

UNINTENTIONAL KILLINGS

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I. DEPRAVED-HEART MURDER	123
II. FELONY MURDER.....	126
III. CONCLUSION.....	128

The concept of criminalizing unintentional homicides sounds almost oxymoronic until one realizes that unintentional does not mean fault free. The unintentional killings that have been punished in the last century run the gamut from the blameless to the highly blameworthy. In this brief Essay, I intend to examine the gamut of unintentional killings and assess the wisdom of various courts' treatment of them.

Although one would think that liability without fault would never be a basis upon which to predicate homicidal liability, such is not universally the case. More than half a century ago, New York, with a rather extreme application of the misdemeanor-manslaughter rule, held a landlord absolutely liable for the death of a tenant for failure to have adequate fire escapes.¹

While that might not sound so terrible (big wicked landlord allowing his poor tenants to perish because of the inadequacy of his fire escapes), the actual facts of the case did not meet that eminently explicable explanation.² The landlord, a previous tenant named Nelson, was a poorly educated African-American.³ His landlord was prepared to close the building, because he knew it was not up to code, and evict everybody.⁴ Instead, he offered Nelson a chance to buy the building at a low price without disclosing his failure to meet the code standard.⁵ Nevertheless, by applying the misdemeanor-manslaughter rule, the New York Court of Appeals upheld Nelson's conviction.⁶

Although for a time I thought *Nelson* to be a relic of a bygone time, the Ohio Supreme Court recently held that a woman who crosses the centerline of a highway, killing three people, can be guilty of involuntary manslaughter even if the reason for her crossing the centerline was a heart attack that rendered her unconscious.⁷ While the case, *State v. Weitbrecht*, merely upheld the state's

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1. *People v. Nelson*, 128 N.E.2d 391, 393 (N.Y. 1955).

2. *Id.* at 394–95 (Van Voorhis, J., dissenting).

3. *Id.* at 394.

4. *Id.*

5. *Id.* at 394–95.

6. *Id.* at 393 (majority opinion).

7. *State v. Weitbrecht*, 715 N.E.2d 167, 172 (Ohio 1999) (Pfeifer, J., dissenting).

right to take her to trial, the court did opine that five years imprisonment would not be disproportionately long for the facts alleged.⁸ Hopefully the court was not approving that long of a sentence if the facts were as the defendant claimed them to be, though frankly, we do not know. In any event, if an involuntary manslaughter conviction were upheld on those facts, it would not be difficult to condemn the conviction as unreasonable.

Whether homicidal liability should ever be imposed for ordinary negligence is surely a closer question. Most courts say “no,” unless the defendant is engaged in hazardous activity, in which case it is at least doubtful whether it is accurate to call this negligence “ordinary.”⁹ A few courts do impose such liability; some because the court believes their legislative formulation demands it.¹⁰ And, in such cases, it certainly is true that the victim would have been alive if only the defendant had been careful.¹¹ Nevertheless, there is a general consensus that sending somebody to prison for ordinary negligence is harsher than the law ought to be.¹²

The hardest involuntary manslaughter question is whether the defendant ought to personally realize the risk before taking it, or whether it is enough that his failure to appreciate the risk is a gross deviation from what we would expect of an ordinary person. The Model Penal Code and many jurisdictions require that the defendant actually appreciate the risk.¹³ Those jurisdictions usually provide a lesser offense for a defendant who does not in fact appreciate a risk that he should appreciate and typically call that offense negligent homicide.¹⁴

Generally, the most difficult issues in these jurisdictions are (1) proving the defendant appreciated the risk when he says he did not; and (2) determining how much of the risk the defendant must have appreciated.¹⁵ The first issue is probably the easier of the two. If the State shows that any person with normal senses would have appreciated the risk and proves the defendant’s senses were normal, it is doubtful that a jury would find that he did not appreciate the risk.¹⁶

8. *Id.* at 171 (majority opinion).

9. *See Galbreath v. Eng’g Constr. Corp.*, 273 N.E.2d 121, 122 (Ind. Ct. App. 1971) (involving a defendant who detonated dynamite which caused injury to the plaintiff who was working nearby); *Klein v. Pyrodyne Corp.*, 810 P.2d 917, 918–19 (Wash. 1991) (en banc) (involving a defendant who lit fireworks too close to an audience), *opinion amended by* 817 P.2d 1359 (Wash. 1991).

