CRIMINAL LAW

STATE v. BRADLEY: THE FELONY MURDER RULE

INTRODUCTION

An essential element of murder at common law was an intent to kill, or an intent to commit acts likely to kill, with conscious disregard for life. An exception exists in felony murder; the malice necessary to make the killing constitute murder is constructively imputed through the intent incident to the perpetration of the underlying felony, and the felon who kills even accidentally is guilty of murder.

The common law felony murder rule has been characterized as "an anachronistic remnant, a historic survivor for which there is no logical or practical basis for existence in modern law." In spite of continued and increasing criticism, the felony murder doctrine has become embedded in the murder statutes of most states, including Nebraska.

The first section of this article will analyze the history of the felony murder doctrine. The questionable genesis of the concept, its development as a rule of substantive law, and its ultimate rejection by the country of its origin will be considered.

Current application of the felony murder rule in the United States, along with the three competing views on the propriety of its continued existence, will be examined in the second section of this article. The first view proposes the abolishment of the felony murder rule...
The third section will analyze the Nebraska Supreme Court's decision in State v. Bradley. In this case, the court reviewed the elements of felony murder as the doctrine exists in Nebraska. The court upheld the felony murder rule, holding that no specific intent is required to constitute felony murder other than the intent to commit the felony during which the death occurred. It will be suggested that the Nebraska Supreme Court has failed to fully consider the ramifications and consequences of approving a doctrine arguably outdated and unjust as applied in modern society.

BACKGROUND

History of the Felony Murder Doctrine

At common law, in order for a homicide to constitute murder, the defendant must have possessed the requisite criminal intent of malice, i.e., a man-endangering state of mind. Malice aforethought in the context of murder at common law occurred when the death of another was caused by the defendant while acting with any of the following mental states: (1) an intent or purpose to kill; (2) an intent to cause great bodily injury; (3) an intent to do an act in wanton and willful disregard of an obvious and strong likelihood that death or great bodily injury may result; or (4) an intent to perpetuate a felony.

The first formal articulation of the felony murder doctrine is found in Lord Dacres' Case. Lord Dacres and a group of companions agreed to hunt in a forest without permission, an unlawful act. One of Lord Dacres' companions killed a gamekeeper who accosted him in the forest. Lord Dacres was not present when the killing occurred but he, along with the rest of the his compan-

7. See id. at 884, 317 N.W.2d at 101.
8. Id.
10. Id. at 46; W. LaFave & A. Scott, Criminal Law § 67 at 528; People v. Aaron, 409 Mich. at —, 299 N.W.2d at 320.
12. Aaron, 409 Mich. at —, 299 N.W.2d at 307-08; Crum, Causal Relations, supra note 11, at 191.
13. Id.
ions, was convicted of murder and was hanged.\textsuperscript{14}

Another early case which has been cited as the genesis of the felony murder doctrine is \textit{Mansell & Herbert's Case},\textsuperscript{15} decided a year after \textit{Lord Dacres' Case}. In \textit{Herbert's Case}, it was held that if one deliberately performed an act of violence upon another and a third person died though not intentionally, it was murder regardless of any mistake or misapplication of force.\textsuperscript{16}

In addition to \textit{Lord Dacres'} and \textit{Herbert's} cases, Sir Edward Coke expounded on the felony murder rule.\textsuperscript{17} Lord Coke, writing in the early 1600's, used sweeping terms to describe the felony murder doctrine. In particular, Coke stated:

\begin{quote}
If the act be unlawful it is murder. As if A. meaning to steale a deere in the park of B., shooteth at the deere, and by the glance of the arrow killeth a boy that is hidden in a bush: this is murder, for that the act was unlawfull, although A. had no intent to hurt the boy, nor knew not of him. But if B. the owner of the park had shot at his own deer, and without any ill intent had killed the boy by the glance of his arrow, this had been homicide by misadventure, and no felony.

So if one shoot at any wild fowle upon a tree, and the arrow killeth any reasonable creature afar off, without any evil intent in him, this is per infortunium [misadventure]: for it was not unlawful to shoot at the wilde fowle: but if he had shot at a cock or hen, or any tame fowle of another mans, and the arrow by mischance had killed a man, this had been murder, for the act was unlawfull.\textsuperscript{18}
\end{quote}

\textsuperscript{14} \textit{Id.} The construction of this case as a source of the felony murder doctrine has been criticized as erroneous. Critics claim the holding was not that Lord Dacres was guilty of murder because he joined in an unlawful act, but rather that those not present at the killing were liable on the theory of constructive presence. 409 Mich. at —, 299 N.W.2d at 308.

\textsuperscript{15} \textit{Mansell & Herbert's Case}, 2 Dyer 128b, 73 Eng. Rep. 279 (K.B. 1536). \textit{See also} \textit{Aaron}, 409 Mich. at —, 299 N.W.2d at 308; \textit{Note, Anachronism Retained, supra} note 11, at 430 n.23; \textit{Crum, Causal Relations, supra} note 11, at 191; \textit{Note, Recent Extensions, supra} note 5, at 534 n.3.

\textsuperscript{16} \textit{Aaron}, 409 Mich. at —, 299 N.W.2d at 308. In \textit{Mansell & Herbert's Case} a group of men unlawfully attempted to steal goods from a house. One member of the group threw a stone at a person in the gateway which instead struck and killed a woman coming out of the house. All members of the group were convicted of murder. \textit{See Aaron}, 409 Mich. at —, 299 N.W.2d at 308. This holding as a basis of the origin of the felony murder doctrine has been criticized. In \textit{Mansell & Herbert's Case}, a deliberate act of violence against a person was involved. Thus, because express intent was present, no finding of malice from the intention to commit an unlawful act was necessary.

