REJOINING MORAL CULPABILITY WITH CRIMINAL LIABILITY: RECONSIDERATION OF THE FELONY MURDER DOCTRINE FOR THE CURRENT TIME

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INTRODUCTION

In 2014, Kurese Bell, a young man from the San Diego area, was arrested after committing two armed robberies. Bell and his accomplice, Marlon Thomas, robbed a smoke shop and a marijuana dispensary, with both robberies occurring within four days of each other. During the second robbery, the two men exchanged gunfire with a security guard, who had newly been hired to keep watch over the dispensary. The guard was hit in the fray, but not before he was able to shoot and kill Thomas. Bell was charged and convicted of first-degree murder under California's felony murder rule,[1] even though he did not fire the bullet that killed his accomplice.[2] Bell was later sentenced to sixty-five years to life in prison, plus thirty-five years to run concurrently.[3]

The felony murder rule attempts to hold criminals such as Mr. Bell liable for unintended killings which happen to occur during the commission of a felony.[4] The California Supreme Court has stated that "[t]he felony-murder rule makes a killing while committing certain felonies murder without the necessity of further examining the defendant's mental state."[5] While the idea of holding someone morally culpable for a killing they did not intend contrasts with the general principles of criminal law, the intent to commit the felony is generally explained to constitute an implied intent

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1 CAL. PENAL CODE § 189 (West 2018).

2 It can also be said that Bell did not possess the criminal intent necessary for a first-degree murder conviction in California. First-degree murder in California follows the common law approach, which requires malice aforethought, premeditation, and deliberation. David Crump, *"Murder, Pennsylvania Style": Comparing Traditional American Homicide Law to the Statutes of Model Penal Code Jurisdictions*, 109 W. VA. L. REV. 257, 262–63 (2007).

3 Dana Littlefield, *Robber Gets 65 Years to Life in Dispensary Robbery, Murder*, SAN DIEGO UNION-TRIB. (Sept. 1, 2017, 11:10 AM), http://www.sandiegouniontribune.com/news/courts/sd-bell-sentencing-20170901-story.html.

4 Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 404 (2011).

5 People v. Chun, 203 P.3d 425, 430 (Cal. 2009).

to commit common law murder.[6] Most courts, when justifying the rule within their opinions, explain its use as one of deterrence.[7] California's murder statute reads:

> All murder . . . which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289 . . . is murder in the first degree.[8]

This statute and others like it are illustrative of the felony murder doctrine. The felony murder rule is in effect in a majority of American jurisdictions[9] even as it has been condemned and criticized by some in the academic community[10] for a swath of reasons, such as its enforcement of disproportionate punishments,[11] its expansion of cases eligible for the death penalty,[12] and its apparent lack of any actual deterrent effect.[13]

This Comment seeks to analyze the felony murder rule from a legislative perspective. While it is important to discuss the role of courts across the country who have been active in their attempts to judicially abrogate or limit the felony murder doctrine,[14] the focus of this Comment lies squarely upon the actual statutes that make up the doctrine of felony murder. The ultimate goal of this Comment is to provide a framework for what this author would consider the "ideal" felony murder statute: one that can best comply with the justifications for the existence of the doctrine while avoiding as many of the doctrine's numerous pitfalls as possible. Part I of this Comment will give a brief history of the felony murder rule from its beginnings in English common law to modern day statutes. Part II will examine some of the criticisms levied upon the rule as well as some of the limitations put in place to combat them. Part III will examine the statutory structures generally implemented by legislative bodies when codifying the rule. Finally, Part IV will contain this

6 Leonard Birdsong, *Felony Murder: A Historical Perspective by Which to Understand Today's Modern Felony Murder Rule Statutes*, 32 T. MARSHALL L. REV. 1, 2 (2006) (citing JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 31.06 (3d ed. 2001)).

7 The idea is that the possibility of harsher punishments will stop criminals from committing felonies or cause them to be careful not to negligently or accidently kill while engaging in such felonies. Michael C. Gregerson, Note, *Recent Decisions of the Minnesota Supreme Court: Case Note: Criminal Law—Dangerous, Not Deadly: Possession of a Firearm Distinguished from Use Under the Felony-Murder Rule—State v. Anderson*, 31 WM. MITCHELL L. REV. 607, 613 (2004).

8 CAL. PENAL CODE § 189 (West 2018). The sections referred to in the statute refer to statutes regarding torture, sodomy, lewd or lascivious acts, oral copulation, and forcible acts of sexual penetration.

9 John S. Huster, Comment, *The California Courts Stray from the Felony in Felony Murder: What is "In Perpetration" of the Crime?*, 28 U.S.F. L REV. 739, 743–44 (1994).

10 *See* Binder, *supra* note 4, at 404–05 (citing MODEL PENAL CODE & COMMENTARIES PT. II § 210.2 cmt. 6, at 32–42 (AM. LAW. INST. Official Draft and Revised Comments 1980)).

11 Tamu Sudduth, Comment, *The Dillon Dillema: Finding Proportionate Felony-Murder Punishments*, 72 CALIF. L. REV. 1299, 1327 (1984).

12 Rudolph J. Gerber, *The Felony Murder Rule: Conundrum Without Principle*, 31 ARIZ. ST. L.J. 763, 776–79 (1999).

13 *Id.* at 779–82.

14 And indeed, this Comment will touch upon some examples of efforts by the judiciary to constrain and control various felony murder statutes.

author's suggestion as to how to best design a felony murder statute in order to fulfill the rule's intended legislative purpose.

I. HISTORY OF THE FELONY MURDER RULE

A. A Historical Overview

The precise origins of the doctrine are unclear. One possible source for the theory behind the rule is the medieval theory of "tainting" in which culpability for a death attaches regardless of the killer's mental state.[15] Some legal historians generally opine that the first actual statement of the felony murder doctrine is the English case of Lord Dacres, which was decided in 1535.[16] Lord Dacres had trespassed upon a park with his companions in order to illegally hunt there, at which time he and his hunting party agreed to kill anyone who would stop them from doing so.[17] Their pact came to a realization when a member of the group did indeed kill one of the park's gamekeepers.[18] Although Lord Dacres was not physically present at the site of the murder, he, along with the other members of the hunting party, were charged with murder and sentenced to death.[19] However, the holding of the case which imposed liability on Lord Dacres was not based on his joining of an unlawful act, but instead on the theory of "constructive presence," which frustrates the construction of the case as the inception of the felony murder rule.[20]

Another case which some scholars have cited as the origin of the felony-murder doctrine is the case of Mansell & Herbert.[21] The Mansell & Herbert case arose from an attack upon the home of Sir Richard Mansfield by a gang under the command of George Herbert.[22] The men had gone to Mansfield's house in order to seize goods while pretending to have lawful authority.[23] One of the men in Herbert's group threw a stone at someone standing in the gateway of the house but missed and accidentally hit a woman who was exiting the house, and who later died as a result of her wounds.[24] The court held that because the person intended to perform an act of violence against a third party, even though another died, it was murder regardless of the fact that the eventual victim was not the intended target.[25]

15 Gerber, *supra* note 12, at 765.

16 Gregerson, *supra* note 7, at 611; People v. Aaron, 299 N.W.2d 304, 307 (Mich. 1980) (citations omitted).

17 *Aaron*, 299 N.W.2d at 307 (citations omitted).

