



## Felony Murder Rule in Common Law

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### Abstract

*Recurring problem in criminal law is the breadth of coverage to be given the felony murder rule. At common law a death occurring in the course of a felony was chargeable to the felon as murder. Constricted variations of that rule have now been adopted by statute or through judicial construction in most jurisdictions. Enmund v. Florida (1982) and Tison v. Arizona (1987) were two cases which were brought to Supreme Court and the disputes over capital felony-murder were then reappeared, where the assertions made by two highly divided Courts regarding the position of community sentiment on this matter were quite controversial. Two experiments were carried out to examine these assertions regarding the felony-murder rule and the accessorial liability theory where in a simulated forum, mock jurors passed verdicts and sentences for four defendants who varied in their level of culpability and level of participation in the crime. To test the Supreme Court's reasoning, the "ninth Justice" paradigm was used to render rulings and reasons for the subjects wherein they could "reverse and remand" or "let stand" the death sentence for felony-murder. The experimental outcome shows that the accessorial liability theory and the felony-murder rule are both rejected obviously and in a consistent manner by the subjects, and these results disapprove the majority's assertions in Tison regarding the position of community sentiment.*

**Keywords:** Felony, guilty of murder, anticipate, risks, contemplate.

### Introduction

Although most of the critics in America tend to move towards a general doctoring regarding the felony murder, the US criminal law holds felons strictly liable for any death resulting from any felony. According to many commentators and courts this harsh doctrine which has governed for a long time as the common law rule in England, entered into American law upon independence, and will remain the law unless a modern legislation modify it. The American Law Institute's Model Penal Code Commentaries has also referred to "the common-law felony-murder doctrine" and stated that "classic formulation of the felony-murder doctrine declares that one is guilty of murder if death results from conduct during the commission or attempted commission of any felony. As thus conceived, the rule operated to impose liability for murder based on ... strict liability. Joshua Dresser states in his book "At common law, a person is guilty of murder if she kills another person during the commission or attempted commission of any felony. This is the so-called 'felony murder rule.' . . . The felony-murder rule applies whether a felon kills the victim intentionally, recklessly, negligently, or accidentally and unforeseeably. Arnold Loewy also declares in his book "Criminal Law in a Nutshell" that "[a]t early common law, felony murder was a simple proposition: any death resulting from a felony is murder. Thus a totally unforeseeable death resulting from an apparently non-dangerous felony would be murder.

In a few words, the reported information about the origins of American felony murder rules is dubious. This study supports and justifies such suspicion and proves the harsh "common law" felony murder rule is just a myth. The sources of American felony murder rules have been followed in this study so as to reveal their modern, American, and legislative origins, the rationality of their original scope, and the fairness of their original application. It constitutes evidences to show that the draconian doctrine of strict liability for all deaths resulting from all felonies was never legislated in English law or entered into American law. Based on the reason that at the time of American Revolution no felony murder rule existed in common law, any felony murder rules did not enter from England to American law. Traditionally, often where the deaths were resulted from intentional infliction of injury, English law rendered the murderers liable for them. Such killings were known as murders whether they involved in the context of a felony or while a felony could not transform an accidental death into a murder. A broad rule regarding the felony murder was put forward in some eighteenth-century English disquisitions but despite the fact that in some English cases in this century this rule was discussed favorably, it was not applied. In a legal system with a limited number of felonies which considered all these felonies dangerous and punishable with death, and contained no significant liability for attempts, such a rule might have taken into account as a rational one. In such circumstances, a broad felony murder rule could have been used as an alternative way of seriously punishing failed attempts to commit capital crimes

that caused without intention but substantial harm. However in eighteenth century the unavailability of serious attempt liability was the only condition which was held. Felonies were increasing rapidly, and although they were all potentially punishable by death, most were not really involved the death sentence. Seemingly that is why no English court ever applied the broad felony murder rule proposed in the eighteenth century. That rule was anachronistic before anyone even proposed it<sup>1</sup>.

