96.

199 *Id.* at 797.

200 *Id.* at 800–01.

201 *Id.* at 797–801. To be fair, retribution appears to be the only purpose that could justify the death penalty, and it might not even accomplish that. *See* Part III-A *infra*.

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

203 *See id.*

one is planning to kill after a robbery, but the victim dies of a heart attack before the individual has the opportunity to kill.

In other words, *Enmund* applied the Eighth Amendment to a situation where all of the problems described above were present but did not allow for an Eighth Amendment solution where only some were present. The facts of the case provided some limitation, but the evolving standards doctrine prevented this case from going further. To find a national consensus under the objective indicia, the Court had to narrow the kind of felony murder in question as opposed to applying the doctrine to felony murder more generally. *Tison* then exacerbated these shortcomings.

2. Tison v. Arizona

The Court narrowed *Enmund*'s scope five years later in *Tison*, where it again considered the Eighth Amendment limitations on felony murder in capital cases under the evolving standards of decency.[204] *Tison* involved the prosecution of two of Gary Tison's sons, after their father and an associate brutally murdered a family after stealing their car.[205] The sons participated both in helping Tison break out of prison and in the carjacking.[206] They were not present, however, when their father killed the family,[207] and they were unaware that he intended to do so.[208]

In assessing the jury's imposition of death sentences on the sons, the *Tison* Court considered whether their punishments violated the Eighth Amendment.[209] Like Enmund, the Tison sons argued that they did not take life, attempt to take life, or intend to take life.[210]

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[204] Tison v. Arizona, 481 U.S. 137, 152–58 (1987).

[205] *Id.* at 139–41. For a chilling account of Gary Tison's escape from prison and subsequent crime spree, see generally JAMES W. CLARKE, LAST RAMPAGE: THE ESCAPE OF GARY TISON (1st ed. 1988).

[206] *Tison*, 481 U.S. at 139–40.

[207] *Id.* at 139–41. The facts are harrowing. Gary Tison and Randy Greenawalt and the two Tison sons were plotting how to escape to Mexico. They needed a new car to drive to avoid detection by the police. They feigned car trouble on the side of the road. A couple and their two children, one of which was a baby, decided to stop and help. The escapees pulled a gun on the family and forced them into the Tison car, which they drove away from the road. Gary Tison then shot the tires so the family would not be able to drive away. The man in the family asked for water, as they were being left in the desert. Gary Tison sent his two teenaged sons back to the other car to get water. He then brutally shot the parents and their two children. A manhunt ensued, and the sons and Greenawalt were captured. Gary Tison died of exposure in the desert hiding from the police. *Id.*

[208] *Id.* Tison's death may have increased the public desire (or at least that of the prosecutor) to seek death sentences for his sons. *See* CLARKE, *supra* note 205, at 263–66.

[209] *Tison*, 481 U.S. at 152–58.

[210] *Id.* at 150.

Using the evolving standards of decency doctrine, the Court applied the same counting of state statutes as in *Enmund* but combined the jurisdictions that allowed felony murder for any accomplice with those that only allowed felony murder with additional aggravating circumstances.[211] The Court reasoned that, unlike Enmund, the Tison sons played an active role in the crime (particularly the prison escape), and as a result *both* categories of jurisdictions should count, leading to a finding that only eleven jurisdictions did not allow death sentences in felony murder cases like *Tison*.[212]

The Court's subjective judgment likewise found that the death sentences imposed on the Tison sons were not disproportionate.[213] Specifically, the Court cited that the Tison sons' "reckless indifference to human life" provided the intent to justify a death sentence, even though the sons did not participate in the killing itself.[214] The distinction, then, between the outcomes in *Enmund* and *Tison* was the intent of the felony murder accomplices.[215] Unlike in *Enmund*, the *Tison* Court made clear that the majority view did not provide a consensus view in favor of eliminating the application of the punishment at issue.[216]

The *Tison* Court's rule was that a capital felony murder is constitutional when the individuals in question are (1) major participants in the felony and (2) exhibit a reckless indifference to human life.[217] This modified the *Enmund* rule as juries could still find individuals that did not kill, attempt to kill, or intend to kill guilty of capital felony murder.

Note that the shift with respect to the act requirement moves the inquiry to the relationship of the act to the felony, not the homicide. In addition, the *Tison* rule keeps the mens rea connected to the homicide and captures all reckless actors.

