Columbia Law School
Scholarship Archive

Faculty Scholarship | Faculty Publications

1981

Reflections on Felony-Murder

George P. Fletcher
Columbia Law School, gpfrecht@gmail.com

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship

Part of the Criminal Law Commons, and the Criminal Procedure Commons

Recommended Citation

George P. Fletcher, *Reflections on Felony-Murder*, 12 SW. U. L. REV. 413 (1981).
Available at: https://scholarship.law.columbia.edu/faculty_scholarship/4165

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu.

REFLECTIONS ON FELONY-MURDER

George P. Fletcher*

Of all the reforms proposed by the Model Penal Code, perhaps none has been less influential than the Model Code's recommendation on the perennial problem of felony-murder.[1] As found in our nineteenth-century criminal codes, the rule has several variations. The basic scheme is to hold the accused liable for murder if the killing is connected in any way with the attempt to commit a felony or the flight from the scene of a felony.[2] It does not matter whether the accused or an accomplice causes the death. Nor does it matter whether the killing occurs accidentally and non-negligently. According to one popular rationalization, the felon's intent in committing the felony attaches, fictitiously, to the killing and somehow becomes transformed into the malice aforethought required for murder.[3]

The drafters of the Model Penal Code attempted to crack this fictitious connection between the culpability of committing an ordinary felony and the culpability required for the most egregious felony of murder. The Code stands for the principle that the minimal culpability required for murder is greater even than reckless killing. The killing must be not only reckless, but, in addition, committed under circumstances "manifesting extreme indifference to the value of human life."[4]

* Professor of Law, U.C.L.A. School of Law. This article was originally presented as part of the Distinguished Lecture Series at Southwestern University in September 1980.

1. MODEL PENAL CODE § 210.2(1)(b) reads in pertinent part:

> (1) Except as provided in Section 210.3(1)(b), criminal homicide constitutes murder when . . .
>
> . . . .
>
> (b) it is commited recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit, robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.

2. *E.g.*, CAL. PENAL CODE § 189 (West Supp. 1981); IDAHO CODE § 18-4003 (1979); NEV. REV. STAT. § 200-030(1)(b) (1979).

3. M. FOSTER, A REPORT OF SOME PROCEEDINGS OF THE COMMISSIONER FOR THE TRIAL OF THE REBELS IN THE YEAR 1746 IN THE COUNTY OF SURREY AND OF OTHER CROWN CASES 259 (1762).

4. MODEL PENAL CODE § 210.2(1)(b).

The Code recognizes that the prosecution might prove this required degree of recklessness by showing that the killing occurred in the course of a felony especially dangerous to human life.[5] There is no doubt that many killings committed in the course of robbery, rape, arson, or burglary are reckless, and indeed they might be committed under circumstances manifesting extreme indifference to the value of human life. But that is surely not the case with all killings that occur in the course of these felonies. Suppose that an arsonist carefully checks the premises for signs of human life before setting fire, yet as the blaze erupts, an independently motivated burglar breaks into the house and perishes. One would be hard-pressed to regard the arsonist as having acted recklessly toward the unexpected burglar. Or suppose that an unarmed burglar encounters an occupant with a weak heart; though the burglar attempts to calm the occupant, the latter dies of shock. It is obvious that in some cases a felon might be reckless in taking the risk of homicide; but in other cases he might be free from significant fault in bringing on the death. The Model Penal Code suggests that killing in the course of a dangerous felony should be merely presumptive of the culpability required for homicide.[6] The point is that the presumption does not always hold, and when it does not, there is no reason to regard a killing in the course of a felony as different from other killings.

As a general matter, the Model Penal Code has stimulated an extraordinary level of legislative activity. In the last two decades thirty-four states have adopted at least some portion of the recommendations embodied in the Model Code.[7] The most popular provisions are those defining the four kinds of culpability,[8] those on lesser evils,[9] insanity,[10] duress,[11] and, of course, the provision that adorns any criminal code:

5. *Id.* (robbery, rape, deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping, or felonious escape.)

6. *Id.*

7. On the reception of the Model Code as of July 1, 1980, see Wechsler, *Foreword* to 2 MODEL PENAL CODE & COMMENTARIES at xi (1980).

8. MODEL PENAL CODE § 2.02(2). For adoptions of this provision, *see, e.g.,* ARK. STAT. ANN. § 41-203 (1977); DEL. CODE ANN. tit. 11, § 231 (1979); HAWAII REV. STAT. § 702-204, -206 (1976).

9. MODEL PENAL CODE § 3.02. For adoptions of this provision, *see, e.g.,* HAWAII REV. STAT. § 703-302 (1976); ME. REV. STAT. ANN. tit. 17A, § 103 (1980).

10. MODEL PENAL CODE § 4.01(1). For adoptions of this provision, *see, e.g.,* CONN. GEN. STAT. ANN. § 53a-13 (West Supp. 1981); IDAHO CODE § 18-207 (1979); MO. ANN. STAT. § 562.086 (Vernon 1979).

11. MODEL PENAL CODE § 2.09. For adoptions of this provision, *see, e.g.,* COLO. REV. STAT. § 18-1-708 (1978); HAWAII REV. STAT. § 702-231 (1976 & Supp. 1980); PA. STAT. ANN. tit. 18, § 309 (Purdon 1973).

the requirement of a voluntary act.[12] And the least popular recommendation: the proposed revision of the felony-murder rule.

