ARTICLES

MAKING THE BEST OF FELONY MURDER

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Although scorned as irrational by academics, the felony murder doctrine persists as part of our law. It is therefore important that criminal law theory show how the felony murder doctrine can be best justified, and confined within its justifying principles. To that end, this Article seeks to make the best of American felony murder laws by identifying a principle of justice that explains as much existing law as possible, and provides a criterion for reforming the rest. Drawing on the moral intuition that blame for harm is properly affected by the actor's aims as well as the actor's expectations, this Article proposes a dual culpability principle, which justifies imposing murder liability for killing negligently in the pursuit of an independent felonious purpose. A review of current felony murder rules reveals that most jurisdictions condition the offense on negligence through a combination of culpability requirements, dangerous felony limits, foreseeable causation requirements, and complicity standards. In addition, most jurisdictions require felonious motive through a combination of enumerated felonies, causation standards, and merger limitations. Thus, felony murder law more or less conforms to the dual culpability principle in most jurisdictions. This sufficiently validates the principle to warrant its use as a critical standard. Many felony murder laws nevertheless fall short of the principle's demands in some respects, and this Article identifies the reforms needed in each jurisdiction. More importantly, it provides the arguments of principle and precedent that lawyers and legislators will need to advocate those reforms.

INTRODUCTION: THE WORST OF FELONY MURDER

The felony murder doctrine, imposing murder liability for some unintended killings in the course of some felonies, is part of the law of almost every American jurisdiction. Yet it is also one of the most widely criticized features of American criminal law.[1] Leading criminal law scholars have urged its

[1] *See, e.g.*, MODEL PENAL CODE § 210.2 cmt. 6, at 36 (Official Draft and Revised Comments 1980); SAMUEL H. PILLSBURY, JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER 106-08 (1998); Charles Crum, *Causal Relations and the Felony-Murder Rule*, 1952 WASH. U. L.Q. 191, 210; George Fletcher, *Reflections on Felony-Murder*, 12 SW. U. L. REV. 413, 413-15 (1981); Martin R. Gardner, *The* Mens Rea *Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 706-07; James J. Hippard, *The Unconstitutionality of Criminal Liability Without Fault: An Argument for a Constitutional Doctrine of Mens Rea*, 10 HOUS. L. REV. 1039,

abolition, condemning it as unprincipled and irrational.[2] Critics charge that felony murder imposes undeserved strict liability for accidental death.[3] Criminal law teachers impart this view to their students,[4] and use felony murder to illustrate the perils of rigid rule formalism. Critics can point to examples like these eleven cases from ten different jurisdictions:

> 1. Seven months after stealing a car, James Colenburg, a Missouri man, was driving down a residential street when an unsupervised two-year-old suddenly darted in front of the stolen car. The toddler was struck and killed. Colenburg was convicted of felony murder predicated on theft.[5]
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> 2. Jonathan Miller, a fifteen-year-old Georgia youth, punched another boy in a schoolyard dispute. The second boy suffered a fatal brain hemorrhage. Miller was convicted of felony murder, predicated on the felonies of assault with a deadly weapon and battery with injury.[6]
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> 3. Suspecting Allison Jenkins of drug possession, an Illinois police officer chased him at gunpoint. As the officer caught him by the arm, Jenkins tried to shake free. The officer tackled Jenkins and fired the gun as they fell, killing his own partner. Jenkins was convicted of felony murder, predicated on battery of a police officer. No drugs were found.[7]

1045 (1973); Robert G. Lawson, *Criminal Law Revision in Kentucky: Part I – Homicide and Assault*, 58 KY. L.J. 242, 252-55 (1970); Roy Moreland, *A Re-Examination of the Law of Homicide in 1971: The Model Penal Code*, 59 KY. L.J. 788, 804 (1971); H. L. Packer, *Criminal Code Revision*, 23 U. TORONTO L.J. 1, 4 (1973); Maynard E. Pirsig, *Proposed Revision of the Minnesota Criminal Code*, 47 MINN. L. REV. 417, 427-28 (1963); Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 491 (1985); Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1542-43 (1974); Jeanne Hall Seibold, Note, *The Felony-Murder Rule: In Search of a Viable Doctrine*, 23 CATH. LAW. 133, 161-62 (1978); Note, *Felony Murder as a First Degree Offense: An Anachronism Retained*, 66 YALE L.J. 427, 427 (1957) [hereinafter *Anachronism*]; Note, *Felony Murder: A Tort Law Reconceptualization*, 99 HARV. L. REV. 1918, 1935 (1986); Adam Liptak, *Serving Life for Providing Car to Killers*, N.Y. TIMES, Dec. 4, 2007, at A1.

[2] MODEL PENAL CODE § 210.2 cmt. 6, at 32-42 (Official Draft and Revised Comments 1980); Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 695-96 (1994).

[3] *See* Roth & Sundby, *supra* note 1, at 451-52.

[4] *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 515 (3d ed. 2001); ARNOLD H. LOEWY, CRIMINAL LAW IN A NUTSHELL 45 (4th ed. 2003).

[5] State v. Colenburg, 773 S.W.2d 184, 185 (Mo. Ct. App. 1989).

[6] Miller v. State, 571 S.E.2d 788, 792 (Ga. 2002).

[7] People v. Jenkins, 545 N.E.2d 986, 990-91 (Ill. App. Ct. 1989).

4. Jonathan Earl Stamp robbed a California bank at gunpoint. Shortly thereafter, one of the bank employees had a fatal heart attack. Stamp was convicted of felony murder.[8]

5. New York burglar William Ingram broke into a home, only to be met at the door by the homeowner, brandishing a pistol. The homeowner forced Ingram to lie down, bound him, and called the police. After police took Ingram away, the homeowner suffered a fatal heart attack. Ingram was convicted of felony murder.[9]

6. Also in New York, Eddie Matos fled across rooftops at night after committing a robbery. A pursuing police officer fell down an airshaft to his death. Matos was convicted of felony murder.[10]

7. John Earl Hickman was present when a companion overdosed on cocaine in Virginia. He was convicted of felony murder predicated on drug possession.[11]

8. John William Malaske, a young Oklahoma man, got a bottle of vodka for his underage sister and her two friends. One of the friends died of alcohol poisoning. Malaske was convicted of felony murder predicated on the felony of supplying alcohol to a minor.[12]

9. Ryan Holle, a young Florida man, routinely loaned his car to his housemate. At the end of a party, the housemate talked with guests about stealing a safe from a drug dealer's home, maybe by force. The housemate asked Holle for the car keys. Holle, tired, drunk, and unsure whether the housemate was serious, provided the keys and went to bed. The housemate and his friends stole the safe and one clubbed a resisting resident to death. Holle was convicted of felony murder and sentenced to life without parole.[13]

10. Bernard Lambert, a Pennsylvania man who regularly gave rides to a friend, drove the friend to a home where he claimed someone owed him money. The friend broke in and shot a resident in the head. Lambert was convicted of felony murder predicated on burglary.[14]

11. North Carolina college student Janet Danahey set fire to a bag of party decorations as a prank in front of the door of her ex-boyfriend's apartment in the exterior hallway of an apartment complex. To

[8] People v. Stamp, 82 Cal. Rptr. 598, 601 (Cal. Ct. App. 1969).

[9] People v. Ingram, 492 N.E.2d 1220, 1220-21 (N.Y. 1986).

[10] People v. Matos, 83 N.Y.2d 509, 510-11 (N.Y. 1994).

[11] Hickman v. Commonwealth, 398 S.E.2d 698, 699 (Va. Ct. App. 1990).

[12] Malaske v. State, 89 P.3d 1116, 1117 n.1 (Okla. Crim. App. 2004).

[13] Liptak, *supra* note 1.

[14] Commonwealth v. Lambert, 795 A.2d 1010, 1013-14 (Pa. Super. Ct. 2002).

> Danahey's surprise, the building caught fire and four people died in the blaze. Danahey pled guilty to four counts of felony murder.[15]

These cases are indeed troubling. The *New York Times* featured the Holle case in a story portraying the felony murder doctrine as out of step with global standards of criminal justice.[16] Many readers will recognize the Stamp case as one that criminal law textbooks use to illustrate the harshness of the felony murder rule.[17] Janet Danahey's supporters present her case as a condemnation of the felony murder doctrine.[18] Indeed, a doctrine designed to produce results like these would be hard to defend. Yet I will argue that such cases are anomalous rather than paradigmatic – misapplications of a rational doctrine rather than illustrations of an irrational one. Rather than agreeing with the academic consensus that felony murder liability should be abolished, I will argue that we should *make the best* of felony murder liability. By this, I mean two things.

First, in proposing reform rather than abolition, I acknowledge that many of my readers disapprove of felony murder liability. Like it or not, however, we are probably stuck with the felony murder doctrine. Legislatures have supported felony murder for decades in the teeth of academic scorn. Although most states revised their criminal codes in response to the American Law Institute's (ALI) Model Penal Code, only a few accepted the ALI's proposal to abolish felony murder.[19] Today, criminal justice policy is less likely than ever to be influenced by academic criticism, as candidates for office find themselves competing to appear tougher on crime than their opponents.[20] Moreover, in adhering to the felony murder doctrine, legislatures are likely following popular opinion. Opinion studies find that mock jurors are willing to punish negligent killers far more severely if they kill in the course of a serious

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[15] *Janet Danahey*, NORTH CAROLINA CITIZENS FOR FELONY MURDER RULE CHANGE, http://www.ncfelonymurder.org/Janet%20Danahey/janet.html [hereinafter CITIZENS FOR CHANGE] (last visited Nov. 12, 2010).

[16] Liptak, *supra* note 1.

[17] *See* RONALD N. BOYCE, DONALD A. DRIPPS & ROLLIN M. PERKINS, CRIMINAL LAW AND PROCEDURE 547-50 (11th ed. 2010); JOSHUA DRESSLER, CASES & MATERIALS ON CRIMINAL LAW 318 (5th ed. 2009); PHILLIP E. JOHNSON & MORGAN CLOUD, CRIMINAL LAW 254 n.a (7th ed. 2002); SANFORD H. KADISH, STEPHEN J. SCHULHOFER & CAROL S. STEIKER, CRIMINAL LAW AND ITS PROCESSES 438 (8th ed. 2007); CYNTHIA LEE & ANGELA HARRIS, CRIMINAL LAW 432-35 (2005); LLOYD L. WEINREB, CRIMINAL LAW 156-59 (7th ed. 2003).

[18] CITIZENS FOR CHANGE, *supra* note 15.

[19] Guyora Binder, *Felony Murder and Mens Rea Default Rules: A Study in Statutory Interpretation*, 4 BUFF. CRIM. L. REV. 399, 400-01 (2000).

[20] JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 34-35 (2007); Rachel E. Barkow, *The Political Market for Criminal Justice*, 104 MICH. L. REV. 1713, 1718 (2006); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 530 (2001).

felony like robbery.[21] Felony murder liability is not going away and we are going to have to learn to live with it.

But we should also "make the best" of felony murder in a second way: we should try to make it "the best it can be," in Ronald Dworkin's sense. Of course those readers who believe the felony murder doctrine to be inherently unprincipled will find this aspiration of perfecting felony murder incoherent. Nevertheless, drawing on previous work,[22] I will contend that felony murder liability is rationally justifiable on the basis of a plausible conception of desert. I limit this claim to murder punishable by incarceration: I do not maintain that felony murder alone justifies capital punishment.[23] If felony murder liability is ever justifiable, however, felony murder rules can be improved by confining them to the limits of their justifying principles. Even readers who disagree with the felony murder doctrine's justifying principle should prefer that it be applied in a principled way rather than haphazardly. If the law of felony murder can be better or worse, we should make it the best it can be.

Felony murder liability can be justified by the plausible moral intuition that blame for causing harm is properly affected by our evaluation of the actor's aims.[24] This principle pervades our criminal law.[25] A sufficiently worthy purpose – preventing a rape, for example – can justify an intentional killing. A less compelling but still worthy purpose – expressing justified indignation over a rape – can mitigate an intentional killing to manslaughter. A very bad purpose – committing a rape – can aggravate an intentional killing to capital murder. In jurisdictions adopting the Model Penal Code's definitions of

[21] PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME 169-81 (1995).

[22] Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965, 1060 (2008) [hereinafter *Culpability*]; Guyora Binder, *Meaning and Motive in the Law of Homicide*, 3 BUFF. CRIM. L. REV. 755, 773 (2000) [hereinafter *Meaning and Motive*] (book review).

[23] Without venturing an opinion on capital punishment, I proceed from the premise that it is reserved for the most culpable murders, such as premeditated murders for gain. In *Enmund v. Florida*, 458 U.S. 782, 801 (1982) and *Tison v. Arizona*, 481 U.S. 137, 158 (1987), the Supreme Court limited capital murder liability for accomplices in predicate felonies to those acting with at least the extreme indifference to human life often required for murder liability outside of the context of a felony. This effectively makes participation in a predicate felony an aggravator that raises what is already murder to capital murder. A homicide offense requiring extreme indifference to human life is not a true felony murder offense and is beyond the scope of my analysis. I would – at the very least – generalize the *Tison* holding to felons who kill as well as those who participate in felonies in which others kill, since modern law does not generally distinguish between perpetrators and accomplices in culpability or liability. It would be more consistent with the aim of reserving capital punishment for the most culpable homicides to limit capital murder to aggravated *intentional* killings.

[24] *See Culpability*, *supra* note 22, at 1032-46.

[25] *Id*. at 1046-52.

recklessness and negligence, a sufficiently worthy purpose can justify the knowing or reasonably knowable imposition of a risk of harm, and an insufficiently worthy purpose can condemn such risk imposition as reckless or negligent.[26] Moreover, an antisocial or hostile purpose can aggravate reckless killing from manslaughter to murder.[27] Indeed, because harm results from the interaction of competing activities we can hardly assign risk to one activity without evaluating its aims in comparison to those of competing activities.[28] In short, our ends affect our guilt for causing harm.

This intuition implies that culpability is properly understood as the product of two factors: the harm reasonably expected from an action and the moral worth of the ends for which it is committed. The expected harm is the cognitive dimension of culpability, and the moral worth of the actor's ends is the normative dimension of culpability. Let us call the view that both are relevant the principle of dual culpability. Today, courts generally explain felony murder as a crime of risk imposition, in which a dangerous activity leads to death.[29] Previously, courts explained it as a crime of transferred intent, in which a malicious purpose justifies liability for a different, unintended result.[30] The principle of dual culpability reveals that felony murder must involve both the negligent imposition of risk, and a distinct malicious purpose. This principle implies that one who negligently causes death deserves more punishment if he does so for a felonious end. Consider a sexual assailant who inadvertently smothers a child victim in an effort to silence her;[31] a robber who inadvertently pulls the trigger of a gun aimed at a victim's forehead;[32] and an arsonist, who burns down a storefront to collect insurance without considering the danger to neighboring apartment dwellers.[33] All of these offenders seem very blameworthy for the deaths they cause, but because they do not kill intentionally, or even recklessly, they cannot be punished as murderers without a felony murder rule. Thus, lawmakers and citizens may rationally support felony murder rules as necessary to impose deserved punishment in accordance with the principle of dual culpability.

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[26] *See* MODEL PENAL CODE § 2.02(2)(c), (d) (1980).

[27] *See* People v. Thomas, 261 P.2d 1, 3 (Cal. 1953); People v. Protopappas, 246 Cal. Rptr. 915, 927 (Ct. App. 1988); Mayes v. People, 106 Ill. 306, 314 (1883); Commonwealth v. Malone, 47 A.2d 445, 446-47 (Pa. 1946); WAYNE R. LAFAVE, CRIMINAL LAW 726 (4th ed. 2003).

[28] *See Culpability*, *supra* note 22, at 1021-26.

[29] People v. Washington, 402 P.2d 130, 134 (Cal. 1965); Jenkins v. State, 230 A.2d 262, 268-69 (Del. 1967).

[30] Moynihan v. State, 70 Ind. 126, 130 (1880); Simpson v. Commonwealth, 170 S.W.2d 869, 869 (Ky. 1943); People v. Scott, 6 Mich. 287, 293 (1859); Commonwealth v. Flanagan, 7 Watts & Serg. 415, 418 (Pa. 1844).

[31] Commonwealth v. Hanlon, 3 Brewst. 461, 470-71 (Pa. Ct. of Oyer and Terminer 1870).

[32] Slater v. State, 316 So. 2d 539, 540-41 (Fla. 1975).

[33] People v. Goldvarg, 178 N.E. 892, 892-93 (Ill. 1931).

This dual culpability principle explains why felony murder liability is not justified in the eleven cases that began this article. In each case, at least one of the two required forms of culpability was missing. In the first eight cases, the likelihood of death from the defendant's conduct was low, probably too low even for negligence. To be sure, robbery creates a significant risk of death, but not a significant risk that anyone will drop dead, or fall down a hole. In cases three through eight, no participant in the felony caused death directly. In case one, the defendant's fatal act did not serve the felonious end – it had no felonious purpose. In cases nine and ten, the defendants assisted in felonies that proved fatal, but do not appear to have shared the felonious ends. In case eleven, the defendant had no discernible felonious purpose. In cases two, three, seven and eight, the act imposing risk did not advance any independent felonious purpose. These felonies were punished only because they endangered life and health, not because they aimed at some other wrongful end that justified aggravating a resulting death to murder. Thus, the injustice exemplified by these eleven cases resulted from misapplication of the felony murder doctrine. It is not necessary to abolish the felony murder doctrine to prevent such cases. It is only necessary to conform it to its justifying purpose.

By dismissing the felony murder doctrine as rationally indefensible, legal scholars deprive themselves of meaningful roles in reforming felony murder rules. Refusing to acknowledge any common ground with supporters of the felony murder doctrine, scholars offer legislators and voters little reason to listen to them. Moreover, by insisting that felony murder has no justifying purpose, legal scholars perversely encourage lawmakers to make the law of felony murder less rational and less just than it could be. Lectured that felony murder rules violate desert in principle, legislators may assume they must abandon considerations of justice in designing felony murder rules. Told that felony murder rules reflect cynical political pandering, courts will assume they are properly deferring to legislative intent when they impose undeserved punishment. Instructed by scholars that felony murder doctrine imposes strict liability, courts will more likely instruct juries to impose strict liability. In demanding abolition rather than reform, legal scholars make their narrow conception of the best the enemy of the good. The result is a self-fulfilling prophecy that encourages the arbitrariness and injustice it professes to condemn.

Because American felony murder rules rest on a widely supported and theoretically plausible moral principle, the most democratic approach to critiquing them is to test them against that principle. The most pragmatic strategy for improving the law of felony murder is to show lawmakers how to bring it into conformity with that principle. These are the aims of this Article. It pursues these aims by surveying and critiquing the current design of American felony murder rules in all felony murder states, as well as in the District of Columbia and the federal system. It finds that these rules roughly conform to the principle of dual culpability on most issues, in most jurisdictions. It reveals unjust results like the eleven cases summarized above

to be anomalies, attributable to unusual rules or misapplications of enacted law. Finally, it offers guidelines for reforming felony murder law where necessary to avoid such results, while still convicting the surprised pedophile, the overconfident robber, and the myopic arsonist who deserve murder liability.

The Article is divided into four parts. Part I explains my interpretation of the felony murder doctrine as an application of the principle of dual culpability. It introduces Dworkin's conception of principle; reviews the development of felony murder liability and the standard objections to it; offers the principle of dual culpability as a response to those objections; and outlines a range of doctrinal devices that may be used to conform felony murder liability to the principle of dual culpability. Part II examines three different ways jurisdictions condition felony murder liability on the killer's negligence with respect to an apparent danger of death. These are culpability requirements; dangerous felony requirements, including those implicit in the selective enumeration of predicate felonies; and causation requirements, particularly those requiring foreseeability of death. Part III turns to criteria of vicarious felony murder liability for participants in the felony other than the killer. These include foreseeability and felonious purpose standards for complicity in felony murder, as well as special collective liability rules in some jurisdictions. Part IV focuses on the most important device for conditioning felony murder on felonious motive: independent felony requirements. It considers covert independence requirements implied in the selective enumeration of predicate felonies, and justifies waiving independence requirements for felonies entailing depraved indifference to human life. The conclusion summarizes the argument and offers jurisdictionally-specific recommendations for reform.

I. THE PRINCIPLES OF FELONY MURDER LIABILITY

A. *The Constructive Interpretation of Legal Principle*

In *Law's Empire* Ronald Dworkin developed an influential account of normative legal argument that integrates the concerns of lawyers, judges, legislators, citizens, and legal theorists in a single conversation.[34] Although participating in the legal process in different roles, each of these speakers addresses a common question: how to make the law of some particular political community "the best it can be."[35] For Dworkin, legal reasoning is always at once positive and normative. It draws on the authority of institutions accepted as legitimate, while remaining mindful that the legitimacy of those institutions is always open to question and always contingent on the acceptance and commitment of other legal actors. Thus, an appeal to settled authority never suffices to warrant a legal claim. Such claims also depend upon some

[34] RONALD DWORKIN, LAW'S EMPIRE 5-15 (1986).

[35] *Id.* at 53.

normative legal theory; yet such legal theories are always also interpretations of the history of some particular legal system.

Dworkin uses the concept of "principle" to capture this complex ambiguity of legal argument between claims about how the law is and claims about how it should be. For Dworkin, rules and precedents are never self-interpreting. Decision-makers cannot apply sources of law without first constructing some more general account of their purposes and values, and of how they fit within the larger body of law that makes them authoritative. These more general accounts of the purposes and values of rules within a particular legal system, are what Dworkin calls "principles." Dworkin is neither the first nor the last legal theorist to argue that applying rules involves constructing their purposes. Theorists of legal interpretation from Francis Lieber, through Hart and Sacks, to William Eskridge have critiqued naïve formalism by pointing out the dependence of statutory meaning on some understanding of the statute's purpose.[36] But Dworkin argues that these ordering purposes are best understood as moral principles, rather than instrumental policies. In other words, laws are best understood as setting up cooperative institutions to share the burdens of achieving public goods. Thus interpreted, laws have an additional basis of legitimacy beyond their democratic pedigree: they can be defended as fair, and therefore worthy of popular support.[37]

A jurisprudence of principle is one kind of "constructive interpretation."[38] Constructive interpretation is a two-part process of judgment as to how to continue a practice. A constructive interpreter must first construct a purpose that explains and justifies the history of that practice, and second apply that purpose to resolve dilemmas that arise within that practice. The validity of a constructed purpose depends upon two different considerations: how well it fits with or explains the past history of the practice, and how normatively appealing it is on its own terms. Thus, a legal principle is valid insofar as it explains authoritative legal sources in a way that seems just. The principles that "best" reconcile these two considerations of fit and justice make the law "the best it can be."[39]

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[36] *See* GUYORA BINDER & ROBERT WEISBERG, LITERARY CRITICISMS OF LAW 47-50, 83-85, 188-95 (2001) (citing WILLIAM N. ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION (1994); FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS (3d. ed., 1880); J. G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION (Frank E. Horack, Jr. ed., 3d ed. 1943); Max Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388 (1942)). *See generally* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (teaching materials prepared in 1957 treating legislation, administrative application, and adjudication as parts of a continuous process).

[37] DWORKIN, *supra* note 34, at 211, 213, 225.

[38] *Id.* at 52-53, 225.

[39] *Id.* at 53.

Although Dworkin insists that the conventions of legal reasoning require that lawyers and judges treat legal questions as having "right answers,"[40] his account of legal reasoning explains why legal theorists often describe law as indeterminate. After all, the principles that best fit enacted laws may not be the ones that seem most just. Indeed, the question of what laws are enacted is not entirely separable from the question of their justice.[41] As Dworkin admits, the constructive interpretation is a "creative" process depending on something like aesthetic judgment.[42] Moreover, some legal dilemmas – those faced by legislators for example – are not conventionally seen as having right answers. And yet these are also questions of principle for Dworkin. The legislator is not free to enact laws whimsically, but should maintain the integrity of the legal system.[43] Each new law should maintain integrity with the rest of the legal system even as it improves it. Every legal actor, in every legal decision, should strive to make the legal system as a whole the best it can be.

Because constructive interpretation involves a trade-off between explanation and justification, a constructed purpose need not "fit" past practice perfectly. Like any legitimating rationale, it has critical as well as justificatory implications. An interpretive legal theory may demand reforms to maintain integrity with the principle justifying the remainder of the law.

In proposing that we "make the best of felony murder," I am offering a constructive interpretation of the felony murder doctrine, designed to explain much current law, critique and reform what it cannot explain, and justify the law as thus reformed. In past work I have identified and defended a moral principle – the principle of dual culpability – that can justify felony murder liability as deserved under certain circumstances.[44] In the remainder of this Part, I explicate the principle of dual culpability, show how it meets prevalent objections to felony murder, and develop its implications for designing felony murder rules. In subsequent Parts, I show that the current law of felony murder conforms to the principle of dual culpability in most respects in most jurisdictions. I also show where and how felony murder law falls short of this principle, and suggest how it should be changed.

B. *The Development of Felony Murder Liability*

A felony murder rule punishes as murder at least some instances of unintended homicide in the course of attempting or perpetrating at least some felonies. Such a rule was first conceived and proposed in the early Eighteenth

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[40] Ronald Dworkin, *No Right Answer?*, 53 N.Y.U. L. REV. 1, 1 (1978); *see also* DWORKIN, *supra* note 34, at 4-6.

[41] DWORKIN, *supra* note 34, at 48.

[42] *Id.* at 49-51, 228-238; RONALD DWORKIN, A MATTER OF PRINCIPLE 168 (1985) ("Interpretive claims are interpretive . . . and so dependant on aesthetic or political theory all the way down.").

[43] DWORKIN, *supra* note 34, at 178-84.

[44] *Culpability*, *supra* note 22, at 1059.

Century by Chief Justice Holt in the 1700 case of *Rex v. Plummer*,[45] and William Hawkins in his 1716 treatise.[46] Holt proposed that even unforeseeable killings in the course of felonies should be murder. Although he acknowledged there was no precedent for such a rule, he offered it as a narrowing interpretation of an unlawful-act-murder rule he mistakenly attributed to Coke,[47] and which had been clearly rejected by the courts.[48] Coke's murky discussion appears to be a description of an unlawful-act-manslaughter rule.[49] Hawkins reasoned that killing in the course of an unlawful act should be murder if the act was dangerous and likely to provoke armed resistance. Hawkins regarded all felonies as having this dangerous quality. At that time the common law recognized "murder, manslaughter, rape, burglary, arson, robbery, theft, and mayhem" as felonies.[50] But Hawkins limited his rule to felonies aimed at some harm other than physical injury to the victim, thus excluding murder, manslaughter, and mayhem as predicates. Blackstone, writing on the eve of the American Revolution, declared that an "involuntary killing" in pursuit of a felonious intent was murder.[51] Yet this rule probably did not cover genuinely unforeseeable deaths, instead encompassing only unintended deaths resulting from violent assaults. Blackstone added that participation in "an unlawful act against the king's peace, of which the probable consequence might be bloodshed" made one complicit in a partner's intentional killing.[52]

Despite endorsements in treatises, felony murder liability was not enacted into law in England or the Colonies before the American Revolution.[53] On the other hand, at the time of the Revolution, English law did not require intent to kill for any murder. Instead, murder required malice, which was presumed from a "killing," absent self-defense or provocation.[54] "Killing" had a narrower meaning in the Seventeenth and Eighteenth Centuries than the term "causing death" has today. "Killing" meant causing death by intentionally

[45] (1701) 84 Eng. Rep. 1103 (K.B.) 1104.

[46] WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 86-87 (proposing felony murder rule) (photo. reprint 1978) (1716); *see also* Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 88-92 (2004) [hereinafter *Origins*].

[47] R v. Plummer, (1701) 84 Eng. Rep. 1103 (K.B.) 1107.

[48] *See, e.g.*, Sir John Chichester's Case, (1647) 82 Eng. Rep. 888 (K.B.) (imposing mansalughter rather than murder for death resulting from unlawful act); R v. Hull, (1664) 84 Eng. Rep. 1072 (K.B.) 1072-73 (declining to impose manslaughter liability on ground that act causing death was not illegal); *Origins*, *supra* note 46, at 85 (discussing the Chichester and Hall cases).

[49] *Origins*, *supra* note 46, at 144.

[50] *Id.* at 91.

[51] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 192-93 (1770).

[52] *Id.* at 200.

[53] *Origins*, *supra* note 46, at 63.

[54] *See* BLACKSTONE, *supra* note 51, at 200.

injuring a person or intentionally striking a person with a weapon.[55] According to Matthew Hale "death without the stroke or other violence makes not the homicide."[56] Participation in crime had two implications for homicide liability. First, it precluded the defendant from excusing a killing as provoked or as necessary for defense. Second, it made an offender complicit in another participant's killing, but only if she had also used or agreed to the use of violence in committing the crime. The felonious character of the crime was irrelevant.

Felony murder liability emerged in the United States during the Nineteenth Century as one product of a legislative reform movement aimed at narrowing murder by limiting it to "killings" that were intentional or committed in furtherance of particularly heinous crimes.[57] Many states patterned their murder statutes on a 1794 Pennsylvania statute limiting capital or first degree murder to "murders" that were either intended and premeditated or committed in perpetrating or attempting robbery, rape, arson, or burglary.[58] Courts in most of these states determined that murder included unintended killing in the course of these felonies. Some courts also decided that unintended killing in the course of other felonies could be second degree murder. Another large group of states passed statutes explicitly defining killing in the course of some or all felonies as murder. Many were patterned after statutes in Georgia and Illinois defining murder as unlawful killing with either express malice – intent to kill – or malice implied by circumstances showing an "abandoned and malignant heart."[59] This included any "involuntary killing . . . in the commission of an unlawful act which in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent."[60] Some statutes combined a felony murder provision with a grading provision predicating first degree murder on enumerated felonies. A total of twenty-two states that imposed felony murder liability during some part of the Nineteenth Century enumerated particular predicate felonies.[61] In the great majority of these states, felony murder was limited to these predicate felonies. In all, almost eighty percent of the reported felony murder cases ending in conviction in nineteenth-century America were predicated on robbery, rape, arson or burglary.[62]

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[55] Guyora Binder, *The Meaning of Killing*, *in* MODERN HISTORIES OF CRIME AND PUNISHMENT 88, 91-93 (Markus D. Dubber & Lindsay Farmer eds., 2007).

[56] 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 426 (1736).

[57] *Origins*, *supra* note 46, at 64-65.

[58] 1794 Pa. Laws 599-600.

[59] 1817 Ga. Laws 92, 95-96; 1827 Ill. Laws. 127-28.

[60] 1827 Ill. Laws. 128. Georgia also included "riotous" intent in this formula. 1817 Ga. Laws 96.

[61] *Origins*, *supra* note 46, at 187-90.

[62] *Id.*

This selectiveness about predicate felonies suggests that not all felonies were thought equally malicious. Courts offered differing explanations as to why some felonies rendered unintended killings malicious. Some courts emphasized the wickedness of the felonious purpose. Thus, a Michigan decision reasoned that unintended killing during a crime "*malum in se*" was murder "because resulting from the same species of depravity or maliciousness."[63] An Indiana decision explained that enumerated offenses involved "great moral depravity and an utter disregard of the rights of person and property."[64] Such an offender "intends a great wrong . . . and if death ensue he must take the consequences which result."[65] A Pennsylvania decision reasoned that enumerated felonies justified murder liability because they involved "such turpitude of mind, and protection against which was so necessary to the peace and welfare of all good citizens, that our Legislature considered the intention as of no consequence . . . ."[66] Other courts emphasized the dangerousness of certain felonies. An 1833 opinion explained New Jersey's statutory enumeration of predicate felonies as reflecting the common law principle "that if a person . . . undesignedly kill[s] a man" while attempting "a felony, the killing is murder; especially if death were a probable consequence of the act."[67] An 1864 case explained that California's felony murder law imputed malice on the basis of acts "*malum in se*" which naturally result in death.[68] Perhaps the most complete and cogent explanation appeared in the 1875 Massachusetts case of *Commonwealth v. Pemberton*:

> If the purpose of the defendant was to commit robbery, and if in the execution of that purpose, and in order to overcome the resistance and silence the outcries of the victim, he made use of violence that caused [the victim's] death, no further proof of premeditation or of willful intent to kill is necessary. Robbery committed by force and violence, and in spite of all resistance, is of course malicious, and if in the perpetration of that crime the person robbed is killed, it is a killing with malice aforethought . . . .[69]

Here we see the twin themes of wicked motives and dangerous acts linked – the felony murderer is malicious because determined to achieve wicked aims by force, regardless of the inevitable danger to others. This is the principle of dual culpability.

In making sense of these statutes we must also keep in mind that nineteenth-century American lawyers still conceived the act of killing as necessarily

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[63] People v. Scott, 6 Mich. 287, 293 (1859).

[64] Moynihan v. State, 70 Ind. 126, 130 (1880).

[65] *Id.*

[66] Commonwealth v. Flanagan, 7 Watts & Serg. 415, 418 (Pa. 1844).

[67] State v. Cooper, 13 N.J.L. 361, 370 (N.J. 1833).

[68] People v. Foren, 25 Cal. 361, 366 (1864).

[69] Commonwealth v. Pemberton, 118 Mass. 36, 44 (1875).

entailing some measure of culpability by virtue of either violence or manifest danger. An 1804 treatise on Kentucky criminal law defined killing as follows:

> [N]ot only he, who by wound or blow, or by poison, or by lying in wait, or by strangling, famishing or suffocation, &c. directly causes another's death, but also in many cases he who by wilfully and deliberately doing a thing which visibly and clearly endangers another's life, thereby occasions his death, shall be considered to kill him.[70]

This understanding of killing informed felony murder law. An 1873 Kentucky case reasoned that a felonious context aggravated a negligent killing from manslaughter to murder.[71] A trial court in the 1867 California case *People v. Nichol* instructed the jury that the infliction of a "mortal wound" during an enumerated felony was murder.[72] In the 1883 case of *State v. Wells* the Iowa Supreme Court reasoned that "where murder is committed in the perpetration of rape or robbery, it is not essential . . . [that] there was a specific intent to kill. It is sufficient if death ensues from violence inflicted while the defendant is engaged in the commission of the offense named . . . ."[73] The conditioning of homicide on an intentional battery or some other obviously dangerous act was reflected in the fact patterns of cases in which felony murder liability was imposed in nineteenth century America. Typically, these involved shooting or stabbing a robbery victim.[74]

English courts began to impose felony murder liability belatedly and half-heartedly in the second half of the Nineteenth Century, limiting predicate felonies to those involving grave danger or violence.[75] Initially, they limited felony murder liability to those who had committed or intended violence in furtherance of a felony. Thus, in instructing the jury in the 1864 case of *Regina v. Lee*, Judge Pollock defined felony murder as follows:

> [I]f a man in the committal of a felony uses violence to the person, which causes death, even although he did not intend it, he is guilty of murder, and . . . if two or more persons go out to commit a felony, with intent that personal violence shall be used in its committal, and such violence is used and causes death, then they are all equally guilty of murder, even although death was not intended.[76]

By the end of the Nineteenth Century, however, Anglo-American jurists and scholars had begun to re-conceptualize homicide as causing death with some degree of foresight rather than committing a fatal assault without adequate

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[70] HARRY TOULMIN & JAMES BLAIR, A REVIEW OF THE CRIMINAL LAW OF THE COMMONWEALTH OF KENTUCKY 4 (photo. reprint 1983) (1804).

[71] Chrystal v. Commonwealth, 72 Ky. (9 Bush) 669, 671-72 (1873).

[72] People v. Nichol, 34 Cal. 211, 213 (1867).

[73] State v. Wells, 17 N.W. 90, 92 (Iowa 1883).

[74] *Origins*, *supra* note 46, at 193-96.

[75] *Id.* at 100.

[76] R v. Lee, (1864) 176 Eng. Rep. 468 (Kent Assizes) 469-70 (footnote omitted).

excuse.[77] Expressing this viewpoint from the bench in 1887, James Fitzjames Stephen instructed a jury:

> I think that, instead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life, and likely in itself to cause death done for the purpose of committing a felony which caused death, should be murder.[78]

This became the prevailing English rule[79] until Parliament abolished this category of murder in 1957.[80]

In the early Twentieth Century, American courts sometimes explained felony murder rules as legal fictions. A Kentucky court reasoned that "[t]he intent to perpetrate a different felony . . . supplies the elements of malice and intent to murder although the death is actually against the original intention of the party."[81] In a case predicated on the enumerated felony of arson, a Missouri court declared that "the law supplies or presumes . . . an *intent to kill*."[82] Yet it also reaffirmed an earlier court's conclusion that "the homicide must be an ordinary and probable effect of the felony."[83] Over the course of the century courts increasingly relied on the dangerousness of the felony in explaining felony murder.

As scholars and courts reconceived the act element of homicide to include any conduct causing death, the mental element became a more important determinant of liability. In his history of English criminal law, Stephen had analyzed malice as encompassing five distinct mental states, and proposed replacing them with recklessness, or awareness of a substantial risk of death.[84] In Stephen's view, this scheme would render a distinct felony murder rule superfluous.[85] In the 1930s, Herbert Wechsler and Jerome Michael built on Stephen's work, proposing a scheme for grading homicide according to the degree of the actor's expectation of causing death.[86] Wechsler's and Michael's

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[77] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 51-60 (Mark DeWolfe Howe ed., 1963) (1881); 3 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 79-87 (1883); FRANCIS WHARTON, A TREATISE ON THE LAW OF HOMICIDE IN THE UNITED STATES, at iii-iv, 33-34 (2d ed. 1875).

[78] R v. Serné, (1887) 16 Cox's Crim. L. Cas. 311 (Cent. Crim. Ct.) 313 (Eng.).

[79] SERJEANT STEPHEN, NEW COMMENTARIES ON THE LAWS OF ENGLAND 59 (Edward Jenks ed., 16th ed. 1914); 9 HALSBURY'S LAWS OF ENGLAND 437 (Hailsham ed., 2d ed. 1933).

[80] Homicide Act, 1957, 5 & 6 Eliz. 2, c.11, § 1 (Eng. & Wales).

[81] Simpson v. Commonwealth, 170 S.W.2d 869, 869 (Ky. 1943).

[82] State v. Glover, 50 S.W.2d 1049, 1052 (1932) (quoting State v. Wieners, 66 Mo. 13, 22 (1877)).

[83] *Id.*

[84] STEPHEN, *supra* note 77, at 80-81.

[85] *Id.*

[86] Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701, 749 (1937).

risk-oriented analysis of homicide would eventually blossom into the hierarchy of culpable mental states that Wechsler incorporated into the American Law Institute's 1962 Model Penal Code. The greater an actor's awareness of an incriminating circumstance or future harm, the more culpable the actor was. As crime increasingly became conceptualized as the wrongful imposition of risk, it began to seem primitive and unscientific to base homicide liability on any consideration other than the actor's expectation of causing death. Scholars and commentators increasingly saw the felony murder doctrine as an anachronistic relic.[87] The Model Penal Code proposed abolishing felony murder liability, which the accompanying commentary scorned as "indefensible in principle."[88] To proponents of the Model Penal Code, felony murder liability was a form of strict liability, which the Code forbade. The Code required at least extreme indifference to human life for murder but permitted juries to treat participation in an enumerated felony as prima facie evidence of such indifference.[89]

A majority of states revised their criminal codes in response to the Model Penal Code. While they embraced the Model Penal Code's general approach to defining and analyzing criminal offenses, most states retained felony murder. In so doing, they defined felony murder as causing death in committing or attempting particular felonies, rather than requiring a particular culpable mental state with respect to death. A substantial minority of states retained traditional definitions of murder in terms of malice. The Model Penal Code's drafters may have influenced felony murder law indirectly by advocating the expansion and clarification of the prosecution's burden of proof. In a series of cases, the U.S. Supreme Court established the prosecution's constitutional burden to prove offense elements beyond a reasonable doubt.[90] The Court's 1978 ruling in *Sandstrom v. Montana* forbade requiring juries to presume mental elements of offenses from other facts.[91] In

[87] *See, e.g.*, MODEL PENAL CODE § 210.2 cmt. 6, at 31-32 (Official Draft and Revised Comments 1980); *Anachronism*, *supra* note 1, at 433; Crum, *supra* note 1, at 210 ("[The felony murder rule] appears to have grown out of a medieval legal system which punished small crimes with death as quickly as large ones . . . ."); Roy Moreland, *Kentucky Homicide Law with Recommendations*, 51 KY. L.J. 59, 82 (1962); *see also* People v. Aaron, 299 N.W.2d 304, 307 (Mich. 1980) ("Historians and commentators have concluded that the rule is of questionable origin and that the reasons for the rule no longer exist, making it an anachronistic remnant . . . .").

[88] *See* MODEL PENAL CODE § 210.2 cmt. 6, at 38-39.

[89] MODEL PENAL CODE § 210.2(1)(b) (Proposed Official Draft 1962).

[90] Mullaney v. Wilbur, 421 U.S. 684, 701 (1975); *In re* Winship, 397 U.S. 358, 364 (1970).

[91] Sandstrom v. Montana, 442 U.S. 510, 524 (1979) ("Because David Sandstrom's jury may have interpreted the judge's instruction as constituting either a burden shifting presumption . . . or a conclusive presumption . . . we hold the instruction given in this case unconstitutional."); *see also* Morissette v. United States, 342 U.S. 246, 274 (1952) (holding as a matter of federal evidence law rather than constitutional due process that "the trial court

consequence, courts have generally avoided explaining felony murder rules as presuming malice or intent to kill. Although Montana's code refers to felony murder as "deliberate homicide,"[92] the Montana Supreme Court reacted to *Sandstrom* by denying that felony murder requires intent to kill.[93] The court reasoned that the rule instead punished "dangerous" or "reckless" actions "likely to result in death."[94] Virginia courts justify "imputing malice" from violent felonies on the basis that the "commission of a felony of violence manifests a person-endangering frame of mind . . . ."[95] South Carolina courts permit juries to infer malice when a killing is in the context of a felony, but define malice as a "malignant recklessness of the lives and safety of others" that the prosecution must prove.[96] Wisconsin courts require no proof that felons should have foreseen death, instead relying on the legislature's judgment that the statutorily enumerated felonies are so "inherently dangerous" that "death is deemed to be a natural and probable consequence."[97] Iowa courts have justified an inference of malice from enumerated felonies posing "a substantial risk of serious injury or death."[98] Courts in Oklahoma and Kansas have reasoned similarly.[99]

In states with traditional definitions of murder as malicious killing, the modern trend has been to view the dangerousness of the felony, rather than its unlawful motive, as its malicious feature. In its influential 1965 opinion in *People v. Washington*, the California Supreme Court concluded that "[t]he felony-murder doctrine ascribes malice aforethought to the felon who kills in the perpetration of an inherently dangerous felony," and explained the rule as

may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act"); Tot v. United States, 319 U.S. 463, 467 (1943) (due process requires that presumptions must satisfy a rational basis test.).

[92] MONT. CODE ANN. § 45-5-102(1)(b) (1999).

[93] State v. Cox, 879 P.2d 662, 668 (Mont. 1994); *see also* State v. Nichols, 734 P.2d 170, 177 (Mont. 1987).

[94] *Cox*, 879 P.2d at 668.

[95] Kennemore v. Commonwealth, 653 S.E.2d 606, 609 (Va. Ct. App. 2007) (quoting Cotton v. Commonwealth, 546 S.E.2d 241, 243 (Va. Ct. App. 2001)); *Cotton*, 546 S.E.2d at 243 (quoting JOHN L. COSTELLO, VIRGINIA CRIMINAL LAW AND PROCEDURE § 3.4-3, at 33 (2d ed. 1995)).

[96] State v. Heyward, 15 S.E.2d 669, 671 (S.C. 1941) (quoting 29 CORPUS JURIS 1084-95 (1922); *see also* Lowry v. State, 657 S.E.2d 760, 764 (S.C. 2008).

[97] State v. Oimen, 516 N.W.2d 399, 407 (Wis. 1994).

[98] State v. Ragland, 420 N.W.2d 791, 794 (Iowa 1988), *overruled on other grounds*, State v. Heemstra, 721 N.W.2d 549 (Iowa 2006).

[99] *E.g.*, State v. Hoang, 755 P.2d 7, 8 (Kan. 1988) ("The purpose of the felony-murder doctrine is to deter all those engaged in felonies from killing negligently or accidentally."); Kinchion v. State, 81 P.3d 681, 684 (Okla. Crim. App. 2003) (stating that enumeration of felonies reflects legislative purpose to hold defendants responsible when "death occurs during a felony so inherently dangerous as to create a foreseeable risk of death").

serving to deter killing.[100] A 1967 Kansas case still treated the felony as "tantamount to" the premeditation and deliberation otherwise necessary for first degree murder.[101] By 1978, however, the Kansas Supreme Court conditioned felony murder on a showing that "participants in the felony could reasonably foresee or expect that a life might be taken," reasoning that those committing dangerous felonies "knowing full well the possible tragic results" deserved liability.[102] Within a few years, Kansas adopted a modern code limiting felony murder to those predicated on enumerated "inherently dangerous felon[ies]."[103]

In states that have reformed their codes in light of the Model Penal Code, courts generally justify felony murder liability on the basis of the dangerousness of the felony, without referencing malice, transferred intent, or conclusive presumptions. For example, in *State v. Martin*, the New Jersey Supreme Court rejected an account of felony murder as a crime of transferred intent.[104] It recounted how New Jersey's code drafting commission had carefully considered the Model Penal Code's abolition of felony murder, but chose to retain felony murder to deter violent felonies because of their danger.[105] Although it characterized felony murder as a crime of strict liability, the court ruled that death must have been "the foreseeable result of the risk created by the felon" and a "probable consequence" of the felony.[106]

In reviewing the history of felony murder liability, we see that courts and legislatures have justified it on the basis that the predicate felonies contribute culpability to the killing in one of two ways: because they are foreseeably dangerous, or because they are motivated by a wrongful purpose. Neither justification is adequate on its own. Negligence does not provide sufficient culpability to justify murder liability, and rape and robbery are not as malicious as murder. When the two justifications are combined, however, as in *Commonwealth v. Pemberton*,[107] they make a convincing case. Using deadly force in order to rape or rob does justify murder liability. Thus, the principle of dual culpability synthesizes the disparate particular formulations of felony murder that comprise its history and then uses that synthesis to critique and improve upon those particular formulations.

C. *Objections to Felony Murder*

A constructive interpretation is a criterion as well as a rationale. While it should make sense of traditional accounts of a practice like felony murder

[100] People v. Washington, 402 P.2d 130, 133 (Cal. 1965).

[101] State v. Moffitt, 431 P.2d 879, 891 (Kan. 1967).

[102] State v. Branch, 573 P.2d 1041, 1043 (Kan. 1978).

[103] KAN. STAT. ANN. § 21-3401(b) (1981).

[104] State v. Martin, 573 A.2d 1359, 1368 (N.J. 1990).

[105] *Id.* at 1368-70.

[106] *Id.* at 1375.

[107] 118 Mass. 36, 44 (1875).

liability, it should also account for familiar critiques. The principle of dual culpability meets this test. Because the principle of dual culpability reveals the traditional accounts of felony murder to be partial truths, it also shows why prevailing critiques of felony murder are partial truths as well. These critiques note the inadequacy of the transferred malice and foreseeable danger rationales, but draw the wrong conclusion – that no better rationale is possible.

1. Theoretical Objections

Influential critics like Herbert Wechsler and Sanford Kadish have charged that "[p]rincipled argument in favor of the felony-murder doctrine is hard to find"[108] because it is "rationally indefensible."[109] By this they mean that punishing felony murder is neither efficacious nor fair.

Critics charge that felony murder liability imposes the social costs of punishment without corresponding benefits in utility. In particular, critics effectively challenge the claim of some courts and legislatures that felony murder liability is an effective deterrent. Severely punishing the unintended consequences of intended dangerous conduct imposes a punishment lottery on the intended conduct. In other words, a felony murder rule subjects participants in predicate felonies to a small risk of a large penalty. Yet we should expect to achieve greater deterrence by increasing the certainty of punishment rather than its severity. This result is expected because (1) offenders are likely to be relatively risk-preferring, and (2) since status degradation is a significant cost of incarceration that does not vary with its duration, longer terms of incarceration should have diminishing marginal utility.[110] Indeed, empirical studies have generally confirmed that raising the severity of penalties has little or no deterrent effect.[111] Moreover, the only empirical study directly addressing the deterrent effect of felony murder rules found no deterrent benefit.[112]

Although apparently persuasive, this punishment lottery argument is subject to two rejoinders. First, it proves too much. All penalties conditioned on actual harm – including all penalties for homicide – are punishment lotteries. Indeed, Professor Kadish applied the epithet "rationally indefensible" not only to felony murder, but to all punishment conditioned on results.[113] In this spirit, Herbert Wechsler's Model Penal Code generally equalized the punishment of

[108] MODEL PENAL CODE § 210.2 cmt. 6, at 37 (Official Draft and Revised Comments 1980).

[109] Kadish, *supra* note 2, at 695.

[110] *Culpability*, *supra* note 22, at 981-86.

[111] *See Culpability*, *supra* note 22, at 982.

[112] *See* Anup Malani, Does the Felony-Murder Rule Deter? Evidence from FBI Crime Data 2 (Dec. 3, 2007) (unpublished manuscript), *available at* http://nytimes.com/packages/pdf/national/malani.pdf.

[113] Kadish, *supra* note 2, at 679.

attempts, conspiracies, and completed crimes.[114] Thus, the logic of the punishment lottery argument precludes punishing harm at all. If deterrence theory demands such a massive – and unlikely – transformation of our criminal law, it fails as a guiding principle for constructive interpretation. Second, there are utilitarian reasons to punish actual harms that transcend simple deterrence theory, and these considerations support felony murder liability as well. Unlike the imposition of risk, actual harm produces victims who suffer status degradation. Victims and those associated with them are under social pressure to restore their status by avenging injuries. A state can only establish a rule of law and a public monopoly on the use of force if it can credibly undertake to vindicate victims degraded by private violence.[115] By injuring particular victims in the pursuit of felonious ends, felons degrade their status.[116] Punishing felony murders fulfills the state's duty to vindicate the civic equality of victims and thereby encourages loyalty to the rule of law. This argument is one form of the common claim that deserved punishment promotes welfare by strengthening the sense of civic obligation to obey law.[117]

But is felony murder liability deserved punishment? Critics charge that felony murder violates desert by holding felons strictly liable for causing death. Yet the equation of 'felony murder' with 'strict liability' relies on contestable interpretations of both of these concepts.

First, the critique of felony murder as strict liability relies on selective interpretation of the concept of felony murder liability. The broad concept of felony murder liability includes liability for any kind of unintended killing in the course of any felony. It includes not only strict liability rules, but also rules conditioning liability on culpably careless mental states such as recklessness and negligence, and rules restricting predicate felonies to those entailing such culpable mental states. The charge of undeserved strict liability therefore applies to some possible conceptions of felony murder but not all. Yet critics of felony murder liability have associated it with strict liability by claiming that existing felony murder rules all originated from a common law doctrine of strict liability for accidental death during all felonies.[118] This genealogy implies that even if current felony murder rules do not impose strict liability, they owe their existence to strict liability rules. Thus current rules must be regarded as vestiges of injustice, unless the original "common law felony murder doctrine" can be justified today. On this reasoning, a "principled"

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[114] MODEL PENAL CODE § 5.05(1) (1985).

[115] Guyora Binder, *Victims and the Significance of Causing Harm*, 28 PACE L. REV. 713, 727 (2008).

[116] *Culpability*, *supra* note 22, at 1037.

[117] *See* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 409-13 (1958); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV 453, 468-70 (1997); Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315, 333-36 (1984).

[118] *See Origins*, *supra* note 46, at 60-62; *supra* notes 2-15 and accompanying text.

justification of felony murder must justify strict liability for accidental death during any felony. By tying existing felony murder rules to a mythic history of strict liability, critics place constructive interpreters of felony murder in a dilemma. It seems they must fail one of the two criteria for constructive interpretation of a practice: they can find no principle that will both fit the history of the practice and also justify it.

But if the interpretation of felony murder as fundamentally a strict liability crime is premised on its supposed descent from a strict liability rule, the actual history of felony murder falsifies that premise. Current felony murder rules are not descended from a common law felony murder doctrine. There was no felony murder in pre-Revolutionary English law. Felony murder rules are the product of American legislation. Each is independent of every other, with its own history. In general, however, these rules did not punish accidental death in the course of all felonies. Instead, they were limited to inherently culpable means of killing, involving violence or apparent danger. They were also limited to particular felonies, characterized as particularly dangerous or malicious. Thus, proponents of felony murder rules conditioned on negligence or recklessness need not justify a primeval strict liability rule because no such rule existed.[119]

The critique of felony murder as strict liability also relies on selective interpretation of the concept of strict liability. Kenneth Simons has drawn attention to the ambiguity of this term by distinguishing between substantive and formal strict liability.[120] Substantive strict liability means liability without fault.[121] If the felony murder doctrine imposed substantive strict liability, it would obviously violate desert. Formal strict liability has a narrower, more technical meaning that depends on the particular analytic scheme of the Model Penal Code.[122] According to this scheme, the actus reus of any offense can be broken down into some combination of acts, omissions, circumstances, and results.[123] We can call these objective elements. The mens rea of the offense consists of culpable mental states such as purpose, knowledge, recklessness, or negligence associated with particular acts, omissions, circumstances, or results.[124] We may call these mental states subjective elements. If an offense requires proof of a subjective element such as intent to kill, without a

[119] *See supra* Part I.B.

[120] Kenneth W. Simons, *When is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1087 (1997).

[121] *Id.* at 1088.

[122] *Id.*

[123] *See* MODEL PENAL CODE § 2.01(1) (1985) ("A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable."); *id.* § 1.13(9)(a) (defining "element of an offense" as conduct, attendant circumstances, or result of conduct that "is included in the description of the forbidden conduct in the definition of the offense").

[124] MODEL PENAL CODE § 2.02 (1985).

corresponding objective element such as causing death, the subjective element is inchoate. If an offense requires an objective element without a corresponding subjective element, the objective element is a strict liability element. According to Simons' terminology, an offense with no subjective elements is a pure strict liability offense; an offense with at least one strict liability objective element is an impure or partial strict liability offense.[125] The Model Penal Code, however, prohibits incarceration as undeserved for impure strict liability offenses.[126] In other words, the Model Penal Code equates impure formal strict liability with substantive strict liability. When critics condemn felony murder as a strict liability offense they similarly equate impure formal strict liability with substantive strict liability.

As Mark Kelman has pointed out, however, these concepts are not equivalent. Statutes can employ impure formal strict liability rules as means to punish negligent conduct.[127] Imagine that the legislatures of two states, North and South Appalachia, both wish to impose deserved punishment for negligently imposing risk of a certain kind of harm. Imagine further that each adopts a different strategy. North Appalachia applies a flexible negligence standard, incriminating anyone who creates an unreasonable risk of that harm. It defines an "unreasonable" risk as an apparent risk outweighing the expected benefits of the conduct. South Appalachia applies a rigid per se negligence rule, punishing those who knowingly or purposely engage in certain conduct the legislature has determined to be unreasonably dangerous in the same sense. Notice that neither approach involves a strict liability element, but North Appalachia's negligence standard involves an inchoate element. South Appalachia's rigid rule may actually seem fairer in that it conditions liability on the higher culpability standards of knowledge or purpose rather than negligence, and it satisfies legality concerns by clearly defining the proscribed conduct.

