Felony-Murder Doctrine Through the Federal Looking Glass

HENRY S. NOYES*

INTRODUCTION

The federal felony-murder statute requires the government to prove that a murder occurred and then calls for a determination of the degree of the murder for sentencing purposes. The government must prove beyond a reasonable doubt that the defendant acted with "malice aforethought" in order to obtain a conviction. The felony-murder statute is not, however, the only federal statute that seeks to punish a defendant for a felony-related death. Many other felony statutes allow sentences equivalent to those available following a murder conviction if a death results during commission of the felony. It is not clear whether these statutes retain malice aforethought as an element of the offense.

Part I of this Note argues that federal courts should interpret all federal felony statutes such that a resulting death and a culpable mens rea for that death are elements that must be proven at the guilt/innocence stage to sentence a defendant for the resulting death. Such an interpretation is consistent with federal felony-murder theory and would avoid constitutional problems inherent in a murder statute that goes beyond strict liability.

If, and only if, federal courts conclude that death and malice aforethought are not elements of these offenses, then an analysis of the United States Sentencing Commission's ("Sentencing Commission") treatment of federal felony-murder doctrine is necessary. Part II argues that the Sentencing Commission has misinterpreted federal felony-murder doctrine by applying it at the senteneing stage. The Federal Sentencing Guidelines ("Sentencing Guidelines" or "Guidelines") treat a death that results during the commission of a felony as a sentencing factor, rather than as an element of the offense. This interpretation is not a necessary interpretation and it is problematic because it creates inconsistencies in the Sentencing Guidelines.

Part III discusses the Sentencing Commission's use of sentencing by analogy. The Sentencing Commission proceeds on the assumption that other felonies resulting in death are analogous to murder. The Sentencing Guidelines direct federal judges to sentence defendants convicted of a number of distinct felonies resulting in death under the guidelines applicable to murder. Sentencing by analogy is improper for two reasons: specifically, murder is *not* analogous to other felonies resulting in death; and generally, sentencing by

* J.D. Candidate, 1994, Indiana University School of Law—Bloomington; B.A., 1990, Northwestern University. I would like to thank Professor F. Thomas Schornhorst for his guidance; Jennifer Brajkovich, Daniel Mathis, and Shana Connell for their patience and outstanding editorial assistance; my family for their support; and the Honorable Elizabeth N. Mann for 25 years of patience and persistence.

analogy violates either the separation of powers doctrine or the delegation doctrine.

Part IV argues that the Sentencing Commission's interpretation of the federal felony-murder rule—under which conduct resulting in death is relevant to sentencing rather than an element of the offense—violates the Due Process Clause. The Sentencing Guidelines' extension of the felony-murder rule to the sentencing stage turns the resulting death into a sentencing factor—the proof of which is more important than the offense of conviction.

The morass that is the Federal Criminal Code may be the root of the confusion surrounding the use of the felony-murder doctrine in federal criminal law. Part V argues twofold: that the Sentencing Commission's treatment of the felony-murder rule may have been an attempt to clarify a body of criminal law enacted haphazardly, and that uniform treatment of the federal felony-murder rule should begin with a legislative overhaul of the Federal Criminal Code. One recent appeal demonstrates the necessity of addressing how the felony-murder rule applies in federal criminal cases.

UNITED STATES V. RYAN

On October 26, 1993, the Eighth Circuit decided an appeal in the case of *United States v. Ryan*.[1] In *Ryan*, a jury in Des Moines, Iowa convicted the defendant, Dale Ryan, of arson charged under 18 U.S.C. § 844(i).[2] Fire destroyed a fitness center managed by Ryan and owned by Ryan's father. Two firefighters died while fighting the fire. Ryan was sentenced to 328 months imprisonment.

Ryan appealed his conviction on a number of issues, two of which are relevant to this Note. First, Ryan was charged in the indictment with causing the deaths of the firefighters.[3] The trial judge, however, was "[u]ncertain whether the issue of causing death was an element of the offense or merely a sentencing consideration . . . ."[4] The trial judge, therefore, did not require the jury to find that Ryan acted with a culpable state of mind with respect to the deaths that occurred. In fact, "[t]he only *verdict* rendered by the jury in

---

1. *Ryan*, No. 92-1357, 1993 WL 429092 (8th Cir. 1993). The *Ryan* opinion was not available until the date of publication, so all cites are to *Westlaw*. The official cite in the federal reports is: United States v. Ryan, 9 F.3d 660 (8th Cir. 1993). On January 5, 1994, the Eighth Circuit vacated the opinion on grant of rehearing.

2. 18 U.S.C. § 844(i) (1988). The statute reads:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both; . . . and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 34 of this title.

3. Brief for Appellant at 42, United States v. Ryan, 1993 WL 429092 (8th Cir. 1993) (No. 92-1357); Reply Brief for Appellant at 2, United States v. Ryan, 1993 WL 429092 (8th Cir. 1993) (No. 92-1357).

4. Brief for Appellant at 42, *Ryan* (No. 92-1357).

this case was upon the lesser included offense of 'malicious destruction of a building by fire.' Upon the greater homicide offense alleged in the indictment the jury rendered *no verdict whatsoever*."[5] Once the jury found the defendant guilty of the lesser arson offense, the judge put special interrogatories before the jury. Based upon the jury's responses, the *judge* entered a judgment of conviction upon the greater offense.[6] Thus, although the jury did not convict Ryan of the homicide offense, he was sentenced for the greater offense. Second, in applying the Federal Sentencing Guidelines, the *Ryan* court "determined that first degree murder was the most analogous offense"[7] and applied the guideline applicable to first-degree murder. The court effectively sentenced Ryan for murder, an offense which requires a showing of a culpable mens rea as an element of the offense, even though the jury never found this element.

The Eighth Circuit affirmed Ryan's conviction and sentence and held that "18 U.S.C. 844(i) is a sentencing enhancement provision, not a separate and distinct offense with distinct, heightened elements of proof."[8] The court did not have to decide whether "malice aforethought" for the death was an element of the offense as well. The court considered it sufficient that the district court judge found by a preponderance of the evidence that Ryan acted with "malice aforethought."[9] Under the Eighth Circuit's interpretation, the penalty prescribed for the "resulting death is potentially *infinitely* more severe" than the penalty for the underlying offense of arson.[10] The *Ryan* opinion may foretell a revolution in criminal law.

Ryan illustrates two major problems with the use of the felony-murder doctrine[11] in federal criminal law. First, application of the felony-murder doctrine has grown beyond its traditional base. The federal felony-murder doctrine is codified in 18 U.S.C. § 1111.[12] Yet, Congress has extended the scope of the federal felony-murder doctrine[13] by enacting a series of statutes that define felonies such as arson, bank robbery, and aircraft hijacking, and

---

5. *Id.* (emphasis in original) (citations omitted).

6. *Id.* at 44. The simple felony of arson carries a maximum sentence of ten years. The maximum penalty for homicide as a result of arson is life imprisonment or the death penalty. 18 U.S.C. § 844(i).

7. Brief for Appellant at 9-10, *Ryan* (No. 92-1357).

8. *Ryan*, 1993 WL 429092 at *9. The court found that "section 844(i) does resemble a sentence enhancement provision [because] . . . [t]he first portion of the lengthy sentence defines the crime of arson, while the second and third portions seem to do no more than single out a subset of arsonists for more severe punishment." *Id.* at *7.

9. *Id.* at **12-13.

10. *Id.* at *8 (emphasis added). While the court stated that the penalty may be "infinitely more severe," the court failed to consider whether such an increase violates the due process analysis raised by McMillan v. Pennsylvania, 477 U.S. 79 (1986). *See infra* part IV (arguing that the Sentencing Commission's treatment of federal felony-murder doctrine violates due process). The Eighth Circuit in fact made no reference whatsoever to *McMillan* in its decision.

11. "Felony-murder doctrine" and "felony-murder rule" are used to connote two distinct concepts in this Note. "Felony-murder doctrine" covers the general proposition that one who commits a felony that results in death may be held liable for that death. The "felony-murder doctrine" may, however, be applied in a variety of ways. "Felony-murder rule" refers to specific codifications and applications of the "felony-murder doctrine."

12. 18 U.S.C. § 1111(a) (1988).

13. *See infra* part I.B.

providing for enhanced penalties for deaths resulting from these felonies. This extension has resulted in uncertainty as to whether the homicide provisions in these statutes are rooted in substantive law or are relevant only to the sentencing phase. The death of another person and a culpable mens rea ("malice aforethought") for the death must be elements of the offense that the Government must prove in order to obtain a conviction that sustains a sentence for murder.

The second problem in *Ryan* concerns the district court judge's finding that the guideline for first-degree murder was the "most analogous provision." Murder requires a finding at the guilt/innocence stage that the defendant acted with "malice aforethought" resulting in the victim's death. Ryan was convicted of arson. "Malice aforethought" is not an element of arson. Therefore, murder is not an analogous provision. Even if murder were analogous, to allow the trial judge to sentence by analogy denies the defendant due process and the right to a jury trial at which guilt must be established beyond a reasonable doubt.

But Ryan's conviction and sentence for murder present more than a case of poor analogy. The application of the Sentencing Guidelines to these "resulting in death" provisions evidences the Eighth Circuit's and the United States Sentencing Commission's fundamental misunderstanding of traditional federal felony-murder doctrine. The Eighth Circuit's misunderstanding is manifested in its holding that the "if death results" provisions are sentencing provisions. The Sentencing Commission's misunderstanding is evidenced by language in the Guidelines that calls for sentencing the defendant for murder after conviction of a felony in a number of other instances if the victim was "killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States . . . ."[14] Under this sentencing scheme, the prosecutor need only charge and convict the defendant of a predicate felony. Then, at sentencing, the prosecution may open a Pandora's box of charges to establish that the defendant should be sentenced for murder. The sentencing scheme, therefore, departs from the traditional federal felony-murder rule, which requires the prosecution to establish murder at the guilt/innocence stage beyond a reasonable doubt.

This difference in the application of the felony-murder rule derives from a disparity in the way the language of the statute is read. Under the Eighth Circuit's and the Sentencing Commission's interpretation, there is simply one offense, such as arson, and the arson conviction allows for a sentence of up

14. *See, e.g., Proposed Amendments to the Federal Sentencing Guidelines*, 61 U.S.L.W. 42 d78, amend. 4 (May 11, 1993) [hereinafter *Proposed Amendments*] (amending §§ 2A3.1(c)(1) (criminal sexual abuse), 2B3.1(c)(1) (robbery), 2B3.2(c)(1) (extortion by force), 2D1.1(c)(1) (drug offenses), 2E2.1(c)(1) (extortionate extension or collection of credit)). The Sentencing Commission reported these amendments to Congress in April 1993 pursuant to 28 U.S.C. § 994(p) (as amended by section 7109 of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690) and the amendments became effective November 1, 1993.

to life imprisonment.[15] The provisions for increased punishment "if death results" are then merely sentencing factors. Under a more traditional interpretation of criminal statutes,[16] arson is one offense, allowing for a maximum sentence of ten years.[17] Arson where a death results is a *separate* offense punishable by life imprisonment.[18] The Fifth Circuit recognized this traditional interpretation in *United States v. Tripplett.*[19] In a unanimous opinion, Judge Wisdom wrote for the court:

> To uphold Tripplett's conviction and sentence for violating 18 U.S.C. § 844(i), this Court must find that the [G]overnment proved beyond a reasonable doubt that Tripplett (1) maliciously damaged or destroyed a building, or attempted to do so; (2) that Tripplett damaged or destroyed the building by means of fire; (3) that the building was being used in interstate commerce or in an activity affecting interstate commerce; *and (4) that the fire resulted in the death of a person.*[20]

Judge Wisdom's opinion stands in stark contrast to the Eighth Circuit's statement that, "[t]he courts of appeals have not yet construed this aspect of Section 844(i)."[21] To resolve confusion and misunderstanding, Congress and the federal courts should address the Eighth Circuit's opinion and the Sentencing Commission's treatment of the federal felony-murder rule.

I. MENS REA AND THE FEDERAL FELONY-MURDER RULE

The federal codification of the felony-murder doctrine, 18 U.S.C. § 1111, retains "malice aforethought" as an element of the offense. The use of the felony-murder doctrine has not, however, been limited to 18 U.S.C. § 1111. Other federal statutes include provisions to address a felony that "results in" death.[22] The text of these other statutes does not appear to require proof of a culpable mens rea. For instance, the Eighth Circuit, in the *Ryan* decision,

---

15. UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL § 2K1.4 (1992) (setting forth different levels of punishment for the single "offense" of arson). The Federal Sentencing Guidelines are hereinafter referred to as U.S.S.G.

16. Chief Judge Richard S. Arnold dissented on this issue, finding that the homicide provision of § 844(i), that reads "if death results to any person," is an element of the offense, not a sentencing factor. United States v. Ryan, 1993 WL 429092, at *15 (8th Cir. 1993) (Arnold, C.J., concurring in part and dissenting in part).

> As the Court has recognized, Section 844(i) is far from clear. It lacks the traditional indicia of a sentence enhancement; as the Court notes, the increase in punishment upon a finding that a death has occurred is infinitely more severe, and that increase is not a multiple or a derivative of the original sentence (either of which might indicate Congress intended a sentence enhancement). The Court nonetheless concludes, in the face of the ambiguity in the statute, that its language "militates" in favor of interpreting the "if death results" provision to be a sentencing factor. This conclusion is inconsistent with the settled rule that ambiguities in criminal statutes are to be resolved in favor of the defendant, under the Rule of Lenity.

Id. (citing Rewis v. United States, 401 U.S. 808, 812 (1971)).

17. 18 U.S.C. § 844(i).

18. *Id.*

19. *Tripplett*, 922 F.2d 1174 (5th Cir. 1991), *cert. denied*, 111 S. Ct. 2245 (1991).

20. *Id.* at 1177 (footnote omitted) (emphasis added).

21. *Ryan*, 1993 WL 429092 at *7.

22. *See infra* part I.B.

decided that the text of the arson statute did not even require proof of the death itself. This Part argues that federal courts should not only interpret these statutes such that a resulting death is an element of the offense, they should also interpret the statutes to include "malice aforethought" regarding the death as an element of the offense of conviction. Such an interpretation would complement the federal felony-murder rule, would be consistent with the treatment afforded "if death results" provisions by several courts, and would embrace a meaning of the statute which satisfies constitutional scrutiny.[23]

A. 18 U.S.C. § 1111

The typical felony-murder rule posits that an individual is guilty of first-degree murder if a death results from conduct during the commission of, or attempted commission of, a felony.[24] The felony-murder doctrine "'relievf es] the state of the burden of proving pre-meditation or malice.'"[25] Thus, felony murder was an offense of strict liability as to the death element at common law.[26] This doctrine has been controversial since its creation. England, where the doctrine originated, abolished the felony-murder rule in 1957.[27] In the United States there have been some judicial and legislative attempts to limit the expansion of the doctrine by prohibiting conviction for murder if the resulting death was not a necessary or reasonably foreseeable consequence of the underlying felony or the circumstances under which the underlying felony occurred.[28] The doctrine, however, has continued to survive in the United

23. The consequences of an alternative interpretation violate the Due Process Clause. *See infra* part IV.

24. MODEL PENAL CODE § 210.2 cmt. 6 at 30 (1980). However, the drafters of the Model Penal Code believed that the felony-murder doctrine should be abandoned as an independent basis for establishing first-degree murder. *Id.*; *see also* Kevin Cole, *Killings During Crime: Towards a Discriminating Theory of Strict Liability*, 28 AM. CRIM. L. REV. 73, 78 n.15 (1991) (stating that the felony-murder doctrine embraces two distinguishable functions in addition to supplying "malice aforethought" to make the killing a murder: 1) killings during certain felonies make the defendant eligible for the death penalty and 2) establish the "murder" as "first-degree").

25. Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 453 (1985) (quoting Richard Bonnifield, Comment, *An Assault Resulting in Homicide May Be Used to Invoke the Felony-Murder Rule*, 13 GONZ. L. REV. 268, 271 (1977)).

26. *See, e.g.*, MODEL PENAL CODE § 210.2 cmt. 6 at 31; Roth & Sundby, *supra* note 25, at 457-60. Strict liability has been described as the siren song of criminal law. "The chief problem . . . is somehow to get legislators to lash themselves to the mast to keep from yielding, in the heat of the politieal process, to the temptation to define crimes without mens rea." Sanford H. Kadish, *Act and Omission, Mens Rea, and Complicity: Approaches to Codification*, 1 CRIM. L. F. 65, 76-77 (1989).

27. The Homicide Act, 1957, 5 & 6 Eliz. 2, ch. 11, § 1. There is some debate over the exact origin and purposes of the felony-murder doctrine. Roth & Sundby, *supra* note 25, at 449-50.

28. *See, e.g.*, S. 1437, 95th Cong., 2d Sess. § 1601(c) (1978) (proposed Federal Criminal Code which was not adopted). *But see* People v. Stamp, 82 Cal. Rptr. 598, 603 (1969) (rejecting a requirement of reasonable foreseeability in death of a robbery victim who died of a heart attack because a felon takes his victim as he finds him), *cert. denied*, 400 U.S. 819 (1970).

These limitations may also be thought of as a "proximate cause" requirement. *See, e.g.*, MODEL PENAL CODE § 210.2 cmt. 6 at 33-34; WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 623-32 (2d ed. 1986); David Crump & Susan W. Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL'Y 359, 383-84, 391-93 (1985). The Federal Sentencing Guidelines have recognized this concern, albeit indirectly (as opposed to directly addressing the felony-murder doctrine).

States[29] and the enactment of the Federal Sentencing Guidelines has expanded its application to the sentencing stage.

Congress alleviated concern over a federal strict liability murder statute by retaining the requirement of proving a culpable mens rea in 18 U.S.C. § 1111, the federal murder statute.

> Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.
>
> Any other murder is murder in the second degree.[30]

"Malice aforethought" remains a necessary element of every murder, be it murder in the first degree, murder in the second degree, or felony murder.[31] The language of 18 U.S.C. § 1111(a) requires that the government first establish that "murder" was committed with "malice aforethought"[32] before

---

The Sentencing Guidelines forbid sentencing the defendant for relevant conduct that was not "reasonably foreseeable." U.S.S.G. § 1B1.3 cmt. 2, ("Where it is established that the conduct was neither within the scope of the defendant's agreement, nor was reasonably foreseeable in connection with the criminal activity the defendant agreed to jointly undertake, such conduct is not included in establishing the defendant's offense level under this guideline."). But even this minimal requirement may not be taken seriously. *See* Brief for Appellant at 28, United States v. Ryan, 1993 WL 429092 (8th Cir. 1993) (No. 92-1357) (quoting statement of trial judge):

> I do not see a foreseeability requirement in the statutes. The statute simply refers to the conduct resulting in death, and I think that means just that. Whether such deaths are foreseeable or not, the only question is did the conduct actually result in the deaths, so I don't think that the foreseeability on the part of the defendant at the time is an element of the death issue.

29. For a brief discussion of the development of the rule in American law, see People v. Aaron, 299 N.W.2d 304 (1980), *cert. denied*, 498 U.S. 971 (1990); MODEL PENAL CODE § 210.2 cmt. 6; and Jo Anne C. Adlerstein, *Felony-Murder in the New Criminal Codes*, 4 AM. J. CRIM. L. 249 (1975-76). The felony-murder doctrine is widely criticized by legal commentators as unprincipled. *See* Roth & Sundby, *supra* note 25; Jeanne H. Seibold, Note, *The Felony-Murder Rule: In Search of a Viable Doctrine*, 23 CATH. LAW. 133, 133 n.1 (1978). *See generally* 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); Frederick J. Ludwig, *Foreseeable Death in Felony Murder*, 18 U. PITT. L. REV. 51, 52-53 (1956); Norval Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50 (1956); Note, *Felony Murder as a First Degree Offense: An Anachronism Retained*, 66 YALE L.J. 427 (1957). *But cf.* Cole, *supra* note 24 (proposing a justifiable theory for elaboration of the felony-murder rule in light of the rejection of strict liability elsewhere in criminal law); Crump & Crump, *supra* note 28 (defending the rule as a reasonable punishment, reflecting society's idea of proportionality).

30. 18 U.S.C. § 1111(a).

31. "We note in passing that under § 1111 *all* murder, including second-degree murder and felony murder, requires 'malice aforethought.'" United States v. Lilly, 512 F.2d 1259, 1261 n.4 (9th Cir. 1975) (emphasis in original).

It should be noted, however, that there has been no dispositive decision by the Supreme Court interpreting the language of 18 U.S.C. § 1111(a) in this manner. In People v. Dillon, 668 P.2d 697, 715 (Cal. 1983), the Califoruia Supreme Court reached an opposite result, based on a unique legislative history, when interpreting similar language in a state statute.

32. United States v. Sides, 944 F.2d 1554, 1557 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 604 (1991). "Malice aforethought" does not require that the defendant intentionally or knowingly kill another, but may be established by evidence that is "reckless *and* wanton *and* a gross deviation from

it can address whether the "murder" is of the first or the second degree.[33] The fact that the "murder" occurred during the commission of a felony simply supplies the predicate to make the "murder" a murder of the first degree. In addition, because the Due Process Clause requires the government to prove every element of an offense beyond a reasonable doubt, the prosecution may not shift the burden of proof to the defendant by presuming a necessary element upon proof of the other elements of an offense.[34] The federal felony-murder statute does not "presume" the existence of "malice aforethought" from the commission of a felony, because "malice aforethought" is an element of the offense.

B. Statutes Incorporating a Provision Applicable "If Death Results"

Federal felony-murder theory requires the government to prove that a murder occurred and then calls for a determination of the degree of the murder for sentencing purposes. The felony-murder doctrine has expanded with the growing complexity of the Federal Criminal Code, causing confusion as to what level of mens rea is necessary to hold a defendant liable for a death that occurs during the commission of a felony.

Congress has expanded the jurisdictional reach of federal criminal law under the guise of the Commerce Clause.[35] While the federalization of criminal law continues to be criticized,[36] Congress has enacted a variety of wide-ranging

---

a reasonable standard of care, of such a nature that a jury is warranted in inferring that [the] defendant was aware of a serious risk of death or serious bodily harm." United States v. Black Elk, 579 F.2d 49, 51 (8th Cir. 1978) (emphasis in original) (quoting United States v. Cox, 509 F.2d 390, 392 (1974)); *see also* United States v. Fleming, 739 F.2d 945, 947-48 (4th Cir. 1984), *cert. denied*, 469 U.S. 1193 (1985); United States v. Shaw, 701 F.2d 367, 392 n.20 (5th Cir. 1983), *cert. denied*, 465 U.S. 1067 (1984). For purposes of this Note it may be understood that "malice aforethought" encompasses conduct that is intentional, knowing, and extremely reckless but not conduct that is negligent or merely reckless.

33. United States v. Bedonie, 913 F.2d 782, 788 n.4 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 2895 (1991); *see also* Beardslee v. United States, 387 F.2d 280 (8th Cir. 1967). "Clearly, under the first sentence of § 1111(a), malice aforethought is a necessary faetor in the federal crime of murder." *Id.* at 289 (Justice, then Judge, Blackmun writing for the Eighth Circuit).

34. Patterson v. New York, 432 U.S. 197, 215 (1977) (citing Mullaney v. Wilbur, 421 U.S. 684 (1975)) (upholding the portion of a New York murder statute that put the burden of proof upon the defendant to prove beyond a reasonable doubt that the defendant was acting under extreme emotional distress because it was not an element of the crime).

35. U.S. CONST. art. I, § 8, cl. 3. The jurisdictional expansion of the Federal Criminal Code under the guise of the Commerce Clause has generally followed the decision of Perez v. United States, 402 U.S. 146 (1971) (allowing Congress to exercise criminal jurisdiction over entirely *intrastate* activity which adversely affects interstate commerce). *See* GERALD GUNTHER, CONSTITUTIONAL LAW 137-45 (12th ed. 1991). For a discussion of the jurisdictional basis for expanding the Federal Criminal Code, see John S. Baker, Jr., *Nationalizing Criminal Law: Does Organized Crime Make It Necessary or Proper?*, 16 RUTGERS L.J. 495, 502-18 (1985); *see also* S. 1722, 96th Cong., 1st Sess. § 201 (1979); S. 1437, 95th Cong., 2d Sess. § 201(c) (1978); Norman Abrams, *Consultant's Report on Jurisdiction, in* 1 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS (1970) [hereinafter WORKING PAPERS]; Roser A. Pauley, *An Analysis of Some Aspects of Jurisdiction Under S. 1437, The Proposed Federal Criminal Code*, 47 GEO. WASH. L. REV. 475 (1979).

36. Chief Justice William H. Rehnquist has warned repeatedly of the dangers of expanding the Federal Criminal Code. *See, e.g.*, William H. Rehnquist, *Chief Justice's 1991 Year-End Report on the Federal Judiciary*, THE THIRD BRANCH, Jan. 1992, at 2-3. Rehnquist's concern regarding the

statutes that include provisions to address a felony that results in death.[37] The text of these provisions does not appear to require proof of a culpable mens rea. In October of 1992, for example, Congress passed the "Anti Car Theft Act of 1992" and made carjacking a federal crime.[38] Carjacking is the taking of a motor vehicle from the person or presence of another by force and violence or intimidation while possessing a firearm.[39] The carjacking statute contains a provision allowing a sentence of life imprisonment if a death results during the offense.[40] This provision parrots provisions in many federal crimes that hold the offender responsible for a resultant death. Arson,[41] bank robbery,[42] aircraft piracy,[43] drug robberies,[44] and a host of other statutes[45] all contain similar "if death results" provisions. These are representative of markedly different homicide statutes that impose criminal liability without textually requiring proof of culpability with respect to the homicide element. These statutes almost uniformly permit a sentence of life imprisonment,[46] the same punishment for a conviction under the federal murder statute, when a death results.

Statutes containing "if death results" provisions are so similar to felony-murder provisions that courts should treat them as mere extensions of the

---

federalization of state crime is shared by the Judicial Conference. Judge Vincent Broderick, chairman of the Judicial Conference's Committee on Criminal Law, has taken the unusual step of writing directly to the members of the Senate and House Judiciary Committees to notify them of the Committee's "long-standing position in opposition to the unnecessary expansion of federal jurisdiction into areas that traditionally have been within the province of the state courts." *Congress Continues Federalization Efforts*, THE THIRD BRANCH, May 1992, at 4. Robert D. Raven, 1988 and 1989 ABA President, has written that the "caseload crisis" in federal courts is due to the federalization of criminal law and that the federalization of criminal law is a result of political posturing.

> Because being tough on crime plays well at the ballot box, federal politicians in both the legislative and executive branches have embarked on a well-publicized war against crime. To be a front-page player in this war, they have substantially expanded the Federal Criminal Code, essentially creating an entire body of law that duplicates state criminal codes.

Robert D. Raven, *Don't Wage War on Crime in Federal Courts*, TEX. LAW., Aug. 31, 1992, at 13.

37. Many of these statutes are based on felonies not mentioned in the federal felony-murder statute. For example, 49 U.S.C. § 1472(i) (1988) covers air piracy—an offense which is not mentioned in 18 U.S.C. § 1111.

38. Pub. L. No. 102-519, § 101, 1992 U.S.C.C.A.N. (106 Stat.) 3384 (codified at 18 U.S.C. § 2119).

39. 18 U.S.C. § 2119 (Supp. IV 1992). One court has struck down the statute, holding that the Anti Car Theft Act lacks a rational nexus to interstate commeree. United States v. Cortner, 834 F. Supp. 242 (M.D. Tenn. 1993).

40. 18 U.S.C. § 2119(3).

41. *Id.* § 844(i) (statute on which government relied when convicting Dale Ryan).

42. *Id.* § 2113(e) (1988).

43. 49 U.S.C. § 1472(i).

44. 18 U.S.C. § 2118(c)(2) (1988).

45. *See e.g., id.* §§ 32 (destruction of aireraft facilities), 33 (destruction of motor vehicles), 241 (conspiracy against rights), 242 (deprivation of rights under color of law), 245(b) (federally protected activities), 247(c)(1) (damage to religious property or interference with free exercise of religious beliefs), 844(i) (dealing in explosives), 1365(a)(2) (tampering with consumer products), 1716(i)(2) (mailing injurious article), 1864(b)(1) (hazardous or injurious devices on federal land); 21 U.S.C. §§ 841(b)(1)(A) (manufacture, distribution, or dispensing controlled or counterfeit substances), 960(b)(1)-(3) (importing/exporting drugs) (1988).

46. Some of the statutes go further and call for the death penalty in certain circumstances. *See, e.g.,* 18 U.S.C. §§ 34 (setting forth penalties for violation of § 32 or § 33), 844(i), 1716(i)(2) (1988).

felony-murder rule.[47] Accordingly, to use these statutes to sentence a defendant for felony murder courts first must find a culpable mens rea ("malice aforethought") for the death clement of the crime.

C. Mens Rea and Judicial Gloss

One principle of statutory interpretation directs courts to prefer a meaning that satisfies constitutional scrutiny.[48] Compliance with this principle results in a judicial "gloss" upon the law. Federal courts should interpret statutes with "if death results" provisions as requiring proof of a resultant death and a culpable mens rea with respect to the resultant death. This interpretation would recognize the practical treatment accorded these statutes by defendants and the Government.[49] This interpretation would also parallel the treatment of these statutes by several federal courts. One example would be 18 U.S.C. § 2113(e), the federal bank robbery statute. As Ryan's counsel argued:

> Significant also is the recognition by federal courts that prosecutions for homicides committed during federal bank robberies pursuant to 18 U.S.C. § 2113(e) are instances of "murder" or "felony murder" and therefore require proof of *mens rea* relating to any resulting deaths. . . . Of particular note is [the Eighth Circuit's] apparent recognition that the homicide provision of § 2113(e) requires proof of intent to kill during the course of a bank robbery.[50]

The federal bank robbery statute, 18 U.S.C. § 2113(e), is emblematic of the statutes containing "if death results" provisions, because the plain language of the statute appears to require proof of the resultant death and does not appear to require proof of mens rea. Because this statute and all other statutes containing "if death results" provisions are essentially felony-murder statutes, however, courts should interpret them consistently with the actual federal

---

47. *See infra* part I.C.

48. *See, e.g.*, Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress"); *see also* Ashwander v. Teunessee Valley Auth., 297 U.S. 288 (1936). "'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Id.* at 348 (Brandeis J., concurring) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

49. *See infra* notes 53-54 and accompanying text.

50. Brief for Appellant at 49, United States v. Ryan, 1993 WL 429092 (8th Cir. 1993) (No. 92-1357) (emphasis in original) (citations omitted). The cases cited in the *Ryan* brief discuss § 2113(e) as a "murder" or "felony-murder" offense. *See, e.g.*, United States v. Jackson, 756 F.2d 703, 706 (9th Cir. 1985); United States v. Etheridge, 424 F.2d 951, 962 (6th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971); United States v. Curry, 358 F.2d 904, 906 (2d Cir. 1965), *cert. denied*, 385 U.S. 873 (1966). Labelling § 2113(e) as a "murder" or "felony-murder" offense may be nothing more than the sloppy use of terms of art. It may also be indicative, however, of the over-extension of the federal felony-murder rule. When courts interpret the statute to require proof of intent to kill during the course of a bank robbery, *see, e.g.*, United States v. Jones, 678 F.2d 102, 105-06 (9th Cir. 1982); United States v. Delay, 500 F.2d 1360, 1362-64 (8th Cir. 1974) (holding that proof of homicide requires proof of culpability), they are placing a judicial gloss on the language of the statute. This action is important regardless of whether the courts do so consciously or subconsciously.

felony-murder statute. Interpreting "resulting in death" provisions such that "malice aforethought" and even the death itself are not elements would allow punishment tantamount to that permitted for a conviction of murder, but predicated on substantially less proof.[51] Ryan's counsel argued:

> There must, at a minimum, be a rational basis for Congress to have permitted a person to be exposed to the death penalty or to life imprisonment under Section 844(i) upon less proof than Congress required under Sections 1111 and 2113(e). There is no rational explanation, however, for imposing strict liability for arson related deaths in applications of Section 844(i) when arson related deaths under Section 1111 must be established by proof of malice aforethought.[52]

Ryan's counsel proceeded on the assumption that the death was an element of the offense, because discussion of the consequences of a resulting death is present in the language of 18 U.S.C. § 844(i) and the Fifth Circuit had so recognized only two years earlier.[53] In addition, the Government actually charged the death in the indictment and spent "considerable efforts during the course of the trial to prove these elements to the jury."[54] Ryan's counsel argued that § 844(i) violated the Equal Protection Clause because there was no reason to allow equivalent punishments for 18 U.S.C. § 1111 and 18 U.S.C. § 844(i) if § 1111 required proof of malice aforethought and § 844(i) did not. This argument is even more convincing if one accepts, as the Eighth Circuit did, that the death of another person is not an element of § 844(i).

In assessing a similar issue in *United States v. LaFleur*,[55] the Ninth Circuit held that 21 U.S.C. § 848(e), "which provides for a sentence of between twenty years and death for a defendant convicted of intentional murder in furtherance of a continuing criminal enterprise,"[56] does not violate the Equal Protection Clause. LaFleur was convicted of first-degree murder under 18 U.S.C. § 1111(a) and sentenced to a mandatory term of life imprisonment under 18 U.S.C. § 1111(b).[57] In contrast, a death that results from a continuing criminal enterprise does not carry a life sentence. LaFleur, therefore, argued that his sentence violated the Equal Protection Clause because "by virtue of 1111(b)'s mandatory life sentence, [he was] being treated differently than similarly situated defendants under § 848(e)."[58]

---

51. Discussed more fully *infra* part II.B.2.

52. Brief for Appellant at 50-51, *Ryan* (No. 92-1357). The brief cites several cases in support of the statement. *See* United States v. LaFleur, 952 F.2d 1537, 1547-48 (9th Cir. 1991); United States v. Bedonie, 913 F.2d 782, 788 n.4 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 2895 (1991); United States v. Greene, 489 F.2d 1145, 1151, 1170-74 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 977 (1974).

53. United States v. Tripplett, 922 F.2d 1174, 1177 (5th Cir. 1991), *cert. denied*, 111 S. Ct. 2245 (1991); *see also supra* notes 16-21 and accompanying text.

54. Reply Brief for Appellant at 2, *Ryan* (No. 92-1357). "The government's concentration on these elements during the trial fills at least 50 pages of transcript. If these matters were material only to sentencing, then the presentation of such evidence at trial would have been logically irrelevant to the question of guilt or innocence under Federal Rule of Evidence 401." *Id.* at 2 n.1.

55. *LaFleur*, 971 F.2d 200 (9th Cir. 1991) (en banc), *cert. denied*, 113 S. Ct. 1292 (1993).

56. *Id.* at 211-12.

57. *Id.* at 203.

58. *Id.* at 212.

The Ninth Circuit rejected LaFleur's argument and found that Congress had a rational basis for prescribing different punishments.[59] The rationality of this difference, however, rested on the fact that "§ 848(e), which covers persons who have various roles in a murder, covers a broader range of culpability than does § 1111(a), which attaches only to the actual killer."[60] Thus, it made sense that Congress would seek greater latitude in punishment when a greater range of culpability was covered. By contrast, the Government may accomplish the *same* punishment under 18 U.S.C. § 844(i) as it can under § 1111(a) without the same proof because on its face § 844(i) requires less proof of culpability.[61] After *Ryan*, it does *not* require the government to prove to the jury at trial that the defendant caused the death or that a death occurred at all. Though 18 U.S.C. § 844(i) covers a range of punishment, the Sentencing Guidelines eliminate this range of punishment when a death results. It would be rational for § 844(i) to have a *narrower* range of punishment because it requires proof of a lower level of mens rea.