Not a single state has adopted the Model Penal Code's proposed reformulation of the felony-murder rule. This is not to say that all the reformed statutes retain the felony-murder rule. A few states have redefined murder to require proof of culpability in the particular case. Alaska,[13] Hawaii,[14] and Kentucky[15] all insist upon an intentional or knowing killing. Several states use a restricted version of the felony-murder rule in defining aggravating circumstances justifying the death penalty.[16] By and large, however, the states that have reformed their criminal codes since 1960 have, first, ignored the recommendation of the Model Penal Code and, second, retained the felony-murder rule as a criterion of liability for the highest degree of criminal homicide.

The concern of this article is to probe the legislative romance with the felony-murder rule. Only a few jurisdictions in the Western world rely on this heavy-handed approximation of malice in killing. No evidence of the rule has been found in French or German law.[17] In 1957 England abolished the felony-murder rule and all forms of constructive or fictitious malice.[18] The English had never incorporated the rule in legislation, and indeed their common law never carried the notion of fictitious malice to the extent now legislatively recognized in the United States.[19]

The precise problem with the felony-murder rule is that it represents a formal approximation of extremely reckless homicide. No one quarrels with imposing severe punishment on those who, for criminal purposes, generate a high risk of homicide. The problem derives from regarding the commission of the felony as conclusive on the question whether the defendant acted recklessly toward the victim. So far as the test is formal, the jury does not inquire whether in fact the defendant took an excessive risk of killing another; the inquiry falls rather on

12. MODEL PENAL CODE § 2.01(1). For adoptions of this provision, *see, e.g.,* ARK. STAT. ANN. § 41.202 (1977); DEL. CODE ANN. tit. 11, § 242 (1979); N.Y. PENAL LAW § 15.10 (McKinney 1975); PA. STAT. ANN. tit. 18, § 301 (Purdon 1973).

13. ALASKA STAT. § 11.41.100 (1978).

14. HAWAII REV. STAT. § 707-701 (1976).

15. KY. REV. STAT. § 507.020 (Supp. 1980).

16. *See, e.g.,* ILL. ANN. STAT. ch. 38, § 9-1(b) (Smith-Hurd 1979); WASH. REV. CODE ANN. § 9A.32.045 (Supp. 1981).

17. For a survey of the French, German, and Soviet laws of homicide, see G. FLETCHER, RETHINKING CRIMINAL LAW 321-40 (1978) [hereinafter cited as FLETCHER].

18. English Homicide Act of 1957, ch. 11, § 1.

19. *See generally* FLETCHER, *supra* note 17, at 283-84.

whether the defendant committed the underlying felony. If so, the only relevant question is whether the death occurred in the course of perpetrating, attempting to perpetrate, or escaping from the scene of the felony.

The intrinsic injustice of formal tests of liability becomes clear in cases like *People v. Fuller*,[20] a 1978 decision by a California court of appeal. At 8:30 a.m. on a Sunday morning in Fresno, a patrolling police officer saw two men rolling two tires each toward a parked Plymouth. The officer made a U-turn; the two suspects apparently noticed the police car, dropped the tires, got into the Plymouth and attempted to elude the pursuing officer. In the resulting chase, the driver of the Plymouth ran a red light and crashed into another car, killing the other driver. As it happened, the two men had stolen the tires from inside four unoccupied Dodge vans.

What crimes did the escaping suspects commit? They were presumably guilty of theft, either grand or petty, depending on the value of the tires.[21] The driver of the Plymouth was presumably guilty of vehicular homicide;[22] absent a conspiracy to run the red light, it would be difficult to hold the second defendant, who merely was a passenger in the car, to a charge of criminal homicide. This is the outcome of the case that one would expect in most jurisdictions, and it is the outcome that we could have expected under the California criminal code as it was enacted in 1872.

Yet in California[23]—and several other states[24]—a curious thing has happened to the crime of burglary. The common law crime of burglary required a nighttime breaking and entering of a dwelling house.[25] This was the dangerous felony to which the California felony-murder rule was originally hitched. Law reformers in this century, however, have relentlessly expanded the contours of burglary, first by dropping the requirement of a breaking,[26] then by including daytime as well as

20. 86 Cal. App. 3d 618, 150 Cal. Rptr. 515 (1978).

21. CAL. PENAL CODE § 487 (West 1970) ($200 minimum for grand theft).

22. CAL. PENAL CODE § 192(3)(a) (West 1970).

23. CAL. PENAL CODE § 459 (West Supp. 1981).

24. *See, e.g.*, ARK. STAT. ANN. § 41-2002(1) (1977); PA. STAT. ANN. tit. 18, § 3502 (Purdon 1973); WASH. REV. CODE ANN. § 9A.52.020 (1977).

25. *See* E. COKE, THIRD INSTITUTE 62 (1644); 1 M. HALE, HISTORY OF THE PLEAS OF THE CROWN 550 (1736); 4 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 224 (1765-69).

26. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1508 (1978); CONN. GEN. STAT. ANN. § 53a-101 (West 1972); ME. REV. STAT. ANN. tit. 17A, § 401 (1980).

nighttime entries,[27] and finally, in California, by expanding the "buildings" that can be burglarized to include motor vehicles with locked doors.[28] Thus, it turns out, that if the two men entered the vans with the intent to take the tires, they were guilty of burglary. If they were fleeing the scene of burglary, the accident at the intersection became a killing in perpetration of the burglary and thus would support a charge of first-degree murder, not only against the driver but against the passenger as well.

With a little imagination, the court of appeal could have avoided this absurd result; it could have restricted felony-murder based on burglary to circumstances in which the commission of the particular burglary was dangerous to human life.[29] But the judges preferred instead to reason formalistically and to tie the issue of first-degree murder to the independent question whether entering the Dodge vans was burglary. Suppose the thieves had broken into the trunk of a car rather than the passenger compartment of a van. That probably would not have been burglary under the statute and there would have been no liability under the felony-murder rule. Distinctions as fragile as this one derive from losing sight of the relevant question in a prosecution for murder: what did the defendant do to endanger human life? A *formal* test for murder ignores the questions of actual risk and culpability and focuses instead on the commission of the underlying felony.

The taste for formal rules of first-degree murder has become an American idiosyncrasy. Our attachment to this heavy-handed doctrine resembles our attachment to the death penalty—an institution that separates us even more from other jurisdictions of the Western world. Those who complain about the peculiarly American devotion to the exclusionary rule should recall our penchant for felony-murder and the death penalty. We are severe not only toward constables who blunder, but toward felons who blunder and accidentally cause the deaths of others.

There is no doubt that law enforcement has much to gain both from the threat of the death penalty and from expansive tests of first-degree murder. These tough rules at the top of the scale bludgeon de-

27. *See, e.g.*, ARK. STAT. ANN. § 41-2002(1) (1977); CONN. GEN. STAT. ANN. § 53a-101 (West 1972); N.D. CENT. CODE § 12.1-22-02 (1976).

28. CAL. PENAL CODE § 459 (West Supp. 1981).

29. *Cf.* People v. Nichols, 3 Cal. 3d 150, 474 P.2d 673, 89 Cal. Rptr. 721 (1970), which limits felony-murder based on arson to cases in which the defendant intentionally set the fire causing the death.

fendants into pleading to lesser charges. Also, in California at least, felony-murder has become the sole category of murder insulated from claims of diminished capacity.[30] Because law enforcement has much to gain from retaining this joker in its hand, we should not be surprised by efforts to keep the rule as broad as possible. In the *Fuller* case, for example, a trial judge had decided that the automobile accident would not support an information for murder; the prosecution won on appeal.[31] It would be naive to expect law enforcement to welcome anything less than the most expansive possible reading of the felony-murder rule.

What is surprising, however, is that neither state legislatures nor the courts have sought to bring the felony-murder rule into line with well-accepted criteria of individual accountability and proportionate punishment. The legislative romance with felony-murder takes many forms. Some states go so far as to recognize any felony as sufficient to classify a related killing as murder;[32] others restrict the relevant felonies to those that, in the abstract, are "forcible"[33] or "clearly dangerous to human life."[34] The most restrictive mode, one that dates back to the nineteenth-century codes, is simply to specify the felonies that are formally conclusive on the issue of malice.[35] Of the thirty-four codes revised in the last two decades, eighteen rely on this technique.[36] Of course, the list of dangerous felonies varies. Some states include devi-

30. People v. Tidwell, 3 Cal. 3d 82, 473 P.2d 762, 89 Cal. Rptr. 58 (1970). *See generally* Note, *The Diminished Capacity Defense to Felony-Murder*, 23 STAN. L. REV. 799 (1971).

31. 86 Cal. App. 3d at 621, 150 Cal. Rptr. at 516.

32. *See, e.g.,* ARK. STAT. ANN. § 41-1502(a) (1977); DEL. CODE ANN. tit. 11, § 636 (1979); GA. CODE ANN. § 26-1101(b) (1978); KAN. STAT. ANN. § 21-3401, -3402 (1974).

33. *See, e.g.,* ILL. ANN. STAT. ch. 38, § 9-1(b) (Smith-Hurd 1979); IOWA CODE ANN. § 702.2(2) (West 1979); MONT. CODES ANN. § 45-5-102(b) (1979).

34. *See, e.g.,* ALA. CODE § 13-1-70 (1977) ("greatly dangerous to the lives of others").

35. *See, e.g.,* COLO. REV. STAT. § 18-3-102 (1978); CONN. GEN. STAT. ANN. § 53a-54c (West Supp. 1981); IND. CODE ANN. § 35-42-1-1 (Burns 1979).