Now suppose both legislatures decide to be more lenient and punish only those who actually cause the harm as a result of their negligent action. Each adds a result element to the offense. The North Appalachia statute now punishes those who cause the harm by acting negligently with respect to the risk of that harm. The new offense has neither an inchoate element nor a strict liability element. The South Appalachia statute now punishes those who cause the harm by engaging in the dangerous conduct. The new offense has a strict liability element: the result element. Because the new South Appalachia statute has merely narrowed liability within the class of offenders receiving deserved punishment under the earlier statute, it does not impose substantive strict liability. Yet it imposes impure formal strict liability. Similarly, a felony

[125] Simons, *supra* note 120, at 1081-82.

[126] *See* MODEL PENAL CODE §§ 2.02, 2.05(2) (1985).

[127] Mark Kelman, *Strict Liability: An Unorthodox View*, *in* 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1512, 1513 (Sanford H. Kadish et al. eds., 1983); *see also Origins*, *supra* note 46, at 67-68.

murder rule that punishes causing death by means of dangerous felonies may involve impure formal strict liability and yet condition liability on negligence.

In characterizing felony murder liability as a form of strict liability, critics wrongly equate substantive strict liability with impure formal strict liability. For a felony murder rule to impose substantive strict liability, it would have to punish nonculpable killing. The fact that a particular felony murder rule employs impure formal strict liability, however, may simply mean that it uses a per se rule rather than a flexible standard to determine whether conduct is culpable.

Moreover, in viewing felony murder as a crime without culpability, critics treat the felony murderer's felonious motive or purpose as irrelevant. In so doing, they embrace a narrowly cognitive view of culpability as limited to expected harm. This view rests in turn on one particular conception of the proper scope of criminal law, called the harm principle. According to this view, the liberal state may coercively regulate conduct so as to prevent individuals from harming one another, but it may not regulate preferences or values. Thus, it may grade punishment on the basis of the expectations of harm accompanying action, but not on the basis of the actor's ends. This value-neutral view of the criminal law is expressed in the traditional maxim that "motive is irrelevant" to criminal liability.[128] If culpability is purely cognitive and motive is irrelevant, then the aim of committing a felony may not aggravate liability for causing death.

This purely cognitive view of culpability is beset with difficulties, however. First, it violates widely held intuitions. We evaluate an intentional killing very differently, depending upon its motives. Killing to avenge a rape is worse than killing to resist a rape. Killing to avenge a verbal insult is even worse, and killing to commit a rape is worse still. Similarly, many people condemn negligent killing much more when the foreseeable risk is imposed for a criminal purpose. Consider how you might punish these two negligent killers: (1) an armed robber whose finger slips while threatening a victim with a gun, and (2) an inattentive driver. Opinion research finds that subjects will impose thirty times more punishment on negligent killers who cause death in perpetrating a robbery than on negligent killers who act without a felonious purpose.[129]

Second, a purely cognitive theory of culpability provides a poor descriptive account of American criminal law. Motives and purposes matter in American criminal law. Good ends can justify offenses on grounds of self-defense and necessity. Justified fear can excuse offenses on grounds of duress; justified

[128] *See* Guyora Binder, *The Rhetoric of Motive and Intent*, 6 BUFF. CRIM. L. REV. 1 *passim* (2002) [hereinafter *Rhetoric*] (exploring origins of the concept of irrelevance of motive, distinction between motive and intent, and other scholars' notions of maxim).

[129] ROBINSON ET AL., *supra* note 21, at 178 (finding that subjects imposed punishment of 9.6 months on negligent homicide defendants, as opposed to 22.5 or 27.0 years for negligent killings in course of felony).

anger can mitigate murder on grounds of provocation. Bad purposes are required for purely inchoate offenses like attempt and conspiracy, for partially inchoate offenses like burglary and assault with intent to injure, and for completed offenses like premeditated murder. Purposes such as eliminating witnesses or earning a fee can aggravate murder to capital murder. Disfavored political motives are required for such offenses as hate crimes, treason, and terrorism. Even the culpable mental states of knowledge, recklessness and negligence have normative aspects. One who kills knowingly is culpable not because he expects death as a result of his act, but because he chooses to act knowing that death will result. In this way the actor accepts death as the consequence or price of pursuing some other aim. One who kills recklessly or negligently is at fault not just for imposing a risk, but for imposing an unreasonable risk – a risk not justified by a good enough end. In short, the evaluation of ends pervades American criminal law.[130] The cognitive theorist would have to reform much more than the felony murder doctrine to make motive truly irrelevant to criminal liability. Cognitive theorists have responded by calling the purposes that pervade standards of criminal liability "intentions," and trying to distinguish them from other purposes, which they call "motives."[131] This distinction has not proved stable, however.[132] Cognitivists are ultimately reduced to defining "intentions" as those purposes that are legally defined as inculpatory and "motives" as those purposes that are not. This makes the claimed irrelevance of motive purely tautological and so disqualifies it as an objection to any normative culpability standard like felonious purpose once it is enacted into law. [133]

Finally, the cognitive view cannot achieve the value neutrality which is its supposed advantage. The cognitive conception of culpability relies on the concepts of harm, risk, and causation, all of which involve value judgments. Thus, in assigning causal responsibility for harms, we confront the problem of social cost. By this, I mean that such harms arise from the interaction of competing activities, so that neither party can prevent cost to himself without imposing cost on the other. Attributing this social cost to just one of two competing activities implies an evaluation of their relative worth. Based on such evaluative judgments, we blame robbers rather than victims for robberies even though robberies require both. Felony murder liability reflects the same logic: we blame robbers rather than resisting victims for fatalities during robberies, even though resistance increases the mortality of robbery by a factor of fourteen.[134]

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[130] *See Culpability*, *supra* note 22, at 1046-1052.

[131] *See, e.g.*, Gardner, *supra* note 1, at 697; Heidi M. Hurd & Michael S. Moore, *Punishing Hatred and Prejudice*, 56 STAN. L. REV. 1081, 1118 (2004); Heidi M. Hurd, *Why Liberals Should Hate "Hate Crime Legislation"*, 20 LAW & PHIL. 215, 216, 227 (2001).

[132] *Rhetoric*, *supra* note 128, at 7-15.

[133] *Id.*

[134] *Culpability*, *supra* note 22, at 968 n.9.

We also inevitably exercise normative discretion in trying to determine the cause of any particular result. We typically ascribe causal responsibility for a result in part on the basis of the ex ante probability of such a result from such an act. Yet the objectivity of probability assessments is undermined by the multiple description problem. The more specifically we describe the act and the more generally we describe the result, the more likely the result will have been.[135] Any conclusion that an actor is at fault for causing an event because he expected it requires a judgment of analogy between his thoughts and subsequent events. We hold the assassin responsible for intentionally shooting a victim through the heart although he aimed at the head, because we judge the intention and the result to be morally equivalent. There is nothing anomalous about transferring culpability from a felonious purpose to an unexpected death if all attributions of results to culpable mental states involve such contestable judgments of analogy.[136]

2. Constitutional Objections

Some scholars have seen the strict liability critique as implying the unconstitutionality of felony murder. Accepting the Model Penal Code's definition of strict liability and the cognitive view of culpability, Nelson Roth and Scott Sundby argued that the definition of a homicide crime must include some culpable mental state with respect to death.[137] If a felony murder rule requires intent to commit a felony rather than such a culpable mental state, they reasoned, it can only be analyzed in one of two ways. Either the rule irrationally treats the commission of a felony as a conclusive presumption of intent to kill, or it unfairly imposes strict liability with respect to death.[138] They argued that the first alternative violates constitutional due process and the right to a jury trial by circumventing the prosecution's burden to prove an offense element; while the second alternative violates due process and the Eighth Amendment prohibition on cruel and unusual punishment by imposing undeserved punishment.[139] Roth and Sundby were mistaken in assuming that felony murder rules *must* take one of these two forms. As we have seen, jurisdictions can avoid strict liability by conditioning felony murder on dangerous or violent felonies, or on foreseeable death. Yet Roth's and Sundby's arguments point to constitutional principles that should influence legislators in drafting, and courts in interpreting, felony murder laws.

The unconstitutional presumption argument treats all murder offenses as having a common mental element, malice, and accepts J.F. Stephen's interpretation reducing malice to the single dimension of a high expectation of

[135] *Id.* at 1006-07.

[136] *Id.*

[137] Roth & Sundby, *supra* note 1, at 448, 453-60.

[138] *Id.*

[139] *Id.* at 456-57, 460.

causing death.[140] It interprets the traditional claim that a felonious purpose is one form of malice as an evidentiary presumption of intent to kill or gross recklessness. Finally, it relies on the 1979 case of *Sandstrom v. Montana*, requiring the prosecution to prove offense elements and rejecting presumptions of culpability as wrongly lifting this burden from the prosecution.[141] If indeed felony murder rules authorized such a presumption, they would violate due process.

Some courts characterized felony murder rules as presumptions before *Sandstrom* was decided,[142] and a few courts continued to instruct juries that they could "infer" malice from the commission of certain felonies that caused death, even after *Sandstrom*.[143] Some courts have accepted the unconstitutional presumptions argument as a reason to abandon felony murder as traditionally defined. Thus, the New Mexico Supreme Court invoked the presumptions argument in explaining its decisions to require proof of gross recklessness as an element of felony murder.[144] The South Carolina Supreme Court condemned an instruction defining any killing during any felony as murder, because it mandated an unconstitutional presumption of the statutorily defined element of malice. The court recommended permitting juries to infer malice from some particular felonious purpose.[145] South Carolina courts have defined malice as "malignant recklessness of the lives and safety of others"[146] or a "heart devoid of social duty and fatally bent on mischief."[147]

Apart from these few jurisdictions, courts have generally rejected the charge that felony murder involves an unconstitutional presumption, reasoning that the intent to commit certain felonies is not evidence of culpability, or a substitute for culpability, but is simply the culpability required for one form of murder.[148] One such case concludes that "a felony of violence manifests a

[140] *See supra* notes 75-80 and accompanying text.

[141] Roth & Sundby, *supra* note 1, at 469-71.

[142] *See* State v. Moffitt, 431 P.2d 879, 886 (Kan. 1967); Simpson v. Commonwealth, 170 S.W.2d 869, 869 (Ky. 1943); State v. Glover, 50 S.W.2d 1049, 1052 (Mo. 1932).

[143] *E.g.*, State v. Oliver, 341 N.W.2d 744, 747 (Iowa 1983).

[144] *See* State v. Ortega, 817 P.2d 1196, 1199 (N.M. 1991) ("[I]n light of the generally disfavored status of the rule and constitutional strictures against presumptions which may shift the burden of proof to the defendant in a criminal trial, we determine that our [felony murder] rule should be construed as necessitating proof of an intent to kill."), *abrogated on other grounds by* State v. Frazier, 164 P.3d 1 (N.M. 2007), *as recognized in* Kersey v. Hatch, 237 P.3d 683 (N.M. 2010).

[145] Lowry v. State, 657 S.E.2d 760, 764 (S.C. 2008).

[146] State v. Judge, 38 S.E.2d 715, 719 (S.C. 1946) (quoting 29 CORPUS JURIS 1084-95 (1922)).

[147] State v. Kinard, 646 S.E.2d 168, 170 (S.C. Ct. App. 2007).

[148] *See, e.g.*, People v. Sarun Chun, 203 P.3d 425, 431-32 (Cal. 2009) (explaining that malice is an element satisfied by intent to commit inherently dangerous felony); People v. Dillon, 668 P.2d 697, 717 (Cal. 1983) ("[T]he 'conclusive presumption' is no more than a procedural fiction that masks a substantive reality, to wit, that as a matter of law malice is

person-endangering frame of mind such that malice may be imputed to the act of killing."[149] Thus, an unconstitutional presumption challenge to a felony murder rule can become the occasion for confining predicate felonies to those involving violence or some other danger to life.

The strict liability argument relies on two strands of constitutional doctrine that appear to require that criminal liability be conditioned on culpability at least under certain circumstances. One is based on the Eighth Amendment's Cruel and Unusual Punishment Clause and the other is based on the Fifth and Fourteenth Amendments' Due Process Clauses.[150]

The Eighth Amendment argument builds on the doctrine that the Cruel and Unusual Punishment Clause forbids disproportionate punishment, including lengthy terms of imprisonment.[151] Proportionality is generally identified either comparatively or instrumentally. Comparative proportionality measures punishment against that provided for other offenses, or the same offenses in other jurisdictions. Instrumental proportionality assesses punishment in terms of its service to its justifying purposes.

Comparative proportionality is unlikely to condemn felony murder liability as such because such liability is widespread and because many non-homicide offenses now carry lengthy terms of incarceration. However, comparative proportionality could possibly condemn an unusually broad felony murder rule, without the prevalent requirements of a dangerous felony and a foreseeable death.

Instrumental proportionality has been defined far less restrictively for incarceration than for capital punishment. The Supreme Court has justified capital punishment primarily on retributive grounds,[152] and restricted capital punishment to those unimpaired adult offenders capable of full culpability.[153]

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not an element of felony murder."); State v. Ragland, 420 N.W.2d 791, 794 (Iowa 1988) (enumerated felonies pose a "substantial risk of serious injury or death") *overruled on other grounds by* State v. Heemstra, 721 N.W.2d 549 (Iowa 2006); State v. Cox, 879 P.2d 662, 668 (Mont. 1994); State v. Nichols, 734 P.2d 170, 176 (Mont. 1987) ("[W]hen a defendant commits a felony such as burglary, kidnapping, or aggravated assault, he initiates conduct which creates a dangerous circumstance. Therefore, the intent to commit the felony supplies the intent for all the consequences, including homicide, arising therefrom."); Cotton v. Commonwealth, 546 S.E.2d 241, 244 (Va. Ct. App. 2001).

[149] *Cotton*, 546 S.E.2d at 243 (quoting JOHN L. COSTELLO, VIRGINIA CRIMINAL LAW AND PROCEDURE § 3.4-3, at 33 (2d ed. 1995)).

[150] Roth & Sundby, *supra* note 1, at 478-79.

[151] *See id.* at 479-83 (discussing *Solem v. Helm*); *see also* Solem v. Helm, 463 U.S. 277, 290 (1983).

[152] *See* Gregg v. Georgia, 428 U.S. 153, 183 (1976).

[153] *See* Roper v. Simmons, 543 U.S. 551, 568, 571 (2005) (holding that the Eighth Amendment forbids the execution of juveniles under 18 largely because of juveniles' "diminished culpability"); Atkins v. United States, 536 U.S. 304, 318-21 (2002) (holding that the Eighth Amendment requires that "the mentally retarded . . . be categorically excluded from execution").

In considering the proportionality of incarcerative punishments, however, the Court has generally declined to prioritize desert,[154] and has permitted lengthy sentences for nonviolent offenses on the basis of speculative incapacitative considerations.[155] Thus, instrumental proportionality is unlikely to require that felony murder be conditioned on culpability under current law. Yet a proportionality challenge can still provide the occasion for a court to defend felony murder liability as deserved by emphasizing its limits. For example, in 1988 the Iowa Supreme Court rejected a proportionality challenge to a felony murder conviction on the much narrower ground that proportionality was satisfied where the defendant killed with reckless indifference to human life.[156]

The due process argument relies on a line of cases requiring a mental element for offenses involving significant penalties and stigma. In *Baender v. Barnett*, the Court held that due process required culpability for the offense of possessing counterfeiting tools, and interpreted the statute to conform to this requirement.[157] Shortly thereafter, in *United States v. Balint*,[158] the Court recognized an exception to the general requirement of culpability for regulatory offenses. In the influential 1952 case of *Morissette v. United States*, the Court construed a theft statute as requiring knowledge that the goods taken were property of another.[159] The Court did not explicitly determine that the Constitution required such a mental element, but ascribed to Congress an intention to confine strict liability to regulatory offenses of risk rather than harm, entailing low penalties and little moral stigma.[160] Subsequent circuit court decisions have taken *Morissette* to imply that due process requires culpability for offenses triggering substantial penalties and moral disapprobation.[161] The Supreme Court has also required a culpable mental

[154] Youngjae Lee, *Desert and the Eighth Amendment*, 11 U. PA. J. CONST. L. 101, 111 (2008). An important exception is the Court's recent prohibition of life sentences without parole for juveniles convicted of crimes other than homicide. *See* Graham v. Florida, 130 S. Ct. 2011, 2030 (2010). The Court used the same analytic approach it applies to capital punishment. *Id.* at 2023.

[155] *See* Ewing v. California, 538 U.S. 11, 30 (2003) (affirming twenty-five-years-to-life sentence for theft of three golf clubs as consistent with the incapacitation rationale of California's "three strikes" rule); Harmelin v. Michigan, 501 U.S. 957, 996 (1991) (affirming sentence of life without parole for first-time offender's possession of large amount of cocaine); Rummel v. Estelle, 445 U.S. 263, 266, 285 (1980) (upholding life sentence under recidivist statute for repeat offender found guilty of "obtaining $120.75 by false pretenses").

[156] State v. Ragland, 420 N.W.2d 791, 794-95 (Iowa 1988), *overruled on other grounds by* State v. Heemstra, 721 N.W.2d 549 (Iowa 2006).

[157] Baender v. Barnett, 255 U.S. 224, 226-27 (1921).

[158] 258 U.S. 250, 253 (1922).

[159] Morissette v. United States, 342 U.S. 246, 270-71 (1952).

[160] *Id.* at 262.

[161] *See* United States v. Wulff, 758 F.2d 1121, 1125 (6th Cir. 1985); Holdridge v. United States, 282 F.2d 302, 310 (8th Cir. 1960). *But see* United States v. Engler, 806 F.2d 425,

state for various offenses regulating otherwise constitutionally protected conduct. Thus, a felon-registration law burdening the right to travel could not be enforced without proof of notice of the duty to register.[162] A regulation of the sale of obscene publications could not be enforced without proof of knowledge of the obscene character of the literature sold.[163]

Does all of this add up to a constitutional requirement that murder be predicated on culpability with respect to death? Certainly, a conviction of felony murder entails severe punishment and implies severe blame. Accordingly, due process may require proof of culpability for a murder conviction, but it may not require proof of culpability with respect to death. It may be that the culpability entailed in the predicate felony suffices. Professor Alan Michaels has argued that the only constitutional requirement of culpability is that an offender must culpably perform some proscribed conduct that is not constitutionally protected.[164] An offense can constitutionally condition punishment on additional results or circumstances on a strict liability basis. A legislature may treat the underlying conduct as demonstrating insufficient care with respect to these other elements. Michaels proceeds to offer felony murder as an example of constitutional strict liability:

> Although strict liability formally attaches to the element of causing a death, the other elements of the statute – in particular, committing a felony – establish imperfect care with regard to the strict liability element. A person guilty of felony murder displayed imperfect care with regard to causing a death because that person was not as careful as possible . . . ; the person could have been more careful by not committing the felony at all.[165]

Michaels suggests that felony murder does involve a kind of culpability with respect to death – "imperfect care" implied by the commission of a felony that caused death. I would add that since most jurisdictions require that the felony must be dangerous or violent, the "imperfect" care is usually negligent per se. Moreover, since most jurisdictions require that death be foreseeable as a result of an act deemed to cause it, legal causation also seems to require negligence.

Is the higher level of culpability required by most felony murder laws optional, or is it constitutionally mandated? There are two reasons for thinking it could be required by due process. First, Michaels's principle requires at least one culpable conduct element. Michaels assumes that felony murder satisfies that requirement, even if it imposes strict liability with respect to death, because the defendant commits or attempts the felony culpably. But felony

434 (3d Cir. 1986) (permitting strict liability under felony provisions of migratory bird protection statute).

[162] Lambert v. California, 355 U.S. 225, 229 (1957).

[163] United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994); Smith v. California, 361 U.S. 147, 152-53 (1959).

[164] Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828, 836 (1999).

[165] *Id.*

murder is a homicide offense, not a sentencing enhancement adding liability to a felony because death results. Arguably killing or causing death is the single conduct element that requires corresponding culpability under Michaels's test, while the intent to commit a violent or foreseeably dangerous felony is the mental element that supplies that culpability. Second, *Morissette* held that crimes causing actual harm should be read as requiring culpability with respect to that result. Following the example of *Morissette* does not require overturning felony murder statutes for imposing strict liability. Instead, it simply involves reading them as requiring a foreseeable risk of death, as most jurisdictions do, through such doctrines as proximate causation and dangerous felony requirements.

In sum, the Constitution requires that offense elements be proven beyond a reasonable doubt rather than presumed, but leaves legislatures broad discretion in defining those elements. The Constitution may require that crimes involving severe punishment and denunciation for causing harmful results be conditioned on some measure of culpability with respect to those results. But even if this requirement is not clearly established, courts should interpret ambiguous statutes so as to avoid a possible conflict with the requirements of due process. "A statute must be construed, if fairly possible, so as to avoid, not only the conclusion that it is unconstitutional, but also grave doubts upon that score."[166] Thus, when courts interpret ambiguous felony murder laws, they should presume a legislative intent to follow other jurisdictions by conditioning liability on a dangerous felony or foreseeable causation of death.

D. *Felony Murder as a Crime of Dual Culpability*

Examination of objections to felony murder liability suggests that an acceptable rationale must explain felony murder liability as deserved. While a felony murder rule that imposes substantive strict liability is not justifiable, the concept of felony murder is broad enough to include negligent and reckless killings. Moreover, a felony murder rule need not condition liability on all felonies. By restricting predicate felonies to those that are dangerous or violent, or by restricting killing to violent or foreseeably dangerous acts, legislatures or courts may require negligence by means of a per se rule.

Yet readers may object that reckless and negligent homicides are not ordinarily considered sufficiently heinous to merit murder liability. Such killings are usually graded as lesser forms of homicide, such as manslaughter. Thus, murder liability is only deserved for unintended homicide in the attempt of a felony if the felonious aim adds culpability to the killing.

In previous work I have argued that a bad aim should aggravate the punishment otherwise deserved for homicide.[167] I based this argument on an "*expressive* theory of culpability that assesses blame for harm on the basis of

[166] Baender v. Barnett, 255 U.S. 224, 226 (1921) (quoting United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916)).

[167] *Culpability*, *supra* note 22, at 967.

two dimensions of culpability: (1) the actor's expectation of causing harm and (2) the moral worth of the ends for which the actor imposes this risk."[168] We may call the first dimension cognitive culpability; we may call the second normative culpability. The relevance of both cognitive and normative dimensions of culpability to deserved punishment for homicide is what I have called the principle of dual culpability.

An expressive theory of culpability, concerned with both cognitive and normative dimensions, is particularly useful in conceptualizing homicide liability. Our discussion of deterrence theory revealed that deterrent threats are rationally directed only at the imposition of risk rather than the causation of harm.[169] Thus, we cannot justify imposing felony murder liability, or any other form of homicide liability, as a deterrent. However, we can justify punishing homicide in order to correct an expressive injustice associated with offenses that inflict injury.[170] Thus, we punish crimes more severely when they do actual harm to particular victims because such crimes degrade those victims. The law has a special obligation to vindicate victims by punishing such crimes because it precludes victims from using vengeance to vindicate themselves. If we punish homicide to do justice to offenders and victims, it follows that felony murder merits punishment in so far as the homicide is committed culpably and expresses disrespect for victims.

In punishing injuries that express disrespect, we necessarily concern ourselves with the offender's aims. Agents express values by choosing to act on the basis of reasons. To express disrespect for a victim, an offender must show through his actions that he does not value the victim appropriately. An injury expresses disrespect if the injurer (1) acts with some awareness of or inattention to a risk of injury to another and (2) acts for a reason that does not justify accepting or ignoring that risk. Thus, the considerations that move us to punish offenders based on the harm they cause, also move us to punish offenders based on the moral worth of their reasons for acting. Harm matters in imposing blame because the expressive meaning of harm matters to justice. The expressive meaning of harm depends, in turn, on the reasons motivating its infliction. Thus, blame for harm turns on two dimensions of culpability – a cognitive dimension and a normative dimension.

Based on this reasoning, a felon can deserve punishment for causing death unintentionally in the course of a felony. Such an unintended injury can express disrespect for a victim if the felon was aware of or was inattentive to a risk of death and accepted or ignored the risk for an end that did not justify it. Presumably, committing the felony is not an end that justifies such a risk. A plausible implication of this two-dimensional model of culpability is that a particularly unworthy end aggravates the disrespect implied by the injury and

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[168] *Id.*

[169] *See supra* notes 110-117 and accompanying text.

[170] Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1686 (1992).

so increases the culpability. A felonious purpose is particularly unworthy and so could justify imposing severe punishment for a killing that was merely negligent. Where felons endanger victims in order to achieve selfish and wrongful aims, the resulting deaths exploit and demean the victims, literally adding insult to injury. As noted above, public opinion seems to support this conclusion. Paul Robinson and John Darley's subjects supported imposing substantial punishment – prison sentences over twenty years – for negligent homicide aggravated by some felonious motives.[171]

Although criminal law theorists often acknowledge only the cognitive dimension of culpability,[172] American criminal law frequently conditions liability on normative culpability. In particular, normative culpability plays a role in the law of homicide. We treat both the expectation and the hope of causing death as equally inculpatory. Yet we blame the actor who anticipates death not for expecting this result, but for accepting it. It is his normative attitude of indifference rather than his cognitive state of knowledge that inculpates him. This same normative dimension is part of the culpable mental states of recklessness and negligence as well. Recklessness is often defined as awareness of a substantial and *unjustifiable* risk of harm. Negligence is often defined similarly, as the unreasonable disregard of a substantial and *unjustifiable* risk of harm.[173] Both definitions imply that a sufficiently good reason for acting, such as an expected benefit, can justify risk. It would seem to follow that a sufficiently bad reason for acting can aggravate culpability for imposing risk. This principle can explain the prevalent rule that aggravates a reckless homicide from manslaughter to murder, if the killing manifests an "abandoned and malignant heart,"[174] or "depraved indifference to human life."[175] Courts applying these standards often find the requisite depravity or malignance when the defendant acts on the basis of a hostile or antisocial motive.[176] Since a felonious motive is presumably antisocial, it would seem that a felonious purpose for imposing risk should aggravate culpability for imposing the risk knowingly or unreasonably. This would be consistent with the practice of many states of aggravating a feloniously motivated *intentional* killing to a capital crime.[177]

The principle of dual culpability renders some unintended homicides punishable as murder that would otherwise be lesser offenses. Yet it does *not* justify murder liability for otherwise faultless killings in the perpetration of felonies. Imagine a bank robber drives away from the crime scene with the

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[171] ROBINSON & DARLEY, *supra* note 21, at 178.

[172] *See, e.g.*, Kadish, *supra* note 2, at 679.

[173] *See* MODEL PENAL CODE § 2.02(c)-(d) (1985).

[174] *See* WAYNE R. LAFAVE, CRIMINAL LAW 779-85 (5th ed. 2010).

[175] People v. Suarez, 844 N.E.2d 721, 729 (N.Y. 2005).

[176] *See* People v. Protopappas, 246 Cal. Rptr. 915, 922 (Ct. App. 1988); Mayes v. People, 106 Ill. 306, 313 (1883).

[177] *E.g.*, WYO. STAT. ANN. § 6-2-102 1 (h)(xii) (2009).

stolen loot, proceeding at a safe speed. A pedestrian suddenly darts out into traffic and the robber's car hits him fatally. Here, the robber's felonious motive has not subjected the pedestrian to any greater risk than he would have faced from any other motorist. The robber's greed has placed other persons at risk, such as those he has threatened, but the pedestrian's death seems outside the scope of that risk. The robber's felonious motive cannot aggravate his responsibility for a death unless it plays some causal role in the death. The felonious motive can aggravate cognitive culpability but it cannot substitute for it.

While the felonious purpose must motivate a negligent act creating a risk of death, it must also transcend that risk in order to add culpability. The felony cannot simply be an assault aimed at injuring or endangering the victim. This lacks the additional element of exploitation that compounds the defendant's culpability for imposing risk. Nor can the felony consist simply of an inherently dangerous act, such as firing a weapon or exploding a bomb. These offenses do not require any wrongful purpose. They are punished only because they impose danger. Causing death by means of a dangerous act is merely reckless homicide if one is aware of the danger and negligent homicide if one is not. It can only be murder if there is some further culpability. This culpability is supplied by a wrongful purpose, independent of injury or risk to the victim's physical health. The traditional predicate felonies – robbery, rape, arson, burglary, and kidnapping – all involve a wrongful purpose to do something other than inflict a physical injury.

These considerations justify imposing felony murder liability when an actor negligently causes death for a felonious purpose independent of physical injury to the victim. But should we also impose murder liability on an accomplice in that felony? When critics claim that the felony murder doctrine holds felons strictly liable for killings in the course of felonies, they often mean they are liable for unforeseeable killings by co-felons. But such a rule would not be justified by the foregoing principles. An accomplice in a felony should only be held liable for a resulting death on the same basis as the principal. Like the killer, the co-felon must be negligent with respect to the resulting death. Moreover, an accused co-felon must share in the purpose that aggravates this negligence to deserve murder liability. One who reluctantly provides goods or services that he suspects will be used in a crime lacks the exploitative motive for imposing foreseeable risk that warrants condemnation as a murderer. Indeed, such a reluctant collaborator may lack the requisite culpability for complicity in the predicate felony. We should not assume that public support for felony murder liability extends to liability for accomplices who do not kill. Robinson's and Darley's subjects supported far less punishment for co-felons of negligent killers than for the killers themselves.[178] In the face of this

[178] *See* ROBINSON & DARLEY, *supra* note 21, at 169-81. Robinson's and Darley's subjects thought that while a negligent killing merited only about ten months of imprisonment, *id.* at 174, a negligent killing in the course of a robbery merited about

skepticism, legislatures and courts must take special care to insure that any accomplices punished as felony murderers are fully as culpable as perpetrators.

E. *Realizing the Principle of Dual Culpability*

A felony murder law can use a variety of different doctrinal devices to achieve these limitations. To understand these doctrinal devices it is useful to analyze felony murder liability into its component parts. Felony murder is a kind of homicide, an offense ordinarily combining an act causing death with a culpable mental state. Felony murder also requires a felony and some linkage between the act causing death and the felony. Where a fatal felony has multiple participants, felony murder liability may depend on additional criteria of accomplice liability. Thus, a fully specified felony murder rule should provide: (1) a required culpable mental state or strict liability with respect to death; (2) a list or class of predicate felonies; (3) criteria of causal responsibility for death; (4) a required linkage between the felony and the death; and (5) criteria for accomplice liability.

The most straightforward way to condition felony murder liability on negligence with respect to death is simply to make this culpable mental state part of the mental element of the crime. Yet this is not necessarily the best approach, because negligence is arguably not really a mental state at all, but a normative characterization of conduct as unreasonable under the circumstances. Conduct is negligent with respect to a result when an actor engaging in such conduct has reason to foresee the result and no sufficiently good reason to risk it. This may be true of any conduct generally understood to be dangerous. Examples might be driving much faster than the posted speed limit, driving an unbelted passenger, or handling a loaded gun without the safety catch on. Indeed, as the speed limit example illustrates, the law can play a role in providing notice to actors that conduct is dangerous. By proscribing and punishing conduct, criminal law can alert actors to risks, rendering a failure to advert to those dangers unreasonable per se.

Accordingly, felony murder laws can require negligence by requiring apparently dangerous conduct. Such laws can limit predicate felonies to a designated list of dangerous felonies or to the category of inherently dangerous felonies. Limiting a felony murder offense in this way structures it as a per se negligence rule, treating certain types of conduct as apparently dangerous. For reasons we will explore below, dangerousness is often defined in terms of force or violence rather than quantifiable risk. Alternatively, a felony murder law can require an apparently dangerous act in furtherance of the felony. This is a per se negligence standard, defining conduct as culpably committed if it exhibits a certain quality – foreseeable dangerousness. These per se approaches to requiring negligence have the effect of fully incorporating cognitive culpability for the resulting death into the intent to commit the

twenty-two to twenty-seven years of imprisonment, *id.* at 178.

felony. Thus, they fit with the traditional characterization of felony murder as a crime of transferred intent rather than a crime of strict liability.

Note, however, that the intent to commit the felony is not necessarily reducible to the mental element of the felony. If the felony is inherently dangerous to life, the mental element of the felony should itself supply the requisite negligence. But if the felony is dangerous only because of the way it is committed, "the intent to commit the felony" supplies the requisite negligence only if this term means something like "the intent to commit a felony of this kind under these circumstances or by these means." Thus, when jurisdictions require a felony foreseeably dangerous to life as committed – as many do – they impose an additional culpability requirement, beyond the mental element of the felony itself. This additional element is awareness of circumstances rendering commission of the felony, or a particular act in furtherance of the felony, foreseeably dangerous to life. Where felony murder liability is based on a dangerous circumstance or act not inherent in the felony, it is important to prove that accomplices in felony murder shared culpability with respect to this act or circumstance, not just with respect to the felony.

Another approach to requiring negligence is to build a requirement of apparently dangerous conduct into our criteria of "killing," or "homicide" or "legal causation" of death. Thus, a felony murder rule may require not only that a homicidal act be a necessary condition to the resulting death, but that it also impose a foreseeable risk of such a death. This approach also resonates with tradition, in that before the Twentieth Century, English and American law usually defined homicide in terms of "killing," which meant causing death by intentionally inflicting physical harm. Rather than defining murder in terms of a mental state, eighteenth century English law defined murder simply as killing absent certain exculpatory circumstances which would show that the killing was not maliciously motivated. Modern felony murder law may also define a measure of culpability into the act element of the offense. Many jurisdictions use a proximate cause test, conditioning causal responsibility on an act necessary to the death that also imposes a foreseeable danger of death. A minority of jurisdictions use an agency approach that excludes liability when an actor not party to the felony commits a subsequent act necessary to the resulting death, even if foreseeable. Yet even agency jurisdictions may require that the felon's act create a foreseeable risk of death or involve an intentional battery – and we shall see that most do. An agency rule also can have the effect of requiring that the act deemed to cause death serve the felonious purpose.

Finally, lawmakers may build a requirement of negligence into the linkage between the predicate felony and the resulting death by requiring that death occur in a way that was foreseeable as a result of the predicate felony. This approach is particularly useful for ensuring that accomplices in the felony are negligent with respect to death.

Like the requirement of negligence, the requirement of an independent felonious purpose can also be achieved in a variety of ways. One approach is

simply to restrict enumerated predicate felonies to those involving a purpose independent of injuring or endangering the physical health of the victim. Another approach is an independence requirement sometimes referred to as a "merger" limitation, excluding certain predicate felonies such as manslaughter or assault as lesser included offenses of murder itself. Courts applying such a doctrine may interpret it to require that the felony have a purpose, threaten an interest, or involve conduct independent of physical injury. A third device is a linkage requirement which can take several forms: a requirement that the act causing death be (1) in furtherance of the felony, or (2) foreseeable as a result of the felony, or (3) both. A few courts have construed an "in furtherance" standard to require that the act causing death serve a purpose independent of endangering or injuring the victim.

Lawmakers should also ensure that accomplices in felony murder share in the required negligence and independent felonious purpose. One way to do this is to require that the predicate felony involve an apparent danger of death and an independent felonious purpose. Then, if criteria of complicity in the felony are sufficiently demanding, an accomplice in the felony will automatically have the requisite culpability. It does not suffice, however, to require that the felony have been committed in a dangerous way without also requiring that the accomplice expected that danger. As noted previously, most jurisdictions deal with this problem by holding the co-felon complicit only in those fatal acts foreseeable as a result of and resulting from an act in furtherance of the felony. This foreseeability test requires that the accomplice's participation in the felony entail some degree of culpability with respect to the risk of death. If, however, jurisdictions require neither an inherently dangerous felony nor that death be foreseeable to the accomplice as a result of the felony, they leave the accomplice open to strict liability, even if death has been caused in a way foreseeable to the perpetrator. This result would violate the principle of dual culpability.

Thus far, I have argued that felony murder rules *can* be designed to require the dual culpability that justifies felony murder liability as deserved. But *have* they been so designed? Do current felony murder rules satisfy felony murder principles? The ensuing sections answer that question by analyzing contemporary felony murder law in the fifty states, the United States, and the District of Columbia. This analysis explores three main issues: (1) requirements of negligent killing in the form of culpability, dangerous felony, or foreseeable causation standards, (2) complicity and related criteria of vicarious liability, and (3) independent felony requirements.

II. FELONY MURDER AS NEGLIGENT HOMICIDE

Lawmakers can insert a requirement of foreseeable danger into the definition of felony murder in at least three places: as a required mental element, as part of the felony, or as part of the homicide. A substantial minority of felony murder jurisdictions require some form of culpability. A

great majority require a dangerous felony. A substantial majority also condition homicide on a foreseeable danger of death.

A. *Culpability Requirements*

Legislatures may condition felony murder liability on a culpable mental state with respect to death in any of three locations within a penal code: in a definition of murder, in a definition of homicide, or in general provisions on the construction of mental elements of offenses. In addition, courts may add such a requirement to the statutory offense elements. We will consider requirements of culpability imposed by any of these four means. Almost half of American jurisdictions require some form of culpable mental state for murder in the context of a felony. Some of these offenses require too much culpability to count as a felony murder rules.

Two states, Hawaii and Kentucky, attach no significance to a felonious context for murder. Their codes simply define murder as killing with certain culpable mental states.[179] Five other states condition felony murder on the culpability otherwise required for murder, and so lack true felony murder rules. Two of these states, Michigan and Vermont, use a felonious context as an aggravator, raising murder liability from second to first degree. In both states, courts have interpreted the statutory term "murder" as requiring at least reckless disregard of a probability of grievous injury, whether or not in the context of a felony.[180] Courts in a third state, New Mexico, have interpreted that state's felony murder rule similarly. New Mexico's code defines second degree murder as killing with knowledge of "a strong probability of death or great bodily harm," and provides that second degree murder is a lesser included offense of first degree murder.[181] In *State v. Ortega*, the Supreme Court of New Mexico read this mental state into first degree murder, otherwise defined as killing in the commission or attempt of any felony.[182] The statutory felony murder provisions in New Hampshire and Arkansas require extreme indifference to human life. New Hampshire applies a rebuttable presumption of such extreme indifference when the felon causes death by using a deadly weapon in the commission of certain grave felonies, giving rise to second degree murder.[183] Arkansas predicates capital murder on causing death under circumstances manifesting extreme indifference in the commission of certain enumerated felonies (except for arson, which does not require separate proof of extreme indifference).[184] It predicates first degree murder on causing death

[179] HAW. REV. STAT. ANN. § 707-701 (LexisNexis 2007); KY. REV. STAT. ANN. § 507.020 (West 2006).

[180] People v. Aaron, 299 N.W.2d 304, 319-20 (Mich. 1980); State v. Doucette, 470 A.2d 676, 682 (Vt. 1983)

[181] N.M. STAT. ANN. § 30-2-1 (2003).

[182] State v. Ortega, 817 P.2d 1196, 1205 (N.M. 1991).

[183] N.H. REV. STAT. ANN. § 630:1-b (2007); *id.* § 626:7(2).

[184] ARK. CODE ANN. § 5-10-101 (2009).

under such circumstances in the course of any felony.[185] Arkansas predicates second degree murder on such circumstances as well,[186] so that the felony functions as an aggravator for conduct that would otherwise still be murder.[187] Because the murder laws in these five states require so much cognitive culpability in the context of predicate felonies, they clearly do not violate the principle of dual culpability for perpetrators and should not even be classified as felony murder laws.

Two other states arguably condition felony murder on reckless killing. The Illinois penal code requires culpability with respect to every element unless a legislative purpose to impose strict liability is "clearly" expressed in the statute.[188] The Illinois code requires at least recklessness for any element lacking a culpable mental state, absent such an expressed legislative intention. Illinois predicates felony murder on a "forcible felony,"[189] which includes any of an enumerated list of felonies, or any other felony attempted with the use or threat of violence.[190] Illinois punishes any other killing as first degree murder if the defendant had knowledge that his conduct created a "strong probability"

[185] ARK. CODE ANN. § 5-10-102.

[186] ARK. CODE ANN. § 5-10-103.

[187] Arkansas courts treat the statutory requirement of "circumstances manifesting extreme indifference" as part of the act element rather than as a mental state. Perry v. State, 264 S.W.3d 498, 502 (Ark. 2007) (citing ARK. CODE ANN. §§ 5-10-101(a)(1)(B), 102(a)(1)(B) (2006)); *see also* Jefferson v. State, 276 S.W.3d 214, 220-22 (Ark. 2008). This is surprising because the Arkansas Code commentary explicitly says that a mental state of negligence is insufficient for felony murder. B. WILLIAM S. ARNOLD ET AL., ARKANSAS CODE OF 1987 ANNOTATED: COMMENTARIES 160 (2d ed. 1995). This analytic error has had pernicious consequences: in a particularly troubling decision, the Arkansas Supreme Court held that accomplices in fatal felonies can be held liable for murder with less culpability than actual killers must have. Jones v. State, 984 S.W.2d 432, 439 (Ark. 1999) (holding that accomplices in felony murder need not act with extreme indifference to human life despite ARK. CODE ANN. § 5-2-403, which provides that an accomplice in an offense with a result element must have the culpable mental state toward that result element required for the commission of the offense). This is also at odds with Arkansas Pattern Jury Instructions on accomplice culpability: "When two or more persons are criminally responsible for an offense, each person is liable only for the degree of the offense that is consistent with the person's own [culpable mental state] [or] [accountability for an aggravating fact or circumstance]." ARK. MODEL JURY INSTRUCTIONS: CRIMINAL § 405 (2010). The other four extreme indifference states require that accomplices share the required mental state of extreme indifference. *See* N.H. REV. STAT. ANN. § 626:8(IV) (2007); People v. Kelly, 378 N.W.2d 365, 372-73 (Mich. 1985); People v. Flowers, 477 N.W.2d 473, 477 (Mich. Ct. App. 1991); MICHIGAN NON-STANDARD JURY INSTRUCTIONS: CRIMINAL § 25:21 (West 2010) (jury instructions on consideration of multiple defendants in felony murder); State v. Bacon, 658 A.2d 54, 60-62 (Vt. 1995); UNIFORM JURY INSTRUCTIONS: CRIM. [NEW MEXICO] § 14-202 (2010) (jury instructions on the essential elements of felony murder).

[188] 720 ILL. COMP. STAT. 5/4-9 (2008).

[189] 720 ILL. COMP. STAT. 5/9-1(a)(3).

[190] 720 ILL. COMP. STAT. 5/2-8.

of death.[191] The legislative drafting commission and Illinois courts have reasoned that the commission of a forcible felony entails knowledge of such a strong probability.[192] If committing a felony with such knowledge would entail disregarding a substantial and unjustifiable risk of death and would involve a gross deviation from a reasonable standard of care, it would fulfill the Illinois code's definition of recklessness.[193]

The North Dakota code, based on a proposed federal code, provides that every act element requires an accompanying culpable mental state unless strict liability is explicitly imposed by requiring that the act element be achieved "in fact."[194] North Dakota uses recklessness as the default culpable mental state.[195] Because North Dakota's felony murder rule is predicated on enumerated felonies and contains neither a culpability term nor the phrase "in fact,"[196] it appears to require recklessness. Yet there is some countervailing evidence. The felony murder provision was taken from the New York Penal Law[197] and so includes New York's affirmative defense for accomplices who participate in the felony without negligence toward death.[198] This defense seems superfluous if felony murder liability requires recklessness, and the New York statute (which has a different default rule) clearly does not require recklessness. In addition, the federal code drafting commission comment on the felony murder provision implied that they may have understood it to cover merely accidental killings.[199] On the other hand, the comment also implied that the felony murder provision was designed to aggravate reckless manslaughters occurring in the context of enumerated felonies.[200] North Dakota case law has not clarified the situation, but the most straightforward reading of the statute would seem to require recklessness.

At least six states define felony murder as requiring a form of negligence.[201] Delaware requires recklessness for first degree murder in the course of any

[191] 720 ILL. COMP. STAT. 5/9-1(a)(2).

[192] 720 ILL. COMP. STAT. 5/9-1 (1961); 720 ILL. COMP. STAT. ANN 5/9-1 at 14-15 (reprint of Criminal Code of 1961 Committee Comment); People v. Guest, 503 N.E.2d 255, 269 (Ill. 1986); People v. McEwen, 510 N.E.2d 74, 79 (Ill. App. Ct. 1987).

[193] 720 ILL. COMP. STAT. 5/4-6 (2008).

[194] N.D. CENT. CODE § 12.1-02-02.3 (1997).

[195] N.D. CENT. CODE § 12.1-02-02.1, 02.2.

[196] N.D. CENT. CODE § 12.1-16-01.

[197] NAT'L COMM'N ON REFORM OF FED. CRIMINAL LAWS, FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS: PROPOSED NEW FEDERAL CRIMINAL CODE § 1601 cmt., at 174 (1971) [hereinafter FINAL REPORT]

[198] N.D. CENT. CODE § 12.1-16-01 (1997).

[199] FINAL REPORT, *supra* note 197, at 174.

[200] *Id.* at 174-75. In North Dakota, manslaughter is defined as recklessly causing death. N.D. CENT. CODE § 12.1-16-02 (1997).

[201] Although Oregon's code also defines homicide as requiring culpability in OR. REV. STAT. § 163.005 (2010), Oregon's supreme court treats felony murder as a crime of strict liability with respect to causing death, except to the extent that the limitation of predicate

felony,[202] and negligence for second degree murder in the course of any felony.[203] The Pennsylvania, Alabama, and Texas codes define murder as a form of homicide and define homicide as requiring negligence. The Maine and New Jersey codes condition felony murder on foreseeable danger.

Pennsylvania's code requires proof of mental culpability with respect to every act element[204] and defines criminal homicide as causing death with a culpable mental state of at least negligence.[205] It defines second degree murder to include criminal homicide in the perpetration of enumerated felonies.[206] In the case of *Commonwealth v. Hassine*, a Pennsylvania court approved a jury instruction requiring negligence for felony murder in language that tracks the statutory definition of criminal homicide.[207]

Alabama's code also defines homicide as causing death with a culpable mental state of at least negligence[208] and conditions felony murder on any felony "clearly dangerous to human life."[209] The official commentary explains this language as a requirement of foreseeability and reasons that a felony murder rule punishing unforeseeable deaths would be indefensible.[210] Cases have invoked this requirement of foreseeability in holding that the danger must have been apparent to the perpetrator.[211] This interpretation of dangerousness as requiring negligence comports with Alabama's default culpability rules, which create a presumption against strict liability absent clear legislative intent and require culpability if the proscribed conduct – here, causing death and committing a felony clearly dangerous to life – "necessarily involves" a culpable mental state.[212]

The Texas Penal Code also defines homicide as causing death with at least negligence.[213] In addition, the Code contains a general rule of interpretation requiring a culpable mental state of at least negligence with respect to a conduct element.[214] The felony murder provision requires that the defendant

felonies to enumerated dangerous felonies effectively requires negligence per se. *See* State v. Reams, 636 P.2d 913, 917-20 (Or. 1981) (en banc).

[202] DEL. CODE ANN. tit. 11, § 636 (2007).

[203] DEL. CODE ANN. tit. 11, § 635.

[204] 18 PA. CONS. STAT. ANN. § 302 (a) (West 2010).

[205] 18 PA. CONS. STAT. ANN. § 2501.

[206] 18 PA. CONS. STAT. ANN. § 2502.

[207] Commonwealth v. Hassine, 490 A.2d 438, 454 (Pa. Super. Ct. 1985).

[208] ALA. CODE § 13A-6-1 (LexisNexis 2005).

[209] ALA. CODE § 13A-6-2.

[210] ALA. CODE § 13A-6-2 (Commentary: Felony-Murder Doctrine, at 256).

[211] Witherspoon v. State, 33 So. 3d 625, 631 (Ala. Crim. App. 2009); *Ex parte* Mitchell, 936 So. 2d 1094, 1101 (Ala. Crim. App. 2006); Lewis v. State, 474 So. 2d 766, 771 (Ala. Crim. App. 1985).

[212] ALA. CODE § 13A-2-4(b) (LexisNexis 2005).

[213] TEX. PENAL CODE ANN. § 19.01 (West 2003)

[214] TEX. PENAL CODE ANN. § 6.02.

cause death by means of an act "clearly dangerous to life" committed in the course and in furtherance of a felony. Since the danger must be apparent, but need not be actually known to the defendant, this provision would appear to require negligence. The 1980 decision of *Kuykendall v. State* embraced this interpretation, holding that negligent homicide is a lesser included offense of felony murder and explaining that an act clearly dangerous to life implies negligence.[215] A later Texas decision concluded that no separate proof of culpability is required, but that the required act clearly dangerous to life must entail "reckless and wanton disregard of an obvious risk to human life."[216]

Maine does not require separate proof of any culpable mental state but nevertheless requires proof that death be a "reasonably foreseeable consequence" of the predicate felony, which is tantamount to a negligence requirement.[217]

The New Jersey code requires that a culpable mental state accompany every offense element unless there is a clear legislative intent to impose strict liability.[218] While the New Jersey Supreme Court has found such a legislative intent, it has also read the code as requiring that strict liability result elements must be "probable" and "foreseeable" results of defendant's conduct.[219] The Court has admitted that this foreseeability standard is equivalent to a requirement of "negligence."[220] The Court has also applied the code's requirement for negligent causation that the result be "not too remote, accidental in its occurrence, or too dependent on another's volitional act to have a just bearing on the defendant's culpability."[221]

Another nine jurisdictions – California, Nevada, Idaho, South Carolina, Iowa, Mississippi, Rhode Island, Virginia, and the United States – condition felony murder on malice.[222] Courts in all of these jurisdictions have associated malice with the imposition of danger. Only the federal courts have treated the requirement of malice as superfluous.

The California courts have long viewed the felony murder doctrine as an artificial rule that should be confined by the purpose of deterring dangerous

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[215] Kuykendall v. State, 609 S.W.2d 791, 796 (Tex. Crim. App. 1980).

[216] Rodriguez v. State, 953 S.W.2d 342, 354 (Tex. App. 1997) (quoting Eugene R. Milhizer, *Murder Without Intent: Depraved-Heart Murder Under Military Law*, 133 MIL. L. REV. 205, 209 (1991)).

[217] ME. REV. STAT. ANN. tit. 17-A, § 202 (2010).

[218] N.J. STAT. ANN. § 2C:2-2 (West 2005).

[219] N.J. STAT. ANN. § 2C:2-3.

[220] State v. Martin, 573 A.2d 1359, 1374 (N.J. 1990).

[221] *Id.* at 1375.

[222] 18 U.S.C. § 1111 (2006); CAL. PENAL CODE § 189 (Deering 2006); IDAHO CODE ANN. §§ 18-4001, 18-4003 (2008); IOWA CODE § 707.1 (2009); MISS. CODE ANN. §§ 97-3-19(c), 97-3-27 (1999); NEV. REV. STAT. §§ 200.010, 200.020 (2009); R.I. GEN. LAWS § 11-23-1 (2008); S.C. CODE ANN. § 16-3-10 (2009); Wooden v. Commonwealth, 284 S.E.2d 811, 814 (Va. 1981).

conduct in the commission of felonies.[223] The California Supreme Court has recently read the California Penal Code to base felony murder on "implied malice" or circumstances showing an "abandoned and malignant heart." In *People v. Sarun Chun*,[224] the court explained that this statutory definition

> is quite vague. . . . Accordingly, the statutory definition permits, even requires, judicial interpretation. We have interpreted implied malice as having "both a physical and a mental component. The physical component is satisfied by the performance of 'an act, the natural consequences of which are dangerous to life.' The mental component is the requirement that the defendant 'knows that his conduct endangers the life of another and . . . acts with a conscious disregard for life.'" . . .
>
> In *Patterson*, Justice Kennard explained the reasoning behind and the justification for the second degree felony-murder rule: "The second degree felony-murder rule eliminates the need for the prosecution to establish the *mental* component [of conscious-disregard-for-life malice]. The justification therefor is that, when society has declared certain inherently dangerous conduct to be felonious, a defendant should not be allowed to excuse himself by saying he was unaware of the danger to life because, by declaring the conduct to be felonious, society has warned him of the risk involved. The *physical* requirement, however, remains the same; by committing a felony inherently dangerous to life, the defendant has committed 'an act, the natural consequences of which are dangerous to life,' thus satisfying the physical component of implied malice."[225]

The court in *Sarun Chun* reasoned that first degree felony murder is a creature of statute rather than judicial interpretation. Yet this is true only of the grading of such murder. The statute serves only to aggravate "murder" to murder in the first degree when committed in the course of enumerated felonies.[226] The statute therefore still requires killing with malice, express or implied. Nevertheless, the court's reasoning in *Sarun Chun* and *Patterson* applies to first degree felony murder even better than it applies to first degree murder. Thus, the designation of particular offenses as not only felonies, but also statutory predicates for first degree murder, implies the legislature deems them particularly dangerous and puts the offender on notice of such danger. Where conscious disregard of such danger is reckless, disregard of such danger after legislative notice is negligent.

Although the Nevada murder statute was essentially borrowed from California,[227] Nevada courts have characterized malice as a "legal fiction" in

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[223] *See* People v. Washington, 402 P.2d 120, 134 (Cal. 1965).

[224] People v. Sarun Chun, 203 P.3d 425 (Cal. 2009).

[225] *Id.* at 429-30. (citations omitted) (quoting People v. Patterson, 49 Cal. 3d 615, 626 (1989)).

[226] CAL. PENAL CODE § 189 (West 2008).

[227] *Origins*, *supra* note 46, at 166.

felony murder cases.[228] Like the California Supreme Court, however, the Nevada Supreme Court has identified the purpose of the felony murder doctrine as deterring dangerous conduct during the felony.[229] In the 1999 case of *Labastida v. State*, the Nevada Supreme Court articulated limits that effectively condition second degree felony murder on negligence:

> [T]he second degree felony murder rule applies only where the felony is inherently dangerous, where death or injury is a directly foreseeable consequence of the illegal act, and where there is an immediate and direct causal relationship – without the intervention of some other source or agency – between the actions of the defendant and the victim's death.[230]

Presumably the requirements for first degree felony murder are the same, with the only difference that the legislative enumeration of predicate felonies obviates a determination of inherent danger.

Idaho courts have upheld a jury instruction that "The term malice . . . signifies . . . a general malignant recklessness toward the lives and safety of others. Malice may be shown from the fact that an unlawful killing took place during the perpetration or attempted perpetration of the crime of robbery."[231] Idaho courts currently do not appear to predicate second degree murder on non-enumerated felonies.[232] Thus it seems that they have used a requirement of "malignant recklessness" to limit felony murder to enumerated predicate felonies.

South Carolina's felony murder rule is judicially created. South Carolina case law holds that factfinders may, but need not, infer malice from participation in a felony.[233] In the 1973 case of *Gore v. Leeke*, the South Carolina Supreme Court upheld a felony murder conviction as consistent with a requirement of *foreseeable danger* to human life because the felons were *armed* during a residential burglary.[234] Yet it declined to decide whether malice required such foreseeability.[235] In the 2007 case of *Lowry v. State*, the court overturned a conviction because the jury was wrongly instructed to presume malice if the defendant participated in an armed robbery. [236] The court held, citing *Sandstrom*, that malice was a distinct offense element that the prosecution must prove under the due process clause.[237] Although the court

[228] Nay v. State, 167 P.3d 430, 434 (Nev. 2007).

[229] *Id.*

[230] Labastida v. State, 986 P.2d 443, 448-49 (Nev. 1999).

[231] State v. Lankford, 781 P.2d 197, 203 (Idaho 1989).

