

## SHOULD WE HAVE DIFFERENT VIEWS OF FELONY MURDER, DEPENDING ON THE GOVERNING STATUTE?

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Arguments about the felony-murder rule are still vigorous. Years ago, in an unaccustomed lapse, the drafters of the Model Penal Code (MPC) wrote that it was hard to find “[p]rincipled argument” for the doctrine.<sup>1</sup> Then, in 1985, an article that I coauthored changed the debate by suggesting a number of arguments in favor of the doctrine, which ranged from justice-related reasons for the rule, to deterrence and definitional reasons.<sup>2</sup> Since then, however, arguments against the rule have also persisted.<sup>3</sup> These arguments include claims about the non-necessity of the rule to different justice-related reasons.<sup>4</sup> The most salient of those justice-related reasons is the suggestion that some versions of the felony-murder rule divorce criminal liability from blameworthiness.<sup>5</sup>

As an incidental matter, the persistence of the doctrine is illustrated by the felony-murder rule that is, in fact, contained in the MPC.<sup>6</sup> Contrary to their statements, the drafters of the MPC actually retained the felony-murder rule.<sup>7</sup> They did so in a particularly clumsy way: by creating a presumption of the murder *mens rea* if a homicide occurred during the commission of certain

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1. MODEL PENAL CODE & COMMENTARIES PT. II § 210.2 cmt. 6 (1980). The drafters did many things extraordinarily well, particularly their definitions of mental states in § 2.02 of the MPC. MODEL PENAL CODE § 2.02 (1962). Their statements about felony murder, in comparison, were sloppy. See MODEL PENAL CODE § 210(1)(b) cmts. at 118. They did not think very hard about this subject. *Id.*

2. See generally David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL’Y 359, 361–76 (1985) (positing reasoned justifications for the felony-murder rule). The ideas expressed in this Article were partly developed in an earlier article. See generally David Crump, *Reconsidering the Felony Murder Rule in Light of Modern Criticisms: Doesn’t the Conclusion Depend upon the Particular Rule at Issue?*, 32 HARV. J.L. & PUB. POL’Y 1155 (2009) [hereinafter Crump, *Reconsidering*].

3. See, e.g., Guyora Binder, *Making the Best of Felony Murder*, 91 B.U.L. REV. 403, 421–27 (2011).

4. See *id.*

5. See Crump, *Reconsidering*, *supra* note 2, at 1157–58 nn.8–10 (citing Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 706–08; Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 450–60 (1985)). As is indicated in the article, “[m]ost articles critical of the rule at least recognize the contrary arguments.” *Id.* at 1157 n.8.

6. See MODEL PENAL CODE § 210.2(b) (1962).

7. At this point, readers may be objecting, “But I thought the MPC abolished felony murder!” The drafters said that, but they did the opposite. See *id.*; *infra* note 8 and accompanying text.

defined felonies.<sup>8</sup> The drafters believed this method would require a fact finding that would tie the conviction to the defendant's blameworthiness.<sup>9</sup> The trouble is, this approach simply authorizes the jury to find the elements of murder on the basis of an enumerated felony with no further guidelines that connect to the defendant's individual blameworthiness and nothing that connects very well to the murder definition.<sup>10</sup> The presumption is lawless, and the MPC contains an unattractive definition of felony murder.<sup>11</sup>

In any event, the argument against the felony-murder rule that resonates most is that some statutory formulations disconnect liability from blameworthiness.<sup>12</sup> The point that I want to make here is that whether the rule actually departs from blameworthiness depends on the particular form of felony-murder rule that the particular jurisdiction follows. There are "good" felony-murder statutes and there are "not so good" ones. The good ones connect criminal liability and blameworthiness.<sup>13</sup> The not so good ones do so less reliably.<sup>14</sup>

