The Origins of American Felony Murder Rules

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THE ORIGINS OF AMERICAN FELONY MURDER RULES

Guyora Binder

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INTRODUCTION: THE MYTH OF THE COMMON LAW FELONY MURDER RULE

Felony murder liability is one of the most persistently and widely criticized features of American criminal law. Much of the criticism is directed at a sweeping doctrine holding felons strictly liable for any death resulting from any felony. Many commentators and courts assert or assume that this harsh doctrine long prevailed as the common law rule in England, was received into American law upon independence, and remains the law except where modified by enlightened legislation or judicial decision. William Clark and William Marshall summed up this prevailing view on the origin of American felony murder rules in their early twentieth-century treatise on crimes:

At common law, malice was implied as a matter of law in every case of homicide while engaged in the commission of some other felony, and such a

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2. See, e.g. (in chronological order), Crum, supra note 1, at 207-08; Bernard E. Gegan, Criminal Homicide in the Revised New York Penal Law, 12 N.Y.L.F. 565, 586-87 (1966); Seibold, supra note 1, at 133-34, 160; MODEL PENAL CODE § 210.2 cmt. 6, at 31-32; PILLSBURY, supra note 1, at 106-08.
killing was murder whether death was intended or not. . . . On this principle, it was murder at common law to unintentionally kill another in committing, or attempting to commit, burglary, arson, rape, robbery, or larceny. The doctrine has repeatedly been recognized and applied in this country, and is to be regarded as still in force, except where it has been expressly abrogated by statute.

The decisions at common law do not require that the act done shall have been of such a nature as to endanger life, or threaten great bodily harm . . . . If it had been otherwise, the doctrine would have been altogether unnecessary, because the killing would be murder because of the tendency of the act, without regard to its being done in the commission of a felony. 3

Contemporary commentators continue to instruct lawyers and law students that England bequeathed America a sweeping default principle of strict liability for all deaths caused in all felonies. According to Wayne LaFave’s treatise,

At one time the English common law felony-murder rule was that one who, in the commission or attempted commission of a felony, caused another’s death, was guilty of murder, without regard to the dangerous nature of the felony involved or to the likelihood that death might result from the defendant’s manner of committing or attempting the felony. 4

Similarly, the American Law Institute’s Model Penal Code Commentaries refer to “the common-law felony-murder doctrine” 5 and explain that the “classic formulation of the felony-murder doctrine declares that one is guilty of murder if death results from conduct during the commission or attempted commission of any felony. . . . As thus conceived, the rule operated to impose liability for murder based on . . . strict liability.” 6 According to Joshua Dressler’s textbook, “At common law, a person is guilty of murder if she kills another person during the commission or attempted commission of any felony. This is the so-called ‘felony murder rule.’ . . . The felony-murder rule applies whether a felon kills the victim intentionally, recklessly, negligently, or accidentally and unforeseeably.” 7 Arnold Loewy’s Criminal Law in a Nutshell informs students that “[a]t early common law, felony murder was a simple proposition: any death resulting from a felony is murder. Thus a totally unforeseeable death resulting from an apparently non-dangerous felony would be murder.” 8

All of these texts imply that this harsh common law rule was incorporated into American law at independence, where it persists to this day, except where

3. 1 WILLIAM L. CLARK & WILLIAM L. MARSHALL, A TREATISE ON THE LAW OF CRIMES 514-16 (1900) (footnotes omitted).
4. WAYNE R. LAFAVE, CRIMINAL LAW 671 (3d ed. 2000) (footnotes omitted). LaFave does not specify when this rule prevailed in English law, or cite any cases or statutes that would locate his claim temporally (or support it).
5. MODEL PENAL CODE § 210.2 cmt. 6, at 31 nn.73-74.
6. Id. at 30-31.
mitigated by judicial or legislative reforms. Similar accounts of the development of American felony murder rules appear in other treatises and texts, in court opinions, in scholarly articles, and in law review comments. Based on such accounts, critics attack modern rules as "anachronistic" legacies of a morally regressive age.


13. See, e.g., Model Penal Code § 210.2 cmt. 6, at 31-32 (1980); People v. Aaron, 299 N.W.2d 304, 307 (Mich. 1980); Crum, supra note 1, at 210; Roy Moreland, Kentucky Homicide Law with Recommendations, 51 Ky. L.J. 59, 82 (1962); Felony Murder as a First Degree Offense, supra note 1, at 427.
Yet none of these accounts manages to identify when this supposed common law rule of strict liability for all deaths resulting from felonies became the law in England. None identifies a single case in which it was applied in England before American independence. LaFave, for example, explains that as felonies proliferated, the English felony murder rule became broader in scope and harsher in effect, until it was finally thought necessary to restrict it. Yet he does not identify any examples of harsh applications of the rule. Indeed, he does not demonstrate that the rule was ever applied before it was thus "restricted." These accounts are equally hazy about early American law. None of them documents application of such a rule in colonial America, or in the early American republic. None of them troubles to show that such a rule ever led to the conviction of felons who had caused death truly accidentally, that is, without culpability.

In short, there is something suspicious about our received account of the origins of American felony murder rules. This Article vindicates such suspicion and exposes the harsh "common law" felony murder rule as a myth. It retraces the origins of American felony murder rules in order to reveal their modern, American, and legislative sources, the rationality of their original scope, and the fairness of their original application. It demonstrates that the draconian doctrine of strict liability for all deaths resulting from all felonies was never enacted into English law or received into American law.

Americans did not receive any felony murder rules from England, for the simple reason that there was no common law felony murder rule at the time of the American Revolution. English law traditionally imposed murder liability for most deaths caused by the intentional infliction of injury. Such killings were murders whether or not they occurred in the context of a felony, while a felony could not transform an accidental death into a murder. While a broad felony murder rule was proposed in some eighteenth-century English treatises, and discussed favorably in some eighteenth-century English cases, it was not applied. Such a rule might have made sense in a legal system that defined a limited number of felonies, considered all these felonies dangerous and punishable with death, and contained no significant liability for attempts. In such a context, a broad felony murder rule could provide an alternative way of seriously punishing failed attempts to commit capital crimes that caused

14. LAFAVE, supra note 4, at 671.

15. For earlier expressions of like suspicions, see FRANCIS WHARTON, A TREATISE ON THE LAW OF HOMICIDE IN THE UNITED STATES 39 (2d ed. 1875) ("[T]here is reported no modern conviction of common law murder, in a case in which there was no evidence of malicious intent towards the deceased, and in which the felonious intent proved was simply an intent to commit a collateral felony."); Albert E. Arent & John W. MacDonald, The Felony Murder Doctrine and Its Application Under the New York Statutes, 20 CORNELL L.Q. 288, 288 (1934) ("[T]he decisions, whether in New York or elsewhere, except in dicta, have never supported [defining all homicides committed in the perpetration of a felony as murders]; if a rule were to be extracted from the actual holdings of the cases, it would be confined within much narrower boundaries.").
unintended but substantial harm.\textsuperscript{16} Yet only the last of these three conditions, the unavailability of serious attempt liability, held in the eighteenth century. Felonies were proliferating, and while they were all potentially punishable by death, most were not actually punished capitally. Perhaps for this reason, no English court ever applied the broad felony murder rule proposed in the eighteenth century. That rule was anachronistic before anyone even proposed it.

Prior to the American Revolution, English courts had gone no further than to impose murder liability on persons who (1) mistakenly killed one person in an attempt to kill or wound another; (2) killed while defending themselves against resistance to a crime; or (3) agreed with others to kill or wound for a criminal purpose, one of whom then killed for that purpose. The distinction between felonies and other offenses was of no particular significance in these cases. In the last decades of the eighteenth century, a few English courts extended accomplice liability for murders committed in the course of crime to those who had agreed only to the crime and not to the fatal wounding. But others disagreed, and this did not become the general rule.

By the time English courts did apply a felony murder rule, in the last half of the nineteenth century, attempts were punishable, felonies were numerous, and only a very few felonies were capitally punishable. Accordingly, the felony murder rule that actually became law in England was much narrower than the one proposed a century and a half before. It did not apply to all felons, and it did not hold felons strictly liable for purely accidental deaths. Instead, English law conditioned felony murder liability on causing death through an act of violence or an act manifestly dangerous to human life, in the perpetration or attempt of a felony. This felony murder rule added little to the traditional rules transferring an intent to kill or wound to unintended victims, barring justification and mitigation for killing persons resisting crime, and attributing a killing to accomplices sharing in a conditional intent to kill or wound. To these categories of murder, England's belated felony murder rule added unintended deaths resulting from acts of indiscriminate destruction like setting fires or exploding bombs. Accomplices in a felony were not liable for a death resulting from that felony unless they intended the dangerous or violent act that produced death. Thus the felony murder rule eventually adopted in England was at least as mild as the "reformed" law of felony murder prevailing in contemporary America. The "common law" was late in developing a felony murder rule, and never held felons strictly liable for causing death accidentally.

The first felony murder rules were enacted not in medieval England, but in nineteenth-century America. They were developed not by common law adjudication but by means of legislation and statutory construction. Beginning in the 1790s, many American legislatures reduced the penalty for most murders to terms of imprisonment, restricting capital punishment to premeditated killings or murders in the attempt of a few enumerated dangerous felonies.

\textsuperscript{16} See Model Penal Code § 210.2 cmt. 6, at 31 n.74.
These reformers probably understood murder to mean what it had traditionally meant in English law: death from an intentionally inflicted wound or injury. Thus the original significance of a felonious motive in American homicide law was as a circumstance aggravating murder liability. Such felony aggravator provisions were narrow exceptions carved out of reform statutes otherwise mitigating the punishment for murder. Beginning in the 1820s, many American legislatures passed true felony murder statutes, imposing murder liability for all killings in the attempt of certain felonies. Yet the category of killings was probably still understood as including only those deaths traditionally punishable as murder. Beginning in the 1840s, American courts applied both felony aggravator and felony murder statutes to impose murder liability for unintended killings in the course of felonies. American courts appear to have applied felony murder rules earlier and more frequently than their English counterparts.

Yet it is important to remember that American felony murder rules were enacted at different times and varied in content. At the outbreak of the Civil War, roughly half of American jurisdictions had enacted felony murder rules. By the end of the nineteenth century, several jurisdictions still had not adopted felony murder rules, including the federal criminal justice system. This variety reflects the fact that nineteenth-century Americans conceived of criminal law more as democratically enacted positive law than as divinely ordained natural law or historically received customary law. Criminal law was therefore primarily legislative rather than judicial in origin and was jurisdictionally specific. English law did not make the common law of crimes automatically binding on the colonies. Instead, the authority of particular common law rules in particular colonies depended on local reception. Early nineteenth-century Americans rejected the authority of post-Revolution English law and had little enthusiasm for a general American common law of crimes.\textsuperscript{17} Thus, in nineteenth-century America, each jurisdiction had the particular criminal laws—including the particular homicide laws—it had enacted.

While nineteenth-century American felony murder rules varied, these rules were almost always quite limited in scope. In nineteenth-century America, as in nineteenth-century England, attempts were punishable, felonies were numerous, and penalties for felonies varied from short prison terms to death. So a rule holding all felons strictly liable as murderers for all deaths in the course of all felonies would have been inconsistent with the structure of American criminal codes. Accordingly, most American jurisdictions enacting felony murder rules during the nineteenth century predicated murder liability only on felonies dangerous to life. Nor did they predicate murder merely on causing death during these felonies. Rather, they usually required that felons kill their

\textsuperscript{17} See Morton J. Horwitz, \textit{The Transformation of American Law}, 1780-1860, at 9-16 (1977); see also United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812) (holding that there is no federal common law of crimes in the United States).
victims by intentionally battering them or by engaging in some destructive act manifestly dangerous to life, such as deliberately wrecking a train.

This Article reviews statutes and reported case law on felony murder in the federal system and in every state from the Revolution to the end of the nineteenth century. In so doing, it analyzes eighty-five nineteenth-century American felony murder convictions yielding reported opinions. Very few of these cases are likely to trouble modern readers. Nineteenth-century American felony murder convictions typically arose from the intentional shooting of a robbery victim. Often, the killing would have been murder anyway, and was aggravated to murder in the first degree because it was committed in furtherance of a particularly dangerous felony.

In a handful of nineteenth-century American cases, felony murder liability was imposed for killings which most modern observers would probably grade as lesser forms of homicide. These few convictions were predicated on such dubious “felonies” as riot, consensual abortion, and suicide. It is tempting for critics to make these few cases poster children in the campaign against the felony murder rule. But such a polemical use of these cases effaces the federal structure of the American polity and the statutory basis of American criminal law. There was no unitary felony murder rule in nineteenth-century America. Instead there was a range of different rules, some better and some worse. But most of these rules were limited in scope and were applied fairly. The few exceptions are just that. They are not evidence of the common descent of all felony murder rules from a barbaric rule of strict liability for all deaths in the course of all felonies.