On its face, *Tison* may be best understood as a case where hard facts make bad law.[218] Given the brutality of the murder and the inability to hold

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[211] *Id.* at 152–55.

[212] *Id.* at 151–55. The Court focused on the recklessness demonstrated by the sons in busting Tison out of prison, particularly considering their knowledge of his dangerous character and criminal past. *Id.*

[213] *Id.* at 155–58.

[214] *Id.* at 157–58.

[215] *Id.* For an argument that a recklessness mens rea should be required for capital punishment for felony murder, see Binder, Fissell & Weisberg, *Unintentional Felony Murder*, *supra* note 119, at 1142.

[216] *Tison*, 481 U.S. at 157–58.

[217] *See id.* at 151–58.

[218] *See* Winterbottom v. Wright (Exch. 1842) 10 M & W 109, 116 ("This is one of those unfortunate cases in which . . . it is, no doubt, a hardship upon the plaintiff to be without a

Gary Tison responsible, the death sentences the jury imposed are unsurprising.[219] The Court's doctrinal shift, though, seems the product of bad facts as opposed to considered judgment.

One response would have been to create an exception to the *Enmund* rule instead of rewriting it. The rule could be that the death penalty is unavailable in cases where there is no act, attempt, or mens rea, unless the defendants otherwise bear some culpability. To the extent that the Tison sons should face the death penalty, it is because they bear serious culpability in helping their father escape prison and providing him with weapons, particularly in light of his violent criminal past.

Indeed, the better reading of these cases is to treat *Enmund* as the rule and *Tison* as an exception. Courts have done the opposite, treating *Tison* as a modification of *Enmund*. The effect has been that the Eighth Amendment does not provide any meaningful limitation in capital felony murder cases.

Accomplice liability and conspiracy liability do not create much of an obstacle to finding that an individual was a major participant in the felony. The recklessness mens rea could in theory create some obstacle,[220] but courts have not applied it as such.

C. WHY THE FELONY MURDER EVOLVING STANDARDS FAIL TO SATISFY *FURMAN*'S REQUIREMENTS

The Court's application of the evolving standards doctrine to capital felony murder does not satisfy either of the *Furman* requirements. If anything, the *Enmund* and *Tison* holdings, to the extent that they impose any Eighth Amendment restriction at all, fail to address capital felony murder's over-inclusivity issues.

1. Death is not Different

The evolving standards doctrine does not impose heightened requirements for capital felony murder that take into account the actor's culpability with respect to the homicide as the Eighth Amendment requires. It is not clear that all major felony participants whose recklessness causes a

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remedy, but, by that consideration we ought not to be influenced. Hard cases, it has been frequently observed, are apt to introduce bad law.").

[219] The Governor of Arizona ultimately overturned these sentences on appeal, and the Tisons are currently serving life sentences. Greenawalt was executed. C.T. Revere, *Greenawalt Executed for Murders*, TUCSON CITIZEN (Jan. 23, 1997), http://tucsoncitizen.com/morgue2/1997/01/23/98025-greenawalt-executed-for-murders/. [https://perma.cc/J5VW-UGV6].

[220] *See* Binder, Fissell & Weisberg, *Unintentional Felony Murder*, *supra* note 119 (arguing for a minimum requirement of a mens rea of recklessness).

homicide should be eligible for the death penalty. On the contrary, it is evident that many if not most of the individuals that fall into this category lack the required culpability to justify death as a punishment.

Rather than developing a robust Eighth Amendment approach to this problem as *Enmund* started to do, the evolving standards approach fails to apply heightened scrutiny to felony murder cases that fall on either side of the *Tison* rule. It is not clear, for instance, that the Eighth Amendment forecloses capital felony murder convictions for individuals that lack an intentional mens rea with respect to the homicide. It is also not clear that all individuals that satisfy the *Tison* test should be death-eligible.

2. The Class of Murderers Is Insufficiently and Inaccurately Narrowed

Along similar lines, the evolving standards of decency doctrine does not address felony murder's over- and under-inclusivity with respect to individuals that might possess a level of culpability that justifies the death penalty. The objective indicia limit the scope of the Eighth Amendment such that the robust analysis proposed here becomes impossible.

