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A COMPARATIVE REVIEW OF STATES' RECOGNITION OF REDUCED DEGREES OF FELONY MURDER

At common law, the felony murder rule defined any homicide committed during the perpetration of a felony as murder.¹ English courts criticized the harsh penal consequences of the rule² and in 1957, Parliament abolished the rule.³ The majority of jurisdictions in the United States,

¹ See Lord Dacre's Case, 1 M. HALE, PLEAS OF THE CROWN 439 (1546) (killing during attempted felony is murder); Regina v. Keat, 87 Eng. Rep. 661, 662 (1697) (dictum) (any killing during commission of felony is murder). Historically, authorities have disagreed concerning the type of underlying act sufficient to support a felony murder conviction. Compare E. COKE, THIRD INSTITUTE 56 (1680) (unlawful act not necessarily a felony may support felony murder conviction) with 1 M. HALE, PLEAS OF THE CROWN 465 (1778) (felony murder results only when underlying act is a felony) and 4 W. BLACKSTONE, COMMENTARIES 192-93 (1809) (homicide resulting from commission of felony is murder, but killing as consequence of civil trespass is manslaughter).

² See Regina v. Serne, 16 COX, CRIM. CAS. 311, 312-3 (1887). In *Serne*, the court criticized the felony murder rule as being cruel and inadequately supported by authority. *Id.* The court rejected the doctrine that any felony may serve as an adequate basis for a felony murder conviction. *Id.* The *Serne* court adopted the limitation that any act known to be dangerous to life and likely to cause death, that is committed with the purpose of perpetrating a felony, and which causes death, is murder. *Id.* at 313. Other courts, recognizing the harsh penal consequences of the rule, found ways to completely avoid application of the rule. See Regina v. Greenwood, 7 COX, CRIM. CAS. 404 (1857); Regina v. Horsey, 176 Eng. Rep. 129 (1862). In *Greenwood*, the jury found the defendant guilty of rape but would not convict the defendant of the felony murder because of the severe penal consequences. 7 COX, CRIM. CAS. at 404. In *Horsey*, the jury convicted the defendant of arson but not of felony murder. 176 Eng. Rep. at 130. Although the defendant in *Horsey* had set fire to an enclosure that resulted in the occupant's death, the jury decided that the deceased had entered the enclosure after the fire had started and therefore, the deceased's death was not the natural consequence of the defendant's unlawful act. *Id.* at 131-32.

Other English courts only applied the felony murder rule in limited instances. See Director of Public Prosecution v. Beard, 1920 A.C. 479, 481 (liability determined by objective test of whether killing was act of violence and committed in furtherance of violent felony); Regina v. Whitmarsh, 62 J.P. 711 (1898) (when underlying act is nonviolent felony, such as abortion, liability hinges on whether reasonable man could have seen no possibility of death).

³ See HOMICIDE ACT, 5 & 6 Eliz. II, c. 11 (1957) (abolition of felony murder rule in England).

however, retain various attenuated forms of the rule.⁴ In response to arguments against strict application of the rule to a higher degree of murder, such as first degree murder,⁵ several jurisdictions now apply the rule to reduced degrees of homicide, such as second or third degree murder,⁶ or involuntary manslaughter.⁷ Only a minority of jurisdictions, however, limit the application of the rule with the principles of malice

⁴ See chart below (referencing footnotes and accompanying text discussing individual states' application of felony murder rule).

STATE—FOOTNOTE

Ala.-30,39	Ky.-81	N.D.-30
Alaska-30	**La.-33-35,60,73-76	***Ohio-30-35
*Ariz.-32	Me.-30	**Okla.-33-35,49,87
Ark.-31,39,48	*Md.-33,102	Or.-30
**Cal.-33-37,49,87	*Mass.-33	Pa.-30
*Colo.-32,106	Mich.-81,96-98	*R.I.-32
Conn.-30	**Minn.-33-42,60,73,87	S.C.-39
**Del.-33,60-69,77-80	Miss.-31,34,39	**S.D.-33-37,49,87
D.C.-77-78	*Mo.-33	*Tenn.-33,44-46
**Fla.-33-39,49-58,87	Mont.-30	Tex.-30
Ga.-30	Neb.-31,34	**Utah-33,60,70-72
Hawaii-81	*Nev.-39-43,49-55	*Vt.-32
*Idaho-31-33	**N.H.-33,60,70	**Va.-33,39,49,87
Ill.-39	N.J.-39,54	**Wash.-33-35,87
***Ind.-34-35	N.M.-34	*W.Va.-32
*Iowa-32-33,44	N.Y.-30	Wis.-30
*Kan.-32	*N.C.-33	*Wyo.-32

*statutes define only first degree felony murder

**statutes define first, second and/or third degree felony murder

***statutes define felony murder and felony involuntary manslaughter

⁵ See R. MORELAND, *THE LAW OF HOMICIDE* 53-54 (1952) (felony murder rule should be limited to prove reduced degrees of homicide). See generally *People v. Aaron*, 409 Mich. 672, 299 N.W.2d 304 (1980) (discussion of various courts' criticism of felony murder rule).

⁶ See *infra* notes 30 & 33 (list of statutes recognizing reduced degrees of felony homicide). A minority of states recognize third degree felony murder as a type of murder imposing a less severe punishment than second degree murder. See FLA. STAT. ANN. § 782.04 (Supp. 1982) (statutory recognition of third degree felony murder); MINN. STAT. ANN. § 609.195 (West Supp. 1982) (third degree felony murder statutorily defined).

⁷ See *infra* note 34 (discussion of statutes recognizing types of involuntary manslaughter).

aforethought⁸ and criminal liability⁹ that formed the basis of the original common-law felony murder rule.¹⁰

English courts first applied the felony murder rule in 1536,¹¹ eleven years prior to the last statutory enactment dividing homicide into the categories of murder and criminal homicide.¹² The 1547 homicide statute defined murder as any killing committed with "malice aforethought."¹³ Criminal homicide, later defined as manslaughter, included killings committed without malice aforethought.¹⁴ Prior to the late seventeenth century, malice aforethought designated a general malevolence or a volun-

⁸ See *infra* note 30 (list of statutes limiting felony murder rule to reduced degrees of unlawful-act homicide); see also *infra* text accompanying notes 109-112 (discussion of principles of malice aforethought that underlay common-law felony murder rule). Several state courts have imposed numerous limitations on the rule in an attempt to reconcile the rule with current malice aforethought requirements. See *People v. Aaron*, 409 Mich. 672, 680, 299 N.W.2d 304, 312-13 (1980). Numerous jurisdictions require that the underlying felony be dangerous to human life and that the homicide be the natural and probable consequence of the act. *Id.* at 312-13 & nn.47-48. Other jurisdictions require that the felon caused the death "in furtherance" of a felonious purpose and that the victim was not one of the felons. *Id.* at 313 & n.50. Several jurisdictions apply other limitations to further restrict application of the rule. See generally Note, *The Felony-Murder Rule: In Search of a Viable Doctrine*, 23 CATH. LAW. 133 (1978) [hereinafter cited as *Viable Doctrine*] (discussion of statutory limitations of rule).

⁹ See *infra* text accompanying notes 101-103 (discussion of inconsistencies between majority of felony murder statutes and principles of criminal liability).

¹⁰ See *infra* text accompanying notes 11-22 (development of felony murder rule at common law).

¹¹ See *Mansell and Herbert's Case*, 73 Eng. Rep. 279, 280 (K.B. 1536) (court convicted group of men of murder when one man, during an attempted theft, accidentally struck and killed a woman with a stone thrown at another person).

¹² See 1 Edw. 6, c. 12, 510 (1547) (statute dividing homicide into two categories by removing benefit of the clergy from more culpable offense of murder). Prior to the sixteenth century, the benefit of the clergy attached to all felonies that were capital offenses. See L. GABEL, *BENEFIT OF THE CLERGY IN ENGLAND IN THE LATER MIDDLE AGES*, 116 (1929). The benefit of the clergy allowed any literate defendant to face prosecution under the Church's jurisdiction, rather than the Crown's jurisdiction. *Id.* at 7. Ecclesiastical courts were more lenient and provided absolute immunity from capital punishment. *Id.* at 117-18. Courts used a literacy test to distinguish between clerics, who could invoke the benefit of the clergy, and illiterate lay persons. *Id.* at 30. By the early sixteenth century, however, mental culpability replaced "literacy" as the factor that determined punishment for murder. See Note, *Felony Murder as a First Degree Offense: An Anachronism Retained*, 66 YALE L. J. 427, 428-29 (1957) [hereinafter cited as *Anachronism*] (historical overview of benefit of the clergy).