One difficulty in assessing claims that early felony murder rules did or did not impose strict liability for accidental death is that strict liability is an “essentially contested concept.” Ken Simons and Mark Kelman have both usefully explained the concept’s ambiguity.

Simons contrasts “substantive” strict liability with two kinds of “formal” strict liability. Substantive strict liability is a moral notion meaning liability without fault. By contrast, formal strict liability is a technical concept, depending on the practice of element analysis, particularly as employed in the Model Penal Code. This practice first divides the act element of an offense

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18. This survey includes every reported American case ending in a felony murder conviction that I have been able to find, through the year 1900. Of course, there may have been others.

19. See W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC’Y 167 (1956) (defining “essentially contested concepts” as concepts with multiple inconsistent meanings and which thus can be reasonably applied in support of opposing positions).


into constituent acts or omissions, circumstances, and results; and then correlates each of these conduct, circumstance, or result elements with a required culpable mental state, such as purpose or recklessness. An offense is one of “pure” strict liability if it requires no culpable mental state with respect to any of the constituent elements making up the proscribed act. An “impure” strict liability offense requires no culpability with respect to at least one of these act elements. The Model Penal Code treats even impure strict liability as strict liability and rejects it for all felonies and misdemeanors. 22 According to the Model Penal Code’s scheme, the offense of “foreseeably causing death” is not a strict liability crime, because it requires a culpable mental state—negligence—with respect to the offense’s only act element. On the other hand, the offense of “causing death by means of maiming with the intent to torture” is strict liability, because it requires no culpable mental state with respect to one actus reus element, causing death. The second crime may involve more culpability than the first, and is not substantively a strict liability crime. Nevertheless, formally, it is a crime of impure strict liability, barred by the Model Penal Code’s scheme.

Simons and Kelman have both argued that there is no necessary correlation between impure strict liability and substantive strict liability. A legislature can discourage the negligent causation of harm through at least three means: (1) punishing those who foreseeably cause harm; (2) “strictly” punishing those who cause harm by knowingly committing designated dangerous acts; or (3) punishing those who knowingly commit designated dangerous acts whether or not these result in harm. The second alternative is an example of impure strict liability, but Kelman argues it should be seen as a per se negligence rule that achieves the same aims the first alternative achieves by the alternative means of a discretionary negligence standard. 23 The third alternative eliminates the second alternative’s impure strict liability yet still punishes everyone punished by the second alternative. 24

So there are three difficulties with equating formal impure strict liability with substantive strict liability. First, some acts may imply culpability with respect to a result element that has no explicit culpability attached. For example, arson may imply reckless disregard of a risk of death. Depending on how we define “killing” and “causing death,” these acts may themselves imply culpability with respect to death. Thus, if killing means only causing death by certain dangerous means, killing involves culpability per se. If “causing” a result means foreseeably bringing it about, it entails culpability with respect to


23. See Kelman, supra note 20, at 1516-18.

that result. Second, some culpable mental states may imply, but not explicitly require, culpability with respect to a result element. Thus, the intent to inflict grievous bodily injury implies recklessness with respect to death. Third, an offense definition may require no culpable mental state with respect to one element, but require very severe culpability with respect to some other element, or an inchoate element. Thus, causing grievous injury with the intent to rape may be as culpable a form of assault as intentionally causing grievous injury. Similarly, causing death with intent to rape may be as culpable a form of homicide as recklessly causing death. For these three reasons, a felony murder rule may involve formal impure strict liability without substantive strict liability.

This Article argues that early felony murder rules almost always conditioned murder liability on causing death with fault, even if they did not explicitly require proof of a culpable mental state with respect to death. Generally they predicated murder liability on dangerous felonies or means of causing death that implied negligence or recklessness per se. Early felony murder liability combined this culpability with respect to death with a depraved motive. It certainly did not punish felons for “accidental” death. A robber pointing a loaded gun at an unpredictable victim may not wish to kill anyone. A rapist may wish only to silence his child victim by choking her. Nevertheless, the resulting deaths are hardly accidental. Accordingly, it is deeply misleading to say that early felony murder rules imposed strict liability. It is flat wrong to say that they imposed strict liability for accidental death in the course of all felonies.

By mislabeling this unenacted doctrine as the “common law rule,” legal writers falsely imply that it expresses the essential normative premises underlying the far different rules actually enacted.25 They also imply that this harsh doctrine remains a legally binding default rule, authoritative in every American jurisdiction unless explicitly altered by legislatures or courts. Thus, in their determination to condemn modern felony murder rules as barbaric anachronisms, legal scholars actually mislead courts about the source and scope of those rules. By mischaracterizing the origins of American felony murder rules, legal scholars may actually contribute to broadening the very rules they inveigh against. In this way, the critics’ cherished myth of a monstrous “common law felony murder rule” threatens to become a self-fulfilling prophecy.

This Article’s revisionist account of the origins of American felony murder rules is significant in four ways. First, dispelling the myth of the common law

25. See Model Penal Code § 210.2 cmt. 6, at 36 (stating that “modern” limitations “confine the scope of the felony-murder rule, but . . . do not resolve its essential illogic,” which consists in “predicat[ing] liability simply on conduct causing the death of another”); Crum, supra note 1, at 207 (arguing that Coke’s view of accidental killings in the course of crime as murders is “the keystone of the entire structure” of felony murder law).
felony murder rule should improve interpretation of murder provisions in modern criminal codes. These provisions should not be seen as incorporating by reference a common law felony murder rule that never existed. They also should not be presumed to impose strict liability for all deaths caused in the course of all felonies. Courts should impose felony murder rules only on the basis of statutory authorization. Furthermore, they should limit these felony murder rules on the basis of statutory language, whether contained in the provisions defining murder or in general code provisions defining the code's purposes and rules of construction. Each felony murder rule should be construed and applied on its own terms, and not treated as an expression of some pervasive common law principle.

Second, clarifying the statutory basis, the independence, and the limited scope of felony murder rules should discourage lazy, broad-brush criticism of felony murder liability. Critics must acknowledge that "the" felony murder rule was never anything harsher or more punitive or more categorical than the particular felony murder rules enacted in each American jurisdiction. They must stop mischaracterizing contemporary felony murder rules as vestiges of a now-discredited common law rule. The limited felony murder rules prevailing today are not reformist compromises between an original strict liability rule and an enlightened modern conception of murder as intentional killing. Felony murder rules are themselves modern, a product of the nineteenth-century legislative effort to define and codify the various mental elements of murder. Critics of modern felony murder rules must stop trying to prove them guilty by association with a monstrous but entirely mythical ancestor.

Third, recovering the conceptions of culpability underlying nineteenth-century felony murder rules can enrich contemporary accounts of culpability across the criminal law. The Model Penal Code's scheme of element analysis represents an ambitious, but not entirely successful, effort to translate the question of culpability into a scale quantifying awareness of risk. This primarily cognitive model of culpability has been much criticized for evading the moral evaluation of motive. Early felony murder rules reflected an effort

to integrate the moral assessment of motive into a more eclectic conception of culpability.

Fourth, exposing the myth of the common law felony murder rule dramatizes a larger issue in the theory, practice, and teaching of American criminal law. The myth of the common law felony murder rule is part of the larger mythology of the common law of crimes. Even though early nineteenth-century Americans had rejected the idea of a unitary national criminal law rooted in natural law principles, late nineteenth-century criminal law scholars resurrected this idea so as to claim for their work a national scope and a national audience. Clark and Marshall’s discussion of the felony murder rule illustrates this pattern of thinking, according to which American criminal law was founded on the common law, which only legislatures could alter. Thus conceived, the common law was a body of unchanging principle which judges found rather than made. Since the common law component of criminal law was unchanging, it necessarily remained identical in every jurisdiction. This meant that divergent decisions in the different states reflected disagreement about a common national law of crimes rather than different laws. This gave legal scholars a role in researching and explaining the unchanging common law as well as collating and reconciling American cases from all the jurisdictions. It also gave the emerging professoriate a subject that could be taught in the same way at any law school in the country. To this day, student texts and treatises organize the subject of criminal law by describing the common law of crimes as expounded by Blackstone, perhaps comparing it with the “reforms” proposed in the Model Penal Code. In so doing, they train future lawyers in a mythical body of law with no determinate source or jurisdictional domain.

Exposing the myth of the common law felony murder rule is part of the larger project of debunking this mythology of a general American criminal law and rebuilding criminal law teaching and scholarship on a statutory foundation.

This Article is divided into seven Parts. Part I reviews the development of homicide law in England up to the end of the eighteenth century, demonstrating the absence of a common law felony murder rule at the time of the American Revolution. Part II reviews subsequent English developments, showing that—apart from a few isolated cases on accessorial liability—a common law felony murder rule did not emerge until the second half of the nineteenth century, and that this belated rule was predicated on violent or dangerous acts from its inception.

Parts III and IV demonstrate the absence of a common law felony murder rule in colonial and nineteenth-century America. Part III contests the myth of American reception of the English common law of crimes. First, it reveals the limited applicability of English law in the American colonies. Next, it describes the simple murder statutes enacted during the colonial period, which left the

definition of murder to judicial development, but were not, so far as we know, used to impose felony murder liability. It then reviews post-Revolution ideas about the reception of the common law, particularly in the area of criminal law. It shows that early Americans were ambivalent about receiving English law, and generally received it only as locally applied. As a result, each American jurisdiction had to develop its own common law, adapted to local circumstances and institutions. In addition, early Americans were critical of English homicide law and feared judicial definition of crimes. As a consequence, many Americans called for legislative codification of criminal law. Finally, Part III describes the emergence during the antebellum period of two main legislative approaches to the problem of homicide in the course of crime: felony aggravator statutes and felony murder statutes.

Part IV addresses the American law of homicide in the course of crime in those times and places where there was no legislation on the subject. This includes the federal criminal jurisdiction throughout the nineteenth century, and most of the original states for parts of the nineteenth century. Part IV first reviews American scholarly writings on homicide in the course of crime. This literature reveals critical reflection on the supposedly traditional felony murder rule rather than simple acceptance. Early nineteenth-century American scholars understood felony murder liability as a form of transferred intent, justified only where the predicate felonies were as malicious as murder itself. Late nineteenth-century scholars followed English reformers in seeing felony murder liability as a form of reckless homicide liability, justifiable only to the extent that commission of the predicate felony showed indifference to human life. Judicial readers of this literature would have been alerted that developing and applying a felony murder rule was no simple task. Part IV then demonstrates that most American courts declined to take on this difficult task until it was imposed upon them by legislatures. So far as we know, no court convicted anyone of felony murder on the basis of a common law felony murder rule alone until very late in the nineteenth century. Even then, such cases were rare.

Parts V and VI turn to the judicial application of the two leading forms of American legislation on homicide in the course of crime. They show that on the basis of such statutes, felony murder liability was imposed increasingly often in late nineteenth-century America. Part V examines the application of felony aggravator statutes, which graded a murder as first degree if it was committed in the course of enumerated felonies. This discussion demonstrates that while courts sometimes cited common law authorities in support of felony murder rules, they usually relied on statutory language; and that they usually confined felony murder liability to killings in the course of felonies enumerated by statute. This pattern suggests both the statutory basis of felony murder liability and its limitation to acts imposing a substantial and apparent danger of death.

Part VI examines statutes directly imposing felony murder liability and their application in the courts. It shows that these felony murder statutes
account for the majority of reported felony murder convictions in nineteenth-century America. It also shows that successful prosecutions under these statutes were generally confined to situations in which an intentional battery or an act otherwise clearly dangerous to human life was performed in the course of a dangerous felony.

Part VII traces overall patterns of the imposition of felony murder liability in the nineteenth-century United States. It shows that most American jurisdictions confined felony murder liability to killings in the course of dangerous felonies. It also shows that another important constraint on nineteenth-century American felony murder liability was a traditionally restrictive conception of killing that, in effect, built culpability into the act element of murder.

