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*Doctrines of Grading:  
What Degree of Punishment  
Is Deserved for One's  
Blameworthy Violation?*

A legal code's grading of the seriousness of a blameworthy violation appears in two forms: within offenses and between offenses. Within a general offense such as rape or theft, it is often the case that the code makes some distinctions about the differential seriousness of different kinds of rapes or thefts. Different levels of punishment are attached to these different intra-offense gradings. Also, different types of offenses are given different grades, reflecting the relative seriousness of rape as compared to theft, for example.

We have touched on the issue of grading within offenses already. The factors that establish the minimum requirements for criminalization and for liability, discussed in the previous chapters, provide the starting point for grading within an offense. They establish the requirements for the lowest grade of any given offense. The determination of higher grades of the offense then requires consideration of various other factors. Nearly all jurisdictions recognize several grades of homicide: negligent homicide, manslaughter (paradigmatically reckless homicide), and murder (intentional homicide). It is also common to distinguish even within these categories. Some jurisdictions may recognize two grades of murder and of manslaughter—first and second degree. Thus, first degree murder might be reserved for the most brutal forms of murder. Other offenses also have higher grades contained within their definitions, such as aggravated assault. Rape may have three or four grades—the term “rape” sometimes being used only in relation to the most serious of these grades.

A second sort of question involves what might be called “comparative grading” across different offenses. This requires judgments about the seriousness of a particular offense in comparison to other offenses. Murder intuitively seems a more serious offense than rape, which seems a more serious offense than theft, and so on, and the criminal codes recognize this by classifying murder as a higher grade

of offense than rape and rape a higher grade than theft, with a corresponding classification of each of the grades within each general offense.

Questions of offense seriousness and grading have become more important of late because of the move to standardize sentences by creating sentencing guidelines that judges must follow when they sentence convicted criminals. Factors that were once left to be considered by the sentencing judge in a highly discretionary judgment of how much punishment ought to be imposed are now articulated and given defined weight under modern sentencing guidelines. So, offense-grading principles, historically important in constructing criminal codes, have become important in the sentencing context.

The criminalization doctrines identify many of the most important factors in assessing the degree of punishment a person deserves—and thus what we might call the comparative grading of the offense—because they define the harm or evil of the offense. Interestingly, they frequently have done so by appeal to human intuition, although others have suggested that comparative grading is derivable from some more logical, less intuitive, analysis. Regardless of presumed source, it usually comes out that human safety is more important than the safety of property; intercourse with a 9-year-old is a more egregious wrong than intercourse with a 16-year-old. Assessing the relative seriousness of an offense requires an assessment of the relative value of the full range of interests protected by the criminal law. Criminal-law theorists have only recently attempted to formulate principles for determining the relative seriousness of violations, having relied previously on appeals to shared intuitions within the culture (see, e.g., Feinberg, 1984; von Hirsch and Jareborg, 1991).

The grading task for the code drafters, then, is twofold: to distinguish among distinct grades of an offense, specifying minimal requirements for the crime, and specifying the circumstances that will produce a more aggravated version of that crime; and also to put these individual crimes into some comparative relationship of seriousness. Many of the studies reported earlier in this book give a hint at the kinds of factors that are relevant to these tasks.

First, the greater the seriousness of the harm caused, the higher the grade assigned to the offense. “Seriousness” can be an intuitive notion, and people can differ on how “serious” a particular offense (like theft) is, but it is clearly a notion that occupies a central place in a person’s grading of offenses. Crimes in which life is risked or lost consistently receive more severe sentences than what we cannot help referring to as “lesser crimes.” As we saw in our study on offense culpability requirements (Study 8), people regard a sexual offense, in which an individual who did not consent to intercourse is raped, as more serious than setting fire to a dwelling (in which people could conceivably be harmed), and setting fire to a dwelling, in which a person could conceivably be harmed, as more serious than setting fire to a similar site that is uninhabited. Second, similar notions of seriousness define the grades within a category of offense. The risk-of-harm study (Study

2), for example, showed that subjects increase liability as the extent of the harm risked increases.

The operating principle used to grade between and within offenses appears to be the same: The greater the harm caused or risked, the greater the liability, all other things being equal. In Study 15, a study concerning sexual offenses, we show just how refined the community’s judgments can be in distinguishing among actions judged to be of different seriousness. We also show that the general principle of “greater harm means greater liability” applies as well to offenses, such as many sexual offenses, that are defined in terms of the depravity of the conduct rather than the harmfulness of the results of those actions.

A second powerful influence in grading is the person’s culpability level. Several studies in the previous chapters (and particularly Chapter 4) have demonstrated that greater culpability in producing a fixed level of harm generally means greater liability. For instance, recall that greater liability is assigned to the accomplice who has greater culpability as to the perpetrator’s offense or as to assisting a perpetrator (Study 9). Also recall the greater liability assigned to the individual who purposefully sets out to become intoxicated before he kills another, as compared to the individual who only knowingly or recklessly does so (Study 10). In Study 16, we refine that discussion with an investigation of felony murder, a doctrine frequently criticized as deviating from the normal principles of culpability. The study’s results suggest that the subjects make relatively refined judgments about culpability.

A third influence on grading is the actual presence of the harm or evil of the offense and the strength of the person’s causal connection to it. This is a related but distinct factor from the nature of the harm or evil noted previously. We said that, for instance, intentional killing is perceived as more serious than theft and is therefore graded more seriously. The point is that, within the realm of intentional killings, an actual killing is assigned more liability than an unsuccessful attempt to kill. The attempt study (Study 1) demonstrates this point. We refine this notion in this chapter by showing that resulting harm provides increased liability—but only if the harm is sufficiently causally connected with the person’s conduct. In Study 17, we present subjects’ reactions toward different causal connections to a resulting death, which indicate that the stronger the causal connection with a resulting harm, the greater the increase in liability because of that resulting harm. This result was signaled in the objective requirements of complicity study (Study 3). Complicity is a form of *causing* an offense perpetrated by another person. The complicity study suggested that the greater the degree of the accomplice’s causal contribution to the offense, the greater the accomplice’s liability.

A fourth contributor in setting a person’s ultimate punishment is the number of offenses for which he or she is to be punished. Consider the example of a headline which reads, “Burglar Who Committed 20 Burglaries Finally Caught.” Obviously whether the burglar actually did commit the twenty offenses requires judi-

cial determination, but suppose the system determines that the burglar did. Somehow this must be reflected in the sentence that the burglar receives. This goes somewhat beyond the issue of *offense* grading, but it is an essential part of setting the general range of punishment—the goal of the grading determination. In Study 18, we investigate a few of the basic principles involved in determining the range of punishment for multiple offenses.

#### STUDY 15:

##### THE SERIOUSNESS OF THE OFFENSE—SEXUAL OFFENSES

One of the major tasks of a criminal code is to identify the most significant factors that affect the seriousness of a criminal action and to define offenses in a way that incorporates these factors. Our first study in this chapter examines the grading of offenses within the category of sexual offenses. We selected these offenses because, intuitively, some of the judgments encased within some legal codes on these issues seemed “out of kilter” with the ways that ordinary people seem to think about these offenses in the 1990s.

Sexual offenses, as they are defined by the Model Penal Code (MPC, or “the Code”), are defined and graded around several central distinctions. For example, forms of forcible intercourse generally are treated as more serious than forms of consensual but unlawful intercourse, such as consensual intercourse with an underage partner. Within each of these groups (forcible and consensual intercourse), the Code adds several grading refinements and it is here that we think that the Code may contradict community standards. Forcible intercourse is deemed less serious if the victim is a voluntary social companion on the occasion of the crime or previously permitted the person sexual liberties [MPC § 213.1(1)]. Forcible intercourse is judged to be still less serious (indeed, is not a sexual offense but only simple assault) if the aggressor and the victim are married<sup>1</sup> or living together as married [MPC § 213.1(1) and (2)]. However, if the same forcible intercourse occurs between a homosexual couple living together as married, it is not judged to be as serious as rape, because the relationship between the parties is not given legal standing in the Code.<sup>2</sup>

Cases of consensual intercourse similarly are distinguished in seriousness according to several factors. Intercourse with a partner under the age of 16 (“statutory rape”) or with a mentally retarded female who is “incapable of appraising the nature of her conduct” is judged less serious than forcible rape but more serious than consensual intercourse by a female with a retarded male or consensual intercourse with a person who is in the person’s legal custody (such as a prisoner is to a jailer). It is a complete defense to several offenses, including statutory rape, that the victim previously engaged promiscuously in sexual relations with others [MPC §§ 213.1(1)(a) and (2)(b), 213.3(1)(a), 213.4(2) and (8), and 213.6(4)].

Our sexual offenses study sought to test the offense distinctions used in the Model Penal Code against the community’s views by presenting a series of sce-

narios, each of which embodies one of the Code’s distinctions. In this study, those who wrote the different scenarios allowed the circumstances of the scenarios to vary more widely than has been the case in many of the other studies, because they wanted the cases to have some overall plausibility. Thus, occasionally a code-community difference that we will report may be due to differences in scenarios other than the ones that are central to the legal issues that we are pursuing. When that is possibly the case, we will comment on it. The results of the study are described in Table 6.1.

The control case of “straight” rape involves a woman who is followed as she leaves her health club, forcibly detained in a deserted parking lot, and forced to have sexual intercourse by a man who threatens to kill her if she screams or resists him. Our respondents gave this act (Table 6.1, case 1, column *a*) a liability rating of 7.84, which corresponds to 13.4 years in prison. Examine next the case of the rape perpetrated by an individual who was out on a date with the woman, returns with her to her apartment, and rapes her there, the “date” case (row 2). The forcible intercourse mitigation that the Code recognizes for a voluntary social companion appears only as a slightly lower liability mean for that scenario than the control scenario, 7.26 versus 7.84 (9.4 years versus 13.4 years,  $p < .11$ ).

This interpretation of the difference is complicated by the fact that the readers perceive a higher, although not significantly different, degree of consent on the part of the woman to the intercourse in the date scenario and also attribute a higher degree of causation to her as well. (Examine Table 6.2, scenarios 1 and 2, columns *b* and *c* for these results.) In future research, a date rape versus a stranger rape comparison should attempt to create similar perceptions of consent and causation in both instances, and see if any reduction of sentence for the offender remains.<sup>3</sup> Still, one can say of these results that, even if the subjects see greater consent in the date context, they see it as having only a slight effect on liability, not such that would seem to support the grading difference assigned to the two cases by the Code. It may well be that our perceptions of the meaning of accepting an invitation to a date may have changed from those held at the time the Code’s drafters developed these rules. Perhaps the point to extract is that community standards can change over time, and legal codes might properly change with them. The hint of a discovered difference between the two cases, if it can be replicated in future studies, provides some support for the grading difference that the legal code assigns to the two cases, but even so the extent of the Code’s difference in its treatment between the two (maximum of life for first-degree versus maximum of ten years for second-degree offense) is much more of a difference than is justified in the subjects’ view.

In the next two cases, the rape occurs between people who have been cohabiting. The woman tells the man with whom she has been living (case 3) or to whom she has been married (case 4) that she is leaving him and does not want to see him anymore. The conversation takes place in their residence and she asks him to

TABLE 6.1 Liability for Sexual Offenses

Scenarios	(a) Liability	(b) % No Liability (N)	(c) % No Liability or No Punishment (N+0)	(d) Model Penal Code Result
<b>Forcible intercourse:</b>				
1. Stranger	7.84 <sup>a</sup>	0	0	1st-degree felony [§213.1(1)(a), rape]
2. Date	7.26 <sup>a,b</sup>	26	29	2nd-degree felony [§213.1(1)(a)&(ii), rape]
3. Live together	6.27 <sup>b,c</sup>	26	31	Misdemeanor [§2.11(1)(a), simple assault]
4. Married	5.68 <sup>c</sup>	53	66	Misdemeanor [§2.11(1)(a), simple assault]
5. Homosexual	5.58 <sup>c</sup>	53	66	2nd-degree felony [§2.13.2(1)(a), deviate sex by force]
<b>Consensual intercourse:</b>				
6. Statutory	2.29 <sup>d</sup>	18	55	3rd-degree felony [§213.3(1)(a), statutory rape]
7. Statutory— prior promiscuity	2.39 <sup>d</sup>	21	53	Complete defense [§213.6(3)]
8. Mentally handicapped female	1.97 <sup>d</sup>	34	63	3rd-degree felony [§213.1(2)(b), gross sexual imposition]
9. Mentally handicapped male	1.37 <sup>d</sup>	37	74	Misdemeanor [§213.4(2), sexual assault]
10. Female in jail	1.82 <sup>d</sup>	37	63	Misdemeanor [§213.3(1)(c), seduction]

Liability Scale: N=No criminal liability, 0=Liability but no punishment, 1=1 day, 2=2 weeks, 3=2 months, 4=6 months, 5=1 year, 6=3 years, 7=7 years, 8=15 years, 9=30 years, 10=life, and 11=death.