To begin with, many arguments against the felony-murder rule begin with an unrealistically broad definition of the rule. That is to say, many opponents of the rule start with the assumption that, almost like a mathematical equation, the rule says that *felony plus death equals murder*.<sup>15</sup> Some of the hypothetical cases that opponents posit to criticize the rule are best asserted under a crude and unidentified felony-murder statute. For example, Joshua Dressler imagines the murder conviction of a pickpocket who accidentally causes a victim to "die[] of shock" by the act of placing a hand in his pocket—that must not have been a very skillful pickpocket.<sup>16</sup> Professor Dressler is a fine scholar, but that example is not only an imaginary case, I would say it is also pretty creative about the law, at least in any state I know. The rule is differently defined in every jurisdiction, and it is confined in many states by a range of limiting doctrines, such as causation doctrines, dangerousness or violence-related doctrines, merger doctrines, and other kinds of rules.<sup>17</sup> I have not done a

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8. See MODEL PENAL CODE § 210.2(b) (listing such felonies as robbery, rape, arson, and burglary, among others).

9. See *id.*, cmts. at 118.

10. See MODEL PENAL CODE § 210.2(b). Recklessness and indifference are "presumed" if the actor engaged in the named felonies. See *id.*, cmts. at 118. Thus, the *mens rea* is presumed, and the pretense of requiring a "finding" is hollow. See *id.*

11. See Crump, *Reconsidering*, *supra* note 2, at 1164. The jurors, in exercising the lawless discretion created by this provision, can consider "improper factors such as the defendant's lifestyle, personality, or ethnicity." *Id.*

12. See *id.* at 1157–58.

13. See, e.g., TEX. PENAL CODE ANN. § 19.02 (West 2011) (providing that a defendant must commit an act clearly dangerous to human life to be culpable for felony murder).

14. See MODEL PENAL CODE § 210.2(b) (failing to connect blameworthiness and felony-murder liability).

15. See Binder, *supra* note 3, at 426–28 (discussing felony murder in terms of strict liability).

16. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 513 (6th ed. 2012).

17. See, e.g., TEX. PENAL CODE § 19.02 (requiring "an act clearly dangerous to human life" for culpability); MODEL PENAL CODE § 210.2(b) (requiring the commission of a named felony under the statute);

fifty-state survey, but I doubt that there is any state where the actual rule is *felony plus death automatically equals murder*, without important limits.

There are two different ways to define the felony-murder doctrine. One definition uses a “dangerous felony” approach, either by specifying certain named felonies that are thought to be dangerous and, therefore, appropriate for triggering the rule,<sup>18</sup> or by simply requiring a dangerous felony,<sup>19</sup> whatever that means. The other definition requires a “dangerous act” to have been committed by the defendant.<sup>20</sup> The first type is a bad way to do it; the second is a better way. The dangerous act rule goes a long distance toward answering the criticisms of opponents who argue that the felony-murder rule fails to connect criminal liability to personal blameworthiness. The reason this approach is better is that the rule *does* require personal blameworthiness on the part of the defendant.<sup>21</sup>

The certain-named-felonies approach is exemplified by the MPC, which uses a presumption to create a felony-murder rule that applies in circumstances that include certain named felonies.<sup>22</sup> The California approach uses the general notion of “inherently dangerous” felonies, which amounts to the same means of limiting the doctrine, but without specifying the dangerous felonies that trigger the rule.<sup>23</sup> The idea behind these approaches is that the law can determine that certain felonies are dangerous—and that this condition should define the meaning of felony murder without a focus upon *what the defendant has done* that has caused the death in question. Texas law exemplifies the opposite approach, which requires a dangerous act by the defendant during the felony, rather than a dangerous felony without regard to the actions of the defendant—this is a much better approach.<sup>24</sup> By requiring the defendant to commit “an act clearly dangerous to human life,” Texas squarely requires personal blameworthiness for felony murder.<sup>25</sup>

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CAL. PENAL CODE § 188 (West 2014) (requiring an inherently dangerous felony for culpability). Professor Dressler’s example would not work in California—because the crime is not an inherently dangerous felony—or in Texas—because picking a pocket is not “an act clearly dangerous to human life.” See *infra* notes 38–41 and accompanying text. Nor would it fit the MPC because it does not involve a named felony. See *supra* text accompanying note 8. Dressler’s example is an odd one. It might be possible, however, to find some states to fit the example.