Likewise, the subjective indicia do not provide clear guidance on where to draw the line with respect to retribution or deterrence. The *Tison* categories certainly do not seem to solve this problem. It is hard to understand how the major participant and recklessness rules apply to the purposes of punishment. Perhaps the level of one's participation bears on one's culpability, but the inquiry incorrectly centers on participation in the felony, not the killing. The recklessness requirement also could relate to culpability, but it is based on lack of responsibility rather than affirmative intent, meaning that the line will be difficult to draw. It is hard to say how reckless one must be to be culpable enough to deserve a death sentence.

Even if the *Tison* rule could adequately sort the felony murder cases into death-eligible and death-ineligible categories under the Eighth Amendment, the sorting would be inaccurate. The basis for the sorting relates only partly to the homicide and focuses partly on the felony. Whether an individual was a major participant in the homicide seems a better question than whether the individual was a major participant in the felony. Again, the problem is one of over- and under-inclusivity. There may be cases where an individual is a minor participant in the felony, but a major participant in the killing, such as the getaway driver that runs over a bystander as the felons are escaping. There may also be cases where the individual is a major participant in the felony but plays no role in the killing, such as where individuals are robbing different parts of a bank and the death occurs in an area that the major participant does not even enter.

The same disconnect also applies to *Tison*'s recklessness requirement. The recklessness threshold does little to sort second-degree murder cases—the common application of reckless indifference to human life—from the intentional, premeditated murders that typically constitute first-degree murder. The evolving standards doctrine renders the Eighth Amendment impotent in its ability to limit the co-opting of the felony murder doctrine as a tool to elevate second-degree killings into capital murders.

The approach below seeks to offer an alternative means to address this issue.

III. A CAPITAL FELONY MERGER DOCTRINE

Having explored the constitutional infirmities of felony murder and the Supreme Court's failed attempts to create a palatable Eighth Amendment doctrine using the evolving standards of decency, this Section proposes a unique remedy based on a felony murder doctrinal limitation courts impose—the independent felony merger doctrine.

A. THE INDEPENDENT FELONY MURDER MERGER DOCTRINE

Felony murder, as discussed above, elevates the felony crime in question to murder when an individual dies during the commission of a felony. Though the felony in question must be inherently dangerous,[221] the felony must be independent of the homicide under the merger doctrine. In other words, the individual must commit some other felony besides killing to be guilty of felony murder.

Where the criminal act is part of the killing, it merges into the homicide crime and cannot be a felony murder.[222] This typically occurs in assault cases. The crime of assault proscribes the use of physical force to injure another. When the physical force of an assault results in a homicide, the independent felony merger doctrine merges the felony murder crime into the assault crime such that the possible prosecutions can be for assault and homicide, but not felony murder.

If charged as a homicide crime, the assault will be second-degree murder or manslaughter but will not be a first-degree murder because of the criminal actor's mens rea. Because the act involved in the felony of assault

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[221] *See supra* notes 59–61 and accompanying text.

[222] *See supra* note 64 and accompanying text; *see also* MARCUS, MALONE, DRINAN & BERRY, *supra* note 140, at 462–71.

and the killing is the same, the felony cannot be the basis for a felony murder conviction, as it is not an independent felony. [223]

Without the merger doctrine, a prosecutor could charge every second-degree assault homicide as a first-degree felony murder eligible for the death penalty. The independent felony requirement exists to prevent an end run around homicide's mens rea requirements through the use of felony murder when the act in question is the same for both crimes.[224]

B. A CAPITAL FELONY MERGER DOCTRINE

This Article proposes applying the merger doctrine to capital cases. After *Gregg*, to satisfy the Eighth Amendment, states must impose some statutory tool to narrow the class of homicides eligible for the death penalty. Most states accomplish this through aggravating factors, which the state must prove at trial to make the individual eligible for the death penalty at sentencing.

One of the most commonly used statutory aggravating factors is felony murder.[225] The crime of felony murder allows the state to take cases that otherwise would not qualify as a first-degree murder and make them eligible for the death penalty.[226]

My proposal is this: under a capital felony merger doctrine, the crime of felony murder and any felony murder aggravating factor would merge into first-degree murder for death penalty purposes, just like assault homicides cannot be the basis for felony murder convictions. To be death-eligible, there must be an independent basis for such eligibility outside of felony murder. The first-degree murder and accompanying aggravating factor that gave rise to death eligibility could not be the felony murder rule or a felony murder aggravator.