¹³ See 1 Edw. 6, c. 12, s. 10 (1547) (statute eliminating benefit of the clergy from all murders committed with malice prepensed, later designated as malice aforethought); 3 J. STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* 44 (1883) (murder included homicides committed with malice aforethought). The Statute of 13 Richard, passed in 1389 to regulate pardons, contained the first statutory recognition of malice prepensed later designated as malice aforethought. 13 Rich. 2, no. 2, c. 1 (1389); 3 STEPHEN at 43. Courts, prior to the seventeenth century, defined the term "malice aforethought" as a general desire to injure. *Id.*

¹⁴ See 3 STEPHEN, *supra* note 13, at 44 (criminal homicide later called manslaughter, included killings committed without malice aforethought).

tary wrongdoing.¹⁵ Although a minority of courts retained the original definition of malice aforethought,¹⁶ other seventeenth century courts began to insert the mental requisites of premeditation and specific intent into malice aforethought.¹⁷ In an attempt to reconcile the felony murder rule with the indefinite malice aforethought requirement for murder, courts adopted the theory of constructive malice.¹⁸ The theory of constructive malice permitted courts to substitute the felon's intent to commit the underlying felony for the malice aforethought requirement of murder.¹⁹ Originally, the felony murder rule encompassed all felonies²⁰ and the punishment for felony murder was death.²¹ The punishment for the commission of a felony, however, also frequently was death.²²

In 1681, Pennsylvania became the first jurisdiction in the United States to adopt English felony laws, including the definition of murder as any killing committed with malice aforethought.²³ In 1682 and 1683, the governor of Pennsylvania amended the laws by providing that only murder warranted the death penalty and by substituting "wilfully and premeditate-

¹⁵ See *Halloway's Case*, 79 Eng. Rep. 715, 716 (1625) (cruel act against victim who offers no resistance provides evidence of malice prepensed); *Grey's Case*, 84 Eng. Rep. 1084, 1085 (1666) (voluntary commission of wrongful act is evidence of malice prepensed); *Regina v. Mawgridge*, 84 Eng. Rep. 1107, 1111 (1669) (individual who voluntarily committed cruel act behaved with malice prepensed); 2 F. POLLOCK & F. MAITLAND, *HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 469 n.1 (1911) (prior to late seventeenth century malice aforethought designated voluntary wrongdoing).

¹⁶ See *Regina v. Doherty*, 16 COX, CRIM. CAS. 306, 307 (1887) (Stephen, J.) (acting with malice aforethought means committing cruel act voluntarily).

¹⁷ See *infra* text accompanying note 109 (discussion of courts' differing interpretations of malice aforethought during seventeenth century).

¹⁸ See *Mackalay's Case*, 79 Eng. Rep. 239, 240 (1611) (court substituted felon's mental state accompanying commission of felony for malice aforethought requirement of murder). Theory of "constructive malice" substitutes the intent to commit a felony for the requisite malice aforethought element of murder. See *Viable Doctrine*, *supra* note 8, at 135 n.3 (1977). Courts frequently used constructive malice interchangeably with "implied malice." See T. MORRIS & L. BLOM COOPER, *A CALENDAR OF MURDER: CRIMINAL HOMICIDE IN ENGLAND SINCE 1957*, 313 (1964). The theory of implied malice allows courts to infer malice aforethought from the defendant's intention to cause serious bodily harm or to commit an act likely to cause death. See *Viable Doctrine*, *supra* note 8, at 135 n.3.

¹⁹ See *Regina v. Woodburne & Coke*, 16 State Tr. 53 (1722) (King, C.J.) (felonious intent accompanying commission of unlawful act imputed to accidental killing, converting accidental killing into murder).

²⁰ See *supra* note 1 (felony murder rule originally applied to killing committed during perpetration of any felony).

²¹ See 3 STEPHEN, *supra* note 13, at 44-46 (punishment for unjustifiable or unexcusable murder was death).

²² See Corcoran, *Felony Murder in New York*, 6 FORDHAM L. REV. 43, 53-54 (1937) (majority of common-law felonies were punishable by death).

²³ See CHARTER TO WILLIAM PENN AND LAW OF THE PROVINCE OF PENNSYLVANIA PASSED BETWEEN YEARS OF 1682 & 1700, 84 (1874) (felony laws of England applied to Pennsylvania). When Pennsylvania adopted English felony law, murder at common law included any killing of a human with malice aforethought. 1 M. HALE, *PLEAS OF THE CROWN* 425 (1736).

ly" for the malice aforethought element of common-law murder.²⁴ In 1794 the Pennsylvania legislature enacted a statute defining first degree murder²⁵ as any deliberate, wilful, and premeditated killing or any killing committed during the perpetration or attempted perpetration of arson, rape, robbery, or burglary.²⁶ Courts, however, ignored the requirement of wilful premeditation and considered intent to kill sufficient to support a first degree murder conviction.²⁷ In 1974, the Pennsylvania legislature eliminated the element of premeditation from the first degree murder statute and reduced felony murder to second degree murder.²⁸

Currently, all but three states in the United States recognize some form of felony murder.²⁹ Unlike Pennsylvania, however, the majority of states do not restrict felony murder to a reduced degree of homicide, such as second or third degree murder or involuntary manslaughter.³⁰ The

²⁴ See 2 STAT. AT LARGE OF PENN. 1700-1712 at 172 (1896) (establishment of reduced penalty for all offenses except murder, which required proof of willful premeditation under amended murder statute).

²⁵ See 4 JOURNAL OF THE SENATE 80 (Pa. 1794) (statutory division of murder into first and second degree).

²⁶ See *id.*

²⁷ See *Keenan v. Commonwealth*, 44 Pa. 55, 56 (1862) (true criterion of first degree murder is intent); *Republica v. Mulatto Bob*, 4 Dall., 145, 146 (Pa. 1795) (intention, rather than premeditation, remains true criterion of liability for first degree murder).

²⁸ Compare 18 PA. CONS. STAT. ANN. § 2502 (Purdon 1983) (1974 amendment reduced first degree felony murder to second degree felony murder) with 18 PA. CONS. STAT. ANN. § 2502 (Purdon 1973) (first degree felony murder encompasses killings committed during perpetration of specific felonies).

²⁹ See *infra* notes 30-34 (list of felony murder statutes for various jurisdictions).

³⁰ See 18 PA. CONS. STAT. ANN. § 2502 (Purdon Supp. 1981) (statutory limitation of felony murder to murder in second degree); see also *infra* notes 33-34 (list of statutes applying felony murder rule to multiple degrees of homicide). Of the jurisdictions that recognize multiple degrees of murder, only six jurisdictions restrict application of the felony murder rule to one reduced degree of murder. See ALASKA STAT. § 11.41.110 (Supp. 1982) (recognizing only second degree, not first degree, felony murder); ME. REV. STAT. ANN. tit. 17-A § 202 (1964 & Supp. 1982) (felony murder is lesser offense than nonfelony murder); N.Y. PENAL LAW § 125.25 (McKinney 1975) (statutory recognition of only second degree felony murder); OHIO REV. CODE ANN. § 2903.04 (Baldwin 1983) (statute restricts rule to felony involuntary manslaughter); 18 PA. CONS. STAT. ANN. § 2502 (Purdon Supp. 1982) (first degree felony murder reduced to second degree felony murder); WIS. STAT. ANN. § 940.02 (West 1982) (limiting felony murder rule to second degree murder). Statutes in several jurisdictions that do not divide murder into degrees, include felony murder in the same category as "murder" and do not statutorily recognize a lower degree of unlawful-act homicide. See ALA. CODE § 13A-6-2 (1982 Repl. Vol.) (murder includes intentional killing or causing death by reckless acts or acts evidencing extreme indifference towards human life or killing during commission of enumerated felony); CONN. GEN. STAT. ANN. §§ 53a-54a, 53a-54c (West Supp. 1982) (murder includes intentional killing or killing during commission of enumerated felony); GA. CODE ANN. § 16-5-1 (1982) (murder includes killing with intent or abandoned and malignant heart or killing during commission of any felony); MONT. CODE ANN. § 45-5-102 (1981) (murder includes any purposeful or knowing killing, or killing during commission of enumerated or forcible felony); N.D. CENT. CODE § 12.1-16-01 (Supp. 1981) (murder includes intentionally or knowingly causing death, or killing while acting with extreme indifference