The Conclusion reiterates that felony murder liability was probably first imposed in nineteenth-century America rather than England, on the basis of statutes rather than the common law; and that from its inception felony murder usually required a dangerous predicate felony and a violent or dangerous act causing death. The Conclusion suggests that because of sweeping changes in the doctrinal context of homicide law, rules of felony murder liability enacted in nineteenth-century America bear little resemblance to the rules of felony murder liability proposed in seventeenth- and eighteenth-century England. Felony murder liability was first proposed for a criminal justice system without attempt liability, and without an elaborate practice of grading crimes according to different levels of punishability. In this context, a felony murder rule offered to (1) severely punish attempted felonies which caused death, and (2) bar the defenses of provocation and self-defense for killings of those who resisted felonies, while leaving little affected the status of offenders who successfully completed felonies. In nineteenth-century America, however, legislatures sought to define and grade a wide variety of offenses along a scale of punitive severity. In this context, felony murder liability remained a useful method of barring the provocation defense for fatal struggles arising in the context of serious crimes, but was no longer needed as a substitute for attempt liability. On the other hand, certain felonious motives now seemed to offer sensible grounds for aggravating liability for unintended homicide resulting from the imposition of unjustified risk. The felony murder rules enacted in nineteenth-century America were not anachronistic vestiges of ancient rules, however, because the felony murder rules first proposed in England were never enacted into law, there or here. America's original felony murder rules were modern products of an era of legislative codification, limited by plausible conceptions of culpability from their very inception.
I. THE COMMON LAW OF HOMICIDE IN THE COURSE OF CRIME

A. Homicide in the Course of Crime in Early English Law

The principle that an actor is responsible for the unintended harms resulting from an unlawful act is ancient, with roots in Christian ethics and canon law. Augustine wrote, “Accidents which, without our will, happen to others through good and lawful actions of ours, or possessions, must not be imputed to us.” This formulation implies that accidental harms arising from wrongful acts may be imputed to us. In the midthirteenth century, Aquinas seized on this implication in trying to reconcile Augustine’s statement with canon law sources that seemed to treat accidental killings as homicides. He wrote:

[A]ccidental happenings are neither intended nor voluntary. And because every sin is, as Augustine says, voluntary, it follows that accidents as such cannot constitute sins. What is not willed or intended as such may nevertheless be incidentally willed or intended. We may incidentally cause something by removing the obstacle against that thing happening. It follows that somebody who does not remove such occasions of homicide as he could and should remove will in some way be guilty of voluntary homicide.

This can come about in two ways—when a person engages in nefarious activities which he should not have engaged in, or when he does not take due care. This is why the [canon] law lays down that if a man engages in legitimate activities and uses due care, he is not guilty of any homicide that may ensue; if, on the other hand, he engages in illicit activities, or even fails to take due care in some legitimate enterprise, he is guilty of any homicide that may occur.


29. See Augustine, Epistle 47 (to Publicola), reprinted in 33 PATROLOGIAE CURSUS COMPLETUS, SERIES LATINA 184, 187 (J.P. Migne ed., 1861).

30. 38 THOMAS AQUINAS, SUMMA THEOLOGIAE, II-II, q. 64, art. 8, at 44-45 (Blackfriars 1975). Aquinas cites the above-quoted passage from Augustine and, as evidence of the canon law, passages from Gratian. Id. (citing GRATIAN, DECRETUM MAGISTRI GRATIANI pt. 1, dist. 50, chs. 4-8 (c. 1140), reprinted in 1 CORPUS JURIS CANONICI 1, 178-80 (Akademische Druck-U. Verlagsanstalt 1959) (Aemilius Friedberg ed., 1879)). These passages from Gratian concern the problem of whether a priest may continue in his office, or receive promotion, after killing. Of these, chapter 6 may possibly refer to accidental killings, although the term used, “saltim,” does not generally have this meaning (a better translation might be “incidentally,” or “at some point”). Chapter 6 does not say that such killers may not hold clerical office or seek higher office, but may be read to urge that they renounce (or perhaps consider renouncing) such offices voluntarily. Thus, in what follows, Aquinas appears to be straining to read Gratian as endorsing homicide liability for accidental death, in order to set up the apparent conflict with Augustine. I am grateful to John Peradotto and Father Augustine Thompson for comments on the problem of translating this passage.

31. 38 AQUINAS, supra note 30, II-II, q. 64, art. 8, at 44-47 (footnotes omitted).
Aquinas cites the decretals of Gregory in support of his rule that death resulting from an unlawful act, or lack of due care, is homicide.\footnote{32}{Id. at 46-47 (citing Gregory, Decretalium Collectiones, bk. 5, tit. 12, ch. 23 (1234), reprinted in 2 Corpus Juris Canonici, supra note 30, at 1, 803); see also Gregory, supra, bk. 5, tit. 12, ch. 22, reprinted in 2 Corpus Juris Canonici, supra, at 803.}

This principle is not a felony murder rule: it neither distinguishes felonies from other unlawful acts, nor does it distinguish murders from lesser homicides. Nor is it clear that it entails criminal liability for harm arising from a delict. The canon law system was concerned primarily with penance for sin and fitness for clerical office.\footnote{33}{Naomi D. Hurnard, The King's Pardon for Homicide Before A.D. 1307, at 68-69 (1969).} Neither of these concerns necessarily required allocating responsibility for harmful consequences.\footnote{34}{By contrast, the secular legal processes that evolved into criminal punishment were concerned with compensating victims for harm and providing restitution to a lord for violations of a feudal obligation of obedience.}

Finally, it is not clear that Aquinas was proposing a principle of strict liability for imputing harm to an unlawful actor: he seemed to condition such imputation on "intending" harm "incidentally" by failing to take precautions against it. Possibly Aquinas assumed that all action imposes risk, which only a worthy aim can justify. In this case, any unlawful act imposes risk unjustifiably and is negligent per se.

Canon law apparently influenced the practice and theory of English criminal law in the later Middle Ages. Manuals written to guide English clergy in administering penance for sin instructed them that accidental killings were blameless. Consistent with such ideas, some thirteenth-century juries tried to induce the Crown to pardon homicides by describing them as resulting from misdirected attacks on animals.\footnote{35}{Hurnard, supra note 33, at 76.}

The English jurist and cleric Bracton, writing around the same time as Aquinas, applied canon law ideas to the crime of homicide.\footnote{36}{2 Henry de Bracton, On the Laws and Customs of England 341 (Samuel E. Thorne ed., Harvard Univ. Press 1968) (1235).} Bracton held that accidental killing was no homicide "because a crime is not committed unless the intention to injure exists" and "[i]n crimes the intention is regarded, not the result."\footnote{37}{Id. at 384.} Bracton included within intention what we would call motive. Thus, even a legally mandated execution could become a criminal homicide "if done out of malice or from pleasure in the shedding of human blood."\footnote{38}{Id. at 340 (footnote omitted).}

In discussing homicide "[b]y chance, as by misadventure, when one throws a stone at a bird . . . and another passing by unexpectedly is struck and dies," Bracton wrote:

But here we must distinguish whether he has been engaged in a proper or an improper act. Improper, as where one has thrown a stone toward a place where men are accustomed to pass, or while one is chasing a horse or ox someone is
trampled by the horse or ox and the like, here liability is imputed to him. But if he was engaged in a lawful act, as where a master has flogged a pupil as a disciplinary measure, or... cutting down a tree and the like, and if he employed all the care he could... in the case of the master by not exceeding mean and measure in the flogging of his pupil, liability is not imputed to him. But if he was engaged in a lawful act and did not employ due care, liability will be attributed to him.\textsuperscript{39}

Bracton apparently based this discussion on Raymond de Penafort's penitential manual, \textit{Summa de Poenitentia}.\textsuperscript{40} While Penafort's version of the case of "chasing" a horse or ox involved an attempt to steal it,\textsuperscript{41} Bracton avoided specifying this feature of the situation, leaving the impression that the act is improper merely because it is incautious. Thus, for Bracton, unlawful acts encompassed primarily acts done without due care. When such acts resulted in unintended deaths, Bracton held, the perpetrator was guilty of homicide, and should not be pardoned.\textsuperscript{42}

Making sense of Bracton's position requires grasping the significance of a verdict of death by misadventure. Until the middle of the twelfth century, accidental killings and killings in open conflict were resolved through compensation to kin and king, while only stealthy killings were "unemendable" and so subject to capital punishment.\textsuperscript{43} In the middle of the twelfth century, however, the royal courts took jurisdiction over all homicides as breaches of the king's peace. All homicides, whether or not previously emendable, became capital offenses unless justified as an act of law enforcement or pardoned by the king.\textsuperscript{44} In the thirteenth century, accidental and defensive killings were not considered entirely innocent, but merely eligible for a royal pardon, for which the defendant would often have to pay.\textsuperscript{45} By the Statutes of Gloucester of 1278, a verdict of death by misadventure or of self-defense qualified the defendant for a royal pardon, but such verdicts were not acquittals.\textsuperscript{46} Nor did a verdict of misadventure necessarily imply moral innocence: "accidental" deaths included all deaths caused unintentionally, including those caused recklessly and

\textsuperscript{39} Id. at 341 (footnote omitted).
\textsuperscript{40} See HURNARD, supra note 33, at 70.
\textsuperscript{41} Id.
\textsuperscript{42} Of course, we cannot assume that Bracton's opinions reflected English law of his day.
\textsuperscript{44} HURNARD, supra note 33, at 7-9; Green, supra note 43, at 417-19. Justifiable killings included lawful executions, killings of outlaws resisting capture, and killings of thieves escaping with loot. THOMAS A. GREEN, VERDICT ACCORDING TO CONSCIENCE 30 (1985).
\textsuperscript{45} 2 POLLOCK & MAITLAND, supra note 43, at 479-81.
\textsuperscript{46} Statutes of Gloucester, 1278, 6 Edw. 1, c. 9 (Eng.), reprinted in 1 THE STATUTES OF THE REALM 45, 49 (photo. reprint 1963); see also 3 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 38 (1883) (noting specific cases).
negligently. In general, royal pardons might be granted on other grounds than moral innocence, and their sale to the guilty became a source of royal revenue in the decades after Bracton wrote. Bracton may be read as saying that a criminal motive for imposing risk should bar a pardon for an unintended but nevertheless careless killing.

In fourteenth-century England, robberies and ambushes by armed bands became frequent, and complaints were heard that royal pardons were being too frequently bestowed. A 1390 statute provided that pardons would not be granted lightly to those committing “murders,” killings by ambush or assault, and killings with “malice prepensed.” At least one historian has argued that the latter referred simply to homicides that were neither accidental nor justifiable, while “murder” referred to stealthy killings. The category of killing by assault or ambush reflected contemporaneous concern about robberies and other armed attacks on the highways. While the statute distinguished stealthy murder, killing in the course of crime, and killing with malice aforethought as separate categories, little turned on these distinctions. All three forms of homicide were equally felonious and, as such, all were capital crimes, unless committed by a cleric, who would have been subject to ecclesiastical jurisdiction. Such “benefit of clergy” became an increasingly important exception, however, as it was eventually made available to any male who could pass a literacy test.

B. Distinguishing Murder and Manslaughter in Sixteenth-Century England

By the end of the fifteenth century, the association of murder with stealth had been forgotten, and the term was probably interchangeable with felonious

47. Hurnard, supra note 33, at 99-108; 2 Pollock & Maitland, supra note 43, at 483; Green, supra note 43, at 420, 444. Indeed, by the later fourteenth century, truly faultless deaths often led to verdicts of acquittal rather than misadventure. Hurnard, supra note 33, at 100-02; Green, supra note 43, at 444-45.

48. Green, supra note 44, at 70; Green, supra note 43, at 426-27, 457. But see Hurnard, supra note 33, at 13 (“[T]he danger of ascribing too much to the king's mercenary instincts has... rightly... been stressed.”).


51. Kaye, supra note 49, at 369, 391-92; cf. Green, supra note 43, at 462-69 (arguing that “malice aforethought” referred only to premeditated killings, so that the statute forebade cavalier pardons only of the most egregious rather than of all felonious homicides).


homicide. In 1496, however, benefit of clergy was withdrawn for the crime of petty treason, defined as "purposidly murder[ing]" one's "Lord Maister or Soveign immediate." Additional statutes further restricted benefit of clergy, and by the middle of the sixteenth century, all murders "of malice prepense" were no longer clergyable. During the same period, judges and juristic writers proposed a distinction between nonclergyable murder, characterized by "malice prepense," and a residual category of clergyable homicides, referred to as "manslaughter," involving killing by "chance-medley." What meaning attached to "malice prepense" and "chance-medley" was not yet clear. In particular, it was not clear whether killing by "chance-medley" meant accidental killing or an unplanned killing resulting from a chance meeting.

Two important sixteenth-century cases explored the boundaries of malice for homicides committed in the course of crime. In the 1535 case known as Lord Dacres's Case, a group resolved to enter a park and poach game, and to kill anyone who resisted them. When one member of this group killed a gamekeeper, all the rest were held liable, whether or not physically present at the scene of the killing. The decision's innovation lay in its expansion of accessorial liability rather than its expansion of malice. Since all the participants had agreed to the killing, their malice prepense consisted in their intent to kill rather than in their intent to commit an unlawful act. While Lord Dacres did not expand the notion of malice prepense beyond intent to kill, it was important to the reasoning of another sixteenth-century case which did.