18 *Id.* at 307–08.

19 *Id.* at 308.

20 *Id.*

21 *Id.*

22 Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 77 (2004).

23 People v. Aaron, 299 N.W.2d 304, 308 (Mich. 1980).

24 *Id.*

25 *Id.*

Alternatively, other commentators have listed Edward Coke's statement of the rule in 1797 as the original source of the rule which caused the doctrine to gain prominence.[26] Lord Coke's statement of the felony murder rule reads:

> If the act be unlawful it is murder. As if A. meaning to steale a deerre in the park of B., shooteth at the deer, and by the glance of the arrow killeth a boy that is hidden in a bush: this is murder, for that the act was unlawfull, although A. had not intent to hurt the boy, nor knew not of himm. But if B. the owner of the park had shot at his own deer, and without any ill intent had killed the boy by the glance of his arrow, this had been homicide by misadventure, and no felony.
>
> So if one shoot at any wild fowle upon a tree, and the arrow killeth any reasonable creature afar off, without any evill intent in him, this is per infortunium (misadventure): for it was not unlawful to shoot at the wilde fowle: but if he had shot at a cock or hen, or any tame fowle of another mans, and the arrow by mischance had killed a man, this had been murder, for the act was unlawfull.[27]

Lord Coke was suggesting that the evil intent associated with an unlawful act could be substituted for the malice required for homicide.[28] However, other scholars have criticized Lord Coke's statement, claiming—as did the Michigan Supreme Court in *Aaron*—that it was not based off of any existing authority.[29] Regardless of the inception of the felony murder rule in England, the doctrine was seldom used in its country of origin before its abolition in 1957.[30]

B. Current Status of the Doctrine

If the origins of the felony murder rule at English common law are to be considered murky at best, so too is its integration into the American legal system.[31] As the American criminal law system developed to include separate degrees of

26 Gregerson, *supra* note 7, at 612 (citing Michael J. Roman, *"Once More Unto the Breach, Dear Friends, Once More": A Call to Re-Evaluate the Felony-Murder Doctrine in Wisconsin in the Wake of* State v. Oimen *and* State v. Rivera, 77 MARQ. L. REV. 785, 828 n. 15 (1994)); *Aaron*, 299 N.W.2d at 308–09 (citing 2 MICH. CRIM. JURY INSTRUCTIONS (Ann Arbor: Institute of Continuing Legal Education), Felony-Murder Commentary, pp. 16-107–16-109).

27 *Aaron*, 299 N.W.2d at 309 (citing EDWARD COKE, THIRD INSTITUTES 56 (1797)).

28 Binder, *supra* note 22, at 83.

29 People v. Aaron, 299 N.W.2d 304, 309 (Mich. 1980) (citing JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 57, 65 (1883)).

30 *Id.* at 312 (citing Sidney Prevezer, *The English Homicide Act: A New Attempt to Revise the Law of Murder*, 57 COLUM. L. REV. 624, 635 (1957)).

31 There appears to be some disagreement as to whether the American felony-murder rule originated from its English common law counterpart. *Compare* Roman, *supra* note 26, at 787 ("Like many aspects of the present legal system in Wisconsin, the felony-murder doctrine (or felony-murder rule) had its genesis in the common law."), *with* Binder, *supra* note 22, at 63 (stating that America did not receive any felony murder rules from England, as despite cases such as Lord Dacres's, there was no legal authority supporting any such rule in place at the time of the American Revolution).

murder,[32] participation in a felony was used by some states as a grading factor in determining which degree a criminal would be charged with.[33] The first formal felony murder statute was enacted by Illinois in 1827.[34] The doctrine was popular among the states, with all but seven states and the federal government adopting some form of the rule by the end of the nineteenth century.[35]

As it stands now, a mere three states have completely abolished the felony murder rule, with most other jurisdictions retaining the doctrine in some form.[36] Hawaii,[37] Kentucky,[38] and Michigan[39] comprise the states which have completely removed the rule.[40] The decision by the Supreme Court of Michigan in *Aaron* is noteworthy because it is the only affirmative abolition of the rule in America to originate in the judicial branch of a state as opposed to the legislature. The defendant in *Aaron* was convicted of first-degree murder after committing a felony which resulted in an armed robbery.[41] The issue at hand was an instruction by the trial court that "[the jury] could convict defendant of first-degree murder if they found that defendant killed the victim during the commission or attempted commission of an armed robbery."[42] The Supreme Court noted that Michigan did not have a statutorily defined felony murder doctrine, nor did it previously recognize the existence of any common-law rules on the subject.[43] Stating that the abolition of the rule would have "little effect on the result of the majority of cases,"[44] the court held that "malice is an essential element of any murder, as that term is judicially defined, whether the murder

32 Binder, *supra* note 22, at 119.

33 Pennsylvania's 1794 criminal law reform statute was the first statute of this kind, and eventually influenced homicide reform in two-thirds of the other states by the end of the nineteenth century. *Id.* at 119–20.

34 *Id.*at 120–21 (citing ILL. REV. CODE, CRIM. CODE §§ 22, 24, 28 (1827)).

35 *Id.*at 123 (the seven states were Kentucky, Louisiana, North Dakota, Rhode Island, South Carolina, South Dakota, and Vermont).

36 Birdsong, *supra* note 6, at 20 ("While three states, Kentucky, Hawaii, and Michigan, have abolished felony murder, every other jurisdiction in the United States has retained it in some form."); Huster, *supra* note 9, at 743–44 ("While the rule has been abolished in England, its place of origin, the majority of American states still apply the felony murder doctrine in some form.").

37 See the commentary for HAW. REV. STAT. § 707-701 (2017), citing "an extensive history of thoughtful condemnation," states that the legislature decided to follow the "wiser course" set out by England and India in abolishing the statute.

38 KY. REV. STAT. ANN. § 507.020 (West 2017). While being sure to note that killings that occur in the commission of a dangerous felony *can* still constitute murder, the commentary to the Kentucky statute abandoned the doctrine of felony murder as an independent basis for establishing an offense of homicide.

39 People v. Aaron, 299 N.W.2d 304, 321–26 (Mich. 1980) ("We believe it is no longer acceptable to equate the intent to commit a felony with the intent to kill . . . .").

40 Ohio has also effectively abolished the felony murder rule by requiring that deaths occurring while committing or attempting to commit a felony be "purposely cause[d]." OHIO REV. CODE ANN. § 2903.01 (West 2017); *see also* Graham T. Stiles, Comment, *North Carolina's Unconstitutional Expansion of an Ancient Maxim: Using DWI Fatalities to Satisfy First Degree Felony-Murder*, 22 CAMPBELL L. REV. 169, 180 (1999).

