TWO ECONOMIC RATIONALES
FOR FELONY MURDER

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Critics of the felony-murder rule have long argued that the rule is outdated and unreasonable, and the Supreme Court since 1982 has interpreted the Eighth Amendment to limit use of the death penalty in felony-murder cases. I present here two economic rationales for the felony-murder rule and show how the Court's interpretation of the Eighth Amendment might burden potential victims of felonies. The first rationale is that the felony-murder rule reduces the use of violence in the commission of a felony by forcing the felon to bear the entire risk of consequential harm during the course of the felony. The extent to which a "transaction" (be it a contract, a tort, or a crime) is a voluntary exchange is inversely related to the extent of liability for consequential harm. By extending liability for consequential harm, the felony-murder rule is a tax on violence as an input of criminal production. A second economic rationale for the felony-murder rule concerns team production of crimes. The felony-murder rule gives criminal partners an incentive to monitor one another for unnecessary use of violence. One would therefore expect that, by decreasing a criminal's expected costs of causing consequential harm for an unintended killing during the commission of a felony, the Court's interpretation of the Eighth Amendment in felony-murder cases increases the incidence of violent felonies.

INTRODUCTION

On an April morning in 1975, Earl Enmund waited in a Buick on a country road in Florida while Sampson and Jeanette Armstrong got out and walked 200 yards to a farmhouse where eighty-six-year-old Thomas Kersey lived. Several weeks

earlier, Kersey had shown his wallet, full of money, to Enmund. Now Enmund and the Armstrongs had come to rob Kersey. When they reached the back door of the farmhouse, the Armstrongs told Kersey that they needed water because their car had overheated. But when Kersey returned with water, Sampson Armstrong pulled a gun and instructed Jeanette Armstrong to take Kersey's wallet. Then the robbery went awry. Kersey cried for help. His seventy-four-year-old wife, Eunice, appeared with a gun and shot Jeanette Armstrong, wounding her. Then Sampson and Jeanette Armstrong shot and killed Thomas and Eunice Kersey, dragged their bodies into the farmhouse, took the money from the wallet, and fled in the Buick with Enmund at the wheel.[1]

Enmund was convicted of one count of robbery and two counts of first-degree murder under Florida's felony-murder statute, which codified in its essential form the common law felony-murder rule.[2] That rule provides that a homicide committed during a felony or attempted felony shall constitute first-degree murder, even if the criminal lacked actual malice for the homicide. The rule rests on imputed criminal liability. It employs the legal fiction that one's intent to commit an underlying felony transfers to the commission of a homicide, thus supplying the actual malice needed for the homicide to constitute murder. The practical significance of the rule at trial is to relieve the prosecution of the burden of proving the mens rea necessary for murder.[3]

Enmund was sentenced to death but spared execution. The Supreme Court held in 1982 in *Enmund v. Florida* that the government cannot impose the death penalty on someone "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed."[4] The five-member majority in *Enmund* considered the felony-murder rule excessive and anachronistic[5]—a view long espoused by commentators[6] and ultimately

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[1]   Florida v. Enmund, 399 So. 2d 1362, 1364–65 (Fla. 1981), *rev'd*, 458 U.S. 782 (1982).

[2]   FLA. STAT. § 782.04(1)(a) (2015). For an incisive analysis of the origin and evolution of the felony-murder rule, see GUYORA BINDER, FELONY MURDER (2012).

[3]   *See* State v. Ulland, 943 P.2d 947, 950 (Kan. Ct. App. 1997) ("In felony-murder cases, the State is relieved of the burden of proving malice and premeditation . . . .").

[4]   458 U.S. 782, 797 (1982).