This pivotal case was decided in 1558, and resulted from an attack upon the house of Sir Richard Mansfield by a gang of ruffians under the command of one George Herbert. A servant of Herbert's threw a stone at a member of Mansfield's party, but accidentally struck and killed a bystander. A majority held that Herbert and his men were guilty of murder, on the basis of three premises. First, Lord Dacres had established that all who agree to kill anyone resisting an unlawful act are guilty of the killing of a resister by any of those who agreed. Second, the majority reasoned, it was settled law that one who caused the death of a person in an attempt merely to hurt or injure him was

57. See 3 STEPHEN, supra note 46, at 44-45.
58. See, e.g., ANTHONY FITZHERBERT, THE NEWE BOOKE OF JUSTYCES OF PEAS fol. cxxiiia (1541); ANTHONY FITZHERBERT, THE BOKE OF JUSTYCES OF PEAS fol. 4a-b (1510); Thomas Marowe, De Pace Terre et Ecclesie & Conservinge Eisudem (1503), reprinted in 7 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY 286, 378 (Paul Vinogradoff ed., 1924).
guilty of murder. 61 Third, the judges asserted, an unsuccessful attempt to kill one person that resulted in the unintended death of another should be viewed as murder. This transferred-intent principle would later be confirmed by the 1573 murder conviction of one Saunders, whose daughter ate a poisoned apple he had prepared for his wife. 62

From these three premises, it seemed to follow that anyone who agreed to an act of violence was liable for the murder of any person killed as a result. The "malice" shown toward the intended victims of a violent assault would transfer to the death of the unintended victim. This principle predicates murder on participation in an act of violence rather than a felony per se. A substantial minority, including Judges Brooke and Staundford, held that Herbert and his men were guilty only of manslaughter because the actual victim was not one of the intended victims of the violent acts agreed to. The minority viewed the killing of such an unintended victim in the course of an unlawful act as an example of chance-medley. 63

A rather different view of the distinction between malicious murder and manslaughter was propounded in the 1553 case of R. v. Salisbury. 64 Richard Salisbury and two conspirators ambushed Richard Ellis and killed one of his servants. Salisbury's servant (who was not one of the conspirators) came to Salisbury's aid during the fight and wounded the man who died. The jury was instructed that Salisbury's servant should be convicted of murder only if he had acted with malice prepense. The jury apparently concluded that Salisbury's servant had neither known of the planned ambush on Ellis nor premeditated his attack on the dead man. They convicted Salisbury and his confederates of murder, but convicted Salisbury's servant only of manslaughter. 65 This identification of malice prepense with premeditation was confirmed in the 1576 case of R. v. Robinson, where the defendant was convicted only of

61. See, e.g., Dallison, supra note 60, at fol. 41a; Kaye, supra note 55, at 579. Kaye suggests as a possible basis in precedent for this holding a 1330 case abridged by Anthony Fitzherbert. Id. at 579 (citing Plees del Corone No. 314 (Iter Northampton 1330), in ANTHONY FITZHERBERT, LA GRAUNDE ABRIDGEMENT fol. 256a (1565)).

62. R. v. Saunders, 75 Eng. Rep. 706 (Q.B. 1576); accord Agnes Gore's Case, 77 Eng. Rep. 853 (K.B. 1612). Agnes Gore contains some language which later commentators could read as supporting a felony murder rule, although it had no such implication at the time. The court reasoned that one who left poison for rats and accidentally poisoned a human being would not be guilty of felony because he or she lacked felonious intent, while one who left poison and had a felonious intent to kill a human would be punishable if any human died as a result. This is a doctrine that transfers intent to kill from one victim to another; it does not imply the more general principle that any felonious intent supplies the requisite culpability for any other felony.

63. Kaye, supra note 55, at 580. A similar view of chance-medley as an accidental killing in the course of an unlawful act appears in Staundford's 1557 treatise Plees del Corone. Id. at 582-83.

64. This case is discussed in EDMUND PLOWDEN, LES COMENTARIES, OU LES REPORTES DE EDMUND PLOWDEN fol. 100 (1571); see also Kaye, supra note 55, at 585-86.

manslaughter rather than murder, when he pursued and killed his fleeing victim "in un continuing fury" after they had gotten into a sudden fight. 66 William Lambarde wrote in his late sixteenth-century treatise *Eirenarcha* that a killing occurring suddenly upon an unexpected meeting would be manslaughter, because in such a case "men are medled . . . by meere chaunce, and upon some unlooked for occasion, without any former malice or evil mind . . . to offer hurt to the person of the other." 67

Lambarde also offered a discussion of implied malice, which could be imputed to those who drew a weapon and attacked without provocation, who killed an officer of the law, or who caused death in the course of certain unlawful acts. Thus:

[I]t is taken for a rule . . . that wheresoever a man goeth about an unlawfull acte, as to beate a man, or to disseize him of his lands, &c., and doe (in that attempt) kill him, it is Murder: because the lawe presupposeth that he carieth that malicious mind with him, that he will achieve his purpose though it be with the death of him against whom it is directed. And therefore, if a thiefe doe kill a man whom he never saw before, and whom he intended to rob onely, it is Murder in the judgemet of law, which supplieth a former malicious disposition in him rather to kill the man, then not to have his money from him. 68

Lambarde’s reasoning leaves the reader uncertain whether he is proposing a formal rule of liability or an evidentiary maxim. Robbery, he implies, is a rational motive for murder, and so provides evidence of a premeditated intent to kill. A use of deadly force to violate another’s entitlement (a project likely to provoke resistance) suggests a previously established willingness to kill if necessary. Perhaps the unlawful aim does not substitute for malice prepense, but supplies evidence of it. In any case, it is important to realize that Lambarde’s discussion of implied malice is not concerned with accidental killing, but with intentional killing. The dispute provoked by a robbery was not to be treated as a chance or sudden quarrel, justifying a partial defense of provocation. Justified resistance to a violent attack could not be considered provocation, and so it was fair to treat violence used to overcome justified resistance as premeditated.

The results in *Herbert* and *Saunders*, which punish unintended killings as murder, seem at odds with the results in *Salisbury* and *Robinson*, which punish intentional but unpremeditated killings as mere manslaughters. This contradiction reflected the tension between the old meaning of malice prepense as any evil intent and the new identification of this phrase with premeditation. This tension left a legacy of confusion regarding the meaning of malice and provoked a new distinction between express and implied malice. Courts and


68. Id. at 243-44.
commentators said the law would “imply” malice prepense when there was an armed attack with no evidence of a quarrel, when the victim was an officer of the law making an arrest, and in cases like Herbert and Saunders.

Yet the murder convictions in cases like Herbert and Saunders are reconcilable with the new requirement of premeditation if we bear in mind the roots of the law of murder in the fourteenth century’s efforts to suppress organized criminal violence. Both Herbert and Saunders killed unintended victims. Yet both of these accidental deaths resulted foreseeably from the defendants’ premeditated acts of criminal violence. The same principle explains Richard Salisbury’s murder liability for the death of a servant whose presence he may not have anticipated when he planned to ambush Ellis. The cases all express an association of malice with a planned, perhaps instrumental use of violence, rather than a sudden loss of temper in the course of an unexpected quarrel.69

C. Rejecting an Unlawful Act Murder Rule in Seventeenth-Century England

Francis Bacon’s Elements of the Common Law used Saunders to support a maxim that intent could be transferred among crimes of like gravity.70 Bacon reasoned that

All crimes have their conception in a corrupt intent, and have their consummation and issuing in some particular fact; which though it be not the fact at the which the intention of the malefactor levelled, yet the law giveth him no advantage of the error, if another particular ensue of as high a nature.

Therefore if an impoisoned apple be laid in a place to impoison I.S. and I.D. cometh by chance and eateth it, this is murder in the principal that is actor, and yet the malice in individuo was not against I.D.71 Saunders, and another case involving burglary, suggest that Bacon is merely transferring intent among alternative cases of the same crime. But he also asserts that intent can transfer from murder to suicide, while questioning whether intent can transfer from a murder to a petty treason.72 The suicide example suggests that intent can transfer among different offenses of similar kind, while the petty treason example suggests that what makes two offenses of equal gravity might be their legal form (misdemeanor, felony, treason) rather than their maliciousness. Of course, petty treason might be seen as more malicious than murder because of the additional element of betrayal. While

69. Thomas Green argues for an enduring association of the term “murder” with what he calls “professional” homicide, a category in which he includes death resulting from ambush for criminal purposes. Green, supra note 43, at 460-61, 472, 479.
70. FRANCIS BACON, THE ELEMENTS OF THE COMMON LAW OF ENGLAND (1596), reprinted in 4 THE WORKS OF FRANCIS BACON 1, 55 (1826). Bacon appears to have written this work and presented it to the Queen in 1596. Id. at 8.
71. Id.
72. Id. at 55-56.
Bacon’s discussion is an early precursor of the ideas of general intent and the notion of the transferrability of intent among all felonies, it does not appear to have influenced subsequent common law commentators.

In 1619, Michael Dalton stated the general proposition that accidental killing in the course of an unlawful act was felonious: “But if a man be doing of an unlawfull act, though without any evill intent, and he happeneth, by chance, to kill a man, this is felony, viz. manslaughter at the least, if not murder, in regard the thing hee was doing, was unlawful.”73 Dalton added that if a man unlawfully threw a stone at an animal and thereby killed a man, it would be manslaughter only.74 On the other hand, killing resulting from an unlawful beating would be murder: “[W]here a man commandeth another to beat A. and hee beateth him, so as A. dieth thereof, this is murder in him that gave this commandement to beat him, for that he commanded him to doe an unlawfull act, by reason whereof the killing of a man ensued.”75 Similarly, “if a Theefe that offereth to robbe a true man, killeth the true man in resisting him, it is Murder, of malice pretended.”76 Thus, one who caused death in the course of an unlawful act might be guilty of manslaughter or murder, depending on the nature of the unlawful act. In Dalton’s scheme, only unlawful acts of violence implied malice.

Edward Coke adopted what appeared to be a much harsher approach to unlawful act killing in his 1628 Institutes of the Law of England.77 Yet Coke never mentioned the new statutory distinction between clergyable and nonclergyable offenses and so ignored the whole question of which homicides were clergyable. As a result, his terminology is so confusing that it is not clear exactly what he was trying to say about killings in the course of crime. Consider first his use of manslaughter, in his chapter on homicide:

73. MICHAEL DALTON, THE COUNTRY JUSTICE 225 (corrected and enlarged ed. 1619) [hereinafter DALTON (1619)]. A later edition approved the statement that in such cases [i]here is an efficient cause Casual; as if a man intend to doe any unlawful act, & in doing thereof another hurt ensueth, not intended, but by chance cleane beyond all expectation, or desire, yet shall he be said the author of that act not intended, (& so happening by chance) that did intend the first act.

74. DALTON (1619), supra note 73, at 226.

75. Id. at 220.

76. Id. at 218. This example appears in the course of a discussion of implied malice.

Coke here treated manslaughter and homicide as interchangeable, encompassing murder, clergyable felony, and nonfelonious misadventure. A few paragraphs later he wrote:

Some manslaughters be voluntary, and not of malice forethought, upon some sudden falling out . . . And this for distinction sake is called manslaughter. There is no difference between murder, and manslaughter; but that the one is upon malice forethought, and the other upon a sudden occasion: and therefore is called chance-medley.\textsuperscript{79}

Thus Coke had no general term to designate clergyable felonious homicides, "manslaughter" being too broad and "chance-medley" being too narrow. Indeed, he does not identify any cases of felonious homicide that are neither murder nor chance-medley.

Coke's discussion of murder is equally confusing. In his chapter on murder, Coke defined that crime as unlawful killing with malice forethought, express or implied.\textsuperscript{80} This definition hinted, but did not explicitly state, that all murder should be nonclergyable because it was based upon malice prepense. Coke defined express malice as the intent to "kill, wound, or beat"\textsuperscript{81} and repeated Lambarde's example of killing in the course of robbery as one illustration of implied malice.\textsuperscript{82} As George Fletcher comments, "the point of Coke's holding that this case was one of implied malice was to make it clear that provocation could not be a defense on behalf of someone whose robbery induced the victim's provocative act."\textsuperscript{83} In his chapter on homicide, Coke initially reiterated the connection of murder with malice aforethought. But then he offered a puzzling discussion of unlawful act killing in which he characterized it paradoxically as murder, albeit without malice prepense:

There is an homicide, that is neither forethought, nor voluntary. As if a man kill another per infortunium, seu casu, that is homicide by misadventure. . . . Homicide by misadventure, is when a man doth an act, that is not unlawfull, which without any evill intent tendeth to a man's death.