41 *Aaron*, 299 N.W.2d at 307.

42 *Id.*

43 *Id.* at 321–26.

44 *Id.* at 327. The court claimed that in most cases in which the felony murder rule had been applied, its use was unnecessary because the requirement of malice could almost always be inferred from the evidence presented.

occurs in the course of a felony or otherwise."[45] This abrogation of the felony murder rule is significant because it raises an intriguing reasoning for the furor behind the doctrine: that most deaths committed during the commissions of felonies can already be prosecuted through other homicide statutes.[46]

II. CRITICISMS OF THE FELONY MURDER RULE

For a doctrine still in effect in a majority of American jurisdictions, the felony murder rule has drawn much ire from many legal scholars. It is important, before diving into how such statutes can most effectively be constructed, to examine the criticisms of the doctrine. Doing so allows potential legislative bodies to be aware of the difficulties they face when creating and amending felony murder statutes.

A. The Mens Rea Element

The reasoning by the Michigan Supreme Court in *Aaron* that many felony murder charges are redundant begins to point to one of the most vocal criticisms of the doctrine, which is the mens rea element. One of the common criticisms of felony murder centers on its perceived lack of a mens rea, or intent requirement.[47] This is because under the doctrine, accidental deaths can be prosecuted as murder, which generally requires a specific intent.[48] However, this argument is not entirely correct, as Mr. O'Herron notes in his article on the subject,[49] because the felony murder doctrine *does* require a mens rea. The mens rea which is necessary to sustain a felony murder conviction is not, however, the intent to commit what would be murder in a given jurisdiction. Instead, the required intent is merely the intent to commit the felony during which the death occurred.[50] In simpler terms, the felony murder rule "transfers the mental state required to commit the felony to the fatal act itself."[51] This

45 *Id.* at 326; *see also* State v. Galloway, 275 N.W.2d 736 (Iowa 1979) (holding that the Iowa felony murder rule is directed at "murders" occurring during the commission of felonies as opposed to "killings," making malice a necessary element in the instruction and application of felony murder cases); W. E. Shipley, *Judicial Abrogation of Felony-Murder Doctrine*, 13 A.L.R.4th 1226 (1982).

46 The traditional models for the degrees of murder are that "murder is in the first degree if committed in cold blood, and is murder in the second degree if committed on impulse or in the sudden heat of passion." Robert Weisberg, *Impulsive Intent/Impassioned Design*, 47 TEX. TECH L. REV. 61, 63 (2014) (citing Austin v. United States, 382 F.2d 129, 137 (D.C. Cir. 1967)). Manslaughter, on the other hand, is a form of criminal homicide that is defined in the Model Penal Code as a homicide that is committed recklessly or when "a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse." MODEL PENAL CODE § 210.3(1)(a)–(b) (AM. LAW INST. 2018).

47 John O'Herron, *Felony Murder Without a Felony Limitation: Predicate Felonies and Practical Concerns in the States*, 46 No. 4 CRIM. LAW BULLETIN ART. 4 (2010) ("Most of the criticism of the doctrine has focused on the most troublesome aspect of the doctrine: the lack of a mens rea requirement").

48 Gerber, *supra* note 12, at 770.

49 *See supra* note 47. Mr. O'Herron was serving as a law clerk to with the Honorable Chief Justice Cynthia D. Kinser at the Supreme Court of Virginia during the authoring of his article. He now serves as an associate at the law firm of Thompson McMullan.

50 *Id.*

51 Gerber, *supra* note 12, at 770. A more expansive view of the transferred intent requirement briefly arose in North Carolina in the case of State v. Jones, 516 S.E.2d 405 (N.C. App. 1999). In *Jones*, the defendant was charged with felony murder after he had a drunk driving accident which resulted in the death of two college

allows accidental deaths which occur in the commission of a felony to be charged as murder so long as the prosecution can prove the intent to commit the particular felony at issue.[52] The extreme hypothetical that arises when one thinks about this idea of transferred intent would be someone who witnesses a robbery dying of shock upon seeing the heinous act. This hypothetical defendant would have the necessary intent to commit the underlying felony, which in this case is the robbery, and therefore could be charged with felony murder.[53]

While the application of the transferring intent seems fairly straightforward, the states have adopted different interpretations of the degree of criminal intent that can actually be transferred to a felony murder charge. An example of the broadest application of felony murder mens rea is the statute in place in Georgia.[54] This specific statute states that "[a] person commits the offense of murder when, in the commission of a felony, he or she causes the death of another human being *irrespective of malice*."[55] The explicit disregard for the necessity of malice makes the statute applicable to practically any felony imaginable.[56] An example of the statute's broad application is seen in the case of *Durden v. State*.[57] In *Durden*, the defendant had broken into a store in order to commit a robbery when he got into a gunfight with the store's owner. The defendant did not manage to shoot the store owner, but the owner died shortly after the exchange from cardiac arrest.[58] The Georgia Supreme Court found that a jury was authorized in finding the defendant guilty of felony murder based on this death.[59]

Other states have gone in the opposite direction, which is to say that they limit the transfer of criminal intent from a felony to felony murder. For example, the courts in New Mexico have judicially limited their felony murder statute[60] to "requir[e]

students. The *Jones* case brought forward an intriguing question about the extent criminal intent could be transferred for felony murder cases. This is because the defendant did not technically intend to commit the underlying felony, which was assault with a deadly weapon (in this case a motor vehicle). The defendant only had the intent to drive drunk, not to commit an assault. *See* Stiles, *supra* note 40. However, this line of reasoning was swiftly shut down on appeal by the Supreme Court of North Carolina. State v. Jones, 538 S.E.2d 917 (N.C. 2000). While the court conceded that the criminal negligence at hand could be used to satisfy the intent requirements for crimes such as manslaughter, such negligence was not intended to satisfy the mens rea for first degree felony murder. *Jones*, 538 S.E.2d at 923.

52 Gerber, *supra* note 12, at 770.

53 Mr. O'Herron argues in his article that when the predicate felonies upon which a felony murder charge can be brought are enumerated in a statute, this transfer of intent is a positive aspect of the doctrine because it furthers the intended purposes of the rule, such as punishing defendants more harshly for dangerous acts that do end in a death. *See* O'Herron, *supra* note 47. Mr. O'Herron's views will be discussed in more detail later in this Comment.

54 *Id.* at 4.

55 GA. CODE ANN. § 16-5-1(c) (2017) (emphasis added).

56 This is not exactly the case, as the judicial branch of Georgia has limited the statute to apply to inherently dangerous felonies, as discussed below.

57 *See* O'Herron, *supra* note 47, at 4–5 (citing Durden v. State, 297 S.E.2d 237 (Ga. 1982)).

58 *Durden*, 297 S.E.2d at 325.