[5]   *See id.*

[6]   *See, e.g.*, Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701, 749 (1937) ("For if men are threatened with a

embraced as common law shortly before and after *Enmund* by the supreme courts of Michigan[7] and California.[8]

Enmund did not rest on an interpretation of the common law. Rather, the Supreme Court reasoned that the Cruel and Unusual Punishment Clause of the Eighth Amendment to the U.S. Constitution forbids the execution of someone vicariously convicted of first-degree murder by operation of the felony-murder rule unless he possessed or could be inferred to have possessed the requisite intent to kill.[9] A nontriggerman like Enmund still could be held strictly and vicariously liable for first-degree murder, but, after *Enmund*, the most severe punishment that he could receive would be life imprisonment. *Enmund* thus created, through the invocation of constitutional law, a kind of limited liability for criminals convicted of vicarious felony murder. The Court subsequently reaffirmed this doctrinal development in its Eighth Amendment jurisprudence.[10]

Economic analysis suggests why the Supreme Court's jurisprudence on the constitutionality of the felony-murder rule might come at a heavy price. The argument begins, in Part I, with the relationship between consequential harm and involuntary exchange. I argue that, across various doctrines of the common law, the degree of consequential harm borne by the injuring party varies inversely with the extent to which the transaction producing that harm resulted from voluntary exchange between the injuring party and the victim.

In Part II, I explain the familiar deterrent rationale for the felony-murder rule, which depends critically on strict liability and unlimited liability.[11] The rule is a tax on violence. My

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penalty for causing death, no matter how careful they are to discover all appreciable risks and to avoid creating those that they discover, there is nothing that they can do but disregard the threat, or else avoid all but the simplest, necessary activities.").

    7   *See* People v. Aaron, 299 N.W.2d 304, 328–29 (Mich. 1980).

    8   *See* People v. Dillon, 668 P.2d 697, 727 (Cal. 1983).

    9   *See* Cabana v. Bullock, 474 U.S. 376, 386 (1986) (explaining the *Enmund* holding).

    10   *E.g.*, Tison v. Arizona, 481 U.S. 137, 149–50 (1987); *Cabana*, 474 U.S. at 384–88. The Court later ruled that *Enmund* constrains sentencing but not the mens rea jury instruction in capital felony-murder cases. Hopkins v. Reeves, 524 U.S. 88, 100 (1998).

    11   For theoretical and empirical analyses of the economics of the felony-murder rule, see Nuno Garoupa & Jonathan Klick, *Differential Victimization: Efficiency and Fairness Justifications for the Felony Murder Rule*, 4 Rev. L. & Econ. 407 (2008); Anup Melani, *Does the Felony-Murder Rule Deter? Evidence from FBI Crime Data* (Nov. 11, 2002) (unpublished manuscript)) (on file at http://www.law.virginia.edu/pdf/malani/felonymurder021111rand.pdf

analysis begins with the simple case of a single criminal, acting alone, whose felonious conduct unintentionally kills someone. Traditionally, the common law did not limit liability for consequential harms arising from felonious acts. To the contrary, it imposed strict liability for them. This result produces both an output effect (a decrease in the severity of the felony that a criminal chooses to commit) and a substitution effect (a decrease in a criminal's use of violence as a factor of production in favor of other factors). As a matter of risk bearing, the felony-murder rule differed purposefully from the allocation of risk for consequential harm arising from torts or breaches of contract. I explain why this difference in the common law's allocation of risk was efficient and why one would predict that the departure from the common law felony-murder rule would impose costs on potential victims of crimes.

In Part III, I describe the second deterrent function of the felony-murder rule, which the Supreme Court and lesser courts appear to have ignored. The deterrent effect arises when a felony requires the cooperation of two or more persons. This second economic rationale for the felony-murder rule turns on vicarious liability and monitoring costs in the criminal "firm" assembled to commit a felony that is not intended to involve a killing. Enmund's vicarious liability for the Kersey murders illustrates such a case. Before its attenuation beginning in 1982, the felony-murder rule created an efficient incentive for criminal conspirators to monitor one another's conduct to minimize the likelihood, or degree, of violence employed in the commission of felonies that do not require a killing.