jurisdictions that apply the rule to higher offenses, such as first degree murder, generally convict individuals of felony murder on proof of a killing committed during the perpetration of a felony, without establishing the mental state requirement for murder.³¹ Several states have enacted statutes that apply the felony murder rule to more than one degree of homicide.³² Most states apply one form of the rule to a higher degree of homicide and another form of the rule to a lower degree of homicide.³³

towards human life, or while committing a particular felony); OR. REV. STAT. § 163.115 (1981) (murder includes either intentional killing or killing during perpetration of a specific felony); TEX. PENAL CODE ANN. § 19.02 (Vernon 1974) (murder includes intentionally or knowingly causing death, or killing while committing a felony and during an act clearly dangerous to human life).

³¹ See IDAHO CODE § 18-4003 (1979) (first degree felony murder conviction does not require proof of intent to kill); MISS. CODE ANN. § 97-3-19 (Supp. 1982) (killing without specific intent to kill, while committing a felony, constitutes first degree murder); NEB. REV. STAT. § 28-303 (1979) (intent to kill not necessary element of first degree murder conviction). *But see* ARK. STAT. ANN. § 41-1501 (1977 Repl. Vol.) (first degree felony murder requires proof of extreme indifference to life and killing during commission of any felony).

³² See ARIZ. REV. STAT. ANN. § 13-1105(A) (1978) (recognizing only first degree felony murder); COLO. REV. STAT. § 18-3-102(b) (1978 Repl. Vol.) (statutes limit felony murder to first degree offense). The Colorado Supreme Court has stated clearly that second degree felony murder does not exist in Colorado. *See Sayer v. People*, 173 Colo. 351, 353, 478 P.2d 672, 674 (1970) (second degree felony murder not recognized). Iowa, Rhode Island, Vermont, West Virginia and Wyoming also statutorily recognize only first degree felony murder as a killing committed during the perpetration of an enumerated felony. *See* IOWA CODE ANN. § 707.2 (West 1979); R.I. GEN. LAWS § 11-23-1 (Supp. 1980); VT. CODE ANN. tit. 13, §13-2301 (1974); W. VA. CODE § 61-2-1 (1977 Repl. Vol.); WYO. STAT. ANN. § 6-4-101 (1977). Kansas' first degree felony murder statute includes killings committed during perpetration of nonenumerated felonies. KAN. STAT. ANN. § 21-3401 (1981); *see also infra* note 33 (courts judicially recognize second degree felony murder in absence of specific statutory provision).

³³ See CAL. PENAL CODE § 189 (West Supp. 1982) (statutes differentiate between first and second degree felony murder); DEL. CODE ANN. tit. 11, §§ 11-635, 11-636 (1979 Repl. Vol. & Supp. 1982) (statutory recognition of both first and second degree felony murder); FLA. STAT. ANN. § 782.04 (West 1976 & Supp. 1982) (statutory delineation of first, second and third degree felony murder); LA. REV. STAT. ANN. §§ 14:30, 14:30.1, 14:31 (West 1974 & Supp. 1982) (statutory recognition of first and second degree felony murder and form of felony involuntary manslaughter); MINN. STAT. ANN. §§ 609.185, 609.19 (West Supp. 1982) (statutes differentiate between first and second degree felony murder); N.H. REV. STAT. ANN. §§ 630:1-a, 630:1-b (Supp. 1981) (first and second degree felony murder recognized); OKLA. STAT. ANN. tit. 21, §§ 701.7, 701.8 (West 1958 & Supp. 1982) (first and second degree felony murder statutorily distinguished); S. DAK. CODIFIED LAWS, §§ 22-16-4, 22-16-9 (Supp. 1981) (first degree felony murder statutorily distinguished from second degree felony murder); UTAH CODE ANN. §§ 76-5-202, 76-5-203 (1978 Repl. Vol. & Supp. 1981) (first and second degree felony murder recognized); VA. CODE §§ 18.2-32, 18.2-33 (1982 Repl. Vol.) (first degree felony murder and reduced degree of felony homicide statutorily distinguished); WASH. REV. CODE ANN. §§ 9A.32.030, 9A.32.050 (1977) (statutes established both first and second degree felony murder). Some jurisdictions that do not recognize degrees of murder distinguish between felony murder, as a form of murder, and felony involuntary manslaughter. *See* IND. STAT. ANN. §§ 35-42-1-1, 35-42-1-4 (Burns 1979 Repl. Vol.) (felony murder and felony involuntary manslaughter statutorily distinguished); *see also infra* note 34 (discussion of statutory distinctions between felony murder and felony involuntary manslaughter).

In several jurisdictions that statutorily recognize only first degree felony murder, the

The term "unlawful-act homicide" replaces the term "felony murder" to encompass all degrees of homicide, including involuntary manslaughter, currently recognized by various forms of the rule.³⁴

Several states differentiate between degrees of unlawful-act homicide solely on consideration of the nature of the underlying act involved.³⁵ For

courts judicially recognize a different form of second degree felony murder. *See, e.g.*, State v. Alcorn, 7 Idaho 599, ___, 64 P. 1014, 1019 (1901) (intent to commit felonious abortion sufficient to support conviction of second degree felony murder); State v. Rowley, 216 Iowa 140, ___, 248 N.W. 340, 341 (1933) (same); Evans v. State, 28 Md. App. 640, 686 n.23, 349 A.2d 300, 330 n.23 (1975) (common-law felony murder rule raises homicide committed during perpetration of felony to second degree murder), *aff'd*, 362 A.2d 629 (1976); Commonwealth v. Ambers, 370 Mass. 835, 838, 352 N.E.2d 922, 926 (1976) (homicide perpetrated during commission of certain felonies equals second degree murder); State v. Powell, 630 S.W.2d 168, 170 (Mo. App. 1982) (dictum) (commission of certain unlawful voluntary acts may be sufficient to supply intent requirement for second degree felony murder); Sheriff, Clark County v. Willoughby, 97 Nev. 90, 92, 624 P.2d 498, 499 (1981) (homicide resulting from attempted escape is murder, although not murder in the first degree); State v. Jenkins, 300 N.C. 578, ___, 268 S.E.2d 458, 460 (1980) (dictum) (commission of certain inexcusable wrongful acts may satisfy malice requirement for second degree murder); Bailey v. State, 479 S.W.2d 829, 831-33 (Tenn. Crim. App. 1972) (intent to do unlawful act that probably will result in loss of life satisfies malice requirement for second degree murder).