Interpreting statutes with "if death results" provisions to include a resulting death and "malice aforethought" as elements eliminates any equal protection problem. Without placing this judicial gloss on the law, the "if death results" provisions would permit a defendant to be sentenced for murder without so much as a showing of mere negligence with respect to the death.[62] Failure to place this judicial gloss on the law also fails to respect the Rule of Lenity.

In *Morissette v. United States*,[63] the Supreme Court pronounced that mens rea, in this case intent to take another's property, was a necessary element of larceny.[64] The Court stated that common-law offenses[65] such as larceny were distinguishable from regulatory offenses:

> Congressional silence as to mental elements in an Act merely adopting into federal statutory law a concept of crime already so well defined in common law and statutory interpretation by the states may warrant quite contrary inferences than the same silence in creating an

---

59. *Id.*

60. *Id.*

61. This assertion assumes that the district court judge in *Ryan* was correct in his interpretation.

62. *See* Brief for Appellant at 28, United States v. Ryan, 1993 WL 429092 (8th Cir. 1992) (No. 92-1357) (quoting statement of trial judge):

> I do not see a foreseeability requirement in the statutes. The statute simply refers to the conduct resulting in death, and I think that means just that. Whether such deaths are foreseeable or not, the only question is did the conduct actually result in the deaths, so I don't think that the foreseeability on the part of the defendant at the time is an element of the death issue.

This statement by the trial judge does not reach as far as the Eighth Circuit's decision in *Ryan*. The district court judge at least felt that the death was an element whereas the Eighth Circuit held that the death of another person was not an element. *Ryan*, 1993 WL 429092 at *9. Part IV of this Note argues that the consequences of creating a scheme that allows the death of another person to be a sentencing factor violates the Due Process Clause.

63. *Morissette*, 342 U.S. 246 (1952).

64. *Id.* at 263.

65. Common-law offenses included offenses "such as those against the state, *the person*, property, or public morals." *Id.* at 255 (emphasis added).

> offense new to general law, for whose definition the courts have no guidance except the Act.[66]

The Court, therefore, refused to extend the doctrine of strict liability to common-law crimes.

Courts should also refuse to extend the doctrine of strict liability to these new extensions of the felony-murder rule. Felony-murder offenses, of all types, are not mere regulatory offenses. Federal courts do not need to go as far back as common law to interpret these new "if death results" statutes. Federal criminal law already defines felony murder in such a way that the death and "malice aforethought" for the death are elements of the offense. Thus, new extensions of the felony-murder rule statutes are not "new to general law," but merely "adopt[] into federal statutory law a concept of crime already so well defined"[67] in *federal statutory law* at 18 U.S.C. § 1111(a).

Morissette is an application of the Rule of Lenity, a commonly accepted canon of statutory interpretation. The Supreme Court has recognized that when interpreting criminal statutes, the Court should resolve ambiguities in favor of the defendant.[68] The language of the "if death results" statutes by definition discusses a resulting death and is at worst ambiguous as to whether a resulting death is an element of the offense. The conclusion that the "if death results" provisions are sentencing factors is clearly "inconsistent with the settled rule that ambiguities in criminal statutes are to be resolved in favor of the defendant, under the Rule of Lenity."[69] The conclusion that these statutes do not require proof of malice aforethought is also inconsistent with the Rule of Lenity.

> This [Supreme] Court, in keeping with the common-law tradition and with the general injunction that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," has on a number of occasions read a state-of-mind component into an offense even when the statutory definition did not in terms so provide. Indeed, the holding in *Morissette* ean be fairly read as establishing, at least with regard to crimes having their origin in the common law, an interpretetative presumption that

---

66. *Id.* at 262. The *Morissette* court also relied on the Rule of Lenity to a certain degree. The rule of lenity provides that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." Rewis v. United States, 401 U.S. 808, 812 (1971).

67. *Morissette*, 342 U.S. at 262.

68. "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself." United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820). Yet, while the Rule of Lenity is an "ancient maxim," it is not obsolete or academic. *See, e.g.*, United States v. R.L.C., 112 S. Ct. 1329, 1338 (1992); United States v. Kozminski, 487 U.S. 931, 952 (1988); Williams v. United States, 458 U.S. 279, 290 (1982); McElroy v. United States, 455 U.S. 642, 658 (1982); United States v. Bass, 404 U.S. 336, 347 (1971); Rewis v. United States, 401 U.S. 808, 812 (1971). The Rule of Lenity may even apply to statutes that provide both civil and criminal penalties. *See, e.g.*, United States v. Thompson/Center Arms Co., 112 S. Ct. 2102, 2110 (1992) (applying the Rule of Lenity to a statute which taxed anyone who "makes" a firearm because the statute also provided criminal sanctions); *see also* Bruce A. Markell, *Bankruptcy, Lenity, and the Statutory Interpretation of Cognate Civil and Criminal Statutes*, 69 IND. L.J. 335 (1994) (arguing against extending the Rule of Lenity to the Bankruptcy Code).

69. United States v. Ryan, 1993 WL 429092, at *15 (8th Cir. 1993) (Arnold, C.J., concurring in part and dissenting in part) (citation omitted).

> *mens rea* is required. "[M]ere omission . . . of intent [in the statute] will not be construed as eliminating that element from the crimes denounced"; instead Congress will be presumed to have legislated against the background of our traditional legal concepts which render intent a critical factor, and "absence of contrary direction [will] be taken as satisfaction with widely accepted definitions, not as a departure from them."[70]

Congress has legislated against the background of federal felony murder, for which both a resulting death and malice aforethought are elements. They should also be elements of these "if death results" offenses.

D. The Constitution and Mens Rea: Substantive Due Process Problems

While the Supreme Court has ceded power to the state legislatures to enact felony-murder statutes,[71] none of its holdings have definitively assessed the constitutionality of a murder statute that goes beyond strict liability.[72] These new statutes go beyond strict liability because, under the *Ryan* interpretation, they do not require proof of culpability, proof that the victim died, or proof that the defendant caused the death.

The Supreme Court has held that the government must prove each element of an offense beyond a reasonable doubt.[73] Thus, how a legislature defines an offense determines which elements the Government must prove beyond a reasonable doubt. The Court has also recognized that there are limits to a legislature's power to define an offense,[74] stating that "in certain limited circumstances . . . [the] reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged."[75] A legislature's definition of the elements of an offense and the burden of proof necessary to establish such an offense may violate the Due Process Clause by "'offend[ing] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[76] The nature of these new felony-murder offenses violates the Due Process Clause by avoiding the requirement

---

70. United States v. United States Gypsum Co., 438 U.S. 422, 437 (1978) (citations omitted); *see also* Liparto v. United States, 471 U.S. 419 (1985).

71. *See* Lockett v. Ohio, 438 U.S. 586, 602 (1978) (Burger, C.J., joined by three Justices) ("That states have authority . . . , as a matter of law, . . . to enact felony-murder statutes is beyond constitutional challenge.").

72. *See, e.g.*, Territory of Guam v. Root, 524 F.2d 195, 197 (9th Cir. 1975), *cert. denied*, 423 U.S. 1076 (1976); Roth & Sundby, *supra* note 25, at 449 n.16.

73. The constitutional guarantee of due process requires that the prosecution prove beyond a reasonable doubt those elements that the legislature has included in the definition of the charged offense. Patterson v. New York, 432 U.S. 197, 210 (1977); *see also* McMillan v. Pennsylvania, 477 U.S. 79, 85 (1986) (citing *Patterson*); *In re* Winship, 397 U.S. 358, 364 (1970) ("The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

74. *See Patterson*, 432 U.S. at 211 n.12.

75. *McMillan*, 477 U.S. at 86.

76. *Id.* at 85 (quoting Speiser v. Randall, 357 U.S. 513, 523 (1958)).

of proving a death and mens rea for the death[77] if these new felony-murder statutes do not include the death and malice aforethought as elements of the offense of conviction.

Even assuming that a death is an element of the offense, either Congress has created a strict liability offense such that the felony-murder provision no longer requires the government to prove "intent or malice aforethought," or the Sentencing Commission has presumed the existence of "malice aforethought" once the government proves beyond a reasonable doubt the commission of a felony and the fact of the resulting death. If the Guidelines presume malice aforethought, the defendant would still be able to rebut such a presumption by proving by a preponderance of the evidence that he or she did *not* possess a culpable mens rea for the killing.[78] Failure to do so, however, would result in a conviction for felony murder. The different evidentiary standard at sentencing would then allow the defendant to mitigate the sentence by proving lack of a culpable mens rea by a preponderance of the evidence.[79] Nelson E. Roth and Scott E. Sundby argue that both of these alternative conceptions of the felony-murder doctrine fail constitutional analysis.[80]

---

77. While Part I.D. of this Note applies a due process analysis to federal statutes, the arguments made also apply to general felony-murder doctrine, not merely to the federal felony-murder rule.

78. *See infra* part II.A. (noting that in the Sentencing Guidelines' scheme, the defendant bears the burden of proving mitigating factors to establish a downward departure).

79. This idea is supported by the language of the first application note to U.S.S.G. § 2A1.1.

80. Roth & Sundby, *supra* note 25, at 478. The Roth & Sundby article draws much of its argument from, and is essentially consistent with, a previous article on the burden of proof in criminal law. John C. Jeffries & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325 (1979). Jeffries and Stephan perceive two constitutional concerns with the burden of proof and elements of an offense as defined by the legislature. The procedural aspect requires proof beyond a reasonable doubt. *Id.* at 1328-44. The substantive aspect controls the limits of legislative power to define crime and punishment. *Id.* at 1356-65; *see also* C. Peter Erlinder, *Mens Rea, Due Process, and the Supreme Court: Toward a Constitutional Doctrine of Substantive Criminal Law*, 9 AM. J. CRIM. L. 163, 165 (1981) ("[C]ommon law concept[] of criminal culpability, . . . [meaning] concurrence of *mens rea* and *actus reus* in the definition of crime[,] is the very essence of due process in the Anglo-American legal tradition.") (emphasis in original); Alan Saltzman, *Strict Criminal Liability and the United States Constitution: Substantive Criminal Law Due Process*, 24 WAYNE L. REV. 1571, 1573 (1978) (taking the position that a constitutional rule of substantive due process forbids strict criminal liability). *But see* United States v. Ebbole, 917 F.2d 1495, 1499 (7th Cir. 1990) ("The [Supreme] Court bas declined to use the due process clause to substantively shape criminal laws, opting instead to defer to legislative definitions of crime.").

Satisfaction of both the procedural and the substantive aspects is necessary and demanded by the Supreme Court's decisions.

> In point of fact, a constitutional stricture against shifting the burden of proof would not prevent the injustice of unwarranted or disproportionate criminal punishment. It would withdraw from legislative choice certain procedural options, but it would not address the real evil of substantive disproportionality in the assigument of criminal penalties.

Jeffries & Stephan, *supra* at 1358. The real evil of the felony-murder doctrine is that it allows the legislature to define crime such that there is a disproportionately high punishment in light of the absence of a burden of proving mens rea for murder. This argument is the point of departure for the Roth and Sundby article and supports the notion that the Sentencing Guidelines' use of a preponderance of evidence standard in assessing mens rea for deaths resulting from commission of felonies is improper in light of the fact that satisfaction of the standard carries a term of life imprisonment. *See infra* part IV.

1. Strict Liability

Roth and Sundby believe that construing the felony-murder doctrine so that it creates a strict liability offense is unconstitutional because it violates both the Eighth Amendment guarantee against disproportionate punishment and the Fifth Amendment's Due Process Clause.[81] The Eighth Amendment analysis dictated by *Enmund v. Florida*[82] "focuses on the illegitimacy of imposing severe punishments where the trier of fact is not required to find culpability that would justify the sanctions. According to this analysis, the felony-murder rule with its disregard of the defendant's culpability is invalid."[83]

Roth and Sundby cite *United States v. United States Gypsum Co.*[84] in support of their argument that due process limits a "legislature's power to eliminate a mens rea element . . . [for] regulatory crime[s] not recognized at the common law . . . ."[85] Further support for the notion that a strict liability murder statute violates principles of due process comes from *United States v. Bailey*,[86] where the Court stated that "'strict liability' crimes are exceptions to the general rule that criminal liability requires an 'evil-meaning mind'"[87] and that "'[c]lear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime.'"[88] Roth and Sundby argue that a strict liability felony-murder rule "violates this principle, as it fails to distinguish between the mens rea required for murder and the intent to commit a felony."[89] The same problem results if malice aforethought is not an element of these "if death results" statutes.

---

81. Roth & Sundby, *supra* note 25, at 478-91.

82. *Enmund*, 458 U.S. 782, 788-801 (1982) (holding that imposing the death penalty upon an individual convicted of felony murder, but who was not a "triggerman," constituted cruel and unusual punishment).

83. Roth & Sundby, *supra* note 25, at 485.

84. *Gypsum*, 438 U.S. 422 (1978).

85. Roth & Sundby, *supra* note 25, at 487. The Third Circuit has stated that the Guidelines do not violate the presumption against strict liability in criminal law even though the "Commission has intentionally imposed strict liability" for possessing a stolen firearm. United States v. Mobley, 956 F.2d 450, 453 (3d Cir. 1992) (holding that a two-level enhancement of sentence for possession of stolen firearm does not require scienter under § 2K2.1(b)(2)). The *Mobley* decision rested on the fact that enhancement based on possession of a stolen firearm was a regulatory measure affecting the interests of public health, safety, and welfare. *Id.* Such a distinction is entirely consistent with Roth and Sundby's argument that strict liability is only proper for regulatory offenses. This distinction is also consistent with Supreme Court doctrine. *See supra* notes 63-70 and accompanying text; *infra* part II.A.2.

86. *Bailey*, 444 U.S. 394 (1980).

87. *Id.* at 404 n.4; *see also Enmund*, 458 U.S. at 800 ("American criminal law has long considered a defendant's intention—and therefore his moral guilt—to be critical to 'the degree of [his] criminal culpability' . . . .") (citation omitted).

88. *Bailey*, 444 U.S. at 406 (quoting MODEL PENAL CODE § 2.02 cmts. at 123 (Tentative Draft No. 4, 1955)).

89. Roth & Sundby, *supra* note 25, at 491; *cf. infra* parts II.A.-B. (noting that the Sentencing Commission did not distinguish between the mens rea for "felony murder" and the intent to commit a felony *until sentencing*).

2. Conclusive Presumption

Operation of the felony-murder rule as a conclusive presumption shifts the burden of proof to the defendant and relieves the goverument of its burden of proving every statutory element of an offense.[90] Such a shift of the burden of proof violates the guarantees of the Due Process Clause as interpreted by the Supreme Court.[91]

Roth and Sundby rely on a line of cases culminating in *Sandstrom v. Montana*.[92] *Sandstrom* explicitly held that conclusive presumptions are unconstitutional because they relieve the government of the burden of proving an essential element of the offense, the defendant's intent.[93] Since the presumption of innocence "'*extends to every element of the crime*,'"[94] the felony-murder doctrine is unconstitutional because it "completely bypasses the presumption of innoccnce as to this [mens rea] element upon proof of a *different* element, the occurrence of a killing during the commission of a felony."[95] In addition, the doctrine unconstitutionally interferes with the fact-finding function of the jury.[96] "[T]he jury is allowed only to deliberate on whether a killing occurred during the commission of a felony. Upon its finding of that fact, the rule requires the jury to find automatically that the defendant had a culpable state of mind."[97]

Roth and Sundby's position with regard to presumptions finds support in the context of sentencing schemes in the Supreme Court's decision in *McMillan v. Pennsylvania*.[98] In *McMillan*, the Court upheld a Pennsylvania sentencing

---

90. *See*, Roth & Sundby, *supra* note 25, at 460-78. I have limited the discussion of the Roth and Sundby argument as much as possible. The Roth and Sundby article focuses on the constitutional propriety of the felony-murder rule generally. This Note addresses the operation of the federal felony-murder doctrine, as it has been codified, and its relationship to the Federal Sentencing Guidelines.

91. *Id.* at 469-71.

92. *Sandstrom*, 442 U.S. 510 (1979). Prior to *Sandstrom*, the Court had held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re* Winship, 397 U.S. 358, 364 (1970). The Court reaffirmed the requirement of proof beyond a reasonable doubt in Mullaney v. Wilbur, 421 U.S. 684 (1975). In Patterson v. New York, 432 U.S. 197, 215 (1977), *Mullaney* was interpreted to mean that a state may not shift the burden of proof to the defendant with respect to a fact that is statutorily required to be proven by the prosecution.

93. *Sandstrom*, 442 U.S. at 520-24 (stating that a jury instruction that the law presumes a person *intends* the ordinary consequences of his voluntary acts served as an unconstitutional presumption of intent and shifted the burden to the defendant with regard to meus rea of an element of the statute). In light of the fact that the jury could have viewed the instruction as merely shifting the burden of persuasion of mens rea (rather than conclusively presuming mens rea), the Court addressed this possibility and found it to be unconstitutional as well. *Id.* at 524. Therefore, the Sentencing Guidelines' placement of the burden of proof on the defendant to prove mere negligence or recklessness should also be deemed improper. *See infra* part II.A; *infra* notes 116-17 and accompanying text.

94. *Sandstrom*, 442 U.S. at 522 (emphasis in original) (quoting Morissette v. United States, 342 U.S. 246, 275 (1952)).

95. Roth & Sundby, *supra* note 25, at 470 (emphasis in original) (drawing on the reasoning of *Sandstrom*).

96. The fact-finding function of the jury and the burden of proof were both noted as guarantees of the presumption of innocence in *Sandstrom*, 442 U.S. at 521-23; *see also infra* notes 165, 212-17 and accompanying text (discussing fact-finding function of jury and due process).