Note: Superscript letters indicate significance at the  $p < .05$  level by a Newman-Keuls test. Matching superscripts indicate means that are not statistically significantly different from each other. Means are compared within columns only.

TABLE 6.2 Subjects' Perceptions of Sexual Offenses

Scenarios	(a) "Actor Forced"	(b) "Victim Consented"	(c) "Victim Caused"	(d) "Victim Should Have Struggled More"	(e) "Victim Acted Morally Inappropriately"	(f) "Victim Capable of Consent"
<b>Forcible intercourse:</b>						
1. Stranger	8.18 <sup>a</sup>	1.37 <sup>c</sup>	1.82	2.55	1.47	
2. Date	8.13 <sup>a</sup>	1.87 <sup>b,c</sup>	2.47	2.97	1.89	5.37
3. Live together	7.79 <sup>a,b</sup>	2.32 <sup>b</sup>	3.95	2.97	2.87	5.55
4. Married	7.82 <sup>a,b</sup>	2.18 <sup>b</sup>	3.95	2.95	3.11	
5. Homosexual	7.00 <sup>b</sup>	2.26 <sup>b</sup>	3.50	3.97	3.76	
<b>Consensual intercourse:</b>						
6. Statutory	2.16 <sup>c</sup>	7.70 <sup>a</sup>	5.16		5.32	
7. Statutory—prior promiscuity	2.26 <sup>c</sup>	7.63 <sup>a</sup>	5.71		5.47	
8. Mentally handicapped female	3.05 <sup>c</sup>	6.95 <sup>a</sup>	4.05		3.37	
9. Mentally handicapped male	2.82 <sup>c</sup>	7.08 <sup>a</sup>	3.89		3.45	
10. Female in jail	2.57 <sup>c</sup>	7.22 <sup>a</sup>	3.86		3.89	

Key to column heads:

All statements were responded to on a scale where: 1="strongly disagree," 5="unsure," and 9="strongly agree."

(a) The actor forced the victim to have sexual intercourse with him.

(b) The victim consented to have sexual intercourse with the actor.

(c) The victim's behavior caused the actor's actions.

(d) The victim should have struggled harder to prevent what happened.

(e) The victim acted in a way that is morally inappropriate.

(f) The victim was capable of meaningfully consenting to sexual intercourse.

Note: Superscript letters indicate significance at the  $p < .05$  level by a Newman-Keuls test. Matching superscripts indicate means that are not statistically significantly different from each other. Means are compared within columns only.

sleep in a different room or at a relative's home. Angered, the man comes into the bedroom, and they begin fighting. Then the story returns to the core, in which the man forces the woman to have sex and threatens to kill her if she screams or resists. Notice that the rejection of the man creates the possibility that the respondents would perceive the rapist as in the grip of an emotion, and perhaps they reduce the liability assigned for that reason. With that in mind, let us examine the results.

Notice first that the respondents agreed that in this forceable intercourse case, the man forced intercourse on the woman—but agreed less enthusiastically than in the stranger and date rape cases (Table 6.2, column *a*). They also perceive (column *b*) a low degree of consent on the part of the victim—but significantly more consent than in the stranger rape case. This may provide at least a partial account of why the subjects' liability means for stranger rape (column *a* of Table 6.1, 7.84, or 13.4 years) and date rape (7.26, or 9.4 years) are noticeably higher than those for a couple living together (6.27, or 4.2 years) or for a married couple (5.68, or 2.4 years). But even with this possibility, the differences we found are not nearly so different as the Code provides when the aggressor and victim are married or living together: from first- or second-degree felony for rape of a stranger or date rape to a misdemeanor for forcible intercourse with a legal or common-law spouse (treated as simple assault, for which the maximum sentence is one year). This seems to us to suggest that a reexamination of the Code is in order.

If the Code regards forcible sexual intercourse between a couple who are married or living together as significantly less serious, this seems a judgment that is no longer in tune with the way people think. If the Code lowers the degree of the offense because the drafters were attributing an automatically higher degree of consent to the woman, this too seems inappropriate. Sadly, we have learned in the past few decades that spouses do batter, abuse, and rape their mates without regard for the lack of the victim's consent. The issue of consent is a judgment best left to the jurors who are privy to the details in each specific case.

The greatest difference between the Code's and the subjects' views of the forcible intercourse scenarios arises where the aggressor and victim are a homosexual couple living together. In this story (Table 6.1, case 5), the circumstances are the same as in the married couple story. One individual announces he wishes to end the relationship; angered, the other forcibly rapes him, threatening to kill him if he resists or screams. The subjects see the case as meriting essentially the same degree of punishment as that given in the case of forcible intercourse between a married couple (5.58 versus 5.68,  $p = ns$ ). The Code, in sharp contrast, treats the married heterosexual case as a misdemeanor (simple assault), not a sexual offense at all, and the homosexual case as a serious sexual offense (deviate sexual intercourse by force), a second-degree felony. Clearly, a good deal of the reason for this lack of difference is that our respondents see the case of rape within marriage as much more serious than does the Code. A further reason is that our respondents

are not assigning an increment in liability for the fact that the homosexual intercourse is "deviant" although the Code appears to.<sup>4</sup>

Disparities between the Code and the subjects also exist in the consensual intercourse scenarios. The two cases at issue here are the "statutory" and the "statutory with prior promiscuity" cases (Table 6.1, scenarios 6 and 7). In both, a 14-year-old girl initiates sexual intercourse with a 19-year-old boy. In the latter, she has a reputation for prior promiscuity. The Code gives a complete defense to the third-degree felony of statutory rape for the offender in the case of a victim's prior promiscuity, while the subjects see no significance in an underage victim's prior promiscuity (2.29 versus 2.39, column *a*). The mean sentence in both cases is a bit less than four weeks, and more than half of the subjects would assign no punishment. The respondents' reasoning here seems clear. Given the specifics of the case (that the girl is 14, near the age of consent, and initiates the intercourse, that the boy is 19, and that there is no suggestion of violence), the respondents do not regard the case as particularly serious whether or not there is prior promiscuity on the part of the girl. Notice that in these two scenarios—and these two only—the respondents tend to agree with the statement that the victim brought about the intercourse (column *c* of Table 6.2). They also agree strongly that she had consented to it (column *b*); a sensible judgment, since they were told that the girl had initiated it. However, note the sharp difference in the relatively lenient sentence that our subjects assign (2.29, or 3.8 weeks in jail) and the third-degree felony liability (a five-year maximum) that the Code assigns in the case of the individual who has intercourse with a nonpromiscuous 14-year-old girl. As we said earlier, the respondents do not see this particular case of statutory rape as serious.

The Code classifies consensual intercourse with an underage female and with a mentally retarded female as the same grade, and the subjects also consider the latter (case 8) as approximately equal in seriousness to consensual statutory rape. (The liability difference between the two cases is not statistically significant.) Here it is important that we say more about the specifics of the mentally handicapped case. The degree of mental retardation or mental handicap is probably perceived by our subjects as mild, since the mentally retarded woman is described as able to attend physical therapy sessions at a local health club, and the case description makes it clear that the handicapped individual initiates the sex act with the man. Our respondents clearly perceived (column *b* and *c* of Table 6.2) that these circumstances, taken jointly, warrant the inference that the handicapped individual tends to play a causal role in bringing about the intercourse and certainly "consents" to the intercourse.

In these circumstances, the respondents do not view the male's participation in this case of intercourse as particularly blameworthy. This does not mean that people will never see intercourse with a mentally handicapped person as serious; another set of circumstances would probably lead to an inference of more serious wrongdoing. For instance, one would expect that a person who is extremely men-

tally retarded would not be perceived as able to give meaningful consent to intercourse. However, the results do suggest that people are capable of making quite nuanced judgments in this area and resist seeing statutory rape or intercourse with a mentally handicapped person as always being as serious as a third-degree felony.

One obvious limitation on our results ought to be mentioned here; in our case of consensual intercourse with an underage person, the underage person is a 14-year-old teenager and is likely to be seen by the respondents as fairly adult in her decision-making capacities. Were the victim to be younger, one would expect that the subjects would see the offense in a more serious light. (So would the Model Penal Code; if the victim is less than 10 years of age, the Code moves the grade up to the same grade as for forcible rape of a stranger—first or second-degree felony [MPC § 213.1(1)(d)]. Similarly, the mentally retarded person also seems to be perceived as competent enough to give consent. However, the contradiction between our respondents' judgments on these two cases and the Code remains. The consensual statutory rape cases we presented—of the teenage girl or the mentally retarded individual—are cases that represent classes of cases that receive different treatment by our respondents than they are assigned by the Code. We will return to a discussion of what this suggests.

Turning to a comparison of cases 8, 9, and 10, in the mentally handicapped male case (scenario 9), a female has sexual intercourse with a mentally handicapped male under the same circumstances as the previously described case in which the male has intercourse with a mentally handicapped female (scenario 8); and in the "female in jail" case (scenario 10), a female prisoner has sexual intercourse with one of the guards. The guard has supervisory responsibility over the woman, but there is no suggestion in the scenario that he has used his power to coerce the woman into intercourse (she consents to it). The Code finds differences between these three cases. Under the Code, consensual intercourse with a mentally retarded female is classed as a third-degree felony, while the same conduct with a mentally retarded male or with a person for whom the offender has custodial supervision is a misdemeanor. The subjects, in contrast, do not distinguish significantly between these three forms of consensual intercourse (mentally retarded male, mentally retarded female, and person in custody). Nor do they assign significant sentences to any of them; all persons receive a mean sentence of less than two weeks in jail, and approximately between two-thirds and three-quarters of the respondents assign no jail term at all.

In these three cases, the respondents see the victim (or perhaps we should say the "victim") as giving consent to the intercourse. As an examination of the ratings in the "consent" column for these cases reveals, in all of these cases the respondents agree (Table 6.2, column *b*) that the "victim" has consented to the intercourse. An underlying issue here (that code drafters might raise) is the degree to which the consent is freely and competently given—that is, perhaps a reason-

able person's interpretation of the perceptions of the perpetrator on this issue of consent. The legal code may treat other cases involving prisoners or mentally handicapped individuals differently because it regards those cases as involving a lower degree, or otherwise flawed case, of consent. If this is so, then code drafters might consider making the degree and quality of consent the explicit focus of the judicial inquiry rather than imputing different degrees of consent to the different categories of sexual offenses. Alternatively, this may be one of those cases in which there is a reasoned set of valid considerations for having the legal code contradict the intuitive judgments of respondents, in which case it would be useful to articulate those considerations.

Another important aspect of the results is that some major differences appear in punishment assignments between groups of our subjects. More specifically, the results reflect a dramatic disagreement in the amount of punishment imposed in the consensual intercourse scenarios. A majority of subjects would impose no punishment in any of scenarios 6 through 10 (see column *c* of Table 6.1). Our examination of the distribution of punishment given by the subjects suggests two distinct camps of opinion among the subjects. While a majority of subjects impose no punishment, the subjects that do impose punishment impose liability in the 4 to 6 range (4 = 6 months; 6 = 3 years); no one in the study assigned punishment in the in-between range of 1 to 3. One would have expected more sentences in this range if the distribution was of the typical normal curve pattern.<sup>5</sup>

Obviously, this finding arises mainly from the cases in which the lower liability assignments were made. This is one of the few times in our studies that we have found a relationship that suggests that subsets of subjects see the situation differently. The grounds for this result will need to be addressed in future research. One obvious hypothesis, that males and females are seeing the situation differently, seems not to be the case.<sup>6</sup> A related possibility is that a small subset of our sample regards sexual congress with an underage or mildly retarded person as a serious offense while most others do not. Further research is needed to understand this difference and the possible attitudinal sources of it.

#### *Study 15: Summary*

The results of the sexual offenses study suggest that the subjects agree with some of the distinctions contained in the Code but not others. Of the scenarios tested, all forms of forcible intercourse are viewed by the subjects as more serious than any form of unlawful consensual intercourse. The subjects do not, however, recognize the Code's significant reduction in liability for forcible intercourse with a social companion, nor do they provide as much reduction as the Code does for forcible intercourse with a spouse. The Code defines a marital-like relationship of a heterosexual couple as receiving a greater mitigation than our subjects would grant in the seriousness of forcible intercourse. Yet, at the same time, the Code disregards a marital-like relationship of a homosexual couple, treating the offense

as if it is one between strangers, though our subjects would treat the case as analogous to that of a married couple. These differences between the Code and our subjects may reflect a change in public attitudes since the late 1950s, when the Code was drafted.