³⁴ *See infra* notes 30-33 (list of various statutory forms of felony murder rule). Several states recognize a form of felony involuntary manslaughter which includes killings committed during the perpetration of a felony other than the felonies listed in the state's felony murder statute. *See* IND. STAT. ANN. § 35-42-1-4 (Burns 1979 Repl. Vol.) (involuntary manslaughter includes killings committed during perpetration of Class C or D felony that inherently poses risk of serious bodily harm); LA. REV. STAT. ANN. § 14.31 (West 1974) (involuntary manslaughter includes killing during perpetration of felony not enumerated in first or second degree murder statute); OHIO REV. STAT. ANN. § 2903.04 (Baldwin 1983) (involuntary manslaughter includes killings during commission of felony not enumerated in first degree felony murder statute). Most other states recognize a form of involuntary manslaughter known as misdemeanor manslaughter which includes unintentional killings committed during the perpetration of an unlawful act other than a felony. *See, e.g.*, MISS. CODE ANN. § 97-3-29 (1972) (manslaughter includes killing committed during perpetration of misdemeanor); NEB. REV. STAT. § 28-403 (1975) (manslaughter conviction requires proof of unintentional killing during commission of unlawful act); N.M. STAT. ANN. § 30-2-3 (1978) (involuntary manslaughter conviction requires proof of killing during commission of unlawful act not a felony). Nebraska courts have recognized a variety of unlawful acts that will support a manslaughter conviction. *See* Skinner v. Jensen, 178 Neb. 733, 734, 135 N.W.2d 134, 136 (1965) (proof of assault and battery will sustain manslaughter charge); Thiede v. State, 106 Neb. 48, 50, 182 N.W. 570, 572 (1921) (furnishing liquor with extremely high alcoholic content may be unlawful act within meaning of manslaughter statute); Stehr v. State, 92 Neb. 755, 757, 139 N.W. 676, 677-78 (1913) (manslaughter charge based on proof of culpable neglect of infant).

³⁵ *See* CAL. PENAL CODE § 189 (West Supp. 1982) (distinction between first and second degree felony murder based on whether killing occurred during commission of enumerated or nonenumerated felony); FLA. STAT. ANN. § 782.04 (West 1976 & Supp. 1982) (distinction between first and third degree felony murder depends on type of underlying felony involved); MINN. STAT. ANN. §§ 609.185, 609.19 (West Supp. 1982) (second and third degree felony murder distinguished according to type of underlying felony involved); OKLA. STAT. ANN. tit. 21 §§ 701.7, 701.8 (West 1958 & Supp. 1982) (type of underlying felony involved distinguishes first degree from second degree felony murder); S. DAK. CODIFIED LAWS §§

example, some states distinguish between first and second degree felony murder based on whether the predicate felony was statutorily enumerated rather than nonenumerated.³⁶ Enumerated felonies are specific felonies that a legislature lists in the state's homicide statute as sufficient to support a felony homicide conviction.³⁷ Enumerated felonies typically include inherently dangerous felonies, such as rape, arson, burglary, and kidnapping.³⁸ Although first degree murder may require proof that the defendant committed an enumerated felony,³⁹ a reduced degree of homicide

22-16-4, 22-16-9 (Supp. 1981) (same); VA. CODE § 18.2-33 (1982 Repl. Vol.) (first degree felony murder distinguished from reduced degree of felony homicide according to nature of underlying felony involved); WASH. REV. CODE ANN. §§ 9A.32.030, 9A.32.050 (1977) (difference between first and second degree felony murder based on nature of underlying felony). Several jurisdictions distinguish between degrees of felony murder and felony involuntary manslaughter based only on differences in the type of underlying felony involved. *See* IND. STAT. ANN. §§ 35-42-1-1, 35-42-1-4 (Burns 1979 Repl. Vol.) (difference between felony murder and felony involuntary manslaughter based on type of underlying felony involved); LA. REV. STAT. ANN. §§ 14:30.1, 14.31 (West Supp. 1982) (second degree felony murder and felony involuntary manslaughter distinguished according to type of underlying felony involved); OHIO REV. CODE ANN. §§ 2903.01, 2903.04 (Baldwin 1983) (nature of underlying felony distinguishes premeditated murder from involuntary manslaughter).

³⁶ *See supra* note 35 (examples of statutes differentiating between degrees of felony murder based on type of underlying felony involved).

³⁷ *See* CAL. PENAL CODE § 189 (West Supp. 1982) (first degree felony murder includes any killing committed during perpetration of arson, rape, robbery, burglary, mayhem, or any lewd or lascivious act towards child); FLA. STAT. ANN. § 782.04 (West 1976 & Supp. 1982) (felonies sufficient to satisfy first degree felony murder conviction are trafficking of cannabis, arson, sexual battery, robbery, burglary, kidnapping, escape, aircraft piracy or unlawful use of destructive device); S. DAK. CODIFIED LAWS § 22-16-4 (Supp. 1982) (first degree felony murder includes killing during commission of arson, rape, robbery, burglary, kidnapping or unlawful use of destructive device or explosive).

³⁸ *See supra* note 37 (examples of statutorily enumerated felonies that support first degree felony murder convictions).

³⁹ *See supra* notes 34 & 35 (list of statutes requiring proof of commission of enumerated felony to support conviction of higher offense). Some jurisdictions distinguish between capital and noncapital murder based on whether the killing occurred during the commission of an enumerated or nonenumerated felony. *See* ARK. STAT. ANN. §§ 41-1501, 41-1502 (1977 Repl. Vol.) (homicide occurring during commission of enumerated felony, rather than nonenumerated felony, is capital offense). FLA. STAT. ANN. § 702.04 (West 1976 & Supp. 1982) (same); MISS. CODE ANN. § 97-3-19 (Supp. 1982) (same). Most jurisdictions, however, require proof of a mental state, such as specific or premeditated intent to kill, as well as proof of a homicide occurring during commission of an enumerated felony to convict a defendant of capital murder. *See* ALA. CODE § 13A-5-40 (1982 Repl. Vol.) (capital murder conviction requires proof of both specific intent to kill and commission of an enumerated felony); ILL. ANN. STAT. ch. 38, § 9-1 (Smith-Hurd Supp. 1982) (same); IND. STAT. ANN. § 35-42-1-1 (Burns 1979 Repl. Vol.) (same); NEV. REV. STAT. § 200.030 (1981) (capital murder conviction requires proof of a commission of "murder" that may be proved by evidence of felon's abandoned heart while perpetrating enumerated felony); N.J. STAT. ANN. § 2C:11-3 (West 1982) (capital murder conviction requires proof of knowing or purposeful killing during commission of enumerated felony); S.C. CODE ANN. § 16-3-10 (Law. Co-op. 1976) (same); VA. CODE § 18.2-33 (1982 Repl. Vol.) (capital murder conviction requires proof of premeditated killing during commission of enumerated felony). *But see* ARK. STAT. ANN. § 41-1501 (1977 Repl. Vol.) (court may base capital murder conviction on proof of that defendant acted with ex-

may require only proof of the commission of any other felony not statutorily enumerated.⁴⁰ Furthermore, a minority of states base a conviction of a reduced degree of homicide upon proof of a killing resulting from the commission of an unlawful act not specifically defined as a felony.⁴¹ Several jurisdictions, however, statutorily or judicially limit the felony murder rule by restricting the type of felony or unlawful act that may serve as an adequate basis for conviction.⁴² For example, a Nevada statute requires that to support a second degree murder conviction, the unlawful act must be an act that naturally tends to destroy life.⁴³ In *Stallard v. State*,⁴⁴ the Tennessee Supreme Court held that racing automobiles on the wrong side of the road at excessive speeds was an unlawful act directly perilous to human life.⁴⁵ The *Stallard* court held that the unintentional killing committed during the unlawful act constituted murder in the second degree.⁴⁶

States that differentiate between degrees of unlawful-act homicide on the basis of the type of felony or unlawful act involved,⁴⁷ generally do not require additional proof of the defendant's mental state to support a conviction of unlawful-act homicide.⁴⁸ Several jurisdictions that recognize

treme indifference during commission of felony); MISS. CODE ANN. § 97-3-19 (Supp. 1982) (proof of mental state not required for conviction of capital felony murder).

⁴⁰ See *supra* note 35 (list of statutes differentiating between degrees of felony homicide based on whether killing occurred during commission of enumerated or nonenumerated felony).

⁴¹ See NEV. REV. STAT. § 200.070 (1981) (unintentional killing during commission of unlawful act is manslaughter, although if unlawful act naturally tends to destroy life, killing is murder); see also *infra* text accompanying notes 44-46 (Tennessee Supreme Court recognizes killing during certain unlawful acts as second degree murder).