97. Roth & Sundby, *supra* note 25, at 470.

98. *McMillan*, 477 U.S. 79 (1986).

scheme that treated visible possession of a firearm as a sentencing factor, rather than as an element of the offense.[99] The Court, however, noted that a sentencing scheme that creates an improper presumption might violate due process.[100]

The subsequent Parts of this Note analyze the application of the felony-murder doctrine in federal criminal law as it is interpreted by the Sentencing Commission and implemented by the Federal Sentencing Guidelines. If federal courts interpret the "if death results" statute to include malice aforethought as an element of the offense of conviction—as they should—then the problems I raise will be avoided and it will not be necessary to assess the application of the felony-murder doctrine at sentencing. The Government would not be able to use the Sentencing Guidelines to avoid proving malice aforethought beyond a reasonable doubt at trial.

II. PROBLEMS WITH THE SENTENCING GUIDELINES

In 1984, Congress established the United States Sentencing Commission to reduce sentencing disparities.[101] The Sentencing Commission's work culminated in the creation of the Federal Sentencing Guidelines. The Sentencing Guidelines incorporate a form of the felony-murder doctrine to determine sentences for offenses that result in death.[102]

Theoretically, the Sentencing Guidelines could apply the felony-murder rule in either of two ways. The Guidelines could apply the felony-murder rule at sentencing, as was done by the district court in *Ryan*, or the Guidelines could assume that the felony-murder rule applies at the guilt/innocence stage and that the resulting death and malice aforethought are elements of the offense, as was argued in Part I. As written, the Sentencing Guidelines misinterpret the federal felony-murder rule by applying it at the sentencing stage. As a result, defendants are being sentenced as murderers even though they may not have acted with "malice aforethought."

A. The Federal Sentencing Guidelines Do Not Require Proof of Malice Aforethought at the Guilt/Innocence Stage

The United States Sentencing Guidelines Commentary applicable to first-degree murder reads:

> Application Notes:
>
> 1. The Commission has concluded that in the absence of capital punishment life imprisonment is the appropriate punishment for premeditated killing. However, this guideline also applies when death results from the

99. *Id.* at 84-91.

100. *Id.* at 87. The Federal Sentencing Guidelines' use of the felony-murder doctrine may create just such an improper presumption. *See infra* part II.B.

101. Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 217(a), 98 Stat. 1987, 2017-26 (codified as amended at 28 U.S.C.A. §§ 991-998 (West 1993)).

102. *See supra* notes 14-15 and accompanying text.

> commission of certain felonies. Life imprisonment is not necessarily appropriate in all such situations. For example, if in robbing a bank, the defendant merely passed a note to the teller, as a result of which she had a heart attack and died, a sentence of life imprisonment clearly would not be appropriate.
>
> If the defendant did not cause the death intentionally or knowingly, a downward departure may be warranted. The extent of the departure should be based upon the defendant's state of mind (e.g., recklessness or negligence), the degree of risk inherent in the conduct, and the nature of the underlying offense conduct. However, the Commission does not envision that departure below that specified in § 2A1.2 (Second Degree Murder) is likely to be appropriate. Also, because death obviously is an aggravating factor, it necessarily would be inappropriate to impose a sentence at a level below that which the guideline for the underlying offense requires in the absence of death.[103]

The Sentencing Commission clearly contemplated that courts would sentence a convicted felon for felony murder even though he or she lacked "malice aforethought" with respect to the death.[104] In doing so, the Commission fundamentally misinterpreted the federal felony-murder rule, which requires proof of "malice aforethought"—intent, knowledge, or extreme recklessness—before there can be a conviction. The Sentencing Guidelines attempt to temper the harshness of sentencing a defendant for murder when the defendant lacked "malice aforethought" by allowing for a downward departure based on the defendant's state of mind. Under the Sentencing Guidelines, the defendant's state of mind is considered relevant conduct,[105] and the defendant bears the burden of proving relevant conduct by a preponderance of the evidence.[106] Thus, the defendant bears the burden of proving *lack* of a culpable mental state. The Guidelines entail mitigation if the defendant is merely reckless or negligent.

---

103. U.S.S.G. § 2A1.1. cmt. n.1 (first-degree murder).

104. "If the defendant did *not* cause the death intentionally or knowingly, a downward departure may be warranted." *Id.* (emphasis added). Thus, if a defendant is merely negligent or reckless or possesses no culpable mens rea at all, the defendant is still punished for murder, but a downward departure is warranted. "However, the Commission does not envision that departure below that specified in § 2A1.2 (Second Degree Murder) is likely to be appropriate." *Id.*

105. "Subsection (a)(4) [of Relevant Conduct] requires consideration of any other information specified in the applicable guideline. For example, . . . the defendant's state of mind . . . ." *Id.* § 1B1.3 cmt. (background). For a discussion of the definition and use of relevant conduct, see *infra* notes 171-74 and accompanying text.

106. United States v. Rodriguez, 896 F.2d 1031, 1032-33 (6th Cir. 1990); United States v. Kirk, 894 F.2d 1162, 1164 (10th Cir. 1990); United States v. McDowell, 888 F.2d 285, 291 (3d Cir. 1989); United States v. Urrego-Linares, 879 F.2d 1234, 1239 (4th Cir. 1989), *cert. denied*, 493 U.S. 943 (1989).

> [T]he burden of ultimate persuasion should rest upon the party attempting to adjust the sentence. Thus, when the Government attempts to upwardly adjust the sentence, it must bear the burden of persuasion . . . . Conversely, when the defendant is attempting to justify a downward departure, it is usually the defendant who bears the burden of persuasion.

McDowell, 888 F.2d at 291 (citations omitted). The Sentencing Commission concurs with the judgment of these courts. 6 U.S. SENTENCING COMM'N, QUESTIONS MOST FREQUENTLY ASKED ABOUT THE SENTENCING GUIDELINES 35 (December 1, 1992) (question 119) [hereinafter MOST FREQUENTLY ASKED QUESTIONS]. The Sentencing Commission goes even further, however, by stating that "this does not prevent the sentencing judge from taking an independent position that would result in a sentence adjustment (enhancement or reduction) that was not argued by either party." *Id.*

The Sentencing Commission must have assumed that the felony-murder doctrine extended to the sentencing stage and that resulting deaths were sentencing factors. If the Sentencing Commission had recognized that felony-murder offenses include "malice aforethought" as an element of the offense, the Sentencing Guidelines would then act to shift the burden of proof to the defendant to prove a mental state that contravenes the mental state ("malice aforethought") already proven beyond a reasonable doubt by the Government at trial.[107]

While the Sentencing Guidelines direct court to sentence defendants convicted of felony murder under 18 U.S.C. § 1111 pursuant to the guidelines applicable to first-degree murder, the Sentencing Guidelines also encompass sentencing for other felonics "if death results." The Guidelines state that "[t]he Commission has concluded that in the absence of capital punishment life imprisonment is the appropriate punishment for *premeditated killing*. However, this guideline *also applies* when death results from the commission of certain felonies."[108] Thus, to conform most consistently with substantive law, the Sentencing Guidelines must assume that "malice aforethought" is an element of felony murder, but that those statutes with "if death results" provisions do *not* include "malice aforethought" as an element of the offense. An analysis of some of the Guidelines applicable to statutes containing "if death results" provisions reveals a fundamental error in the Sentencing Guidelines.

B. The Federal Sentencing Guidelines That Are Applicable "Under Circumstances That Would Constitute Murder . . . ."

The 1993 amendments to the Federal Sentencing Guidelines added the following language to the guidelines that are applicable to several of the "if death results" statutes mentioned in U.S.S.G. § 2A1.1: "If a victim was killed under circumstances that would constitute *murder* under 18 U.S.C. Section 1111 had such killing taken plaee within the territorial or maritime jurisdiction of the United States, apply Section 2A1.1 (First Degree Murder)."[109] The circumstances that would constitute murder include proof of "malice

---

107. Proving "malice aforethought" at trial requires the Government to prove beyond a reasonable doubt that the defendant acted either with intent, knowledge, or *extreme* recklessness. *Supra* note 32.

108. U.S.S.G. § 2A1.1 cmt. n.1 (emphasis added). A great number of the Guidelines contain provisions for departure to U.S.S.G. § 2A1.1. *See* U.S.S.G. §§ 2A1.5(c)(1) (conspiracy or solicitation to commit murder), 2A3.1(c)(1) (criminal sexual abuse), 2B3.1(c)(1) (robbery), 2B3.2(c)(1) (extortion by force), 2D1.1(c)(1) (drug offenses), 2E2.1(c)(1) (extortionate extension or collection of credit), 2K1.3(c)(1)(B) (prohibited transactions involving explosive materials), 2K1.4(c)(1) (arson), 2K2.1(c)(1)(B) (prohibited transactions involving firearms or ammunition), 2K2.5(c)(1)(B) (possession of firearm in federal facility; possession or discharge of weapon in school zone), 2K3.2(a)(2) (feloniously mailing injurious articles), 2N1.1(c)(1) (tampering with consumer products); *see also Proposed Amendments*, *supra* note 14, amend. 4.

109. U.S.S.G. § 2A4.1 (kidnapping, abduction, unlawful restraint) (emphasis added); *see also id.* §§ 2A3.1(c)(1) (criminal sexual abuse), 2B3.1(c)(1) (robbery), 2B3.2(c)(1) (extortion by force), 2D1.1(c)(1) (drug offenses), 2E2.1(c)(1) (extortionate extension or collection of credit); *Proposed Amendments*, *supra* note 14, amend. 4.

aforethought" as part of the substantive offense. This language presumes that some Guidelines' provisions that are applicable "if death results" require a finding of "malice aforethought." But this language permits two interpretations. Either the Sentencing Guidelines assume that culpability is an element of the offcnse of conviction and is determined at the guilt/innocence stage by the jury, or the Sentencing Guidelines assume that culpability is a sentencing factor and such a determination must be made by the judge at sentencing.

1. The Determination Is Made at the Guilt/Innocence Stage

The 1993 amendments to the Federal Sentencing Guidelines added the language regarding circumstances that would constitute murder to several guidelines which previously did not require a finding that the killing resulted under circumstances that would constitute murder. The commcntary to the amendments states that the "amendment adds cross references to Sections 2A3.1, 2B3.1, 2B3.2, 2D1.1, and 2E2.1 to address the circumstance in which a victim is *murdered* during the offense."[110] Under traditional federal law, the jury determines at trial whether the offense is murder or not. Therefore, the 1993 amendments, promulgated by the Senteneing Commission, might express an understanding of this language that is consistent with traditional federal felony-murder doctrine and the position supported by this Note. The guideline applicable to murder, U.S.S.G. § 2A1.1, would be applicable only if the defendant were found guilty of murder at the guilt/innocence stage. Such a conviction would require a finding that the defendant acted with malice aforethought.

2. The Determination Is Made at the Sentencing Stage

Under the alternative interpretation of the Sentencing Guidclines, all "if death results" statutes entail a determination of the level of mens rea at sentencing. This interpretation removes the determination of mens rea from the jury, cstablishes a standard of preponderance of evidence rather than beyond a reasonable doubt, and increases the prosecutor's discretion.[111] This interpretation also usurps the jury's traditional role in determining the offense of conviction and raises problems comparable to those problems endemic to sentencing "by analogy."[112]

This interpretation.would be consistent with the Sentencing Guidelines' language allowing a downward departure in cases where the defendant acted recklessly or negligently. The 1993 amendments, however, make a life sentence mandatory under 18 U.S.C. § 1111.[113] This means that in instances

110. *Proposed Amendments, supra* note 14, amend. 4 (emphasis added).

111. *See infra* part IV.

112. *See infra* part III (advancing the argument that sentencing by analogy improperly allows the judge to establish substantive law).

113. *Proposed Amendments, supra* note 14, amend. 3 (incorporating the uniform holding of appellate courts that 18 U.S.C. § 1111 provides a mandatory minimum term of life imprisonment).

where the Government has the greatest interest in prosecuting a crime,[114] the statutes require greater proof. When the Government has the least interest, much less proof is required. The following passage illustrates how this point was argued by defense counsel in the *Ryan* appeal:

> There must, at a minimum, be a rational basis for Congress to have permitted a person to be exposed to the death penalty or to life imprisonment under Section 844(i) upon less proof than Congress required under Sections 1111 and 2113(e) [bank robbery]. There is no rational explanation, however, for imposing strict liability for arson related deaths in applications of Section 844(i) when arson related deaths under Section 1111 must be established by proof of malice aforethought.
>
> Even if the trial judge here had properly instructed the jury with respect to the required foreseeability of the firefighters' deaths, the equal protection violation would not have been avoided. There is no rational basis for permitting a murder conviction and sentence to be based upon a mere showing of negligence in cases where federal jurisdiction is premised upon the Commerce Clause, but to require such convictions and sentences to be based upon proof of intent, knowledge or extreme reckless[ness] when federal jurisdiction is premised upon territorial, maritime or federal banking interests.[115]

In addition to creating an equal protection problem, treating "if death results" provisions as sentencing factors is inconsistent with other language in the Sentencing Guidelines. Consider a case in which the jury convicts the defendant of the simple felony of arson and the sentencing court finds that the defendant in fact killed the victim with "malice aforethought." The Sentencing Guidelines would apply U.S.S.G. § 2A1.1, which calls for a sentence of life imprisonment. Importantly, life imprisonment exceeds the maximum penalty for the underlying crime of arson.[116] The Guidelines do allow for downward departure "[i]f the defendant did not cause the death intentionally or knowingly . . . . The extent of the departure should be based upon the defendant's state of mind (e.g. recklessness or negligence) . . . ."[117] But, to depart to U.S.S.G. § 2A1.1, a court must have already found that the defendant acted with "malice aforethought." Such a finding precludes a departure based on recklessness or negligence. Thus, the Sentencing Guidelines would *never* allow a downward departure, and the sentence would exceed the maximum penalty. Federal courts should avoid an interpretation that renders provisions in the Guidelines meaningless. Courts should prefer an interpretation that applies the felony-murder rule at the guilt/innocence stage.

The application of the felony-murder rule at sentencing raises another problem because first-degree murder requires a mandatory minimum sentence

---

114. The Federal Government has exclusive jurisdiction over prosecutions under 18 U.S.C. § 1111, so the federal interest is "greater."

115. Brief for Appellant at 50-51, United States v. Ryan, 1993 WL 429092 (8th Cir. 1993) (No. 92-1357) (citations omitted). Ryan's initial argument did not even address a circumstance where the death itself was not an element of the offense. *See supra* notes 48-54 and accompanying text.

116. The simple arson felony has a maximum sentence of ten years. 18 U.S.C. § 844(i).

117. U.S.S.G. § 2A1.1 cmt. n.1.

of life imprisonment.[118] A mandatory minimum life sentence does not allow the sentencing judge to incorporate mitigation for a mens rea of recklessness or negligence as is provided in the Sentencing Guidelines.[119] The language at the end of the section confirms this: downward departure may be relevant "in the event the defendant is convicted under a statute that expressly authorizes a sentence of less than life imprisonment (for example, 18 U.S.C. §§ 2113(e), 2118(c)(2); 21 U.S.C. § 848(e))."[120] Both the Second and Third Circuits have noticed this conflict in the language of the Sentencing Guidelines, but neither court has addressed the problem.[121]

III. SENTENCING BY ANALOGY

Several of the Sentencing Guidelines call for departure by analogy from the offense of conviction to the guideline applicable to murder. For example, the district court judge in the *Ryan* case in essence sentenced Dale Ryan for first-degree murder, using analogy.[122] Sentencing by analogy is improper for two reasons. First, murder is not analogous to other felonies resulting in death unless a jury determines beyond a reasonable doubt that the defendant acted with "malice aforethought." Second, sentencing by analogy requires federal judges to establish the offense of conviction at the sentencing stage. Such an act establishes substantive criminal law and violates either the separation of powers doctrine or the delegation doctrine.

---

118. *See supra* note 113 and accompanying text. The sentencing court has no discretion to impose a sentence other than life in prison for first-degree murder under 18 U.S.C. § 1111. "[W]hoever is guilty of murder in the first degree . . . shall be sentenced to imprisonment for life . . . ." 18 U.S.C. § 1111(b); *see also* United States v. LaFleur, 971 F.2d 200, 207-09 (9th Cir. 1991) (concluding that 18 U.S.C. § 1111(b) mandates a minimum life sentence), *cert. denied*, 113 S. Ct. 1292 (1993); United States v. Donley, 878 F.2d 735, 741 (3d Cir. 1989) (holding that life imprisonment is mandatory for first-degree murder, but noting the conflict in the language allowing departure for defendant's merely reckless or negligent state of mind in felony-murder deaths), *cert. denied*, 110 S. Ct. 1528 (1990). *See generally* U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991) [hereinafter MANDATORY MINIMUM PENALTIES] (Special Report to Congress directed by § 1703 of P. L. 101-647).

119. U.S.S.G. § 2A1.1, cmt. n.1 ("If the defendant did not cause the death intentionally or knowingly, a downward departure may be warranted. The extent of the departure should be based upon the defendant's state of mind (e.g., recklessness or negligence) . . . .").

120. *Id.*, cmt. (background) (referring to simple felony statutes).

121. United States v. Gonzalez, 922 F.2d 1044, 1048-51 (2d Cir. 1991); *Donley*, 878 F.2d at 739-41. The Third Circuit deferred addressing the problem, stating:

> Therefore, under the normal Sentencing Guidelines procedure, as well as the underlying statute, the court had but one sentencing option: life imprisonment. We note that the commentary to § 2A1.1 raises the question whether life imprisonment is necessarily appropriate in a case in which the defendant did not knowingly or willingly cause the death. In the example given, the defendant, a bank robber, passes a note to a teller, who, as a result, dies of a heart attack. This court need not address here the issue of whether, in a different case, the District Court would be compelled to impose a life sentence for first degree murder.

Id. at 741 n.14.

