

**RECONSIDERING THE FELONY MURDER RULE IN  
LIGHT OF MODERN CRITICISMS: DOESN'T THE  
CONCLUSION DEPEND UPON THE  
PARTICULAR RULE AT ISSUE?**

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The felony murder doctrine has long been a target for detractors.<sup>1</sup> In some instances, the criticisms have had merit, or at least they have had merit when aimed at certain ill-considered

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1. See, e.g., Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965, 966 (2008) (asserting that commentators are “almost unanimous in condemning felony murder”).

formulations of the rule.<sup>2</sup> In other cases, however, the critics have articulated poorly reasoned arguments. Surprisingly, this group includes the drafters of the Model Penal Code (MPC)<sup>3</sup> and the Michigan Supreme Court,<sup>4</sup> which saw no arguments whatsoever for the rule. There was a time when virtually no commentator could find anything to say in favor of retaining the rule, even though it had proven extraordinarily durable over time and almost every state had chosen to retain it.<sup>5</sup> That history ought to have prompted scholars to consider whether there might be valid reasons for the near-universal retention of the felony murder doctrine, but for most of the rule's existence, few scholars did so.

In 1985, my co-author and I attempted to do what had been neglected up until that time: describe the policies that are arguably served by the felony murder rule.<sup>6</sup> The resulting article, *In Defense of the Felony Murder Rule*, appeared in the *Harvard*

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2. See *infra* Part II.B.

3. The MPC purported to abolish the doctrine, largely on the asserted ground that it separated criminal liability from blameworthiness. The drafters contended that “[p]rincipled argument in favor of the felony murder doctrine is hard to find.” MODEL PENAL CODE § 210.2(1)(b) cmts. (Official Draft 1980). But principled arguments can in fact be found. See *infra* Part II. Furthermore, the MPC actually retained a form of felony murder, with a highly ambiguous definition. See *infra* notes 48–50 and accompanying text.

4. See *People v. Aaron*, 299 N.W.2d 304, 312–16 (Mich. 1980) (concluding that to the extent that various States have placed limits on the rule, they “call into question the continued existence of the doctrine itself”). This reason for abolishing the rule is solidly illogical. See *infra* notes 51–56 and accompanying text.

5. See MODEL PENAL CODE § 210.2(1)(b) cmts. (Official Draft 1980) (noting the absence of commentary in support); James J. Tomkovicz, *The Endurance of the Felony Murder Rule: A Study of the Forces that Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429 (1994) (recognizing the persistence of the rule).

6. David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL’Y 359 (1985). Many of the articles citing *In Defense of the Felony Murder Doctrine* deviate from the preexisting scholarship by asserting that the felony murder doctrine serves valid purposes. See, e.g., Sean J. Kealy, *Hunting the Dragon: Reforming the Massachusetts Murder Statute*, 10 B.U. PUB. INT. L.J. 203, 240 & n.279 (2001) (describing as “[m]ost persuasive” the argument that “the rule offers a rational, proportional grading of offenses”); Mitchell Keiter, *With Malice Toward All: The Increased Lethality of Violence Reshapes Transferred Intent and Attempted Murder Law*, 38 U.S.F. L. REV. 261, 273 & n.36 (2004) (supporting the deterrence rationale for the rule); Dru Stevenson, *Toward a New Theory of Notice and Deterrence*, 26 CARDOZO L. REV. 1535, 1579 n.192 (2005) (describing *In Defense of the Felony Murder Doctrine* as “excellent and fascinating”). Nevertheless, “huge disagreement” exists over *mentes rea* for homicide and over the theories set out in the 1985 article. Christopher Slobogin, *The Civilization of the Criminal Law*, 58 VAND. L. REV. 121, 145–46 (2005).

*Journal of Law and Public Policy*, has been cited by a wide variety of courts, and appears in almost every criminal law casebook.<sup>7</sup> Our conclusion was that the question whether to retain the felony murder rule could be argued either way, but that the decision should not be made with a blind eye toward the reasons for retaining the rule. Since that time, the debate has changed. Opponents of the rule still exist, and they should. But with relatively few exceptions, academics no longer argue that the felony murder rule is without any support.<sup>8</sup>

The debate continues, of course. It largely—although not entirely—consists of arguments that detract from the felony murder rule. But there are two remaining questions. First, what arguments, if any, can furnish answers to the newer criticisms of the rule? As was the case years ago, many of the criticisms are subject to answers or counter-criticisms, but the answers have not been uniformly developed. Second, given that most jurisdictions still retain the felony murder doctrine in some form, how should a statute expressing the rule be designed? As is the case with any other legal principle, there are both good and bad versions of the felony murder doctrine.

This Article is an attempted reply to the rule's opponents, including the newest critics. It also contains an appraisal of different types of felony murder laws. Part I briefly summarizes the older rationales for and against the felony murder doctrine, including the arguments contained in the earlier article referred to above. Part II describes various forms that the felony murder rule takes in different states and under a variety of statutes today. Some of the versions are sound; others are not. Part III considers some of the most salient new criticisms of the rule. This discussion illustrates that the relative merit of the criticisms depends heavily upon which version of the rule is at issue.

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7. For recent citations by state courts, see, for example, *People v. Hansen*, 885 P.2d 1022, 1028 (Cal. 1994), *McMillan v. State*, 956 A.2d 716, 731 (Md. Ct. Spec. App. 2008), and *Bowman v. State*, 172 P.3d 681, 685 (Wash. 2007). See also JOSHUA DRESSLER, CRIMINAL LAW 310 (3d ed. 2003).

8. Most articles critical of the rule at least recognize the contrary arguments. See, e.g., 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, 706–08; Nelson E. Roth & Scott E. Sundby, *The Felony Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 450–60 (1985). For more dubious commentary that instead asserts that the rule is “rationally indefensible,” see Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 695–96 (1994).

The Conclusion recognizes that retaining the felony murder rule is a policy decision that can be argued either way, but contends that the decision should not be made with a one-sided bias. In addition, the Conclusion includes the observation that when evaluating the criticisms, a great deal depends upon which version of the felony murder doctrine the critics choose to denounce. The better versions are responsive to, and can withstand, the critics' assaults, whereas the less acceptable formulations give ammunition to the rule's opponents.

I. FOR AND AGAINST THE FELONY MURDER RULE:  
THE WELL-WORN ARGUMENTS

A. *Traditional Arguments in Opposition*

The classic arguments against the felony murder rule have been asserted for many years, and they are partially collected in commentary to the MPC.<sup>9</sup> The most frequent assertion seems to be that the doctrine divorces criminal liability from blameworthiness.<sup>10</sup> If this criticism were found to have merit, it would represent a serious concern, because relationship to blameworthiness is an important criterion in shaping the criminal law.<sup>11</sup> A second point in opposition is the assertion that the rule serves no positive purposes.<sup>12</sup> For reasons described below,

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9. See *supra* note 3.

10. See, e.g., Robert M. Elliot, *The Merger Doctrine as a Limitation on the Felony Murder Rule: A Balance of Criminal Law Principles*, 13 WAKE FOREST L. REV. 369, 371 (1977) (arguing that "the rule does violence to the philosophy which dictates that criminal liability should be commensurate with moral culpability"); George P. Fletcher, *Reflections on Felony Murder*, 12 SW. U. L. REV. 413, 427-28 (1981), Jeanne H. Seibold, *The Felony Murder Rule: In Search of a Viable Doctrine*, 23 CATH. LAW 133, 160-61 (1978) (asserting that the rule is "grossly misplaced in a legal system which recognizes the degree of mental culpability as the appropriate standard for fixing criminal liability" and that abolishing the rule would lead to blameworthiness as the guide for imposing punishment).

11. See Crump & Crump, *supra* note 6, at 362 ("Proportionality is an important value in the criminal law. Such diverse philosophers and judges as Jeremy Bentham, H. L. A. Hart, Sir James Fitzjames Stephen, Joel Feinberg, and Chief Justice Warren Burger have noted the disrespect that the law engenders when its response is disproportionate to public evaluations of the severity of an alleged violation. Many penal codes declare proportionality to be among their major objectives.").