### The doctrine of felony-murder

The felony-murder rule was developed to impute to one who killed a person in the commitment of any malitia praecogitata required for the homicide to be murder. This imputation is justifiable only on the assumption that the risk of death or serious bodily harm as a consequence of a felony, or the risk in concert with the felonious intent, is sufficient to imply malice on the ground that the felon demonstrates that he has no concern for human life. The fact that the felony-murder rule, once the death penalty was no longer imposed for all felonies, was limited generally to a few necessarily violent and dangerous ones supports this conclusion. Many courts, on the basis of this rationale, have extended this doctrine to all killings which are the natural and probable consequences of a felony. Thus, the act of killing as well as the malice has been imputed to the defendant and the fatal shot being fired by a cofelon or by a person lawfully resisting the felony made no differences to the process as well as whether the person killed was a cofelon or someone unconnected with the commission of the felony. It seems preferable, however, to assume liability only for killings resulting from acts done in leading the felony. Considering the extreme penalty attaching to a conviction for felony murder and the difference between the underlying rationales of criminal and tort law a closer causal connection between the felony and the killing than the *causa sine qua non* theory normally applicable to tort cases should be required. The causal connection theory is intended to impose punishment in appropriate cases while the theory of *causa sine qua non* is primarily concerned with who shall bear the burden of a loss. Requiring this closer causal connection, although it precludes the imputation of the act of killing under the felony-murder rule, would not relieve a felon from responsibility for homicides committed by a cofelon since one member of a conspiracy bears the liability of the acts of his coconspirators committed in leading the object of conspiracy<sup>1</sup>.

In view of the recent questioning of the deterrent effect of the felony-murder rule, it may well be time to reappraise that doctrine, even given its narrow interpretation. It seems that the protection of society may be as effectively served by increasing the penalty for the felony itself as by making application of the state's most severe penalty depend upon such fortuitous circumstances as the amount and nature of the resistance encountered in the perpetration of a felony<sup>1</sup>.

### State Interests and Felony Murders

The felony-murder rule is an aberration in the criminal law. It ignores the general principle that criminal liability for causing a

particular result is not established in the absence of some culpable mental state with respect to that result. As a consequence of this peculiarity, the felony-murder doctrine has been a source of considerable discussion; almost all critical. Despite this almost universal criticism, the felony-murder rule persists in all but four states. Although the aim of Model Penal Code legislation has been to lessen the harshness of the felony-murder rule by importing into it a *mens rea* requirement of "extreme indifference to the value of human life," only three states have enacted versions of this provision. Most states have retained the felony-murder rule as a basis for the highest degree of criminal homicide, and its disappearance seems unlikely. Felony murder is said to be premised upon one of three alternative theories. One view finds, as a justification for the felony-murder rule, a taint inherent in causing a death. Emphasizing the states' abhorrence of the death of an individual at the hands of another person, this view imports the intent to commit the felony as creating a constructive intent to commit what is, in reality, an unintended killing. A second view of felony murder contends that the defendant, by engaging in a felony, lowers the threshold of moral responsibility the state must show to punish the resulting death. Perhaps a vestige of the ancient view of criminals as "out-laws," this theory imposes the risk of additional punishment for deaths that may occur in the course of a felony upon felons by virtue of their status as felons. A third and more recent view sees the felony-murder rule as aimed primarily at deterring felonies by imposing on felons a risk of additional punishment should a death occur in the course of their felonies<sup>2</sup>.

The rules discussed above bear an apparent similarity to common law rules. Both these rules and the common law rules are designed to protect state interests; both involve the choice of a single element of the offense as of exclusive jurisdictional significance, with the administrative advantages associated with that choice. This apparent similarity is somewhat deceptive. Instead of assuming, as the common law does, that for all offenses there is a concurrence between the existence of a state interest and the in-state occurrence of some arbitrarily chosen gist of an offense, these rules are designed to further the specific interests behind the felony-murder rule. Thus, rules of jurisdiction over interstate felony murder developed through state interest analysis preserve the pragmatic advantages of common law rules, and are defensible as rational. The relationship between any of these rules and the interests it serves is articulable, and it can be demonstrated that the rule fulfills the purposes for which it is designed. The state interest approach is thus superior to both the common law approach and the current modern approaches, sufficiency of activity and integral relation. To apply the state interest approach, a court must decide what purpose underlies the state felony-murder rule. Generally, the court will have little information upon which to base its choice. Felony murder is a very old crime, and its persistence may be predominantly the result of legislative or judicial inertia. This circumstance is not a major obstacle, for courts frequently interpret legislative purposes with little available information to guide their decisions. An incorrect choice is merely an inexpression of legislative intent and, as such, is subject to ready