122. Brief for Appellant at 9-10, United States v. Ryan, 1993 WL 429092 (8th Cir. 1993) (92-1357).

A. Murder Is Not Analogous Unless the Defendant Acts with Malice Aforethought

If the prosecution does not prove mens rea with respect to the death at the guilt/innocence stage in cases predicated on statutes with "if death results" provisions, it is difficult to see how U.S.S.G. § 2A1.1 (First Degree Murder) can be the most analogous provision, as the district judge decided in Dale Ryan's case. Murder is clearly *not* analogous to an arson resulting in death because murder requires proof of "malice aforethought." This notion was somehow lost on the Sentencing Commission. The guideline for 18 U.S.C. § 844(i), the federal arson statute under which Ryan was convicted, states: "If death resulted, or the offense was intended to cause death or serious bodily injury, apply the most analogous guideline from Chapter Two, Part A (Offenses Against the Person) if the resulting offense level is greater than that determined above."[123] Thus, the Guidelines prescribed the *Ryan* judge's use of analogy.

The Sentencing Guidelines actually direct the judge to sentence a defendant under the guideline applicable to murder in any case in which a death resulted and the defendant "used or possessed any firearm or dangerous weapon in connection with the commission or attempted commission of another offense . . . ."[124] In essence, the Sentencing Guidelines direct a categorical departure to the guideline applicable to murder, rather than asking for a thoughtful analysis to determine what is the most analogous provision.

In *Schad v. Arizona*,[125] a plurality of the Supreme Court,[126] held that a jury does not need to make a specific finding of premeditated murder or felony murder to convict a defendant of murder because the depravity of mind required for premeditated murder and felony murder is morally equivalent.[127] Thus, for the Court, Arizona's felony murder offense was really the

---

123. U.S.S.G. § 2K1.4(c)(1); *see also id.* §§ 2K1.3(c)(1)(B) (unlawful transactions involving explosive materials), 2K2.1(c)(1)(B) (unlawful transactions involving firearms or ammunition), 2K2.5(c)(1)(B) (possession of firearm in federal facility or school zone).

124. *Id.* § 2K2.5(c)(1). "[I]f death resulted, [apply] the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide) . . . ." *Id.* § 2K2.5(c)(1)(B).

125. *Schad*, 111 S. Ct. 2491 (1991).

126. Justice Scalia concurred only in the result, not the plurality's reasoning. *Id.* at 2505 (Scalia, J., concurring).

127. *Id.* at 2503-04. The authors of one article have argued:

> Felony murder reflects a societal judgment that an intentionally committed robbery that causes the death of a human being is qualitatively more serious than an identical robbery that does not. . . . Thus the felony murder doctrine reflects the conclusion that a robbery that causes death is more closely akin to murder than to robbery.

Crump & Crump, *supra* note 28, at 363. The premise for the Crumps' assertion (that the felony murder doctrine accurately reflects societal attitudes) is by no means clear. It has been called into question by empirical evidence. *See* Norman J. Finkel & Kevin B. Duff, *Felony-Murder and Community Sentiment: Testing the Supreme Court's Assertions*, 15 LAW & HUM. BEHAV. 405 (1991). The assertion is also weak because the felony-murder doctrine's genesis occurred in an age when all felonies were punishable by death. For all practical purposes, it made no difference whether one was convicted of murder or the underlying felony because the punishment was the same. MODEL PENAL CODE § 210.2 cmt. 6 at 31, n.74 (1980).

same offense as first-degree murder. The plurality's decision rested on the notion that a defendant convicted of premeditated murder has the same culpability as a defendant convicted of felony murder. Justice Souter stated:

> If, then, two mental states are supposed to be equivalent means to satisfy the *mens rea* element of a single offense, they must reasonably reflect notions of equivalent blameworthiness or culpability, whereas a difference in their perceived degrees of culpability would be a reason to conclude that they identified different offenses altogether.[128]

The Sentencing Guidelines proceed on the theory that a defendant convicted of arson does *not* have the same culpability as one convicted of "murder."[129] Under the Commission's interpretation, the elements that the government must establish to support a jury verdict of arson are different than the elements of felony murder, thus delineating two distinct *offenses* of conviction. The two offenses require proof of different levels of mens rea[130] and are punishable by different sentences.[131] Arson and felony murder are not analogous and constitute "different offenses altogether."[132] The use of relevant conduct at sentencing should not blur this distinction and make the two *offenses* analogous.

One might argue that departure to U.S.S.G. § 2A is analogous because it is applicable to other offenses besides first-degree and second-degrec murder. For instance, the sentencing ranges for convictions under the federal statute for voluntary manslaughter and involuntary manslaughter[133] fall within "Chapter Two, Part A."[134] In addition, neither voluntary nor involuntary

---

While I do not agree with this assertion, I agree that the creation of new offenses such as "robbery-resulting-in-death" would be improper because it would increase prosecutorial discretion. Crump & Crump, *supra* note 28, at 363. The Eighth Circuit's holding in *Ryan* creates this new offense, arson-resulting-in-death. United States v. Ryan, 1993 WL 429092 (8th Cir. 1993).

128. *Schad*, 111 S. Ct. at 2503 (emphasis in original) (Souter, J., plurality).

129. *See supra* part II.A. Under the Eighth Circuit's interpretation, the death is not even at issue at trial. *Ryan*, 1993 WL 429092.

130. Felony murder under 18 U.S.C. § 1111 requires proof of "malice aforethought" which precludes the prosecution from convicting a defendant who is merely negligent or reckless. The Sentencing Guidelines provide for the felony-murder doctrine's application in a scenario where the defendant is merely negligent or reckless. *Supra* notes 116-17 and accompanying text.

131. First-degree murder carries a mandatory sentence of life imprisonment under the Sentencing Guidelines. Arson does not. *See supra* part II.B.2.

132. *Schad*, 111 S. Ct. at 2503. The *Schad* Court easily could have been speaking to the proliferation of felony-murder offenses when it stated that the Due Process Clause would limit a state's ability to "convict anyone under a charge of 'Crime' so generic that any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering, for example, would suffice for conviction." *Id.* at 2497-98. I do not intend to imply that the federal statutes I have discussed are as generic as "Crime," but the Court's statement was also not flip. In the following footnote the Court clarified:

> Although our vagueness cases support the notion that a requirement of proof of specific illegal conduct is fundamental to our system of criminal justice, the principle is not dependent upon or limited by concerns about vagueness. *A charge allowing a jury to combine findings of embezzlement and murder would raise identical problems regardless of how specifically embezzlement and murder were defined.*

Id. at 2498 n.4 (emphasis added). The *Ryan* court's interpretation raises this issue.

133. *Id.*

134. *See* U.S.S.G. §§ 2A1.3 (voluntary manslaughter), 2A1.4 (involuntary manslaughter).

manslaughter requires "malice aforethought" for a death. But voluntary manslaughter occurs only "[u]pon a sudden quarrel or heat of passion" and involuntary manslaughter occurs "[i]n the commission of an unlawful act *not* amounting to a felony . . . ."[135] The Sentencing Guidelines' own language declares that in sentencing for a death, "the Commission does not envision that departure below that specified in § 2A1.2 (Second Degree Murder) is likely to be appropriate."[136]

The Sentencing Commission was not seeking uniformity of sentences based on culpability. The Commission was simply seeking uniform severity of sentences. The language of the Guidelines calls for departure to Chapter Two, Part A only "if the resulting offense level is greater than that determined" by the guideline for the offense of conviction.[137] Thus, the Guidelines do not ask for a thoughtful analogy, they direct a departure by analogy any time a death results—not simply when murder is the most analogous provision.[138] The district court judge in *Ryan* may have applied the Guidelines in a manner consistent with the Sentencing Commission's purpose, nevertheless, the application is unconstitutional.

B. Sentencing by Analogy Is Unconstitutional

In 1984, Congress established the U.S. Sentencing Commission to promulgate new sentencing guidelines.[139] In adopting the Sentencing Guidelines, "Congress . . . assented to virtually all of the Commission's guidelines and amendments by silence."[140] The Supreme Court has ruled that the enactment of the Sentencing Guidelines was constitutional and is binding on the courts.[141] In *Mistretta v. United States*,[142] the Supreme Court held that the enactment of the Sentencing Guidelines was neither an excessive delegation of legislative power nor a violation of the separation of powers principle.[143] While the Guidelines generally satisfy constitutional scrutiny, the Court did not address specific provisions of the Guidelines. Furthermore, the Court based its holding upon the fact that the Sentencing Guidelines did "not include sentences in excess of the statutory maxima"[144] and the

---

135. 18 U.S.C. § 1112(a) (emphasis added).

136. U.S.S.G. § 2A1.1, cmt. n.1. Even second-degree murder is "murder," requiring proof of "malice aforethought."

137. *See, e.g., id.* § 2K1.4(c)(1) (arson).

138. The argument that the Commission intended the departure by analogy to be discretionary is foreclosed by the Commission's own opinion. When asked, "Are the cross references in Chapter Two guidelines optional?" the Commission answered "No." MOST FREQUENTLY ASKED QUESTIONS, *supra* note 106, at 46 (question 148).

139. *Supra* note 101 and accompanying text.

140. Daniel J. Freed, *Fedcral Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1696 (1992).

141. Mistretta v. United States, 488 U.S. 361 (1989).

142. *Id.*

143. *Id.* at 412.

144. *Id.* at 375. The Ninth Circuit held in United States v. Restrepo that "a convicted defendant has an interest in the accurate application of the Guidelines within statutory limits, nothing more, nothing less." United States v. Restrepo, 946 F.2d 654, 659 (9th Cir. 1991) (en banc) (Restrepo II), *cert. denied*,

Guidelines did not supplant the underlying statute for any offense.[145] The Sentencing Guidelines may not create new offenses and may not exceed the statutory maxima.[146] The Sentencing Guidelines use of departure by analogy is distinguishable from the *Mistretta* decision because the Sentencing Guidelines actually allow a judge to establish the offense of conviction at the sentencing stage. Sentencing by analogy permits a judge to establish substantive criminal law. Judicial legislation violates either the separation or delegation of powers doctrine.

The Sentencing Guidelines "provide specific guidance for departure by analogy"[147] in authorizing "a court to depart from a guideline-specified sentence" when it feels that there are especially significant aggravating factors that are not accounted for by the Guidelines.[148] When a judge sentences a defendant by analogy, the judge defines the offense of conviction *post factum*, espccially when the two offenses are in fact *not* analogous.[149] Departure by analogy gives the Sentencing Commission and federal judges power to define the offense of conviction after a conviction has occurred.[150] The policies of the Rule of Lenity are germane and the rule should apply. "[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity."[151] The *Ryan* case is a poiguant

---

112 S. Ct. 1564 (1992). Thus, it is key to know what each statute requires and under which statute each offender has been convicted. Proof beyond a reasonable doubt should be required if the facts in issue constitute a new or distinct crime.

145. The Sentencing Guidelines describe the effect of statutorily required minimum sentences and statutorily authorized maximum sentences on the specific guidelines in U.S.S.G. § 5G1.1; *see also* United States v. Sharp, 883 F.2d 829, 831 (9th Cir. 1989) ("When a statute requires a sentence different than that set by the guidelines, the statute controls."); United States v. Donley, 878 F.2d 735 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 1528 (1990).

146. U.S.S.G. § 5G1.1(a) ("Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence."); *see also Donley*, 878 F.2d at 740 (Congress did not intend to change the sentencing provisions of existing law).

147. U.S.S.G. § 1A4(b) (departures).

148. *Id.* (citing 18 U.S.C. § 3553(b)).

149. *Supra* part III.A. Departure by analogy also denies a defendant fair notice and increases prosecutorial discretion. These actions violate due process. *See* discussion *infra* part IV.B.4.

150. One commentator has described the importance of prescribing statutory maximums this way:

> Grading offenses limits judicial discretion, and the accompanying possibility for judicial caprice or prejudice, by involving a jury in confining the judge's sentencing options on conviction; if a jury convicts the defendant only of second-degree murder or manslaughter, the judge is deprived of certain sentencing options that we make available to the judge when the jury convicts of first-degree murder.

Cole, *supra* note 24, at 107. The existence of limits on judicial sentencing discretion is not diminished by the fact that a statutory offense degree still allows a great deal of sentencing discretion within one degree. Even the Sentencing Guidelines allow discretion for a judge to depart from the guidelines' sentence. *Id.* at 127 n.186. However, Cole uses this language to argue that including felony murder as first-degree murder is beneficial because it allows the jury to distinguish between killings during crime and "simple killings" (unrelated to crime) and thereby limit judicial sentencing discretion. This argument is flawed (apart from the fact that it assumes that a jury will not want to distinguish between killings during crime based upon the defendant's mens rea) because it fails to recoguize that the Sentencing Guideline's allowance of departure by analogy removes the statutory mandate of a jury's check on judicial sentencing discretion.

151. United States v. Bass, 404 U.S. 336, 348 (1971) (citation omitted).

example of such improper behavior. Either the judge established substantive criminal law by creating a new federal offense through the use of analogy—a violation of the separation of powers doctrine—or Congress, by creating a generic category of "crime" with an infinite range of sentences, delegated to the judiciary its power to establish substantive criminal law—a violation of the delegation of powers doctrine.

1. Separation of Powers Doctrine

The Supreme Court has stated that the separation of governmental powers is a fundamental constitutional principle[152] and is a vital and "self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."[153] Thus, there is a special importance to maintaining the independence of the branches.

Because the Constitution gives Congress the power to fix the sentence for federal crimes,[154] the judiciary may not reassign to itself the power to fix the sentence for federal crimes by analogy.[155] Judges have discretion to choose a specific punishment within the range granted by Congress, but the scope of judicial discretion is subject to the limits imposed by Congress.[156] Sentencing by analogy violates the separation of powers doctrine because the legislature must define crime. An act the judicial branch has no power to do is unconstitutional regardless of how carefully it is done. The fact that the Sentencing Guidelines provide for judicial review of such departures and that Congress assented to the delegation of power by adopting the Sentencing Guidelines does not make them valid.[157]

---

152. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 686 (1988); Bowsher v. Synar, 478 U.S. 714, 725 (1986).

153. Buckley v. Valeo, 424 U.S. 1, 122 (1976).

154. United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) ("It is the legislature, not the Court, which is to define a crime, and ordain its punishment."); *see also* United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) (implying that federal crimes are solely creatures of statute and that the legislature is entrusted with the power to define the elements of a criminal offense).

155. *See* Mistretta v. United States, 488 U.S. 361, 382 (1989) (reaffirming the belief that there is a special danger when one branch accretes to itself the power of another branch).

156. *Ex Parte* United States, 242 U.S. 27, 41-42 (1916); *see also* Chapman v. United States, 111 S. Ct. 1919, 1928 (1991) ("Congress has the power to define criminal punishments without giving the courts any sentencing discretion.").

157. In *New York v. United States*, Justice O'Counor, writing for the Court, stated:

> The Constitution's division of powers among the three Branches is violated where one Branch invades the territory of another, whether or not the encroached-upon Branch approves the encroachment. In *Buckley v. Valeo*, 424 U.S. 1, 118-37 (1976), for instance, the Court held that the Congress had infringed the President's appointment power, despite the fact that the President himself had manifested his consent to the statute that caused the infringement by signing it into law.

New York, 112 S. Ct. 2408, 2431 (1992) (citations omitted).

2. Delegation of Power Doctrine

The Constitution also mandates that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,"[158] and the Supreme Court has stated that Congress cannot delegate its legislative power to another branch of the government.[159] Therefore, neither the Commission nor Congress may give the judiciary the power to create new statutes or new sentencing ranges for existing statutes.[160]

If the Eighth Circuit is right, Congress may simply designate a generic category of "Crime" with an infinite range of sentences and leave it up to the judge to determine what the sentence is. If there are no limits on how Congress may define crime, then the entire Federal Criminal Code could arguably be mere sentencing enhancements. This legislative definition of a generic "Crime" offense may violate the Due Process Clause by "'offend[ing] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[161] In the *Ryan* case, the judge was "limited" by a range of zero years to life imprisonment. By requiring the legislature to define crimes and fix their sentences, the Constitution protects two interests. It mandates a diffusion of power and provides accountability for governmental action.[162] "[I]f a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will."[163]

The Sentencing Guidelines have been criticized harshly for expanding prosecutorial discretion.[164] Departure by analogy defeats the diffusion of power by allowing a prosecutor to charge a mere felony and bring in evidence

---

158. U.S. CONST. art. I, § 1.

159. Field v. Clark, 143 U.S. 649, 692 (1892). This Note does not dispute or ignore the Supreme Court's recognition of Congress' broad ability to delegate power. For example, the Court has found that Congress did not violate the nondelegation doctrine by delegating power to promulgate sentencing guidelines for all federal criminal offenses to the independent Sentencing Commission. *Mistretta*, 488 U.S. at 371. Nevertheless, *Mistretta* did not address the constitutionality of allowing judges to establish the offense of conviction at sentencing by analogy. In fact, the decision rested on the fact that "Congress instructed the Commission that these sentencing ranges *must be consistent with* pertinent provisions of Title 18 of the United States Code *and could not include sentences in excess of the statutory maxima.*" *Id.* at 374-75 (emphasis added).

160. *See, e.g.*, *Mistretta*, 488 U.S. at 378 n.11 (explaining that the Sentencing Commission could include the death penalty within the guidelines only if the death penalty was authorized by Congress in the statutory offense).