18. See MODEL PENAL CODE § 210.2(b). This is the approach of the MPC. See *supra* text accompanying note 8.

19. See CAL. PENAL CODE § 188 (California approach); *infra* note 23.

20. See TEX. PENAL CODE § 19.02 (Texas approach); *infra* note 52 and accompanying text.

21. See TEX. PENAL CODE § 19.02. By requiring the defendant “to commit an act clearly dangerous to human life,” the statute considers the blameworthiness of the defendant. *Id.*

22. See MODEL PENAL CODE § 210.2(b); *supra* notes 7–10 and accompanying text.

23. See CAL. PENAL CODE § 188. “[The California] felony-murder rule simply describes a different form of malice under section 188. The felony-murder rule imputes the requisite malice for a murder conviction to those who commit a homicide during the perpetration of a felony inherently dangerous to human life.” *People v. Sanchez*, 164 Cal. Rptr. 3d 880, 893 (2013) (internal quotation marks omitted).

24. See TEX. PENAL CODE § 19.02.

25. See *id.*; *infra* note 52 and accompanying text.

Incidentally, Texas has what I believe is the best penal code in the nation, even though this statement may surprise some people who associate the state with a harsh attitude towards criminal law.<sup>26</sup> The Texas Penal Code was adopted wholesale during the 1970s and was based on the MPC, but with departures that were the subject of extended debate.<sup>27</sup> It was a painful process that required a lot of bad acquittals at first. The Texas Penal Code says what it means, and it carries out the values of the people of the state. It can be understood by juries because it was written to be understandable. Texas does not provide for the usual homicidal crimes. The Code does not have first-degree or second-degree murder with their internally contradictory and indeed lawless definitions; it has only murder.<sup>28</sup> The Code does not have voluntary manslaughter; if a crime is committed under impassioned circumstances, a person would get convicted of murder, but would also get a sentence reduction that is the equivalent of a voluntary manslaughter sentence.<sup>29</sup> The idea is that if one acts intentionally to kill under impassioned circumstances, the person ought to receive some understanding in the form of a more limited sentence, but it ought to be called murder because that is what it is. Since Texas does not have voluntary manslaughter, it does not have involuntary manslaughter either; Texas just has manslaughter, which is reckless killing.<sup>30</sup> And finally, there is criminally negligent homicide.<sup>31</sup> In summary, Texas has a superior approach, because it does not have first-degree murder, second-degree murder, voluntary manslaughter, or involuntary manslaughter, with all of their dysfunctions.<sup>32</sup>

In this manner, Texas avoids the mess that California has made out of words like malice aforethought, premeditation, and deliberation.<sup>33</sup> It avoids using vague terminology to define a crime based on a metaphor, like all of the

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26. See TEX. PENAL CODE § 19.02. Actually, Texas is like other states in combining some harsh results with some other results so lenient as to appear simply loony. See, e.g., Normaan Merchant, *Judge Orders No Jail for Teen in Fatal Car Wreck*, HUFFINGTON POST (Feb. 5, 2014, 7:57 PM), <http://www.huffingtonpost.com/huff-wires/20140205/us-north-texas-deadly-wreck/> (reporting on the so-called affluenza case). For example, in one case the defendant killed four human beings, and injured others seriously and permanently, by driving with three times the legal limit of alcohol in his system. *Id.* The judge ignored the prosecutor's request for a twenty-year sentence and instead imposed probation with no confinement. *Id.* The case involved a so-called affluenza mitigation: a wealthy family had so coddled the defendant as to desensitize him to societal duties. *Id.*

27. See TEX. PENAL CODE § 19.01 (West 2011). Originally adopted in 1974, the Texas Code adopted the MPC's definitions of culpable mental states (except that it replaced "purposeful" with the more intelligible term "intentional"). *Id.* The basic definition of murder copies the MPC. See MODEL PENAL CODE § 210.1. For example, Texas has a modernized rape statute. See TEX. PENAL CODE ANN. § 22.011 (West 2011). Additionally, Texas has an objectively limited definition of passion homicide, as well as a better definition of felony murder. See TEX. PENAL CODE § 19.01.