I

CONSEQUENTIAL HARM AND INVOLUNTARY EXCHANGE

The use of violence in the commission of a felony creates the risk of causing unintended harm or intended harm of an unintended magnitude. Who shall bear the cost of unintended personal injury (or the unintended magnitude of personal injury) arising from a felon's use of violence in the commission of a crime: the felon or the victim? The same question of how to assign liability for consequential harm arises in other areas of the common law. A machinist's tardiness in repairing a mill shaft causes his customer to suffer lost profits because the milling operation must shut down without the shaft. This

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case, *Hadley v. Baxendale*, established in contract law that a breaching party is not liable for harm resulting from the breach if such harm was unforeseeable to the breaching party at the time the contract was entered and if the other party never notified the breaching party of the possibility that a breach could cause such unlikely harm.[12] In tort law, the rule is slightly different. A taxicab negligently hits a decrepit alcoholic who suffers minor injuries but then dies of delirium tremens. This classic "eggshell plaintiff" case, *McCahill v. New York Transportation Co.*, stands for the proposition that a tortfeasor must take his victim as he finds him, bearing the liability for consequential harm notwithstanding the victim's peculiar fragility.[13]

These two cases ask: should the unexpected adverse consequences of an act be borne by the person who sets in motion the chain of events producing that harm or should those consequences be borne by the person injured as a result? From an economic perspective, the answer turns on which party can avoid the consequential harm at lower cost. In *Hadley v. Baxendale*, the breaching party avoids liability for the consequential harm of his breach because there is no evidence that he could have averted that harm at lower cost than the party suffering the harm.[14] In *McCahill*, the party who breaches a duty of care is liable for the consequential harm of his breach because it is less costly for a taxi company to require safe driving than it is for a decrepit and impecunious alcoholic to warn every potential tortfeasor in New York City of his unusual fragility.[15]

The felony-murder rule presents another variant of this same question: can the criminal or the victim better reduce the risk of consequential harm arising from a transaction between them? "Transaction" here broadly describes any transfer between two parties that alters the original distribution of resources between them. In *Hadley v. Baxendale*, the transaction is expressly contractual; in *McCahill*, it is tortious; with felony murder, it is criminal. In the case of felony murder, the criminal breaches a preexisting duty not to engage in felonious conduct. Although the criminal transaction differs fundamentally from a contractual or tortious exchange of wealth (or, more broadly conceived, liberty or property), it too creates

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[12]   156 Eng. Rep. 145, 148–49 (1854).
[13]   94 N.E. 616, 617 (N.Y. 1911).
[14]   *Hadley*, 156 Eng. Rep. at 148–49.
[15]   *See McCahill*, 94 N.E. at 617.

an exorbitant and unexpected harm that the law must determine should be borne by either the transgressor or the transgressed.

In the common law, the degree of consequential harm borne by the injuring party is inversely related to the extent to which the transaction producing that harm resulted from voluntary exchange between the injuring party and the victim. Thus, the felony-murder rule is diametrically opposite to the rule of *Hadley v. Baxendale*, imposing on the felon the full responsibility for the unintended harms flowing from his predicate felony. The rule imposes strict liability and unlimited liability for the unintended consequences of felonious acts.[16] It is well recognized that such a regime of risk allocation would be inefficient when regulating productive, non-criminal conduct that incidentally creates a social cost, such as pollution.[17] But that same regime is efficient with respect to felonies because no social utility results from the perpetration of a criminal act: we do not weigh the utility gain of the thief against the utility loss of his victim to determine whether to permit or outlaw the theft.[18] This conclusion holds with equal force when one considers the amount of violence that a criminal employs to commit a given felony. A violent felony is less voluntary than a nonviolent felony, just as any felony is less voluntary than a non-criminal tort, such that substitution away from violence (to stealth or deception, for example) is always socially efficient.