correction by the legislature. Among the inherent taint, lowered threshold, and deterrence rationales, the third clearly seems to be the most defensible choice. A shift in judicial and legislative thinking from the earlier inherent taint and lowered threshold rationales to the deterrence rationale is largely responsible for the persistence of the felony-murder doctrine. The preeminence of the deterrence rationale is evident from the fact that judicial and scholarly discussion of felony murder in the last half century, centering on the merits of extending the doctrine to include deaths caused by victims and police responding to felonies, has been couched primarily in terms of the deterrence rationale. While many remain skeptical of the actual deterrent effect of the felony-murder rule deterrence itself is a universally accepted rationale for the imposition of criminal sanctions. Inherent taint and lowered threshold, on the other hand, express ancient prejudices and rely on emotional appeal rather than any sort of socially meaningful and methodologically defensible state interests. Doctrines of a like nature have been eliminated from every other area of the criminal law<sup>2</sup>.

### Meaning of "Anticipate" and "contemplate" in felony murder

The meaning of the terms "anticipate" and "contemplate" poses a more vexing problem. Two possible interpretations were identified above: i. the expansive interpretation of the Davis majority and Clines;" and ii. Justice Simon's position, equating the terms with a narrow definition of "knowledge." This note advocates Justice Simon's interpretation, under which a defendant must actually be aware that a killing or the use of lethal force will occur or is virtually certain to occur in order to have the requisite mens rea under Enmund. "Anticipate" and "contemplate" should not be interpreted so broadly that a defendant is liable for foreseeable consequences that a court deems he should have known as well as for consequences of which he was actually aware. Such a broad definition encompasses negligent and reckless, as well as knowing and intentional, conduct. It allows courts, as in Clines, to cite features common to a wide class of felonies and to say that such features make sufficiently likely a killing or the use of lethal force such that a defendant "contemplated" or "anticipated" the killing or the use of lethal force<sup>3</sup>.

Any felony, particularly an armed robbery, contains inherent risks of death or of the use of lethal force. A person must disregard these risks before embarking on the felony. A gun may misfire and kill; the victim may grab at the gun and cause it to fire a fatal shot into him; the victim may fire at the felons and the felon's fire back while defending them, as happened in Enmund; or the victim may drop dead of a heart attack without the felons firing a shot. In all these cases any person participating in the felony may be found guilty of felony murder. It may also happen that a third party, not one of the cofelons, kills another (the victim, a policeman, a bystander, another cofelon) in an attempt to prevent commission of the felony or prevent the felons' escape; under these facts, the cofelons might be liable for felony murder in many

jurisdictions." Indeed, it is an inherent risk in felonies that, no matter how carefully one chooses one's partners for care, steely nerves, or concern for human life, a partner may suddenly and unexpectedly shoot and kill, making the non-triggerman liable for felony murder<sup>3</sup>.

### Felony-Murder and guilt of robber

The decision of the principal case seeks to arrest a trend which had extended culpability in felony-murder far beyond a line which other courts had declined to cross. In successive decisions, the Pennsylvania court had held that a prisoner could be convicted of murder when the fatal shot was fired by the victim in retaliation against a robbery and an innocent third party was killed,' when the shot was fired by a policeman and another policeman was killed, and finally when the shot was fired by a policeman and a co-felon was killed. Their underlying theory was that one should be responsible for all the foreseeable consequences of his acts. Since the felons had precipitated the situation creating the risk and since they should have foreseen that some person might be killed, they were held guilty of murder, despite the fact that one not a party to the crime unleashed the fatal force. The principal case discards this theory, specifically overrules the third case listed above, and holds that conviction for felony-murder can result only when the fatal blow was struck by one acting in furtherance of the felonious design. This was certainly a correct result. But in a decision handed down shortly after the principal case, the Pennsylvania court applied the general rule announced in the principal case and affirmed its earlier holding that an arsonist could be convicted for murder when his accomplice died as a result of injuries received in a fire which the accomplice himself had ignited. The problem in the principal case differs markedly from that of the arson case. In the former, the question is whether or not the act of any of the felons was the cause of death. In the latter, the act of the dead arsonist was unmistakably the cause of death. At this point a question beyond that presented in the principal case must be answered. Granting that an act of a felon caused death and granting that under the test of the principal case the act will be imputed to a surviving felon, should the felony-murder rule be used by the court to construct intent to kill under these circumstances? The answer would seem to be no. Originally employed to achieve desired ends, the felony-murder rule is only a fiction which should not be extended to cover the killing of participating felons. The common undertaking, as among the felons, should be viewed as a legitimate enterprise. In other words, if one could connect the death to the surviving felon then the presence or the absence of an actual intent to kill the other felon determines the degree of his guilt. Although stare decisis may answer a plea for the abolition of the felony-murder rule in its entirety, it does not call for the extension of the rule into this limited area<sup>4</sup>.