\textsuperscript{17} \textit{Aaron}, 409 Mich. at —, 299 N.W.2d at 309; \textit{Crum, Causal Relations, supra} note 11, at 191; \textit{Note, Anachronism Retained, supra} note 11, at 431 n.23.

\textsuperscript{18} \textit{Coke, Third Institutes} 56 (1797), as quoted in \textit{People v. Aaron}, 409 Mich. at —, 299 N.W.2d at 309.
Coke's interpretation of the felony murder doctrine has been criticized as erroneous and completely lacking in authority. 19 Sir James Stephens found the rule a "monstrous doctrine." 20 Another early writer stated, "This is not distinguished by any statute but is the common law only of Sir Edward Coke." 21 In 1834, His Majesty's Commissioners on Criminal Law found the rule to be antiquated and incongruous with the general principles of their jurisprudence. 22

As a result, Coke's specification that the act need be merely unlawful never gained much acceptance. The rule, at early common law, was that a killing caused by an act during the commission of a felony was murder as to all who participated in the felony, and if the crime was a misdemeanor the death was regarded as manslaughter. 23

The felony murder rule went unchallenged at early common law. 24 At the time the rule developed, all felonies were punishable by death, so it made little difference whether the felon was hanged for the felony or for the murder. 25 Consequently, no injustice was caused by application of the rule.

As felony murder cases came before the English courts in the nineteenth century, however, a gradual change occurred in the

19. Aaron, 409 Mich. at —, 299 N.W.2d at 309-10. Bracton was characterized as a leading expert on the law at this time. Coke's statement of the rule stems from misinterpretation of a passage from Bracton in which Bracton states that an unintentional killing is unlawful. See 2 Bracton, De Legibus Angliae 275-77 (1879); 3 Stephens, History of the Criminal Law of England 57-58 (London: MacMillan, 1883). Bracton "in no way states that [an unintentional killing] would amount to murder, . . . which term indeed had quite a special and peculiar significance at the time at which he wrote, being properly confined to crimes of the nature of secret assassinations. Bracton, in fact, was too familiar with the Roman law . . . to have made such a mistake. . . ." Constructive Murder, 65 The Law Times 292 (1878), as quoted in Aaron, 409 Mich. at —, 299 N.W.2d at 310.


25. Model Penal Code, supra note 3, § 210.2 at 31 n.74. Because all felonies were punishable by death, it made little difference whether the actor was convicted of murder or the underlying felony. The primary use of the felony murder rule at common law was to deal with a homicide that occurred in furtherance of an attempted felony that failed. Since attempts were punishable only as misdemeanors, the felony murder rule allowed courts to punish the felony in the same manner as if his attempt had been successful. A conviction for an attempted felony was a misdemeanor, but a homicide committed in the attempt was murder and punishable by death. R. Perkins, Perkins on Criminal Law 44 (2d Ed. 1969).
original sweeping form of the felony murder rule. Case law reflects the efforts of the English courts to limit the application of the doctrine in one of two ways. Application was limited by requiring that the defendant's conduct in committing the felony involve an act of violence in carrying out a felony of violence, or by requiring that the death be the natural or probable consequence of the defendant's conduct in committing the felony. After the imposition of these limitations, the felony murder rule was rarely invoked in England.

In 1957, England abolished the concept of its entirety. Under current English law, a death occurring during the commission of a felony will not amount to murder unless committed with the malice aforethought required for murder. In other words, in England, murder requires proof of an intent to kill, an intent to cause great bodily injury, or an intent to commit an act in wanton disregard for the strong likelihood of death.

Application of the Felony Murder Doctrine in the United States

Modern application has resulted in both judicial and statutory limitations upon the felony murder rule in the United States. In many states, the felony murder doctrine has been limited in scope by a requirement that the felonious act attempted or committed by the defendant be inherently dangerous to human life. Today the

26. Aaron, 409 Mich. at —, 299 N.W.2d at 311. Some of the modifications in the rule were based on quantitative objections. As the number of felonies multiplied so as to include a great number of minor offenses, it became necessary to limit the rule to alleviate harshness.

Other modifications were deemed necessary when it became apparent that the felony murder doctrine was loosely applied to situations said to be within the letter of the law but not within its spirit. Crum, Causal Relations, supra note 11, at 194.

27. W. LAFAVE & A. SCOTT, CRIMINAL LAW § 71 at 546 (1972).

28. Id. See Regina v. Serne, 16 Cox Crim. Cas. 311 (1887) (defendant committed arson to collect insurance and a sleeping boy accidentally burned to death). The court held: "any act known to be dangerous to life, and likely in itself to cause death done for the purpose of committing a felony which caused death, should be murder." Serne, 16 Cox Crim. Cas. at 313.

29. W. LAFAVE & A. SCOTT, CRIMINAL LAW § 71 at 546 (1972). See Regina v. Horsey, 176 Eng. Rep. 129 (Assiz. 1862) (defendant committed arson, accidentally burning a tramp to death; the jury was instructed to convict the defendant of murder only if the death was a natural and probable consequence of the defendant's act in setting the fire).

30. Aaron, 409 Mich. at —, 299 N.W.2d at 312.


32. Id. See note 69 infra. England abolished the felony murder doctrine in 1957 after a period of time in which felony murder was referred to as "constructive murder." W. LAFAVE & A. SCOTT, CRIMINAL LAW § 71 at 560 (1972).