[232] *Cf.* State v. Alcorn, 64 P. 1014, 1018-19 (Idaho 1901) (upholding manslaughter conviction in unintended death resulting from unlawful abortion, but declaring that jury should have been instructed that such a homicide is second degree murder).

[233] State v. Norris, 328 S.E.2d 339, 342 (S.C. 1985) (overruled on other grounds).

[234] Gore v. Leeke, 199 S.E.2d 755, 759 (S.C. 1973).

[235] *Id.*

[236] Lowry v. State, 657 S.E.2d 760, 763 (S.C. 2008).

[237] *Id.* at 764 (citing Sandstrom v. Montana, 442 U.S. 510 (1979)).

did not define malice, it observed that the only evidence of malice was testimony that the defendant was prepared to use deadly force against anyone who interrupted the robbers.[238] These cases suggest that malice requires at least foreseeability or negligence with respect to death. The definition of malice in South Carolina's Pattern Jury Instructions incorporates both the disregard of a risk to life, and an unlawful purpose – but without clearly indicating whether these are conjunctive or disjunctive requirements.

> Malice, in its legal sense, . . . signifies . . . a general malignant recklessness of the lives and safety of others, or a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief. Malice is the wrongful intent to injure another person. It indicates a wicked or depraved spirit intent on doing wrong. . . . It is the doing of a wrongful act intentionally and without just cause or excuse. [239]

The pattern jury instruction on felony murder conditions accomplice liability on negligence:

> If two or more combine together to commit an unlawful act, such as robbery, and in the execution of that criminal act, a homicide is committed by one of the actors, as a *probable or natural consequence* of the acts done in pursuance of the common design, all present participating in the unlawful undertaking are as guilty as the one who committed the fatal act.[240]

This instruction implies that felony murder requires not only an unlawful purpose, but also the willing imposition of danger to life.

The Iowa statute defines murder as killing with malice and defines first degree murder as including killing in the course of enumerated "forcible felonies."[241] Iowa case law permits but does not require an inference of malice from the commission of such a felony.[242] Prior to 1976, the Iowa statute defined first degree felony murder as requiring *murder* in the course of enumerated felonies. In *State v. Ragland*, the Iowa Supreme Court held that the rewording of the statute did not change this, and that malice was still an independent element of felony murder.[243] The court reasoned, however, that malice could be inferred from enumerated felonies because the legislature had determined that these felonies posed "a substantial risk of serious injury or death."[244] The court further reasoned that the punishment as first degree murder was not disproportionate where the defendant had acted with reckless

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[238] *Id.* at 766.

[239] S.C. REQUESTS TO CHARGE: CRIM. § 2-1 (2007) (jury instructions on murder).

[240] *Id.* § 2-3 (emphasis added) (jury instructions on felony murder).

[241] IOWA CODE § 707.1 (2009).

[242] State v. Taylor, 287 N.W.2d 576, 577-78 (Iowa 1980).

[243] 420 N.W.2d 791, 794 (Iowa 1988) (overruled on other grounds).

[244] *Id.* at 794.

indifference to human life.[245] In *State v. Bennet*, the court approved an instruction that malice could be implied from a forcible felony when combined with another instruction defining "malice" as the purpose to "do a wrongful act to the injury of another out of actual hatred or with an evil or unlawful purpose" and "malice aforethought" as "a fixed purpose or design to do some physical harm to another which exists before the act is committed."[246] In *State v. Heemstra*, the court held that willful injury could not serve as a predicate felony because it merged with the killing.[247] Thus Iowa courts require the conscious imposition of a risk of injury in pursuit of some other felonious aim.

The Mississippi code makes unintended killing in the course of nonenumerated felonies murder,[248] but only "felony manslaughter" if committed without malice.[249] This implies that enumerated felonies are inherently malicious and that some nonenumerated felonies might share this malicious quality. Case law does not explain this distinction, and second degree felony murder cases are rare in Mississippi. Nevertheless, second degree felony murder convictions have been predicated on the offenses of shooting from a car with depraved indifference to human life[250] and felonious drunk driving.[251] These cases suggest a conception of malice as recklessness, but without any requirement of an independent felonious motive.

Courts in Rhode Island base the felony murder rule on the common law, which they understand to provide that "[h]omicide is murder if the death results from the perpetration or attempted perpetration of an inherently dangerous felony."[252] Presumably, then, the apparent dangerousness of the felony combines with the felonious motive to fulfill the statutory requirement of malice.

Virginia's code leaves murder undefined, grading murder in the course of enumerated felonies as first degree, and unintended killing in furtherance of a felony as second degree.[253] Virginia courts have interpreted the code as incorporating the common law's definition of murder as killing with malice.[254] In *Cotton v. Commonwealth* the Virginia Supreme Court rejected a claim that Virginia's felony murder rule created an unconstitutional presumption of malice, in upholding a second degree felony murder conviction predicated on

[245] *Id.* at 795.

[246] State v. Bennett, 503 N.W.2d 42, 46 (Iowa Ct. App. 1993) (citing IOWA CRIM. JURY INSTRUCTIONS 700.7).

[247] State v. Heemstra, 721 N.W.2d 549, 554 (Iowa 2006).

[248] MISS. CODE ANN. § 97-3-19 (1999).

[249] MISS. CODE ANN. § 97-3-27.

[250] Boyd v. State, 977 So. 2d 329, 332-33 (Miss. 2008).

[251] Lee v. State, 759 So. 2d 390, 393 (Miss. 2000).

[252] *In re* Leon, 410 A.2d 121, 124 (R.I. 1980) **(**quoting ROLLIN M. PERKINS, CRIMINAL LAW 44 (2d ed. 1969)).

[253] VA. CODE ANN. § 18.2-33 (2009).

[254] Wooden v. Commonwealth, 284 S.E.2d 811, 814 (Va. 1981).

child abuse.[255] The court reasoned that Virginia's felony rule is restricted to felonies entailing malice, since second degree felony murder requires proof of "a felony that involved substantial risk to life"[256] and "a felony of violence manifests a person-endangering frame of mind such that malice may be imputed to the act of killing."[257].

The malicious character of felony murder remains untheorized in federal criminal law. Federal courts have simply explained felony murder as a fictional transfer of intent from an intended felony to an unintended death, without specifying what features the felony must have to be malicious.[258] This is understandable because the federal murder statute predicates first degree felony murder on enumerated felonies, and federal courts have not imposed second degree felony murder liability on the basis of unenumerated felonies. Accordingly they have not been forced to define features that would render some, but not all, deaths caused in the perpetration of such felonies murder.[259] If federal courts ever choose to enact a second degree felony murder rule, they will need an account of how and when the statutory definition of murder as malicious killing authorizes this. In the meantime, they need a better account of why the statutorily enumerated predicate felonies are malicious. At present, their instructions in felony murder cases define malice simply as intentionally doing an unlawful act.[260] Federal courts should follow the example of courts

[255] Cotton v. Commonwealth, 546 S.E.2d 241, 244 (Va. Ct. App. 2001).

[256] *Id.* at 244.

[257] *Id.* at 243 (quoting JOHN L. COSTELLO, VIRGINIA CRIMINAL LAW & PROCEDURE § 3.4-3, at 33 (2d ed. 1995)); *accord* Kennemore v. Commonwealth, 653 S.E.2d 606, 609 (Va. Ct. App. 2007).

[258] United States v. Shea, 211 F.3d 658, 674 (1st Cir. 2000); United States v. Pearson, 159 F.3d 480, 485 (10th Cir. 1998).

[259] One federal court has presumed the existence of a federal second degree felony murder rule in dictum, reasoning that the statute incorporated such a rule from the "common law." *Pearson*, 159 F.3d at 485 (citing WAYNE R. LAFAVE & AUSTIN W. SCOTT, Jr., CRIMINAL LAW §§ 7.1(a), 7.5(e)-(h) (2d ed. 1986); 2 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 147, at 296-97 (15th ed. 1994)). This ill-considered claim raises the puzzling question: What common law? The statute was passed in 1911. Surely Congress did not suppose that the statute incorporated contemporaneous English law. As noted above, English law recognized no felony murder rule at the time of the American Revolution. Federal judges could not have developed a common law felony murder rule subsequently, as they have no authority to create federal common law crimes. United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812). The original 1790 federal murder statute punished simply "willful murder" without any reference to predicate felonies. Act of April 30, 1790, ch. 9, § 3, 1 Stat. 112, *reprinted in* 2 ANNALS OF CONG. 2273, 2274 (1790). Federal courts did not impose felony murder liability under this statute, but instead conditioned murder liability on killing in the course of dangerous crimes, with awareness of the danger. *See* United States v. Boyd, 45 F. 851, 860-61 (C.C.W.D. Ark. 1890) (reversed on other grounds); *Origins*, *supra* note 46, at 134-36.

[260] 2-41 MODERN FED. JURY INSTRUCTIONS: CRIM. § P 41.01, Instruction 41-10 (2010) (instruction adapted from 10TH CIR. CRIM. PATTERN JURY INSTRUCTIONS 2.52.1 and 11TH

in states that define murder in terms of malice and identify malice with the dangerousness of enumerated predicate felonies. They should then use the malice requirement as a basis for requiring that death result foreseeably from the felony.

B. *Dangerous Felony Rules*

Jurisdictions may condition felony murder on apparently dangerous conduct in one of three ways. First, they may enact a legislative rule restricting felony murder to a list of certain predicate felonies, perhaps labeling them as dangerous. Second, they may, whether by statute or judicial decision, restrict predicate felonies to those satisfying a standard of inherent danger or violence. Courts generally view the inherent dangerousness of an offense as a question of law.[261] Third, jurisdictions may, by statute or judicial decision, restrict felony murder to fatal acts that satisfy a standard of dangerousness or violence, committed in the course of or in furtherance of a felony. This third approach requires an inquiry at trial into the risks a defendant chose to impose.

The first approach shifts the inquiry into negligence back to the legislative stage, resulting in a per se negligence rule. The second approach shifts the decision to the judiciary, but also produces a per se negligence rule. The third approach moves the decision to the factfinder, who must apply a negligence standard. An advantage to both the first and second approaches is that, in so far as they require that negligence with respect to a risk of death inheres in the predicate felony itself, they ensure that any accomplice in that felony will also be negligent. A requirement that the felony have been dangerous as committed leaves open a question as to whether the danger was reasonably apparent to each participant charged with felony murder.

1. Enumerated Predicate Felonies

To what particular predicate felonies have jurisdictions limited felony murder? To what extent do these ostensibly dangerous enumerated predicate felonies in fact entail negligence with respect to a risk of death?

Among the forty-five jurisdictions imposing true felony murder liability, a total of twenty-five jurisdictions exhaustively enumerate predicate felonies.[262]

CIR. PATTERN CRIM. JURY INSTR., Offense Instruction 45.2 (2003)).

[261] *E.g.*, People v. Patterson, 778 P.2d 549, 551 (Cal. 1989) ("We reaffirm the rule that, in determining whether a felony is inherently dangerous to human life under the second degree felony-murder doctrine, we must consider 'the elements of the felony in the abstract, not the particular "facts" of the case.'" (citation omitted)); 1 MASS. SUP. CT. CRIM. PRAC. JURY INSTRUCTIONS § 2.3.4 (2004).

[262] 18 U.S.C. § 1111 (2006); ALASKA STAT. § 11.41.110 (2009); ARIZ. REV. STAT. ANN. § 13-1105 (2010); COLO. REV. STAT. § 18-3-102 (2010); CONN. GEN. STAT. § 53a-54c (2009); D.C. CODE § 22-2101 (2001); IDAHO CODE ANN. § 18-4003 (2008); IND. CODE ANN. § 35-42-1-1 (LexisNexis 2010); IOWA CODE § 707.2 (2009); KAN. STAT. ANN. § 21-3401 (2009); LA. REV. STAT. ANN. § 14:30 (2010); ME. REV. STAT. ANN. tit. 17-A, § 202 (2010);

An additional fourteen jurisdictions enumerate several predicate felonies, but also permit others.[263] These enumerated felonies are often assumed to be inherently violent or dangerous[264] and in a few jurisdictions are labeled as such in the code.[265]

For the most part, these different jurisdictions are fairly consistent in the predicate felonies they enumerate. Of the thirty-nine jurisdictions, all but two list some form of arson, burglary, rape, robbery, and kidnapping.[266] A few jurisdictions list special variants of these offenses.[267] A slim majority of

NEB. REV. STAT. § 28-303 (2009); N.J. STAT. ANN. § 2C:11-3 (2005); N.Y. PENAL LAW § 125.25 (McKinney 2010); N.D. CENT. CODE § 12.1-16-01 (1997); OHIO REV. CODE ANN. § 2903.02 (LexisNexis 2008); OR. REV. STAT. § 163.115 (2009); 18 PA. CONS. STAT. § 2502 (1978); S.D. CODIFIED LAWS § 22-16-4 (2010); TENN. CODE ANN. § 39-13-202 (1999); UTAH CODE ANN. § 76-5-203 (LexisNexis 2010); W. VA. CODE § 61-2-1 (2010); WIS. STAT. § 940.03 (2010); WYO. STAT. ANN. § 6-2-101 (2007).

Iowa permitted second degree felony murder before 1976. State v. Anderson, 33 N.W.2d 1, 13 (Iowa 1948); State v. Rowley, 248 N.W. 340, 341 (Iowa 1933); State v. Gibbons, 120 N.W. 474, 475 (Iowa 1909); State v. Minard, 65 N.W. 147, 147 (Iowa 1895); State v. Leeper, 30 N.W. 501, 501 (Iowa 1886). However, the 1976 statutory revision changed the predicates for first degree felony murder to include all forcible felonies, arguably moving unenumerated dangerous felonies up into this category and so obviating second degree felony murder. No second degree felony murder cases have been reported since then. The only second degree felony murder case I have found in West Virginia involved a defunct statutory offense predicated on abortion. State v. Lewis, 57 S.E.2d 513, 520 (W. Va. 1949). Courts for the District of Columbia have held that murder in non-enumerated felonies must be with purpose to kill. Kitt v. United States, 904 A.2d 348, 356 (D.C. 2006); Comber v. United States, 584 A.2d 26, 40 (D.C. 1990). There has been no reported case involving a federal charge of second degree felony murder, but the Tenth Circuit has speculated that such a change could be possible. *See* United States v. Pearson, 159 F.3d 480, 486 (10th Cir. 1998).

[263] ALA. CODE § 13A-6-2 (LexisNexis 2005); CAL. PENAL CODE § 189 (Deering 2006); FLA. STAT. § 782.04 (2010); 720 ILL. COMP. STAT. 5/9-1(a)(3) (2002); MD. CODE ANN., CRIM. LAW § 2-201(a)(4) (LexisNexis 2010); MINN. STAT. § 609.185 (2010); MISS. CODE ANN. § 97-3-19 (1999) (allowing unenumerated felonies); MONT. CODE ANN. § 45-5-102 (2009); NEV. REV. STAT. § 200.030 (2009); N.C. GEN. STAT. § 14-17 (2009); OKLA. STAT. tit. 21, § 701.7 (2010); R.I. GEN. LAWS § 11-23-1 (2010); VA. CODE ANN. § 18.2-32 (2010); WASH. REV. CODE § 9A.32.030(1)(c) (2010).

[264] WAYNE R. LAFAVE, CRIMINAL LAW 786-89 (5th ed. 2010); 2 PENNSYLVANIA SUGGESTED STANDARD CRIM. JURY INSTRUCTIONS § 15.2502B (2008) ("Because . . . [enumerated felony] is a crime inherently dangerous to human life, there does not have to be any other proof of malice.").

[265] ALA. CODE § 13A-6-2 (LexisNexis 2005) ("clearly dangerous to human life"); 720 ILL. COMP. STAT. 5/9-1(a)(3) (2002); IOWA CODE § 707.2 (2009) ("forcible"); OHIO REV. CODE ANN. § 2903.02 (LexisNexis 2008) ("offense of violence"); KAN. STAT. ANN. § 21-3401 (2009) ("inherently dangerous").

[266] CONN. GEN. STAT. § 53a-54c (2009) (does not list arson); MINN. STAT. § 609.185 (a)(2) (2010) (does not list arson, burglary, robbery or kidnapping).

[267] Four states specifically list hijacking. IND. CODE § 35-42-1-1 (2010); N.J. STAT. ANN.

enumerated felony jurisdictions – twenty-one jurisdictions – also list escape or flight from custody.[268] A majority of enumerated felony jurisdictions – twenty-nine – list at least one other type of felony. Other popular predicate felonies include child or elder abuse,[269] drug offenses of various kinds,[270] and such politically motivated offenses as terrorism, treason, or espionage.[271] Two jurisdictions list poisoning consumable products.[272] A number of jurisdictions list murder or manslaughter, presumably of a person other than the victim killed,[273] or various forms of assault.[274] Three list theft offenses.[275] Two list

§ 2C:11-3 (2005); TENN. CODE ANN. § 39-13-202 (1999); WIS. STAT. § 940.03, 943.23 (2010). Five states list bombing. FLA. STAT. § 782.04 (2010); IDAHO CODE ANN. § 18-4003 (2008); OHIO REV. CODE ANN. § 2903.02 (LexisNexis 2008); OR. REV. STAT. § 163.115 (2009); S.D. CODIFIED LAWS § 22-16-4 (2010). Other states list variations on sexual offenses. IND. CODE § 35-42-1-1 (2007) (human trafficking and promotion of human trafficking); OHIO REV. CODE ANN. § 2903.02 (1998) (exposure to HIV); OR. REV. STAT. § 163.115 (2009) (forced prostitution).

[268] 18 U.S.C. § 1111 (2006); ALA. CODE § 13A-6-2 (2005); ALASKA STAT. § 11.41.110 (2009); ARIZ. REV. STAT. ANN. § 13-1105 (2010); COLO. REV. STAT. § 18-3-102 (2010); CONN. GEN. STAT. § 53a-54c (2009); FLA. STAT. § 782.04 (2010); IOWA CODE § 707.2 (2009); LA. REV. STAT. ANN. § 14:30 (2010); ME. REV. STAT. ANN. tit. 17-A, § 202 (2010); MD. CODE ANN., CRIM. LAW § 2-20(a)(4) (West 2010); MONT. CODE ANN. § 45-5-102 (2009); N.J. STAT. ANN. § 2C:11-3 (West 2005); N.Y. PENAL LAW § 125.25 (McKinney 2010); N.D. CENT. CODE § 12.1-16-01 (1997); OHIO REV. CODE ANN. § 2903.02 (LexisNexis 2008); OKLA. STAT. tit. 21, § 701.7 (2010); OR. REV. STAT. § 163.115 (2009); UTAH CODE ANN. § 76-5-203 (2010); W. VA. CODE § 61-2-1 (2010); WYO. STAT. ANN. § 6-2-101 (2010).

[269] 18 U.S.C. § 1111 (2006); D.C. CODE § 22-2101 (2001); FLA. STAT. § 782.04 (2010); IDAHO CODE ANN. § 18-4003 (2008); KAN. STAT. ANN. §§ 21-3401, 21-3436 (2009); LA. REV. STAT. ANN. § 14:30 (2010); NEV. REV. STAT. § 200.030 (2009); OHIO REV. CODE ANN. § 2903.02 (LexisNexis 2008); OR. REV. STAT. § 163.115 (2009); TENN. CODE ANN. § 39-13-202 (1999); UTAH CODE ANN. § 76-5-203 (2010); WYO. STAT. ANN. § 6-2-101 (2010).

[270] ALASKA STAT. § 11.41.110 (2009); ARIZ. REV. STAT. ANN. § 13-1105 (2010); D.C. CODE § 22-2101 (2001); FLA. STAT. § 782.04 (2010); IND. CODE ANN. § 35-42-1-1 (LexisNexis 2010); KAN. STAT. ANN. §§ 21-3401, 21-3436 (2009); LA. REV. STAT. ANN. § 14:30(A)(6) (2010); OHIO REV. CODE ANN. § 2903.02 (2008); OKLA. STAT. tit. 21, § 701.7 (2010); R.I. GEN. LAWS § 11-23-1 (2010); UTAH CODE ANN. § 76-5-203 (LexisNexis 2010); W. VA. CODE § 61-2-1 (2010). Some states also have separate drug distribution death offenses. COLO. REV. STAT. 18-3-102(e); N.J. STAT. ANN. § 2C:11-3 (West 2005); NEV. REV. STAT. § 200.030 (2009); MINN. STAT. § 609.195(b) (2010).

[271] 18 U.S.C. § 1111 (2006); ARIZ. REV. STAT. ANN. § 13-1105 (2010); FLA. STAT. § 782.04 (2010); IDAHO CODE ANN. § 18-4003 (2004); 720 ILL. COMP. STAT. 5/9-1(a)(3) (2002); IOWA CODE § 707.2 (2009); KAN. STAT. ANN. §§ 21-3401, 21-3436 (2009); NEV. REV. STAT. § 200.030 (2009); N.J. STAT. ANN. § 2C:11-3 (2005); N.D. CENT. CODE § 12.1-16-01 (1997); OHIO REV. CODE ANN. § 2903.02 (LexisNexis 2008); TENN. CODE. ANN. § 39-13-202 (2010).

[272] IND. CODE § 35-42-1-1 (2010); KAN. STAT. ANN. § 21-3401, 21-3436 (2009).

[273] 18 U.S.C. § 1111 (2006); FLA. STAT. ANN. § 782.04 (LexisNexis 2010); KAN. STAT. ANN. § 21-3401 (2009); 720 ILL. COMP. STAT. 5/9-1(a)(3) (2002); ME. REV. STAT. ANN. tit.

simple breaking and entering.[276] One lists forcible obstruction of justice[277] and two list resisting arrest.[278] One lists train wrecking.[279]

How well do these various predicate felonies meet the requirement of apparent danger to human life? That depends on what we mean by apparent danger. A tempting approach to this problem measures apparent danger to human life in the strictly quantitative terms of probability of death. However, there are three related problems that complicate this approach. We may call these the threshold problem, the offense-framing problem, and the result-framing problem.

The threshold problem concerns how much danger of death should qualify as negligent. Surely negligence cannot require that death be "probable" in the sense of more likely than not. By this demanding standard, causing death by deliberately shooting at a victim would not qualify as a negligent killing. Federal statistics suggest that no more than about twenty percent of the injuries resulting from intentional shootings are fatal.[280] A study of drive-by shootings directed at minors in Los Angeles found that only about five percent resulted in deaths.[281] Similarly, if negligence requires a probability above fifty percent, intent to injure is not negligent with respect to the risk of death. Federal statistics indicate that assaults with intent to injure result in death only about

17-A, § 202 (2010); OHIO REV. CODE ANN. § 2903.02 (LexisNexis 2008); OKLA. STAT. tit. 21, § 701.7 (2010); TENN. CODE ANN. § 39-13-202 (2010).

[274] CAL. PENAL CODE § 189 (Deering 2010); D.C. CODE § 22-2101 (2001); 720 ILL. COMP. STAT. 5/9-1(a) (3); IOWA CODE ANN. § 707.2 (20010); KAN. STAT. ANN. § 21-3401 (2009); LA. REV. STAT. ANN. § 14:30 (2010); MD. CODE ANN., CRIM. LAW § 2-201(a)(4) (LexisNexis 2010); MINN. STAT. ANN. § 609.185 (LexisNexis 2010); OHIO REV. CODE ANN. § 2903.02 (LexisNexis 2010); OKLA. STAT. tit. 21, § 701.7 (2002); WIS. STAT. ANN. § 940.03 (LexisNexis 2008).

[275] KAN. STAT. ANN. § 21-3401, 21-3406 (2009); TENN. CODE ANN. § 39-13-202 (2010); WIS. STAT. ANN. § 940.03 (2010).

[276] R.I. GEN. LAWS § 11-23-1 (2010); W. VA. CODE ANN. § 61-2-1 (2010).

[277] WIS. STAT. ANN. § 940.03 (2010).

[278] FLA. STAT. ANN. § 782.04 (LexisNexis 2010); R.I. GEN. LAWS § 11-23-1 (2010).

[279] CAL. PENAL CODE § 189 (Deering 2010).

[280] *See* Melonie Heron et al., Nat'l Ctr. for Health Statistics, *Deaths: Final Data for 2006*, 57 NAT'L VITAL STAT. REP., Apr. 17, 2009, 1, 11 (2009), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr57/nvsr57_14.pdf (reporting 12,791 homicide deaths by firearm in 2006); Office of Statistics & Programming, Nat'l Ctr. for Injury Prevention and Control, Ctrs. for Disease Control and Prevention, *Assault Firearm Gunshot Nonfatal Injuries and Rates per 100,000*, *available at* http://webappa.cdc.gov/sasweb/ncipc/nfirates 2001.html (reporting 52,748 intentional but nonfatal firearm injuries in 2006). Thus no more than 19.51 percent of injuries sustained by intentional shootings were fatal in 2006.

[281] H. Range Hutson et al., *Adolescents and Children Injured or Killed in Drive-By Shootings in Los Angeles*, 330 NEW ENG. J. MED. 324, 324 (1994) ("A total of 677 adolescents and children were shot at, among whom 429 (63 percent) had gunshot wounds and 36 (5.3 percent) died from their injuries.").

three percent of the time.[282] Yet English law has long regarded intent to injure as a sufficient mental state for murder.[283] Thus, we view risks of death much lower than fifty percent as intolerable and apparently base judgments of culpability on other factors beyond risk.

The offense-framing problem is that the probability of death assignable to a type of offense may depend upon normative judgments about how narrowly to frame the offense. There are at least two types of offense-framing problems. First, some felonies may not impose a very high risk of death taken in isolation, but they may be part of a pattern of activity that in the aggregate produces high risk. For example, robbery results in homicide only about 0.6% of the time.[284] Yet, a Rand study estimated that the ten percent of inmates who committed robbery most frequently committed an average of eighty-seven robberies a year.[285] Such high rate muggers should generate an average of one death every two years. Narcotic use and trafficking poses similar questions. A single use may pose little risk. Habitual use is more dangerous, and marketing large amounts more dangerous still. Viewed alone, a street-level retailer may impose a small risk, but he may be participating in a distribution organization that imposes a much larger risk.

Second, the risk we assign particular crimes may depend on how we assess the causal contributions of victim behavior. For example, voluntary victim participation in drug abuse seems to undercut the trafficker's causal responsibility. Yet the more dangerous and addictive the drug, the less inclined we are to judge its abuse voluntary. Like addiction, coercion can complicate assessments of the independence of victim contributions to risk. When robbery victims do not resist, the risk of death drops to 0.2%; but when they do resist, the risk of death rises to 3% – greater than the risk from assault

[282] Dep't of Justice, Fed. Bureau of Investigation, *Offense Definitions - Crime in the United States 2007*, FBI – UNIFORM CRIME REPORTS (Sept. 2008), *available at* http://www.fbi.gov/ucr/cius2007/about/offense_definitions.html [hereinafter FBI] (aggravated assault defined as "[a]n unlawful attack by one person upon another for the purpose of inflicting severe or aggravated bodily injury"); *Id.* at tbl.16, *available at* http://www2.fbi.gov/ucr/cius2007/data/table_16.html (603,212 reported aggravated assaults in 2007); Office of Statistics & Prevention, Nat'l Ctr. For Injury Prevention & Control, Ctrs. for Disease Control & Prevention, *2007, United States Homicide Injury Deaths and Rates per 100,000*, *available at* http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html (18,361 homicide deaths due to injury in 2007). The resulting fatality rate for aggravated assault is about 3.04 percent.

[283] STEPHEN, *supra* note 77, at 80, *cited in* Binder, *supra* note 55, at 89.

[284] MARVIN E. WOLFGANG, PATTERNS IN CRIMINAL HOMICIDE 66 (1958) (5.9 homicides per 1000 robberies for Philadelphia, 1948-1952); Franklin E. Zimring & James Zuehl, *Victim Injury and Death in Urban Robbery: A Chicago Study*, 15 J. LEGAL STUD. 1, 8 tbl.1 (1986) (noting "probable" robbery killings of 5.2 per 1000).

[285] James Q. Wilson & Allan Abrahamse, *Does Crime Pay?*, 9 JUST. Q. 359, 363 tbl.2 (1992).

with intent to injure.[286] Which statistic is the right one to consider? Should we assign the increased risk of resisted robberies to the resistance rather than the robbery? Or should we reason that since the victim has the right to resist, the robber should always be held responsible for imposing a 3% risk, even when the victim is too scared to resist? Although the robber may expect the victim's cooperation, remember he induces this cooperation by *threatening* the victim with deadly force. He can hardly claim not to have foreseen the possibility of death when he counts on the victim to foresee it.

The result-framing problem is that our assessment of risk may depend on additional expected results beyond death. The Model Penal Code's popular definition of criminal negligence requires reasonable notice of a substantial and *unjustifiable* risk that a proscribed result will occur. We view fast driving as negligent only if the risks of death, injury and property damage outweigh the expected benefit of time saved. In contrast, while the risk of death resulting from arson may be no more than one percent,[287] even that "small" risk is unjustifiable because the commission of the crime is wholly without benefit. For a death to be caused negligently arguably requires only that net harm is expected as a consequence of the act causing death, not that death is probable. A very small probability of a great harm might suffice to outweigh a certain but negligible benefit. Assuming a crime has no benefit, a very small apparent probability of death would arguably render the crime inherently negligent.[288]

In light of these difficulties, it seems we must find some non-quantitative way to assess apparent danger. The point of requiring a dangerous felony is to insure the defendant's culpability, which can only be identified through the exercise of normative judgment rather than precise measurement. In evaluating felonious conduct that leads to death, the most promising approach is to assess the normative meaning of the felony rather than its probable consequences.[289] What values are expressed by the felony? In particular, what

[286] *Culpability*, *supra* note 22, at 968 n.9.

[287] *See* MICHAEL J. KARTER, JR., FIRE LOSS IN THE U.S. DURING 2005, NATIONAL FIRE PROTECTION ASSOCIATION, at iii (2006), *available at* http://www.nfpa.org/assets/files/PDF/Public%20Education/FireLoss2005.pdf (31,500 intentionally set structure fires causing 315 civilian deaths); MICHAEL J. KARTER, JR., FIRE LOSS IN THE U.S. DURING 2006, NATIONAL FIRE PROTECTION ASSOCIATION, at iii (2007), *available at* http://www.nfpa.org/assets/files/PDF/Public%20Education/FireLoss2006.pdf (31,000 intentionally set structure fires causing 305 civilian deaths); MICHAEL J. KARTER, JR., FIRE LOSS IN THE U.S. DURING 2007, NATIONAL FIRE PROTECTION ASSOCIATION, at iii (2008), *available at* http://www.nfpa.org/assets/files/PDF/Public%20Education/FireLoss2007.pdf (32,500 intentionally set structure fires causing 295 civilian deaths); MICHAEL J. KARTER, JR., FIRE LOSS IN THE U.S. DURING 2008, NATIONAL FIRE PROTECTION ASSOCIATION, at iii (2009), *available at* http://www.fire.state.mn.us/mfirs/Fire%20in%20US/FireLossintheUS2008.pdf (30,500 intentionally set structure fires causing 315 civilian deaths).

[288] *See* Simons, *supra* note 120, at 1121-24.

[289] JEAN HAMPTON, THE INTRINSIC WORTH OF PERSONS: CONTRARIANISM IN MORAL AND

attitude towards the lives of others does it communicate? Arguably, a violent felony that aims at injury expresses a willingness to endanger life, even if the actual risk is low. So felonies like murder, mayhem, assault with intent to injure, drive-by shooting, and aggravated forms of child abuse satisfy the requirement of negligent indifference to human life. Simple battery without intent to seriously injure does not. Whether these assaultive felonies meet the independent felonious purpose requirement is another matter to be discussed below.

Two crimes of political motive, treason and espionage, could meet this test of willingness to inflict a risk of death even though they do not explicitly require intent to injure. Treason, which requires aid and loyalty to an enemy during war,[290] may be thought of as a crime of accessorial participation in the killing inherent in war by one who lacks combatant immunity. It implies a willingness to shed blood. Espionage may be viewed similarly when it involves an intention that defense information be communicated to an enemy in wartime.[291] However, federal criminal law defines several espionage offenses that do not require the occurrence or expectation of war.[292]

Another category of offenses expressing negligent indifference to human life are inherently coercive felonies, in which the felon coerces the will of a victim by threatening violence. Such offenses imply a willingness to cause injury and risk death. They therefore place a low value on the lives of others, regardless of the actual risk imposed. Based on this reasoning, robbery, rape, and kidnapping are all appropriate predicate felonies. They express negligent indifference to human life even if they very rarely result in death. One inculpatory characteristic of these offenses is that they deliberately cultivate and use fear, which shows the defendant certainly could have adverted to the dangers imposed. This is also a feature of "terrorism," defined by the Patriot Act as illegal acts that "appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government."[293] The offense of consumer product tampering has this feature as well. Child abuse is sometimes motivated by an aim to intimidate and control and so may meet this coercion criterion for negligent indifference, depending on how it is defined.

POLITICAL PHILOSOPHY 120-34 (Daniel Farnham ed., 2007); *Culpability*, *supra* note 22, at 1032-46.

[290] 18 U.S.C. § 2381 (2006).

[291] *Id.* § 794b.

[292] *See, e.g.*, *id.* § 793 (criminalizing obtaining information used to cause "injury [to] the United States, or [for] the advantage of any foreign nation"); *see also id.* § 794 (criminalizing transmitting such information to "any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States").

[293] *Id.* § 2331 (using this definition for both national and international terrorism).

Obstruction of justice can meet this test if it is limited to crimes involving the use or threat of violence against witnesses or officials.

What about the other three most commonly enumerated felonies: escape from custody, arson and burglary? All three can inspire great alarm in the public, but they do not inherently involve intimidation as an element or aim of the crime. Their designation as predicate felonies must rest on some other basis.

While escape is not coercive, it entails resisting lawful coercion. The escapee must plan either to overcome resistance or to try to evade it. In either case he must foresee violent confrontation with armed officers who have not only a right but also a duty to resist. This expresses a sufficiently negligent indifference to human life. This reasoning does not apply with equal force to all situations of flight from police. Suspects are not subject to the same comprehensive loss of liberty as prisoners. Furthermore, police are duty bound to exercise restraint in using force or otherwise endangering the public (and themselves) in pursuit of suspects who may be neither dangerous nor guilty of anything, who may be heedless juveniles, or who may reasonably fear police mistreatment.

Arson – traditionally defined as maliciously burning a dwelling[294] or setting a fire with intent to destroy a building[295] – has been an enumerated predicate for felony murder in the United States since the early Nineteenth Century.[296] Yet British juries were reluctant to convict arsonists of murder during the Nineteenth Century,[297] when homicide was still conceptualized as fatal wounding. Fatal arson provides a kind of paradigm of the modern conception of homicide as causing death by wrongly exposing a victim to risk. Modern citizens, accustomed to purchasing fire insurance, obeying fire alarms, conforming to fire codes, and honoring firefighters as courageous, are acutely aware of the risks of fire. The mortality of arson – approximately one death per hundred cases – is greater than that of robbery and less than that of assault with intent to injure.

While few will disagree that arson entails culpability with respect to a risk of death, arson-murder convictions have sometimes provoked controversy. The North Carolina case of Janet Danahey, discussed in the Introduction, is cited by her supporters as a reason to reform the felony murder rule.[298] Danahey pled guilty to the felony murder of four victims who died in an apartment house fire she caused by burning a bag of party decorations outside

[294] LAFAVE, *supra* note 27, at 1036.

[295] MODEL PENAL CODE § 220.1(1) (1980).

[296] *See, e.g.*, Act of Feb. 17, 1829, § 66, 1829 N.J. LAWS 128; Act of Apr. 22, 1794, 1794 PA. LAWS 187 (construed by the courts to impose felony murder liability in 1826); Stocking v. State, 7 Ind. 326, 331 (1855).

[297] R v. Serné, (1887) 16 Cox's Crim. Law Cases 311 (Cent. Crim. Ct.) 312-13; 314 R v. Horsey, (1862) 176 Eng. Rep. 129 (Kent Summer Assizes) 130-31.

[298] CITIZENS FOR CHANGE, *supra* note 15.

of the building, in front of her ex-boyfriend's door. This result is undeserved, but *not* because North Carolina's felony murder rule does not require sufficient culpability. North Carolina's felony murder rule requires that death be caused by an act in furtherance of an enumerated felony or one involving the use of a deadly weapon from which death is reasonably foreseeable.[299] Arson is defined in North Carolina by the common law, and requires the "willful and malicious burning of the dwelling house of another."[300] If indeed Danahey set fire to debris outside of the building, with no expectation that the building would burn, it appears that she did not commit arson. Arson is only suitable as an enumerated predicate felony for felony murder if it requires the purpose of burning a potentially occupied building. This gives it an independent felonious purpose, and makes death a reasonably foreseeable consequence.

Burglary has also long been designated as a predicate felony. Because people invest their homes with a sense of security, they find residential burglaries deeply disturbing. One could argue that such burglaries are likely to provoke violent confrontations since victims of residential burglaries generally have a right to resist with deadly force and no duty to retreat. Thus, a home invasion, when victims are known to be present, *can* be seen as a coercive crime closely related to robbery. Yet most burglaries are planned to avoid encountering witnesses. As a result, the mortality rate for burglary is surprisingly low, no more than 0.02%.[301] Burglary is typically defined as entering a building without permission with the intent to commit another felony. Thus, when burglary does result in death, some other felony can often be used as a predicate. For example, where thieves expect to encounter victims in a residence, they intend a robbery. Where an individual burglar uses force to effectuate a theft, he commits robbery and is negligent with respect to death.

Given the scarcity of fatal burglaries, nonviolent fatal burglaries are bound to be rare indeed. In *People v. Ingram*, discussed in the Introduction, the victim surprised and captured the burglar before suffering a heart attack. The burglar could hardly have expected such a result. In the Nebraska case of *State v. Dixon* the victim apparently suffered a heart attack when the defendant broke down her door.[302] The defendant may have culpably contributed to the victim's death by cutting the phone lines and so preventing her from summoning aid, but an appellate court did not rely on this theory in upholding the conviction.[303] Instead, the court treated the break-in as the cause of the

[299] State v. Bonner, 411 S.E.2d 598, 604 (N.C. 1992).

[300] State v. Allen, 367 S.E.2d 626, 637 (N.C. 1988); State v. Vickers, 291 S.E.2d 600, 606 (N.C. 1982).

[301] FRANKLIN E. ZIMRING & GORDON HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA 69 (1997); *see also* FBI, *supra* note 282, tbl.23 & tbl.11, *available at* http://www.fbi.gov/ucr/cius2007/data/table_23.html (86 of 1,749,497 reported burglaries resulted in death in 2007).

[302] State v. Dixon, 387 N.W.2d 682, 686 (Neb. 1986).

[303] *Id*. at 689.

victim's heart attack.[304] It is hard to see how such causation could have been proven. The defendant testified that the victim was already down when he entered, and there was no evidence that he touched her.[305] Had these courts properly defined causation, the defendants would not have been convicted without some showing of violence or foreseeable danger. Yet results like this could also be avoided if legislatures acknowledged that nonviolent burglaries are not inherently dangerous.

Because fatal burglaries are rare, and almost always involve other more dangerous felonies, the inclusion of burglary among enumerated predicate felonies rarely leads to the conviction of a nonculpable defendant. This is a danger in two scenarios, however.

One problematic scenario arises when several persons collaborate in a burglary, hoping and expecting not to encounter any victims or witnesses. If one thief encounters resistance and overcomes it with force, he becomes a robber, but his accomplices may not. In such cases, use of burglary as a predicate felony can inculpate accomplices in deaths they had little reason to expect. In the West Virginia case of *State v. Tesack*, a look-out and getaway driver was convicted of felony murder when his co-felons were surprised by the return of the homeowners and a gun battle ensued.[306] Here there was no question defendant knowingly aided in a burglary, but his liability for murder did not depend on proof of awareness that his co-felons were armed.[307] In a contrasting case from Maryland, the defendant participated in a planned home invasion and robbery that only became a burglary when the homeowner proved to be absent.[308] The homeowner returned while the burglary was in progress, however.[309] Two of the defendant's accomplices encountered the homeowner at an outbuilding, raped her, and killed her.[310] Maryland's highest court overturned the conviction for failure to instruct the jury that defendant could only be liable if the killing was a "natural probable consequence" of an act "in furtherance of or pursuant to" the common design.[311] Standards of accomplice liability like this – in place in most jurisdictions – condition burglary-murder on negligence.

A second problematic scenario arises when the fatal events occur during flight from a burglary. The California case of *People v. Fuller*[312] illustrates this problem. Defendants were interrupted by a police officer while breaking

[304] *Id.*

[305] *Id.* at 685.

[306] State v. Tesack, 383 S.E.2d 54, 56-57 (W. Va. 1989).

[307] *Id.* at 59.

[308] Mumford v. State, 313 A.2d 563, 565 (Md. Ct. Spec. App. 1974).

[309] *Id.*

[310] *Id.*

[311] *Id.* at 566.

[312] 150 Cal. Rptr. 515 (Ct. App. 1978).

into cars in a parking lot.[313] Fleeing from the pursuing officer at high speed, they ran a red light and struck another car, killing the driver.[314] An appellate court reluctantly upheld a first degree murder conviction, reasoning that burglary of a car was included within the burglary statute, and that precedent held that any burglary could serve as a predicate for first degree felony murder.[315] The court added that no causal link was required between the felony and the death as long as they occurred as part of "one continuous transaction," and that flight was considered part of the transaction until the defendants reached a place of temporary safety.[316] The court expressed regret for this result, arguing that burglary is not inherently dangerous unless limited to nighttime burglaries of occupied structures.[317] The court added that burglary was so limited at the time the felony murder provision was added to the California Penal Code and that first degree burglary was still so limited.[318] Thus the court called on the California Supreme Court to construe the Code as predicating first degree felony murder only on such aggravated burglaries.[319] In defending this proposal, the court also argued that the defendants' reckless driving in flight from the burglary should not be seen as a danger inhering in burglary because dangerous flight was a possibility in any crime.[320] The court thereby implicitly proposed replacing the temporally defined "continuous transaction" test with a causal test requiring that death be within the scope of the risk inhering in the felony.

Another illustrative flight case is the Wisconsin case of *State v. Chambers*[321] in which a burglar was held liable for his accomplice's killing of a pursuing police officer during the accomplice's separate flight.[322] The defendant, who had set out with his co-felon to commit a robbery, conceded his complicity in the predicate felony of armed burglary.[323] Nevertheless, he denied responsibility for his partner's killing of the police officer.[324] It can be argued that where, as here, a burglar knows his co-felons are armed he accepts that they will use deadly force if necessary to defend themselves and make good their escape.

The *Chambers* case may be contrasted favorably with the famous Illinois case of *People v. Hickman*, in which one police officer shot another whom he

[313] *Id.* 516.
[314] *Id.*
[315] *Id.*
[316] *Id.* at 517.
[317] *Id.* at 519-20.
[318] *Id*. at 520.
[319] *Id.*
[320] *Id.* at 519-20.
[321] 515 N.W.2d 531 (Wis. Ct. App. 1994).
[322] *Id.* at 533.
[323] *Id*. at 533 n.2.
[324] *Id.* at 533.

took for an armed felon in flight from a burglary.[325] While one of Hickman's accomplices brought a gun, there was no evidence that either Hickman or the errant officer was aware of it.[326] The court offered the following astonishing argument that death was indeed foreseeable as a consequence of their burglary: "There should be no doubt about the 'justice' of holding a felon guilty of murder who engages in a robbery followed by an attempted escape and thereby inevitably calls into action defensive forces against him, the activity of which results in the death of an innocent human being."[327] Since Hickman neither robbed nor threatened anyone he did nothing to provoke defensive force. Where the felony is not inherently dangerous, causal responsibility for death cannot simply be presumed.

Conversely, the *Chambers* case illustrates how foreseeable danger can be required by predicating felony murder on burglary aggravated by some dangerous circumstance such as the use of arms or the likely presence of victims. Wisconsin is one of fifteen enumerated felony jurisdictions that limit predicate burglaries in this way.[328] The most common aggravating factors are that the burglary is committed in a dwelling or with a person present; that the felon is armed; or that the felon commits assault or causes injury.

These aggravating circumstances establish dangerousness, but they only establish a burglar's negligence if he or she is aware of these circumstances. In the Ohio case of *State v. Kimble*[329] the defendant induced a prostitute to bring a customer to the scene of a planned robbery where a co-felon shot him. Kimble

[325] People v. Hickman, 297 N.E.2d 582, 583 (Ill. App. Ct. 1973).

[326] *See id.* at 583.

[327] *Id*. at 586.

[328] ALA. CODE § 13A-6-2 (LexisNexis 2005) (of a dwelling, or armed, or causes injury); ALASKA STAT. § 11.41.110 (2010) (of a dwelling, armed, or attempts or causes injury); D.C. CODE § 22-2101 (2001) (of a dwelling while armed); IOWA CODE § 707.2 (2009) (occupied structure with persons present; and armed, recklessly injures, or sexually assaults); LA. REV. STAT. ANN. § 14:30 (2010) (armed, or commits battery); MD. CODE ANN., CRIM. LAW § 2-201(a)(4) (LexisNexis 2010) (of a dwelling or barn); N.C. GEN. STAT. § 14-17 (2005) (of a dwelling at night, according to case law); OHIO REV. CODE ANN. § 2903.02 (LexisNexis 2010) (in an occupied structure with person present, or dwelling when person likely to be present); OKLA. STAT. tit. 21, § 701.7 (2002) (of a dwelling with victim present); OR. REV. STAT. § 163.115 (2009) (of a dwelling, or armed, or causes or attempts injury); R.I. GEN. LAWS § 11-23-1 (2010) (of a dwelling at night, according to case law); VA. CODE ANN. § 18.2-32 (1998) (of a dwelling at night); WASH. REV. CODE § 9A.32.030(1)(c) (2010) (armed or commits assault); W. VA. CODE § 61-2-1 (2010); WIS. STAT. § 940.03 (2010) (of a dwelling with persons present, armed, uses explosive, or commits battery). In addition to these enumerated felony jurisdictions, Massachusetts, which limits all predicate felonies to those inherently dangerous to human life, also limits first degree felony murder predicates to those most severely punished, including burglary in a dwelling, while armed, or involving assault. MASS. GEN. LAWS ch. 265, § 1 (2008).

[329] State v. Kimble, No. 06 MA 190, 2008 WL 852074, at *1 (Ohio App. 7 Dist. Mar. 17, 2008) (slip opinion).

was held to be an accomplice in the predicate felony of armed robbery, despite her claim that she did not know her co-felons were armed.[330] The court considered the statutory element of possession or use of a weapon to be a strict liability element, reasoning that possession is typically a strict liability element.[331] This is particularly troubling because Ohio's statutory default rules require recklessness unless a purpose to impose strict liability is clearly indicated.[332] Moreover, these default rules require a voluntary act and provide that possession constitutes a voluntary act only if the possessor knowingly procured, received or controlled the thing possessed.[333] Finally, the code provides that offense definitions "shall be strictly construed against the state."[334] There is a danger that similar reasoning could be employed in a felony murder case predicated on armed burglary, holding a co-felon liable when a burglar unexpectedly brings a weapon. Such reasoning would be even more perverse in a burglary case because unlike simple robbery, simple burglary is not inherently violent. Moreover, if the aggravating result of injury during a burglary is treated as a strict liability element, there is a danger that an unforeseeable death could be counted twice: both as the aggravating circumstance rendering the burglary dangerous and as the murder predicated on the dangerous burglary. Finally, dangerous circumstances increase a burglar's guilt for a resulting death only if the death was within the scope of risk imposed by the aggravating circumstance. A firearm should ordinarily be irrelevant if the victim dies in a car crash.

A further difficulty with the use of burglary as a predicate felony arises because burglary is an inchoate crime depending on a possibly unexecuted intent to commit a further felony. Where a defendant aids in an unlawful entry that ultimately leads to a violent killing, prosecutors and juries may be tempted to over-ascribe the requisite felonious intent so as to impute complicity.[335] Thus, in the Colorado case of *Auman v. People*,[336] defendant broke into a locked room in an apartment she had shared and retrieved her own belongings, while her co-defendants apparently helped themselves to other property.[337] One of these co-defendants fatally shot a police officer while in flight from this theft.[338] The defendant's convictions for burglary and felony murder were

[330] *Id.* at *4.

[331] *Id.* at *5.

[332] OHIO REV. CODE ANN. § 2901.21(B) (LexisNexis 1996).

[333] *Id.* § 2901.21(D)(1).

[334] *Id.* § 2901.04(A).

[335] Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 VAND. L. REV. 1383, 1385 (2003); Martin Lijtmaer, Comment, *The Felony Murder Rule in Illinois: The Injustice of the Proximate Cause Theory Explored Via Research in Cognitive Psychology*, 98 J. CRIM. L. & CRIMINOLOGY 621, 623 (2008).

[336] 109 P.3d 647 (Colo. 2005).

[337] *Id.* at 651.

[338] *Id.*

ultimately overturned for failure to consider her claim that she had no felonious intent to take the property of another.[339]

A less careful result was reached in *Commonwealth v. Lambert*,[340] discussed in the Introduction. Lambert drove a friend to the home of the friend's girlfriend and her mother, whom the friend claimed owed him money.[341] The friend broke in and fatally shot the mother.[342] In upholding Lambert's felony murder conviction, the court reasoned that the illegal entry justified an inference that the friend intended some undetermined illegal act within; the fact that Lambert observed the illegal entry justified an inference that he knew his friend had such an intention.[343] The fact that he remained available to give his friend a ride implied the required "intent of promoting or facilitating the commission of the offense."[344]

It is unlikely that legislatures will abandon a two-hundred-year-old tradition of predicating felony murder on burglary, but there is little justification for viewing burglary as inherently dangerous, and there is some risk of wrongly convicting non-culpable accomplices. Jurisdictions that retain simple burglary as a predicate felony[345] should narrow it to aggravated burglary. Courts in such jurisdictions may achieve a similar effect by interpreting causation standards to prevent the ascription of death to the burglary unless the burglary is committed in a dangerous way. They should also carefully define criteria of accessorial responsibility for death, so as to ensure that participants in burglary are not punished for felony murder when they lacked awareness of circumstances rendering death foreseeable. Six of the states that predicate felony murder on simple burglary provide an affirmative defense for accomplices who had no reason to expect a killing and no knowledge that any participant was armed.[346]

Other non-forcible property offenses like theft are neither dangerous nor traditionally seen to be so. Because these offenses rarely lead to death, they rarely result in felony murder charges. Where they do, courts are rightly reluctant to attribute those deaths to the felonies. In the Tennessee case of *State v. Pierce*[347] a fifteen-year-old youth drove a car several weeks after its

[339] *Id.* at 652.

[340] 795 A.2d 1010 (Pa. Super. Ct. 2002).

[341] *Id*. at 1118-19.

[342] *Id*. at 1119.

[343] *Id.* at 1119-20.

[344] 18 PA. CONS. STAT. ANN. § 306(c)(1) (1998).

[345] Arizona, California, Colorado, Connecticut, Florida, Idaho, Illinois, Indiana, Kansas, Maine, Mississippi, Montana, Nebraska, Nevada, New Jersey, New York, North Dakota, Pennsylvania, South Dakota, Tennessee, Utah, Wyoming, and the United States.

[346] COLO. REV. STAT. § 18-3-102 (2010); CONN. GEN. STAT. ANN. § 53a-54c (2009); ME. REV. STAT. ANN. tit. 17-A, § 202 (2010); N.J. STAT. ANN. § 2C:11-3 (West 2010); N.Y. PENAL LAW § 125.25 (McKinney 2010); N.D. CENT. CODE § 12.1-16-01 (2010).

[347] 23 S.W.3d 289 (Tenn. 2000).

misappropriation by the owner's daughter.[348] He lost control of the wheel at a police roadblock when he saw an officer aiming a gun at him.[349] The resulting collision killed the officer.[350] A Tennessee appellate court reversed the youth's felony murder conviction on the ground that the act causing death was "collateral to not in pursuance of the felony of theft."[351] The court also found no temporal connection between the collision and the theft, as the thief had previously reached a temporary position of safety.[352] In another Tennessee case, the killing of a thief's accomplice by a resisting victim was held not to be in furtherance of the felony.[353] These cases illustrate how the requirements of a dangerous felony and of a causal connection between the felony and the death can substitute for one another as proxies for negligence with respect to death. Nevertheless, property crimes unaccompanied by the use, threat, or even danger of deadly force are not inherently dangerous and should not be enumerated predicates for felony murder.

Drug offenses are popular predicates despite the fact that they involve neither force nor coercion. Yet drugs are regulated primarily because of their dangers to health, so it may seem to follow that drug trafficking is inherently dangerous. There are two difficulties with this conclusion, however.

First, the causal responsibility of drug traffickers for drug-related deaths is often undermined by the contribution of uncoerced victim behavior. For example, in the case of *State v. Mauldin* the Kansas Supreme Court upheld a trial judge's dismissal of a felony murder charge based on a self-administered drug overdose.[354] The trial judge reasoned that:

> [T]he defendant's only connection with the homicide was that he sold a quantity of heroin to the deceased who some time later, voluntarily and out of the presence of the defendant, injected himself with an overdose and died as a result. This is not a case where the defendant injected the heroin into the deceased, or otherwise determined the amount of the dose, or assisted in administering the dosage . . . .[355]

Unlike victims who resist rape or robbery, drug users have no legal right to endanger themselves. Voluntary drug users are arguably partners in crime rather than victims.

Second, the overall fatality of drug trafficking appears much lower than the fatality of paradigmatic predicate felonies like robbery and arson. At the high end, about 0.5% of heroin users suffered a fatal overdose for the years 2002-

[348] *Id.* at 291.

[349] *Id.* at 292.

[350] *Id.* at 290.

[351] *Id.*

[352] *Id.* at 319-20.

[353] State v. Severs, 759 S.W.2d 935, 938 (Tenn. Crim. App. 1988).

[354] State v. Mauldin, 529 P.2d 124, 127 (Kan. 1974).

[355] *Id.* at 126.

2005.[356] By contrast, in 1998 approximately 0.05% of cocaine users died of overdoses.[357] And of course there are illegal drugs like marijuana that pose virtually no risk of overdose.[358]

Nevertheless, there are countervailing considerations that militate in favor of felony murder liability for some drug offenses. First, drug users who overdose are disproportionately likely to be addicts, with arguably compromised wills. Second, the dangers of wholesale drug trafficking may greatly exceed the dangers of individual drug use. So it may be reasonable to use trafficking in narcotics as a predicate felony when the amount is very large. But if so, it may seem arbitrary and formalistic to focus on the scale of a single transaction which may be part of an ongoing business. Suppose Wholesaler sells two kilos of cocaine to Retailer who, over the course of a month, sells two grams to each of a thousand persons. One of these is Addict, who is in ill health, has ingested cocaine earlier in the day, and who quickly and fatally consumes the entire amount. Why should Retailer be held any less responsible for Addict's death than Wholesaler, when both sold the same amount? One approach is to distinguish between trafficking for profit and sharing drugs socially. Where companions are sharing the risks of drug use it seems morally arbitrary to hold the survivor liable for an unlikely misfortune that could as easily have fallen on him.