59 *Id.* at 329.

60 N.M. STAT. ANN. § 30-2-1(A)(2) (2017). The statute reads that "[m]urder in the first degree is the killing of one human being by another without lawful justification or excuse, by any of the means with which death may be caused . . . in the commission of or attempt to commit any felony . . . ." It should be noted that the statute itself seems very broad, leading to the judicial branch of the New Mexico government to take it upon themselves to limit its application. *See* O'Herron, *supra* note 47, at 5.

proof that the defendant intended to kill the victim."[61] This effectively means that a killing in the commission of a felony must already be murder in the second degree in order for the felony murder statute to apply.[62] This interpretation of the intent shifting component of felony murder seems to miss some of the purpose of the doctrine, however. It seems that the New Mexico interpretation of the rule ceases to punish defendants for *deaths* that occur in the course of felonies and instead punishes *murders* that occur during such felonies. The distinction is that the deterrent effect of the doctrine[63] moves away from preventing potential criminals from committing felonies and toward preventing criminals who have decided to engage in felonies from committing murder. It seems that with this being the case, having a felony murder statute becomes superfluous, as such crimes are deterred and punished by other degrees of murder or manslaughter statutes.[64]

B. Proportionality

The perceived lack or diminution of the mens rea requirement in the felony murder rule leads many detractors to also decry the seemingly disproportionate punishments the doctrine brings about. The eighth amendment to the United States Constitution states that "[e]xcessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*."[65] The Supreme Court has held that the prohibition on "cruel and unusual" punishments also applies to punishments that are excessive for the offense committed.[66] In the early history of felony murder, the idea of proportionate crimes was not an incredibly important matter since all felonies carried the same penalty.[67] In the modern world, however, most jurisdictions of the United States classify offenses, including homicides, "to reflect a theory of proportionality to the severity of the crime."[68] This idea of proportionality arises most noticeably when considering the felony murder rule's application to cases involving accidental deaths in the commission of felonies. As Justice White stated in *Enmund v. Florida*,[69] "it is fundamental that 'causing harm intentionally must be punished more severely than causing the same harm unintentionally.'"[70]

To this end the Supreme Court has laid out a framework that the various courts should use when analyzing the proportionality of a punishment.[71] The Court laid out three objective criteria in this test, imploring courts to consider: "(i) the gravity of the

61 State v. Ortega, 817 P.2d 1196, 1204–05 (N.M. 1991).

62 O'Herron, *supra* note 47, at 5 (citing State v. Campos, 921 P.2d 1266, 1273 (N.M. 1996)).

63 Whether or not such an effect exists will be discussed later in this section.

64 *See supra* note 46 and accompanying text; MODEL PENAL CODE § 210.3(1)(a)-(b) (AM. LAW INST. 2018).

65 U.S. CONST. AMEND. VIII (emphasis added). This amendment is made binding upon the states through the fourteenth amendment.

66 Sudduth, *supra* note 11, at 1310.

67 Roman, *supra* note 26, at 789–90.

68 *Id.* at 789.

69 458 U.S. 782 (1982).

70 *Id.* at 798 (citing H. HART, PUNISHMENT AND RESPONSIBILITY 162 (1968)).

71 Solem v. Helm, 463 U.S. 277 (1983).

offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."[72] Additionally, because state constitutions have their own clauses pertaining to proportionality, criminal punishments at the state level must conform to the requirements of both the federal and state constitutions which apply.[73] This has led to some states further limiting the breadth of sentences available for felony murder prosecutions. For example, the California Supreme Court has held that a punishment which may not be disproportionate in the abstract[74] may still be impermissible if the defendant is not proportionately culpable.[75] The *Dillon* court declared that the "'facts of the crime in questions' . . . i.e., the totality of the circumstances surrounding the commission of the offense in the case at bar," must be considered in the proportionality analysis for felony murder sentences.[76] In *Dillon*, the defendant was a high school student who was attempting to rob an illegal marijuana farm.[77] When the owner of the farm snuck up on the boy and his friends from behind, the defendant "began rapidly firing his rifle at him," eventually killing the owner.[78] The California Supreme Court found that the defendant's sentence of life imprisonment was excessive, considering the facts that the shooting in question was responsive instead of proactive and that none of the defendant's accomplices received a charge of homicide at all.[79] By viewing the totality of the facts at hand, the Supreme Court was able to examine the proportionality of the individual case, as opposed to viewing the sentence in light of the charged crime alone.

Regardless of the additional limitations that may be present at the state level, it would appear that the test articulated by the Supreme Court in *Solem v. Helm*, specifically the first prong, actually seems to justify the punishments doled out by felony murder statutes. This is because the predicate element of the rule is that a defendant actually has committed a felony. The "gravity" of such an offense seems to be incredibly large from a societal standpoint, especially considering the intended deterrent effect of the doctrine. The criticisms of proportionality are at their zenith, however, when it comes to felony murder's potential expansion of capital punishment crimes and vicarious liability.

1. Vicarious Liability

One of the more troubling aspects of the felony murder doctrine, especially in the realm of proportionality, is the idea of applying vicarious liability to the actual killer's accomplices.[80] Under the common law version of the doctrine, one could be

72 *Id.* at 292.

73 Sudduth, *supra* note 11, at 1311.

74 California courts have long used a similar proportionality test to that stated in *Solem*. In re Lynch, 503 P.2d 921 (Cal. 1972).

75 People v. Dillon, 668 P.2d 697, 721 (Cal. 1983).

76 *Id.* at 720 (citing In re Foss, 519 P.2d 1073, 1078 (Cal. 1974)).

77 *Id.* at 700–01.

78 *Id.* at 701.

79 *Id.* at 727.

80 Roman, *supra* note 26, at 807–08.

found guilty of felony murder "no matter if they, the accomplice, or the victim caused a death during the defendant's commission or attempted commission of the underlying felony."[81] This theory of criminal liability is evident in the case of Kurese Bell, whose story was detailed in the introduction to this Comment.[82] Mr. Bell did not fire the bullet that killed his friend, Marlon Thomas. In fact, no person involved in the commission of the robbery killed Mr. Thomas, with the fatal bullet instead originating from the gun of a security guard hired by the targeted business. Despite this, Mr. Bell was still charged and convicted under the felony murder doctrine. As the application of the doctrine in situations such as these seems somewhat nonsensical, some states have taken steps to limit the rule.[83] Seven jurisdictions actually define felony murder as "murder as participation in a felony *in which any participant causes death.*"[84] A further five states allow for liability under felony murder when *any* person causes a death.[85] When considering situations such as Mr. Bell's, in which a death is caused by someone resisting a felonious act, jurisdictions have implemented two limitations: the "agency theory" and the "proximate cause theory."[86]

Under the agency theory, "for a defendant to be held guilty of murder, it is necessary that the act of killing be that of the defendant, and for the act to be his, it is necessary that it be committed by him or by someone acting in concert with him."[87] Another way to look at the agency theory is to describe it as killings that are in furtherance to the felonious aims that the accomplices agreed to.[88] This idea is illustrated in the California case of *People v. Pool*,[89] which concerned a defendant who participated in a stage coach robbery, and the death that occurred was that of a constable who pursued them afterward.[90] The Supreme Court of California found the defendant liable because the defendant conspired to commit the robbery, including resisting apprehension should they be captured.[91] The decision in *Pool*, timeworn though it may be, emphasizes the point that by agreeing to commit the felony, which in Pool's case was a robbery, the accomplice who did not pull the trigger implicitly agreed to killings which would occur in the commission, or in this case the escape from, the felony.[92] The agency theory has become the most accepted limitation of vicarious liability in felony murder statutes.[93]

81 *Id.* at 808.

