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Imputed Criminal Liability*

Paul H. Robinson†

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† Professor of Law, Rutgers University School of Law—Camden. B.S., Rensselaer Polytechnic Institute, 1970; J.D., University of California at Los Angeles, 1973; LL.M., Harvard, 1974; Dipl. Leg. St., Cambridge, 1976. I am indebted to Jane A. Grall for her extensive assistance in the preparation of this article.

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Imputed Criminal Liability

Typically, the set of elements defining a crime comprise what may be called the *paradigm* of liability for that offense: An actor is criminally liable if and only if the state proves all these elements.¹ The paradigm of an offense, however, does not always determine criminal liability. Even where all the elements of the paradigm are proven, rules and doctrines create exceptions that affect criminal liability. Some exceptions, such as insanity, duress, and law enforcement authority, can exculpate an actor even though his conduct and state of mind satisfy the paradigm for the offense charged. Such exculpating exceptions are grouped and analyzed as defenses.²

Other exceptions inculpate actors who do not satisfy the paradigm for the offense charged. Such inculpating exceptions may be termed instances of "imputed" elements of an offense. Some writers have suggested that the imposition of liability absent a required element of the offense is illogical,³ immoral,⁴ or perhaps unconstitutional.⁵ But just as there are many defenses—exceptions that exculpate despite satisfaction of the paradigm—there are also many common and well-established exceptions that inculpate despite the absence of a "required" element of the offense definition. If, for example, an actor causes another person to engage in illegal conduct, a required element of conduct of the offense may be properly

1. As used here, "paradigm" refers to the paradigm for a particular offense, e.g., arson, rape, or murder. Each offense has its own paradigm, which can nearly always be determined by examining the offense definition. There are, however, exceptions to this simple methodology. Certain offense definitions incorporate exceptions to the paradigm. See *infra* note 6. Further, certain offenses are not statements of the paradigm but rather are codified exceptions to the paradigm of another offense. See *infra* pp. 624–29.

2. See generally 1 P. ROBINSON, CRIMINAL LAW DEFENSES § 11–41 (1984) (discussing system of defenses and its practical implications); Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 203 (1982) (grouping defenses into failure of proof, offense modification, justifications, excuses, and public policy defenses).

3. Compare *Director of Pub. Prosecutions v. Morgan*, [1975] 2 All E.R. 347, 360 (Hailsham, L.J.) (logic requires jury instruction permitting finding that intoxication negates any element of offense) with *Director of Pub. Prosecutions v. Majewski*, [1976] 2 All E.R. 142, 157 (Salmon, L.J.) (logical requirement that prosecution must prove every element of offense cannot prevail where defendant's voluntary intoxication has caused absence of element) and *id.* at 166–68 (Edmund-Davies, L.J.) (same).

For a scholarly discussion of the illogic of conviction absent proof of a required element, see G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 569–72 (2d ed. 1961); MODEL PENAL CODE § 2.08 comment at 6–7 (Tent. Draft No. 9, 1959). It is, however, unprincipled imputation, and not imputation itself, that is illogical and immoral. See *infra* pp. 639–42.

4. See J. SMITH & B. HOGAN, CRIMINAL LAW 37 (3d ed. 1973) (arguing that voluntarily intoxicated who cannot control their conduct should not be punished); cf. *Majewski*, 2 All E.R. at 168–71 (Edmund-Davies, L.J.) (recognizing but rejecting moral objections to conviction absent required culpable state of mind).

5. The due process clause, for example, requires the prosecution to prove beyond a reasonable doubt "every fact necessary to constitute the crime with which [the defendant] is charged." *In re Winship*, 397 U.S. 358, 364 (1970). If one interprets this to mean that *every element of the definition of the offense charged* must be proven, every form of imputed liability discussed in this Article could be unconstitutional unless written into the definition of the particular offense. The constitutionality of most of these doctrines, however, is undisputed.

imputed to the actor. Similarly, the requisite culpable state of mind may properly be imputed to an actor if he would have had the culpable state of mind but for his voluntary intoxication. These familiar results follow from special rules governing complicity and voluntary intoxication. Like the defenses of insanity, duress, and law enforcement authority, which also generally appear outside the definition of an offense, these rules of imputation alter the requirements for criminal liability.

Legislators could conceivably include all inculpatory exceptions to a particular paradigm within the definition of the offense.⁶ Inculpatory exceptions, however, often embody principles that are independent of any particular offense.⁷ Such general principles of inculcation provide an alternative basis for liability; they justify liability in the absence of every element of the offense. These general principles make it unnecessary to refer to the doctrines of imputation in the definition of each offense.⁸

6. Arson, for example, is defined in Tennessee to include in complicity "[a]ny person who willfully and maliciously sets fire to or burns, causes to be burned, *or who aids, counsels or procures* the burning of any house . . . shall be guilty of arson . . ." TENN. CODE ANN. § 39-3-202 (1982) (emphasis added); see also W. VA. CODE § 61-3-1 (1977) (arson committed by one who burns or aids, counsels, or procures burning of house). Similarly, definitions of an offense sometimes incorporate the rules governing voluntary intoxication, and impose liability even though intoxication may negate an otherwise required culpable state of mind:

(a) A person commits an offense if he:

(1) recklessly causes the death of an individual; or

(2) by accident or mistake when operating a motor vehicle *while intoxicated and,*

by reason of such intoxication, causes the death of an individual.

TEX. PENAL CODE ANN. § 19.05(a) (Vernon 1974) (emphasis added).

The paradigm of liability for arson under the Tennessee statute, generally requires proof that the actor set fire to or burnt the house. If the actor aids, counsels, or procures another to do the burning, however, that act is imputed. Similarly, the paradigm for manslaughter under the Texas statute includes recklessness, but this element is imputed if the actor causes death if driving while intoxicated. In either case, a required element of the offense is eliminated, and liability is instead supported by a combination of the remaining elements of the paradigm and the special requirements of complicity (for arson) or intoxication (for manslaughter).

Some general formulations of rules governing complicity and voluntary intoxication contain explicit provisions for imputation. The *Model Penal Code*, for example, does so in its complicity provision: "A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both." MODEL PENAL CODE § 2.06(1) (Proposed Official Draft 1962). Thus, if accountability is established, another's conduct may be imputed. The *Model Penal Code* provision governing voluntary intoxication is similar: "When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial." *Id.* § 2.08(2).

7. For example, aiding and abetting is so firmly entrenched as a doctrine applicable to all offenses that federal courts have recognized that the federal complicity provision, 18 U.S.C. § 2 (1982), is "an alternative charge in every count, whether explicit or implicit." *United States v. Bryan*, 483 F.2d 88, 95 (3d Cir. 1973) (quoting *United States v. Bullock*, 451 F.2d 884, 888 (5th Cir. 1971)). The *Bryan* case illustrates two significant characteristics of most doctrines of imputation: They are *alternative* charges, because the conditions for liability are different from the elements of the offense charged; and they have applicability beyond the offense charged. See *Bryan*, 483 F.2d at 95 (conviction under indictment charging aiding and abetting permissible even though proof at trial established that defendant acted as principal). For a discussion of the elements of complicity, i.e., the prerequisites to imputation of elements of conduct under this theory, see *infra* p. 633 (contribution to offense); p. 637 (culpable state of mind as to contribution); note 102 (culpability required by offense).

8. Cf. TENN. CODE ANN. § 39-1-303 (1982) (aiders and abettors deemed principal offenders).

Recognition of the conceptually distinct group of inculpatory exceptions not only reveals the functional similarity of a variety of inculpatory rules and doctrines but also raises a crucial theoretical issue in each instance of imputation. If the minimum requirements for an offense have been defined in its paradigm, why should one of these "required" elements be eliminated in a particular case? All instances of imputed elements, while they may be founded upon reasonable grounds for imposing liability, permit deviation from the previously defined minimum requirements for a given offense. At the very least, such deviation requires an explanation. Defenses—exceptions that redound to the defendant's benefit—are supported by well-developed and rational explanations.⁹ Can we also articulate sound theoretical and practical reasons supporting the well-established inculpatory exceptions?

The rules and doctrines that impute required elements have no common name to draw them together, as do "defenses," and, perhaps for this reason, have rarely been viewed as a group. Having defined instances of imputation as a conceptual group, however, one may ask whether there is an identifiable and consistent set of principles that governs the imputation of definitional elements. Are the rules governing such imputation consistent with their rationales? Do doctrines or rules with similar rationales operate in properly analogous ways to produce consistent results? These are the inquiries undertaken in this Article.

I. THE PRINCIPLES OF IMPUTED LIABILITY

American criminal law permits the imputation of both the objective and culpability elements of a crime. While the most obvious and common instances of imputing objective elements are found in the rules governing complicity,¹⁰ such rules are only one of several seemingly dissimilar doc-

Compare TEX. PENAL CODE ANN. § 19.05(a) (Vernon 1974) (discussed *supra* note 6) with *id.* § 8.04(a) (voluntary intoxication is no defense to crime). The general imputation provisions in both the Tennessee and Texas statutes create liability in all cases included in the specific imputation provisions of the arson and manslaughter offenses, quoted *supra* note 6. Thus, the specific offense approach is unnecessary in both cases.

9. Excuses, such as insanity and duress, apply where the actor is not responsible for the criminal conduct because of his disability. See Robinson, *supra* note 2, at 221, 225. Excuses ensure that only those who are blameworthy and deterrable—those who violate the law through a meaningful exercise of free will—will be punished. *Id.* at 221 & n.81. Justifications, such as self-defense and law enforcement, apply where the harm of the actor's criminal conduct is, under the special circumstances, outweighed by the benefit it creates. *Id.* at 213–20. Justifications ensure that conduct that creates a net benefit is both recognized as harmless under such circumstances and encouraged in the future. *Id.* at 213–14.

10. If A holds B's baby while B takes C's property, A may be guilty of theft. Under normal complicity rules, the objective element required for theft, the "taking," may be imputed to A. See State v. Duran, 86 N.M. 594, 526 P.2d 188 (Ct. App.), *cert. denied*, 86 N.M. 593, 526 P.2d 187 (1974). Further, where an offense contains a result element and the conduct and result elements are imputed to an accomplice, the causation element is also imputed. See Commonwealth v. Smith, 480 Pa. 524,

trines that impose liability even though the defendant has not satisfied all the objective elements of an offense.

Where an actor exercises control over an innocent person's actions, the latter's satisfaction of an objective element of an offense may be imputed to the former as an instance of "causing crime by an innocent."¹¹ The doctrines of "substituted objective elements"¹² and "transferred actus reus"¹³ impute objective elements to an actor who, for example, burglarizes a store thinking it a dwelling and to an actor who intends to shoot someone other than his actual victim, respectively. Statutory and judicial presumptions permit the imposition of liability even though the evidence adduced at trial would not establish all the objective elements of the offense.¹⁴ Moreover, one could argue that rules imposing liability for omis-

391 A.2d 1009 (1978) (where complicity is established, proof that principal caused death suffices to establish liability).

The rules of complicity generally impute the objective elements of the offense charged upon a showing of the actor's contribution to the criminal venture, the actor's culpability as to his contribution, and the culpable state of mind necessary for the commission of the offense. *See* MODEL PENAL CODE § 2.06(3)-(4) (Proposed Official Draft 1962) (requiring solicitation, aid, agreement or attempt to aid, with purpose of promoting or facilitating offense, and imposing special requirements for culpability for result). For a discussion and criticism of these and similar provisions, see Robinson & Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 736-44 (1983).

Some complicity rules also impute a required mental state of the offense. *See infra* pp. 617-18.

11. The *Model Penal Code* provides: "A person is legally accountable for the conduct of another person when . . . acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct . . ." MODEL PENAL CODE § 2.06(2)(a) (Proposed Official Draft 1962).

Although the precise statutory requirements for liability under § 2.06(2)(a) are less than clear, the objective elements of the offense charged appear to be imputed upon a showing of causation, *see infra* p. 631-32, recklessness or knowledge as to causing the innocent's conduct, *see infra* p. 638, and the culpable state of mind necessary for commission of the offense charged.

12. An illustration of "substituted objective elements" follows. If A believes he is burglarizing a store while he in fact burglarizes a dwelling (a different offense), he may be convicted of the offense of burglarizing a store even though an element of the offense, "store," is not satisfied. The existence of a comparable objective element in the actual offense, "dwelling," is used as a justification for imputing the required objective element of the offense charged. This was the approach originally adopted and later rejected by the drafters of the *Model Penal Code*. MODEL PENAL CODE § 2.04(2) comment 2 at 137 (Tent. Draft No. 4, 1955). For a further discussion and illustration of the imputation provided by § 2.04(2), see 1 P. ROBINSON, *supra* note 2, § 62 n.33.

13. Where A shoots at B but hits C, the objective element of the death of C may be "transferred" to justify holding A liable for the intentional homicide of B, at whom he was shooting. *See* *Mayweather v. State*, 29 Ariz. 460, 462, 242 P. 864, 865 (1926). Such "transferred actus reus" is an alternate, although uncommon, method for dealing with cases typically analyzed in terms of "transferred intent."

14. *See* TENN. CODE ANN. § 39-1-507 (1982) (presumption of manufacture of moonshine from assembly of still). For a list demonstrating the variety of statutory and judicial presumptions imputing objective elements, see *infra* note 163.

The term "presumptions" is used throughout this Article to refer to statutory and judicially created rules based on the existence of a logical relationship between sets of facts. As employed here, the term includes rules that others have labeled presumptions, assumptions, and inferences. *See* Ashford & Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165 (1969); Hug, *Presumptions and Inferences in Criminal Law*, 56 MIL. L. REV. 81 (1972).

While for the most part, presumptions create only an evidentiary inference that can in theory be

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sions,¹⁵ when the offense charged is defined only in terms of affirmative conduct, are also instances of imputed elements of conduct.¹⁶

Thus, a variety of rules and doctrines impute unsatisfied objective elements of the offense charged. Similarly, a diverse group of doctrines impute a culpable state of mind.¹⁷ The most common of these doctrines shapes the law governing voluntary intoxication: Voluntary intoxication, coupled with the objective elements of the offense, establishes liability despite the absence of some required mental elements.¹⁸ The doctrine of "transferred intent" would impute a culpable state of mind to an actor who intends to harm one person but actually harms another.¹⁹ An analo-

rebutted by the defendant, as a practical matter the existence of the presumption frequently results in imputation because the defendant often is unable to rebut it. *See* Ashford & Risinger, *supra*, at 194-203 (describing impact of mandatory presumptions as dependent upon amount of evidence required to rebut and impact of "permissive" presumptions as dependent upon weight given). On the effect of a rebutted presumption, see 1 E. MORGAN, *BASIC PROBLEMS OF EVIDENCE* 33-35 (1954); J. THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 336-39 (1898); Ashford & Risinger, *supra*, at 167-70; Hug, *supra*, at 84.

15. Liability for an omission is generally imposed only if the actor has a duty to perform the omitted conduct. *See* MODEL PENAL CODE § 2.01(3)(b) (Proposed Official Draft 1962). The duty may arise from the actor's relationship with the victim, from a statute independent of the offense charged that imposes a duty to act, or from the actor's creation of the dangerous circumstances. The actor must be aware of the circumstances giving rise to the duty, *see* W. LAFAYE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW*, § 26, at 187 (1972), and must have the culpability required by the definition of the offense, *see id.* § 2, at 7. There must also be a causal relationship between the omission and the prohibited result. *See id.* § 26, at 189.

Imputation of conduct based on satisfaction of these special conditions should be distinguished from offenses explicitly defined to punish omissions, e.g., failure to provide support. *See* MODEL PENAL CODE § 230.5 (1980). The latter do not involve imputation; the true harm they prohibit is the omission.

16. *See* United States v. LaBrecque, 419 F. Supp. 430, 437-38 (D.N.J. 1976). *But see* W. LAFAYE & A. SCOTT, *supra* note 15, § 26, at 183 (nothing in definition of homicide suggests that offense may or may not be committed by omission). A rule permitting liability without a special doctrine would violate the well-established notice and specificity requirements of the legality principle. *See* G. WILLIAMS, *supra* note 3, § 184, at 575-76. The vagueness doctrine imposes similar limitations on the legislature's authority to define offenses. *See* Colautti v. Franklin, 439 U.S. 379, 389-90 (1979) (abortion statute void for vagueness because ambiguity in definition of viability failed to notify physicians when duty arises).

17. This Article uses the phrase "culpable state of mind" to refer to any level of culpability, i.e., purpose, knowledge, recklessness, or negligence. The phrase is a useful shorthand device, *see* W. LAFAYE & A. SCOTT, *supra* note 15, § 2, at 5 n.2, and it comports with current statutory language, *see* Robinson & Grall, *supra* note 10, at 683 n.7.

18. *See* State v. Barrett, 408 A.2d 1273 (Me. 1979) (defendant convicted of arson after having set fire to duplex after drinking heavily). Although arson required a "conscious disregard of a substantial risk that his conduct would endanger any person or damage or destroy the property of another," ME. REV. STAT. ANN. tit. 17-A, § 802(1)(B)(2) (1983), the court held any unawareness was immaterial, *see id.* § 37(2) (1983) (formerly *id.* § 58-A(2) (1979)) (unawareness of risk immaterial where recklessness is required and actor is unaware of risk because of voluntary intoxication. *Cf.* MODEL PENAL CODE § 2.08(2) (Proposed Official Draft 1962) (quoted *supra* note 6). Such statutes permit voluntary intoxication to negate purpose or knowledge but not recklessness.

19. Where A intends to shoot X but misses and kills Y, the intention to kill X is "transferred" to Y. *People v. Forrest*, 133 Ill. App. 2d 70, 272 N.E.2d 813 (1971), illustrates this doctrine. Defendant announced his intention to shoot at the next passing car containing whites. When that time came, however, his hand slipped, and he shot and killed one of his friends. He was convicted of the murder of his friend despite the clear absence of intent to kill the deceased. The Court concluded, "an intent to kill deceased may be imputed from the existence and proof of an intent to kill another." *Id.* at

gous doctrine permits suspension of the requirement of concurrence. It imputes an actor's earlier intention to commit an act that he believes is an offense to his later conduct constituting the offense.²⁰ Imputation is also accomplished through a device that might be termed "substituted mental elements."²¹ The doctrine substitutes an actor's intention regarding the offense he thought he was committing for the intention required for the offense he in fact committed. The mental element present justifies the im-

72-73, 272 N.E.2d at 815.

The need for a doctrine of transferred intent is clear under modern codes. See MODEL PENAL CODE § 210.1 (1980) (homicide defined as "purposely, knowingly, recklessly or negligently caus[ing] the death of another"); *Id.* § 2.03(2)-(3) (Proposed Official Draft 1962) (requiring culpability as to "actual result" in typical case).

This doctrine of imputation is not limited to transfer of intent. See J. SMITH & B. HOGAN, *supra* note 4, at 49-51 (discussing transferred malice); G. WILLIAMS, *supra* note 3, at 126-28 (same). Nor has it been limited to homicide: Under modern codes the doctrine is applicable to every offense that requires culpability as to a result. See MODEL PENAL CODE § 2.03(2)(a), (3)(a) (Proposed Official Draft 1962) (imputing requisite purpose, knowledge, recklessness, or negligence as to "actual" result if it differs from result designed, contemplated, risked, or ignored only in that different person or different property is injured or affected); accord ALA. CODE § 13A-2-5(b)(1) (1982); ARIZ. REV. STAT. ANN. § 13-203(B)(1), (C)(1) (1978); DEL. CODE ANN. tit. 11, §§ 262(1), 263(1) (1979); HAWAII REV. STAT. §§ 702-215(1), -216(1) (1976); KY. REV. STAT. § 501.060(2)(a), (3)(a) (1975); MONT. CODE ANN. § 45-2-201(2)(a), (3)(a) (1983); N.J. STAT. ANN. § 2C:2-3(d) (West 1982); 18 PA. CONS. STAT. ANN. § 303(b)(1), (c)(1) (Purdon 1983); TEX. PENAL CODE ANN. § 6.04(b)(2) (Vernon 1974).

20. Thus, where A wounds B and, thinking B is dead, attempts to dispose of what he believes is B's body, A's earlier intention to kill B is imputed to A at the time he causes B's death by disposing of the body. See *Thabo Meli v. Regina* (High Ct. of Basutoland 1953), *appeal dismissed sub nom. Meli v. Regina*, [1954] 1 W.L.R. 228, 230, [1954] 1 All E.R. 373, 374.

In instances of suspension of the concurrence requirement, the imputed intention and the actual intention do not differ in their object, as in transferred intent cases, only in time.

The concurrence principle is codified in several contemporary penal codes. *E.g.*, CAL. PENAL CODE § 20 (West 1970); IDAHO CODE § 18-114 (1979); NEV. REV. STAT. § 193.190 (1979). It seems implicit in the statement of the general requirements of culpability in other codes. See MODEL PENAL CODE § 2.02(1) (Proposed Official Draft 1962).

Failure to satisfy the concurrence requirement typically results in acquittal. See, *e.g.*, *Jackson v. State*, 102 Ala. 167, 170, 15 So. 344, 345 (1894) (one who breaks and enters and afterwards forms intent to steal has not committed burglary); *State v. Hopple*, 83 Idaho 55, 60, 357 P.2d 656, 659 (1960) (larceny not established where defendant accidentally took another's chattel, later realized it was not his, and then decided not to return it); *Commonwealth v. Spallone*, 267 Pa. Super. 486, 488, 406 A.2d 1146, 1147 (1979) (one who kills another accidentally and then decides to take deceased's money has not committed felony murder). But see *State v. Craig*, 82 Wash. 2d 777, 781-83, 514 P.2d 151, 154-55 (1973) (conviction for felony murder not precluded by defendant's lack of intent to rob at time of killing, because he had previously had intent during same transaction).

21. Under § 2.04(2) of the *Model Penal Code* and similar provisions in state codes, if A believes he is burning a store but in fact burns a dwelling—a different offense—he may be held liable for burning a dwelling even though he does not satisfy the required mental element of the offense. See MODEL PENAL CODE § 2.04(2) (Proposed Official Draft 1962) ("Although ignorance or mistake would otherwise afford a defense to the offense charged, the defense is not available if the defendant would be guilty of another offense had the situation been as he supposed."); accord IDAHO CODE § 18-307 (1979); ME. REV. STAT. ANN. tit. 17-A, § 33 (1983); NEV. REV. STAT. § 208.070(2) (1977); OKLA. STAT. ANN. tit. 21, § 43 (West 1983); S.D. CODIFIED LAWS ANN. § 22-4-2 (1979). A defendant may intend to commit a crime which is lesser, greater, or equal in seriousness and blameworthiness to the crime charged. The prosecution may charge the defendant with having violated the greater, lesser, or equal offense. For a further discussion of such provisions and an illustration of the imputation it effectuates, see 1 P. ROBINSON, *supra* note 2, § 62 n.32.

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putation of the mental element of the offense charged. Finally, as with the objective elements, a variety of statutory and judicial presumptions effectively impute required mental elements.²²

Other rules can impute both objective and mental elements. If *A* and *B* conspire to rob a bank and *B* purposely kills a guard, both the killing and the purposeful culpability may be imputed to *A* under the *Pinkerton* doctrine.²³ The "natural and probable consequence" rule in complicity law analogously expands the liability of accomplices.²⁴ Similarly, the complicity

22. Some presumption statutes that impute objective elements, *see infra* note 163, also impute mental elements. For example, possession of a still has been used to presume both the manufacture (or attempt to manufacture) and the required intention to manufacture whiskey. TENN. CODE ANN. § 39-1-507 (1982) (presuming manufacture from assembly of still).

Commonly, however, presumptions impute only required mental elements. For example, proof of unlawful entry into a building may trigger a rebuttable presumption of the intent to commit larceny required for burglary. NEV. REV. STAT. § 205.065 (1981). Dissemination or possession of obscene material in the course of business may trigger a presumption of the knowing or reckless possession for sale or dissemination required for conviction. MODEL PENAL CODE § 251.4(2) (1980). Judicially created presumptions are also common. *See, e.g., Sandstrom v. Montana*, 442 U.S. 510 (1978) (discussing constitutionality of presumption that persons intend natural and probable consequences of their actions); *United States v. Reynolds*, 573 F.2d 242 (5th Cir. 1978) (statute prohibiting willful misapplication of bank funds "presumes" intent to defraud upon proof of reckless disregard of bank's interest); *State v. DiRienzo*, 53 N.J. 360, 370-82, 251 A.2d 99, 104-08 (1969) (knowledge that goods are stolen may be presumed upon unexplained possession of recently stolen goods).

23. *Pinkerton v. United States*, 328 U.S. 640, 646-48 (1946) (member of conspiracy is liable for all offenses committed by co-conspirators in furtherance of conspiracy). *Pinkerton* liability is typically limited to offenses that are reasonably foreseeable consequences of the conspiracy. *See infra* note 226.

24. Under vicarious liability, "an accessory is liable for any criminal act which in the ordinary course of things was the natural or probable consequence of the crime that he advised or commanded, although such consequence may not have been intended by him." 22 C.J.S. *Criminal Law* § 92 (1961). The natural and probable consequence rule is codified in several jurisdictions. *See* WIS. STAT. ANN. § 939.05(2)(c) (West 1982); *cf.* IOWA CODE ANN. § 703.2 (West 1979) (accomplice liable for acts of co-felon unless accomplice "could not reasonably expect [act] to be done" in furtherance of initial offense); KAN. STAT. ANN. § 21-3205 (1981) (liable if act reasonably foreseeable consequence of crime); ME. REV. STAT. ANN. tit. 17-A, § 57.3 (1983) ("reasonably foreseeable consequence" of "conduct"). Even without statutory authority, courts have employed the natural and probable consequence rule to impute both mental and objective elements. *See, e.g., United States v. Clayborne*, 509 F.2d 473, 475, 481 (D.C. Cir. 1974) (murder by defendant Clayborne in course of chase was natural and probable consequence of defendant Brown's participation in criminal venture; proof that Brown shared Clayborne's intention to kill therefore not required); *Johnson v. United States*, 386 A.2d 710, 713 (D.C. 1978) (defendant liable for natural and probable consequence of initiating fight with victim regardless of intent regarding result).

