Washington and Lee Law Review

Volume 51 | Issue 4 Article 8

Fall 9-1-1994

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I. Introduction

The felony-murder rule cannot help but fascinate.[1] It has deep but terribly obscure historical roots.[2] It is one of four traditional branches on the tree of murder,[3] yet clearly the odd one out.[4] It permits severe

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1. *See* People v. Aaron, 299 N.W.2d 304, 306 (Mich. 1980) (noting felony-murder doctrine has "perplexed generations of law students, commentators, and jurists").

2. *See* George P Fletcher, *Reflections on Felony Murder*, 12 SW. U. L. REV 413, 421 (1980-1981) (describing "historical roots" of felony-murder as "tenuous and ill defined"); Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV 446, 449-50 (1985) (discussing "disputed origins" of rule); *id.* at 492 (stating that doctrine arose from "obscure historical origins"); *see also infra* part III.

3. The other three traditional branches of the murder tree, also described as the three variations of actual malice, are intent to kill, intent to cause grievous bodily harm, and depraved heart or gross recklessness murder. *See* WAYNE R. LAFAVE & AUSTIN W SCOTT, JR., CRIMINAL LAW 605, 615-621 (2d ed. 1986).

4. *See Aaron*, 299 N.W.2d at 326 (concluding that it is inappropriate to equate intent to commit felony with forms of actual malice otherwise needed for murder conviction); Note, *Felony Murder· A Tort Law Reconceptualization*, 99 HARV L. REV 1918, 1919 (1986) [hereinafter Note, *Tort Law*] (describing rule as "an anomaly in the law of homicide" because it requires no mental state to be proven with respect to death); Andrea Rosenthal, Note, People v. Patterson: *Changing the Second Degree Felony Murder Doctrine*, 25 U.S.F L. REV 123, 125 (1990) (asserting that felony-murder is "exception to general rule" that malice is element of murder); Tamu Sudduth, Comment, *The* Dillon *Dilemma: Finding*

punishment for the most heinous of offenses in some cases that can appropriately be described as accidents.[5] In its classic form, the operation of the rule follows a compellingly simple, almost mathematical, logic: a felony + a killing = a murder. Abandoned by its motherland,[6] the felony-murder rule, like so many outcasts, has found a niche in America.[7]

I should make it clear from the start that I approach this task with an intent neither to praise nor bury the felony-murder rule. The former would be disingenuous, the latter impossible.[8] Nor is it my purpose to demon-

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Proportionate Felony-Murder Punishments, 72 CAL. L. REV 1299, 1306 (1984) (observing that intent to commit felony is not like other mental states associated with crime of murder).

5. I will suggest later that members of the public might well not agree with the description of such killings as "accidental." *See infra* text accompanying notes 173-82. Unless otherwise indicated, my use of the term is consistent with the usage of other scholars. An accidental killing is one in which none of the recognized forms of mens rea is attributable to the person who caused the death—that is, he or she did not purposely, knowingly, recklessly, or negligently bring about the loss of life.

6. The doctrine was a common law creation in England. *See* SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 514 (5th ed. 1989). With the 1957 enactment of the following provision, Parliament abolished the doctrine:

> Where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence.

Homicide Act of 1957, 5 & 6 Eliz. 2, ch. 11, § 1 (Eng.).

7 *See* LAFAVE & SCOTT, *supra* note 3, at 640-41 (noting that felony-murder is "well entrenched in American law"); 2 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW 204 (14th ed. 1979) (observing that felony-murder has "flourished" in America); Fletcher, *supra* note 2, at 417 (opining that American "devotion to felony-murder" is like its devotion to capital punishment); David Lanham, *Felony Murder—Ancient and Modern*, 7 CRIM. L.J. 90, 90-91 (1983) (discussing American courts' treatment of doctrine as "well-established and legitimate"); Michelle L. Gilbert, Note, *A Comparative Review of States' Recognition of Reduced Degrees of Felony-Murder*, 40 WASH. & LEE L. REV 1601, 1605 (1983) (asserting that all but three states retain some version of felony-murder).

8. It would be disingenuous for me to praise the felony-murder rule because, like most scholars, I continue to believe that the concept is misguided in principle, unnecessary in practice, and inappropriate in symbolism. It would be impossible for me to bury the felony-murder rule because others more able than I, and armed with every logical and persuasive tool in the scholarly arsenal, have tried and failed. While scholars might well deserve credit for much of the limitation of the doctrine, the scholarly pleas for abolition have met stern resistance and have had little success. *See* Kevin Cole, *Killings During Crime: Toward a Discriminating Theory of Strict Liability*, 28 AM. CRIM. L. REV 73, 73-74 (1991) (concluding that despite uniform hostility of commentators rule remains "quite durable"); David Crump & Susan W Crump, *In Defense of the Felony Murder Doctrine*,

strate how fundamentally flawed the crime of felony-murder is. That path is much too worn.[9] My goal is more modest: to understand how a rule of law that has been maligned so mercilessly for so long and that is putatively irreconcilable with basic premises of modern criminal jurisprudence has survived[10] and promises to persist into the twenty-first century [11]

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8 HARV J.L. & PUB. POL'Y 359, 359 (1985) ("Scholarly denunciation has had little effect upon its retention.").

9. The scholarly community has not had many favorable things to say about the felony-murder rule. *See* MODEL PENAL CODE § 210.2 commentary at 37 (1980) (noting that it is difficult to find "[p]rincipled argument in favor of felony-murder"); Crump & Crump, *supra* note 8, at 359 (stating that few scholars have tried to articulate policies that support doctrine); *id.* at 395-98 (accusing scholars of "superficial" analysis of justifications for felony-murder). Commentators have "almost universally condemned" the felony-murder rule. Lynne H. Rambo, *An Unconstitutional Fiction: The Felony-Murder Rule as Applied to the Supply of Drugs*, 20 GA. L. REV 671, 674 (1986); *see also* Lanham, *supra* note 7, at 90 n.2 (stating that "[t]he rule has many critics"); Jeanne H. Seibold, Note, *The Felony-Murder Rule: In Search of a Viable Doctrine*, 23 CATH. LAW 133, 134 n.1 (1978) (asserting that "doctrine has been the subject of vitriolic criticism for centuries").

For some idea of the criticism leveled against the rule, see LAFAVE & SCOTT, *supra* note 3, at 632, 640; Cole, *supra* note 8, at 74-77; Isabel Grant & A. Wayne MacKay, *Constructive Murder and the Charter· In Search of Principle*, 25 ALBERTA L. REV 129, 133, 156-57 (1987); Lanham, *supra* note 7, at 101, Rosenthal, *supra* note 4, at 126; Roth & Sundby, *supra* note 2, at 446, 491, Seibold, *supra* at 134 n.1, 162; Sudduth, *supra* note 4, at 1306-07; Note, *Tort Law*, *supra* note 4, at 1918, 1935.

In recent years, a few adventurous commentators have endeavored to furnish substantive arguments in support of the concept of felony-murder. *See* Frederick C. Moesel, Jr., *A Survey of Felony Murder*, 28 TEMP. L.Q. 453, 466 (1955). *See generally* Cole, *supra* note 8; Crump & Crump, *supra* note 8.

10. Even its critics have conceded that the rule is a survivor. *See* People v Aaron, 299 N.W.2d 304, 307 (Mich. 1980) (describing rule as "historic survivor"); MODEL PENAL CODE § 210.2 commentary at 40 (1980) (noting that, in general, attacks on rule in United States have not succeeded); GEORGE P FLETCHER, RETHINKING CRIMINAL LAW § 4.4.7, at 317-18 (1978) (alleging that "durability of the felony-murder rule is manifest" and noting that doctrine has "survived the onslaught [of the California Supreme Court]"); Fletcher, *supra* note 2, at 415 (conceding that by and large rule has been retained); Lanham, *supra* note 7, at 101 (complaining of doctrine's survival into 20th century); Roth & Sundby, *supra* note 2, at 446 (conceding that doctrine has shown "great resiliency" and that it "persists in a vast majority of states" despite "widespread criticism"); Seibold, *supra* note 9, at 135-36 (opining that doctrine has survived criticism and retains significant viability); Note, *Tort Law*, *supra* note 4, at 1918 (observing that scholarly and judicial attacks have had quite limited success).

11. *See* LAFAVE & SCOTT, *supra* note 3, at 641 (predicting continued existence of rule "for many years to come"); Seibold, *supra* note 9, at 150 (concluding that rule's "continued existence is assured").

My intent is not to provide a single, coherent solution to or explanation of the felony-murder puzzle. My object, instead, is to identify many of its pieces.[12] An examination of these pieces will provide insight into the role of history and the effect of politics in forming and preserving our law It may also spur productive reflection upon the differences among scholars', lawmakers', and citizens' conceptions of criminal law, in particular, and the institution of law, more generally Perhaps the study of a rule that has withstood an avalanche of negative scholarship will reveal shortcomings in scholarly thought;[13] perhaps it will simply confirm the deficiencies of felony-murder and the fortuity of some legal rules. It might (perish the thought) suggest a need to reexamine the premises on which so many of us who study the criminal law operate or (worse yet) call into question our single-minded devotion to rationality [14]

Part II sketches the felony-murder rule, certain widely-accepted modern principles of culpability, and the ways in which the former is not consistent with the latter. Part III discusses the history of the doctrine in England and the United States. The discussion places special emphasis on changes in the law and in society that make it highly questionable to engraft the classic rule onto the modern world. Part IV explores the primary justification offered for the contemporary felony-murder doctrine—deterrence. This Part focuses on the reasons that deterrence is a theoretically and empirically vulnerable foundation for the felony-murder rule. Part V posits a variety of vectors that have conspired to propel felony-murder toward the twenty-first century History, the politics of law and order and of life and death, the restricted scope of the felony-murder rule in modern times, and the public's and lawmakers' conceptions of culpability, blameworthiness, and criminal liability have all contributed to the rule's perpetuation.

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12. Like Professor Fletcher, my purpose is "to probe the legislative romance with the felony-murder rule." Fletcher, *supra* note 2, at 415.

13. *See* Crump & Crump, *supra* note 8, at 360 (speculating that public officials might possess insights that scholars lack with regard to felony-murder doctrine).

14. *See, e.g.*, Note, *Tort Law*, *supra* note 4, at 1933 (complaining that felony-murder has "no rational basis"). I plead guilty to being the slave of logic and rationality At times, however, I have wondered whether we lawyers place a bit too much faith in the ability of logic and rationality to lead to the best answers to legal and social problems. While not at all prepared to foreswear rational thought, I have begun to sense that there is some truth in Lord Salmon's admonition that "[a]bsolute logic in human affairs is an uncertain guide and a very dangerous master." D.P.P v Majewski, 2 All E.R. 142, 158 (H.L. 1976).

If my enterprise sheds light on our apparently inseverable attachment to felony-murder, that will be enough. If its lessons extend beyond the rule, or even beyond the criminal law, so much the better.

II. The Felony-Murder Rule, Modern Culpability, and the Tension Between Them

In its starkest, broadest form, the felony-murder rule provides that the killing of another human being in the furtherance of *any* felonious enterprise constitutes the crime of murder.[15] It would seem, however, that the instances in which this pristine, capacious version of the rule has remained the controlling law are rare.[16] It certainly is not the predominant law in our nation today [17] In fact, states have enacted a variety of quite

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15. *See* MODEL PENAL CODE § 210.2 commentary at 30 (1980) (describing classic formulation of rule as including any felony); LAFAVE & SCOTT, *supra* note 3, at 622 (stating that at one time in English common law nature of felony did not matter); Gilbert, *supra* note 7, at 1601 (stating that common-law felony-murder rule defined any homicide during felony as murder).

The explanation for the rule is that "[a]t common law malice was implied as a matter of law for homicides arising from felonies." WILLIAM L. CLARK & WILLIAM L. MARSHALL, A TREATISE ON THE LAW OF CRIMES 656 (Marian Q. Barnes ed., 7th ed. 1967); *see also* People v. Patterson, 778 P.2d 549, 557 (Cal. 1989) (felony-murder rule posits existence of malice from commission of felony, thus rendering actual malice irrelevant); Erwin S. Barbre, Annotation, *What Felonies Are Inherently or Foreseeably Dangerous to Human Life for Purposes of Felony-Murder Doctrine*, 50 A.L.R.3d 397, 399-400 (1973) (explaining that malice involved in felony is "transferred" or "imputed" to classify killing as murder).

16. Not long after the rule gained a foothold, the efforts to limit its scope began. *See, e.g.*, Regina v. Serne, 16 Cox Crim. Cas. 311, 313 (1887) (holding felony-murder branch of murder requires finding that person of common intelligence would be aware that felonious conduct poses danger to human life). Those efforts have continued unabated in modern times. *See, e.g.*, People v Smith, 678 P.2d 886, 887 (Cal. 1984) (holding felony with purpose of infliction of physical injury or pain on victim merges into homicide and cannot be basis for felony-murder rule); People v Phillips, 414 P.2d 353, 360 (Cal. 1966) (concluding felony must be inherently dangerous to human life in abstract to qualify for second degree felony-murder rule); State v Canola, 374 A.2d 20, 30 (N.J. 1977) (interpreting statutory felony-murder rule as limiting operation to cases in which felon commits actual lethal act).

17 *See* People v. Aaron, 299 N.W.2d 304, 312 (Mich. 1980) (stating that limitations of felony-murder doctrine have been adopted by most states); State v Doucette, 470 A.2d 676, 680 (Vt. 1983) (observing that majority of states have limited felony-murder rule); FLETCHER, *supra* note 10, § 4.4.4, at 293 (asserting that "dominant trend" has been "toward limitation and refinement" of felony-murder rule); ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 64-65 (3d ed. 1982) (observing that in United States only few states retain broad, unlimited rule and that all others have limited it); Crump & Crump, *supra* note

different versions of felony-murder,[18] some have abandoned it entirely,[19] and the law is anything but stable. Most American jurisdictions have a restricted form of the rule that applies only when a felon acting in furtherance of one of a certain, limited group of felonies commits a lethal act that kills another human being.[20]

To understand the primary indictment of the core concept of felony-murder, one must appreciate the contemporary scholarly approach to

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8, at 377 (noting "widespread agreement" that rule requires limitation, that application to "any felony" results in "irrational grading").

18. *See* LAFAVE & SCOTT, *supra* note 3, at 622 (noting that law of felony-murder today "varies substantially"); Lanham, *supra* note 7, at 100 (asserting that rule has been subject of "a variety of treatments in different jurisdictions and at different times"); M. Susan Doyle, Note, People v Patterson: *California's Second Degree Felony-Murder Doctrine at "The Brink of Logical Absurdity"*, 24 LOY. L.A. L. REV 195, 200-01 (1990) (stating that doctrine varies from state to state). For sample variations, see, e.g., ALA. CODE § 13A-6-2(a)(3) (1994) (restricting felony-murder to enumerated felonies or "any other felony clearly dangerous to human life"); ALASKA STAT. § 11-41.110(a)(3) (West Supp. 1993) (limiting felony-murder to enumerated felonies); ARK. CODE ANN. § 5-10-102(a)(1) (Michie 1993) (confining doctrine to deaths caused during any felony "under circumstances manifesting extreme indifference to the value of human life"); FLA. STAT. ANN. § 782.04 (West Supp. 1994) (creating three degrees of felony-murder: enumerated felonies in which felon kills, enumerated felonies in which nonfelon kills, and non-enumerated felonies in which felon kills); GA. CODE ANN. § 16-5-1 (Michie 1992) (allowing any felony to support felony-murder conviction); MASS. GEN. LAWS ANN. ch. 265, § 1 (West 1990) (limiting rule to felonies with punishment of death or life imprisonment).

19. *See, e.g.*, HAW REV STAT. §§ 707-701, 707-701.5 (Supp. 1992) (eliminating felony-murder rule); KY. REV STAT. ANN. § 507.020(1)(a) (Michie/Bobbs-Merrill 1990) (same); People v. Aaron, 299 N.W.2d 304, 324-26 (Mich. 1980) (reinterpreting malice as not including commission of felony, thereby abolishing felony-murder doctrine).

20. The two limitations made explicit in this description are: (1) that not all felonies can be the basis of felony-murder prosecutions, *see Aaron*, 299 N.W.2d at 316 n.79 (majority of states with statutory felony-murder rule enumerate list of felonies that qualify); PERKINS & BOYCE, *supra* note 17, at 70 (except where legislatively changed, felony-murder in United States today makes homicide murder if it results from perpetration or attempted perpetration of inherently dangerous felony), and (2) that one of the felons must commit the actual killing act, *see* State v. Canola, 374 A.2d 20, 23 (N.J. 1977) (stating "agency" rule that requires lethal act to be committed by felon is adhered to by large majority of jurisdictions).