82 *See supra* note 3 and accompanying text.

83 Roman, *supra* note 26, at 808.

84 Binder, *supra* note 4, at 513 (emphasis added). The jurisdictions with this specific definition are Alabama, Connecticut, Montana, New York, North Dakota, Oregon, and Washington.

85 *Id.* at 516. The additional five jurisdictions are Alaska, Arizona, Colorado, Florida, and New Jersey.

86 Roman, *supra* note 26, at 809.

87 *Id.* (citing Erwin S. Barbre, Annotation, *Criminal Liability Where Act of Killing is Done by One Resisting Felony or Other Unlawful Act Committed by Defendant*, 56 A.L.R. 3d 239, 242 (1974).

88 Binder, *supra* note 22, at 198.

89 27 Cal. 572 (Cal. 1865).

90 *Id.* at 573.

91 *Id.* at 580.

92 Binder, *supra* note 22, at 198.

93 Roman, *supra* note 26, at 810.

On the other hand, the theory of proximate causation does not extend liability to charges of felony murder where the death is caused by an unexpected chain of events.[94] Thus the proximate cause theory requires that the death be reasonably foreseeable. Another way to articulate this theory is to say that the death be a "natural and probable consequence of the act agreed to."[95] This promulgation of the theory is expressed by the Court of Criminal Appeals of Texas in *Darlington v. State*.[96] *Darlington*, much like *Pool*, concerned a robbery that resulted in an unintended death. The court in *Darlington* decided that because the defendant agreed to rob the train, he would have known that such a killing could have been a probable result.[97]

The differences between the two theories are apparent when one applies them to a real-world scenario such as Kurese Bell. Under the agency theory of felony murder accomplice liability, Mr. Bell would not have been liable for the death as the security guard was certainly not acting in concert with the robbers. Under the proximate cause theory, however, it is possible that Mr. Bell could be found liable because the carrying of a gun during a robbery could make the death (or the shootout causing the death) foreseeable.[98]

2. Expansion of the Death Penalty to Vicariously Liable Felons

Even with the limitations states have imposed on vicarious liability through the felony murder rule, concerns of proportionality between the punishment and the action come up whenever the death penalty rears its ugly head. While the death penalty has been held to not be cruel and unusual per se,[99] circumstances when it is applied to vicariously liable defendants become especially suspect. This was the issue at hand in *Enmund v. Florida*,[100] where the defendant was convicted of first degree murder through the felony murder rule after the death of two elderly people during the course of a robbery.[101] However, the defendant in question had not participated in the actual killings or even the robbery, but instead was merely the getaway driver.[102] The Supreme Court reversed the decision of the Florida Supreme Court sentencing the defendant to death, declaring that "Enmund's criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt."[103] Additionally, the Court declared that applying the death penalty to Enmund and cases like his "[did]

94 *Id.* (citing David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL'Y 359, 383–87 (1985)).

95 Binder, *supra* note 22, at 198 (citing Darlington v. State, 50 S.W. 375, 376 (Tex. Crim. App. 1899)).

96 50 S.W. 375 (Tex. Crim. App. 1899).

97 *Id.* at 376.

98 It is obvious that when using the proximate cause theory, there would need to be some sort of statutory provision or legislative intent adequately defining what should be considered "reasonably foreseeable" in regards to deaths which occur during felonies.

99 Lily Kling, *Constitutionalizing the Death Penalty for Accomplices to Felony Murder*, 26 AM. CRIM. L. REV. 463, 465 (1998) (citing Gregg v. Georgia, 428 U.S. 153, 187 (1976)).

100 458 U.S. 782 (1982).

101 *Id.* at 782.

102 *Id.*

103 *Id.* at 801.

not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts."[104] The Court held that "unless there was a showing that the defendant killed, attempted to kill, or intended to kill, the death penalty was disproportionate and thus unconstitutional when imposed on a non-triggerperson."[105]

C. The Lack of Deterrence

One of the primary justifications for the continued survival and application of the felony murder rule is the deterrent effect it has on criminals.[106] The supposed deterrent effect has two main facets: namely, that the felony murder rule will deter felons from causing a death while committing crimes, and that the rule will deter potential felons from committing a felony at all.[107] Some proponents of this line of thinking have even gone so far as to suggest that having the rule in place will convince co-felons to "dissuade each other from using violence if they know they will be liable for murder."[108]

The principal problem with this justification is that it is practically impossible to deter someone from the act of another.[109] How is a defendant supposed to be deterred from committing an unintended act? Even if a felon were to be more careful during the commission of his or her felony, unintended events and consequences can still arise that were completely unforeseen to the felon. Another problem arises when one considers that the average felon does not have any knowledge of the felony murder rule or the potential liability they face should a death occur.[110] Due to this criticism of the questionable deterrent effect of the doctrine, the courts of the state of California have held that the rule should be given the narrowest possible application consistent with its purpose.[111] This type of limitation, although it be judicial in nature, combats the condemnation the doctrine faces and attempt to make the rule more compatible with its indicated purpose.

III. COMMON STATUTORY STRUCTURES

A. Enumerating Felonies in Felony Murder Statutes

While the aforementioned criticisms certainly paint a concerning perspective of the felony murder doctrine, many states work to alleviate these issues by limiting the applicable underlying statutes upon which a charge of felony murder can be

104 *Id.*

105 Kling, *supra* note 99, at 467 (citing *Enmund*, 458 U.S. at 787).

106 Roman, *supra* note 26, at 822. However, as one author notes, "[t]he history of the original rule . . . does not reveal the deterrent focus underlying the modern rule." Gerber, *supra* note 12, at 779 ("Coke, Forster, and Blackstone did not justify the doctrine on deterrence grounds.").

107 Roman, *supra* note 26, at 822.

108 Huster, *supra* note 9, at 747.

109 Gerber, *supra* note 12, at 780.

110 *Id.* at 781.