It is broadly stated that criminal responsibility for homicide committed while carrying out one of the enumerated felonies extends not only to the person actually doing the killing, but also to all his accomplices in the underlying felony. This principle is, however, subject to several qualifications. In the

first place, under the rule of *People v. Ferlin*, if one of the conspirators kills himself accidentally while committing the felony, his confederates are not guilty of murder. Secondly, none of the conspirators is responsible for deaths not actually or constructively caused by him. Thus where a mob was attacking an arsenal and the soldiers defending it fired, killing an innocent third person, none of the rioters could be held guilty of murder. On the other hand, where fleeing bank robbers used a bank teller as a shield, and he was accidentally killed by a pursuing posse, the robbers were all held guilty of first degree murder since their act was the direct cause of death. A third limitation, analogous to rules of agency, is that each member of the conspiracy to commit the felony is criminally liable for the acts of his associates only if such acts were in furtherance of the common design for which they combined. The defendant cannot escape responsibility for a homicide by his confederate merely by showing that he was not present at the crime or that he did not agree to the killing and, in fact, actually forbade any resort to violence. However, it is part of the prosecution's case to prove that the homicide was committed in the execution of the common design. Where the person slain was also the victim of the felony involved, the inference is strong that the homicide by one of the confederates was in prosecution of the conspiracy; but, if the accused can disprove this, he should be permitted to do so. Where, however, there is no evidence of a relation between the crime contemplated and the homicide but instead the killing appears to have been the independent act of one of the associates, the others should not be held accountable<sup>4</sup>.

Thus in the principal case it may be argued that the shooting of X was the result of a sudden burst of anger on the part of one of the robbers at what he considered his companion's blundering; if so, it might be contended that none of the conspirators except the one actually firing the shot should be guilty of murder, for, in the language of *People v. Ferlin*, such an act was not in furtherance of the conspiracy, but was entirely opposed to it. On the other hand, it may be said that if this murderous anger had been directed at the victim of the robbery and he had been killed, it is clear that the associates in the robbery would be responsible; it seems that it should make no difference that the wrath happened to be vented on one of the confederates<sup>5</sup>.

### **The court's limitation of the felony-murder**

It seems that the court's limitation of the felony-murder rule to murders committed by the felon or his accessory is defensible only if its statement of the rule's purpose-detering felons from committing negligent or accidental homicides is accepted. This view of the rule's scope and purpose, however, is unjustified. Rather, its continued legislative approval would appear to be based on the judgment that the frequent occurrence of homicides in the course of felonious undertakings warrants imposition of a more serious penalty on the felons creating the dangerous situation. To be sure, if it is sought to disapprove the dangerous nature of a felonious act, it would better comport with equality of treatment to increase drastically the penalty for all felonious crimes regardless of whether a homicide results. Such a measure, however, would increase the waste of human

resources which results from long confinement, and would therefore seem politically unacceptable. The legislature has instead chosen to impose the increased penalty only when a killing results from the felony, thus providing the retributive motive which makes imposition of the penalty palatable to society. Although this explanation of the legislature's intent is descriptive rather than normative, the rule's application to all felonies in which a killing occurs seems mandated. Further, even in the absence of the felony-murder rule, the felon's conduct would appear to be manslaughter; one who embarks on an armed robbery engages in reckless conduct, a foreseeable result of which is retaliation by the victim resulting in the death of a co-felon or bystander. The analogy to manslaughter would explain the willingness of the dissenters to import the rules of tort causation into criminal law as well as the artificiality of the distinction between the situation in which the felon fires first and the facts in the instant case. Although the nexus between the homicide and the action of the felon is clearer when he fires first, the causal relationship is not sufficiently attenuated to make unreasonable conviction of the felon for precipitating the homicidal act by pointing his pistol at the victim. Thus, culpability seems clear if the crime is conceived as manslaughter; the majority and dissent differ only in their willingness to escalate the crime to murder<sup>6</sup>.