⁴² See MINN. STAT. ANN. § 609-195 (West Supp. 1982) (third degree murder conviction supported by evidence of unintentional killing during commission of eminently dangerous act). In *State v. Forsman*, a Minnesota court convicted the defendant of third degree felony murder. 260 N.W.2d 160, 164 (Minn. 1977). The defendant had unintentionally killed the victim by administering injections of heroin. *Id.* at 165. Some courts within jurisdictions that statutorily define felony murder as a killing during the commission of any felony require that the felony be inherently dangerous. See *People v. Ireland*, 70 Cal. 2d 522, ___, 450 P.2d 580, 590, 75 Cal. Rptr. 188, 197 (1969) (court determined whether felony, regardless of the surrounding circumstances under which killing occurred, was inherently dangerous); *State v. Underwood*, 615 P.2d 153, 160-61 (Kan. 1980) (first degree felony murder conviction requires proof that felony was inherently dangerous); *Commonwealth v. Estromera*, 419 N.E.2d 835, 843 (Mass. 1981) (second degree felony murder conviction required proof of intent to commit act that creates plain and strong likelihood of death or grave harm).

⁴³ See NEV. REV. STAT. § 200.070 (1981) (killing during commission of unlawful act that naturally tends to destroy life may constitute second degree felony murder).

⁴⁴ 209 Tenn. 13, 348 S.W.2d 489 (1961).

⁴⁵ See *id.* at 14, 348 S.W.2d at 490.

⁴⁶ *Id.*

⁴⁷ See *supra* note 35 (list of statutes differentiating between degrees of felony homicide based on type of underlying felony involved).

⁴⁸ See ARK. STAT. ANN. §§ 41-1501, 41-1502 (1977 Repl. Vol.) (statutory distinction between capital and noncapital felony murder based on type of underlying act involved). The Arkansas statute requires proof that the defendant acted with extreme indifference towards life to support either a capital or noncapital felony murder conviction. *Id.*

a reduced degree of unlawful-act homicide, however, also recognize a lower mental state requirement for conviction of the reduced degree of homicide when the defendant has not committed a felony or unlawful act.⁴⁹ A lower mental state refers to a form of malice aforethought that does not include specific or premeditated intent to kill.⁵⁰ Generally, a lower mental state denotes a degree of recklessness.⁵¹ Some jurisdictions, however, recognize a lower mental state similar to malice aforethought at early common law.⁵² Missouri, for instance, adheres to the early common-law definition of malice aforethought as voluntary wrongdoing.⁵³

State statutes and courts employ various terms, such as "extreme indifference to human life,"⁵⁴ "abandoned and malignant heart,"⁵⁵ or "depraved mind"⁵⁶ to designate a lower mental state. For example, in Florida the prosecution may satisfy the mental state requirement for second degree murder with proof that the defendant acted with a depraved mind.⁵⁷ Furthermore, a Florida prosecutor may satisfy the requirements for second degree murder with proof of a killing during the commission of an enumerated felony.⁵⁸ Therefore, a Florida court may convict a defendant of murder either on proof of a killing during the commission of an

⁴⁹ See CAL. PENAL CODE § 187 (West Supp. 1982) (second degree murder is any unlawful killing committed with malice aforethought). In *People v. Matta*, the California Court of Appeals held that acts of "wanton disregard" towards human life provided evidence of malice aforethought. 129 Cal. Rptr. 205, 210, 57 Cal. App.3d 472, 480 (1976). The *Matta* court held that a felonious assault was an act evidencing wanton disregard. *Id.* at 210, 57 Cal. App.3d at 481. Several jurisdictions require evidence of a "depraved mind" to satisfy the mental state requirement for second degree murder when there is no charge of felony murder. See FLA. STAT. ANN. § 782.04 (West 1976 & Supp. 1982); OKLA. STAT. ANN. tit. 21 § 701.8 (West Supp. 1982); S. DAK. CODIFIED LAWS, § 22-16-9 (Supp. 1982). Virginia requires proof of malice aforethought to support a second degree murder conviction. See VA. CODE § 18.2-33 (1982 Repl. Vol.). *But see* MINN. STAT. ANN. § 609.19 (West Supp. 1982) (second degree murder conviction requires proof of intent to kill).

⁵⁰ See *infra* notes 53-56 (malice aforethought may not designate specific or premeditated intent to kill).

⁵¹ See *infra* notes 53-56 (malice aforethought refers to various degrees of recklessness).

⁵² See *State v. Powell*, 630 S.W.2d 168, 170 (Mo. App. 1982) (malice aforethought means intentional doing of wrongful act); *Bailey v. State*, 479 S.W.2d 829, 834 (Tenn. Crim. App. 1972) (malice aforethought denotes general condition of wicked and depraved spirit bent on mischief).

⁵³ See *State v. Powell*, *supra* note 52, at 170 (malice aforethought designates voluntary wrongdoing).

⁵⁴ See N.J. STAT. ANN. § 2C:11-4 (West 1982) (manslaughter conviction requires proof that defendant recklessly caused death under circumstances manifesting extreme indifference to human life).

⁵⁵ See NEV. REV. STAT. § 200.010 (1981) (abandoned and malignant heart evidences malice aforethought); *State v. Van Vlack*, 57 Idaho 316, 336, 65 P.2d 736, 756-57 (1937) (intent to kill or abandoned and malignant heart is essential element of second degree murder).

⁵⁶ See *supra* note 48 (evidence of depraved mind satisfies malice aforethought requirement of murder).

⁵⁷ See FLA. STAT. ANN. § 782.04 (West 1976 & Supp. 1982) (second degree murder requires proof that defendant acted with a depraved mind).

⁵⁸ See *id.*

enumerated felony, or on proof that the defendant committed a killing with a depraved heart.⁵⁹

Several jurisdictions distinguish between degrees of unlawful-act homicide solely on the basis of the defendant's mental state accompanying the commission of the unlawful act.⁶⁰ Generally, jurisdictions base a conviction for second or third degree felony murder on proof that the defendant committed a homicide, without specific or premeditated intent, during the perpetration of an enumerated felony.⁶¹ Proof of the additional element of specific or premeditated intent to kill elevates the offense to first degree or capital murder.⁶² Some jurisdictions, however, differentiate between degrees of unlawful-act homicide on the basis of the degree of recklessness accompanying the commission of the unlawful act.⁶³ For example, in *Collins v. State*,⁶⁴ the Delaware Supreme Court recognized that first degree felony murder requires proof of a higher form of recklessness than second degree felony murder.⁶⁵ In *Collins*, the defendant killed the victim during the course of a robbery and was convicted of second degree felony murder.⁶⁶ The defendant appealed the conviction on the grounds that the indictment insufficiently charged the defendant with either first or second degree felony murder.⁶⁷ The *Collins* court stated that the indictment sufficiently charged first degree felony murder which requires proof of the defendant's reckless state of mind during the commission of a nonenumerated felony.⁶⁸ The court further stated that the indictment,

⁵⁹ *Id.*

⁶⁰ See DEL. CODE ANN. tit. 11, §§ 11-635, 11-636 (1979 Repl. Vol. & Supp. 1982). Delaware statutes define first and second degree felony murder as an unlawful killing committed during the perpetration of any felony. *Id.* First degree felony murder requires additional proof of recklessness. *Id.* at § 11-636. Second degree felony murder requires additional proof of criminal negligence. *Id.* at 11-635. Louisiana, Minnesota, New Hampshire, and Utah statutes all define first degree and second degree felony murder as an unlawful killing during the commission of an enumerated felony. See LA. REV. STAT. ANN. §§ 14:30, 14:31 (West 1974 & Supp. 1982); MINN. STAT. ANN. §§ 609.185, 609.19 (West Supp. 1982); N.H. REV. STAT. ANN. §§ 630:1-a, 630:1-b (Supp. 1981); UTAH CODE ANN. § 76-5-202, 76-5-203 (1978 Repl. Vol. & Supp. 1981). Louisiana, Minnesota and Utah statutes require independent proof of intent to kill for first degree felony murder. See LA. REV. STAT. ANN. at § 14:30; MINN. STAT. ANN. at § 609.185; UTAH CODE ANN. at § 76-5-202. New Hampshire requires separate proof that a defendant knowingly caused the death of another to elevate second degree felony murder to first degree felony murder. See N.H. REV. STAT. ANN. 630:1-a (Supp. 1981).