The subjects see as less serious than the Code does all forms of consensual intercourse, and most of the Code's distinctions in this area are not particularly significant to the subjects. In our respondents' view, consensual intercourse with someone under 16 years of age is seen as only slightly more serious than other forms of consensual intercourse. Contrary to the Code's rule, our subjects judge prior promiscuity of the underage partner as having no such mitigating effect, although there is the possibility that this is true because the sentence assigned the non-prior-promiscuity is so low as not to be much reducible. In the context of consensual intercourse as well, the distinctions that the Code uses—prior promiscuity of a statutory rape victim, female versus male mentally handicapped victim—and its more serious treatment of all forms of unlawful consensual intercourse may reflect public opinion as it was before 1962. More than three decades have passed since then, and public opinion has shifted. Even in the several years since this data was collected, state code reforms have nearly eliminated use of the Model Penal Code's spousal exception to rape as well as other traditional formulations of sexual offenses. Thus, state legislatures appear to have been sensitive to the changing public views revealed by these results and have reformulated their codes accordingly.

Another more complex explanation of the differences between the Code and the subjects' responses is that the Code standards were based on a mix of two considerations—first, assumptions about what the degree of consent was likely to have been, as inferred from the nature of the existing relationships between the two individuals; and second, notions concerning “a husband's rights” and the “unnaturalness” of any homosexual relationship. It would be useful, in future research, to see if individuals who differ on these attitudes also differ in their liability assignments to specific rape scenarios. But we would continue to suggest that it would probably be useful, to the degree to which codes were based on what seem to us to be outmoded notions, to revise the Code to reflect changes in community views. If codes are instantiating notions about what degree of consent is assumed to exist in different relationships, it might be better to deal directly with consent issues in the context of the specific trial rather than infer them from relationships.

Should the Code be drafted in terms of the ultimate issue of effective consent, rather than using substitutes for consent such as age, mental handicap, or position of power disadvantage? In an age in which sexual harassment is a commonplace issue, this is a remarkably timely question. Some might suggest that these objective substitutes are needed because a person uses them to know whether the partner is capable of, and in a position to, give effective consent. In

this way, we avoid punishing persons who are honestly mistaken about effective consent. But an alternative approach to protect these same persons from liability is available: to rely on culpability requirements to exculpate for a mistake. To be logically consistent, however, this might mean that the culpability requirement would need to be restored for statutory rape, for example, from which it frequently has been removed.

We have offered the suggestion that community standards about sexual offenses may have changed over the past few decades. Not all offenses are likely to be the subject of significant changes in public opinion, but a mechanism ought to exist that will detect such changes and signal a need for code drafters to reexamine the offense definitions. This is one important function of increased social science research on community views of criminal liability and punishment.

#### STUDY 16:

##### THE CULPABILITY OF THE PERSON—FELONY MURDER

One person causes the death of another. As common intuition suggests, the legal codes concern themselves with exactly how this came about and assign different degrees of liability depending on the answer. Specifically, the standard grading differences among homicides tie the degree of liability to the level of a person's culpability as to causing the death. As is familiar to the reader by now, a person who purposely or knowingly causes a death is liable for murder; one who recklessly causes a death is liable for manslaughter; one who negligently causes a death is liable for negligent homicide; and the grade of the offense in each instance is diminished.<sup>7</sup>

When an accomplice is involved in the homicide, similar considerations of culpability are used. Specifically, the culpability level of a *person who assists* the principal (an *accomplice*) as to causing another's death is determinative of the degree of liability. Like the principal, an accomplice who is purposeful or knowing as to the homicide is liable for murder; one who is reckless is liable for manslaughter; and one who is negligent is liable for negligent homicide.<sup>8</sup>

But for a certain kind of homicide—when the homicide occurs during the commission of a felony—the consideration of either the principal's or the accomplice's degree of culpability abruptly stops; any homicide of this kind is considered to call for the penalties assigned for murder. Most jurisdictions have a special doctrine, called the felony-murder rule, that holds a person liable for murder, without regard to his level of culpability as to causing the death, if that person causes the death in the course of a felony.<sup>9</sup> Thus, an offender's negligent killing that would otherwise be punished as negligent homicide is treated as murder if it occurs during a robbery.<sup>10</sup> A second aspect of the felony-murder rule applies this aggravation of culpability to accomplices as well. Thus, an accomplice in a robbery is liable for murder, although he assists a principal who is only negligent as to the killing and is himself (the accomplice) only negligent as to such a death.<sup>11</sup>

Initially, one intuitively sees the point of this. Assume I am robbing a bank and fire a warning shot into the floor, but I have used such a powerful pistol that the shot ricochets and kills some innocent customer to my surprise. The force of the claim that I have committed a more serious offense than negligent homicide is clear. I have created a situation fraught with danger and should pay the price when the potential harm is realized. Still, one also understands why the case is still distinguishable from intentional killing (murder) in a way that suggests lower liability.

The felony-murder rule is still broader in some jurisdictions, and it seems to move even farther away from our intuitions. Some jurisdictions hold felons liable for a death caused by an innocent person who resists the intended felony.<sup>12</sup> Thus, in the case in which a person who is being robbed draws a gun and accidentally kills an innocent bystander, the robbers are held liable for murder for the killing of the bystander by the robbery victim. A specific case will make the operation of the rule clear and also will help explicate why it causes us uneasiness. Two thieves have tunneled into a bank vault and are surreptitiously hauling away cash. Alerted by a silent alarm, two independent private security groups rush to the scene, each unaware of the other. In the confusion, a member of security force *A* shoots and kills a member of security force *B*. The thieves, neither of whom are armed, are charged with murder. Now clearly, the thieves created the occasion for the accident and are in some very basic and central way responsible for the outcome, but it does not seem intuitively obvious that the right decision is to assign them the same penalty we would assign a thief who shoots the security guard.

In some jurisdictions, the rule goes yet farther. It has been applied to both killings of an innocent and killings of one of the felons.<sup>13</sup> In this latter case, it is felony murder for the surviving robber if a robbery victim pulls out a hidden gun and kills one of the robbers in self-defense; that is, some jurisdictions hold surviving robbers liable for murder for the death of their fellow robber. Consider the case: I and my accomplice are stealing valuable property from a warehouse at night. A security guard approaches to apprehend us, and my accomplice unwisely attacks the guard while I cower in the corner. The guard shoots the accomplice, kills him, and I am charged with murder. Intuitively, this seems a bit severe.

It seemed severe to the Model Penal Code drafters as well. The Code drafters disapproved of the felony-murder rule, even in its most narrow form. They substituted an evidentiary presumption, rebuttable by the defendant, that if a killing occurs in the course of a felony, the felons are presumed to have caused the death "recklessly under circumstances manifesting an extreme indifference to the value of human life," which it defines as adequate culpability for murder [MPC § 210.2(1)(b)]. Commentators similarly criticize the felony-murder rule and have applauded the Model Penal Code's rejection of it.<sup>14</sup> Finkel (1990) has provided a forceful analysis of the complexities and apparent contradictions in the various courts' holdings in the felony-murder matter, and the degree to which the felony-

murder rule seems to contradict community sentiment. Both code drafters and commentators argue, in part, that the rule fails to accurately assess the felon's degree of blameworthiness. That is, they concur with what we would expect ordinary people's intuitions would be about the blameworthiness of the individual—who admittedly caused the state of affairs that led to the death but did so in ways that cause us to wish to distinguish that case from a prototypical case of murder.

Interestingly, this is one of the instances in which the code drafters and the commentators have had little effect on state criminal codes. The enduring popularity of the felony-murder rule is reflected in the fact that although more than over two-thirds of the states have recodified their codes to adopt the Model Penal Code's general structure, a majority have insisted on reinserting felony murder. Could this be because we misunderstand community standards about this issue? Does the community wish to impute the penalties for murder in the cases we have discussed? Or, might those legislators be wrong in believing that their constituents would insist on such a rule? Another perspective suggests itself. A broad felony-murder rule, while in some general sense unjust, is a useful additional deterrent that might make felons more careful during the commission of a felony, or better yet, might make them not commit the felony in the first place. Relatedly, it does give the prosecution a heavy weapon to bring into play during pretrial maneuvering on crimes in which a death has occurred; various individuals who have played some subsidiary role in a crime that has led to a death can be threatened with murder liability if they do not cooperate with the prosecution.

We will first examine the community view on the various possible instances in which the felony-murder rule could come into effect and then say more about the sources of the rejection of the Model Penal Code position.

Subjects in this study were presented with a variety of felony-murder scenarios and three control cases (Table 6.3). The control cases give us the baseline liability that our respondents assign for standard murder (scenario 1), for manslaughter (scenario 2), and for negligent homicide (scenario 3). The liability-punishment results in the felony-murder scenarios (cases 5 through 11) can then be compared to the three controls to determine which of those controls the subjects see each felony-murder scenario as more akin to, murder, manslaughter, or negligent homicide.

Look first at the control scenarios. In scenario 1, an individual deliberately purchases a gun and kills his best friend, at whom he is angry. The respondents, not unnaturally, see this as a case of deliberate murder (the culpability rating in column *d* is 1.64, with 1 = purposeful and 2 = knowing) and assign an average punishment (column *a*) to the killer of between life imprisonment and death. When an individual recklessly fires a gun at a noisy and drunken party in a nearby house (case 2), the offender is seen by our subjects as reckless (3.29, with 3 = reckless and 4 = negligent) and deserving of a penalty of 9.08, or approximately 30 years in prison. This, then, is the punishment we would expect if a person commits man-

TABLE 6.3 Liability for Felony Murder

Scenarios	(a)	(b)	(c)	(d)	(e)	(f)	(g)
	Principal Liability	Accomplice Liability	Defender Liability	Culpability of Principal	Culpability of Accomplice	Culpability of Defender	Legal Treatment Under Felony Murder Rule
1. Purposeful killing	10.39 <sup>a</sup>	10.39 <sup>a</sup>		1.64			Murder
2. Reckless killing	9.08 <sup>b,c,d</sup>	9.08 <sup>a</sup>		3.29			Manslaughter
3. Negligent killing	4.58 <sup>f</sup>	4.58 <sup>d</sup>		4.00			Negligent homicide
4. Purposeful shooter, purposeful co-felon, owner victim	10.11 <sup>a,b</sup>	9.56 <sup>a</sup>		1.43	1.54		Murder
5. Negligent shooter, negligent co-felon, owner victim	8.78 <sup>c,d</sup>	7.31 <sup>a</sup>		3.86	3.91		Murder
6. Purposeful shooter, Negligent co-felon, owner victim	10.08 <sup>a,b,c</sup>	6.92 <sup>b</sup>		1.76	3.83		Murder
7. Negligent shooter, purposeful co-felon, owner victim	8.53 <sup>d</sup>	9.11 <sup>a</sup>		4.00	2.19		Murder
8. Purposeful but innocent shooter, purposeful co-felon, felon victim	(killed)	5.25 <sup>c,d</sup>	0.69		2.11	1.97	Murder*
9. Purposeful but innocent shooter, negligent co-felon, felon victim	(killed)	4.97 <sup>d</sup>	0.67		3.71	2.11	Murder*
10. Negligent but innocent shooter, purposeful co-felon, felon victim	(killed)	5.39 <sup>c,d</sup>	0.51		1.89	3.69	Murder*
11. Negligent but innocent shooter, purposeful co-felon, owner victim	6.83 <sup>e</sup>	6.64 <sup>b,c</sup>	0.33	1.83	1.72	4.08	Murder*

Liability Scale: N=No criminal liability, 0=Liability but no punishment, 1=1 day, 2=2 weeks, 3=2 months, 4=6 months, 5=1 year, 6=3 years, 7=7 years, 8=15 years, 9=30 years, 10=life, and 11=death.

Note: Superscript letters indicate significance at the  $p < .05$  level by a Newman-Keuls test. Matching superscripts indicate means that are not statistically significantly different from each other. Means are compared within columns only. In addition, no subjects gave either No Liability (N) or Liability but No Punishment (0). The columns indicating (N) and (N+0) have therefore been left out of this table, as all percentages were 0. Culpability of principal (column d), accomplice (column e), and defender (column f) were scored on the following scale:

- 1 = The actor wanted to kill the victim (purposeful).
- 2 = The actor was practically certain that his conduct would cause the victim's death (knowing).
- 3 = The actor was aware of a substantial risk that the victim would be killed (reckless).
- 4 = The actor was not aware of a substantial risk that the victim would be killed but should have been aware (negligent).
- 5 = The actor was not aware of any substantial risk that the victim would be killed and a reasonable person in his situation would not have been aware of such a risk (faultless).