The *Model Penal Code's* complicity provision and those patterned after it, however, reject the natural and probable consequence rule, and impose liability for confederate's offense only when the normal complicity requirements are met. The *Model Penal Code* provides:

(3) A person is an accomplice of another person in the commission of an offense if:

(a) with the purpose of promoting or facilitating the commission of the offense, he

.....

(ii) aids or agrees or attempts to aid such other person in planning or committing it;

.....

MODEL PENAL CODE § 2.06(3) (Proposed Official Draft 1962); *accord* HAWAII REV. STAT. § 702-222 (1976); MO. ANN. STAT. § 562.041 (Vernon 1979); OR. REV. STAT. § 161.155 (1981); 18 PA. CONS. STAT. ANN. § 306(c) (Purdon 1983). *See* MODEL PENAL CODE § 2.04 comment 2, at 26 (Tent. Draft No. 1, 1953) (accomplice's liability should not extend beyond criminal purposes he shares or knows) (currently § 2.06 (Proposed Official Draft 1962)). *See infra* p. 638.

ity aspect of the felony-murder rule imputes both objective and culpability elements in homicide cases.²⁵ Finally, vicarious liability,²⁶ and its special subclass governing the liability of officials of organizations,²⁷ imputes certain elements because of a continuing relationship between the perpetrator and the defendant. This is not an exhaustive list of the instances of imputation.²⁸

25. Typically, the complicity aspect of the felony-murder rule imputes both the conduct and the mental state of the killer co-felon to his accomplices. See *People v. Cabaltero*, 31 Cal. App. 2d 52, 57, 87 P.2d 364, 366 (1939) (all co-defendants held liable for intentional killing of one co-defendant by another during felony). When the killer co-felon does not have the culpability required for murder, the aggravation of culpability aspect of the felony-murder rule imputes that state of mind to the killer, and the complicity aspect of the rule imputes both the killing and culpability to the co-felons. For a discussion of the aggravation of culpability under the felony-murder rule, see *infra* pp. 624-26. Several jurisdictions codify both aspects of the felony-murder imputation. See N.Y. PENAL LAW § 125.25(3) (McKinney 1975). The *Model Penal Code's* substitute for the felony-murder rule, see *infra* p. 625, does not codify the complicity aspect of the rule. It imputes liability for the homicidal conduct of a co-felon only where normal complicity rules would do so. See MODEL PENAL CODE § 210.2(1)(b) (1980) ("recklessness and indifference [as to causing death] are presumed if the actor is engaged or is an accomplice in the commission of [certain enumerated felonies]"); *id.* comment 6 at 30.

26. In this Article, vicarious liability denotes instances where the defendant is held liable for an offense committed by another even though the defendant lacked the culpability required for the offense and did not satisfy the objective elements of the offense.

The continuing relationship necessary for vicarious liability may be found in a parent-child relationship, see *State v. Akers*, 119 N.H. 161, 400 A.2d 38 (1979); *Board of Educ. v. Caffiero*, 173 N.J. Super. 204, 413 A.2d 981 (App. Div. 1980), *aff'd*, 86 N.J. 308, 431 A.2d 799 (1981), an employer-employee relationship, see *Overland Cotton Mill Co. v. People*, 32 Colo. 263, 75 P. 924 (1904); *Commonwealth v. Sacks*, 214 Mass. 72, 100 N.E. 1019 (1913), a co-felon relationship, see *United States v. Alsondo*, 486 F.2d 1339, 1346 (2d Cir. 1973), *rev'd sub nom.* *United States v. Feola*, 420 U.S. 671 (1975); *Taylor v. Superior Court*, 3 Cal. 3d 578, 477 P.2d 131, 91 Cal. Rptr. 275 (1970), and a relationship between an innocent and the one who causes his criminal conduct, see *Fritz v. State*, 25 Wis. 2d 91, 96, 130 N.W.2d 279, 281 (1964), *cert. denied*, 380 U.S. 936 (1965).

Modern codes often contain general provisions that permit vicarious liability. See MODEL PENAL CODE § 2.06(2)(b) (Proposed Official Draft 1962).

27. The rules governing the liability of officials within an organization are in some ways a specialized form of employer-employee vicarious liability and may impute both objective and mental elements. They go beyond the rules of complicity to impute these elements of the offense upon the showing of a supervisory relationship between the defendant and the perpetrator and culpably deficient supervision. Typically, this doctrine imputes objective rather than mental elements, see *United States v. Park*, 421 U.S. 658 (1975); *United States v. Dotterweich*, 320 U.S. 277 (1943); *United States v. Shapiro*, 491 F.2d 335 (6th Cir. 1974) (*per curiam*), probably because liability is most frequently imposed on organization officials where strict liability offenses are charged. See *Park*, 421 U.S. at 666 (1975); *Dotterweich*, 320 U.S. at 280-81 (1943). For a discussion of strict liability as a form of imputation, see *infra* pp. 628-29.

Several modern codes contain general provisions setting forth the conditions for special liability of organizational officials. The following statutes impute the act or omission required for an offense upon a showing that a person who is primarily responsible for a duty imposed by law recklessly failed to perform it. MODEL PENAL CODE § 2.07(6)(b) (Proposed Official Draft 1962); HAWAII REV. STAT. § 702-228(2) (1976); ME. REV. STAT. ANN. tit. 17-A, § 61(2) (1983); 18 PA. CONS. STAT. ANN. § 307(e)(2) (Purdon 1983); WASH. REV. CODE ANN. § 9A.08.030(4) (1977) (negligence suffices in case of agent of top-level management); *cf.* IOWA CODE ANN. § 703.4 (West 1979) (supervisor liable for directing, knowingly permitting, or assigning duty which assignor can reasonably anticipate will result in commission of offense); N.D. CENT. CODE § 12.1-03-03(2) (1976) (omission need not be culpable); OHIO REV. CODE ANN. § 2901.24(A)(2) (Page 1982) (same).

28. For example, imputation may occur where "impossible attempts" are punished. Some see evil in an attempt only if the actor comes close to doing actual harm. In the words of Holmes, there "must be dangerous proximity to success." *Hyde v. United States*, 225 U.S. 347, 388 (1912) (Holmes, J.,

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Most of the above rules can, at least theoretically, impute a required element of *any* offense.²⁹ Some may tend to apply to certain recurring factual situations: Transferred intent appears most commonly in bad-aim cases. But this is a factual rather than a theoretical limitation.

Given the variety of rules and doctrines of imputed liability, one may reasonably question whether there is any similarity in their supporting rationales. This Article identifies four theories that support imputed liability. Reflecting the tensions in criminal law generally, some of these justifications adhere closely to the requirement of personal culpability as a prerequisite for criminal liability, while others rely on more utilitarian concerns.

In many instances, an actor will be held accountable despite the absence of a required element of culpability because he is causally responsible for the commission of an objective element by another or for the absence of a required state of mind in himself or another. In the case of objective conduct elements, the actor may have caused or contributed to another's performance of the required conduct. In the case of mental elements, the actor may have caused the absence of the required mental state in himself or another by external means, such as intoxicants, or through simple "deliberate blindness" to the circumstances or consequences of his own conduct or the conduct of another. This "causal theory" generally corresponds well to our collective notions of culpability.

In some instances, however, while there may be a community consensus

dissenting); *accord*, *People v. Rizzo*, 246 N.Y. 334, 337, 158 N.E. 888, 889 (1927) (defendants not liable for attempt because they did not come "*very near* to the accomplishment of the crime"). Under this view, attempts should be punished only where the actor has progressed from mere preparation to a certain proximity to *actual*, not imagined, commission.

Some jurisdictions, however, punish an attempt because the actor has demonstrated his dangerousness or culpability. *See* G. FLETCHER, *RETHINKING CRIMINAL LAW* 174-75 (1978); G. WILLIAMS, *supra* note 3, at 634. Similarly, where "present ability" to inflict harm is an element of assault or assault with intent to kill, *see* CAL. PENAL CODE § 240 (West 1970), that element must be imputed to convict one who fires an unloaded shotgun at another of assault with intent to do bodily harm. *See* *State v. Mitchell*, 139 Iowa 455, 459, 116 N.W. 808, 810 (1908) (acknowledging requirement of present ability but concluding, without explanation, that if defendant believed gun was loaded, he was guilty); *cf.* IOWA CODE ANN. § 708.1 (West 1979) (offense requires "apparent" rather than "present" ability).

Imputation also occurs where defenses of mistake are limited so as to either bar a defense when an actor's mistake of law negates an element of the offense or require a "reasonable" mistake where the offense requires culpability greater than negligence. 1 P. ROBINSON, *supra* note 2, at § 62(c)(1)-(2); *see generally* Robinson & Grall, *supra* note 10, at 725-32 (discussing relationship of defenses of accident and mistake to culpability requirements).

29. Certain rules can normally be applied regardless of the offense: those governing complicity, causing crime by an innocent, voluntary intoxication, and omissions, the doctrines of transferred intent, of transferred actus reus, of substituted objective elements, and of substituted mental elements, the suspension of the concurrence requirement, the *Pinkerton* doctrine, the natural and probable consequence rule, vicarious liability, and the rules governing liability of officials within an organization. While some presumptions apply to a variety of defenses, *see* *Sandstrom v. Montana*, 442 U.S. 510 (1979) (presumption that persons intend natural and probable consequences of their acts), many presumptions apply only to a particular offense. *See infra* note 163.

that an element should be imputed because the actor is as culpable as if he had in fact satisfied the element, there is no analytic theory to support the consensus. Rather, the best one can do is to restate the conclusion: The actor is as culpable as one who satisfies the element. The doctrine of transferred intent is illustrative. The label itself, cast in terms of transferring intention, is deceptively theoretical; the best explanation of why the intent to shoot the desired victim should be "transferred" to the actual victim is that both intentions are equally culpable. The theory is merely one of equivalence. Section 2.04(2) of the *Model Penal Code* explicitly reveals its reliance upon such an "equivalency theory": "Although ignorance or mistake would otherwise afford a defense to the offense charged [i.e., would negative a required culpability element], the defense is not available if the defendant would be guilty of another offense had the situation been as he supposed."³⁰ The rationale for imputing the absent state of mind is simply that the actor had the intention (or other level of culpability) to commit another offense, and is therefore as culpable, and can properly be treated, as if he had the required intention for the offense committed.

Both the causal and the equivalency theory correspond to the "culpability principle." Together with the satisfied elements of an offense, the requirements of a rule of imputation supported by either theory closely approximate the paradigm of liability for the offense charged. That is, because these two theories focus on culpability, the rules implementing the theories include conditions that insure it.

A third theory eschews strict adherence to the culpability principle in the face of practical problems of proof. Doctrines of imputation supported by this theory thus do not always include conditions that insure culpability. In these cases, a required element of the offense probably exists, but the prosecution need not prove that element since requiring such proof would allow many culpable persons to escape conviction or would make their convictions too costly to obtain.³¹ Such an "evidentiary theory" for imputing a required element balances the competing interests of fairness and utility; as a result, the rules and doctrines supported by this theory are the subject of considerable controversy.³²

Finally, in still other instances of imputation, the culpability principle

30. MODEL PENAL CODE § 2.04(2) (Proposed Official Draft 1962).

31. The evidentiary theory is most often employed to support imputation of mental rather than objective elements. One would expect such a pattern of application since the evidentiary rationale responds to problems of proof, and proof of mental elements is more difficult than proof of objective elements.

32. See *infra* p. 655 (constitutional challenges to presumptions); p. 622 (tension inherent in imposition of criminal sanctions for strict liability offenses); p. 672 (constitutional limitations on status and possession offenses); note 35 (broader debate over any evidentiary advantages for prosecution).

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may be sacrificed on utilitarian grounds to other important societal interests. Such a “nonculpability theory” for imputing required objective and mental elements often supports rules and doctrines governing strict liability, for example. The same societal interests that support strict liability offenses are used to justify the rules and doctrines imputing required elements under a nonculpability theory.

These four theories—causal, equivalency, evidentiary, and nonculpability—are not so much categories of imputed liability as they are explanations or justifications for imputing an absent element of an offense definition. It is possible, even likely, that more than one theory or rationale may justify a particular rule, while only a combination of two or more theories or rationales can adequately explain others.³³ In every instance, however, the justification provides a basis for a normative assessment of such imputation.

Because a causal theory is likely to accord with the culpability principle and to provide a clear analytic foundation for imputation, it may be the preferred justification. Where a strong causal theory is available, no other rationale is necessary. Despite its analytic shortcomings, an equivalency theory is frequently as persuasive as a causal theory in justifying a particular rule or doctrine. Thus, where a causal argument fails, an equivalency argument may be an acceptable fallback.³⁴ Unfortunately, equivalency fails to provide a general principle for discovering and supporting other instances of imputation. Every claim of equivalency must be justified by an independent demonstration of consensus.

To accept an evidentiary rationale, one must be willing to trade the potential for some erroneous convictions for increased ease of prosecution. The latter interest goes beyond mere concern for the convenience of prose-

33. For an illustration of a dual justification, see *infra* p. 644 (analyzing felony murder as supported by causal and equivalency theories). For a discussion of the implications of alternative theories supporting a single instance of imputation, see *infra* pp. 660–75.

34. In *Moore v. State*, 267 Ind. 270, 369 N.E. 2d 628 (1977), for example, the court rejected defendant’s contention that he was not guilty of burglary since he did not “break” into the victim’s residence: Because the victim unlocked the door at gun point, defendant “was as guilty of breaking as if he had taken the keys from her hand and unlocked the door himself.” *Id.* at 277–78, 369 N.E.2d at 632 (emphasis added). The causal argument for this type of causing crime by an innocent is so compelling that the court need not have relied on a vague equivalency rationale: The actor is as culpable as if he had engaged in the prohibited conduct himself, because he caused the element to be satisfied by another. See *infra* pp. 631–32.

Because a causal theory leads to analysis of specific elements required by liability—i.e., culpability as to causing, the causal relationship, and culpability as to the substantive offense—it encourages the precise definition of the conditions that must be satisfied prior to imputation. The equivalency theory, however, merely asserts an equivalence and thus encourages imprecise definitions and may permit arbitrary results. Equivalency theories, in this sense, are akin to the early “wickedness” notion of *mens rea* typical of “offense analysis”; like “offense analysis,” equivalency theories should be replaced whenever possible with a theory more compatible with the modern “element analysis” approach to culpability. For a discussion of the virtues of element analysis, see generally Robinson & Grall, *supra* note 10, at 703–04.

cutors. It permits conviction of dangerous criminals who might have escaped conviction but for the evidentiary advantage of such imputation. Rules relying upon evidentiary rationales are thus subject to the criticisms presented in the broader debate over evidentiary advantages for the prosecution generally.³⁵ Since evidentiary concerns are independent of culpability concerns, evidentiary rationales comprise a specialized subgroup of nonculpability rationales.³⁶ However, rather than rejecting the validity of the culpability principle, they approximate it as closely as the problems of proof permit.

Nonculpability rationales are most susceptible to criticism and should be the least favored theory supporting imputation.³⁷ They must justify not simply the creation of an evidentiary shortcut to proving the presence of the required offense elements, as in evidentiary rationales; they must also justify the rejection of the culpability principle. Nonculpability rationales therefore implicate the broader debate over whether criminal law should serve a purely utilitarian purpose or should punish only after an assessment of personal culpability.³⁸

35. One writer states the argument in the context of presumptions:

The urge for simplifying the task of the prosecutor in certain cases by requiring the defendant to go forward with evidence on some of the issuable facts is balanced by the very real fear that going too far in this direction may result in substituting an inquisitorial procedure for our traditional accusatorial system.

C. McCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* 811 (E. Cleary 2d ed. 1972). Learned Hand, in support of limited defense discovery, suggested that the balance has tipped too far in favor of the defendant: "Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime." *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923).

The tension also arises in a variety of other evidentiary and procedural contexts. See Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing To Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463 (1980); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960).

36. Every use of an evidentiary rationale arguably must rely in part on nonculpability rationales because as long as the required element need not be proven beyond a reasonable doubt there will be some cases where it is not in fact present. The frequency of such erroneous imputations, however, is significantly reduced where an imputed element may be rebutted.

37. For example, Lords Edmund-Davies and Salmon in *Director of Pub. Prosecutions v. Majewski*, [1976] 2 All E.R. 142, need not have conceded that limiting a voluntary intoxication defense was "illogical," see *supra* note 3, or have resorted to defending their position with a nonculpability deterrent rationale, see *infra* p. 661. Critics of the decision, see Dashwood, *Logic and the Lords in Majewski* (pts. 1 & 2), 1977 CRIM. L. REV. 532, 591, would have had more difficulty disparaging a causal theory analysis in *Majewski*. For a discussion of a doctrine of voluntary intoxication based on a causal theory, see *infra* pp. 639-42, 662.

38. The commentary to § 2.05 of the *Model Penal Code* summarizes the debate in the context of strict liability:

It has been argued, and the argument undoubtedly will be repeated, that absolute liability is necessary for enforcement in a number of the areas where it obtains. But if practical enforcement can not undertake to litigate the culpability of alleged deviation from legal requirements, we do not see how the enforcers rightly can demand the use of penal sanctions for the purpose. Crime does and should mean condemnation and no court should have to pass that judgment unless it can declare that the defendant's act was wrong. This is too fundamental to be com-

II. PRACTICAL IMPLICATIONS

The preceding explication of the theories supporting imputation has several practical purposes. As a general matter, the development of a rational and consistent theoretical framework is the first step toward a rational and consistent criminal law. There is nothing more practical than a good theory. In addition, the theories of imputation provide significant insights into specific doctrinal problems. First, their common characteristics suggest that the same process of imputing liability exists in more subtle form in the definition of certain offenses. Recognition of such codified imputation provides, in turn, a basis for analyzing these offenses. It may explain the use of an otherwise unjustifiable form of liability, or it may expose the impropriety of a form of liability and suggest limitations derived from the principles of imputation.

Moreover, the conceptual framework of imputed liability described in Part I can help identify similarities among criminal law doctrines. Under the proper circumstances, sufficiently analogous doctrines should have analogous requirements and analogous results. The framework thus provides a device for comparative analysis of instances of imputed liability.

Finally, the conceptual framework encourages one to evaluate a doctrine's practical consistency with its underlying theory or rationale. Where the conceptual framework suggests that alternative theories support a doctrine, one might argue that the formulation of the doctrine, or the rules governing its application, should vary with the theory relied upon. Again, these analyses may serve either to justify apparent aberrations in the formulation of a doctrine or to criticize a formulation that is not true to its underlying theory.

A. *Recognition of Certain Offenses as Codified Forms of Imputation*

There are at least four instances of substantive if not formal deviation from the paradigm of offense liability: the aggravation of culpability in felony murder, status offenses, possession offenses, and strict liability offenses. In each case, liability is imposed only when all the elements of the formal definition of the offense charged are satisfied. Under a literal reading, there has been no imputed liability since the defendant has satisfied all the express elements of the offense. There is reason to believe, however, that the statutory definition itself embraces principles of imputation rather than a complete statement of the paradigm. Thus, even though a

promised. The law goes far enough if it permits the imposition of a monetary penalty in cases where strict liability has been imposed.

MODEL PENAL CODE § 2.05 comment 1, at 140 (Tent. Draft No. 4, 1955). For additional authorities on the debate over strict liability, see *infra* note 63.

defendant has met all the formal requirements for the offense, that offense may well be only a codified application of imputed liability.

Murder generally requires either an intentional or knowing killing or recklessness "manifesting extreme indifference to the value of human life."³⁹ But if an accidental killing occurs in the course of armed robbery, the felony-murder rule can aggravate the actor's culpability and allow conviction for murder.⁴⁰ Such a killing satisfies the formal definition of the offense of "felony murder," which requires a death during an underlying felony,⁴¹ and in that sense is not a deviation from the paradigm as expressed in the definition of the offense. But one can view the formal definition of felony murder as the codification of a principle that imputes the culpable state of mind required for murder whenever the actor causes a death in the course of a felony.⁴²

Various restrictions on the application of the felony-murder rule support the view that it imputes the culpable mental state for murder. These restrictions increase the likelihood that persons held liable under the rule will in fact possess that culpable state of mind. Examples of such restrictions include statutes that limit the rule to certain dangerous felonies⁴³ as

39. MODEL PENAL CODE § 210.2(b) (1980). The "extreme indifference" requirement is sometimes described as manifesting "an abandoned and malignant heart." See, e.g., CAL. PENAL CODE § 188 (West 1970) (when circumstances attending killing show "an abandoned and malignant heart" requisite malice aforethought for murder conviction is implied); 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *199 (distinguishing murder from other homicides on basis of malice, which Blackstone defines as "the dictate of a wicked, depraved, and malignant heart").

40. This aspect of the felony-murder rule is conceptually and historically distinct from the complicity aspect discussed *supra* note 25. In this Article, the former is denoted by the term "the aggravation of culpability" aspect of the felony-murder rule.

41. See 18 U.S.C. § 1111(a) (1982) (every murder committed during robbery or attempted robbery is first-degree murder).

42. See, e.g., *People v. Johnson*, 28 Cal. App. 3d 653, 658, 104 Cal. Rptr. 807, 811 (1972) (malice aforethought is conclusively presumed from commission or attempted commission of robbery and killing during perpetration of robbery); *People v. Aaron*, 409 Mich. 672, 299 N.W.2d 304 (1980) (because intent to commit felony does not in itself establish a man-endangering state of mind, common law felony-murder doctrine is abrogated). It might be argued that the Supreme Court has implicitly recognized that the paradigm for murder requires culpability as to homicide. *Enmund v. Florida*, 458 U.S. 782 (1982) (imposition of death penalty unconstitutional where homicide committed by codefendant, and defendant not culpable as to homicide).

Because the intent to commit a felony is not necessarily the same as the intent to murder, the fictitious nature of a substitution of the former for the latter is apparent. See generally *FOURTH REPORT OF THE COMMISSIONERS OF CRIMINAL LAW* xxviii (1839) (condemning felony murder as form of constructive murder); *People v. Aaron*, 409 Mich. 672, 299 N.W.2d 304 (1980) (discussed *supra*). There is continuing debate over whether malice is imputed to an actor who kills during a felony or is simply inferable from his felonious intent. See *SPECIAL COMMITTEE OF THE MICHIGAN STATE BAR FOR THE REVISION OF THE CRIMINAL CODE: FINAL DRAFT—JUNE 1979* § 2002 committee commentary at 202 (1972) [hereinafter cited as *MICH. 2D PROPOSED REV.*] (describing split in Michigan courts over this issue).

43. The enumeration of felonies that support application of the felony-murder rule is the most common statutory approach to felony murder. These enumerated felonies generally include crimes involving danger to human life. See N.Y. PENAL LAW § 125.25(3) (McKinney 1975) (limiting application of rule to commission of or attempt to commit robbery, burglary, kidnapping, arson, or rape); accord ALASKA STAT. § 11.41.110(a)(3) (1978); COLO. REV. STAT. § 18-3-102(1)(b) (1983); N.J.

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well as judicial decisions and statutory provisions that limit liability to homicides that are reasonably foreseeable results of the felony⁴⁴ and are caused "in furtherance of" the underlying felony.⁴⁵

The *Model Penal Code's* treatment of felony murder is instructive. After conceding that "principled argument in . . . defense [of felony murder] is hard to find,"⁴⁶ the drafters nonetheless have retained an ameliorated form of that doctrine which facilitates classifying as murder an accidental killing during a felony. This "reasonable substitute for the felony-murder rule"⁴⁷ provides that a death caused during the commission of certain specified felonies creates a rebuttable presumption that the defendant caused the death recklessly under circumstances manifesting extreme indifference to the value of human life, as required for murder.⁴⁸

STAT. ANN. § 2C:11-3(a)(3) (West 1982); cf. FLA. STAT. ANN. § 782.04 (West Supp. 1983) (also including drug trafficking, sexual battery, escape, aircraft piracy, bomb throwing). See generally Adlerstein, *Felony-Murder in the New Codes*, 4 AM. J. CRIM. L. 249, 269-74 (1975-76) (detailing statutory practice of enumerating various felonies); Note, *The Felony-Murder Rule: In Search of a Viable Doctrine*, 23 CATH. LAW. 133, 138-41 & nn.14-30 (1978) (discussing various statutory formulations). Several jurisdictions adopting the enumerated felony approach further limit felony murder by allowing a defendant who did not commit or aid in the homicidal act to avoid liability for the homicidal acts of his co-felons. See *infra* p. 667. Other states explicitly require that the felony be committed in a dangerous manner. See ARK. STAT. ANN. § 41-1502(a) (1977); TEX. PENAL CODE ANN. § 19.02(a)(3) (Vernon 1974).

Similarly, the judiciary has limited the felony-murder rule to dangerous felonies. See *State v. Underwood*, 228 Kan. 294, 615 P.2d 153 (1980) (construing KAN. STAT. ANN. § 21-3401 (1981) to require inherently dangerous felony and holding that possession of firearm by convicted felon is not such felony); *Regina v. Serné*, 16 Cox Crim. Cas. 311, 313 (Central Crim. Ct. 1887) (discussed *infra* note 125).

44. See *State v. Glover*, 330 Mo. 709, 719-20, 722, 50 S.W.2d 1049, 1053, 1054 (1932) (death must be "a natural and proximate result" of felony, and defendant must have had reason to believe injury would occur).

Because the issue of proximate causation can be viewed as turning on the foreseeability of the result, requiring this causal relationship between the felonious conduct and the death imposes a limitation similar to the reasonably foreseeable result requirement. See *Regina v. Horsey*, 3 F.&F. 287, 176 Eng. Rep. 129 (1862) (if victim entered barn after defendant set fire that spread to barn, victim's act was intervening cause that broke causal chain between felony and homicide). Cf. S. 1437, 95th Cong., 1st Sess. § 1601(a)(3), (c)(1)-(2) (1977) (any homicide committed during one of enumerated felonies is murder; affirmative defense exists where death was neither necessary nor reasonably foreseeable consequence of underlying offense). Other foreseeability formulations limit liability only for deaths caused by co-felons. See *infra* p. 667.