⁶¹ See *supra* note 60 (differences in felon's mental state distinguish first degree felony murder from second degree felony murder).

⁶² See *supra* note 60 (proof of higher mental state necessary to support conviction of higher degree of felony murder).

⁶³ See *infra* note 65 (first degree felony murder requires proof of higher degree of recklessness than second degree felony murder).

⁶⁴ 420 A.2d 170 (Del. 1980).

⁶⁵ *Id.* at 173; see DEL. CODE ANN. tit. 11, §§ 11-635, 11-636 (1979 Repl. Vol. 1982 Supp.) (first degree felony murder requires proof of recklessness and second degree felony murder requires proof of criminal negligence).

⁶⁶ 420 A.2d at 172.

⁶⁷ *Id.*

⁶⁸ *Id.* at 173; see DEL. CODE ANN. tit. 11, § 11-636 (1979 Repl. Vol. & 1982 Supp.) (first

a fortiori, supported a second degree felony murder conviction requiring proof of the lower mental state of criminal negligence.⁶⁹

Half of the jurisdictions that recognize mental state as the factor that distinguishes between degrees of unlawful-act homicide, also recognize a lower mental state requirement for conviction of the reduced degree of homicide, absent evidence of the commission of a felony.⁷⁰ For example, in Utah, a defendant can be convicted of second degree felony murder without proof of any particular mental state, if the defendant killed the victim during the perpetration of an enumerated felony.⁷¹ A defendant in Utah also can be convicted of second degree murder without proof of the commission of a felony, if the defendant acted with depraved indifference towards the victim by creating a grave risk of serious bodily harm.⁷²

The remaining states that vary the degree of unlawful-act homicide according to the defendant's mental state, however, require proof of a higher mental state to convict a defendant of a reduced degree of homicide.⁷³ In *State v. Stewart*,⁷⁴ for example, the defendant was convicted

degree felony murder includes recklessly causing death in furtherance of commission of felony).

⁶⁹ 420 A.2d at 173; see DEL. CODE ANN. tit. 11, § 11-635 (1979 Repl. Vol.) (second degree felony murder includes killings committed with criminal negligence during perpetration of nonenumerated felony).

⁷⁰ See N.H. REV. STAT. ANN. § 630.1-b (Supp. 1981) (evidence that defendant acted recklessly under circumstances manifesting extreme indifference to human life satisfies malice aforethought element of second degree murder). In New Hampshire, extreme indifference to life indicates something more than a conscious disregard of a substantial and unjustifiable risk. See *State v. Howland*, 119 N.H. 413, ___, 402 A.2d 188, 191 (1979). The *Howland* court indicated that the extreme indifference element of second degree murder requires a higher degree of recklessness than the recklessness element of manslaughter. *Id.* at ___, 402 A.2d at 191. See N.H. REV. STAT. ANN. § 630.2 (Supp. 1981) (manslaughter statute requires proof of recklessness). Utah statutes permit courts to base second degree murder convictions upon proof that the defendant acted with depraved indifference to life by creating a grave risk of serious bodily harm. UTAH CODE ANN. § 76-5-203 (Supp. 1981).

⁷¹ See UTAH CODE ANN. § 76-5-203 (Supp. 1981) (second degree felony murder includes killing during commission of robbery, rape, forcible sodomy, aggravated sexual assault, arson, burglary, or kidnapping).

⁷² See UTAH CODE ANN. § 76-5-203(1) (c) (Supp. 1981) (evidence of depraved indifference towards life satisfies malice element of second degree murder). In *State v. Day*, the Utah Supreme Court held that the jury should attach an ordinary meaning to the words "depraved indifference." 572 P.2d 703, 705 (Utah 1977). The *Day* court stated that failure to define the words "depraved indifference" did not constitute error. *Id.* The jury in *Day* convicted the defendant of second degree murder relying upon evidence that the defendant had struck the deceased on the head with a wooden stick after an argument regarding an automobile collision. *Id.* at 704-5.

⁷³ See LA. REV. STAT. ANN. § 14:30.1 (West Supp. 1982) (if second degree murder indictment does not charge felony murder, then prosecution must prove that defendant specifically intended to kill or cause bodily harm); MINN. STAT. ANN. § 609.19 (West Supp. 1982) (second degree nonfelony murder requires proof that defendant, without premeditation, specifically intended to kill).

⁷⁴ 400 So. 2d 633 (La. 1981).

of second degree felony murder on proof that the defendant killed the victim while committing armed robbery.⁷⁵ The Louisiana statute for nonfelony second degree murder, however, requires proof of specific intent to kill or to inflict serious bodily harm before courts can convict a defendant of second degree murder.⁷⁶

A minority of state statutes apply alternative forms of the felony murder rule to one particular degree of unlawful-act homicide.⁷⁷ For example, a Delaware statute varies the mental state requirement for first degree felony murder according to the nature of the underlying felony.⁷⁸ Delaware's first degree murder statute requires proof of a higher mental state, such as recklessness, when the killing occurred during the perpetration of an enumerated, rather than a nonenumerated felony.⁷⁹ If the killing occurred during the commission of an enumerated felony, however, the Delaware statute only requires proof of criminal negligence to support a first degree felony murder conviction.⁸⁰ Three other jurisdictions have completely abolished the felony murder rule, either through statutory enactments or judicial abrogation.⁸¹

The majority of jurisdictions that statutorily recognize more than one degree of unlawful-act homicide employ one of two general methods for distinguishing between degrees of unlawful-act homicide.⁸² Ten jurisdictions differentiate between degrees of unlawful-act homicide based on the

⁷⁵ *Id.* at 635.

⁷⁶ See *State v. Huizar*, 414 So. 2d 741, 746 (La. 1982) (gravaman of second degree murder statute is specific intent to kill); LA. REV. STAT. ANN. § 14:30.1(1) (West Supp. 1982) (second degree murder requires proof of intent to kill or cause serious bodily harm).

⁷⁷ See DEL. CODE ANN. tit. 11, § 11-636 (1979 Repl. Vol. & Supp. 1982) (recognition of two different statutory forms of first degree felony murder); D.C. CODE ANN. § 22-2401 (1981) (statute provides two means for proving first degree felony murder).

⁷⁸ DEL. CODE ANN. tit. 11, § 11-636 (1979 Repl. Vol. & Supp. 1982). The Delaware first degree felony murder statute provides the prosecution with two different means of proving first degree felony murder. *Id.*; see *infra* text accompanying notes 79 & 80 (mental state element of first degree felony murder in Delaware varies according to whether killing occurred during perpetration of enumerated or nonenumerated felony). The District of Columbia recognizes two forms of first degree felony murder. See D.C. CODE ANN. § 22-2401 (1981). In the District of Columbia, if the underlying felony was nonenumerated, proof that defendant, purposely, or deliberately and premeditatedly killed, sustains a first degree felony murder conviction. *Id.* If the killing occurred during the perpetration of an enumerated felony, however, courts do not require additional proof of "purpose." *Id.*

⁷⁹ DEL. CODE ANN. tit. 11, § 11-636(a) (2) (1979 Repl. Vol.).

⁸⁰ *Id.* at § 11-636(a) (6) (Supp. 1982).

⁸¹ See HAWAII REV. STAT. § 707-701 (1976 Repl. Vol.) (abolishing felony murder rule); KY. REV. STAT. § 507-020 (1975 Repl. Vol.) (same). See also *People v. Aaron*, 409 Mich. 703, 728, 299 N.W.2d 304, 314 (1980) (judicially abrogating felony murder rule).