111 Huster, *supra* note 9, at 748 (citing People v. Satchell, 489 P.2d 1361, 1365 (Cal. 1971)) ("[T]he court has held that the rule will not be applied where it does not serve its deterrent purpose.").

brought.[112] In his article on the subject, Mr. O'Herron claims that by limiting the predicate felonies, the doctrine can be dutifully confined to its intended purposes, thereby limiting many of the criticisms levied its way.[113] Many courts, however, have declined to explicitly define an exhaustive list of the felonies to which felony murder can be applied, and have instead defined murder as causing a death in the course of a felony "clearly dangerous to human life."[114]

1. Inherently Dangerous Felonies

The issue with statutes that base felony murder on felonies "clearly dangerous to human life" arises with the question of which felonies should be considered to be dangerous.[115] In *Ex parte Mitchell*[116] the Court of Criminal Appeals in Alabama tackled just such a question. The Alabama court examined two tests other jurisdictions had used when confronted with this question. The first, the "elements test," requires that "the court consider the elements of the felony 'in the abstract' rather than look at the particular facts of the case under considerations."[117] The other test is known as the "facts test," which allows the jury to consider the facts and circumstances of the particular case to determine if the felony in question is inherently dangerous in the manner and the circumstances in which it was committed.[118]

a. The "Facts Test"

As the Supreme Court of Alabama noted, the "facts test," when used to determine whether a felony is "inherently dangerous," allows the jury to consider the totality of the facts and circumstances surrounding the specific crime at issue. In the case of

112 For an example of a statute that enumerates a set list of felonies that can be used as the basis for felony murder, see CAL. PENAL CODE § 189 (West 2018), *supra* note 9, and accompanying text. Another example is found in the Arkansas capital murder statute, which dictates that a person commits capital murder if they cause a death in the furtherance or immediate flight from a list of felonies including terrorism, rape, kidnapping, vehicular piracy, robbery, aggravated robbery, residential burglary, commercial burglary, aggravated residential burglary, a felony violation of the Uniform Controlled Substance Act, first degree escape, and arson. ARK. CODE. ANN. § 5-10-101 (2017).

113 O'Herron, *supra* note 47, at 9–10. Mr. O'Herron, in voicing his support for the doctrine of felony murder, notes that as "an act causing death during another wrongful act, a felony should be treated more harshly than an act causing death independent from any other wrongful act." It appears that Mr. O'Herron believes that because defendants are already involved in a morally corrupt act (the predicate felony), the fact that a death occurred is rightfully punished harshly by the felony murder rule. Thus, by enumerating the exact felonies under which felony murder can be brought, the doctrine succeeds in punishing those victims who ultimately do cause a death.

114 For example, the Alabama murder statute reads: "A person commits the crime of murder if he or she . . . commits or attempts to commit . . . any other felony clearly dangerous to human life and, in the course of and in furtherance of the crime that he or she is committing or attempting to commit, or in the immediate flight therefrom, he or she . . . causes the death of any person." ALA. CODE. § 13A-6-2 (2017).

115 Another problem comes about when legislatures decide to get "tough on crime" and thus choose to expand the list or breadth of enumerated felonies to which felony murder can attach. Gerber, *supra* note 12, at 768.

116 936 So. 2d 1094 (Ala. Crim. App. 2006).

117 *Id*. at 1096 (citing State v. Stewart, 663 A.2d 912, 918–19 (R.I. 1995)).

118 *Id.* at 1097.

Mitchell, the underlying felony supporting the felony murder charge at issue was unlawful distribution of a controlled substance.[119] Specifically, Mitchell and an accomplice were in a vehicle and were in the business of selling marijuana. They attempted to sell the illicit substance to a potential customer, who instead tried to rob the two men.[120] The robber shot Mitchell's accomplice, who later died from his wounds. The Alabama Supreme Court held that the fact-based approach was "the more logical approach," and more consistent with the way the doctrine had been developed in the state.[121] The court did not provide much detail for their reasoning in the matter, but did quote the Rhode Island Supreme Court in saying that "the better approach is for the trier of fact to consider the facts and circumstances of the particular case to determine if such felony was inherently dangerous in the manner and the circumstances in which it was committed."[122]

While the idea of viewing the totality of the circumstances surrounding a felony seems at first blush to be ideal, the facts test, as shown in *Mitchell*, can lead to truly troubling results. In *Mitchell*, the defendant was held liable for his co-felon's death even though the death was caused by a third party over which the defendant had no control. Additionally, the underlying charge in the *Mitchell* case was merely distribution of a controlled substance. While there could be some argument that the distribution of illegal drugs is inherently dangerous due to the level of violence surrounding that particular industry, the Alabama Supreme Court points to no legislative history which would point to the fact that the state legislature considered the crime in such a way.

Additionally, it could be argued that the facts-based test fails to provide criminals with fair notice that their conduct will leave them open to felony murder liability. In essence, the application by a trier of fact that the particular circumstances of a given case are "inherently dangerous" could be considered an ex post facto law in violation of the Due Process Clause.[123] The Supreme Court of the United States has held that the ex post facto clause can also extend to judicial enactments.[124] In this instance, the application of the facts-based inquiry into the nature of the felony appears to act as an after-the-fact aggravation of the crime. Because the jury in *Mitchell's* case found the crime of illegal distribution of controlled substances to be "inherently dangerous" without the input of any legislative history, the judiciary effectively raised the punishment that Mitchell received for his crime. The necessity of this factual approach becomes even more dubious when one considers that the facts of

119 Which in this case was marijuana. *Id.* at 1096.

120 *Id.* at n.2.

121 *Id.* at 1101.

122 *Stewart*, 663 A.2d at 919.

123 U.S. CONST. art. I, § 10, cl. 1.

124 Stiles, *supra* note 40, at 197 (citing Bouie v. City of Columbia, 378 U.S. 347, 353–54 (1964)) ("An unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an 'ex post facto law.'")). Other improper categories of law and enactments include making an action criminal which would have been innocent when the crime was done before the passing of the law or enactment, allowing for the imposition of a different or greater punishment than was allowed when the crime was committed, and altering the legal rules of evidence to permit different or less testimony to convict the offender than was required at the time of the offense was committed. Stiles, *supra* note 40, at 197 (citing Collins v. Youngblood, 497 U.S. 37, 42 (1990)).

the case could have subjected Mitchell to a higher penalty through the normal use of the state's sentencing standards.[125]

b. The "Elements Test"

The elements test for inherently dangerous felonies, as opposed to the facts test, examines the elements or the crime in question without regard for the facts of the underlying case.[126] According to the New Mexico Supreme Court in *Mora*,

> [t]he abstract approach involves a two-step process by which the court first examines the 'primary element' of the offense at issue to determine whether it involves the requisite danger to life. The court then looks to the 'factors elevating the offense to a felony' to determine whether the felony, taken in the abstract, is inherently dangerous to human life.[127]

The California Supreme Court applied this abstract approach in the case of *People v. Patterson*.[128] In *Patterson*, the defendant provided the victim with cocaine. The victim soon became sick and died of acute cocaine intoxication. The defendant was charged with murder under California's second-degree felony murder doctrine.[129] The *Patterson* court refused to replace the elements test in place in California with the facts test outlined above because in every instance such a test would be applied, there would already have been a death.[130] The court reasoned that that "the existence of the dead victim might appear to lead inexorably to the conclusion that the underlying felony is exceptionally hazardous."[131]

The court first had to decide whether to consider the elements of the entire statute dealing with controlled substances[132] or to view the section of that statute dealing

125 The Alabama Sentencing Commission's "Drug Worksheet," which can be found on their website, contains a two point increase for the use or possession of a dangerous weapon during a drug crime. *New Sentencing Standards: General Instructions, Worksheets, and Sentence Length Tables*, AL. SENTENCING COMM'N, http://sentencingcommission.alacourt.gov/sent_standards.html (last visited Apr. 11, 2018).