To be clear, this proposal would not abolish the crime of felony murder; it would just require some other basis for the crime in question to be eligible for the death penalty. And felony murder could still be a form of first-degree murder, just not a death-eligible one, unless some other aggravating factor exists.

This merger limitation would take effect both in the crime of felony murder's definition and in aggravating factors related to felony murder. A

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[223] *See* sources *supra* note 64 (explaining the merger doctrine); *see also* MARCUS, MALONE, DRINAN & BERRY, *supra* note 140, at 462–71.

[224] *See* sources *supra* note 64 (explaining the merger doctrine); *see also* MARCUS, MALONE, DRINAN & BERRY, *supra* note 140, at 462–71.

[225] *Aggravating Factors by State*, *supra* note 47.

[226] *See* discussion *supra* Part I.

felony murder conviction that previously would confer death eligibility solely on the basis of the felony murder would merge into first-degree murder; if the crime could satisfy the mens rea and actus reus requirements of first-degree murder, it could still be death-eligible. Similarly, a prosecutor could not rely on a felony murder-type of aggravating factor to establish death-eligibility but could establish death eligibility through other aggravating factors under the capital felony merger doctrine.

In addition to merging capital felony murder into first-degree murder, the capital felony merger doctrine would also merge complicity and conspiracy homicides into first-degree murder. Accomplices and co-conspirators would have to have an independent basis for death-eligibility aside from their involvement in a crime during which a death occurred. One could not receive the death penalty by being an accomplice to a homicide; there would need to be an independent basis (non-complicity first-degree murder) to impose capital punishment. Similarly, one could not receive the death penalty for being a co-conspirator to a homicide; there would need to be an independent basis (non-conspiracy murder) to impose capital punishment.

The felony merger doctrine would supersede all state statutes in question—felony murder, complicity, and conspiracy—because it is the manifestation of a constitutional requirement. Under the Eighth Amendment, arbitrary and random imposition of the death penalty is unconstitutional. Failing to have some method of narrowing the death-eligible murders from the non-death-eligible murders violates the Eighth Amendment. Though state capital schemes currently have, in theory,[227] more guidance than the *Furman* statutes did, the use of felony murder, complicity, and conspiracy all can interfere with the constitutional narrowing. These doctrines do this by introducing cases that should not be eligible for the death penalty into the group of death-eligible cases, counteracting the narrowing that the other parts of the statutory scheme attempt to achieve.

As with the independent felony murder doctrine, which renders felony murder inapplicable in assault cases, so, too, would the capital felony merger doctrine render capital felony murder, capital complicity murder, and capital conspiracy murder inapplicable. As an Eighth Amendment limitation, the capital felony merger doctrine would serve to bar use of these murder doctrines as a basis for establishing death eligibility.

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[227] *But see* Glossip v. Gross, 576 U.S. 863, 909 (2015) (Breyer, J., dissenting) (Post-*Furman* capital statutes in theory cured the flaws of the death penalty by giving more guidance to juries, but as Breyer argues, they have done little in practice to alleviate the random and arbitrary application of the death penalty).

In practice, the capital felony merger doctrine would simply exclude felony murder from consideration at capital sentencing; there would have to be some other aggravating factor or element that justified the death penalty's imposition. Similarly, the capital felony merger doctrine would not eliminate first-degree complicity murder convictions or first-degree conspiracy murder convictions. But these doctrines could not provide a means, through statute or aggravating factor, to allow for consideration of the death penalty.

The elevation of a doctrine of statutory interpretation to a constitutional doctrine under the Eighth Amendment admittedly requires openness to creative solutions. Before explaining the doctrine's justifications, it is important to emphasize its constitutional grounding.

First, the doctrine is appropriate under the Court's mantra that death is different. Capital punishment's consequences are unique in severity and irrevocable. The extent to which a state subjects individuals to unfair, draconian, excessive, and inappropriate death sentences is the extent to which the Eighth Amendment should play an important role in limiting such injustices.

States would not have to abandon felony murder under this approach. In the same way that the independent felony murder doctrine eliminates assault felony murder convictions, the capital felony merger doctrine would eliminate capital felony murder convictions and sentences. Death is different, which warrants a doctrinal limitation on who is eligible for the death penalty.