36. ARIZ. REV. STAT. ANN. § 13-1105 (1978); COLO. REV. STAT. § 18-3-102 (1978); CONN. GEN. STAT. ANN. § 53a-54c (West Supp. 1981); FLA. STAT. ANN. § 782.04 (West Supp. 1981); IDAHO CODE § 18-4001 (1979); IND. CODE ANN. § 35-42-1-1 (Burns 1979); ME. REV. STAT. ANN. tit. 17A, § 202 (1980). MINN. STAT. ANN. § 609-1852(2) (West 1964); MO. ANN. STAT. § 565.003 (Vernon 1979); MONT. CODES ANN. § 45-5-102(1)(b) (1979); NEB. REV. STAT. § 28-401 (1979); NEV. REV. STAT. § 200.030(1)(b) (1979); N.Y. PENAL LAW § 125.25(3) (McKinney 1975); N.D. CENT. CODE § 12.1-16-01(3) (Supp. 1979); OR. REV. STAT. § 163.095(2)(d) (1979); PA. STAT. ANN. tit. 18, § 2502 (Supp. 1981); WASH. REV. CODE ANN. § 9A.32.045(g) (Supp. 1981); WYO. STAT. § 6-4-101(a) (1977).

ant sexual conduct,[37] felonious escape,[38] or kidnapping;[39] others make do with the core felonies of rape, robbery, arson, and, alas, burglary.[40]

The only new legislative technique to enter the ring in this round of law reform is New York's effort in 1965 to curtail the liability of accomplices.[41] Recall that our passenger in the car running the red light would be guilty of first-degree murder. Every conspirator is liable for the substantive crimes, even the unexpected crimes, of his partners. This arbitrary rule derives from the fiction that the conspirators support each other's acts and, therefore, become complicitous in each other's substantive crimes. Yet killings and deaths sometimes occur without any contribution by co-conspirators; the arbitrariness of vicarious liability must give pause to even the most sanguinary advocate of law enforcement. The New York legislature sought to avoid extreme cases of injustice by defining a complicated four-part defense, which has since gained adoption in at least a half-dozen states.[42]

To see how this affirmative defense works, let us analyze the case of the passenger in the *Fuller* case. The driver, as noted, is guilty of first-degree murder. Though an accomplice in the burglary, the passenger will not be liable if the following four conditions are satisfied:

1. He has neither committed the homicidal act nor aided its commission in any way. Unless he urged the driver to go through the red light, it would be hard to classify the passenger's sitting in the car as "aiding" in the homicidal act.
2. He is not armed with a deadly weapon. Let us suppose that the passenger did not have a gun on him. The problem in this case, however, is that the car itself is a deadly weapon. Is riding in the car tantamount to being armed with the weapon? Let us assume that this fanciful argument would not disqualify our passenger.

37. *See, e.g.,* IND. CODE ANN. § 35-42-1-1 (Burns 1979); N.Y. PENAL LAW § 125.25(3) (McKinney 1975); UTAH CODE ANN. § 76-5-202(1)(d) (1978).

38. ARIZ. REV. STAT. ANN. § 13-1105(A)(2) (1978); IND. CODE ANN. § 35-42-1-1 (Burns 1979); MONT. CODES ANN. § 45-5-102(b) (1979); N.Y. PENAL LAW § 125.25(3) (McKinney 1975).

39. IND. CODE ANN. § 35-42-1-1 (Burns 1979); N.D. CENT. CODE § 12.1-16-01(3) (Supp. 1979); OHIO REV. CODE ANN. § 2903.01(B) (Page 1975); OR. REV. STAT. § 163.095 (1979).

40. *E.g.,* CONN. GEN. STAT. ANN. § 53a-54c (West Supp. 1981); WYO. STAT. § 6-4-101 (1977).

41. N.Y. PENAL LAW § 125.25(3) (McKinney 1975).

42. *E.g.,* ARK. STAT. ANN. § 41-1502(2) (1977); CONN. GEN. STAT. ANN. § 53a-54c (West Supp. 1981); ME. REV. STAT. ANN. tit. 17A, § 202(2) (1980); N.D. CENT. CODE § 12.1-16-01(3) (Supp. 1979); OR. REV. STAT. § 163.115(3) (1979); WASH. REV. CODE ANN. § 9A.32.030(1)(c) (1977).

3. The accomplice has no reasonable ground to believe that the perpetrator was armed with a deadly weapon. This condition would give us difficulty. If the car constitutes such a weapon, our passenger loses the benefit of the affirmative defense.
4. The accomplice has no reasonable ground to believe the perpetrator would intentionally engage in dangerous conduct, in this case, to run the red light. This fourth condition poses a difficult hurdle, for our passenger presumably had grounds to believe the driver would run a traffic light if necessary to elude the police car.

This examination of the affirmative defense reveals how difficult it would be to find a set of facts that qualified an accomplice for exclusion. Nonetheless, the recognition of this affirmative defense has important symbolic value. The negative implication of the exclusion is that, in principle, co-conspirators should be judged only on their own culpability and their contribution to the homicidal act. This exclusion should be seen as but the beginning of law reform, a wedge against injustice that highlights the arbitrariness of punishing accomplices who fall just short of the legislative standard.

If this is all that legislative reform has accomplished in thirty-four states, perhaps we might expect more of the courts—those agents of the law that are thought to be sympathetic to criminal defendants.[43] Unfortunately, the courts have done very little[44] to bring us into line with the principles of homicide liability that prevail in the rest of the world.[45]

It is true that the 1960s witnessed a sustained and sometimes successful attack on some excesses of the felony-murder rule. The leading cases—largely from Pennsylvania and California—raised the hopes of those seeking to refine the substantive criminal law. Yet these monuments of legal reasoning—*Redline*,[46] *Washington*,[47] *Phillips*,[48] *Satchell*,[49] *Sears*,[50] and others—hardly speak to current issues in felony-

43. The supposed sympathy of American courts to criminal defendants is limited to procedural protections such as the exclusionary rule, restrictions on station-house interrogation, and the right to counsel. *See* text at notes 82-83 *infra*.