10. *State v. Williams*, 484 P.2d 1167, 1171 (Wash. Ct. App. 1971), *superseded by statute*, WASH. REV. CODE ANN. § 9A.32.060 (West 2011), *as recognized in* *State v. Norman*, 808 P.2d 1159 (Wash. Ct. App. 1991).

11. *Id.* at 1174.

12. *See, e.g., State v. Shepard*, 973 A.2d 318, 321 (N.H. 2009) (“[A] person charged with criminal negligence may not be convicted on evidence that establishes only ordinary negligence.”).

13. MODEL PENAL CODE § 210.3 (1962).

14. *Mitchell v. State*, 321 S.W.3d 30, 36 (Tex. App.—Houston [1st Dist.] 2010, pet. ref’d) (“The offense of criminally negligent homicide ‘involves inattentive risk creation, that is, the actor ought to be aware of the risk surrounding his conduct or the results thereof [but fails] to perceive the risk.’” (alteration in original) (citing *Stadt v. State*, 182 S.W.3d 360, 364 (Tex. Crim. App. 2006) (quoting *Lewis v. State*, 529 S.W.2d 550, 553 (Tex. Crim. App. 1975)))).

15. *Id.* at 37–38; *Goodman v. State*, 190 S.W.3d 823, 831–32 (Tex. App.—Fort Worth 2006, pet. ref’d).

16. *See, e.g., Porter v. State*, 88 So. 2d 924, 925 (Fla. 1956) (en banc).

The harder issue is determining how much of the risk the defendant must have appreciated? In three editions of my casebook, I have used a different case each time to illustrate this problem. My current edition uses *Goodman v. State*, a Texas case involving an oil rigger engaging in horseplay to initiate a new colleague.¹⁷ Goodman was aware that what he was doing was risky—having been the victim of similar horseplay in his early days and having known that some people get hurt badly, especially when certain conditions are present.¹⁸ He did not, however, know that the especially dangerous condition was present.¹⁹ Nevertheless, the appellate court, by a 2–1 vote, upheld his conviction.²⁰ In my view, the holding was incorrect because the portion of the risk that the defendant realized was not substantial and unjustifiable. Had he done more looking, as a reasonable person would have done before acting, he would have realized the risk. Thus, negligent homicide is the verdict that should have been reached in that case. His astounding eighteen-year sentence should not have been allowed to stand.²¹

I. DEPRAVED-HEART MURDER

Depraved-heart murder can be described as involuntary manslaughter plus. That is, it has all of the elements of involuntary manslaughter plus an additional element of outrageousness.²² An argument against the crime's existence is the difficulty of ascertaining when the level of outrageousness has reached the level of depraved heart. Professor Crump once described the concept of depraved heart as having a wonderful rhetorical flourish like Robert Burns's "O, my love's like a red, red rose," and being just as devoid of meaning.²³ I agree that precisely where the line is between recklessness and outrageous recklessness can be a bit murky, and undoubtedly, there are some cases that are close to the line. Nevertheless, there are some easy cases, and they should be punished accordingly.

For example, a man who throws a brick from a twentieth-floor balcony into a crowd of people, but fully intends to not hit anyone, should be guilty of murder if his brick hits and kills a person in the crowd below.²⁴ What is important, however, is that the concept not be overused. It is easy to find a case where contempt for a particular defendant might cause the prosecutor to charge depraved-heart murder. And that same contempt will lead a jury to convict.

17. *Goodman*, 190 S.W.3d at 827.

18. *Id.* at 831.

19. *Id.* at 832.

20. *Id.* at 835.

21. *Id.* at 827.

22. See MODEL PENAL CODE § 210.2(1)(b) (1962).

23. David Crump, "Murder, Pennsylvania Style": Comparing Traditional American Homicide Law to the Statutes of Model Penal Code Jurisdictions, 109 W. VA. L. REV. 257, 306 (2007).

24. Arnold H. Loewy, *Critiquing Crump: The Strengths and Weaknesses of Professor Crump's Model Laws of Homicide*, 109 W. VA. L. REV. 369, 373 (2007) [hereinafter *Critiquing Crump*].