\*Only under the broader forms of the felony-murder rule, where the rule is applied to killings by nonfelons.

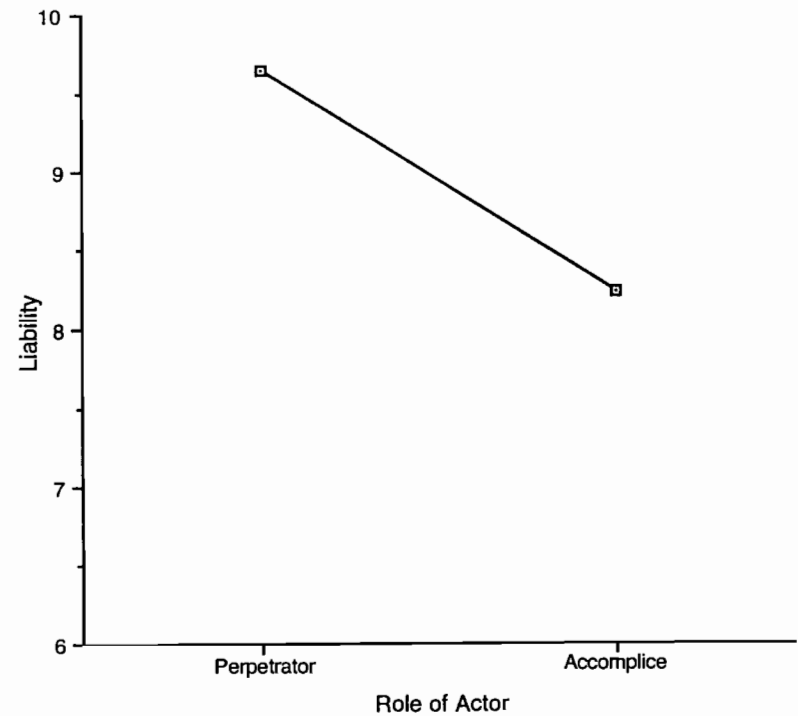
slaughter—the reckless killing of another person.<sup>15</sup> When the person fails to check on whether the gun is loaded and accidentally kills a friend (case 3), the respondents judge that he should have been aware of that risk and therefore was culpably negligent (their culpability rating was 4, and 4 = negligent) and assign punishment of 4.58 (9.6 months). These controls provide reference points against which we can evaluate the sentences assigned in the various felony-murder cases.

We next examine the felony-murder cases. Looking back, we see that we created a number of cases in which the differences between them, which are critical to our analysis, are quite difficult for the reader to understand. (And in retrospect, conceivably, quite difficult for the writers to understand as well.) For that reason, we will walk through them in some detail. Begin with cases 4 through 7, all of which share a common core. Two men set out to rob a liquor store, carrying guns. One or both of them plan to shoot the owner if he does not turn over the cash fast, or one or both do not plan to shoot the owner but simply plan to menace him with what they think is an unloaded gun. The owner is slow about turning over the cash, and one of the robbers, whom we have labeled the principal or “shooter,” shoots him. This is true even if the principal did not plan originally to shoot the owner. To go on in a slightly tedious fashion, this creates four cases in which the principal does shoot the owner: The principal did or did not plan to shoot the owner and the accomplice did or did not plan to shoot the owner. In the cases in which the person, whether principal or accomplice, did not plan to shoot the owner, we thought that he would be perceived as negligent with respect to causing death and perhaps draw a reduced sentence. For all of these cases, the felony-murder rule grades the offense as murder.

Look at the liability results for cases 4 through 7 (column *a*). There are a number of questions that we can ask of these data. Let us start with a relatively simple one. In each case, the perpetrator, purposefully or negligently, is the one that shoots the owner; the accomplice does not. Does this perpetrator-accomplice distinction make a difference in liability assignments given by our respondents?

As Figure 6.4 reveals, it does. The figure is made by simply averaging the four sentences given to the perpetrator and the four given to the accomplice in the four symmetric cases of scenarios 4 through 7. As can be clearly seen, the perpetrator receives a higher average sentence. The principal, even though he sometimes does not plan to do so, does pull the trigger and shoot the owner; the accomplice, even though he sometimes plans to do so, does not. The legal doctrine, in contrast, fails to recognize such a mitigation for an accomplice. Standard complicity rules, such as those in the Model Penal Code, hold the accomplice liable as if he were the principal; our respondents do not. This result is consistent with the “complicity discount” that we have seen in other studies, for instance, Study 3, Objective Requirements of Complicity (Chapter 2) and Study 9, Culpability Requirements for Complicity (Chapter 4). However, in a more global sense, our respondents and

FIGURE 6.4 Liability as a Function of the Role of the Actor



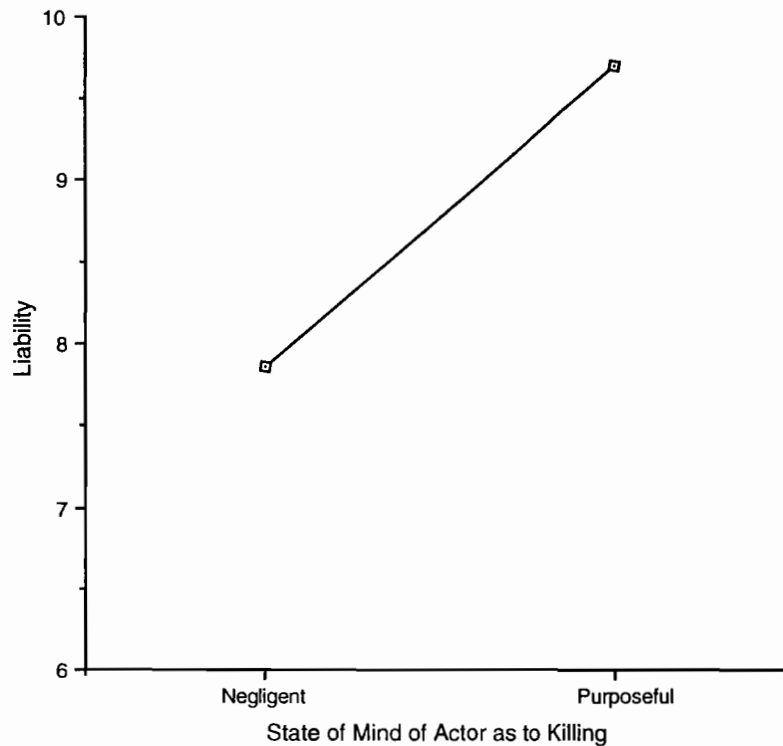
the various versions of the code are in accord: All give a very high sentence to both the principal and the accomplice.

A useful next question to ask is whether the state of mind as to causing death with which the two robbers enter the situation makes a difference to our respondents. Variations in the story made the accomplice or the principal either negligent as to the death because he had no plan to shoot or purposeful as to causing the death because he had plans to shoot. In Figure 6.5, we have simply averaged the liabilities assigned to those who plan to kill, whether perpetrator or accomplice, and those who do not.

Obviously, state of mind matters. Those who plan to kill receive higher average sentences than those who do not plan to kill.

Averages can be built up from more than one pattern of differences, and both Figure 6.4 and Figure 6.5 present averages. Thus, we need to look at the various cases that make up the averages, to see if anything is hidden by the averaging process. Figure 6.6 shows the results of the four cases that are averaged in Figures 6.4

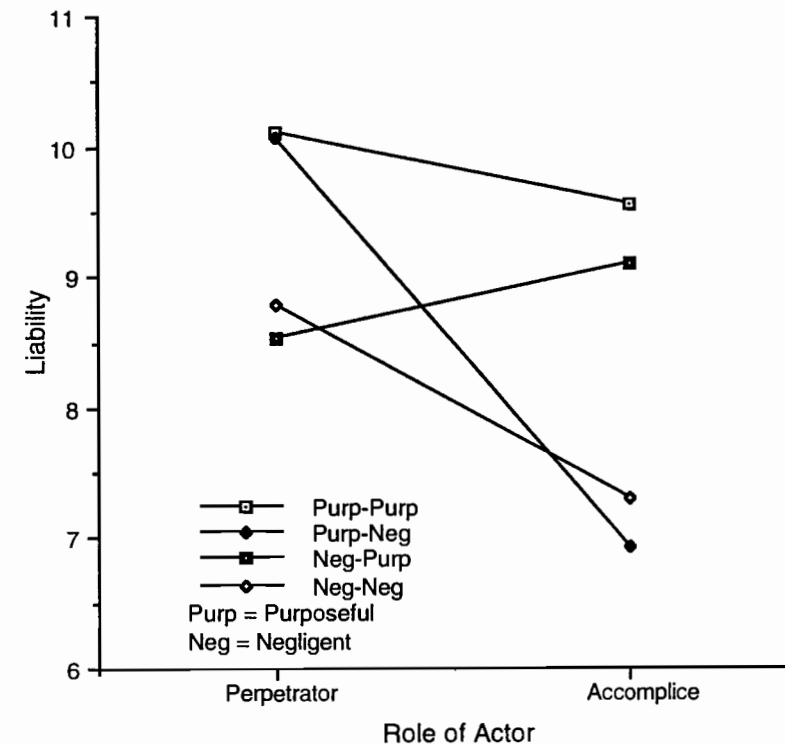
FIGURE 6.5 Liability as a Function of the State of Mind of the Actor as to Killing



and 6.5. Our look can be mercifully brief, because the figure indicates that the individual cases are rated about as we would expect, based on the two rules we articulated: The shooter gets a higher liability than the one who does not shoot, and a person who plans to shoot gets higher liability than one who does not plan to shoot. In the figure legend, we first indicate whether the principal is purposeful or negligent with respect to the shooting and indicate second whether the accomplice is purposeful or negligent with respect to the shooting. Thus, for instance, the line labeled “Purp-Neg” is the one that charts the results of the case in which the principal plans to shoot and the accomplice does not (or scenario 6 of Table 6.3).

Three of the lines give a lower sentence for the accomplice, as we would expect from the joint operation of the two rules. The only case in which the accomplice draws a higher liability than the principal is the one (corresponding to scenario 7) in which the principal does not plan to shoot and the accomplice does plan to, which is the case in which we would expect this reversal to happen. This being the case, it is fair to summarize the results as follows: Respondents assign more liability

FIGURE 6.6 Liability as a Function of Role and State of Mind as to Killing



ity to the principal than to the accomplice, probably reflecting a tendency to punish more heavily the individual who does the actual shooting. They also give less liability to a person—principal or accomplice—who they know does not intend to shoot if the store owner resists. These two effects, combined, give the accomplice who does not plan to shoot a considerable reduction in liability from the other cases. Finkel and his associates (Finkel and Duff, 1991; Finkel and Smith, 1993) have found similar effects. They demonstrated that, in a number of felony-murder scenarios, college student respondents assigned lesser sentences to accomplices than to felony-murder principals.

Recall a point that we have made before. It is worth noting that our scenarios were such as to give the respondents confidence in the belief that one of the robbers really does not intend to shoot. Subjects were straightforwardly told this in the scenario. Notice the culpability ratings in Table 6.3 (column *d* for the principal, and column *e* for the accomplice), which indicate that the subjects believed what they were told. Further, the culpability ratings do make a difference; they do predict the liability ratings assigned to the two individuals. An actual robber, try-

ing to convince an actual jury of that lack of intention, might have considerable difficulty in doing so and therefore often may be treated as a purposeful murderer. Still, the pattern of responses of our respondents argues that the accused should at least have the chance to try to convince the jury concerning his intentions. More generally, this pattern of differences between the felony-murder rule and the subjects' responses echoes the commentators' criticisms of the rule and the Model Penal Code's rejection of it in its current form.

Here is how we would formulate the rule that might underlie our respondents' judgment. Notice that the penalties assigned the negligent persons were reduced—but not reduced to the level of the grade given the negligent individual who kills another while cleaning his gun. The baseline for negligent homicide is 4.58 (9.6 months), although the subjects' sentences for negligent felony-murder principals are 8.53 (22.5 years) and 8.78 (27.0 years) and for negligent accomplices are 6.92 (6.6 years) and 7.31 (9.4 years). These sentences are sufficiently greater than the baseline for a negligent killing to suggest that there is some support for the notion at the heart of the felony-murder rule—that a killing in the course of a felony ought to be punished more severely than it would be without the felonious context. This suggests that our subjects, like the state legislators, are assuming that committing an armed robbery for example, creates a risk of causing death of which the person must be aware. The data pattern suggests that, from our respondents' view, the felony-murder rule is on the right track but simply goes too far. The subjects would support a felony-murder rule that significantly aggravates negligent killings during a robbery but only to the level of manslaughter for principals and to something less than that for accomplices, not to the level of murder as the current doctrine does. In other words, they would support a “felony-manslaughter rule” with a standard “accomplice discount.”