33. W. LAFAVE & A. SCOTT, CRIMINAL LAW § 71 at 547 (1972). See also People v. Pavlic, 227 Mich. 562, 565, 199 N.W. 373, 374 (1924) (defendant sold moonshine whiskey, a felony; buyer drank it, went out into the cold and died of acute alcoholism
courts apply the "inherently dangerous to human life" test in two differing manners: (1) the elements of the felony are examined in the abstract to determine whether the felony is inherently dangerous to human life; or (2) both the nature of the felony and the circumstances under which the felony was committed are examined to determine whether the particular felonious act at issue was inherently dangerous to human life.

Numerous legislative codifications of the doctrine have restricted the operative effect of the felony murder rule to a limited number of enumerated felonies. The purpose of these limitations is to exclude from felony murder accidental or reasonably unforeseeable fatalities occurring in the course of nonviolent felonies.

Additionally, some jurisdictions impose a "proximate" or "le-
gal” cause qualification on the application of the doctrine.\textsuperscript{39} Courts have attempted to define this causation in terms of when a particular criminal transaction has come to its logical and legal conclusion.\textsuperscript{40} The traditional test of causal connection in felony murder is that the homicide must be so clearly connected to the felony as to fall within its \textit{res gestae}.\textsuperscript{41} The nature of this causal relationship is stated as follows:

It is held in many jurisdictions . . . that when the homicide is within the \textit{res gestae} of the initial crime and is an emanation thereof, it is committed in the perpetration of that crime in the statutory sense. Thus it has been often ruled that the statute applies where the initial crime and the homicide were parts of one continuous transaction, and were closely connected in point of time, place and causal relation. . . .\textsuperscript{42}

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As a limitation, the use of enumerated felonies has been criticized. There exists no logical reason why cases involving the enumerated felonies should be treated differently than those involving non-enumerated felonies for the purpose of establishing malice. “The enumerated felonies are not necessarily inherently dangerous to human life.” Aaron, 409 Mich. at —, 299 N.W.2d at 326.

\textsuperscript{40} State v. Thompson, 280 N.C. 202, —, 185 S.E.2d 666, 673 (1972). The causation requirement for imposition of liability in a felony murder situation is that the homicide stem from the commission of the felony. Commonwealth v. Redline, 391 Pa. 486, —, 137 A.2d 472, 481 (1958). Causation consists of those acts of the defendant or his accomplice initiating and leading to the homicide without an unforeseeable, intervening force, even though the defendant’s or his accomplice’s acts are unintentional or accidental. See Harrison, 90 N.M. at —, 564 P.2d at 1323-24. Stated simply, causation exists when there is no break in the chain of events leading from the initial felony to the act causing death, so that the homicide is linked to or part of a series of incidents forming one continuous transaction. Thompson, 280 N.C. at —, 185 S.E.2d at 673.

\textsuperscript{41} Harrison, 90 N.M. at —, 564 P.2d at 1323.

\textsuperscript{42} State v. Adams, 339 Mo. 926, —, 98 S.W.2d 632, 637 (1936). This statement has been criticized as follows:

On the surface, and at first reading, this would appear to be a fairly clear and explicit statement of an easy rule to follow. But consider for a moment what the court is actually saying: if the death occurred during the course of a criminal transaction, it is murder. The death occurred during the course of a criminal transaction if it was closely related in point of time and place and \textit{if there was a causal relation} . . . .

It does not aid analysis to say that a connection between a felony and a homicide exists if the homicide fell within the \textit{res gestae} of a crime, and that the homicide fell within the \textit{res gestae} of the crime if a connection between the homicide and the crime existed.

Crum, \textit{Causal Relations}, supra note 11, at 196.

As a result of increasing dissatisfaction and inability to accurately establish the requisite parameters of time and distance through the traditional \textit{res gestae} test, a second test of causal connection has been utilized. This test requires that the death
The use of causation requirements to limit the scope of felony murder occurs most frequently in cases where the person causing the death is one other than the felon or an accomplice. Premised upon violation of the fundamental principle of culpability, the causation limitation requires that the culpability of criminal defendants be determined by their own acts, not by the fortuitous acts of their victims or third parties, which are beyond the control of the defendants and are thus logically irrelevant to their culpability.

The leading case cited for the proposition that murder cannot be based on justifiable homicide is Commonwealth v. Redline. Three classes of homicide were recognized at common law: (1) justifiable, (2) excusable, and (3) felonious. Justifiable homicide is committed either by command or with permission of law. An example of a justifiable homicide is where the police officer or felony victim shoots the felon to prevent the commission of the felony or the felon's escape. Blackstone's Commentaries 177-86, 195 (Hammond Ed., 1898).

In Pennsylvania, prior to Redline, felons were held responsible for deaths not directly caused by them and for the justifiable killing of their co-felons by others. In Commonwealth v. Almeida, 362 Pa. 596, 68 A.2d 595 (1948) cert. denied, 339 U.S. 924 (1950), three robbers stole a car and robbed a supermarket. As they fled toward their car, the police approached and a gun battle ensued. An off-duty policeman was shot and killed by one of the robbers. Almeida, 362 Pa. at —, 68 A.2d at 597-98. In convicting all three of felony murder, the court concluded that since the felony was the proximate cause of the fatality it was immaterial whether the shot was fired by or at the robbers. Almeida, 362 Pa. at —, 68 A.2d at 613-14. In other words, an accidental or unintentional killing occurring during the perpetration of a robbery rendered those feloniously engaged in the robbery guilty of murder in the first degree even though the fatal wound was not inflicted by any one of the felons or someone acting in their behalf. The rationale of this holding lay in the adoption of the doctrine of proximate cause as a prerequisite to the applicability of felony murder rule. See Redline, 391 Pa. at —, 137 A.2d at 480.