Second, *Furman*'s *and Gregg*'s narrowing requirement is incompatible with capital felony murder, complicity-based capital murder, and conspiracy-based capital murder. The goal of trying to separate murders based on culpability in terms of applying the death penalty is difficult enough to accomplish without major difficulties.[228] As described above, the felony murder statutes and aggravating factors do not accurately narrow the class of death-eligible felons. Instead, the felony murder rule complicates the picture by adding a mix of cases into the death-eligible category, undermining any legitimate separation that other aggravating factors might be able to achieve.

The capital felony merger doctrine ensures that cases with insufficient actus reus or mens rea facts to merit first-degree murder do not somehow find their way into the pool of death-eligible cases. The capital felony merger doctrine is thus appropriate as a means to fulfill *Furman*'s and *Gregg*'s requirements in the same manner that aggravating factors and proportionality review should.

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[228] Indeed, the American death penalty is broken. *See id.* at 908–48 (Breyer, J., dissenting).

The capital felony merger doctrine also helps clarify the application of other aggravating factors to better fulfill the Eighth Amendment narrowing function. The killing of a police officer, for instance, provides an aggravating factor that makes a case death-eligible.[229] Using a capital felony merger doctrine ensures that only intentional killings of police officers, and not accidental ones, are eligible for the death penalty. The use of aggravating factors presumes an individual has committed a first-degree murder; using the felony merger doctrine ensures that the underlying homicide is death-eligible before applying aggravating circumstances to the equation.

One final issue is worth discussing: retroactivity. If the Court elects to adopt the capital felony merger rule, it should apply to those convicted of capital felony murder or through accomplice or conspiratorial liability. Under *Teague*, new substantive rules of constitutional law apply retroactively, while new procedural rules of constitutional law do not unless they are watershed rules of criminal procedure.[230] The capital felony merger rule is a substantive one—it offers a substantive bar to the use of certain kinds of doctrines to achieve death-eligibility. Although there may be procedural elements to this idea, the capital felony merger doctrine constitutes a substantive bar to the devaluation of the mens rea and actus reus requirements of first-degree murder.

In light of *Teague*, then, the capital felony merger doctrine would presumptively commute all death sentences arising out of felony murder, complicity, and conspiracy to life sentences. Where the state could show that an alternative basis existed for death-eligibility, the death sentence would stand, consistent with the capital felony merger doctrine. It would be the state's burden to demonstrate that there existed grounds for death eligibility.

C. AN EXAMPLE

To illustrate how the capital felony merger doctrine would work, an example is instructive. Assume three individuals form a conspiracy to rob a bank. Al and Ben will enter the bank carrying handguns, and Carl will circle the building in the getaway car.

Al and Ben succeed in their robbery, entering the building while the security guard is in the bathroom. They point their guns at the teller, get their bags filled with cash, and head for the door. Ben drops his gun, and it goes off and kills an oblivious customer, Donald, who has just entered the bank.

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[229] *See Aggravating Factors by State*, *supra* note 47.

[230] Teague v. Lane, 489 U.S. 288, 300–03 (1989).

Under most state felony murder laws, Al, Ben, and Carl could receive a felony murder conviction and the death penalty for killing Donald.[231]

The felony merger doctrine would bar the imposition of the death penalty. For Al, as an accomplice who did not kill or intend to kill, his conduct would not constitute a first-degree murder on its own. Because the felony murder conviction would have to rise to the level of first-degree murder under the capital merger doctrine, he would be ineligible for the death penalty.

The same would be true for Carl as a co-conspirator. He could be guilty of felony murder, but would be ineligible for the death penalty, because when merged with murder the crime would not rise to the level of first-degree murder, as his only role in the crime was as a getaway driver.

Finally, Ben's killing of Donald, while a felony murder, also was not a first-degree murder as he did not intend to kill Donald and, so, he likewise would be ineligible for the death penalty. The felony murder would merge into the degrees of murder for purposes of death eligibility; Ben's act did not reflect the intentionality needed to establish murder, much less capital murder.