We now proceed to a discussion of cases 8 through 10. In these cases, a bystander to the robbery (the wife of the store owner), who is hidden from view, shoots and kills the principal felon. Since the principal felon is dead, the question we asked in these cases is what sentence should be given to the accomplice. As noted previously, some jurisdictions extend the felony-murder rule to impute to the surviving felon, as murder, killings committed by innocent persons defending against the felony. In case 8, the wife purposefully shoots the principal, and the accomplice had planned to shoot the store owner if he did not respond quickly. In scenario 9, the wife purposefully shoots the principal, and the accomplice had not planned to shoot the store owner. In scenario 10, the wife accidentally shoots the principal, and the accomplice had not planned to shoot. Given these facts, it is possible to intuitively order the cases. One might expect that the accomplice who had planned to shoot would get a higher sentence than the accomplice in either of the cases in which he had not planned to shoot, and that the purposeful choice of the wife to shoot might further lower the liability assigned to the accomplice.

In fact, no such “intuitive” differences appeared. The subjects' liability assignments hovered around 5.20, a sentence of about 1 year for all cases, with no statistically significant difference among them. One way of saying what this means is that the subjects do not spontaneously impose the level of liability that the most extended form of the felony-murder rule provides in these cases. Intuitively, the respondents might condition their liability ratings on the fact that a bystander shoots the felon, and the respondents do not attempt to reason through the somewhat complex possible interpretations of the various intentions of the accomplice.

The lower level of respondent liability assigned to the accomplice in these cases of killings of the principal by an innocent does not differ significantly from the baseline for a negligent killing, 4.58 (9.6 months). It is possible (some would say, likely) that standard homicide grading would impose liability for negligent homicide in such cases. That is, it is likely that a jury would conclude that a robber who enters a store with his gun drawn is at least negligent as to causing a death (when one occurs) regardless of who shoots whom (i.e., the robber should have been aware of a substantial risk that such conduct could cause a death). If this is true, then the liability levels given by the subjects in cases of killings of co-felons by innocent bystanders may be obtained in settings in which the code is applied without the felony-murder rule. The rule is needed, in the subjects' view, only in cases of negligent killings of innocents by felons. Further, even in these cases the subjects would prefer that the rule only aggravate liability to manslaughter (reckless homicide) at most, and in most cases to something considerably less.<sup>16</sup>

Finally, let us examine the somewhat baroque case of scenario 11, in which a bystander attempts to stop the robbery and clumsily shoots the owner of the store instead. In this case, although the felon is actually purposeful or knowing as to planning to cause a death, the subjects put his liability for the killing by an innocent of another innocent at 6.83 (6.2 years), significantly less than the liability for murder ( $p = .01$ ). Indeed, such liability is significantly less than the liability imposed on the purposeful accomplice in the analogous situation (scenario 7 in which a negligent principal kills the innocent owner, 9.11 (9 = 30 years; 10 = life). The fact that the killing is actually done by an innocent person, not the principal or an accomplice, appears to matter a great deal to the subjects.<sup>17</sup>

#### *Study 16: Summary*

This study confirms that subjects, like current legal doctrine, aggravate the liability of a person who kills during a felony over what that liability would be if the offense did not occur during a felony. They punish a person's negligent killing during a robbery at a liability level similar to a reckless killing in a nonfelonious context. If one brandishes a gun during the course of a robbery, and it goes off accidentally and kills an innocent, the subjects are not particularly sympathetic to the

view that this is equivalent to accidentally discharging a gun and killing another. But according to our subjects, current doctrine goes too far, for it punishes such a negligent killing as if it were murder, although the subjects would prefer to punish it as manslaughter. So, the subjects would support a “felony-manslaughter rule.”

The complicity aspect of the felony-murder rule reflects similar differences. Like the doctrine, the subjects punish the accomplice for more than negligent homicide when the perpetrator kills during a felony. But while the doctrine treats the accomplice exactly like a murderer, the subjects impose liability somewhat less than they would for manslaughter. The lesser liability of the accomplice is significant. It reflects the view of the subjects, manifested in several studies, that the accomplice generally deserves less liability than the perpetrator, all other things being equal. If the code were to adopt a standard “accomplice discount,” felony-murder accomplices could remain within the rule; the accomplice would be held at some level of liability less than that of the “felony-manslaughter” perpetrator.

The vicarious aspect of the felony-murder rule—holding a felon liable for murder for a killing by the intended victim of the felon or by some other bystander—has even less support among the subjects than the aggravation and complicity aspects of the rule. Where the victim kills the principal felon, the liability imposed by the subjects on the surviving accomplice is not significantly more than that imposed for a negligent homicide and is far from the murder liability imposed on the accomplice by the felony-murder rule in some jurisdictions. (Also, under the felony-murder rule, the state of mind of the accomplice as to planning to kill does not seem to matter.) Where an innocent person is killed by the robbery victim, the accomplice’s liability is slightly more than that for negligent homicide but is still nowhere near manslaughter liability. This result is likely under normal homicide grading; thus, the subjects would see no need for extension of the special rule to these cases.

To conclude, it is possible that a jury might reach the same conclusions as our subjects even without a felony-murder rule, by seeing culpability in the felon’s creation of a situation in which the likelihood of a killing is brought about. It may be, as we suggested earlier, that it is this perception of blame for creating the dangerous situation that generates the subjects’ responses. Such increased liability is possible if not likely under the normal graded-homicide offenses, and its likelihood is increased if the Model Penal Code’s evidentiary presumption approach is used. The Code, recall, uses the fact of the felony as grounds to create a presumption of “recklessness manifesting extreme indifference to the value of human life,” which is defined as sufficient culpability for murder; the defendant can rebut this presumption. One might suggest, on the one hand, then, that these results argue against the continuing need for a felony-murder rule. On the other hand, the results suggest that a form of a felony-murder rule might be unobjectionable—and,

thus, if politically demanded, might be continued—if revised to better reflect the subjects’ views, which call for lower liability levels.

A rule that mirrors the subjects’ views would aggravate a negligent killing by a felon in the course of a felony to reckless homicide (manslaughter), not murder. No special complicity rule would be required; accomplices would receive the normal complicity discount, which varies with the level of the accomplice’s culpability and degree of contribution. A felon might be liable for killings by an intended victim of the felony, at the level of negligent homicide, but not under a special rule for killings during a felony.

#### STUDY 17: THE STRENGTH OF THE PERSON’S CONNECTION WITH THE PROHIBITED RESULT—CAUSATION REQUIREMENTS

A person acts, intending a result that is prohibited, such as another’s death. Through some chain of circumstances, the result intended occurs, but not exactly in the way intended by the person. Should we hold the person liable for that result? This situation is a familiar one to fans of courtroom drama. For example, I intend to kill Jones but only put him in the hospital with a minor wound. The hospital, due to some medical ineptness, causes Jones’s death. Have I committed murder? In another example, I shoot at Jones and miss, but he dies of fright induced by the noise of the shot. Have I murdered him? Alternatively, and as a third example, intending to kill my rival, Smith, I administer a slow-acting poison to him. Before it acts, a third rival, Clark, bludgeons Smith to death. What is my liability? Philosophers have posed these and similar cases for generations, to explore the limits of moral sanctions; we posed some similar cases to a set of our respondents.

We begin by examining the current legal code. Current criminal-law doctrine typically imposes two requirements for a person to be held causally accountable for a prohibited result. First, the person’s conduct must have been necessary for the result to occur: “It is an antecedent but for which the result in question would not have occurred” [MPC § 2.03(1)(a)]. Second, even if the person’s conduct is a necessary cause (“but for” cause) of the result, the nature of the connection between the conduct and the result must be sufficiently close and direct; the result must not be “too remote or accidental in its occurrence to have a [just] bearing on the person’s liability or on the gravity of his offense” [MPC § 2.03(2)(b)]. Where these two requirements—termed “factual cause” and “legal cause,” respectively—are not met, a person cannot be held accountable for the result and, typically, is liable only for an attempt to commit the substantive offense (or, in some instances, has no liability<sup>18</sup>).

A “necessary cause” requirement is one formulation of factual cause. Another is a “sufficient cause” requirement. A cause is *necessary* if the result would not

have occurred but for the cause. A cause is *sufficient* if, without additional assistance, intervention, or changed circumstances, it will cause the result. The traditional doctrinal position is to require the former (a necessary cause). During the Model Penal Code debate, it was argued that an alternative, less-demanding ground for causal accountability be permitted, requiring only that the cause be “a substantial factor in producing the result,”<sup>19</sup> a formulation even less demanding in many ways than a sufficient-cause requirement.<sup>20</sup> The members of the American Law Institute rejected the sufficient- or substantial-cause formulations, instead adhering to the traditional requirement of a necessary cause.<sup>21</sup> This means that, in the case example in which I poisoned Smith but Clark bludgeoned him to death before the poison acted, I would not be liable for murder (but would be liable for attempted murder). Although the poison eventually would have killed Smith without additional assistance or intervention, and thus fits the definition of a sufficient cause, it was not a necessary cause: Smith would have died when he did from the beating by the subsequent person, even if he had never been poisoned. One goal of the causation study was to examine which of these two tests—necessary cause or sufficient cause—best represents the community’s view of a prerequisite for causal accountability.

A second concern of the causation study was the effect of the strength of the relationship between a person’s necessary cause and the prohibited result—the so-called legal-cause requirement. This is the question that arises, to refer to the first example described previously, when I set out to murder Jones but only wound him, and some other events (such as carelessness in the hospital) bring about Jones’s death. The test of the legal-cause requirement in current doctrine is relatively vague: The result must not be “too remote or accidental in its occurrence to have a just bearing on the actor’s liability.” Yet much depends on the application of this standard, specifically, the difference between liability for the full substantive offense and liability for an attempt (or, in some cases, exoneration from all liability). The study sought to test various factors that might affect the community’s liability judgment in such cases of potentially “remote” or “accidental” results. An identification of relevant factors, it was felt, might lead to formulation of a more specific standard or might guide decision-makers in applying the present vague standard.

In summary, the causation study sought to determine which of the two factual cause requirement tests—necessary cause or sufficient cause—best reflects the community’s view of a prerequisite for causal accountability. A second goal was to examine the effect of the strength of the relationship between a person’s necessary cause and the prohibited result—the legal-cause requirement.

We first presented respondents with two control scenarios that established liability baselines for a clear, direct, and immediate killing (scenario 1 of Table 6.7) and a failed attempted killing (scenario 2). The various other scenarios can then

TABLE 6.7 Liability as Related to Causation

Scenarios	Principal		Second Actor or Accomplice	
	(a) Liability	(b) Legal Code Result	(c) Liability	(d) Legal Code Result
1. Murder, control	9.89 <sup>a</sup>	Murder	8.89 <sup>b</sup>	Murder
2. Attempt, control	7.25 <sup>e</sup>	Attempted murder	6.67 <sup>e</sup>	Attempted murder
3. Subsequent killer	9.47 <sup>a</sup>	Attempted murder	9.89 <sup>a</sup>	Murder
4. Allergy	8.75 <sup>b</sup>	Murder	7.97 <sup>c</sup>	Murder
5. Careless nurse	8.33 <sup>b,c</sup>	Murder or attempt (jury)	7.58 <sup>c,d</sup>	Murder or attempt (jury)
6. Accident on way to hospital	8.03 <sup>c,d</sup>	Probably attempted murder	7.36 <sup>d,e</sup>	Probably attempted murder
7. Construction accident	7.36 <sup>d,e</sup>	Attempted murder	6.75 <sup>e</sup>	Attempted murder

Liability Scale: N=No criminal liability, 0=Liability but no punishment, 1=1 day, 2=2 weeks, 3=2 months, 4=6 months, 5=1 year, 6=3 years, 7=7 years, 8=15 years, 9=30 years, 10=life, and 11=death.

Note: Superscript letters indicate significance at the  $p < .05$  level by a Newman-Keuls test. Matching superscripts indicate means that are not statistically significantly different from each other. Means are compared within columns only.

be compared to the control cases to see if the assignment of liability in each instance is more akin to the case of causal accountability for murder or more akin to the case of no causal accountability, where only attempt liability is imposed. As this process suggests, we first examine the liability ratings for the two control scenarios, which establish boundaries within which the other cases can be interpreted. Examining Table 6.7, one sees that the liability assigned to the murder in scenario 1 is high (9.89, or just slightly less than life imprisonment). Second, notice that the attempted murder scenario drew an average sentence of 7.25 (9.4 years). This finding in itself is significant for the topic of this chapter, because it shows just how important the actual occurrence of the resulting harm is as related to the respondents’ grading of liability.