12. See, e.g., Roth & Sundby, *supra* note 8, at 450-60 (discussing the proposed purposes of the rule and examples of how each purpose has failed); Seibold, *supra* note 10, at 151-52 (describing the theory that the purposes existing for the felony murder rule at its creation no longer exist).

this argument is dubious.<sup>13</sup> Third is the argument that the felony murder rule is encumbered with so many limitations that its own exceptions undermine it.<sup>14</sup> This is probably the weakest of the traditional arguments,<sup>15</sup> although at least one court has accepted it.<sup>16</sup> Each of these contentions warrants discussion. Examination will show that, although the critics generally do not specify which version of the rule they are attacking, each argument depends on precisely which kind of felony murder doctrine is under discussion.

The chief complaint of the MPC drafters appears to be that the felony murder doctrine results in convictions unrelated to individual blameworthiness.<sup>17</sup> Unfortunately, the commentary to this part of the MPC is not well developed. The underpinnings of the argument seem to include an assumption that the rule inevitably will be written to avoid any connection to individual blameworthiness, which is not true.<sup>18</sup> The argument also seems to assume that felony murders are not, as a class, more blameworthy than felonies that do not result in death. This assumption is debatable,<sup>19</sup> and it further presupposes that differences in moral blameworthiness cannot be addressed appropriately in sentencing laws.<sup>20</sup> Ultimately, the drafters seem to be saying that *mens rea* is the only legitimate determinant of blameworthiness,<sup>21</sup> that the traditional determinants of *mens rea* for mur-

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13. See *infra* notes 24–25 and accompanying text.

14. See Joseph M. Conley, *Michigan Supreme Court Abrogates Common Law Felony Murder Rule*, 15 SUFFOLK U. L. REV. 1304, 1318 (1980) (stating that “restricting the scope of felony murder to inherently dangerous felonies rendered the doctrine superfluous to most prosecutions because defendants who perpetrate such felonies usually display sufficient culpability to support a murder conviction”).

15. See *infra* notes 51–56 and accompanying text.

16. See *People v. Aaron*, 299 N.W.2d 304, 312–16 (Mich. 1980).

17. See MODEL PENAL CODE § 210.2(1)(b) cmts. (Official Draft 1980); see also Tomkovicz, *supra* note 5, at 1437–41.

18. See *infra* Part II.

19. See Crump & Crump, *supra* note 6, at 363–65 (pointing out that at least some versions of the felony murder rule do not divorce liability from blameworthiness, and citing information taken from court opinions, jury verdict research, and empirical public opinion surveys).

20. Note that nothing in the felony murder rule requires “equal” sentences for all murders. Furthermore, nothing prevents any jurisdiction from authorizing its courts to take into account other circumstances, including the defendant’s lack of intent to cause a death.

21. See Crump & Crump, *supra* note 6, at 366 (observing that “[m]ens rea is not a ‘unified field theory’ of homicide, and while such a theory might make the subject

der are the only way to describe the appropriate mental states for murder,<sup>22</sup> and that the felony murder rule cannot be crafted to create an equivalent requirement of moral blameworthiness.<sup>23</sup> Again, the argument rests upon debatable propositions.

The classic arguments also assert that the felony murder rule cannot advance other goals of the criminal law, including those founded on utilitarian concepts such as deterrence.<sup>24</sup> This criticism sometimes asserts that the felony murder rule cannot deter accidental killings that occur during felonies because felons will not know the law and cannot conform their conduct to the goal of minimizing accidental killings.<sup>25</sup> The argument is dubious because the same reasoning could be applied to many rules aimed at avoiding accidents, including those penalizing negligence or creating strict liability. No one advocates rescission of those laws because actors may not know the law. Finally, some critics argue that the exceptions or limits to the felony murder rule somehow undermine the rule in its entirety.<sup>26</sup> This position seems to be grounded in an assumption that no rule should have exceptions, and that the existence of any such limits shows the rule itself to be illegitimate, even if the limits produce results consistent with the policy of the rule by avoiding

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artificially 'logical' or 'consistent,' it does not reflect our society's more complex understanding of the nature, function, and purpose of the criminal law"); *see also* Rudolph J. Gerber, *The Felony Murder Rule: Conundrum Without Principle*, 31 ARIZ. ST. L.J. 763, 770 (1999) (stating that "[m]ental state or 'mens rea' is the decisive yardstick for determining culpability").

22. *See infra* note 92 and accompanying text (citing authority for adoption of mens rea conceptions different from traditional intent); *see also* Tomkovicz, *supra* note 5, at 1437 (noting that "it is the widely accepted view today that criminal liability must rest on proof of a recognized level of mental fault for every essential element of an offense").

23. *See infra* notes 59–61 and accompanying text (citing a particular formulation of the felony murder rule and explaining why it corresponds to blameworthiness); *see also* Tomkovicz, *supra* note 5, at 1438 (stating that "[e]very true variation of the felony murder rule is to some extent inconsistent with these contemporary notions of culpability and fault" (footnote omitted)).

24. *See* Crump & Crump, *supra* note 6, at 369–71; Seibold, *supra* note 10, at 151 (claiming that deterrence "is furthered by the felony murder rule only marginally, if at all" and that "[s]ince neither negligence nor accident can be deterred, the felony murder rule cannot fulfill such a purpose").

25. Justice Holmes, among others, offered this criticism. *See* O. W. HOLMES, JR., *THE COMMON LAW* 58 (Boston, Little, Brown, & Co. 1881).

26. *See supra* note 4 and accompanying text.

its application when the rule could not carry out its purposes.<sup>27</sup> These arguments, too, are subject to criticism.

It should be immediately added, however, that these arguments might have more currency for certain formulations of the felony murder rule than for others. The California jurisprudence on felony murder, for example, is poorly designed.<sup>28</sup> The California version of felony murder produces arbitrary distinctions that excuse from murder some individuals with greater moral blameworthiness than other individuals found liable for murder.<sup>29</sup> This is not the same thing, however, as detaching felony murder from considerations of moral blameworthiness, because the California decisions resulting in murder convictions do reflect moral blameworthiness; the problem is that California uses odd distinctions to exonerate others who also are blameworthy.<sup>30</sup> This is the perennial condition of the criminal law, which is written to minimize errors of conviction and which therefore creates anomalies of exoneration. But there is no doubt that the California rule is badly designed, and that the moral blameworthiness rationale has something to do with the reasons why. In any event, California's approach is not the only way to formulate the felony murder rule. There are other types of felony murder statutes that do not reflect the disadvantages of California's law, as Part II of this Article will show.

### B. Traditional Arguments Supporting the Rule

Are there any defensible rationales for the felony murder rule? Yes, there are, and developing these arguments was one purpose of my earlier article.<sup>31</sup> As the present Article will ex-

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27. See Crump & Crump, *supra* note 6, at 377–93 (discussing extent to which limits on the felony murder rule are policy-driven, in that they attempt to avoid application of the doctrine to situations not justified by the underlying policies).

28. See *infra* Part II.B.; see also Stephen L. Miller, Comment, *People v. Dillon: Felony Murder in California*, 21 CAL. W. L. REV. 546, 549–51 (1985) (discussing the California ruling that a felony must be dangerous “in the abstract” and giving examples of cases in which felonies were deemed not to be so).

29. See M. Susan Doyle, Comment, *People v. Patterson: California's Second Degree Felony Murder Doctrine at "The Brink of Logical Absurdity,"* 24 LOY. L.A. L. REV. 195, 197–99 (1990) (discussing the notion that drug-related deaths will likely never be prosecuted under California's felony murder rule since the rule requires that there be “a high probability that furnishing the drug would prove fatal” and this almost never occurs).

30. See *infra* notes 79–81 and accompanying text.

31. Crump & Crump, *supra* note 6, at 361–77.

plain, the rule's most important purpose is enhancing the connection between moral blameworthiness and the imposition of criminal liability. Also, the idea that deterrence is impossible may be overstated; it seems probable that at least some meaningful deterrence may result from the felony murder rule. In addition, the rule may serve some subordinate purposes that might not suffice alone to support it: decreasing the utility of perjury,<sup>32</sup> preserving fine calibration of adjudication for cases in which it is most appropriate,<sup>33</sup> condemning the taking of human life,<sup>34</sup> and providing clear, unambiguous definitions of crimes.<sup>35</sup> Finally, the exceptions to the rule arguably do not undermine it; every rule requires limits, and the exceptions to the felony murder rule can be seen as logical and policy-driven.<sup>36</sup> Each of these issues has been underestimated by the classical opponents, and each requires discussion and development.