Another limitation recognized by several jurisdictions is that the party killed not be one of the felons. *See, e.g.*, People v Kittrell, 786 P.2d 467, 469 (Colo. Ct. App. 1989) (citing statute that provides culpability only for "death of a person, other than one of the participants"). It is unclear, however, whether this view is presently followed in a majority of the states. *See generally* Martin J. McMahon, Annotation, *Application of Felony Murder Doctrine Where Person Killed was Co-Felon*, 89 A.L.R.4th 683 (1991).

culpability and fault.[21] The requirement of mens rea, or a guilty mind, as a basis for criminal liability is nothing new The criminal law of England recognized that notion fairly early on.[22] The content or meaning of that requirement, however, has evolved substantially Originally, the concept was vague and imprecise; any badness or wrongfulness qualified.[23] Eventually, a variety of more specific culpable mental states began to take shape. Notions of intent, recklessness, and negligence developed to reflect varying degrees of mental culpability and, therefore, of fault.[24]

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21. By referring to the "scholarly" approach, I do not mean to suggest that others do not understand culpability in the same way I only mean to emphasize that this view is prevalent in the scholarly community

22. *See* LAFAVE & SCOTT, *supra* note 3, at 193 (asserting that guilty mind requirement is one of "basic premises which underlie the whole of the Anglo-American substantive criminal law" and "have been of great importance in shaping the criminal law"); *id.* at 212 (stating that although in earliest times common-law judges did not require mens rea, from about 1600 forward they prescribed "bad state of mind requirement"); PETER W LOW ET AL., CRIMINAL LAW 194 (2d ed. 1986) (asserting that while origins of common-law mens rea demand are not clear, it is clear that such general requirement has existed for centuries); Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815, 825-30 (1980); Note, *Tort Law*, *supra* note 4, at 1923 (declaring that mens rea principle has long been cornerstone of just criminal law system).

23. *See* MODEL PENAL CODE § 210.2 commentary at 31 (1980) (noting that mens rea demand at one time referred merely to "general criminal disposition" rather than specific mental attitude toward elements of crime); LOW ET AL., *supra* note 22, at 195-96 (discussing fact that mens rea, in earlier times, "smacked strongly of general moral blameworthiness") (quoting Francis B. Sayre, *Mens Rea*, 45 HARV L. REV 974, 988 (1932)); Robinson, *supra* note 22, at 821 (observing that early mental state distinctions were only between "wilful" and "accidental").

24. The text might suggest that the picture became more clear and precise than it actually did. Quite a number of ill-defined mental state requirements persisted and are present today in statutory definitions of crimes. *See* MODEL PENAL CODE § 2.02 commentary at 230 n.3 (1980) (observing that one reason for reform proposals in federal system was that there were "76 different methods of stating the requisite mental element in present federal criminal statutes"); *see, e.g.*, ARIZ. REV STAT. ANN. § 32-1696(A)(9) (Supp. 1993) (making it crime for optician to *unprofessionally* conduct practice of optical dispensing); CAL. PENAL CODE § 95 (West Supp. 1994) (making it crime to *corruptly* attempt to influence juror); *id.* § 288 (making it crime to *lewdly* commit lewd or lascivious act with child); *id.* § 337e (West 1988) (making it crime to *dishonestly* umpire sporting event); FLA. STAT. ANN. § 256.051(2) (West 1991) (making it crime to *contemptuously* abuse flag or emblem of Florida).

There has been steady movement, however, toward the sort of clarity, consistency, uniformity, and precision exemplified by § 2.02 of the Model Penal Code. In that section, the drafters specified the four mental states—purpose, knowledge, recklessness, and negligence—that they believed were sufficient to encompass virtually all of the culpable

In addition, the demand that the state prove fault for every necessary component of a criminal offense gained acceptance. According to this view, an individual is not responsible for an offense unless he or she has the requisite mens rea for each essential element of that offense.[25] The underlying premises of this position are straightforward. Liability for a particular offense requires fault for that offense. Fault for a particular offense requires that an individual have a blameworthy mental attitude toward all of the components that the law deems essential to constitute that offense.[26]

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mindsets necessary for a comprehensive criminal code. Moreover, they specified the definitions of each term with as much precision as was linguistically and pragmatically possible.

Regina v Cunningham, 41 Crim. App. 155 (Crim. App. 1957), provides a good example of judicial implementation of the principle that mens rea refers to particular mental states, not just general wrongfulness. In *Cunningham*, the defendant was charged with "maliciously" causing a noxious substance to be administered to a woman so as to endanger her life. *Id.* at 157-58. The trial judge instructed the jurors that they should find that the defendant met the "malicious" requirement if his actions were "wicked." *Id.* at 160. Because it was larcenous conduct that resulted in the administration of coal gas to the victim, it was no surprise that the jury convicted.

On appeal, the court held that general wickedness was not enough. *Id.* at 160-61. Rather, the State had to prove that the defendant intentionally or recklessly caused the harm proscribed by the statute. *Id.* at 161. In other words, it was not enough that Cunningham was a wicked person who caused a noxious substance to be administered to the woman and thereby endangered her life. Cunningham had to intentionally or recklessly administer the substance and bring about such endangerment.

25. *See* MODEL PENAL CODE § 2.02 commentary at 229 (1980) (observing that § 2.02 "expresses the basic requirement that unless some element of mental culpability is proved with respect to each material element of the offense, no valid criminal conviction may be obtained").

26. Regina v. Faulkner, 13 Cox Crim. Cas. 550 (1877), provides a good illustration of this principle at work in the late 1800s. In *Faulkner*, the trial judge instructed the jury that the defendant could be convicted of "maliciously" damaging a ship if he set it on fire during the course of a felonious act. *Id.* at 551. Because the defendant had been stealing rum at the time he set the blaze that damaged the ship, he was guilty under the judge's instruction. *Id.*

On appeal, however, the court held that the maliciousness required by the statute referred to a culpable mental state—at least recklessness—with regard to the property damage element of the crime. *Id.* Even a thief could not be convicted for causing the damage if he did so "accidentally "

The court believed that an intent to steal rendered one liable for theft, but that liability for criminal damage required more than an intent to steal and more than an intent to perform the conduct that resulted in the damage. Because the essence of the criminal offense was damage to another's property, liability for the offense required a culpable

Thus, putting aside the public welfare offenses that seek to achieve maximum deterrence through the device of strict liability, it is the widely accepted view today that criminal liability must rest on proof of a recognized level of mental fault for every essential element of an offense.[27] Larceny, for example, might well require that one intentionally take an item of property, that one know it belongs to another person, and that one intend to deprive that person of the item permanently [28] Rape might well require that one intentionally engage in intercourse and that one be at least negligent with regard to whether the intercourse is nonconsensual.[29]

The third aspect of modern scholarly thought that is implicit in some of the foregoing is the demand for liability proportionate to culpability According to this position, offenses should be graded as more or less serious according to the level of mental fault established.[30] Thus, if a

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attitude toward the damage that was done. In other words, to be blameworthy for the offense, an individual had to have a guilty mind for the element that was an integral constituent of the crime contemplated and defined by Parliament.

27 *See* LOW ET AL., *supra* note 22, at 233 (stating that "[a]s many as half of the states have adopted [Model Penal Code-like] culpability provisions" and that Model Penal Code's culpability provision "has had an important impact on the decisional law" in states that "still base the culpability inquiry on the common law").

28. *See* CLARK & MARSHALL, *supra* note 15, at 824-25 (opining that mens rea required for larceny is "intent, without bona fide claim of right, and with the objective of any personal benefit and gain, to take another's property permanently" and that it is not larceny to take another's property "by accident" or under good faith "claim of ownership or right"); LAFAVE & SCOTT, *supra* note 3, at 721-22 (discussing "intent to steal" requirement of larceny and addressing its inconsistency with belief that property does not belong to another); STEWART RAPALJE, A TREATISE ON THE LAW OF LARCENY AND KINDRED OFFENSES 3 (Chicago, Wait 1892) (defining common-law larceny as "the felonious, wrongful, and fraudulent taking and carrying away by any person, of the personal goods of another, with the felonious intent to convert them to his own use and make them his property, without the consent of the owner"); *see also* State v Waltz, 2 N.W 1102, 1103 (Iowa 1879) (holding that evidence that accused horse thief believed that owner never acquired title to horses because sale to him was sham should have been admitted because it was material to larceny charge).

29. *See* State *ex rel.* M.T.S., 609 A.2d 1266, 1279 (N.J. 1992) (holding that for second degree sexual assault conviction, state must prove either that defendant did not actually believe that victim had freely given permission to intercourse or that his belief to that effect was unreasonable); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 33.06, at 526-27 (1987) (stating that under common law not only must defendant's conduct be intentional but he must be at least negligent regarding victim's lack of consent).

30. *See* Roth & Sundby, *supra* note 2, at 459 (referring to "progressive trend of categorizing homicide according to the degree of culpability" proven); *cf.* H.L.A. HART, LAW, LIBERTY AND MORALITY 36-37 (1963) (suggesting that "there are many reasons why

person inadvertently creates an unreasonable risk of death and kills, he might be liable for negligent homicide.[31] A killing caused by recklessness, that is, conscious disregard of an unreasonable risk of death, could constitute the more serious offense of involuntary manslaughter.[32] An intentional or grossly reckless killing could be murder in the second degree.[33] And a deliberate and premeditated murder might be the highest possible offense, first degree murder.[34] The more deserving of blame and condemnation the proven mental attitude of the offender, the more severe the potential categorization and punishment.

Every true variation of the felony-murder rule[35] is to some extent inconsistent with these contemporary notions of culpability and fault. The broadest version of the doctrine makes even an accidental killing—one caused by nonnegligent conduct—murder.[36] If a death is accidental, then by definition the state can prove no mental fault (not even negligence, the

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we might wish the legal gradation of the seriousness of crimes, expressed in its scale of punishments, not to conflict with common estimates of their comparative wickedness" and arguing that one can consistently assert that point of punishment is prevention and still adhere to "principles which make relative moral wickedness of different offenders a partial determinant of the severity of punishment").

31. *See, e.g.*, ALA. CODE § 13A-6-4 (1994); LA. REV STAT. ANN. § 14:32 (West Supp. 1994); N.Y. PENAL LAW § 125.10 (McKinney 1987); N.D. CENT. CODE § 12.1-16-03 (1985); TEX. PENAL CODE ANN. § 19.05 (West 1994); WYO. STAT. ANN. § 6-2-107 (1988); MODEL PENAL CODE § 210.4 (1980).

32. *See, e.g.*, CONN. GEN. STAT. ANN. § 53a-56 (West 1985); MO. ANN. STAT. § 565.024 (Vernon Supp. 1994); 18 PA. CONS. STAT. ANN. § 2504 (1983); TEX. PENAL CODE ANN. § 19.04 (West 1994); MODEL PENAL CODE § 210.3 (1980).

33. *See, e.g.*, ARIZ. REV STAT. ANN. § 13-1104 (Supp. 1993); HAW. REV STAT. § 707-701.5 (Supp. 1992); LA. REV STAT. ANN. § 14:30.1 (West Supp. 1994); MINN. STAT. ANN. § 609.19 (West Supp. 1994); N.Y PENAL LAW § 125.25 (McKinney 1987 & Supp. 1994); WASH. REV CODE ANN. § 9A.32.050 (West 1988).

34. *See, e.g.*, ARIZ. REV STAT. ANN. § 13-1105 (Supp. 1993); CAL. PENAL CODE § 189 (West Supp. 1994); FLA. STAT. ANN. § 782.04 (West Supp. 1994); IOWA CODE ANN. § 707.2 (West 1993); WASH. REV CODE ANN. § 9A.32.030(1)(a) (West Supp. 1994).

35. By a "true variation" I mean one in which the felony takes the place of mens rea entirely or at least elevates the offense to a level higher than the level otherwise appropriate for the mens rea proven. If the categorization of a crime is consistent with the actual degree of mental fault proven, then the offense is not, in my view, a "true variation" of the felony-murder concept.

36. *See* Grant & MacKay, *supra* note 9, at 136 (stating felony-murder rule treats "accidental, negligent, reckless and intentional killings" all alike, as murder); Barbre, *supra* note 15, at 399-400 (stating felony-murder rule transfers or imputes malice to felon even if his or her killing is "accidental").

least culpable recognized state of mind) with regard to the element of causing the death of another human being. Such a rule, therefore, is disloyal to the principle that some level of mental fault is required for each essential element.[37]

Our legal tradition ordinarily defines murder as a killing with at least gross recklessness—a conscious disregard of a risk to human life of sufficient magnitude to evince a callous or depraved indifference to the value of human life.[38] A felony-murder rule that by virtue of the limitations imposed by courts or legislatures makes only negligent, or grossly negligent, killings murder[39] is untrue to the principle of gradation

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37 *See* MODEL PENAL CODE § 210.2 commentary at 36 (1980) (stating that felony-murder rule is inconsistent with requirement that culpability be proven with regard to "homicide" element); Roth & Sundby, *supra* note 2, at 459 (asserting felony-murder rule "effectively eliminates a mens rea element" by classifying homicide as murder "regardless of the defendant's culpability" with regard to death).

38. The traditional and still common definition of murder is a killing with malice aforethought. The essence of malice is this "callous or depraved indifference to human life." Intentional or knowing killings qualify as murders because they satisfy this minimum essence. In fact, they entail *even more* culpability than the minimum indifference. Grossly reckless killings also satisfy this minimum threshold for malice. *See* United States v. Fleming, 739 F.2d 945, 947-48 (4th Cir. 1984) (malice does not require intent to kill or injure but is satisfied by acts that indicate "a heart without regard for the life and safety of others" or "depraved disregard of human life"), *cert. denied*, 469 U.S. 1193 (1985); Commonwealth v Malone, 47 A.2d 445, 447 (Pa. 1946) (concluding that "act of gross recklessness for which [an individual] must reasonably anticipate that death to another is the likely result" is act betraying "malice").

39. Some statutes, for example, restrict felony-murder liability to certain enumerated felonies that, by nature, constitute gross or ordinary negligence with regard to human life. *See, e.g.*, ARIZ. REV STAT. ANN. § 13-1105 (1989 & Supp. 1993) (limiting felony-murder to very specific felonies that involve great risk to human life); COLO. REV STAT. § 18-3-102(1)(b) (1986 & Supp. 1993) (same); D.C. CODE ANN. § 22-2401 (1989 & Supp. 1994) (same). The judicial limitation of some felony-murder rules to felonies that are either inherently dangerous to human life in the abstract, *see, e.g.*, People v Patterson, 778 P.2d 549, 551 (Cal. 1989); State v. Underwood, 615 P.2d 153, 162-63 (Kan. 1980), or to those that are either dangerous in the abstract or as committed in the particular case, *see, e.g.*, Jenkins v State, 230 A.2d 262, 269 (Del. 1967), *aff'd*, 395 U.S. 213 (1969); State v Thompson, 185 S.E.2d 666, 672-73 (N.C. 1972), seems to ensure that the offenders will be at least negligent or grossly negligent in causing the deaths with which they are charged. *See* MODEL PENAL CODE § 210.2 commentary at 37 (1980) (maintaining that restriction of doctrine's application to felonies involving "foreseeable risk" of death "is a roundabout way of limiting felony murder to cases of negligent homicide"); FLETCHER, *supra* note 10, at 301 (concluding that it is justified to conclusively presume "differential" or "incremental" culpability only when felony is "inherently dangerous" and such "incremental culpability" amounts to "negligence").

proportionate to the established level of mental fault. Grossly or ordinarily negligent killings typically amount to manslaughter or negligent homicide.[40] Although a felony-murder rule that punishes "reckless" killings as murder[41] is less unfaithful, it still violates the same gradation principle. Reckless killings are typically no more than manslaughter.[42]

The variety of felony-murder rule that requires proof of malice and then elevates the crime to first degree murder because of the commission of a felony[43] is also inconsistent with ordinary gradation principles. First degree murder, the most heinous of offenses, generally requires proof of the most culpable of all mental states—not just malice, but premeditation and deliberation.[44]

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40. *See* 18 PA. CONS. STAT. ANN. § 2504 (1983) (making grossly negligent killing involuntary manslaughter); WASH. REV CODE ANN. § 9A.32.070 (West 1988) (providing that killing "with criminal negligence" constitutes second degree manslaughter); State v Barnett, 63 S.E.2d 57, 61 (S.C. 1951) (stating that killing with "ordinary negligence" in use of "an inherently dangerous instrumentality" is involuntary manslaughter); *supra* note 31 and accompanying text; *see also* Roth & Sundby, *supra* note 2, at 452 (asserting that punishment of homicide as murder without proof of subjective culpability is not consistent with modern mens rea requirements for offense of murder).

41. *See* DEL. CODE ANN. tit. 11, § 636(a)(2) (1992) (requiring recklessness in causing death for some felony-murders).

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

43. *See, e.g.*, IDAHO CODE § 18-4003 (1987 & Supp. 1994) (upgrading murder to first degree murder if committed during certain enumerated felonies); MICH. COMP LAWS ANN. § 750.316 (West 1991) (same).

44. *See* CAL. PENAL CODE § 189 (West 1988 & Supp. 1994) (making murders perpetrated by any "willful, deliberate, and premeditated killing murder of the first degree"); IOWA CODE ANN. § 707.2 (West 1992) (stating "murder in the first degree" includes persons who kill "willfully, deliberately, and with premeditation").

Although a few states interpret "premeditation and deliberation" as synonymous with a mere "intent to kill," the "better" interpretation holds that those terms connote more. According to that view, actual forethought and reflection upon the idea of killing for some period of time prior to the homicide is essential. *See* DRESSLER, *supra* note 29, at 458-59 (criticizing "intent to kill" view as "probably wrong as a matter of legislative intent" and noting that "many courts" have adopted view that "it takes 'some appreciable time' to premeditate"); LAFAVE & SCOTT, *supra* note 3, at 643 (calling more demanding approach to premeditation and deliberation "better view" and one that is "growing in popularity"). Not all, however, agree that premeditation and deliberation, so defined, should be considered the most culpable of mental states. The drafters of the Model Penal Code rejected these traditional criteria for dividing murder into degrees because they believed that the "generalization" they reflect, "that the person who plans ahead is worse than the person who kills on sudden impulse," is not sound. While it is the case that some killers who reflect beforehand are in fact more blameworthy than some who kill impulsively, it is also

Thus, the major complaint about the felony-murder rule is that it violates generally accepted principles of culpability Some versions, including the classical statement of the rule, impose criminal liability for a serious offense without proof of any culpability for the essential element of death. Others entail proof of some culpability, but by categorizing the crime as murder or first degree murder, they result in gradation at a disproportionately severe level considering the established mental fault.