In Commonwealth v. Bolish, 381 Pa. 500, 113 A.2d 464 (1955), the defendant and the deceased entered into an agreement whereby the deceased was to burn down an empty house in order to collect the insurance. The deceased subsequently died of burns received in his attempt to fulfill the agreement. Bolish, 381 Pa. at —, 113 A.2d at 467. The majority held that the victim's own actions were not a superseding event, and the defendant was not relieved from liability for felony murder. Bolish, 381 Pa. at —, 113 A.2d at 475.

In Commonwealth v. Thomas, 382 Pa. 639, 117 A.2d 204 (1955), Thomas and the deceased robbed a store and fled in opposite directions. The owner of the store pursued the deceased with a gun and, after an exchange of shots, killed him. Thomas, 382 Pa. at —, 117 A.2d at 204. It was held that though the killing was justified as to the actual killer, the defendant could properly be prosecuted for murder. Thomas, 382 Pa. at —, 117 A.2d at 204-05. The court determined that the legislature intended any killing proximately caused by the robbery to be first degree murder.
In Redline, the defendant and his accomplice robbed several persons in a restaurant at gunpoint. The two felons, fleeing the scene, forced one of the victims to accompany them. As they were departing, a gun battle with the police ensued during the course of which a bullet from a policeman's gun hit and fatally wounded Redline's accomplice. It was the accomplice's death for which Redline was indicted, tried, and convicted of murder.

On appeal the Pennsylvania Supreme Court held Redline not guilty of first degree murder, expressly overruling prior Pennsylvania decisions. The court articulated the rule to be followed with respect to a justifiable killing of a co-felon during the perpetration of a felony as follows: "[I]n order to convict for felony-murder, the killing must have been done by the defendant or by an accomplice or confederate or by one acting in furtherance of the felonious undertaking."

Other limitations on the rule were accomplished by several different methods. First, courts required that the underlying felony be independent of the homicide. The felony murder rule does not apply where the felony is an offense included in the homicide; the collateral felony must involve conduct separate from the

attributable to the robber, regardless of the identity of the victim or of the actual slayer. The only requirement was that the force which killed was one which was naturally and foreseeably brought into existence by the robbery. Thomas, 382 Pa. at —, 117 A.2d at 204-06.

47. Redline, 381 Pa. —, 137 A.2d at 474.
48. Id.
49. Id.
50. Id.

51. Id. at —, 137 A.2d at 482. See note 46 supra.
52. Redline, 391 Pa. at —, 137 A.2d at 476. The true basis of the Redline limitation is the idea that it is not justice to hold the felon liable for murder on account of the death, which the felon did not intend, of a co-felon who willingly participated in the felonious act. W. LAFAVE & A. SCOTT, CRIMINAL LAW § 71 at 552 (1972).
53. Aaron, 409 Mich. at —, 299 N.W.2d at 313; W. LAFAVE & A. SCOTT, CRIMINAL LAW § 71 at 545. See, e.g., State v. Essman, 98 Ariz. 228, 403 P.2d 540 (1965); People v. Ireland, 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969); State v. Fisher, 120 Kan. 226, 243 P. 291 (1926); People v. Moran, 246 N.Y. 100, 158 N.E. 35 (1927). In Moran, the court stated:

To make the quality of the intent indifferent, it is not enough to show that the homicide was felonious, or that there was a felonious assault which culminated in homicide. [cite omitted] Such a holding would mean that every homicide, not justifiable or excusable, would occur in the commission of a felony, with the result that intent to kill and deliberation and premeditation would never be essential. [cite omitted] The felony that eliminates the quality of the intent must be one that is independent of the homicide and of the assault merged therein, as, e.g., robbery or larceny or burglary or rape.

54. State v. Essman, 98 Ariz. at —, 403 P.2d at 545. Under this rule, acts of as-
acts of violence which constitute a part of the homicide itself. These common law offenses included rape, sodomy, robbery, burglary, arson, larceny, and mayhem. Third, a requirement that the felony be judged mala in se rather than mala prohibitum has also been imposed as a prerequisite to application of the felony murder rule. Fourth, some states have enacted defenses designed to reach the situation where the killing was not a reasonably foreseeable consequence of the felon’s conduct. Affirmative defenses exist where a defendant is not the only participant in the commission of the underlying felony. Finally, some jurisdictions have reduced the grade of felony murder from first to second or third degree murder.

The Future of the Felony Murder Rule in the United States

With the development of these numerous limitations on the felony murder rule, the doctrine throughout the United States now bears increasingly less resemblance to the traditional common law felony murder concept. Indeed, the evolution of these limitations has called into question the validity of the doctrine’s continued existence. Three competing views on this issue have developed: abandonment of the rule in its entirety; abandonment of the substantive, conclusive presumption of malice and the adoption of an evidentiary, rebuttable presumption; and, retention of the doctrine in its current form.