The only explicit recognition of this inverse relationship between the extent of liability for consequential harm and the social utility of the harm-causing activity that I have found in

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[16] Binder shows that the felony-murder rule in practice implicitly requires some degree of foreseeability, as in a negligence standard, by requiring as its predicate an enumerated or inherently dangerous felony—although sometimes, he notes, the standard more resembles negligence *per se*. *See* BINDER, *supra* note 2, at 12–13. Consequently, he describes felony murder as "negligent homicide." *Id.* at 183. However, a decision to discard the characterization of felony murder as strict liability homicide does not change my analysis, which rests merely on the proposition that the felony-murder rule imposes liability for consequential harm that tort law and contract law would consider too attenuated to support a finding of liability in the more consensual transactions that tort and contract address.

[17] *See* A. Mitchell Polinsky & Steven Shavell, *The Optimal Tradeoff Between the Probability and Magnitude of Fines*, 69 AM. ECON. REV. 880, 880 (1979).

[18] *See* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 207–08 (1968). For a discussion of this point with respect to antitrust enforcement, see Michael K. Block & J. Gregory Sidak, *The Cost of Antitrust Deterrence: Why Not Hang a Price Fixer Now and Then?*, 68 GEO. L.J. 1131, 1135–38 (1980).

the literature of law and economics is a brief but insightful passage by Mark Grady discussing a conundrum posed in 1939 by Warren Seavey:

> Seavey wrote, "One who, while carefully driving an automobile with which he is kidnapping a child, runs over and kills a pedestrian is not civilly liable for the death, even though he may be guilty of murder." It is indeed a conundrum because one would expect that proximate cause rules for crimes would be *more restrictive* than proximate cause rules for civil negligence. Since the criminal law entails much harsher sanctions than does civil negligence, one would think that criminal courts would be more reluctant to impose these sanctions in cases of attenuated causation. The opposite is true of the felony-murder rule to which the conundrum refers. The solution is to realize that most felonies, and all of the felonies to which the felony-murder rule applies, are highly inefficient acts. In the civil context, restrictive proximate cause rules arise from the possibility that people can be efficiently negligent. These causal rules are designed to limit the collateral damage from civil liability for efficient behavior. By contrast, when someone kidnaps a child and in the process runs over a pedestrian, there is little worry that harsh rules of criminal causation will unduly reduce the activity of kidnapping. Unlike with the activities governed by civil negligence, the optimum level of kidnapping is zero.[19]

What Grady does not explicitly say—but correctly could have said—is that the extent to which an activity enhances economic efficiency is directly related to the extent to which it results from voluntary exchange. Conversely, an action's potential to increase economic efficiency is inversely related to the degree to which it results from involuntary exchange.

The Supreme Court's opinion in *Enmund*, however, does not recognize this inverse relationship between attenuated causation and involuntary exchange. The Court implicitly analogizes the unintended death in a felony-murder case to the kind of remote causation observed in *Palsgraf v. Long Island Railroad*, where the party who set in motion the sequence of events producing the unintended and unforeseen harm is not made to shoulder its cost.[20] There, a commuter

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[19] Mark Grady, *Causation and Foreseeability*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF TORTS 114, 146 (Jennifer H. Arlen ed., 2013) (citation omitted) (discussing Warren A. Seavey, *Mr. Justice Cardozo and the Law of Torts*, 48 YALE L.J. 390, 404 (1939)).

[20] 162 N.E. 99, 101 (N.Y. 1928).

was pulled by a conductor onto a departing train and dropped a package containing fireworks onto the train tracks, causing an explosion that knocked over a scale on the rail platform onto the unlucky Mrs. Palsgraf—and precipitating one of the most celebrated colloquies on legal theory in the twentieth century, the opposing opinions in 1928 by Justice Andrews and Justice Cardozo on the question of foreseeability in tort law.   The Supreme Court in *Enmund* views Earl Enmund's role in the murder of the Kerseys as causally remote and thus unforeseeable, much as Justice Cardozo reasoned that the Long Island Railroad was not negligent because it could not have reasonably foreseen the risk that its passengers might be injured by firework explosions at its stations.   The Court thus stumbles over the conundrum that Grady shows is answered by focusing on the optimal level of the harm-producing activity, which in the case of felonies is zero.