\textit{Unlawfull.}\textsuperscript{84} If the act be unlawful it is murder. As if A. meaning to steal a deere 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 no intent to hurt the boy, nor knew not of him. 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

\textsuperscript{78.} Id. at 54.
\textsuperscript{79.} Id. at 55.
\textsuperscript{80.} Id. at 47.
\textsuperscript{81.} Id. at 51.
\textsuperscript{82.} Id. at 52.
\textsuperscript{83.} FLETCHER, supra note 27, at 280.
reasonable creature afar off, without any evil intent in him, this is per infortunium: 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 unlawful.

Without any evil intent.] If a man knowing that many people come in the street from a sermon, throw a stone over a wall, intending only to feare them, or to give them a light hurt, and thereupon one is killed, this is murder; for he had an ill intent, though that intent extended not to death . . . .

For Coke, then, unlawfulness or an “evil intent” could apparently substitute for malice aforethought in qualifying a killing as murder. Coke did not treat these scenarios as instances of implied malice. But neither did he classify any killings involving unlawful acts or culpable mental states as manslaughter or chance-medley. At least one commentator has suggested that the clumsiness of Coke’s terminology may have caused him to say more than he meant. According to David Lanham,

The message that Coke was evidently trying to convey was that if there was an unintentional killing in the course of an unlawful act the killing would be felonious. The appropriate word would have been “manslaughter” but unfortunately Coke had precluded himself from using that word by holding that some manslaughters were not felonious.

In other words, Coke may have characterized unlawful act killing as “murder” for want of a better general term for felonious homicide. By specifying that such “murders” were without malice prepense, Coke may have meant to exclude them from the class of nonclergyable homicides, if he thought about this issue at all. Thus, it is likely that Coke did not mean to characterize accidental killings in the course of unlawful acts as murder in the technical sense. After all, “murder” referred simply to atrocious killings in ordinary speech, and it was only murders with malice prepense that were excluded from benefit of clergy by statute. Thus, in characterizing unlawful act killings as murders without malice, Coke may have meant to treat them as felonious, but nevertheless clergyable, homicides.

Fletcher argues that Coke’s whole discussion of unlawful act killing was an anachronism, reflecting the law of homicide before development of the doctrine that murders with malice prepense were nonclergyable. On this interpretation, Coke was simply expressing a traditional view that the unlawfulness of an act causing death would deprive the defendant of the excuse of accident, or per infortunium. The unlawfulness of the act causing death meant the prosecution’s prima facie proof of felonious homicide remained undisturbed. According to Fletcher, this doctrine preceded and had nothing to do with the later doctrine that felonious homicides committed with malice prepense were

84. COKE, supra note 77, at 57.
86. FLETCHER, supra note 27, at 278.
nonclergyable. 87 Fletcher argues that Coke clearly did not regard the unlawful act as a source of or substitute for malice prepense:

It is significant that in picking an example of an unlawful act, Coke turned away from arson, robbery, and the dangerous felonies and instead picked the homely example of shooting a deer in the park belonging to another.

It is abundantly clear from the text that Coke did not think of the "unlawful act" doctrine as a basis for establishing malice, expressed, implied, or any other variety. If he had been so concerned, he would have framed an example of killing in the course of a dangerous felony. In the section on malice, he does refer to a robber's killing a victim who resists as an example of implied malice. Yet this inference of malice is in no way formal or constructive, and there is no intimation that Coke sees a connection between the robber's killing a resisting victim and the doctrine of the unlawful act as a basis for denying the applicability of *per infortunium* as an excuse. 88

Fletcher's argument that Coke wrote in an anachronistic idiom is supported by Coke's citations, which were all to sources preceding the sixteenth century. Coke obviously offered his examples of shooting a deer or a bird in order to echo Bracton's discussion of throwing a stone at a bird, which Coke cited. 89 Yet Bracton merely ascribed liability to one who kills accidentally in an unlawful act, not murder liability or capital punishability. 90 Coke also cited three yearbook cases. Two of these simply confirm that in the late Middle Ages, accidental killers were considered liable for homicide until they received their inevitable pardons. 91 The third, dating from 1496, says that it is a felony to kill another in consensual combat (a duel or joust), unless the combat was at the king's command, and that it is felony to kill with the intention merely of beating. 92 Both of these hypothetical killings meet Coke's test for express malice (the intent to kill, injure, or beat). Hence the jousting case does not show that an unlawful act can substitute for malice. As of 1496 there was not yet any distinct offense of murder, since all felonious homicides were still clergyable, while the category of felonious homicides included killings that would later be called manslaughters. Coke's reliance on this case supports Lanham's suggestion that Coke was using "murder" in a nontechnical sense, to mean only felonious homicide.

James Fitzjames Stephen scoffed that Coke's discussion of unlawful act killings is "entirely unwarranted by the authorities which he quotes." 93 This

87. *Id.* at 278-79.
88. *Id.* (footnotes omitted).
89. *Coke, supra* note 78, at 56 (citing Bracton).
90. *Bracton, supra* note 36, at 341; see also *3 Stephen, supra* note 46, at 58 (pointing out the discrepancy between Bracton and Coke).
91. Plees del Corone No. 354 (Iter Northampton 1330), *in Fitzherbert, supra* note 61, at fol. 257a; *Y.B. 2 Hen. 4, fol. 18* (1400). Note that here and in the notes to follow, I will list cases (and statutes) in chronological order for the ease of the reader.
93. *3 Stephen, supra* note 46, at 57.
condemnation is fair if we take Coke to be staking out the extreme proposition that killing accidentally in the course of any unlawful act is nonclergyable murder with malice prepense. But Coke’s authorities accord much better with the limited position Lanham and Fletcher attribute to him: that while killing accidentally in the course of a lawful act is excusable as death by misadventure, killing in the course of an unlawful act is not excusable, and is therefore (clergyable) felonious homicide. In sum, it seems most unlikely that Coke intended to say that deaths resulting from unlawful acts were malicious and therefore nonclergyable murders.

In any case, no such rule ever achieved legal authority in England. Two cases decided during the course of the seventeenth century squarely rejected the concept of unlawful act murder. In a 1647 case, Sir John Chichester was fencing with his servant with covered swords, apparently illegally. Unbeknownst to the fencers, the cover of Chichester’s sword fell off and he struck his servant a fatal blow. The unlawful act murder rule later attributed to Coke would have made this accident a murder. The court held it manslaughter because the servant’s death, while resulting from an unlawful act, came with no intent to harm. In a 1664 case, the defendant, Hull, shouted a warning and then threw a piece of lumber off a roof, killing a fellow workman below. While Hull was indicted for murder, all the judges agreed that if he had acted with unlawful carelessness, he would be liable for manslaughter only (a majority found him innocent of any wrongdoing, however).

The 1663 case of Sir Charles Stanley does offer support for some form of unlawful act homicide rule. Stanley resisted arrest by firing a pistol at the arresting bailiff. Servants of both antagonists joined the fray, and some of Stanley’s servants ultimately killed a servant of the bailiff’s. Stanley was deemed guilty of this murder because of his initial act of violence, a result consistent with Herbert. Yet some of the language suggests a rule broader than the result: “[W]hen several men joyn in an unlawful act they are all guilty of whatever happens upon it; as in The Lord Dacre’s case . . . .” This is only, by its terms, an unlawful act homicide rule, making the participants criminally responsible for death resulting from an unlawful act, but not necessarily grading it as murder. In Lord Dacres the liability was murder, but that was because the unlawful acts joined in included a contingency plan to kill all opposers. A later discussion in Stanley suggests that unlawfulness has two effects: to render one negligently culpable for causing a result and to “imply” malice where an intentional act of violence is provoked or unpremeditated. The justices agree that one who, coming upon the scene of an arrest, draws his sword against the arresting officers is guilty of murder if an officer is killed.

97. Id. at 1094.
even if he did not understand he was interfering with an arrest:

For a man must take heed how he joineth in any unlawful act as fighting is, for if he doth, he is guilty of all that follows. And it being murder to kill those who come to execute the law; every one who joins in that act is guilty of murder, and his ignorance will not excuse him, where the fact is made murder by the law without any malice precedent, as in the case of killing a bailiff. 98

So here we have an unlawful act of fighting creating a negligent culpability for impeding an arrest; resistance of an arrest implying malice for an intentional, but provoked or sudden, killing; and an assault with a lethal weapon supporting complicity in that intentional killing. None of this amounts to a general rule of murder liability for causing death accidentally in the course of any unlawful act.

Subsequent writers rejected any substitution of an unlawful act for malicious intent as an element of murder. Thomas Hobbes complained in his 1681 Dialogue Between a Philosopher and a Student of the Common Laws of England that Coke had no authority for treating accidental killing in the course of an unlawful act as if it were committed with "prepensed malice." 99 Writing at about the same time, Matthew Hale insisted that a killing in the course of an unlawful act was manslaughter only, unless accompanied by malice, which he defined as an "ill intent" 100 or an "intention to do harm." 101 Hale added that

98. Id.
99. Hobbes wrote:
   P[hilosopher]. This is not so distinguished by any statute, but is the common-law only of Sir Edward Coke. I believe not a word of it. If a boy be robbing an apple-tree, and falleth thence upon a man that stands under it and breaks his neck, but by the same chance saveth his own life, Sir Edward Coke, it seems, will have him hanged for it, as if he had fallen of prepensed malice.


100. Hale wrote:
   Involuntary per infortunium.
   Chancemedeley, where a Man doing a lawful act, without intent of hurt to another, and death casually ensues. . . .
   But if the act be unlawful, then death ensuing Manslaughter or Murder.
   Shooting at a Deer in another's Park, the Arrow glanced and killeth a stander by, Manslaughter.
   Throwing stones or shooting in the High-way, and death ensuing, Manslaughter.
   But if a man, knowing people passing by in the street, throw a stone, over the wall, Murder.
   Playing at Hand-sword without command of the King, death ensuing, Manslaughter. So that an unlawful act, without an ill intent, Manslaughter; with an ill intent, Murder.


101. He wrote:
   I. Malice implied in the manner of doing.
“[t]hough the malice did not rise so high as death, but intended only to beat the party, yet if malitious, it is Murder if death ensue." Hale followed Lambarde and Coke in offering the killing of a resisting robbery victim as an illustration of implied malice. He also concluded that the accidental killing of one person in the attempt to kill another was malicious. Finally, following Lord Dacres, he concluded that “[i]f a person ... comes with a general resolution against all Opposers, if the act be unlawful, and death ensue, it is Murder . . .” Hale commented on one further instance of unlawful act homicide. He considered death resulting from the administration of a potion to induce abortion to be murder,

for it was not given to cure her of a disease, but unlawfully to destroy her child within her, and therefore he, that gives a potion to this end, must take the hazard, and if it kills the mother, it is murder, and so ruled before me at the assizes at Bury in the year 1670.

This position looks harsh to the modern reader, but fits with Hale’s conception of malice as the intent to injure, since Hale regarded abortion as manslaughter.

While Hale confined the mental element of murder to an intent to harm, he also restricted the act element of murder to killing. Homicide required not just causing death, but causing death by means of a battery, “for the ... death without the stroke or other violence makes not the homicide . . . .” Hale added that

[i]f a man either by working upon the fancy of another or possibly by harsh or unkind usage put another into such passion of grief or fear, that the party either die suddenly, or contract some disease, whereof he dies . . . it cannot come under the judgment of felony, because no external act of violence was offerd, whereof the common law can take notice, and secret things belong to

HALE, PLEAS OF THE CROWN, supra note 100, at 44-45 (emphasis added).
Thus, Hale's conception of killing would have precluded homicide liability in cases where the frightened victim of a robbery dies of a heart attack, or the despondent victim of a rape commits suicide. Hale's conception of violent acts of course included blows, strangling, and poisoning. However, it also included forcing someone into danger, as by starving or exposing an infant, or confining a prisoner in dangerous conditions.

Summing up Hale's position, Fletcher writes that "there are two distinct ways in which the act of illegal poaching could be used against a party who killed another. It might be used to deny the relevance of provocation; or it might be used to reject the excuse of per infortunium." Only if death resulted from intentional violence would the defense of provocation be available. If the defense were successful, the defendant would be guilty of manslaughter; otherwise he would be guilty of murder. By contrast, the defense of per infortunium would be available only when injury was unintended. If this defense were successful, the defendant would be innocent; otherwise he would be guilty of manslaughter. But an unlawful act involving a threat of injury, like robbery, was inherently malicious in Hale's view. An unlawful motive for initiating violence was therefore inconsistent with provocation. Accordingly, if the robber killed in trying to overcome his victim or anyone resisting the robbery, he was guilty of murder.