161. McMillan v. Pennsylvania, 477 U.S. 79, 86 (1986) (quoting Speiser v. Randall, 357 U.S. 513, 523 (1958)).

162. *See Mistretta*, 488 U.S. at 381-82. The argument in favor of accountability is analogous to the constitutional division of power between the Federal Government and the states. *See generally* New York v. United States, 112 S. Ct. 2408, 2424 (1992). Where the Federal Government compels the Judiciary to define crimes, the accountability of both Congress and the Judiciary is diminished. The Judiciary will "bear the brunt of public disapproval, while the federal officials who devised the [mandatory sentencing] program may remain insulated from the electoral ramifications of their decision." *Id.*

163. United States v. Brown, 381 U.S. 437, 443 (1965).

164. *See infra* part IV.B.4.

of the death at sentencing to bump the punishment exponentially. Departure by analogy also disregards the importance of the fact-finding function of the jury. The jury's fact-finding function assists the process of diffusing power in a unique way. The jury may act as a societal check on the system by acquitting a defendant of felony murder because the mens rea for murder did not exist. Under the Sentencing Commission's system, the jury's check may be disregarded by the prosecution, who possesses the power not to charge certain conduct and then prove the conduct at sentencing where there exists a lesser burden of proof. In essence, the prosecution may "impose its unchecked will."[165]

Departure by analogy also defeats the goal of maintaining accountability. Neither Congress nor the judiciary is accountable for sentences that result from departure by analogy. Congress must pass the statutes and be accountable to the electorate for the consequences of those statutes. Congress has an interest in both being "tough on crime" and in protecting individual liberties.[166] These are the two "crime" interests that are key to reelection. The voters demand a balance between these two interests, and it is up to Congress to strike the balance. The Sentencing Guidelines allow Congress to avoid accountability. Because the Sentencing Commission does not have the authority to enact new offenses,[167] the Sentencing Guidelines permit (and

---

165. *Brown*, 381 U.S. at 443. It is also important that the provisions calling for departure by analogy when a death results direct the sentencing judge to depart to the guideline applicable to murder, § 2A1. First-degree murder carries a mandatory minimum sentence of life imprisonment. The Sentencing Commission has stated:

> In general, a mandatory minimum becomes applicable only when the prosecutor elects to *charge* and the defendant is *convicted* of the specific offense carrying the mandatory sentence. On the other hand, sentencing guidelines are more generic in nature and do not necessarily require conviction of a particular charge for an aggravating factor to be reflected in the sentence.

MANDATORY MINIMUM PENALTIES, *supra* note 118, at 31-32 (citation omitted) (emphasis in original). Thus, the Sentencing Commission noted that there were important differences between mandatory minimums and sentencing guidelines, but the use of departure by analogy actually incorporates mandatory minimums into the Sentencing Guidelines. As the Sentencing Commission acknowledged, this raises serious questions about the evidentiary standard required by due process. "[I]ntertwined with the charge-specific and conviction-predicate nature of mandatory minimums, is the more stringent, beyond-a-reasonable-doubt evidentiary standard that generally must be met before many mandatory minimums apply." *Id.* at 32; *see also infra* part IV (discussing how use of felony-murder doctrine at sentencing, with the concomitant lower burden of proof, violates due process).

166. What should not be neglected is the defendant's interest in knowing the charges that are being brought and the potential liability he faees.

> It is a basic responsibility of government to assure that the criminal law is adequate to meet both its abstract and its practical purposes. Certainly the law must set a standard, it must reflect moral principles, *it must provide fair notice of its provisions, and it must specify fair procedures and just penalties for redressing its violation.*

Ronald L. Gainer, *Report to the Attorney General on Federal Criminal Code Reform*, 1 CRIM. L. F. 99, 112 (1989) (emphasis added) (discussing the need for, and the benefits of, Federal Criminal Code reform).

167. *See* 28 U.S.C. § 994(b)-(x) (1988); *supra* notes 143-46 and accompanying text; *see also* S. REP. NO. 225, 98th Cong., 1st Sess. 163 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3346 ("The sentencing guidelines . . . must be consistent with all pertinent provisions of titles 18 and 28 . . . .).

direct) the sentencing judge to depart from the offense of conviction by analogy, even when the offenses are not analogous. This departure relieves Congress of accountability because the departure occurs at sentencing. The judiciary is not accountable for the departure because of the mandatory nature of the Guidelines.[168]

IV. FELONY-MURDER DOCTRINE AND THE FEDERAL SENTENCING GUIDELINES: THE TAIL WHICH WAGS THE DOG OF THE SUBSTANTIVE OFFENSE

This Part of the Note analyzes the Sentencing Guidelines' use of the felony-murder doctrine at sentencing. Again, this analysis is only necessary if federal courts do not find malice aforethought to be an element of felonies—other than murder—resulting in death. Even assuming, arguendo, that Congress and the Sentencing Commission have the power to establish a felony-murder rule that is applicable only at sentencing[169] and that this extension of the felony-murder rule is constitutional,[170] the Sentencing Guidelines' use of relevant

---

168. One commentator has written that the incentive for creating the Sentencing Commission was that "[n]on-elective commissions could serve as buffering agencies, making unpopular sentencing decisions that legislators would avoid." Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 934 (1991). This provides support for the argument that the adoption of the Guidelines avoids accountability on all sides. I believe, however, that what has happened with the Guidelines, generally, and, their treatment of the felony-murder doctrine, specifically, is not so devious. I believe that the Sentencing Commission attempted to rewrite the code through "uniform sentencing." *See infra* part V. This would make sense. Since Congress could not agree on how to rewrite the code, they got someone else to do it. That "someone" was the Commission in enacting the Guidelines and currently is the judges who render departures by analogy.

Departure by analogy might ensure that similar offenses receive similar sentences. However, the Sentencing Guidelines do not account for the subtle, and often irrational distinctions between similar offenses, such as mens rea culpability. *See infra* part V. When a legislature defines two separate crimes, A and B, with different punishments and a trial is had only on crime A, a judge may not sentence under crime B no matter how analogous the offenses. The Supreme Court has stated that:

> Decisions about what facts are material and what are immaterial, or, . . . what "fact[s] [are] necessary to constitute the crime," and therefore must be proved individually, and what facts are mere means, represent value choices more appropriately made in the first instance by a legislature than by a court.

Schad v. Arizona, 111 S. Ct. 2491, 2500 (1991) (citation omitted).

169. It shonld be noted that this Part of the Note, arguing that interpreting malice aforethought as a sentencing factor violates dne process, assumes that proof of the death of another person is an element of the offense. It is clear to me that treating the death as a sentencing factor, as the *Ryan* court did, United States v. Ryan, 1993 WL 429092 (8th Cir. 1993), violates due process. Malice aforethought is a closer issue, bnt if death may be a sentencing factor without first having been found to be an element of the offense, then there is nothing that may be fairly characterized as "the tail which wags the dog of the substantive offense." Nonetheless, the same arguments made here would apply (with more force) to an analysis of the constitutionality of a sentencing scheme in which death is a sentencing factor.

170. The arguments in Part IV are not dependent upon the acceptance of the constitutional or statutory arguments made in the previous Parts of this Note.

conduct[171] to establish felony murder at sentencing violates the Due Process Clause.

Under the Sentencing Commission's interpretation of the felonies resulting in death the defendant may be acquitted of felony murder (or the prosecutor may *choose* not to seek a conviction of felony murder), convicted of a simple felony, but sentenced for felony murder. If the felony-murder rule is applied at sentencing, the prosecution need only prove by a preponderance of the evidence that a death occurred and that the defendant aeted with "malice aforethought." In fact, the prosecution would only have to prove the occurrence of a death itself by a preponderance of the evidence, not beyond a reasonable doubt. The "logical" reasoning for this position is that the standard of evidence at the sentencing stage is merely a "preponderance of evidence,"[172] whereas the standard of evidence at the guilt/innocence stage is "beyond a reasonable doubt."[173] The evidence of relevant conduct may satisfy the burden at sentencing even though it failed to satisfy the burden at trial.[174] But the Sentencing Guidelines find no refuge in "logic" when their

---

171. Relevant conduct is defined as:

> [A]ll acts and omissions committed, aided, abetted, counselled, commanded, included, procured, or wilfully caused by the defendant, . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.

U.S.S.G. § 1B1.3(a)(1). In addition, the Guidelines include "all harm that resulted from acts or omissions specified in subsection[] (a)(1) . . . above, and all harm that was the object of such acts and omissions . . . ." *Id.* § 1B1.3(a)(3).

Eighth Circuit Senior Judge Gerald W. Heaney has said that "'relevant conduct' is frequently just a euphemism for separate and distinct crimes for which punishment cannot be imposed without constitutional safeguards." Gerald W. Heaney, *Revisiting Disparity: Debating Guidelines Sentencing*, 29 AM. CRIM. L. REV. 771, 783 (1992). Judge Heaney argues that the Sentencing Guidelines evade the safeguards of the Fifth and Sixth Amendments "by characterizing particular criminal acts as 'relevant conduct,' 'specific offense characteristics,' or 'enhancements.' Yet they *require* that specific, nondiscretionary, additional prison time be added to a sentence for these acts, all without indictment, jury trial, or the right of the accused to confront witnesses against him." *Id.* (emphasis in original).

172. *See, e.g.*, United States v. Restrepo, 946 F.2d 654, 656-57 (9th Cir. 1991) (en banc) (Restrepo II) (stating that use of the preponderance of evidence standard in sentencing proceedings generally satisfies Due Process Clause), *cert. denied*, 112 S. Ct. 1564 (1992); United States v. Frederick, 897 F.2d 490, 493 (10th Cir. 1990) (stating that government must only establish facts under the Sentencing Guidelines by a preponderance of the evidence), *cert. denied*, 111 S. Ct. 171 (1990); United States v. Mocciola, 891 F.2d 13, 16-17 (1st Cir. 1989); United States v. Guerra, 888 F.2d 247, 250-51 (2d Cir. 1989), *cert. denied*, 494 U.S. 1090 (1990); United States v. Ehret, 885 F.2d 441, 444 (8th Cir. 1989), *cert. denied*, 493 U.S. 1062 (1990); United States v. Urrego-Linares, 879 F.2d 1234, 1238 (4th Cir. 1989), *cert. denied*, 493 U.S. 943 (1989); *see also* McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986) (explaining that in the sentencing phase, judges have traditionally "heard evidence and found facts without any prescribed burden of proof at all.").

173. *In re* Winship, 397 U.S. 358, 364 (1970) ("The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

174. A verdict of acquittal does not establish innocence, it demonstrates only a lack of proof beyond a reasonable doubt. *See* United States v. Martin, 972 F.2d 349 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1058 (1993); United States v. Isom, 886 F.2d 736, 738 (4th Cir. 1989). A defendant could be acquitted of felony murder, be convicted of the simple felony, and still be sentenced for the death which resulted. The "logical" reasoning for this argument is that even though the government could not satisfy the burden of proof at trial (beyond a reasonable doubt), acquittal does not foreclose the government's proving the mens rea for felony murder at sentencing by a mere preponderance of the evidence. *See, e.g.*, United States v. Rodriguez-Gonzalez, 899 F.2d 177, 179-82 (2d Cir. 1990) (holding that at

application breaches the barrier between the guilt/innocence stage and the sentencing stage, or when the two stages become one.

A. McMillan v. Pennsylvania

The Supreme Court, in *McMillan v. Pennsylvania*,[175] noted that due process limits a legislature's power to impose liability on a defendant for facts which are proven at the sentencing stage, rather than at the guilt/innocence stage. In *McMillan*, the Supreme Court evaluated a Pennsylvania statute treating visible possession of a firearm as a sentencing factor. The Court held that due process does not require treating visible possession of a firearm as an element of an offense to be proved beyond a reasonable doubt, rather than as a sentencing factor.[176] However, the Court did state that due process may require a higher burden of proof if a sentencing scheme may be fairly characterized as the "tail which wags the dog of the substantive offense."[177]

Thus, one must ask "When is a sentencing scheme the tail which wags the dog of the substantive offense?" *McMillan* provides the answer. The Court found several factors important in evaluating the Pennsylvania sentencing scheme. Pennsylvania's sentencing scheme "neither alter[ed] the maximum penalty for the crime committed nor create[d] a separate offense calling for a separate penalty . . . ."[178] The Court worried that a sentencing factor (the tail) might have a disproportionate impact on (wag) the defendant's sentence relative to the offense of conviction (the dog). The Court also found no indication that the legislature had taken factors that were traditionally considered elements of an offense and turned them into sentencing factors with the intent of evading the presumption of innocence protected by the "reasonable doubt" requirement.[179] The Court was again concerned that the legislature might diminish the fundamental importance of the guilt/innocence stage by enhancing the importance of the sentencing stage.

Courts should evaluate four factors in determining whether a sentencing scheme is the tail wagging the dog of the substantive offense: 1) a sentencing factor which greatly alters the maximum penalty for the crime committed, especially if the factor "expose[s] [the defendant] to greater or additional punishment"[180] beyond that provided for by the offense of conviction; 2) a

---

sentencing a judge may consider charges on which the defendant *was acquitted* because evidence may satisfy the burden at sentencing even though it failed to prove guilt beyond a reasonable doubt), *cert. denied*, 111 S. Ct. 127 (1990); United States v. Juarez-Ortega, 866 F.2d 747, 749 (5th Cir. 1989) (finding that sentencing court may consider the defendant's possession of a handgun *despite his acquittal* of the substantive firearm offense). This makes logical sense, but it does not address the problem of whether the Sentencing Guidelines have altered or duplicated the elements of the original offense of felony murder. *See supra* part III (altering the elements of an offense exceeds the Sentencing Commission's powers); *infra* part IV.B.2 (Sentencing Guidelines create a "new offense").

175. *McMillan*, 477 U.S. 79 (1986).

176. *Id.* at 91.

177. *Id.* at 88.

178. *Id.* at 87-88.

179. *Id.* at 89-90.

180. *Id.* at 88.

sentencing factor which creates a new and separate offense; 3) a sentencing factor that would traditionally be considered an element of an offense; and 4) a sentencing scheme which circumvents the presumption of innocence protected by the "reasonable doubt" requirement. Each one of these factors arises when the Sentencing Guidelines allow a resulting death to be proved as "relevant conduct." Thus, the Sentencing Guidelines application of felony-murder doctrine is the "tail which wags the dog of the substantive offense."

B. Application of the Four McMillan *Factors*

1. The Sentencing Guidelines Have a Disproportionate Impact and Alter the Maximum Penalty

The Sentencing Guidelines consider "relevant conduct" when determining the guideline applicable to a particular defendant. Prior to enactment of the Sentencing Guidelines, sentencing courts were considered a defendant's actual conduct (not just charged conduct)[181] and several circuits have held that the application of the Sentencing Guidelines has not changed the sentencing phase so substantially that it now constitutes a separate criminal proceeding.[182] Such analyses, nevertheless, focused on the general nature of the Guidelines and did not address the "if death results" provisions and their effect upon the substantive federal offenses.

The felony-murder doctrine's application in sentencing federal offenses through the Sentencing Guidelines' use of "relevant conduct" differs substantially from the use of "relevant conduct" to establish other aggravating factors because it allows the greatest possible increase in a sentence, that of life in prison. The use of the felony-murder doctrine under the Sentencing Guidelines is so quantitatively different from the use of other "relevant conduct" that this "sentencing enhancement . . . [should] be considered as an element of the offense"[183] and require proof beyond a reasonable doubt.

The Third Circuit's analysis of the Guidelines' sentencing enhancement provisions illuminates the unique effect of a resultant death. In *United States v. Mobley*,[184] the Third Circuit upheld the enhancement of a sentence for possession of a firearm by a convicted felon.[185] The court enhanced the sentence two levels because the firearm was stolen. Mobley received had he

181. United States v. Castellanos, 904 F.2d 1490, 1494 (11th Cir. 1990).

182. *See, e.g.*, United States v. Wise, 976 F.2d 393, 401 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1592 (1993).

183. United States v. Sanchez, 967 F.2d 1383 (9th Cir. 1992). *McMillan v. Pennsylvania* may demand such an analysis, but the issue was not addressed because the defendant did not raise it. *McMillan*, 477 U.S. at 79, 87-88 (1986). The Court stated that there may be a problem if the sentencing scheme was "tailored to permit the [death] finding to be a tail which wags the dog of the substantive offense." *Id.* at 88.

184. *Mobley*, 956 F.2d 450 (3d Cir. 1992).

185. *Id.* (under 18 U.S.C. § 922(g)(1) (1988)).

been charged, convicted, and sentenced for violating a different federal statute.[186]

The Third Circuit upheld the sentence[187] and held that Mobley had not been deprived of due process, asserting that the government was entitled to treat the stolen firearm as a sentencing factor rather than as an element of a particular offense.[188] The court explained that because Mobley's sentence was still within the statutory maximum for the offense the Government charged, "[t]his is not the situation of a tail wagging the dog; but rather, of two dogs having tails of equal length."[189] Notwithstanding this statement, the court acknowledged that there are limits to the extent which Congress or the Sentencing Commission can define sentence enhancements and offenses so as to circumvent the Due Process Clause.[190]

The distinction between the Sentencing Guidelines' treatment of the possession of a firearm in *Mobley* and the Sentencing Guidelines' treatment of the federal felony-murder rule is that Mobley had not been sentenced beyond the range of the felony for which he was convicted. Thus, the court could characterize the offense of conviction and the offense of sentencing as "two dogs having tails of equal length."[191] The incorporation of the felony-murder doctrine through proof of "relevant conduct," on the other hand, allows for imposition of a life sentence, a sentence far greater than the sentence allowable for conviction of a simple felony. For example, "the basic crime of arson under § 844(i) is punishable by no more than 10 years imprisonment. With the additional proof of resulting death, the available sanctions increase to any term of years, life imprisonment or death."[192] The Sentencing Guidelines application of the felony-murder doctrine has a significantly larger tail (sentence) than the tail (sentence) for a simple felony. This tail is so much larger that it can "fairly be characterized as 'a tail which wags the dog of the substantive offense.'"[193] *McMillan* supports this analysis by acknowledging that Pennsylvania's tinkering with the line between sentencing and trial might have been unconstitutional if the finding of the

---

186. *Id.*; *see* 18 U.S.C. § 922(i) or § 922(j) (1988).

187. *Mobley*, 956 F.2d at 457.

188. *Id.* at 454-59.