55. W. LaFave & A. Scott, Criminal Law § 71 at 559 (1972).
56. Model Penal Code, supra note 3, § 210.2 at 34. See generally People v. Pavlic, 227 Mich. 562, 199 N.W. 373 (1924) (the unlawful sale of “moonshine” whiskey was not a common law felony; therefore, the defendant could not be convicted of felony murder).
57. W. LaFave & A. Scott, Criminal Law § 71 at 547 (1972); Model Penal Code, supra note 3, § 210.2 at 35.
58. Aaron, 409 Mich. at —, 299 N.W.2d at 313, W. LaFave & A. Scott, Criminal Law § 71 at 547 (1972); Model Penal Code, supra note 3, § 210.2 at 35. See also Reddick v. Commonwealth, 33 S.W. 416 (Ky. 1895); People v. Pavlic, 227 Mich. 562, 199 N.W. 373 (1924).
61. Aaron, 409 Mich. at —, 299 N.W.2d at 315; Model Penal Code, supra note 3, § 210.2 at 41-42.
62. Aaron, 409 Mich. at —, 299 N.W.2d at 316.
Abandonment of the Doctrine in Its Entirety

The strongest argument in favor of complete abolishment of felony murder in the United States contends that application of the doctrine violates a fundamental principle of criminal law: the principle of culpability. If one had to choose the most basic principle of the criminal law in general... it would be that criminal liability for causing a particular result is not justified in the absence of some culpable mental state in respect to that result... The felony murder rule violates this basic principle in that it punishes all homicides committed in the perpetration or attempted perpetration of a felony regardless of whether they are intentional or unintentional. It is not necessary to prove the relation between the homicide and the felon's state of mind. The felony murder rule thus "erodes the relation between criminal liability and moral culpability." The felony murder doctrine's failure to account for a defendant's moral culpability has been explained as follows:

The rationale of the doctrine is that one who commits a felony is a bad person with a bad state of mind, and he has caused a bad result, so that we should not worry too much about the fact that the fatal result he accomplished was quite different and a good deal worse than the bad result he intended. Yet it is a general principle of criminal law that one is not ordinarily criminally liable for bad results which differ greatly from intended results. While it is understandable that little compassion may be felt for the felon whose innocent victim dies, this does not justify ignoring fundamental principles of criminal law underlying our system of jurisprudence. As the United States Supreme Court articulated in Mullaney v. Wilbur, American criminal law has long considered a defendant's intention—and therefore moral guilt—to be critical to the degree of criminal culpability.

64. Aaron, 409 Mich. at —, 299 N.W.2d at 316.
69. Aaron, 409 Mich. at —, 299 N.W.2d at 318.
71. See id. at 697-98.
Arguments against the felony murder doctrine have led to its abolishment in most foreign countries. England, the country of the rule's origin, abolished the doctrine in 1957. India has also abolished the rule. Felony murder is unknown as such in continental Europe, though the homicide may sometimes be considered as an aggravating factor in sentencing for the underlying felony.

In this country, the felony murder rule has been completely abolished by statute in only three states—Ohio, Kentucky and Hawaii. In addition to abolishment by statute, Michigan has abrogated the concept through judicial decree. While the United...
States Supreme Court has not squarely addressed the constitutional validity of the rule, it has recently held that, in a felony murder context, the eighth amendment prohibits imposition of the death penalty on an accomplice who neither kills, attempts to kill, or intends that a death occur or that lethal force be used.\textsuperscript{80}

\textit{Model Penal Code—Evidentiary Presumption}

The most significant limitation which has been suggested abandons the felony murder doctrine as a rule of substantive law and reformulates it as a rule of evidence.\textsuperscript{81} The Model Penal Code, as prepared by the American Law Institute, advances this new approach to the problem of homicide occurring in the course of a felony.\textsuperscript{82}

Under the Model Penal Code, murder occurs only if a person kills purposely, knowingly, or with extreme recklessness.\textsuperscript{83} The Code rejects the common law’s inclusion of intent to commit a felony as a sufficient mental state to constitute murder.\textsuperscript{84}

If a homicide occurs during the commission or attempted commission of robbery, rape, arson, burglary, kidnapping, or felonious escape, a rebuttable presumption of recklessness or extreme indifference is created.\textsuperscript{85} This presumption seems particularly justified where the crime is facilitated with the use of a dangerous weapon. As the rebuttable presumption applies only to the culpability for murder, it places on the prosecution the ultimate burden of persuasion beyond a reasonable doubt that the defendant acted recklessly or with extreme indifference.\textsuperscript{86} The effect of the Code,

to inflict great bodily harm or with a wanton and willful disregard of the likelihood that the natural tendency is to cause death, must be proven in order for a defendant to be convicted of first degree murder. \textit{Id.} at —, 299 N.W.2d at 329.


\textsuperscript{81} HAWAI\textsc{i} REV. STAT. § 707-701 and Commentaries, Comment at 346 (1976).

\textsuperscript{82} MODEL PENAL CODE, supra note 3, § 210.2 at 29.

\textsuperscript{83} \textit{Id.} In particular, the \textit{MODEL PENAL CODE} provides as follows:

\textit{210.2 Murder (1) Except as provided in Section 210.3 (1) (b), criminal homicide constitutes murder when: (a) it is committed purposely or knowingly; or (b) it is committed 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) Murder is a felony of the first degree. . . .}

\textsuperscript{84} \textit{See id.}

\textsuperscript{85} \textit{Id.} § 210.2 at 29. This presumption also arises if the defendant is an accomplice to any of the enumerated felonies. \textit{Id.} § 210.2 at 29-30.