Let us first look at the “factual cause” issue—the necessary- versus sufficient-cause debate. In scenario 3, labeled “subsequent killer,” the first person inflicts a wound sufficient to kill but, before the victim can die from this wound, the second person, unaware of the prior attack, shoots and immediately kills the victim. (This scenario is equivalent to the earlier example in which I poisoned Smith but

Clark bludgeons him to death before the poison takes effect.) Recall that the necessary-cause requirement of the legal code is not satisfied in this scenario. The first person's conduct is sufficient to cause the death but is not necessary; the victim would have died exactly when he did from the conduct of the second person.

The subjects found the first person warranted a high degree of liability. The subjects impose liability upon the first person that is very close to that imposed in the direct-killing control case (9.47 versus 9.89). However, the liability that they impose is very different from that imposed in the attempt control (9.47, or 30 years to life, versus 7.25, or 9.4 years, for the attempt control, with  $p < .02$ ). Thus, where a person's conduct is sufficient to cause death but is not necessary for the death, the subjects impose liability only slightly less than that imposed for conduct that is both necessary and sufficient to cause death.

Obviously, the respondents are much closer to a formulation that treats either necessary or sufficient actions equally as examples of murder than they are to the code formulation in which one is treated as murder and the other as only attempt. But we also point out that column *e* of scenario 3 (see Table 6.8) indicates that subjects were unclear that the act of the first person was not necessary for bringing about the death; instead, their mean rating (5.74) hovered around the neither-agree-nor-disagree point on the scale. Further research will need to see if the punishment equivalent to murder is given by the community for actions clearly seen as not necessary but sufficient to bring about death.

Consider next the "legal cause" requirement, which holds that the connection between the person's conduct and the result must be close and direct for liability to be incurred. Four scenarios (4 through 7 in Table 6.7) involving an attempted homicide were used to present various situations that we thought might raise legal causation issues. In all of these scenarios, two persons go to the victim's house to kill him. The first person shoots at the victim, either missing or only wounding him, while the second person serves as a lookout. The scenarios differ in the way in which the death of the victim ultimately results. In two scenarios, the death occurs when the man is being treated in the hospital. The victim dies from an unusual allergic reaction to a drug given during initial treatment of the wound (case 4). Alternatively, death results from the careless actions of a nurse during initial treatment (case 5). In a third case, death of the wounded individual results from a traffic accident that occurs while the victim is on the way to the hospital for followup treatment, and this occurs two months after the shooting (case 6). In the fourth case, the shooters miss their intended victim, and he flees from them. His death results from a construction-crane accident that occurs during his flight (case 7). The liabilities assigned to the persons in these cases are contained in Table 6.7, and the respondents' perceptions of the cases are listed in Table 6.8.

Let us deal with what is by now a familiar issue, which is the liabilities assigned to the perpetrator and to the individual who plays a lesser role in the incident. To

TABLE 6.8 Subjects' Perceptions of Causation

Scenarios	(e) "Actor's Act Necessary"	(f) "Actor's Act Sufficient"	(g) "Actor Intended Death"	(h) "Accomplice Intended Death"
	1. Murder, control	7.86 <sup>a</sup>	8.22 <sup>a</sup>	8.56 <sup>a</sup>
2. Attempt, control			8.17 <sup>b</sup>	7.92 <sup>b</sup>
3. Subsequent killer	5.74 <sup>c</sup>	7.78 <sup>a</sup>	8.31 <sup>a,b</sup>	8.36 <sup>a</sup>
4. Allergy	7.20 <sup>a,b</sup>	5.22 <sup>b</sup>	8.08 <sup>b</sup>	7.83 <sup>b</sup>
5. Careless nurse	6.91 <sup>a,b</sup>	4.81 <sup>b</sup>	8.08 <sup>b</sup>	7.72 <sup>b</sup>
6. Accident on way to hospital	4.37 <sup>d</sup>	4.83 <sup>b</sup>	8.03 <sup>b</sup>	7.69 <sup>b</sup>
7. Construction accident	6.34 <sup>b,c</sup>	4.81 <sup>b</sup>	8.11 <sup>b</sup>	7.81 <sup>b</sup>

Key to column heads:

All statements were responded to on a scale where: 1="strongly disagree," 5="unsure," and 9="strongly agree."

(e) The victim's death would not have occurred but for the actor's conduct.

(f) The actor's conduct was by itself sufficient to cause the victim's death.

(g) The actor intended to kill the victim.

(h) The accomplice intended that the actor kill the victim.

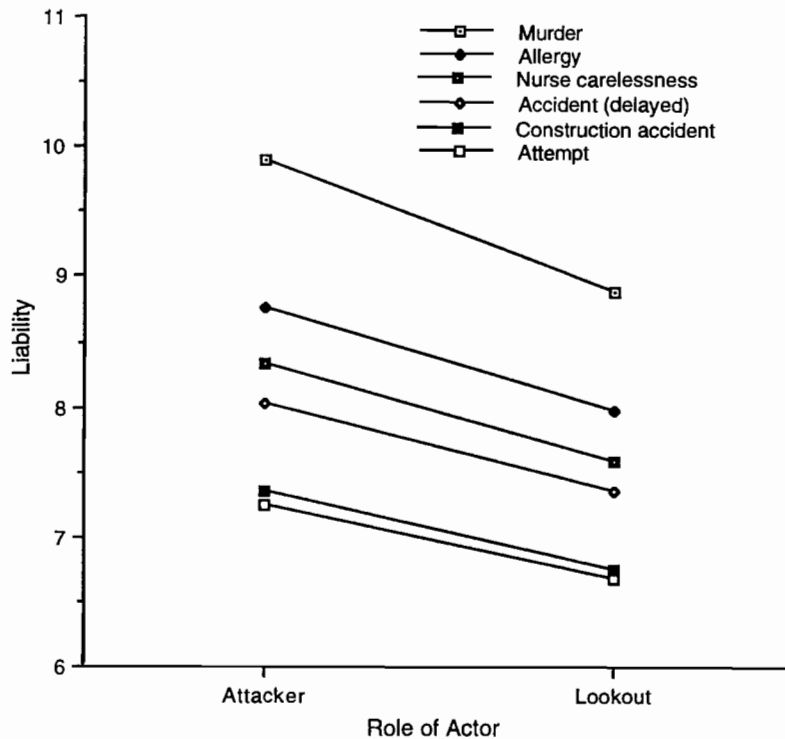
Note: Superscript letters indicate significance at the  $p < .05$  level by a Newman-Keuls test. Matching superscripts indicate means that are not statistically significantly different from each other. Means are compared within columns only.

test all of the complex causal connections we wanted to investigate, it was necessary to have two individuals involved in the commission of the act. The liability assigned to the second person, who functioned as lookout in the cases we will examine, in contrast to that assigned to the first person, gives us another chance to examine the effect of the criminal role on liability. To examine that, we have plotted the liabilities assigned to the perpetrator and to the lookout in Figure 6.9.

As this figure shows, the liability scores assigned to the perpetrator and the lookout are consistently quite different; the liability assigned to the individual who fulfills only the lookout function is consistently lower than that assigned to the major perpetrator.

This is consistent with the "accomplice discount" that we have seen in other studies. In these cases, in which the second individual serves only as a watchkeeping accomplice, the codes regard both as equally liable. Given the results that emerge so clearly from Figure 6.9 and the results of our two earlier complicity studies, the community standard is in significant disagreement with the codes, in that a lesser degree of liability (reflected in a lesser prison term) is given

FIGURE 6.9 Liability for Perpetrator and Lookout in Causation Scenarios



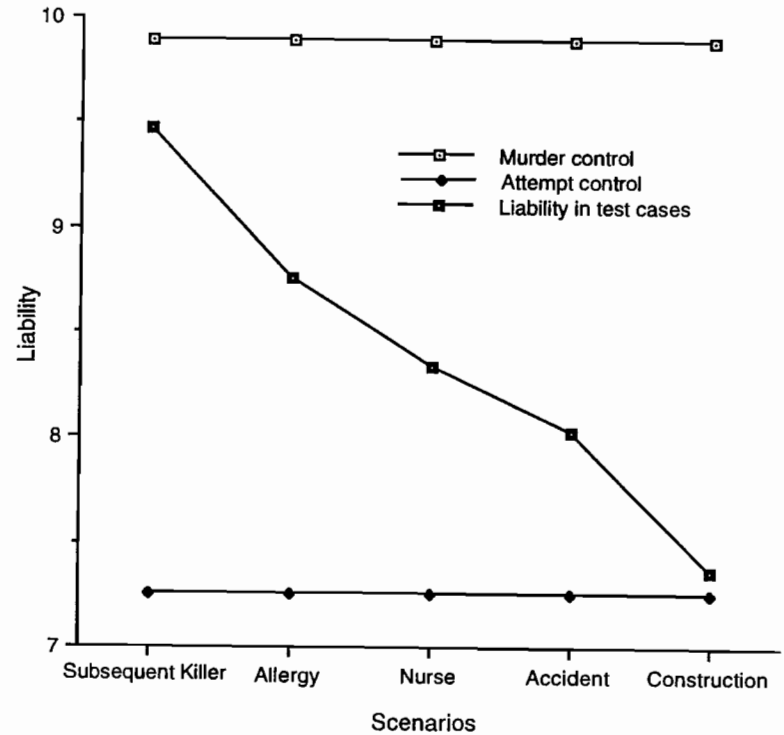
to the accomplice. Recall that some modern sentencing guidelines are moving in this direction; they assign reduced sentences to those who play lesser roles in crimes.<sup>22</sup>

Notice that we have omitted scenario 3 from the figure and this discussion. In that scenario, the second person, unaware of the first person's actions, steps in and kills the wounded victim. The killer, therefore, is not an "accomplice" but rather an independent perpetrator, who is appropriately assigned murder liability by our subjects.

Let us now look at the question of "legal causation." The point at issue here is whether and when an outcome of a chain of events is so remote, in any of the various senses of "remote," that the respondents do not see the perpetrator as having the normal accountability for the outcome, even if that was the outcome the perpetrator intended.

The drop in liability assigned to the complex causal scenarios (4 through 7 in Table 6.8) suggests that these scenarios include factors that discount a person's

FIGURE 6.10 Liability as Related to Causation



causal accountability for the resulting death. In Figure 6.10, we have attempted to examine this by contrasting the liabilities assigned to the principal in each of the four test scenarios. The top line in the figure shows the liability assigned by respondents to the case of murder, and the bottom line shows the liability assigned to attempted murder. What one would expect (according to the doctrine of legal causation) is that some of the scenarios should be assigned murder liabilities and others should coincide with the liability assigned to the attempt case. Obviously, our respondents' assignments do not mirror this expectation.

Factors that seem to make a difference include whether the risk that comes to fruition is one that commonly results from the conduct (compare allergic reaction—8.75, or 27 years—to construction accident cause—7.36, or 10.2 years); the presence of a subsequent volitional person contributing to the result (compare allergic reaction—8.75, or 27 years—to careless nurse—8.33, or 19.5 years); and the remoteness of the result in time and place from the person's conduct (see death by accident two months later when returning to the hospital for treat-

ment—8.03, or 15 years).<sup>23</sup> Further studies could establish the factors that contribute to a perception of remoteness and the relative effect of the different factors on liability. It may be that the subjects are reaching their judgments of liability via the mediating inference of remoteness—or some alternate reasoning model may be needed to explain their judgments. Further still, one may need a reasoning model that includes both remoteness of result and necessary-versus-sufficient causal contribution to the death.

Notice the pattern of the results in the figure. The liability of the perpetrator in each of the test scenarios, other than the construction-crane accident, is statistically significantly different than his liability in the murder and attempt control scenarios—lower than the murder liability but higher than the liability for attempted murder. This suggests that the subjects see the circumstances as reducing but not eliminating the person's accountability and liability for the death. In other words, the subjects see causal conditions as presenting a continuous rather than a dichotomous relationship with liability. The legal rules, in contrast, set causation as a minimum requirement, which when met establishes liability for the full offense (in this case, murder) and when not met defaults liability to that for a case of attempt.