189. *Id.* at 457 (referring to the Supreme Court's statement that a sentencing enhancement could be inappropriate if it was "a tail which wags the dog of the substantive offense." McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986)).

190. *Id.* at 459. The *Mobley* court was acknowledging the statement in *McMillan* that the requirement of proof beyond a reasonable doubt "applies to [some] facts not formally identified as elements of the offense charged." *McMillan*, 477 U.S. at 86.

191. *Mobley*, 956 F.2d at 457.

192. Reply Brief for Appellant at 7, United States v. Ryan, 1993 WL 429092 (8th Cir. 1993) (No. 92-1357). The issue of whether the sentence exceeds the statutory maximum reemphasizes the importance of determining exactly what are the elements of the "if death results" offenses. *Supra* part I. The Sentencing Guidelines prohibit departure beyond the statutory maximum. U.S.S.G. § 5G1.1. The Sentencing Guidelines proceed, however, on the assumption that malice aforethought is not an element of the offense. *Supra* part II.A.

193. United States v. Kikumura, 918 F.2d 1084, 1101 (3d Cir. 1990) (citation omitted).

additional fact at sentencing exposed the defendant to punishment greater than the statutory maximum allowed for by the offense of conviction.[194]

Application of the felony-murder doctrine so that a resultant death is a sentencing factor also has a disproportionate impact on the sentence relative to the offense of conviction. The Third Circuit, in *United States v. Kikumura*,[195] held that the Sentencing Guidelines' use of relevant conduct could "fairly be characterized as 'a tail which wags the dog of the substantive offense'"[196] when the defendant's sentence was increased from thirty months to thirty years based on the district court's finding at sentencing that the defendant intended to commit murder.[197] The Third Circuit held that in order to support such a departure predicated upon the defendant's intent to commit murder, the prosecution must establish the intent by "clear and convincing evidence."[198] The defendant did not argue that proof beyond a reasonable doubt was required. As a result, the court "assume[d] without deciding that the clear and convincing standard is sufficient" when "the sentencing hearing [is] 'a tail which wags the dog of the substantive offense.'"[199]

If the Government may establish Felony murder at sentencing, courts should require proof beyond a reasonable doubt. Because the felony-murder enhancements may infinitely increase a sentence,[200] the use of relevant conduct to satisfy the felony-murder doctrine should qualify for a clear and convincing standard of evidence at an absolute minimum. "[D]ue process may be violated if the punishment meted out following application of the sentencing factors overwhelms or is extremely disproportionate to the punishment that would otherwise be imposed."[201] Courts must give substance to this due process limit by acknowledging that use of the felony-murder doctrine at sentencing exceeds it.

In *McMillan*, the Supreme Court evaluated a Pennsylvania statute treating visible possession of a firearm as a sentencing factor. The Court held that due process does not require treating visible possession of a firearm as an element of an offense to be proven beyond a reasonable doubt, rather than as a

---

194. *McMillan*, 477 U.S. at 88. The distinction that the Eighth Circuit might make—that the death is a sentencing factor and the statutory maximnm is, therefore, life imprisonment—is paperthin. Such a sentencing scheme would make the guilt/innocence stage a mere formality and largely irrelevant.

195. *Kikumura*, 918 F.2d 1084.

196. *Id.* at 1101-03 (citation omitted).

197. *Id.* at 1115. The defendant was convicted of interstate transportation of explosive devices for manufacturing three lethal home-made firebombs in preparation for a terrorist bombing. *Id.*

198. *Id.* at 1100-02.

199. *Id.* at 1101 (citation omitted).

200. Increasing a sentence to life imprisonment is an increase of the greatest degree possible without reviving federal use of the death penalty. United States v. Ryan, 1993 WL 429092, at *8 (8th Cir. 1993) ("[T]he penalty proscribed for the resulting death is potentially infinitely more severe [than the penalty for the nnderlying offense of arson] and is left to the discretion . . . of the judge.").

201. United States v. Galloway, 976 F.2d 414, 426 (8th Cir. 1992) (citation omitted) (noting agreement by the Third, Ninth, and Seventh Circuits), *cert. denied*, 113 S. Ct. 1420 (1993); *see* United States v. Trujillo, 959 F.2d 1377, 1382 (7th Cir. 1992) (concern with "extreme" disparity); United States v. Mobley, 956 F.2d 450, 456 (3d Cir. 1992) ("disproportionate impact"); United States v. Restrepo, 946 F.2d 654, 659 (9th Cir. 1991) ("extremely disproportionate effect"), *cert. denied*, 112 S. Ct. 1564 (1992).

sentencing factor.[202] The Court noted that the statute "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty *within the range already available to it* without the special finding of visible possession of a firearm."[203] Pennsylvania's "enumerated felonies retain the same elements they had before the Mandatory Minimum Sentencing Act was passed. The Pennsylvania Legislature did not change the definition of any existing offense."[204] Thus, the sentencing scheme gave no impression of having been designed or implemented to avoid the presumption of innocence protected by the requirement of proof beyond a reasonable doubt.[205]

By contrast, the basic crime of arson under 18 U.S.C. § 844(i) is punishable by no more than ten years of imprisonment. Under the Sentencing Guidelines, with the additional proof of a resulting death by relevant conduct, the available sentence increases to any term of years, life imprisonment, or even death. This would seem to distinguish the *McMillan* statute which did not alter the maximum penalty for the crime committed. Alternatively, if Congress—in enacting the Sentencing Guidelines—intended to remove from jury consideration the essential fact (resulting death) that separates a defendant's exposure to execution or life imprisonment from a maximum of ten years imprisonment, then surely the Sentencing Guidelines are "tailored to permit the . . . finding [of death] to be a tail which wags the dog of the substantive offense."[206]

2. The Sentencing Guidelines Create a New Offense

The Third Circuit believed that its decision in *Kikumura* was consistent with *McDowell v. United States*[207] which involved no more than a four-level increase or decrease to the defendant's offense level. "Moreover, *McDowell* 'explicitly d[id] not address the burden of proof in cases where a sentencing adjustment constitutes more than a simple enhancement but a new and separate offense.'"[208] In upholding Pennsylvania's sentencing scheme, the *McMillan* Court also noted that it did not "create[] a separate offense . . . ."[209] The Sentencing Guidelines' creation of a new offense of conviction in sentencing "by analogy"[210] distinguishes *McMillan* and is consistent with

---

202. *McMillan*, 477 U.S. 79 (1986).

203. *Id.* at 87-88 (emphasis added).

204. *Id.* at 89.

205. "Finally, we note that the specter raised by petitioners of States restructuring existing crimes in order to 'evade' the commands of *Winship* just does not appear in this case." *Id.*

206. *Id.* at 88.

207. *McDowell*, 888 F.2d 285, 290-91 (3d Cir. 1989) (finding that the preponderance of evidence standard is generally appropriate in guidelines sentencing).

208. *Kikumura*, 918 F.2d at 1101 n.16 (citation omitted); *cf. id.* at 1119-21 (Rosenn, J., concurring) (arguing that although Kikumura was *not* convicted of attempted murder, the government should have been required to charge and try him for that offense because that is the crime upon which the court relied most heavily in sentencing him).

209. *McMillan*, 477 U.S. at 88.

210. *See supra* part III.B.

Kikumura's demand for a higher standard of proof. Using relevant conduct to establish felony murder at sentencing requires a higher standard of proof to comport with due process.

Specht v. Patterson[211] and *McMillan v. Pennsylvania*[212] both support this proposition. *Specht* held that the right of confrontation was constitutionally required in a Colorado sentencing scheme.[213] This sentencing system allowed the sentencing judge to increase the defendant's sentence to life from ten years upon finding that the defendant was mentally ill, a habitual offender, or a threat to the public.[214] Even though confrontation rights are not generally guaranteed in sentencing systems, the Court guaranteed them in Colorado's system because it contemplated an adversarial proceeding and "a new finding of fact that was not an ingredient of the offense charged."[215] *McMillan v. Pennsylvania* also cited the important distinction based on the fact-finding in *Specht*.[216] The Sentencing Guidelines' creation of a new offense of conviction in sentencing by analogy necessarily entails a new finding of fact that was not an element of the offense charged and should, therefore, qualify for greater procedural protection than Sentencing Guidelines' provisions generally.[217]

3. Mens Rea for Killing Is Traditionally an Element of Murder

The federal felony-murder statute requires proof of mens rea for a killing.[218] Therefore, the incorporation of the felony-murder doctrine into the sentencing stage distinguishes the Sentencing Guidelines' scheme from the scheme in *McMillan v. Pennsylvania*.[219] The Sentencing Guidelines have taken factors traditionally considered elements of an offense and turned them into sentencing factors.[220]

---

211. *Specht*, 386 U.S. 605 (1967).
212. *McMillan*, 477 U.S. 79.
213. *Specht*, 386 U.S. at 608-09.
214. *Id.* at 607.
215. *Id.* at 608 (citations omitted).
216. *McMillan*, 477 U.S. at 88-91.
217. The importance of the finding of fact was raised before Congress during hearings on the Sentencing Guidelines:

> It is one of the fine ironies of the Guidelines System that while it takes away the legitimate judicial sentencing discretion which should rightfully repose in the district judge, it also grants immense illegitimate "Star Chamber" fact-finding powers to that same judge, contrary to American ideals and traditions in the criminal justice field.

Sentencing Guidelines: Hearings Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary of the House of Representatives, 100th Cong., 1st Sess. 510 (1988) [hereinafter *Sentencing Guidelines Hearings*] (statement of Judge Gerald W. Heaney, U.S. Court of Appeals for the Eighth Circuit) (quoting Judge Eisele).
218. *See supra* notes 30-34 and accompanying text.
219. *McMillan*, 477 U.S. 79.
220. *See id.* at 89-90. The Supreme Court has upheld sentencing schemes which allow aggravating factors to duplicate elements of the offense, but this has occurred in the limited and special circumstances of *capital* sentencing. *See* Lowenfield v. Phelps, 484 U.S. 231, 246 (1988). Interestingly, the death penalty may be seeing a revival in the prosecution of federal offenses. *See, e.g.*, United States v. Pitera, 795 F. Supp. 546 (E.D.N.Y. 1992) (upholding a federal capital sentencing scheme for 21

Mens rea has traditionally been a necessary element of the federal offense of felony murder.[221] The Supreme Court notes:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.[222]

The Ninth Circuit has held that the defendant has a right to a jury trial when the aggravating circumstances in an Arizona death penalty procedure "mirror the attributes of an essential element of the offense during the guilt phase of a trial."[223] The court found it significant that "to determine the existence of the aggravating circumstances at issue here requires subjective and complex inquiries into the defendant's state of mind . . . . These assessments directly measure a defendant's 'moral guilt' and overall culpability—traditionally the jury's domain of decision."[224]

A resolution of this issue may be as simple as acknowledging that the Sentencing Commission's consideration of the defendant's mental state as "relevant conduct"[225] is misplaced. Consideration of "relevant conduct" should mean that conduct is at issue, not mens rea divorced from the actus reus. Mens rea in a felony murder context should be left to the province of the jury. The importance of sentencing and the Sentencing Guidelines should not diminish the importance of proof of the statutory elements of an offense, and due process should require that mens rea be proven at trial.[226] If mens

---

U.S.C. § 848 (continuing criminal enterprise) which allows the prosecutor to introduce the fact that the killing was intentional as an aggravating factor even though this mirrors the mens rea element of the charged crime because the statute requires the jury at the sentencing stage to find an *additional* aggravating factor), *aff'd mem.*, 986 F.2d 499 (2d Cir. 1992); United States v. Pretlow, 779 F. Supp. 758 (D.N.J. 1991). The Eastern District of New York actually rejected the defendant's argument that a "duplicative factor unfairly tips the sentencing balance by permitting the government to argue something in aggravation that really adds nothing new to the crime of conviction." *Pitera*, 795 F. Supp. at 577.

221. *See supra* notes 30-34 and accompanying text. This is to say nothing of the death itself—which has always been an element of felony murder, even in strict liability schemes.

222. Morissette v. United States, 342 U.S. 246, 250 (1952) (Jackson, J.); *see also* Liparota v. United States, 471 U.S. 419 (1985) (holding that in the absence of a contrary intention expressed in the language or legislative history of a statute, criminal offenses retain mens rea as an element of the offense); United States v. United States Gypsum Co., 438 U.S. 422, 438 (1978) (stating that since criminal offenses requiring no mens rea have a disfavored status, "more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement").

223. Adamson v. Ricketts, 865 F.2d 1011, 1026 (9th Cir. 1988), *cert. denied*, 497 U.S. 1031 (1990).

224. *Id.* at 1026-27 (citing Eumund v. Florida, 458 U.S. 782, 800 (1982)). The Ninth Circuit also noted that inquiries into the defendant's mental state "are identical in essence to those required under the formal (statutory) distinctions Arizona makes among homicides." *Id.* at 1027 n.28. The same may be said about the Sentencing Guidelines' use of the felony-murder doctrine at sentencing.

225. U.S.S.G. § 1B1.3(a); *id.* cmt. (background) ("Subsection a(4) requires consideration of any other information specified in the applicable guideline. For example, . . . the defendant's state of mind; [and] . . . the risk of harm created.").

226. *See supra* part I.C.-D. The Third Circuit, in United States v. Kikumura, 918 F.2d 1084, 1101 (3d Cir. 1990), also raised the possibility that mens rea for murder might have to be proven at trial. The court stated that there are two possible ways in which a court could provide sufficient process when certain findings would increase a defendant's sentence from thirty months to thirty years:

rea is to be considered "relevant conduct," courts must require proof beyond a reasonable doubt. Shifting the burden of proving mens rea "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[227]

Additionally, unique circumstances exist when the defendant is to be sentenced for an offense "equivalent" to murder, in terms of punishment. Murder is qualitatively different from other offenses. It is a crime "so grievous an affront to humanity that the only adequate response may be the penalty of death."[228] Because the opprobrium attached to murder is greater than that for other offenses, the culpability required for such a conviction should also be greater.

4. The Sentencing Guidelines' Treatment of a Resulting Death Evades the Presumption of Innocence

The key difference between the sentencing scheme considered in *McMillan* and the Sentencing Guidelines' scheme is the qualitative disparity which arises when the actual conduct considered consists of elements of offenses that the prosecutor has chosen not to charge. Vesting control over sentencing in a relatively unbiased, objective, and neutral federal judge[229] differs from

---

> The first would place some limit on the concededly broad power of legislatures to define, and courts to consider, conduct that is or could be criminalized as an aggravating factor at sentencing. In effect, this approach would require that, for sentencing purposes, certain findings in certain circumstances be made pursuant to the *entire* panoply of procedural protections that apply at trial. Neither here nor in the district court, however, did Kikumura advance the argument that a conviction under 18 U.S.C. § 844(d) is too slender a reed on which to support consideration at sentencing of the defendant's specific intent to commit murder.

Id. (emphasis in original). The second—to increase some of the procedural protections applicable at sentencing (including the evidentiary standard)—was argued by the defendant and accepted by the court. *Id.*

227. McMillan v. Pennsylvania, 477 U.S. 79, 85 (1986) (quoting Speiser v. Randall, 357 U.S. 513, 523 (1958)).

228. Gregg v. Georgia, 428 U.S. 153, 187 (1976); *see also* Patterson v. New York, 432 U.S. 197, 227 (1977) (Powell, J., dissenting) (citing 4 W. BLACKSTONE, COMMENTARIES 190-93, 198-201) (murder is distinguished from manslaughter not only in punishment, but also in stigma).

Distinguishing between murder and other crimes is not merely a philosophical or academic distinction. The Court finds the qualitative difference compelling enough to use it as a distinction between those offenses which are death eligible and those which are not.

> Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair. We have the abiding conviction that the death penalty, which is 'unique in its severity and irrevocability,' *Gregg*[], 428 U.S. at 187[], is an excessive penalty for the rapist who, as such, does not take human life.

Coker v. Georgia, 433 U.S. 584, 598 (1977).

229. I recognize that this view may be unrealistic, but it is one of the premises upon which our system of government is based.

vesting such discretion in the prosecutor, who represents a party to the case.[230] Prosecutors can use their discretion to evade the presumption of innocence protected by the "reasonable doubt" requirement because, under the Sentencing Guidelines' system of "real conduct" sentencing, it is the prosecutor who holds the tail and wags the dog as he or she sees fit.

Courts and commentators have recognized "the danger that United States Attorneys may seek indictments for less serious offenses that are easier to prove and then seek substantially increased sentences based on the uncharged conduct."[231] A federal prosecutor may obtain conviction of a simple felony, like arson, which carries a statutory maximum of ten years.[232] Then, at sentencing, the prosecutor may submit evidence of a resulting death to increase the possible sentence to life imprisonment.[233] The Eighth Circuit believes that this danger is adequately addressed by the fact that the district judges are "authorized to require the United States Attorney to undertake the burden of presenting evidence to prove that conduct."[234] The Chairman of the Sentencing Commission, United States Circuit Judge William W. Wilkins, Jr., and General Counsel John R. Steer agree that the district judge retains adequate control over this sentencing practice through the assumption of an appropriate burden of proof.[235]

---

230. *See Kikumura*, 918 F.2d at 1119 (Rosenn, J., concurring) (stating that sentencing scheme that "replaced judicial discretion over sentencing with prosecutorial discretion" would violate a defendant's due process rights); United States v. Williams, 746 F. Supp. 1076, 1080 n.6 (D. Utah 1990) (minimum mandatory sentencing statutes and the Sentencing Guidelines have resulted in *de facto* sentencing by police and prosecutors); Freed, *supra* note 140, at 1725 (asserting that defendant must rely on his attorney's ability to negotiate a sentence with the prosecutor "to the extent that the guidelines strip judges of sentencing discretion"); Heaney, *supra* note 171, at 774 (arguing that prosecutors have replaeed judges as the determiners of sentencing); Melissa M. McGrath, Comment, *Federal Sentencing Law: Prosecutorial Discretion in Determining Departures Based on Defendant's Cooperation Violates Due Process*, 15 S. ILL. U. L.J. 321 (1991); Bennett L. Gershman, *Prosecutorial Discretion Under the Federal Sentencing Guidelines*, N.Y. L.J., Apr. 20, 1990, at 1. *But see* William W. Wilkins, *Response to Judge Heaney*, 28 AM. CRIM. L. REV. 795, 802-05 (1992).