For these reasons, it is said that the rule is, among other things, "abhor[r]ent,"[45] "anachronistic,"[46] "barbaric,"[47] "injudicious and unprincipled,"[48] "parasitic,"[49] and a "modern monstrosity"[50] that "erodes the relationship between criminal liability and moral culpability "[51] According to the many opponents of the doctrine, individuals deserve to be punished in accord with their moral failings. Because the felony-murder rule sanctions individuals more severely than is their desert, it is a serious anomaly in our law, an anomaly that ought to be abolished.[52]

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the case that some who kill impulsively are in fact more blameworthy than some reflective killers. *See* MODEL PENAL CODE § 210.6 commentary at 127-28 (1980). In other words, the mental states described by the terms "premeditation" and "deliberation" do not reliably isolate those who deserve the most severe treatment.

45. Grant & MacKay, *supra* note 9, at 157

46. *See* People v. Burroughs, 678 P.2d 894, 897 (Cal. 1984); People v Aaron, 299 N.W.2d 304, 307 (Mich. 1980); State v Ortega, 817 P.2d 1196, 1201 (N.M. 1991); Rosenthal, *supra* note 4, at 126; Roth & Sundby, *supra* note 2, at 453.

47 *See Burroughs*, 678 P.2d at 897 n.3; People v Smith, 678 P.2d 886, 888 (Cal. 1984); People v Phillips, 414 P.2d 353, 360 n.6 (Cal. 1966); Lanham, *supra* note 7, at 101.

48. *Aaron*, 299 N.W.2d at 334.

49. *Id.* at 333 n.16.

50. Lanham, *supra* note 7, at 101.

51. People v. Patterson, 778 P.2d 549, 554 (Cal. 1989) (citing People v Washington, 402 P.2d 130, 134 (Cal. 1965)). According to two commentators, the criticism levelled against the doctrine "constitutes a lexicon of everything that scholars and jurists can find wrong with a legal doctrine." Roth & Sundby, *supra* note 2, at 446 (presenting wide array of those criticisms).

52. *See* PERKINS & BOYCE, *supra* note 17, at 136-37 (opining that "abrogation" seems "logical conclusion" of development of felony-murder doctrine); Lanham, *supra* note 7, at 101 (hoping that appreciation of history of rule leads to abolition or to restriction of its scope); Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV 1497, 1606 (1974) (advocating abolition because rule is unsupportable).

III. The Tenuous and Unclear History of Felony-Murder

I was once under the impression that the origins of felony-murder were clearly documented and ascertainable.[53] I also believed that, no matter how misguided and outdated the rule might seem today, it was the deliberate product of rational judicial lawmaking. Neither is the truth.

The felony-murder rule has been traced to a variety of sources. Some say its source is Lord Dacre's Case.[54] Others cite Mansell and Herbert's Case, which was decided just one year later.[55] Others contend that Lord Coke fathered the doctrine in 1644.[56] And at least one distinguished commentator believes that the rule that a killing during a felony would automatically become a murder was actually first promulgated by Sir Michael Foster in 1762.[57] Suffice it to say that prior to Foster there is no unambiguous authority in support of the rule—either from the commentators or the courts. All of the putative earlier sources are subject to multiple interpretations—that is, the nature of the rule they intended to endorse is uncertain.[58]

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53. For discussions of the history of the felony-murder rule, see People v Aaron, 299 N.W.2d 304, 307-12 (Mich. 1980); 3 JAMES F STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 56-57 (London, MacMillan 1883); J.M. Kaye, *The Early History of Murder and Manslaughter* (pt. 2), 83 L.Q. REV 569, 569-87 (1967); Lanham, *supra* note 7, at 91-100; Roth & Sundby, *supra* note 2, at 449-50; Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV 1425, 1446-47 (1968).

54. 72 Eng. Rep. 458 (K.B. 1535). *See* Norval Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV 50, 58 (1956); Note, *Recent Extensions of Felony-Murder Rule*, 31 IND. L.J. 534, 534 n.3 (1956).

55. 73 Eng. Rep. 279 (K.B. 1536). See Kaye, *supra* note 53, at 577-82 (arguing that English judiciary's first application of doctrine was Mansell and Herbert's Case); Note, *Felony Murder as a First Degree Offense: An Anachronism Retained*, 66 Yale L.J. 427, 430-31 n.23 (1957) (same); Gilbert, *supra* note 7, at 1603 n.11 (same).

56. *See* EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND *56 (1644); STEPHEN, *supra* note 53, at 57; TORCIA, *supra* note 7, at 204; Lanham, *supra* note 7, at 91-94; Moesel, *supra* note 9, at 453.

57 *See* FLETCHER, *supra* note 10, § 4.4.4, at 291.

58. Lanham suggests that Lord Coke actually meant to say that a killing during an unlawful enterprise was "felonious," what today would be called manslaughter not murder. Lanham, *supra* note 7, at 91-94. Fletcher also finds it "abundantly clear" that Coke did not view an unlawful act as a basis for establishing malice. Rather, Coke, along with Hale and Hawkins, merely viewed the commission of an unlawful act as a bar to the defendant's claim that a killing was accidental. *See* FLETCHER, *supra* note 10, § 4.4.1, at 277-81, *see also* Lanham, *supra* note 7, at 99 (opining that Blackstone's supposed statement of rule is ambiguous and that he might actually have accepted Lord Hale's view that killing during unlawful act is *not* murder).

And some highly reputable sources, such as Lord Hale, rejected the concept.[59]

In addition, neither the cases nor the commentators furnish evidence that the doctrine was the product of a conscious, deliberate reasoning process designed to reflect or implement penal policies. Lord Coke simply attributed the rule to judicial authorities that, in fact, provide no direct support.[60] Foster, too, in support of his statement of the felony-murder rule, cited authorities that provided tenuous support, at best.[61] Neither Coke nor Foster, therefore, persuasively demonstrated an origin in the actual common law of England.[62] Moreover, none of the classical commentators' discussions of felony-murder demonstrate a serious consideration of the penological appropriateness of the concept. It could be that a deliberate reasoning process was behind the declarations of the rule that emerged from the commentators, but such a process is not evident in their works.[63]

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59. *See* Lanham, *supra* note 7, at 95-96 (stating that Hale's writings are "uniformly against the proposition" that causing death in course of unlawful act constitutes murder, though he did rely on Coke for proposition that killings during unlawful acts were manslaughters). According to Lanham, Dalton, a contemporary of Lord Coke, relied on the same sources that Coke did but rejected the view that a killing during an unlawful act was necessarily a murder. *See id.* at 94, 100.

60. *See* People v Aaron, 299 N.W.2d 304, 309-10 (Mich. 1980); STEPHEN, *supra* note 53, at 57-58; Lanham, *supra* note 7, at 91-92. Consequently, some scholars have concluded that felony-murder was the "accidental" result of the good Lord Coke's mistakes. *See infra* note 64. According to Lanham, Coke probably never intended to promulgate a felony-*murder* rule. Rather, he meant that an unintended killing during an unlawful act would be *felonious*—i.e., manslaughter. *See* Lanham, *supra* note 7, at 94.

61. *See* Lanham, *supra* note 7, at 97

62. Fletcher asserts that English common law never included the general rule that an accidental killing in the course of a felony would constitute a murder; such a rule was not mentioned until Foster rewrote the law in 1762. *See* FLETCHER, *supra* note 10, § 4.4.4, at 291; *see also* Fletcher, *supra* note 2, at 421 (maintaining that tenuous roots of felony-murder doctrine are not found in judicial decisions but in scholarly commentaries).

63. *See* FLETCHER, *supra* note 10, § 4.4.1, at 285 (stating that although Foster clearly viewed any felonious intent as basis for finding malice, it is "not clear why that should be true"); Roth & Sundby, *supra* note 2, at 450 nn.21-22 (asserting that purpose of felony-murder was unclear, vague, and not fully articulated).

The absence of supporting reasons is apparent from a quick reading of the brief, pertinent passages in the original works. *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES *200-01, COKE, *supra* note 56, at 56; MICHAEL FOSTER, A REPORT OF SOME PROCEEDINGS ON THE COMMISSION FOR THE TRIAL OF THE REBELS IN THE YEAR 1746, IN THE COUNTY OF SURRY; AND OF OTHER CROWN CASES 258-59 (London, Brooks, 3d ed. 1792).

We are left, therefore, to make poorly-informed guesses about the historical reasons for the felony-murder rule's birth. The rule might have been an accident, the product of a misunderstanding of authorities.[64] Perhaps the doctrine was intentionally designed to prevent one who killed—even accidentally—in the course of an *attempt* to commit a felony from escaping the punishment for a felony—death.[65] It may be that in a legal world that saw all killings as murders—except those that were accidental or excusable—the concept made sense as a device calculated to preclude those with unclean hands (felons) from avoiding punishment for murder by claiming accident.[66] Thereafter, the concept was simply converted without good reason into an affirmative rule that automatically turned any killing in the course of a felony into a murder.[67] It is even possible that none of these theories accurately explains why felony-murder came about.[68] The reasons

64. *See Aaron*, 299 N.W.2d at 309-10 (observing that some see doctrine as product of Coke's blunder in translating Bracton); Lanham, *supra* note 7, at 91 (asserting that it is possible that whole doctrine is result of "slip of the quill on the part of Lord Coke"); Rambo, *supra* note 9, at 674 n.11 (stating that doctrine is said to have grown out of mistakes).

65. *See* PERKINS & BOYCE, *supra* note 17, at 136. According to this position, the rule was developed to prevent those who killed during the perpetration of felonies that failed—and thus amounted only to *misdemeanor* attempts—from escaping the punishment that would have been imposed if they had succeeded with their felonies. It was thought inappropriate to allow the fortuity of their failure to complete the felony to affect their potential liability By calling the killing a murder, the state could impose the death penalty Of course, those who did not kill during their unsuccessful felonies remained eligible for no more than misdemeanor sanctions.

66. According to Fletcher, at an early time "malice" was not an affirmative basis for murder but a means of expressing the conclusion that the conditions that would excuse a defendant were absent. Up until the eighteenth century, the fact that a killing occurred during an unlawful act was a "rejoinder" to a claim of accident. That claim—known as *per infortunium*—was unavailable if the accident occurred during an unlawful act. Those who chose to act unlawfully forfeited the excuse that would otherwise exculpate them from responsibility for their homicides. *See* FLETCHER, *supra* note 10, § 4.4.1, at 276-79.

67 *See id.* at 278-82. There is a significant difference between the two "rules." In the version that, according to Professor Fletcher, preceded Foster, participation in a felony deprived a felon of the excuse of accident that was available to others whose homicides would presumptively be considered murder. *Id.* at 277 The version that Foster promulgated, however, held that the participation in a felony was a form of malice that would turn a killing that was accidental into a murder. *Id.* at 281-82. While the former was a "theory for rejecting excuse," the latter was "a formal test of liability." *Id.* at 278.

68. For additional explanations of the historical origins of the rule, see Crump & Crump, *supra* note 8, at 360 n.7

for the felony-murder rule are enshrouded, and destined to remain, in mystery

I do not intend to take sides in the controversies over who is responsible for felony-murder and why the rule was created. The point is simply that it is not a rule with either solid, ancient ancestry or unimpeachably logical underpinnings. To their complaints about the rule's inconsistency with modern understandings of culpability and fault, critics add the charge that its historical legitimacy is doubtful at best.[69]

It seems fairly clear that, in the eighteenth century, Blackstone intended to approve of and endorse broad statements of the classic rule: a killing committed during the course of a felony constitutes a murder.[70] Viewed in historical context, however, this rule was actually quite limited in both scope and consequence. First, there were not many common-law felonies.[71] Consequently, the occasions for invocation of the rule were limited. Second, all common-law felonies were serious offenses that were inherently morally

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69. *See* Fletcher, *supra* note 2, at 421 (felony-murder's historical foundations are "tenuous and ill defined"); Grant & MacKay, *supra* note 9, at 133 (rule had "dubious origins"); Lanham, *supra* note 7, at 91 (rule has "only the weakest of antecedents"); *id.* at 101 (felony-murder is not "relic of ancient barbarism but an instance of modern monstrosity"); Sudduth, *supra* note 4, at 1306 (doctrine is of "questionable origin").

70. *See* FLETCHER, *supra* note 10, § 4.4.1, at 285 (maintaining that Foster was plainly of view that any felonious intent would suffice for malice); PERKINS & BOYCE, *supra* note 17, at 62 (referring to Blackstone's stark statement of broad felony-murder rule); Barbre, *supra* note 15, at 403 (asserting that Blackstone endorsed broad statement of felony-murder rule). *But see* Lanham, *supra* note 7, at 99 (suggesting that ambiguities in Blackstone's statement of felony-murder make it possible that he did not hold view that killing during unlawful act was murder).

According to Foster, if a "death ensueth" from an act "done in the prosecution of a felonious intention[,] it will be murder," but only if "the act from which death ensued was *malum in se*" and not "if it was barely *malum prohibitum*." FOSTER, *supra* note 63, at 258-59. Thus, his understanding of the doctrine does not seem to be quite as broad as some think.

Blackstone stated that "if one intends to do another felony, and undesignedly kills a man, this is also murder." BLACKSTONE, *supra* note 63, at *200-01.

71. *See* LAFAVE & SCOTT, *supra* note 3, at 623 (including consensual sodomy among common-law felonies); Jo Anne C. Adlerstein, *Felony-Murder in the New Criminal Codes*, 4 AM. J. CRIM. L. 249 n.1 (1976) (noting that "homicide, mayhem, arson, rape, robbery, burglary, larceny, prison breach, and rescue of a felon" were felonies at common law); *see also* MODEL PENAL CODE § 210.2 commentary at 31 n.74 (1980) (observing that there were few common-law felonies); JOHN C. KLOTTER, CRIMINAL LAW § 3.3, at 48 (2d ed. 1986) (noting that there were few felonies when felony-murder rule originated); Walter Dickey et al., *The Importance of Clarity in the Law of Homicide: The Wisconsin Revision*, 1989 WIS. L. REV 1323, 1365 (stating that there were relatively few common-law felonies).

wrong,[72] and most of them engendered a fair degree of danger to human life.[73] Finally, all felonies were punishable by death.[74] Therefore, the felony-murder rule might make no difference in terms of the sanction imposed.[75] In sum, opportunities to employ the rule were restricted. Moreover, the typical effect of the rule was to brand as murderers only those who had performed seriously immoral acts of a life-threatening nature, and application of the rule might make no difference in punishment in an individual case.

Because of the second qualification, the felony-murder rule was not dissonant with notions of mens rea prevailing at the time of its origins. When the rule first arrived on the scene, any wrongful mental attitude, any malevolence, could serve as the malice required for murder.[76] One who engaged in a felonious endeavor necessarily had *a* wicked mindset. Such a person often possessed some level of fault *for the homicide caused* as well.

These observations teach several lessons. First, no historical support exists for the rule of law that results from transposing the classical, unquali-

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72. In the words of the law, the common-law felonies were all *mala in se*—that is, in society's eyes they were considered bad or immoral in themselves. These are to be distinguished from felonies that are *mala prohibita*—that is, bad because they are prohibited by law, not because of their inherent immorality

73. *See* LAFAVE & SCOTT, *supra* note 3, at 623 (concluding that with exceptions of larceny and consensual sodomy, all common-law felonies involved danger to human life).

74. *See* MODEL PENAL CODE § 210.2 commentary at 31 n.74 (1980); LAFAVE & SCOTT, *supra* note 3, at 622 n.4; TORCIA, *supra* note 7, at 212; Dickey et al., *supra* note 71, at 1365.

It is sometimes said that the fact that the sanction for any felony and the sanction for murder were equivalent furnishes the "rationale" for the felony-murder rule. *See* Barbre, *supra* note 15, at 403. It is difficult to see, however, how the fact that the offenses were punishable by the same sanction provides a logical explanation for a rule that automatically turns any killing during one felony into the distinct felony of murder. While the identical nature of the available sanctions could mean that the rule did not have any real impact on those subjected to it, it hardly provides an explanation of the rule's logic. The fact that a felon was already eligible for the death penalty could just as easily, and perhaps more rationally, have led to the conclusion that a conviction for the homicide was unnecessary

75. I say "might" make no difference because, according to Professor Fletcher, the ultimate sanction was most likely to be carried out in connection with certain felonies, including murder. Therefore, as a practical matter, a person convicted of murder might well be treated more harshly than a person convicted, for example, of larceny *See* FLETCHER, *supra* note 10, § 4.4.1, at 282-83.