For example, in *Jeffries v. State*, a habitual drunk, whose license had long since been suspended, drove under the influence of way too much alcohol.²⁵ The only improper maneuver he made, however, was a slow, left turn on an icy Alaskan Highway, thereby leading to a collision with a car going straight, which killed his front seat passenger.²⁶ While the case had a lot of aggravating circumstances, not the least of which was the defendant's failure to honor his driving suspension or attend court-ordered drunk driving classes, there was nothing about the driving itself that warranted anything close to depraved-heart murder.²⁷

This case should be contrasted with other drunk driving cases where the conviction was more appropriate. For example, *Pears v. State*, also from Alaska, involved a hopelessly drunk driver who upon being told by a police officer not to drive, feigned acceptance, ducked back into a bar, and began driving as soon as the officer left.²⁸ After his traveling companion told him how much his driving scared her, he let her out of the car.²⁹ Thereafter, he drove in an extraordinarily reckless manner, occasioning several near-misses before the accident, which occurred when he passed several cars to enter an intersection where the light was red.³⁰

Because this was a case where a wreck was almost inevitable, with the only question being whether chance would allow or preclude one or more fatalities, I think the court was entirely right in letting the question of depraved-heart murder go to the jury, and the jury was entirely right in convicting the defendant.³¹

In some jurisdictions, depraved-heart murder requires a risk of death to many people.³² I suppose these courts are equating the dangerousness of an extreme risk to many people with the intentional killing of one. In such a jurisdiction, a person who—like William Tell—attempts to shoot apples off of the head of a small child would be guilty of no more than manslaughter if one of his shots kills the boy. In my view, this rule is probably not wise. If a person acts with depraved recklessness towards another, he should be guilty of murder.

So how does one tell when recklessness is so extreme that it amounts to a depraved heart? Dean Alan Michaels has offered one suggestion.³³ In his view, we should look at a new mental state that he would call

25. *Jeffries v. State*, 169 P.3d 913, 914 (Alaska 2007).

26. *Id.*

27. *Id.* at 915.

28. *Pears v. State*, 672 P.2d 903, 909 (Alaska Ct. App. 1983), *remanded by* 698 P.2d 1198 (Alaska 1985).

29. *Id.*

30. *Id.*

31. *Id.* at 905.

32. *See, e.g., Northington v. State*, 413 So. 2d 1169, 1171 (Ala. Crim. App. 1981).

33. Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L. REV. 953, 960–63 (1998).

“acceptance.”³⁴ Under this view, the question is whether, if the defendant would have known that his act would result in death, would he have done it anyway?³⁵ According to Dean Michaels, if this mental state is present, then the defendant acts with a depraved heart.³⁶ Otherwise not.³⁷

In my view, “acceptance” cannot replace outrageousness. That is, even if the defendant would have acted as he did, knowing that his actions would cause death, I still would not hold him liable for murder unless, objectively speaking, there was a very high risk of death occurring. For example, if an individual wants to burn down an old barn on his premises that nobody ever sleeps in, he may, in fact, not care if anyone is in there, and if they are, too bad. Yet if, objectively speaking, the chance of someone being in the barn was extremely small, but at the time of the burning, someone was in fact sleeping in the barn and was killed, I do not think the defendant should be guilty of murder.

Similarly, if the wildly drunk driver or the guy who throws a brick from the twentieth-floor balcony swears that he never would have done such a thing if he knew it would cause a death, I would allow his protestations to fall on deaf ears and affirm his convictions. For example, suppose that the guy who threw the brick from the twentieth floor actually made a bet with his roommate that he would not hit anybody, and that his actually hitting somebody cost him \$100.³⁸ Obviously, he would not have thrown the brick if he knew he would hit somebody. Nevertheless, I do not think that murder is too harsh a crime for this callous defendant.

Of course, there will always be close cases. One such case, *People v. Berry*, came from California.³⁹ In that case, a man kept and trained an exceptionally vicious dog who had two jobs: (1) win dog fights as far away as South Carolina, and (2) guard his marijuana plants.⁴⁰ Needless to say, this was not a terribly sympathetic defendant. He was not, however, all bad. The dog was kept tied behind a fence except for a small opening, which unfortunately, a child could get through.⁴¹ Additionally, the defendant had warned the child’s parents to beware of this particular fighting dog and not to let their children go near him.⁴² But children being children, one did get near the dog and was killed.⁴³

The California trial judge let the case go to the jury on a theory of depraved-heart murder.⁴⁴ The jury returned a guilty verdict of the lesser offense

34. *Id.*

35. *Id.* at 961–62.