Even Senator Kennedy, one of the original advocates of the Sentencing Guidelines, believes that they are being abused by federal prosecutors because of their mandatory nature:

> Some advocates of mandatory sentencing believe that coerced uniformity is appropriate. But the mandatory statutes do not produce uniformity; they merely transfer discretion from judges to prosecutors, who decide whether defendants will be charged with an offense carrying a mandatory penalty and whether to insist on a plea to that count of the indictment. A guideline system makes judges accountable for the discretion they exereise; mandatory sentencing laws impose no similar check on prosecutors.

Edward M. Kennedy, *Foreword*, 29 AM. CRIM. L. REV. (1992).

231. United States v. Galloway, 976 F.2d 414, 427 (8th Cir. 1992) (citing William W. Wilkins & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495, 500 (1990)), *cert. denied*, 113 S. Ct. 1420 (1993); *see also* Freed, *supra* note 140, at 1714 (Relevant conduct "allows a prosecutor to increase an offender's sentence more easily by dropping eharges than by bringing them . . .[and] allows the [prosecutor] to introduce evidence of another crime at the sentencing stage that was withheld from trial because the [prosecutor] could not prove it 'beyond a reasonable doubt.'") (alteration in original).

232. 18 U.S.C. § 844(i).

233. U.S.S.G. § 2K1.4(c)(1).

234. *Galloway*, 976 F.2d at 427.

235. Wilkins & Steer, *supra* note 231, at 500.

While Chairman Wilkins may maintain that such a burden is "appropriate" in some contexts, it raises serious constitutional questions in the felony-murder context, where the conduct at issue is the "tail which wags the dog of the substantive offense." Moreover, this judicial control warrants merely a preponderance of the evidence standard.[236]

Under this type of system, the prosecutor may stockpile accusations of conduct far more serious than the conduct at issue in trial and present the accusations at sentencing where the burden is comparatively negligible.

> It is proper to enhance a defendant's sentence for conduct related to the offense of conviction such as role in the offense, degree of planning required, and the defendant's criminal history. The Guidelines already do this, but they go further by also mandating incremental penalties for separate offenses that the prosecution has not and may not be able to prove.[237]

At least one state commission has concluded that a relevant conduct system not based on convicted conduct would violate due process by failing to provide the defendant notice of the specific charge.[238]

V. SENTENCING GUIDELINES: CURING THE SYMPTOMS OR THE DISEASE?

Felony murder is a doctrine of substantive law, and courts should limit their use of it to substantive law. The Sentencing Commission, however, interpreted the growth of the Federal Criminal Code to include an expansion of the felony-murder doctrine beyond substantive law. This has caused confusion as to what mens rea is necessary to hold a defendant liable for a death that occurs during the commission of a felony. The Sentencing Commission may have attempted to make sense of the haphazard expansion of the felony-murder doctrine by applying it to all defendants who cause a death. Uniform application of the felony-murder doctrine is a noble, sensible, and necessary goal—but the Sentencing Guidelines are an improper place to tinker with the Federal Criminal Code. A more appropriate approach would begin with a legislative overhaul of the Federal Criminal Code.

---

236. *See, e.g.*, United States v. Restrepo, 946 F.2d 654, 656-57 (9th Cir. 1991) (en banc) (Restrepo II) (stating that use of the preponderance of evidence standard in sentencing proceedings generally satisfies the Due Process Clause), *cert. denied*, 112 S. Ct. 1564 (1992).

237. United States v. Silverman, 976 F.2d 1502, 1522 n.15 (6th Cir. 1992) (Merritt, C.J., dissenting), *cert. denied*, 113 S. Ct. 1595 (1993).

238. DALE G. PARENT, STRUCTURING CRIMINAL SENTENCES: THE EVOLUTION OF MINNESOTA'S SENTENCING GUIDELINES 62-63, 159-61 (Daniel J. Freed ed. 1988). Minnesota did not adopt a real conduct sentencing scheme because "[t]he [Minnesota] Commission believed that it would be fundamentally unfair to base a presumptive sentence on an offense for which the defendant had not been charged or convicted." *Id.* at 63. The Supreme Court has unanimously stated:

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.

Cole v. Arkansas, 333 U.S. 196, 201 (1948).

Perhaps the Sentencing Commission knew it was blurring the line between conviction for felony murder and conviction for simple felonies. The Policy Statement for the Sentencing Guidelines explains that the United States Sentencing Commission "analyzed data drawn from . . . the differing elements of various crimes as distinguished in substantive criminal statutes, . . . in order to determine which distinctions were important in pre-guidelines practice. After consideration, the Commission accepted, *modified*, or rationalized these distinctions."[239] The Commission, in fact, knew it was changing the existing code and the principles and "distinctions" upon which it was based. Unfortunately, it attempted to cure the symptoms of disparity in sentencing[240] rather than calling on Congress to cure the disease of the Federal Criminal Code.

The Sentencing Commission modified and rationalized the elements of various crimes in seeking uniformity, but the federal statutes currently do not allow for uniformity. The tendency to aggregate similar cases[241] and seek uniformity in sentencing may have resulted in the Commission's tendency to aggregate statutory offenses. "In its overriding quest to forestall disparity, the Commission tends to apply the same measuring rods to persons of widely varying culpability . . . ."[242] To make the sentences for different statutes uniform requires recodifying the statutes or interpreting the statutes so that they require comparable culpability. Making them uniform at sentencing exceeds the Commission's authority and Congress' goals.[243]

To say that the Commission exceeded its authority and Congress' goals is not to say that the action the Commission took should be condemned. On the contrary, the Commission was pursuing an important goal—recodifying federal criminal law. The error lies in how the Commission attempted to achieve the goal. The Sentencing Commission stated: "For one thing, the hundreds of overlapping and duplicative statutory provisions that make up the federal criminal law forced the Commission to write guidelines that are descriptive of generic conduct rather than guidelines that track purely statutory language."[244] The Commission acknowledged that real progress would necessitate an overhaul of the federal code,[245] but went ahead and did

---

239. U.S.S.G. § 1A3 (emphasis added).

240. Freed, *supra* note 140, at 1740-41 ("There are at least two approaches to reducing unwarranted disparity: a legislature or outside agency can try to force it out of the system with severe rules; or courts, in cooperation with an agency, can probe the causes of disparity and evolve agreed upon principles and norms to help sentencers achieve greater consistency. . . . The U.S. Sentencing Commission chose the former.").

241. "Preguidelines regimes emphasized individual punishment; to a considerable extent, guidelines regimes substitute punishment based on aggregation of similar cases." Alschuler, *supra* note 168, at 902 (stating that aggregation of sentences through guidelines and mandatory minimums increases injustice).

242. Freed, *supra* note 140, at 1705. The 1993 amendments to the Federal Sentencing Guidelines may have been an attempt to account for culpability. *See supra* part II.B.

243. The Judiciary Committee did not intend to restructure the pre-existing statutes. S. REP. NO. 225, 98th Cong., 2d Sess. 3270 (1984) (the Judiciary Committee "postponed the restructuring of Federal offenses according to their relative seriousness").

244. U.S.S.G. § 1A4.a.

245. *Id.* § 1A3.

a patchwork job of addressing the politically popular problem of uniformity in sentencing.

The Federal Courts Study Committee noted the confluence between the problems of the sentencing guidelines and the problems of the federal code and acknowledged the necessity of addressing those problems.[246]

> A number of criticisms of the guidelines may actually be criticisms of the arbitrary structure of the federal criminal laws, a structure made transparent by the guidelines. There are thousands of separate federal criminal prohibitions, enacted at different times, reflecting different penal attitudes, and full of gaps and overlaps. We urge Congress to resume the task, formidable as it is, of recodifying federal criminal law in order to bring about a simplified, rationalized, and coherent system of prohibitions.[247]

Today, there are more than 3000 separate federal statutory offenses.[248] Comprehensive crime bills come before Congress each session, but are rejected or revised, resulting in an expansion of the Federal Criminal Code by accretion. The current array of criminal laws is so disheveled that one commentator has suggested that it may not even properly be recognized as a criminal "code."[249] For example, the Code uses more than seventy-five terms to describe the requisite statutory mens rea of federal criminal offenses.[250] This has led to great difficulty for courts in establishing the mens rea that a prosecutor must show to establish a violation of a federal offense.[251]

---

246. FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 106 (1991) [hereinafter FEDERAL COURTS STUDY REPORT] ("lack of a rational criminal code has also hampered the development of a rational sentencing system").

247. *Id.* at 23.

248. *Id.* at 106.

249. Gainer, *supra* note 166, at 113. Gainer proposes that the code has developed through hindsight rather than foresight, "as a series of sporadic attempts to resolve crises of the moment." *Id.* at 113-14.

250. FEDERAL COURTS STUDY REPORT, *supra* note 246, at 106 (78 terms used); 1 WORKING PAPERS, *supra* note 35, at 119-20 (more than 75 terms).

251. The Supreme Court has noted the uncertainty of mens rea definitions as the result of the haphazard expansion of federal criminal law: "Few areas of criminal law pose more problem than the proper definition of the *mens rea* required for any particular crime." United States v. Bailey, 444 U.S. 394, 403 (1980) (emphasis in original); *see also* Kenneth R. Feinberg, *Toward a New Approach to Proving Culpability: Mens Rea and the Proposed Federal Criminal Code*, 18 AM. CRIM. L. REV. 123, 124 (1980) (asserting that a new code would resolve the problems faced by lawyers and judges in determining mens rea requirements of a criminal offense).

The Federal Courts Study Committee suggested a "checklist" that congressional legislative staffs should consider when analyzing pending legislation for technical problems. Several of these suggestions are clearly related to avoiding statutory problems in the criminal code: "the definition of key terms; the *mens rea* requirement in criminal statutes; . . . whether a proposed bill would repeal or otherwise circumscribe, displace, impair, or change the meaning of existing federal legislation . . . ." FEDERAL COURTS STUDY REPORT, *supra* note 246, at 91. Solving such problems does not have to benefit only those charged with violations. Addressing these exact same concerns through recodification has been deemed necessary in order to ensure adequate and effective prosecution of crime. *See* Gainer, *supra* note 166, at 101 (discussing the necessity for, and benefits of, Federal Criminal Code reform). Gainer's article was originally a document prepared for the Attorney General of the United States by the Office of Legal Policy of the United States in 1989. Gainer believes that recodification is necessary to ensure proper prosecution and enforcement. For example, Gainer believes that the present code "has invited defense counsel to confuse juries with rhetoric concerning '*mens rea*' and '*criminal intent.*'" *Id.* at 100 (emphasis in original).

The Federal Courts Study Committee has stated that the need for recodification is "a pressing matter for Congress's attention."[252] Proposed recodification of the criminal code and the corresponding uniform definition of mens rea terms would "encourage uniformity and consistency."[253] While this was in fact the reason for promulgating the Sentencing Guidelines, the sentencing stage is not the proper and legitimate place to make sense of the code.

CONCLUSION

Recent cases illuminate the importance of articulating the limits to a legislature's ability to enhance the importance of the sentencing stage and diminish the importance of the guilt/innocence stage. For example, in *Nichols v. McCormick*,[254] the Ninth Circuit held that a sentencing enhancement which increased the defendant's sentence beyond the statutory maximum for the offense of conviction did not violate the defendant's due process rights as defined in *McMillan v. Pennsylvania*[255] or the defendant's Sixth Amendment rights.[256]

Nichols is simply and clearly a misinterpretation of *McMillan*. *Nichols* involved a Montana statute which stated that the use of a weapon during the commission of a felony mandated an increase in the punishment provided for the commission of such an offense of between two and ten years.[257] Thus *Nichols*, like *McMillan*, involved the use of a firearm as a sentencing factor. The statute at issue in *Nichols*, however, altered the maximum penalty for the crime committed rather than "operat[ing] solely to limit the sentencing court's

---

252. FEDERAL COURTS STUDY REPORT, *supra* note 246, at 106 (1990).

> The need for recodification has long been recognized, but its accomplishment has been indefinitely postponed. Congress authorized a National Commission on the Reform of Federal Criminal Laws in 1966, and the Commission presented its report to Congress in 1971. Unfortunately, this work never came to fruition despite repeated efforts in Congress between 1971 and 1982. The effort must be resumed, and a new code should be created to assist in this undertaking. The Commission should work with Congress, the judiciary, and the Department of Justice to focus public and professional attention on the need for a revised criminal code, to develop draft legislation, and to help shepherd the resulting bills through the legislative process.

Id.

253. Feinberg, *supra* note 251, at 124 (citation omitted).

254. *Nichols*, 929 F.2d 507 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1226 (1992).

255. *McMillan*, 477 U.S. 79, 87-88 (1986) (Pennsylvania's sentencing factor "neither *alters the maximum penalty for the crime committed* nor creates a separate offeuse calling for a penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty *within the range already available to it* without the [sentencing factor] . . .") (alteration in original) (emphasis added).

256. *Nichols*, 929 F.2d 507. The Sixth Amendment protects the accused's right "to be informed of the nature and cause of the accusation . . . [and] to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI.

This blatant disregard for the defendant's due process and Sixth Amendment rights has not escaped the federal courts' applieation of the Sentencing Guidelines. *See* United States v. Young, 936 F.2d 1050 (9th Cir. 1991) (relying on *Nichols* in upholding federal sentencing enhancement for use of a deadly or dangerous wcapon even though the sentence could then exceed the "normal" statutory maximum by as many as seven years).

257. *Nichols*, 929 F.2d at 509.

discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm."[258]

Even assuming the propriety of the Ninth Circuit's application of *McMillan*, one may distinguish *Nichols* from the use of uncharged conduct to prove felony murder because the use of a firearm during the commission of a felony is a factor that is traditionally considered at the sentencing phase.[259] In contrast, proof of a culpable mind is a factor traditionally regarded as an element of an offense and required for conviction.

The Third Circuit, in *United States v. Kikumura*,[260] correctly notes that due process requires the court to limit the use of the preponderance of evidence standard at sentencing in certain cases. The Supreme Court's concern in *McMillan* mandates that courts prove a resultant death and the defendant's culpable mens rea by a higher standard of proof than a mere preponderance of the evidence. "[S]entencing proceedings are arguably the most important judicial business conducted by Article III judges,"[261] and are clearly the most important business conducted in a felony-murder scenario. Courts should give substance to the *McMillan* due process limit and require proof beyond a reasonable doubt of all the elements of felony murder at the guilt/innocence stage rather than at the sentencing stage.

The Supreme Court has not revisited *McMillan v. Pennsylvania* to clarify the due process limits that the Court acknowledged but did not define. Other federal courts (as exemplified by the Third Circuit's decision in *Kikumura*) have expressed concern regarding the application of the Sentencing Guidelines. These courts have failed, however, to delineate limits on a legislature's ability to blur the line between the guilt/innocence stage and the sentencing stage. Because federal courts have ignored what seems the simplest command of *McMillan* and the Due Process Clause—that a sentencing factor may not enhance the sentence beyond the statutory maximum—Congress and the Supreme Court must speak on this issue.

Chief Justice Rehnquist "cited a need to adjust Federal sentencing guidelines and procedural rules" as a major concern he hoped Congress would address in 1993.[262] The felony-murder doctrine, with its difficult and uncertain handling of mens rea, requires special attention at the statutory level and at the sentencing level. In light of the confusion over the application of the felony-murder rule at trial and the effect of the Sentencing Guidelines on the felony-murder doctrine, Congress should take two actions. Congress should directly address the problems with the Federal Criminal Code and its definitions of the mens rea elements of all offenses. This would require

---

258. *McMillan*, 477 U.S. at 88.

259. *Id.* at 89-90; *see supra* part IV.A.

260. *Kikumura*, 918 F.2d 1084 (3d Cir. 1990).

261. Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years*, 60 GEO. WASH. L. REV. 857, 889 (1992) (arguing that the Federal Rules of Evidence should be amended to include greater protection for the defendant in light of the more adversarial nature of the sentencing hearings).

262. *Chief Justice Urges Cooperation with Clinton*, N.Y. TIMES, Jan. 1, 1993, at A19.

adopting a revised Federal Criminal Code. Congress should also limit the use of the felony-murder doctrine to the guilt/innocence stage. These two actions would provide notice to all defendants of the charges they face. They would also prevent the prosecution from circumventing the presumption of innocence and protect the jury's role as finder of fact.

In the absence of congressional action, or in the interim, courts should recognize that a resulting death and a culpable mens rea for that death are fundamental elements of any murder offense and courts should address the propriety of a statute which goes beyond strict liability. The Supreme Court first stated, and the circuit courts have agreed, that there exist due process limits to a sentencing scheme or a sentencing factor that is the "tail which wags the dog of the substantive offense."[263] Use of the felony-murder doctrine at sentencing exceeds the limits of due process. In order to secure the full panoply of constitutional protections, courts must require the Government to prove felony murder at trial.

Should federal courts fail to do so, they must still delineate procedural limits for application of the Sentencing Guidelines. "[W]hatever procedures the courts ultimately adopt they will be an ugly and pale parody of, and substitute for the majesty and glory of the protections afforded by the Constitution."[264] If the Government may establish felony murder at sentencing, as the Sentencing Commission directs and the Eighth Circuit held, courts should go beyond the commands of the *Kikumura* court and require proof beyond a reasonable doubt. At a bare minimum, the Court must give substance to the Due Process Clause and *McMillan v. Pennsylvania* by stating that a sentence may never exceed the statutory maximum for the simple felony which is the offense of conviction.

263. McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986).
264. *Sentencing Guidelines Hearings*, *supra* note 217, at 512.