45. See, e.g., *Commonwealth v. Waters*, 491 Pa. 85, 418 A.2d 312 (1980) (felony-murder rule applicable only to homicides committed "in furtherance of" underlying offense); *Buel v. People*, 78 N.Y. 492, 497 (1879) (requiring that "death ensued in the consequence of the felony"). Several jurisdictions have codified a similar limitation: The homicidal act must be committed "in the course of and in furtherance of such crime." ALA. CODE § 13A-6-2 (a)(3) (1982); ALASKA STAT. § 11.41.110(a)(3) (1983); ARK. STAT. ANN. §§ 41-1501(1)(a), -1502(1)(a) (1977); COLO. REV. STAT. § 18-3-102(1)(b) (1978); CONN. GEN. STAT. §§ 53a-54c (1983); DEL. CODE ANN. tit. 11, § 636(a)(2), (6), (7) (1979 & Supp. 1982); N.Y. PENAL LAW § 125.25(3) (McKinney 1975); N.D. CENT. CODE § 12.1-16-01(3) (Supp. 1983); OR. REV. STAT. § 163.115(1)(b) (1981); TEX. PENAL CODE ANN. § 19.02(a)(3) (Vernon 1974); WASH. REV. CODE ANN. § 9A.32.030(1)(c) (1977).

46. MODEL PENAL CODE § 210.2 comment at 37 (1980).

47. *Id.* comment at 29 (Tent. Draft No. 9, 1959).

48. *Id.* comments at 29, 39 (1980). The *Model Penal Code* defines murder as, *inter alia*, causing another's death "recklessly under circumstances manifesting extreme indifference to the value of human life." The *Code* then creates a rebuttable presumption of such recklessness and indifference

Such a revision invites characterization of the traditional felony-murder rule as an *irrebuttable* presumption of the culpability required for murder.

Thus, felony murder may not represent an independent harm or evil. Rather, the crime may be a derivative formulation of the traditional murder offense that codifies a rule that imputes traditional culpability for murder when the killing occurs during a felony.⁴⁹ Under this view, felony murder does not reject the paradigm of murder; it builds upon it.⁵⁰

Perhaps possession cases present the clearest case of codified imputed liability. Again, to be held liable for possession, one must satisfy all the elements of the definition of the offense. But, as with felony murder, the definition of the offense does not truly represent the paradigm—it does not fully and accurately describe the harm or evil the offense seeks to punish. Possession offenses seek to prohibit and punish not possession itself, but harmful conduct, past or future, that is facilitated and evidenced by the possession. The possession of trace amounts of narcotics, for example, suggests their past use or distribution.⁵¹

In addition to punishing possession of narcotics, many jurisdictions

where a death results from the commission or attempted commission of certain enumerated felonies. See *id.* § 210.2(1)(a)–(b) (1980) (murder); *id.* § 1.12(5) (Proposed Official Draft 1962) (effect of presumptions). Thus, where the accused has not in fact acted with the requisite recklessness and indifference but cannot overcome the presumption created by his participation in an enumerated felony, he may be convicted although he does not satisfy all the elements of the offense. Arguably, section 210.2(1)(b) violates the demands of due process. For a discussion of constitutional limitations on presumptions, see *infra* p. 655. Ironically, statutory and judicial formulations of the felony-murder rule that dispense with proof of culpability by defining the offense to require only a death caused in the commission of any or certain felonies seem to avoid this constitutional problem.

49. It is much like the definition of arson quoted earlier that includes complicity liability within the definition of the offense. See *supra* note 6.

50. In at least one case, because of procedural peculiarities, courts have confirmed this view of felony murder. In *State v. Thorne*, 39 Utah 208, 117 P. 58 (1911), for example, the information charged a premeditated killing, not felony murder. Responding to the defendant's claim that the proof of felony murder at trial did not correspond to the information, the Utah Supreme Court concluded: "[T]he 'willful and premeditated intent to commit the felony is transferred from that offense to the homicide actually committed,' and 'is the legal equivalent of and tantamount to' the allegations in the information of a willful, deliberate and premeditated killing by shooting." *Id.* at 217, 117 P. 58, 61 (court does not identify the source of the internal quotation; at time of *Thorne*, culpability required for first-degree murder was malice aforethought and premeditation). The language of the opinion also illustrates the similarity between the felony-murder rule and the other intent "transferring" doctrines of imputation discussed previously.

51. As one court explained:

The legislative policy [behind criminalizing possession of trace amounts of narcotics] is obviously to stop the horrendous traffic in narcotics which has led to the unfortunate addiction of so many people, and the unfortunate waste of human life. Thus, the Legislature in its attempt to guard the public health and safety has proscribed the use, possession and sale of the illegal substance.

People v. Harrington, 396 Mich. 33, 47, 238 N.W.2d 20, 26 (1976). See generally Note, *Criminal Liability for Possession of Non-Usable Amounts of Controlled Substances*, 77 COLUM. L. REV. 596, 616–17 (1977) (prohibition of possession of trace amounts of narcotics reflects strong inference of past possession of usable amounts of narcotics).

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punish possession of burglar's tools,⁵² counterfeiting dyes,⁵³ dangerous weapons,⁵⁴ motor vehicle master keys,⁵⁵ or drug paraphernalia.⁵⁶ In each instance, one can readily identify the actual harm or evil that is of concern, and it is this harm and the accompanying elements of culpability that more appropriately comprise the paradigm of the offense. In relation to this *true* paradigm, there is indeed a deviation. The objective and culpability requirements of the paradigm are imputed upon proof of possession.⁵⁷

Status offenses are analogous to possession offenses; the definition does not represent the true paradigm of the offense. Thus, vagrancy statutes, common before they were subject to constitutional challenge,⁵⁸ punish the conduct and culpability of attempted theft.⁵⁹ They frequently have been replaced by "loitering or prowling" offenses,⁶⁰ which are designed to pro-

52. *E.g.*, ME. REV. STAT. ANN. tit. 17-A, § 403 (1983).

53. *E.g.*, 18 U.S.C. § 474 (1982).

54. *E.g.*, MODEL PENAL CODE § 5.06 (Proposed Official Draft 1962); *People v. Stinson*, 8 Cal. App. 3d 497, 87 Cal. Rptr. 537 (1970) (conviction for possession of sawed-off shotgun).

55. *E.g.*, N.J. STAT. ANN. § 2C:5-6 (West 1982).

56. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 11,364 (West Supp. 1983) (possession of paraphernalia used for unlawfully injecting or smoking controlled substance); *accord* N.J. STAT. ANN. §§ 24:21-47 to -48 (West Supp. 1983). Often these statutes are patterned after the Model Drug Paraphernalia Act of the Drug Enforcement Administration of the United States Department of Justice.

57. In *Peachie v. State*, 203 Md. 239, 100 A.2d 1 (1953), however, because narcotics possession rather than narcotics use was criminalized, the court was obliged to argue in reverse—from actual use to possession—to establish the objective element of possession and control required by the formal definition of the offense:

The evidence . . . would permit the inference that [the defendant] had taken an injection of the drug just prior to the entry of the officers. This circumstantial evidence points clearly to the fact that he had administered the drug to himself. Of course, if that fact is assumed, it necessarily follows that he had possession and control of the instrument and its contents at the time of the injection . . .

Id. at 242-43, 100 A.2d at 2. Of course, where the punishment for possession is significantly less than the punishment prescribed for the completion of the actual harm that the legislation is designed to prevent, one may use possession as a basis for imputing the objective and mental elements of an attempt to commit the offense.

58. Vagrancy was at one time an offense in every American jurisdiction. Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 609 & n.7 (1956). *See generally* Note, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U. L. REV. 102, 108-14 (1962) (discussing vagrancy statutes from forty-eight jurisdictions).

59. For example, in 1547, the preamble to the "Slavery Act," a vagrancy statute, noted: "[I]dleness and vagabondry is the mother and root of all thefts, robberies, and all evil acts, and other mischiefs . . ." An Act for the Punishment of Vagabonds, 1547, 1 Edw. 6, ch. 3.; *see* MODEL PENAL CODE § 250.12 comment (Tent. Draft No. 13, 1961); Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203 (1953); Sherry, *Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision*, 48 CALIF. L. REV. 557 (1960).

60. The drafters of the *Model Penal Code*, for example, rejected the concept of status criminality and proposed instead a "suspicious loitering" offense that punishes one whose conduct justifies suspicion that he is about to engage in criminal activity. MODEL PENAL CODE § 250.12 (Tent. Draft No. 13, 1961). Section 250.12 was subsequently modified to require justifiable "alarm" for the safety of persons or property. *Id.* § 250.6 (1980).

hibit and punish a variety of preparatory criminal conduct. Elements of the attempt are imputed upon proof of loitering or prowling.⁶¹

Strict liability offenses are a fourth instance of codified imputed liability, although the characterization is more tenuous here. While the definition of a strict liability offense does not formally contain a culpable state-of-mind element,⁶² arguably the true harm or evil the statute is meant to prohibit includes such an element, and the paradigm therefore includes culpability. A vast literature supports the normative claim that culpability should be required in all offenses.⁶³ Strong evidence also suggests that, as a descriptive matter, culpability remains part of the general paradigm for all criminal offenses. Every modern criminal code includes general provisions either requiring culpability⁶⁴ or at least creating a presumption that the legislature intended to require culpability, as to each element of every offense that carries the stigma of the criminal sanction.⁶⁵

One may at least argue, then, that offenses without a requirement of culpability deviate from the true paradigm, and that the culpability re-

61. To be convicted for "loitering or prowling," *id.* § 250.6 (1980), the actor need not "purposely [do or fail] to do anything . . . constituting a substantial step" toward the commission of the offense and need not have "the kind of culpability otherwise required for the commission of the crime." *Id.* § 5.01(1)(c) (Proposed Official Draft 1962) (definition of attempt). The elements of attempt are imputed upon proof of the circumstances of loitering or prowling "in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity." *Id.* § 250.6 (1980). Narcotics vagrancy offenses have been defended on the basis of such imputation—that such offenses are useful in preventing and punishing past, planned or attempted drug transactions. *See Ricks v. United States*, 228 A.2d 316 (D.C. 1967), *rev'd*, 414 F.2d 1097 (D.C. Cir.) and 414 F.2d 1111 (D.C. Cir. 1968).

62. Strict liability is commonly imposed by failing to include a culpability requirement in the definition of a particular offense. Statutes that impose strict liability are common where actors generally can avoid the sanction through the exercise of due care, e.g., in the manufacture, distribution, or sale of drugs, food, liquor, and explosives. *See* MODEL PENAL CODE § 2.05 comment 2, at 141-45 (Tent. Draft No. 4, 1955); Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 84-88 (1933); Annot., 152 A.L.R. 755 (1944) (discussing strict liability for violations of food laws).

63. *E.g.*, J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 70-71 (2d ed. 1960); G. WILLIAMS, *supra* note 3, at 75-99; Perkins, *The Civil Offense*, 100 U. PA. L. REV. 832 (1952); Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1932); Sayre, *supra* note 62. *See generally* MODEL PENAL CODE § 2.05 comments 1 & 2, at 140-46 (Tent. Draft No. 4, 1955) (summarizing arguments and cataloguing literature).

64. MODEL PENAL CODE §§ 2.02(3), 2.05 (Proposed Official Draft 1962). *See generally* Robinson & Grall, *Element Analysis*, *supra* note 10, at 700 n.84 (listing jurisdictions adopting provisions that require at least recklessness whenever culpability requirement is not specified in definition of crime). The commentary to § 2.02(3) states that by imposing liability for recklessness unless otherwise specified, the drafters establish "as the basic norm what usually is regarded as the common law position." MODEL PENAL CODE § 2.02 comment 4, at 127 (Tent. Draft No. 4, 1955); *see also* CAL. PENAL CODE § 20 (West 1970) (every crime must have union of act and intent, or criminal negligence); NEV. REV. STAT. § 193.190 (1981) (same).

65. The presumption is strong where the penalty is severe. Some of these statutes direct the court to require at least recklessness if the presumption is not defeated by a contrary indication of legislative intent. *See* TEX. PENAL CODE ANN. § 6.02(b)-(c) (Vernon 1974). Others permit the court to apply any of the defined culpability requirements. *See* Criminal Code of 1961 §§ 4-3 to -9, ILL. ANN. STAT. ch. 38, §§ 4-3 to -9 (Smith-Hurd 1972); ME. REV. STAT. ANN. tit. 17-A, § 34(1), (5) (1983); N.Y. PENAL LAW §§ 15.05, 15.15(2) (McKinney 1975).

quired by the paradigm is in fact imputed.⁶⁶ For example, where a state law prohibits the sale of liquor to minors, one might argue that all tavern owners are under a legal duty to ascertain the age of their customers, and that they should recognize this duty. If an owner nevertheless sells alcohol to a minor, he can be considered culpable, as negligent per se.⁶⁷ Of course, the statute will impute negligence whether or not the circumstances warrant such a finding,⁶⁸ but the failure to include a culpability element in the formal definition does not refute a claim that the harm or evil sought to be prevented and punished—the paradigm—includes a culpability requirement. Rather, one can consider the culpability element imputed when the actor satisfies the formal elements of the offense.

The claim here—that all four of these classes of offenses are designed to punish a harm or evil other than that manifested in their formal definitions and that the elements of the true paradigms are imputed upon proof of the conditions stated in the offenses' formal definitions—is not unassailable. One might argue that these definitions accurately represent a paradigm that simply rejects the principles of culpability that govern other, traditional formulations of offenses. The difficulty of supporting this argument varies with each instance. It is extremely difficult to argue that possession alone is really the harm or evil prohibited and punished by possession offenses. It is at least plausible, however, that felony murder represents an independent harm or evil in which the culpability for murder really is irrelevant. Similarly, pure status offenses and strict liability offenses may define a punishable harm or evil. This characterization is possible, however, only if one is willing to reject the notions of act and culpability as universal requirements for criminal liability.⁶⁹ Many would be unwilling to do so.

66. The existence of general code provisions that establish culpability as a norm, see *supra* notes 64–65, supports the view of strict liability as an exception to the paradigm. See also G. FLETCHER, *supra* note 28, at 717–22; W. LAFAVE & A. SCOTT, *supra* note 15, § 31, at 221; Abrams, *Criminal Liability of Corporate Officers for Strict Liability Offenses—A Comment on Dotterweich and Park*, 28 UCLA L. REV. 463, 465–66, 473 (1981); Fletcher, *The Theory of Criminal Negligence: A Comparative Analysis*, 119 U. PA. L. REV. 401, 405 (1971); Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 743–44 (1960).

67. *State v. Dahnke*, 244 Iowa 599, 57 N.W.2d 553 (1953). For a discussion of strict liability as supported by an evidentiary rationale, i.e., one that relies on the likely existence of culpability, see *infra* p. 654.

68. See *State v. Hendrickson*, 67 Utah 15, 245 P. 375 (1926) (defendant convicted of polygamy despite evidence of actual good faith). For a discussion of the only rationale for imputation of culpability where it is clearly absent, see *infra* pp. 669–70; cf. *People v. Vogel*, 46 Cal. 2d 798, 299 P.2d 850 (1956) (different result reached on basis of evidentiary rationale; case discussed *infra* note 168).

69. Indeed, if one is willing to disregard the requirements of an act and culpability, one may be able to claim that many instances of clear *formal deviation*, such as complicity, are in fact instances of *substantive compliance* in which no imputation occurs. But this approach does not advance the inquiry. If, however, these offenses are accepted as instances of substantive deviations from the paradigm, then a comparison of these offenses to other instances of imputed liability may provide insight into the proper formulation of these offenses.

B. *Analogous Requirements and Results for Analogous Doctrines of Imputation*

Under a rational and principled criminal law, analogous rules should have analogous requirements and analogous results. Rules may be analogous because they seek similar goals, rely on similar rationales, or overlap in application. Thus, where doctrines impute similar elements on the basis of a common justifying theory—causal, equivalency, evidentiary, or nonculpability—there is a basis on which to argue for analogous requirements and results. This is especially true if the doctrines cover the same or similar factual situations.⁷⁰ Dissimilar requirements and results in such cases create the specter of arbitrariness by making liability dependent not upon the actor's culpability but rather upon the rule chosen to impute it. This section employs the conceptual framework of imputation to identify analogous doctrines and to criticize the anomalous results from failures to recognize such analogies.

One could argue that all doctrines sharing a particular theory of imputation—causal, equivalency, evidentiary, or nonculpability—are analogous doctrines. But it is possible to define more precisely the underlying theories of imputation and thereby increase the similarity among doctrines sharing a particular theory. Some causal theories of imputation rely on the fact that the defendant has caused his own or another's criminal conduct. Other causal theories, in contrast, claim that imputation is appropriate because the actor has created a dangerous situation in which the harm or evil was likely to occur. Similarly, two different kinds of equivalency theories support imputation: substituted culpability and cumulative culpability. The two most common forms of evidentiary arguments are, first, that circumstances suggest that *culpability* required by the offense definition probably exists and need not be proved, and, second, that the elements of *complicity* probably exist and need not be proved. Most nonculpability theories are similar in form, imputing required elements to increase the deterrent threat of the criminal sanction. Comparison of doctrines sharing a specific theory reveals their many similarities. Differences

In any case, the identity and legitimacy of the conceptual group of instances of imputed liability do not depend on acceptance of these offenses as instances of imputation.

70. See, e.g., *Jackson v. State*, 286 Md. 430, 408 A.2d 711 (1979) (defendant's hostage accidentally killed by officer; case could be analyzed as causing crime by innocent or felony murder); *State v. Akers*, 119 N.H. 161, 400 A.2d 38 (1979) (recognizing similarity of factual situations giving rise to vicarious liability of parents and "status" offenses, and invalidating, on ground that it punishes status, statute imposing vicarious parental liability); *Queen v. Saunders & Archer*, 2 Pl. Com. 473, 75 Eng. Rep. 706 (1575) (husband who poisoned apple and gave it to wife held liable for death of child, who was given apple by wife; opinion suggests that case can be analyzed as one of causing crime by innocent or transferred intent). For a discussion of overlap between the doctrines of vicarious liability, conspiracy, complicity, the complicity aspect of felony murder, and causing crime by an innocent, see *supra* note 26. For a discussion of overlap between omission liability and complicity, see *infra* p. 673.

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also appear, however, which illuminate both the proper formulation of the particular doctrine and the nature of the conceptual group.

1. *Causing Another To Engage in Criminal Conduct*

An actor who does not personally satisfy an objective element, such as conduct, but who directly causes the required element by other means should be treated as if he satisfied the element himself.⁷¹ Indeed, in cases where the causal link is strong, it is natural to think that the actor actually did satisfy the element himself. Where the actor uses a crowbar to break into a house, he is taken to satisfy the objective element of "breaking" even though he did not use his own hands. If he causes his pet gorilla to break the door, the result is the same. When he causes an insane person to do the breaking, where the insane person's capacity for self-determination and the defendant's control over the insane person are comparable to the capacity of and his control over the gorilla, the result again remains the same. In this last instance, however, the analysis may shift away from causation by the actor to "causing crime by an innocent."⁷²

This similarity between humans and non-human objects in completing the causal chain often leads to ambiguity in the demarcation between pure causation and causing crime by an innocent. In *Morse v. United States*,⁷³

71. See, e.g., *Morse v. United States*, 174 F. 539 (2d Cir.), cert. denied, 215 U.S. 605 (1909) (discussed *infra* p. 632); *Moore v. State*, 267 Ind. 270, 369 N.E.2d 628 (1977) (discussed *supra* note 34); *Commonwealth v. Moyer*, 357 Pa. 181, 53 A.2d 736 (1947) (where causal element is strong, actor is responsible for result as if he caused it himself).

72. Several states have adopted separate "causing crime by an innocent" provisions similar to *Model Penal Code* § 2.06(2)(a), quoted *supra* note 11. ALA. CODE § 13-A-2-22 (1982); ARIZ. REV. STAT. ANN. § 13-303(A)(2) (Supp. 1982-83) (liability for causing another person to commit crime "whether or not [he] is capable of forming culpable mental state"); ARK. STAT. ANN. § 41-302(3) (1977); COLO. REV. STAT. § 18-1-601 (1978); DEL. CODE ANN. tit. 11, § 271(1) (1979); GA. CODE ANN. § 26-801(b)(2) (1983) (liability for intentionally causing crime by another who is not guilty either "in fact or because of legal incapacity"); HAWAII REV. STAT. § 702-221(2)(a) (1976); Criminal Code of 1961 § 5-2(a), ILL. ANN. STAT. ch. 38, § 5-2(a) (Smith-Hurd 1972); KY. REV. STAT. § 502.010(1)(b) (1975); ME. REV. STAT. ANN. tit. 17-A, § 57(2)(A) (1983); MONT. CODE ANN. § 45-2-302(1) (1981); N.H. REV. STAT. ANN. § 626:8(II)(a) (1974); N.J. STAT. ANN. § 2C:2-6(b)(1) (West 1982); N.D. CENT. CODE § 12.1-03-01(1)(a) (1976) (imposing liability for causing another to engage in criminal conduct; does not specify that other party may be innocent or irresponsible); OHIO REV. CODE ANN. § 2923.03(4) (Page 1982); 18 PA. CONS. STAT. ANN. § 306(b)(1) (Purdon 1973); TEX. PENAL CODE ANN. § 702(a)(1) (Vernon 1974); WASH. REV. CODE ANN. § 9A.08.020 (1977).

The remainder of the states and the District of Columbia impose liability in this situation under their normal complicity rules. Typical of this approach is CAL. PENAL CODE § 31 (West 1970); *People v. Roberts*, 26 Cal. App. 3d 385, 103 Cal. Rptr. 25 (1972) (no defense to aiding and abetting that defendant induced children who were legally incapable of committing crime); accord *People v. Alexander*, 17 Mich. App. 30, 169 N.W.2d 190 (1969) (asportation element of theft may be accomplished by confederate or innocent agent); see also 18 U.S.C. § 2(b) (1982) (punishing one who willfully causes another's act that would be offense if performed directly by causing agent); VA. CODE § 18.2-67.2(A) (1982) (incorporating liability for causing crime by innocent in sexual penetration offense). For a discussion of the common law treatment of one who causes crime by an innocent, see W. LAFAVE & A. SCOTT, *supra* note 15, § 63, at 496-97.

73. 174 F. 539 (2d Cir.), cert. denied, 215 U.S. 605 (1909).

for example, the court held that it was immaterial whether Morse, vice-president of the National Bank of North America, himself recorded stock purchases as loans or whether he caused employees so to record the transactions in the ordinary course of business.⁷⁴ The court simply reasoned that it was "immaterial whether such officer acts through a pen or a clerk controlled by him."⁷⁵ The revisors of section 2(b), title 18 of the United States Code similarly decline to distinguish human from non-human causal links. Their revision notes state: "[O]ne who puts in motion or assists in the illegal enterprise but causes the commission of an indispensable element of the offense by an innocent *agent or instrumentality*, is guilty"⁷⁶

An actor's causal connection with the required objective elements of the offense will usually be more attenuated than in *Morse*. There is clearly a spectrum of cases along which the strength of the causal relation varies with the actor's degree of control over the other person or, in other words, with the other person's degree of independent action. In *Fritz v. State*⁷⁷ the defendant persuaded one Clayton, who had a history of mental illness, to kill the defendant's husband. The defendant's persuasive powers derived from her emotional manipulation of Clayton. Clayton was later adjudged insane and found not guilty of the killing on that basis, while the defendant was held liable for first-degree murder.⁷⁸ The defendant's control in *Fritz* was somewhat less than in *Morse*, as Clayton's opportunity or potential for independent action was greater.

This spectrum from pure causation analysis through causing crime by an innocent via an innocent dupe to causing crime by an innocent via clever persuasion, continues into cases likely to be analyzed as instances of complicity.⁷⁹ But even within this latter group there exist variations in the

74. *Id.* at 547.

75. *Id.*; accord *United States v. Giles*, 300 U.S. 41, 49 (1937) (citing *Morse*); *People v. Jack*, 233 Cal. App. 2d 446, 456, 43 Cal. Rptr. 566, 572 (1965) ("a person [who] has caused a crime to be committed through the instrumentality of an innocent agent" is guilty of that crime). The instrumentality analysis has also been employed to defend liability under the *Pinkerton* doctrine. See *State v. Carbone*, 10 N.J. 329, 339-40, 91 A.2d 571, 575-76 (1952) (conspiratorial relationship analogous to principal/agent; what is done by agent is done by principal; agent is principal's "mere instrument").

76. 18 U.S.C. § 2(b), historical and revision notes (1982) (emphasis added). Even more indicative of the revisors' reliance on pure causal analysis is the fact that the 1948 revision failed to include a culpability requirement for causing crime by an innocent. See MODEL PENAL CODE § 2.04 comment at 16 n.11 (Tent. Draft No. 1, 1953). The culpability requirement "willfully" was subsequently added. See 18 U.S.C. § 2(b) (1982). For a discussion of the culpability requirements for causing crime by an innocent, see *infra* pp. 637-38.

77. 25 Wis. 2d 91, 130 N.W.2d 279 (1964), *cert. denied*, 380 U.S. 936 (1965).

78. *Id.* at 94, 130 N.W.2d at 280.

79. Sayre, for example, attempts to explain a variety of criminal law doctrines, including complicity and vicarious liability, using a causal responsibility theory: "It is not surprising . . . that courts today as a general rule . . . make criminal liability exclusively dependent upon causation. Causation may be proved either (1) by authorization, procurement, incitation or moral encouragement, or (2) by knowledge plus acquiescence" Sayre, *Criminal Responsibility for the Acts of Another*, 43

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actor's involvement with his accomplice. Such involvement ranges from cases where the actor serves as the mastermind and moving force in the operation,⁸⁰ through cases where he is essentially an equal in his contribution to the success of the venture,⁸¹ through cases where his contribution constitutes minor facilitation,⁸² to cases where only encouragement and no actual aid is given.⁸³

Even one who makes no direct contribution to the conduct constituting the offense may be held criminally liable if he is nonetheless causally connected to the act, at least in the sense that he has created or helped create the situation in which the offense occurs. Such causal responsibility, based upon creation of or contribution to the situation in which another commits an offense, has justified the imputation of a required objective element

HARV. L. REV. 689, 702-03, 706-07 (1930).