36. *Id.* at 1015–16.

37. *Id.*

38. *Critiquing Crump*, *supra* note 24, at 373–74.

39. *People v. Berry*, 2 Cal. Rptr. 2d 416, 417–19 (Cal. Ct. App. 1991).

40. *Id.* at 418.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

of involuntary manslaughter.⁴⁵ I am inclined to agree with both the judge and the jury in this case. I believe that there was evidence of sufficient depravity that, were I the judge, I would have let the jury speculate on depraved-heart murder and would have upheld such a verdict. On the other hand, were I a juror, I might well have considered all of the mitigating evidence sufficient to reduce the crime to manslaughter.

But, as I have said, the fact that there will be some close cases like *Berry* is not a reason to eliminate the crime entirely. On the other hand, courts should try to avoid extreme misapplications of the doctrine, such as occurred in *Jeffries*.⁴⁶

II. FELONY MURDER

I conclude with a discussion of “felony murder.” Unlike negligent homicide, involuntary manslaughter, and depraved-heart murder, felony murder need not, and in fact, usually is not, committed unintentionally.⁴⁷ For example, the man who enters the local 7-11, points a gun at the clerk, demands money, and upon receiving it, shoots and kills the clerk to prevent him from ever testifying is surely guilty of felony murder. Just as surely, his killing was intentional. Of course, that application is uncontroversial.

The more controversial aspects of felony murder occur when the defendant did not intend to kill, but a death occurred anyway. The Model Penal Code and a few states have argued that in the absence of intent (or at least extreme recklessness), a killing perpetrated during the course of a felony should not be murder.⁴⁸ In their view, felony murder is unnecessary (he would be guilty anyway) or unjust (he should not be guilty at all).⁴⁹

Let us test that hypothesis. *A* points an apparently loaded, but actually unloaded, gun at *B* while robbing a 7-11 store. *B* dies of a heart attack. *C* rapes *D*, and in the process thereof accidentally suffocates her with a maneuver, which *ex ante* was highly unlikely to result in death. In both of these cases, absent the felony-murder rule, the defendant is unlikely to be convicted of murder. In neither case did the defendant intend to kill, nor did he intend to inflict serious bodily injury⁵⁰ (unless rape qualifies as serious bodily injury,

45. *Id.* at 417.

46. *Jeffries v. State*, 169 P.3d 913, 925–26 (Alaska 2007) (Matthews, J., dissenting).

47. BLACK’S LAW DICTIONARY 694 (9th ed. 2009); *see also* Arnold H. Loewy, *Culpability, Dangerousness, and Harm: Balancing the Factors on Which Our Criminal Law Is Predicated*, 66 N.C. L. REV. 283, 304–06 (1988) [hereinafter *Culpability, Dangerousness, and Harm*] (discussing how the relationship between the underlying felony and the malice of the murder distinguishes felony murder from these other crimes).

48. MODEL PENAL CODE & COMMENTARIES II, art. 210 (1980); *see* *People v. Aaron*, 299 N.W.2d 304, 315 (Mich. 1980).

49. MODEL PENAL CODE & COMMENTARIES II, art. 210; *see Aaron*, 299 N.W.2d at 315.

50. *Cf. People v. Stamp*, 82 Cal. Rptr. 598, 602–03 (Cal. Ct. App. 1969) (affirming defendants’ conviction of felony murder when the victim bank owner died of a heart attack after defendants robbed the bank, even though the defendants had already left the bank and had not harmed anyone else).

which it usually does not for purposes of homicidal liability).⁵¹ Furthermore, neither defendant has acted with the kind of outrageous recklessness that normally would be required for depraved-heart murder.⁵²

So, how many would be satisfied with treating *A* and *C* exactly the same as any robber or rapist where a death did not occur? I suspect that outside of the academy, the numbers would be relatively small. Among academics, there are probably more who would not want to impose additional criminal liability, but there is a split even among our numbers.⁵³