⁸² See *supra* notes 33 & 34 (examples of jurisdictions recognizing more than one degree of unlawful-act homicide). The comparison of the states' methods for distinguishing degrees of unlawful-act homicide does not include consideration of misdemeanor manslaughter as a form of unlawful-act homicide. See *supra* note 34 (discussion of distinction between felony and misdemeanor involuntary manslaughter).

type of unlawful-act involved.⁸³ Generally, a reduced degree of unlawful-act homicide requires proof of a killing committed during the perpetration of a nonenumerated, rather than an enumerated felony.⁸⁴ The majority of these ten jurisdictions recognize a lower mental state requirement for the reduced offense when no independent felony is involved.⁸⁵ Furthermore, the majority of these jurisdictions judicially limit the rule by restricting the type of unlawful act that may support a conviction of the reduced degree of unlawful-act homicide.⁸⁶ Six of the ten jurisdictions, however, continue to apply the rule to higher offenses that otherwise require proof of specific or premeditated intent to kill.⁸⁷

The remaining jurisdictions that statutorily recognize more than one degree of unlawful-act homicide differentiate between degrees of homicide on the basis of the felon's mental state during the commission of the felony.⁸⁸ The majority of these jurisdictions require independent proof of a mental state such as recklessness or knowledge to support a conviction of the higher degree of unlawful-act homicide.⁸⁹ Over half of these remaining jurisdictions also require either proof of a separate mental state to support a reduced degree of unlawful-act homicide⁹⁰ or recognize a lower mental state requirement for the reduced offense.⁹¹ A minority of these jurisdictions, however, allow evidence that the defendant committed an enumerated felony to support a conviction of a reduced degree of homicide that otherwise requires proof of specific intent to kill.⁹²

⁸³ See *supra* note 35 (degree of felony homicide varies according to nature of underlying felony).

⁸⁴ *Id.*

⁸⁵ See *supra* note 49 (recognition of lower mental state requirements for certain degrees of homicide).

⁸⁶ See *supra* text accompanying notes 42-45 (discussion of judicial limitations imposed on type of felony that may support felony homicide conviction).

⁸⁷ See CAL. PENAL CODE § 189 (West Supp. 1982) (first degree murder conviction requires proof of premeditation); FLA. STAT. ANN. § 782.04 (West 1976 & Supp. 1982) (same); MINN. STAT. ANN. § 609.185 (West Supp. 1982) (if indictment does not charge felony murder then prosecution must prove intent and premeditation for first degree murder conviction); OKLA. STAT. ANN. tit. 21 § 701.7 (West Supp. 1982) (first degree murder conviction requires proof of deliberate, intentional killing); S. DAK. CODIFIED LAWS § 22-16-4 (Supp. 1981) (premeditation is requisite element of first degree murder); VA. CODE § 18.2-32 (1982 Repl. Vol.) (same). *But see* WASH. REV. CODE ANN. § 9A-32-30 (1977), (proof of premeditation or extreme indifference towards human life may support first degree murder conviction).

⁸⁸ See *supra* note 60 (mental state is factor that distinguishes between degrees of felony homicide).

⁸⁹ See *supra* note 60 (proof of specific or premeditated intent to kill elevates degree of felony homicide).

⁹⁰ See DEL. CODE ANN. tit. 11, § 11-635 (1979 Repl. Vol.) (second degree felony murder conviction requires proof of criminal negligence and killing committed during perpetration of nonenumerated felony).

⁹¹ See *supra* text accompanying notes 60-69 (reduced degrees of homicide require proof of lower mental state).

⁹² See *supra* text accompanying notes 73-76 (reduced degree of nonfelony homicide requires proof of specific or premeditated intent to kill).

In jurisdictions that retain statutes applying the rule to degrees of murder that otherwise require proof of specific or premeditated intent to kill, defendants may nevertheless argue against the court's strict application of the rule.⁹³ First, defendants can urge the court to construe the felony murder statute as requiring separate proof of the elements of murder, including the requisite mental state, before applying the felony murder rule.⁹⁴ For example, in *People v. Aaron*,⁹⁵ the Michigan Supreme Court interpreted Michigan's first degree felony murder statute as requiring independent proof of a "murder."⁹⁶ The Michigan court stated that the additional proof of an independent felony only operates to elevate the offense of murder to first degree murder.⁹⁷ The *Aaron* court reasoned that since the relevant statute defined first degree felony murder as any "murder," rather than any "killing," committed during the perpetration of an enumerated felony, the state must initially prove the elements of murder without relying on proof of the commission of an independent felony.⁹⁸

The argument that the prosecution must separately prove the elements of murder before applying the felony murder rule is difficult to assert, however, in jurisdictions that recognize a reduced degree of unlawful-act homicide.⁹⁹ At the time of the *Aaron* court's decision, Michigan recognized only first degree felony murder.¹⁰⁰ Construing statutes that recognize reduced degrees of unlawful-act homicide as requiring independent proof of the elements of nonfelony murder, renders the statutory requirements of evidence of the commission of a separate felony mere surplusage.

Courts in jurisdictions that statutorily recognize reduced degrees of

⁹³ See *supra* note 87 (list of statutes that require proof of specific or premeditated intent to kill for nonfelony murder).

⁹⁴ See *Michigan v. Aaron*, 409 Mich. 672, 688, 299 N.W.2d 304, 326 (1980) (malice requirement of murder not satisfied by evidence of enumerated or nonenumerated felony); *State v. Galloway*, 275 N.W.2d 736, 738 (Iowa 1979) (proof of intent to commit underlying felony does not relieve prosecution of burden of proving malice requirement of murder).

⁹⁵ 409 Mich. 672, 299 N.W.2d 304 (1980).

⁹⁶ *Id.* at 688, 299 N.W.2d at 326. In *People v. Aaron*, the Michigan Supreme Court stated that proof of the commission of a felony may provide evidence of the malice element of murder. *Id.* The *Aaron* court held that the jury, however, must ultimately decide whether malice did exist. *Id.*

⁹⁷ *Id.* at 689, 299 N.W.2d at 327. The *Aaron* court stated that the prosecution may prove first degree murder, without evidence of premeditation, when a homicide is committed with malice during the perpetration of an enumerated felony. *Id.*

⁹⁸ *Id.* at 321-23. The *Aaron* court held that the term "murder" in Michigan's first degree felony murder statute required the prosecution to initially prove murder before applying the statute to elevate the degree. *Id.* at 323.

⁹⁹ See *supra* notes 94 & 97 (term "murder" in felony murder statutes requires independent proof of malice requirement of murder); *supra* notes 33 & 34 (list of states recognizing reduced degrees of unlawful-act homicide).

¹⁰⁰ See 409 Mich. at 674, 299 N.W.2d at 306 (defendant convicted under Michigan's first degree felony murder statute).

unlawful-act homicide may adopt one of two alternative constructions of the felony murder rule.¹⁰¹ Some courts may assert that the rule substitutes the felon's mental state accompanying the commission of an unlawful-act for the mental state element of murder.¹⁰² When the mental state requirement of murder is specific or premeditated intent, defendants may argue that proof of an independent felony or unlawful act does not provide evidence of the requisite mental state and therefore allows the prosecution to circumvent the constitutional requirement of proving every element of the crime beyond a reasonable doubt.¹⁰³ In *In re Winship*,¹⁰⁴ the United States Supreme Court held that the due process clause of the fourteenth amendment requires that the prosecution bear the burden of proving every element of murder beyond a reasonable doubt.¹⁰⁵

The prosecution, however, may assert the counter-argument that the felony murder rule establishes a separate type of malice aforethought other than specific or premeditated intent to kill.¹⁰⁶ For example, in jurisdictions that differentiate between degrees of unlawful-act homicide solely on the basis of whether the underlying act was an enumerated or a nonenumerated felony,¹⁰⁷ the prosecution may argue that the commission of an

¹⁰¹ See *infra* text accompanying notes 94, 102 & 108 (discussion of alternative constructions of current felony murder rule).

¹⁰² See, e.g., *De Loach v. State*, 388 So.2d 31, 32 (Fla. Dist. Ct. App. 1980) (intent to commit felony supplants malice aforethought requirement of murder); *State v. Underwood*, 228 Kan. 294, ___, 615 P.2d 153, 160 (1980) (doctrine of transferred intent permits court to substitute intent to commit inherently dangerous felony for malice aforethought element of first degree murder); *Newton v. State*, 280 Md. 260, 263-64, 373 A.2d 262, 266-67 (1977) (proof of every element of underlying felony establishes element of malice necessary for murder); *State v. Battick*, 133 Vt. 558, 559, 349 A.2d 221, 223 (1975) (felony murder rule operates as conclusive presumption automatically imputing elements of first degree murder).