76. *See* People v Aaron, 299 N.W.2d 304, 319 (Mich. 1980) (early in common law malice was vaguely defined to mean any intentional wrongdoing); *see also supra* notes 21-23 and accompanying text.

fied felony-murder rule onto the body of modern American criminal laws. The designation "felony" does not have the same meaning that it had at common law [77] Today, there are numerous felonies, but not all are serious, or *mala in se*, or life-endangering.[78] Moreover, the death penalty is restricted to a precious few [79] The rest are punished less severely—most substantially so.[80] To engraft the rule onto our contemporary scheme is to broaden the rule dramatically, to change both its content and its consequences. [81]

On the other hand, felony-murder rules that are restricted to certain, serious, statutorily designated offenses or to inherently dangerous felonies

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77 *See* United States v. Watson, 423 U.S. 411, 438 (1976) (Marshall, J., dissenting) (stating that felony at common law and felony today bear only slight resemblance).

78. *See* MODEL PENAL CODE § 210.2 commentary at 31 (1980) (noting that today there is wide range of felonies; many proscribe relatively minor conduct, many are not dangerous to life); Dickey et al., *supra* note 71, at 1365 (observing that modern codes include wide range of felonies many of which do not endanger life and most of which have less severe penalties than murder); Barbre, *supra* note 15, at 406 n.6 (suggesting that many statutory felonies have no natural tendency to cause death and are less serious than common-law felonies); *see, e.g.*, ALA. CODE § 11-65-40 (Supp. 1994) (making it felony to transmit results of horse race within 20 minutes of completion); COLO. REV STAT. § 33-6-113 (1984 & Supp. 1993) (providing that it is felony to buy or sell eagles); GA. CODE ANN. § 19-10-2(c) (Michie 1991) (making it felony for husband to abandon his pregnant wife and leave state).

79. *See* PERKINS & BOYCE, *supra* note 17, at 136 (observing that most modern felonies are not capital).

80. *See* MODEL PENAL CODE § 210.2 commentary at 31 (1980) (stating that today many crimes classified as felonies carry far less severe penalties than common-law felonies did); *see, e.g.*, ALA. CODE § 11-65-40 (Supp. 1994) (punishing felony of transmitting racing information by term of one to ten years and/or fine of $5,000 to $50,000); GA. CODE ANN. § 19-10-2(c) (Michie 1991) (punishing felony of abandoning pregnant wife and leaving state by imprisonment for between one and three years); IND. CODE ANN. § 35-50-2-7(a) (Burns 1994) (punishing Class D felonies by fixed term of one and one-half years, with potential for time added for aggravating circumstances or subtracted for mitigating circumstances, and fine of up to $10,000).

81. The rule originally led to murder convictions for those who had chosen to engage in seriously immoral, usually life-endangering, conduct that resulted in a death. At least in theory, it did not elevate the punishment beyond the level already available for the underlying felony. When applied to the wide range of felonious activities that exist today, the broad rule could lead to murder convictions for those who have engaged in relatively minor, not seriously immoral, nondangerous conduct that happened to result in a death. The punishment available for murder would likely be drastically higher than that available for the underlying felony. *See* MODEL PENAL CODE § 210.2 commentary at 32 (1980) (opining that "startling results" that would be consequence of applying felony-murder rule to spectrum of modern felonies led to demands for limitation).

can claim some historical support dating to at least the nineteenth century Such rules may enhance punishment in a way that the original rule did not, but in content they resemble their ancestor.[82]

In evaluating the historical support for the modern felony-murder rule, one cannot ignore the marked evolution of how we conceptualize mens rea. Modern scholarly and judicial thought considers fault for every element of an offense to be an essential predicate for blame, responsibility, and punishment.[83] As a result, unlike the early rule, all true variations of contemporary felony-murder—even the most restricted versions—are incompatible with the prevailing understanding of the fundamental mens rea demand. The radical alteration of a basic aspect of the legal substructure further weakens felony-murder's historical foundations and casts a very different light on the doctrine.

The object of this Part was to consider whether the felony-murder rule has solid historical roots that can explain, even justify, its endurance despite the basic inconsistency with modern mens rea notions. The rule's critics would seem to be right. An unlimited modern rule has no antecedent in the common law of England. Even limited versions of the rule can claim only qualified historical support. Contrary to what might be the popular impression, no version of felony-murder is grounded in centuries of unblemished ancestry And yet the rule endures.

IV The Deterrence Delusion

The primary justification offered for the contemporary felony-murder rule is deterrence.[84] The doctrine is allegedly designed to save lives by

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82. Restricted rules resemble their ancestor because they do not extend the automatic operation of the felony-murder rule beyond the sphere of a limited number of serious and/or dangerous felonies. They do enhance the punishment available, however, because today the sanction for murder is more severe than the sanction for most other felonies. If, as Professor Fletcher suggests, the *actual* consequences of a murder conviction at common law were more severe than the *actual* consequences of a conviction for another felony, *see supra* note 75, then even the punishment enhancement feature of modern felony-murder schemes would bear some resemblance to the original rule.

83. *See supra* notes 27-29 and accompanying text.

84. *See* Cole, *supra* note 8, at 98 (stating deterrence is most common defense offered for felony-murder rule); *see, e.g.*, People v Patterson, 778 P.2d 549, 558 (Cal. 1989) (Lucas, C.J., concurring and dissenting) (asserting felony-murder rule performs valuable function by deterring commission of inherently dangerous crimes); People v. Washington, 402 P.2d 130, 133 (Cal. 1965) (stating that purpose of felony-murder is to deter felons from killing negligently or accidentally); Cole, *supra* note 8, at 87-92 (discussing deterrent

threatening potential killers with the serious sanction for first or second degree murder.[85] One deterrent argument holds that the threat of a murder conviction for any killing in furtherance of a felony, even an accidental killing, might well induce a felon to forego committing the felony itself.[86] Because it could lead to quite severe punishment, the risk averse might shy away from the entire felonious enterprise. Another argument, the more prevalent of the two main deterrent explanations of felony-murder,[87] maintains that the rule is aimed at discouraging certain conduct during the felony, not the felony itself.[88] The goal is to encourage greater care in the performance of felonious acts.[89] Such care will lower the risks to human life and result in fewer deaths. Still another view suggests that felons who might kill intentionally in order to complete their felonies successfully will be discouraged by the rule's proclamation that the law will entertain no excuses for the homicide. Calculating felons will forego killing because of their awareness that the chance of constructing a defense that would eliminate or mitigate liability is virtually nonexistent and that, therefore, their likely fate is a murder conviction.[90]

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operation of felony-murder rule).

85. *See* TORCIA, *supra* note 7, at 207 (maintaining that strict accountability approach of felony-murder rule is attempt by law to protect innocent lives).

86. *See Patterson*, 778 P.2d at 558 (Lucas, C.J., concurring and dissenting) (arguing that purpose of rule is to deter commission of inherently dangerous felonies); FLETCHER, *supra* note 10, § 4.4.5, at 298 (observing that one argument is that felony-murder rule was designed to provide additional deterrent to felony); Cole, *supra* note 8, at 110 (stating that felony-murder rule can deter potential felons from committing predicate offenses in first place); Roth & Sundby, *supra* note 2, at 450-51 (observing that one strain of reasoning holds that felony-murder doctrine is designed to deter felonies themselves).

87 *See* Roth & Sundby, *supra* note 2, at 450-51 n.28 (indicating that position that rule is designed to deter underlying felony itself is "minority view").

88. *See* People v. Smith, 678 P.2d 886, 891-92 (Cal. 1984) (asserting that ostensible purpose of rule is not to deter underlying felonies, but instead to deter negligent or accidental killings occurring during commission of those felonies); FLETCHER, *supra* note 10, § 4.4.5, at 298 (opining that preferable and plausible rationale for felony-murder is deterrence of killings, encouragement of care during felonies).

89. *See* TORCIA, *supra* note 7, at 207-08 (stating that purpose of law is to deter felons from committing felonies in dangerous or violent ways); Cole, *supra* note 8, at 96 (asserting that holding felons strictly liable for deaths during felonies plausibly deters by increasing care on part of felons); Roth & Sundby, *supra* note 2, at 450-51 (suggesting that goal is to induce cofelons to dissuade one another from using violence in perpetrating felony); Doyle, *supra* note 18, at 196 (suggesting that goal of rule is to deter felons from engaging in unnecessary violence that might kill).

90. *See* Cole, *supra* note 8, at 96 (asserting that felony-murder deters by eliminating

Undoubtedly, one purpose of felony-murder was to prevent future killings. That is true of every proscription of homicide. The history of the felony-murder rule, however, does not provide the sort of deterrent focus and emphasis that judges and scholars have found underlying the contemporary rule.[91] The writings of Coke, Foster, Blackstone, and others do not justify the doctrine on deterrence grounds.[92] It seems unlikely, at best, that the originators of the rule would have explained its rationales in the same way that modern courts and defenders do. At least no concrete evidence exists that the original perspective was the same as the contemporary perspective.

That does not, of course, make the deterrent explanation for today's versions erroneous or illogical. A rule that initially had one underlying understanding and rationale could survive today on different premises.[93] The point is simply that the deterrent emphasis is a modern phenomenon.

It should not be surprising that this is so. The need to rationalize the felony-murder rule in deterrent terms arises only because of the rule's conflict with accepted culpability principles. There must be adequate justification to suspend the principles that mens rea is required for every element of an offense and that malice is required for the result element of murder.[94]

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possibility of false claims of lack of mens rea by those felony-murderers who do in fact kill with actual, subjective culpability); Crump & Crump, *supra* note 8, at 371 (noting that by "facilitating proof and simplifying liability [the rule] may deter intentional kill[ers]" who are deprived of option of false claims). For a thorough discussion of possible ways in which the felony-murder rule might operate as an effective deterrent, see generally Cole, *supra* note 8.

91. *But see* KLOTTER, *supra* note 71, § 3.3, at 48 (asserting that felony-murder rule was originally designed for purpose of protecting human life).

92. *See supra* note 63 and accompanying text.

93. *See* Crump & Crump, *supra* note 8, at 396 (asserting that "many common law doctrines originat[ed] as artificial constructs [but] have proved to be supported by policy").

94. Because the requirement of mens rea for each essential element was not considered fundamental in earlier times, there was not the same need to find an adequate basis for suspending the requirement in any given case. In Regina v Prince, 2 L.R.-Cr. Cas. Res. 154 (1875), for example, the defendant claimed that he could not be convicted of taking an unmarried girl under 16 out of her father's possession because he reasonably and honestly believed that she was 18 years of age. *See id.* at 156 (Brett, J.). In essence, his defense was that he lacked mens rea for the age element. The majority's response was that he did possess mens rea, in a more general sense, because he knowingly did an act that he knew to be "wrong in itself"—taking a young girl away from her father. *See id.* at 170 (Blackburn, J.). A guilty mind with respect to the age element was not considered essential. *See id.* at 171. Under that reasoning, the court did not need to find some counterweight to justify the conviction of a defendant who clearly lacked such a guilty mind.

The protection of lives achieved through the enhanced deterrence that results from the felony-murder doctrine is thought to provide that justification.

When the felony-murder rule arose, the premises widely accepted today did not hold sway The doctrine was not considered a departure from culpability norms, which were satisfied by the wrongfulness inherent in the felonious intent. Thus, while the rule did discourage life-endangering conduct, there was no necessity that it be sufficiently protective of human life to counterbalance an infringement of fundamental principles.

The use of strict liability—or lesser culpability than is the norm—as a means of preventing harm by maximizing deterrence and minimizing the possibilities of escaping liability is certainly not unknown in our modern criminal law [95] The growth of strict liability criminality has been a significant modern phenomenon.[96] Lawmakers and other proponents of strict criminal liability believe that in a variety of ways strict liability can increase deterrence of behaviors that bring about particular social harms. As a result, these social harms are diminished.

People v. Olsen, 685 P.2d 52 (Cal. 1984), stands in pointed contrast. Therein, the defendant asserted that his reasonable and honest mistake that a girl was over 16 should have been a defense to the crime of lewd and lascivious acts with a child under 14. *Id.* at 54. The court's reply, in essence, was that the legislature had intended the offense to be strict liability on the age element in order to maximize protection of children of tender years. *Id.* at 58-59. Unlike the *Prince* court, the *Olsen* court accepted the basic notion that mens rea is generally required for each essential element. The *Olsen* court found the offense at issue to be a deliberate exception to that general rule, an exception based on a legislative balancing of countervailing interests.

95. *See, e.g.*, United States v Balint, 258 U.S. 250, 253-54 (1922) (holding that to protect innocent purchasers from danger, statute prohibiting possession of and trafficking in narcotics did not require proof defendant knew substances were narcotics); United States v. Ayo-Gonzalez, 536 F.2d 652, 660, 662 (5th Cir. 1976) (holding that 16 U.S.C. § 1081, which prohibits fishing in certain U.S. waters, was intended by Congress to dispense with proof of mens rea in order to protect marine resources against depletion or extinction and to ensure effective and strict enforcement of law), *cert. denied*, 429 U.S. 1072 (1977); *Olsen*, 685 P.2d at 59 (holding that in order to protect children of tender years against sexual exploitation, legislature intended lewd and lascivious acts with child under 14 to be strict liability offense).

96. *See* Morissette v. United States, 342 U.S. 246, 253 (1952) (discussing "century-old but accelerating tendency" to create strict liability offenses); Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV 55, 55 (1933) (asserting that "we are witnessing today a steadily growing stream of offenses punishable without any criminal intent whatsoever"); Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV 731, 731 n.1 (1960) (noting that proliferation of legislatively created strict liability offenses is "of quite recent date").

First, strict liability can induce those who engage in the enterprises that engender the harms to exercise maximum care—even more than a reasonable person would—because they know that only prevention of the proscribed act or consequence can preclude liability.[97] Second, some who fear they will not be able to avoid liability may refrain entirely from engaging in a risky enterprise.[98] As a result, they will not create the occasions that bring about the social harm. Third, because many people engage in the enterprises that cause the harm, the availability of a "no mens rea" defense could clog the system and lead to lengthy delays in prosecution. The threat of a sanction, and thus the deterrent force of the law, could diminish. By eliminating the option of a no mens rea claim and by making the proof required for conviction simple, a higher volume of prosecutions can be handled, and the threat of prosecution and conviction can remain meaningful.[99] Fourth, strict liability deprives defendants who cause harm culpably (that is, with negligence or a higher degree of fault) of the opportunity to deceive juries.[100] Thus, the incentive to do wrong and escape under cover of false testimony is lessened, and deterrence is further enhanced.

The modern employment of strict liability is typically reserved for offenses of a "public welfare" or "regulatory" nature.[101] There are two

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97 *See* Regina v City of Sault Ste. Marie, 85 D.L.R.3d 161, 171 (1978) (reciting argument that "removal of any possible loophole [is] an incentive to take" extra care "in order that mistakes and mishaps be avoided"); Wasserstrom, *supra* note 96, at 736 (contending that it is plausible that person subjected to strict liability might be induced to engage in activities "with much greater caution").

98. *See* Wasserstrom, *supra* note 96, at 737 (opining that it is reasonable to believe that strict liability offenses might have "the added effect of keeping a relatively large class of persons from engaging in certain" activities).

99. *See City of Sault Ste. Marie*, 85 D.L.R.3d at 162 (describing "administrative efficiency" argument in favor of strict liability).

100. *See* Malcolm Budd & Andrian Lynch, *Voluntariness, Causation, and Strict Liability*, 1978 CRIM. L. REV 74, 76 n.6 (observing that claim is made that strict liability prevents those with fault who would "take advantage of some false but successful plea of lack of fault from doing so and thereby escaping liability").

101. "Public welfare" or "regulatory" offenses ordinarily do not proscribe conduct that is immanently immoral. They seek to regulate certain activities that by their very nature pose widespread risks of harm to the public. *See* Morissette v. United States, 342 U.S. 246, 255-56 (1952); Sayre, *supra* note 96, at 68, 79. In contrast stand the offenses known to the common law, offenses that coincide with and are designed to reflect society's morals.

Modern strict liability legislation is not confined exclusively to public welfare crimes. As at common law, in the vast majority of jurisdictions statutory rape remains a strict

simple reasons for that limitation. First, strict liability—criminal responsibility without proof of moral fault—is thought acceptable only in cases in which the moral stigma is minor or limited and the sanction is not severe.[102] Suspension of the fundamental principle that conviction and punishment are justifiable only when imposed on the morally blameworthy is not defensible unless the "imposition" on the individual is not great. Our respect for individuals and our sense of fair treatment leads us to eschew severe punishments and stigmata in the absence of proven moral fault.[103]

Second, public welfare offenses generally address conduct that threatens a high volume of widespread harm to society [104] A high volume of prosecutions, or at least the threat thereof, is critical for achieving the

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liability offense on the element of the age of the victim. *See* People v Olsen, 685 P.2d 52, 54 n.10 (Cal. 1984). And in jurisdictions where it has not been abolished or modified, misdemeanor-manslaughter, like felony-murder, requires no culpability to be proven for the element of causing death. *See* MODEL PENAL CODE § 210.3 commentary at 77 (1980).

102. *See* Sayre, *supra* note 96, at 78-80 (opining that strict liability is only defensible when penalty and moral obloquy are limited); *see also* State v Turner, 474 P.2d 91, 94 (Wash. 1970) (concluding that although state may criminalize acts without regard to intent or knowledge, "guilty knowledge will be deemed an essential ingredient if the defined crimes involve moral turpitude"); LAW REFORM COMMISSION OF CANADA, STUDIES IN STRICT LIABILITY 15-16 (1974) (concluding that strict liability is both illogical and unjust for "real crimes" that involve condemnation of those who have done something wrongful and deserving of punishment).