II
TAXING VIOLENCE AS A FACTOR OF CRIMINAL PRODUCTION

The first economic rationale for the felony-murder rule is to make the commission of a felony safer.   The rule is a tax on violence.   It imposes excessive risk bearing on anyone electing to employ violence during a felony.   For a single criminal planning a robbery, ingenuity, stealth, deception, intimidation, and violence are factors of production for his crime.   If these factors can be employed in variable proportions to one another (as capital and labor can be substituted for one another in the production of most goods), then the same output (the successful perpetration of a robbery, let us say) can be produced in ways that trade increments of violence for greater amounts of ingenuity, stealth, and other factors.[21]

The decision to employ violence as a factor of production is thus a matter of degree.   As sometimes happens in robberies of armored cars, the robber might rely overwhelmingly on violence and shoot to kill the courier and his guards without warning.   Or, the robber might pull a gun, never intending

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[21]   Garoupa & Klick, *supra* note 11.   Consider variation in the victim's vulnerability to the crime, which is the *McCahill* issue discussed above.   They argue that the felony-murder rule induces the criminal to select less fragile victims: "[T]o the extent that we worry about the over-victimization of the weak (even beyond the fact that they are more likely to die generating a social cost) on normative grounds, the felony murder rule creates a penalty enhancement that offsets the attraction of weak victims." *Id.* at 416. One can characterize this effect as resulting from the criminal's marginal substitution away from violence in favor of yet another factor of production—search.   In this respect, my analysis here is compatible with, and extends, the insight of Garoupa and Klick.

to fire it. His gun might even be empty. Or, the robber might choose a weapon that is only effective at arm's length, such as a knife or blackjack or his own fists.

If the criminal is a profit maximizer, he will use that proportion of factor inputs, including violence or the threat of violence, having the lowest private cost of production to him. That cost includes the expected cost of punishment for the crime. If the expected penalty costs of violence are high relative to the prices of other factors of criminal production, then the criminal's demand for violence will fall and fewer robberies will be produced in a violent manner, all other factors being the same.

For ease of exposition, assume that there are only two factors of criminal production. One is violence, V, and the other is stealth, S. Thus, the criminal's production function is $Q = Q(V, S)$. An individual criminal is assumed to undertake a constrained cost-minimization problem analogous to the theory of firm production. Specifically, he seeks to minimize the total private cost C to him of committing the crime, subject to the constraint that he attain a specified level of output q_0 from the crime, which is measured in terms of expected dollars. One can consider this output constraint the "haul" from the crime: a purse snatching, a liquor store robbery, a bank robbery, and an armored-car robbery are four conceivably increasing levels for q_0.

One can depict graphically the violence-reducing effect of the felony-murder rule. In Figure 1, q_0 is the isoquant for a given (nonhomicidal) felony that would be the predicate for application of the felony-murder rule—that is, a curve showing the different combinations of violence and stealth that produce the output q_0 for that felony. For example, q_0 might represent the theft of \$10,000 produced by a bank robbery. The isocost line z_0 shows all the combinations of violence and stealth for which the criminal incurs cost z_0, given the prices of violence and stealth in the absence of the felony-murder rule. In the absence of the felony-murder rule, the criminal would operate at point A and thus employ V_0 units of violence and S_0 units of stealth. The existence of the felony-murder rule raises the relative price of violence as a factor of production. The pivoting of isocost z_0 to isocost z_2 represents how the increase in the relative price of violence (as a result of the felony-murder rule) leads to a decrease in the demand to use violence as a factor of production in the commission of a felony. The expansion path, denoted as E_0, connects the optimal

combination of violence and stealth as the scale of production expands, given a felon's profit-maximizing behavior.