44. Shortly after the delivery of this lecture, the Michigan Supreme Court held in People v. Aaron, 409 Mich. 672, 299 N.W.2d 304 (1980), that the intent to commit a felony other than homicide is no longer sufficient to establish the malice required for murder. This decision may have a far-reaching impact.

45. *See* text at notes 17-19 *supra*.

46. Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958).

47. People v. Washington, 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965).

48. People v. Phillips, 64 Cal. 2d 574, 414 P.2d 353, 51 Cal. Rptr. 225 (1966).

49. People v. Satchell, 6 Cal. 3d 28, 489 P.2d 1361, 98 Cal. Rptr. 33 (1971).

50. People v. Sears, 2 Cal. 3d 180, 465 P.2d 847, 84 Cal. Rptr. 711 (1970).

murder. They all responded to particular excesses with respect to the felony-murder rule.

A peculiar situation in California generated at least a dozen cases of historical interest. Like many other nineteenth-century codes that distinguish between first- and second-degree murder, the California Penal Code delineates several categories of first-degree murder and then tacks on the residual clause: all other kinds of murder are murder in the second degree.[51] Felony-murder, based on six specified felonies, counts as one category of murder in the first degree.[52] There is no hint in the statute of creating second degree felony-murder based on unspecified felonies. Yet the California Supreme Court readily assumed that the statutory use of the phrase "all other murders are of the second degree" implicates the entire common law of murder, and that the felony-murder rule adheres to that common law.[53]

In fact, the historical roots of felony-murder are tenuous and ill defined. The sources of the rule are not judicial decisions but scholarly commentaries. The earlier commentators, Coke[54] and Hale,[55] stressed the role of the unlawful act as a rejoinder to a defense of *per infortunium*.[56] It was only with the eighteenth century commentators, Hawkins[57] and Foster,[58] that the argument shifted to the positive thesis that a felonious intent renders an incidental killing murder.[59]

These commentators cast the felony-murder rule as an abstract generalization. They tell us little about the particular felonies that support the rule. Thus the California Supreme Court found itself in the paradoxical situation of taking the rule to be well established and yet having to work out the content of the rule as each case arose.

Which felonies should be sufficient to support felony-murder in the second degree? If there were indeed a common law on point, it

51. CAL. PENAL CODE § 189 (West Supp. 1981), reads, in pertinent part: "All murder which is . . . committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem or [child molestation], is murder of the first degree; and all other kinds of murder are of the second degree."

52. *Id.*

53. People v. Powell, 34 Cal. 2d 196, 208 P.2d 974 (1949); People v. Brenon, 138 Cal. App. 2d 795, 292 P.2d 645 (1956).

54. E. COKE, THIRD INSTITUTE 56 (1644).

55. 1 M. HALE, HISTORY OF THE PLEAS OF THE CROWN 475 (1736).

56. For a critique of Coke's formulation of the "unlawful act" rule, see 3 F. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 57-59 (1883).

57. 1 W. HAWKINS, PLEAS OF THE CROWN, 112, 126-27 (6th ed. 1787).

58. FOSTER, *supra* note 3, at 259.

59. *See* the summary of this history in FLETCHER, *supra* note 17, at 276-85 (1978).

would not have been so trying to determine whether aggravated assault,[60] larceny,[61] fraud,[62] false imprisonment,[63] escape,[64] and possession offenses[65] support the rule. In the last two decades, the California courts have heard one appeal after another about whether these felonies, taken in the abstract, are either too dangerous,[66] or insufficiently dangerous[67] to support a charge of felony-murder. The defendants have won most of these cases, but some decisions, particularly those related to the use of drugs and intoxicants, have found for the prosecution.[68]

This development has little significance outside California. Prior to its reform in 1977, the Arizona statute was worded similarly to the California statute,[69] but the Arizona Supreme Court rejected the California argument that the word "murder" triggered inclusion of a felony-murder rule.[70] With its comprehensive statutory rule based on "commission of *a felony*,"[71] Georgia might have something to learn from the California development, but the Georgia Supreme Court ruled recently that the new statute is meant to encompass all felonies.[72] Even in California, these cases are largely of historical interest; the Supreme Court has nearly completed the legislative task of deciding which felonies are included and which excluded from the mythical common law rule.

In the second field that dominated the scene in the 1960s, the courts in several states confronted the question whether third-party killings fall within the felony-murder rule. These are killings in which someone other than a participant in the felony fires the fatal shot. The victim might be either a co-felon, a police officer or an uninvolved by-

60. People v. Ireland, 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969).

61. People v. Morales, 49 Cal. App. 3d 134, 122 Cal. Rptr. 157 (1975).

62. People v. Phillips, 64 Cal. 2d 574, 414 P.2d 353, 51 Cal. Rptr. 225 (1966).

63. People v. Henderson, 19 Cal. 3d 86, 560 P.2d 1180, 137 Cal. Rptr. 1 (1977).

64. People v. Lopez, 6 Cal. 3d 45, 489 P.2d 1372, 98 Cal. Rptr. 44 (1971).

65. People v. Satchell, 6 Cal. 3d 28, 489 P.2d 1361, 98 Cal. Rptr. 33 (1971).

66. If a felony is "too dangerous"—e.g., assault with a deadly weapon—it merges with the act of killing under the *Ireland* test. *See* People v. Ireland, 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969).