126 Ex parte Mitchell, 936 So. 2d 1094, 1096–97 (Ala. Crim. App. 2006).(citing State v. Mora, 950 P.2d 789, 796–97 (N.M. 1977)).

127 *Mora*, 950 P.2d at 796–97 (citing People v. Lee, 286 Cal. Rptr. 117, 122 (Cal. Ct. App. 1991)). An example of the second step in the process is contained in *People v. Henderson*, in which the court considered whether the crime of false imprisonment was a felony inherently dangerous to human life. The statute differentiated between felony and misdemeanor false imprisonment by making it a felony to commit the crime with "violence, malice, fraud or deceit." However, the court stated that the legislature did not make any relevant distinctions as to those specific elements, as they were solely used to distinguish between the different levels of the crime. 560 P.2d 1180, 1184–85 (Cal. 1977).

128 778 P.2d 549 (Cal. 1989).

129 "Second-degree felony murder attaches to any death resulting from a commission of a non-enumerated felony 'inherently dangerous to human life'" which gives the act the implied malice to which felony murder can then be applied. Though the recent decision in *People v. Sarun Chun* declares that the California second-degree felony murder doctrine is a creature of statute, the rule is generally believed to be one of judicial creation. David Mishook, Note, People v. Sarun Chun—*In its Latest Battle with Merger Doctrine, Has the California Supreme Court Effectively Merged Second-Degree Felony Murder out of Existence?*, 15 BERKELEY J. CRIM. L. 127, 131 (2010) (citing People v. Ford, 60 Cal. 2d 772, 795 (Cal. 1964)).

130 *Patterson*, 778 P.2d at 554. (citing People v. Burroughs, 678 P.2d 894, 897 (Cal. 1989)).

131 *Id.* (quoting *Burroughs*, 678 P.2d at 897–98).

132 CAL. HEALTH & SAFETY CODE § 11352 (West 2018).

with cocaine separately. The court noted that "[t]he fact that the Legislature has included a variety of offenses . . . does not require that we treat them as a unitary entity,"[133] and found that the reasoning for the conglomerated statute was merely convenience; thus, the court could examine the cocaine provision of the code separately. Thus, the court held that the determination of whether furnishing cocaine is inherently dangerous should not turn on whether other drugs included in the same statute were also dangerous.[134]

Finally, the court provided guidance to the trial court on remand to evaluate whether the statute under which the defendant's crime fell was "inherently dangerous to human life."[135] The court concluded that for the purposes of second-degree felony murder's implied malice requirement, an "inherently dangerous felony" is one which has a high probability that a death will result.[136] Even more poignantly, the court stated that "it is the Legislature, rather than this court, that should determine whether expansion of the second-degree felony murder rule is an appropriate method by which to address this problem," and thus they were bound to apply the elements test to the statute at hand.[137]

B. The Texas Solution: Inherently Dangerous Acts

The Texas felony murder statute[138] uses a much different framework than those discussed above. As opposed to specifically enumerating which felonies may be used as predicates for a charge of felony murder, the Texas statute states that a person commits murder if he or she:

> (3) commits 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.[139]

This statute makes moot some of the proportionality complaints against the felony murder doctrine, because the dangerous act by the defendant must be what has caused the death in question.[140] Mr. Crump, in his article concerning the merits of the Texas statute, states that this version of felony murder liability is superior to the enumerated felonies approach because, in this iteration, the doctrine would require personal blameworthiness on the part of the defendant.[141] This is not to say that there

133 *Patterson*, 778 P.2d at 556.

134 *Id.*

135 *Id.* at 557–58.

136 The court also noted that any more lenient standard could improperly expand the scope of the second-degree felony-murder doctrine. *Id.* at 558.

137 *Id.*

138 TEX. PENAL CODE ANN. § 19.02(b)(3) (West 2017).

139 *Id.*

140 David Crump, *Should We have Different Views of Felony Murder Depending on the Governing Statute?*, 47 TEX. TECH L. REV. 113, 118–19 (2014).

141 *Id.* at 115.

are no problems with the construction of the Texas statute, however, and one issue potentially surfaces when the predicate felony requires only criminal negligence as opposed to intent or knowledge.[142] Mr. O'Herron, however, takes a much more negative view of the Texas felony murder statute.[143] In regards to the element of a "clearly dangerous" act, Mr. O'Herron claims that the element makes the doctrine unduly less broad, as it seems to preclude the application of the rule to felonies that would not typically result in death.[144] Despite Mr. O'Herron's arguments, it does seem as if requiring an actual "clearly dangerous" act by a potential defendant goes a long way towards reconnecting the idea of moral culpability with the charge being brought.

C. Degrees of Felony Murder

Another way that some states limit the doctrine of felony murder is to include different degrees of punishment for different types of underlying felonies.[145] This separation by the states appears to be a recognition that certain underlying felonies are more egregious than others and should be punished accordingly.[146] While some states do segregate specified levels of felonies into different degrees, most of them do not do so in ways that make the application of the doctrine effective.[147] Mr. O'Herron outlines his view on how felony murder should properly be segmented into the various categories of the degrees of murder. He outlines that first-degree murder should be reserved for the felonies that are historically associated with the doctrine.[148] Second-degree felony murder would then be reserved for dangerous felonies that are not *quite* as dangerous as those outlined for consideration of first-degree felony murder,[149] much like the California take on the doctrine.[150] Only two

142 According to Mr. Crump, this issue is mostly on hand when the predicate felony is injury to a child. *Id.* at 119.

143 O'Herron, *supra* note 47, at 5–6.

144 *Id.* Mr. O'Herron also notes the broad interpretation of the "in furtherance of" language in the Texas statute. He cites to *Bigon v. State*, in which the Texas Court of Criminal Appeals held that "driv[ing] a heavily loaded jeep towing a loaded trailer across the center stripe of a roadway into the oncoming lane of travel" was in furtherance of the crime of driving while intoxicated. 252 S.W.3d 360, 366, 373 (Tex. Crim. App. 2008).

145 We have already seen an example of this idea in Part II(1)(b), *supra*, where the California courts had introduced second-degree felony murder to be applied to felonies not enumerated by the first-degree felony murder statute but still being "inherently dangerous to human life." *See* Mishook, *supra* note 127, and the accompanying text.