\textsuperscript{86} \textit{Id.} § 210.2 at 30. This presumption may be rebutted by the defendant or may not be accepted by the jury. Even though the defendant is not liable for murder in either of the above cases, he may be liable for manslaughter or negligent
therefore, is to abandon the felony murder doctrine as an independent basis for establishing the criminality of homicide and to retain the presumption described as a "concession to the facilitation of proof." Yet, since the presumption is rebuttable, the defendants are allowed to introduce evidence which would demonstrate that their particular conduct did not constitute reckless disregard for human life—an alternative unavailable in those jurisdictions which retain the rule in its modern form.

New Hampshire is the only state which has adopted the rebuttable presumption formulation of the Model Code. While New Hampshire’s capital and first-degree murder statutes require that death be caused purposely or knowingly in connection with specific enumerated felonies, its second degree murder statute requires that death be caused recklessly under “circumstances manifesting an extreme indifference to the value of human life.”

**Retention**

Finally, the last view on the continued existence of the felony murder rule in the United States advocates retention of the rule as a substantive definition of murder. Few arguments have been proffessed in support of this position. The two strongest arguments focus on the rule’s constitutionality and purpose.

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homicide. If the presumption is not rebutted and the jury finds that extreme indifference existed on the part of the defendant, then the appropriate conviction is murder. *Id.*

87. *Id.*


630:1 Capital Murder. I. A person is guilty of capital murder if he *knowingly* causes the death of: (a) A law enforcement officer acting in the line of duty; (b) Another before, after, while engaged in the commission of, or while attempting to commit kidnapping as that offense is defined. . . .

630:1-a First Degree Murder. I. A person is guilty of murder in the first degree if he: (a) *Purposely* causes the death of another; or (b) *knowingly* causes death of (1) Another before, after, while engaged in the commission of, or while attempting to commit rape . . . or deviate sexual relations . . . ; (2) Another before, after, while engaged in the commission of, or while attempting to commit robbery or burglary while armed with a deadly weapon, the death being caused by the use of such weapon; (3) Another in perpetrating or attempting to perpetrate arson . . . .

630:1-b Second Degree Murder. I. A person is guilty of murder in the second degree if: (a) He *knowingly* causes the death of another; or (b) He causes such death *recklessly* under circumstances manifesting an extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor causes the death by the use of a deadly weapon in the commission of, or in an attempt to commit, or in immediate flight after committing or attempting to commit any class A felony [*emphasis added*].

90. *Id.*
As articulated above, the felony murder rule relaxes the requirement of intent for the crime of murder occurring in the commission or attempted commission of a felony.\textsuperscript{91} In attacking the constitutionality of the felony murder rule, it has been claimed that the rule operates to relieve the state of its burden of proving intent, an essential element of the crime of murder.\textsuperscript{92} Once an intent to commit the underlying felony is proven, the intent to commit the homicide is conclusively presumed.\textsuperscript{93} It has been argued that the felony murder rule thus relieves the prosecution of its burden of proof, violating the due process clause of the fourteenth amendment as defined in \textit{Mullaney v. Wilbur}.\textsuperscript{94} \textit{Mullaney} declares as unconstitutional any procedural device which either imposes upon a defendant a burden or proving innocence as to any element of a crime, or relieves the state of its ultimate burden of persuasion beyond a reasonable doubt as to any essential element of the crime.\textsuperscript{95}

A definition of the intent necessary for a particular crime, however, is a rule of substantive rather than procedural law.\textsuperscript{96} As \textit{Mullaney v. Wilbur} addresses only procedure, it does not affect any rules of substantive law.\textsuperscript{97} Consequently, by defining murder as requiring an intent merely to commit the underlying felony, the common law definition of malice is no longer an element of the crime of murder.\textsuperscript{98} Such a substantive redefinition renders the statute unaffected by the procedural due process requirements enunciated in \textit{Mullaney}.\textsuperscript{99}

In defense of the modern felony murder statutes, the Maryland Supreme Court has held that such statutes do not unconstitutionally shift the burden of proof; rather, they provide alternative methods of proving the deliberation and premeditation otherwise required for a conviction of first degree murder.\textsuperscript{100} The forms of felony murder statutes are not mere reflections of willful, deliber-
ate and premeditated killing but "stand upon their own feet as self-sufficient definitions of murder. . . . Their own sets of circumstances do not constitute . . . murder because willfulness, deliberation and premeditation may somehow be inferred, presumed or implied, but because such willfulness, deliberation and premeditation are irrelevant considerations and are flatly superfluous."  

Simply stated, a prosecution under the felony murder rule merely changes the type of proof necessary to establish murder.  

Because the mental state required for the underlying felony is an independent basis for murder, it is unaffected by Mullaney v. Wilbur.  

This substantive redefinition of murder, however, seems to be a form of strict liability without regard to the defendant's actual intent with respect to the victim's death.

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101. Evans, 28 Md. App. at —, 349 A.2d at 329.
102. Id. at —, 349 A.2d at 330.
103. Evans, 28 Md. App. at —, 349 A.2d at 337 (emphasis original). See also R. Perkins, Perkins on Criminal Law 45 (2d Ed. 1969).
104. "Strict liability" occurs where criminal liability is imposed without fault, i.e., without a requirement that the actor have any particular mental state with regard to the result for which punishment is imposed. W. LaFave & A. Scott, Criminal Law § 31 at 218-23 (1972). This doctrine has been traditionally confined to mala prohibita, "regulatory" or "public welfare" offenses which did not exist at common law and impose minimum sanctions, such as liquor laws, pure food and drug laws and traffic offenses. Id. § 31 at 218 n.1. When confined to these mala prohibita offenses, the doctrine has been held constitutional. United States v. Park, 421 U.S. 658, 670-71 (1975); United States v. Balint, 258 U.S. 250, 252-54 (1922). However, although the issue is somewhat unresolved, it is generally agreed that strict liability is inappropriate for crimes which are mala in se and incur the stigma of incarceration. People v. Clark, 71 Ill. App. 3d 381, —, 389 N.W.2d 911, 921 (1979); W. LaFave & A. Scott, Criminal Law § 31 at 223 (1972); Model Penal Code, supra note 3, at § 2.05; see generally Morissette v. United States, 342 U.S. 246, 250-63 (1952).