First, the felony murder rule may actually serve the policy of linking the criminal law to moral blameworthiness,<sup>37</sup> contrary to its critics' assertions. Specifically, the rule arguably produces proportional grading of criminal offenses. This argument rejects criticisms of the rule founded on a mens-rea-only assumption. The criminal law has never been limited to mens rea alone in assessing the severity of crime. Actus reus and results count, too.<sup>38</sup> Murder is not the same offense as attempted murder, even though the two crimes have similar mentes reae. Murder is a more serious crime, even if the main difference is the result. The felony murder rule, like classical criminal law in general, is founded on the proposition that the result is sometimes a factor that aggravates or reduces the severity of a crime. Specifically, the felony murder rule reflects a judgment that a robbery that causes a human death is not merely a robbery but something more serious; it is more akin to a murder than to a robbery.<sup>39</sup>

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32. See *infra* note 42 and accompanying text.

33. See *infra* note 43 and accompanying text.

34. See *infra* note 44 and accompanying text.

35. See *infra* notes 45–50 and accompanying text.

36. See *infra* notes 51–56 and accompanying text.

37. See Crump & Crump, *supra* note 6, at 361–67.

38. See *id.* at 362–66.

39. See *id.* For further commentary discussing this concept, see Binder, *supra* note 1 (describing a method of defining felony murder that links it to blameworthiness or culpability); Tomkovicz, *supra* note 5, at 1430–32 (explaining the persistence of the rule).

In addition, the ancient policy of deterring killings, which has justified the felony murder rule for many years, may have more truth to it than the critics recognize.<sup>40</sup> It seems doubtful that felons are so different from other people that they cannot understand that a killing makes a criminal episode more serious. Surely, a robber who causes a human death during the crime knows that he has bought more trouble for himself than if he had left everyone alive. Furthermore, the assumption that the rule cannot deter accidental killings is extravagant. If that were the case, the law would have long since discarded every principle based on negligence, as well as strict liability, on the ground that accidents are not deterrable. Finally, the rule may well deter intentional killings. If the defendant falsely claims that the gun discharged accidentally, and the jury cannot tell beyond a reasonable doubt whether this claim is true, the result would be acquittal without the felony murder rule.<sup>41</sup>

There are several other justifications for the rule. As the last example above shows, the rule removes some of the incentives to commit perjury<sup>42</sup> and, as the California Supreme Court has recognized, it reserves finely calibrated (and scarce) trial resources for more substantial issues.<sup>43</sup> The rule also performs a function involving condemnation, because it reaffirms the sanctity of human life by reserving severe sanctions for crimes that destroy human life.<sup>44</sup>

In addition, the felony murder rule serves the purpose of providing a clear and unambiguous crime definition.<sup>45</sup> This is an important (albeit certainly not the only) value in the criminal law.<sup>46</sup> Ambiguity encourages discriminatory and inconsistent adjudication. Clarity, on the other hand, limits the discretion of both jurors and judges to import invidious criteria into decisions concerning criminal liability.<sup>47</sup> A well-drafted felony murder statute, such as the one considered in the next Part of

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40. See Crump & Crump, *supra* note 6, at 369–70.

41. See *id.*

42. See *id.* at 375–76.

43. See *People v. Burton*, 491 P.2d 793, 801–02 (Cal. 1971); Crump & Crump, *supra* note 6, at 374–75.

44. Crump & Crump, *supra* note 6, at 367–68.

45. *Id.* at 371–74.

46. *Id.*

47. *Cf. Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983) (explaining problems relating to the application of vague statutes).

this Article, serves this goal. In contrast, the MPC attempts to cover the felony murder situation by an odd combination: a confusing concept of recklessness coupled with a presumption. First, the MPC defines murder to include homicides committed “recklessly under circumstances manifesting extreme indifference to the value of human life.”<sup>48</sup> This sentence contains several vague concepts that are likely to produce inconsistency and arbitrariness in verdicts. For example, two juries can differ significantly enough over the kinds of indifference that are “extreme” that they produce seriously inconsistent verdicts. Furthermore, some jurors may be motivated to find “extreme” indifference because of improper factors such as the defendant’s lifestyle, personality, or ethnicity. Next, the MPC provides that the requisite recklessness and indifference are “presumed” if the actor was engaged in any of several named felonies.<sup>49</sup> A criminal presumption, of course, requires the judge to tell the jury that it can follow or disregard the presumption as it chooses.<sup>50</sup> A well-crafted felony murder law would provide greater clarity and thus confine discretion better than the MPC’s backdoor method of ostensibly “abolishing” the rule while actually preserving it in an altered form.

What about the exceptions to the rule? Do they destroy its very legitimacy?<sup>51</sup> Here, the critics’ argument involves a non sequitur, because every legal principle requires delimitation. The classic murder statute is limited both by its own terms and by exceptions that range from self-defense to insanity. But no one advocates abolishing the crime of murder because it is subject to exceptions. These limits help the criminal law to carry out its underlying policy aims by confining convictions for murder to cases that should be denoted as murder.

Do the exceptions to felony murder perform a similar function? Upon examination, the exceptions and limits to the felony murder rule similarly turn out to reflect instances in which a

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48. MODEL PENAL CODE § 210.2(b) (Official Draft 1980).

49. MODEL PENAL CODE § 210.2(b) (listing robbery, rape, deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping, and felonious escape).

50. *Sandstorm v. Montana*, 442 U.S. 510, 522–24 (1979) (explaining that criminal presumptions cannot be mandatory); *County Court v. Allen*, 442 U.S. 140, 157 (1979) (distinguishing between mandatory and permissive presumptions in criminal law).

51. The Michigan Supreme Court concluded that they did. *See People v. Aaron*, 299 N.W.2d 304, 312–16 (Mich. 1980).

conviction for murder would not be justified by policy reasons.<sup>52</sup> Although every jurisdiction that recognizes exceptions to the felony murder rule seeks to advance the rule's underlying policy aims, some jurisdictions' limits and exceptions have proved far more effective than others' in achieving this goal.<sup>53</sup> The merger doctrine, for example, keeps the felony murder rule from swallowing up the system of crime grading reflected in lesser homicides.<sup>54</sup> The dangerous act (or less reliably, the dangerous felony) requirement is designed to confine the murder category to instances of blameworthiness.<sup>55</sup> Causation doctrines are another effort to correlate the application of the rule with blameworthiness.<sup>56</sup> Basing a blanket abolition of all types of felony murder doctrines on the existence of exceptions and limits is poor reasoning, but that has not kept critics from asserting the argument.

Once again, it should be observed that both the critics' arguments and the rationales for the felony murder rule depend to some extent upon which form of the rule one is discussing. There are better felony murder statutes, and there are worse ones. The better statutes can stand up to the critics' attacks more persuasively than the worse ones can.

## II. WHAT KIND OF FELONY MURDER STATUTE? GOOD ONES AND BAD ONES

### A. "Good" Felony Murder Definition (Although "Good" Is Always in the Eye of the Beholder)

A good felony murder statute would have several characteristics. First, it would avoid interfering with the policies underlying other kinds of crime grading contained in statutes defining lesser homicides and other related crimes. It also would tie the definition of murder to situations involving relatively high degrees of individual blameworthiness. Such a rule would also maximize effectiveness in carrying out utilitarian goals such as deterrence. It would avoid ambiguity, which is always a diffi-

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52. For an analysis of this issue, see Crump & Crump, *supra* note 6, at 377-91.

53. *See id.*

54. *Id.* at 377-83.

55. *Id.* at 391-93.

56. *Id.* at 383-91.

cult problem in the criminal law. Finally, it would minimize the anomalies that result from schemes of crime grading.<sup>57</sup>

As an example, consider the following state statute, which is excerpted here to remove other definitions of murder and to isolate the felony murder component. The most important language is italicized:

A person commits an offense if he:

....

(3) *commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.*<sup>58</sup>

This law is currently in place in at least one state. It is a relatively good statute, considered by the criteria outlined above, although it is subject to some potential criticisms. This Part will examine the reasons for calling this version a good one.