FIGURE 1: SUBSTITUTION AND OUTPUT EFFECTS
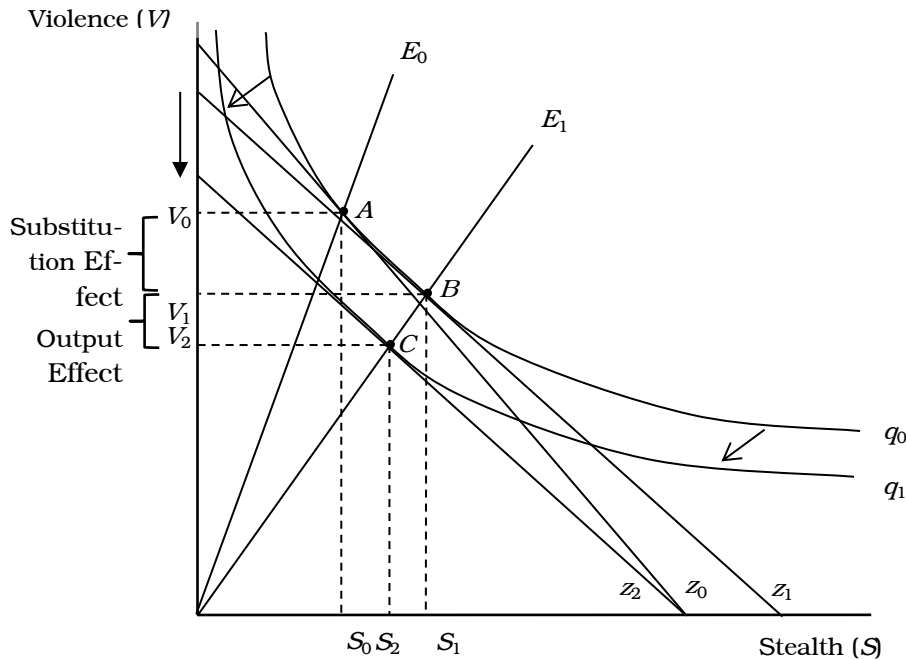OF THE FELONY-MURDER RULE

Figure 1 depicts both an output effect and a substitution effect. As the shift from isocost z_0 to isocost z_2 depicts, the cost of obtaining the output represented by isoquant q_0 is no longer attainable for the felon with the original expenditure z_0. Instead, the felon can produce only at the lower level represented by isoquant q_1. The increased cost of using violence to commit a felony causes the criminal to shift from point A on isoquant q_0 to point C on isoquant q_1. E_1 shows the new expansion path of the cost-minimizing output of criminal activity if the prices of violence and stealth remain the same.

Due to its imposition of a tax on violence, the felony-murder rule has two separate effects on the felon's optimal combination of stealth and violence: (1) substitution from violence to stealth and (2) a decrease in the level of criminal output. One can best understand the substitution effect by examining the point at which the felon would produce if he could expend more resources to commit the same felony (z_1 and q_0). Although the felon would commit the same crime whether or not the felony-murder rule is in

effect, the higher relative cost of violence compared to stealth would still cause him to substitute to stealth some of the resources that he would have devoted to violence. In Figure 1, this factor substitution is seen as the shift from point A to point B along isoquant q_0. The felon's use of violence decreases from V_0 to V_1, and his use of stealth increases from S_0 to S_1.

The output effect represents the increased cost of producing at the original output q_0 after the felony-murder rule in effect has taxed the criminal's use of violence. One can isolate this output effect in Figure 1 by the movement from point B to point C along expansion path E_1. With this output effect, the felon's use of violence further decreases from V_1 and V_2, and his use of stealth also decreases from S_1 to S_2. The expansion paths E_0 and E_1 each show the cost-minimizing combinations of stealth and violence at each output level, holding constant the relative price of violence and stealth. In other words, a movement along either expansion path is a pure output effect.

In short, by taxing violence as a factor of criminal production, the felony-murder rule will cause the felon (1) to reduce the quantity of violence used in committing a given felony (depicted by the movement from V_0 to V_2) and (2) to choose to commit a less serious felony—that is, a felony with a reduced production output (depicted by the movement from isoquant q_0 to isoquant q_1).