28. See TEX. PENAL CODE § 19.02 (West 2011).

29. See TEX. PENAL CODE § 19.04 (West 2011).

30. See *id.* § 19.04.

31. See TEX. PENAL CODE § 19.05 (West 2011).

32. See TEX. PENAL CODE §§ 19.01–.05 (West 2011).

33. Cf. DAVID CRUMP ET AL., CRIMINAL LAW: CASES, MATERIALS, AND LAWYERING STRATEGIES 43 (3d ed. 2013) (containing cases showing the difficulties created by these terms).

states that use the “depraved [or malignant] heart” formula.<sup>34</sup> It avoids the overlap of that crime definition with involuntary manslaughter, which has created so much confusion in California.<sup>35</sup> Texas also follows the majority of states that have steered clear of the MPC’s subjective definition of voluntary manslaughter.<sup>36</sup> As I, and others, have pointed out, this approach would have made Sirhan Sirhan not guilty of the murder of Bobby Kennedy.<sup>37</sup> Our illustrious host, Professor Loewy, has criticized me for saying so by reasoning that the New York Court of Appeals could adjudicate the statute.<sup>38</sup> The concern is not the New York Court of Appeals. It is the jury. The jury has to be told what the statute says. And, like many of these other definitions, the statute cannot be told to the jury without ordering a senseless result in the case of Sirhan Sirhan.<sup>39</sup> It matters what we tell the jury. If it is incomprehensible, or if it is nonsense, the jury earnestly tries to follow it. Garbage in, garbage out. If the statute cannot be read to a jury in a way that makes sense, it is not a good statute, even if it is possible for an appellate court to affirm a conviction reached by a sensible jury that completely misreads a nonsense statute and convicts when the words of the statute would not.

But I digress. My purpose is to contrast the good, the bad, and the ugly of the felony-murder rule, exemplified by the Texas, California, and Model Penal Codes, respectively. None of these use the simplistic formula that allows critics to caricature the felony-murder rule: the formula of felony plus death equals murder.<sup>40</sup> Each of these states uses much more sophisticated limits for the definition, but they do it in different ways, and the words matter.

The California approach, actually, is not specified by explicit words in the statute. It is judicially created.<sup>41</sup> Felony murder requires an inherently dangerous felony.<sup>42</sup> In this manner, California tries to tie the doctrine to blameworthiness, because someone who has committed a dangerous felony and caused a death by that felony is guilty of blameworthy conduct, and most of the time, the results of California convictions do correlate with blameworthiness.<sup>43</sup> The problem is, the hypotheticals given by critics are remote but still possible. You could have a robber who spills a slippery substance and causes someone to fall and die in an unforeseeable accident, who could be guilty of felony murder under this statute. One might guess that

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34. See *id.* at 67–74.

35. See *id.* at 68–69.

36. See David Crump, “Murder, Pennsylvania Style”: Comparing Traditional American Homicide Law to the Statutes of Model Penal Code Jurisdictions, 109 W. VA. L. REV. 257, 318–19 (2007) [hereinafter *Murder, Pennsylvania Style*].

37. See *id.*

38. Arnold H. Loewy, *Critiquing Crump: The Strengths and Weaknesses of Professor Crump’s Model Laws of Homicide*, 109 W. VA. L. REV. 369, 372–73 (2007).

39. See *Murder, Pennsylvania Style*, *supra* note 36, at 319.

40. See DRESSLER, *supra* note 16, at 510.

41. See Crump, *Reconsidering*, *supra* note 2, at 1170–71.

42. See *id.* at 1171.

43. See *id.* at 1161–62.

causation limits on the felony-murder rule could prevent a guilty outcome, but that conjecture is uncertain. And there is a bigger problem: the decisions about dangerous felonies are ridiculous. Consider the following list of dangerous and non-dangerous felonies that a California judge once gave:

Felonies that have been held inherently dangerous to life include shooting at an inhabited dwelling, poisoning with intent to injure, arson of a motor vehicle, grossly negligent discharge of a firearm, manufacturing methamphetamine, kidnapping, and reckless or malicious possession of a destructive device.