67. If the background felony is not "inherently dangerous" it will not support a charge of second-degree felony-murder. *See* People v. Phillips, 64 Cal. 2d 574, 414 P.2d 353, 51 Cal. Rptr. 225 (1966).

68. People v. Shockley, 79 Cal. App. 3d 669, 145 Cal. Rptr. 200 (1978) (based on CAL. PENAL CODE § 73a(1) (West Supp. 1981) (child abuse)).

69. ARIZ. REV. STAT. § 13-451 (repealed 1977) (current version at ARIZ. REV. STAT. §§ 13-1101, -1104 (Supp. 1978), 13-1105 (Supp. 1981)).

70. State v. Dixon, 109 Ariz. 441, 511 P.2d 623 (1973).

71. GA. CODE ANN. § 26-1101(b) (1978) (emphasis added).

72. Baker v. State, 236 Ga. 754, 225 S.E.2d 269 (1976).

stander. In the 1950s Michigan[73] and Pennsylvania[74] began extending their felony-murder doctrines to cover these cases. The extension was particularly insidious, for the logic of vicarious liability implied that if a police officer shot and killed someone at the scene of the felony or the escape, all the co-conspirators would be accountable for murder. By descending into these lower circles of injustice, the Pennsylvania courts "shocked the conscience" of many commentators.[75] The issue for reform was not "whether," but "how."

In the leading case of *Commonwealth v. Redline*,[76] the Pennsylvania Supreme Court held that the rule could not apply when a third party killed a co-felon; in this situation the killing was justifiable and lawful and no one should be held accountable for a lawful killing. The weakness of *Redline*, however, was that to the extent that killing a bystander was excusable rather than justifiable, the felony-murder rule would still impose liability. In *Washington*,[77] the California Supreme Court agreed with *Redline* on the merits of curtailing liability for third-party killings, but rejected the principle that no one could be accountable for a justifiable killing. Instead, the court ruled that felony-murder could apply only to those cases in which a participant in the felony fired the fatal shot, but that it might nonetheless be possible to hold felons liable for a third-party shooting—regardless of the identity of the victim—if one of the felons maliciously provoked the fatal firing. The entire weight of the analysis thereafter fell on the causal link between the behavior of at least one of the participating felons and the response by the party firing the fatal shot. If this causal link should prove sufficiently tight to attribute the death to the malicious behavior of one of the felons, then all participating felons could be liable for murder.

The logic of *Washington* requires classification of the homicide as second-degree murder—a malicious killing attributable to the party who provoked the shooting. Yet in subsequent cases, the court proceeded to interweave the *Washington* test with the statutory definition of felony-murder.[78] If a third-party killing was attributable to the

73. People v. Podolski, 332 Mich. 508, 52 N.W.2d 201 (1952).

74. Commonwealth v. Moyer, 357 Pa. 181, 53 A.2d 736 (1947); Commonwealth v. Almeida, 362 Pa. 596, 68 A.2d 595 (1949), *cert. denied*, 339 U.S. 924 (1950); Commonwealth v. Bolish, 381 Pa. 500, 113 A.2d 464 (1955); Commonwealth v. Thomas, 382 Pa. 639, 117 A.2d 204 (1955).

75. *E.g.*, W. LAFAVE & A. SCOTT, CRIMINAL LAW 551 n.40 (1972); S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESS 294, editorial note (3d ed. 1975).

76. 391 Pa. 486, 137 A.2d 472 (1958).

77. 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965).

78. *See* People v. Gilbert, 63 Cal. 2d 690, 408 P.2d 365, 47 Cal. Rptr. 909 (1965), which interprets *Washington* and establishes guidelines for further litigation.

malicious behavior of a participating felon, and occurred during commission of one of the specified felonies, then all the participating felons would be automatically liable not for second, but for first-degree murder.

The California approach has struck most commentators as more plausible than the theory of the *Redline* case. The significant historical fact, however, is that other state courts have categorically rejected the California theory of causal responsibility for third-party killings.[79] They cite *Redline* favorably and then proceed, as the Pennsylvania Supreme Court[80] and legislature[81] have done, to gloss over the tenuous distinction between killing a co-felon and killing a bystander. The result appears to be that the entire country, except California, has rejected felony-murder liability for third-party killings. California has become isolated with its 1872 criminal code and its landmark decisions on felony-murder.

A recent case illustrates why California law deserves to remain isolated. The implication of *Washington*, we should recall, is that a robber could be liable for murder only if first, he or an accomplice acted to create a high risk of death and, second, that dangerous act proximately caused the death. The standard example is initiating a gun battle that provokes someone else to respond with deadly force. In *Superior Court v. Pizano*,[82] the Supreme Court diluted the criteria of proximate causation to the point where one wonders whether causation is still the issue. Pizano's accomplice, Esquivel, took a hostage as he was leaving the scene of a robbery; as Esquivel and the hostage stepped outside, a neighbor shot at Esquivel and accidentally hit and killed the hostage. The neighbor conceded in his testimony that his shooting was not a response to Esquivel's holding a human shield. All seven justices agreed that on these facts, the evidence of malice and of proximate cause was sufficient to permit the jury to find both accomplices liable for murder.