103. *See* LAW REFORM COMMISSION OF CANADA, *supra* note 102, at 18-19 (suggesting that inclusion of mens rea requirement for real crimes regards accused individuals as "person[s] with person[s'] rights and duties, responsibilities and obligations" and that elimination of mens rea for such crimes would result in "loss of liberty" and rests upon "inhuman attitude"); Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV 1511, 1513 (1992) (stating that criminal law ties legal blame to moral blame for serious, severely punished offenses and that to convict for *mala in se* crime, State must prove "*moral culpability* for breaching the law's commands" (emphasis in original)); Sayre, *supra* note 96, at 56 (asserting that infliction of "substantial punishment upon one who is morally entirely innocent would outrage the feelings of the community"); *id.* at 80 n.88 (calling it "grossly unfair to subject" those without mens rea to "the social disgrace of conviction" or risk of substantial penalty); *id.* at 84 (maintaining that it "would sap the vitality of the criminal law" if strict liability doctrines applicable to public welfare offenses were extended to "true crimes").

104. *See Morissette*, 342 U.S. at 254 (discussing how widespread risks and perils engendered by industrial revolution and growth of congested cities gave rise to phenomenon of strict liability public welfare offenses); Sayre, *supra* note 96, at 79 (concluding that strict criminal liability is justifiable "[i]f violation threatens serious and widespread public injury").

preventive goals of the proscriptions. Strict liability is essential to maximizing the number of prosecutions and, thus, to achieving the very objects of the criminal prohibitions.[105]

In sum, in the regulatory context, the gains to society are thought great, and the costs to the individual are considered tolerable. These two conditions make strict liability an important and acceptable tool.[106] Both are essential to the balance that sustains modern strict liability legislation.

The deterrent reasoning underlying felony-murder tracks most of the reasoning underlying strict liability generally Supporters claim that felony-murder induces felons to exercise maximum care during felonies, prompts potential felons to refrain from committing felonies in the first place, and warns prospective felons that they will not be able to hide behind false claims of accident or mere negligence.[107] The problem, however, is that felony-murder does not fit the mold of crimes for which strict liability is considered appropriate and necessary It is not a modern public welfare offense, but a *mala in se* common-law crime. The stigma could hardly be worse;[108] the penalty could not be much higher.[109] More-

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105. *See* Sayre, *supra* note 96, at 69-70 (concluding that number of petty "public welfare" prosecutions that swamp courts precludes inquiries into intent and that "ready enforcement which is vital for effective petty regulation on an extended scale can be gained only by a total disregard of the state of mind").

106. Not all agree that strict liability crimes are a wise or legitimate use of the state's coercive power. *See, e.g.*, MODEL PENAL CODE § 2.05 commentary at 282-83 (1985); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 422-25 (1958).

107 For a discussion of deterrence and felony-murder, see *supra* text accompanying notes 84-90. Understandably, supporters of strict felony-murder liability do not assert that without it, logjams would occur or that a mens rea requirement would clog the system and lead felons to believe that they could kill and never be brought to trial. The "volume" of felony-murder prosecutions does not rival the volume of prosecutions for regulatory offenses.

108. The convicted felony-murderer is branded at least a second degree and often a first degree murderer.

109. In some circumstances in certain jurisdictions, the death penalty is an available sanction. *See, e.g.*, ALA. CODE § 13A-6-2(c) (1994) (providing possible death penalty for felony-murder committed under aggravated circumstances); ARIZ. REV STAT. ANN. § 13-1105(c) (Supp. 1993) (providing death penalty for felony-murder); ARK. CODE ANN. § 5-10-101(c) (Michie 1993) (prescribing death penalty for capital felony-murder); CONN. GEN. STAT. ANN. § 53a-54b (West Supp. 1994) (listing death penalty for certain dangerous felonies); FLA. STAT. ANN. § 782.04(3) (West Supp. 1994) (making death penalty available for first degree felony-murderers).

Even if death is not available, the sanction provided for first or second degree murder

over, there is no avalanche of felony killings. Strict liability is not essential to combat a widespread societal threat. Consequently, felony-murder does not fit the modern strict liability paradigm. Because the rule appears to infringe substantially upon accepted culpability principles without providing offsetting societal gains of sufficient magnitude,[110] neither of the conditions that we properly consider essential to the acceptance of strict criminal liability exists. The balance that usually underlies and is thought to justify strict criminal liability is simply not struck in the felony-murder context.[111]

Felony-murder stands apart from the body of public welfare crimes in another significant respect. Public welfare crimes do not ordinarily constitute alternative versions of an offense that otherwise requires mens rea. From their conception, they are strict liability crimes that do not require mens rea because that is their essence. The omission of the culpability element is inseparably linked to the reasons for their creation. Felony-murder, on the other hand, is a variety of murder, a stigmatizing common-law crime the essence of which is actual malice. Felony-murder is the no or lesser culpability branch of an offense that otherwise depends upon proof of serious subjective culpability [112] In that sense, it is some-

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will certainly be among the highest penalties provided for any offense. *See, e.g.*, ALA. CODE § 13A-6-2(c) (1994) (listing life imprisonment without parole as possible penalty for felony-murder); ARIZ. REV STAT. ANN. § 13-1105(c) (Supp. 1993) (providing for life imprisonment for some felony-murderers); MONT. CODE ANN. § 45-5-102(2) (1993) (providing for punishment by death, by life imprisonment, or by imprisonment for not less than 10 nor more than 100 years).

110. I do not mean to minimize the importance of even one human life. My point is that the cumulative gains in terms of protecting human life do not seem to outweigh the cumulative losses incurred by punishment of those without fault.

111. *Cf.* Roth & Sundby, *supra* note 2, at 491 (concluding that felony-murder transgresses principle that nonregulatory offenses must have culpability proven for every essential element).

112. Oliver Wendell Holmes was of the view that murder did not require proof that the defendant was actually aware of the risk to human life, as long as the act was sufficiently dangerous and a reasonable person would have been aware of the danger. *See* OLIVER W HOLMES, JR., THE COMMON LAW 53-60 (1881). He believed that one could be branded a murderer on the basis of sufficiently extreme negligence. *See* Commonwealth v Pierce, 138 Mass. 165, 174-76 (1884). The predominant view, however, is that murder requires the serious fault that can be found only in subjective awareness and disregard of a sufficient risk to human life. *See* People v Patterson, 778 P.2d 549, 557 (Cal. 1989) (stating that "mental component" required for proof of "implied malice" is both knowledge by defendant that his conduct endangers life and conscious disregard for life).

what unique and most unlike the range of strict liability offenses recently incorporated into the criminal law [113]

The problem with the modern felony-murder doctrine is not only that it seeks practical goals by prescribing severe punishments without proof of fault, but that it does so on the basis of unproven and highly questionable assumptions. While the felony-murder rule must save some lives, the odds are that the number is small indeed. The number of killings during felonies is relatively low [114] The subset of such killings that are nonculpable—thus not already subject to the threat of a substantial sanction—is undoubtedly considerably smaller. Further, the addition of a small risk of a murder sanction for an unlikely event is probably not a major influence on some prospective felons' behavior,[115] and a good number of those who are affected in some way probably would not have killed in any event. Moreover, some who are aware of and even sensitive to the threatened sanction will probably still kill negligently or accidentally [116]

Admittedly, it would be difficult, if not impossible, to prove that the felony-murder rule does not annually save a considerable number of lives. Nonetheless, in a world in which the evidence is uncertain (or nonexistent)

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113. Felony-murder does not stand alone as a serious common-law strict liability offense. *See* HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 125-26 (1968). Statutory rape is another prime example that has survived. *See id.* at 126; *supra* notes 94-95. Strict liability bigamy has not fared as well, but has not yet been eliminated. *See* KADISH & SCHULHOFER, *supra* note 6, at 301; PACKER, *supra*, at 126. Although it has been abolished by some states and severely restricted by others, misdemeanor-manslaughter also remains in force to varying degrees in various jurisdictions. *See id.* at 126-27

These survivors share with felony-murder a tension with contemporary conceptions of culpability and other characteristics that set them far apart from the run of "modern" strict liability offenses. To appreciate the difference, contrast murder, rape, bigamy, and manslaughter with the strict liability offenses collected in the commentary to § 2.05 of the Model Penal Code. *See* MODEL PENAL CODE § 2.05 commentary at 284-90 & n.7 (1985).

114. *See* LAFAVE & SCOTT, *supra* note 3, at 640; Schulhofer, *supra* note 52, at 1542-43; Sudduth, *supra* note 4, at 1307; *see also* Roth & Sundby, *supra* note 2, at 451-52.

115. *See* Schulhofer, *supra* note 52, at 1546 (asserting that it is not easy to determine extent to which relatively severe penalty imposed on relatively infrequent basis can have meaningful deterrent effect, but that certainty of sanction seems more important than severity). Only those who are both risk averse and responsive to the differential between the penalty for the felony and the penalty for murder would be influenced.

116. Only if a felon is deterred from engaging in the felony itself would all risk of a killing during the offense be eliminated. If the felony-murder rule's deterrent effect is the encouragement of greater care in the commission of the felony, as is usually posited, *see supra* text accompanying notes 88-89, then some deaths will undoubtedly still occur. No matter how careful felons try to be, they cannot prevent all accidents.

and in which it seems unlikely that felons actually hear the rule's deterrent message in the ways that courts presume that they do, common sense would suggest putting the burden of proof upon those who contend that deterrent gains are sufficient to outweigh the infringement of our fundamental philosophy of fault and punishment.[117]

One might contend that the suspicions about the efficacy of deterrence prove too much—that similar doubts about deterrent gains could be raised in all areas of criminal law This argument misses the point. In most other areas there is no *need* to prove a countervailing deterrent gain because the culpability principle is not violated. Either culpability proportionate to liability is a part of the requisite proof, or the sanction is sufficiently small to be acceptable despite the absence of proven fault. Neither is true in the case of felony-murder. Proof of the level of culpability that ordinarily justifies a murder sanction is not required, and the available sanction is very severe.

I refer to the claim that the felony-murder rule actually results in substantial savings of human life—savings so substantial as to justify its infidelity to the conception of fault we usually hold dear—as the "deterrence delusion." Assertions that the doctrine exists to prevent killings that occur in the course of felonies *and* that it actually achieves its goal are rooted in blind faith or self-delusion. More should be required. If the rule is to stand upon deterrent premises, it is incumbent upon supporters to do more than speculate. They should have to justify the suspension of our normal insistence upon proof of blameworthiness. Without a credible foundation in established facts, deterrence is not a real justification, but is instead a poor excuse for our infidelity [118] We owe ourselves more honesty

It is unclear whether the public and lawmakers actually believe the delusion or, instead, are aware of the spurious nature of the deterrent claim but, nonetheless, are content to rely upon it. There are probably members in each camp. What is clear is that while the delusion is the beginning of

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117 Of course, reasonable people can differ about the conclusions to be drawn from "common sense." *See* Crump & Crump, *supra* note 8, at 396-97 (concluding that even though deterrent theory behind felony-murder may not be fully capable of empirical evaluation, its value is "logically inferable"). The main reason that supporters of the rule should bear the burden of *proof* is that they are the ones who advocate departure from a basic principle.

118. For criticisms of the deterrent efficacy of the felony-murder rule, see Fletcher, *supra* note 2, at 428; Schulhofer, *supra* note 52, at 1542-43; Seibold, *supra* note 9, at 151-52. For deterrent-based defenses of the doctrine, see Cole, *supra* note 8, at 78-119; Crump & Crump, *supra* note 8, at 369-71.

an explanation for felony-murder's survival, it is only the beginning. To get to the bottom of the felony-murder rule, it is necessary to explore the reasons that we would indulge such a delusion. On such an important matter, why have we been willing to rest on assumptions and not demand proof that the rule actually produces beneficial results? Why do we continue to sacrifice a fundamental principle on no more than unfounded faith in the deterrent efficacy of a doctrine with dubious parentage? Only forthright confrontation of these questions can bring us closer to understanding the felony-murder rule's remarkable persistence.

V Reasons Felony-Murder Remains

It seems likely that a number of forces have conspired to preserve the felony-murder rule and to keep it safe against an unceasing barrage of criticism. In all probability, none of them would have been independently adequate to sustain the doctrine. Their confluence has undoubtedly been critical to the rule's endurance. The following reflections upon those forces are not intended as gospel, but rather as food for thought.

A. Historical Roots

Earlier, I documented the vulnerability of the historical underpinnings of felony-murder.[119] In light of that, it might seem odd to posit "history" as one of the forces that have nurtured the rule. It may be odd, but it is neither inconsistent nor contradictory to do so. As I see it, the historical impetus of the doctrine simply cannot be ignored.

The birth of the felony-murder doctrine might well have been a mistake or an accident. It most certainly is not attributable to considered reflection and thoughtful policy analysis. Nonetheless, the fact remains that it was born into the law and, more important, was adopted by American legal systems. It was given a place among our laws at a relatively early date[120] and has been with us for most, if not all, of our nation's history In this country, felony-murder's historical credentials seem solid.

It would be foolish to suggest that every historical relic descended to us from the English common law had to survive.[121] Proof to the contrary

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119. *See supra* notes 53-76 and accompanying text.

120. *See* FLETCHER, *supra* note 10, § 4.4.1, at 283 (noting that Blackstone and East picked up Foster's felony-murder doctrine and bequeathed it to American state legislatures, which incorporated it into nineteenth century penal codes); Lanham, *supra* note 7, at 90 n.3 (noting that American cases in 1830s treated felony-murder doctrine as both well-established and legitimate).

121. Oliver Wendell Holmes wrote:

would not be hard to come by The point is that strong roots in American legal history provide a rule with at least a cloak of respectability, an aura of the wisdom that comes with age. Longevity alone is not an adequate reason to retain a rule of law Historical credentials, however, provide more than enough reason to hesitate and to reflect upon the prospect of abandonment.

In addition, time gives rise to a certain amount of inertia that prevents us from casually forsaking the past. The longer the ancestry, the greater the inertia. Historical attachments are severable, but a decent amount of respect and an understandable degree of caution require us to have good reasons before we sever them.

The longer we live with a doctrine—and felony-murder has been a companion for more than 150 years—the more familiar it becomes. And, if I may corrupt a phrase, familiarity can breed content. Felony-murder has been so much a part of our law for so long that the very thought of abrogation is discomforting. It does not matter that England, the country in which it originated and developed, abolished the doctrine over thirty-five years ago.[122] By the time of that event, the rule had become an integral and independent part of our heritage and a functioning part of our legal landscape. It is hardly surprising that American states felt no obligation to follow suit.[123]

I have tried to imagine a world without a felony-murder rule. Assuming that it had never arisen, I have wondered whether it would be adopted as part of our law if proposed for the first time today Although I am not without doubts, my inclination is to answer in the negative. In fact, I doubt that anyone would actually propose such a rule today [124] I can

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> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV L. REV 457, 469 (1897).

122. *See supra* note 6 and accompanying text.

123. A few American jurisdictions have abolished felony-murder entirely *See supra* note 19 and accompanying text. While the British abandonment has been mentioned as a relevant factor, *see* People v. Aaron, 299 N.W.2d 304, 312 (Mich. 1980), there is no reason to think that any of the American jurisdictions simply followed the leader. The British decision to overthrow the doctrine seems to have had a negligible effect on our laws.

124. Perhaps I should be less confident. Some pretty odd proposals are made and even make their way into our criminal laws. *See, e.g.*, MICH. COMP. LAWS ANN. § 750.42 (West 1991) (criminalizing advertisements of intoxicating liquors that contain references to

easily imagine a proposal to enhance punishment for a felony when one precipitates a death during the commission. What I find unlikely is that anyone would suggest that a killing during a felony (even a felony inherently dangerous to human life) ought to be considered a *coequal* with the variations of "actual malice" murders. In a system never inured to felony-murder, it would seem a bit bizarre; it would be a rule without a modern analogue.

We will, of course, never know whether I am right or wrong. Because of history, we can only imagine such a legal world. And therein lies my point. Because felony-murder has a time-honored place, it is considerably more difficult for us to think of a body of criminal laws without it.[125] The winds of change have faced and continue to face a challenge made all the more daunting by the psychological attachments of history Old habits die much harder than new ones.

B. The Politics of Law and Order and of Life and Death

The arguments against the felony-murder rule are rational, principled, and sensible. The doctrine is undeniably and unavoidably inconsistent with modern notions of culpability [126] Moreover, the deterrent justifications offered to assuage concerns about punishment without fault are logically questionable and empirically unsupported. [127] These abolitionist arguments,

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deceased ex-presidents of United States); *id.* § 750.337 (providing that anyone who uses "indecent, immoral, obscene, vulgar or insulting language in the presence or hearing of any woman or child" commits misdemeanor); *id.* § 750.542 (criminalizing playing national anthem in public places in certain ways—such as, as part of medley or as exit march). Still, it seems fair to say that nothing that in form or substance resembles felony-murder has made its way into our criminal law in modern times.

125. History most likely played a role in the decision of the Model Penal Code (MPC) drafters to make their murder provision palatable by incorporating a "presumption" of culpability when a killing occurs in the course of certain felonies. *See* MODEL PENAL CODE § 210.2(1)(b) (1980). The presumption is actually a permissive inference that jurors may, but need not, make. *See id.* § 1.12(5)(b). Because culpability for murder must be found beyond a reasonable doubt, *see id.*, the MPC provision is the next thing to abolition of the felony-murder rule. Nevertheless, the awareness of our historical attachment to felony-murder kept the drafters from biting the bullet and eliminating all traces of the rule from the MPC. That historical attachment has also undoubtedly influenced the decisions of American states to eschew the route proposed by the MPC. *See* KADISH & SCHULHOFER, *supra* note 6, at 514 (noting that only New Hampshire has adopted MPC formulation of felony-murder).