In State v. Guest, 583 P.2d 836, 839 (Alaska 1978), the Alaska Supreme Court found that the doctrine of strict liability, if applied to any crime other than a "public welfare" offense, would be unconstitutional ("where the particular statute is not a public welfare type of offense, either a requirement of criminal intent must be read into the statute or it must be found unconstitutional."). In Guest, the court held that strict liability was inappropriate for the crime of "statutory rape," thereby construing the statute at issue to allow the defense of honest and reasonable mistake as to the age of the victim. Guest, 583 P.2d at 840. The court rejected the argument that since the defendant was aware that he was at least guilty of fornication, there was sufficient criminal intent to justify a conviction of the more serious charge of statutory rape. The court stated: "[w]hile, it is true that under such circumstances a mistake of fact does not serve as a complete defense, we believe that it should serve to reduce the offense to that which the offender would have been guilty of had he not been mistaken." Guest, 583 P.2d at 839. By analogy, even though a defendant may have intended to commit the underlying felony, if an unintended death occurs
The primary purpose advanced for the felony murder rule, in those states which retain it, is the deterrence of felons from acting in such a manner as to increase the likelihood of violence. The purpose is presumably deterred from committing violent crimes if held strictly responsible for the deaths that result. The rule has been characterized as absolutely necessary for the protection of society in that it deters felons from committing acts of violence. However, this rationale is lacking in support. Limited empirical data discloses that accidental killings do not occur disproportionately often, even in connection with the so-called “inherently dangerous” felonies. This conclusion is based upon three studies of robbery statistics. In each study, comparison showed that only approximately one-half of one per cent of the robberies resulted in death.

through accident, and the felony was not perpetrated with reckless disregard for human life, the reasoning of Guest would seem to reject the principles articulated in Evans as justifications for the felony murder rule.

105. Victory v. Bombard, 432 F. Supp. 1240, 1243 (S.D.N.Y. 1977) (the application of the felony murder rule to the non-killing accomplice to the underlying felony is justified by the deterrence rationale).


[1] If experience shows, or is deemed by the law-maker to show, that somehow or other deaths which the evidence makes accidental happen disproportionately often in connection with other felonies, or with resistance to officers, or if on any other ground of policy it is deemed desirable to make special efforts for the prevention of such deaths, the law-maker may consistently treat acts which, under the known circumstances, are felonious, or constitute resistance to officers, as having a sufficiently dangerous tendency to be put under a special ban. The law may, therefore, throw on the actor the peril, not only of the consequences foreseen by him, but also of consequences which, although not predicted by common experience, the legislator apprehends.


110. Id. The statistics relied upon by the American Law Institute were summarized in Enmund v. Florida, — U.S. —, — n.23, 102 S. Ct. 3368, 3378 n.23 (1982):

<table>
<thead>
<tr>
<th>Date &amp; Location</th>
<th>No. Robberies</th>
<th>Robberies Accompanied by Homicide</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cook County, Ill.</td>
<td>14,392 (est.)</td>
<td>71</td>
<td>.49</td>
</tr>
<tr>
<td>1926-1927</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Philadelphia, Pa.</td>
<td>6,432</td>
<td>38</td>
<td>.59</td>
</tr>
<tr>
<td>1940-1952</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New Jersey</td>
<td>16,273</td>
<td>66</td>
<td>.41</td>
</tr>
<tr>
<td>1975</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
THE FELONY MURDER RULE IN NEBRASKA

Nebraska recognizes felony murder as a rule of substantive law. The law of felony murder is promulgated in section 28-303 of the Nebraska Revised Statutes. Murder occurs where any death results in the course of certain enumerated felonies without regard to whether it was the result of accident, negligence, recklessness or willfulness.

In particular, the relevant provision covering murder in the course of these enumerated felonies provides:

28-303. Murder in the first degree; penalty. A person commits murder in the first degree if he kills another person (1) purposely and with deliberate and premeditated malice, or (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary.

In interpreting section 28-303, the Nebraska Supreme Court has traditionally followed the majority rule that, in a prosecution for felony murder, proof of the intent to commit the underlying felony satisfies the mens rea element of the crime of murder.

An estimated total of 548,809 robberies occurred in the United States in 1980. Approximately 2,361 persons were murdered in the United States in 1980 in connection with robberies. Thus, only about .43% of robberies in the United States in 1980 resulted in homicide.
In the case of State v. Bradley, the Nebraska Supreme Court was again given the opportunity to interpret felony murder as the doctrine exists in Nebraska. In Bradley, the defendant was found guilty of murder in the shooting death of a robbery victim, although the victim was shot by Bradley's accomplice.