The West Virginia case of *People v. Rodoussakis*[359] offers a fact scenario supporting felony murder liability for a retail drug dealer.[360] Prosecution witnesses testified that the defendant habitually dealt morphine, that he had recently witnessed another customer become ill from three doses of morphine and refused to render aid, and that he had injected the victim three times on the day of his death, despite the fact that the victim became ill after the second injection and a witness urged him not to administer the third dose.[361] These facts are compelling because they include evidence both that death was foreseeable and that the victim did not self-administer. Yet the very strength of these facts shows it is important to require the prosecution to prove legal

[356] *See* LOIS A. FINGERHUT, CTRS. FOR DISEASE CONTROL & PREVENTION, INCREASES IN POISONING AND METHADONE-RELATED DEATHS: UNITED STATES, 1999-2005, at 4 (2008), *available at* http://www.cdc.gov/nchs/data/hestat/poisoning/poisoning.pdf (quantifying heroin fatalities); U.S. DEP'T OF HEALTH & HUMAN SERVS., SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., 2007 NATIONAL SURVEY ON DRUG USE AND HEALTH, *available at* http://dx.doi.org/10.3886/ICPSR23782 (quantifying drug use).

[357] *See Culpability*, *supra* note 22, at 1023 n.95.

[358] Recognizing the statistical rarity of drug overdoses, and their frequent dependence on victim conduct, the New Jersey legislature eliminated the normal requirements for legal causation of death in a drug-delivery-homicide statute imposing strict liability on dealers for drug overdoses. N.J. STAT. ANN. § 2C:35-9 (West 2005). Provisions of this kind should not be considered felony murder laws and are not justified by the principle of dual culpability.

[359] 511 S.E.2d 469 (W. Va. 1998).

[360] *Id.* at 473.

[361] *Id.* at 474.

causation when the predicate felony is not inherently violent or destructive. A contrasting case from the Introduction illustrates the impropriety of predicating murder liability on social drug use. In *Hickman v. Commonwealth*[362] a Virginia court upheld the conviction of a defendant who jointly possessed a small amount of cocaine with the victim. Hickman sat with the victim in the victim's truck and helped him prepare an injection of cocaine which the victim self-administered, and which proved fatal.[363] Because the victim self-administered, Hickman did not directly cause the death. Because the ex ante risk of fatal overdose associated with the possession of a small amount for recreational use is low, proximate causation and negligence appear to be missing as well.

Another argument for predicating felony murder on drug distribution despite the relatively low risk of overdose is that drug trafficking may pose other dangers. Homicides may occur during drug transactions or disputes among drug traffickers. The difficulty here, as with other nonviolent predicate felonies, is that the linkage between the predicate felony and the act causing death may be tenuous. In the Kansas case of *State v. Beach* an accomplice in a drug purchase was held liable for her co-felon's killing in a robbery of which she was acquitted.[364] The court argued that robbery is a foreseeable risk of an illegal drug transaction.[365] Yet it is hard to see why drug traffickers should be held responsible for the risks imposed by those endeavoring to thwart their interests unlawfully.

In sum, large scale trafficking in dangerous, addictive drugs for profit may be sufficiently dangerous to justify felony murder liability. On the other hand, trafficking in less dangerous, less addictive drugs is not. Nor is small scale possession even of dangerous and addictive drugs for personal use or social sharing. Because drug offenses do not inherently involve violence, coercion, or destruction, and because their dangers are so variable and context specific, drug offenses should not be viewed as inherently dangerous. Jurisdictions that enumerate predicate offenses should avoid including drug offenses among them. If they do, they should use culpability, causation and complicity standards to ensure that parties to fatal drug offenses are truly negligent.

2. Dangerousness Standards

A total of twenty jurisdictions impose either first or second degree felony murder liability without exhaustively enumerating predicate felonies.[366] Six of these states do not enumerate at all.[367]

[362] 398 S.E.2d 698, 699-700 (Va. Ct. App. 1990).

[363] *Id.* at 699.

[364] State v. Beach, 67 P.3d 121, 138 (Kan. 2003).

[365] *Id.* at 135; *see also* State v. Wade, 490 S.E.2d 724, 732 (W. Va. 1997) (defendant's possibly defensive killing treated as in furtherance of companion's drug distribution).

[366] Alabama, California, Delaware, Florida, Georgia, Illinois, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nevada, North Carolina, Oklahoma, Rhode

The great majority of these twenty jurisdictions, as many as seventeen, condition felony murder liability on dangerous conduct in the commission or attempt of the felony. Only one jurisdiction – Missouri – has a case explicitly rejecting a requirement of danger, and here there is conflicting authority of greater weight. Standards requiring dangerous conduct can be imposed by statute or by judicial decision. They can take a variety of forms, focusing on risk, force or violence, or the use of a weapon. A requirement that dangerous conduct be a defining element of the predicate felony is a requirement of *inherent* danger. Such standards give courts the role of determining which felonies can be predicates for murders. If requirements of force or danger apply to the felons' conduct in committing any felony, they can be applied by properly instructed juries evaluating the facts of the case. Such case-specific requirements are usually called requirements of *foreseeable* danger, or of danger *under the circumstances*. Of the twenty states that do not exhaustively enumerate predicate felonies, only four – California, Nevada, Minnesota and Massachusetts – require an inherently dangerous predicate felony.

California's Penal Code defines second degree felony murder obliquely, defining involuntary manslaughter as unlawful killing without malice in the commission of unlawful act not amounting to felony.[368] The California courts have predicated second degree murder on non-enumerated felonies since the Nineteenth Century,[369] but limit predicate felonies to those determined by the court to be inherently dangerous.[370] The California Supreme Court imposed this requirement in order to limit felony murder liability to the function of deterring carelessness by felons.[371] The Court reasoned that if felons had no reason to anticipate a danger of death, they would not recognize the threat of

Island, South Carolina, Texas, Virginia, and Washington (note I am not including felony aggravator states that require gross recklessness).

[367] Delaware, Georgia, Massachusetts, Missouri, South Carolina, and Texas. Massachusetts grades murders as first degree if predicated on felonies punishable by death or by life terms, but permits felonies to serve as predicates for felony murder regardless of punishment, only if inherently dangerous. *See* MASS. SUP. CT. CRIM. PRAC. JURY INST. § 2.2 (Mass. Continuing Legal Educ., Inc. 2004).

[368] CAL. PENAL CODE § 192 (West 2008). At one time this provision explicitly stated that killing in the course of a felony was murder, but the elimination of this language was apparently not aimed at changing the law. People v. Sarun Chun, 203 P.3d 425, 431 (Cal. 2009).

[369] People v. Olsen, 22 P. 125, 126 (Cal. 1889).

[370] People v. Phillips, 414 P.2d 353, 360 (Cal. 1966) (overturning felony murder conviction predicated on grand theft despite foreseeably dangerous conduct of claiming that chiropractic treatments could cure cancer); People v. Williams, 406 P.2d 647, 649-50 (Cal. 1965) (overturning felony murder conviction predicated on conspiracy to possess methedrine despite foreseeably dangerous conduct of stabbing); People v. Ford, 388 P.2d 892, 907 (Cal. 1964).

[371] *Williams*, 406 P.2d at 650 n.4.

felony murder liability.[372] A 1989 case, *People v. Patterson*, remanded a felony murder conviction predicated on distribution of cocaine for the court to determine whether there is always a "high probability" that the distribution of cocaine will result in death.[373]

Nevada's felony murder law closely parallels that of its neighbor California. As in California, murder is defined as killing with express or implied malice,[374] and a statutory felony murder rule is hidden in the definition of involuntary manslaughter. According to this provision, murder includes causing death either by means of an unlawful act tending to destroy human life, or in prosecution of felonious intent.[375] In a 1983 case the Nevada Supreme Court recognized second degree felony murder for the first time, upholding a conviction predicated on the distribution of barbiturates.[376] Relying on California cases, the court limited predicate felonies to those inherently dangerous in the abstract, to ensure that the felon could foresee the possibility of death or injury and so be deterred by the threat of murder liability.

Minnesota's code punishes unintentionally causing death in the attempt or commission of any non-enumerated felony as second degree murder.[377] Minnesota courts originally required that the predicate felony involve a special danger of death either inherently or as committed.[378] However in *State v. Anderson*,[379] the court required both inherent and circumstantial danger in overturning a conviction predicated on gun possession by a convicted felon.[380]

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[372] *Id.*

[373] People v. Patterson, 778 P.2d 549, 558 (Cal. 1989). Inherently dangerous felonies have included furnishing heroin, providing methyl alcohol for human consumption, and burning a car. People v. Mattison, 481 P.2d 193, 197-98 (Cal. 1971) (finding provision of methyl alcohol for human consumption inherently dangerous); People v. Nichols, 474 P.2d 673, 682 (Cal. 1970) (finding burning a motor vehicle inherently dangerous); People v. Taylor, 169 Cal. Rptr. 290, 296 (Ct. App. 1980) (considering furnishing heroin inherently dangerous). *But see* People v. Satchell, 489 P.2d 1361, 1370 (Cal. 1971); People v. Lovato, 65 Cal. Rptr. 638, 643 (Ct. App. 1968) (holding that weapons possession offenses are not inherently dangerous felonies).

[374] NEV. REV. STAT. § 200.030 (2010).

[375] *Id.*; *see also* State v. Contreras, 46 P.3d 661, 662 (Nev. 2002).

[376] Sheriff, Clark Cnty. v. Morris, 659 P.2d 852, 858-59 (Nev. 1983).

[377] MINN. STAT. § 609.19 (2010).

[378] State v. Back, 341 N.W.2d 273, 277 (Minn. 1983) (felony must involve special danger to human life as committed); State v. Nunn, 297 N.W.2d 752, 754 (Minn. 1980) (commenting that burglary of a dwelling is dangerous in the abstract, but recognizing the greater value of a circumstance test); *accord* State v. Cole, 542 N.W.2d 43, 53 (Minn. 1996) (theft dangerous under the circumstances because defendant carried a gun, defendant then shot police officer in resisting arrest); State v. Gorman, 532 N.W.2d 229, 233 (Minn. Ct. App. 1995).

[379] 666 N.W.2d 696 (Minn. 2003).

[380] *Id.* at 700-01.

Although a later case appeared to use a circumstantial danger test,[381] the inherent danger requirement was subsequently reconfirmed.[382]

The Massachusetts criminal code grades murder predicated on the most severely punished felonies as first degree, without defining murder itself.[383] Massachusetts courts have recognized second degree murder predicated on non-enumerated felonies since the Nineteenth Century.[384] In the 1982 case of *Commonwealth v. Matchett*, the Supreme Judicial Court held that when the felony is not inherently dangerous per se, the jury must find "circumstances demonstrating the defendant's conscious disregard of the risk to human life" to find second degree murder.[385] The court reasoned that "criminal liability for causing a particular result is not justified in the absence of some culpable mental state in respect to that result." [386] Thus murder liability must be based on gross recklessness rather than the felony murder doctrine, unless the felony is inherently dangerous. This requirement of inherent danger or gross recklessness applies to both first and second degree felony murder.[387]

Six states – Alabama, Texas, Illinois, Montana, North Carolina and Delaware – restrict unenumerated predicate felonies by statute to those involving danger or violence. All six permit any felony to serve as a predicate as long as it is committed in a dangerous or violent way.

Alabama predicates felony murder on enumerated felonies or "any other felony clearly dangerous to human life."[388] In 2006 an Alabama court upheld an indictment charging felony murder predicated on the felony of distributing marijuana, where one of the defendants shot a customer who attempted to rob them.[389] The court declined to assess the dangerousness of the felony according to an inherent danger test, and concluded that whether the felony was dangerous as committed was a question of fact for the jury.[390] Under such a test, defendants could still argue that the felony did not create the danger.

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[381] State v. Mitchell, 693 N.W.2d 891, 895 (Minn. Ct. App. 2005) (permitting child neglect as dangerous felony).

[382] State v. Smoot, 737 N.W.2d 849, 851-52 (Minn. Ct. App. 2007) (upholding DWI as dangerous predicate felony).

[383] MASS. GEN. LAWS ch. 265, § 1 (2008).

[384] Commonwealth v. Jackson, 81 Mass. (15 Gray) 187, 187-88 (1860); *see also* Commonwealth v. Mink, 123 Mass. 422, 429 (1877) (dictum implying second degree felony murder).

[385] Commonwealth v. Matchett, 436 N.E.2d 400, 410 (Mass. 1982).

[386] *Id*. at 409 (quoting People v. Aaron, 299 N.W.2d 304, 304 (Mich. 1980)); *accord* Commonwealth v. Ortiz, 560 N.E.2d 698, 700 (Mass. 1990); Commonwealth v. Moran, 442 N.E.2d 339, 403 (Mass. 1982); Commonwealth v. Chase, 679 N.E.2d 1021, 1025 (Mass App. Ct. 1997) (larceny, theft of truck).

[387] *See* MASS. SUP. CT. CRIM. PRAC. JURY INSTRUCTIONS § 2.2 (2004); *see also* Commonwealth v. Garner, 795 N.E.2d 1202, 1209-10 (Mass App. Ct. 2003).

[388] ALA. CODE § 13A-6-2 (LexisNexis 2005).

[389] *Ex parte* Mitchell, 936 So. 2d 1094, 1101 (Ala. Crim. App. 2006).

[390] *Id*.

The Texas criminal code predicates felony murder on "an act clearly dangerous to human life that causes the death of an individual" in the course of "a felony, other than manslaughter."[391] In one case felony murder was predicated on auto theft, where the defendant's dangerous act was to drive the car away at night without headlights, while drunk.[392] The risks imposed by the defendant, while not inhering in auto-theft, were instrumental to this particular theft.

The Illinois code predicates first degree murder on any forcible felony other than second degree murder. It defines forcible felonies as one of several enumerated felonies or "any other felony which involves the use or threat of force or violence."[393] Any felony can be deemed forcible if committed in this way.[394] The use or threat of violence must be intentional, however: reckless driving is not force, and does not turn auto-theft into a forcible felony.[395] Illinois courts have held that a forcible felony must also be foreseeably dangerous.[396] Nevertheless, the requirement of force can leave the bar to conviction quite low, particularly when combined with the cavalier approach to causation exemplified by the *Hickman* case.[397] *People v. Jenkins*,[398] discussed in the Introduction, illustrates this dynamic. The defendant's "forcible" felony was simple battery of a police officer, consisting of elbowing him in the chest, with the obvious intent to escape rather than inflict injury.[399] That the officer would react to this by shooting his partner was hardly foreseeable, but the jury was never told it had to find that the defendant foreseeably caused the death. A federal court subsequently found this failure to instruct on causation erroneous, but – astonishingly – deemed the error harmless.[400] It is hard to see how a failure to instruct on causation could be harmless, given that the victim was killed recklessly by the police officer, there was a factual dispute as to whether the defendant caused the officer's fall, and the causation standard calls

[391] TEX. PENAL CODE ANN. § 19.02 (West 2003).

[392] *In re* E.B.M., No. 2-04-201-CV, 2005 WL 2100481, at *1-3 (Tex. App. Fort Worth Aug. 31, 2005).

[393] 720 ILL. COMP. STAT. 5/2-8 (2002).

[394] People v. Golson, 207 N.E.2d 68, 73-74 (Ill. 1965) (holding theft can be forcible felony if planned to use violence or violence used as means to carry it out).

[395] People v. McCarty, 785 N.E.2d 859, 859-60 (Ill. 2003) (overturning conviction for death of police officer struck by another officer's car during reckless flight in stolen car); People v. Belk, 784 N.E.2d 825, 830 (Ill. 2003) (car theft not forcible even though involved reckless driving, because violence was not intended).

[396] People v. Pugh, 634 N.E.2d 34, 35 (Ill. App. Ct. 1994) ("[F]orcible felonies are so inherently dangerous that a resulting homicide, even an accidental one, is strongly probable. Consequently, felons are responsible for those deaths which occur during a felony and which are foreseeable consequences of their initial criminal acts.").

[397] *See supra* notes 325-327 and accompanying text.

[398] 545 N.E.2d 986 (Ill. App. Ct. 1989).

[399] *Id.* at 990-91.

[400] Jenkins v. Nelson, 157 F.3d 485, 493, 495 (7th Cir. 1998) (reversing habeas).

for a judgment of reasonable foreseeability.[401] While the unjust result in Jenkins can be attributed to a misapplication of Illinois law, the case illustrates that the requirement of a "forcible" felony is not always sufficient to condition felony murder liability on negligence. This aim can be subverted by a failure to require causal responsibility.

The Montana criminal code's felony murder provision parallels that of the Illinois criminal code. It predicates felony murder on enumerated felonies or any other forcible felony, which it defines as any felony involving the threat or use of physical force or violence.[402] A forcible felony can be any felony committed with force or threat; forcible felonies are not limited to those including the use of force or threat as an offense element. Thus witness tampering is a forcible felony if committed by coercion, but not if committed by bribery.[403]

North Carolina case law previously conditioned first degree felony murder on felonies involving either inherent danger or foreseeable danger as committed.[404] These cases have now been superseded by a statute predicating first degree murder on any felony "committed or attempted with the use of a deadly weapon."[405] Accordingly, "there is no second-degree felony murder" in North Carolina.[406] Unfortunately, North Carolina decisions have weakened the statutory requirement of a deadly weapon in two ways. First, the deadly weapon need only be brought along on the crime; it need not cause the death.[407] Second, a deadly weapon can be any implement capable of causing death, such as a car, if it has been used negligently.[408] The North Carolina courts have held, however, that a predicate felony must have a mental element of intent.[409] Because North Carolina also employs a merger limitation, such intent is required with respect to some harm independent of death or injury to the victim killed.[410]

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[401] A further difficulty with the case was that in predicating felony murder liability on assault, the charge violated the dual culpability principle's requirement of an independent felonious purpose. This aspect of the case will be discussed below. *See infra* Part IV.A.

[402] *See* MONT. CODE ANN. §§ 45-5-102(1)(b), 45-2-101(24) (2009).

[403] *See* State *ex rel.* Murphy v. McKinnon, 556 P.2d 906, 908-09 (Mont. 1976).

[404] State v. Davis, 290 S.E.2d 574, 588 (N.C. 1982); State v. Thompson, 185 S.E.2d 666, 672 (N.C. 1972).

[405] N.C. GEN. STAT. § 14-17 (2005).

[406] State v. Vines, 345 S.E.2d 169, 175 (N.C. 1986); *see also Davis*, 290 S.E.2d at 589-91. But note that second degree murder now includes causing death by means of drug overdose in a drug crime. N.C. GEN. STAT. § 14-17 (2005).

[407] State v. Fields, 337 S.E.2d 518, 523 (N.C. 1985).

[408] *See* State v. Jones, 538 S.E.2d 917, 922 (N.C. 2000).

[409] *Id.* at 923-25.

[410] *Id.* at 924.

Finally, Delaware case law formerly required a dangerously committed felony,[411] but this requirement has now been subsumed within the statutory requirement that death be caused negligently or recklessly in the commission or attempt of any felony.[412] These mental states presuppose perpetrating the felony dangerously. Six additional states appear to have adopted requirements of dangerousness under the circumstances by judicial decision: Georgia, Maryland, Oklahoma, Rhode Island, South Carolina and Virginia.

Georgia's code does not enumerate predicate felonies at all but simply provides that a person commits murder "when, in the commission of a felony, he causes the death of another human being irrespective of malice."[413] The state supreme court's 1992 decision in *Ford v. State* overturned a murder conviction predicated on the felony possession of a fire-arm by an ex-felon, who accidentally shot the gun while unloading it, unaware of presence of the victim in an apartment on the floor below.[414] The court held that the predicate felony must be either inherently dangerous to life or dangerous under the circumstances.[415] A later decision found the same offense dangerous under the circumstances where the felon deliberately pointed the firearm at a victim and then shot unintentionally.[416] Another decision found felony possession of a weapon at school dangerous where a fourteen-year-old defendant brandished a knife during an argument and ended up using it fatally to repel a threatened beating.[417] The Georgia Supreme Court has also ascribed danger under the circumstances to the felony of methadone distribution where defendant doled out an addict's supply and gave her a potentially lethal dose.[418] The court also ascribed inherent danger to one form of the felony of flight from a police officer, which includes the element of reckless driving.[419]

The Georgia case of *Miller v. State*,[420] featured in the Introduction, illustrates the risk that courts will find danger whenever a fatality occurs, however improbably. It also reveals the importance of requiring a felonious purpose independent of injury to the victim.

Fifteen-year-old Miller was sentenced to life in prison for fatally punching a thirteen-year-old in the back of the head.[421] His murder conviction was predicated on one of two offenses – aggravated battery or aggravated

[411] Jenkins v. State, 230 A.2d 262, 269 (Del. 1967).

[412] DEL. CODE ANN. tit. 11, §§ 635(2), 636(a)(2) (2007).

[413] GA. CODE ANN. § 16-5-1(c) (2008).

[414] Ford v. State, 423 S.E.2d 255, 255 (Ga. 1992).

[415] *Id.* at 256.

[416] Metts v. State, 511 S.E.2d 508, 510 (Ga. 1999).

[417] Mosley v. State, 536 S.E.2d 150, 152 (Ga. 2000).

[418] Hulme v. State, 544 S.E.2d 138, 139-40 (Ga. 2001).

[419] State v. Tiraboschi, 504 S.E.2d 689, 690-91 (Ga. 1998).

[420] 571 S.E.2d 788 (Ga. 2002).

[421] *Id.* at 792.

assault.[422] Aggravated assault consists of intentionally striking someone with a weapon causing or likely to cause serious injury.[423] The weapon may consist of the assailant's hands when they cause actual injury.[424] Aggravated battery consists of disabling a body part "maliciously," which the trial court did not define in its jury instruction.[425] The body part found disabled here was the brain.[426] Both felonies *sound* inherently dangerous because they entail injury – but because the court treated both as strict liability offenses with respect to the required injury,[427] neither is foreseeably dangerous. In treating aggravated assault as a strict liability offense, the court ignored prior precedent requiring an attempt or threat to injure, or a likelihood of injury.[428] Without the aggravating deadly weapon element, the offense would be simple assault, which is not a felony and could not trigger felony murder.[429]

However, a federal district court ruled this to be harmless error in a habeas corpus review on the theory that the jury could have based felony murder on aggravated battery and that Miller met the mental element for this offense because he intentionally punched the victim.[430] In failing to require *any* expectation of injury as an element of aggravated battery, however, the court effaced the statutory requirement of *malicious* injury and ignored prior precedent.[431] Moreover, if intentionally punching suffices, the aggravating injury adds no culpability to a simple non-felonious battery. There is no felonious intent to aggravate the unintended death. Acknowledging that "the sentence of life with the possibility of parole . . . would be grossly disproportionate to the conduct and intent involved,"[432] the reviewing federal judge, considering an Eighth Amendment claim, offered the following tortured conclusion:

> The Court has deliberated over this case, in anguish, for a very long time. . . . At the core, this case involves an attack by one youngster against another where the intent was to hurt, but certainly not to kill. . . . [T]he charges on which Miller was convicted did not require any finding of serious moral culpability. . . .

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[422] *Id.*

[423] *Id.* at 793.

[424] *Id.*

[425] *See id.* at 792-93.

[426] *Id.*

[427] *See id.*

[428] *See* Smith v. Hardrick, 464 S.E.2d 198, 200 (Ga. 1995).

[429] *See* GA. CODE ANN. § 16-5-20 (2008).

[430] Miller v. Martin, No. 1:04-cv-1120-WSD-JFK, 2007 U.S. Dist. LEXIS 13112, at *39 (N.D. Ga. Feb. 26, 2007).

[431] An earlier case approved an instruction requiring intentional injury. *See* Wade v. State, 401 S.E.2d 701, 703 (Ga. 1991).

[432] *Miller*, 2007 U.S. Dist. LEXIS 13112, at *44.

> The injustice of a term of imprisonment that could last for the remainder of Miller's life is enabled by the unique structure of Georgia law, particularly the mechanical operation of its felony murder rule. Georgia is one of only three states that has a felony murder rule unlimited as to the predicate felony, requisite intent, or the foreseeability of the death.[433]

The judge was right that Georgia's felony murder law is particularly flawed, but he somewhat mischaracterized the problem. While it is true that Georgia's felony murder code provision does not limit predicate felonies or require foreseeable danger of death, Georgia case law *does* require that the felony be either inherently dangerous or dangerous as committed. The latter criterion in turn requires a jury finding of foreseeability, which should have precluded liability here. The trial court did not so instruct the jury, presumably on the assumption that aggravated assault and aggravated battery are *inherently* dangerous. But if these offenses impose strict liability for the injury, they are not inherently dangerous when viewed ex ante and their treatment as such was erroneous. Finally, Georgia is one of only eight states that predicate felony murder on non-enumerated felonies without requiring an independent felonious purpose.[434] A "merger doctrine" would have precluded the unjust result in this case.

Rhode Island's code grades murder in the course of enumerated felonies as first degree murder and leaves second degree murder as a residual category.[435] The 1980 decision *In re Leon* upheld a family court finding of guilt for second degree felony murder predicated on unlawful burning.[436] The court purported to derive this felony murder rule from the common law and conditioned it on an inherently dangerous felony.[437] A subsequent decision modified this rule, permitting second degree felony murder predicated on felonies dangerous to life under the circumstances, rather than inherently dangerous felonies.[438]

Maryland's code leaves murder undefined, but grades it as first degree murder if committed in the course of enumerated felonies.[439] Maryland courts read a felony murder rule into this first degree murder provision during the Twentieth Century.[440] They did not establish a second degree felony murder

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[433] *Id*. at *47-48.

[434] Maryland, Minnesota, Mississippi, Montana, Texas, Virginia, and Washington are the others.

[435] R.I. GEN. LAWS § 11-23-1 (2010).

[436] *In re* Leon, 410 A.2d 121, 123 (R.I. 1980).

[437] *Id.* at 124.

[438] State v. Stewart, 663 A.2d 912, 918-19 (R.I. 1995) (predicating conviction on child neglect).

[439] MD. CODE ANN., CRIM. LAW § 2-201 (LexisNexis 2010).

[440] Wood v. State, 62 A.2d 576, 580 (Md. 1948); *see also* Stansbury v. State, 146 A.2d 17, 20 (Md. 1958); *Origins*, supra note 46, at 150.

rule until a 2001 decision upholding a conviction predicated on child abuse.[441] Here, the court reasoned that both first and second degree felony murder rules descended from a supposed common law rule, predicating murder on felonies foreseeably dangerous to life under the circumstances of their commission.[442] The court invoked J. F. Stephen's nineteenth-century opinion in *Regina v. Serné*,[443] as well as more recent cases from Delaware, Rhode Island, Massachusetts, Georgia, North Carolina and Virginia in support of a foreseeably dangerous felony rule.[444]

The Oklahoma Criminal code defines second degree murder as including homicide in the commission of any unenumerated felony.[445] The 1978 decision in *Wade v. State*[446] upheld a second degree murder conviction predicated on unlawfully possessing a firearm in a bar where the defendant fatally shot the victim from seven feet away.[447] The court required that "there must be a nexus between the underlying felony and the death of the victim. The felony must be . . . inherently dangerous as determined by the elements of the offense or potentially dangerous in light of the facts and circumstances surrounding both the felony and the homicide."[448] Because carrying a weapon in public lacks any independent felonious purpose, however, Oklahoma's merger rule[449] should arguably have precluded liability in this case.

Oklahoma's dangerous felony and merger rules should also have precluded murder liability in *Malaske v. State,* discussed in the Introduction.[450] The case is troubling for three reasons. First, murder liability was predicated on a regulatory offense, committed routinely by millions and not punished as a felony in most states. Second, because the prohibition of juvenile alcohol consumption is primarily concerned with safety, and the defendant did not profit in any way, there was no discernibly independent felonious purpose. Third, the offense is not ordinarily very dangerous – perhaps even less dangerous than distributing alcohol legally to driving-age adults.

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[441] Fisher v. State, 786 A.2d 706, 718, 733 (Md. 2001).

[442] *Id.* at 732. This rule is now also reflected in Maryland's Pattern Jury Instructions. MD. CRIM. PATTERN JURY INSTRUCTIONS § 4:17.7.2 (2007) ("[T]he way in which [the crime] was committed or attempted, under all of the circumstances, created a reasonably foreseeable risk of death or of serious physical injury likely to result in death . . . .").

[443] *See supra* text accompanying note 78 (excerpting opinion).

[444] *Fisher*, 786 A.2d at 728.

[445] OKLA. STAT. tit. 21, § 701.8 (2010).

[446] 581 P.2d 914 (Okla. Crim. App. 1978).

[447] *Id.* at 916.

[448] *Id.*

[449] Sullinger v. State, 675 P.2d 472 (Okla. Crim. App. 1984); Massie v. State, 553 P.2d 186, 191 (Okla. Crim. App. 1976); Tarter v. State, 359 P.2d 596, 602 (Okla. Crim. App. 1961).

[450] *See supra* text accompanying note 12.

In finding causation, the jury did determine that Malaske's conduct was a "substantial factor in bringing about the death and the conduct is dangerous and threatens *or destroys* life."[451] Yet this instruction allowed the jury to determine that the conduct was dangerous because death resulted, rather than determining that the conduct caused death because it was foreseeably dangerous. The dissent argued that death was neither directly nor foreseeably caused by defendant's conduct and that the majority had failed to supply any cogent criterion that could explain the defendant's causal responsibility.[452] Indeed, the majority finessed the requirement of foreseeability by ruling the felony *inherently* dangerous to human life, on the ground that the law proscribing it was obviously aimed at protecting health and safety.[453] Like the *Miller* case in Georgia, however, the *Malaske* case illustrates the paradox that a requirement of inherent danger can be easier to satisfy than a requirement of foreseeable danger, because it does not require proof beyond a reasonable doubt.

Virginia courts first addressed the question of dangerousness in the 1984 case of *Heacock v. Commonwealth*,[454] which upheld a conviction basing second degree felony murder on the distribution of cocaine.[455] The court rejected a requirement that the felony must inherently cause death, but concluded that distributing cocaine is in fact dangerous to life, reasoning simply that the legislature must have thought so in proscribing it. The court reserved decision as to whether causation of death requires an *act* foreseeably dangerous to human life.[456] In the 1990 case of *Hickman v. Commonwealth*,[457] from the Introduction, the defendant and the victim together brought cocaine to the victim's truck.[458] Defendant placed some of the cocaine on a mirror.[459] The victim took some of that cocaine, injected himself "three or four times," and then died.[460] It was not proven who had acquired or provided the cocaine. Citing *Heacock*, the court upheld a second degree murder conviction based on the theory that the defendant had jointly possessed the cocaine and aided the victim in administering the cocaine.[461] The case illustrates the risks of predicating murder on drug offenses. There was no moral basis for murder

[451] Malaske v. State, 89 P.3d 1116, 1118 (Okla. Crim. App. 2004) (internal quotations omitted) (emphasis added).

[452] *Id.* at 1121 n.10 (Chapel, J., dissenting).

[453] *Id.* at 1117 (majority opinion).

[454] 323 S.E.2d 90 (Va. 1984).

[455] *Id.* at 92.

[456] *Id.* at 94.

[457] 398 S.E.2d 698 (Va. Ct. App. 1990).

[458] *Id.* at 699.

[459] *Id.*

[460] *Id.*

[461] *Id.* at 699-700.

liability because the defendant neither imposed a significant risk on an unwilling victim, nor sought to benefit at the victim's expense.

A requirement that death result from foreseeably dangerous conduct in furtherance of the felony could prevent a result like this. Fortunately, Virginia law appears to have adopted such a requirement with its 2001 decision in *Cotton v. Commonwealth*.[462] Virginia law also requires an adequate causal connection between the felony and the resulting death.[463] On this basis, Virginia courts have refused to treat fatal collisions in stolen cars as felony murder, even when the car thief drives recklessly to avoid police.[464] They have similarly declined to impose felony murder liability based on a plane crash during a drug distribution offense.[465] In the latter case, the court reasoned that "[t]he justification for imputing malice was the theory that the increased risk of death or serious harm occasioned by the commission of a felony demonstrated the felon's lack of concern for human life."[466] Accordingly, death had to be attributable to the risk occasioned by the felony. A 2000 decision overturned a second degree felony murder conviction for an accidental shooting involving the felony of "possession of a firearm by a convicted felon."[467] The court reasoned that the felony had not "dictated [the felon's] conduct which led to the homicide,"[468] and death did not result from an "act which was an integral part of the felony or an act in direct furtherance of or necessitated by the felony."[469] In light of these developments it appears that *Hickman* is no longer good law.

South Carolina's felony murder rule is judicially developed and received little definition until the 1973 case of *Gore v. Leeke*,[470] which endorsed, if it did not quite adopt, a requirement of danger as committed.[471] The court upheld Gore's murder conviction for a co-felon's fatal shooting of a police officer during their flight from a daytime residential burglary.[472] The court endorsed a jury instruction holding accomplices responsible for acts of violence that are the "probable or natural consequence of the acts which were done in pursuance of [the] common design."[473] Rejecting California's requirement of inherent

[462] 546 S.E.2d 241, 244 (Va. Ct. App. 2001).

[463] *See id.*; Haskell v. Commonwealth, 243 S.E.2d 477, 482 (Va. 1978); Doane v. Commonwealth, 237 S.E.2d 797, 798 (Va. 1977).

[464] *Doane*, 237 S.E.2d at 797; *see also* Commonwealth v. Montague, 536 S.E.2d 910, 913 (Va. 2000).

[465] King v. Commonwealth, 368 S.E.2d 704, 708 (Va. Ct. App. 1988).

[466] *Id.* at 705-06.

[467] Griffin v. Commonwealth, 533 S.E.2d 653, 655 (Va. Ct. App. 2000).

[468] *Id.* at 658 (quoting WAYNE R. LAFAVE, CRIMINAL LAW § 7.5, at 634-36 (1998)).

[469] *Id.* at 659.

[470] 199 S.E.2d 755 (S.C. 1973).

[471] *See id.* at 758-59.

[472] *Id.* at 756-57.

[473] *Id.* at 757.

danger, the court preferred the majority rule that unenumerated felonies must be foreseeably dangerous to life as committed and approvingly quoted from a North Carolina opinion adopting this test.[474] The *Gore* court stopped short of requiring foreseeable danger, but it approved Gore's conviction as consistent with this test.[475] No subsequent case has addressed the issue.

In three states – Florida, Mississippi, and Washington – courts have not directly addressed the question as to whether predicate felonies must be foreseeably dangerous. Yet such a requirement would be consistent with the general approach to felony murder liability accepted in these states. Florida decisions explain felony murder rules as "protect[ing] the public from *inherently dangerous* situations caused by the commission of the felony."[476] Florida courts have therefore required a causal relationship between the felony and the death,[477] overturning felony murder convictions predicated on auto-theft and drug possession where the act causing death was not instrumental to the felony.[478] A Washington decision justified the felony murder doctrine as "premised upon a theory of transferred intent, that is, that one perpetrating or attempting to perpetrate an inherently dangerous felony possesses a malevolent state of mind which the law calls malice."[479] A 1929 decision overturned a murder conviction predicated on theft where a defendant ran over a child while trying to return a stolen car.[480] Liability required that "death must have been the probable consequence of the unlawful act."[481] The current statute requires that death be caused in furtherance of the felony or flight therefrom.[482] On the other hand, a more recent decision found that temporal proximity between a car theft and fatally reckless driving sufficed.[483] Mississippi's code implicitly

[474] *Id.* at 758-59 (citing State v. Thompson, 185 S.E.2d 666, 672 (N.C. 1972)).

[475] *Id*.

[476] Parker v. State, 570 So. 2d 1048, 1051 (Fla. Dist. Ct. App. 1990) (quoting State v. Hacker, 510 So. 2d 304, 306 (Fla. Dist. Ct. App. 1986)) (emphasis added).

[477] Santiago v. State, 874 So. 2d 617, 621 (Fla. Dist. Ct. App. 2004); State v. Williams, 776 So. 2d 1066, 1072 (Fla. Dist. Ct. App. 2001).

[478] *Santiago*, 874 So. 2d at 622 (conviction overturned where co-felon in drug-buy kills victim in unrelated robbery); State v. House, 831 So. 2d 1230, 1232 (Fla. Dist. Ct. App. 2002); *Williams*, 776 So. 2d at 1071 (careless driving of stolen cars not caused by theft); Lester v. State, 737 So. 2d 1149, 1151 (Fla. Dist. Ct. App. 1999); Allen v. State, 690 So. 2d 1332, 1334 (Fla. Dist. Ct. App. 1997); *c.f.* Baker v. State, 793 So. 2d 69, 69 (Fla. Dist. Ct. App. 2001) (careless driving in completing theft is caused by felony); Howard v. State, 545 So. 2d 352, 353 (Fla. Dist. Ct. App. 1989) (upholding conviction where co-felon in drug sale swallowed cocaine to hide evidence).

[479] State v. Lee, 538 P.2d 538, 542 (Wash. Ct. App. 1975) (quoting State v. Suit, 323 A.2d 541, 546 (N.J. Super. Ct. Law Div. 1974)).

[480] *See* State v. Diebold, 277 P. 394, 395 (Wash. 1929).

[481] *Id.* at 396.

[482] WASH. REV. CODE § 9A.32.050(1) (2010); State v. Hacheney, 158 P.3d 1152, 1159 (Wash. 2007).

[483] *See* State v. Percer, 1997 WL 642320, at *2 (Wash. Ct. App. 1997) (applying a

conditions murder, "done without any design to effect death . . . in the commission of any" unenumerated felony, on *malice*, by defining unintended killing in the course of such felonies as manslaughter when committed without malice.[484] In other jurisdictions such as California and Virginia, "malice" has been interpreted as requiring danger, but the issue has not been addressed in Mississippi.[485] In Florida, Mississippi, and Washington, lawyers can plausibly argue that death should be attributed to the felony only insofar as death resulted from a foreseeably dangerous act in furtherance of the felony.

Missouri alone, of all the states, has some authority explicitly *rejecting* a requirement of dangerousness. Yet Missouri also has adopted a causation standard that *requires* foreseeable danger. Missouri restricts felony murder to second degree murder, in which "another person is killed *as a result of* the perpetration or attempted perpetration of such felony or immediate flight from the perpetration of such felony or attempted perpetration of such felony."[486] The case of *State v. Glover* upheld a murder conviction predicated on arson because death was a reasonably foreseeable danger of the crime under the circumstances.[487] The court held that if homicide is "committed in course of perpetrating the felony, and is a natural and proximate result thereof, such as the defendant reasonably was bound to anticipate – and therefore especially where the felony is dangerous and betokens a reckless disregard of human life – the homicide will be first degree murder under the statute."[488] The court added that "where the defendant has no reason to believe anyone will be injured, . . . the defendant cannot be charged with murder, for there the homicide will not be regarded as a natural and probable result of the arson . . . ."[489] However, the court upheld murder in this case because "the ensuing homicide was a natural and probable consequence of the arson . . . ."[490]

The case of *State v. Chambers*[491] ignored *Glover*'s requirement of foreseeable danger, however: a drunken Chambers stole a pickup truck and hitched it to his car.[492] He drove off with the truck in tow, without lights although it was dark, weaving across the road, while a witness pursued in

temporal rather than causal test to find liability for fatal collision predicated on auto-theft).

[484] *See* MISS. CODE ANN. § 97-3-19 (2004) (defining unintended killing in unenumerated felonies as murder); *Id.* § 97-3-27 (defining killing without malice in course of unenumerated felonies as manslaughter).

[485] A rare Mississippi case on second degree felony murder upheld a conviction predicated on felony drunk driving. Lee v. State, 759 So. 2d 390, 392 (Miss. 2000).

[486] MO. REV. STAT. § 565.021(1) (2010) (emphasis added).

[487] State v. Glover, 50 S.W.2d 1049, 1057 (Mo. 1932).

[488] *Id.* at 1053.

[489] *Id.* at 1054.

[490] *Id.* at 1054-55.

[491] 524 S.W.2d 826 (Mo. 1975).

[492] *Id.* at 827-28.

another vehicle, firing shots.[493] The defendant crossed the center line and collided head on with another vehicle.[494] While the court observed that Chambers' conduct was foreseeably dangerous, it rejected requirements of both inherent and foreseeable danger.[495]

While a requirement of foreseeable danger would not have changed the result in *Chambers*, it would have prevented the grotesque result in another car theft case, *State v. Colenburg*, featured in the Introduction.[496] Colenburg was convicted of murder because an unsupervised two-year-old darted into the street while he was driving in a vehicle stolen seven months previously.[497] He may have been driving over the speed limit, but even so, there was no indication that driving at the speed limit would have enabled him to avoid the child.[498] The prosecution initially charged him with involuntary manslaughter, but then charged him with second degree felony murder when he refused to concede that he had killed recklessly.[499]

The predicate felony in *Colenburg* was not theft per se, but "tampering with a motor vehicle," which embraces merely possessing a vehicle without the owner's permission. Thus, one factor producing the unjust result in *Colenburg*, as in *Malaske*, is the unusual legislative choice to punish a relatively minor offense as a felony. Moreover, because Colenburg's offense was not required to be foreseeably dangerous, he was not required to have been culpable for the death at all. The court did not cite *Chambers* or distinguish *Glover*, but nevertheless rejected the defendant's argument that he could not be convicted because "he could not have reasonably foreseen the death."[500] The *Colenburg* majority offered no reason for rejecting a requirement of foreseeability apart from characterizing felony murder generally as a strict liability offense.[501] The court ignored the statutory requirement of a causal relationship between the felony and the resulting death.[502] Nor did it require that the risk be imposed in furtherance of the theft – as was the reckless driving in *Chambers*. Finally, in order to find even a temporal connection between the felony and the death, the court had to reject the common view of theft offenses as episodic crimes in favor of a conception of tampering as a crime that can continue indefinitely.[503]

[493] *Id.* at 828.

[494] *Id.*

[495] *Id.* at 832.

[496] State v. Colenburg, 773 S.W.2d 184 (Mo. Ct. App. 1989).

[497] *Id.* at 185-86.

[498] *See id.* at 185.

[499] *Id.* at 185.

[500] *Id.* at 187.

[501] *Id.* at 187-89.

[502] *Id.* at 190 (Gaertner, J., dissenting).

[503] *See id.* at 188 (majority opinion).

But was *Colenburg* correctly decided from the standpoint of then-prevailing Missouri law? It was not. *Glover*'s requirement of a foreseeable danger of death remains authoritative. The *Chambers* court did not overtly repudiate *Glover* but simply failed to recognize its requirement of foreseeable danger. That requirement was reconfirmed in the 1979 case of *State v. Moore*.[504] There, the court upheld the first degree felony murder conviction of a robber for an unintended killing by a resisting witness, on the ground that such defensive fire was foreseeable.[505] Although Moore's conviction was ultimately overturned by a federal court, that court recognized that Missouri law still required the killing to be a "natural and proximate result of the felony."[506] A foreseeability standard was again endorsed in the 1980 case of *State v. Baker*,[507] and in the 1993 case of *State v. Blunt*.[508]

Not only must a Missouri felon foreseeably cause the death, he arguably must do so in furtherance of the felony. In the 1936 case of *State v. Adams*[509] the court upheld a felony murder conviction for an armed burglar, whose accomplice fatally shot a pursuer during their flight.[510] The court held that it was irrelevant that the burglary had ended, because the killing was "closely connected in point of time, place *and causal relation*" to the felony.[511] Thus, a killing was attributable to the felony if committed "to prevent detection, or promote escape."[512] Therefore, since Colenburg's fatal collision with the toddler was not motivated or caused by his aim of misappropriating the vehicle, the required linkage between the felony and the death seems absent, as the dissent argued. *Colenburg* was not only a very unjust decision. It was also illegal.

Our survey of dangerousness standards has revealed that many jurisdictions limit felony murder to enumerated felonies, most of which are inherently dangerous or violent. Almost all of the remaining felony murder jurisdictions require that the felony be committed in a way foreseeably dangerous to human life. No jurisdiction has clearly repudiated such a requirement. And even in those jurisdictions that have not yet recognized a dangerousness requirement, lawyers have the resources to argue for its recognition. Among these resources is the fact that a dangerousness requirement is nearly a consensus position among jurisdictions imposing felony murder liability.

Dangerousness requirements limit felony murder to negligent killing in most cases, but not in all. There are three main difficulties. First, even properly

[504] 580 S.W.2d 747 (Mo. 1979).

[505] *Id.* at 748, 752.

[506] Moore v. Wyrick, 766 F.2d 1253, 1255-56 (8th Cir. 1985).

[507] 607 S.W.2d 153, 156 (Mo. 1980).

[508] 863 S.W.2d 370, 371 (Mo. Ct. App. 1993).

[509] 98 S.W.2d 632 (Mo. 1936).

[510] *Id.* at 634.

[511] *Id.* at 637 (emphasis added).

[512] *Id.*

instructed factfinders too readily assume that any felonious conduct leading to death must have been foreseeably dangerous.[513] Therefore, trial courts must make requirements of foreseeable danger explicit in their instructions and appellate courts must require some evidence of apparent risk beyond the occurrence of death itself. Second, courts are equally prone to hindsight bias and equally in need of standards when making post hoc determinations of inherent danger. Third, even if the felony is inherently or foreseeably dangerous, the felon is blameless for the death unless the dangerous conduct has caused it. Thus dangerousness standards only insure negligence if they are combined with appropriate causation standards. Our next section examines these standards.

C. *Causation Standards*

Two closely related issues arise concerning the causal responsibility of felons for deaths in the commission or attempt of a felony. One is the causal link between a felon's act and the resulting death. A second is the causal link between the felony and the resulting death. If either causal link requires foreseeable danger of death, the felon whose act caused the result must have negligently imposed a risk of death. Once courts acknowledge this requirement of negligent causation of death by a perpetrator, they can have no justification for requiring any less culpability of accomplices in the felony who do not cause the death.

The problem of causal responsibility for a harmful result is not unique to felony murder. Lawyers conceptualize "legal causation" as a normative filter that assigns responsibility for a subset of those acts that contribute to a result "in fact." Philosophers have traditionally defined "the cause" of an event as the entire set of conditions necessary for it to occur.[514] By definition, the complete set of necessary conditions is also a sufficient set of conditions.[515] The difficulty is that no offender is ever responsible for all the necessary conditions (such as, for example, the existence of the victim, or of the planet Earth). Requiring that the offender's act be *the* cause sets the bar too high to find anyone causally responsible for a death.

Accordingly, lawyers have defined "factual causation" as requiring only that the offender's act be one of several qualifying causal conditions, usually that it be either a necessary condition for the harmful result[516] or perhaps a necessary

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[513] Dripps, *supra* note 335, at 1399-1400; Lijtmaer, *supra* note 335, at 623; *see also* People v. Burroughs, 678 P.2d 894, 898 (Cal. 1984) ("[T]he existence of the dead victim might appear to lead inexorably to the conclusion that the underlying felony is exceptionally hazardous.").

[514] *See* Richard Taylor, *Causation*, *in* 2 ENCYCLOPEDIA OF PHILOSOPHY 56, 62-63 (Paul Edwards ed., 1967).

[515] *Id.*

[516] *See* JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, CRIMINAL LAW 260 (6th ed. 2008).

element of some sufficient set of conditions.[517] It is tempting to require nothing more than this, so that causation is left a relatively morally neutral concept, equally embracing the conduct of assailant and victim. We could then confine the moral assessment of the defendant's conduct entirely to the mental element of the offense.

The difficulty with this solution is that it seems unfair to attribute the result to the culpable actor unless the culpable mental state plays some causal role. An assailant shoots a bystander while robbing an arsonist who is on his way to start a fire. Surely the arsonist's recklessness of life does not make him causally responsible for the bystander's death. It was not within the scope of the risk of which he was reckless. It seems we cannot exorcise normative judgment from the attribution of causal responsibility. "Legal causation" is this normative attribution of fault.

Causal attribution is normative because it depends on the values expressed by action. Recall that we punish harmful results in order to vindicate the equal status of those harmed. This purpose is served only when injury implies disrespect. Yet injury implies disrespect only when it expresses an inappropriate valuation of the victim. When the arsonist walks to the site of his crime, he expresses no disrespect to his fellow pedestrians because he does not endanger them. The robber firing a gun on a public street, however, disrespects them by endangering them for a bad end. Similarly, a thief like Colenburg, who runs over an errant toddler while driving a stolen car prudently, has disrespected the car's lawful owner, but not the toddler.[518] Because causal responsibility in criminal law is about the insult implied by injury, it depends on the offender's expectations and ends.

Thus "legal" causation has traditionally been defined in terms of fault. The first common law treatise to analyze causation in homicide, Matthew Hale's, focused exclusively on acts of violence.[519] This narrow conception of homicide as death by violence explains Blackstone's view that malice should be presumed from the act of killing, absent evidence of provocation or self-defense. The act of killing was defined in such a way as to entail a hostile motive and an expectation of injury.[520]

Legal causation continues to be defined normatively today. Hart and Honoré's influential study of causation defined a legal cause as an abnormal

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[517] *See* John L. Mackie, *Causes and Conditions*, 2 AM. PHIL. Q. 245, 246-49 (1965) (proposing the insufficient but necessary element of an unnecessary but sufficient set test); Kenneth J. Rothman, *Causes*, 104 AM. J. EPIDEMIOLOGY 587, 588 (1976) (proposing a sufficient component cause test in epidemiology); Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1774-75 (1985) (proposing a necessary element of a sufficient set test for tort); Eric A. Johnson, *Criminal Liability for Loss of a Chance*, 91 IOWA L. REV. 59, 88 (2005) (proposing necessary element of a sufficient set test for criminal law).

[518] *See supra* note 5 and accompanying text.

[519] *See supra* note 56 and accompanying text.

[520] Binder, *supra* note 55, at 89.

act necessary to a result, associated with such a result in normal experience, and not followed by another unexpected act or event necessary to the result.[521] "Abnormality" here connotes not just rarity but illegitimacy. A "normal" consequence is a foreseeable one that would be negligent to ignore. Wayne LaFave's criminal law treatise, drawing on Hart and Honoré, concludes that a necessary condition loses its status as a legal cause only if another necessary condition is an "unforeseeable" independent event or an "abnormal" consequence of the first necessary condition.[522] The Model Penal Code makes defendants causally responsible only for results of the kind they intended, or recklessly or negligently risked. Thus, the Model Penal Code standard for causal responsibility varies with the degree of culpability required for the offense. The Code conditions causation on apparent danger even for strict liability offenses, requiring that the result was a "probable consequence" of defendant's conduct.[523]

How do these principles apply in the case of felony murder? Does felony murder require a violent or dangerous act from which death is reasonably foreseeable? Or does it simply require factual causation, that is, an act necessary to the resulting death? LaFave rejects the latter view as an analytic mistake, observing that the same principles of legal causation apply in felony murder cases as in other homicides.[524] Even when homicide requires no separate proof of a culpable mental state, causal responsibility still requires a death within the scope of a culpably imposed risk. As we shall see, LaFave's analysis accords with prevailing law.

Litigation concerning causation in felony murder has focused on felons' responsibility for deaths resulting from the responses of non-parties fleeing, resisting, or pursuing the felons. Such cases are usually framed as a choice between an "agency" test that restricts liability to deaths directly caused by felons, and a "proximate cause" test that includes all deaths foreseeably resulting from the felons' acts. Yet foreseeability and agency are not necessarily incompatible limits on causation. LaFave's treatise argues that the proximate cause and agency limitations address two different issues. He treats foreseeability as a test of causal responsibility, while viewing agency as one possible test for determining whether the act causing death is sufficiently related to the felony.[525] In fact, most agency rule jurisdictions *also* require foreseeability. While fifteen felony murder jurisdictions have adopted an agency test,[526] twelve of these require foreseeability for all predicate

[521] *See* H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 44-49, 62, 109-14, 162-85, 340-51 (2d ed. 1985).

[522] LAFAVE, *supra* note 264 at 374.

[523] MODEL PENAL CODE § 2.03(4) (1980).

[524] LAFAVE, *supra* note 264, at 376-78.

[525] *Id.* at 374-75, 795-96.

[526] *See* People v. Washington, 402 P.2d 130, 137 (Cal. 1965); Alvarez v. City of Denver, 525 P.2d 1131, 1132 (Colo. 1974); Comer v. State, 977 A.2d 334, 340 (Del. 2009); State v.

felonies,[527] and one more requires foreseeability for predicate felonies not deemed inherently dangerous.[528] An additional nineteen jurisdictions without an agency rule also require that death result foreseeably.[529] Thus a substantial

Pina, 233 P.3d 71, 78 (Idaho 2010); State v. Sophophone, 19 P.3d 70, 77 (Kan. 2001); State v. Myers, 760 So. 2d 310, 315 (La. 2000); State v. Garner, 115 So. 2d 855, 859-60 (La. 1959); Campbell v. State, 444 A.2d 1034, 1032 (Md. 1982); Commonwealth v. Balliro, 209 N.E.2d 308, 314 (Mass. 1965); State v. Branson, 487 N.W.2d 880, 882 (Minn. 1992); State v. Rust, 250 N.W.2d 867, 875 (Neb. 1977); Sheriff v. Hicks, 506 P.2d 766, 768 (Nev. 1973); State v. Bonner, 411 S.E.2d 598, 603 (N.C. 1992); State v. Oxendine, 122 S.E. 568, 570-71 (N.C. 1924); Commonwealth *ex rel* Smith v. Myers, 261 A.2d 550, 561 (Pa. 1970); Commonwealth v. Redline, 137 A.2d 472, 488 (Pa. 1958); State v. Severs, 759 S.W.2d 935, 938 (Tenn. Crim. App. 1988); Wooden v. Commonwealth, 284 S.E.2d 811, 816 (Va. 1981).

[527] *See* DEL. CODE ANN. tit. 11, §§ 261-264 (2007); 18 PA. CONS. STAT. §303(c), (d) (defining causation) (2010); *Id.* § 2501 (defining criminal homicide); *Id*. § 2502(b) (defining second degree murder); State v. Hokenson, 527 P.2d 487, 492 (Idaho 1974) (containing the natural and probable consequences test); State v. Branch, 573 P.2d 1041, 1043 (Kan. 1978) (utilizing the reasonably foreseeable death standard); State v. Kalathakis, 563 So. 2d 228, 233 (La. 1990); Fisher v. State, 786 A.2d 706, 732 (Md. 2001); Jackson v. State, 408 A.2d 711, 718 (Md. 1979); State v. Dixon, 387 N.W.2d 682, 688 (Neb. 1986); Sheriff v. Morris, 659 P.2d 852, 859 (Nev. 1983) (holding that inherent danger implies that felon foresees death); *Bonner*, 411 S.E.2d at 601; State v. Mickens, 123 S.W.3d 355, 370 (Tenn. Crim. App. 2003); *Severs*, 759 S.W.2d at 938; State v. Simerly, No. E2002-02626-CCA-R3-CD, 2004 Tenn. Crim. App. LEXIS 230, at *14 (Tenn. Crim. App. Mar. 11, 2004) (no longer requiring foreseeability of killing for accomplice liability); Heacock v. Commonwealth, 323 S.E.2d 90, 94 (Va. 1984) (reserving question whether causation of death requires foreseeability); Kennemore v. Commonwealth, 653 S.E.2d 606, 609 (Va. Ct. App. 2007) (holding that malice requires "person-endangering frame of mind"); Cotton v. Commonwealth, 546 S.E.2d 241, 243-44 (Va. Ct. App. 2001) (same); King v. Commonwealth, 368 S.E.2d 704, 706 (Va. Ct. App. 1988) (holding that death must be causally attributable to dangerousness of felony, not merely fortuitous); 1-500 JUDICIAL COUNCIL OF CAL., CRIM. JURY INSTRUCTIONS 540C (2010) (stating that the felony must cause death; causation requires that result be "natural and probable," and one a "reasonable person would know is likely to happen if nothing unusual intervenes"). The exceptions are Colorado and Minnesota.