126. *See supra* text accompanying notes 35-37

127 *See supra* text accompanying notes 86-90.

however, must contend with a couple of strong currents in American criminal law, currents that have been flowing for some time, that show no signs of weakening, and that are irresistible to lawmakers and appealing to their constituents.

The demand for "law and order" strikes an emotional chord in America. One can hardly be elected to public office without embracing the concept wholeheartedly In 1992, the Democrats took that lesson seriously and gained the White House. In the 1994 campaigns, virtually every candidate for a major office claimed that he or she would be tougher on criminals than his or her opponent. The phrase is a shorthand, a code for a number of related ideas. We are a society that sees itself as being plagued by an ever-increasing epidemic of serious crime.[128] We lead the world in homicides, for example.[129] We seem to have an "us against them" attitude, a siege mentality, a sense that we are locked in a mortal struggle with the enemy—criminals. This embattled posture leads us to prefer tough, punitive approaches to dealing with criminals and issues of criminal law We are inclined to restrict the rights of accused and suspected individuals,[130] to

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128. *See America's Bulging Prisons*, CHRISTIAN SCI. MONITOR, Jan. 24, 1991, at 20 (observing that United States leads world in imprisonment rates due to "crime explosion" in 1980s) [hereinafter *Bulging Prisons*]; Andrew Mollison, *U.S. Crime Rate Falls at Last*, ATLANTA CONST., Apr. 26, 1993, at A2 (observing that U.S. crime rate dropped in 1992 for first time since 1984); Norval Morris, *It's the Time, Not the Rate of Crime, That's Filling American Prisons*, CHI. TRIB., Mar. 29, 1993, § 1, at 11 (noting that popular and political perspective is that crime increases year by year and demands tough responses and that conventional wisdom assumes that increased prison population is due to "soaring crime rates"); Jennifer Nagorka, *Fear of Crime Up, but Murder Rate in U.S. Same as in '74*, DALLAS MORNING NEWS, Mar. 29, 1993, at 6A (stating that "[c]rime—and the fear of it—permeates Americans' lives like the stench in a sewer" and quoting opinion that public generally tends to think that crime problem is always worsening).

129. *See* David Ellis, *The Deadliest Year Yet*, TIME, Jan. 13, 1992, at 18 (observing that United States reached new high in number of homicides in 1991 and that it leads Western Hemisphere in homicides); Mollison, *supra* note 128, at A2 (noting that "[n]o other industrialized country even comes close to" United States in homicides); Morris, *supra* note 128, at 11 (stating that United States is far ahead of other countries in homicides); Nagorka, *supra* note 128, at 6A (documenting homicide rate in United States and contrasting it with much lower rates in other countries).

130. Examples of this "inclination" are proposals to expand the exceptions to the Fourth Amendment exclusionary rule, to limit the review available to convicted defendants, and to eliminate pretrial rights recognized by the Supreme Court. *See, e.g.*, OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, TRUTH IN CRIMINAL JUSTICE SERIES, REPORT NO. 7, REPORT TO THE ATTORNEY GENERAL ON FEDERAL HABEAS CORPUS REVIEW OF STATE JUDGMENTS at v-vii, 53-71 (1988), *reprinted in* 22 U. MICH. J.L. REF 901, 908-09, 966-85 (1989) (discussing desirability of restricting availability of federal habeas relief); OFFICE OF

increase the severity of sentences,[131] and to expand the availability of the death penalty.[132] Law and order means that we will use force to win the war against crime and that we will equip ourselves with more powerful weapons designed to bring crime under control.

Of course, this punitive, forceful approach is not the only alternative for dealing with and trying to control our crisis of violent crime. Some think that a preferable solution is to devote more resources to eliminating the causes. They would prefer, from both practical and philosophical standpoints, to try to remedy poverty, inadequate living conditions, ineffective educational systems, deficient health care, and the spectrum of underlying variables that they believe engender crime.[133] In their view, we are respons-

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LEGAL POLICY, U.S. DEP'T OF JUSTICE, TRUTH IN CRIMINAL JUSTICE SERIES, REPORT NO. 3, REPORT TO THE ATTORNEY GENERAL ON THE SIXTH AMENDMENT RIGHT TO COUNSEL UNDER THE *MASSIAH* LINE OF CASES at IV-VI, 27-37 (1986), *reprinted in* 22 U. MICH. J.L. REF 661, 666-68, 696-706 (1989) (advocating abrogation of right to counsel against pretrial elicitation of inculpatory statements from accused individuals); OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, TRUTH IN CRIMINAL JUSTICE SERIES, REPORT NO. 2, REPORT TO THE ATTORNEY GENERAL ON THE SEARCH AND SEIZURE EXCLUSIONARY RULE at VI-VII, 46-53 (1986), *reprinted in* 22 U. MICH. J.L. REF 573, 580-82, 631-38 (1989) (proposing and discussing abolition of or restrictions upon Fourth Amendment exclusionary rule); Frank J. Remington, *Change in the Availability of Federal Habeas Corpus: Its Significance for State Prisoners and State Correctional Programs*, 85 MICH. L. REV 570, 574, 578 (1986) (discussing Supreme Court's restrictions of and Congress's proposals to restrict federal habeas corpus remedy).

131. *See Bulging Prisons*, *supra* note 128, at 20 (stating that new study found "that the United States leads the world in per-capita incarceration of criminals"); Morris, *supra* note 128, at 11 (observing that during 1980s, "political attitudes and sentencing laws and policies toughened"); Rob Rossi, *Clinton Supporters Take on Barr's Rx for Crime*, THE RECORDER, Sept. 30, 1992, at 3.(stating that Bush Administration took position that states ought to adopt federal government's tougher sentencing and imprisonment standards as way of dealing with violent crime); *Towards Honest Sentencing*, BOSTON GLOBE, Feb. 27, 1993, at 10 (noting calls of Massachusetts Governor and others for "truth in sentencing" bills and suggesting that such bills "play[ ] well to a frustrated public") [hereinafter *Honest Sentencing*].

132. *See, e.g., Honest Sentencing*, *supra* note 131, at 10 (noting that Massachusetts Governor's proposed bill to deal with crime includes "death penalty provision"); Mary Beth Lane & Thomas Suddes, *The Siege Ends*, PLAIN DEALER, Apr. 22, 1993, at 1A (noting call for re-examination and toughening of Ohio's death penalty law in wake of fatal prison riot).

133. *See Bulging Prisons*, *supra* note 128, at 20 (urging that "the nation's greatest exertions in the criminal-justice arena should be to eliminate the conditions that cause crime, especially in the inner cities, and to nip crime in the bud through early intervention programs"); Matthew T. Crosson, *Retiring Court Administrator Offers Reflections About the Justice System*, N.Y L.J., May 3, 1993, at S3, S6 (observing that "[s]ome argue that we

ible for the conditions that have given rise to the plague. Force has proven ineffective in dealing with it. The only sensible way to combat crime is with creativity, resources, and compassion directed at the root causes.

Given a choice between these antithetical attitudes, our society clearly prefers the punitive, forceful approach.[134] We pay some attention to the underlying causes of crime, but proposals and efforts to bring it under control center primarily around force and coercion. Despite some periods during which we have inclined a bit more toward "prevention-oriented" reform, the law and order attitude has generally prevailed.[135] It is clearly the controlling popular attitude in our society today

The felony-murder rule is compatible with the law and order mentality.[136] It is harsh, tough, and designed to protect us against those who introduce unwarranted and unnecessary threats of death into our daily lives. It is meant to safeguard us against the risks of armed robbery, burglary, rape, and the like by sending an unmistakably stern and punitive message to felons. The abolition of felony-murder, on the other hand, is inconsistent with the law and order current. Consequently, anyone bent on reforming the rule must fight the tide and be prepared to pay a political price.[137] In the world of American politics, logical consistency and fairness to felons are not very potent weapons against the charge that one is soft on crime and hostile to law and order. In part, felony-murder's continued survival must be rooted in the politics of law and order.[138]

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will make no progress in reducing crime until the family structure is re-established, poverty is eliminated, and decent-paying jobs are available for everyone").

134. The dichotomy is, of course, an oversimplification. On the spectrum of attitudes, there are more than just the two extreme alternatives. *See* Ronald J. Ostrow, *FBI May Shift Resources to Domestic Crime*, L.A. TIMES, Dec. 28, 1991, at A1, A16 (noting Attorney General Barr's suggestions that both toughened law enforcement and social programs designed to eliminate root causes of crime are essential in fighting crime and that argument between two is "false dichotomy"). The point is simply that our strong, general inclination is toward the "crime control" end of the spectrum.

135. *Cf. id.* (describing "'weed and seed' approach," which first employs tougher crime control measures to "weed out" crime and disorder "before [seeding] social reform").

136. *See* FLETCHER, *supra* note 10, § 4.4.7, at 318 (stating that felony-murder rule is too attractive to law enforcement to be easily surrendered); Fletcher, *supra* note 2, at 417-18 (observing that law enforcement's efforts on behalf of felony-murder should not surprise us and that it would be naive to expect otherwise).

137 *See* Seibold, *supra* note 9, at 161 (concluding that legislative reluctance to abolish felony-murder is understandable because taking that position could suggest softness on crime and be tantamount to political suicide).

138. *See* Doyle, *supra* note 18, at 236 (asserting that legislators are hesitant to eliminate

The significance of "life and death" issues gives rise to a second current in our culture that has probably contributed to the retention of felony-murder. When life and death are at stake, emotions run high and controversy abounds. One need look no further than the furors that surround our national debates over abortion, assisted suicide, and capital punishment. Life, particularly the life of an innocent, has particularly evocative symbolic value and political force.[139]

In the case of felony-murder, a felon's interest in fair, proportional treatment stands in stark contrast to the life of an innocent victim. The decision to favor the latter may not be rationally consistent with culpability premises and may not be empirically supportable in deterrent terms, but it is emotionally compelling. Innocent victims merit our support, our protection, and, when their lives are lost, our affirmation of their value. Denunciation of the killer—who is, after all, a felon—is a way of proclaiming the significance of innocent human life.[140]

A call for the abolition of felony-murder flies in the face of the importance that we accord such life. The repeal of a rule that announces how very valuable actual and potential victims' lives are could send a message that undercuts our commitment.[141] For this reason as well, to seek the end of felony-murder is to invite the end of political viability [142]

One possible explanation for the judicial reluctance to abolish felony-murder when the power to do so exists[143] is that judges are acutely aware

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felony-murder because they fear political pressures and appearance that they are soft on crime); Seibold, *supra* note 9, at 136 (observing that reluctance to abolish doctrine is due to "social and political pressures" rather than to flawed logic on part of critics).

139. *Cf.* FLETCHER, *supra* note 10, § 5.3.1, at 380 (noting that human life is commonly thought to be sacred, and, thus, homicide invades sacred realm and constitutes "desecration").

140. *See* Crump & Crump, *supra* note 8, at 367-68 (opining that felony-murder rule serves goal of condemnation, which includes reinforcement of value of reverence for human life); Rambo, *supra* note 9, at 704 (suggesting that application of felony-murder rule to narcotics suppliers advances no principle but "vindication of user's death").

141. *See* Crump & Crump, *supra* note 8, at 368 (noting that if law did not treat felony-homicide more severely than it treats mere felony, message could be "a devaluation of human life," and suggesting that by condemning one who kills in course of felony, law expresses "solidarity with the victim[ ]" while failure to do so could "communicate to the victim that we do not understand his suffering").

142. Unlike Professor Fletcher, therefore, I am not the least bit surprised that legislatures and courts have not sought to make the rule conform to our "well-accepted criteria of individual accountability and proportionate punishment." *See* Fletcher, *supra* note 2, at 417-18. Strong counterweights counsel against such a move.

143. Putting aside the question of unconstitutionality, a court has the power to abolish

of the political ramifications. If they serve subject to the approval of voters, electoral pressures could induce jurists to retain felony-murder. Even if they are not subject to the electorate's will, judges might well realize that abolition could provoke an even harsher regime. If they abolish the limited forms of the rule that have endured, legislators might react by enacting even broader rules. Those hostile to the rule might consider it the better part of valor to swallow a theoretically indefensible and empirically unsupported felony-murder rule of limited scope when the alternative is to risk triggering an even harsher version.[144] In today's climate, such a fear is not unfounded. It could account further for the endurance of felony-murder.

C. The State of the Law

The classic felony-murder rule held that a death caused during the commission of any felony constitutes murder.[145] One not schooled in the intricacies of contemporary statutes and judge-made doctrines pertinent to felony-murder might assume that the broad, original version is still generally the law That is far from the case. While the breadth of the doctrine varies from jurisdiction to jurisdiction, a number of restrictions limit most modern incarnations of felony-murder.[146] This proclivity for

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felony-murder only when the legislature has not written the doctrine into law. For example, the California Supreme Court rejected the argument that it should abolish the first degree rule because it concluded that the state legislature had intended to incorporate a "first degree felony-murder rule" in the penal code. *See* People v Dillon, 668 P.2d 697, 714-15 (Cal. 1983) (en banc) (concluding that first degree felony-murder is "creature of statute"). The California court, however, reached a contrary conclusion with regard to the second degree felony-murder rule. The court did not believe that the legislature specifically included a second degree felony-murder rule in the code. Although the court did not deny that it has the power to abolish that rule, it did not think it was advisable to do so. *See* People v Patterson, 778 P.2d 549, 554 (Cal. 1989) (declining Government's invitation to "determine the continued vitality" of "judicially created" second degree felony-murder rule).

144. Particularly during the 1960s and 1970s, and even in the early 1980s, a majority of the California Supreme Court was undeniably hostile to the felony-murder rule. The court limited the second degree felony-murder rule in every way that it could, but refrained from abolishing the doctrine. I have always suspected that a partial explanation of the court's hesitance was the fear that a reactionary legislature would have responded to eradication with a broader and judicially untouchable felony-murder rule.

145. *See supra* text accompanying note 15.

146. *See* FLETCHER, *supra* note 10, § 4.4.4, at 293 (observing that dominant trend is toward limitation and refinement of rule); Crump & Crump, *supra* note 8, at 377 (noting that there is widespread agreement of need for limitation of felony-murder doctrine); Roth

confining the rule is often the product of hostility to the rule itself.[147] Some maintain that the consistent determination to restrict felony-murder leads logically to the abolition of the doctrine.[148] Others disagree.[149] As I see it, the limitations placed on felony-murder's operation are another reason for its survival.

An unlimited felony-murder rule could make us confront a number of unsettling outcomes in individual cases. Individuals engaged in felonies that are neither risky nor inherently immoral could be convicted of murder for consequential killings. Such convictions would probably not be frequent, but could occur often enough and would, by their nature, attract sufficient publicity to disconcert more than a few The number of individuals punished without fault and the disparity between fault and the punishment imposed would both increase and, consequently, be harder to ignore. Even

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& Sundby, *supra* note 2, at 446 (stating that most states have tried to limit harshness of doctrine by limiting scope of its operation).

147 This hostility manifests itself in the pejorative and highly antagonistic language found in the opinions that have propounded and applied the restrictions upon the scope and operation of the rule. *See, e.g.*, People v Burroughs, 678 P.2d 894, 897 (Cal. 1984) (opining in course of opinion invoking highly restrictive inherent dangerousness limitation that "court has long held the felony-murder rule in disfavor" and that application of felony-murder rule to facts of case "would be an unwarranted extension of this highly 'anachronistic' notion" (footnote omitted)); People v Smith, 678 P.2d 886, 888 (Cal. 1984) (asserting in course of opinion imposing merger limitation that court's "opinions have repeatedly emphasized that felony murder, although the law of this state, is a disfavored doctrine" that "anachronistically resurrects from a bygone age a 'barbaric' concept" and that "it erodes the relation between criminal liability and moral culpability" (quoting *Dillon*, 668 P.2d at 709 (quoting People v Phillips, 414 P.2d 353, 360 n.6 (Cal. 1966) and People v Washington, 402 P.2d 130, 134 (Cal. 1965)))); People v Satchell, 489 P.2d 1361, 1365 (Cal. 1971) (stating that "we have sought to insure" that concept "of strict criminal liability incorporate[d] in the felony-murder doctrine be given the narrowest possible application consistent with its ostensible purpose" while applying inherent dangerousness restriction); People v. Phillips, 414 P.2d 353, 360 (Cal. 1966) (observing in course of opinion applying inherent dangerousness restriction that "felony murder doctrine expresses a highly artificial concept that deserves no extension beyond its required application" and that it "has been subjected to severe and sweeping criticism").

148. *See* People v Aaron, 299 N.W.2d 304, 316 (Mich. 1980) (concluding that limitations and modifications of scope and operation of rule call into question its continued existence); Crump & Crump, *supra* note 8, at 393 (noting argument that limitations on felony-murder doctrine reflect such dissatisfaction as to suggest outright abolition as logical conclusion).

149 *See* Crump & Crump, *supra* note 8, at 394-96 (maintaining that limitations are not basis for abolition and that abrogation should not be considered logical conclusion of principled limitations imposed on felony-murder doctrine).

those devoted to law and order might have sympathy with felons caught in the sweep of so broad a rule. The unfairness and extreme inconsistency with common notions of culpability could give felony-murder opponents the support that they lack and an impetus for abolition.[150]

An unlimited felony-murder rule, however, is *not* the law of our land. In most places, the rule is cabined in a number of ways. A brief review of typical restraints put upon the rule is in order.