Notice that Esquivel did nothing beyond the act of committing robbery to provoke the neighbor's shooting. What he did do was increase the risk that an innocent human being would be killed in the event that shooting erupted. But if that risk is sufficient to hold all accomplices liable for a third-party killing, then the principle might

79. Alvarez v. District Court, 186 Colo. 37, 525 P.2d 1131 (1974); People v. Morris, 1 Ill. App. 566, 274 N.E.2d 898 (1971); Sheriff v. Hicks, 89 Nev. 78, 506 P.2d 766 (1973).

80. Commonwealth *ex rel.* Smith v. Meyers, 438 Pa. 218, 261 A.2d 550 (1970).

81. PA. STAT. ANN. tit. 18, § 2501 (Purdon 1973).

82. 21 Cal. 3d 128, 577 P.2d 659, 145 Cal. Rptr. 524 (1978).

well apply to all robberies committed in crowded places. Indeed, it should apply to cases of rape in which a third party shoots at the rapist and kills the rape victim. The court interwove the requirement of provoking the third party to shoot with the distinct issue of increasing the risk of death to persons in the vicinity. With this state of the law in California, we are but a short step away from the cases in the 1950s that represent the high-water point of liability for third-party killing.[83]

One would think that a sound constitutional attack could be mounted against the felony-murder rule. If some state supreme courts could find the guest statute in tort cases unconstitutional,[84] one would think a similar denial of equal protection would infect the application of the felony-murder rule. There is no plausible justification for distinguishing a case like *Fuller* from one in which the accidental death occurred outside the framework of a felony. In addition to the problem of equal protection, criminal lawyers should think more about the sixth amendment as a constitutional weapon. If, in fact, the issue of reckless homicide is implicit in the proof of the underlying felony, then the defendant has a right to have a jury of his peers pass on that substantive issue. Yet these constitutional attacks have not emerged. Appellate criminal lawyers may not be paying due heed to these arguments;[85] but even if the criminal defense bar should mount the kind of attack against the felony-murder rule that personal injury lawyers have waged against guest statutes, it is unlikely to succeed. As odd as it may be, courts are arguably more responsive to issues of substantive fairness in tort cases than they are to the same claims in structuring the law of homicide. Witness the tendency of the courts in negligence cases to undermine the rule of negligence per se and insist on a showing of personal fault.[86] Would that the courts were as concerned about justice in criminal cases, where the stakes are obviously much higher. One account for this paradox is that tort rules are subject to full enforcement. It is up to the plaintiff to enforce the rules of the system. When the law is fully enforced, the substantive rules must obviously reflect greater sensitivity to principles of justice. Prosecutors may use their discretion

83. *See* notes 74, 76, 77 *supra*.

84. *E.g.*, Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973); Thompson v. Hagan, 96 Idaho 19, 523 P.2d 1365 (1974).

85. *But cf.* the skillful Supplemental Brief by appellant in People v. Ramos, now pending before the California Supreme Court (developing the argument of equal protection as well as an ingenious argument based on Mullaney v. Wilbur, 421 U.S. 684 (1975)).

86. *See, e.g.*, New Amsterdam Casualty Co. v. Novick Transfer Co., 274 F.2d 916 (4th Cir. 1960) (violation of statute is merely evidence of negligence); Gill v. Whiteside-Hemby Drug Co., 197 Ark. 425, 122 S.W.2d 597 (1938) (violation is merely evidence of negligence); Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814 (1920) (only unexcused wrongs are negligence per se).

to counteract the injustice of the law they enforce, but that potential amelioration is of little consolation to defendants who suffer the brunt of heavy-handed rules.

There is yet another approach to the felony-murder rule, which, if valid, would justify full enforcement. In this alternative conception the principle of felony-murder reflects two unrefined ways of thinking about criminal responsibility. One mode of thought stresses the taint that inheres in causing death, whether the homicide is culpable or not. The second mode of thought takes the preliminary act of wrongdoing, the felony, as a rationale for holding the felon accountable for the deadly consequences of his actions. Both of these modes of thought require explication and criticism, for they both enjoy far more influence than they deserve.

The principle of tainting dates back to the origins of prosecution for criminal homicide. In thirteenth-century England, the assumption was that if one person caused the death of another, the killing itself upset the natural order; some response was necessary to expiate the killing and thus to expunge the taint.[87] As the Bible demands the sacrifice of a heifer in cases of homicides by unknown persons,[88] English law extracted two forfeitures in every case of manslaying. First, the instrument of death was forfeited to the Crown as deodand. Second, the killer forfeited his lands and his goods. These forfeitures applied in every case of unjustified killing.[89] If, in addition, the killing occurred without excuse, that is absent the conditions of *se defendendo* and *per infortunium*, the slayer was subject to the death penalty for murder.