80. For example, in *Asher v. United States*, 394 F.2d 424 (9th Cir. 1968), the defendant persuaded his accomplice to rob a bank, planned the execution of the robbery, provided the money used to purchase the toy gun and sack, provided a post-robbery hiding place by locating and unlocking a parked car, and promised to pick up his accomplice after the robbery. *Id.* at 428.

81. For example, in *Ivey v. State*, 232 So. 2d 368 (Miss. 1970), all three co-felons participated in a robbery, but the defendant, unlike other participants, was unarmed. He nonetheless was held liable for armed robbery. The court reasoned "[a]ll three acted jointly and in concert; each was responsible and accountable for the wrongful actions of the other two." *Id.* at 369.

82. Complicity liability on the basis of trivial assistance is illustrated by the case of *State v. Duran*, 86 N.M. 594, 526 P.2d 188 (Ct. App.), *cert. denied*, 86 N.M. 593, 526 P.2d 187 (1974). See *supra* p. 613. In some cases no assistance is required. See *State ex rel. Attorney Gen. v. Tally*, 102 Ala. 25, 15 So. 722 (1893). On the degree of assistance normally required, see generally W. LAFAVE & A. SCOTT, *supra* note 15, § 63, at 502-05.

83. In *Wilcox v. Jeffery*, [1951] 1 All E.R. 464, for example, the court went so far as to conclude that the defendant's attendance at a concert given by a foreign performer in violation of the performer's visiting permit, was a sufficient basis for finding the defendant an accomplice to the violation. For a discussion of encouragement as a basis for accomplice liability, see R. PERKINS, *CRIMINAL LAW* 659 (2d ed. 1969).

In large measure, the common law distinctions between participants in a felony were abandoned soon after their procedural and practical significance disappeared; at common law accessories before or after the fact could not be convicted if the principal in the first degree escaped, died, or was acquitted or pardoned; however, principals in the second degree could be convicted under these circumstances, W. LAFAVE & A. SCOTT, *supra* note 15, § 63, at 500. Modern codes eliminate the accessory/principal distinctions, see MODEL PENAL CODE § 2.06 (Proposed Official Draft 1962), reflecting differences in degrees of causal contribution to the offense. A principal in the first degree was the one who personally committed the criminal act, or who caused an innocent to commit a crime. W. LAFAVE & A. SCOTT, *supra* note 15, § 63, at 496-97. A principal in the second degree was one present at the scene who aided, counselled, commanded, or encouraged the act but did not himself perform it. *Id.* § 63, at 497. An accessory before the fact was one not present at the scene, but who aided, counselled, commanded, or encouraged the act. *Id.* § 63, at 498.

An accessory after the fact was one who aided the principal after completion of the offense. *Id.* § 66, at 522. At early common law, the accessory after the fact could be held guilty of the substantive offense committed by the principal, but now he is viewed as an obstructor of justice and held liable for that offense rather than for contributing to the substantive offense. See MODEL PENAL CODE §§ 242.3-4 (1980); R. PERKINS, *supra*, at 682-84.

under the complicity aspect of the felony-murder rule,⁸⁴ the *Pinkerton* doctrine,⁸⁵ and the natural and probable consequence rule in complicity.⁸⁶

A similar theory of causal responsibility has supported the rules governing vicarious liability and the liability of officials within an organization. Sayre, for example, argues that the primary and appropriate basis for the imposition of vicarious liability (in which he means to include complicity as well as the more narrow strict-liability meaning of "vicarious liability" that is intended in this Article) should be "strict principles of causation."⁸⁷ A causal theory has also justified the rules governing the liability of officials within an organization, although the decision in *United States v. Park*⁸⁸ suggests that another rationale is now also at work. As some writers have observed, after *Park* courts no longer require as a prerequisite for liability a close relationship between a corporate officer's activities and the criminal violation or a showing that the defendant in some way had "caused" the prohibited result.⁸⁹

Despite the variety of the rules and doctrines employed to impose liability, in each instance considered above the defendant causally contributes to

84. See *Mumford v. State*, 19 Md. App. 640, 643-44, 313 A.2d 563, 566 (1974) ("causation requirements . . . must be satisfied before the felony-murder rule may be applied"); *Commonwealth v. Moyer*, 357 Pa. 181, 192, 53 A.2d 736, 742 (1947) (where causal contribution is strong, actor is responsible for result as if he produced it himself); *Taylor v. State*, 41 Tex. Crim. 564, 572, 55 S.W. 961, 964 (1900) ("The whole [felony-murder] question here is one of causal connection.").

85. See *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 998-99 (1959) ("Criminal acts done in furtherance of a conspiracy may be sufficiently dependent upon the encouragement and material support of the group as a whole to warrant treating each member as a *causal agent* to each act.") (emphasis added).

86. This rule patently demonstrates its reliance upon a causal theory since it applies only where additional offenses are *consequences* of the defendant's underlying offense. The court in *Breaz v. State*, 214 Ind. 31, 13 N.E.2d 952 (1938), for example, gives the following causal explanation for the natural and probable consequence rule:

It is true that to connect one with a crime as an accessory before the fact it is necessary that there be an immediate causal connection between the instigation and the act, but this does not require that the act consummated shall be, in all its details, the precise one previously contemplated by the parties

"There can be no doubt of the general rule of law, that a person engaged in the commission of an unlawful act is legally responsible for all the consequences which may naturally or necessarily flow from it, and that, if he combines and confederates with others . . . he is liable *criminaliter* for everything done by his confederates which follows incidentally in the execution of the common design, as one of its probable and natural consequences"

Id. at 34-35, 13 N.E.2d at 953.

87. Sayre, *supra* note 79, at 702 (criticizing courts' tendencies to rely on broader notions of *respondeat superior*).

88. 421 U.S. 658 (1975).

89. See O'Keefe & Shapiro, *Personal Criminal Liability Under the Federal Food, Drug & Cosmetic Act: The Dotterweich Doctrine*, 30 FOOD DRUG COSM. L.J. 5, 24 (1975). The degree of causal connection necessary has been described by courts in various ways. Compare *United States v. Kaadt*, 171 F.2d 600, 604 (7th Cir. 1948) (requiring responsibility for conduct of business and directing that responsibilities be assessed by evaluating the extent of defendant's direction and control over business) with *United States v. Parfait Powder Puff Co.*, 163 F.2d 1008, 1010 (7th Cir. 1947) (finding adequate basis for liability in defendant's initiation of events that placed prohibited commodity in stream of commerce), *cert. denied*, 332 U.S. 851 (1948).

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satisfaction of the objective elements of the offense by another. Often the contribution is at least as strong as in most complicity cases and his liability is justified.⁹⁰

But doctrines of imputation have also resulted in liability where the defendant's causal connection to the harm is tenuous at best. Under the complicity aspect of the felony-murder rule, a co-felon has been held for murder when a gangleader, annoyed by one member of the gang, shot and killed the offending member.⁹¹ The *Pinkerton* doctrine has been used to hold an actor liable for a series of abortions performed without her knowledge by a doctor to whom she had on other occasions referred women for abortions.⁹² Under the natural and probable consequence rule in complicity, a passenger in a car has been held liable for second degree murder when the driver, operating a vehicle on the wrong side of the road, killed a pedestrian. Both driver and passenger were drinking, and the passenger was held to be part of the unlawful enterprise of drinking and driving.⁹³ Under vicarious liability rules, a store owner has been held liable for an employee's unlawful sale of oleomargarine in direct violation of the owner's orders.⁹⁴ And in *United States v. Park*,⁹⁵ the president of Acme Markets, Inc., was held liable for the contamination of food in a company warehouse despite his lack of personal control over the warehouse and his ignorance of the contamination.⁹⁶

If the perceived basis for the imputation of the objective element is the causal connection, then where the connection is weak—as in these latter cases—the imputation should be considered unjustified. Indeed, the various doctrines and rules that impute objective elements are criticized in inverse proportion to the strength of the causal connection. Causing crime by an innocent is clearly accepted, and is almost subsumed by the causation issue. Complicity is widely accepted, although in some cases it has

90. See *United States v. Tilton*, 610 F.2d 302 (5th Cir. 1980) (liability for mail fraud under *Pinkerton* doctrine where fraudulent bills were mailed to pay bribe defendant had extracted); *United States v. Shapiro*, 491 F.2d 335 (6th Cir. 1974) (liability of organization official for food adulteration, where defendant failed to correct, and then failed to require his agent to correct, conditions causing adulteration); *Breaz v. State*, 214 Ind. 31, 13 N.E.2d 952 (1938) (natural and probable consequence liability where robbery defendant directed, equipped, and profited from robbery ring he did not plan); *State v. Rosania*, 33 N.J. 267, 163 A.2d 139 (1960) (liability for murder based on complicity in underlying robbery where defendant planned operation in detail), *cert. denied*, 365 U.S. 864 (1961); *Commonwealth v. Zehner Bros. Farm Prods.*, 70 Pa. D. & C.2d 501 (Columbia County Ct. 1972) (vicarious liability for unlawful discharge of industrial waste where employer ordered employee to spray dangerous insecticide on land near stream).

91. *People v. Cabalero*, 31 Cal. App. 2d 52, 87 P.2d 364 (1939) (discussed *supra* note 25).

92. *Anderson v. Superior Court*, 78 Cal. App. 2d 22, 177 P.2d 315 (1947).

93. *Berness v. State*, 40 Ala. App. 198, 202-03, 113 So. 2d 178, 180 (1958), *cert. denied*, 269 Ala. 694, 113 So. 2d 183 (1959).

94. *Groff v. State*, 171 Ind. 547, 85 N.E. 769 (1908).

95. 421 U.S. 658 (1975).

96. *Id.* at 672-73.

been limited to instances of "substantial assistance."⁹⁷ Felony murder, the *Pinkerton* doctrine, the natural and probable consequence rule, and vicarious liability have all been strongly criticized for their potential imposition of liability where the causal connection is weak.⁹⁸ Special rules governing liability for corporate officials have escaped similar criticism so far, perhaps because of the growing concern over "white-collar" crimes and offenders. Introducing a minimum causal contribution requirement into each doctrine that relies on a causal theory would reduce criticism and do much to insure rational imputation.

The analogy among these causal theory doctrines of imputation does more than illustrate the importance of the causal connection. It leads one to question variations in the culpability requirements among the different doctrines. Two distinct culpable states of mind are pertinent: the actor's culpability as to causing, assisting, or encouraging another to satisfy the objective elements; and the actor's culpability as to the objective elements specified in the definition of the offense. The distinction is sometimes subtle, but one's state of mind as to *whether one's conduct will assist the*

97. Substantial assistance is often required where the state of mind as to assistance must be knowing rather than purposeful. The Brown Commission, for example, recommended that legislatures replace the traditional purposefulness requirement with the requirement that the actor "knowingly provides substantial assistance." NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT OF THE NATIONAL COMMISSION ON THE REFORM OF FEDERAL CRIMINAL LAWS: A PROPOSED NEW FEDERAL CRIMINAL CODE (1971) [hereinafter cited as BROWN COMMISSION]. The drafters of the *Model Penal Code* considered but rejected a similar provision. Compare MODEL PENAL CODE § 2.04(3)(b) (Tent. Draft No. 1, 1953) with *id.* § 2.06 (Proposed Official Draft 1962). The purposefulness requirement is most common. See *infra* note 100; Robinson & Grall, *supra* note 10, at 739.

98. See T. MACAULAY, A PENAL CODE PREPARED BY THE INDIAN LAW COMMISSIONERS AND PUBLISHED BY COMMAND OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL 65 (1837) (note M) ("It would be a less capricious, and therefore a more salutary course, to provide that every fiftieth or every hundredth thief selected by lot should be hanged" than to punish as murder unforeseeable homicides committed during the course of a felony.); Crum, *Causal Relations and the Felony-Murder Rule*, 1952 WASH. U.L.Q. 191, 206-07 (criticizing complicity aspect of felony-murder rule on ground that felon has too little control over co-felons). Many jurisdictions have attempted to strengthen the causation requirements of their felony-murder statutes. See *supra* notes 44-45; W. LAFAVE & A. SCOTT, *supra* note 15, § 71, at 557.

The *Pinkerton* doctrine is less widely accepted than the felony-murder rule. See *id.* § 65, at 515. The *Model Penal Code* commentary explains the drafters' rejection of the *Pinkerton* doctrine: "Law would lose all sense of just proportion if in virtue of that one crime, each were held accountable for thousands of offenses that he did not influence at all." MODEL PENAL CODE § 2.04(3) comment 1, at 21 (Tent. Draft No. 1, 1953). Others have argued: "Aiding should mean something more than the attenuated connection resulting solely from membership in a conspiracy and the objective standard of what is reasonably foreseeable." 1 NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 156 (1970).

Objections to the natural and probable consequence rule generally center upon its imputation of requisite mental states rather than weak causal connection. See W. LAFAVE & A. SCOTT, *supra* note 15, § 30, at 516.

For criticism of the tenuous causal connection in cases of vicarious liability, see Sayre, *supra* note 79, at 702.

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perpetrator in causing a result, for example, is distinguishable from one's state of mind as to *the result of the perpetrator's conduct*.⁹⁹

Only the doctrines governing complicity and causing crime by an innocent require the latter kind of culpability. Under rules governing complicity, the state of mind that is required as to causing or assisting another—the first culpability issue—is “purposefully” or, in some jurisdictions, “knowingly.”¹⁰⁰ Under the doctrine of causing crime by an innocent, an actor must knowingly or perhaps recklessly cause the conduct of the innocent.¹⁰¹ Under both forms of liability, the culpability requirement for causing or assisting another is commonly a certain minimum that applies to all offenses, no matter what level of culpability is required for the offense (e.g., the same culpability as to assistance is required for complicity in murder and for complicity in reckless homicide).

In contrast, the second culpability issue for imputation—the culpability required by the substantive offense—obviously varies with the offense. One is not an accomplice to murder unless one is knowing or purposeful

99. One may want to assist the perpetrator, but also wish that a possible harmful result not occur. For example, if *A* and *B* are engaged in a robbery, *A* may desire to assist *B* in the robbery even though *A* realizes that his assistance will increase the chance of *B*'s wounding the robbery victim. *A* may nonetheless not want the wounding to occur. See *State v. Edwards*, 209 Kan. 681, 498 P.2d 48 (1972); cf. *People v. Cabalero*, 31 Cal. App. 2d 52, 87 P.2d 364 (1939) (defendants desired to assist in armed robbery but surely would have preferred that one co-felon not shoot another, although they may have been aware of such risk).

One may act to create only a risk that one's conduct will assist or cause the perpetrator to effectuate a desired result. *A* may desire *B*'s death and place a poisoned apple where *B* will be likely to eat it, thereby creating only a risk of assisting *B* in causing *B*'s own death. Cf. *Queen v. Saunders & Archer*, 2 Pl. Com. 473, 75 Eng. Rep. 706 (1575) (defendant intended to cause his wife to cause her own death, but mother fed poisoned apple to child).

100. The defendant must have either a purpose to assist or encourage or, in some jurisdictions, simply have knowledge of the fact that he is assisting or encouraging. The majority of United States codes require purposeful or intentional assistance. See MODEL PENAL CODE § 2.06(3) (Proposed Official Draft 1962); CAL. PENAL CODE § 31 (West 1970); Criminal Code of 1961 § 5-2, ILL. ANN. STAT. ch. 38, § 5-2 (Smith-Hurd 1972); MINN. STAT. ANN. § 609.05 (West 1964); N.J. STAT. ANN. § 2C:2-6 (West 1982); N.Y. PENAL LAW § 20.00 (McKinney 1975); 18 PA. CONS. STAT. ANN. § 306 (Purdon 1973); TEX. PENAL CODE ANN. § 7.02 (Vernon 1974); WIS. STAT. ANN. § 939.05 (West 1982). Most states that do not explicitly codify an intentional aid requirement impose it through case law. See W. LAFAVE & A. SCOTT, *supra* note 15, § 64, at 508.

A handful of jurisdictions codify a knowing standard. See IND. CODE ANN. § 35-41-2-4 (Burns 1979); WASH. REV. CODE ANN. § 9A.08.020(3)(a) (1977). England also applies a knowing standard. See G. WILLIAMS, TEXTBOOK OF CRIMINAL LAW 293 (1978).

101. The *Model Penal Code*'s provision, and most provisions patterned after it, see *supra* note 72, impose liability for causing crime by an innocent when the actor does so “acting with the kind of culpability that is sufficient for the commission of the offense.” MODEL PENAL CODE § 2.06(2)(a) (Proposed Official Draft 1962). A general provision of the *Code* instructs courts to impute recklessness with respect to each result element—here, aiding—and knowing with respect to each conduct element—here, the conduct by which one does so. See *id.* § 2.02(3). For a discussion of the operation of § 2.02(3), see Robinson & Grall, *supra* note 10, at 700-02, 715-19. For a discussion of other possible constructions of § 2.06(2)(a), see *id.* at 732-44.

The comparable federal statute requires that the actor “willfully” cause the innocent's conduct. 18 U.S.C. § 2(b) (1982). Federal courts have considered proof of negligent causation sufficient for liability. See *Pereira v. United States*, 347 U.S. 1, 8-9 (1954) (since use of mail by innocent could “reasonably be foreseen,” defendant guilty of mail fraud).

as to causing the death. One is not an accomplice to reckless or negligent homicide unless one is reckless or negligent as to causing the death. Such a requirement of culpability as to the definitional elements is explicit in many provisions governing causing crime by an innocent but is ambiguous in many complicity provisions.¹⁰²

These culpability requirements for complicity and for causing crime by an innocent reveal another basis—beyond tenuous causal connections—for criticizing some of the doctrines that use causal theories to impute required elements. Under the complicity aspect of felony murder, the *Pinkerton* doctrine, and the natural and probable consequence rule, a defendant may be held liable for an offense even though he does not satisfy the culpability requirements of the offense.¹⁰³ The same criticism may be directed at vicarious liability and corporate officials' liability. Under the last two doctrines, none of the culpability elements of the offense need be proven,¹⁰⁴ and even a requirement of culpability as to assisting or contributing to the conduct is sometimes foregone.¹⁰⁵

As noted previously, the complicity aspect of felony murder, the *Pinkerton* doctrine, the natural and probable consequence rule, and vicarious and corporate officials' liability are often supported by weak causal connections. The impropriety of imposition of liability on the basis of such weak causal connections is further exacerbated because it is these same doctrines and rules that also fail to require either culpability as to causing or culpability as to the elements of the offense. All of these doctrines would be more acceptable if they deviated less from the requirements that are persuasive bases for imputing objective elements under a causal theory: a strong causal connection with the imputed objective element, culpa-

102. The defendant must also act with the mental culpability necessary for the commission of the offense. See CONN. GEN. STAT. § 53a-8 (1977); HAWAII REV. STAT. § 702-226 (1976); N.Y. PENAL LAW § 20.00 (McKinney 1975). In some codes, however, the requirement is unclear. Compare MODEL PENAL CODE § 2.06(4) (Proposed Official Draft 1962) (addressing only culpability as to result in complicity cases) with *id.* § 2.06(2)(a) (requiring "kind of culpability that is sufficient for the commission of the offense" for causing crime by innocent).

103. The complicity aspect of the felony-murder rule, for example, has been applied both when the actual killer intended the killing, *United States v. Carter*, 445 F.2d 669 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 932 (1972), and when he did it accidentally, *Jackson v. State*, 286 Md. 430, 408 A.2d 711 (1979). The doctrine also has been applied whether or not the defendant-accomplice anticipated the killing. See *Carter*, 445 F.2d at 672 (although co-felon's homicidal act may have been "far from [defendant's] mind . . . his participation in the robbery . . . made him guilty of murder").

For a discussion of imputation of mental states under the natural and probable consequence rule and the *Pinkerton* doctrine, see, respectively, *United States v. Clayborne*, 509 F.2d 473 (D.C. Cir. 1974) (discussed *supra* note 24); *Pinkerton v. United States*, 328 U.S. 640 (1946) (discussed *supra* note 23).

104. See *Prather v. United States*, 9 App. D.C. 82, *aff'd*, 164 U.S. 452 (1896) (vicarious liability). For a discussion of the imputation of required culpability elements for the liability of officials within an organization, see *supra* note 27.

105. See *supra* notes 26-27 (vicarious liability and the liability of officials within an organization).

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bility as to the causal connection, and the culpability required by the substantive offense. Circumstances may justify minor relaxation of one or another of these three requirements. For example, it may be appropriate to permit a weaker causal connection for homicide liability when the actor is engaged in a serious felony. But relaxing any one increases the importance of adhering to the others if the result is to accord with our intuitive sense of justice.

2. *Causing Oneself to Engage in Criminal Conduct*

The causal theory for imputing objective elements has a counterpart for imputing mental elements: A required mental element will be imputed to an actor if he is causally responsible for criminal conduct committed in the absence of the mental element. One of the obvious cases of imputed mental elements based upon such a causal theory is that of voluntary intoxication. Where an actor's intoxication negates a required mental element, the element will nevertheless be imputed if the intoxication was voluntary.¹⁰⁶ It is this same concern for an actor's culpability for causing his own disability that supports analogous results when an actor causes in himself conditions of a general excuse such as hypnotism, duress, impaired consciousness, involuntary act, or somnambulism.¹⁰⁷

There is a conceptual similarity between the defendant's voluntarily becoming intoxicated and then committing a crime, and the defendant's causing another person to become intoxicated who then commits a crime.¹⁰⁸ This analogy between the doctrines of voluntary intoxication and causing crime by an innocent suggests both a basis for criticizing current rules on voluntary intoxication and a proposal for their reform.

There are several problems with the current rejection of a failure of proof defense for offenses committed following voluntary intoxication.¹⁰⁹ First, for some offenses, it permits a court to impute required culpability—recklessness under many modern codes—even though the definition of voluntary intoxication requires only negligence. To find that intoxication was self-induced, the *Model Penal Code*, for example, requires only

106. The theory is not a new one. In Aristotle's words: "[W]e punish a man for his very ignorance, if he is thought responsible for the ignorance . . . for the moving principle is in the man himself, since he had the powers of not getting drunk and his getting drunk was the cause of his ignorance." ARISTOTLE, *ETHICA NICOMACHEA* 1113^b (W. Ross trans. 1931).

107. For a discussion of cases dealing with culpability in causing an excusing condition, see 2 P. ROBINSON, *supra* note 2, at § 162.

108. In both cases, the "causer" has two possible objectives: to bring about the harmful result, and to bring it about through an agent who will not be held responsible because of the lack of a culpable state of mind at the time the agent committed the offense. In both cases, it seems appropriate to consider the actor's state of mind regarding both objectives at the time he created the condition that caused the subsequent absence of the mental state, whether his own or another's. *See id.*

109. For a discussion of this rejection and its alternate rationales, see *infra* pp. 661–62.

that the actor "knows or *ought to know*"¹¹⁰ that the substance tends to intoxicate—a requirement of mere negligence. Assume an actor kills a pedestrian while driving at a speed that he should know risks such a death. In fact, he does not know of such a risk because of his voluntary intoxication. The *Model Penal Code* would convict him of reckless homicide despite this lack of awareness. Further, he would be convicted of reckless homicide even if he were only negligent in becoming drunk—even if, for example, he ate what he believed was a sugar cube, but which he should have known might contain an intoxicating substance.¹¹¹

Second, this imputation of recklessness is objectionable because even if the actor had been reckless or even purposeful as to getting intoxicated, it does not follow that he is in fact reckless as to causing the death of a pedestrian. It is commonly presumed that a person risks all manner of resulting harm when he voluntarily becomes intoxicated,¹¹² but this is not necessarily correct. Hawaii, in rejecting the *Model Penal Code*'s provision, notes just this objection: "It equates the defendant's becoming drunk with the reckless disregard by him of risks created by his subsequent conduct and thereby forecloses the issue."¹¹³

In contrast, liability for causing another to become intoxicated and to commit an offense—under special rules governing causing crime by an innocent—requires at least recklessness as to actually causing the other's intoxication and, more importantly, requires that the defendant have the culpability required by the substantive offense.¹¹⁴ The analogy between causing crime by an innocent and voluntary self-intoxication suggests that the former doctrine's requirements ought to apply to cases under the latter doctrine. The actor's liability for the ultimate offense should depend upon his conduct in causing his own excused conduct, and his accompanying culpable state of mind *at the time of such initial conduct and with respect to his commission of the ultimate offense*. Thus, where the actor arranges for a hypnotist to give him a hypnotic suggestion to kill his wife, the actor should be held liable for intentionally killing his wife. Such liability does not rest on his excused conduct—killing while in a hypnotic state—but rather on his earlier conduct of going to and making the arrangements

110. MODEL PENAL CODE § 2.08(5)(b) (Proposed Official Draft 1962) (emphasis added).

111. The *Model Penal Code*'s definition of "self-induced intoxication" is also inadequate because it does not account for situations in which an actor may know the intoxicating effect of drinking, but is not fully responsible for that drinking, e.g., a chronic alcoholic. *Id.*; see 2 P. ROBINSON, *supra* note 2, at §§ 162, 194.

112. Thus, it was held that voluntary intoxication could not negate "specific intent," *State v. Shipman*, 354 Mo. 265, 189 S.W.2d 273 (1945), or malice aforethought, *Newsome v. State*, 214 Ark. 48, 50, 214 S.W.2d 778, 779 (1948).

113. HAWAII REV. STAT. § 702-230 commentary (1976).

114. See *supra* pp. 637-38.

with the hypnotist with the intention of causing the subsequent death of his wife.

The actor may have such a culpable state of mind as to the commission of the offense when he causes the disability, as in going to the hypnotist, or when he fails to make allowance for a pre-existing disability. For example, in *Fain v. Commonwealth*, Fain suffered from a disability that rendered him violent when awakened.¹¹⁵ Knowing this, he went to sleep in a hotel lobby with a gun in his possession; when roused, Fain shot the person who woke him.¹¹⁶ His liability is properly determined by asking whether, when he failed to account for his disability, he was aware that such failure might subsequently cause physical injury to others. If he was aware of a risk of such injury, he should be convicted of reckless wounding; if he intended such injury to other persons, he should be convicted of intentional wounding. Fain, then, should have been punished for his "breach of social duty in going to sleep in the public room of a hotel with a deadly weapon on his person."¹¹⁷ Since he "[no doubt] knew . . . his propensity to do acts of violence when aroused from sleep,"¹¹⁸ he should have been held liable for reckless homicide based upon his earlier conduct of going to sleep while armed, in disregard of the attendant risks.