An apparent majority of jurisdictions provides that only a short list of specified or enumerated felonies can be the foundation of a felony-murder conviction.[151] Others are a bit broader, but confine the operation of the rule to felonies "inherently dangerous to human life."[152] Most jurisdictions apparently follow some form of the "merger" doctrine,[153] a restriction that precludes certain particularly dangerous felonies—the archetype is assault with a deadly weapon—from qualifying.[154] The vast majority also bars felony-murder convictions when someone other than a felon performs the actual lethal act, even though the act is causally connected to the felony [155]

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150. *Cf.* FLETCHER, *supra* note 10, § 4.4.7, at 308 (observing that third party killing/proximate cause cases that broadened felony-murder liability shocked sensibilities of lawyers and "generated momentum" toward restrictions on rule).

151. *See Aaron*, 299 N.W.2d at 316 n.79 (observing that "the majority of states which have a statutory felony-murder rule enumerate the felonies"); LAFAVE & SCOTT, *supra* note 3, at 625 (noting that most modern codes limit operation of felony-murder rule to certain specified felonies); Seibold, *supra* note 9, at 138 (stating that clear majority of jurisdictions limit application of rule to homicides occurring during statutorily enumerated felonies). For examples of such statutes, see ALASKA STAT. § 11-41.110(a)(3) (Supp. 1993) (limiting felony-murder doctrine to enumerated felonies); ARIZ. REV STAT. ANN. § 13-1105(A)(2) (Supp. 1993) (enumerating felonies that constitute bases for first degree murder, which is only felony-murder provision in state); IND. CODE ANN. § 35-42-1-1(2)-(3) (Burns 1994) (listing felonies that can provide foundations for felony-murder convictions).

152. *See* Sudduth, *supra* note 4, at 1305 (observing that many courts have limited felonies that trigger rule to those that are dangerous to human life); Barbre, *supra* note 15, at 399-409 (discussing judicially-developed inherently dangerous limitation). For examples of cases explaining and applying the limitation, see People v Patterson, 778 P.2d 549 (Cal. 1989); People v. Phillips, 414 P.2d 353 (Cal. 1966); Jenkins v State, 230 A.2d 262 (Del. 1967); State v Underwood, 615 P.2d 153 (Kan. 1980).

153. *See* KADISH & SCHULHOFER, *supra* note 6, at 531 (observing that "great majority of jurisdictions" have some type of merger limitation).

154. *See, e.g.*, People v Smith, 678 P.2d 886, 888-92 (Cal. 1984) (concluding that assaultive-variety child abuse merges into resultant homicide and cannot serve as predicate for felony-murder doctrine); People v Ireland, 450 P.2d 580, 589-91 (Cal. 1969) (holding that assault with deadly weapon merges and cannot be basis for felony-murder conviction).

155. *See, e.g.*, People v Washington, 402 P.2d 130, 133 (Cal. 1965) (asserting that

Several do not allow felony-murder prosecutions when the homicide victim is one of the felons.[156] This sampling of the major restrictions[157] indicates how truly confined the rule is and, thus, how far we have departed from the classic statement.

All of these restrictions on felony-murder certainly diminish the frequency of the rule's application. Equally important, they mean that few convictions, if any, will correspond to the model sometimes thought to epitomize the injustice of felony-murder. That is not to say that felony-murder prosecutions and convictions will be entirely consistent with notions of fairness and justice implicit in our modern understanding of culpability To some extent, most felony-murder convictions will be inconsistent with those notions. The point is that the injustices are not as egregious as those that would result from an unlimited felony-murder scheme.[158] Few

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penal code requires felon or accomplice to "commit the killing"); State v Canola, 374 A.2d 20, 27-30 (N.J. 1977) (concluding that state's murder statute did not contemplate conviction when nonfelon performed lethal act); Commonwealth *ex rel.* Smith v. Myers, 261 A.2d 550, 552-60 (Pa. 1970) (overruling prior decision adopting proximate cause approach and confining felony-murder doctrine to killings by felons).

156. *See, e.g.*, People v Kittrel, 786 P.2d 467, 469 (Colo. Ct. App. 1989) (citing statute that provides culpability only for "the death of a person, other than one of the participants"); Jackson v. State, 589 P.2d 1052, 1052-53 (N.M. 1979) (deciding that felony-murder rule applies when individual resisting felony kills another innocent person, but not when such resisting individual kills felon).

157 Other limitations on the rule include the requirement that the homicide be in the course of and/or in furtherance of the felony, *see, e.g.*, ALA. CODE § 13A-6-2(a)(3) (1994) (providing that felony-murder rule is applicable to killings "in the course of and in furtherance of the crime"); ALASKA STAT. § 11.41.110(a)(3) (Supp. 1993) (providing for felony-murder for killings "in the course of or in furtherance of" certain enumerated felonies); DEL. CODE ANN. tit. 11, § 636(a)(6) (Supp. 1992) (providing for rule to govern killings "in the course of and in furtherance of" any enumerated felony), the demand that the felony be *mala in se* or a common-law felony, *see, e.g.*, Reddick v Commonwealth, 33 S.W 416, 417 (Ky 1895) (concluding that arson is *malum in se* and therefore capable of supporting felony-murder conviction); People v. Pavlic, 199 N.W 373, 374 (Mich. 1924) (observing that sale of liquor is only criminal because it is made so by statute and, therefore, that it cannot support felony-murder conviction); Commonwealth v Exler, 89 A. 968, 969-71 (Pa. 1914) (stating that because statutory rape was not common-law felony, it could not be basis of felony-murder conviction); *see also* MASS. GEN. LAWS ANN. ch. 265, § 1 (West 1990) (limiting felony-murder to those felonies that are punishable by death or life imprisonment), and the "proximate cause" limitation, *see, e.g.*, State v Mauldin, 529 P.2d 124, 125-27 (Kan. 1974); State v. Severs, 759 S.W.2d 935, 938 (Tenn. Crim. App. 1988).

158. *Cf.* People v. Aaron, 299 N.W.2d 304, 316 (Mich. 1980) (noting that numerous modern restrictions on common-law felony-murder doctrine "reflect dissatisfaction with harshness and injustice of the rule"); MODEL PENAL CODE § 210.2 commentary at 31-32

"innocent" felons are caught in today's felony-murder traps. Rather, based on the proof required for a felony-murder conviction, most are chargeable with some level of fault for the death caused.[159] In addition, in some cases, the State could have proven actual malice on the part of the individual convicted of felony-murder.[160] For those defendants, the rule does no more than streamline prosecutions[161] and deprive them of the benefits of possible, though likely invalid, mens rea defenses.[162]

In sum, the evolved restrictions on the scope of felony-murder have probably contributed to its endurance. By keeping it on a leash, legislatures and courts have prevented it from behaving in ways that could attract public attention and antipathy A rule with considerable roots in our nation's legal history and with such undeniable political appeal is only likely to be overthrown if it transgresses in some flagrant way Modern American felony-murder doctrines have kept the rule from doing so.

(1980) (asserting that application of felony-murder rule to wide range of felonies that exist today would yield "startling results," which explains limitations imposed on rule); *id.* at 41 (observing that jurisdictions retaining felony-murder generally have excluded "egregious applications" of rule); Roth & Sundby, *supra* note 2, at 447 (arguing that limiting scope of felony-murder increases probability that those convicted are in fact guilty of some form of criminal homicide); Seibold, *supra* note 9, at 162 (suggesting that ameliorative limitations serve to make felony-murder rule "more humane and more rational").

159. *See* Dickey et al., *supra* note 71, at 1365 (stating that courts have devised schemes that limit rule to circumstances in which defendant has or is presumed to have culpable mental state); Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 624-25 (1984) (observing that various restrictions on felony-murder support imputation of liability because they increase likelihood that individual will have culpable state of mind); Roth & Sundby, *supra* note 2, at 447 (asserting that limiting scope of felony-murder increases probability that convicted defendant is in fact guilty of some level of criminal homicide); Seibold, *supra* note 9, at 161 (stating that inherent dangerousness limitation "heightens the felon's culpability for the results of his actions").

160. *See* MODEL PENAL CODE § 210.2 commentary at 37 (1980) (concluding that in vast majority of cases, killings during felonies probably amount to murder apart from operation of felony-murder rule); Roth & Sundby, *supra* note 2, at 491 (observing that imposition of requirement that culpability be proven for murder may not change result in many felony-murder cases because malice may be found).

161. *See* Robinson, *supra* note 159, at 654-55 (describing theory that felony-murder is justified on ground of relieving prosecution of burden of actually proving culpabilities that are present in most cases of killings during felonies).

162. *See* Seibold, *supra* note 9, at 142 (observing that in situations in which mens rea required for murder is provable, felony-murder rule poses obstacles to defenses that defendant otherwise might have).

D Popular Conceptions of Culpability and Responsibility

I have saved the most interesting, important, and, I believe, influential of the forces behind felony-murder for last. A main premise of this Article and of scholarly and judicial attacks on felony-murder is that the doctrine is inconsistent with culpability principles. The doctrine is clearly dissonant with the premises generally accepted by those who study our criminal law Although those premises are also accepted by the populace and by lawmakers to a certain extent, I have little doubt that they do not constitute a complete picture of the notions of fault, blame, and criminal responsibility that inform the public conscience. Different understandings and conceptions of culpability—understandings and conceptions that are not widely accepted by the scholarly community—probably underlie and help explain our abiding allegiance to felony-murder.[163]

Modern jurisprudence, for example, rejects the idea that a person is blameworthy simply because he has caused societal harm.[164] The essence of the mens rea demand is that there be a culpable mental attitude that accompanies and coincides with the infliction of harm. While actual harm can be significant,[165] it is not even a requisite basis for blame.[166] Mental

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163. *See* Crump & Crump, *supra* note 8, at 363 (discussing "societal perceptions," "societal judgment," and "societal attitudes" that modern felony-murder doctrine reflects); *id.* at 395 (observing that public opinion polls and jury surveys suggest that populace does not agree with judicial assessments of injustice of felony-murder rule); *cf.* People v Aaron, 299 N.W.2d 304, 317 (Mich. 1980) (asserting that felony-murder gives rise to "emotional reaction" that is not based in logic or abstract principles and that it is "based on [a] rough moral notion").

164. *See* MODEL PENAL CODE § 210.2 commentary at 36 (1980) (asserting that criminal law does not generally predicate homicide liability on causation of death, but requires guilty mind that makes result "reprehensible as well as unfortunate"); Fletcher, *supra* note 2, at 428 (criticizing notion that punishment should "fit not the crime, but the result for which the offender is not personally to blame"); Schulhofer, *supra* note 52, at 1602 (stating that occurrence of harm has no apparent bearing on person's moral blameworthiness).

165. *See* FLETCHER, *supra* note 10, § 5.2.2, at 362 (suggesting that causation of harm does have bearing on appropriate level of just punishment).

Unless a jurisdiction follows the Model Penal Code's lead and criminalizes "reckless endangerment," *see* MODEL PENAL CODE § 211.2 (1980), a person who behaves in a grossly reckless manner that endangers human life, but luckily causes no harm, has no criminal liability. Another individual who performs the same acts with the same mental attitude, but has the bad fortune to cause a death, can, however, be liable for murder. *See supra* text accompanying notes 5, 36, and 39. The causation of harm has an obvious and dramatic effect on liability

166. For example, a person can be found guilty of attempted murder, and be punished

fault, however, is essential.[167]

I would not contend that people believe that criminal punishment generally ought to be based on the causation of harm alone.[168] I would suggest, however, that ordinary citizens place a greater emphasis on harm than the scholarly community An injury to another person is a weighty factor in the balances struck by the public. The more serious the injury is, the weightier the factor is. There is no need to pay a person back or to make a person pay merely because of the damage done, but damage makes us begin to think along those lines and generates an inclination to respond.[169]

In sum, the public view of the relative significance of harm and mental attitude is different from that of the scholarly community Loss of life is the most serious harm of all. By causing a death, a potential felony-murderer primes the balance and readies it to be tipped in favor of punishment.[170]

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quite severely, if he completely misses his target and inflicts no damage whatsoever. In fact, it is not even critical that the individual do everything that he intended to do. It is enough that the acts committed amounted to more than "mere preparation." *See* LAFAVE & SCOTT, *supra* note 3, at 431 ("It is commonly stated that more than an act of preparation must occur."). In other words, one can sometimes be guilty of a serious offense without even coming close to actually causing harm.

167 *See Aaron*, 299 N.W.2d at 316 (opining that most basic criminal law principle is that liability for causing result is not justifiable without culpable mental state with regard to result); MODEL PENAL CODE § 210.2 commentary at 36 (1980) (concluding that because murder is heinous offense with grave sanctions, it must be premised on confluence of guilty act and guilty mind).

168. According to Professor Fletcher, in our distant past, it was thought proper to punish a person simply because he brought about a harm of "transcendent" significance. *See* FLETCHER, *supra* note 10, § 5.3.1, at 382.

169. To distinguish it from "retribution"—the idea that punishment should be commensurate with mental fault—commentators have called the notion that liability should be related to the harm done by names other than "harm-based retributivism." Professor Schulhofer refers to it as "retaliation." Schulhofer, *supra* note 52, at 1571. Others have called it "expiation," *see* Crump & Crump, *supra* note 8, at 368, and "vengeance," *see* Note, *Tort Law*, *supra* note 4, at 1932. Whatever its name, the public possesses a certain attachment to the concept. That attachment is part of the substructure of the felony-murder rule.

170. *Cf.* FLETCHER, *supra* note 10, § 4.1, at 240-42 (maintaining that felony-murder is reflection of residual influence of harm-oriented approach to homicide law); Seibold, *supra* note 9, at 151 (observing that felony-murder is compatible with retributive system because it allows stiff punishment to be imposed on person who contributes to another's death).

The public clearly is not convinced of the merits of a purely harm-based retributivism. Wholly accidental killings by otherwise innocent persons are not criminalized, and there is no reason to think that they ever will be.[171] No matter the number of deaths caused, we excuse such persons because we can attribute no fault to them.[172] Scholars and the public agree that, except in the special cases presented by public-welfare type criminal enactments, accidents should not be punished.

There may well be a difference, however, in how those who study the criminal law and those who elect lawmakers define accidents. Both groups agree that an innocent driver whose vehicle malfunctions in a way that was wholly unforeseeable has killed accidentally Scholars, however, would say the same of an individual engaged in a felonious enterprise.[173] Because the felon was not negligent, his or her killing was an "accident" by definition.

On that point, the public probably disagrees. "Accidental" means innocent, and "innocent" means without fault. The public does not perceive a nonnegligent killing during a felonious endeavor to be lacking in fault. A person who engages in a criminal and likely quite immoral act is not "innocent." But for the willing choice to engage in the act, the occasion for the death would not have arisen. Because the felon is morally responsible for creating the situation—in both a "but-for" and "proximate" sense, she guiltily engendered it—she is morally responsible for the killing.[174]

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171. In other words, if a person who is not engaged in a criminal endeavor takes the life of another without negligence, there can be no homicide liability Our society today does not believe that such wholly innocent killers are proper targets of criminal sanctions, and it is not likely to change its view in the future.

172. The primary theoretical reason that we do not punish is the lack of fault. Additionally, it might well be futile as a practical matter to try to affect similar future conduct by those persons and others like them. The argument is that a person cannot, or is not likely to, do more than refrain from careless behavior that creates foreseeable risks of harm.

173. *See* People v Satchell, 489 P.2d 1361, 1365 (Cal. 1971) (noting that ostensible purpose of felony-murder rule is to deter felons from "killing negligently or accidentally"); People v. Aaron, 299 N.W.2d 304, 327 (Mich. 1980) (concluding that when death during felony is "accidental," imposition of felony-murder liability is unjust); Roth & Sundby, *supra* note 2, at 447-48 (United States is "virtually the only western country still recognizing a rule which makes it possible 'that the most serious sanctions known to law might be imposed for accidental homicide.'" (quoting John C. Jeffries, Jr. & Paul B. Stephan, III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1383 (1979))).

174. *See* FLETCHER, *supra* note 10, § 4.4.1, at 277 (discussing original nature of felony-murder rule as device that rendered claim of accident unavailable and concluding that it was "not implausible to deny [such] an excuse to someone who has acted wrongfully in

To the public's eye, there is a marked difference between innocent persons who kill without negligence and guilty persons who kill without negligence.[175] Notwithstanding what scholars might say, these two types of killers do not belong in the same category Scholarly logic considers it irrational to treat them differently Popular logic considers it irrational to treat them alike. It may be appropriate for the criminal law to ignore a death due to an *innocent's* accident. It is not appropriate, however, to do so when a *felon* volitionally and guiltily brings about the occasion of the "accidental" death. For doing so, the felon deserves a stigma and sanction.[176]

It would seem that while the populace accepts the general premise behind the notion of mens rea—that there must be moral fault for there to be criminal liability—it does not concur with the scholarly understanding of blameworthiness in all respects.[177] In particular, the public does not adhere

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creating the situation").

175. *See* Cole, *supra* note 8, at 122 (opining that taking life-threatening risks during criminal activities is fundamentally different from taking same risks in connection with legal activities).