The model of taint and expiation haunts the way our courts think about criminal homicide. The felon must answer for a human death for no reason other than that he or his accomplice causes it. The felon is tainted by causing and the state responds by seeking expiation. It is important to distinguish expiating the taint of killing from justly punishing for faultfully causing death. The taint arises regardless of fault or blame; punishment is just only so far as it is proportional to fault. The notion of expiating a taint reflects a conception of the world that, if brought to consciousness, most lawyers would vehemently reject. Yet the notion of tainting might be one of the subconscious props for the contemporary persistence of the felony-murder rule.

---

87. For a more general account of this development, see FLETCHER, *supra* note 17, at 344-47.

88. *Deuteronomy* 21:1-9.

89. *See generally* Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169 (1973).

The other unrefined mode of thought behind the rule begins not with the deadly outcome, but with the felonious background. That someone engages in a felony lowers the threshold of moral responsibility for the resulting death. If there is a principle behind this way of thinking, it is that a wrongdoer must run the risk that things will turn out worse than she expects.[90] The same principle has motivated common law courts and legislatures to reject the claim of mistake in cases of abducting infants,[91] statutory rape,[92] and assaulting a police officer.[93] If the act is wrong, even as the defendant conceives the facts to be, then she presumably has no grounds for complaining if the facts turn out to be worse than she expects. In *United States v. Feola*,[94] defendant committed an assault against someone who turned out to be a police officer. He was convicted for assaulting a police officer, without regard to the reasonableness of his mistake. The United States Supreme Court upheld the conviction because "from the very outset . . . his planned course of conduct [was] wrongful."[95] Therefore, the offender had to "take his victim as he [found] him."[96] If wrongdoing justifies disregarding mistakes about aggravating circumstances, then felonious wrongdoing can justify disregarding whether the deadly outcome of the felony is accidental or culpable.

The decision of the California Supreme Court in *Pizano*[97] finds some support in the principle that preliminary wrongdoing lowers the threshold of liability for resulting death. Esquivel's taking the victim as a shield was a heinous act, worse even than committing the robbery; thus, as this way of thinking goes, his moral wrong should render Esquivel liable even for a neighbor's shooting the victim. *Pizano* makes more sense when we ignore the court's rationalization about causation and interpret the decision as an application of the principle that wicked acts deprive felons of their right to complain of liability for resulting death.

These two modes of thought—the practice of tainting and the principle that the wrongdoer runs the risk—violate a basic principle of just

90. For a further development of this issue, *see generally* FLETCHER, *supra* note 17.

91. Regina v. Prince, L.R., 2 Cr. Cas. Res. 154 (1875).

92. *See, e.g.,* CONN. GEN. STAT. ANN. § 53a-67 (West Supp. 1981); LA. REV. STAT. ANN. § 14:80 (West Supp. 1981); N.Y. PENAL LAW §§ 15.20(3), 130.25(2) (McKinney 1975).

93. United States v. Feola, 420 U.S. 671 (1975).

94. 420 U.S. 671 (1975).

95. *Id.*

96. *Id.*

97. 21 Cal. 3d 128, 577 P.2d 659, 145 Cal. Rptr. 524 (1978).

punishment. Punishment must be proportional to wrongdoing. When the felony-murder rule converts an accidental death into first-degree murder, then punishment is rendered disproportionate to the wrong for which the offender is personally responsible. Tainting is no substitute for criteria of moral responsibility, and the principle that the wrongdoer must run the risk explicitly obscures the question of actual responsibility for the harmful result.

The theory of just punishment is called the retributive theory. Before we criticize retribution and the *lex talionis*[98] as outmoded, we should realize how much worse it is to make the punishment fit not the crime, but the result for which the offender is not personally to blame.

It may be that in the thinking of many people, the felony-murder rule finds its warrant in principles of deterrence as well as in the residual influence of early common law notions of taint and expiation. But of course, deterrence is not an apology for treating like cases differently; if there is no sound basis for distinguishing between thieves killing in an automobile accident and others doing so, then the remote possibility of deterring thieves from escaping the scene of the crime hardly justifies convicting Fuller of first degree murder.

There may be an apology for the felony-murder rule, but it is one that could easily excuse too much injustice in our substantive criminal law. If we compare our combined system of substantive law and procedural rights with the total system that prevails in a Continental jurisdiction, say, in West Germany, we could hazard the following generalization. American law achieves a balance of advantage between defense and prosecution by bestowing extraordinary procedural protections on the accused and yet compensating the prosecution with rules of strict liability, felony-murder, conspiracy, and vicarious liability. German law, in contrast, offers fewer procedural protections—no jury, no exclusionary rule in our sense, fewer restrictions on hearsay evidence[99]—yet the German substantive law is more refined and more consistent with principles of individual responsibility.[100] This overall comparison between the two systems exceeds our present concerns. The point is simply that we should be more humble about the grandeur of American law. What the law of procedure grants the accused, the

98. *Exodus* 21:23-25 (an eye for an eye).

99. *See generally* J. LANGHEIN, COMPARATIVE CRIMINAL PROCEDURE: GERMANY (1977).

100. See FLETCHER, *supra* note 17, at 736-58 (German approach to mistake of law), 818-29 (German theory of necessity as an excuse).

law of substance takes away. And if law enforcement in the United States fights to eliminate the fourth amendment exclusionary rule, then the defense should fight even harder to eliminate the unjust rules of vicarious liability and felony-murder.