This form of culpability-in-causing analysis is preferable to current voluntary intoxication rules for a variety of reasons. First, it makes clear that an actor who brings about conduct that causes a death should be liable no matter who actually commits the killing. For example, under this analysis, the result in the hypnosis hypothetical is the same whether the defendant arranges with the hypnotist to have himself hypnotized to kill his wife or to have someone else hypnotized to do it. As long as there is precedent for holding persons liable for causing irresponsible agents to engage in criminal conduct,¹¹⁹ it should not change the analysis if the irresponsible agent that the actor causes to commit the offense is another person or the actor himself.

Second, this form of analysis properly accounts for different degrees of culpability as to the ultimate criminal conduct. If, at the time of causing the disability and excusing conditions, the actor is reckless as to ultimately causing a death, then he may properly be held liable for reckless homicide. If the actor should but does not know that a notorious hypnotist may give him a hypnotic suggestion to kill his wife, then he is negligent as to

115. *Fain v. Commonwealth*, 78 Ky. 183, 188 (1879).

116. *Id.* at 192-93.

117. *Id.* at 193.

118. *Id.* at 192-93. The court, however, concluded that Fain could not be held liable because the earlier conduct, going to sleep, was not criminal, and the later conduct, killing in a somnambulistic state, was excused. *Id.*

119. See *supra* note 72.

causing her death if he voluntarily goes to the hypnotist and later kills his wife under hypnotic suggestion.¹²⁰ In the context of intoxication, this means that one must inquire into the actor's state of mind as to the elements of the offense at the time he voluntarily becomes intoxicated. If he is on his way to a robbery, the situation in one reported case,¹²¹ then he is properly held liable for the subsequent offense even though at the time of the robbery he is not responsible for his criminal conduct.

There is some precedent for this method of analysis, primarily in cases of pre-existing disabilities where the actor's culpability is in his failure to prevent a harmful result. In *State v. Gooze*, for example, the defendant had a history of blackouts from Ménière's Syndrome.¹²² During one such blackout he ran over a pedestrian. The court pointed out that "[i]t was reasonably foreseeable that if he 'blacked out' or became dizzy without warning, its probable consequences might well be injury or death to others."¹²³ The court then held, "while one cannot be liable for what he does during the unconsciousness of sleep, he is responsible for allowing himself to go to sleep."¹²⁴

3. *Creating Dangerous Situations*

The conceptual similarity between causing harm through a human agent, such as a drunken actor, and through an instrumentality, such as a crowbar or gorilla, is the actor's causal responsibility for the results. Such causal responsibility is similar in many respects to a causal theory that bases liability upon the creation of a dangerous situation. Where an actor enters a bank, with a loaded gun drawn, and fosters confusion and anxiety, he creates a risk of harm and is arguably causally responsible for and properly held accountable for harm that ensues. Indeed, one could argue that all but the most direct cases of agents and instrumentalities—all but the crowbar case—create only a risk, not a certainty of harm.

Thus, in general terms, the imputation of required elements under a causal theory might be viewed as imputation based upon an actor's causal responsibility for creating the dangerous situation in which the harm or

120. Where the ultimate offense is never committed, the defendant may nonetheless be liable for an attempt to commit the offense. For example, if the hypnotist refuses to comply with the actor's request and reports the request to the police, the actor may be held liable for attempted murder.

121. *DeBerry v. Commonwealth*, 289 S.W.2d 495 (Ky. Ct.

122. 14 N.J. Super. 277, 81 A.2d 811 (App. Div. 1951). Ménière's Syndrome is a form of auditory vertigo apparently produced by hemorrhage within the inner ear. Symptoms include dizziness and nausea. HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 2153-54 (10th ed. 1983).

123. *Id.* at 286, 81 A.2d at 816.

124. *Gooze*, 14 N.J. Super. at 286, 81 A.2d at 816. The approach has also been employed where the actor culpably causes a defense that negates an element of the offense. See, e.g., *State v. Manus*, 93 N.M. 95, 100, 597 P.2d 280, 285 (1979) (defendant cannot claim provocation when he intentionally caused decedent to undertake "provocative" act).

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evil can occur absent the culpable state of mind normally required by the offense. Under this theory, one could argue that if a required element can be imputed to an actor when he creates a dangerous situation by voluntarily becoming intoxicated or intoxicating another, it should also be imputed where he voluntarily creates a dangerous situation through other means. Thus, by robbing a bank the actor creates at least a risk that someone may be *accidentally* harmed. In the anxiety and confusion of the moment, a customer or employee may fall, be stepped on, or suffer a heart attack. A gun may accidentally discharge when the intruder or a guard trips or panics. If such accidents result in death, the actor might not have, at the moment of the killing, the culpability required for murder—purpose, knowledge, or recklessness manifesting extreme indifference to the value of human life—just as these elements may not be present at the moment of a drunken killing. But just as it would be improper to limit one's perspective to the actor's state of mind at the moment of the drunken killing, so too would it be improper to consider only his state of mind at the time of the accidental killing.

If the felony-murder rule and similar doctrines of imputed liability rely on this causal theory of risk creation,¹²⁵ then they must also adhere to the logical limitations of such a theory. When an actor voluntarily becomes intoxicated, thereby creating the risk of causing a death, for example, modern criminal codes will impute only the culpability of reckless homicide, not murder.¹²⁶ Although liability for reckless homicide is inadequate in the unusual case where an actor becomes intoxicated knowing or in-

125. Such analysis seems to be the basis for the now common felony-murder requirement that the underlying felony be one that is dangerous to life. The rule that requires that the death be causally connected with the felony also supports this analysis. In *Regina v. Serné*, for example, Judge Stephen argued:

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

16 Cox's Crim. Cas. 311, 313 (Central Crim. Ct. 1887) (emphasis added).

One might argue that strict liability and suspension of the concurrence requirement may also sometimes rely on the creation of dangerous situations. See *United States v. Balint*, 258 U.S. 250 (1922) (strict liability case relying on same rationale); *Thabo Meli v. Regina*, [1954] 1 W.L.R. 228, [1954] 1 All E.R. 373 (by engaging in conduct that he believed caused death, defendant created situation in which he subsequently caused death without required culpability); Wasserstrom, *supra* note 66, at 743 (certain instances of strict liability "can be interpreted as legislative judgments that persons who intentionally engage in certain activities and occupy some peculiar or distinctive position of control are to be held accountable for the occurrence of certain consequences").

126. See MODEL PENAL CODE § 2.08(2) (Proposed Official Draft 1962); accord authorities cited *infra* note 200. The Code imputes such culpability by rendering "immaterial" the unawareness of the risk of death if the actor was voluntarily intoxicated, see MODEL PENAL CODE § 2.08(2) (Proposed Official Draft 1962), even though such an awareness normally is required for reckless homicide, see *id.* § 2.02(2)(c); *id.* § 210.3 (1980). This negative formulation—"such unawareness is immaterial"—is deficient because it fails to specify what the prosecution must prove.

tending that he will, in an intoxicated state, commit the offense,¹²⁷ conviction for reckless homicide generally is adequate for such lethal risk creation. If the felony-murder rule relies upon a similar theory of risk creation, how can it impute the culpability of murder rather than that of reckless homicide?

The answer may be that while the causal theory of risk creation does not fully explain liability for murder, that causal theory combined with another does. The felony-murder rule may in fact combine the causal theory of the dangerous situation—which accounts for the actor's liability for reckless homicide—with the culpability of the underlying felony (e.g., bank robbery) to produce a single "cumulative culpability" equal to murder.¹²⁸

While a theory of risk creation alone may suggest limiting liability to offenses requiring recklessness as to a result, it does not require limitation based on the identity of the actor who causes the harm once that situation is created. Just as the causal theory for intoxication should operate consistently whether the actor causes his own or another's intoxication, the doctrines based upon the causal theory of creation of dangerous situations should operate without regard to the identity of the person who actually causes the "accidental" harm or evil. For example, where the actor's responsibility derives from his conduct in culpably causing the circumstances in which an accidental killing occurs, as in felony murder, it should be irrelevant whether the immediate cause of the accident is his own faultless slip of the trigger or someone else's. Perhaps for this reason the felony-murder rule applies to killings by the defendant or by a co-felon, and in some jurisdictions, by a victim, an innocent bystander, or a policeman.¹²⁹

Similarly, the imputation of required elements under the complicity and

127. See *supra* pp. 641-42.

128. Cumulative culpability is discussed *infra* pp. 650-52.

129. See, e.g., *United States v. Carter*, 445 F.2d 669 (D.C. Cir. 1971) (killing of victim by co-felon), *cert. denied*, 405 U.S. 932 (1972); *People v. Cabalero*, 31 Cal. App. 2d 52, 87 P.2d 364 (1939) (killing of one co-felon by another); *Jackson v. State*, 286 Md. 430, 408 A.2d 711 (1979) (accidental killing of hostage by officer); *People v. Podolski*, 332 Mich. 508, 514, 52 N.W.2d 201, 203-04 (officer killed by bullet from another officer's gun), *cert. denied*, 344 U.S. 845 (1952); *Commonwealth v. Bolish*, 381 Pa. 500, 113 A.2d 464 (1955) (co-felon killed himself), *rev'd on other grounds*, 391 Pa. 550, 138 A.2d 447, *cert. denied*, 357 U.S. 931 (1958).

Some recent codifications limit liability to killings committed by co-felons. See ARK. STAT. ANN. § 41-1502(1)(a) (1977) (under circumstances manifesting extreme indifference to human life); N.Y. PENAL LAW § 125.25(3) (McKinney 1975); N.D. CENT. CODE § 12.1-16-01(3) (Supp. 1983); WASH. REV. CODE ANN. § 9A.32.030(1)(c) (1977).

Jurisdictions also divide over whether a felon should be held liable for felony murder where a co-felon is the victim. Compare ARIZ. REV. STAT. ANN. § 13-1105(A)(2) (Supp. 1983) (any person) with N.Y. PENAL LAW § 125.25(3) (McKinney 1975) (person other than a participant). If creation of danger is the rationale for felony-murder liability, the identity of the victim should be irrelevant. Cf. *Commonwealth v. Redline*, 391 Pa. 486, 137 A.2d 472 (1958) (ambiguous whether court limits liability on basis of identity of person doing killing, or on basis of victim, or on basis of the particular combination in that case—killer/police officer, victim/co-felon).

innocent-party-killing aspects of the felony-murder rule also depends on this causal theory: The actor may not satisfy the culpability or objective elements required for the offense, but he caused the circumstances in which the killing was likely to occur. He may not have intended the killing, but by engaging in an armed robbery with another he intentionally contributed to the creation of the circumstances that caused the killing by his co-felon or by an innocent party.¹³⁰

The same analysis appears in cases arising under the *Pinkerton* doctrine and the natural and probable consequence rule in complicity. In *Pinkerton*, Justice Douglas relied upon the causal responsibility language of complicity theory to justify holding each co-conspirator liable for offenses committed in furtherance of the conspiracy: "Each conspirator instigated the commission of the crime."¹³¹ Similarly, the natural and probable consequence rule relies upon a causal theory of risk creation on its face, as noted previously: The actor is liable for offenses when he creates the risk of the criminal result by his complicity in an underlying course of criminal conduct.¹³²

An analogous argument supports liability imposed under the doctrines of vicarious liability and organizational liability: An actor is liable for his contribution to the circumstances giving rise to the criminal conduct or result despite his lack of intent, knowledge, or recklessness, just as he is liable for causing prohibited conduct or results absent a culpable state of mind due to voluntary self-intoxication. Even in *Park*, where the causal connection was clearly attenuated, the Court relied upon this sort of theory to hold the president of a supermarket chain criminally liable for the presence of adulterated food in a company warehouse. Park may have been entirely ignorant of the violation, but it was by his own earlier inaction that the contamination occurred.¹³³

While each of these instances of imputed mental elements may have some foundation in a causal theory of risk creation, it does not follow that

130. See *Jackson v. State*, 286 Md. 430, 442, 408 A.2d 711, 718 (1979) (defendants "were just as much the cause of [victim's] death as if each had fired the fatal shot" where their actions exposed their hostages to gunfire). See generally J. HALL, *supra* note 63, at 274-81 (discussing causal theories for felony-murder liability).

131. *Pinkerton v. United States*, 328 U.S. 640, 647 (1946).

132. For example, in *United States v. Clayborne*, 509 F.2d 473 (D.C. Cir. 1974), the court upheld the accessory's conviction for second-degree murder, reasoning that: "The murder here was a natural and probable consequence of [the accessory's] actions which permitted Clayborne to fight with the decedent with his hands free and to shoot him with a loaded weapon." *Id.* at 481.

133. Chief Justice Burger stated:

[T]he defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and . . . he failed to do so. *The failure thus to fulfill the duty imposed by the interaction of the corporate agent's authority and the statute furnishes a sufficient causal link.*

United States v. Park, 421 U.S. 658, 673-74 (1975) (emphasis added).

each is justifiable in the form now applied by the courts. Using an actor's causal responsibility as the basis for imputation should require more than a showing of simple causal connection.¹³⁴ By analogy to complicity and to causing crime by an innocent, the defendant should also possess a minimum culpable state of mind as to the causal connection and the culpable state of mind required by the definition of the offense.

The doctrines imputing elements under a causal theory of risk creation generally require a minimum culpable state of mind as to the causal connection, although the required level of culpability sometimes drops to negligence rather than the purposefulness (or in some jurisdictions, knowledge) required under a complicity theory of liability. Under the *Model Penal Code*, for example, the imputation of a required mental state for "self-induced intoxication"¹³⁵ will apply whenever "the actor knowingly introduces into his body [the substances causing intoxication], the tendency of which to cause intoxication he knows or ought to know."¹³⁶ While this provision requires that the actor knowingly ingest the intoxicant, it permits imputation even when he is only negligent as to its intoxicating effect, that is, where he is only negligent in causing circumstances in which he may behave criminally without the requisite mental state.

Similarly, as the discussion of general causal theories shows, the felony-murder doctrine, the *Pinkerton* doctrine, and the natural and probable consequence rule in complicity require only negligence as to causing or contributing to the conduct of the perpetrator, at least where the doctrines are limited to foreseeable offenses. The doctrines of vicarious liability and organizational official liability often require no culpability as to causing or contributing to the perpetrator's conduct or as to causing the circumstances giving rise to the conduct, although in light of the relationship between the defendant and the perpetrator, or the defendant's position of responsibility in the organization, negligence may often be present in fact.¹³⁷

The second culpable state of mind requirement for general causal theories—proof of the culpable state of mind required by the substantive offense—does not have the same application under causal theories of risk creation because the rules and doctrines supported by these theories impute the required mental elements. However, where the theory supports the imputation of only some of the required mental states of the offense

134. See *supra* pp. 637–38 (relation to direct causal theories).

135. MODEL PENAL CODE § 2.08(2) (Proposed Official Draft 1962) (specifying circumstances under which it is immaterial that actor is unaware of risk because of self-induced intoxication).

136. *Id.* § 2.08(5)(b) (defining "self-induced intoxication").

137. See *infra* p. 657.

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charged, the prosecution should be obliged to prove those not expressly imputed.¹³⁸

4. *Substituting Equivalent Culpability*

Under *Model Penal Code* section 2.04(2), which codifies the doctrine of substituted mental elements, the culpable mental state required for an offense will be imputed to the actor if he had the culpable state of mind for another offense.¹³⁹ The doctrine of transferred intent can be justified under an analogous theory of substituting equivalent culpability: The intention toward the intended victim is taken as an adequate substitute for the required intention toward the actual victim.¹⁴⁰

138. In instances of involuntary intoxication, for example, the intoxication may negate only one of many required mental elements. The element negated by the intoxication will be imputed. Required mental states that are not present and whose absence is not caused by the intoxication should not be imputed, however, and their absence should provide a defense.

139. MODEL PENAL CODE § 2.04(2) (Proposed Official Draft 1962) (quoted *supra* note 21). The equivalency rationale for this imputation is evinced by the *Code's* mitigation of sentencing: "[T]he ignorance or mistake of the defendant shall reduce the grade and degree of the offense of which he may be convicted to those of the offense of which he would be guilty had the situation been as he supposed." *Id.* Arkansas, Hawaii, and New Jersey have adopted § 2.04(2). ARK. STAT. ANN. § 41-206(4) (1977); HAWAII REV. STAT. § 702-219 (1976); N.J. STAT. ANN. § 2C:2-4(b) (West 1982).

Other jurisdictions have adopted § 2.04(2) but have done so without adopting this sentencing provision. See KY. REV. STAT. § 501.070(2) (1975); ME. REV. STAT. ANN. tit. 17-A, § 37(3) (1983). The failure to adopt the mitigation-of-sentencing provision seems to undermine the justification for imputation. Several older, but still valid penal codes have provisions that appear to reach the same result. These codes define the attempt to commit a crime in a way so as "not [to] protect a person who, in attempting unsuccessfully to commit a crime, accomplishes the commission of another and different crime, whether of greater or less guilt, from suffering the punishment prescribed by law for the crime committed." CAL. PENAL CODE § 665 (West 1970); accord IDAHO CODE § 18-307 (1979); OKLA. STAT. ANN. tit. 21, § 43 (West 1958).

The doctrine of substituted mental elements, as embodied in § 2.04(2), might well be broad enough to include imputation covered by transferred intent and suspension of the concurrence requirement, since in both instances the actor intends to commit another offense, as § 2.04(2) requires. In the transferred intent case, A would be denied a defense under § 2.04(2) because he would have been guilty of an offense—murder of X—if the situation had been as he supposed. See MODEL PENAL CODE § 2.04(2) (Proposed Official Draft 1962). Similarly, in the suspension of concurrence case, A would be denied a defense to murder because he would have been guilty of an offense—abuse of B's corpse, *id.* § 250.10 (1980)—had the situation been as he supposed. *Id.* § 2.04(2) (Proposed Official Draft 1962). See generally Williams, *The Mental Element in Crime*, 27 REV. JUR. U.P.R. 193, 211-12 (1957-1958) (suggesting application of § 2.04 to cases of transferred malice). For a discussion of possible inconsistencies resulting from the apparent overlap of §§ 2.03 and 2.04, see *infra* note 151. One might argue, however, that § 2.03(2)(a) and (3)(a) apply only to mistakes as to a result, i.e., accidents, and that § 2.04(2) applies only to mistakes as to circumstance elements. See *infra* p. 648.

140. See *Tolen v. State*, 49 Ala. App. 353, 355, 272 So. 2d 279, 280-81 (1972) ("If a person, shooting at another, kills a third person, his guilt is the same as if he had killed the person for whom the shot was intended."), *cert. denied*, 289 Ala. 752, 272 So. 2d 281 (1973).

The equivalency doctrine explains provisions that define murder as an act done "with the intent to cause the death of a person other than himself, [whereby the actor] causes the death of that person or of another person." MICH. 2D PROPOSED REV., *supra* note 42, at § 2005(1)(a) (emphasis added); accord ALA. CODE § 13A-6-2(a)(1) (1982); ALASKA STAT. § 11.41.100 (1978); ARK. STAT. ANN. § 41-1502(1)(b) (1977); COLO. REV. STAT. § 18-3-102(1)(a) (1978); Criminal Code of 1961 § 9-1(a)(1), ILL. ANN. STAT. ch. 38, § 9-1(a)(1) (Smith-Hurd Supp. 1983-84); KY. REV. STAT. § 507.020(1)(a) (Supp. 1982); MINN. STAT. ANN. § 609.185(1) (West Supp. 1983); MISS. CODE ANN. § 97-3-19(1)(a) (Supp. 1982); N.Y. PENAL LAW § 125.25(1) (McKinney 1975); UTAH CODE ANN. §

Some writers have suggested that the language of section 2.04(2) is broad enough to cover the transferred intent cases,¹⁴¹ rendering unnecessary those parts of *Model Penal Code* section 2.03 that codify the doctrine of transferred intent.¹⁴² It is true that in the bad-aim case, typical of the transferred intent doctrine, there is an intention to commit an offense other than the one actually committed, as required by section 2.04(2). Nonetheless, it seems clear that drafters of the *Model Penal Code* did not intend any overlap between the two sections. Section 2.04(2) governs situations where "ignorance or mistake would otherwise afford a defense to the offense charged,"¹⁴³ while section 2.03 applies where "a particular result is an element of an offense"¹⁴⁴ and determines whether a result element is or is not established if "the actual result differs from that designed or contemplated"¹⁴⁵ or "from the probable result."¹⁴⁶ The former section concerns "mistakes"; the latter "accidents." The former imputes a circumstance element; the latter imputes a result element.¹⁴⁷

While the doctrines of substituted mental elements and transferred intent may not overlap, they are analogous. There is no apparent reason why the requirements for or results of imputation under analogous theories should differ when the imputed culpability applies to a circumstance rather than a result. Yet the doctrines do, perhaps inadvertently, impose different requirements and can generate different results.

Section 2.03 limits imputation to instances in which the actual result differs from that designed, contemplated, or risked "only in the respect that a different person or different property is injured or affected or that the probable injury or harm would have been more serious or more extensive than that caused."¹⁴⁸ This limitation attempts to assure a general equivalence between the culpability present and that imputed. In contrast, section 2.04(2) places no limitation on the "ignorance or mistake"—the culpability as to a circumstance—that may trigger imputation of the requisite culpability. While the literal language of the provision permits the actor's culpable mental state for *any* other offense to provide the basis for imputation, an equivalency theory of substituted culpability would require that the other offense entail generally similar culpability.¹⁴⁹

76-5-202(1)(c) (1978).

141. See Williams, *supra* note 139, at 211-12.

142. MODEL PENAL CODE § 2.03(2)(a), (3) (Proposed Official Draft 1962).

143. *Id.* § 2.04(2) (emphasis added).

144. *Id.* § 2.03(2), (3) (emphasis added).

145. *Id.* § 2.03(2)(a).

146. *Id.* § 2.03(3)(a).

147. For a discussion of the means for, and importance of, distinguishing conduct, circumstance, and result elements, see Robinson & Grall, *supra* note 10, at 706-09, 719-25.

148. MODEL PENAL CODE § 2.03(3)(a) (Proposed Official Draft 1962).

149. Such a limitation has been proposed elsewhere. See H. SILVING, CONSTITUENT ELEMENTS

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Section 2.04(2) does, however, reduce “the grade and degree of the offense of which [the actor] may be convicted to those of the offense of which he would be guilty had the situation been as he supposed.”¹⁵⁰ This reduction assures that the actor’s punishment will not exceed that prescribed for the offense for which the actor had the required culpability. If the offense contemplated is not broadly equivalent to that committed and charged, the actor’s liability will be reduced accordingly. Section 2.03, in contrast, has no similar mechanism to adjust the defendant’s ultimate liability when the contemplated and actual offenses are not equivalent. And although the stringent requirements of similarity of offenses of section 2.03 may be intended to assure the same degree of culpability as the corrective mechanism of section 2.04(2), the different approaches can generate different results.¹⁵¹ More importantly, a code arguably should adopt a single approach to such analogous provisions if there is a danger of disparate results. The problem, of course, is that without the conceptual framework of imputed liability it is considerably more difficult to see the strong analogy between a provision governing substituted mental elements for mistake defenses and a provision on causation that codifies the doctrine of transferred intent.

OF CRIME 373 (1967). The hypothetical cases given in the commentary to § 2.04(2) and its analogues in other jurisdictions support this suggestion. See Criminal Code of 1961 § 4-8(c), ILL. ANN. STAT. ch. 38, § 4-8(c) committee comments—1961 at 280 (Smith-Hurd 1972) (offense of same sort identified—arson of store intended; arson of dwelling mistakenly committed); MODEL PENAL CODE § 2.04(2) comment 2, at 137 (Tent. Draft No. 4, 1955) (same). The language is clearly broad enough, however, to cover cases the drafters could not have intended. For example, where an actor is charged with murder under a provision of the *Model Penal Code* dealing with knowing homicide, the language of § 2.04(2) would seem to deny a defense of mistake if the actor believed he was shooting at a tree stump and shooting at tree stumps was also unlawful. The commentary to § 2.04(2) as well as the illustrative hypothetical suggest that the section was not intended to cover such cases: “The doctrine that when one intends a lesser crime he may be convicted of a graver offense committed inadvertently leads to anomalous results if it is generally applied in the penal law . . .” *Id.*

150. MODEL PENAL CODE § 2.04(3) (Proposed Official Draft 1962). For jurisdictions adopting or failing to adopt this provision, see *supra* note 139.

151. For example, the defendant may shoot at and miss a civilian victim, but hit an on-duty police officer. A provision similar to § 2.03(2)(a) would impose liability for the more serious harm, injury of an officer (if the jurisdiction distinguishes between injury to an officer and injury to a private individual). Section 2.04(2), however, would limit the defendant’s liability to that imposed for shooting a civilian. Of course, where the defendant intended or risked a “more serious or more extensive” injury or harm, he is not likely to gain any benefit from the use of § 2.04(2), since the penalty for the harm intended or risked will probably be equal to or greater than that of the harm actually caused. *Id.* § 2.04(2).

There is a compelling argument against the application of § 2.04(2) to these problems of divergence: It applies only where the mistake “would otherwise afford a defense to the offense charged,” see *id.* § 2.04(2). Moreover, subsections (2)(a) and (3)(a) of § 2.03 foreclose a defense where there is a divergence between the actual result and the result intended or risked.