First, this statute is a good law because it ties the crime of murder to relatively high degrees of individual blameworthiness. It does not automatically apply if the defendant commits a felony and a death results, as one might think could happen under a crude definition of the crime. In fact, it does not automatically apply even if the felony, in the abstract, is “dangerous.”<sup>59</sup> It requires the defendant to undertake two kinds of actions. First, the defendant must be acting in the course of committing a felony. Most felonies are serious crimes requiring a mens rea of intent or knowledge.<sup>60</sup> But second, and more importantly, the defendant must himself engage in an act that is “clearly dangerous to human life.”

Thus, under this statute, mere accident is not enough. In fact, dangerousness is not necessarily sufficient either, because the act must be one that is not just dangerous in the abstract, but one

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57. These criteria are distilled from the criticisms of and supporting arguments for felony murder laws generally. See *supra* Part I.

58. TEX. PENAL CODE § 19.02(b)(3) (2008) (emphasis added).

59. Thus, it differs in an important way from the approaches of some states, such as California. See *infra* Part II.B.

60. But not all felonies require this mens rea. The criticism that might be addressed to this aspect of the statute is discussed below. See *infra* note 67 and accompanying text.

that is “clearly dangerous to human life.” Furthermore, this clearly dangerous act must be the agency that “causes” the death of an individual. In summary, this statute focuses on individual blameworthiness more than other felony murder statutes<sup>61</sup> by centering its criteria on the actions of the individual defendant.

By the same token, the statute is confined to circumstances that are more readily subject to deterrence. Even though it is obvious that accidents in general are deterrable,<sup>62</sup> this statute does not cover every situation that involves an accident. The defendant is called upon to avoid only conduct that is “clearly dangerous to human life.” Defining murder in this way confines the label of murder to those situations in which the defendant has the most reason to be both able and motivated to avoid liability for the crime.

The statute does not seem likely to require a great deal of interpretation. Its language is transparent enough to guide jury deliberation, and it can be used directly in jury instructions.<sup>63</sup> In other words, it is not ambiguous, considered relative to other criminal laws. And the statute seems less prone than other versions considered below to exonerating more blameworthy individuals while convicting less blameworthy individuals, because its “clearly dangerous act” requirement is targeted directly at blameworthy conduct.

A critic could certainly find ways to attack this statute. First, the “clearly dangerous act” component seems to require only an objective standard of dangerousness. That is to say, the “clearly dangerous” requirement seems to demand only that a reasonable person be able to perceive the act as clearly dangerous; the subjective mental state of the individual defendant appears to be irrelevant. A meticulous critic might argue that the statute should be written so that the defendant is liable only if he “knows” that the act is clearly dangerous to human life, and perhaps even then, only if he “intends” to commit the act anyway. But then, this meticulous critic would have much greater difficulty with other common kinds of crime definition, such as the widespread use of

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61. For comparison, see *infra* Part II.B.

62. See *supra* notes 40–41 and accompanying text.

63. See 1 ELIZABETH BERRY & GEORGE GALLAGHER, TEXAS CRIMINAL JURY CHARGES § 3:80 (2008) (quoting the statute virtually verbatim in model jury instructions).

“depraved heart” murder statutes,<sup>64</sup> which present more significant possibilities of misapplication.

Additionally, the careful critic might note that the statute requires an act that “causes” the victim’s death. It does not require “proximate” causation.<sup>65</sup> One can speculate that a felon who commits an act that is dangerous to human life from a clearly foreseeable cause, but that causes a death in some unpredictable way or even by a freak accident, might be swept up by this statute. For example, imagine that a criminal pours a large quantity of gasoline into the first floor of a building with a large number of people in it, and lights the fluid; but instead of death from fire, an individual falls because the floor is slippery, hits his head, and dies. Critics have speculated about odd causation scenarios, as discussed later in this Article.<sup>66</sup> The statute quoted above could conceivably produce a conviction in this highly unusual and contrived circumstance. Many people would conclude that an arsonist who pours and lights gasoline in a building with people trapped inside can justly be called a murderer even if the mechanism of death is not precisely the one that seems most likely, but for other people the statute would be better if it required proximate causation. It seems doubtful, however, that the difference in crime definition would be significant enough to warrant the change.

A more substantial problem arises because some felonies are capable of being committed through *mentes rea* lesser than intent or knowledge, and some felonies even can be committed negligently. Negligent homicide is an example, if it is defined as a felony rather than as a misdemeanor. The statute above has a narrow merger exception that carves out only manslaughter and no other felony. Does someone who commits negligent homicide, and who commits an act clearly dangerous to human life, get bootstrapped into being convicted of murder, because the felony is “other than manslaughter” and all other elements of

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64. For a critique of the “depraved heart” formula, see David Crump, “Murder Pennsylvania Style”: Comparing Traditional American Homicide Law to the Statutes of Model Penal Code Jurisdictions, 109 W. VA. L. REV. 257, 305–12 (2007) (comparing depraved heart statutes to “crime definition by literary metaphor”).

65. The word “causes” seems to imply only but-for causation or cause-in-fact. “Proximate” causation, on the other hand, requires foreseeability—a cause and effect that are linked by objectively reasonable expectation of the possibility that the result will occur. See BLACK’S LAW DICTIONARY 234 (8th ed. 2004).

66. See *infra* note 105 and accompanying text.

the crime are present? The courts in the state of this statute actually had to decide this question. They answered no: negligent homicide is not a proper predicate felony for felony murder.<sup>67</sup> Still, it might have been better if the statute had said so expressly. In addition, there are other felonies that can be read as supporting a murder conviction, including aggravated assault and endangering a child. If child endangerment is capable of being committed negligently, and if it is committed in a way that is clearly dangerous to the child's life, can the actor be convicted of murder with only negligent conduct involved? The answer is yes, and Texas courts have so interpreted the statute.<sup>68</sup> Perhaps, then, to some critics there is value in the idea of requiring in the felony murder statute that the defendant act intentionally or knowingly in committing the object felony.

It seems doubtful, once again, that these changes would make significant differences in the actual incidence of murder convictions under the quoted felony murder rule. One might, however, conclude that the statute quoted above could be improved if it were amended to include additional language. The requirements that would be added are contained in the draft that follows, in italics:

A person commits an offense if he:

....

(3) *intentionally or knowingly* commits or attempts to commit a felony, other than manslaughter, and in the course and in furtherance of the attempt, or in immediate flight from the commission or attempt, he *intentionally* commits or attempts to commit an act *he knows to be* clearly dangerous to human life that *proximately* causes the death of an individual.<sup>69</sup>

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67. See *Lawson v. State*, 64 S.W.3d 396, 403 (Tex. Crim. App. 2001) (Meyers, J., dissenting). This anomaly in crime definition occurred through an understandable legislative oversight. Negligent homicide was a misdemeanor at the time that the felony murder statute in question was adopted. The legislature later elevated negligent homicide to a felony but did not notice that it needed to change the murder statute also. Crump, *supra* note 64, at 345.

68. See *Johnson v. State*, 4 S.W.3d 254, 256 (Tex. Crim. App. 1999). For a discussion of this issue, see Crump, *supra* note 64, at 345–46.

69. The treatment of an act as murder with nothing in the definition requiring any mens rea higher than negligence seems dubious at first glance. On the other hand, one can find policy reasons for this seeming anomaly. Child abuse often

Extra words in a jury charge cause confusion, of course, and in this instance it seems doubtful that the value of the extra words is worth it. Any definitional problems in the version quoted at the beginning of this Part seem minor compared to more common definitions of various kinds of crimes.<sup>70</sup>

It should be added that both the proposed statute immediately above and the actual statute cited earlier resemble proposals by commentators such as Professor Guyora Binder<sup>71</sup> for a revised modern felony murder statute that they consider defensible against the arguments of the critics. Professor Binder advocates negligence theory as a basis for felony murder. He has not recognized the actual statute above as conforming to his idea, but it fits his proposal well, at least in a general way. Arguably, however, the statute is better than a formula based purely upon negligence. This Article will explore the reasons in a later Part,<sup>72</sup> after the development of further background.