[528] Commonwealth v. Baez, 694 N.E.2d 1269, 1271-72 (Mass. 1998) (holding that death must be natural and probable consequence of the act unless felony is inherently dangerous).

[529] *See* ALA. CODE §13A-6-1 (2005) (containing the definition of homicide); ALA. CODE §13A-2-5 (holding a causation standard for negligence, strict liability); ME. REV. STAT. ANN. tit 17-A, § 202 (2010); N.J. STAT. ANN. § 2C: 2-3 (West 2005) (requiring causation); TEX. PENAL CODE ANN. § 19.01 (West 2003) (containing the definition of criminal homicide); TEX. PENAL CODE ANN. § 19.02 (b)(3) (requiring an act clearly dangerous to human life); Witherspoon v. State, 33 So. 3d 625, 626, 630 (Ala. Crim. App. 2009) (applying foreseeability test in affirming conviction of a felon when robbery victim killed a co-felon); Lewis v. State, 474 So. 2d 766, 770 (Ala. Crim. App. 1985) (finding it unforeseeable that victim would shoot himself after Russian Roulette "game" is over); State v. Lopez, 845 P.2d 478, 482 (Ariz. Ct. App. 1992) (applying "natural and probable consequences" test); State v. Spates, 405 A.2d 656, 660 (Conn. 1978) (applying foreseeable

majority of felony murder jurisdictions – at least thirty-two out of forty-five – condition felony murder liability on the foreseeability of death, either as a result of a felon's act or the felony itself. Significantly, the great majority of those jurisdictions that exhaustively enumerate predicate felonies – sixteen out of twenty-five – also require that the felons foreseeably cause death.[530] In

and natural consequence test); Wilson-Bey v. United States, 903 A.2d 818, 838 (D.C. 2006) (holding accomplice liability felony murder requires reasonably foreseeable killing); Lee v. United States, 699 A.2d 373, 386 (D.C. 1997); Bonhart v. United States, 691 A.2d 160, 163 (D.C. 1997) (holding that a foreseeable intervening act does not break causal chain); United States v. Heinlein, 490 F.2d 725, 735 (D.C. 1973) (finding accomplices responsible for natural and probable consequence of felony); Hulme v. State, 544 S.E.2d 138, 141 (Ga. 2001) (finding that felony must be dangerous per se or foreseeably dangerous under circumstances); People v. Lowery, 687 N.E.2d 973, 977-78 (Ill. 1997) (requiring foreseeability); People v. Smith, 307 N.E.2d 353, 356 (Ill. 1974) (utilizing a foreseeability analysis); People v. Jenkins, 545 N.E.2d 986, 994 (Ill. App. Ct. 1989) (applying a foreseeability test); People v. Burke, 407 N.E.2d 728, 730 (Ill. App. Ct. 1980) (requiring foreseeability); People v. Tillman, 388 N.E.2d 1253, 1256 (Ill. App. Ct. 1979) (requiring foreseeability); Moon v. State, 419 N.E.2d 740, 741 (Ind. 1981) (applying a natural and probable, or foreseeable consequence of the felony test); Sheckles v. State, 684 N.E.2d 201, 204 (Ind. Ct. App. 1997) (same); State v. Burrell, 160 S.W.3d 798, 803 (Mo. 2005) (holding that a felony must foreseeably cause death); State v. Black, 50 S.W.3d 778, 785 (Mo. 2001) (holding that a felony must foreseeably cause death); State v. Baker, 607 S.W.2d 153, 156 (Mo. 1980); State v. Moore, 580 S.W.2d 747, 752 (Mo. 1979) (requiring forseeability); State v. Glover 50 S.W.2d 1049, 1053 (Mo. 1932); State v. Cole, 248 S.W.3d 91, 95 n.4 (Mo. Ct. App. 2008) (holding a felon liable for the natural and proximate result of the commission of the felony); O'Neal v. State, 236 S.W.3d 91, 99 (Mo. Ct. App. 2007); State v. Blunt, 863 S.W.2d 370, 372 (Mo. Ct. App. 1993) (finding that a felony must foreseeably cause death); State v. Weinberger, 671 P.2d 567, 568 (Mont. 1983); State *ex rel* Murphy v. McKinnon, 556 P.2d 906, 910 (Mont. 1976); State v. Martin, 573 A.2d 1359, 1375 (N.J. 1990); People v. Matos, 634 N.E.2d 157, 158 (N.Y. 1994); People v. Flores, 476 N.Y.S.2d 478, 480 (Sup. Ct. 1984); State v. Franklin, No. 06-MA-79, 2008 WL 2003778, at *13 (Ohio Ct. App. May 5, 2008); State v. Ervin, No. 87333, 2006 WL 2507563, at *4 (Ohio Ct. App. Aug. 31, 2006); State v. Adams, No. 2000-T-0149, 2004 WL 1486834, at *11 (Ohio Ct. App. Jun. 30, 2004); State v. Dixon, No. 18582, 2002 WL 191582, at *5 (Ohio Ct. App. Feb. 8, 2002) (containing a statutory requirement that felony murderer cause death as a proximate result of felony applied as a foreseeability test) OHIO JURY INSTRUCTIONS 2-CR 417.23 (2010) (containing jury instructions on causation); Kinchion v. State, 81 P.3d 681, 684 (Okla. Crim. App. 2003); Johnson v. State, 386 P.2d 336, 337 (Okla. Crim. App. 1963); OKLA. JURY INSTRUCTIONS. – CRIM. § 4-60 (2009) (containing a jury instruction that required act causing death "is dangerous and threatens or destroys life"); *In re* Leon, 410 A.2d 121, 125 (R.I. 1980); State v. Dunn, 850 P.2d 1201, 1216 (Utah 1993) (defining causation of death as requiring foreseeability in a manslaughter case); State v. Jackson, 976 P.2d 1229, 1238 (Wash. 1999) (utilizing a "natural and probable consequence" test); State v. Diebold, 277 P. 394, 396 (Wash. 1929) (utilizing a "probable consequence" test); State v. Weisengoff, 101 S.E. 450, 451 (W. Va. 1919) (requiring foreseeability).

[530] These are Arizona, Connecticut, D.C., Idaho, Indiana, Kansas, Louisiana, Maine, Nebraska, New Jersey, New York, Ohio, Pennsylvania, Tennessee, Utah, and West

conditioning felony murder on apparent danger, these jurisdictions do not only rely on legislative judgment that danger inheres in certain felonies. They also require the jury to find foreseeability. The illogical assumption that a legislative or judicial determination of inherent danger obviates a jury finding of foreseeable causation is a minority position.

Courts have sometimes invoked the causal requirement of foreseeability in overturning convictions. Thus, in *Lewis v. State*, an Alabama court overturned the conviction of a Russian Roulette player for the death of a fellow player who shot himself after the "game" ended, on the ground that this act was unforeseeable.[531] In the early twentieth-century case of *State v. Weisengoff*, a West Virginia court overturned a second degree murder conviction for a fleeing fugitive who lost control of his car and crashed into a bridge with a pursuing police officer hanging onto the outside of his car.[532] The court reasoned that to be liable for felony murder predicated on resisting arrest, Weisengoff had to have committed an act "which might reasonably produce death."[533] In *State v. Kalathakis*, a Louisiana court held that the shooting of a co-felon by police was not a foreseeable result of the felony of drug manufacturing.[534] To be sure, courts more commonly overturn convictions for failure to show the felony was dangerous as committed, or that the act causing death was sufficiently related to the felony. But the same facts can often support arguments that death was not caused foreseeably. For example, in *Ford v. State*, a Georgia court held that felony possession of a weapon by a convict was not committed in a dangerous way, because it was not foreseeable that cleaning a gun would cause death.[535]

Several jurisdictions have neither adopted nor rejected a foreseeability standard. All of these have other limits that tend to ensure some measure of apparent danger. Three of these jurisdictions – Iowa, South Carolina, and Mississippi – require separate proof of malice, which may in turn require proof of apparent danger. Six of them – Colorado, Iowa, Oregon, South Dakota, Wyoming, and the United States – limit felony murder to enumerated predicate felonies. We have seen that the remaining jurisdiction, Florida, has several cases finding that deaths following such non-dangerous felonies as auto-theft were not sufficiently related to the felony to support felony murder liability. Of course it would be better for courts in these jurisdictions to explicitly instruct jurors that either malice or causation requires apparent danger.

Only four jurisdictions explicitly reject a requirement of foreseeability for causal responsibility, and these also may achieve a similar effect in most cases through other doctrinal devices. Jurisdictions rejecting foreseeability are

Virginia.

[531] *See Lewis*, 474 So. 2d at 771.

[532] *See Weisengoff*, 101 S.E. 454-55.

[533] *Id.* at 455.

[534] *See* State v. Kalathakis, 563 So. 2d 228, 232 (La. 1990).

[535] *See* Ford v. State, 423 S.E.2d 255, 256 (Ga. 1992).

Alaska, North Dakota, Wisconsin, and Minnesota.[536] Of these four jurisdictions, Minnesota restricts predicate felonies to those inherently dangerous to human life. Wisconsin, Alaska, and North Dakota limit predicate felonies to enumerated felonies. The Wisconsin Supreme Court justified its rejection of a foreseeability standard on the assumption that the legislature had intentionally restricted predicate felonies to those it regarded as inherently dangerous to human life.[537] While the Alaska courts have rejected a requirement of foreseeable danger, they have required that the act causing death involve unlawful force.[538] Finally, North Dakota's code has a recklessness default rule that would seem to apply to felony murder.[539]

Nevertheless, it would be far better for these jurisdictions to join the majority and require foreseeable danger as a criterion of causal responsibility. The failure to require that death result from a foreseeably dangerous act can lead to unwarranted convictions, even in cases involving dangerous predicate felonies.[540] Consider the infamous 1967 California case of *People v. Stamp*, described in the Introduction. In the course of the presumably dangerous felony of robbery, Stamp threatened victims at gunpoint and so imposed a risk of death, and expressed a willingness to kill. Yet death occurred in an unlikely way, as one victim was sufficiently agitated to suffer a fatal heart attack shortly after the robbery. The court refused defendant's request for an instruction requiring proof that defendant caused death foreseeably. An appellate court upheld his conviction, insisting that even an accidental death in the course of a robbery sufficed for murder.[541]

Today, California no longer rejects a requirement of foreseeability, at least in cases like *Stamp* where no battery is committed and no injury is inflicted. Thus, California's Pattern Jury Instructions now require that if there is more than one cause of death, as in heart attack cases, the felony must be a "substantial factor in *causing*" the death.[542] Causation in turn requires that death be "the direct, *natural, and probable consequence* of the act."[543] The

[536] *See* N.D. CENT. CODE § 12.1-02-05 (1997) (defining a cause simply as a necessary condition); Phillips v. State, 70 P.3d 1128, 1142 (Alaska Ct. App. 2003); State v. Gorman, 532 N.W.2d 229, 232 (Minn. Ct. App. 1995); State v. Oimen, 516 N.W.2d 399, 408 (Wis. 1994).

[537] *See Oimen*, 516 N.W.2d at 408.

[538] *Phillips*, 70 P.3d at 1142.

[539] *See supra* note 195-196 and accompanying text.

[540] One consequence of failing to clearly require foreseeability is a further failure to ask whether a particular death is within the scope of the foreseeable risk. *See* Adams v. State, 310 So. 2d. 782 (Fla. 1975) (robbery of elderly victim causes broken hip, leading to heart attack); State v. White, 538 N.W.2d 237 (S.D. 1995) (rape leads to ruptured aneurysm).

[541] People v. Stamp, 82 Cal. Rptr. 598, 603 (1969); *see also* People v. Hernandez, 215 Cal. Rptr. 166, 168 (1985) (holding robber liable for the fatal heart attack of a victim he held at gunpoint and forced to crawl about in a strenuous way).

[542] 1-500 JUD. COUNCIL OF CAL. JURY INSTRUCTIONS 540C (2010) (emphasis added).

[543] *Id*. (emphasis added).

instruction adds that "a natural and probable consequence is one that *a reasonable person would know is likely to happen* if nothing unusual intervenes."[544] These instructions are consistent with the requirement of an act naturally dangerous to life recognized in *People v. Patterson*[545] and *People v. Sarun Chun*.[546] If the *Stamp* fact pattern were to occur in California today, the defendant would be entitled to an instruction requiring proof that the heart attack would have appeared probable to a reasonable person as a result of the stickup.[547]

A foreseeability standard is not the only way to condition causation on danger, however. *Stamp* is usefully contrasted with the Alaska case of *Phillips v. State*.[548] Here a police officer suffered a fatal heart attack while struggling with the defendant, who was resisting arrest.[549] Although the Alaska court rejected a foreseeability test, it required that death result from the felon's unlawful use of force, and suggested that if the heart attack had occurred during a strenuous chase rather than a violent struggle there would be no liability.[550] Such a requirement of unlawful force could have precluded the conviction of Stamp. Moreover, such a requirement would comport with the judicial rationale for California's embrace of an agency rule. California courts derived the agency rule from the language of California's venerable murder statute, which defines murder as malicious "killing" and imposes felony murder liability for "murdering" in the course of enumerated felonies. According to the California Supreme Court in *People v. Washington*, the ordinary meaning of "murder" did not include causing death indirectly by provoking the act of another.[551] Yet, as Hale noted in the Eighteenth Century, neither did it include "harsh or unkind usage" that "put[s] another into such passion of grief or fear[] that the party. . . die[s] suddenly."[552] The *Stamp* court could have avoided an unjust result by adhering to the traditional conception of homicide as a fatal physical injury inflicted by unlawful force, as the Alaska court did in *Phillips*.

Nevertheless, not every use of unlawful force renders death foreseeable. Thus, in the case of *State v. Gorman*, the Minnesota Supreme Court upheld a second degree murder conviction predicated on felony assault, where defendant merely punched the victim, who died as a result of his head striking

[544] *Id.* (original emphasis removed) (emphasis added).

[545] *See* People v. Patterson, 778 P.2d 549, 551 (Cal. 1989).

[546] *See* People v. Sarun Chun, 203 P.3d 425, 430 (Cal. 2009).

[547] For a case similar to *Stamp* from another jurisdiction, see Booker v. State, 386 N.E.2d 1198, 1202 (Ind. 1979) (holding a robber liable for the victim's later heart attack, without foreseeability). Like California, Indiana now requires foreseeability.

[548] 70 P.3d 1128 (Alaska 2003).

[549] *Id.* at 1141.

[550] *Id.*

[551] *See* People v. Washington, 402 P.2d 130, 133 (Cal. 1965).

[552] HALE, *supra* note 56, at 429.

the floor.[553] In a similar Illinois case from the 1920s, a murder conviction was overturned on the ground that death was not a "reasonable and probable consequence" of a blow with a fist.[554] The *Gorman* decision is particularly disturbing because the predicate felony did not require any culpability with respect to the physical injury that rendered it felonious.[555] Such a strict liability assault-with-injury offense may be inherently dangerous ex post but the danger is not necessarily apparent to the assailant ex ante. The offense involves no culpability to "transfer" to the death. The *Gorman* case is further troubling because assault offenses lack any independent felonious purpose. Like the predicate felony in Georgia's *Miller v. State* the predicate felony in the Gorman case fulfills neither branch of the dual culpability requirement.

Like the *Gorman* decision, the *Miller* decision also results in large part from the misguided choice to define aggravated assault as a strict liability offense.[556] Georgia compounds these mistakes by dropping its foreseeability standard for predicate felonies deemed inherently dangerous, such as aggravated assaults. In *Durden v. State*, a Georgia court imposed liability for a burglary victim's heart attack after the defendant fired a gun at him.[557] The court rejected the traditional requirement of physical injury as archaic, but did not replace it with a requirement of foreseeability. A jury might well have found such foreseeability on these facts but was never given the chance.

Indeed, we cannot be sure that a foreseeability standard would prevent conviction on facts like those in *Stamp*. First, there is the danger that courts will simply ignore the legal limits on causal responsibility. New York's *Ingram* case illustrates this risk.[558] Recall that the hapless Ingram's captor died of a heart attack without a physical struggle. Prior case law in New York conditioned causation of death on (1) a physical interaction between defendant and victim directly causing death as (2) a foreseeable consequence of defendant's act.[559] The *Ingram* court gave no instruction on these two elements of causation, but the defense attorney never requested one.[560] The New York Court of Appeals upheld Ingram's conviction for felony murder because the error had not been preserved. Ingram – as unlucky in law as in life – was unjustly convicted not because of New York's definition of causation, but in spite of it.[561]

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[553] State v. Gorman, 532 N.W.2d 229, 231 (Minn. 1995).

[554] *See* People v. Crenshaw, 131 N.E. 576, 578 (Ill. 1921).

[555] *Gorman*, 532 N.W.2d at 231.

[556] *See* Miller v. State, 571 S.E.2d 788 (Ga. 2002).

[557] *See* Durden v. State, 297 S.E.2d 237, 242 (Ga. 1982).

[558] *See* People v. Ingram, 492 N.E.2d 1220, 1221 (N.Y. 1986).

[559] *See* People v. Kibbe, 321 N.E.2d 773, 776 (N.Y. 1974); People v. Flores, 476 N.Y.S.2d 478, 480 (Sup. Ct. 1984).

[560] *Ingram*, 492 N.E.2d at 1221.

[561] Another New York case, *People v. Howard*, 241 A.D.2d 920, 920-21 (N.Y. App. Div. 1997), illustrates a similarly cavalier attitude toward the causation requirement on the part of

Second, even properly instructed juries may be persuaded that a felon should bear the blame for the unexpected death of a frail victim. As noted above, cognitive biases can predispose factfinders to misattribute foresight and responsibility to felons when harm occurs.[562] Thus, in the Maine case of *State v. Reardon*, the victim of a mugging suffered a heart attack, while reporting the incident to police. Acting as the factfinder in the case, the trial judge found that it was reasonably foreseeable that a sixty-seven-year-old victim would have heart disease and that robbing him would cause him to have a heart attack and die.[563] Recall the *Dixon* case where a burglar kicked in the door of an elderly woman's home, and cut the phone cord, but apparently never touched her. The Nebraska court upheld Dixon's conviction on the ground that the victim's heart attack was foreseeable under the circumstances.[564] In *People v. Matos*, described in the Introduction, a police officer fell off a roof while pursuing a robber. Some evidence suggested that the robber pushed the officer, but the court held that the state was not required to prove this suspicion. The trial court reasoned that the officer's death was foreseeable as a result of the robber's flight across a roof and rejected any requirement of a direct physical interaction between defendant and victim.[565] It justified these conclusions by relying on the *result* in *People v. Ingram*,[566] even though the *reasoning* in that case never reached the questions of direct causation and foreseeability because they were not raised below.

Death from a heart attack seems more foreseeable where the defendant inflicts physical injuries, especially to an obviously frail victim, or the victim shows physical distress during the crime. Thus, murder liability was defensible in the Connecticut case of *State v. Spates*, where defendants left a robbery victim bound despite his asking for doctor and telling robbers he was

a trial court. An elderly homeowner with severe heart disease had a fatal heart attack during a burglary. The trial court allowed a medical expert to testify that the burglary had caused the death, despite the fact that she formulated this conclusion after reading the statement of a co-defendant which had been suppressed on grounds of unreliability. The statement claimed that the defendant had denied her access to her medication. Moreover, the trial court threatened to allow in the suppressed statement if the defense argued, through cross-examination and competing expert testimony, that there was no scientific basis for concluding that the heart attack would not have occurred but for the burglary, or was likely as a result of the burglary. The conviction was overturned in a habeas proceeding that found the medical testimony "unreasonable." Howard v. Walker, 406 F.3d 114, 135 (2d Cir. 2005).

[562] *See* Dripps, *supra* note 335, at 1385; Lijtmaer, *supra* note 335, at 622-24 (discussing tendencies to equate hindsight with foresight, to attribute bad outcomes to bad decisions, and to attribute events to character rather than situation).

[563] State v. Reardon, 486 A.2d 112, 117 (Me. 1984).

[564] State v. Dixon, 387 N.W.2d 682, 688 (Neb. 1986).

[565] People v. Matos, 568 N.Y.S.2d 683 (N.Y. Sup. Ct. 1991), *aff'd* 634 N.E.2d 157, 158 (N.Y. 1994).

[566] *Id.* at 686.

having a heart attack;[567] and in the North Carolina case of *State v. Atkinson*, where a victim with heart disease was beaten with a baseball bat during a robbery.[568] The conviction was also warranted in the Kansas case of *State v. Shaw*, where an eighty-six-year-old victim of a robbery/burglary was found bound and gagged, with bruises and abrasions, dead of a heart attack likely caused by her struggles to breathe and to free herself.[569] The same reasoning could apply to other unexpected complications from physical injury to an elderly victim. Thus, in the Illinois case of *People v. Brackett*, an elderly rape victim was left with broken ribs and other injuries, but also became depressed and refused to eat.[570] Eventually she choked to death while being force-fed by nurses. Her injuries contributed to her choking by making it impossible to use a feeding tube and making it more difficult for her to cough out the obstruction. The court held that Brackett could be liable as long as the elderly victim's death was foreseeable as a result of the rape and beating. The particular manner of death need not be.[571] Assuming that Brackett should have foreseen death occurring in some simpler way, the victim's death would arguably meet Model Penal Code's standard for negligent causation. The Code imposes causal responsibility for a death outside the risk of death of which the actor should have been aware, if it was not "not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability."[572]

A requirement of causal linkage between the predicate felony and the resulting death has another important implication beyond requiring that the felony involve apparently dangerous conduct. Such linkage also implies that the apparently dangerous act foreseeably causing death was committed to further the felony or a related interest, such as avoiding apprehension. Thus it involves both cognitive and normative dimensions of culpability – both notice of danger, and a malign purpose.

State codes mandate such a causal linkage requirement for some or all cases in about a third of all felony murder jurisdictions. Several codes require that the act causing death occur in the course of and in furtherance of the felony.[573] A few states require that it be in the course of *or* in furtherance of the felony.[574]

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[567] *See* State v. Spates, 405 A.2d 656, 659 (Conn. 1978).

[568] *See* State v. Atkinson, 259 S.E.2d 858, 864 (N.C. 1979).

[569] *See* State v. Shaw, 921 P.2d 779, 784-85 (Kan. 1996); *see also* People v. Cable, 471 N.E.2d 447, 450-52 (N.Y. 1984) (delayed death of elderly victim as a result of binding).

[570] People v. Brackett, 510 N.E.2d 877, 882 (Ill. 1987).

[571] *Id.*; *see also* Commonwealth v. Tevlin, 741 N.E.2d 827, 835 (Mass. 2001) (involving complications from stomping elderly victim during robbery).

[572] MODEL PENAL CODE § 2.03(3)(b) (1980) (alteration in original).

[573] ALA. CODE § 13A-6-2 (2005); ARIZ. REV. STAT. § 13-1105 (LexisNexis 2010); CONN. GEN. STAT § 53a-54c (2009); N.Y. PENAL LAW § 125.25 (McKinney 2010); N.D. CENT. CODE § 12.1-16-01 (1997); OR. REV. STAT. § 163.115 (2009); TEX. PENAL CODE ANN. § 19.02 (West 2003).

[574] ALASKA STAT. § 11.41.110 (2009); COLO. REV. STAT. § 18-3-102 (2010); WASH. REV.

Two states require that the felony foreseeably cause the death.[575] Two states simply require that death result from the felony.[576] Courts in many of these jurisdictions have required a causal linkage in applying these statutes.[577]

Several codes only require a temporal connection, by referring to deaths caused "while engaged in" or "committing" a predicate felony.[578] Some courts have read temporally phrased statutes restrictively to preclude any requirement of a causal connection.[579] A few courts have interpreted temporally phrased standards expansively to imply a requirement of causal linkage, however.[580]

Codes in almost half the felony murder jurisdictions employ a more ambiguous phrasing, punishing killings "in" the commission or perpetration, which could mean either by means of the felony, or during the felony.[581]

CODE ANN. § 9A.32.030 (LexisNexis 2010).

[575] ME. REV. STAT. ANN. tit. 17-A, § 202(1) (2010) (stating death must be a "reasonably foreseeable consequence of" committing, attempting, or fleeing from the felony); OHIO REV. CODE ANN. § 2903.02(b) (LexisNexis 2008) (requiring that the felon cause death as a "proximate result" of committing the felony).

[576] MO. REV. STAT. § 565.021 (2009); OKLA. STAT. ANN. tit. 21, § 701.8 (2010).

[577] *See* Witherspoon v. State, 33 So. 3d 625, 628 (Ala. Crim. App. 2009) (act in furtherance of felony can cause death by provoking foreseeable response); State v. Miles, 918 P.2d 1028, 1033 (Ariz. 1996); Whitman v. People, 420 P.2d 416, 419 (Colo. 1966); State v. Young, 469 A.2d 1189, 1192 (Conn. 1983); State v. Burrell, 160 S.W.3d 798, 803 (Mo. 2005); State v. Black, 50 S.W.3d 778, 785 (Mo. 2001); State v. Moore, 580 S.W.2d 747, 752 (Mo. 1979); State v. Cole, 248 S.W.3d 91, 95 (Mo. Ct. App. 2008); State v. Blunt, 863 S.W.2d 370, 371 (Mo. Ct. App. 1993); People v. Joyner, 257 N.E.2d 26, 27 (N.Y. 1970); State v. Franklin, No. 06-MA-79, 2008 WL 2003778, at *15 (Ohio Ct. App. May 5, 2008); State v. Rose, 810 P.2d 839, 845 (Or. 1991); State v. Schwensen, 392 P.2d 328, 334 (Or. 1964); State v. Hacheney, 158 P.3d 1152, 1166-67 (Wash. 2007).

[578] *See* DEL. CODE ANN. tit. 11, § 635 (2007); IOWA CODE ANN. § 707.2 (2010); LA. REV. STAT. ANN. § 14:30.1 (2010); MINN. STAT. § 609.19 (2010); MISS. CODE ANN. § 97-3-27 (West 2010); OKLA. STAT. ANN. tit., 21 § 701.8 (West 2010); 18 PA. CONS. STAT. § 2502 (2010); S.D. CODIFIED LAWS § 22-16-4 (2004); UTAH CODE ANN. § 76-5-203 (LexisNexis 2008); WIS. STAT. ANN. § 940.03 (West 2002).

[579] *See* State v. French, 402 N.W.2d 805, 808 (Minn. Ct. App. 1987); Conner v. State, 362 N.W.2d 449, 454 (Iowa 1985); State v. Brant, 295 N.W.2d 434, 436-37 (Iowa 1980); Gavin v. State, 425 N.W.2d 673, 678 (Iowa Ct. App. 1988); Moody v. State, 841 So. 2d 1067, 1092-93 (Miss. 2003); Pickle v. State, 345 So. 2d 623, 626 (Miss. 1977).

[580] *See* Commonwealth v. Waters, 418 A.2d 312, 317-18 (Pa. 1980); Commonwealth v. Legg, 417 A.2d 1152, 1154 (Pa. 1980); Franks v. State, 636 P.2d 361, 364 (Okla. Crim. App. 1981), *overruled on other grounds by* Brown v. State, 743 P.2d 133, 138 (1987).

[581] *See* 18 U.S.C. § 1111 (2006); CAL. PENAL CODE § 189 (Deering 2006); D.C. CODE § 22-2101 (2001); FLA. STAT. § 782.04 (2010); GA. CODE ANN. § 16-5-1 (2008); IDAHO CODE ANN. § 18-4003 (2004); 720 ILL. COMP. STAT. ANN. 5/9-1 (2002); IND. CODE § 35-42-1-1 (LexisNexis 2010); KAN. STAT. ANN. § 21-3401 (2009); ME. REV. STAT. ANN. tit. 17-A, § 202 (2010); MD. CODE ANN., CRIM. LAW § 2-201 (LexisNexis 2010); MONT. CODE ANN. § 45-5-102 (2009); NEB. REV. STAT. ANN. § 28-303 (2009); NEV. REV. STAT. ANN. § 200.030 (2009); N.J. STAT. ANN. § 2C:11-3 (West 2005); N.C. GEN. STAT. § 14-17 (2009); R.I. GEN.

Courts in the great majority of these jurisdictions have adopted causal linkage tests.[582] Courts have rejected such tests in only a handful of the jurisdictions punishing killing in perpetration of the felony: California, Nebraska, and Wyoming.[583]

Despite variation in statutory language the great majority of felony murder jurisdictions have adopted a requirement of causal linkage. In all, only seven felony murder jurisdictions appear to have rejected a requirement of causal linkage.[584] By contrast, at least thirty jurisdictions have adopted a causal

LAWS § 11-23-1 (2010); TENN. CODE ANN. § 39-13-202 (2010); VA. CODE ANN. § 18.2-32 (2005); W. VA. CODE ANN. § 61-2-1 (LexisNexis 1998); WYO. STAT. ANN. § 6-2-101 (2009).

[582] *See* United States v. Heinlein, 490 F.2d 725, 736 (D.C. Cir. 1973); United States v. Bolden, 514 F.2d 1301, 1307 (D.C. Cir. 1975); Lester v. State, 737 So. 2d 1149, 1151 (Fla. Dist. Ct. App. 1999); Allen v. State, 690 So. 2d 1332, 1334 (Fla. Dist. Ct. App. 1997); State v. Hokenson, 527 P.2d 487, 492 (Idaho 1974); People v. Tillman, 388 N.E.2d 1253, 1256-57 (Ill. App. Ct. 1979); People v. Graham, 477 N.E.2d 1342, 1346 (Ill. App. Ct. 1985); People v. Burke, 407 N.E.2d 728, 730 (Ill. App. Ct. 1980); Moon v. State, 419 N.E.2d 740, 742 (Ind. 1981); Sheckles v. State, 684 N.E.2d 201, 205 (Ind. Ct. App. 1997); State v. Hoang, 755 P.2d 7, 10-12 (Kan. 1988); State v. Mauldin, 529 P.2d 124, 125 (Kan. 1974); Commonwealth v. Christian, 722 N.E.2d 416, 423 (Mass. 2000); Commonwealth v. Dickerson, 364 N.E.2d 1052, 1063 (Mass. 1977) (overruled on other grounds); Commonwealth v. Osman, 188 N.E. 226, 228 (Mass. 1933); State v. Allen, 875 A.2d 724, 728-29 (Md. 2005); Watkins v. State, 744 A.2d 1, 5 (Md. 2000); Campbell v. State, 444 A.2d 1034, 1041 (Md. 1982); Mumford v. State, 313 A.2d 563, 566 (Md. Ct. Spec. App. 1974); State v. Russell, 198 P.3d 271, 274 (Mont. 2008); Kills On Top v. State, 15 P.3d 422, 428-29 (Mont. 2000); State v. Weinberger, 671 P.2d 567, 569 (Mont. 1983); State *ex rel*. Murphy v. McKinnon, 556 P.2d 906, 910-11 (Mont. 1976); State v. Bonner, 411 S.E.2d 598, 603-04 (N.C. 1992); State v. Hutchins, 279 S.E.2d 788, 803 (N.C. 1981); State v. Martin, 573 A.2d 1359, 1371 (N.J. 1990); Nay v. State, 167 P.3d 430, 434-35 (Nev. 2007); State v. Pierce, 23 S.W.3d 289, 294-95 (Tenn. 2000); State v. Buggs, 995 S.W.2d 102, 106 (Tenn. 1999); Haskell v. Commonwealth, 243 S.E.2d 477, 481 (Va. 1978); Doane v. Commonwealth, 237 S.E.2d 797, 798 (Va. 1977); Kennemore v. Commonwealth, 653 S.E.2d 606, 609 (Va. Ct. App. 2007); Griffin v. Commonwealth, 533 S.E.2d 653, 657 (Va. Ct. App. 2000); Montague v. Commonwealth, 522 S.E.2d 379, 381 (Va. Ct. App. 1999); King v. Commonwealth, 368 S.E.2d 704, 706 (Va. Ct. App. 1988); State *ex rel*. Painter v. Zakaib, 411 S.E.2d 25, 26 (W.Va. 1991); State v. Wayne, 289 S.E.2d 480, 482 (W. Va. 1982); *see also* 2-41 MODERN FED. JURY INSTRUCTIONS – CRIM. P 41.01, 41-8, 41-10 (2010) (requiring death "as a consequence of" knowing and willful commission of predicate felony). Although Montana has generally required a causal linkage, it has not been entirely consistent. *See* State v. Cox, 879 P.2d 662, 668 (Mont. 1994) (rejecting causal standard).

[583] People v. Chavez, 234 P.2d 632, 640-42 (Cal. 1951); People v. Miller, 53 P. 816, 816 (Cal. 1898); *c.f.* People v. Cavitt, 91 P.3d 222, 225 (Cal. 2004) (requiring a "logical nexus" between the felony and the act causing death that falls short of requiring that the act be in furtherance of the felony); State v. Montgomery, 215 N.W.2d 881, 884 (Neb. 1974); Eaton v. State, 192 P.3d 36, 67 (Wyo. 2008); Bouwkamp v. State, 833 P.2d 486, 491-92 (Wyo. 1992).

[584] 74 Del. Laws. 567 (2004), *available at* 2004 Del. ALS 246; DEL. CODE ANN. tit 11,

linkage test either legislatively or judicially.[585] The prevalence of this requirement of causal linkage strengthens the authority of the principle of dual culpability as a normative rationale for felony murder liability.

III. COMPLICITY AND COLLECTIVE LIABILITY

A. *The Problem of Complicity in Felony Murder*

If a killer must cause death negligently to be liable for felony murder, an accomplice in felony murder should be no less culpable. Yet critics have contended that the felony murder doctrine automatically punishes accomplices in predicate felonies whenever their co-felons kill, however unexpectedly.[586] A *New York Times* story on felony murder liability dramatized this claim with a detailed discussion of the Ryan Holle case.[587]

In fact, the Holle case does not support the point the *New York Times* was trying to make. To explain why, it is necessary to clarify what it means to be an accomplice in a predicate felony. Accomplice liability generally requires a different actus reus than that required for liability as a principal: the accomplice must aid or encourage a principal in committing an offense. Because the accomplice's conduct is different from the perpetrator's conduct, the accomplice's mental state must differ as well.[588] Most jurisdictions require intent to aid, which they interpret as a purpose of making the crime succeed.[589] These jurisdictions include Florida, where Holle's case was decided, and Pennsylvania, the location of the other complicity case, *Commonwealth v. Lambert*, highlighted in the Introduction.[590]

This intent to aid standard should have precluded liability for Lambert irrespective of the felony murder doctrine. The prosecution offered no

§§ 635, 636 (2007); *Chavez*, 234 P.2d at 640-42; *Miller*, 53 P. at 816; Conner v. State, 362 N.W.2d 449, 454 (Iowa 1985); State v. Russell, 503 N.W.2d 110, 113-14 (Minn. 1993); Moody v. State**,** 841 So. 2d 1067, 1092-93 (Miss. 2003); State v. Montgomery, 215 N.W.2d 881, 884 (Neb. 1974); *Eaton*, 192 P.3d at 67; *Bouwkamp*, 833 P.2d at 491-92.

[585] These are Alabama, Arizona, Colorado, Connecticut, D.C., Florida, Idaho, Illinois, Indiana, Kansas, Maine, Maryland, Massachusetts, Missouri, Montana, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Virginia, Washington, West Virginia, United States. *See supra* notes 573-577, 580, 582 and accompanying text.

[586] Liptak, *supra* note 1.

[587] *Id.*; *see also supra* text accompanying note 13.

[588] KAPLAN, WEISBERG & BINDER, s*upra* note 516, at 716.

[589] *E.g.*, People v. Beeman, 674 P.2d 1318, 1326 (Cal. 1984); 1-3 CRIM. JURY INSTRUCTIONS FOR D.C. 3.200 (2001); FLA. STAN. JURY INSTRUCTIONS IN CRIM. CASES § 3.5(a) (1995) ("conscious intent that the criminal act be done"); 2 GA. STATE BAR – CRIM. JURY INST. § 1.42.10 (2010); MD. CRIM. PATTERN JURY INSTRUCTIONS 6:01 (2007); N.J. STAN. JURY INSTRUCTIONS 2C:2-6 (2009); PA. SUGGESTED STAN. CRIM. JURY INSTRUCTIONS 8.306(a)(6) (2008); 1-3 TENN. CRIM. JURY INSTRUCTIONS 3.01 (2007).

[590] *Supra* note 14 and accompanying text.

evidence that Lambert drove his friend to his ex-girlfriend's home for the purpose of burglary.[591] The same is true in Holle's case. Holle, who routinely shared the use of his car with a cohabitant, should not have been convicted of burglary without proof that he provided the car on this occasion for the purpose of – not just with the expectation of – facilitating the burglary. Holle testified that he heard one of the burglars say that it might be necessary to knock out the victim,[592] so he had reason to foresee that she would be clubbed fatally. If Holle accepted this risk as a means to the end of stealing, he arguably deserved murder liability. But if stealing was never his goal and he was merely fulfilling his household obligations by sharing use of his possessions, he deserved liability for neither the murder, nor the predicate felony of burglary. Accordingly, the injustice of Holle's *murder* conviction resulted from his *undeserved accomplice liability for the burglary* rather than any undeserved attribution of the killing to the burglary. Unjust convictions of complicity in felony murder often result from misattributions of complicity in the predicate felony.[593]

Nevertheless, the *New York Times* was right to criticize Florida's rules for attributing felony murder liability to accomplices. Florida *does* permit accomplices to be held strictly liable for their co-felon's unexpected killings. Yet, as we shall see, Florida is unusual in this respect. Most felony murder jurisdictions do a much better job of ensuring that accomplice liability for felony murder is deserved.

The general problem of accomplice liability for felony murder can be illustrated with two hypothetical scenarios.

First, imagine that Armory plans the armed robbery of a bank with Rob and Driver. Armory supplies a loaded gun for Rob to use in sticking up a teller, while Driver waits outside in a getaway car. A security guard, Vigilant, opens fire on Rob during the robbery. Rob returns fire, killing Vigilant. Rob exits the bank and flees with Driver in the getaway car. Police pursue them in a high speed chase. Driver eventually runs a stoplight and collides with another vehicle, killing Passenger. Armory is certainly liable as an accomplice in Rob's bank robbery – he purposefully aided it. Rob is liable for the felony murder of Vigilant in any felony murder jurisdiction, and Driver is liable for the felony murder of Passenger in most jurisdictions. But is Armory liable for Rob's felony murder of Vigilant? Is he liable for Driver's felony murder of Passenger?

Second, imagine that Cat asks Buddy to drive him to and from a warehouse at night and wait for him while he burglarizes it. Buddy asks if anyone will get hurt. Cat replies that the warehouse is unguarded, he is not expecting any

[591] Commonwealth v. Lambert, 795 A.2d 1010, 1022 (Pa. Super. Ct. 2002).

[592] Liptak, *supra* note 1.

[593] *See, e.g.*, State v. Medeiros, 599 A.2d 723, 726-27 (R.I. 1991) (convicting despite defendant's claim, supported by crime scene evidence, to have waited in a friend's car during the burglary, without having aided or encouraged it).

trouble, and is not bringing a gun. Buddy agrees. In fact, Cat is interrupted by Watchman, an armed security guard. Cat attempts to disarm Watchman and shoots him with Watchman's own gun in the ensuing struggle. Buddy will certainly be liable as an accomplice in Cat's burglary, which he intentionally aided. Cat will be guilty of felony murder. Although he did not expect resistance in advance and did not bring a gun, his felony became foreseeably dangerous once he decided to struggle with an armed victim; and the presence of a victim and the use of a gun would aggravate the burglary sufficiently to meet requirements for a predicate burglary in most jurisdictions. But what about Buddy? Does his complicity in Cat's burglary also implicate him in the death of Watchman?

There are three possible answers to such questions, depending on whether accomplices in predicate felonies are held liable for all killings by their co-felons, for killings they intend, or for killings they should foresee. If accomplices in the predicate felony are strictly liable for their co-felon's killings, Armory must be liable for the death of Passenger and Buddy must be liable for the death of Watchman. This would make Buddy liable with *less* culpability than the negligence required to convict the actual killer of felony murder. On the other hand, if complicity in felony murder requires the intent to promote that crime, Armory may not even be liable for the foreseeable but undesired death of Vigilant. This test requires *more* culpability to convict an accomplice of felony murder than to convict an actual killer. Intermediate between these extremes is the answer given by the principle of dual culpability, punishing negligent killing in the pursuit of a felonious purpose. This test permits Armory's liability for Vigilant's death, which was foreseeable to Armory as a result of supplying a gun for use in robbing a defended target. The same test may or may not convict him for Passenger's death, depending on whether it was foreseeable to him. This foreseeability test acquits Buddy, who never became aware of the armed guard and so had no reason to foresee a fatal struggle. This foreseeability test requires the same culpability, negligence, to convict both perpetrator and accomplice.

The question of accomplice liability for felony murder is one example of a larger problem with complicity. How does the required purpose of promoting the offense apply to crimes involving the careless rather than intentional infliction of harm? Must the accomplice in an unintentional crime be more culpable than the perpetrator? The Model Penal Code and several state codes solve this problem by distinguishing between conduct elements and result elements. Thus, the accomplice must purposely aid or encourage the perpetrator in committing proscribed conduct. However, the accomplice need only have the same culpable mental state with respect to a result as the perpetrator.[594]

[594] CONN. GEN. STAT. § 53a-8 (2009); N.Y. PENAL LAW § 20.00 (McKinney 2010); MODEL PENAL CODE §§ 2.06 (3)(a)(ii), (4) (1980).

Accordingly, if a perpetrator must cause death negligently by means of certain conduct, the accomplice must purposely aid or encourage that conduct, with negligence toward the resulting risk of death. If felony murder were defined as negligently causing death by means of certain felonies, an accomplice in felony murder would have to purposely promote the predicate felony, with negligence toward the risk of death. This mental element would satisfy the principle of dual culpability.

The difficulty is that felony murder definitions rarely spell out the requirement of negligence this straightforwardly. Felony murder rules often require negligence obliquely, by requiring conduct that is negligent per se. Such per se negligent conduct includes inherently dangerous predicate felonies, foreseeably dangerous commission of the predicate felony, or foreseeable causation of death. How can we apply the Model Penal Code standard for complicity in crimes of unintended results, to crimes requiring no explicit culpable mental state? The problem disappears when the predicate felony is inherently dangerous: intentionally promoting the felony automatically entails negligence with respect to the risk of death. Yet most states predicate felony murder on at least some felonies that are *not* inherently dangerous.[595] Accomplices in these felonies might not be in a position to foresee danger. Thus, the aims of the Model Penal Code complicity scheme are best fulfilled by holding accomplices in predicate felonies complicit only in those deaths they are in a position to foresee.

Such a foreseeability standard comports with traditional tests of accomplice responsibility for felony murder. Collective liability for crimes of violence

[595] States conditioning felony murder on felonies neither enumerated nor inherently dangerous include: ALA. CODE § 13A-6-2 (2005); DEL. CODE ANN. tit. 11, § 635 (2007); FLA. STAT. § 782.04 (2010); GA. CODE ANN. § 16-5-1 (2008); 720 ILL. COMP. STAT. 5/9-1 (2002); MD. CODE ANN., CRIM. LAW § 2-201 (LexisNexis 2010); MISS. CODE ANN. § 97-3-27 (1999); MO. REV. STAT. § 565.021 (2010); MONT. CODE ANN. § 45-5-102 (2009); N.C. GEN. STAT. § 14-17 (2009); OKLA. STAT. ANN. tit. 21, § 701.8 (2010); R.I. GEN. LAWS § 11-23-1 (2010); TEX. PENAL CODE ANN. § 19.02 (West 2003); VA. CODE ANN. § 18.2-32 (2005); WASH. REV. CODE § 9A.32.050 (2010); State v. Norris, 328 S.E.2d 339, 343 (S.C. 1985) (declaring that factfinders may, but need not, infer malice necessary for murder under S.C. CODE ANN. § 16-3-10 (2009) from participation in a felony) (overturned on unrelated grounds). Jurisdictions predicating felony murder on unaggravated burglary include: 18 U.S.C. § 1111 (2006); ARIZ. REV. STAT. § 13-1105 (LexisNexis 2010); CAL. PENAL CODE § 189 (Deering 2006); COLO. REV. STAT. § 18-3-102 (2010); CONN. GEN. STAT § 53a-54c (2009); FLA. STAT. § 782.04 (2010); IDAHO CODE ANN. § 18-4003 (2008); 720 ILL. COMP. STAT. 5/9-1 (2002); IND. CODE. ANN. § 35-42-1-1 (LexisNexis 2010); KAN. STAT. ANN. §§ 21-3401, 21-3436 (2009); ME. REV. STAT. ANN. tit. 17-A, § 202 (2010); MISS. CODE ANN. § 97-3-27 (1999); MONT. CODE ANN. § 45-5-102 (2009); NEB. REV. STAT. ANN. § 28-303 (LexisNexis 2009); NEV. REV. STAT. ANN. § 200.030 (LexisNexis 2009); N.J. STAT. ANN. § 2C:11-3 (West 2010); N.Y. PENAL LAW § 125.25 (Consol. 2005); N.D. Cent. Code § 12.1-16-01 (1997); 18 PA. CONS. STAT. § 2502 (2010); S.D. CODIFIED LAWS § 22-16-4 (2004); TENN. CODE ANN. § 39-13-202 (2010); UTAH CODE ANN. § 76-5-203 (2008); WYO. STAT. ANN. § 6-2-101 (2009).

long preceded the attachment of any significance to felonious motive. The 1535 case of *Lord Dacres* held that when a group embarks on a crime, resolving to kill resisters, all are liable for a killing by any.[596] The 1558 case of *Mansell & Herbert* extended this ruling to make all collaborators in a violent assault liable for a killing by any, on the ground that intent to injure or wound sufficed for murder liability.[597] In first proposing a felony murder rule in 1700, Justice Holt reasoned that complicity should transfer from the predicate offense to the killing only if four conditions were met: (1) the predicate offense must be "deliberate" rather than careless; (2) "the killing must be in pursuance of that unlawful act, and not collateral to it"; (3) the predicate offense must "tend to the hurt of another either immediately, or by necessary consequence" and (4) the accomplice "must know of the malicious design of the party killing."[598] Holt's rule limits accomplice liability to deaths caused in furtherance of felonies involving a substantial danger of injury known to the accomplice. While Blackstone endorsed a fairly sweeping felony murder rule for *killers*,[599] he restricted *accomplice* liability for murder to those anticipating violence: "if two or more come together to do an unlawful acts against the king's peace, of which the probable consequence might be bloodshed . . . and one of them kills a man; it is murder in them all, because of the unlawful act, the *malitia praecogitata*, or evil intended beforehand."[600] Where they considered accomplice liability for felony murder, nineteenth-century American cases and treatises generally followed this English literature. Most sources addressing complicity in felony murder required a resolution against opposers, agreement to an act of violence, or a probability of death as a consequence of the felony.[601] Several states required that the killing be in furtherance of the felony.[602]

Today, many jurisdictions address the problem of complicity in felony murder with a two part test that Professor LaFave traces back to Holt. This test holds a participant in a predicate felony responsible for fatal acts of co-felons in furtherance of the felony, and foreseeable as a result of the felony.[603] A

[596] Lord Dacres's Case, (1535) 72 Eng. Rep. 458 (K.B.) 458.

[597] Mansell & Herbert's Case, (1558) 73 Eng. Rep. 279 (K.B.) 279.

[598] R v. Plummer, (1700) 84 Eng. Rep. 1103 (K.B.) 1105-07.

[599] BLACKSTONE, *supra* note 51, at 192-93, 201.

[600] *Id*. at 200.

[601] Binder, *supra* note 48, at 198-99.

[602] *Id.* at 198.

[603] *See* LAFAVE, *supra* note 264, at 789-90 (citing R v. Plummer, (1700) 84 Eng. Rep. 1103, 1105-07 (K.B.)); *see also* IOWA CODE § 703.2 (2009) (joint criminal liability for co-conspirators acting "in furtherance" of an offense); MINN. STAT. § 609.05, Subd. 2 (2010) (accomplice liability for secondary crimes and accomplices responsible for all acts in furtherance of or natural and probable consequence of felony); State v. Lopez, 845 P.2d 478, 481-82 (Ariz. 1992); State v. Cots, 9 A.2d 138, 143 (Conn. 1939); Lee v. United States, 699 A.2d 373, 384 (D.C. 1997); United States v. Heinlein, 490 F.2d 725, 735 (D.C. 1973); People v. Bongiorno, 192 N.E. 856, 857-58 (Ill. 1934); Vance v. State, 620 N.E.2d 687, 690

majority of felony murder jurisdictions require that death be caused by an act in furtherance of the felony. A dozen states' codes mention such a requirement,[604] and a number of other states have adopted similar tests by judicial decision.[605] In addition, a majority of felony murder jurisdictions have required that death or a fatal act should be foreseeable as a result of the felony.[606] This two-part test reflects the two dimensions of culpability

(Ind. 1993); Mumford v. State, 313 A.2d 563, 566 (Md. Ct. Spec. App. 1974); Commonwealth v. Ortiz, 560 N.E.2d 698, 700 (Mass. 1990); Commonwealth v. Heinlein, 152 N.E. 380, 384 (Mass. 1926); State v. Mahkuk, 736 N.W.2d 675, 682 (Minn. 2007); State v. Day, No. A07-0455, 2008 Minn. Ct. App. LEXIS 726, at *7-8 (Minn. Ct. App. June 10, 2008); Romero v. State, 164 N.W. 554, 555 (Neb. 1917); People v. Hernandez, 624 N.E.2d 661, 665-66 (N.Y. 1993); State v. Bonner, 411 S.E.2d 598, 600 (N.C. 1992); Commonwealth v. Tate, 401 A.2d 353, 355 (Pa. 1979); Gore v. Leeke, 199 S.E.2d 755, 757-58 (S.C. 1973); D.C. JURY INSTRUCTIONS 3-200; MD. CRIM. PATTERN JURY INSTRUCTIONS 4:17.7 (2007); S.C. REQUESTS TO CHARGE-CRIM. § 2-3; 1-3 VA. MODEL JURY INSTRUCTIONS – CRIM. INSTRUCTIONS NO. 3.160 (describing concert of action).

[604] Ten states list the requirement in their felony murder provisions. *See* ALA. CODE § 13A-6-2 (2005); ALASKA STAT. § 11.41.110 (2010); ARIZ. REV. STAT. ANN. § 13-1105 (2010); COLO. REV. STAT. § 18-3-102 (2010); CONN. GEN. STAT § 53a-54c (2009); N.Y. PENAL LAW § 125.25 (McKinney 2010); N.D. CENT. CODE § 12.1-16-01 (1997); OR. REV. STAT. § 163.115 (2010); TEX. PENAL CODE ANN. § 19.02 (2003); WASH. REV. CODE. § 9A.32.030 (2010). Two list the requirement in the complicity provisions. IOWA CODE § 703.2 (2009); MINN. STAT. §609.05-3 (2010) .

[605] *See Lee*, 699 A.2d at 384; *Heinlein*, 490 F.2d at 735; *Bongiorno*, 192 N.E. at 857-58; *Vance*, 620 N.E.2d at 690; *Mumford*, 313 A.2d at 566; *Ortiz*, 560 N.E.2d at 700; *Heinlein*, 152 N.E. at 384; *Mahkuk*, 736 N.W.2d at 682; *Day*, No. A07-0455, 2008 Minn. Ct. App. LEXIS 726, at *7-8; *Romero*, 164 N.W. at 555; *Hernandez*, 624 N.E.2d at 665-66; *Bonner*, 411 S.E.2d at 600; *Tate*, 401 A.2d at 355; *Leeke*, 199 S.E.2d at 757-58; D.C. JURY INSTRUCTIONS. 3-200; MD. CRIM. PATTERN JURY INSTRUCTIONS 4:17.7 (2007); S.C. REQUESTS TO CHARGE-CRIM. § 2-3; 1-3 VA. MODEL JURY INSTRUCTIONS – CRIM. INST. NO. 3.160 (describing concert of action). *See also* Lester v. State, 737 So. 2d 1149, 1152 (Fla. Dist. Ct. App. 1999); Allen v. State, 690 So. 2d 1332, 1334-35 (Fla. Dist. Ct. App. 1997); State v. Hokenson, 527 P.2d 487, 492 (Idaho 1974); State v. Hoang, 755 P.2d 7, 10-11 (Kan. 1988); State v. Mauldin, 529 P.2d 124, 126 (Kan. 1974); Commonwealth v. Christian, 722 N.E.2d 416, 423 (Mass. 2000) (declaring that a causal connection is required; afterthought theft does not support felony murder) (case abrogated on other grounds); State v. Weinberger, 671 P.2d 567, 568 (Mont. 1983); State v. Russell, 198 P.3d 271, 279 (Mont. 2008); State *ex rel.* Murphy v. McKinnon, 556 P.2d 906, 910 (Mont. 1976) (*but see* State v. Cox, 879 P.2d 662 (Mont. 1994) (rejecting causal standard)); Nay v. State, 167 P.3d 430, 436 (Nev. 2007); State v. Pierce, 23 S.W.3d 289, 290-91 (Tenn. 2000); State v. Buggs, 995 S.W.2d 102, 106 (Tenn. 1999); 2-41 MODERN FED. JURY INSTRUCTIONS – CRIM. P 41.01, 41-8 (2009).

[606] *See* ALA. CODE § 13A-6-2 (2005); ME. REV. STAT. ANN. tit. 17-A, § 202 (2010); MINN. STAT. § 609.05(2) (2009); OHIO REV. CODE ANN. § 2903.02 (LexisNexis 2008); United States v. Heinlein, 490 F.2d 725, 735 (D.C. Cir. 1973); Witherspoon v. State, 33 So. 3d 625, 628-29 (Ala. Crim. App. 2009); State v. Lopez, 845 P.2d 478, 481 (Ariz. Ct. App. 1992); State v. Spates, 405 A.2d 656, 600 (Conn. 1978); Hassan-El v. State, 911 A.2d 385, 394-95

recognized by the principle of dual culpability: negligence of death in the pursuit of a felonious motive. It resonates with traditional understandings of collective liability for felony murder and is compatible with the Model Penal Code's approach to complicity in crimes of inadvertent harm.

Let us now look more closely at the standards different jurisdictions have developed for defining vicarious liability for felony murder. Legislatures have taken two general approaches to the problem of defining felony murder. Most define felony murder individually, as causing death in perpetration of a felony. In these jurisdictions other participants in the felony can only be liable for the murder as accomplices. The less common approach is to define felony murder collectively, as participating in a felony that causes death, or in which some person causes death. Such statutes avoid the problem of defining complicity in felony murder, by treating all participants as principals. We will examine the application of statutes of both types.