5. *Aggregating Culpability*

In some cases, imputation of the elements of a serious offense can be justified on a finding of equivalent culpability reached by aggregating the actor's culpability for two or more less serious offenses. Equivalency through cumulative culpability is illustrated by cases like *Thabo Meli v. Regina*, which suspend the usual requirement of concurrent action and intent. In *Meli*, the defendant struck the victim with the intent to kill him and subsequently dumped off a cliff what he believed to be the corpse, thereby causing the death of the victim without a present intention to do so.¹⁵² *Meli* arguably committed two separate offenses, attempted murder and negligent homicide (persons who throw bodies off cliffs are probably at least negligent as to causing death). The relation of the two offenses legitimates the aggregation of the two instances of culpability. The requirement of this relationship also avoids an unacceptable precedent: permitting such aggregation in all cases of multiple offenses. Indeed, courts often argue that two such related acts are a single course of conduct.¹⁵³ In any case, there is little dispute about the propriety of the result. "Ordinary ideas of justice and common sense" support the result¹⁵⁴ and confirm the general culpability basis of the underlying equivalency theory.

Applications of the doctrine of transferred intent, as in the bad-aim cases, present similar situations.¹⁵⁵ The actor is, by normal rules of paradigm liability, liable for two offenses: attempted murder of the person he misses and negligent or reckless homicide of the person he hits.¹⁵⁶ Using the notion of cumulative culpability, one may aggregate the culpability of these two offenses to impute to the actor the mental state required for murder. The propriety of such an accumulation is even more apparent in the transferred intent case than in the case of suspended concurrence be-

152. *Thabo Meli v. Regina*, [1954] 1 W.L.R. 228, [1954] 1 All E.R. 373.

153. The *Meli* and *Jackson* courts both rejected the defendant's suggested two-act analysis. *Thabo Meli v. Regina*, [1954] 1 W.L.R. 228, [1954] 1 All E.R. 373; *Jackson v. Commonwealth*, 100 Ky. 239, 38 S.W. 422 (1896). Both claimed that the defendant's acts must be viewed as one, indivisible transaction. *Thabo Meli v. Regina*, [1954] 1 W.L.R. at 230, [1954] 1 All E.R. at 374; *Jackson v. Commonwealth*, 100 Ky. at 265, 38 S.W. at 428. The approach is conclusory and unhelpful. In a different case, where there was more time between the acts, the "one-transaction" analysis would appear artificial. Ultimately, any transactional analysis of "living-cadaver" cases relies upon an assessment that, for unarticulated reasons, it is simply fair to treat separate acts as if they were a single series of acts or one transaction.

154. G. WILLIAMS, *supra* note 3, § 65, at 174. Although it is difficult to disagree with Williams' conclusion, it is more difficult to say why he is correct. Adverting to common sense fails to advance the argument against those who disagree.

155. See *People v. Forrest*, 131 Ill. App. 2d 70, 272 N.E.2d 813 (1971) (discussed *supra* note 19).

156. Shooting at a person probably creates a risk of death to others that is so unjustifiable that it constitutes negligence. G. WILLIAMS, *supra* note 3, § 49, at 134-36.

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cause the two offenses arise not just from what is arguably the same course of conduct but from what is indisputably the same act.¹⁵⁷

The same theory of cumulative culpability may also help explain felony-murder cases: The culpability for the underlying felony and for the killing—the latter being imputed under a causal theory of risk creation—are aggregated to support conviction for a higher degree of homicide than would be justifiable otherwise.¹⁵⁸ By demanding that the underlying felony contain a purpose other than the killing, the common law merger doctrine assures that the felony and the killing are independent harms and thus may properly be aggregated.¹⁵⁹

But if a cumulative theory is used to justify the aggravation of culpability in felony murder, an actor cannot properly be convicted of both felony murder and the underlying felony. The actor's conviction for murder takes into account his culpability for the felony. A number of jurisdictions, in fact, bar conviction for both felony murder and the underlying felony.¹⁶⁰ The failure of some jurisdictions to establish such a restraint either under-

157. Indeed, the "one act" analysis of transferred intent cases is so strong that where courts use an equivalency rationale, it tends to be more of substituted than cumulative culpability. See *Gettings v. State*, 32 Ala. App. 644, 646, 29 So. 2d 677, 680 (person, shooting at another but killing a third person, is as guilty "as if he had killed the object of his aim"), *cert. denied*, 249 Ala. 87, 29 So. 2d 683 (1947).

The fact that the two offenses stem from the same act may explain the development of the doctrine of transferred intent. The inseverable nature of an act suggests one offense in a system that tends to focus on conduct to determine the number of offenses. See, e.g., MODEL PENAL CODE § 1.07(1) (Proposed Official Draft 1962) (where same conduct results in commission of more than one offense, conviction for more than one offense is prohibited under variety of circumstances). But see Mannheim, *Mens Rea in German and English Law — II*, 17 J. COMP. LEGIS. & INT'L L. 246, 246-47 (1935) (discussing treatment of transferred intent cases under German law, where liability is based on two offenses—attempted murder and negligent homicide).

158. *People v. Cabalero*, 31 Cal. App. 2d 52, 87 P.2d 364 (1939) (discussed *supra* note 25; intent to commit robbery justified imputation of culpability for first-degree murder; law adds intent to kill to intent to commit felony); see also Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1384-85 (1979) (arguing that felony murder may be analyzed by treating felony and homicide as package and determining whether aggravation of penalties thus authorized is grossly disproportionate to actor's blameworthiness).

159. *People v. Burton*, 6 Cal. 3d 375, 388, 491 P.2d 793, 802, 99 Cal. Rptr. 1, 10 (1971) (while burglary with intent to assault may not form basis for felony-murder charge, armed robbery—crime with felonious purpose independent of homicide—may); *People v. Ireland*, 70 Cal. 2d 522, 539, 450 P.2d 580, 590, 75 Cal. Rptr. 188, 198 (1969) (felony murder does not apply when felony, such as assault with deadly weapon, is "integral part of the homicide"); *State v. Cook*, 560 S.W.2d 299, 304 (Mo. App. 1977) (underlying felony cannot be integral part of homicide). *Contra Baker v. State*, 236 Ga. 754, 756-57, 225 S.E.2d 269, 271-72 (1976) (court expressly rejected merger doctrine that prohibited felony-murder instruction where underlying felony is integral part of homicide). See generally 1 P. ROBINSON, *supra* note 2, § 103 (discussing merger doctrine).

160. See *United States v. Greene*, 489 F.2d 1145, 1158 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 977 (1974); *Sampson v. State*, 400 So. 2d 170 (Fla. Dist. Ct. App. 1981); *Frye v. State*, 37 Md. App. 476, 378 A.2d 155 (1977), *aff'd*, 283 Md. 709, 393 A.2d 1372 (1978); *People v. Wilder*, 411 Mich. 328, 308 N.W.2d 112 (1981); *State v. Hubbard*, 123 N.J. Super. 345, 303 A.2d 87 (App. Div. 1973).

For statutes that seem to preclude conviction for the underlying felony when the defendant has been convicted of felony murder, see COLO. REV. STAT. § 18-1-408(1)(a) (1978); MONT. CODE ANN. § 46-11-502(1) (1983); N.J. STAT. ANN. § 2C:1-8(a)(1), (d)(1) (West 1982); UTAH CODE ANN. § 76-1-402(3)(a) (1978); WIS. STAT. ANN. § 939.66(1)-(2) (West 1982).

mines the propriety of such multiple convictions or suggests that felony murder is justified under another theory.¹⁶¹

6. *Presuming Evidence of Required Offense Elements*

Evidentiary theories posit that a culpable state of mind or a certain objective element of an offense may be imputed rather than proven because additional facts suggest that these elements are indeed satisfied. Thus, efficiency and ease in prosecution may be promoted without unduly increasing the danger of convicting innocent persons.

The clearest instances of imputed objective elements based upon such an evidentiary rationale appear as statutory presumptions and as possession and status offenses. In a Tennessee case, for example, the defendant was charged with the offense of manufacturing whiskey.¹⁶² At trial the State relied in part upon a statutory presumption that established the objective elements of the offense from proof of possession or control of a still.¹⁶³ Apprehending an actor in the process of manufacture is difficult, and such a presumption provides an evidentiary advantage that compensates for such practical difficulties. It does not reject the significance of the required objective element of manufacturing whiskey, but rather relies upon the belief that usually where there is possession or control of a still, there is the required manufacture or attempt to manufacture. Indeed, in many such cases it is possible that the presumption is unnecessary: It is likely that, even without the legal presumption, the circumstances of possession and control themselves would lead the finder of fact to the conclusion that the presumption directs.¹⁶⁴

161. See, e.g., *Martin v. State*, 433 A.2d 1025 (Del. 1981) (because legislature intended to authorize separate convictions for felony murder and underlying felony, such convictions were permissible), *cert. denied*, 454 U.S. 1151 (1982); *State v. Crump*, 232 Kan. 265, 654 P.2d 922 (1982) (conviction for both felony and felony murder permitted); *State v. Harris*, 69 Wash. 2d 928, 421 P.2d 662 (1966) (rejecting doctrine of merger of underlying offense and felony murder). For a discussion of other theories supporting felony murder, see *infra* p. 663-65.

162. *Sesson v. State*, 563 S.W.2d 799 (Tenn. Crim. App. 1978).

163. *Id.* at 802-03. Numerous presumptions impute objective elements. See, e.g., N.Y. PENAL LAW § 265.15 (McKinney 1975) (every passenger of automobile in which firearm discovered presumptively guilty of possession of firearm); N.C. GEN. STAT. § 14-113.12 (1981) (presumption of forgery of financial transaction cards from fraudulent possession of such cards); S.C. CODE ANN. § 16-17-230 (Law. Co-op. 1976) (presumption of defacing flag from possession of defaced flag).

The doctrine of constructive possession also imputes objective elements. See generally Whitebread & Stevens, *Constructive Possession in Narcotics Cases: To Have and Have Not*, 58 VA. L. REV. 751, 761-62 (1972) (describing constructive possession as "a legal fiction used by courts to find possession in situations where it does not in fact exist").

Similarly, the rule of joint possession may render the issue of actual possession immaterial by imputing possession to all persons found in the proximity of contraband, i.e., in a room or a car. Comment, *Possession of Narcotics in Pennsylvania: "Joint" Possession*, 76 DICK. L. REV. 499, 508 (1972) (describing Pennsylvania cases on joint possession as reaching same result as New York presumption of possession of weapon in vehicle).

164. In *Sesson v. State*, 563 S.W.2d 799 (Tenn. Crim. App. 1978), federal agents observed Sesson

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This explicit use of possession to presume the objective elements of a manufacturing offense illustrates the implicit use of a similar presumption in possession offenses. Many possession offenses represent codified presumptions that where there is possession, there also probably exists the harm or evil that the possession offenses actually seek to prevent and punish. Possession of trace amounts of narcotics, for example, suggests past use or distribution of narcotics.¹⁶⁵ Possession offenses differ from statutory presumptions, however, in that they preclude a defendant's rebuttal of the presumption.

Offenses predicated on status similarly punish or prevent a harm or evil other than that explicitly provided in the formal objective elements of the offense. This is evident in "narcotics vagrancy statutes" such as that in *Ricks v. United States*.¹⁶⁶ The result in *Ricks*, using a status offense, is similar to those in cases charging possession of trace amounts of narcotics: Both vagrancy and possession permit the state to punish the use or distribution of narcotics, a goal that would otherwise be difficult or impossible to attain. A similar rationale supports equivalent uses of other status offenses, such as traditional vagrancy statutes designed to reach theft offenses.¹⁶⁷

An analogous evidentiary rationale supports a variety of statutory presumptions that impute mental elements: The *Model Penal Code*, for example, uses such a presumption in place of the traditional felony-murder

at the site of a still. To establish manufacturing, the state relied, in part, upon the presumption of manufacturing from possession or control of a still. When Sesson argued on appeal that there was no evidence that he was manufacturing whiskey, the court concluded that "[t]here could be no other logical conclusion but that he was manufacturing or attempting to manufacture whiskey." *Id.* at 802.

165. See *supra* p. 626. The evidentiary rationale underlying possession offenses seems to punish only past criminal behavior. Criminalizing possession to deter future criminal conduct, however, may be justifiable under a nonculpability rationale. See *infra* pp. 671-72.

166. 228 A.2d 316 (D.C. 1967), *rev'd*, 414 F.2d 1111 (D.C. Cir. 1968). In *Ricks*, the defendants were convicted of a status offense that punished one who: (1) is a narcotics user or has been convicted of a narcotics offense; (2) has no lawful employment or visible means of support; (3) wanders about in public places at late and unusual hours at night; and (4) fails to give a good account of himself. 414 F.2d at 1113 (citing D.C. CODE ANN. § 33-416 a(b)(1)(A), (C) (1967) (later repealed as unconstitutional)). The defendants had previously been convicted of narcotics offenses, had old and new needle marks on their arms, and had repeatedly been seen in the company of convicted prostitutes known to be drug users. 228 A.2d at 318-19. The defendants in *Ricks* criticized the use of the narcotics vagrancy statute as a "catch-all" designed to convict when no other offense could be proven. The trial court did not dispute the defendants' characterization of the statute but defended its usefulness in preventing and punishing past, planned, or attempted drug transactions that could not be proven. *Id.* at 322.

167. It appears that such status offenses are sometimes used less for evidentiary advantage at trial and more for an investigative advantage, as when a vagrancy offense is used to arrest a suspect for questioning. See Foote, *supra* note 58, at 625 n.65 (reporting obvious instances of such abuse of vagrancy statute). This use of vagrancy offenses permits charges for offenses that do not constitute a criminal harm or evil to further an investigation of unproven or even unknown crimes. This use of the substantive criminal law is inappropriate.

rule. The mental state required for a murder conviction is presumed when the death is caused in the course of certain felonies.

Strict liability offenses are the most common use of an evidentiary rationale for imputing mental elements.¹⁶⁸ In *Flynn v. Galesburg*,¹⁶⁹ for example, the defendant tavern owners were held liable for serving liquor to a minor; proof of knowledge of the age of the customer was not required.¹⁷⁰ The court reasoned that it was the defendants' duty to determine a customer's age. Thus, when the defendants' agent sold liquor to a minor, the sale raised the irrebuttable presumption that he did not investigate carefully enough.¹⁷¹ This reasoning assumes that the actor knows of his duty and is capable of performing it—the normal requirements for punishing an omission. Such assumptions are frequently valid under the circumstances in which strict liability is imposed.¹⁷²

Felony-murder statutes have similarly been justified on the theory that most killings during felonies are in fact intentional, knowing, or reckless under circumstances manifesting an extreme indifference to the value of human life.¹⁷³ This being true, it is argued, prosecutors may be spared the task of actually proving such culpability.

There is, then, an analogy between presumptions imputing elements of an offense, on the one hand, and possession offenses, status offenses, strict liability offenses, and felony murder, on the other. The analogy exists both in their common functions of imputing required elements of the true paradigm of the offense and in the evidentiary rationales used to support them. Given this, one may question why the constitutional infirmities that plague explicit presumptions do not also invalidate the less explicit codified presumptions.

The Supreme Court has held that a presumption, if employed, must be

168. See W. LAFAVE & A. SCOTT, *supra* note 15, § 31, at 218 (convictions for many strict liability crimes would be difficult if fault element were included); *People v. Vogel*, 46 Cal. 2d 798, 299 P.2d 850 (1956) (legislature omitted culpability requirement for bigamy to alleviate prosecutor's burden of proof, not to punish the blameless; defendant therefore permitted to establish a defense of reasonable mistake); *Commonwealth v. Smith*, 166 Mass. 370, 375-76, 44 N.E. 503, 504 (1896) (when particular fact implies knowledge of other elements of crime, or when actual knowledge is difficult to prove, preliminary fact may constitute crime). See generally Paulus, *Strict Liability: Its Place in Public Welfare Offences*, 20 CRIM. L.Q. 445, 449, 461 (1978) ("personnel in charge of enforcement rarely prosecute unless they find an element of fault . . . present in the offence," and thus in practice "the use of strict liability to prosecute morally blameless offenders is very rare").

169. 12 Ill. App. 200 (1883).

170. *Id.* at 201-02, 204.

171. *Id.* at 203.

172. "[Public welfare] offences presuppose a continuous activity, such as carrying on a business, so that (a) special skill and attention may reasonably be demanded, and (b) if the law is broken there will be a suspicion that it was a deliberate breach due to self-interest." G. WILLIAMS, *supra* note 3, at 235.

173. See MODEL PENAL CODE § 210.2 comment at 36-37 (1980). Jurisdictions that limit felony murder to enumerated felonies that are typically dangerous to human life take this position, see authorities cited *supra* note 43.

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rebuttable.¹⁷⁴ Further, a mandatory presumption—one that the factfinder must accept upon proof of the basic fact unless the defendant rebuts it¹⁷⁵—is permissible only if the evidence necessary to invoke the presumption “is sufficient for a rational jury to find the inferred fact beyond a reasonable doubt.”¹⁷⁶ The requirements of the codified forms of imputation, or the special conditions under which they apply, frequently satisfy this latter requirement. It is the likely connection between the proven fact (e.g., possession) and the inferred fact (e.g., manufacture, distribution, or use) that gives rise to the codified form in the first place. But none of the codified forms of imputation noted above satisfies the first requirement; all have the effect of creating irrebuttable presumptions. The possessor may not prove that he did not intend to manufacture, distribute, or use; the “narcotics vagrant” may not prove that he had no intention to buy, use, or sell narcotics; the strict liability offender may not prove that his conduct was faultless; and the felony-murder defendant may not prove that the killing was entirely blameless. Logic suggests that the constitutional principles limiting the use of explicit presumptions should apply to these analogous forms of imputation.¹⁷⁷

Doctrines relying upon evidentiary rationales for imputing objective or

174. *Sandstrom v. Montana*, 442 U.S. 510, 523 (1979); *McFarland v. American Sugar Ref. Co.*, 241 U.S. 79, 86 (1916).

175. *County Court v. Allen*, 442 U.S. 140, 161 (1979). In *Allen*, the majority distinguished mandatory and permissive presumptions. It defined permissive presumptions as those that leave the factfinder to reject or accept the fact proved as sufficient evidence of the fact presumed. *Id.*

176. *Id.* at 166; *cf. Sandstrom v. Montana*, 442 U.S. at 524 (burden-shifting mandatory presumption unconstitutional because it may have been interpreted to require defendant to rebut presumption by preponderance of evidence without also requiring analysis of relationship between proved fact—a voluntary act—and presumed fact—that one intends natural and probable consequences of his voluntary acts); *Mullaney v. Wilbur*, 421 U.S. 684 (1975) (burden-shifting presumption, rebuttable by preponderance of evidence, held unconstitutional for failure to analyze relationship between fact proved—intentional homicide—and fact presumed—intentional killing with malice and absent provocation); *Sheriff v. Boyer*, 97 Nev. 599, 637 P.2d 832 (1981) (mandatory presumption of embezzlement from failure to return rented vehicle 72 hours after lapse of rental agreement unconstitutional under *Mullaney*). Permissive presumptions, *see supra* note 175, are not viewed as shifting the burden and the validity of such presumptions is evaluated under less stringent tests. *See Sandstrom v. Montana*, 442 U.S. at 519 & nn.8–9 (noting that line of cases would have been relevant if instruction had merely permitted jury to find that one intends natural consequences of voluntary act). Similarly, where the presumption may be rebutted by introduction of minimal evidence, the presumption is tested under the less stringent rules applied to permissive presumptions. *See County Court v. Allen*, 442 U.S. at 166–67 nn.28–29. In *Allen*, the Court split over the appropriate test for the validity of permissive presumptions. The majority held that such presumptions are valid if the jury could rationally find the presumed fact. *Id.* The dissenters argued that permissive inferences are valid only if the presumed fact is more likely than not to flow from the proven fact. *Id.* at 172 (Powell, J., dissenting). On the effect of an invalid presumption, *see Connecticut v. Johnson*, 103 S. Ct. 969 (1983) (plurality and dissent split over whether *Sandstrom* instruction could ever constitute harmless error).

177. It would seem absurd to think the legislature would be free to dispense with a culpability element entirely but not be free to presume the same element. If this were so, the California bigamy statute, discussed *supra* note 168, would be constitutional as written but unconstitutional as construed even though the latter provided a means for establishing faultlessness and the former did not. *See also supra* note 48 (irony of apparent unconstitutionality of MODEL PENAL CODE § 210.2 (1980), which allows a defendant to rebut a presumption of culpability as to a homicide committed during a felony).

culpability elements reflect a common legislative and judicial view that the effective operation of the criminal justice system has its limits, in the competence of the jury to draw the proper inference from the evidence before it, in the capacity of the trial process to present to the jury all pertinent evidence, or in the ability of an investigation to reveal all evidence necessary for full litigation of the existence of the required elements of the offense. These limitations are very real. Society must frequently choose between ineffective prosecution of dangerous offenders and unacceptably intrusive investigative methods or evidentiary advantages for prosecutors.

Unfortunately, the doctrines and rules generated by these choices often have broader ramifications than intended or desired. A rule that creates a presumption of a required element under circumstances that suggest that the element is present but cannot be proven—at least without violating personal liberties—can sometimes impute the element where the presumption is not in fact warranted. Such errors may be an inherent cost of all evidentiary shortcuts, but certainly they should be minimized where possible. Thus, we should prefer rebuttable presumptions to conclusive presumptions. Specifically, felony murder, possession, status, and strict liability offenses, and similar instances of conclusive presumptions, should formally express the definitional elements of the real harm or evil at issue, and defendants should have the opportunity to rebut the doctrines' presumption of the existence of these elements.

Still, we may have to accept some degree of error if we are to maintain the effectiveness of prosecution that the doctrines of imputation create. Some see conviction of a few innocent persons as the necessary price for conviction of the numerous guilty and dangerous persons who could avoid punishment without an overinclusive rule.¹⁷⁸ But in cases of clearly improper conviction, the evidentiary rationale loses the appeal gained by adherence to the culpability principle.¹⁷⁹

This balancing of interests is complex. The tendency may be to debate the value of increased deserved convictions as against the relative increase in erroneous convictions for each doctrine of imputation supported by an evidentiary rationale. Expansion or retraction of a rule of imputation, however, is not the only possible reform. If the need for effective prosecution is significant, as in instances of food adulteration, for example, it may

178. See *infra* note 244.

179. As argued previously, every use of an evidentiary rationale must rely in part on non-culpability rationales. See 2 NEW JERSEY CRIMINAL LAW REVISION COMM'N, THE NEW JERSEY PENAL CODE: COMMENTARY: FINAL REPORT OF THE NEW JERSEY CRIMINAL LAW REVISION COMMISSION 158 (1971) (conceding impossibility of determining how many felony-murder convictions were for homicides committed purposely, knowingly, or with extreme-indifference recklessness, but accepting rule in all but limited circumstances in belief that rule is effective deterrent); *supra* p. 622.

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be better to tolerate more intrusive investigative procedures rather than to tolerate more erroneous convictions.¹⁸⁰

7. Presuming Evidence of Complicity

The same evidentiary rationales that underlie the imputation of required offense elements also support a variety of other rules and doctrines, such as the complicity aspect of the felony-murder rule.¹⁸¹ Application here is different, however, since the presumption imputes not the elements of the substantive offense, but rather the elements of *complicity* in the substantive offense, such as assistance or encouragement. Such evidentiary presumptions also underlie the *Pinkerton* doctrine,¹⁸² the natural and probable consequence rule in complicity,¹⁸³ vicarious liability,¹⁸⁴ and liability of organizational officials.¹⁸⁵

In each instance, the group nature of the activity may conceal an actor's complicity in an offense. The private communications and tacit understandings possible in an ongoing relationship can hinder the proof of complicity and its required culpable state of mind. Prosecutors frequently use the special provisions supported by this evidentiary rationale to close the evidentiary gap.¹⁸⁶ Such use is subject to the same criticisms as the felony-

180. See generally 3 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 214-15 (1978) (discussing relaxed requirements for legal searches of heavily regulated industries).

181. For example, in *People v. Podolski*, 332 Mich. 508, 52 N.W.2d 201, cert. denied, 344 U.S. 845 (1952), the court affirmed defendant's conviction for felony murder by employing an evidentiary rationale to hold defendant liable for a death caused by a policeman during a gun battle. "When a defendant deliberately engenders an affray, deliberately using therein a lethal weapon, it must be considered to be within his intent that death should result from the affray as a natural and probable consequence of his acts, where the death is directly attributable to the affray . . ." *Id.* at 514-15, 52 N.W.2d at 204 (emphasis added).

182. The rules governing withdrawal from a conspiracy indicate the evidentiary rationale that underlies the *Pinkerton* doctrine. "[O]ne who has joined a criminal conspiracy can only effectively withdraw therefrom by some affirmative act bringing home the fact of his withdrawal to his confederates." *Loser v. Superior Court*, 78 Cal. App. 2d 30, 32, 177 P.2d 320, 321 (1947).

183. An evidentiary rationale seems particularly appropriate in a case like *Commonwealth v. Moyer*, 357 Pa. 181, 53 A.2d 736 (1947), where defendant and his co-felon "decided to go out and rob a filling station or someplace," *id.* at 183, 53 A.2d at 738, armed themselves and participated in a gun battle in which the gas station attendant died, *id.* at 184-85, 53 A.2d at 738-39. The defendant was convicted of first-degree murder under the natural and probable consequence rule. *Id.* at 190-91, 53 A.2d at 741-42.

184. In *Groff v. State*, 171 Ind. 547, 85 N.E. 769 (1908), the court justified imposition of vicarious liability upon a proprietor for an unlawful sale of oleomargarine by a store clerk whose employer was not present. The court refused to allow defendant's claim of non-authorization as a defense. The court believed that requiring the state to prove that the proprietor knew of, authorized, or consented to the sale under such a rule might allow proprietors "easy escape." *Id.* at 550, 85 N.E. at 770. The court also relied on the "community of interest" between employer and employee, *id.*, to infer that the employer "had [the illegal act] done by another." *Id.* at 552, 85 N.E. at 771.

185. See *United States v. Laffal*, 83 A.2d 871 (App. D.C. 1951) (error to dismiss information against president of corporation operating restaurant because there was probable cause to believe that corporation president knew of restaurant's illegal operation and either encouraged or permitted it).

186. As one court observed:

murder rule and possession, status, and strict liability offenses. The presumptions of assistance or encouragement are irrebuttable and serve to impute elements even in cases where the presumption may not be valid.