¹⁰³ See *Sandstrom v. Montana*, 442 U.S. 510, 518-24 (1979). The *Sandstrom* Court held that a jury instruction stating that the law presumes that a person intends the ordinary consequences of his voluntary acts was unconstitutional. *Id.* at 518-21. The Court stated that the fact that the defendant had killed another human being did not permit the jury to conclusively presume that the defendant had "purposely or knowingly" caused the death of another. *Id.* at 517. The Court reasoned that a jury instruction permitting a conclusive presumption regarding the malice requirement of murder violated the due process clause of the fourteenth amendment. *Id.* at 518-24. The *Sandstrom* Court explained that the due process clause requires the prosecution to prove every element of murder beyond a reasonable doubt. *Id.* at 521-23. A conclusive presumption of malice therefore permits prosecutors to avoid the due process burden of proof requirement. *Id.* at 523; see *In re Winship*, 397 U.S. 358, 364 (1970) (due process clause of fourteenth amendment requires prosecution to prove every element of crime beyond a reasonable doubt).

¹⁰⁴ 397 U.S. 358 (1980).

¹⁰⁵ *Id.* at 363-64 (beyond a reasonable doubt standard of proof protects individuals from loss of liberty due to erroneous convictions based on insufficient evidence).

¹⁰⁶ See *Whitman v. People*, 161 Colo. 110, ___, 420 P.2d 416, 418 (1966) (turpitude of felonious act supplies element of malice for first degree murder although killing was casual and unintentional).

¹⁰⁷ See *supra* note 35 (list of statutes differentiating between degrees of unlawful-act homicide on basis of nature of underlying felony).

enumerated felony evidences a degree of recklessness much more extreme than the recklessness inherent in the commission of a nonenumerated felony or the degree of recklessness sufficient for nonfelony murder.

The argument that the rule creates a separate type of malice aforethought, however, is contrary to the original conceptualization of the rule at common law.¹⁰⁸ When English courts originally applied the rule, the malice aforethought element of murder designated a general malevolence or voluntary wrongdoing, rather than a specific or premeditated intent to kill.¹⁰⁹ Therefore, the felon's mental state accompanying the commission of certain felonies provided evidence of the malice aforethought requirement of general malevolence.¹¹⁰ When malice aforethought in current statutes designates a degree of recklessness, the felon's mental state during the commission of certain dangerous felonies provides evidence of the requisite malice aforethought element.¹¹¹ If current statutes, however, extend the rule to offenses that otherwise require proof of specific or premeditated intent, the felon's mental state while committing the felony can no longer supply the malice aforethought element of the offense.¹¹²

Courts ultimately may assert that the felony murder rule abolishes the mental state requirement of murder.¹¹³ Statutes that permit courts

¹⁰⁸ See *infra* text accompanying notes 109-112 (discussion of inconsistencies between current felony murder statutes and malice aforethought principles that underlay rule at common law).

¹⁰⁹ See *supra* note 15 (common-law definition of malice aforethought as general malevolence). Some courts, however, disagreed as to the exact meaning of malice aforethought during the developmental stages of the felony murder rule. See *Anachronism*, *supra* note 12, at 430 n.22 (conflicting definitions of malice aforethought in seventeenth century). One argument emphasizes that the Statute of Stabbing, passed in 1604, provided evidence that malice aforethought designated premeditation. See Statute of Stabbing, 2 Jac. 1, c. 8 (1604); MORELAND, *supra* note 5, at 11 & n.17. The Statute of Stabbing eliminated the benefit of the clergy from homicides committed by a stabbing resulting from any provocation less than a drawn weapon. See 2 Jac. 1, c. 8 (1604). Sudden killings resulting from sufficient provocation, however, did not constitute murder. *Id.* If certain sudden killings were not murder, then the malice aforethought element of murder must have referred to premeditation. See STEPHEN, *supra* note 13, at 47-48. Courts in the late seventeenth century, however, stated that even sudden, cruel acts may involve malice aforethought if the defendant acted voluntarily. See *Halloway's Case*, 79 Eng. Rep. 715, 716 (1625) (sudden killing of trespasser involved malice aforethought if victim did not resist); *Grey's Case*, 84 Eng. Rep. 1084, 1085 (1866) (blacksmith, who upon sudden provocation fatally wounded disobedient servant, convicted of murder). The counter-argument to ascribing premeditation to malice aforethought was that provoked, sudden homicides were not indicative of a general malevolence. See FOSTER, CRIMINAL CASES & CROWN LAW 255 (1762) (provoked homicide does not result from diabolical malignity, but from human frailty, and is therefore less serious than murder).

¹¹⁰ *Id.*

¹¹¹ See *supra* text accompanying notes 53-56 (malice aforethought designates degree of recklessness).

¹¹² See *supra* notes 85 & 92 (when indictment does not charge defendant with unlawful act homicide, prosecution must prove specific or premeditated intent to kill).

¹¹³ See *Burke v. State*, 234 Ga. 512, 514, 216 S.E.2d 812, 814 (1975) (difference between nonfelony and felony murder is absence of malice in felony murder).

to base a homicide conviction on proof that the defendant committed a felony or unlawful act without requiring any evidence of a mental state operate contrary to the current emphasis on mental culpability as the appropriate basis of criminal liability.¹¹⁴ Courts have suggested, however, that other reasons exist for retaining a rule that operates contrary to current principles of criminal liability.¹¹⁵ Courts assert that the felony murder rule's possible deterrent effect on felons provides an important reason for retaining the rule.¹¹⁶ Courts reason that holding felons strictly responsible for felony homicides may deter felons from killing negligently or accidentally.¹¹⁷ Other courts, although, assert the counterargument that increased punishment for inadvertent crimes has no possible deterrent effect and that legislatures, therefore, should eliminate the rule.¹¹⁸

Although several states apply various forms of the felony murder rule to reduced degrees of unlawful-act homicide, the majority of jurisdictions retain first degree felony murder statutes.¹¹⁹ In the absence of legislative action, however, courts have adopted various means for restricting the application of the rule.¹²⁰ Courts in several states impose various requirements regarding the inherent danger of the underlying felony.¹²¹ Other courts have construed felony murder statutes to require independent proof of all the elements of murder before applying the rule.¹²² Despite arguments regarding the inapplicability of the felony murder rule to higher degrees of murder,¹²³ some courts nevertheless will continue to strictly apply the rule without adopting any limitations to protect defendants from the resulting harsh penalties.

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¹¹⁴ See MORELAND, *supra* note 13, at 53-54 (presentation of argument that felony murder rule only should be applied to reduced degree of homicide requiring lower mental state culpability); see also O. HOLMES, *THE COMMON LAW* 59 (1881) (felony murder rule should be applied only to crimes evincing high degree of risk to human life).

¹¹⁵ See *infra* text accompanying notes 103-04 (discussion of possible rationale for retaining felony murder rule).

¹¹⁶ See *People v. Washington* 62 Cal. 2d 777, 781, 44 Cal Rptr. 442, 445, 402 P.2d 130, 133 (1965) (purpose of felony murder rule is to deter felons from killing negligently or accidentally); *Campbell v. State of Maryland*, 293 Md. 938, 992, 444 A.2d 1034, 1042 (1982) (deterrent effect of rule not served by extending punishment under rule for killings committed by felon's victim).

¹¹⁷ See *supra* note 116 (discussion of deterrent effect of felony murder rule).

¹¹⁸ See *Commonwealth of Pennsylvania v. Legg*, 491 Pa. 78, ____, 417 A.2d 1152, 1154 (1980) (deterrent effect of felony murder rule questioned).

¹¹⁹ See *supra* notes 31-33 (list of statutes defining first degree felony murder).

¹²⁰ See *supra* text accompanying notes 8, 42, 94-97 (discussion of judicially imposed limitations on felony murder rule).

¹²¹ See *supra* note 42 (underlying felony must be inherently dangerous to support felony murder conviction).

¹²² See *supra* notes 94-97 (felony murder statute only operates to elevate degree of offense, not to supply malice requirement of murder).

¹²³ See *supra* text accompanying notes 103-105, 114 (felony murder rule operates contrary to current principles of malice aforethought and criminal liability).