B. *“Bad” Felony Murder Definition (Although “Bad” Is in the Eye of the Beholder, Too)*

The definition of felony murder in California is plainly unsatisfactory. Indeed, it is so deficient that at least one respected state supreme court justice has called for abolition of the California jurisprudence altogether and has appealed to the legislature to pass something that makes more sense.<sup>73</sup> The California felony murder rule is not even expressed in the statutes (except by the broadest kind of implication), and its nondefinition ap-

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happens so that only the adult defendant is able to testify about it, and usually the explanation offered then is that the killing was accidental.

70. See *supra* note 58 and accompanying text.

71. See Binder, *supra* note 1, at 967 (stating that “felony murder liability is deserved for those who negligently cause death by attempting felonies inherently involving (1) violence or destruction and (2) an additional malign purpose independent of injury to the victim killed”). Binder’s theory contains some additional elements, but those add little to the statute’s requirement of risk of death. See also Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1121–24 (1997) (stating that the felony murder rule is negligence-related but opposing the rule).

72. See *infra* notes 84–90 and accompanying text.

73. See *People v. Howard*, 104 P.3d 107, 115 (Cal. 2005) (Brown, J., concurring and dissenting) (stating that the California doctrine should be “abrogate[d]” so as to “leave it to the Legislature” to define the crime “precisely”).

pears to be the product of a legislative oversight.<sup>74</sup> The California Supreme Court has had to develop the state's felony murder rule by fits and starts, without legislative guidance. Not surprisingly, the California rule fails some of the tests for a good felony murder doctrine set out at the beginning of the preceding Part. For the reasons that follow, California's doctrine does not correlate as well as it might with moral blameworthiness, is clumsy in its application to the deterrence purpose, contains a large amount of ambiguity, and results in exonerating some bad actors on dubious grounds while convicting other bad actors who seem no worse.

The principal limitation upon the felony murder rule in California is the "inherently dangerous felony" requirement.<sup>75</sup> This concept differs sharply from the "clearly dangerous act" requirement in the state statute discussed above. In California, the relevant question is whether the felony "in the abstract" is inherently dangerous.<sup>76</sup> This formulation is subject to criticism because it divorces the definition of murder from the individual blameworthiness of the defendant. The defendant personally need not do anything dangerous other than commit the felony. Under this formulation, a dangerous felony coupled with an unpredictable accident qualifies.

But that is not all. The California court has had a great deal of trouble deciding precisely which felonies are "dangerous." For example, does a felon who commits his particular felony by illegally possessing a sawed-off shotgun, and who points the weapon directly at another person, commit murder if the weapon discharges and kills the victim? The issue, in California, boils down to whether a felon's possession of a sawed-off shotgun is "in the abstract . . . inherently dangerous."<sup>77</sup> One might think that the answer from a California court would be, "Yes, absolutely!" California presumably outlawed sawed-off shotguns for previously convicted felons precisely because such weapons are quite obviously dangerous. But the court's

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74. See Crump, *supra* note 64, at 331-32 (detailing the history of enactment, which includes an apparently inadvertent legislative repeal of the felony murder doctrine followed by judicial implication of the doctrine as part of the broad concept of malice).

75. See *id.* at 334-40.

76. See *id.* at 335; see also *People v. Satchell*, 489 P.2d 1361, 1367 (Cal. 1971) (announcing this rule).

77. *Satchell*, 489 P.2d at 1367.

opinion did not take that (perhaps too straightforward) approach. Instead, the court reasoned that this particular felony could possibly be committed in ways that were not dangerous—for instance, if the felon kept the sawed-off shotgun unloaded and in a locked case all the time—and therefore the felony was not dangerous in the abstract. As an even more outlandish example, the court itself offered the possibility that the felon might keep his sawed-off shotgun (perhaps together with many others of differing shapes and sizes) “as a keepsake or curio.”<sup>78</sup> The trouble with this reasoning is that every felony, at least theoretically, is capable of being committed in “safe” ways, that is, in manners not dangerous to human life. A criminal can rob someone without using a weapon, and an arsonist can search the premises before committing the act of setting a fire. Thus, even these hardcore felonies can be carefully committed so that they pose little danger to human life. This reasoning ultimately leads to the conclusion that there are no inherently dangerous felonies, even though the California court has decreed that there are.<sup>79</sup> Not surprisingly, the list of felonies that the California court has found to be “inherently dangerous” looks completely arbitrary when compared with the list of felonies that it has found *not* to be “inherently dangerous”:

Felonies that have been held inherently dangerous to life include shooting at an inhabited dwelling, poisoning with intent to injure, arson of a motor vehicle, grossly negligent discharge of a firearm, manufacturing methamphetamine, kidnapping, and reckless or malicious possession of a destructive device.

Felonies that have been held *not* inherently dangerous to life include practicing medicine without a license under conditions creating a risk of great bodily harm, serious physical or mental illness, or death; false imprisonment by violence, menace, fraud, or deceit; possession of a concealable firearm by a convicted felon; possession of a sawed-off shotgun; escape; grand theft; conspiracy to possess methedrine; extortion; furnishing phencyclidine; and child endangerment or abuse.<sup>80</sup>

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78. *Id.* at 1371.

79. *See* *People v. Howard*, 104 P.3d 107, 111–12 (Cal. 2005) (summarizing those felonies the California court has found to be inherently dangerous and those it has found not to be).

80. *Id.* (citations omitted).

But why is recklessly possessing a destructive device “inherently dangerous” while intentional possession of a concealed weapon by a felon is not? Likewise, why is manufacturing methamphetamine inherently dangerous while furnishing phenylidone is not? Furthermore, why is “grossly negligent discharge of a firearm” inherently dangerous, but “practicing medicine without a license under conditions creating a risk of great bodily harm, serious physical or mental illness, or death” is not? These distinctions have no apparent anchor in reality, and even worse, they disrespect the legislative language. Consequently, the California rule gives the appearance of a disconnect between moral blameworthiness and crime definition.<sup>81</sup>

The California formulation also seems to miss opportunities for deterrence. If you are a felon in possession of a sawed-off shotgun, for example, the act of pointing it directly at another person might be deterred. The idea of an inherently dangerous felony is so ambiguous that the state supreme court’s decisions about which felonies qualify lack coherence. The law remains unclear and probably will forever. Because of the apparently arbitrary lists quoted above, the California doctrine exonerates some truly bad actors while convicting similarly bad actors who may legitimately think that their conduct is less morally blameworthy. This circumstance, although a constant problem in criminal justice, ought to be minimized, because it tends to foster disrespect for the law.

We have not yet considered the California version of the merger rule, which also contains some surprising anomalies.<sup>82</sup> All in all, California would do well to address the problem via legislation, perhaps of the type contained in Part II.A. There are other kinds of murder definitions that also seem inferior to a good felony murder rule. As this Article has shown, the MPC, for example, defines murder in situations involving neither intent nor knowledge, but only recklessness, and then “presumes” recklessness in situations involving felonies.<sup>83</sup> One can question whether this backdoor method of ostensibly abolishing the felony murder rule—despite actually preserving it through a presumption—introduces ambiguity and confusion

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81. For a more detailed critique of the California rule, see Crump, *supra* note 64, at 334–40.

82. For a discussion of the California merger doctrine, see *id.* at 341–43.

83. See MODEL PENAL CODE § 210.2 (Official Draft 1980).

that outweigh any perceived disadvantages of keeping the felony murder rule but defining it better.

At this point, it may be valuable to consider modern proposals for negligence-related justifications of the felony murder rule and to compare them with the two approaches discussed in this Part. Professor Binder, for example, claims to have produced the “long-missing principled defense of the felony murder doctrine”<sup>84</sup> and explains his thesis as follows:

[F]elony murder liability is deserved for those who negligently cause death by attempting felonies inherently involving (1) violence or destruction and (2) an additional malign purpose independent of injury to the victim killed. How can merely negligent homicide deserve punishment as murder? Because the felon’s additional depraved purpose aggravates his culpability for causing death carelessly. To impose a foreseeable risk of death for such a purpose deserves severe punishment because it expresses a commitment to particularly reprehensible values. In defending felony murder liability as deserved in cases like those described above, I will be defending an *expressive* theory of culpability that assesses blame for harm on the basis of 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.<sup>85</sup>

The three elements Professor Binder combines arguably correspond to an amalgamation of parts taken from the better statute quoted above (requiring an “act clearly dangerous to human life,” which encompasses Professor Binder’s negligence element, although it requires more)<sup>86</sup> and from the less satisfactory approach described above (requiring an “inherently dangerous felony,” which California has construed to correspond to his second and third elements—that is, felonies “inherently involving violence or destruction” and including an “additional malign purpose”).<sup>87</sup> Professor Binder’s theory is a useful contribution to the understanding of the much-criticized and often-caricatured doctrine called felony murder.