D. Proposing a Felony Murder Rule in Eighteenth-Century England

A felony murder rule made its first appearance in English case law as a dictum regarding accomplice liability for collateral crimes in the 1701 case of R. v. Plummer. Plummer was one of a group attempting to export wool illegally. A second member of this group killed a third. While the court concluded that Plummer was not guilty of murder on these facts, Chief Justice Holt discoursed at length on the circumstances under which participation in an unlawful act resulting in death would merit murder liability. For the most part, his conclusions tracked those of Hale. He wrote that "[t]his notion that hath been received, that if divers persons be engaged in an unlawful act, and one of them kills another, it shall be murder in all the rest, is very true; but it must be admitted with several qualifications." These qualifications were (1) "the abettor must know of the malicious design of the party killing," (2) "[t]he killing must be in pursuance of that unlawful act, and not collateral to it," (3) "the unlawful act ought to be deliberate," and (4) "it ought to be such an act as may tend to the hurt of another either, immediately, or by necessary

109. Id. at 429.
110. FLETCHER, supra note 27, at 280.
112. Id. at 1105.
consequence."

Yet Holt then identified what he thought was a conflict between the views of Hale and Coke and offered the following reconciliation:

Shooting at a deer in another’s park is an unlawful act: if the arrow glanceth and kills a man, this is but manslaughter, which is contrary to 3 Inst. 56 [Coke], that holds it to be murder: but Lord Hale 31,(2) saith it is but manslaughter . . . .

The design of doing any act makes it deliberate; and if the fact be deliberate, though no hurt to any person can be foreseen, yet if the intent be felonious, and the fact designed, if committed, would be felony, and in pursuit thereof a person is killed by accident, it will be murder in him and all his accomplices . . . .

So if two men have a design to steal a hen and one shoots at the hen for that purpose, and a man be killed, it is murder in both, because the design was felonious. So is Lord Coke 56,(3) surely to be understood, with that difference, but without this difference none of the books quoted in the margin . . . do warrant that opinion; nor indeed can I say that I find any to warrant my opinion, but only the reason is submitted to the judgment of those Judges that may at any time hereafter have that point judicially brought before them.\footnote{114}

Holt’s dictum was, by his own confession, an innovation, no better supported by precedent than the more sweeping rule he mistakenly attributed to Coke. He justified it as a moderation of Coke’s supposed doctrine. Although he might have found some support in Bacon’s idea of transferrability of “general malicious intent” among crimes of like grade, he did not seek support there. It should not be forgotten that even Holt’s formulation of a felony murder rule still predicates murder liability on the dangerousness (“tend to the hurt of another”) of the felony.

In any case, Holt’s compromise was taken up and defended by the early eighteenth-century treatise writer William Hawkins, who attempted to reconcile the divergent positions of Hale and Holt in the following terms:

\begin{quote}
[I]f a man happen to kill another . . . in the willful commission of any unlawful act, which necessarily tends to raise tumults and quarrels, and consequently cannot but be attended with the danger of personal hurt, to someone or other; as by committing a riot, robbing a park, &c. he shall be adjudged guilty of murder.

And \textit{a fortiori}, he shall come under the same construction, who in the pursuance of a deliberate intention to commit a felony, chances to kill a man, as by shooting at tame fowl, with an intent to steal them, &c. for such persons are by no means \textit{favored}, and they must at their peril take care of the consequence of their actions; and it is a general rule, that wherever a man intending to commit one felony, happens to commit another, he is as much
\end{quote}

\footnote{113. \textit{Id.} at 1105-07.}
\footnote{114. \textit{Id.} at 1107.}
guilty as if he had intended the felony which he actually commits.\textsuperscript{115}

This passage implies something like the following argument: (1) Killing in the course of an unlawful act is murder only if accompanied by an "ill intent," according to Hale. (2) Hale does not limit "ill intent" to intent to kill, but includes knowingly imposing a risk of death or injury. (3) Such a knowing imposition of risk is inherent in all crimes that would tend to provoke resistance. (4) Felonies are a particularly heinous subset of such inherently dangerous crimes. (5) Hence, the intent to commit a felony may be included within the "ill intent" that qualifies killings in the course of unlawful acts as murder. Like Holt, Hawkins did not rely on Bacon.

Fletcher comments:

The emphasis in Hawkins appears to be on the incriminating impact of these unlawful acts, rather than their relationship to the defense of \textit{per infortunium}. Yet their incriminating aspect does not derive from the immorality of acting contrary to law or from any formal theory that the culpability of the "unlawful act" is transferred to the act of killing. The point of Hawkins' analysis is that these acts, which happen to be unlawful, are dangerous in varying degrees and that this relative degree of danger supports the classification of the killing as either manslaughter or murder.\textsuperscript{116}

Of course, Fletcher is right as far as he goes, but it must be conceded that Hawkins was apparently willing to assume that all felonies were dangerous\textsuperscript{117} in order to reconcile Holt's dictum with Hale's "intent to harm" standard. Moreover, Hawkins did not require a very close causal connection between the danger inherent in the predicate felony and the resulting death. Thus, "not only in such cases where the very act of a person having such a felonious intent, is the immediate cause of a third person's death, but also where it in any way occasionally causes such a misfortune, it makes him guilty of murder."\textsuperscript{118}

Indeed, Hawkins's proposed felony murder rule applied only to felonies that did not aim directly at physical injury to the victim: "Such killing shall be adjudged murder which happens in the execution of an unlawful action principally intended for some other purpose, and not to do a personal injury to him in particular who happens to be slain."\textsuperscript{119} Here, at the intellectual birth of the felony murder doctrine, we find a formulation of the so-called merger doctrine, holding that murder liability can only be predicated on a felony with a purpose independent of the death or injury of the victim.

Hawkins's "general rule" equating the dangers of all felonies raises a question as to whether all felonies were indeed dangerous at the time that Holt and Hawkins wrote. The term "felony," although it originally referred simply to

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  \item \textsuperscript{115} I William Hawkins, \textit{A Treatise of the Pleas of the Crown} 86 (1716).
  \item \textsuperscript{116} Fletcher, \textit{supra} note 27, at 281.
  \item \textsuperscript{117} Even theft of fowl. See 1 Hawkins, \textit{supra} note 115, at 86.
  \item \textsuperscript{118} Id. at 100.
  \item \textsuperscript{119} Id. at 87.
\end{itemize}
vicious acts, had by this time come to be associated with capital punishment crimes, including those for which benefit of clergy was available. Yet felonies included petty larcenies and mayhem, which were not punishable by death, and did not include some crimes, like treason, which were. Coke mentions only eight common law felonies: murder, manslaughter, rape, burglary, arson, robbery, theft, and mayhem. Statutory felonies included abduction with intent to marry, sodomy, and a few novel forms of theft. Statutory felonies greatly proliferated over the course of the eighteenth century. Blackstone, writing in the later eighteenth century, discusses over thirty felonies. According to Stephen, most of the new felonies created in the eighteenth century were variants of the common law felonies, especially of theft, but the newer theft offenses included such pacific offenses as forgery.

Of the traditional common law felonies, all but burglary and theft involve a direct threat to the person. Burglary, which then involved breaking into a dwelling at night to commit another felony, is still generally thought to justify resistance with deadly force. Only theft would strike the modern reader as not necessarily dangerous to life. But theft was a narrower crime in seventeenth-century England, requiring a “trespassory” taking from possession, this trespass apparently consisting of some action that could alarm an observer by

120. 2 Pollock & Maitland, supra note 43, at 464-66.
121. See 1 Stephen, supra note 46, at 463 (discussing Coke).
122. An Acte Aygnst Taking Awaye of Women Aygainst Theire Wille, 1487, 3 Hen. 7, c. 3 (Eng.), reprinted in 2 The Statutes of the Realm, supra note 46, at 512.
123. An Acte for the Punysshement of the Vice of Buggerie, 1533-1534, 25 Hen. 8, c. 6 (Eng.), reprinted in 3 The Statutes of the Realm, supra note 46, at 441; An Act for the Punishment of the Vyece of Sodomye, 1562-1563, 5 Eliz., c. 17 (Eng.), reprinted in 4 The Statutes of the Realm, supra note 46, at 447.
124. See 2 Stephen, supra note 46, at 206-07.
125. 4 William Blackstone, Commentaries on the Laws and Customs of England 56 (photo. reprint 2002) (1769) (harboring a Catholic priest); id. at 71-72 (piracy); id. at 99 (paying with counterfeit coin; sending extortionate letters); id. at 100 (serving a foreign prince; conspiring to kill a lord; attempting to kill an officer); id. at 101 (desertion; embezzling the king’s arms); id. at 128 (falsifying court records); id. at 129 (coercing prisoners to testify; obstructing justice); id. at 130 (escape; permitting escape); id. at 131 (return from exile by Catholic recusants); id. at 132 (demanding a reward for return of property); id. at 142 (riot with intent to change the laws or do violence to the privy council); id. at 144 (poaching in disguise; destroying tollhouses); id. at 154 (exporting wool); id. at 155 (smuggling); id. at 156 (fraudulent bankruptcy); id. at 162 (violating a plague quarantine); id. at 164 (bigamy); id. at 165 (being absent without leave); id. at 191-202 (manslaughter, murder); id. at 207 (mayhem); id. at 208 (malicious shooting); id. at 210 (rape); id. at 227 (burglary); id. at 232 (theft); id. at 241 (robbery). Note that this list excludes the many treason offenses, which although capital punishment in many cases, were not classified as felonies.
manifesting criminal purpose.\textsuperscript{127} Thus, theft was seen as inherently provocative. LaFave comments that “the judges who determined the scope of larceny (including its limitations) apparently considered larceny to be a crime designed to prevent breaches of the peace rather than aimed at protecting property from wrongful appropriation.”\textsuperscript{128} And indeed, deadly force was considered justifiable in resisting any felony in one’s home\textsuperscript{129} or when necessary to apprehend a felon.\textsuperscript{130} Thus, a trespassory theft was seen as a breach of the peace that challenged the victim or the sheriff to use deadly force to stop the thief.

It has sometimes been suggested that a felony murder rule could have had no practical significance in the common law because all felonies were capitally punishable anyway, whether or not they resulted in a death.\textsuperscript{131} This is not entirely true for two reasons. First, a few felonies remained clergyable at the beginning of the eighteenth century: mayhem, petty thefts, and thefts that were not from the person.\textsuperscript{132} Second, both Holt and Hawkins wished to extend felony murder liability to deaths caused in the course of attempting felonies. It is not clear that there was any general doctrine of attempt liability before the late eighteenth century,\textsuperscript{133} except perhaps in the jurisprudence of the notorious Star Chamber.\textsuperscript{134} Where punished, attempts were not seen as felonies nor punished capitally.\textsuperscript{135} Blackstone concluded that “a bare assault, with intent to kill, is only a great misdemeanor.”\textsuperscript{136} Thus, by virtue of the felony murder rule, a death could raise an attempted felony from a misdemeanor to a capitally punishable felony. Indeed, we can think of the proposed felony murder rule as an early conception of attempt liability. Rather than imposing felony liability for culpable conduct that failed to cause harm, this felony murder rule would have imposed causal responsibility for the unintended consequences of culpable conduct.

Holt’s dictum was approved, though not applied, in the 1722 case of \textit{R. v. Woodburne}.\textsuperscript{137} Hawkins’s “general rule, that wherever a man intending to commit one felony, happens to commit another, he is as much guilty as if he

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\textsuperscript{127} See George Fletcher, \textit{The Metamorphosis of Larceny}, 89 HARV. L. REV. 469 (1976).
\textsuperscript{128} \textit{LaFave}, supra note 4, at 791.
\textsuperscript{129} \textit{Hawkins}, supra note 115, at 81-82.
\textsuperscript{130} \textit{Id.} at 80.
\textsuperscript{131} See Tomkovicz, supra note 11, at 1446.
\textsuperscript{132} \textit{Id}. note 46, at 467.
\textsuperscript{133} \textit{Fletcher}, supra note 27, at 132-35. The general doctrine that an attempt to commit a crime is also a crime is not found in Hale, Hawkins, Foster, or Blackstone. It first appears in Lord Mansfield’s opinion in \textit{R. v. Scofield}, Cald. 397 (1784).
\textsuperscript{134} \textit{Id}. note 46, at 222-24.
\textsuperscript{135} \textit{Id}.
\textsuperscript{136} 4 \textit{Blackstone}, supra note 125, at 196.
\textsuperscript{137} 16 St. Trials 53 (Suffolk Assizes 1722).
\end{quote}
had intended the felony which he actually commits,” received more qualified approval. The defendants were charged with a form of mayhem, maiming with intent to disfigure. They claimed they had lacked the requisite intent to disfigure but instead had intended to kill (which would have made their attack the mere misdemeanor of attempted murder!). The judge, Sir Peter King, encouraged the jury to find that the defendants had intended to kill by means of disfiguring, and so had fulfilled the statutory requirement of intent to disfigure. King appeared to acknowledge Hawkins’s idea of transferred felonious intent, but confined it to certain crimes, not including maiming with intent to disfigure. This was what would later be called a “specific intent crime.”