Therefore, and as common sense suggests, the degree of perceived liability generally decreases in a graduated way as the causal connection between the person's conduct and the result becomes weaker. Furthermore, many of the factors that one might guess would add to a result's "remote or accidental" nature do serve to reduce the liability that the subjects impose. An unusual event, such as an allergic reaction to a drug during treatment, reduces liability. A subsequent person's carelessness reduces liability even further, as does a significant time delay between the conduct and the result. Notice also, however, that no simple rule summarizes our results; the construction accident takes place within minutes of the attempted murder, but receives lower liability assignments than do other scenarios in which the death-causing incident is much more delayed in time from the murder attempt. Therefore, unless the relevant factors (e.g., remoteness, accidentalness) and their interrelation can be more clearly explicated, it may be best for code drafters to leave this particular determination to juries, rather than attempt to codify it.

#### *Study 17: Summary*

As to the factual cause issue, our findings are inconclusive. Our subjects gave liability almost equal to murder in the sufficient-cause scenario, which would suggest that the codes' necessary-cause test was too limiting. But our analysis also suggests that the subjects were unclear as to whether the cause in that scenario was a necessary cause.

Our results did clearly suggest, however, that the extent of a person's liability is reduced as the result becomes more "remote or accidental" in relation to the per-

son's conduct. This result is at significant variance with the current treatment in the modern codes. Subjects do not seem to conceive of the causation issue in the dichotomous way that the doctrine treats it. They do not see causal accountability as a yes-no issue but as one with a continuum of accountability. As a person's degree of accountability increases, so does his liability, from attempt liability up to liability for the full substantive offense. This is one of several examples of the current doctrine's tendency to treat continuous functions as dichotomous ones, an issue discussed further in the concluding chapter.

#### STUDY 18: PUNISHMENT FOR MULTIPLE OFFENSES

Current law has some considerable difficulty in determining the appropriate range of punishment for multiple related offenses. If a single instance of theft deserves a punishment of  $x$  amount, how much punishment is deserved if the offender is convicted of two identical but separate instances of such theft? Traditionally, judges sentence such an offender separately for each of the two offenses, then determine whether those sentences are to run concurrently or consecutively. Concurrent sentences are served at the same time; consecutive sentences are served one after the other. This leads to the odd result that a person who, for example, carries out two burglaries and gets a two-year sentence for each—to be served concurrently—serves only two years. Concurrent sentences are rightly criticized because they trivialize the second (and all subsequent) offenses. If consecutive sentences are imposed, our burglar would have his two sentences served one after the other, for a total jail term of four years. Consecutive sentences are criticized on the basis that two identical offenses by the same offender do not necessarily deserve twice the punishment as a single offense.

The theory behind this latter claim is somewhat unclear. It may stem in part from the fact that the punishment deserved for an offense is based only in part on the harm caused, such as the deprivation of the owner of his property. The person's willingness to violate the announced rules of society may be part of the foundation for punishment, and this factor is already taken into account in the sentence for the first offense. In any event, there seems to be some general sense that additional punishment is deserved for each additional offense but that the additional amount deserved is less than that for the first offense. There seems to be some feeling, in specific, that a third, fourth, fifth, or further offense ought to each give rise to additional punishment but that, in each instance, the amount of the punishment ought to be less than the additional punishment assigned for the previous offense. This multiple-offense discount notion is instantiated in the United States Sentencing Commission (USSC) guidelines. Each additional offense is punished, although with increasingly reduced penalties. (The Sentencing Commission guidelines use a formula that takes account as well of different seriousness levels of the different offenses, establishing the baseline with the most se-

rious offense and adding on penalties for additional offenses by considering offenses in their decreasing order of seriousness (USSC Guidelines Manual §§ 3D1.1–3D1.5.1).<sup>24</sup>

The “multiple-offense discount” may well describe what sentencing judges would like to do, but their options may be limited by the consecutive-versus-concurrent options we discussed earlier. (One somewhat manipulative way around this, reported by some judges, is to give the defendant more than the offense deserves on one or both of the counts, then have the sentences run concurrently.)

Given these competing models of multiple-offense sentencing, it seemed useful to have some empirical data on what ordinary people think on the issue; so, we set out to collect such data through this study. The multiple-offenses study sought to determine whether the subjects concur with the general notion of a multiple-offense discount in the sentencing of such cases.

The study also sought to investigate the significance of the time interval between multiple offenses (all of which occur before conviction for any one). We speculated that the closer in time the offenses occurred, the more the subjects would treat them as a single offense and, therefore, impose proportionally less increase in liability for each subsequent offense. The longer the period of time between the multiple offenses, the more the subjects would be likely to treat them as entirely independent offenses deserving entirely independent, nonoverlapping penalties. It might even be the case that they would begin to see the offender as a habitual offender and assign harsher sentences for the second offense than for the first.<sup>25</sup>

The study also sought to determine whether the operative principles are different for offenses against a person, such as assault, than for offenses against property, such as theft. One might speculate that offenses against property, where the harm can more easily be reduced to a monetary form, may well be thought of in those terms only. Sentences for multiple offenses against property might follow a principle of a simple accumulation of the monetary value of all the property taken. In other words, while two assaults may be viewed as entirely separate offenses for which a substantial add-on is appropriate for multiple violations, multiple theft offenses might be viewed as no different in seriousness than a single theft offense where the value of the property taken equals the sum of the values for the multiple offenses. This is the approach taken by the United States Sentencing Commission guidelines: If the nature of the harm of multiple offenses is such that it simply can be aggregated, as in theft or fraud, then the amounts are aggregated and treated as a single offense of this amount [USSC Guidelines Manual § 3D1.3(b)]. Thus, the guidelines take different approaches to aggregatable and nonaggregatable offenses. They suggest a very different patterning of additional penalties for multiple theft offenses than for multiple assault offenses. Even the treatment of theft, the aggregatable offense, does not really give full value to each additional dollar of theft, since the grading of theft itself provides a discount for each additional dollar stolen, but they do ignore whether the total loss is caused

by one theft or by many. That seems inconsistent with the general principle that every new offense should count for something additional—not just in recognition of greater harm but also in recognition of an additional violation of the legal rules. Nonaggregatable offenses such as assault, however, would be expected to generate more substantial add-on sentences.

Other possible hypotheses might suggest other patterns of multiple-offense sentencing. We thought it best first to do the study, and let its results guide further theorizing. We set up two sets of scenarios. In the core assault scenario, an individual who had been angered by a co-worker (or co-workers) at an office where he used to work returns to the office, armed with a baseball bat, and breaks several bones of the co-worker (or co-workers). In the core theft scenario, the thief, waiting until no one is around (and thus by inference avoiding needing to use violence on anybody who observes him) steals a 55-gallon-drum from a gas station to resell it (or steals several drums from several gas stations).<sup>26</sup>

To study the effects of the time interval between the multiple offenses, we created several cases in which two persons are assaulted or two drums are stolen, and the interval between the events is either nearly zero (the previously described scenarios), two weeks, or two years in length.

We asked our subjects, in other words, to read and retain the subtle differences in a good many cases. Luckily for us, they did. Table 6.11 indicates that subjects are reasonably accurate as to the number of individuals injured in the various assaults and the number of drums stolen in the various thefts (column *a*). The respondents also recognize the differences in the time intervals between the crimes, in the cases in which multiple crimes are committed (column *b*).

The liability results for this study are in Table 6.12. As with other tables that we have presented in which multiple comparisons are possible, it is difficult to extract them from the table. Perhaps the main points to extract from the table are that no respondent thinks that no liability is appropriate, and only very few assign liability with no punishment—and when this assignment is made, it is almost always in the theft cases.

As we said, the various comparisons we want to make are difficult to make from an inspection of the liability table alone. It seemed useful to present them in figures. Let us look first at the major question of this study, which involves the patterns of changes in liability when the number of offenses increases. In Figure 6.13, we assemble for comparison all of the cases of theft or assault in which the multiple thefts or assaults occurred immediately one after the other.

First, notice that the liability assigned for any assault is always greater than that assigned for any theft [ $F(1,40) = 127.88, p < .0001$ ]. This is exactly as we would expect from both intuition and the criminal code; harming another person is more serious than stealing an oil drum.

Notice, second, that both curves have the general property that both matches our intuition and is built into the federal sentencing guidelines for nonaggregatable offenses. The greater the number of offenses, the greater the sen-

TABLE 6.11 Subjects' Perceptions of Multiple Offenses

Scenarios	(a) Number of Offenses	(b) Time Interval	(c) "Threat of Harm"	(d) "Intended to Commit"	(e) "Likely Future Offense"	(f) "Likely Past Offenses"
Single day—Assault:						
1. 1 victim	1.00		8.63	8.61	5.41	5.10
2. 2 victims	1.98	1.00	8.83	8.68	5.83	5.49
3. 4 victims	3.93	1.00	8.93	8.76	5.95	5.59
4. 7 victims	6.85	1.00	9.00	8.83	6.44	5.93
Single day—Theft:						
5. 1 item	1.05		2.05	8.68	5.22	5.24
6. 2 items	2.00	1.00	2.51	8.71	5.51	5.49
7. 4 items	3.88	1.00	2.41	8.61	5.90	5.76
8. 4 items/1 victim	1.46		2.10	8.51	5.46	5.56
9. 7 items	7.02	1.02	2.66	8.66	6.05	5.95
Two-week interval:						
10. Assault, 2 victims	2.00	1.98	8.83	8.78	6.37	5.90
11. Theft, 2 items	2.05	1.97	2.52	8.57	5.92	5.90
Two-year interval:						
12. Assault, 2 victims	2.00	2.98	8.85	8.83	6.71	6.27
13. Theft, 2 items	2.05	2.93	2.73	8.46	6.51	6.47

Key to column heads:

Statements (c) through (f) were responded to on a scale where: 1="strongly disagree," 5="unsure," and 9="strongly agree."

(a) Number of crimes the actor committed: 1 to 10.

(b) Time interval between offenses: 1=less than a day, 2=2 weeks, and 3=2 years.

(c) In the scenario above, there was physical harm or a threat of physical harm to persons.

(d) The actor intended to commit the offense.

(e) After his conviction, the actor is likely to commit other offenses in the future.

(f) The actor is likely to have committed other offenses in the past for which he has not been caught.

TABLE 6.12 Liability for Multiple Offenses

Scenarios	(a) Liability	(b) % No Liability (N)	(c) % No Liability or No Punishment (N+0)
Single day—Assault:			
1. 1 victim	5.85	0	0
2. 2 victims	6.17	0	15
3. 4 victims	6.76	0	0
4. 7 victims	7.10	0	0
Single day—Theft:			
5. 1 item	3.17	0	0
6. 2 items	3.95	0	5
7. 4 items	4.37	0	2
8. 4 items/1 victim	3.54	0	10
9. 7 items	4.68	0	2
Two-week interval:			
10. Assault, 2 victims	6.41	0	0
11. Theft, 2 items	4.10	0	5
Two-year interval:			
12. Assault, 2 victims	6.59	0	0
13. Theft, 2 items	4.15	0	7

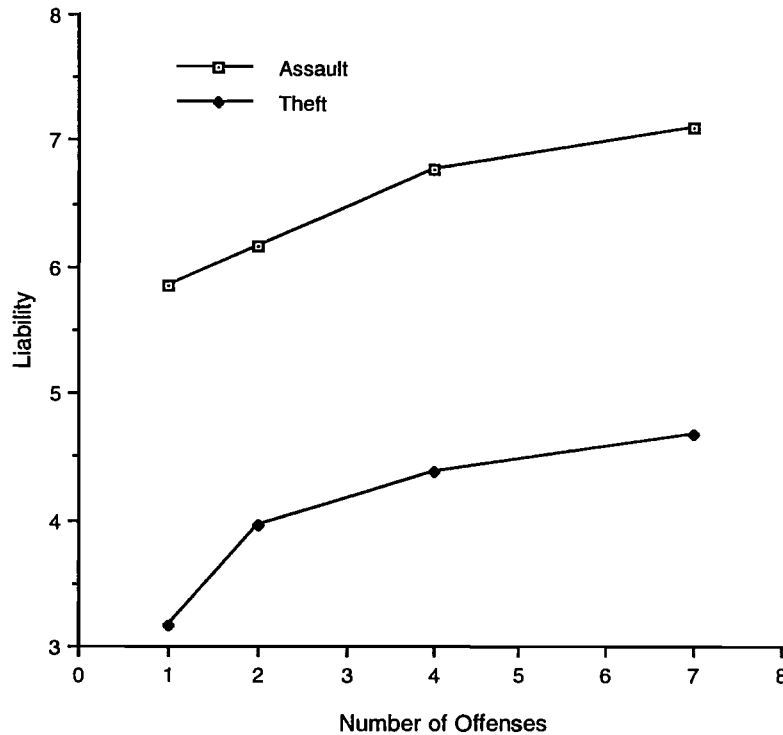
Liability Scale: N=No criminal liability, 0=Liability but no punishment, 1=1 day, 2=2 weeks, 3=2 months, 4=6 months, 5=1 year, 6=3 years, 7=7 years, 8=15 years, 9=30 years, 10=life, and 11=death.

tence grows [ $F(1,120) = 70.01, p < .001$ ], but it does not do so in a linear fashion. Instead, it follows the general rule we discussed of adding a decreasing increment for each additional offense.