Felonies that have been held not inherently dangerous to life include practicing medicine without a license under conditions creating a risk of great bodily harm, serious physical or mental illness, or death; false imprisonment by violence, menace, fraud, or deceit; possession of a concealable firearm by a convicted felon; possession of a sawed-off shotgun; escape; grand theft; conspiracy to possess methedrine; extortion; furnishing phencyclidine; and child endangerment or abuse.<sup>44</sup>

Criticism of these results would be easy to overstate. What they really say is that some criminals get their just deserts while others escape it on irrational grounds. That, of course, is a constant condition in criminal law, because we often define crimes so that we do not convict every guilty person. But when the picture looks as strange as this one does, it is a bad thing.

The Texas statute does not require similar difficulties of adjudication and does not have the same irrationalities.<sup>45</sup> Texas requires blameworthiness on the defendant's part and says it clearly.<sup>46</sup> The Texas statute includes, as guilty of murder, a person who:

[C]ommits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.<sup>47</sup>

So, the defendant must engage in a felony and must cause a death in furtherance of the felony, but that is just the beginning.<sup>48</sup> The defendant must also "commit an act clearly dangerous to human life," and there must be

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44. See *People v. Howard*, 104 P.3d 107, 111–12 (Cal. 2005) (internal citations omitted). The California court continues to produce dubious results. See *People v. Manibusan*, 314 P.3d 1, 46–47 (Cal. 2013) (opposing a past holding that beating the victim to death with a pipe did not authorize the jury to consider felony murder because the commission of mayhem as a predicate required specific intent, and beating the victim with a pipe could just have been an "indiscriminate attack").

45. See TEX. PENAL CODE ANN. § 19.02 (West 2011).

46. See *id.* § 19.02 (b)(3).

47. *Id.* (emphasis added).

48. See *id.*

causation, because the dangerous act committed by the defendant must be what caused the death.<sup>49</sup> The statute does not require the kind of oddball adjudication that the California court has done. And most importantly, it ties criminal liability to personal blameworthiness, since the defendant must “commit an act clearly dangerous to human life.”<sup>50</sup> The hypotheticals that opponents offer about slippery floors causing falls or pickpockets causing heart attacks do not fall under this statute.<sup>51</sup>

Now, I do not intend to suggest that the Texas statute is flawless. For example, there is the question of felonies that do not require intent or knowledge but only criminal negligence. The most frequent felony used for this purpose in Texas is injury to a child, which can be committed negligently.<sup>52</sup> The dangerous act requirement means that these cases, by and large, reach just results because the dangerous act is usually an act of horrifying violence against a child, but the possibility of a murder conviction based on negligence does exist. Another issue is the universal question of vicarious liability: if your co-felon commits a dangerous act, you may be responsible for a felony murder in which you had limited blameworthiness beyond the felony itself.<sup>53</sup> The Texas statute would avoid these arguable anomalies if the words “personally and knowingly” were inserted before the requirement of committing an act clearly dangerous to human life.

But even so, the Texas statute is a better formulation. It generally overcomes the criticism that, allegedly, the felony-murder rule divorces convictions from blameworthiness. The statute requires a blameworthy act and is a much better rule than most.<sup>54</sup>

And there you have it. Felony-murder statutes are different, and judgments about them should be based upon the particular form of the felony-murder rule that is in question. And they come in three types: good, bad, and . . . ugly.

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49. See *id.*; Crump & Crump, *supra* note 2, at 383.

50. See TEX. PENAL CODE § 19.02(b)(3); Crump, *Reconsidering*, *supra* note 2, at 1161–62.

51. See CRUMP ET AL., *supra* note 33, at 102–03; Crump, *Reconsidering*, *supra* note 2, at 1180.

52. See *Johnson v. State*, 4 S.W.3d 254, 256 (Tex. Crim. App. 1999) (upholding use of negligently committed crime as predicate); Crump, *Reconsidering*, *supra* note 2, at 1168.

53. See Crump, *Reconsidering*, *supra* note 2, at 1185.

54. See TEX. PENAL CODE § 19.02(b)(3).