B. *Individual Felony Murder Liability Jurisdictions*

Most jurisdictions define felony murder individually, as causing death in perpetrating a predicate felony.[607] Wyoming, for example, imposes first

(Del. 2006); *Lee*, 699 A.2d at 385-86; Hulme v. State, 544 S.E.2d 138, 141 (Ga. 2001); Durden v. State, 297 S.E.2d 237, 241-42 (Ga. 1982); *Hokenson*, 527 P.2d at 492; People v. Jenkins, 545 N.E.2d 986, 994 (Ill. App. Ct. 1989); People v. Tillman, 388 N.E.2d 1253, 1256 (Ill. App. Ct. 1979); Booker v. State, 386 N.E.2d 1198, 1201-02 (Ind. 1979); Sheckles v. State, 684 N.E.2d 201, 205 (Ind. Ct. App. 1997); *Hoang*, 755 P.2d at 9; State v. Branch, 573 P.2d 1041, 1043 (Kan. 1978); State v. Kalathakis, 563 So. 2d 228, 231 (La. 1990); Watkins v. State, 726 A.2d 795, 803-04 (Md. Ct. Spec. App. 1999); Commonwealth v. Baez, 694 N.E.2d 1269, 1271-72 (Mass. 1998); State v. Mahkuk, 736 N.W.2d 675, 682 (Minn. 2007) (requiring foreseeability for accomplices only); State v. Day, No. A07-0455, 2008 Minn. App. LEXIS 726, at *12-16 (Minn. Ct. App. June 10, 2008) (same); State v. Blunt, 863 S.W.2d 370, 371 (Mo. Ct. App. 1993); *Weinberger*, 671 P.2d at 569; *State ex rel. Murphy v. McKinnon*, 556 P.2d at 910; State v. Martin, 573 A.2d 1359, 1369 (N.J. 1990); People v. Matos, 634 N.E.2d 157, 158 (N.Y. 1994); State v. Bonner, 411 S.E.2d 598, 600 (N.C. 1992); Malaske v. State, 89 P.3d 1116, 1118; Kinchion v. State, 81 P.3d 681, 684 (Okla. Crim. App. 2003); Commonwealth v. Tate, 401 A.2d 353, 355 (Pa. 1979); *In re* Leon, 410 A.2d 121, 125 (R.I. 1980); Gore v. Leeke, 199 S.E.2d 755, 758-59 (S.C. 1973); Graham v. State, 346 N.W.2d 433, 436 (S.D. 1984) (dictum); State v. Severs, 759 S.W.2d 935, 938 (Tenn. Crim. App. 1988); State v. Jackson, 976 P.2d 1229, 1238 (Wash. 1999) (requiring and finding sufficient evidence that death was a "natural and probable consequence" of either defendant's felony or her actions as an accomplice in the felony); State v. Diebold, 277 P. 394, 396 (Wash. 1929); State v. Weisengoff, 101 S.E. 450, 456 (W. Va. 1919); *see also* 1-6 ME. JURY INSTRUCTION MANUAL § 6-33 (2010); S.C. REQUESTS TO CHARGE-CRIM. §2-3 (2007); 1-3 TENN. CRIM. JURY INSTRUCTIONS 3.01 (2007).

[607] *See* 18 U.S.C. § 1111 (2006); CAL. PENAL CODE § 189 (Deering 2010); DEL. CODE ANN. tit. 11, § 635 (2007); D.C. CODE § 22-2101 (LexisNexis 2001); GA. CODE ANN. § 16-5-1 (2008); IDAHO CODE ANN. § 18-4003 (2004); 720 ILL. COMP. STAT. ANN. 5/9-1 (LexisNexis 2002); IND. CODE § 35-42-1-1 (LexisNexis 2010); IOWA CODE ANN. § 707.2 (West 2010); KAN. STAT. ANN. §§ 21-3401, -3436 (2010); LA. REV. STAT. ANN. § 14:30.1

degree murder liability on "[w]hoever . . . in the perpetration of, or attempt to perpetrate" various felonies "kills any human being."[608] In these jurisdictions, one who does not personally cause death can only be liable for felony murder as an accomplice to one who does. Yet ordinarily, one is only liable as an accomplice in so far as one intentionally aids or encourages the conduct constituting the crime. Typically an accomplice in an offense must intend to promote it.[609] A few jurisdictions provide that co-felons are liable for any act in furtherance of and foreseeable as a result of the offense, but this approach is the exception.[610] In Wyoming, one who "knowingly aids or abets in the

(2010); MD. CODE ANN., CRIM. LAW § 2-201 (LexisNexis 2010); MASS. GEN. LAWS ch. 265, § 1 (2009); MINN. STAT. § 609.19 (2010); MISS. CODE ANN. § 97-3-27 (2010); NEB. REV. STAT. ANN. § 28-303 (LexisNexis 2009); NEV. REV. STAT. ANN. § 200.030 (LexisNexis 2009); N.C. GEN. STAT. § 14-17 (2009); OKLA. STAT. ANN. tit. 21, § 701.8 (2010) (defining murder in the second degree as murder "perpetrated by a person engaged in the commission of any felony other than" certain enumerated unlawful acts); 18 PA. CONS. STAT. § 2502 (2010); R.I. GEN. LAWS § 11-23-1 (2010); S.C. CODE ANN. § 16-3-10 (2009); S.D. CODIFIED LAWS § 22-16-4 (2004); TENN. CODE ANN. § 39-13-202 (2010); TEX. PENAL CODE ANN. § 19.02 (West 2003); UTAH CODE ANN. § 76-5-203 (LexisNexis 2009); VA. CODE ANN. § 18.2-32 (2005); W. VA. CODE ANN. § 61-2-1 (LexisNexis 2009); WIS. STAT. ANN. § 940.03 (West 2002); WYO. STAT. ANN. § 6-2-101 (2009); Commonwealth v. Garner; 795 N.E.2d 1202, 1209-10 (Mass. App. Ct. 2003); Lowry v. State, 657 S.E.2d 760, 763-64 (S.C. 2008) (holding that malice was a distinct offense element that the prosecution bears a burden to prove under the due process clause); State v. Norris, 328 S.E.2d 339, 343 (S.C. 1985) (stating that factfinders may, but need not, infer malice from participation in a felony); Gore v. Leeke, 199 S.E.2d 755, 759 (S.C. 1973) (upholding a felony murder conviction as consistent with a requirement of *foreseeable danger* to human life, because the felons were *armed* during a residential burglary).

[608] WYO. STAT. ANN. § 6-2-101 (2010).

[609] DEL. CODE ANN. tit. 11, §271(2) (2007); GA. CODE ANN. § 16-2-20(b)(3), -(4) (2008); 720 ILL. COMP. STAT. ANN. 5/5-2(c) (LexisNexis 2002); IND. CODE § 35-41-2-4 (2010); KAN. STAT. ANN. § 21-3205(1) (2009); MINN. STAT. § 609.05 (2009); 18 PA. CONS. STAT. § 306(c)(1) (2010); S.D. CODIFIED LAWS § 22-3-3 (2004); TENN. CODE ANN. § 39-11-402 (2) (2010); TEX. PENAL CODE ANN. § 7.02(2) (West 2003); UTAH CODE ANN. § 76-2-202 (LexisNexis 2008); WIS. STAT. ANN. § 939.05(2)(b) (West 2002); WYO. STAT. ANN. § 6-1-201(a) (2009); *see also* People v. Beeman, 35 Cal. 3d 547 (1984); 1-11 MODERN FED. JURY INSTRUCTIONS – CRIM. P.11.01, 11-2 (2009) (an aider and abettor must know that the crime is being committed and act in a way which is intended to bring about the success of the criminal venture); 1-3 CRIM. JURY INSTRUCTIONS FOR THE D.C. 3.200 (2009); MD. CRIM. PATTERN JURY INSTRUCTIONS 6:01 (2007); MASS. SUP. CT. CRIM. PRAC. JURY INSTRUCTIONS § 2.11(8) (2004) (requiring intent to aid conduct, while sharing mental element required for offense); OKLA. JURY INSTRUCTIONS – CRIM. § 2-5 (2009); 1-3 VA. MODEL JURY INSTRUCTIONS – CRIM. INSTRUCTIONS NO. 3.100 (2009). A few jurisdictions also require that accomplices have the culpability required for the offense. 18 PA. CONS. STAT. § 306(d) (2010); UTAH CODE ANN. § 76-2-202 (2009); MASS. SUP. CT. CRIM. PRAC. JURY INSTRUCTIONS No. 2.11(8) (2004).

[610] IOWA CODE § 703.2 (2010); KAN. STAT. ANN. § 21-3205(2) (2009); MINN. STAT. § 609.05(2) (2009).

commission of a felony" is liable as an accessory before the fact in that felony.[611] Yet the fact that one knowingly aided or encouraged a predicate felony does not entail that one also knowingly aided or encouraged a killing.

Thus, in individual felony murder liability jurisdictions, accomplices in the predicate felony are liable for a killing only if they meet general criteria of accomplice liability for homicide, or satisfy special rules for complicity in felony murder developed by courts. If courts *choose without statutory authorization* to impose felony murder liability on co-felons who do not intentionally aid or encourage a killing, they need some principled rationale. In the case of *Mares v. State*, the Wyoming Supreme Court rejected a burglar's proposed affirmative defense that he did not know a weapon would be present and had no reason to expect a killing.[612] The court rested this decision entirely on grounds of institutional competence, reasoning that the creation of such a defense was a legislative function. Yet on such reasoning there should have been no need for an affirmative defense. The proposed affirmative defense was borrowed from jurisdictions that impose felony murder liability collectively, on all participants in a predicate felony that leads to death. Wyoming's code, however, imposes no murder liability on co-felons unless they knowingly aid or encourage a killing. The Wyoming court acted without legislative authorization in imposing accomplice liability for killings on co-felons without intent to kill. The court might have reasoned that Mares knowingly aided an act proximately causing death if he knew that the burglary was foreseeably dangerous. But the burden to prove that foreseeability should then have logically fallen on the prosecution. *There is no statutory basis for accomplice strict liability in the thirty jurisdictions imposing individual felony murder liability.*

There is arguably no need to prove that death was foreseeable to the accomplice when the felony he aided or encouraged is inherently dangerous to human life. Individual liability jurisdictions use one of two approaches to insure that the felony is dangerous. About half of these jurisdictions restrict predicate offenses to an enumerated list of felonies. The remaining jurisdictions restrict predicate felonies to those courts or juries find to be dangerous or violent. We will examine accomplice liability for felony murder in each group.

1. Individual Liability Jurisdictions with Exhaustive Enumeration

Fifteen individual liability jurisdictions enumerate exhaustively.[613] If we assume that all of these predicate felonies are inherently dangerous,

[611] WYO. STAT. ANN. § 6-1-201 (2009).

[612] Mares v. State, 939 P.2d 724, 727-28 (Wyo. 1997).

[613] 18 U.S.C. § 1111 (2006); D.C. CODE § 22-2101 (2001); IDAHO CODE ANN. § 18-4003 (2004); IND. CODE § 35-42-1-1 (LexisNexis 2010); IOWA CODE ANN. § 707.2 (West 2010); KAN. STAT. ANN. § 21-3401 (2010); LA. REV. STAT. ANN. § 14:30.1 (2010); NEB. REV. STAT. ANN. § 28-303 (LexisNexis 2009); 18 PA. CONS. STAT. § 2502 (2010); S.D. CODIFIED LAWS

participants in these felonies are at least negligent with respect to a risk of death. Thus, the Pennsylvania Pattern Jury Instructions reason that "[b]ecause [robbery] . . . is a crime inherently dangerous to human life, there does not have to be any other proof of malice."[614] Similarly, a District of Columbia court explained:

> Our felony murder statute, D.C. Code § 22-2101, imposes criminal responsibility for first-degree murder in the case of a reasonably foreseeable killing, without a showing that the defendant intended to kill the decedent, if the homicide was committed in the course of one of several enumerated felonies. . . . This doctrine is premised on the notion that malice may be presumed from the commission of certain "dangerous" or "violent" felonies that "generally involve[] a risk that . . . someone might be killed."[615]

Courts in Kansas and Wisconsin have offered similar arguments.[616]

Unfortunately, every jurisdiction with individualized liability and exhaustive enumeration has at least one predicate felony that is *not* inherently dangerous. Almost all of these jurisdictions – including Wyoming – predicate felony murder on unaggravated burglary.[617] Six of these jurisdictions predicate felony murder on drug offenses,[618] and three predicate felony murder liability on theft.[619]

Kansas predicates felony murder liability on all three. This makes it particularly important that Kansas condition complicity in felony murder on actual foreseeability. The Kansas code makes accomplices liable for all foreseeable secondary crimes,[620] and Kansas courts have long justified felony murder liability on the basis that dangerous felonies foreseeably risked

§ 22-16-4 (2004); TENN. CODE ANN. § 39-13-202 (2010); UTAH CODE ANN. § 76-5-203 (LexisNexis 2008); W. VA. CODE § 61-2-1 (1998); WIS. STAT. § 940.03 (2010); WYO. STAT. ANN. § 6-2-101 (2009).

[614] PA. SUGGESTED STAN. CRIM. JURY. INSTRUCTIONS 15.2502(B) (2008).

[615] Wilson-Bey v. United States, 903 A.2d 818 (D.C. 2006) (quoting WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 14.5(a), at 347 (2d ed. 2003)).

[616] *See* State v. Gleason, 88 P.3d 218, 229 (Kan. 2004); State v. Oimen, 516 N.W.2d 399, 406 (Wis. 1994).

[617] *See* 18 U.S.C. § 1111 (2006); IDAHO CODE ANN. § 18-4003 (2004); IND. CODE § 35-42-1-1 (LexisNexis 2010); KAN. STAT. ANN. § 21-3401 (2010); NEB. REV. STAT. ANN. § 28-303 (LexisNexis 2009); 18 PA. CONS. STAT. § 2502 (2010); S.D. CODIFIED LAWS § 22-16-4 (2004); TENN. CODE ANN. § 39-13-202 (2010); UTAH CODE ANN. § 76-5-203 (LexisNexis 2008); W. VA. CODE ANN. § 61-2-1 (LexisNexis 1998); WYO. STAT. ANN. § 6-2-101 (2009).

[618] D.C. CODE § 22-2101 (LexisNexis 2001); IND. CODE § 35-42-1-1 (LexisNexis 2010); KAN. STAT. ANN. § 21-3401 (2010); LA. REV. STAT. ANN. § 14:30 (2010); UTAH CODE ANN. § 76-5-203 (LexisNexis 2008); W. VA. CODE ANN. § 61-2-1 (LexisNexis 1998).

[619] KAN. STAT. ANN. § 21-3401 (2010); TENN. CODE ANN. § 39-13-202 (2010); WIS. STAT. ANN. § 940.03 (West 2002) ("operating motor vehicle without the owner's consent").

[620] *See* KAN. STAT. ANN. § 21-3205 (2) (2010).

death.[621] Nevertheless, Kansas courts have held that a foreseeability instruction is unnecessary because predicate felonies are limited to those designated inherently dangerous.[622] In *State v. Gleason*, the Kansas Supreme Court concluded that a foreseeability instruction was not required where an accomplice supplied a shotgun to be used in a burglary and knew a victim was present.[623] Yet the court's reasoning could also impose felony murder liability on Buddy, who aided a burglary while aware of neither of these dangerous circumstances. The court's reasoning conflates notice that the legislature *considers* an offense dangerous with notice of actual danger.

Tennessee courts have reached a similar conclusion. Like Kansas, Tennessee generally considers accomplices responsible for secondary crimes that are natural and probable as a result of their primary crimes.[624] Like Kansas courts, however, Tennessee courts have held that this requirement of foreseeability does not apply to felony murder.[625] Indeed, in *State v. Mickens*, an intermediate appellate court held this rule inapplicable to felony murder, based on a passage from LaFave's treatise that precisely contradicted the court's position.[626] LaFave characterized the foreseeability test for complicity in felony murder as an exception to the general rule that complicity requires a purpose to make the crime succeed.[627] The *Mickens* court cited this very passage for the claim that felony murder was an exception to a general rule requiring foreseeability for complicity in secondary crimes.[628]

While Tennessee generally restricts predicate felonies to genuinely dangerous ones – the predicate felony in *Mickens* was kidnapping – it is one of the few states conditioning felony murder on simple theft. Tennessee courts have used a different device to avoid holding thieves liable for unexpected deaths. Thus the Tennessee Supreme Court overturned the felony murder conviction of a fifteen-year-old who lost control of a stolen car while approaching a police roadblock, causing a fatal collision. The court concluded that his fatal conduct was "collateral to and not in pursuance of the felony of

[621] *See* State v. Branch, 573 P.2d 1041, 1042-43 (Kan. 1978).

[622] *See* State v. Gleason, 88 P.3d 218, 229 (Kan. 2004); State v. Chism, 759 P.2d 105, 110 (Kan. 1988).

[623] *Gleason*, 88 P.3d at 229-30.

[624] *See* State v. Richmond, 90 S.W.3d 648, 655 (Tenn. 2002); State v. Howard, 30 S.W.3d 271, 276-77 (Tenn. 2000).

[625] State v. Simerly, No. E2002-02626-CCA-R3-CD, 2004 Tenn. Crim. App. LEXIS 230, at *32-34 (Tenn. Crim. App. Mar. 11, 2004); State v. Mickens, 123 S.W.3d 355, 369 (Tenn. Crim. App. 2003); State v. Winters, 137 S.W.3d 641, 659 (Tenn. Crim. App. 2003).

[626] *Mickens*, 123 S.W.3d at 370.

[627] 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 7.5(b) (1986).

[628] *Mickens*, 123 S.W.3d at 370.

theft."[629] On this reasoning the original car thief would not have been liable as an accomplice in felony murder either.

A similar expedient is available in Kansas, which limits accomplice liability to killings in furtherance of the felony.[630] Pennsylvania courts have also insulated accomplices from liability for unexpected killings by treating such killings as unrelated to the felony.[631] A conclusion that death is unrelated to the felony is almost always available when death results in an improbable way from a felony that is not intrinsically violent or destructive. Courts can use a requirement that the *perpetrator* cause the death "in the commission" of the felony as the functional equivalent of a requirement that the *felony* foreseeably cause death. Yet a jury instruction that death must be foreseeable to the accomplice as a result of the felony is a more reliable and intellectually honest way to restrict liability to those who are culpable.

A number of other individualized liability/enumerated felony jurisdictions *do* require that death be foreseeable as a result of the felony. These include the District of Columbia, Idaho, Indiana, Iowa, Louisiana, and South Dakota.[632] Some jurisdictions that have conditioned causation on foreseeability have not directly addressed the responsibility of co-felons for unforeseeable conduct that foreseeably causes death.[633]

Because non-dangerous predicate felonies necessarily do not generate a lot of felony murder cases, the problem of non-negligent accomplices arises far less often in real life than in law school exam hypotheticals. Nevertheless,

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[629] State v. Pierce, 23 S.W.3d 289, 290 (Tenn. Crim. App. 2000).

[630] *See* State v. Hoang, 755 P.2d 7, 11 (Kan. 1988).

[631] *See* Commonwealth v. Waters, 418 A.2d 312, 318 (Pa. 1980).

[632] *See* IOWA CODE § 703.2 (2009) (joint participants responsible for acts in furtherance unless not reasonably foreseeable); United States v. Heinlein, 490 F.2d 725, 735 (D.C. Cir. 1973) (accomplices responsible for all acts in furtherance of or natural and probable consequence of felony); Wilson-Bey v. United States, 903 A.2d 818, 838 (D.C. 2006) ("Our felony murder statute . . . imposes criminal responsibility . . . in the case of a reasonably foreseeable killing . . . if the homicide was committed in the course of one of several enumerated felonies."); State v. Hokenson, 527 P.2d 487, 492 (Idaho 1974) ("A person is criminally liable for the natural and probable consequences of his unlawful acts as well as unlawful forces set in motion during the commission of an unlawful act."); Vance v. State, 620 N.E.2d 687, 690 (Ind. 1993) (for an accomplice, felony murder only requires proof of the underlying felony and that death is a probable and natural consequence of the common plan); Sheckles v. State, 684 N.E.2d 201, 205 (Ind. Ct. App. 1997) (imposing liability "[w]here the accused reasonably should have been foreseen that the commission of or attempt to commit the contemplated felony would likely create a situation which would expose another to the danger of death . . . and where death in fact occurs as was foreseeable"); State v. Smith, 748 So. 2d 1139, 1143 (La. 1999) (accomplices in aggravated burglary responsible for fatal acts foreseeable as a consequence of the dangerous felony); Graham v. State, 346 N.W.2d 433, 435-36 (S.D. 1984) (accomplice in felony responsible for deaths that "should have been within his contemplation").

[633] This includes Pennsylvania, Utah, and West Virginia.

complicity statutes require culpability, and due process requires proof of offense elements. Accordingly, courts in individual felony murder liability jurisdictions should instruct juries that complicity in felony murder requires proof that death was foreseeable to the accomplice.

2. Individual Liability with Dangerous Felony Rules.

Fifteen jurisdictions impose individual felony murder liability predicated on dangerous felony rules.[634] Of these, California, Massachusetts, Minnesota, and Nevada restrict predicates to those that are inherently dangerous. This precludes felony murder liability for non-negligent accomplices in non-enumerated felonies. Massachusetts requires either inherent danger or recklessness for all felony murders, including those predicated on enumerated felonies.[635] Minnesota enumerates only dangerous offenses, while providing that accomplices are always responsible for additional crimes "committed in pursuance of" and "reasonably foreseeable by the person as a probable consequence of" the intended crime.[636] California and Nevada enumerate only violent predicate felonies, except for non-aggravated forms of burglary. As noted above, California has adopted a vague test linking co-felons to killings with a "logical nexus" to the felony,[637] but California's pattern jury instructions also require that death be the "natural and probable consequence" of the felony.[638] This instruction implies that death must appear natural and probable in light of what the accomplice knows about the felony. This would be consistent with California's general rule that "the liability of an aider and abettor extends . . . to the natural and reasonable consequences of the acts he knowingly and intentionally aids and encourages."[639] The question of accomplice liability for an unforeseeable killing in an enumerated felony does not appear to have been decided in Nevada, but Nevada courts often follow California precedent in interpreting Nevada's very similar code.

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[634] *See* CAL. PENAL CODE § 189 (Deering 2010); DEL. CODE ANN. tit. 11, § 635 (2010); GA. CODE ANN. § 16-5-1 (2010); 720 ILL. COMP. STAT. ANN. 5/9-1 (LexisNexis 2010); MD. CODE ANN., CRIM. LAW § 2-201 (LexisNexis 2010); MASS. GEN. LAWS ch. 265, § 1 (2010); MINN. STAT. § 609.19 (2010); MISS. CODE ANN. § 97-3-19, -27 (2010); NEV. REV. STAT. ANN. § 200.030 (LexisNexis 2009); N.C. GEN. STAT. § 14-17 (2010); OKLA. STAT. ANN. tit. 21, § 701.8 (West 2010); R.I. GEN. LAWS § 11-23-1 (2010); S.C. CODE ANN. § 16-3-10 (2009); TEX. PENAL CODE ANN. § 19.02 (West 2003); VA. CODE ANN. § 18.2-32 (2010); Commonwealth v. Garner, 795 N.E.2d 1202, 1209-10 (Mass. App. Ct. 2003); Gore v. Leeke, 199 S.E.2d 755, 758-59 (S.C. 1973).

[635] MASS. SUP. CT. CRIM. PRAC. JURY INSTRUCTIONS §§ 2.2 (c), 2.3.4 (2004).

[636] *See* MINN. STAT. § 609.05(2) (2009); *see also* State v. Mahkuk, 736 N.W.2d 675, 682 (Minn. 2007).

[637] People v. Cavitt, 91 P.3d 222, 227 (Cal. 2004).

[638] 1-500 JUDICIAL COUNCIL OF CAL. CRIM. JURY INSTRUCTIONS 540C (2010).

[639] People v. Beeman, 674 P.2d 1318, 1326 (Cal. 1984).

The remaining eleven states[640] predicate individual felony murder on non-enumerated felonies committed in foreseeably dangerous ways. These jurisdictions therefore must confront the problem of liability for accomplices to whom death was not foreseeable. Only five of these jurisdictions also predicate individual felony murder liability on any non-dangerous enumerated felonies: Illinois, Maryland, Mississippi and North Carolina predicate felony murder on simple burglary, while Rhode Island predicates felony murder on drug offenses.[641] Almost all of these eleven jurisdictions set high standards of culpability for accomplice liability, requiring intent to aid, or sharing in the principal's intent.[642]

Most jurisdictions imposing individual liability for killing in the course of foreseeably dangerous felonies condition accomplice liability for felony murder on the foreseeability of death as a result of the predicate felony. Delaware, which conditions felony murder on killing recklessly or negligently in the course of a felony, holds co-felons liable only if the killing was a "foreseeable consequence" of the felony.[643] This is also Delaware's general

[640] *See* DEL. CODE ANN. tit. 11, § 635 (2007); GA. CODE ANN. § 16-5-1 (2008); 720 ILL. COMP. STAT. ANN. 5/9-1 (LexisNexis 2002); MD. CODE ANN., CRIM. LAW § 2-201 (LexisNexis 2010); MISS. CODE ANN. § 97-3-27 (2010); N.C. GEN. STAT. § 14-17 (2009); OKLA. STAT. ANN. tit. 21, § 701.8 (2010); R.I. GEN. LAWS § 11-23-1 (2010); S.C. CODE ANN. § 16-3-10 (2009); TEX. PENAL CODE ANN. § 19.02 (West 2003); VA. CODE ANN. § 18.2-32 (2005); Gore v. Leeke, 199 S.E.2d 755, 757 (S.C. 1973).

[641] Four of the remaining jurisdictions have no enumerated felonies at all. DEL. CODE ANN. tit. 11, § 635 (2010); GA. CODE ANN. § 16-5-1 (2010); S.C. CODE ANN. § 16-3-10 (2009); TEX. PENAL CODE ANN. § 19.02 (West 2009). Oklahoma predicates collective liability on its enumerated felonies. OKLA. STAT. ANN. tit. 21, § 701.8 (2010). Virginia has enumerated felonies, but all of them are dangerous by our criteria. VA. CODE ANN. § 18.2-32 (2010).

[642] *See* DEL. CODE ANN. tit. 11, § 271 (2007); GA. CODE ANN. § 16-2-20(b)(3) (2008) ("Intentionally aids or abets the commission of the crime . . . . "); 720 ILL. COMP. STAT. ANN. 5/5-2(c) (LexisNexis 2002); TEX. PENAL CODE ANN. § 7.02(a)(2) (West 2003) (requiring an intent to promote or assist the crime); State v. Francis, 459 S.E.2d 269, 272 (N.C. 1995) (requiring that the defendant knowingly encouraged or aided, causing or contributing to commission of crime). Rhode Island and Oklahoma require that the accomplice share in the culpability required for the offense. State v. Medeiros, 599 A.2d 723, 726 (R.I. 1991) ("The defendant, in order to be convicted as an aider or abettor, must be proved to have shared in the criminal intent of the person who actually committed the criminal act."); OKLA. UNIF. JURY INSTRUCTIONS – CRIM. § 2.5 (2009); *see also* MD. CRIM. PAT. JURY INSTRUCTIONS 6:01 (2007) (requiring that the defendant somehow seek to make the crime succeed); 2 GA. JURY INSTRUCTIONS – CRIM. § 1.42.10 (stating that a person is a party to a crime only if they intentionally help the crime); 1-3 VA. MODEL JURY INSTRUCTIONS – CRIM. INST. No. 3.100 (intent to aid). Mississippi and South Carolina have not clarified the culpability generally required for accomplice liability.

[643] Hassan-El v. State, 911 A.2d 385, 395 (Del. 2006); Claudio v. State, 585 A.2d 1278, 1282 (Del. 1991).

standard concerning the liability of accomplices for secondary crimes.[644] Illinois holds co-felons responsible for killings "reasonably or probably necessary to accomplish the objects of [the] felony"[645] or that are the "direct and foreseeable consequence" of the felony.[646] South Carolina holds co-felons liable for any homicide that is the "probable or natural consequence of the acts which were done in pursuance of this common design."[647] Virginia holds accomplices liable for the "incidental probable consequences" of concerted action,[648] including killings that "should have been contemplated as a probable result" of the felony.[649] North Carolina also holds felons responsible for any crimes, including killings, in furtherance of, and foreseeable as a consequence of, the felony.[650] Rhode Island courts have held that an accomplice in burglary is liable for all further crimes "natural[ly] and reasonabl[y] or probabl[y]" resulting.[651] The Texas criminal code does not specifically address felony murder liability of co-felons, but provides generally that those who conspire to commit a felony are guilty of any other felony committed in furtherance of the unlawful purpose that should have been anticipated as a result of the conspiracy.[652] Since the Texas code requires that felony murderers cause death by means of an act clearly dangerous to life, an accomplice arguably cannot "inten[d] to promote" the offense without aiding or encouraging the clearly dangerous act.[653] Mississippi conditions accomplice liability for a secondary homicide on the violence of the primary felony: "[w]hen two or more persons act in concert, with a common design, in committing a crime of violence upon others, and a homicide committed by one of them is incident to the execution of the common design, both are criminally liable for the homicide."[654] Oklahoma has traditionally held co-conspirators liable for fatal acts perpetrated in felonies that involve some danger of death.[655] The current pattern jury

[644] *Hassan-El*, 911 A.2d at 393. Note the logic of this argument dictates that accomplices should only be liable for first degree felony murder if they are reckless with respect to the risk of death.

[645] People v. Bongiorno, 192 N.E. 856, 858 (Ill. 1934).

[646] People v. Burke, 407 N.E.2d 728, 730 (Ill. App. Ct. 1980); People v. Tillman, 388 N.E.2d 1253, 1257 (Ill. App. Ct. 1979).

[647] Gore v. Leeke, 199 S.E.2d 755, 757 (S.C. 1973); S.C. REQUEST TO CHARGE § 2-3 (2007).

[648] 1-3 VA. MODEL JURY INSTRUCTIONS – CRIM. INST. No. 3.160 (2010).

[649] Haskell v. Commonwealth, 243 S.E.2d 477, 483 n.4 (Va. 1978).

[650] *See* State v. Bonner, 411 S.E.2d 598, 600 (N.C. 1992).

[651] *See* State v. Medeiros, 599 A.2d 723, 726 (R.I. 1991).

[652] TEX. PENAL CODE ANN. § 7.02(b) (West 2010).

[653] *Id.*

[654] Moffett v. State, 3 So. 3d 165, 175 (Miss. Ct. App. 2009).

[655] *See* Oxendine v. State, 350 P.2d 606, 610 (Okla. Crim. App. 1960).

instructions hold co-felons liable only for secondary crimes "necessary in order to complete" the felony or flight from the felony.[656]

Georgia conditions complicity in felony murder on foreseeability in principle, but a recent decision undermined this requirement in practice. In *Williams v. State*, the Georgia Supreme Court upheld an instruction that when a victim is killed in furtherance of a conspiracy to rob, "such killing is the probable consequence of the unlawful design to rob."[657] This instruction appears to be an unconstitutional presumption, requiring the jury to infer foreseeable danger from felonious motive. Such a presumption is defensible only if confined to felonies that are, like robbery, inherently dangerous.

Finally, Maryland courts have recently moved away from a foreseeability requirement for complicity in felony murder, despite general rules holding accomplices liable only for "acts that naturally and necessarily flow from the common design and are in furtherance of, or pursuant to, that design."[658] In the 1974 case of *Mumford v. State*, an accomplice in a burglary successfully argued that she should be acquitted of a killing unforeseeable as a result of the planned burglary.[659] The court reasoned that death must be "a natural probable consequence" of the intended felony.[660] However the 1999 decision of an intermediate appellate court rejected a foreseeability standard, requiring only that the killing be in furtherance of the felony.[661] This decision was at odds with precedent, principle, authorized pattern jury instructions, and the law of jurisdictions with similar statutes. Hopefully it will be overruled by a higher court.

C. *Collective Liability Jurisdictions*

A substantial minority of jurisdictions have sought to avoid the complicity problem by defining felony murder collectively, as a crime of participation in a felony that causes death. Collective liability felony murder statutes take two quite different forms. One defines felony murder as causing death *by means of* certain felonies. We may call this *direct collective liability*. Direct collective felony murder liability appears to require that non-killers be just as culpable for the death as the killer. The other form conditions felony murder on participating in a felony in which *another person* causes death. We may call this *vicarious collective liability*. This may permit liability for participants who cannot foresee the dangers imposed by the killer. Florida is one of a dozen states with such a vicarious collective liability rule. Yet most of the

[656] OKLA. UNIF. JURY INSTRUCTIONS – CRIM. § 4-93 (2009).

[657] Williams v. State, 578 S.E.2d 858, 860 (Ga. 2003).

[658] MD. CRIM. PATTERN JURY INSTRUCTIONS 4:17.7 (2007).

[659] Mumford v. State, 313 A.2d 563, 566 (Md. Ct. Spec. App. 1974).

[660] *Id.*

[661] Watkins v. State, 726 A.2d 795, 573-74 (Md. Ct. Spec. App. 1999) (upholding a felon's murder liability for one co-felon's killing of yet another co-felon to eliminate him as a witness).

others states in fact limit felony murder liability to deaths foreseeable to each participant. Only Florida, Alaska, and possibly Colorado have not required foreseeability. Thus, the *New York Times* is right in one important sense[662]: Florida's felony murder rule does impose a risk of strict liability on accomplices in fatal felonies, and it should be reformed. Yet, Florida's law is atypical, and the Holle case, discussed in the Introduction, does not illustrate its problems.

1. Causing Death by Means of a Felony

Ohio, Maine and Missouri define felony murder as causing death as a result of certain felonies.[663] Oklahoma defines first (but not second) degree felony murder as including participating in certain felonies that cause death.[664] These statutes imply that since the felony itself causes death, every participant in the felony is causally responsible for the death. If causation requires an act foreseeably causing death, it would seem that death should be foreseeable as a result of the felony to *each* person who causes death by participating in the felony.

Ohio defines felony murder as causing the death of a person as a proximate result of the commission or attempt of a violent felony of sufficiently high grade.[665] Ohio's code enumerates several violent felonies and also defines a violent felony as an offense committed purposely or knowingly and involving injury or a risk of serious injury or death.[666] These limitations arguably restrict predicate felonies to those imposing a negligent risk of death. For example, predicate burglaries of sufficient grade are limited to those committed in an occupied structure with a person present, or in a dwelling when a person is likely to be present.[667] Given the use of violent felonies as predicates for felony murder, it seems most reasonable to construe such felonies as requiring knowledge of the circumstances that creates the risk of serious injury or death. Thus construed, the aggravated burglary statute would require knowledge that a victim was present in a building, or a victim was likely to be present in a dwelling. To be liable as an accomplice in Ohio, one must aid or abet another in committing the offense with the kind of culpability required for the commission of the offense.[668] Thus, an accomplice in an aggravated burglary should be as aware of the aggravating circumstance creating a risk of death or serious injury as would the perpetrator. On this reasoning, Buddy would be

[662] *See* Liptak, *supra* note 1.

[663] ME. REV. STAT. ANN. tit. 17-A, § 202 (2010); MO. REV. STAT. § 565.021 (2009) ("killed as a result of"); OHIO REV. CODE ANN. § 2903.02 (LexisNexis 2010).

[664] OKLA. STAT. tit. 21, § 701.7 (2010).

[665] OHIO REV. CODE ANN. § 2903.02.

[666] *Id.* § 2901.01.

[667] *Id.* § 2911.12(A)(1)-(2).

[668] *Id.* § 2923.03.

guilty of neither aggravated burglary nor felony murder.[669] Unfortunately, a mid-level Ohio court eschewed this approach in the troubling case of *State v. Kimble*.[670] As argued earlier,[671] the decision is not authorized by the language or structure of the code and Ohio's highest court should correct it.[672]

Three other jurisdictions, Maine, Missouri and Oklahoma, define felony murder as including participation in a felony in which death is caused by the commission or attempt of the felony, but they leave a loophole that could result in accomplice liability without culpability. The Maine and Missouri statutes cover deaths caused by *flight from* the felony,[673] and Oklahoma's jury instructions do the same.[674] These provisions could implicate Armory for the felony murder of Passenger during reckless flight from the felony, which he might not have expected.[675]

The Maine statute limits predicate felonies to the traditional five plus escape and murder of a different victim, and requires that death be "a reasonably foreseeable consequence of such commission, attempt or flight."[676] Because the Maine statute makes all participants potentially liable for such deaths, it would seem that death must be foreseeable to each participant. This interpretation is consistent with Maine's general provision on complicity, implicating one in any crime reasonably foreseeable as a result of her conduct.[677] A Maine standard jury instruction provides that one is guilty of murder if:

> with the intent of promoting or facilitating the crime of robbery, the accused aided or attempted to aid or agreed to aid another person in the planning or commission of the crime of robbery and commission of the crime of murder by that other person was a reasonably foreseeable consequence of *participation by the accused* in the robbery.[678]

Finally, Maine provides an apparently redundant affirmative defense for accomplices like Buddy who do not kill, are not armed, are not aware that a co-felon is armed, and do not expect the co-felon to kill.[679]

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[669] *See supra* text accompanying note 392.

[670] *See* State v. Kimble, No. 06 MA 190, 2008 WL 852074, at *6 (Ohio Ct. App. 2008) (holding that accomplice to felony murder predicated on armed robbery need not be aware that her co-felons are armed).

[671] *See supra* text accompanying notes 329-334.

[672] At the very least, the holding should be confined to robbery, on the grounds that even unarmed robbery is a violent felony that justifies felony murder liability.

[673] ME. REV. STAT. ANN. tit. 17-A, § 202 (2010); MO. REV. STAT. § 565.021 (2010).

[674] OKLA. UNIF. JURY INSTRUCTIONS – CRIM. § 4-65 (2009).

[675] *See supra* text accompanying note 392.

[676] ME. REV. STAT. ANN. tit. 17-A, § 202.

[677] *Id.* § 57(3)(A).

[678] 1-6 ME. JURY INSTRUCTIONS MANUAL § 6-33 (2010) (emphasis added).

[679] ME. REV. STAT. ANN. tit. 17-A, § 202.

Accomplice liability rules are particularly important in Missouri because it does not limit predicate felonies to enumerated or inherently dangerous offenses. As noted earlier, Missouri instead conditions causation on foreseeable danger of harm. Missouri requires that accomplices have "the required culpable mental state" for the offense[680] and attempt to aid "with the purpose of promoting the commission of an offense."[681] Missouri courts hold co-felons responsible for deaths foreseeable as a result of the felony.[682]

Finally, Oklahoma's convoluted statute imposes first degree felony murder liability on those who participate in an enumerated felony that results in death or in the commission of which a participant causes death.[683] Oklahoma's enumerated felonies are all dangerous except for drug offenses. Oklahoma's jury instructions extend accomplice liability for felonies to those who provide aid "knowingly" and with "criminal intent."[684] They further provide that "[a] death is caused by . . . conduct if the conduct is a substantial factor in bringing about the death and the conduct is dangerous and threatens or destroys life."[685] The jury instructions make participants liable for deaths caused by the conduct of another participant that is an "inseparable part of" or "necessary in order to complete" the offense, or flight from the offense.[686] The statute would be clearer if it simply required participation in an enumerated felony causing death.

2. Participating in a Felony in Which Death Is Caused by a Participant

Seven jurisdictions – Alabama, Connecticut, Montana, New York, North Dakota, Oregon, and Washington – define felony murder as participation in a felony in which any participant causes death.[687] In all of these states but

[680] MO. REV. STAT. § 562.036 (2009).

[681] *Id.* § 562.041.

[682] *See* State v. Blunt, 863 S.W.2d 370, 371 (Mo. Ct. App. 1993).

[683] OKLA. STAT. tit. 21, § 701.7 (2010).

[684] OKLA. UNIF. JURY INSTRUCTIONS – CRIM. § 2-6 (2009).

[685] *Id.* § 4-60.

[686] *Id.* § 4-65.

[687] *See* ALA. CODE § 13A-6-2 (2010); CONN. GEN. STAT. § 53a-54c (2010); MONT. CODE ANN. § 45-5-102 (2010) (permitting a felony murder conviction for "the person or any person legally accountable for the crime"); N.Y. PENAL LAW § 125.25 (McKinney 2010); N.D. CENT. CODE § 12.1-16-01 (2010); OR. REV. STAT. § 163.115 (2009); WASH. REV. CODE ANN. § 9A.32.030 (LexisNexis 2010). An eighth jurisdiction with a similar statute, Arkansas, does not impose true felony murder. Arkansas defines first degree murder as including participation in a felony in which a participant kills under circumstances manifesting extreme indifference to human life. Arkansas courts instruct juries that "when two or more persons are criminally responsible for an offense, each person is liable only for the degree of the offense that is consistent with the person's own [culpable mental state] [or] [accountability for an aggravating fact or circumstance]." 1-4 ARK. MOD. JURY INSTRUCTIONS – CRIM. 2d 405 (brackets in original). Felony manslaughter (negligent killing in furtherance of felony) and the predicate felony itself are both lesser included offenses of

Alabama, the felony includes flight.[688] All require that accomplices have either the intention to promote the offense, the mental culpability required for the offense, or both.[689] All appear to require that death be caused in furtherance of the felony.[690] Thus, for the most part, these states require that the accomplice share in the felonious aim that motivates the act causing death.

To what extent do these seven states also condition the felony-murder liability of non-triggermen on negligence? Jurisdictions can do this in three ways: by requiring negligence on the part of each participant; limiting predicate felonies to those inherently dangerous; or requiring that death result from danger foreseeable to all participants.

As noted above, the North Dakota code's default rules appear to condition felony murder on recklessness, although courts have not considered the question.[691] Alabama's definition of homicide requires a culpable mental state of at least negligence for felony murder.[692] Five of these seven states – Connecticut, New York, North Dakota, Oregon, and Washington – have an affirmative defense for non-triggermen who were not armed and had no reason to know their co-felons were armed or would kill.[693] Such a defense would acquit Buddy. Unfortunately, it shifts the burden onto the defendant to disprove negligence.[694]

Previous analysis showed that Oregon restricts predicates to inherently dangerous enumerated felonies.[695] Three states – Connecticut, New York, and North Dakota – do so with the important exception that they include unaggravated burglaries.[696] Alabama, Washington, and Montana predicate

this form of murder in Arkansas. Thus it would seem that accomplices in a felony must participate in the felony with extreme indifference to human life or knowledge of circumstances manifesting such indifference to be liable for murder.

[688] CONN. GEN. STAT. § 53a-54c; MONT. CODE ANN. § 45-5-102; N.Y. PENAL LAW § 125.25; N.D. CENT. CODE § 12.1-16-01; OR. REV. STAT. § 163.115; WASH. REV. CODE ANN. § 9A.32.030.

[689] ALA. CODE § 13A-2-23; CONN. GEN. STAT. § 53a-8; MONT. CODE ANN. § 45-2-302; N.Y. PENAL LAW § 20.00; N.D. CENT. CODE § 12.1-03-01; OR. REV. STAT. § 161.155; WASH. REV. CODE ANN. § 9A.08.020.

[690] ALA. CODE § 13A-6-2; CONN. GEN. STAT. § 53a-54c; N.Y. PENAL LAW § 125.25; N.D. CENT. CODE § 12.1-16-01; OR. REV. STAT. § 163.115; WASH. REV. CODE ANN. § 9A.32.030; State v. Russell, 198 P.3d 271, 279 (Mont. 2008); State v. Weinberger, 671 P.2d 567, 568 (Mont. 1983); State *ex rel.* Murphy v. McKinnon, 556 P.2d 906, 910 (Mont. 1976).

[691] *See supra* text accompanying notes 194-200.

[692] *See supra* notes 208-212 and accompanying text.

[693] CONN. GEN. STAT. § 53a-16b; N.Y. PENAL LAW § 125.25(3)(b)-(d); N.D. CENT. CODE § 12.1-16-01(c)(2)-(4); OR. REV. STAT. § 163.115(3)(b)-(d); WASH. REV. CODE § 9A.32.030(1)(c)(ii)-(iv).

[694] CONN. GEN. STAT. § 53a-12; N.Y. PENAL LAW § 25.00; N.D. CENT. CODE § 12.1-01-03(3); OR. REV. STAT. § 161.055(2); WASH. REV. CODE § 9A.32.030(1)(c).

[695] *See supra* note 262 and accompanying text.

[696] CONN. GEN. STAT. § 53a-54c (2010); N.Y. PENAL LAW § 125.25 (McKinney 2006);

felony murder on non-enumerated foreseeably dangerous felonies as well as traditional dangerous felonies.[697] However, Alabama limits predicate burglaries to aggravated ones, and limits non-enumerated felonies to those "clearly" dangerous to human life.[698] This implies that the danger – even if not inherent in the offense – must be apparent to each defendant. This requirement comports with the official commentary on the felony murder provision, characterizing felony murder liability as justifiable only if restricted to foreseeable deaths.[699] Thus Oregon and Alabama limit felony murder liability to participation in felonies implying negligence.

Courts in four other states appear to base felony murder liability on the foreseeability of death to each participant. Connecticut courts have interpreted the requirement that death be caused "in furtherance" of the felony to mean that death must result from circumstances foreseen as part of the common plan.[700] A Washington court upheld a felony murder conviction based on evidence that a child's death was "a natural and probable consequence" of defendant's "actions as an accomplice" in an assault.[701] The Montana Supreme Court overturned a felony murder conviction predicated on attempted aggravated assault because of a failure to prove the defendant could foresee death or knew the killer had a gun.[702] Another Montana decision justified accomplice liability for felony murder as imposing responsibility on "people who engage in dangerous acts likely to result in death."[703] New York long used the same foreseeability standard in assessing the responsibility of killers and other participants,[704] and appears to have continued to do so after adopting its collective liability statute.[705]

It appears that all seven states conditioning felony murder on participating in a felony in which another participant causes death effectively require that all felony murderers exhibit at least negligence toward death. Buddy should not be liable in any of these states, although Armory might be liable for Passenger's death. To the extent that the law in any one of these states remains uncertain, courts should conform it to the principle of dual culpability, which is supported by the prevailing consensus among these states.

N.D. CENT. CODE § 12.1-16-01 (2010).

[697] *See supra* note 263 and accompanying text.

[698] ALA. CODE § 13A-6-2 (2010).

[699] *See supra* note 210.

[700] State v. Valeriano, 468 A.2d 936, 938 (Conn. 1983).

[701] State v. Jackson, 976 P.2d 1229, 1238 (Wash. 1999).

[702] *See* State v. Weinberger, 671 P.2d 567, 576 (Mont. 1983).

[703] State v. Cox, 879 P.2d 662, 668 (Mont. 1994); *see also* State *ex rel*. Murphy v. McKinnon, 556 P.2d 906, 910 (Mont. 1976).

[704] *See* People v. Giusto, 99 N.E. 190, 193 (N.Y. 1912); People v. Giro, 90 N.E. 432, 434 (N.Y. 1910).

[705] People v. Hernandez, 624 N.E.2d 661, 665-66 (N.Y. 1983).

3. Participating in a Felony in Which Death Is Caused by any Person

An additional five states – Alaska, Arizona, Colorado, Florida, and New Jersey – condition liability on participating in an enumerated predicate felony in which death is caused by any person.[706] The predicate felonies include the traditional five plus escape. In some of these states they include drug offenses;[707] terrorist offenses;[708] and child abuse, manslaughter of another, and resisting arrest.[709] Of these, all but the drug offenses and simple burglary[710] seem inherently dangerous. All of these states except Florida include flight in the felony, however.[711] All provide, either by statute, or in pattern jury instructions, that accomplices must purposely or knowingly promote the offense.[712]

Only Arizona requires by statute that the act causing death always be in furtherance of the felony.[713] Alaska and Colorado require that the act causing death occur in furtherance or in the course of the felony.[714] The Florida and New Jersey codes provide temporal criteria only,[715] however Florida courts have adopted a requirement that death occur as a consequence of the felony.[716]

To what extent do these five states require that the felony cause death in a way foreseeable to the accomplice? The New Jersey pattern instruction, following *State v. Martin*,[717] requires the prosecution to prove that "death was a probable consequence" of the commission, attempt, or flight from the predicate felony.[718] In addition, New Jersey has the affirmative defense for

[706] *See* ALASKA STAT. § 11.41.110 (2008); ARIZ. REV. STAT. ANN. § 13-1105 (2010); COLO. REV. STAT. § 18-3-102 (2010); FLA. STAT. § 782.04 (2010); N.J. STAT. ANN. § 2C:11-3 (West 2005 & Supp. 2010). Florida also punishes causing death in non-enumerated felonies, but with no liability for other accomplices in the felony.

[707] *See* ALASKA STAT. § 11.41.110 (2008); ARIZ. REV. STAT. ANN. § 13-1105 (2010); FLA. STAT. § 782.04 (2010).

[708] ARIZ. REV. STAT. ANN. § 13-1105 (2010); FLA. STAT. § 782.04 (2010); N.J. STAT. ANN. § 2C:11-3 (West 2005 & Supp. 2010).

[709] *See* FLA. STAT. § 782.04 (2010).

[710] Of these states, only Alaska limits liability to aggravated burglary. *See* ALASKA STAT. § 11.41.110(a)(3) (2008); *supra* note 595.

[711] *See supra* note 236.

[712] ALASKA STAT. § 11.16.110(2) (2008); ARIZ. REV. STAT. ANN. § 13-301 (2010); COLO. REV. STAT. § 18-1-603 (2010); N.J. STAT. ANN. § 2C:2-6(c)(1) (West 2005); ARIZ. JURY INSTRUCTIONS – CRIM. 3D 3.01 (2009); FLA. STAN. JURY INSTRUCTIONS CRIM. CASES § 3.5(a) (2010) (defining a principal as one who aids with "conscious intent that the criminal act be done").

[713] ARIZ. REV. STAT. ANN. § 13-1105 (2010).

[714] ALASKA STAT. § 11.41.110 (2008); COLO. REV. STAT. § 18-3-102 (2010).

[715] FLA. STAT. § 782.04 (2010); N.J. STAT. ANN. § 2C:11-3 (West 2005 & Supp. 2010).

[716] *See* Lester v. State, 737 So. 2d 1149, 1151 (Fla. Dist. Ct. App. 1999); Allen v. State, 690 So. 2d 1332, 1334 (Fla. Dist. Ct. App. 1997).

[717] State v. Martin, 573 A.2d 1359, 1375 (N.J. 1990).

[718] *See* N.J. MODEL CRIM. JURY CHARGES 2C:11-3a(3) (2009).

unarmed non-triggermen who do not know their co-felons are armed and do not have reason to expect they will kill and – unlike other states – places the burden on the prosecution to disprove the affirmative defense beyond a reasonable doubt.[719] Arizona holds participants in a felony liable for deaths that are the "natural and proximate result thereof,"[720] or that are naturally and foreseeably caused by acts in furtherance of the felony.[721] It has approved an instruction saying "[a] person whose deliberate acts in perpetrating" a predicate felony have "set in motion a chain of events which cause the death of another person, which was a risk reasonably to be foreseen, is guilty of first degree murder."[722] Because the statute imposes collective liability, this instruction would seem applicable to all participants. In Colorado, the case of *Auman v. People*[723] implied – but did not directly hold – that felons are responsible for killings they have reason to foresee.[724] The court explained that defendant's knowledge that the killer was armed and posed a danger to the victim would have inculpated her, if she had been complicit in the predicate burglary.[725]

Finally, Alaska and Florida have not adopted foreseeability standards for causation or complicity. They could well convict Buddy of felony murder even though he had no reason to anticipate Cat's fatal struggle with the armed security guard. Although Florida law was misapplied in the Ryan Holle case, Florida law does currently permit conviction for felony murder on the basis of strict liability. Yet this is unusual among collective felony murder liability jurisdictions. Florida and Alaska courts should determine that a person is not killed in the perpetration of a felony unless such a death is a foreseeable consequence of the felony. Until then, their felony murder laws will remain proverbial exceptions proving the rule of foreseeability.

Yet even instructing juries to require foreseeability cannot fully redeem these statutes. These statutes are obviously designed to preclude judicial imposition of an agency limitation. Although the end is legitimate, the means are perverse, throwing out the baby of proximate causation with the bathwater of agency. The resulting statutes flout principle by purporting not to require *any* causal responsibility on the part of the felons. Though better in practice than in principle, these statutes willfully embrace the hyperbolic critique of felony murder as liability without fault, and enact it into law.

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[719] *Id.*

[720] State v. Lopez, 845 P.2d 478, 481 (Ariz. Ct. App. 1992).

[721] State v. Rutledge, 4 P.3d 444, 446 (Ariz. Ct. App. 2000).

[722] *Lopez*, 845 P.2d at 481-82.

[723] 109 P.3d 647 (Colo. 2005).

[724] *Id.* at 657.

[725] *Id.*

IV. INDEPENDENT FELONY REQUIREMENTS

The dual culpability principle conditions felony murder liability on felonious purpose combined with culpable indifference to a risk of death. We have seen that most felony murder jurisdictions limit felony murder liability to deaths caused negligently. We will now consider the extent to which these jurisdictions also require a felonious purpose.

All felony murder jurisdictions require felonious purpose in one important way: they limit felony murder liability to those who have committed, attempted, or promoted certain felonies. In most jurisdictions one cannot attempt a felony or be complicit in a felony without having a wrongful purpose. Traditional predicate felonies – arson, burglary, robbery, rape, and kidnapping – all involve wrongful purposes. Traditional accounts of felony murder liability as transferring of intent from an intended wrong to an unintended injury presume that the predicate felony involves a wrongful purpose. Most jurisdictions require felonious purpose by means of a second device as well – requiring that the act causing death be committed in furtherance of the felony. A dozen states include such a requirement in their statutes,[726] and another nineteen jurisdictions have adopted similar standards by judicial decision.[727]

[726] Eight states require that the death occurs in the course of *and* in furtherance of the felony. *See* ALA. CODE § 13A-6-2 (2010); ARIZ. REV. STAT. ANN. § 13-1105 (2010); CONN. GEN. STAT. § 53a-54c (2010); N.Y. PENAL LAW § 125.25 (McKinney 2009); N.D. CENT. CODE § 12.1-16-01 (1997); OR. REV. STAT. § 163.115 (2009); TEX. PENAL CODE ANN. § 19.02 (West 2003); WASH. REV. CODE § 9A.32.050 (2010). Two require that the death occurs in the course of *or* in furtherance of the felony. ALASKA STAT. § 11.41.110 (2008); COLO. REV. STAT. § 18-3-102 (2010). Two extend accomplice liability to secondary crimes committed in furtherance of the primary crime. IOWA CODE § 703.2 (2009); MINN. STAT. § 609.05-2 (2009).

[727] *See* Comer v. State, 977 A.2d 334, 339-40 (Del. 2009); United States v. Heinlein, 490 F.2d 725, 735 (D.C. Cir. 1973); Lee v. United States, 699 A.2d 373, 384 (D.C. 1997); Lester v. State, 737 So. 2d 1149, 1151 (Fla. Dist. Ct. App. 1999); Allen v. State, 690 So. 2d 1332, 1334 (Fla. Dist. Ct. App. 1997); State v. Hokenson, 527 P.2d 487, 492 (Idaho 1974); People v. Bongiorno, 192 N.E. 856, 857-58 (Ill. 1934); Vance v. State, 620 N.E.2d 687, 690 (Ind. 1993); State v. Hoang, 755 P.2d 7, 8 (Kan. 1988); State v. Mauldin, 529 P.2d 124, 127 (Kan. 1974); Mumford v. State, 313 A.2d 563, 566 (Md. Ct. Spec. App. 1974); Commonwealth v. Ortiz, 560 N.E.2d 698, 700 (Mass. 1990); Commonwealth v. Heinlein, 152 N.E. 380, 384 (Mass. 1926); State v. Russell, 198 P.3d 271, 279 (Mont. 2008); State v. Weinberger, 671 P.2d 567, 580-81 (Mont. 1983); State *ex rel.* Murphy v. McKinnon, 556 P.2d 906, 910 (Mont. 1976); Romero v. State, 164 N.W. 554, 555 (Neb. 1917); Nay v. State, 167 P.3d 430, 435 (Nev. 2007); State v. Bonner, 411 S.E.2d 598, 600 (N.C. 1992); State v. Franklin, No. 06-MA-79, 2008 WL 2003778, at *13 (Ohio Ct. App. May 5, 2008); Commonwealth v. Tate, 401 A.2d 353, 355 (Pa. 1979); Gore v. Leeke, 199 S.E.2d 755, 757-58 (S.C. 1973); State v. Pierce, 23 S.W.3d 289, 294 (Tenn. 2000); State v. Buggs, 995 S.W.2d 102, 106 (Tenn. 1999); Haskell v. Commonwealth, 243 S.E.2d 477, 483 (Va. 1978); Doane v. Commonwealth, 237 S.E.2d 797, 798 (Va. 1977); Kennemore v. Commonwealth, 653 S.E.2d 606, 609 (Va. Ct. App. 2007); Griffin v. Commonwealth, 533 S.E.2d 653, 657-

A third important device for conditioning felony murder liability on felonious purpose is a merger limitation. Such a rule requires that predicate felonies endanger some interest other than the physical health of the victim. This section will briefly review the development of the merger doctrine and then examine its current prevalence in felony murder law. This review will suggest the merger doctrine is an integral and traditional feature of felony murder law, widely adhered to in contemporary law. I will argue that the merger doctrine is best understood as an independent felonious purpose requirement. I will acknowledge that some commonly enumerated predicate felonies lack an independent felonious purpose, but nevertheless warrant murder liability on the basis of extreme indifference to human life. Apart from these exceptions, however, failure to observe merger limitations can lead to undeserved murder liability in violation of the principle of dual culpability.