IV. THE CASE FOR A CAPITAL FELONY MERGER DOCTRINE

Having explained how the capital felony merger doctrine works, the Article concludes by explaining why this idea helps solve the capital felony murder infirmities described earlier. Note that this is not the only way to make sure that the Eighth Amendment's application bars the unjust use of the death penalty in felony murder cases. It nonetheless provides a simple way to place a clear, bright-line limitation on defendants who should not receive the death penalty.

A. THE EVOLVING STANDARDS DOCTRINE HAS FAILED

The evolving standards doctrine is inadequate to address the injustices inherent in the current use of capital felony murder. Neither the *Enmund* nor the *Tison* test provides a satisfactory way to separate the cases that the Eighth Amendment should bar from the death penalty from those that it should not. Certainly, cases where individuals do not kill, attempt to kill, or intend to kill should not be death eligible, but it is not clear that all major felony participants that act with reckless indifference to human life should be either.

Instead, the capital felony merger doctrine eliminates the arbitrary line drawing that felony murder prompts, consistent with *Furman*'s goal of eliminating the death penalty's arbitrary application. This doctrine does not

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[231] *See, e.g.*, ROBINSON & WILLIAMS, *supra* note 3, at 53.

require consensus and does not rest on some evolution of decency. Rather, it arrests the use of capital felony murder as a tool by which a state can execute individuals guilty of no more than second-degree murder.

B. MENS REA AND ACTUS REUS SHOULD MATTER

By eliminating cases that have a mens rea below first-degree murder, the capital felony merger doctrine makes mens rea matter. In practice, homicide cases that involve a mens rea below purposeful should be ineligible for the death penalty in most situations.

To the extent that a state includes "knowing" and perhaps even "extremely reckless" killings in its first-degree murder definition, such crimes would be death-eligible under the capital felony merger doctrine, but they would at least have to satisfy a threshold of heightened intent and culpability. The capital felony merger doctrine would, by contrast, exclude all strict liability and negligent homicides from the death penalty. In so doing, this doctrine would signify the mens rea's importance and restore it to its proper relationship to the death penalty.

In the same way that the capital felony merger doctrine would rescue mens rea from the transgressions of capital felony murder, the doctrine also would prevent unjust death sentences where the individual did not act to further the homicide (as in *Enmund*). It would eliminate accomplice death sentences and instead require that there be an independent basis for an accomplice to receive the death penalty. Also, for co-conspirators that did not commit an affirmative act toward the killing (thus providing an independent basis for death-eligibility), the death penalty would be unavailable. The capital felony merger doctrine would cure the disturbingly common issue of individuals receiving the death penalty in cases where they did not kill anyone or otherwise cause anyone's death.

C. THE DOCTRINE ACCURATELY SORTS CASES

Finally, the capital felony merger doctrine accurately sorts cases for capital punishment purposes in a way that the evolving standards cannot. It draws a line that eliminates the prosecutorial tools that allowed for the elevation of second-degree murder, manslaughter, and negligent homicide crimes to first-degree, death-eligible murders.

The proliferation of aggravating factors in most capital punishment states means that eliminating the tools of felony murder, complicity, and conspiracy will not impede the state from pursuing the death penalty in the most serious cases. But it will help sort the more serious criminal actors from the less serious ones. In addition, this doctrine's retroactive application could significantly decrease the death penalty's costs to the state (assuming state

attorney general offices would not try to relitigate every reversed capital case).

Death penalty supporters should welcome this reform as a way to remedy the erroneous sorting of cases. The capital felony merger doctrine offers a more balanced approach that can help restore some of the death penalty's legitimacy.

Death penalty abolitionists likewise should favor a constitutional capital felony merger doctrine. At the very least, this doctrine will have a significant impact in remedying the unjust application of the death penalty. Although any execution is a problem from the abolitionists' perspective, abolitionists find felony murder capital cases to be particularly troubling miscarriages of justice. This doctrine's retroactive application could also thin out death rows in some states.

CONCLUSION

This Article has advanced a novel approach to the problems created by capital felony murder (and capital complicity and conspiracy murder). Specifically, it has argued for the creation of an Eighth Amendment merger doctrine by which felony murder, complicity, and conspiracy cases are merged into first-degree murder, such that they cannot provide an independent basis for death eligibility. This constitutional doctrine has the ability to improve the Eighth Amendment's narrowing function to decrease the death penalty's unjust imposition on individuals that did not intend to kill or did not kill.