There are some cases where an unlawful or felonious intent to do one act, may be carried over to another act, done in prosecution thereof; and such other act will be felony, because done in prosecution of an unlawful or felonious intent. As, if a man shoots at a wild fowl, wherein no man hath any property, and by such shooting happens unawares to kill a man; this homicide is not felony, but only a misadventure or chance-medley, because it was an accident that happened in the doing of a lawful act: but if this man had shot at a tame fowl, wherein another had property, but not with intention to steal it, and by such shooting had accidentally killed a man, he would then have been guilty of manslaughter, because done in prosecution of an unlawful action, viz. committing a trespass on another’s property: but if he had had an intention of stealing this tame fowl, then such accidental killing of a man would have been murder, because done in prosecution of a felonious intent, viz. an intent to steal.

But now the indictment on this statute is for a certain particular intent; for purposely, maliciously, and by lying in wait, slitting Mr. Crispe’s nose, with an intention in so doing to maim or disfigure....

Thus, while King approved Holt’s felony murder dictum, the case afforded him no opportunity to apply it. He could have applied Hawkins’s general principle of transferred felonious intent to find the mental element of maiming supplied by the intent to kill, but declined to do so. Thus, despite the judge’s endorsement of a felony murder rule, the actual decision in Woodburne, like that in Plummer, confers no authority upon it.

Notwithstanding the dicta in Plummer and Woodburne, the prevailing practice of English courts in murder cases appears to have been closer to the views of Hale than those of Hawkins during the century preceding the American Revolution. Popular journalistic accounts of murder trials at London’s Old Bailey Courthouse reveal that murder liability turned on proof of death caused by an intentional stabbing, shooting, or bludgeoning. Prosecutors generally made no effort to prove, and defense attorneys made no effort to disprove, intent to kill or felonious motive. For example, in a 1718 case,...
John Price was interrupted in the act of raping and robbing Elizabeth White, who died of wounds to her head, throat, and abdomen. The testimony and questions at Price's murder trial were directed only to proving the fatal assault rather than the theft or the rape. Because any serious assault established malice, there was no need to allege an attempted felony where the defendant intentionally attacked the body of the victim. On the other hand, the Old Bailey reports do not reveal any murder convictions without such intentional acts of violence during the century before the American Revolution.

Although the proposed felony murder doctrine had not yet been put into practice on the eve of the American Revolution, it received further scholarly support in Michael Foster's 1762 treatise, *Crown Law.* Like Hawkins, Foster attempted to reconcile Holt's felony murder rule with Hale's requirement that unlawful act murders must be accompanied with evil intent. Foster suggested that even unlawful act manslaughters required a kind of evil intent. But this evil intent was established by the intent to do any unlawful act that was *malum in se.* If the unlawful and evil act causing death were a felony, the resulting death would be murder. Conceding that Coke had disagreed with this position, Foster invoked the dictum from *Plummer:*

A. shooteth at the poultry of B, and by accident killeth a man; if his intention was to steal the poultry, which must be collected from circumstances, it will be murder by reason of that felonious intent; but if it was done wantonly and without that intention it will be barely manslaughter.

Next, citing Hale, Foster explained:

The rule I have laid down supposeth, that the act from which death ensued was *malum in se.* For if it was barely *malum prohibitum,* as shooting at game by a person not qualified by statute-law to keep or use a gun for that purpose, the case of a person so offending will fall under the same rule as that of a qualified man . . .

Foster's support for the dictum in *Plummer* flowed from his conception of malice, which clearly differed from Hale's. For Foster, malice did not require the intent to kill, harm, or endanger any person. Malice meant a wicked

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141. Of homicide by accident, Foster wrote:
[T]he act upon which death ensueth must be lawful. For if the act be unlawful, I mean if it be *malum in se,* the case will amount to felony, either murder or manslaughter, as circumstances may vary the nature of it. If it be done in prosecution of a felonious intention it will be murder, but if the intent went no further than to commit a bare trespass, manslaughter . . .

142. Id. at 258-59.
143. Id. at 259.
disposition or character, which could be manifested by deliberately committing any wicked act. "[f]or the law by the term Malice . . . meaneth, that the fact hath been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, malignant spirit."144 "Implied malice" referred to "circumstances as carry in them the plain indications of an heart regardless of social duty and fatally bent on mischief."145 It followed that the commission of a felony malum in se (as presumably all felonies were) was a clear manifestation of malice, supplying all the "evil intent" Hale could want.

A few years after the appearance of Foster's Crown Law, Blackstone published his Commentaries on the Laws of England, which became the standard reference work on the common law for American lawyers.146 Blackstone offered a version of Hawkins's general principle that the intent to commit one felony could transfer to an unintended felonious result. Blackstone reasoned that while every crime required both a "vitious act" and a "vitious will,"147 the vicious act implied a vicious will unless the defendant was incapable of controlling his action, by virtue of some excusing circumstance. Blackstone then analyzed accident and mistake as such excusing conditions. Citing Hale, he wrote:

"[i]f any accidental mischief happens to follow from the performance of a lawful act, the party stands excused from all guilt: but if a man be doing anything unlawful, and a consequence ensues which he did not foresee or intend, as the death of a man or the like, his want of foresight shall be no excuse; for, being guilty of one offence, in doing antecedently what is in itself unlawful, he is criminally guilty of whatever consequence may follow the first misbehaviour."148

Of course, this says nothing about the grading of criminal liability for the unlawfully produced "mischief." The cited passage from Hale says only that death resulting from an unlawful act is felony and homicide, not murder. Murder, according to Blackstone, required malice aforethought, express or implied,149 and Blackstone adopted Foster's definition of malice as "any evil design in general; the dictate of a wicked, depraved, and malignant heart."150

Blackstone offered two divergent discussions of how to grade unintended homicide in the course of crime. In a discussion of involuntary manslaughter, Blackstone invoked Foster's formulation of a felony murder rule:

"[I]n general, when an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter according to the nature

144. Id. at 256.
145. Id. at 257.
147. 4 BLACKSTONE, supra note 125, at 21.
148. Id. at 26-27 (citing 1 HALE, HISTORY OF THE PLEAS OF THE CROWN, supra note 100, at 39).
149. Id. at 198-99.
150. Id. at 199.
of the act which occasioned it. If it be in prosecution of a felonious intent, it will be murder; but if no more was intended than a mere trespass, it will amount only to manslaughter.\textsuperscript{151}

But in discussing murder with express malice, Blackstone offered a rule like Hale’s, emphasizing the dangerousness of the predicate crime rather than its felonious quality. Thus,

\begin{quote}
if two or more come together to do an unlawful act against the king’s peace, of which the probable consequence might be bloodshed; as to beat a man, to commit a riot, or to rob a park; and one of them kills a man; it is murder in them all, because of the unlawful act, the \textit{malitia praecogitata}, or evil intended beforehand.\textsuperscript{152}
\end{quote}

In the next paragraph, on implied malice, Blackstone cited Hale in support of a felony murder rule possibly premised on a similarly restrictive notion of “felonious intent”:

\begin{quote}
[I]f one intends to do another felony, and undesignedly kills a man, this is also murder. Thus if one shoots at A and misses him, but kills B, this is murder; because of the previous felonious intent, which the law transfers from one to the other. The same is the case, where one lays poison for A; and B, against whom the prisoner had no malicious intent, takes it, and it kills him; this is likewise murder.\textsuperscript{153}
\end{quote}

Blackstone’s citation to Hale and his use of examples of transferred intent to kill suggested a restriction of the rule to predicate felonies involving intended bodily harm, or to deaths resulting from acts of violence. Notably, Blackstone omitted any discussion of the poaching examples offered by Bracton, Coke, Holt, Hawkins, King, and Foster.\textsuperscript{154}

There is little evidence to suggest that Foster’s views reflected the actual state of English law at the time of the American Revolution. Murder still seemed to require the intentional infliction of an injury or wound. For example, the 1773 decision of \textit{R. v. Lad} overturned a murder conviction in a case where a girl of “about nine years old” died after languishing from “grievous” lacerations to “the private parts and inside of the body” sustained in a rape.\textsuperscript{155} The court held the indictment defective because it failed to allege that the defendant wounded the victim mortally. This decision has sometimes been read as clearly rejecting a felony murder rule,\textsuperscript{156} but that puts it too strongly, since the conviction was overturned because of a faulty charging instrument rather than insufficient evidence at trial. The opinion does not clarify whether the missing element was (1) an intentional injury causing death, or (2) merely a

\begin{itemize}
\item 151. \textit{Id.} at 192-93.
\item 152. \textit{Id.} at 200.
\item 153. \textit{Id.} at 201 (footnote omitted).
\item 154. See Lanham, \textit{supra} note 85, at 97-99 for a similar interpretation of Blackstone’s position as equivocal.
\item 156. Lanham, \textit{supra} note 85, at 100.
\end{itemize}
causal connection between the rape and the death. While the first interpretation would make the defendant’s felonious motive irrelevant to his murder liability, the second interpretation would be compatible with a felony murder rule requiring a close causal connection between the felony and the resulting death. Yet the court’s fastidiousness in a case of such moral depravity suggests a reluctance to endorse a felony murder theory of liability.

Although eighteenth-century courts appeared reluctant to convict felons of murder unless death resulted from an act of violence, they were sometimes willing to treat participation in a crime as a basis for complicity in such a fatal battery. Journalistic accounts of Old Bailey trials reveal that, during the last two decades of the eighteenth century, judges sometimes instructed juries that participants in crime were accountable for killings or murders in furtherance of the criminal plan. In one 1786 case, for instance, a youthful member of a ring of pickpockets was held liable for murder when one of his adult confederates fatally stabbed a pursuer while the youth merely looked on. However, this case seems to have been exceptional: in other cases liability was confined to those who manifested malice by joining in or agreeing to acts of violence.

157. In a 1769 case, Laurence Balfe and Edward Quirk were among a mob of thugs hired to bludgeon supporters of one candidate at a polling place. One victim of this mob died of his injuries. Balfe and Quirk were observed beating voters and were convicted as accomplices of the unidentified killer. In considering an evidentiary issue, one of the three judges argued that if persons were “assembled upon an unlawful occasion . . . and any act was done by any one that terminated in murder, all persons concerned in the prosecution of that unlawful design or purpose, will be answerable for it, if they were present, aiding and abetting it . . . .” R. v. Balfe, Nos. 108-09 (Old Bailey Jan. 12, 1769), http://www.oldbaileyonline.org/html-units/1760s/t17690112-22.html.

158. The court instructed the jury that
wherever two or three people or more set out together to commit an illegal act; where they go with a purpose of committing such a felony as you have heard of, or any other felony, picking pockets being one as you know; and in consequence of that act, death ensues; they are all chargeable for that death. It is not at all necessary, Gentlemen, that they should have struck the blow, one of them striking the blow communicates the guilt to the rest; it is as little necessary that they should have had in their minds any sort of idea of committing murder . . . ; but if they went out for the purpose of committing a felony, which is such an offense as they must naturally suppose, and the law will always presume, might tend to mischief, they must be answerable for the mischief; for the law will presume, that when they came for the purpose of committing this act, they came also for the purpose of carrying it into execution.


159. In 1782 Francis Gray was convicted of murder for fatally shooting a victim in the head in the course of a robbery. Although Gray admitted that he had fired the fatal blow, and none of Gray’s accomplices in the robbery were charged with the murder, the court instructed the jury that “if a robbery is committed, and any one person is killed in consequence of that robbery, all present were equally guilty . . . .” R. v. Gray, No. 622 (Old Bailey Oct. 16, 1782), http://www.oldbaileyonline.org/html_units/1780s/t17821016-11.html (emphasis omitted). In a 1789 case, three robbers held up a farmer with a pistol, threatening to kill him. Two of them knocked the farmer off his cart and beat him, one of them stabbing him fatally in the head. One of the robbers was charged and convicted of murder, on the following instruction:
1779 King’s Bench case, *R. v. Borthwick*, offers further evidence that complicity in murder required actually aiding or encouraging the fatal assault. Borthwick was a member of a naval crew sent ashore to arrest unemployed mariners for naval service, but without a proper warrant. The crew encountered resistance from a group of sailors in a tavern and set upon them with their clubs, killing a bystander in the confusion. A special verdict left it unclear who had struck the fatal blow, who among the other members of the crew had aided and abetted the fatal attack, and whether they “were all of the same party, and upon the same pursuit, and under the same engagement and expectation of mutual defence and support with those that did the fact.” Accordingly, charges were dismissed.