A. *The Merger Problem*

A felony murder rule aggravates an unintended killing to murder on the basis of committing or attempting a felony. To aggravate the unintended killing to murder, the felony must be distinct from the killing. Yet felonies include some unintended killings which are nevertheless punished less severely than murder. It would subvert any effort to grade homicide if every felonious homicide aggravated itself to murder. Some criterion is therefore needed to distinguish predicate felonies from the homicides they aggravate. This is the merger problem.

It may seem we could solve the merger problem by simply excluding homicide offenses as predicate felonies. Yet a nonfatal felony may involve conduct and culpability required for a lesser homicide offense such as manslaughter. If death results, the perpetrator could be guilty of murder for conduct the legislature graded as a lesser form of homicide. Indeed, a felony might involve less culpability than a lesser homicide offense. Thus, most jurisdictions punish intentional killing as voluntary manslaughter if committed with provocation or extreme emotional disturbance. If a similarly aroused defendant strikes a blow with intent to injure, or with a deadly weapon, he is likely guilty of a felonious assault. If the victim dies, the assailant would not be guilty even of voluntary manslaughter in most jurisdictions if he lacked intent to kill; yet he might be guilty of felony murder. An alternative theory of homicide liability would be involuntary manslaughter, if the assailant recklessly disregarded a risk of death. If, however, felonious assault could serve as a predicate felony, the assailant would be guilty of murder rather than manslaughter.

58 (Va. Ct. App. 2000); Montague v. Commonwealth, 522 S.E.2d 379, 381 (Va. Ct. App. 1999); King v. Commonwealth, 368 S.E.2d 704, 706 (Va. Ct. App. 1988); State *ex rel*. Painter v. Zakaib, 411 S.E.2d 25, 26 (W. Va. 1991); State v. Wayne, 289 S.E.2d 480, 482 (W. Va. 1982). *But see* State v. Cox, 879 P.2d 662, 668 (Mont. 1994) (rejecting causal standard).

The *Miller* and *Jenkins* cases from the Introduction illustrate the potential injustice of predicating felony murder on an assault.[728] Miller's only intentional act was punching another teen with his fist. His assault was aggravated to a felony only because of the fatal result. Jenkins merely struggled to shake free of a pursuing police officer. His offense was a felony only because the victim was an officer. It did not require any felonious motive such as resisting arrest. An unexpected death from an unarmed physical altercation would not have been murder at common law, and might not even have been manslaughter.[729] Even if these assaults had been reckless of life, reckless homicide would merit only manslaughter liability in most American jurisdictions. Thus, predicating felony murder on felonious assault would frustrate the grading schemes typically found in American homicide statutes. Adding conduct or culpability not included in homicide offenses requires a predicate felony attacking some interest other than the life or health of the victim.

As we have seen, predicate felonies can be defined by enumeration or categorization. Legislatures confront the merger problem in enumerating felonies. They can solve it by restricting enumerated predicate felonies to those attacking interests other than life or health. This is generally true of the traditionally enumerated felonies of arson, burglary, rape, robbery, and kidnapping. Courts confront the merger problem when they apply categorical rules predicating murder on dangerous, forcible, or severely punished felonies. Courts sometimes face merger arguments that murder should not be predicated on enumerated felonies under certain circumstances – for example, when burglary is committed for the purpose of assaulting the deceased. Yet courts have been understandably reluctant to carve an exception from a specific statutory directive to harmonize it with a general statutory design.

Merger limitations may take at least five forms. A *homicide test* simply excludes all statutory homicide offenses punished less severely than felony murder. A *lesser included offense test* excludes predicate felonies unless they have statutory offense elements not included in homicide offenses punished less severely than felony murder. An *independent act test* excludes predicate felonies unless they involve some act beyond that required for the homicide. An *independent interest test* excludes predicate felonies unless they endanger some interest other than the life or health of the victim. We might say that such a test limits the "extra" element to a result element. An *independent culpability test* excludes predicate felonies unless they involve culpability with respect to harming an interest other than the life or health of the victim. The most prevalent formulation of this test requires an independent *purpose*, but less demanding versions might require only knowing acceptance of, or reckless indifference toward, an independent harm.

[728] *Supra* notes 2-3 and accompanying text.

[729] Binder, *supra* note 55, at 103-04.

Which of these tests is best? The oft-stated purpose of a merger rule is to maintain the coherence and integrity of a scheme for grading homicide offenses. Thus, a merger limitation requires that a predicate felony have some feature that appropriately aggravates a homicide and relevantly distinguishes it from homicides graded below murder. Judicial merger tests have often been justified by one of three purposes: deterring dangerous felonies, deterring dangerous acts by those engaged in felonies, or transferring culpability from an intended felonious result to an unintended homicide. According to the view defended in this article, however, a felony murder rule is not an effective method of deterring predicate felonies. More generally, homicide liability is not a particularly effective method of deterring dangerous conduct. If a felony murder rule is justifiable it must be on the basis of desert. Desert is conventionally understood to be a function of wrongdoing and culpability, where wrongdoing is injuring or endangering some legal interest.[730] Assuming all homicides are equally wrongful injuries to life, their punishment should depend on their culpability. It follows that a predicate felony properly aggravates a homicide to murder by adding culpability. The only one of the five tests considered above that measures added culpability is the independent culpability test. Accordingly, the most persuasive traditional rationale for a merger standard is the aim of transferring culpability from one felonious wrong to another.

Because legal scholars generally disapprove of felony murder liability itself, they have offered little guidance to courts on how to solve the merger problem. Herbert Wechsler's and Jerome Michael's influential *Rationale of Homicide* article dismissed New York's merger doctrine as a "less sensible" substitute for a dangerous felony requirement, rather than evaluating it as an additional limitation ensuring additional culpability.[731]

One of the few contemporary criminal law theorists to address the issue is Claire Finkelstein. Finkelstein assumes that felony murder requires two separate acts: an act that constitutes a felony and a distinct act committed in the course of the felony that causes death.[732] On this basis she argues that the traditional predicate felony of arson – setting a fire to destroy a building – should be deemed to merge with any resulting homicide, since the homicide would result from the same act as that intended to destroy the building.[733] Yet Finkelstein's independent act test has further counterintuitive implications. If a sexual assailant sodomizes a victim with a broom-handle, fatally perforating

[730] *See* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 461 (1978); MICHAEL MOORE, PLACING BLAME 45, 71 (1997).

[731] Wechsler & Michael, *supra* note 86, at 715-16.

[732] Claire Finkelstein, *Merger and Felony Murder*, *in* DEFINING CRIMES 218, 220 (R.A. Duff & Stuart P. Green eds., 2005).

[733] *Id.* at 224-25, 231, 238-39 (criticizing *Murphy v. State*, 665 S.W.2d 116 (Tex. Crim. App. 1983) and *People v. Billa*, 125 Cal. Rptr. 2d 842 (Dist. Ct. App. 2002), which reject application of the merger doctrine to arson)

the victim's bowel, the act causing death is an element of the forcible sodomy. If a robber fatally shoots an armored car driver and takes money from the truck, the fatal shooting is the force or threat required for robbery. Thus, Finkelstein's requirement of an independent act causing death would seem to exclude paradigmatic felony murder scenarios. Moreover, Finkelstein's independent act test is also subject to a more fundamental objection: she offers no moral reason why two *acts* are necessary for the felon to deserve murder liability for causing death. This is for the sensible reason that – like most contemporary scholars – she doubts felony murder liability *is* deserved.[734] Thus, she endorses an independent act standard only as a logical implication of what she takes to be an arbitrary feature of a pointless rule.

Yet the felony murder doctrine is not a pointless rule. Instead, it serves the purpose of imposing deserved punishment for those who kill with a combination of two forms of culpability: bad expectations and bad motives. Rather than viewing felony murder as a combination of *two acts*, the principle of dual culpability explains the merger doctrine as a requirement that the fatal felony combines *two culpable mental states*: indifference to a risk of death, and an independent felonious purpose. The combination of these two mental states ensures that the fatal felon is sufficiently culpable to deserve murder liability. Felony murder requires a dangerous and therefore negligent act causing death and an act aimed at some other wrongful end. These two acts may be the same – what matters are the two distinct mental states.

This independent culpability test explains why arson has been a traditional predicate for felony murder, and why courts do not see it as merging with the resulting homicide. Thus, the purpose of destroying a building is the additional bad end that makes fatal arson worse than reckless manslaughter. Such an independent felonious purpose renders the felon who negligently or recklessly causes death culpable enough to deserve murder liability. Her culpability for causing death carelessly is aggravated by the bad end she seeks.

In applying the merger doctrine, it is important to remember it is not an end in itself, but merely a means to ensure that a predicate felony sufficiently aggravates a killer's culpability to justify murder liability. This means that the merger limitation may become less compelling as the predicate felony becomes more dangerous or violent. If the cognitive dimension of culpability is greater, the normative dimension of culpability need not be as great to merit murder liability. Let us presume that a negligent killing in furtherance of an independent felonious purpose is sufficiently culpable to justify murder liability for a resulting death. A reckless killing might warrant murder liability if committed in furtherance of an illegal or antisocial purpose that is not, by itself, felonious. Alternatively, a reckless killing might warrant murder liability if aggravated by a culpable attitude toward an independent harm, that falls short of purpose, such as indifference. In other words, where the

[734] *See id.* at 218-19.

commission of a certain felony entails depraved indifference to human life, a merger limitation is no longer needed.

Which predicate felonies violate the requirement of independent culpability? Clearly felony murder should not be predicated on manslaughter of the deceased. Yet aggravated involuntary manslaughter typically results from a fatal battery where the defendant shows recklessness by using a deadly weapon or intentionally inflicting an injury. Thus involuntary manslaughter often is just a felonious assault that results in death. Voluntary manslaughters, requiring provoked intentional killing, will generally involve such felonious assaults as well. If most manslaughter offenses include felonious assaults, preserving manslaughter as a distinct offense also precludes using felonious assault of the deceased as a predicate felony.

Should felony murder be predicated on manslaughter or assault of another victim? Arguably the answer may depend on the circumstances. If the assailant misses the intended victim and fatally hits someone else, it seems sensible simply to transfer manslaughter liability. If the assailant knowingly endangers multiple victims in attacking one intended victim, however, he acts with depraved indifference to human life rather than merely recklessness. If a victim is killed, murder liability seems warranted. On similar reasoning, drive-by shooting might be an acceptable predicate felony, where the offense endangers multiple victims. Another scenario where felony murder can sensibly be predicated on felonious assault is where the offender fatally assaults a third party who resists or impedes the assault. Such an assailant has killed culpably in furtherance of a substantial and independent wrong, and so deserves felony murder liability.

Suppose there are special circumstances further aggravating a fatal and otherwise felonious assault. Murder liability might be justified if these additional wrongs are sufficiently substantial and independent. A possible approach would consider whether the aggravating circumstance entails a purpose sufficiently malign to warrant felony liability by itself. Consider a predicate felony of burglary, where the intended felony is the assault. This is essentially a felonious assault combined with a mere trespass to property. Or consider the predicate felony of shooting into a dwelling, which also combines a felonious assault with an invasion of property. Both of these felonies involve unlawful purposes independent of physical injury to the victim, but the independent unlawful purposes are not felonious. Moreover, the independent purposes are not the ultimate purposes: the violation of property is in furtherance of the assault and not the other way around. These considerations suggest murder liability is not deserved.

An alternative analysis considers whether the aggravating circumstance adds *enough* culpability to the felonious assault to warrant murder liability. If we assume that a felonious assault recklessly imposes a risk of death, it takes less additional culpability to aggravate it to murder than is required for a felony entailing negligence. An antisocial but not necessarily felonious purpose may suffice. A willingness to endanger additional victims may suffice as well.

Let us apply this analysis to three controversial predicate felonies: burglary for purposes of felonious assault, shooting into a house, and mayhem. If burglary for purposes of an aggravated assault is reckless with regard to life and also violates a property interest in habitation it arguably reflects extreme indifference to human life. If additional victims are likely to be present, the case for extreme indifference murder is strengthened further. Thus it seems to me that burglary for purposes of an aggravated assault is a justifiable predicate for felony murder even though it lacks an independent felonious purpose. Intentionally shooting into an occupied dwelling is also a justifiable predicate, assuming the assailant must be aware of the danger to human life. Such an offense is more justifiable as a predicate felony if it requires shooting with intent to injure, or knowledge that victims are present. If an aggravated assault is reckless of life and also particularly cruel – involving torture or mutilation, for example – this additional malign purpose arguably aggravates the recklessness to depraved indifference to human life. Thus mayhem should be acceptable as a predicate felony.

Child abuse is another common predicate felony that can embody a particularly aggravated form of assault. Aggravating factors might include such wrongful desiderative attitudes as (1) indifference to the physical and emotional vulnerability of a youthful victim, or (2) willful violation of a duty of care toward the child. These attitudes are not felonious purposes, but they nevertheless reflect bad values. Choosing to act on the basis of such values arguably aggravates an assailant's culpability from recklessness to depraved indifference. A sadistic purpose to torture, degrade, or enslave is an independent felonious purpose that can aggravate a merely negligent rather than reckless act. Thus child abuse is a potentially defensible predicate felony, provided it is defined in such a way as to require (1) reckless endangerment of the child's life or (2) a sadistic purpose. Similar arguments would apply to elder abuse.

Another problematic set of offenses are those we criminalize not because they aim at an injury, but because they carelessly impose a risk to life. One example would be drunk driving, which can become a felony in some jurisdictions if the offense is repeated. Drunk driving is generally considered reckless and so a drunk-driving fatality is a paradigm case of involuntary manslaughter. There is no additional culpability to aggravate the reckless killing to murder. Felony murder jurisdictions have not traditionally enumerated drunk driving as a predicate felony for felony murder. Yet many jurisdictions do predicate felony murder on drug trafficking, criminalized primarily because of the health risks of drug use. Moreover, the risk imposed by drug trafficking is well below that imposed by drunk driving. When a drug customer dies of an overdose, is there any additional wrong that aggravates the dealer's culpability? Arguably there is: the dealer profits by exploiting the drug user's addictive or otherwise irrational desire for a product that society has proscribed on patently paternalistic grounds. The resulting transaction is arguably destructive rather than welfare-enhancing: drug habits can impoverish

users and drive them into crime. On this analysis, drug profits are misappropriated property, and drug-dealing has the same exploitative structure of risk-imposition as classic predicate felonies like robbery. Of course this characterization of drug dealing depends on some contestable value judgments, but once those value judgments have been made it follows that the pursuit of drug profits should count as an independent felonious purpose. Drug trafficking is probably not sufficiently dangerous to qualify as a predicate felony, but it is sufficiently independent.

In sum, the principle of dual culpability always precludes conditioning felony murder on manslaughter, felonious assault of the deceased and drunk driving. It precludes conditioning felony murder on felonious assault of another in simple intent-transferring situations, but permits it when the assailant consciously exposes several persons to danger. The same reasoning justifies predicating felony murder on drive-by shooting defined to require consciously endangering multiple victims, or consciously endangering one for an antisocial motive. The principle of dual culpability permits conditioning felony murder on aggravated forms of felonious assault that are reckless and involve an antisocial purpose or knowing violation of an independent legal interest. This permits conditioning felony murder on severe child abuse, particularly in violation of a fiduciary duty; and on burglary for purposes of felonious assault. It arguably permits predicating felony murder on shooting into a home.

B. *A History of the Merger Problem*

1. Emergence

The merger problem was recognized as soon as felony murder rules were first proposed. In his 1716 treatise William Hawkins reasoned that malice was implicit in a crime that "necessarily tends to raise Tumults and Quarrels, and consequently cannot but be attended with the Danger of personal Hurt."[735] Those who kill in committing such crimes "shall be adjudged guilty of Murder."[736] Hawkins then reasoned that this rule should extend to killings in the course of felonies "*à fortiori*."[737] Why to felonies even more so? Presumably, because felonies justified armed resistance. Yet this was not necessarily true of a simple assault which was not a felony, which might have been provoked or invited, and from which the victim should retreat if possible. It was hard to assign fault when an argument turned violent, but an independent criminal motive resolved the ambiguity and made fault manifest. Hawkins therefore required that the predicate felony aim at an additional wrong transcending danger to the victim: "such killing shall be adjudged Murder, which happens in the Execution of an unlawful Action, principally

[735] HAWKINS, *supra* note 46, at 74.

[736] *Id*.

[737] *Id*.

intended for some other Purpose, and not to do a personal Injury to him in particular who happens to be slain."[738] Thus Hawkins included a merger limitation in the first scholarly defense of felony murder liability, well before felony murder liability was enacted or applied as law in any jurisdiction.

When felony murder liability developed in nineteenth-century American states, most jurisdictions avoided the merger problem by limiting predicate felonies. Most felony murder jurisdictions aggravated murder to first degree based on participation in enumerated felonies. While second degree felony murder liability predicated on non-enumerated felonies was theoretically possible in many jurisdictions, it was rarely imposed. Although seventeen states defined second degree felony murder as an offense during some portion of the Nineteenth Century, I have found only eight reported cases in which second degree felony murder liability was imposed, in only six states. Two of these were transferred intent cases, predicated on attempted murder of a different victim. None was predicated on assault of the deceased and none discussed the merger problem.[739]

The merger problem instead emerged in the minority of jurisdictions with categorical felony murder rules. These were ungraded felony murder statutes, third degree felony murder statutes, or common law felony murder rules.[740] A

[738] *Id*. at 83.

[739] *Origins*, *supra* note 46, at 187. Ten states conditioning first degree murder on enumerated felonies imposed felony murder liability by statute: California, Nevada, Utah, Montana, Idaho, Texas, Alabama, Oregon, New York (from 1860-1873), and Missouri (after 1879). Of these, all but Missouri and Alabama clearly imposed second degree murder liability for killing in the course of non-enumerated felonies. Missouri and Alabama both left the definition of second degree murder to the common law. In these ten states there were only two reported cases affirming second degree felony murder convictions: one predicated on theft in California and one predicated on murder of another victim in Texas. Twenty-one states aggravated murder to first degree when committed in the course of enumerated felonies: Arkansas, Connecticut, Delaware, Indiana, Iowa, Kentucky (briefly), Louisiana (from 1812-1855), Maine, Maryland, Massachusetts, Michigan, Nebraska, New Hampshire, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, Washington, West Virginia, and Wyoming. States interpreting these provisions to impose first degree felony murder liability included: Arizona, Connecticut, Delaware, Indiana, Iowa, Maine, Massachusetts, Michigan, Nebraska, New Hampshire, North Carolina, Pennsylvania, Tennessee, Virginia, and Washington. States interpreting these provisions to impose second degree felony murder liability were: Delaware, Iowa, Maine, Massachusetts, Minnesota, New Hampshire, Pennsylvania, Tennessee, and Virginia. States actually imposing second degree felony murder liability in reported cases were: Delaware (one robbery case, one abortion case), Iowa (two abortion cases), Maine (one abortion case), and Tennessee (murder of a different victim). *Id.* at 187-91.

[740] *Id.* at 121, 138-39, 172, 175-76, 181. States with ungraded felony murder statutes were New York from 1829-1860 and after 1873, Mississippi from 1839-1857, Missouri before 1879, Illinois, Georgia, and New Jersey. States with third degree felony murder provisions were Minnesota, Wisconsin, Florida. States with common law felony murder rules were Kentucky, Louisiana, South Carolina.

merger limitation was first developed in New York. An 1829 New York statute defined the killing of a human being "when perpetrated without design to effect death by a person engaged in the commission of any felony," as one form of murder.[741] The 1838 case of *People v. Rector* concerned a murder conviction for a fatal beating with a heavy iron bar.[742] Although upholding the conviction on the extreme indifference theory, the court rejected a felony murder theory. The court considered fallacious the argument "that the blow cannot be a misdemeanor when it results in death, because the act is then a felony, to wit, manslaughter, ergo it is murder."[743] Manslaughter could not be a predicate felony because it "merged" with the homicide. The 1872 decision in *Foster v. People* extended this logic to exclude felonious assault as a predicate felony for felony murder, on grounds that it, too, merges with the homicide.[744] An 1879 case rejected this analysis for the predicate felony of rape, however. Even if the fatal assault supplied the force traditionally required as an element of rape, rape involved a felonious purpose independent of that assault.[745]

Later New York cases raised some doubts about the continuing validity of the merger doctrine. Thus, an 1888 conviction was predicated on the unusual offense of illegal entry or assault by a tramp.[746] Since the defendant strangled the victim while invading a home it is hard to tell whether the entry or the assault was the predicate felony, but there is no discussion of merger in the case.[747] An 1894 case upheld a felony murder conviction predicated on the murder of a different victim,[748] and an 1895 case held that escape did not merge.[749] Nevertheless, in the 1906 case of *People v. Huther* the New York Court of Appeals reaffirmed that assault of the deceased merged.[750] The court held that an assault contained no element that was not an "ingredient" of the homicide.[751] The key requisite for a predicate felony was a *purpose* independent of the homicide, rather than a second *act*: "By the same act one may commit two crimes . . . it is not necessary that there should be an act collateral to or independent of that which causes the death; but if the act causing the death be committed with a collateral and independent felonious

[741] *Id.* at 121.

[742] People v. Rector, 19 Wend. 569, 592-93 (N.Y. Sup. Ct. 1838).

[743] *Id.* at 592.

[744] Foster v. People, 50 N.Y. 598, 602-03 (1872).

[745] *See* Buel v. People, 78 N.Y. 492, 497 (1879).

[746] *See* People v. Deacons, 16 N.E. 676, 677 (N.Y. 1888).

[747] *Id.*

[748] *See* People v. Miles, 38 N.E. 456, 458 (N.Y. 1894).

[749] *See* People v. Wilson, 40 N.E. 392, 394 (N.Y. 1885).

[750] People v. Huther, 77 N.E. 6, 8-9 (N.Y. 1906).

[751] *Id.* at 8.

design it is sufficient."[752] This holding was reaffirmed repeatedly throughout the first half of the Twentieth Century.[753]

Another state that developed a merger doctrine in the Nineteenth Century was Missouri. In 1845 Missouri adopted a felony aggravator statute conditioning first degree murder on any felony. This statute also contained a provision imposing murder liability for any unintended killings that were murder at common law – presumably those resulting from an intentional injury – if committed in the course of felonies.[754] In applying this categorical felony murder rule, the Missouri Supreme Court initially rejected New York's merger doctrine. In both the 1853 case of *State v. Jennings* and the 1857 case of *State v. Nueslein*, the court upheld first degree murder convictions for beating deaths predicated on the felony of inflicting "great bodily harm."[755] In the 1878 case of *State v. Shock*, however, the court overruled these cases and embraced the merger doctrine formulated in *Rector*.[756] Overturning the first degree murder conviction of a defendant who had viciously beaten a small child to death, the court held that "inflicting great bodily harm" could not be a predicate for felony murder:

> [T]he words "other felony" used in the first section refer to some collateral felony, and not to those acts of personal violence to the deceased which are necessary and constituent elements of the homicide itself, and are, therefore, merged in it, and which do not, when consummated, constitute an offense distinct from the homicide.[757]

The court interpreted the phrase "other felony" as not necessarily encompassing all felonies: "As this section . . . includes only such murders as were murders at common law, it may well be doubted whether the words 'other felony' can be held to include offenses which were not felonies at common law."[758] The court rejected the possibility that some felonies might support second rather than first degree murder.[759] The following year, the

[752] *Id.* at 9.

[753] *See* People v. Spohr, 100 N.E. 444, 446 (N.Y. 1912) (holding assault merges); People v. Moran, 158 N.E. 35, 36-37 (N.Y. 1927) (holding assault with a deadly weapon on victim merges); People v. Wagner, 156 N.E. 644, 646 (N.Y. 1927) (holding assault with deadly weapon on deceased merges, but assault with deadly weapon on a different victim does not); People v. Lazar, 2 N.E.2d 32, 33 (N.Y. 1936) (holding assault merges); People v. Luscomb, 55 N.E.2d 469, 472 (N.Y. 1944) (holding assault merges).

[754] *See* MO. REV. STAT. ch. 47, art. 2, § 7 (1845); *Origins*, *supra* note 46, at 176.

[755] State v. Jennings, 18 Mo. 435, 441-44 (1853); State v. Nueslein, 25 Mo. 111, 126 (1857).

[756] State v. Shock, 68 Mo. 552, 563-64 (1878).

[757] *Id.* at 561-62.

[758] *Id.* at 562.

[759] *Id.* at 560.

Missouri legislature codified the court's position by limiting predicate felonies for first degree murder to arson, burglary, robbery, rape, and mayhem.[760]

Two other courts touched on the problem obliquely during the Nineteenth Century, in Mississippi and South Carolina. Between 1839 and 1857 Mississippi had a categorical felony murder statute modeled on New York's.[761] Thereafter, Mississippi limited felony murder to enumerated felonies. But in the 1858 case of *Mask v. State* the Mississippi Supreme Court applied the earlier categorical statute to a case in which the defendant shot a brother and sister, wounding the brother and killing the sister.[762] The Court rejected as harmless error an instruction that would have imposed murder liability if the defendant killed the deceased while committing a felony against her brother. Since the only possible felony would have been assault, the Mississippi court may have disapproved this instruction on the ground that this predicate felony merged with the homicide.[763] South Carolina's murder statute did not address homicide in the course of crime during the Nineteenth Century. Nevertheless, in the 1889 case of *State v. Alexander*, the South Carolina Supreme Court approved felony murder liability as authorized by the common law, and approved an instruction predicating felony murder on assault and battery of the victim, without discussing the merger problem.[764]

Finally, Wisconsin and Florida, two states defining homicide in the course of any felony as third degree murder, had cases implying that third degree murder could be predicated on assault or mayhem of the deceased.[765] This is not surprising since the punishment for this offense was comparable to the punishment imposed for manslaughter in other states.[766]

In the early Twentieth Century, North Carolina and Kansas took opposing positions on the merger question. North Carolina adopted a categorical felony aggravator statute in 1893 and soon applied it in imposing felony murder liability.[767] In the 1904 case of *State v. Capps* the North Carolina Supreme Court rejected the merger doctrine in upholding a first degree felony murder conviction predicated on the felony of firing into occupied property.[768] Kansas courts appear not to have imposed felony murder liability under the state's

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[760] *See* MO. REV. STAT. § 1232 (1879).

[761] Act of Feb. 15, 1839, ch. 66, tit. 2, § 4, 1839 Miss. Laws 102, 105-06. Mississippi's first murder statute simply punished murder without defining it. *See* MISS. REV. CODE ch. 54, § 2 (1824).

[762] Mask v. State, 36 Miss. 77, 85 (1858).

[763] *See id.* at 91.

[764] State v. Alexander, 8 S.E. 440, 441 (S.C. 1889).

[765] *See* Collins v. State, 12 So. 906, 909 (Fla. 1893); Boyle v. State, 15 N.W. 827, 832 (Wis. 1883); State v. Hammond, 35 Wis. 315, 319 (1874).

[766] *See Origins*, *supra* note 46, at 181-82.

[767] Act of Feb. 11, 1893, ch. 85, 1893 N.C. Sess. Laws 76; State v. Covington, 23 S.E. 337, 353 (N.C. 1895).

[768] State v. Capps, 46 S.E. 730, 732 (N.C. 1904).

categorical felony aggravator statute until 1921.[769] Soon thereafter, the Kansas Supreme Court considered the merger problem in the 1926 case of *State v. Fisher*.[770] Defendant shot at the tires of a car trespassing on his land, and fatally hit a passenger. Convicted of first degree murder predicated on assault with a deadly weapon, he appealed successfully. The court held that assault with a deadly weapon merged because its elements were "ingredients" of the homicide.[771] In 1944 the Kansas court again struck down a first degree murder conviction predicated on assault, citing the holding in *Fisher*.[772]

2. The Merger Controversy in the Era of Code Reform

Litigation of the merger issue became more widespread in the 1960s after the Model Penal Code brought the felony murder doctrine under increasing critical scrutiny, and before legislatures responded with code revisions. Courts in Oklahoma, Kansas, Arizona, Oregon, and California applied merger limitations. Courts in Florida and Washington rejected such limitations, however.

During this period Oklahoma's code defined murder as including unintended homicide in the commission of any felony. In a 1961 case the Oklahoma Supreme Court held that manslaughter and assault merged with the resultant homicide, citing Kansas and New York cases with approval.[773] Kansas reiterated its merger limitation in a 1967 case upholding a murder conviction predicated on gun possession by an ex-felon, reasoning that possession and use of a gun are distinct acts.[774] This two act test implied that assault continued to merge with the resulting homicide, as a 1969 case confirmed.[775]

Arizona had a graded felony murder statute similar to California's until 1978. In 1965, the Arizona Supreme Court also ruled that assault with a deadly weapon merged with a resulting homicide, so that no second degree felony murder instruction was necessary in a case where first degree murder was charged.[776] The court cited arguments from the New York cases that predicating felony murder on assault would subvert the statutory grading scheme and transform manslaughters into murders.[777] Later cases declined to apply this doctrine to two enumerated felonies: burglary for the purpose of assault on a different victim and arson.[778]

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[769] *See* State v. Roselli, 198 P. 195, 198 (Kan. 1921).

[770] State v. Fisher, 243 P. 291, 293 (Kan. 1926).

[771] *Id.*

[772] *See* State v. Severns, 148 P.2d 488, 491 (Kan. 1944).

[773] *See* Tarter v. State, 359 P.2d 596, 602 (Okla. Crim. App. 1961).

[774] *See* State v. Moffitt, 431 P.2d 879, 894 (Kan. 1967).

[775] *See* State v. Clark, 460 P.2d 586, 590 (Kan. 1969).

[776] *See* State v. Essman, 403 P.2d 540, 545 (Ariz. 1965).

[777] *Id.*

[778] *See* State v. Miller, 520 P.2d 1113, 1114 (Ariz. 1974); State v. Miniefield, 522 P.2d

Oregon had a graded felony murder statute providing second degree felony murder liability for unintended killings in non-enumerated killings.[779] The Oregon Supreme Court allowed assault of one victim to be used as a predicate for felony murder of another in a 1957 case, although without directly addressing the question of merger.[780] A 1965 case permitted burglary for the purpose of assault to be used as a predicate for felony murder, again without considering the merger question directly.[781] The next year, however, the Oregon Supreme Court held that assault of the deceased could not serve as a predicate for felony murder.[782] In 1971 the court reaffirmed that burglary for the purposes of assault did not merge, however.[783]

The California courts initially rejected the merger doctrine. Between 1951 and 1966 California decisions predicated second degree felony murder on felonious assault[784] and possession of a gun by a felon,[785] and predicated first degree murder on burglary for the purpose of murder.[786] In 1969, however, the California Supreme Court embraced a merger limitation in the pivotal case of *People v. Ireland*, holding that the felony assault with a deadly weapon was an "integral part of the homicide . . . included in fact within the offense charged."[787]

Over the next two years, California courts decided several cases working out the contours of this merger doctrine. The California Supreme Court took the surprising step of barring felony murder liability predicated on burglary for the purposes of assault. The court viewed the requisite element of intent to commit assault as "integral to the homicide," even though the act of unauthorized entry obviously is not.[788] With this decision, the court transformed the "integral to the homicide" test into a requirement of independent felonious purpose. Soon the court further extended this rule to hold that burglary predicated on assault of one victim merged with the killing of a second victim.[789] The court argued that since intent transfers from one victim to another anyway, homicide of a second victim is not independent of the intended assault. An appellate court held that the felony of firing into an

25, 27 (Ariz. 1974).

[779] OR. REV. STAT. § 163.020 (1969) (repealed 1971).

[780] *See* State v. Reyes, 308 P.2d 182, 192 (Or. 1957).

[781] State v. Morris, 405 P.2d 369, 370 (Or. 1965).

[782] *See* State v. Branch, 415 P.2d 766, 768 (Or. 1966); *see also* State v. Shirley, 488 P.2d 1401, 1403 (Or. Ct. App. 1971).

[783] *See* State v. Tremblay, 479 P.2d 507, 510 (Or. Ct. App. 1971).

[784] *See* People v. Carmen, 228 P.2d 281, 286 (Cal. 1951).

[785] *See* People v. Robillard, 358 P.2d 295, 300 (Cal. 1960).

[786] *See* People v. Talbot, 414 P.2d 633, 641 (Cal. 1966) (explicitly rejecting New York's merger rule); People v. Hamilton, 362 P.2d 473, 485 (Cal. 1961).

[787] People v. Ireland, 450 P.2d 580, 590 (Cal. 1969).

[788] People v. Wilson, 462 P.2d 22, 28 (Cal. 1969).

[789] *See* People v. Sears, 465 P.2d 847, 852-53 (Cal. 1970).

occupied dwelling merged, presuming that endangering life rather than violating property was the ultimate felonious purpose.[790] The 1971 decision in *People v. Burton* confirmed the authority of the independent felonious purpose test and rejected a "same act" test. The court denied that robbery merges even though it "includes" assault as a necessary element, instead emphasizing that robbery has a purpose independent of assault.[791] Eventually, the California Supreme Court would apply the independent felonious purpose test to preclude predicating felony murder on child abuse, whether in the form of assault or neglect.[792]

California courts applied the independent felonious purpose test to permit predicating felony murder on the sale of dangerous drugs. One appellate court held that distribution of heroin does not merge.[793] The California Supreme Court approved this approach in a decision predicating felony murder on the felony of poisoning, where defendant sold methyl alcohol to an alcoholic.[794] The supreme court rejected an independent act test in favor of an independent intent test. Reiterating its view that felony murder liability serves to deter negligent and reckless killing during predicate felonies, the court reasoned that such deterrence presupposed a felonious aim independent of endangering the victim. Presumably that aim here and in the heroin case was profiting by exploiting the victim's addiction.

Other state courts rejected the merger doctrine during this period. The Florida Supreme Court declined to apply it to a burglary committed for the purpose of assault in a 1966 case. The court reasoned that the merger doctrine was unnecessary in a state which enumerated all predicate felonies.[795] The Washington Supreme Court declined to adopt New York's merger rule, on the ground that, unlike New York at that time, Washington graded felony murder predicated on non-enumerated felonies as second degree murder rather than first.[796] The court also noted that fatal assaults had been punished as murder in the common law.[797] The Maine Supreme Judicial Court upheld an instruction

[790] People v. Wesley, 89 Cal. Rptr. 377, 381 (Ct. App. 1970).

[791] People v. Burton, 491 P.2d 793, 801-02 (Cal. 1971).

[792] *See* People v. Smith, 678 P.2d 886, 891-92 (Cal. 1984), *overruling* People v. Northrop, 182 Cal. Rptr. 197 (Ct. App. 1982) (holding that child abuse merges where it takes the form of assault because there is no independent felonious purpose); People v. Benway, 210 Cal. Rptr. 530, 534 (Ct. App. 1985) (holding child abuse merges whether in the form of assault, failure to protect from assault, or other neglect).

[793] *See* People v. Taylor, 89 Cal. Rptr. 697, 702 (Ct. App. 1970).

[794] *See* People v. Mattison, 481 P.2d 193, 198-99 (Cal. 1971); *c.f.* People v. Calzada, 91 Cal. Rptr. 912, 915 (Ct. App. 1970) (rejecting an independent purpose test in favor of an independent act test in holding that driving under the influence of narcotics did not merge).

[795] *See* Robles v. State, 188 So. 2d 789, 792 (Fla. 1966).

[796] *See* State v. Harris, 421 P.2d 662, 665 (Wash. 1966).

[797] *Id.* at 664.

predicating felony murder on assault a few years before Maine adopted a new code limiting predicate felonies to those enumerated.[798]

3. Merger Under the New Codes

Many states adopted new criminal codes in response to the Model Penal Code but continued to impose felony murder liability. A majority of these new felony murder provisions limited predicate felonies to those enumerated and so limited the potential scope of any merger limitation.[799] Nevertheless, a substantial minority defined predicate felonies categorically.[800] A few states excluded murder and manslaughter as predicates.[801] Several state courts took up the merger question after the passage of these codes, particularly in jurisdictions defining predicate felonies categorically. Courts in some jurisdictions without new codes also considered merger questions during the same period.

The central controversy concerned predicating felony murder on assault of the deceased. Courts in Texas, Missouri, and Massachusetts precluded felony murder liability predicated on assault[802] while courts in Minnesota, Illinois, Georgia, and Iowa permitted such charges.[803]

None of the decisions precluding felony murder predicated on assault relied on California's independent felonious purpose test. In 1974 Texas adopted a new criminal code, with a murder definition that included causing death by

[798] *See* State v. Trott, 289 A.2d 414, 417-18 (Me. 1972).

[799] 1978 Alaska Sess. Laws ch.166, at 6; 1978 Ariz. Sess. Laws 729; 1974 Colo. Sess. Laws 251-53; 1974 Conn. Acts 466 (Reg. Sess.); 1976 Ind. Acts 730; 1976 Iowa Acts 555-56; 1972 Kan. Sess. Laws 482; 1975 Me. Laws 1294-95; 1977 Neb. Laws 96; 1978 N.J. Laws 540-41; 1965 N.Y. Laws 2387-88; 1973 N.D. Laws 254-55; 1971 Or. Laws 1903; 1974 Pa. Laws 216-17; 1979 S.D. Sess. Laws 200; 1973 Utah Laws 607; 1982 Wyo. Sess. Laws 523.

[800] 1977 Ala. Acts 836-37; 58 Del. Laws 1662-63 (1972); 1971 Fla. Laws 838; 1968 Ga. Laws 1276; 1961 Ill. Laws 2003; 1963 Minn. Laws 1200; 1983 Mo. Laws 926-27; 1973 Mont. Laws 1355; 1963 N.M. Laws 834-35; 1973 Tex. Gen. Laws 913; 1975 Va. Acts 21-22; 1975 Wash. Sess. Laws 833-34.

[801] *See* Malone v. State, 232 S.E.2d 907, 908 (Ga. 1977); *see also* 1983 Mo. Laws 926-27; 1973 Tex. Gen. Laws 913.

[802] *See* Commonwealth v. Quigley, 462 N.E.2d 92, 95-96 (Mass. 1984); State v. Hanes, 729 S.W.2d 612, 616-17 (Mo. Ct. App. 1987) (assault merges, so second degree murder instruction is not available); Garrett v. State, 573 S.W.2d 543, 545 (Tex. Crim. App. 1978).

[803] *See* Baker v. State, 225 S.E.2d 269, 271 (Ga. 1976) (predicated on aggravated assault); People v. Viser, 343 N.E.2d 903, 908 (Ill. 1975); State v. Ragland, 420 N.W.2d 791, 793 (Iowa 1988); State v. Beeman, 315 N.W.2d 770, 775 (Iowa 1982); State v. Abbott, 356 N.W.2d 677, 679-80 (Minn. 1984); State v. Jackson, 346 N.W.2d 634, 636 (Minn. 1984); State v. Loebach, 310 N.W.2d 58, 65 (Minn. 1981); Kochevar v. State, 281 N.W.2d 680, 686 (Minn. 1979); State v. Carson, 219 N.W.2d 88, 89 (Minn. 1974); State v. Smith, 203 N.W.2d 348, 350 (Minn. 1972); State v. Morris, 187 N.W.2d 276, 277 (Minn. 1971); State v. French, 402 N.W.2d 805, 808 (Minn. Ct. App. 1987).

means of an act clearly dangerous to life in the course of any felony other than manslaughter.[804] In the 1978 case *Garrett v. State*, however, a Texas criminal appeals court expanded this modest statutory merger limitation to also bar felony murder predicated on aggravated assault.[805] The court argued that the statutory requirement of a fatal dangerous act in the course of a felony implied that the clearly dangerous act causing death must be distinct from the predicate felony. Although the *Garrett* court explained felony murder liability as a transfer of intent from the predicate felony to the resulting death, it required two independent acts rather than two independent culpable mental states.[806] A later decision permitted felony murder predicated on aggravated assault of another victim.[807] Between 1978 and 1983 Missouri conditioned second degree murder on extreme indifference to human life manifested by committing any felony. In applying this statute a Missouri court held that such murder could not be predicated on assault, reasoning that since a fatal assault was already manslaughter or murder, assault was "included" within homicide.[808] Massachusetts did not adopt a new criminal code during this period, but retained a code conditioning first degree murder on severely punished felonies and permitting second degree murder liability predicated on other felonies. A 1984 case relied on Professor LaFave's treatise in finding that a predicate felony must be "separate from the acts of personal violence which constitute a necessary part of the homicide itself."[809]

Decisions permitting felony murder predicated on assault typically relied on statutory language and structure. The 1962 Illinois code predicated murder on any forcible felony, including an aggravated battery. In 1975 the Illinois Supreme Court placed weight on the legislature's enumeration of aggravated battery in arguing that a merger limitation would violate legislative intent.[810] The court also argued that fatal aggravated battery had been murder at common law, and that the purpose of conditioning felony murder on forcible felonies is to deter such felonies, not dangerous acts in furtherance of such felonies.[811] Iowa's 1978 code included a similar provision predicating felony murder on enumerated forcible felonies including assaults. In a 1982 case, the Iowa Supreme Court held that the "forcible felony" of willful injury could

[804] 1973 Tex. Gen. Laws 913.

[805] *Garrett*, 573 S.W.2d at 545.

[806] *Id.* at 546.

[807] *See* Wray v. State, 642 S.W.2d 27, 29-30 (Tex. App. 1982) (overturned on other grounds).

[808] *See* State Hanes, 729 S.W.2d 612, 617 (Mo. Ct. App. 1987).

[809] Commonwealth v. Quigley, 462 N.E.2d 92, 95 (Mass. 1984) (quoting WAYNE R. LAFAVE & AUSTIN W. SCOTT JR., HANDBOOK ON CRIMINAL LAW 559 (1972)).

[810] People v. Viser, 343 N.E.2d 903, 909 (Ill. 1975).

[811] *See id.*

support felony murder.[812] The court viewed the legislature's mention of assault as evidence of an intention to reject a merger limitation.[813]

Georgia's 1969 code defined murder as including causing death in the commission of any felony "irrespective of malice."[814] It limited involuntary manslaughter to causing death by means of either unlawful acts other than felonies, or lawful acts likely to cause death. In the 1970s, Georgia courts held that voluntary and involuntary manslaughter would merge with the resulting homicide,[815] but aggravated assault would not.[816] The Georgia Supreme Court reasoned that it was necessary to grade fatal assaults as murder because they could not be punished as involuntary manslaughter under the Georgia code, which excluded dangerous acts during felonies.[817] Georgia courts have expressed dissatisfaction with this scheme, urging the legislature to add reckless homicide to the code and exclude fatal assaults from felony murder.[818] The legislature's failure to heed this advice eventually led to the infamous result in the *Miller* case.[819]

Minnesota's 1963 code predicated second degree murder on unintended killing in the course of any felony.[820] The code graded negligent killings as first degree manslaughter if committed pursuant to a misdemeanor, and second degree manslaughter otherwise, but graded extreme indifference murder as third degree murder. As noted previously, Minnesota courts have limited felony murder to violent predicate felonies. They also have repeatedly imposed murder liability predicated on felonious assaults without addressing a merger challenge.[821]

Several courts considered merger arguments in felony murder cases predicated on child abuse during this period. Courts accepted such arguments

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[812] *See* State v. Beeman, 315 N.W.2d 770, 775-77 (Iowa 1982).

[813] *Id*. at 776-77 (citing State v. Hinkle, 229 N.W.2d 744, 750 (Iowa 1975)).

[814] 1968 Ga. Laws 1276.

[815] Malone v. State, 232 S.E.2d 907, 908 (Ga. 1977); *see also* Edge v. State, 414 S.E.2d 463, 465 (Ga. 1992) (explaining that where provocation is present, a jury may only convict for voluntary manslaughter to prevent malice from being wrongly attributed on the basis of the assault).

[816] Baker v. State, 225 S.E. 2d 269, 271-72 (Ga. 1976).

[817] *Id.*

[818] *See* Lewis v. State, 396 S.E.2d 212, 213 n.2 (Ga. 1990).

[819] Miller v. Martin, No. 1:04-cv-1120-WSD-JFK, 2007 U.S. Dist. LEXIS 13112, at *47-48 & n.10 (N.D. Ga. Feb. 26, 2007) (criticizing result as unjust and reflecting unique injustice of Georgia felony murder law).

[820] 1963 Minn. Laws 1200.

[821] *See* State v. Jackson, 346 N.W.2d 634, 636 (Minn. 1984); State v. Abbott, 356 N.W.2d 677, 679-80 (Minn. 1984); State v. Loebach, 310 N.W.2d 58, 65 (Minn. 1981); Kochevar v. State, 281 N.W.2d 680, 686 (Minn. 1979); State v. Carson, 219 N.W.2d 88, 89 (Minn. 1974); State v. Smith, 203 N.W.2d 348, 349-52 (Minn. 1972); State v. Morris, 187 N.W.2d 276, 277 (Minn. 1971); State v. French, 402 N.W.2d 805, 808 (Minn. Ct. App. 1987).

in Kansas and Oklahoma, as well as California.[822] Courts rejected such arguments in Georgia, Mississippi, South Dakota, and Texas.[823] All of the decisions precluding child abuse as a predicate felony simply viewed it as a form of assault. The California decisions applied the independent felonious purpose test.[824] A Kansas court rejected a lesser included offense test in favor of a vaguer test predicating murder on felonies "included" within the homicide.[825]

Most of the decisions permitting child abuse as a predicate felony also analogized it to assault. The Georgia decision simply followed from Georgia's position on assault.[826] The Mississippi Supreme Court invoked an earlier decision permitting felony murder predicated on burglary for the purpose of assault, reasoning that burglary and murder attacked different societal interests.[827] The court found that murder and child abuse statutes also protected different interests, offering the puzzling distinction that "[w]hile the latter statute is intended to protect the child, the former statute is designed to punish and act as a deterrent to such crimes should death result."[828] In 1977 South Dakota adopted a categorical felony murder rule, but replaced it two years later with an exhaustive enumeration of predicate felonies that excluded assault and child abuse. In 1980 South Dakota's Supreme Court applied the newly repealed categorical rule to an earlier case. It invoked an Illinois decision, and attributed intent to include all felonies to the legislature that enacted the earlier rule.[829] The Texas decisions were anomalous because they diverged from the position a Texas court had taken on assault. These decisions ignored *Garrett*'s independent act test and instead held that child abuse did not merge with felony murder because it was not a "lesser included offense" of murder or manslaughter.[830]

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[822] *See* State v. Prouse, 767 P.2d 1308, 1313 (Kan. 1989) (child abuse merges); State v. Lucas, 759 P.2d 90, 98-99 (Kan. 1988); Massie v. State, 553 P.2d 186, 191 (Okla. Crim. App. 1976); *see also* People v. Smith, 678 P.2d 886, 891 (Cal. 1984) (declaring that child abuse merges where it takes the form of assault because there is no independent felonious purpose); People v. Benway, 210 Cal. Rptr. 530, 534 (Ct. App. 1985) (stating child abuse merges whether in the form of assault, failure to protect from assault, or other neglect).

[823] *See* Holt v. State, 278 S.E.2d 390, 393 (Ga. 1981); State v. O'Blasney, 297 N.W.2d 797, 800 (S.D. 1980); Faraga v. State, 514 So. 2d 295, 303 (Miss. 1987); *Ex parte* Easter, 615 S.W.2d 719, 721 (Tex. Crim. App. 1981); Berghahn v. State, 696 S.W.2d 943, 948 (Tex. App. 1985).

[824] *Smith*, 678 P.2d at 891; *Benway*, 210 Cal. Rptr. at 535.

[825] *Lucas*, 759 P.2d at 96.

[826] *Holt*, 278 S.E.2d at 392.

[827] *Faraga*, 514 So. 2d at 303 (citing Smith v. State, 499 So. 2d 750, 754 (Miss. 1986)).

[828] *Id.*

[829] State v. O'Blasney, 297 N.W.2d 797, 800 (S.D. 1980) (citing People v. Viser, 343 N.E.2d 903, 908 (Ill. 1975)).

[830] *See Ex parte* Easter, 615 S.W.2d 719, 721 (Tex. Crim. App. 1981); Berghahn v. State, 696 S.W.2d 943, 948 (Tex. App. 1985).

Controversy also focused on the predicate felony of burglary for the purpose of assault or murder. Courts rejected arguments that such felonies merged in Oregon, New York, Arizona, District of Columbia, Kansas, and Mississippi. These courts expressed reluctance to bar a statutorily enumerated felony and sometimes argued that burglary threatens an interest independent of that attacked by murder. A Mississippi court reasoned that burglary could not merge because it violated a distinct interest in property.[831] An Oregon court argued that in enumerating burglary as a predicate for felony murder the legislature intended to give "added protection to persons who are within a dwelling place."[832] The New York Court of Appeals argued that the merger limitation was less necessary after the New York Penal Law limited felony murder to enumerated dangerous felonies.[833] The court also reasoned that punishing fatal assaults in the home served the legislature's primary aim of punishing foreseeable deaths, because such assaults were unusually dangerous.[834] A Kansas court cited the New York decision in predicating felony murder on burglary for purposes of assault.[835] The District of Columbia, which has an enumerated felonies rule, also followed New York. The court reasoned that burglary was independent of the homicide because it harmed a distinct interest in property.[836] The Arizona courts did not explain why burglary for purposes of assault could serve as a predicate felony when assault could not, but burglary was also an enumerated felony in Arizona.[837] Only Arkansas, which conditions felony murder on extreme indifference to human life, barred burglary with intent to assault as a predicate felony. The Arkansas court reasoned that a killing could not be in furtherance of a burglary if the burglary was a means of achieving the killing.[838]

A few courts considered and rejected challenges to other traditionally enumerated felonies such as robbery,[839] rape,[840] and arson.[841] An Arizona case

[831] *Smith*, 499 So. 2d at 754.

[832] State v. Reams, 636 P.2d 913, 916 (Or. 1981) (quoting State v. Tremblay, 479 P.2d 507, 517 (Or. Ct. App. 1971)).

[833] People v. Miller, 297 N.E.2d 85, 87 (N.Y. 1973).

[834] *Id.* at 87-88.

[835] State v. Foy, 582 P.2d 281, 288-89 (Kan. 1978) (citing *Miller*, 297 N.E.2d at 85).

[836] Blango v. United States, 373 A.2d 885, 888 (D.C. 1977).

[837] State v. Hankins, 686 P.2d 740, 744 (Ariz. 1984); State v. McGuire, 638 P.2d 1339, 1342 (Ariz. 1981); *see also* ARIZ. REV. STAT. ANN. § 13-1105 (1977); 1978 Ariz. Sess. Laws 729.

[838] *See* Parker v. State, 731 S.W.2d 756, 759 (Ark. 1987).

[839] *See* State v. Rueckert, 561 P.2d 850, 857-58 (Kan. 1977) (holding that robbery does not merge, because it is not a lesser included offense and lacks an independent felonious purpose).

[840] *See* State v. Champagne, 198 N.W.2d 218, 227 (N.D. 1972).

[841] *See* State v. Miniefeld, 522 P.2d 25, 28 (Ariz. 1974); Murphy v. State, 665 S.W.2d 116, 119-20 (Tex. Crim. App. 1983).

justified predicating felony murder on arson based on a lesser included offense test, pointing out that arson has elements not included in murder.[842] In *Murphy v. State*, a Texas court curiously invoked *Garrett*'s independent act test in predicating murder on arson, even though homicide does not require any act independent of arson.[843] Yet the court emphasized that the defendant's purpose – to destroy a building and fraudulently collect insurance – was independent of the homicide and threatened property rather than life.[844]

Two states rejected merger challenges to predicating felony murder on shooting into an occupied structure. A Texas court cited *Murphy* when using an independent interest test to permit a felony murder charge predicated on shooting into a building.[845] North Carolina courts also predicated felony murder on shooting into a house.[846] One such decision relied principally on the fact that a 1977 statutory reform had not introduced a merger limitation.[847]

4. Recent Developments

The merger controversy has continued in the last two decades, with additional states taking sides on the issue, and some others switching sides.[848]

Several courts have recently adopted merger limitations. In Alabama, which predicates felony murder on any felony dangerous to life, an appeals court excluded assault as a predicate felony on the grounds that it merges with a resulting homicide.[849] Three jurisdictions that formerly rejected merger limitations have now adopted them. In 2006, the Iowa Supreme Court overruled its *Beeman* decision, and held that an assault causing the victim's death cannot be a predicate for felony murder.[850] The North Carolina Supreme Court barred felony murder predicated on assault of the deceased with a deadly weapon.[851] "Otherwise," the Court reasoned, "virtually all felonious assaults

[842] *Miniefield*, 522 P.2d at 28.

[843] *Murphy*, 665 S.W.2d at 119.

[844] *Id.*

[845] *See* Aguirre v. State, 732 S.W.2d 320, 324-25 (Tex. Crim. App. 1987).

[846] *See* State v. King, 340 S.E.2d 71, 73-74 (N.C. 1986); State v. Mash, 287 S.E.2d 824, 826 (N.C. 1982); State v. Wall, 286 S.E.2d 68, 71 (N.C. 1982); State v. Swift, 226 S.E.2d 652, 668-69 (N.C. 1976); State v. Williams, 199 S.E.2d 409, 411-13 (N.C. 1973).

[847] *Wall*, 286 S.E.2d at 72.

[848] For less significant developments see *Crawford v. State*, 121 P.3d 582, 585 (Nev. 2005); *State v. Campos*, 921 P.2d 1266, 1271-72 (N.M. 1996) (merger doctrine no longer necessary because New Mexico now requires depraved indifference for felony murder); *Johnson v. State*, 61 P.3d 1234, 1248 (Wyo. 2003) (enumerated child abuse felonies do not merge).

[849] Barnett v. Alabama, 783 So. 2d 927, 930 (Ala. Crim. App. 2000).

[850] State v. Heemstra, 721 N.W.2d 549, 558 (Iowa 2006).