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84. Binder, *supra* note 1, at 967.

85. *Id.*; see also Simons, *supra* note 71, at 1121–24 (arguing that the doctrine is negligence-related, but opposing the doctrine).

86. See TEX. PENAL CODE § 19.02(b)(3) (2008).

87. See Crump, *supra* note 64, at 334–40.

Nonetheless, the better statute quoted above,<sup>88</sup> which already exists, may arguably improve upon Professor Binder's formulation. Instead of requiring mere negligence, it imposes a higher standard by requiring objectively that the causal act be "clearly" dangerous. Furthermore, it does not call merely for negligence of a generalized sort. Instead, it requires that the lethal act be clearly dangerous "to human life." And the better statute is superior, one could argue, precisely because it omits Professor Binder's reference to the "inherent" dangerousness, violence, or destructiveness of the underlying felony, upon which Professor Binder would make liability depend. The policy underlying the element of an inherently violent felony is better covered instead by the requirement that the act be clearly dangerous to human life, which allows the statute to avoid the arbitrariness that inevitably accompanies the quixotic effort to classify felonies as inherently violent or destructive. As evidenced above, California has convincingly shown the potential messiness of this distinction,<sup>89</sup> and a few examples may further illustrate the point. Is a felony involving destruction of property inherently violent or destructive? What about a felony involving reckless (or drunk) driving? Abuse of a corpse? Sexual assault by fraud? The lists quoted above of the felonies California recognizes as inherently dangerous, and the felonies that supposedly are not inherently dangerous (and yet seem just as dangerous),<sup>90</sup> demonstrate how unsatisfactory this element is in actual adjudication.

And yet Professor Binder's theory may be fundamentally sound. His approval of a revised felony murder rule, designed to depend upon "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," seems to encapsulate a sensible way of defining liability in this controversial area. The point, however, is that a statute that focuses on the actor's conduct, requiring that it be clearly dangerous to human life and be tied to ends that have low moral worth (because the end is a felony), seems better than an approach that attempts to parse felonies for their "inherent" dangerousness.

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88. See TEX. PENAL CODE § 19.02(b)(3).

89. See *People v. Howard*, 104 P.3d 107, 111–12 (Cal. 2005).

90. See *id.*

### III. EVALUATING THE NEWER ARGUMENTS AGAINST THE FELONY MURDER RULE

#### A. Restatements of Traditional Arguments

In some instances, the arguments of today are the arguments of old. It is surprising still to read allegations by a few commentators that there are no rational arguments supporting the felony murder rule.<sup>91</sup> These commentators may be tacitly concluding that the arguments sketched in Part I of this Article are unmeritorious or are insubstantial compared to the counter-arguments that they perceive. If so, these critics would do better to explain why they reject the reasons offered in defense of the rule, rather than assert that there are no such rationales.

Another argument still sometimes made is that the felony murder rule disconnects criminal liability from blameworthiness.<sup>92</sup> That conclusion, however, depends in large measure upon the type of felony murder rule at issue. If the version of felony murder under discussion were to state merely the rough and unpolished proposition that commission of any felony that results however unpredictably in a death is murder, cases may exist in which blameworthiness would be disconnected from criminal liability. But that version of the rule is today a caricature. At early common law, felonies generally were punishable by death, so the use of a rough rule without careful limits may not have made much difference.<sup>93</sup> Today, however, every juris-

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91. For a particularly dubious example, see Sara Sun Beale, *What's Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 53–56 (1997) (arguing that the rule “has received nearly universal scholarly condemnation” and suggesting that it may be retained because of public attitudes at variance with those of “experts”). Such sweeping statements, however, are no longer accurate and assume that the rule’s detractors have “expertise” that its scholarly supporters do not. For a more balanced but still unexplained example, see Michael S. Moore, *The Independent Moral Significance of Wrongdoing*, 5 J. CONTEMP. LEGAL ISSUES 237, 280–81 (1994) (classifying felony murder among “unfair doctrines” because although results matter, “they don’t matter that much or in that way”).

92. See Christopher Slobogin, *The Civilization of the Criminal Law*, 58 VAND. L. REV. 121, 145–46 & n.115 (2005) (finding that a “huge disagreement exists over the types of *mentes rea* that merit punishment” and citing various sources discussing the proposition).

93. See WAYNE R. LAFAVE, CRIMINAL LAW 744 & n.5 (4th ed. 2003).

diction imposes limits on the felony murder rule.<sup>94</sup> The requirement of “an act clearly dangerous to human life,” coupled with the commission of a felony, creates a clear link between liability and blameworthiness.<sup>95</sup> Thus, a well-written felony murder statute is far less vulnerable to this criticism. Even the California version of the rule, which includes a “dangerousness requirement,” links liability to blameworthiness, although in a less satisfactory manner.<sup>96</sup>

### B. *Newer Arguments Against the Rule*

Newer arguments against the rule seem to focus on the blameworthiness issue, but they contain more sophisticated reasoning than a mere assertion that the felony murder doctrine divorces liability from culpability. Perhaps the common philosophy in these newer arguments—an emphasis on blameworthiness—is not surprising, because correspondence to blameworthiness is an important value in crime definition, and it is a natural issue to arise in this context. First, one can argue that some versions of the felony murder rule are underinclusive—that is, they exonerate some individuals whose crimes seem at least as serious as the crimes of other individuals whom they convict.<sup>97</sup> The effect is an arguably inconsistent correspondence to blameworthiness. Second is the argument that some versions of the felony murder doctrine are overinclusive, producing unacceptable convictions of criminals whose crimes are based on conduct that is not seriously blameworthy.<sup>98</sup> Third, other argu-

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94. See Crump, *supra* note 64, at 329–30.

95. See TEX. PENAL CODE § 19.02(b)(3) (2008).

96. See Crump, *supra* note 64, at 332–33.

97. See Tomkovicz, *supra* note 5, at 1467 (indicating that most jurisdictions follow the “merger” doctrine, “a restriction that precludes certain particularly dangerous felonies—the archetype is assault with a deadly weapon—from qualifying” for application of the felony murder rule).

98. Lord Macaulay offered the classic formulation of this criticism in his notes to the Indian Model Penal Code. LORD THOMAS BABINGTON MACAULAY, INTRODUCTORY REPORT UPON THE INDIAN PENAL CODE (1837), reprinted in 1 MISCELLANIES 666, 668–72 (1901) (also suggesting that “[i]t would be a less capricious . . . course to provide that every fiftieth or every hundredth thief selected by lot should be hanged, than to provide that every thief should be hanged who, while engaged in stealing, should meet with an unforeseen misfortune”); see also Kevin Cole, *Killings During Crime: Toward a Discriminating Theory of Strict Liability*, 28 AM. CRIM. L. REV. 73, 123–24 (1990) (“The felony murder rule might be considered objectionable because it treats a robber who kills differently from a robber who does not kill, even if each robber ran precisely the same risk respecting death.”); Gerber,

ments invoke the concept of “moral luck,” or the imposition of rewards or punishments through mechanisms that are primarily accidental, as opposed to those based on blameworthiness.<sup>99</sup> Each of these arguments can have validity if asserted against crude conceptions of the felony murder doctrine, or even against badly written actual statutes, but better versions of the felony murder doctrine can withstand these criticisms.