176. This explanation of the popular thinking that supports felony-murder parallels Professor Fletcher's explanation of the original understanding of the concept of felony-murder. According to Fletcher, the notion arose at a time when any killing was presumptively a murder. *See* FLETCHER, *supra* note 10, § 4.4.1, at 276. The presumption of murder liability, however, was qualified by the availability of excuses. Malice was not an affirmative basis for finding one guilty of murder, but rather was an expression of the absence of all excusing conditions. *See id.* The fact that one had killed during an unlawful act was a "rejoinder to the defensive claim of accidental killing." *Id.* at 277 Felony-murder served as a basis for denying an excuse—accident—that would otherwise have been available for a murder charge because it seemed fitting "to deny the excuse to someone who ha[d] acted wrongfully in creating the situation in which the excuse [was to] be asserted." *Id.*

David and Susan Crump approach the issue from a slightly different angle. According to them, felony-murder "reflects a societal judgment that an intentionally committed robbery that causes the death of a human being is qualitatively more serious than an identical robbery that does not." Crump & Crump, *supra* note 8, at 363.

Professor Fletcher has criticized the notions that the basis for blaming the defendant lies in the commission of the felony itself and that engagement in the felony itself lowers the threshold of moral responsibility as "unrefined" ways of thinking about criminal responsibility. *See* Fletcher, *supra* note 2, at 426-27; *see also* PACKER, *supra* note 113, at 127 (calling it "incompatib[le] with the spirit of *mens rea*" to conclude that felon acts at peril of liability for consequences of his actions because he has chosen to engage in wrongful conduct).

177 *See* Crump & Crump, *supra* note 8, at 366 (asserting that mens rea alone does not reflect society's understanding of function and purpose of criminal law and that actus reus

to the demand for proof of mens rea for every essential element of every offense. Applied specifically to homicide, this means that for the public, liability does not depend upon proof of a culpable mental state regarding the "killing of another human being" element. There are other sources of blameworthiness for inflicting harm. One alternative source is a culpable mental attitude toward precipitation of the events that caused the harm.

The point is not that the public entirely rejects the understandings of culpability dominant in the scholarly community Much of our operative criminal law reflects those understandings. Rather, the point is that the public *supplements* those conceptions with others, some of which have ancient roots in the law and in our psyches.[178]

There is yet another difference in the scholarly and popular philosophies of blame and punishment. Scholars are appropriately concerned with avoiding punishment more severe than a felon deserves.[179] This concern leads them to conclude that felons should be sanctioned for their felonies, but not for accidental killings brought about by those felonies. The public, however, even if it did accept the description of a non-negligent death during a felony as "accidental," would probably be *less* concerned about imposing an "undeserved" sanction upon the felon. To the public, the injustice of holding an innocent person criminally liable for an accidental killing is evident and dramatic. The injustice of holding a "similar" felon criminally liable for the homicide is not. A murder label and sanction are simply not as harmful or troubling when attached to and

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and result are also relevant determinants of just disposition in society's eyes); *id.* at 360 (suggesting that public officials who perpetuate felony-murder doctrine may know something that scholars do not).

178. Professor Fletcher explains that criminal liability originally hinged solely on the harm done, rather than culpability, because the "harm-doer" was "tainted," and the objective was "expiation" rather than blame. *See* FLETCHER, *supra* note 10, § 4.1, at 237-39; Fletcher, *supra* note 2, at 426-27 I believe that the public still finds the notions of "taint" and "expiation" somewhat attractive and that they continue to influence and shape our criminal law. *See also* Roth & Sundby, *supra* note 2, at 458 (observing that ideas that one who does bad acts cannot complain about punishment for consequences and that retribution should focus on resulting harm, not actor's mental state, can find roots in seventeenth and eighteenth century conceptions of criminology).

179. *See* Fletcher, *supra* note 2, at 426, 427-28 (asserting that punishment is just only insofar as it is proportionate to fault and that basic principle of just punishment is that it must be proportional to wrongdoing); Roth & Sundby, *supra* note 2, at 458-59 (noting basic premise that criminal law is not only concerned with guilt and innocence in abstract, but also with degree of criminal liability, and referring to "progressive trend of categorizing homicides according to culpability").

imposed upon an individual already stigmatized as a felon and punished for a felony [180]

Also probably inextricable from the public consciousness is the idea that felons—by virtue of their choices to engage in felonies—have effectively forfeited any entitlement to close scrutiny of their blameworthiness.[181] If a person with dirty hands causes a death he may not insist on the inquiry into and finding of fault to which he would ordinarily be entitled. We are simply less sympathetic to, and not as inclined to listen to, felons' claims of innocent accident. It serves them right to have their pleas ignored; they asked for such treatment by deciding to violate the law [182]

Legal scholars demand that homicide convictions and sanctions be proportionate to the level of culpability or fault proven.[183] Undoubtedly, the public is also concerned with proportionality—with liability that corresponds to mental fault and to harm done. The structure of our extant criminal law reflects that concern.[184] I believe, however, that there are at

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180. The intent here is not to suggest that the additional stigma and sanction for the homicide are not onerous for the defendant. To the contrary, conviction and punishment for murder are quite serious and substantial impositions. The point is simply that the public is not as troubled by such impositions upon an individual who has already been classified and punished as a felon. *See* Cole, *supra* note 8, at 128-29 (suggesting that false conviction is less harmful to defendant in felony-murder situation and that false conviction may be minimally stigmatizing to one already branded felon); Note, *Tort Law*, *supra* note 4, at 1931-32 (stating that it is easy to attribute responsibility in felony-murder situations because state is dealing with criminal upon whom it is easier to inflict severe punishment).

181. *See* People v Aaron, 299 N.W.2d 304, 318 (Mich. 1980) (reciting view that underlying rationale of felony-murder is that for those who commit bad acts, it is permissible to exclude niceties in assessing liability); *cf.* People v Patterson, 778 P.2d 549, 557 (Cal. 1989) (asserting that justification for felony-murder's suspension of need to prove subjective mental fault is that when society has declared dangerous conduct to be felonious, defendant should not be allowed to excuse himself by saying he was unaware of danger).

182. *See Aaron*, 299 N.W.2d at 318 (conceding that it is understandable that people feel little compassion for felons and suggesting that lack of compassion is one reason that underlying principles of our system are ignored); FLETCHER, *supra* note 10, § 4.4.1, at 285 (stating that possible "principled moral defense" of felony-murder is that people who commit felonies should be required to assume risk of deaths during perpetration); LAFAVE & SCOTT, *supra* note 3, at 632 (stating "somewhat primitive rationale" that because felon is bad person, there is no need to worry too much about difference between intent and results).

183. *See supra* note 179; *see also* H.L.A. HART, LAW, LIBERTY AND MORALITY 36-37 (1963) (discussing reasons why we should honor principles that make "relative moral wickedness" into factor that influences severity of punishment).

184. Thus, even though the harm done is the same, a person who kills another human

least two significant differences between the perspective of legal scholars and that of the general public. First, the public is less concerned about precision and exactitude in gauging proportionality Second, and more important, the public's sense of the punishment that killers in felony-murder contexts deserve is different.

Scholarly thought holds that labels and sanctions attached to criminal homicides and those who commit them should correspond precisely to the proven level of mens rea.[185] According to this view, it is objectionable to punish a person any more severely than the established culpability justifies. For example, if the State has only proven fault for manslaughter, a murder conviction is unacceptable. Thus, one of the serious problems with any form of a felony-murder rule is the disproportion between the categorization and the fault proven. The defendant has, at most, been proven culpably negligent or reckless,[186] a mental state that should lead to no worse than a manslaughter conviction.

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being with gross negligence would typically be guilty only of manslaughter or negligent homicide, *see* ALA. CODE § 13A-6-4(a) (1994) (killing with "criminal negligence" constitutes "criminally negligent homicide"); CAL. PENAL CODE § 192(b) (West 1988) (killing "without due caution and circumspection" constitutes involuntary manslaughter), while a person who kills another human being with gross recklessness or intent would typically be guilty of murder, *see* ALA. CODE § 13A-6-2(a)(1)-(2) (1994) (intentional killings and extremely reckless killings constitute murder); CAL. PENAL CODE §§ 187(a), 188 (West 1988) (killings with express malice, which includes intent to kill, or implied malice, which includes gross recklessness, constitute murder). Moreover, even if two individuals act with the same level of bad intent, the person who actually kills another will be guilty of the more serious offense of murder, and the person who fails to kill for reasons beyond his control will be guilty of the less serious offense of attempted murder. *Compare* ARIZ. REV STAT. ANN. § 13-1105(A)(1), (C) (Supp. 1993) (intentional and premeditated killing constitutes first-degree murder, which is class 1 felony punishable by death or life imprisonment) *with* ARIZ. REV STAT. ANN. § 13-1001(A)(2), (C)(1) (1989) (one who intentionally does anything that "is any step in a course of conduct planned to culminate in an offense" is guilty of attempt, and attempt to commit class 1 felony constitutes class 2 felony); *compare* CONN. GEN. STAT. ANN. § 53a-54a (West Supp. 1994) (intentional killing constitutes murder, which is class A felony) *with* CONN. GEN. STAT. ANN. §§ 53a-49(a), 53a-51 (West 1985 & Supp. 1994) (person is guilty of attempt if he intentionally does anything that is substantial step in course of conduct planned to culminate in crime, and attempt to commit class A felony is class B felony).

185. *See* Roth & Sundby, *supra* note 2, at 459 (referring to "progressive trend of categorizing homicides according to culpability").

186. A manslaughter conviction may require proof of recklessness, culpable negligence, or ordinary negligence. *See supra* notes 40-42. Proof of the defendant's inherently dangerous felonious act may often be a sufficient basis for inferring one of these mental states, but not a sufficient foundation for an inference of malice, the state of mind essential for a murder conviction.

Unless I miss my guess, popular notions of proportionality are concerned much less about precise correspondence between culpability and liability—especially in cases of killings by felons. As long as the individual deserves *a* serious homicide sanction, it is no major cause for dismay that the accuracy of the classification is a bit off.

More important, and related to preceding portions of this discussion, is the fact that the public does not perceive the same degree of disproportion in felony-murder situations. A felon who kills with culpable or gross negligence is not seen as equivalent to a nonfelon who kills with the same mental state. In the public mind, the culpability associated with the felony is joined with an additional measure of culpability for the homicide.[187] Although a person who kills with culpable negligence *plus* a felonious attitude may not be as blameworthy as a person who kills with actual malice, he is more blameworthy than a person who kills with culpable negligence alone. Murder is the only category that is ordinarily available once one rises above the manslaughter level. The choice between the excessive indulgence involved in treating the felon as a manslaughterer and the excessive harshness inherent in classification of the felon as a murderer[188] is an easy one for a society enamored of law and order.

These strains of popular thought concerning culpability are intertwined and inseparable. The reason for exploring them here is not to suggest that the public finds scholarly conceptions of fault, blame, and criminal punishment generally unacceptable as the basis for a system of criminal laws. The law on the whole incorporates and is consistent with the culpability principles predominant in scholarly thought. The point is that there are additional premises that are integral parts of the public psychology [189] Those premises help account for the contemporary retention of a

187 *Cf.* FLETCHER, *supra* note 10, § 4.4.5, at 300-01 (discussing possible justification of "differential" or "incremental" culpability presumption in cases in which felony is inherently dangerous to life); Crump & Crump, *supra* note 8, at 381 (positing concept of "plus factor" that is supplied by commission of certain felonies and that enables felony-murder rule to "serve the objective of proportional justice"); Robinson, *supra* note 159, at 644 (observing that felony-murder rule may combine causal theory of dangerous situation with culpability theory of underlying felony to produce single "cumulative culpability" equal to that required for murder).

188. To treat the felon as a manslaughterer is indulgent because the felon had greater culpability than that which is necessary to render one a manslaughterer—he possessed culpable negligence *plus* a felonious intent. On the other hand, treatment as a murderer is harsh because the felon had lesser culpability than that which is required to render one a murderer—he did not possess actual malice.

189. Evidence of the operation of these additional premises can be found in criminal

law doctrines other than felony-murder. If, for example, a defendant acts under a bona fide mistaken belief regarding an essential element of an offense, but would still be guilty of a "lesser" crime under the circumstances as she believed them to be, the law might well accord no exculpatory significance to the mistake and might hold the defendant liable for the more serious offense even though she lacked culpability for that offense. *See* People v Lopez, 77 Cal. Rptr. 59, 63-64 (Ct. App.) (concluding that defendant's mistaken belief that recipient was over 21 years of age was not defense to charge of furnishing marijuana to minor, in part because act that defendant contemplated committing—furnishing marijuana—was criminal, not innocent, act), *cert. denied*, 396 U.S. 935 (1969). This conclusion manifests an unwillingness to engage in precise measurement of the culpability of one who has decided to commit some criminal act and suggests an inclination to hold one with "unclean hands" liable for all consequences of his deeds.

Complicity law has also been influenced by the public's different slants on fault. If a person meets the requirements necessary to qualify as an accomplice to one offense, she might well be held responsible for any other offenses committed by the principal as long as those offenses were "reasonably foreseeable." *See* MODEL PENAL CODE § 2.06 commentary at 313 n.43 (1985) (listing states that adopt "reasonably foreseeable" or "probable consequence" approach). The accomplice is held liable, in essence, for her negligent promotion of the ancillary offenses even though the culpability requirements for the offenses themselves and the level of culpability essential to qualify as an accomplice in the first place are both higher than negligence. *See id.* at 312 n.42 (discussing incongruity and injustice of holding accomplice liable based on negligent promotion of offense "even though more is required to convict the principal actor"); *id.* at 313-20 (indicating that under two dominant views of mens rea required to qualify as accomplice to crime one must either have purpose to promote offense or at least know that one is promoting offense). The underlying message is that if an individual becomes an accomplice, she forfeits any entitlement to a close look at culpability for additional, consequential harms. In other words, much like the felony-murderer, the "guilty" accomplice assumes the risks and acts in peril of further liability

The law surrounding intoxication provides further evidence of popular culpability principles. If an individual chooses to become intoxicated, the law will typically hold him liable for an offense requiring conscious disregard of particular risks even if he was, due to the intoxication, unaware of those risks. *See id.* § 2.08(2) (noting that even though recklessness—awareness of risk—is requisite for conviction of offense, if one is unaware due to self-induced intoxication and would otherwise have been aware of risk, he is treated as if aware of risks); *id.* § 2.08 commentary at 353-54 (noting that net effect of traditional common-law rule allowing voluntary intoxication as defense against specific intent crimes, but not against general intent crimes, is to preclude defense for crimes requiring recklessness or negligence). In effect, the law is willing to treat the recklessness involved in drinking as tantamount to the recklessness required for the particular offense. *See id.* at 359 (concluding that it is fair to postulate general equivalence between risks created by drunken actor's conduct and risks created by his conduct in becoming drunk). In some jurisdictions, the law will even preclude an intoxicated person from demonstrating that his faculties were sufficiently impaired to preclude the formation of an "intent" required for the offense charged. *See* PA. STAT. ANN. tit. 18, § 308 (1983) (allowing intoxication evidence to be used to reduce first degree to second degree murder, but otherwise barring negation of intent through evidence showing impairment of faculties due to voluntary intoxication); McDaniel

doctrine descended from prior generations and compatible with modern American politics. They help explain the inefficacy of the scholarly community's accusations that felony-murder transgresses basic principles and the failure of numerous efforts to overthrow the rule.

One final point merits clarification and repetition. My endeavor has been to document the popular views that could explain felony-murder's endurance and to describe the ways in which public and scholarly understandings seem to diverge. It has not been my intent to endorse any of these views. At the same time, I have tried to avoid denunciation or dismissal. My objects have been description, explanation, and exploration.

VI. Conclusions

If it had been my task to analyze and critique the felony-murder rule, I would have been inclined to find much fault with it and to add my voice to the chorus of its opponents. I am steeped in a scholarly tradition that finds the rule irreconcilable in principle with fundamentals of modern culpability and blame. My object, however, was not to follow the well-worn course of prior analysts. Instead, it was to investigate and discuss the forces that have made the doctrine resistant to the many efforts to purge it from our body of laws.

One more diatribe about the irrationalities and perils of the rule would not have been of much service. The rule has withstood better assaults than I could have mustered. One hope is that my approach to the subject might inspire some new perspectives on the rule. Perhaps this effort to determine why the rule has been able to endure will prompt both the scholarly and lawmaking communities to see the rule in a different light and to re-evaluate their well-entrenched biases. Perhaps those bent on reform might

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v. State, 356 So. 2d 1151, 1161 (Miss. 1978) (Sugg, J., specially concurring) (concluding that evidence of voluntary intoxication may no longer be used to disprove intent required for specific intent defenses).

One who chooses to become voluntarily intoxicated to such an extent forfeits his right to close scrutiny of culpability and is punished for the harmful acts that result from the "guilty" decision to become intoxicated. In essence, these intoxication doctrines reflect the view that a "guilty" drunken individual who causes harm without the normally required mental state, but while in a self-induced, impaired condition, is quite unlike a truly "innocent" sober individual who causes harm without the requisite mental state.

This discussion is not meant to provide an exhaustive list of the rules that demonstrate popular culpability principles at work. Its object is to show that some of the premises and understandings underlying felony-murder's persistence are well-entrenched and influential in other areas of criminal law.

simply be prompted to come at their task from different angles. Maybe supporters will only be further convinced of the virtues of their position. At the very least, I hope my modest effort will facilitate understanding of one of the more remarkable legal phenomena of our time—the survival of the felony-murder rule.