III
LEAST-COST DETERRENCE OF THE USE OF VIOLENCE IN THE COMMISSION OF FELONIES REQUIRING TEAM PRODUCTION

Some jurists and scholars might consider it an offense to fundamental principles of criminal law to convict the driver of a getaway car for a murder committed by his cohorts when the driver did not intend to kill and did not participate in the killing. The objection is that, for the nontriggerman, there is no mens rea for murder—and to convict someone of murder under a strict-liability theory is pointless from a deterrence standpoint, because the state cannot deter a person from an outcome that he never intends.

This criticism of the felony-murder rule is incomplete. It overlooks that the joint-liability and strict-liability features of the felony-murder rule together generate a deterrence result that is independent of the risk-bearing result discussed in Part II. This second economic rationale for the felony-murder rule flows from the fact that the rule has the practical effect of charging the nontriggerman with the duty of deterring the use of violence (and, ultimately, lethal force) in the commission of a felony. The imposition of this duty on the nontriggerman is efficient because he

is the person (apart from the triggerman himself) best situated to ensure that the felony is performed safely. Thus, the felony-murder rule creates an internal monitoring of the use of violence within criminal conspiracies.[22]

A criminal conspiracy requires the coordinated acts of several persons. It is significant for the purposes of the felony-murder rule that, for any one member of a conspiracy, the expected cost of punishment depends not only on his own actions during the commission of the felony, but also on the actions of his cohorts (both during and after the predicate felony). Thus, the felony-murder rule creates an incentive for conspirators to plan and execute crimes in a manner that minimizes the possibility that one conspirator will raise the expected cost of punishment for all participants in the felony by resorting to lethal force. The driver of the getaway car, therefore, has a strong incentive to insist that the gunman use an unloaded pistol when robbing a liquor store so that the cashier is only intimidated or roughed up rather than accidentally shot. A pair of muggers will have an incentive to make sure that each is armed with a knife or a blackjack rather than a pistol. In both examples, the criminal is less likely to enter into a conspiracy if he thinks it too risky that his cohort will resort to violence and thereby expose the first criminal to liability for first-degree murder under the felony-murder rule.

It may be quixotic to suggest that criminals negotiate around this risk problem when plotting a felony. Obviously, a "contract" between the gunman and the getaway driver that the gunman will not shoot during the commission of the felony is unenforceable in court—because the contract is contrary to public policy and because the gunman already faces a pre-existing duty not to commit felonies, violent or otherwise. So the driver, sentenced to life imprisonment or death for felony murder, could never sue the gunman-turned-killer for damages for having breached his promise to forbear from using lethal force.

But this enforceability problem does not mean as a consequence that the felony-murder rule fails in its role as a violence-reducing device. The rule may still encourage safe felonies if it becomes difficult to enlist colleagues with whom to perpetrate crimes that reasonably can be expected to necessitate the use of violence. In short, the enforceability problem of a nonviolence pact

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[22] This second economic rationale for the felony-murder rule addresses what Binder calls the issue of "complicity and collective liability." BINDER, *supra* note 2, at 213.

among felons may have the net effect of discouraging entry into criminal conspiracies.

CONCLUSION

The Supreme Court should ask whether the intent requirement that it engrafted onto the felony-murder rule as a matter of constitutional law has encouraged more frequent use of lethal force in the commission of robberies and other property crimes. The Court's reading of the Eighth Amendment, conditioning as it does vicarious criminal liability for felony murder on the moral culpability of the nontriggerman, erodes the felony-murder rule's efficient risk allocation. The Court's interpretation reduces the nontriggerman's incentives (1) to minimize his own probability of causing an unintended killing by substituting stealth or other factors of criminal production for violence and (2) to monitor his partners and to decline to enter into team production of felonies with criminals predisposed to employ violence. By decreasing the expected cost of consequential harm to a nontriggerman during the commission of a felony, the Court's jurisprudence would seem to have exposed potential victims of crime to greater risk of violence.