146 O'Herron, *supra* note 47, at 13.

147 *Id.*

148 *Id.* at 14 ("A felony is properly included in a first-degree felony murder statute if it requires an intent to do harm that is proportional to the punishment imposed for first degree murder, usually life in prison, and if its commission includes the reasonable foreseeability of death.") Mr. O'Herron's reasoning is reminiscent of the applicability of felony murder in its original form at common law, which was not nearly as troubling as it is today due to the fact that the small number of felonious crimes in effect at the time were all punishable by the same sentence.

149 *Id.* at 15 ("[S]econd degree felony murder should encompass those felonies that are *potentially* dangerous to human life, as opposed to those that are *inherently* dangerous to human life and necessarily involve a willingness to take life.").

150 *See* Mishook, *supra* note 129, and the accompanying text.

states[151] go lower than second-degree murder when defining the extent of their felony murder doctrines, and it is questionable whether they qualify as "felony manslaughter" statutes, as such crimes would foreseeably come incredibly close to matching the elements of regular manslaughter statutes.[152]

IV. PROPOSED SOLUTIONS

The felony murder rule is a useful tool that enables society to punish criminals who, in the course of their crimes, cause the death of another human being. While there is no shortage of criticisms levied upon the felony murder rule, these are not so insurmountable that a legislature could not create a law that avoids a great many of them. For example, Mr. O'Herron appears to be on the right track when he states that enumerating the felonies upon which the felony murder rule can be used is essential to limit the doctrine and confine it to its intended purposes of retribution and deterrence.[153]

However, it appears that the only way to truly limit the doctrine in order to avoid questions of proportionality, is to revert the felony murder rule to apply only to those underlying felonies that would be considered inherently dangerous.[154] At the inception of the doctrine, the number of felonies available to prosecutors was incredibly limited, and included only the most heinous crimes.[155] By extending the felony murder rule to other, less serious crimes, the risk of creating disproportionate punishments becomes increasingly tangible. As such, it does not seem prudent to burden the legislature with the creation of separate degrees of felony murder,[156] especially because deaths that are caused in the commission of such felonies will likely fall under the actual murder or manslaughter statutes of that jurisdiction.[157] Another benefit of limiting the available underlying felonies through specific statutory enumeration is that it gives proper notice of potential consequences to potential felons. By taking the decision as to which felonies are "inherently dangerous" out of the hands of the courts, the doctrine becomes much more clear and unambiguous.[158]

This is not intended to discount the idea proposed in the Texas felony murder statute,[159] which requires a clearly dangerous act for a felony to be used as a predicate

151 The two states are Kansas (*See* KAN. STAT. ANN. § 21-5405(a)(2)) (2017) and Mississippi (*See* MISS. CODE ANN. § 97-3-27 (2017)).

152 O'Herron, *supra* note 47, at 15.

153 *See supra* note 113 and the accompanying text.

154 This can also apply to crimes which are substantially similar to these traditional felonies or those which serve as an extension thereof.

155 Some of the traditionally enumerated felony murder felonies include robbery, arson, kidnapping, burglary, rape, and terrorism. *See* O'Herron, *supra* note 47, at 14.

156 *See supra* Part II(C).

157 *See supra* note 46 and the accompanying text.

158 That being said, should a legislature be dead set on including all "inherently dangerous felonies," it would be wise of them to statutorily enact the elements test as the method of determining which felonies qualify. As discussed above, the elements test is better at following the intent of the legislature as to which felonies they deemed inherently dangerous while passing their statutes.

159 Which has been called a "better formulation" by Mr. Crump. Crump, *supra* note 140, at 119.

element of felony murder. Quite the contrary; it would appear that combining the dangerous act element with the enumeration of predicate felonies could create the most well rounded felony murder statute that would best circumvent the potential problems with the doctrine. Limiting the number of felonies ensures that the criminals being punished have actually committed morally reprehensible crimes, which gives a stronger basis for the idea that their intent to commit such a crime should be transferred to the death which occurred. By then adding the requirement that the defendant have acted in some way so as to cause the death, the hypothetical statute would also tie the commission of the felony into the cause of the death and the proportionality of the sentence.

Furthermore, it would be beneficial for a state legislature to require that the hypothetical defendant "purposefully and knowingly" commit the dangerous act.[160] This would ensure that unknowing defendants would not be held vicariously liable for actions taken solely by their co-felons. It should be noted, however, that this would cause a defendant only to be liable for deaths caused *by his own actions*. For an example, take the case of Mr. Bell, which was chronicled in the introduction to this note.[161] Mr. Bell was committing the crime of robbery, which would be one of the enumerated felonies under this hypothetical statute,[162] and got into a gunfight with a security officer, which would be a clearly dangerous act which Mr. Bell knowingly and purposefully entered into. Thus, the hypothetical ideal statute would not shield a defendant from liability merely because the defendant was not the one to actually kill the victim. However, it does more closely join the ideas of cause, moral culpability, and punishment.[163]

CONCLUSION

While many of the criticisms of the felony murder doctrine are warranted to a certain degree, it must be admitted that the rule itself has a designed and necessary role in the framework of the criminal justice system. Mr. O'Herron's point that felons who cause a death while perpetrating their crimes should be punished more harshly is well taken.[164] The idea of punishing those who cause deaths with relative severity is consistent with the theory of using criminal punishment as a form of retribution and deterrent.[165] However, there is a need to limit the doctrine in order to avoid the

160 *Id.*

161 *See supra* note 3 and the accompanying text.

162 The full text of this ideal statute would read something like: "A person commits the crime of murder when they commit or attempt to commit robbery, arson, kidnapping, burglary, rape, or terrorism, and in the course of the commission or attempt, or in immediate flight from the commission or attempt, he purposely and knowingly commits or attempts to commit an act clearly dangerous to human life that proximately causes the death of an individual."

163 Perhaps Mr. Bell, though he may feel hard done by as he did not "actually" kill anyone himself, does deserve his harsher sentence. He participated in a robbery and a gunfight, acts which in and of themselves are morally reprehensible, without which the death in question would almost certainly not have occurred. As this Comment has previously discussed, illegal acts that cause wrongful deaths seem as if they should be punished harsher than those that occur during innocent conduct. *See supra* note 111 and the accompanying text.

164 *See supra* note 113 and the accompanying text.

165 As Justice Kennedy stated in the Supreme Court's opinion in *Graham v. Florida*, "[r]etribution is a legitimate reason to punish." 560 U.S. 48, 71 (2010).

many drawbacks which have plagued the rule since its inception. The most efficient way to accomplish this end is for state and federal legislatures to take a more direct, hands on approach, and confront these problems before it becomes necessary to be subject to judicial review. By implementing limitations in the actual statutes, such as enumerating the predicate felonies and requiring an act which is dangerous to human life, legislatures can clearly define when a potential felon will face liability for deaths caused by themselves or others in the course of such a felony.