As noted above, one group of critics using the blameworthiness argument may contend that the felony murder rule is underinclusive.<sup>100</sup> The rule, these critics could claim, results in the convictions of some bad actors who are blameworthy, but fails to similarly convict some others who are at least as blameworthy.<sup>101</sup> There are at least two answers to this claim. First, underinclusiveness is built into criminal justice. Simply by requiring proof beyond a reasonable doubt, we allow some bad actors to escape. The standard of proof is a different issue, of course, but every time words are se-

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*supra* note 21, at 784 (suggesting that the felony murder rule takes unfortunate felons outside the scope of our general system of justice); Rudolph J. Gerber, *A System in Collapse: Appearance vs. Reality in Criminal Justice*, 12 ST. LOUIS U. PUB. L. REV. 225, 233–34 (1993) (“The rule has long been criticized as an exception to the otherwise universal principle of our criminal law which requires that guilt and punishment be proportionate to mens rea . . .”) [hereinafter Gerber, *System in Collapse*]; Denise M. Oas, *The Felony Murder Rule Is Alive and Well in Missouri, But Should It Be?*, 57 UMKC L. REV. 85, 97 (1988) (“Compare the culpability of the following defendants: 1) an arsonist accidentally kills a bum asleep in an abandoned building; 2) an escaping robber causes the death of an innocent bystander by using that bystander as a body shield. While neither party intended the deaths, the arsonist was not aware of the bum, while the robber intentionally put the bystander at risk. . . . Individual justice would require that these defendants be treated differently since they are not equally culpable . . .”).

99. See Gerber, *System in Collapse*, *supra* note 98, at 233–34 (A felony murderer’s “intent, by definition short of homicidal, is then injected with homicidal motive not because of a corresponding intent but because of the external misfortune of a death”); Lloyd L. Weinreb, *Desert, Punishment, and Criminal Responsibility*, 49 LAW & CONTEMP. PROBS. 47, 64 (1986) (“The crucial problem of fortuity remains. Why ought we punish for an accident?”); Kimberly D. Kessler, Note, *The Role of Luck in the Criminal Law*, 142 U. PA. L. REV. 2183, 2196–97 (1994) (advancing the claim that felons should not be punished for “chance occurrence[s]” beyond their control).

100. See, e.g., Michael T. Cahill, *Attempt, Reckless Homicide, and the Design of Criminal Law*, 78 U. COLO. L. REV. 879, 911–13, 937 & n.173 (2007) (advocating abolition of felony murder rule, but without specifying the version of the doctrine being considered; suggesting that basing liability on conduct without “culpability” may result in “underinclusiveness”; and advocating instead a crime of “attempted reckless homicide”).

101. See *People v. Howard*, 104 P.3d 107, 111–12 (Cal. 2005) (summarizing those felonies California courts have found to be inherently dangerous and those they have found not to be).

lected to define a crime so as to confine the category and not blindly sweep in less blameworthy people, the law inevitably lets some blameworthy people escape. The solution to this problem is to undertake the clearest and best crime definition possible, not to throw out the entire category of crime because it does not and never will adequately cover every situation.

The second answer is both more important than and suggested by the first. The degree of underinclusiveness depends upon the particular version of the felony murder rule that the jurisdiction in question uses. The California Supreme Court, for example, has held that discharging a firearm into an occupied residence is a proper predicate felony for felony murder, if the bullet kills an individual inside.<sup>102</sup> But strangely, a California court of appeals has held that the felony of discharging a firearm into an occupied vehicle is not a proper predicate for felony murder.<sup>103</sup> The court based its reasoning on the merger doctrine rather than the dangerous felony requirement, but the holding nevertheless seems anomalous in light of the conclusion that shooting into an occupied residence is a proper predicate. Between two otherwise similar killers, the individual shooting into the occupied residence who is convicted of felony murder may argue that it is not fair for another individual, who instead shoots into a vehicle, to be exonerated on the ground that shooting into an occupied vehicle is not a “dangerous” felony. One can question whether the critic’s apparent conclusion—that because one is exonerated, both should be exonerated—actually follows; nevertheless, the result is anomalous. In any event, the solution is easy. No other state should blindly follow the California jurisprudence, and California should revise its law. Thankfully, better written statutes, such as the one in Part II.A, above, requiring an act “clearly dangerous to human life,”<sup>104</sup> are not so dramatically underinclusive. The better crime definition is superior precisely because it ties liability to individual blameworthiness, and for this reason, it is less likely to exonerate the most serious conduct.

A more sophisticated criticism focuses not on underinclusiveness, but overinclusiveness. These commentators are con-

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102. *People v. Hansen*, 885 P.2d 1022, 1026–27 (Cal. 1994) (in bank).

103. That is, it is not a proper predicate if the motive lacks an independent felonious purpose. See *People v. Chun*, 65 Cal. Rptr. 3d 738, 753 (Ct. App. 2007), *petition for review granted*, 173 P.3d 415 (Cal. 2007).

104. TEX. PENAL CODE § 19.02(b)(3) (2008).

cerned that the felony murder rule might make a murderer out of someone who has done virtually nothing that would perceptibly cause danger to a human life, but who has merely committed a garden-variety felony that produced a freak accident. For example, Professor Joshua Dressler, an eminent and objective scholar, criticizes the blameworthiness and condemnation arguments supporting the felony murder rule with the following example:

Consider two pickpockets, *P1* and *P2*. *P1* puts her hands in *V1*'s pocket and finds a wallet containing two hundred dollars. *P2* puts her hand in *V2*'s pocket and discovers a wallet with the same amount of money, but *V2* dies of shock from the experience. . . . [T]he culpability of *P1* and *P2* as to the thefts is identical. Therefore, as to the larcenies, they should be punished alike.

As for the social harm of the death, *P2* is no more culpable than *P1*, as the death was unforeseeable. It is true, of course, that *P2* caused a death, but in terms of *mens rea*, her culpability (as that of *P1*) is that of an intentional thief, and no more. Even if it were concluded that *P2* should pay some debt for the unforeseeable death, it surely violates ordinary concepts of just deserts to treat the unlucky pickpocket as deserving of punishment equal to that of an intentional, premeditated killer.<sup>105</sup>

This criticism was leveled not at the felony murder rule generally, but at the argument that the rule is supported by condemnation-related considerations or reaffirmation of the value of human life. Still, the criticism depends upon questionable assumptions. First, it assumes that all crimes of any given category must be sentenced alike, without regard to lesser *mentes rea*. The suggestion that the unlucky pickpocket faces a punishment "equal to that of an intentional premeditated killer" is dubious. Second and more importantly here, however, the criticism depends once again upon the version of the felony murder rule that the particular jurisdiction follows. The only way that Professor Dressler's example could result in a murder conviction is if one assumes that the jurisdiction applied the rawest and least defensible form of felony murder, namely, that death resulting from the commission of a felony is murder, without any limits or other requirements.

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105. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 517–18 (3d ed. 2001).

But again, this primitive form of felony murder is a caricature, inasmuch as modern jurisdictions confine the felony murder rule.<sup>106</sup> Even the California approach requires at least that the defendant engage in a dangerous felony, although it does remain partially vulnerable to Professor Dressler's criticism. A robber who did nothing perceptibly dangerous to life could be considered a murderer if a freak accident caused a death, assuming there was no need to show proximate causation. The requirement of proximate causation, instead of mere but-for causation, addresses the issue directly by demanding a foreseeable cause.<sup>107</sup> Therefore, even with California's clumsy statute, either a dangerous felony approach or a requirement of proximate causation should produce an adjudication that Professor Dressler's hapless pickpocket is a criminal but not a murderer. And if the better statute set out in Part II.A is in force, the requirement of an act clearly dangerous to human life removes the problem almost entirely. The overinclusiveness argument thus has less force than it might appear, unless it is offered against an unrealistically crude hypothetical statute.

Another newer attack on the felony murder rule is a broadside, aimed at the entire rule. Commentators espousing this view invoke concepts of moral luck, and they argue that the felony murder rule violates these principles.<sup>108</sup> The basic concern of moral luck philosophy is to describe the conditions that may allow us to visit the consequences of accidental results on actors who had incomplete knowledge of the risks at issue.<sup>109</sup> For example, imagine that two equally astute stock speculators buy shares of two different companies with wildly disparate results, such that one receives a bonanza and the other holds a worthless asset. It seems appropriate to allow the successful investor to keep his gains and not require him to give half to the other investor, even if the result depends only on luck. Similarly, imagine that one robber points his pistol at the convenience store clerk and kills no one, while a second, equally competent robber points his pistol with the result that it accidentally discharges and kills the clerk. Is it morally acceptable

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106. See Crump, *supra* note 64, at 329–30.