8. *Deterring Criminal Conduct*

Most criminal liability, including imputed liability, deters some criminal conduct. It usually does so within the confines of the culpability principle. As one writer suggests, while purely utilitarian grounds may justify the existence of a criminal justice system, principles of culpability are nonetheless appropriate to guide the assignment of liability within that system.¹⁸⁷ There are several situations, however, in which furtherance of the utilitarian goal of deterrence disregards principles of culpability¹⁸⁸ and many, if not most, of these instances involve imputed liability.

The most obvious case is strict liability. While evidentiary rationales explain many instances of strict liability—the actor is probably culpable even if his culpability is not proven—other instances are admittedly cases where the actor is not in fact culpable. The law imposes liability here largely to deter others who may contemplate criminal conduct or omissions.

The same rationale supports a variety of rules and doctrines imputing liability, including the rules governing voluntary intoxication, the aggravation and complicity aspects of felony murder, the *Pinkerton* doctrine, the natural and probable consequence rule in complicity, vicarious liability, liability of officials within an organization, status offenses, and possession offenses. The following explanation of felony murder is typical:

[T]o require from the state actual and positive proof of specific authorization or actual knowledge and acquiescence in a matter lying peculiarly within the secret knowledge of the two concerned in the offense, will effectually block most convictions and open the way for successful evasion through secret instructions and covert understandings.

Commonwealth v. Wolfe, 433 Pa. 141, 143, 249 A.2d 316, 317 (defendant liquor licensee convicted of violating statute prohibiting sale of liquor to minors, although not present at time sale was made), *cert. denied*, 395 U.S. 934 (1969).

187. See H. HART, *PUNISHMENT AND RESPONSIBILITY* 8-9 (1968).

188. The felony-murder rule (at least in its broadest forms) imposes liability where the actor may be faultless as to the resulting death; the purpose is deterrence. See *infra* note 237. Strict liability offenses, by definition, have this capacity; again, deterrence is the goal. See Wasserstrom, *supra* note 66, at 736-37. There are a few instances of rejection of the culpability principle in addition to instances of imputation. For example, a common modification of the duress defense that bars the claim of duress where the defendant is coerced to commit homicide, see, e.g., GA. CODE ANN. § 16-906 (1983); ME. REV. STAT. ANN. tit. 17-A, § 103-A (1983), has been explained as necessitated by principles of deterrence. See R. PERKINS, *supra* note 83, at 952; see also 2 J. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 107 (1983) (arguing against duress defense in all cases because where temptation to crime is strongest law should speak most emphatically). Several codes have rejected such limitations on the duress defense, on the ground that in some cases the coercive force may be more compelling than the best of us could resist and that under such circumstances the actor is not culpable. See MODEL PENAL CODE § 2.09 comment at 8 (Tent. Draft No. 10, 1960).

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[I]f experience shows, or is deemed by the law-maker to show, that somehow or other deaths which the evidence makes accidental happen disproportionately often in connection with other felonies . . . or if on any other ground of policy it is deemed desirable to make special efforts for the prevention of such deaths, the law-maker may [place such acts] under a special ban. The law may, therefore, throw on the actor the peril, not only of the consequences foreseen by him, but also of consequences which, although not predicted by common experience, the legislator apprehends.¹⁸⁹

Constitutional approval of a deterrent rationale for strict liability offenses might provide precedential support for its use in these other instances of imputed liability.¹⁹⁰ It is ironic, however, that while the Court has restricted the use of presumptions and other doctrines relying upon evidentiary justifications,¹⁹¹ it has approved the use of the more objectionable doctrines of imputed liability that rely upon deterrent rationales unrelated to the defendant's culpability. In its concern for precise procedural fairness, the Court may have lost sight of the more fundamental goal of ensuring a just result; justice often depends more on substantive than on procedural rules. Doctrines of imputed liability that disregard culpability do not require a procedurally improper shift of the burden of persuasion, but they engender what many consider a more objectionable substantive result by violating the principle of culpability.

C. *Significance of the Theory of Imputation for the Formulation and Application of Rules Imputing Liability*

A doctrine of imputation should be formulated and applied in a manner consistent with the theory that justifies it. Therefore, if alternative theories of imputation support a single doctrine, then the formulations of the doctrine, or the rules governing its application, should vary with the theory that supports it. This form of analysis—comparing alternative formulations of a doctrine with the alternative theories of imputation supporting it—either may serve as a basis for criticizing identical formulations supported by inconsistent theories, or may serve to support and explain apparently aberrational formulations of a doctrine. Such analysis is most revealing in the substantive law of six areas: voluntary intoxication; the aggravation of culpability in felony murder; the imposition of liability for the crimes of a confederate; strict liability; offenses of status and of possession; and liability for an omission.

189. O. HOLMES, *THE COMMON LAW* 59 (1881) (emphasis added).

190. See *United States v. Balint*, 258 U.S. 250, 254 (1922) (quoted *infra* pp. 669–70).

191. See *supra* pp. 654–55.

1. *Voluntary Intoxication*

The rules imputing liability in cases of voluntary intoxication have been rationalized under each of the theories for imputing liability. Under the most persuasive rationale—a causal theory—an actor causes his own criminal conduct by becoming intoxicated or at least creates a situation that risks such criminal conduct.¹⁹²

Both the cumulative¹⁹³ and substituted equivalency justifications are considerably less persuasive. Intoxication may sometimes be criminal or quasi-criminal¹⁹⁴ but it does not justify any accumulation of culpability. The substituted culpability theory is similarly unpersuasive because the culpability of becoming intoxicated is rarely of the same degree as the culpability being imputed to the actor. It is nonetheless frequently used. The drafters of the *Model Penal Code's* intoxication provision, for example, state:

We believe it fair to postulate a general equivalence between the risks created by the conduct of the drunken actor and the risks created by his conduct in becoming drunk. Becoming so drunk as to destroy temporarily the actor's powers of perception and of judgment is conduct which plainly has no affirmative social value to counter-balance the potential danger. The actor's moral culpability lies in engaging in such conduct.¹⁹⁵

Such unreasonable claims of equivalency¹⁹⁶ doubtless account for much of the suspicion that falls upon other imputations based on equivalency theories.

Equally unpersuasive are the evidentiary rationales that have been used to support the imputation, rather than the proof, of a required mental element under the rules governing voluntary intoxication. The commentary to the *Model Penal Code*, for example, also justifies its rule on voluntary intoxication by relying upon

the impressive difficulties posed in litigating the foresight of any particular actor at the time when he imbibes These considerations lead us to propose, on balance, that the Code declare that un-

192. See *supra* p. 639.

193. Aristotle refers to a rule by which the penalty for an offense is doubled in a case of drunkenness. ARISTOTLE, *supra* note 106, at 1113^b.

194. See R. PERKINS, *supra* note 83, at 888-92.

195. MODEL PENAL CODE § 2.08 comment at 9 (Tent. Draft No. 9, 1959).

196. For a critique of the *Model Penal Code's* equation of drunkenness with recklessness, see HAWAII REV. STAT. § 702-230 commentary at 234-35 (1976); P. BRETT, AN INQUIRY INTO CRIMINAL GUILT 193-95 (1963).

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awareness of a risk of which the actor would have been aware had he been sober be declared immaterial.¹⁹⁷

Deterrent rationales have also been offered: "The facts are commonplace—indeed so commonplace that their very nature reveals how serious from a social and public standpoint the consequences would be if men could behave as the appellant did and then claim that they were not guilty of any offence."¹⁹⁸ "[I]llogical as the outcome may be . . . [the rule on voluntary intoxication is necessary] for the purpose of protecting the community"¹⁹⁹

These alternative rationales for imputation under the rules governing voluntary intoxication can explain many of the differences in the formulations of the rules. The greatest differences exist in the degree of culpability imputed. Many jurisdictions, especially those following the *Model Penal Code*, limit the doctrine to imputing recklessness²⁰⁰ and limit its application to instances where the actor "would have been aware [of the risk] had he been sober."²⁰¹ Such limitations seem consistent with the equivalency and evidentiary rationales. Voluntary intoxication may be equivalent to the recklessness that this rule imputes. Similarly, proof of voluntary intoxication arguably provides a basis for presuming the hard-to-prove awareness of a risk that this rule imputes. Voluntary intoxication is clearly inadequate, however, to show an equivalency with or to allow the presumption of a higher level of culpability.

But under a deterrent rationale, a jurisdiction may well feel that imputing all levels of culpable,²⁰² or admitting only a few narrow exceptions,²⁰³

197. MODEL PENAL CODE § 2.08 comment at 9 (Tent. Draft No. 9, 1959). The argument has also been made in more sweeping form:

Many people get drunk but when honest people get drunk they do not go out and commit crimes. In other words, you could say if a person committed a crime while drunk he must have a criminal instinct in him because they say, as you probably know, that in a state of intoxication a person exhibits his true desires.

Heideman v. United States, 259 F.2d 943, 948 n.4 (D.C. Cir. 1958) (Bazelon, J., dissenting) (quoting trial court's statement to appellant's counsel refusing counsel's request that jury be instructed that intoxication could make it impossible for defendant to form requisite intent), *cert. denied*, 359 U.S. 959 (1959).

198. *Regina v. Majewski*, [1975] 3 All E.R. 296, 299, *aff'd sub nom. Director of Pub. Prosecutions v. Majewski*, [1976] 2 All E.R. 142.

199. *Director of Pub. Prosecutions v. Majewski*, [1976] 2 All E.R. 142, 146.

200. Several jurisdictions have adopted the rule of imputation set forth in MODEL PENAL CODE § 2.08(2) (Proposed Official Draft 1962). See ALA. CODE § 13A-3-2(b) (1982); CONN. GEN. STAT. § 53a-7 (1973); KY. REV. STAT. § 501.020(3)-(4) (1975); ME. REV. STAT. ANN. tit. 17-A, § 37 (1983); MO. ANN. STAT. § 562.076(1) (Vernon 1979); N.H. REV. STAT. ANN. § 626:2 II(c) (1974); N.J. STAT. ANN. § 2C:2-8 (West 1982); N.Y. PENAL LAW § 15.05(3) (McKinney 1975); N.D. CENT. CODE § 12.1-04-02 (Supp. 1983); OR. REV. STAT. § 161.125(2) (1981); UTAH CODE ANN. § 76-2-306 (1978). For treatment of other jurisdictions, see *infra* notes 202-04, 209.

201. MODEL PENAL CODE § 2.08(2) (Proposed Official Draft 1962).

202. Several jurisdictions attempt to bar intoxication as a defense regardless of the state of mind required by the offense. See *McDaniel v. State*, 356 So. 2d 1151 (Miss. 1978) (defense available only

or imputing all "general intents,"²⁰⁴ will provide greater deterrence than would imputing only recklessness.²⁰⁵ As is frequently the case, the deterrent rationale may become more attractive when marginal, possibly illusory, culpability exists, such as in the arguably immoral if not illegal conduct of voluntary intoxication.²⁰⁶

Pure causal theories for this doctrine are rare, as are formulations consistent with such a theory. As discussed above, a purely causal theory would suggest that the requirements for imputing liability under the doctrine of voluntary intoxication should be the same as the requirements for imposing liability for causing crime by an innocent²⁰⁷—i.e., the culpability required by the definition of the offense present at the time the actor becomes voluntarily intoxicated.²⁰⁸

if intoxication renders defendant an automaton); *State v. Vaughn*, 268 S.C. 119, 232 S.E.2d 328 (1977) (voluntary intoxication is defense only if it produces permanent insanity); DEL. CODE ANN. tit. 11, § 421 (1979); TEX. PENAL CODE ANN. § 8.04 (Vernon 1974) (evidence of voluntary intoxication only usable to mitigate penalty if intoxication produced temporary insanity).

203. See, e.g., *Commonwealth v. Cobb*, 379 Mass. 456, 405 N.E.2d 97 (exception only to mitigate first-degree murder if it renders defendant mentally incapable of deliberate premeditation), *vacated on other grounds sub nom. Massachusetts v. Hurley*, 449 U.S. 809 (1980); *Commonwealth v. England*, 474 Pa. 1, 20, 375 A.2d 1292 (1977) (intoxication lowers crime to lesser degree of murder but cannot reduce murder to manslaughter); *Hatcher v. Commonwealth*, 218 Va. 811, 814, 241 S.E.2d 756, 758 (1978) (drunkenness does not by itself render an actor incapable of forming requisite intent); NEV. REV. STAT. § 193.220 (1981) (intoxication admissible only on questions of specific intent); 18 PA. CONS. STAT. ANN. § 308 (Purdon 1983) (evidence of intoxication admissible where relevant to reduce murder from higher to lower degree); S.D. CODIFIED LAWS ANN. § 22-5-5 (1979) (when specific intent is required jury may take defendant's intoxication into account); *id.* § 22-16-6 (if design to effect death is shown, homicide will not be reduced from murder because of voluntary intoxication). For a comprehensive list of authorities, see 1 P. ROBINSON, *supra* note 2, at § 65(a).

204. *Varmedare v. State*, 264 Ark. 596, 573 S.W.2d 57 (1978) (state statute removing self-induced intoxication as a defense does not prevent defendant from showing that his drunkenness was of such a great degree that it negates specific intent); *Harris v. United States*, 375 A.2d 505 (D.C. 1977); *People v. Harkey*, 69 Ill. App. 3d 94, 386 N.E.2d 1151 (1979); *People v. Guillett*, 342 Mich. 1, 69 N.W.2d 140, 143 (1955); *State v. Fox*, 68 Ohio St. 2d 53, 428 N.E.2d 410 (1981); *State v. McGehearty*, 121 R.I. 55, 394 N.E.2d 410 (1978); CAL. PENAL CODE § 26(b) (West Supp. 1983) (specific intent, or premeditation, deliberation, or malice aforethought required where specific intent crime is charged); see 1 P. ROBINSON, *supra* note 2, at § 65(a) (comprehensive list of authorities).

205. See *State v. Stasio*, 78 N.J. 467, 396 A.2d 1129 (1979). There, the New Jersey Supreme Court reasoned: "The need to protect the public from the prospect of repeated injury and the public policy demanding that one who voluntarily subjects himself to intoxication should not be insulated from criminal responsibility are strongly supportive of [our rejection of voluntary intoxication as a defense to all specific intent crimes]." *Id.* at 474, 396 A.2d at 1132. The court thus concluded that voluntary intoxication would only be admissible to negate the premeditation and deliberation required for first-degree murder. *Id.* at 482-83, 396 A.2d at 1136.

206. This rationale combines a crude and unpersuasive equivalency theory with a nonculpability deterrent rationale.

207. See *supra* pp. 640-42.

208. For example, the defense could be defined as follows:

(1) Evidence of intoxication, either voluntary or involuntary, may be admitted into evidence to negate a culpability element of the offense.

(2) Although an actor's intoxication negates the existence of a culpability element at the time of the offense, such element is nonetheless established if the actor satisfied such element immediately preceding or during the time he was voluntarily becoming intoxicated or at any time thereafter until commission of the offense, and the harm or evil that was intended, contemplated, or risked, as the case may be, is brought about by the actor's subsequent conduct

A few jurisdictions bar any imputation in cases of voluntary intoxication.²⁰⁹ The common explanation is that "intoxication at the time of the conduct alleged [ought to be treated] the same as any other evidence bearing on the defendant's conduct and state of mind."²¹⁰ These jurisdictions view barring admission of evidence of intoxication as unprincipled and illogical.²¹¹ But this reflects a mistaken belief that imputation of required elements is per se improper. It fails to recognize the analogy between imputation in cases of voluntary intoxication and undisputed instances of imputation.²¹² As this Article seeks to demonstrate, imputation of the elements of an offense is not itself improper; the objection is only to imputation that does not have a proper basis. Whether a basis is proper depends, first, upon the theories for imposing criminal liability on which the jurisdiction is willing to rely, and, second, upon the adherence of the doctrinal formulation to the underlying theory of imputation.

2. *The Aggravation of Culpability in Felony Murder*

Causal, equivalency, evidentiary, and deterrence theories have all been used to support the aggravation of culpability in felony murder. The variety of theories relied upon does much to explain the great variety of qualifications placed upon the doctrine.

The causal theories have been discussed previously: By committing a felony, the actor intentionally creates the risk of an accidental killing.²¹³ If this theory of creation of risk justifies the felony-murder rule, then it is appropriate to limit the rule's application to felonies that are in fact dangerous.²¹⁴ Logically, the defendant should also be liable for the death of any actor within the scope of the risk he creates, whether those killed are victims of the felony, innocent bystanders, police, or co-felons.²¹⁵

during intoxication.

209. See HAWAII REV. STAT. § 702-230 (1) (1976).

210. *Id.* § 702-230 commentary at 234.

211. *Id.*; see authorities cited *supra* notes 3-4.

212. See *supra* pp. 640-42.

213. See *supra* pp. 643-44.

214. For jurisdictions adopting this view, see authorities cited *supra* note 43. The requirement of an "inherently dangerous" felony does not, however, further this rationale where the dangerousness of the crime is assessed in the abstract, i.e., is grand theft dangerous, rather than in the context of the particular crime, i.e., is grand theft by a physician who recommends a life-threatening course of treatment to extract a fee dangerous. See *People v. Phillips*, 64 Cal. 2d 574, 414 P.2d 353, 51 Cal. Rptr. 225 (1966) (defendant's conduct in persuading child's parents to have her placed in defendant's care and to forego lifesaving surgery constituted grand theft, but such theft was not inherently dangerous enough to trigger felony-murder rule); see also *State v. Underwood*, 228 Kan. 294, 615 P.2d 153 (1980) (status offense of possession of firearm by convicted felon not inherently dangerous enough to serve as underlying felony).

215. For a summary of various positions on this issue, see *supra* note 129. In contrast, where an equivalency theory based on the "transfer" of culpability is used to support the felony-murder rule, liability depends upon the existence of transferable malice, and may well depend upon the status of

Under an equivalency theory of substituted culpability, the intention to commit the felony is transferred to the homicide as "the legal equivalent of and tantamount to' . . . a willful, deliberate and premeditated killing."²¹⁶ Imputation is also justified under an equivalency theory of cumulative culpability: The actor is held liable for a single felony-murder offense rather than for the underlying felony and the negligent or reckless homicide.²¹⁷ The choice between these equivalency theories affects the formulation of the imputed liability doctrine. A theory of substituted culpability requires only culpability as to committing a felony; the doctrine will apply even if the killing is entirely accidental.²¹⁸ Under a cumulative-culpability theory, however, there must be some additional culpability as to the killing to aggregate with the culpability for the underlying felony if the actor is to be liable for murder. Thus, under the latter theory, a jurisdiction is likely to require at least a negligent killing,²¹⁹ or to add restrictions that tend to limit the doctrine to situations where the killing is in fact negligent (e.g., restriction to dangerous felonies, to foreseeable deaths, or to deaths caused "in furtherance of" the felony).²²⁰

The equivalency-through-cumulative-culpability rationale for the felony-murder rule would also explain two other common limitations on the rule. The first limitation, the merger doctrine, prevents application of the felony-murder rule when the underlying felony is precisely the conduct causing death, such as an assault from which the victim later dies.²²¹

the killer. *See* *Wooden v. Commonwealth*, 222 Va. 758, 284 S.E.2d 811 (1981) (if killing of co-felon by victim was not done with malice, no malice can be imputed to defendants).

216. *State v. Thorne*, 39 Utah 208, 217, 117 P. 58, 61 (1911); *see also* *Wooden v. Commonwealth*, 222 Va. 758, 284 S.E.2d 811 (1981) (malice inherent in robbery provides malice prerequisite to finding that homicide was murder).

217. *See supra* p. 651.

218. *See* KAN. STAT. ANN. § 21-3401 (1981) (murder in first degree is killing "committed in the perpetration or attempt to perpetrate any felony") (emphasis added). *But see* *State v. Underwood*, 228 Kan. 294, 615 P.2d 153 (1980) (construing statute to require commission of inherently dangerous felony).

219. *See supra* note 44; *infra* p. 667.

220. *See supra* pp. 624-25. It can also be argued that even where the risk is small in terms of probability, the seriousness of the harm risked (death) and the grossly unjustified nature of the risktaking (the felony), transform even minor risk creation into negligence per se. *See* W. LAFAVE & A. SCOTT, *supra* note 15, at 210 ("test for reasonableness in creating risk is thus said to be determined by weighing the magnitude of the risk of harm against the utility of the actor's conduct"). Professor Williams suggests that the risk involved in taking one gun from a group of one million guns, only one of which is loaded, and firing it at another reasonable creature is unreasonable given the total absence of social utility in the conduct. G. WILLIAMS, *supra* note 3, § 26, at 59-61; *see* W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 31 (4th ed. 1971); *RESTATEMENT (SECOND) OF TORTS* § 291 (1965).

221. Blackstone's statement of the felony-murder rule suggests this limitation: "[I]f one intends to do another felony, and undesignedly kills a man, this is also murder." 4 W. BLACKSTONE, *supra* note 39, at *200-01 (emphasis added). The law of many jurisdictions today explicitly requires that the defendant engage in another felony distinct from the homicide itself. *See supra* p. 651. *See generally* Annot., 40 A.L.R.3d 1341 (1971) (application of felony-murder doctrine where felony relied upon is includable offense with homicide).

In such a case there is only one offense and thus no basis for accumulation. The requirement of an “independent felonious purpose”²²² and the “caused in furtherance” requirement ensure that the two instances of culpability are separate but related—the precise condition needed for accumulation. A second limitation, arising from concerns about double jeopardy, prohibits consecutive sentences—sometimes even multiple convictions—for both felony murder and the underlying felony. It reflects the notion that the felony-murder rule takes into account the actor’s culpability for the underlying felony, and that an independent sentence for that felony would punish the same offense twice.

An evidentiary justification for the felony-murder rule suggests restrictions that are similar to those discussed under causal theories. An evidentiary theory would justify a felony-murder rule under the argument that such killings probably are purposeful, knowing, or at least reckless under circumstances manifesting an extreme indifference to the value of human life. The creation of risk to life for the purpose of engaging in a felony manifests an actor’s indifference to the value of human life. Under such an evidentiary theory, the restrictions noted above,²²³ which focus liability on improper risk creation, are appropriate.

A deterrence theory, aimed simply at discouraging killings during felonies, suggests the fewest restrictions. It might demand that the killing be avoidable, on the ground that unavoidable (e.g., purely accidental) killings are not deterrable. But even this restriction is unnecessary if a general rather than special deterrence theory is used. Punishing any killing during a felony arguably serves the purpose of general deterrence by deterring other felons or by at least making other felons more careful to avoid risks of causing death. The only necessary restriction is the requirement that the killing occur “in the course of” a felony.²²⁴

3. *Liability for Crimes of Another*

Several forms of imputed liability hold an actor liable for the crimes of another: complicity, the *Pinkerton* doctrine, the complicity aspect of the felony-murder rule, the natural and probable consequence rule in com-

222. See *People v. Burton*, 6 Cal. 3d 375, 387, 491 P.2d 793, 801, 99 Cal. Rptr. 1, 9 (1971); *State v. Rueckert*, 221 Kan. 727, 734–35, 561 P.2d 850, 857–58 (1977); *supra* note 159.

223. See *supra* p. 664.

224. It is during this time that the general deterrent lesson is meant to apply. For jurisdictions imposing this requirement and an “in furtherance of” requirement, see *supra* note 45. A jurisdiction relying upon a nonculpability theory might well adopt some culpability-based restriction on the theory that general deterrence can be maintained with a lower risk of erroneous convictions if such restrictions are added. Still, nonculpability theory does not demand such restrictions. See *People v. Johnson*, 28 Cal. App. 3d 653, 104 Cal. Rptr. 807 (1972) (because felony-murder rule is designed to deter all killings, liability for accidental homicide committed during course of felony was appropriate).

plicity, vicarious liability, and liability of officials within an organization. Several theories have been used to justify each imputation. Under a causal theory—where the actor should be liable because he either directly caused the other's criminal conduct or created the dangerous situation in which the other's criminal conduct was more likely—a jurisdiction is likely to restrict these doctrines in a way that requires a strong causal connection to, and culpability as to causing, the criminal conduct. Causal theories would, for example, explain the common restrictions on the *Pinkerton* doctrine and the felony-murder rule that the offense be "in furtherance of" the group's enterprise²²⁵ and "reasonably foreseeable."²²⁶

Equivalency theories of cumulative culpability would also support these doctrines. The culpability inherent in the ongoing conspiracy or joint felony may be added to the recklessness or negligence as to the commission of an offense by a confederate, thereby justifying liability for the confederate's offense under the imputation doctrines of *Pinkerton*, the natural and probable consequence rule, and the complicity aspect of the felony-murder rule.²²⁷ Once that culpability has been accumulated, however, it no longer forms an independent basis for liability for the joint criminality.²²⁸ The punishment of such group criminality through punishment for a confederate's offense explains limitations barring consecutive sentences or multiple convictions for conspiracy and the object offense,²²⁹ for complicity in the substantive offense and complicity in another offense which was its natural and probable consequence,²³⁰ and for the underlying felony and a fel-

225. See, e.g., *supra* notes 23 (*Pinkerton*), 44-45 (felony murder).

226. This limitation is supported by dicta in *Pinkerton v. United States*, 328 U.S. 640 (1946), warning that:

A different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which *could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement*.

Id. at 647-48 (emphasis added). Even where this limitation is applied, however, the *Pinkerton* doctrine allows conviction for substantive offenses without satisfaction of either the actus reus or mens rea element of the substantive offense. The "reasonably foreseeable" limitation only requires negligence as to the substantive offenses committed by co-conspirators, and wherever the definition of the offense requires greater culpability, the culpability is imputed. See *United States v. Tilton*, 610 F.2d 302, 309 (5th Cir. 1980); *State v. Stein*, 70 N.J. 369, 360 A.2d 347 (1976) (defendant conspirator held liable for reasonably foreseeable consequences of conspiracy even though they were not in contemplation of conspirators at time of agreement). Several states have codified similar limitations. See MINN. STAT. ANN. § 609.05(2) (West 1964); TEX. PENAL CODE ANN. § 7.02(b) (Vernon 1974); WIS. STAT. ANN. § 939.05(2)(c) (West 1982); S. 1437, 95th Cong., 1st Sess. § 401(b)(2)-(3) (1977).