However, our results do not support the aggregation side of the United States Sentencing Commission guidelines approach. Under the guidelines, theft is aggregatable; assault is not. Under the guidelines, therefore, each additional theft would get even less additional increment; each would be treated as providing no more punishment than if the person took the two drums from the same gas station in a single theft. The sharp increase in sentence for the thief for the theft of the second drum suggests that subjects do not follow this rule. Future research, in which the scenarios might compare the theft of  $x$  drums from different stations with the theft of  $x$  drums all at once, will clarify this still further.

Turn now to the effect that a time delay between offenses has on the sentencing patterns of our respondents. Figure 6.14 shows us the effect of time delays between a first and a second offense on liability for the two offenses. (The figure

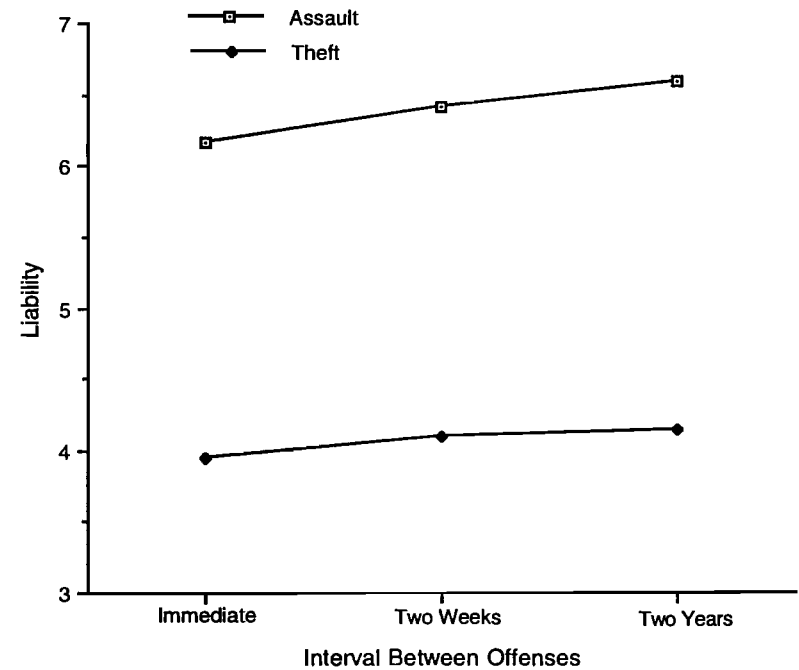
FIGURE 6.13 Total Liability as a Function of Number of Offenses (no time delay)



graphs the total liability for the two offenses.) As can be seen, the time delay does seem to make a difference; the longer the time between the two offenses, the more severe the sentence for the pair of them, and this is confirmed by the statistical test,  $F(2,78) = 9.85, p < .001$ . However, it is also important to note that, compared to many of the other differences we have found between scenarios in other chapters, the differences we have graphed in Figure 6.14 are not large or dramatic. Respondents assign only mildly more severe sentences the longer the delay between the incidents for which they are sentencing the individual. It may well be that this is because the longer the period of time between the multiple offenses, the more the subjects would be likely to treat them as entirely independent offenses deserving entirely independent, nonoverlapping penalties, as we suggested earlier. The best description of these results is this: increasing the interval between offenses slightly increases the liabilities assigned.

Why might this be so? A glance at Figure 6.15, in which we have illustrated the respondents' ratings of the likelihood of the person having committed previous offenses (from column *f* of Table 6.11) or the likelihood of the person committing

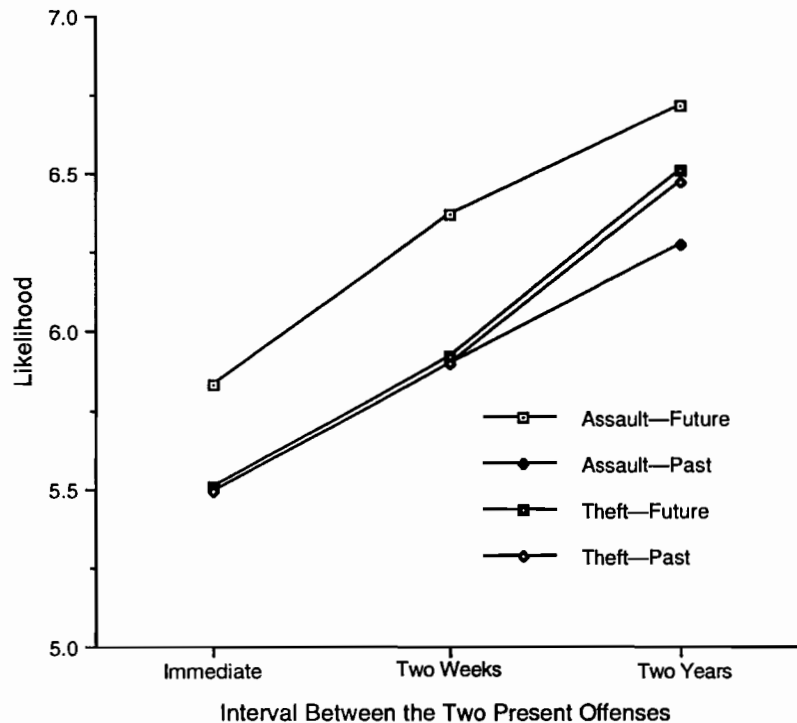
FIGURE 6.14 Total Liability as a Function of the Interval Between Two Offenses



future offenses (from column *e* of Table 6.11), suggests a mechanism that might be triggered by the delay between offenses and might be producing the increase in sentences. Respondents judge that it is much more likely that an individual who commits two assaults or two thefts *separated by several weeks* is more likely to commit similar assaults or thefts in the future (and to have done so in the past<sup>27</sup>) than an individual who commits two assaults or thefts immediately following each other. Further, an individual who commits two assaults or thefts over a period separated by two years is even more likely to act in a similar way in the future (and to have done so in the past).

It is clear that the respondents do what a great deal of research on person attribution processes suggests that they would, which is to treat information about a person's actions as providing information about his underlying dispositions (Jones and Davis, 1965; Kelley, 1967). In this instance, if a person does something once, a number of possible explanations are available for that action, including situational pressures rather than underlying dispositions. The thief of an oil drum could have been under some extraordinary pressure (for instance, needing medicine for his child) that caused him to steal; and the person who assaults another could have been assaulting a co-worker who harassed him. However, if the person

FIGURE 6.15 Past and Future Likelihood of Committing Similar Offenses



commits essentially the same act in different situations, then we are likely to conclude that the act is dispositional; that it reflects the true underlying personality of the person. So the observer will conclude, specifically, that the person is a thief or a habitually violent person. What the data pattern suggests is that the time separation between the two acts is read as suggesting that the two situations are in fact different.

#### Study 18: Summary

Our respondents do function the way that our intuition suggests and as the general, nonaggregated aspect of the federal sentencing guidelines articulate. They assign a more extended sentence for two crimes than for one but generally do not double the sentence that they assign for the first offense. They do not follow the strictly additive pattern characteristic of consecutive sentencing or the pattern of no increase in sentence that would be dictated by a concurrent-sentencing philosophy. Their sentencing pattern is in accord with the principle that we suggested earlier—that the punishment deserved for an offense is based only in part on the

harm caused, such as the deprivation of the owner of his property. The person's willingness to violate the announced rules of society may be part of the foundation for punishment, and this factor is already taken into account in the sentence for the first offense.

Our respondents do not agree with the aggregational rules provided by the sentencing guidelines. Within those guidelines, theft is an aggregatable offense, and a number of thefts of one item draws the same penalty as one theft of the same total number of items. Our respondents assign a sharply increased penalty to the second theft. In further disagreement with the sentencing guidelines, although slight differences emerged between the pattern of sentencing for multiple assault and multiple theft cases, the small variations do not suggest any major differences in our respondents' sentencing "philosophies" in those two kinds of cases.

What remains to be explored in future research are the conditions under which a pattern of multiple offenses leads respondents to move from a model in which each additional offense is punished, although with increasingly reduced penalties, to one in which the "habitual offender" concept comes into play. The latter may apply when an individual who has served a sentence for an offense repeats the crime. The "psychological logic" would then be that the sentence for the first offense did not deter the convict and a longer one is required. An alternative explanation is that, having once been officially sanctioned, greater punishment is called for with the second offense because the subsequent violation is a greater challenge to the authority of the criminal law. Yet one more explanation: We noticed that our subjects are making the inference that a person who commits the same sort of crime after a delay is predicted to be more likely to commit future crimes, and one might expect this to find its way into individuals' sentencing patterns. Subjects might be exercising the incapacitation function of punishment, locking away a person who is likely to commit future offenses. Future research could sort out some of these issues.

#### CHAPTER SUMMARY

In several of the cases we considered in this chapter, we found that our respondents' intuitions about the appropriate grading for different variants of offenses differ from those reflected in the legal codes. For instance, in sexual offenses, our respondents regard forcible rapes as generally of similar grades regardless of the existence of various kinds of prior relationship between the individuals involved, while the Code sharply conditions the offense grade as a function of prior relationship. With regard to felony murder, our respondents preferred a "felony-manslaughter rule" with a standard "accomplice discount" rather than the law's imposition of murder liability for all participants (and, in some jurisdictions, all variations of involvement by innocents and felons). When this or another community-code discrepancy was discovered, we commented on what principles of

judgment might be underlying our subjects' responses, and we also discussed the implications of the discrepancy for code alteration, where we thought that a case could be made for consideration of that. With those discussions as background, we now turn to a consideration of the general implications of our subjects' responses.

In sum, it is clear that our respondents are in accord with the general tendency in the legal codes to distinguish grades of offenses within and between offenses. For instance, the subjects clearly distinguish different levels of sexual offenses, although not always exactly in the ways suggested by the legal codes. Interestingly, in the case of felony murder, in which, probably for policy reasons, the codes emphatically reject the idea of grading within felony murder and treat all cases as murder, our respondents do distinguish grades within that offense, assigning lower sentences to felons whose causal connection with the resultant death is more remote. Similarly, in the causation study, respondents grade different causal connections with a death differently, specifically assigning lower sentences to persons who intend to kill but do not succeed in directly doing so, although death eventuates by means of a later chain of events. The general notion of grading offenses is recognized as a basic and appropriate code function, both in the eyes of our respondents and in legal codes.

However, it is worth noting that the grading of offenses registered by our subjects is done in a somewhat different manner than codes generally accomplish such grading. The codes tend toward dichotomous grading: A botched attack on another's life, which through a chain of circumstances leads to that other's death, is either causally closely enough connected to the death (in which case it is murder) or not closely enough connected (in which case it is only attempted murder). In contrast, our respondents provide more continuous judgments; for instance, they judge that cases in which an attempted murderer's victim dies only through a chain of events after the attempt warrant a sentence lower than that for straightforward murder but higher than that for attempted murder. We will discuss the implications of this continuous grading further in the concluding chapter.

A different but related point is the tendency of some codes, including the Model Penal Code, to recognize too few categories of offenses—as compared to the refined intuitions of our respondents. Most jurisdictions have adopted a grading scheme that uses more than the five grades of the Model Penal Code,<sup>28</sup> but even eight or nine grades could not give expression to the rather nuanced judgments that we see our respondents make. The effect of this shortage of grades means that even in cases in which the codes properly identify a relevant mitigating or aggravating factor, they frequently must give it more or less effect in grading than it merits. Our respondents agreed with the Model Penal Code, for example, that absence of a prior sexual relationship aggravates liability for rape, but the Code's one-grade difference for those two cases—the minimum distinction it can make—significantly exceeds the difference in grade that our respondents would

give. This argues for codes with more grades into which offenses can be categorized.<sup>29</sup>

The special problems of sentencing multiple offenses also suggest a structural change in current doctrine. Presently, multiple offenses typically are dealt with either by concurrent sentences, which impose no additional sentence for the second offense, or by consecutive sentences, which effectively double the penalty. Our respondents assign sentences for a second offense that add to but do not double the sentence for the first offense; and they continue this pattern for any further offenses. This approach matches at best one aspect of the United States Sentencing Commission guidelines, and the model provided by these guidelines may move the legal doctrine in this direction.