[851] *See* State v. Jones, 538 S.E.2d 917, 926 (N.C. 2000) (involving the deadly weapon of an automobile driven while drunk); *cf.* State v. Abraham, 451 S.E.2d 131, 139 (N.C. 1994) (holding that assault with deadly weapon can be a predicate for felony murder of a different victim).

on a single victim that result in his or her death would be first-degree murders via felony murder, thereby negating lesser homicide charges such as second-degree murder and manslaughter."[852] In 2001 the Illinois Supreme Court reversed its long-standing position by precluding felony murder charges based on aggravated battery of, or aggravated shooting at, the deceased. The court concluded that "where the acts constituting forcible felonies arise from and are inherent in the act of murder itself, those acts cannot serve as predicate felonies for a charge of felony murder."[853] Subsequent Illinois cases have continued to permit felony murder charges predicated on assaults against victims other than the deceased.[854]

The California courts, after temporarily weakening their merger limitation, have reinvigorated it. In the 1995 case of *People v. Hansen*, the California Supreme Court narrowed its merger rule by upholding a conviction predicated on the felony of firing a gun in a dwelling.[855] The court construed the independent felonious purpose as permitting any inherently dangerous predicate felony other than an assault. The court reasoned that one who intends to injure is more culpable than one who intends some other aim.[856] Subsequent decisions criticized this analysis,[857] and the recent case of *People v. Sarun Chun* clearly overruled *Hansen* and barred felony murder predicated on shooting into an occupied vehicle.[858] Unfortunately, the *Sarun Chun* decision did not articulate any clear standard, so the continuing authority and significance of the independent felonious purpose test is unclear. Other California decisions first narrowed the *Wilson* decision,[859] and ultimately overruled it by permitting felony murder predicated on burglary for purposes of assault.[860] The court reasoned that a merger doctrine should not limit a legislatively enumerated predicate felony, and emphasized the added danger of assaults in the home.[861]

Courts in two more states, Washington and Delaware, attempted to impose merger limitations but were checked by legislatures.[862] Both states have

[852] *Jones*, 538 S.E.2d at 926 n.3.

[853] People v. Morgan, 758 N.E.2d 813, 838 (Ill. 2001).

[854] *See, e.g.*, People v. Boyd, 825 N.E.2d 364, 369-70 (Ill. App. Ct. 2005).

[855] People v. Hansen, 885 P.2d 1022, 1030-31 (Cal. 1995).

[856] *Id.*

[857] *See* People v. Randle, 111 P.3d 987, 999 (Cal. 2005); People v. Robertson, 95 P.3d 872, 880-81 (Cal. 2004).

[858] People v. Sarun Chun, 203 P.3d 425, 443 (Cal. 2009).

[859] People v. Gutierrez, 52 P.3d 572, 608 (Cal. 2002) (permitting felony murder predicated on burglary for the purpose of assault of a different victim).

[860] People v. Farley, 210 P.3d 361, 410-11 (Cal. 2009).

[861] *Id.* at 409-10.

[862] *Compare In re* Andress, 56 P.3d 981, 985 (Wash. 2002) (rejecting State's argument that Legislature had "affirmatively declined to omit assaults" as predicate felonies), *with* WASH. REV. CODE § 9A.32.050 (2010) (includes assault as predicate felony); *compare*

categorical felony murder rules, and both states required that death be caused in furtherance of the predicate felony. In the 2002 case of *In re Andress*, the Washington Supreme Court held that this "in furtherance" requirement incorporated a merger rule, precluding second degree felony murder liability predicated on assault.[863] A 2003 statute, however, specifically included assault among the predicate crimes and was accompanied by a statement repudiating *Andress*.[864] This outcome was particularly unfortunate since, as the *Andres*s court pointed out, assault in Washington includes negligent injury.[865] Thus defined, assault does not entail any felonious purpose, let alone an independent one.

In its 1992 decision in *Chao v. State*, the Delaware Supreme Court upheld an arson-murder conviction by sensibly denying that a killing in furtherance of the felony must be an *act* independent of the felony.[866] In the 2002 case of *Williams v. State*, the court reached the equally plausible conclusion that the "in furtherance" requirement precluded predicating felony murder on burglary for the purpose of assault.[867] Both results are compatible with a requirement of independent felonious purpose. Yet the *Williams* court unnecessarily based the *Williams* decision on an independent act test, overturning *Chao*, and concluding that its merger rule would preclude felony murder liability predicated on arson.[868] The legislature responded to this clumsy reasoning by eliminating the "in furtherance" language.[869] If this is taken to express an intention to restore the law of the *Chao* case, there is still room to advocate an independent felonious purpose test as compatible with the result and reasoning in *Chao*. Such a test would preclude predicating felony murder on assault.

Recently, courts in Montana and Maryland rejected the merger doctrine.[870] In Montana, the crime of "deliberate homicide" includes causing death in the

Williams v. State, 818 A.2d 906, 908 (Del. 2002) (holding that burglary for purposes of murder cannot support felony murder), *with* 74 Del. Laws. 567 (2004), *available at* 2004 Del. ALS 246.

[863] *Andress*, 56 P.3d at 985.

[864] WASH. REV. CODE § 9A.32.050; 2003 Wash. Sess. Laws 3

[865] *Andress*, 56 P.3d at 988.

[866] Chao v. State, 604 A.2d 1351, 1361-63 (Del. 1992).

[867] *Williams*, 818 A.2d at 908.

[868] *See id.* at 913.

[869] 74 Del. Laws 567 (2004) (codified at DEL. CODE ANN. tit 11, §§ 635, 636 (2010)).

[870] An Ohio court appeared to reject the merger doctrine, but actually did not. Ohio enacted its first felony murder law in 1998, conditioning murder on causing death in the course of any first or second degree felony of violence other than involuntary manslaughter. In a 2006 case a judge dismissed a murder charge predicated on a felonious assault, reasoning that involuntary manslaughter also included causing death in the course of the felony of assault. The trial judge did not base his decision on the merger doctrine, however, but instead based it on a misreading of the statute as requiring that the killing (rather than the predicate felony) not constitute manslaughter. An appeals court issued an advisory opinion pointing out the interpretive error. The opinion might be read as implying that

course of any "forcible felony." A 2004 case permitted deliberate homicide to be predicated on aggravated assault.[871] In Maryland, first degree felony murder requires enumerated felonies, while second degree murder is undefined. Maryland first recognized second degree felony murder in a 2001 decision upholding a murder conviction predicated on child abuse.[872] The decision was surprising: assuming child abuse could not serve as a predicate for felony murder, the legislature had instead defined fatal child abuse as an aggravated child abuse offense. Yet the court found both that second degree murder could be predicated on unenumerated felonies, and that child abuse did not merge. It offered the theory that child abuse harms a relationship of custodial trust, an interest distinct from the victim's health. A subsequent case rejected the merger doctrine altogether, holding that assault could serve as a predicate for felony murder on the theory that the felony murder doctrine serves simply to deter felonies foreseeably causing death.[873] This expansion of felony murder beyond the limits prevailing in other jurisdictions was not authorized by the legislature.

A Virginia court upheld felony murder predicated on child abuse, but left undecided whether a merger limitation could bar other predicate felonies. Virginia courts impose second degree murder liability predicated on non-enumerated felonies. A 2001 case declined to impose a merger limit in upholding a second degree murder conviction predicated on child abuse.[874] The court used a lesser included offense test: "[f]elony child abuse requires proof that the assailant is a person responsible for the care of a child. That requirement of a special relationship is not an element of murder. Accordingly, felony child abuse is not a lesser-included offense of murder."[875] This reasoning leaves open the possibility that other types of assault offenses might merge.

Three other states that previously embraced merger limitations have weakened them in recent decades. The Kansas legislature recently narrowed that state's merger limitation by dividing its enumeration of inherently dangerous felonies into those which can and cannot merge with a resulting homicide. Felonies that can merge include various homicide and assault offenses. Those which cannot merge include child abuse and burglary offenses.[876] In Missouri, recent decisions have cast doubt on the authority of the merger doctrine. A 1998 decision, although endorsing the merger doctrine,

assault is a legitimate predicate for felony murder, but the court did not so hold, and the merger question remains open. State v. Brodie, 847 N.E.2d 1268, 1272 (Ohio Ct. App. 2006).

[871] *See* State v. Burkhart, 103 P.3d 1037, 1046-47 (Mont. 2004).

[872] Fisher v. State, 786 A.2d 706, 732-33 (Md. 2001).

[873] *See* Roary v. State, 867 A.2d 1095, 1100-02 (Md. 2005).

[874] *See* Cotton v. Commonwealth, 546 S.E.2d 241, 244 (Va. Ct. App. 2001).

[875] *Id*. at 244.

[876] KAN. STAT. ANN. § 21-3436 (2009); 2009 Kan. Sess. Laws 31-32.

offered an almost comically strained rationale to avoid applying it to an assault with a deadly weapon where the defendant fired two shots.[877] A later decision of a different appellate court permitting felony murder on the basis of child abuse, rejected the merger doctrine for predicate felonies other than manslaughter.[878]

The merger doctrine has been particularly controversial in Texas. In 1997 the Court of Appeals criticized the *Garrett* decision as judicial legislation and rejected its independent act test in favor of a narrow rule excluding only manslaughter and its lesser included offenses.[879] In a later case a Texas Criminal Appeals Court applied this standard to permit felony murder predicated on assault with intent to injure.[880] These decisions are unfortunate. The *Garrett* case's two-act test was indeed flawed, but applying a merger limitation is not an act of judicial legislation in Texas. Instead, choosing some merger test is a necessary task of constructive interpretation imposed on courts by the Texas Penal Code. The Code requires an apparently dangerous act in furtherance of a felony other than manslaughter. This does not require an act independent of homicide but it does require that the act causing death be "in furtherance" of a felonious purpose independent of (a) the reckless endangerment of life required for manslaughter and (b) the apparent danger to life of the act causing death.[881] The *Murphy* decision, requiring a purpose to endanger some interest other than the health of the victim, provides an appropriate interpretation of the statute.[882]

C. *Overt and Covert Merger Limitations in Contemporary Law*

Our history of the merger doctrine has revealed persistent controversy in the courts. Yet, greater consensus becomes apparent when we include legislation in the picture, and view the resulting pattern through the lens of the principle of dual culpability.

An explicit merger limitation is best understood as just one means of enforcing the principle of dual culpability. This principle permits murder liability for unintended killing in the course of felonies only when the felony

[877] State v. Rogers, 976 S.W.2d 529, 532 (Mo. Ct. App. 1998). The court reasoned that the two shots endangered overlapping but slightly different groups of potential victims and somehow decided that menacing the group endangered by the nonfatal shot was the felonious purpose, while the fatal shot was the means. *Id.*

[878] State v. Williams, 24 S.W.3d 101, 117 (Mo. Ct. App. 2000) (holding that child abuse does not merge because statute excludes only murder and manslaughter as predicate felonies for felony murder).

[879] *See* Rodriguez v. State, 953 S.W.2d 342, 349-51 (Tex. Ct. App. 1997) (shooting into occupied auto does not merge); *see also* Johnson v. State, 4 S.W.3d 254, 258 (Tex. Crim. App. 1999).

[880] Lawson v. Texas, 64 S.W.3d 396, 397 (Tex. Crim. App. 2001).

[881] TEX. PENAL CODE ANN. § 19.02 (West 2003).

[882] *See* Murphy v. State, 665 S.W.2d 116, 119 (Tex. Crim. App. 1983).

adds enough culpability to the assailant's expectation of causing death. The higher the assailant's expectation of causing death, the less additional culpability the felony must supply. When the killing is negligent, the felony must supply an independent felonious purpose. When the killing is reckless, however, the felony need only establish enough additional culpability to aggravate that recklessness to depraved indifference. A reckless homicide may manifest depraved indifference if it involves a cruel or spiteful motive for endangering another, a willingness to harm some other legal interest in endangering another, or a willingness to endanger many people.

Conditioning murder on aggravated assault or battery violates the principle of dual culpability. Yet other assaultive felonies are permissible predicate felonies if defined so as to entail depraved indifference per se. Burglary for the purpose of aggravated assault or homicide always meets this test, because it is at least reckless of life and involves knowing violation of an independent property interest. Intentionally shooting into a home or a vehicle in use arguably meets this test, on the assumption that the crime entails knowingly endangering victims and violating an independent property interest. Shooting *from* a car does not meet this test unless defined to require at least an aggravated assault. Drive-by shootings often endanger bystanders and proceed from a retaliatory or other antisocial motive – but these inculpatory circumstances do not inhere in shooting from a vehicle. Fatal child abuse typically involves multiple forms of culpability – recklessness of life, indifference to child welfare, willful violation of custodial responsibility, and a purpose to torture, degrade, or coerce. Accordingly, fatal child abuse often merits murder liability. Yet child abuse felonies are not always defined in such a way as to require such culpability. Thus, if a child abuse predicate felony is defined simply as battery of a child that in fact results in death, the result could be undeserved murder liability.

Not every felony murder jurisdiction has explicitly adopted a merger doctrine. Nevertheless, the vast majority have avoided predicating felony murder on aggravated assault or battery. In so doing, they have covertly observed merger limitations. Thus, in predicating felony murder only on assaultive felonies violating another interest, such as shooting into a home or child abuse, most legislatures and courts have shown respect for the principle of dual culpability. Yet sometimes they have not been sufficiently careful in insuring that these predicate felonies involve enough recklessness of life to manifest depraved indifference, or enough culpability toward the other interest to "transfer" to a negligent homicide.

1. Exhaustive Enumeration Jurisdictions

Many legislatures have obviated a merger doctrine by predicating felony murder only on enumerated felonies involving either an independent felonious purpose or depraved indifference to human life. Recall that twenty-five of the

forty-five felony murder jurisdictions enumerate exhaustively.[883] Of these twenty-five, only two jurisdictions violate the principle of dual culpability by predicating felony murder on assault of the deceased. Wisconsin imposes a penalty enhancement of up to fifteen years when death results from various assault offenses.[884] At least one scholar considers this relatively low penalty merely manslaughter liability, despite Wisconsin's use of the term "felony murder."[885] Ohio predicates felony murder on "violent" felonies of the first or second degree, which include an assault requiring knowing infliction of serious physical harm.[886] As noted, Ohio courts have not yet considered a merger challenge to this predicate felony.[887] In addition to these two jurisdictions predicating felony murder on aggravated assault, Louisiana predicates felony murder on "assault by drive-by-shooting,"[888] but does not define this offense in such a way as to require an intent to injure, or exposure of multiple victims.[889]

Ten of these twenty-five jurisdictions predicate felony murder on child abuse offenses.[890] These offenses are defined quite variably, however. Some are clearly defensible as predicate felonies. For example, the Kansas child abuse predicate felony requires a sadistic motive, supplying an independent felonious purpose, and arguably depraved indifference as well: "intentionally torturing, cruelly beating . . . or inflicting cruel and inhuman corporal punishment."[891] The federal child abuse offense requires "a pattern or practice

[883] The jurisdictions exhaustively enumerating predicate felonies for felony murder are Alaska, Arizona, Colorado, Connecticut, District of Columbia, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Nebraska, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, West Virginia, Wisconsin, Wyoming, and the United States. *See supra* note 262 and accompanying text.

[884] WIS. STAT. ANN. § 940.03 (West 2010).

[885] *See* Malani, *supra* note 112, at 14.

[886] OHIO REV. CODE ANN. §§ 2901.01(9), 2903.02, 2903.11 (LexisNexis 2010).

[887] The Kansas Code identifies assault as a dangerous felony, but specifically excludes assaults that merge with the act causing death. KAN. STAT. ANN. § 21-3436 (2007). The Iowa Code includes willful injury as a predicate felony, IOWA CODE ANN. § 702.11 (West 2003), but Iowa courts have excluded willful injuries of the deceased. *See* State v. Heemstra, 721 N.W.2d 549, 558 (Iowa 2006). The D.C. Code includes mayhem as a predicate felony, D.C. CODE § 22-2101 (2001), but I have argued that mayhem involves depraved indifference to human life and so does not offend the principle of dual culpability. *See supra* Part IV.A. (discussing whether mayhem should be an acceptable predicate felony to murder).

[888] LA. REV. STAT. ANN. § 14:30 (2007).

[889] *Id.*

[890] 18 U.S.C. § 1111 (2006); D.C. CODE § 22-2101; IDAHO CODE ANN. § 18-4003 (2004); KAN. STAT. ANN. § 21-3436; LA. REV. STAT. ANN. § 14:30 (2007); OHIO REV. CODE ANN. § 2903.02; OR. REV. STAT. § 163.115 (2009); TENN. CODE ANN. § 39-13-202 (2010); UTAH CODE ANN. § 76-5-203 (LexisNexis 2008); WYO. STAT. ANN. § 6-2-101 (2009).

[891] KAN. STAT. ANN. § 21-3436 (enumerating predicate felonies); *id.* § 21-3609 (defining the crime of abuse of a child).

of assault or torture against a child or children."[892] Such a pattern arguably entails an assailant with custodial obligations toward the child and a purpose of tormenting, degrading or coercing the child. Oregon's aggravated child abuse felony requires, at a minimum, that the assailant intentionally inflict an injury to a victim under fourteen.[893] The youth of the victim perhaps suffices to elevate what would otherwise be manslaughter to depraved indifference murder. Tennessee's child abuse predicate felony requires either intentional injury, like Oregon, or knowingly harming the child's welfare through neglect of a custodial duty.[894] Such a custodial duty is an independent legal interest.

Some enumerated child abuse offenses are debatable as predicate felonies. The D.C. Code predicates felony murder on an offense requiring reckless infliction of an injury on a minor.[895] If death is the recklessly inflicted injury, the youth of the victim may suffice to aggravate this to depraved indifference murder; but if the assailant is merely reckless as to a nonfatal injury, the assailant lacks the culpability required for murder. The Wyoming statute is similar, requiring recklessly causing physical or mental injury to a child under sixteen.[896] The Ohio child abuse offense qualifying as a predicate felony requires causing injury by means of abuse, torture, excessive punishment, unwarranted discipline, or a drug offense.[897] No culpable mental state is assigned to the injury element, but if recklessness – Ohio's default culpability standard[898] – is required, murder liability is arguably warranted. Torture, excessive punishment, unwarranted discipline, and drug dealing all add malign purposes independent of injury, although "abuse" does not.[899] Utah's code predicates murder on killing a domestic partner at least negligently in the presence of a child.[900] The resulting emotional harm to a child – presumably a cohabitant toward whom the assailant bears some custodial responsibility – is an independent wrong of great weight, but perhaps not sufficiently purposeful to aggravate a negligent killing to murder.

Finally, some enumerated child abuse offenses are clearly insufficient as predicate felonies. Thus, predicate child abuse offenses in Idaho and Louisiana appear to require nothing more than causing death or injury negligently or foreseeably. Idaho predicates felony murder on aggravated battery on a child under twelve.[901] Aggravated battery is defined as an intentional blow or act of

[892] 18 U.S.C. § 1111(a).

[893] OR. REV. STAT. § 163.115(J).

[894] TENN. CODE ANN. § 39-15-401.

[895] D.C. CODE § 22-2101; *id.* 22-1101 (defining first degree cruelty to children).

[896] WYO. STAT. ANN. § 6-2-503 (2009).

[897] OHIO REV. CODE ANN. § 2919.22(1)-(6) (LexisNexis 2010).

[898] *Id.* § 2901.21(B).

[899] By contrast, the empty term "abuse" does not imply any particular purpose and does not add any culpability.

[900] UTAH CODE ANN. § 76-5-109.1 (LexisNexis 2008).

[901] IDAHO CODE ANN. § 18-4003(d) (2004).

violence that causes "great bodily harm, permanent disability or permanent disfigurement" with no further culpability required.[902] Louisiana requires only negligent mistreatment causing "unjustifiable pain and suffering."[903] These predicate offenses violate the dual culpability principle and should either be redefined, or eliminated as predicates for felony murder.

2. Partial Enumeration Jurisdictions

An additional fourteen jurisdictions partially enumerate predicate felonies while also permitting felony murder predicated on unenumerated felonies.[904] These states have divided on the merger question. Most have avoided enumerating assault offenses, or have enumerated only assaults sufficiently aggravated to entail depraved indifference. California and Maryland predicate felony murder on mayhem, which I have argued manifests depraved indifference.[905] California also predicates felony murder on the defensible predicate felonies of torture and drive-by shooting with intent to kill.[906] Illinois enumerates the offense of aggravated battery resulting in injury, but by court decision now precludes its use in cases where the assault is committed against the deceased.[907] Minnesota and Oklahoma have each enumerated some assault-type felonies that may fall short of the recklessness toward death required for depraved indifference. Minnesota enumerates a drive-by shooting offense predicated on recklessly shooting toward persons or buildings or vehicles.[908] Oklahoma enumerates intentionally shooting into a building (not necessarily a dwelling), with no requirement of knowingly endangering anyone.[909]

[902] *Id.* § 18-907(a).

[903] LA. REV. STAT. ANN. § 14:93(A)(1) (2007).

[904] ALA. CODE §13A-6-1 (2005); CAL. PENAL CODE § 189 (Deering 2006); FLA. STAT. ANN. § 782.04 (West 2010); 720 ILL. COMP. STAT. ANN. 5/9-1 (West 2002); MD. CODE ANN., CRIM. LAW § 2-201 (LexisNexis 2002); MINN. STAT. ANN. § 609.19 (West 2009); MISS. CODE ANN. § 97-3-27 (West 2005); MONT. CODE ANN. § 45-5-102 (2009); NEV. REV. STAT. ANN. § 200.030 (2009); N.C. GEN. STAT. § 14-17 (2009); OKLA. STAT. ANN. tit. 21, § 701.8 (2005); R.I. GEN. LAWS § 11-23-1 (2010); VA. CODE ANN. § 18.2-32 (West 2005); WASH. REV. CODE ANN. § 9A.32.030 (LexisNexis 2010).

[905] CAL. PENAL CODE § 189; MD. CODE ANN., CRIM. LAW § 2-201(a)(4)(vii) .

[906] CAL. PENAL CODE § 189.

[907] 720 ILL. COMP. STAT. ANN. 5/2-8, 5/9-1; People v. Morgan, 758 N.E.2d 813, 838 (Ill. 2001).

[908] MINN. STAT. ANN. § 609.185. Another enumerated felony, aggravated battery in violation of a protective order, seems defensible as a form of depraved indifference murder. *See id.* § 609.185(6).

[909] OKLA. STAT. ANN. tit. 21, § 701.7(B). Another Oklahoma predicate felony – shooting with intent to kill – obviously supplies enough culpability for murder in Oklahoma, which recognizes no defense of provocation or extreme emotional disturbance for intentional killings. *Id.* § 711 (defining first degree manslaughter).

Courts in five of these states – Alabama, California, Illinois, North Carolina, and Oklahoma – have adopted merger rules barring felony murder predicated on assault of the deceased.[910] Illinois courts have permitted felony murder predicated on assault of another, and would likely permit predicate felonies combining assault with violation of a property interest.[911] North Carolina courts have permitted intentionally shooting into an occupied dwelling as a predicate felony.[912]

Four other states have clearly rejected merger altogether: Maryland, Minnesota, Montana, and Washington.[913] These states permit felony murder liability predicated on aggravated assault.

The law is less clear in five other states. Mississippi has upheld felony murder predicated on child abuse using an independent interest test.[914] Virginia courts have used a lesser included offense test in predicating felony murder on a child abuse offense requiring violation of a custodial duty.[915] These tests might preclude predicating felony murder on assault. The question of felony murder predicated on assault has not yet been decided in Florida,[916] Nevada, and Rhode Island. Nevada has upheld a felony murder conviction predicated on intentionally shooting into a dwelling, without considering a merger argument.[917] The court relied on a later overruled California case, involving a similar crime, which nevertheless acknowledged California's merger rule.[918] Nevada courts would likely follow California decisions on merger if the question were directly raised.

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[910] *See* Barnett v. State, 783 So. 2d 927, 930 (Ala. Crim. App. 2000); People v. Sarun Chun, 203 P.3d 425, 443 (Cal. 2009); People v. Morgan, 758 N.E.2d 813, 838 (Ill. 2001); State v. Jones, 538 S.E.2d 917, 925 n.3 (N.C. 2000); Massie v. State, 553 P.2d 186, 191 (Okla. Crim. App. 1976); Tarter v. State, 359 P.2d 596, 602 (Okla. Crim. App. 1961).

[911] *See Morgan*, 758 N.E.2d at 838.

[912] State v. King, 340 S.E.2d 71, 73-74 (N.C. 1986); State v. Wall, 286 S.E.2d 68, 71 (N.C. 1982).

[913] *See* WASH. REV. CODE ANN. § 9A.32.050(b) (LexisNexis 2010); Roary v. State, 867 A.2d 1095, 1106 (Md. 2005); State v. Morris, 187 N.W.2d 276, 277 (Minn. 1971); State v. French, 402 N.W.2d 805, 808 (Minn. Ct. App. 1987); State v. Burkhart, 103 P.3d 1037, 1045-46 (Mont. 2004).

[914] Faraga v. State, 514 So. 2d 295, 302-03 (Miss. 1987).

[915] Cotton v. Commonwealth, 546 S.E.2d 241, 244 (Va. Ct. App. 2001).

[916] Florida's 1966 decision *Robles v. State*, 188 So. 2d 789, 792 (Fla. 1966), holding that merger is unnecessary in a state enumerating all predicate felonies, no longer applies to its current code, which predicates third degree murder on unenumerated felonies. FLA. STAT. ANN. § 782.04(4) (West 2010).

[917] Cordova v. State, 6 P.3d 481, 484 (Nev. 2000) (defendant shot through a door on being asked to identify himself, in violation of NEV. REV. STAT. § 202.285 (2009)).

[918] *Cordova*, 6 P.3d at 484 (citing People v. Hansen, 885 P.2d 1022, 1031-32 (Cal. 1994), *overruled by* People v. Sarun Chun, 203 P.3d 425, 442-43 (Cal. 2009)). The offense was defined by CAL. PENAL CODE § 246 (Deering 2006).

In all, six of the fourteen partial enumeration states predicate felony murder on child abuse offenses. Florida and Nevada do so by statutory enumeration. Mississippi, North Carolina, Virginia, and Maryland have done so by judicial decision. All of these child abuse predicate felonies arguably satisfy our dual culpability test by involving either depraved indifference toward human life or an attack on an independent legal interest. The Mississippi child abuse predicate requires intent to injure.[919] The child abuse predicate approved by the Virginia courts involves intentional injury in violation of a custodial duty.[920] The Maryland child abuse predicate felony is also limited to assailants who breach a custodial duty. It requires that the custodian of a minor cause physical injury to the child by a cruel, inhumane, or malicious act.[921] The North Carolina child abuse predicate felony requires an injurious assault on a child victim with a deadly weapon.[922] The Florida predicate felony of aggravated child abuse requires intentional injury, willful torture, or malicious punishment of a child.[923] More dubiously, the Nevada predicate felony involves the intentional infliction of pain or suffering on a child. The mere infliction of pain on a child does not seem to be a very great harm, but it is arguably an independent purpose the Nevada legislature has deemed felonious. Both Florida and Nevada have elder abuse predicates similar to their child abuse predicates.[924]

3. Categorical Jurisdictions

Six states predicate felony murder only on unenumerated felonies: Delaware, Georgia, Massachusetts, Missouri, South Carolina, and Texas. These are the jurisdictions in which an explicit merger doctrine is most needed. Indeed, the Georgia, Missouri, and Texas legislatures all acknowledged the merger problem by excluding homicide offenses as predicate felonies.[925]

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[919] *See* MISS. CODE ANN. § 97-5-39(2)(a) (West 2005) ("[A]ny person who shall intentionally burn[,] . . . torture[,] . . . whip, strike or otherwise abuse or mutilate any child in such a manner as to cause serious bodily harm shall be guilty of felonious abuse of a child . . . ."); Faraga v. State, 514 So. 2d 295, 303 (Miss. 1987).

[920] *See Cotton*, 546 S.E.2d at 244; *see also* VA. CODE ANN. § 18.2-371 (West 2005).

[921] *See* Fisher v. State, 786 A.2d 706, 733 (Md. 2001); *see also* MD. CODE ANN., CRIM. LAW § 3-601(a)(2) (LexisNexis 2002).

[922] *See* N.C. GEN. STAT. § 14-318.4 (2009) (defining felony child abuse as intentional injury or intentional assault leading to injury); *id.* § 14-17 (first degree murder predicated on any felony involving use of a deadly weapon); State v. Anderson, 513 S.E.2d 296, 311-12 (N.C. 1999) (approving felony child abuse as predicate felony).

[923] FLA. STAT. ANN. § 782.04(1)(a)(2)(h) (West 2010); FLA. STAT. ANN. § 784.045(1)(a)(1) (defining aggravated battery); FLA. STAT. ANN. § 827.03(1)-(2) (provisions defining child abuse and aggravated child abuse).

[924] FLA. STAT. ANN. § 782.04 (murder); *id.* § 825.102 (elder abuse); NEV. REV. STAT. § 200.030(1)(b) (2009) (murder); *id.* § 200.5092 (defining elder abuse).

[925] GA. CODE ANN. § 16-5-1(c) (2008); Malone v. State, 232 S.E.2d 907, 908 (Ga. 1977); MO. REV. STAT. § 565.021 (2009); State v. Williams, 24 S.W.3d 101, 117 (Mo. Ct. App.

Unfortunately, only Massachusetts has clearly established a merger doctrine.[926] Georgia has firmly rejected a merger limitation for assault offenses,[927] as is well illustrated by the *Miller* case.[928] After initially adopting merger rules, Delaware, Missouri and Texas have all retreated.[929] By predicating felony murder on assault with intent to injure, the Texas courts have clearly rejected the merger doctrine.[930] The status of the merger doctrine remains undecided in Delaware[931] and Missouri.[932] South Carolina courts have not considered the problem.

Of the six purely categorical jurisdictions, only Georgia and Texas have endorsed child abuse as a predicate felony.[933] The Georgia offense requires merely negligent infliction of pain.[934] The Texas offense appears to require only negligent injury.[935] Neither offense meets the dual culpability test, but this is hardly surprising since both courts have rejected the merger doctrine.

D. *Summary: The Authority of the Merger Doctrine*

The apparent authority of the merger doctrine in contemporary law depends on how we pose the question. If we simply ask how many jurisdictions have overtly adopted the merger doctrine and how many have overtly rejected it, we will find the merger doctrine deeply controversial. Courts actively employ a merger doctrine in only eight states: Alabama, California, Kansas, Illinois, Iowa, Massachusetts, North Carolina, and Oklahoma. Courts or legislatures have unambiguously rejected merger limitations in seven states: Georgia, Wisconsin, Maryland, Minnesota, Montana, Texas, and Washington. The

2000); TEX. PENAL CODE ANN. § 19.02 (West 2003).

926 Commonwealth v. Quigley, 462 N.E.2d 92, 95 (Mass. 1984).

927 Baker v. State, 225 S.E.2d 269, 271 (Ga. 1976).

928 Miller v. State, 571 S.E.2d 788, 797 (Ga. 2002).

929 *Compare* Williams v. State, 818 A.2d 906, 908 (Del. 2002), *and* State v. Hanes, 729 S.W.2d 612, 617 (Mo. Ct. App. 1987), *and* Garrett v. State, 573 S.W.2d 543, 545 (Tex. Crim. App. 1978), *with* DEL. CODE ANN. tit. 11, § 636 (2010) ("in furtherance" language relied on in *Williams* replaced with "while engaged" language), *and* State v. Williams, 24 S.W.3d 101, 117 (Mo. Ct. App. 2000), *and* Lawson v. Texas, 64 S.W.3d 396, 397 (Tex. Crim. App. 2001), *and* Rodriguez v. Texas, 953 S.W.2d 342, 354 (Tex. App. 1997).

930 *See Lawson*, 64 S.W.3d at 397.

931 *See* Chao v. State, 604 A.2d 1351, 1363 (Del. 1992) (rejecting independent act test, but not considering independent felonious purpose test, which would be consistent with result).

932 *See* State v. Rogers, 976 S.W.2d 529, 532 (Mo. Ct. App. 1998) (using an independent felonious purpose test to permit assault of persons other than deceased to serve as predicate felony).

933 Holt v. State, 278 S.E.2d 390, 393 (Ga. 1981) (cruelty to children can serve as a predicate for felony murder); *Ex parte* Easter, 615 S.W.2d 719, 721 (Tex. Crim. App. 1981) (injury to a child); Berghahn v. State, 696 S.W.2d 943, 948 (Tex. App. 1985) (same).

934 GA. CODE ANN. § 16-5-70(c) (2008).

935 TEX. PENAL CODE ANN. § 22.04 (West 2003).

situation remains unclear in several states such as Missouri, Delaware, and Virginia.

Yet we have instead assessed the authority of the merger doctrine by first asking what its purpose is. We have identified that purpose as ensuring that persons convicted of felony murder are sufficiently culpable to deserve murder liability. We have seen that felony murder typically involves some measure of culpability with respect to the danger of death, amounting to criminal negligence at least. A requirement of an independent felonious purpose – a purpose to harm some legal interest beyond the life and health of the victim – ensures that the predicate felony combines enough culpability with that criminal negligence to merit murder liability. Felonies entailing depraved indifference to human life do not need an independent felonious purpose to justify murder liability. Predicate felonies requiring intent to injure or recklessness toward life satisfy this test if they also require either knowing violation of an independent interest, a depraved motive, or a danger to multiple potential victims. The merger doctrine achieves its purpose by requiring enough culpability to merit murder liability, not by requiring an independent felonious purpose in every case.

We have proceeded by asking a second question: who decides which felonies can serve as predicates for felony murder? That decision is made far more often by legislatures than by courts. Legislatures apply a covert merger limitation when they predicate felony murder only on felonies requiring sufficient culpability to satisfy the principle of dual culpability.

Measured by this standard, the overwhelming majority of felony murder jurisdictions have limited felony murder liability, whether overtly or covertly, in conformity with the principle of dual culpability. To be sure, seven jurisdictions have clearly decided that a fatal aggravated assault or battery suffices for murder – although Wisconsin's felony murder offense is arguably murder in name only. In addition, Ohio's code predicates felony murder on aggravated battery, and Louisiana predicates felony murder on a merely reckless drive-by shooting offense. Yet remarkably, the remaining thirty-six felony murder jurisdictions, four fifths of the total, have not predicated felony murder on assault of the deceased.

Although many jurisdictions predicate felony murder on child abuse, these offenses usually entail either depraved indifference or an independent felonious purpose. Child abuse predicate felonies typically involve knowing harm to the child's welfare and knowing violation of custodial duties. These offenses sometimes require an independent purpose such as torture or unwarranted discipline. They are usually defined to require at least reckless injury. Predicating felony murder on child abuse usually does not violate the principle of dual culpability. The same is true of compound felonies like shooting into a dwelling or burglary for purposes of aggravated assault or homicide. These felonies involve an expectation rather than a purpose of harming an independent property interest. If they also involve recklessness

toward life, they include enough combined culpability to warrant murder liability.

Predicating felony murder on these offenses is compatible with the principle of dual culpability. A merger test best embodies that principle if it takes the form of a flexible standard. If a predicate felony entails recklessness towards life, the predicate felony must additionally supply only knowing harm to an independent interest, or a depraved motive. If causing death in pursuit of the felony implies only negligence toward life, the felony must aim at harming an independent interest. If applied, this standard justifies felony murder liability as deserved.

Such a flexible merger limitation is consistent with the judgment of almost all those legislatures that have fully enumerated predicate felonies. Legislatures that have left predicate felonies partially or completely unenumerated have not rejected a merger limitation, but have instead invited courts to exercise principled judgment in determining which felonies can serve as predicates. Courts should decide that question in conformity with the principle of dual culpability by adopting a flexible standard requiring either negligence in pursuit of an independent felonious purpose or depraved indifference to human life.

CONCLUSION: MAKING FELONY MURDER LAW THE BEST IT CAN BE

Constructive interpretation of a body of law identifies a just principle that explains as much as possible of the law as it is and has been. This principle in turn provides a criterion to guide reform toward a law defensible as both coherent and just. By maintaining continuity with existing law, constructive interpretation respects the processes by which the law has been developed and enacted, and the investment legal actors have made in developing routines of compliance. Constructive interpretation therefore offers a particularly democratic method for critique and reform of law made by elected legislatures, and enforced primarily through the voluntary compliance of law-abiding citizens. Accordingly, it is an appropriate method for critique and reform of American criminal law.

The felony murder doctrine, though widely criticized by legal theorists, persists as law in most American jurisdictions. It is therefore important that criminal law theory acknowledge and articulate its normative appeal. To dismiss felony murder liability as inherently irrational – as legal theorists have done – insults the democratic public that supports it and frees legislators, judges, and prosecutors to pander by enacting and applying it without reason or restraint. If felony murder liability is going to be part of our law, we must be prepared to justify it, and to confine it to its justifying principles.

To that end, this Article has presented a constructive interpretation of the felony murder doctrine in American law. Drawing on my previous work, it has justified felony murder liability as deserved based on an expressive theory of culpability. This theory explains punishment as serving to motivate popular support for the rule of law by vindicating the equal status of all legal subjects.

Punishment rebukes those who demean others by harming them for unworthy ends. Such punishment is properly assessed on the basis of the dignitary injury done to victims by the offense. This dignitary injury is a function of both the harm done and the culpability with which it is done. That culpability in turn has two dimensions: a cognitive dimension, concerned with the harm expected; and a normative dimension, concerned with the moral worth of the ends for which that risk was imposed. Because culpability has two dimensions, killers may deserve murder liability for killing with a variety of different culpable mental states. Murder liability may be warranted for causing death knowingly or purposefully and for no good reason; or for causing death recklessly and with an antisocial purpose or attitude; or for causing death negligently with a felonious purpose. The first form of murder is intentional murder; the second form is depraved indifference murder; and the third form is felony murder. Thus felony murder liability is justifiable insofar as we understand culpability for killing as the product of two dimensions of culpability that can vary in gravity. This *dual culpability principle* justifies felony murder liability, but restricts it to negligent killings for an independent felonious purpose.

In my previous work, I have defended the justice of the dual culpability principle. The distinctive contribution of this Article has been to show that existing felony murder law accords with the dual culpability principle on most issues in most jurisdictions. Taken together, these two claims warrant the dual culpability principle as a constructive interpretation of the felony murder doctrine. Crucially, this Article has shown that felony murder requires negligence and a malign motive in most jurisdictions. This demonstration has three important implications. First, it refutes critics of felony murder who condemn felony murder liability as a form of strict liability. Second, it refutes proponents of expanded felony murder liability, who may mistake the prevalence of felony murder liability for the acceptance of strict liability. Third, it exposes existing strict liability standards for felony murder as anomalies, at odds with prevailing practice as well as principle.

This Article's analysis of contemporary felony murder law has focused on three issues: requirements of cognitive culpability, dangerousness, and causal responsibility that condition killing on negligence; standards of complicity and collective liability that determine the culpability required for non-killing participants in felonies; and requirements of an independent predicate felony. This analysis has set aside seven jurisdictions that require intent to kill or depraved indifference to human life for all murders, and focused on forty-five jurisdictions that impose true felony murder liability. This analysis has also set aside the problem of capital punishment, which should be irrelevant for killings without intent to kill or depraved indifference to human life.

One third of felony murder jurisdictions explicitly condition felony murder on the culpable mental states of negligence[936] or malice.[937] With the exception

[936] *See supra* notes 201-221 and accompanying text (discussing Alabama, Delaware, Maine, New Jersey, Pennsylvania, and Texas).

of the federal system, all the jurisdictions conditioning felony murder on malice have interpreted it to require apparently dangerous conduct. Federal courts should interpret the federal statute similarly. Two additional jurisdictions, Illinois and North Dakota, have default culpability standards apparently requiring reckless indifference to human life for felony murder. Illinois can best harmonize this requirement with the rest of its law by interpreting the category of "forcible felonies" as those involving not only violence, but also a "strong probability" of death. North Dakota's code predicates felony murder only on enumerated felonies, which are all inherently dangerous except for burglary. North Dakota's courts should invoke the recklessness default rule in interpreting the felony murder provision to require aggravated burglary, and in requiring that death be caused as a result of the danger inhering in enumerated felonies. These modest changes would make little difference in practice, however: fatal burglaries are almost always aggravated burglaries; and while accomplices may not be aware of the aggravating circumstances, North Dakota has an affirmative defense for non-negligent accomplices.

Almost all felony murder jurisdictions condition the offense on per se negligent conduct by requiring a dangerous felony. A requirement of an inherently dangerous felony ensures that all participants in the felony are negligent with respect to death. A requirement of foreseeable danger ensures that at least one participant, usually the actual killer, acted negligently.

Twenty felony murder jurisdictions predicate felony murder on unenumerated felonies in at least some cases. Few of these, if any, convict participants in unenumerated felonies of murder for killing accidentally. Thus, four jurisdictions restrict unenumerated felonies to those inherently dangerous.[938] Another thirteen restrict unenumerated felonies to those foreseeably dangerous as committed.[939] Only Florida, Mississippi, and Washington have not clearly required foreseeably dangerous felonies. Of these, Mississippi has defined malice, and Washington has defined causation of death, in ways that seem to require dangerous conduct.[940] Florida, Mississippi and Washington courts should bring their states in line with the consensus by explicitly requiring a felony inherently or foreseeably dangerous.

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[937] *See supra* note 222 and accompanying text (discussing California, Idaho, Iowa, Mississippi, Nevada, Rhode Island, South Carolina, Virginia, and also listing the United States Code).

[938] *See supra* notes 368-387 and accompanying text (discussing how California, Massachusetts, Minnesota, and Nevada restrict unenumerated felonies).

[939] *See supra* notes 388-495 and accompanying text (discussing Alabama, Delaware, Georgia, Illinois, Maryland, Missouri, Montana, North Carolina, Oklahoma, Rhode Island, South Carolina, Texas, and Virginia).

[940] *See supra* notes 248-251, 701 and accompanying text.

Most felony murder convictions are predicated on enumerated felonies. Twenty-five jurisdictions restrict predicate felonies to enumerated felonies,[941] and another fourteen predicate felony murder on both enumerated and unenumerated felonies.[942] Although legislatures, courts, and commentators often presume that the purpose of enumeration is to identify inherently dangerous felonies, we have seen that some enumerated felonies do not always entail negligence. Thus our analysis has shown that while *killing* in the course of burglary generally involves negligence toward a risk of death, *mere participation* in a non-aggravated burglary does not automatically entail negligence toward a risk of death. Drug crimes can involve culpability towards death but need not. In all, twenty-six jurisdictions enumerate non-aggravated burglary or simple breaking-and-entering,[943] twelve enumerate drug offenses,[944] and three enumerate theft as predicate felonies.[945] None of these should be enumerated felonies.

By attaching a heightened penalty to killing in the course of particular felonies – most of which are inherently dangerous – legislatures have acknowledged the principle that felony murder should be predicated on dangerous conduct. Yet most have violated that principle in practice by including one or more felonies that are actually far less dangerous than commonly believed.[946] Moreover, courts have sometimes frustrated legislative intent to condition felony murder on apparent danger. When codes classify predicate felonies as dangerous or violent because of aggravating elements such as injuries, weapons, or victims present, courts must require culpability

[941] *See supra* note 262 and accompanying text (discussing the United States Code, Alaska, Arizona, Colorado, Connecticut, District of Columbia, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Nebraska, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, West Virginia, Wisconsin, and Wyoming).

[942] *See supra* note 263 and accompanying text (discussing Alabama, California, Florida, Illinois, Maryland, Minnesota, Mississippi, Montana, Nevada, North Carolina, Oklahoma, Rhode Island, Virginia, and Washington).

[943] See *supra* notes 595, 617 and accompanying text for unaggravated burglary (discussing the United States Code, Arizona, California, Colorado, Connecticut, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Mississippi, Montana, Nebraska, Nevada, New Jersey, New York, North Dakota, Pennsylvania, South Dakota, Tennessee, Utah, and Wyoming); see *supra* note 276 and accompanying text for breaking-and-entering (discussing Rhode Island and West Virginia).

[944] *See supra* note 270 and accompanying text (discussing Alaska, Arizona, District of Columbia, Florida, Indiana, Kansas, Louisiana, Ohio, Oklahoma, Rhode Island, Utah, and West Virginia).

[945] *See supra* note 275 and accompanying text (discussing Kansas, Tennessee, and Wisconsin).

[946] However, seven jurisdictions have restricted enumerated predicate offenses to inherently dangerous felonies. *See supra* notes 201, 208-209, 253-257, 404-410, 440-444, 479, 636 and accompanying text (discussing Alabama, Maryland, Minnesota, North Carolina, Oregon, Virginia, and Washington).

with respect to those elements. Treating such aggravating circumstances and results as strict liability penalty enhancements repeats the misunderstanding of felony murder itself as a strict liability crime.

Most felony murder jurisdictions – thirty-two out of forty-five – require negligence indirectly by defining homicide as the foreseeable causation of death.[947] This includes twenty-two of the thirty-two jurisdictions enumerating felonies that are not inherently dangerous.[948] Only Alaska, Minnesota, North Dakota, and Wisconsin have explicitly rejected a requirement of foreseeability.[949] Yet Alaska substitutes a requirement of violent physical contact, Minnesota permits only inherently dangerous predicate felonies, and Wisconsin uses the homicide only as a relatively small penalty enhancement for the underlying felony.[950] The remaining jurisdictions have not clearly defined causation.[951] Four of these undecided jurisdictions – Iowa, Mississippi, South Carolina, and the federal system – can invoke requirements of malice in support of foreseeability requirements, as some states have done in requiring dangerous felonies. Foreseeability is less necessary in Oregon, which – like Minnesota – uses only inherently dangerous predicate felonies. Nevertheless, it would be best for the four minority and nine undecided jurisdictions to join the majority by adopting foreseeability standards. All courts and factfinders must resist the temptation to over attribute foreseeability on the basis of hindsight. Heart attacks, self-administered overdoses, and reckless police work are rarely predictable.

Most felony murder jurisdictions condition vicarious felony murder liability on negligence, although they use a variety of doctrinal devices to achieve this. Three jurisdictions completely restrict predicate felonies to inherently dangerous crimes. [952] Four jurisdictions define felony murder simply as

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[947] *See supra* text accompanying notes 526-530 (describing Alabama, Arizona, California, Connecticut, Delaware, District of Columbia, Georgia, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Massachusetts, Maryland, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, and West Virginia).

[948] See *supra* notes 943-945 (identifying jurisdictions with nondangerous felonies) and note 947 (identifying jurisdictions requiring foreseeability). Jurisdictions on both lists are Arizona, California, Connecticut, District of Columbia, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Montana, Nebraska, Nevada, New Jersey, New York, Ohio, Oklahoma,Pennsylvania, Tennessee, Utah, Rhode Island, West Virginia. Jurisdictions with nondangerous enumerated felonies and without foreseeability include Alaska, Colorado, Florida, Iowa, Mississippi, North Dakota, South Dakota, Wisconsin, Wyoming and the United States.

[949] *See supra* note 536 and accompanying text.

[950] *See supra* text accompanying notes 537-538.

[951] *See supra* notes 535-536 and accompanying text (describing the United States Federal Code, Colorado, Florida, Iowa, Mississippi, Oregon, South Carolina, South Dakota, Wyoming).

[952] *See supra* text accompanying notes 201, 536, 635-636 (describing Massachusetts,

participation in a felony foreseeably causing death.[953] At least twenty-seven jurisdictions condition complicity in felony murder on predicate felonies with foreseeable or inherent danger, or expected violence.[954] Eight felony murder jurisdictions provide an affirmative defense for accomplices who had no reason to expect a killing or that any participant was armed.[955] In most of these jurisdictions, the defense is redundant with other requirements of foreseeability or inherent danger, but it could make a difference in Colorado and North Dakota. Jurisdictions requiring foreseeability for killers should make clear that the same requirement applies to their accomplices.[956] Courts rejecting a foreseeability requirement for accomplices, such as Maryland, Tennessee, and Kansas – or for all felons, such as Wisconsin and Alaska – should reconsider. Jurisdictions that have not yet adopted foreseeability requirements for perpetrators or accomplices – such as Florida and Wyoming – should follow the majority rule on both questions.[957]

Felony murder jurisdictions have usually conditioned causal responsibility and complicity on normative as well as cognitive culpability. Two thirds of felony murder jurisdictions require an instrumental or causal relationship between the felony and the death,[958] while only seven jurisdictions have rejected such a requirement.[959] The required linkage between the felony and the fatality implies that culpability is being transferred from the felony to the killing. Thus, felonious motive is part of the culpability required for felony murder in most jurisdictions. Negligence toward death and felonious motive combine to justify murder liability as deserved.

The dual culpability required for felony murder – negligence and felonious motive – explains the purpose and the contours of the otherwise puzzling

Minnesota, and Oregon).

[953] *See supra* text accompanying notes 663-664 (describing Maine, Missouri, Ohio, and Oklahoma).

[954] *See supra* text accompanying notes 603-606 (describing Alabama, Arizona, California, Connecticut, Delaware, District of Columbia, Georgia, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Minnesota, Mississippi, Missouri, Montana, New Jersey, New York, North Carolina, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, Virginia, and Washington).

[955] *See supra* notes 346, 679, 693 and accompanying text (describing Colorado, Connecticut, Maine, New Jersey, New York, North Dakota, Oregon, and Washington).

[956] *See supra* notes 527-530 and accompanying text (describing Georgia, Nebraska, Nevada, Pennsylvania, Utah, and West Virginia).

[957] *See* supra note 595 and accompanying text.

[958] *See supra* note 585 and accompanying text (describing the United States Code, Alabama, Arizona, Colorado, Connecticut, District of Columbia, Florida, Idaho, Illinois, Indiana, Kansas, Maine, Maryland, Massachusetts, Missouri, Montana, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Virginia, Washington, and West Virginia).

[959] *See supra* notes 584, 866-869 and accompanying text (describing California, Delaware, Iowa, Minnesota, Mississippi, Nebraska, and Wyoming).

merger doctrine. Felonies aimed at injuring some interest other than the life and health of the victim – such as rape, robbery, arson, or aggravated burglary for purposes of theft – supply normative culpability that aggravates the cognitive culpability implicit in endangering the victim. Requiring an independent felonious purpose ensures that the felony will supply enough normative culpability to aggravate a negligent homicide to murder. Yet courts need not require an independent felonious purpose if legislatures enumerate only predicate felonies with such purposes. Because judicial application of a merger doctrine is primarily helpful in limiting unenumerated felonies, a merger doctrine is not necessary in most jurisdictions.

Moreover, the principle of dual culpability does not require that every predicate felony have an independent felonious purpose. Murder liability is also deserved when death is caused by a felony entailing depraved indifference to human life. Although the dual culpability principle precludes murder predicated on simple aggravated assaults, it may permit murder predicated on a property offense committed for the purpose of an aggravated assault, an aggravated assault on a vulnerable dependent, or a particularly cruel and demeaning assault, such as mayhem. A legislature may rationally conclude that these predicate felonies express depraved indifference to human life.

Most jurisdictions have limited predicate felonies in conformity with these principles. To be sure, only eight jurisdictions have adopted the merger doctrine,[960] while seven have rejected it.[961] Yet few other jurisdictions have violated the principles underlying the merger doctrine, and these violations are easily fixed.[962] Courts that have rejected the merger doctrine should reconsider.[963] Properly understood, the doctrine is not very restrictive, but those few restrictions are integral to the principles that justify felony murder liability.

In sum, most felony murder jurisdictions condition the offense on negligence through a combination of culpability requirements, enumerations of

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[960] *See supra* notes 773, 809, 849-853, 855-858, 876 and accompanying text (describing Alabama, California, Kansas, Illinois, Iowa, Massachusetts, North Carolina, and Oklahoma).

[961] *See supra* text accompanying notes 765, 816-821, 862-864, 870-873, 879-880 (describing Georgia, Maryland, Minnesota, Montana, Texas, Washington, and Wisconsin).

[962] Thus, Ohio courts should determine that the statutory exclusion of manslaughter as a predicate felony also bars aggravated assault. The Louisiana legislature should revise its drive-by shooting felony to require more recklessness; the Louisiana and Idaho legislatures should define more aggravated forms of child abuse and predicate felony murder only on these; and the Oklahoma legislature should require clearer endangerment of human life for its shooting-into-a-building predicate felony.

[963] *See supra* text accompanying notes 486, 641, 904, 961. In addition, jurisdictions using unenumerated felonies (Delaware, Florida, Mississippi, Missouri, Nevada, Rhode Island, South Carolina, and Virginia) should adopt merger limitations if prosecutors charge felony murder predicated on assaults involving neither an independent felonious purpose nor depraved indifference to human life. *See supra* text accompanying notes 914-918.

predicate felonies, dangerous felony limits, foreseeable causation requirements, and complicity rules. In addition, most jurisdictions condition the offense on felonious motive through a combination of enumerated felonies, causal linkage requirements, and merger limitations. Thus, felony murder law conforms to the principle of dual culpability in most respects in most jurisdictions. At the same time, felony murder law can and should be improved in at least some respects in the great majority of jurisdictions. This Article has provided the arguments of principle and precedent that lawyers and legislators will need to argue for those reforms.

Because felony murder laws generally conform to just principles, however, the cases presented in the Introduction are anomalous rather than typical. These eleven decisions all violated the principle of dual culpability. None of the defendants could reasonably have foreseen that death would result from their actions. In addition, Miller, Jenkins, and (arguably) Malaske lacked an independent felonious purpose, while Colenburg, Holle, Lambert, and Danahey lacked any felonious purpose at all. These cases effectively illustrate why the felony murder doctrine needs limits, but do not show that felony murder law has no such limits. Some of these cases are no longer good law. The rest were misapplications of existing law when they were decided.

Stamp's jury convicted him for fatally frightening a robbery victim without any instruction on foreseeability. California law no longer permits this. Hickman's murder conviction for sharing cocaine with a friend resulted from Virginia's failure to require foreseeability. Since foreseeability is now required, the case is no longer good law.

Colenburg's murder conviction for driving a car stolen months before resulted in part from the trial court's failure to apply Missouri's requirements that death result foreseeably from and in furtherance of the felony. Jenkins was convicted for being tackled by a trigger-happy officer, partly because Illinois had not yet adopted its current merger rule. His conviction also resulted from the trial court's erroneous failure to instruct on the requirement of foreseeability. Ingram, the New York burglar convicted of causing his captor's heart attack, acquiesced in the trial court's erroneous failure to instruct the jury on the requirements of foreseeability and a physical interaction. The case has no authority as precedent. Matos was convicted of provoking an officer to jump off a roof because a New York court wrongly treated the result in *Ingram* as authoritative precedent.

Malaske's murder conviction for supplying his younger sister with alcohol was obtained on the basis of a jury instruction that failed to require foreseeability. An appellate court justified this oversight on the dubious ground that his felony was inherently dangerous to human life, and was never asked to apply Oklahoma's merger doctrine. Miller's murder conviction for punching his schoolmate resulted in large measure from Georgia's rejection of a merger limitation. Yet Miller's trial court also erroneously instructed his jury that assault with a deadly weapon required no knowledge of the deadly potential of a fist; ignored precedent requiring an expectation of injury for

aggravated battery; and failed to instruct on foreseeability on the ground that these strict liability offenses were nevertheless inherently dangerous.

Holle's and Lambert's unjust convictions for felony murder resulted from their wrongful convictions as accomplices in burglary. No proof was offered that either one provided transportation with the intent to further burglary. Danahey's prosecutors somehow persuaded her to plead guilty to felony murder with no proof she intended the predicate felony of arson.

We can do better than this. But to do so we must recognize the felony murder doctrine as a principle of *justice*, punishing culpable killing. We must fashion and interpret our felony murder rules in light of that principle. Finally, we must take that principle seriously as *law*, by which we who stand in judgment must also be judged.