107. See BLACK'S LAW DICTIONARY 234 (8th ed. 2004).

108. See, e.g., Kadish, *supra* note 8, at 695–96 (calling felony murder liability “rationally indefensible”).

109. See Meir Dan-Cohen, *Luck and Identity*, 9 THEORETICAL INQ. L. 1, 3 (2008).

to visit the consequences of the unintended result on the second robber by holding him guilty of murder?<sup>110</sup>

At some point, it may make sense to say, “This particular criminal was not engaged in actions that should result in a murder conviction, even though (or perhaps because) he was spectacularly unlucky.” Professor Dressler’s hypothetical pick-pocket who causes fatal fright to another person might evoke this reaction. He would not be convicted, however, under either of the statutes considered in this Article. On the other hand, if he engages in more risky behavior—conduct that anyone would recognize as likely to precipitate severe stress in a person known to be vulnerable—at some point it may be morally justified to say that the defendant has engaged in conduct that does justify the imposition upon him of the consequences of his actions. A requirement that the defendant must have engaged in an act clearly dangerous to human life arguably supplies that condition. The moral luck argument seems dubious if asserted against this better formulation of the rule, because the actor can consciously avoid conduct that is clearly dangerous to human life, and if he does not, his liability is related not just to his luck but to his relative blameworthiness as well.

In general, the hardest cases for the felony murder rule come about when there are multiple parties to the crime, and some, but not all, of the parties engage in acts clearly dangerous to human life. Consider some examples: A confederate shoots a clerk, to the surprise of the getaway car driver. A confederate accidentally kills a bystander several blocks away by a stray bullet during a gun battle. A police officer justifiably kills a confederate criminal who threatened the officer. Can another participant in the robbery, who provably was involved in the crime but who did not personally commit any of the dangerous acts described here, be convicted of murder?

Different jurisdictions have answered this question in different ways. The longstanding rule of *Commonwealth v. Redline*<sup>111</sup> precludes liability for the lawful death of a co-felon, largely on the

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110. See, e.g., David Enoch, *Luck Between Morality, Law, and Justice*, 9 THEORETICAL INQ. L. 23, 23–24 (2008) (proposing that outcomes dependent upon luck should not be a factor in the law because “[t]here is no moral luck,” and “[i]f there is no moral luck, there should be no legal luck”).

111. 137 A.2d 472 (Pa. 1958). For discussion, see Crump & Crump, *supra* note 6, at 384–91.

ground that the result is not part of the criminal design. The death is not itself criminal, and therefore does not involve the other co-felon in blameworthiness for the death, or so the reasoning goes. At the opposite philosophical pole, there is the cone-of-violence argument, which asserts that one who participates in armed criminal conduct should anticipate that violence will escalate, and thus is the legal responsibility of all who set it in motion.<sup>112</sup> Perhaps the extreme example is one modern case<sup>113</sup> in which the defendant's co-felon threatened to kill a police officer by raising his gun toward him; the co-felon was lawfully killed in turn by the officer, and the court upheld the defendant's conviction for murder although the defendant participated in only the robbery and not in the ultimate act that caused his co-felon's death.<sup>114</sup> The defendant was in custody at the time of the shooting.<sup>115</sup>

There is appeal to the cone-of-violence theory. Certainly, one reason for designating armed robberies as serious crimes is the realization that escalation of violence in all directions can be anticipated. But perhaps the *Redline* result, which rejects this kind of liability, has appeal, too. And so the moral luck argument seems to gain its most traction in these multiple-party cases. Requiring a showing that the defendant himself *personally* engaged in an act clearly dangerous to human life would go a long way toward addressing the moral luck concern of the critics. This solution, however, might require reconsideration of well-established vicarious liability doctrines.

#### CONCLUSION

Almost all jurisdictions have retained the felony murder rule in some form, despite the many criticisms of the rule. Those law-making bodies that have abolished it have provided poor reasons for doing so. The persistence of the rule is not attributable merely to knee-jerk politicians or to its creation by common-law judges. Rather, its persistence reflects the sound rationales that support the felony murder rule. Chief among these rationales is that, despite the critics' arguments to the contrary, the felony murder doctrine often arguably does result in crime gradation that corre-

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112. See, e.g., *State v. Canola*, 343 A.2d 110, 116 (N.J. Super. Ct. App. Div. 1975).

113. *State v. Sophophone*, 19 P.3d 70 (Kan. 2001).

114. *Id.* at 71-72.

115. *Id.*

sponds to blameworthiness. Also, the age-old deterrence argument may have some merit, and the critics' contentions that felons do not know the law and that accidents thus cannot be deterred do not withstand scrutiny. Felons know enough to figure out that they have bought much more trouble if their actions result in loss of human life, and the persistence of our law of negligence and strict liability—in both civil and criminal cases—evidences a belief that accidents are deterrable to some degree.

Comments denying that sound rationales exist for the felony murder rule ignore the literature. Modern arguments that the felony murder rule divorces the definition of murder from blameworthiness paint with too broad a brush, and generally ignore the cases in which the rule does result in linking blameworthiness to liability. This conclusion depends, however, upon the version of the felony murder doctrine under discussion.

There are better and worse definitions of felony murder. Too often the critics assume a law that produces a conviction for murder upon the mere coincidence of a felony and a death. But that version of the rule, if it ever existed, is as distant a memory as many other unjust laws. Every state applies limits and exceptions to the felony murder definition. How these are written determines the value of the critics' arguments. The California law, for example, focuses on the type of felony in the abstract, demanding that it conform to concepts of inherent dangerousness before it can serve as a predicate for a murder conviction. This limit is better than nothing, but it is more vulnerable than other formulations to the critics' argument that it divorces the definition of murder from blameworthiness. A better crime definition would tie liability to the defendant's individual blameworthiness. Requiring that the defendant actually commit an act clearly dangerous to human life, and that this act be what causes the death, produces a better statute. Careful critics might also demand, that the statute require that the defendant intentionally or knowingly commit the act (and the felony). These suggestions seem subject to the complaint that they "gild the lily,"<sup>116</sup> or make something that already works

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116. WILLIAM SHAKESPEARE, *THE LIFE AND DEATH OF KING JOHN* act 4, sc. 2, lines 11–12, 16 (1623), reprinted in WILLIAM SHAKESPEARE: *THE COMPLETE WORKS* 621 (Alfred Harbage ed., Viking Press 1977) ("To gild refined gold, to paint the lily, / To throw a perfume on the violet / . . . Is wasteful and ridiculous excess."). Despite technically being a misquotation of Shakespeare, the phrase "gilding the lily" has become the favored version.

more clumsy, but perhaps the critics can justifiably argue that these changes produce minor improvements.

A better-written felony murder statute links liability and blameworthiness more satisfactorily than other formulations. It also arguably avoids critics' complaints of underinclusiveness and overinclusiveness. By directly requiring blameworthy conduct from the defendant personally and not merely from the class of felons at issue, the better statute avoids criminalizing conduct that produces unforeseeably tragic results. Similarly, by eschewing California's anomalous "dangerous felonies" jurisprudence, and by focusing instead on the defendant's own actions, a better statute would minimize the degree to which it may acquit criminals more blameworthy than those it convicts. Furthermore, the better statute would be more consistent with the proper treatment of moral luck. It is far less offensive to convict someone for an occurrence, though unintended, that the actor's conduct was "clearly" in danger of causing.

The hardest cases remain those with multiple parties, that is, those involving group-committed felonies in which one actor does something particularly blameworthy, and a resulting unintended death is attributed to an arguably less blameworthy codefendant. The critics' argument that this result violates fair treatment of moral luck is understandable. But the cone-of-violence theory—the notion that if a person personally undertakes armed criminal activity, that person appreciates or should appreciate the likelihood of escalation—also is persuasive. Perhaps the argument of the critics should prove influential here, but in a way that still gives some weight to the cone-of-violence theory. The law could provide, for example, that no one can be convicted of felony murder by vicarious liability unless the defendant personally appreciated or should have appreciated the risk of the co-felon's clearly dangerous act.

Thus, with other minor changes, and with the selection of a better version of the felony murder rule, the felony murder doctrine should be considered on its merits. The doctrine serves important positive purposes. The critics can make some valid points by targeting only the clumsier versions, but their arguments are much less persuasive when considered against well-drafted formulations of the rule.