The most powerful reason of non-employment of felony-murder rule is probably based on the rule's artificial construction of mens rea which is an essential necessity of guilt in criminal law. When a felon is convicted of murder for the death of a bystander shot by his victim the intent to kill which renders his conduct culpable does not exist absent its attribution to him required by the rule. While the felon may have the mens rea of manslaughter, since he can foresee that death is a highly probable consequence of his actions, to impute to him the certain knowledge that death will result and consequently increase his penalty serves no rational deterrent function. That the construction of mens rea which has traditionally obtained under the felony-murder rule is equally, if not more, unreasonable does not compel an extension of the rule to situations not historically within its scope. Although extension to the instant circumstances would be compelled by logical analysis of the rule, it would be an extension based on an unreasonable premise. That the majority ignored the rule's legislative purpose and refused to so extend it indicates a heightened awareness of the doctrine's underlying illogic<sup>6</sup>.

In addition to the requirement that the misdemeanor be dangerous to human life or safety, the court held that the Penal Code requirement of a union of act and intent for every crime applied to the crime of manslaughter. The prosecution must show that the defendant had the state of mind required by the state for the particular crime at the time he committed the guilty act. For example, to convict the defendant of manslaughter, the prosecution must prove more than that the defendant caused the death of another by the sale of misbranded drugs. It must also prove that he was also at least criminally negligent, the minimal mental element required for a manslaughter conviction. Such a holding in effect completely abrogates the misdemeanor-

manslaughter doctrine. The purpose of the misdemeanor-manslaughter rule is to establish the otherwise missing mental element needed to make the homicide manslaughter. A requirement that this mental element be proven independently of the commission of the misdemeanor renders the rule meaningless. The shortcut which the rule gives to prosecutors is taken away if the mental element must be established independently of the collateral misdemeanor. If the court could limit the misdemeanor-manslaughter rule in this way, it could similarly restrict the second degree felony murder rule. In fact, the latter step is easier to take because the court is not limited by the wording of a statute. The misdemeanor-manslaughter provision of the Penal Code seems clearly to exclude the necessity of separate proof of the mental element. There is no such legislative authorization for second degree felony murder. Since the latter is a judicial extension of the statutory first degree felony murder rule, the court can modify its own creation freely<sup>7</sup>.

## Conclusion

If a felony committed in one state results in a death in another and the accused is prosecuted in either for homicide under the felony-murder rule, the court must first establish its jurisdiction to hear the case. The court's jurisdiction depends upon the existence of a valid state interest. Since the most compelling interest behind the felony-murder rule is the deterrence of felonies, the court's jurisdiction depends upon whether the prosecution will effectuate this policy. Only if the felony occurred within the state does a valid state interest sufficient to justify an assertion of jurisdiction exist. Criminal law teaching, learning, and arbitration have often made two assumptions about the origin and jurisdiction of American felony murder rules: i. that the English common law has taken felons for a long time seriously liable for all deaths caused in the course of all felonies; and ii. that the English common law of crimes has been enacted as the law in an independence manner in every American jurisdiction - and in subsequently formed territories and states upon their creation - and remained the law until statute altered it. Based on these premises, lawyers drew the inference that broad felony murder liability was the default rule in American jurisdictions with no legislation on the subject; they have read American felony murder statutes as simply continuing in force this broad rule; and they have treated statutes or judgments explicitly limiting felony murder liability as unenthusiastic confessions that any form of felony murder rule makes an obsolete and unfair basis perpetual for liability. It was just after the commencement of this process of codification that the Felony murder rules developed in the United States. Felony murder legislations which worsened the situation of this scope were enacted and began to spread in the 1790s, and felony murder statutes began to increase rapidly in the 1820s. The first American felony murder convictions were not however reported until the 1840s. Reported felony murder convictions were in fact completely scarce until the last three decades of the nineteenth century, by which time the vast majority of jurisdictions had passed felony aggravator or felony murder statutes. The larger

part of reported nineteenth-century felony murder sentences were enacted in states with felony murder statutes. Felony murder liability was usually decided for murders in the course of statutorily felonies which were predetermined, only in jurisdictions with felony aggravator statutes and recommended that the courts take the statutes as the source of felony murder liability. At the end of nineteenth century and after the development of statutory felony murder liability there were only three felony murder convictions which were reported in jurisdictions with neither felony murder nor felony aggravator statutes. In a nutshell, it was not the common law adjudication which established the felony murder rules in US legal system but these rules were created primarily by statute.

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