227. See *State v. Rosania*, 33 N.J. 267, 163 A.2d 139 (1960) (relying on defendant's contribution to armed robbery and circumstances indicating that defendant, who planned robbery, knew that innocent persons would be present and that guns would be employed; court concluded that in "such a situation" by "aiding in the robbery" he was as culpable as one who fired shot).

228. See *supra* pp. 651, 664-65.

229. See MODEL PENAL CODE § 1.07(1)(b) (Proposed Official Draft 1962); N.J. STAT. ANN. § 2C:1-8(a)(2) (West 1982); 1 P. ROBINSON, *supra* note 2, at § 84.

230. The natural and probable consequence rule is often applied to impute liability for a greater offense where complicity in the lesser offense is established but not punished. See cases cited *supra*

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any murder committed by a co-felon.²³¹ A causal theory, in contrast, would not support such multiple offense limitations.

A cumulative-culpability theory, however, does not justify doctrines in which the basis for the actor's liability for the crimes of another is not necessarily criminal in itself. Such doctrines include vicarious liability and liability of organizational officials.²³²

Evidentiary theories can also support the complicity aspect of felony murder.²³³ An evidentiary theory should foster rules that limit imputation to situations where the requirements of complicity are probably satisfied. For example, many states provide a special defense to the complicity aspect of felony murder if the accomplice:

(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.²³⁴

Without requiring proof of complicity in murder, such provisions provide a defense if the defendant can in effect prove that he was not an accomplice to murder. This approach, however, shifts the burden of persuasion to the defendant to negate elements essential to his liability as an accomplice—the culpable mental state as to assisting and encouraging the homicide, the requisite culpability as to the homicide, and the assistance and encouragement typically required to establish liability as an accomplice.²³⁵

note 24.

231. See *supra* note 160.

232. For example, where an employer hires an irresponsible worker, this is not an offense and this neglect should not be cumulated. There is evidence of cumulation, however, in certain offenses that require a failure to perform a duty imposed by law—at least where that failure is an offense. See statutes cited *supra* note 27.

233. See *supra* p. 657.

234. N.Y. PENAL LAW § 122.25(3)(a)–(d) (McKinney 1975). Because negligence requires an unreasonable lack of awareness of a risk, see N.Y. PENAL CODE § 15.05(4) (McKinney 1975), subsections (c) and (d) effectively excuse defendants who were not at least negligent as to the homicides. Accord ALASKA STAT. § 11.41.115(b)(1)–(4) (Supp. 1982); ARK. STAT. ANN. § 41-1502(2) (1977); COLO. REV. STAT. § 18-3-102(2) (1978); CONN. GEN. STAT. § 53a-54c(A)–(D) (1983); N.J. STAT. ANN. § 2C:11-3(a)(3) (West 1982); N.D. CENT. CODE § 12.1-16-01(3) (Supp. 1983); OR. REV. STAT. § 163.115(2)(a)–(e) (1981); WASH. REV. CODE ANN. § 9A.32.030(c) (1977).

235. For a discussion of these requirements, see *supra* pp. 637–38. For a discussion of the condi-

Courts have held this sort of burden-shifting device unconstitutional in many analogous instances of imputation.²³⁶

Finally, deterrence theories have been offered to support some of these doctrines as devices to discourage the underlying criminal conduct—conspiracy, complicity, or joint felonies—and to encourage all members of the enterprise to minimize further criminal conduct by other members.²³⁷ The first use—deterring the underlying conduct—has no application where the doctrine does not require underlying criminal conduct, as with vicarious liability and liability of officials within an organization. And where the underlying conduct is criminal, the doctrines are unnecessary because liability already attaches to that criminal conduct and thereby serves as a deterrent.²³⁸ The second use—deterring further offenses by other members—is the more persuasive justification. If all actors are strictly liable for homicides committed by their co-felons, they might police one another to minimize the dangers of negligent and accidental killings in the course of the felony. A deterrence theory for these doctrines leads to few, if any, restrictions.²³⁹ Thus, it seems likely that this is the theory relied upon in those jurisdictions that adopt the relatively unrestricted common law form of co-felon liability.²⁴⁰

tions necessary for such imputation, see Robinson & Grall, *supra* note 10, at 736–44.

236. See *supra* p. 655.

237. “The purpose of the felony-murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit.” *People v. Washington*, 62 Cal. 2d 777, 781, 402 P.2d 130, 133, 44 Cal. Rptr. 442, 445 (1965). *Callanan v. United States*, 364 U.S. 587 (1961) (dual convictions for conspiracy and for underlying offense), similarly concludes:

Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the *immediate aim of the enterprise*.

Id. at 593–94 (emphasis added).

238. In *Washington*, the State argued for imposition of felony-murder liability where the victim of the robbery killed defendant’s accomplice on the theory that the felony-murder rule is designed to deter robbery. 62 Cal. 2d at 781, 402 P.2d at 133, 44 Cal. Rptr. at 445. The court rejected the argument, stating that any deterrence of robbery derived from felony-murder liability would be haphazard at best. *Id.* The court concurred with Oliver Wendell Holmes’ assessment: “To ‘prevent stealing, [the law] would do better to hang one thief in every thousand by lot.’” *Id.* (quoting O. HOLMES, *THE COMMON LAW* 58 (1881)).

239. For an explanation of this conclusion, see *supra* note 224. But see *People v. Washington*, 62 Cal. 2d 777, 781, 402 P.2d 130, 133, 44 Cal. Rptr. 442, 445 (1965) (deterrence rejected as rationale for holding felon liable for death caused by third party).

240. Federal courts, for example, punish conspiracy on the basis of the harm of criminal combination. See *supra* note 237. They punish for both conspiracy and the offenses that are its object. *Id.* They apply the *Pinkerton* doctrine. See *supra* notes 23, 226. And they often apply the natural and probable consequence rule narrowly to allow a broad application of the *Pinkerton* doctrine. See *supra* note 226.

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4. *Strict Liability*

Strict liability, including vicarious liability and liability of officials within an organization, is frequently justified under causal, evidentiary, or nonculpability theories. A causal theory justifies strict liability because the defendants have created a dangerous situation. This theory holds that those who profit from engaging in potentially dangerous business ought to ensure the safety of others. "The requirements of foresight and vigilance imposed [by the duty to implement measures that ensure safety] are . . . perhaps onerous, but they are no more stringent than the public has a right to expect of those . . . whose services and products affect the . . . well-being of the public that supports them."²⁴¹

Under an evidentiary theory, the doctrines imposing strict liability are frequently limited so as to increase the likelihood that the defendant was at least negligent. Limiting strict liability to high-risk activities or businesses that require special skills or involve familiar hazards increases the likelihood that those involved are aware of the risks and hazards, can perform with the requisite skill, and, if a mishap occurs, are in fact negligent. Of such offenses Justice Jackson said: "The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect"²⁴²

Strict liability offenses²⁴³ and strict liability imposed under the doctrines of vicarious liability²⁴⁴ and liability of officials within an organization²⁴⁵ have also been justified under a deterrence theory. The rule under this rationale is "proceed at your own risk":

[The] manifest purpose [of strict liability for failure to comply with regulations] is to require every person dealing in [dangerous substances] to ascertain at his peril whether that which he sells comes within the inhibition . . . and if he sells the [dangerous substance] in ignorance of its character, to penalize him. Congress weighed the

241. *United States v. Park*, 421 U.S. 658, 672 (1975).

242. *Morissette v. United States*, 342 U.S. 246, 256 (1952).

243. As Professors LaFare and Scott have noted in explaining the rationale for strict liability offenses: "If the conduct to be stamped out is harmful enough, or if the number of prosecutions to be expected is great enough, the legislature may thus wish to make the absence of fault no defense, in order to relieve the prosecution of the task of going into the matter." W. LAFARE & A. SCOTT, *supra* note 15, at 222.

244. As Sayre has suggested with regard to instances of vicarious liability: "The law's aim is not reformatory, but almost exclusively deterrent, to prevent future repetitions of similar offenses." Sayre, *supra* note 79, at 720, 722.

245. The Court in *Park* observed of the statute imposing liability:

[I]n providing sanctions which reach and touch the individuals who execute the corporate mission . . . the Act imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur.

United States v. Park, 421 U.S. 658, 672 (1975).

possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided.²⁴⁶

The evidentiary and deterrence theories both support strict liability where the actor probably is at least negligent.²⁴⁷ In situations where the defendant is probably not culpable, the two theories suggest divergent results: An evidentiary theory would bar liability because of the absence of culpability, but a deterrence theory would impose it nonetheless.

Thus, causal and evidentiary theories, in their commitment to the culpability principle, appeal to fairness; a nonculpability theory, in its greater capacity for general deterrence, appeals to practicality. The tension between these goals explains the continuing controversy over the proper restrictions to be placed upon strict liability. In *Dotterweich*²⁴⁸ and *Park*, for example, the Supreme Court concluded that strict liability may be imposed only where the defendant stands "in a responsible relation" to the harm or danger.²⁴⁹ The restriction is a classic device in both causal and evidentiary theory, designed to establish causal responsibility through risk creation, or at least to increase the likelihood that an actor held liable is in fact culpable even though proof of his culpability is not formally required. Indeed, the dissent in *Park* characterizes the majority opinion as requiring proof of negligent risk creation:

As I understand the Court's opinion, it holds that in order to sustain a conviction under § 301(k) of the Federal Food, Drug, and Cosmetic Act the prosecution must at least show that by reason of an individual's corporate position and responsibilities, he had a duty to use care to maintain the physical integrity of the corporation's food products. A jury may then draw the inference that when the food is found to be in such condition as to violate the statute's prohibitions, that condition was "caused" by a breach of the standard of care imposed upon the responsible official. This is the language of negligence, and I agree with it.²⁵⁰

The causal theory explains another limitation imposed by the *Park*

246. *United States v. Balint*, 258 U.S. 250, 254 (1922).

247. *See Groff v. State*, 171 Ind. 547, 85 N.E. 769 (1908) (because distribution of impure or adulterated food is perilous to human life and health, one who sells any article interdicted by law does so at his peril, and impliedly undertakes to exercise whatever degree of care is necessary to secure compliance with law).

248. *United States v. Dotterweich*, 320 U.S. 277 (1943).

249. *United States v. Park*, 421 U.S. 658, 670-73 (1975); *United States v. Dotterweich*, 320 U.S. 277, 281, 285 (1943).

250. 421 U.S. at 678-79 (Stewart, J., dissenting) (contending that majority's position properly requires negligence as standard but improperly applies that standard in holding *Park* liable).

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Court. Liability may not be imposed where the defendant is “powerless” to prevent or correct the violation.²⁵¹ The causal theory requires proof of the defendant’s power to prevent or correct, not only to increase the likelihood of negligence but also to ensure that the defendant is held accountable only for dangers that he creates through his activity and has the power to avoid. As the *Park* Court summarized: “The theory upon which responsible corporate agents are held criminally accountable for ‘causing’ violations of the act permits a claim that a defendant was ‘powerless’ to prevent or correct the violation”²⁵² Neither an evidentiary nor a deterrence theory would admit such a claim; the evidentiary rationale would deduce “power to prevent” from responsibility, and a general deterrent rationale would consider such power—or its absence—irrelevant.²⁵³

5. *Status and Possession Offenses*

Status and possession offenses frequently punish harms other than those defined on the face of the relevant statute. An evidentiary theory, of course, supports such liability for an unproven harm or evil since circumstances suggest that the actor has committed or is about to commit the unproven act.²⁵⁴

Deterrence theories also have been used to justify status and possession offenses as a means of discouraging possible independent future crimes.²⁵⁵ In discussing a statute outlawing the possession of a blackjack, for example, one court showed that it was really concerned with future use, not current possession:

[T]here is impressed upon slung-shots [sic], sandbags, black-jacks,

251. *Id.* at 673 (majority opinion).

252. *Id.* (quoting *United States v. Wiesenfeld Warehouse Co.*, 376 U.S. 86, 91 (1964)).

253. There is little rationale for such restrictions in a jurisdiction relying upon a general deterrence theory. Yet the greater potential for convicting innocent persons increases the need for provisions barring imprisonment upon conviction under strict liability. See MODEL PENAL CODE § 2.05(2)(a) (Tent. Draft No. 4, 1955); *supra* p. 628 (discussing treatment of strict liability under current statutes).

254. See *supra* p. 653. Where the evidentiary rationale is used to support liability for future acts, it is imputing the elements of attempt.

255. For example, one court noted:

The obvious intent of the legislature in enacting . . . the vagrancy statute was to enable law enforcement officers to keep the streets clear, at late and unusual hours of the night, of those persons who, by reason of being bent upon serious mischief, theft, or burglary, have no visible or lawful business or mission in the locality

‘And their purpose is to subject persons whose habits of life are such as to make them objectionable members of society, to police regulations promotive of the safety or good order of the community in which they are found.’

State v. Grenz, 26 Wash. 2d 764, 770, 175 P.2d 633, 637–38 (1946) (quoting 66 C.J.S. *Vagrancy* § 2 (1934)), *appeal dismissed*, 332 U.S. 748 (1947). The reasoning applies with equal validity to possession offenses. See *infra* p. 672.

and metal knuckles the indubitable indicia of criminal purpose. To every person of ordinary intelligence these instruments are known to be the tools of the brawl fighter and cowardly assassin and of no beneficial use whatever to a good citizen or to society. The Legislature may take note of and act upon such common facts It follows that, if the beneficial use of a thing is entirely lacking or grossly disproportionate to its harmful use, the police power may absolutely prohibit its possession.²⁵⁶

As with strict liability, the major controversy here is whether the imputation inherent in status and possession offenses should rely on an evidentiary or a deterrence theory for support. The deterrence theory is more compelling here than in most other doctrines of imputation. Not only does liability generally deter possession by other potential felons, but it also helps prevent commission of the true harm sought to be prevented, "brawling," by the actor at hand. This theory supports broadly defined offenses of status and of possession to provide the greatest deterrent effect. Legislatures have apparently been heavily influenced by this theory and have enacted a host of such statutes.²⁵⁷

An evidentiary theory, in contrast, would suggest restricting liability to those cases where the defendant probably has committed or is about to commit an offense. The increasing demands for specificity in vagrancy statutes,²⁵⁸ for example, reflect such restrictions. By requiring more specificity, courts force the legislature to identify the real harm or evil it wishes to prevent and to state conditions that more closely relate to those harms or evils.²⁵⁹ Such specificity provides a stronger basis for presuming the elements of an offense or an attempt to commit an offense.²⁶⁰

6. *Liability for Omissions*

Cases that impose liability for an omission have sometimes been justified upon a causal theory. Indeed, such cases factually overlap with other instances of imputation governed by causal theories. Where an actor sets in motion, through another person or instrumentality, a force that then threatens a harm or evil that the actor has an opportunity to prevent, he is liable under either pure causation theory for directly or indirectly causing

256. *People v. Ferguson*, 129 Cal. App. 300, 304, 18 P.2d 741, 742 (1933).

257. See authorities cited *supra* pp. 626-28.

258. See *Kolender v. Lawson*, 103 S. Ct. 1855 (1983); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

259. The "narcotics vagrancy" statutes nicely illustrate this need for greater specificity. See *supra* p. 653.

260. See *Record Head Corp. v. Sachse*, 682 F.2d 672 (7th Cir. 1982); see also *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495-97 (1982) (drug paraphernalia statutes not overbroad when directed at stopping clearly illegal activity).

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the crime, or under a theory of omission for his failure to intervene following his creation of the danger.²⁶¹

Courts have analyzed omission cases as instances of direct causation even where the actor clearly makes no physical causal contribution. In *Palmer v. State*,²⁶² for example, the defendant failed to protect her child from beatings by her paramour. The court sustained the trial judge's conclusion that "her gross and criminal negligence was a contributing cause of [the child's] unfortunate death."²⁶³ In other cases, where natural forces are the physical cause of the harm, courts similarly impute the force and its effect to the actor. In *Territory v. Manton*,²⁶⁴ for example, the court held a husband liable for allowing his wife to freeze in the snow:

The very volition of the defendant which led him to refuse aid to his wife, when the law imposed the duty upon him to protect her, is transferred to the violence of the elements, and he is made to use their forces, and hence is responsible for the death they immediately caused.²⁶⁵

But use of such a causal theory to justify omission liability appears strained. Only in a purely legal sense is Manton "made to use" the forces of nature to cause the death of his wife. Such a causal analysis of omission cases, with its chains of cause-and-effect, can only be confusing where

261. In *Stephenson v. State*, 205 Ind. 141, 179 N.E. 633 (1932) (per curiam), *error dismissed*, 205 Ind. 194, 186 N.E. 293 (1933), for example, the defendant abducted, raped, and wounded a young woman. "[I]n great distress of mind and body," *id.* at 150, 179 N.E. at 636, she swallowed poison; he refused to help her and she died. The indictment charged murder by omission, owing to his failure to administer the antidote or call for medical help, and charged murder by commission, for causing her to become so distraught as to administer the poison by creating her great mental distress. *Id.* at 145-49, 179 N.E. at 635-36. Thus, the indictment reflected a pure theory of omissions, i.e., one might attribute imposition of the duty to act to defendant's creation of the situation. The indictment also reflected a causing-crime-by-an-innocent theory.

Altering the facts of *Stephenson*, one can see an overlap between omission and complicity. Suppose that the defendant had not rendered the woman irresponsible but that she nonetheless freely chose to end her life rather than bear the memory of her ordeal. In that case, the defendant's guilt might be analyzed under a theory of accomplice liability—he did not cause an innocent to commit suicide but rather aided and encouraged her suicidal act by committing a felony against her, the natural and probable consequence of which was, arguably, her suicide. Others have suggested an analytical similarity between cases which impose duties to act and those which impose accomplice liability. See S. KADISH, S. SCHULHOFER & M. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 626-27 (4th ed. 1983).

262. 223 Md. 341, 164 A.2d 467 (1960).

263. *Id.* at 353, 164 A.2d at 474.

264. 8 Mont. 95, 19 P. 387 (1888).

265. *Id.* at 107, 19 P. at 392. Similarly, in *State v. Williams*, 4 Wash. App. 908, 484 P.2d 1167 (1971), parents were convicted of manslaughter because they had failed to provide their child with medical care. Occasionally, a defendant's failure to take precautions against foreseeable dangers may subject him to liability for an omission when natural forces—such as fire or storm at sea—cause death that would not have occurred if the defendant had taken the necessary safety precautions. See *United States v. LaBrecque*, 419 F. Supp. 430 (D.N.J. 1976) (storm); *Commonwealth v. Welansky*, 316 Mass. 383, 55 N.E.2d 902 (1944) (fire).

"causation" means, if anything, something entirely different than it does in commission cases. Causation through an omission exists only in a technical "but-for" sense, not as a physical cause-and-effect.

Further, the but-for requirement has dramatically different effects in omission and commission cases. An actor may kill a child by commission by smothering it with a pillow, or by omission by not feeding it. The actor's failure to feed the child is, admittedly, a but-for cause of the child's death. The problem here, and with causation by omission generally, is that every other person in the world also satisfies the but-for cause requirement; "but for" the omission of every one of us, the child would not have died.

The but-for cause requirement is therefore nearly useless for determining liability for an omission. To identify who should be held responsible for the child's death by starvation, the law must instead rely upon the proximate cause (or "remoteness") requirement, the culpable state-of-mind requirements of the offense, and most importantly, the omission liability requirements of duty²⁶⁶ and of capacity-to-perform.²⁶⁷

One can avoid the misleading and strained analysis of causation theory by relying instead upon an equivalency theory. The failure to perform a duty of which one is capable is *as culpable* as causing the harm or evil by affirmative conduct. Liability for the omission to perform a duty lies "in the volitional element, the spiritual rebellion underlying and accompanying the omission."²⁶⁸ Thus, the culpability of the omission conforms generally with the culpability of a comparable affirmative act.²⁶⁹ While other explanations exist, the most common statement of the equivalency theory of omissions simply equates an act with the omission to perform a duty.²⁷⁰

266. See 1 P. ROBINSON, *supra* note 2, at § 87.

267. See *id.* at § 86.

268. Kirchheimer, *Criminal Omissions*, 55 HARV. L. REV. 615, 616 (1942). Bentham focuses on this culpability rationale for omissions when he argues:

A woman's head-dress catches fire: water is at hand: a man, instead of assisting to quench the fire, looks on and laughs at it. A drunken man, falling with his face downwards into a puddle, is in danger of suffocation: lifting his head a little on one side would save him: another man sees this and lets him lie. A quantity of gunpowder lies scattered about a room: a man is going into it with a lighted candle: another, knowing this, lets him go in without warning. Who is there that in any of these cases would think punishment misapplied?

J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 323 n.1 (2d ed. 1879).

269. One court explained: "Usually wanton or reckless conduct consists of an affirmative act . . . in disregard of probable harmful consequences to another. But where . . . there is a duty of care . . . wanton or reckless conduct may consist of intentional failure to take such care in disregard of the probable harmful consequences . . ." Commonwealth v. Welansky, 316 Mass. 383, 397, 55 N.E.2d 902, 909 (1944) (improper fire safety precautions resulting in many deaths).

270. For example, the Supreme Court of Delaware equated acts and omissions in this way: An act, lawful in itself, but negligently done, is an unlawful act . . . One apparently inactive is actually doing something, even though that something is the abstinence from doing something else that he ought to have done. Even sleeping is an efficient act, and may become the

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But it is rare that even this general equivalence of act and omission is explicitly stated.²⁷¹

Reliance upon an equivalency theory avoids the confusion of traditional causation analysis, and more properly focuses upon the duty and the capacity-to-perform requirements to determine whether the actor is as culpable as one who affirmatively causes the forbidden harm or evil.

III. SUMMARY AND CONCLUSION

The definition of an offense describes the elements normally required to hold an actor liable for the offense; it is that offense's paradigm for liability. Despite the absence of required elements of the definition, an actor may be held liable for the offense if a doctrine serves to impute the absent elements. Such a doctrine does not alter the definition of an offense but rather provides an alternative means of establishing the required elements, or at least an alternative means of treating the defendant *as if* the required elements were satisfied. For the most part, the principles underlying imputation reflect concerns beyond those of the offense at hand. A single doctrine of imputation may apply to a range of offenses or to all offenses. As a group, instances of imputed liability play as significant a role in criminal law theory as do general defenses.

Although they represent a single conceptual group, the instances of imputed liability rely upon a variety of different theories and rationales. The causal/equivalency/evidentiary/nonculpability structure used in this Article to distinguish these theories and rationales approximates our intuitive assessment of the rationales for imputation and provides the basis for a logical and consistent theoretical framework.

The resulting framework enables us to derive a series of practical implications. First, the conceptualization of imputed liability identifies several offenses that resemble codified forms of imputation. This perspective suggests both criticisms and justifications for such offenses. Second, the conceptualization permits comparative analysis of a host of doctrines that reveals unjustifiable inconsistencies and suggests necessary reforms. Fi-

object of penal prosecution when it operates to interrupt an act on the part of the defendant which the law requires of him with the penalty of prosecution for his disobedience

Failing to look when required by duty to look is likewise an efficient act.

State v. Benton, 38 Del. 1, 20, 187 A. 609, 617 (1937); see Regina v. White, [1871] 1 L.R.-Cr. Cas. Res. 311, 313 (opinion of Bovill, C.J.) (equating father's failure to remove child from street with act of abandonment).

271. Even the *Model Penal Code*, which defines "conduct" to mean "an action or omission," fails to give a justification for the equivalency in the Commentary to this definition and to the general omission provisions. MODEL PENAL CODE §§ 1.13(5), 2.01(3) (Proposed Official Draft 1962) (emphasis added).

nally, analysis of an instance of imputed liability in light of the alternative rationales that support it dictates rules that comport with those rationales.

The conceptual framework should also be useful whenever new issues of imputed liability arise. It can give an initial sense of how the issue fits into the larger picture. Such a perspective in turn can provide general insights into the nature of the rule at issue and, by inviting analogies to doctrines with a similar basis, can suggest new comparisons and analyses.

Some writers believe that "criminal law exhibits few unifying doctrinal patterns."²⁷² Any apparent theoretical framework is flawed, this view suggests, because it cannot reflect the complex dynamic considerations that really shape the doctrinal structure of the substantive law—"rules of procedure and evidence [as well as] social, economic, and political circumstances."²⁷³ This school of thought seems to question whether there should be a theory of criminal law.

I believe not only that unifying doctrinal patterns exist, but that the health of the criminal justice system depends upon discovering these patterns and using them to formulate principles of criminal liability that more closely comport with our collective notions of justice.²⁷⁴ This Article offers such a conceptual framework derived from doctrinal patterns in one area of criminal law. This analysis might prove wanting in practice, but such weaknesses are the stimulants for refinement. The process of discovery of doctrinal patterns, conceptual generalization, criticism, and refinement is, I believe, the most promising path to a rational, consistent, and inherently just criminal law.

272. Schulhofer, Book Review, 68 CALIF. L. REV. 181, 187 (1980).

273. *Id.* at 188. Similar views on the futility of discovering or organizing general principles of liability may also underlie criticism of the attempts to define criteria for mental responsibility and culpability. See P. BRETT, *supra* note 196, at 70-85.

274. As I have argued in more detail elsewhere, social, economic, and political circumstances are significant determinants of when criminal law doctrine will increase in sophistication and even of important details of its precise formulation. I believe, however, that there is a common intuitive sense that binds all people of Western societies. "That [intuitive] judgment may become more developed in an enlightened society, but it is not so fickle as to be a product of the current social context. Rather, it is a major contributor to that social context, manifested in the criminal law as well as other social institutions." Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815, 849 (1980). It is this common intuitive sense that I and others seek to approximate through the refinement of criminal law theory. I take others' belief that no fundamental doctrinal patterns exist only as evidence that the quest has suffered from neglect. American criminal law scholarship has now taken up the challenge. See G. FLETCHER, *supra* note 28; J. HALL, *supra* note 63.