In appealing the conviction, the defendant attacked the constitutionality of the felony murder rule, as applied in Nebraska as a result of the decision in State v. Kauffman. Kauffman stood for the proposition that in a prosecution for homicide occurring in the perpetration, or attempt to perpetrate, an enumerated felony proof of premeditation, deliberation or a purpose to kill are not required. “The turpitude involved in the robbery takes the place of intent to kill or premeditated malice, and the purpose to kill is conclusively presumed from the criminal intention required for robbery.” It is this statement that Bradley asserted was unconstitutional as a violation of the rule against irrebuttable presumptions.

In its brief opinion, the court dismissed Bradley’s claim as being without merit. The court’s decision was based upon the construction of the felony murder rule given in several previous years.

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When two or more, in furtherance of a common design, enter upon the perpetration of a burglary, armed and prepared to kill if opposed, and while so engaged are discovered, and in the effort to escape one of the burglars shoots and kills one who is trying to arrest him, all are equally guilty of the homicide, although one of them, who was not armed with a deadly weapon, escaped before the shooting, and such killing was not part of the prearranged plan.


112. 210 Neb. at 882-83, 317 N.W.2d at 99-100. Juan Bradley and his two accomplices discussed taking from someone either marijuana or the money necessary to purchase marijuana. After this discussion, one of Bradley's accomplices approached the house of the victim, knocked on the front door, and when it was answered, shot the victim in the neck, inflicting a fatal wound. Bradley was found guilty of the crime of felony murder and was sentenced to a term of life imprisonment. Id. at 882-83, 317 N.W.2d at 100-01.

113. Id. at 883, 317 N.W.2d at 101. See notes 92-103 and accompanying text supra. The defendant did not request that the court strike § 28-303 in its entirety, but challenged only the statute as applied in Nebraska. Brief for Appellant at 11, 210 Neb. 882, 317 N.W.2d 99 (1982).

114. Kauffman, 183 Neb. 817, 164 N.W.2d 469 (1969). Kauffman was decided under previous § 28-401. See note 113 supra. In Kauffman, the victim of the robbery was bound, gagged and died from suffocation. The victim was not found until several days later. Kauffman, 183 Neb. at 816, 164 N.W.2d at 470.


Nebraska Supreme Court cases. Although the court disapproved of the statement in Kauffman that "the purpose to kill is conclusively presumed from the criminal intention required for robbery," it dealt with the issue of constitutionality by merely reiterating the principle that proof of a purpose to kill is not required because it is not an element of the crime of felony murder.

The court's holding in Bradley adds nothing new to the concept of felony murder as it exists in Nebraska. While express language of "conclusive presumptions" is disapproved, the effect of Bradley is to retain this presumption, as it is the very foundation upon which liability is imposed under the felony murder doctrine, unless it is conceded that the statute imposes a form of strict liability.

CONCLUSION

The felony murder doctrine aside, criminal law does not predicate liability simply upon the resulting death of another. Liability has traditionally been imposed according to the accused's moral culpability. The felony murder doctrine ignores liability based upon culpability. Consequently, the rule has been criticized as unsound as it is indefensible to convert accidental, negligent or reckless homicide into murder simply because, without more, the killing was in furtherance of a criminal objective.

The Nebraska Supreme Court should recognize the trend toward, and substantial body of criticism supporting, abandonment of the felony murder rule as a separate basis for establishing liability for homicide. The capital sanctions of first degree murder, as employed by section 28-303, should not be used unless there is a


No specific intention is required to constitute felony murder other than the intent to do the act which constitutes the felony in question . . . . It is sufficient if death occurs unexpectedly and without design if it occurs while the party or parties charged are in the perpetration of, or an attempt to perpetrate, one of the acts set out in the statute.

123. See also State v. McDonald, 195 Neb. 625, 636-37; 240 N.W.2d 8, 15 (1976), wherein the court held:

All that must be proven on a felony murder charge is that a death occurred in the perpetration of one of the specific felonies listed in Section 28-401, R.S. Supp., 1974. If those facts are not proven, the defendant is not guilty . . . . In a felony murder case, the proof of a particular mental state is not required as to the killing.

124. Bradley, 210 Neb. at 885, 317 N.W.2d at 102. But see note 104 supra.

125. See generally Model Penal Code, supra note 3, § 210.2 at 31.
finding that the actor's conduct at least manifested extreme indifference to the value of human life.\textsuperscript{126} A rule of evidence could be established under the statute which would provide that proof that a killing occurred during the commission of certain felonies raises a rebuttable presumption that this necessary specific intent was present.\textsuperscript{127} Under this rebuttable presumption, murder would occur only if a person kills knowingly, purposely, or with extreme recklessness.\textsuperscript{128} Thus, the fundamental principle of criminal law premising liability on moral culpability would be introduced into the law of felony murder and extreme applications of the outmoded and rigid doctrine of felony murder would be avoided.

Establishing such a rebuttable presumption as a facilitation of proof would not necessarily change the result in most felony murder cases, but a conviction on this basis would rest solidly on the principle of moral culpability. Engaging in certain penalty-prohibited behavior may evidence a recklessness sufficient to establish manslaughter, or an extreme indifference to the likelihood of causing death sufficient to establish murder, but such a finding should be an independent determination which would rest upon the facts of each case.

\textit{Angela Johnson Ostrander—'84}

\textsuperscript{126} \textit{Id.} at 29-30.
\textsuperscript{127} The adoption of a rebuttable presumption that the necessary specific intent was present would be in accord with the American Law Institute Model Penal Code § 210.2. See notes 81-88 and accompanying text \textit{supra}.
\textsuperscript{128} \textit{See generally} Model Penal Code, \textit{supra} note 3, § 210.2 at 29.