I am one of those who favor punishing *A* and *C* more seriously than the robber or rapist whose conduct did not cause a death for this reason: Crimes that cause extra harm are typically punished more severely than crimes that do not.⁵⁴ For example, assault inflicting serious injury is usually punished more seriously than simple assault, even though the underlying conduct may have been the same, with the only difference being that one victim landed on cement when punched whereas the other landed on grass.⁵⁵ If one is comfortable with the crime of assault inflicting serious injury being more serious than simple assault, one ought to be equally comfortable with punishing rape or robbery inflicting death more severely than simple rape or robbery, notwithstanding the equal culpability of the defendants.

Of course, the government would need to establish proximate causation. That is, in these hypotheticals, they would have to establish that the robbery or the rape, respectively, actually caused the death. That should not be too difficult for the State, which could invoke the aid of the maxim, “You take your victim as you find her.”⁵⁶

I do think that because the theory of felony murder is that the *mens rea* for the underlying felony transfers to the murder,⁵⁷ this rule should be limited to especially dangerous and intentional felonies. Furthermore, I would strictly apply the merger rule; for example, the felony of assault with a deadly weapon cannot suffice for felony murder.⁵⁸ Additionally, drunk driving cannot apply because that does not have to be done intentionally, although as I have said

51. *Cf. Elkins v. State*, 681 S.W.2d 890, 891 (Tex. App.—Fort Worth 1984, no writ) (holding a rape to be an aggravated rape when the defendant threatens serious bodily injury to the victim during commission of the rape).

52. *See* discussion *supra* Part I.

53. *Critiquing Crump*, *supra* note 24, at 375–76; *see* Michael S. Moore, *The Independent Moral Significance of Wrongdoing*, 5 J. CONTEMP. LEGAL ISSUES, 1994, at 237, 280–81 (stating the felony murder rule is unfair by acknowledging that results matter, but stating, “they don’t matter that much”).

54. *Culpability, Dangerousness, and Harm*, *supra* note 47, at 283–84, 288–90.

55. *Id.*

56. *See* *People v. Stamp*, 82 Cal. Rptr. 598, 603 (Cal. Ct. App. 1969).

57. *See* *People v. Aaron*, 299 N.W.2d 304, 315 (Mich. 1980) (stating that three states—Arkansas, Delaware, and New Hampshire—require a demonstration of *mens rea* beyond the intent to cause the felony); *State v. Griffin*, 866 P.2d 1156, 1162 (N.M. 1993) (“The felony-murder intent requirement is satisfied if there is proof that the defendant intended to kill, knew that his actions created a strong probability of death or great bodily harm to the victim or another person . . .”).

58. *People v. Ireland*, 450 P.2d 580, 590 (Cal. 1969) (en banc), *overruled by* *People v. Chun*, 91 Cal. Rptr. 3d 106 (Cal. 2009).

earlier, a drunk enough driver can, and should, qualify for depraved-heart murder.⁵⁹

To be truthful, in my ideal world, the killings described in this section of the paper should not be called felony murder. They should be called “robbery resulting in death” or “rape resulting in death.” The punishment for such crimes could (perhaps should) approach life imprisonment. In the absence of an intent to kill, however, the perpetrator should not be eligible for the death penalty.⁶⁰

This approach strikes me as an appropriate way to distinguish the robber who inflicted death from one who did not, without subjecting such a person to the ultimate penalty for a crime that he did not intend.

III. CONCLUSION

Strict homicidal liability or homicidal liability for ordinary negligence should never be imposed. Liability for a death resulting from gross negligence is reasonable, especially if the penalties are in the misdemeanor range. I do, however, prefer the Model Penal Code’s subjective appreciation of the risk as the better standard for the felony of involuntary manslaughter.⁶¹

As for the more serious unintentional killings, I would retain a properly cabined form of depraved-heart murder. I would also allow an accidental death resulting from an intentional serious felony to qualify as felony murder, although I would prefer to call it “death resulting from the felony,” and punish it with appropriate severity.

59. See *supra* note 31 and accompanying text.

60. See *Culpability, Dangerousness, and Harm*, *supra* note 47, at 285–87.

61. See MODEL PENAL CODE § 210.2 (1962).