To sum up: By the time of the American Revolution, the rule that an accidental death in the course of any felony was murder had become a standard theme in scholarly writing about the common law of homicide, supported by Hawkins, Foster, and—ambivalently—by Blackstone. Yet no English court had ever actually applied such a rule. The unlawful act murder rule attributed to Coke was explicitly rejected in the cases of *Chichester* and *Hull*. The cases of *Plummer* and *Woodburne* offered felony murder rules as dicta, but neither version was put into practice. The authoritative rule remained the holding of *Herbert*, that the malice supplied by an intention to physically harm one person can transfer to a different injury to a different victim, caused by an accomplice sharing that intent. By the end of the eighteenth century, some judges thought cofelons were automatically implicated in any murder committed in attempt of a felony, but most judges required participation in or encouragement of the act causing death. By and large, eighteenth-century English practice accorded with Hale’s conception of murder as the infliction of a fatal wound with the intent to cause harm.

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[If several men go out together upon an illegal purpose, meaning to commit a robbery, and determine to oppose all resistance that may be offered to them in the prosecution of the attempt, if one man kills another, the man that was present, though he is not the hand that gave the blow, he is equally guilty....]

*R. v. Carty*, No. 103 (Old Bailey Jan. 14, 1789), http://www.oldbaileyonline.org/html_units/1780s/t17890114-6.html. In a 1792 case, Francis Hubbard and several others beat and pursued one victim. Hubbard then fatally stabbed another who came to the original victim’s aid. Although the judge instructed the jury that all who join in a criminal purpose are liable for a mortal wound given in its pursuit, he concluded that Hubbard alone was responsible, because his killing was not in furtherance of any common plan. *R. v. Hubbard*, No. 184 (Old Bailey Mar. 29, 1792), http://hri.shef.ac.uk/luceneweb/bailey/highlight.jsp?ref=t17920329-26.

160. 99 Eng. Rep. 136 (K.B. 1779); *see also* Crum, supra note 1, at 194 (viewing *Borthwick* as inconsistent with a felony murder rule).


162. *Id.* at 139.
II. THE BELATED EMERGENCE OF FELONY MURDER LIABILITY IN ENGLAND

After the American Revolution, the leading English commentators came to accept Foster’s relatively broad formulation of a felony murder rule as an accurate statement of English law. Yet it took the English courts much longer to accept felony murder liability. The rule they finally did accept was much narrower than Foster’s rule, and instead reflected Hale’s more nuanced approach to homicide in the course of crime. Courts applying the felony murder rule required either an act of violence or an offense otherwise dangerous to human life, such as arson.

Edward East’s 1806 treatise held that “if the act on which death ensue [is] . . . done in prosecution of a felonious intent, however the death ensued against or beside the intent of the party, it will be murder.” 163 East did not, however, report any cases applying this rule, instead citing Plummer and Woodburne, as well as Foster. 164 William Russell’s treatise, first published in 1819, agreed that “[w]henever an unlawful act, an act malum in se, is done in prosecution of a felonious intention, and death ensues, it will be murder . . . .” 165 Russell cited the treatise literature through Foster, but no cases other than Plummer. Yet learned opinion did not support a felony murder rule unanimously. In 1834, the Bentham-influenced First Criminal Law Reform Commission found such a rule “totally incongruous with the general principles of our jurisprudence.” 166 Subsequent Commission reports argued on deterrence grounds that murder liability should always be predicated on the actor’s subjective awareness of a danger of death. 167 Scholarly opinion had already turned against the rule before it was established as law.

Felony murder liability was still not established in the case law by the middle of the nineteenth century. An 1855 edition of Russell cited only one new case, R. v. Smithies. 168 This 1832 case involved a defendant found guilty of “the wilful murder of Ellen Twamley by setting fire to his own house.” 169 There is nothing in the report of the case to indicate that the jury was instructed that murder liability depended on the fire being set feloniously or to indicate that the death was accidental. Even if the death was unintended, murder liability could be justified on the basis that burning a dwelling exhibits gross

164. Id.
165. 1 WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 660-61 (1819).
166. FIRST REPORT FROM HIS MAJESTY’S COMMISSIONERS ON CRIMINAL LAW 29 (1834).
169. Id.
recklessness, rather than on the basis that arson is a felony.170

So Smithies provided no support for a felony rule. On the other hand, two other cases from the 1830s firmly rejected Hawkins’s “general rule” that culpability could be transferred from one felony to another felony, at least as far as accomplices were concerned. In an 1831 case, *R. v. Collison*,171 a pair of watchmen caught two men in the act of stealing apples. One of the thieves assaulted one of the watchmen, but the other thief was held not to be complicit in the assault because he had not agreed to it, even though the assault was in furtherance of the theft to which he had agreed. In an 1830 mayhem case, *Duffey’s & Hunt’s Case*, the court approved a similar doctrine, instructing the jury that

if three persons go out to commit a felony, and one of them, unknown to the other, puts a pistol in his pocket and commits a felony of another kind, such as murder, the two who did not concur in this second felony will not be guilty thereof, notwithstanding it happened while they were engaged with him in the felonious act for which they went out.172

An 1841 decision, *R. v. Holland*,173 suggests that murder liability for unintended death still turned on an act of violence or an intention to injure, rather than a felony. Holland was convicted of murder for beating his victim and cutting him with “an iron instrument,” inflicting “divers mortal blows and wounds,” including a wound on his finger that became fatally infected with tetanus.174 The issue in the case was only one of causation, it being taken as given that the intentional and unjustifiable—not necessarily felonious—infliction of a wound would be murder if the wound caused death.

By the middle of the nineteenth century, then, the “common law rule” of

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170. Had murder liability been predicated on the arson, the case would be compatible with a felony murder rule confined to predicate felonies dangerous to human life. At the time of this case, arson of an occupied dwelling was one of the few remaining capital felonies, along with such other dangerous felonies as attempted murder with injuries, burglary with violence, and robbery with wounds. See 4 LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, at 329-31 (1968). By 1861, however, only murder remained capitally punishable. *Id.* at 341.


172. 168 Eng. Rep. 1009, 1009 (Lancaster Assizes 1830); see also *R. v. Holloway*, 1806-1807 Proc. Old Bailey 131 (1807); *R. v. Hawkins*, 172 Eng. Rep. 470 (Worcester Assizes 1828) (holding that poachers who assaulted a gamekeeper were not responsible for the later robbery of the gamekeeper by one of their number). *But see R. v. Eyres*, No. 84 (Old Bailey Jan. 9, 1799). http://www.oldbaileyonline.org/html_units/1790s/t17990109-5.html. Eyres instigated a riot at a police station where magistrates were in session. The rioters threw bricks through the windows after being warned to disperse. During these events, a rioter and a bystander were fatally shot. Eyres was charged with the murder of the bystander only. Some testimony suggested that Eyres had urged another of the rioters to shoot the bystander, mistakenly believing him to be an official, but other evidence suggested that the police had shot both victims from inside the station.


174. *Id.* at 313.

175. *Id.*
felony murder, although supported by leading treatises, remained controversial and still had not been applied in a single English case. Some of the earliest reported jury instructions on the felony murder rule allude to its unpopularity, and seem to invite the jury to ignore it. The 1857 case of *R. v. Greenwood*\(^{176}\) presented a scenario similar to that in *Lad*. The defendant was found to have raped a child under the age of ten, infecting her fatally with venereal disease. The court offered the jury the odd instruction that these findings "would justify them in finding him guilty of murder," but that "it was open to them to find the prisoner guilty of manslaughter," and that "they might ignore the doctrine of constructive malice if they thought fit."\(^{177}\) The jury convicted the defendant of manslaughter rather than murder.

In the 1861 case of *R. v. Franz*,\(^{178}\) the victim was found in her recently burglarized home, suffocated by a gag. Justice Blackburn instructed the jury that "[a]s matter of law," if the accused had caused her death by "violence . . . to enable [him] to commit a burglary (or any other felony), although . . . [he] might not have intended to kill her," he was guilty of murder.\(^{179}\) He added, "[Y]ou need not take on yourselves the responsibility of that. I take that on myself."\(^{180}\) Yet he also offered that "[i]t would be more agreeable to you and to me, and to everybody, that the evidence should not lead us to consider the prisoner guilty."\(^{181}\) Perhaps taking the hint, the jury acquitted altogether.

Some cases from this period accepted the felony murder rule, but conditioned its application on some form of culpability. One case required that the felony be foreseeably dangerous. In the 1862 case of *R. v. Horsey*,\(^{182}\) the accused set fire to a barn, unaware of a tramp sleeping inside, who was trapped and burned to death. Justice Bramwell charged the jury that though it "may appear unreasonable," the law held that "where a prisoner, in the course of committing a felony, caused the death of a human being, that was murder even though he did not intend it."\(^{183}\) Yet, he proceeded, the defendant caused the death only if it was "the natural and probable result" of his arson.\(^{184}\) Bramwell finally offered the jury the preposterous suggestion that the victim had entered the barn after the fire was set. The jury acquitted the convicted arsonist of murder, apparently on the view that the death of the tramp was not a "natural and probable" result from the standpoint of the defendant. Thus, they used Bramwell's formulation of a proximate cause standard as a culpability standard, requiring recklessness or negligence.

\(^{176}\) 7 Cox's Crim. L. Cas. 404 (Liverpool Assizes 1857).
\(^{177}\) Id. at 404.
\(^{178}\) 175 Eng. Rep. 1195 (Croydon Assizes 1861).
\(^{179}\) Id. at 1196.
\(^{180}\) Id.
\(^{181}\) Id. at 1197.
\(^{183}\) Id. at 130-31.
\(^{184}\) Id. at 131.
The 1864 decision in *R. v. Lee* applied the approach taken in *Collison* and in *Duffey & Hunt* to a killing in the course of a felony. Lee and Costen, charged with murder, had followed an elderly man out of a pub. Lee pushed the old man into a ditch and summoned Costen to help him rob the victim. Costen did so, and the victim, bruised and severely chilled, crawled home and died. Judge Pollock urged the jury at least to acquit Costen. He instructed them that

There is an ancient principle of law, that if a man in the committal of a felony uses violence to the person, which causes death, even although he did not intend it, he is guilty of murder, and that if two or more persons go out to commit a felony, with intent that personal violence shall be used in its committal, and such violence is used and causes death, then they are all equally guilty of murder, even although death was not intended. This, however, does not apply where several go out even with a joint design to commit a felony, and with no design to commit personal violence, and one of them, without the knowledge or consent of the others, uses such violence as causes death.

The instruction in *Lee*, like that in *Franz*, presents felony murder liability as predicated not only on a felony, but also on an act of "violence" to the person of a victim. As in *Collison* and *Duffey & Hunt*, the court refused to transfer culpability from the robbery, which Costen agreed to, to the death, which resulted foreseeably from Lee's assault.

In the 1868 case of *R. v. Desmond*, the defendants were convicted of murder after they set off an explosion in a crowded street in order to free a prisoner, killing many bystanders. Justice Cockburn instructed the jury that they could find murder on either of two theories: causing death by an illegal and extremely dangerous act, or causing death in the attempt to commit a felony. Of the latter theory, he said:

There were persons who thought and maintained that where death thus occurred, not being the immediate purpose of the person causing the death, it was a harsh law which made the act murder. But the Court and jury were sitting there to administer law, not to make or mould it, and the law was what he told them.

The jury convicted, but whether they found felony murder or gross recklessness murder is unclear.

Thus, when English courts first applied the felony murder rule in the second half of the nineteenth century, they identified it as controversial and linked it to actual participation in a violent or obviously dangerous act. Justices Blackburn, Bramwell, and Stephen also expressed their views that the felony murder rule should be so limited in reporting to a parliamentary committee on

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186. *Id.* at 469-70.
187. 11 Cox's Crim. L. Cas. 146 (Cent. Crim. Ct. 1868).
188. JAMES F. STEPHEN, DIGEST OF THE CRIMINAL LAW 228 (1926) (quoting an April 28, 1868 story in the *London Times*).
homicide law revision in 1874. Stephen commented that a rule imposing murder liability for accidental killing in the course of a felony such as theft would be "perfectly barbarous and monstrous." Stephen claimed that he was aware of many cases of accidental deaths caused by felonies, but that

The judge never really wishes to press the matter or to stand strictly on the law, and the jury have a sort of common sense notion in their own heads that it ought not to be held murder, that the man ought not to be hanged, and they find manslaughter.

Bramwell agreed that the supposed rule imposing murder liability for accidental death in the course of any felony was "preposterous," and acknowledged that he had persuaded the jury to subvert it in Horsey. Blackburn assured the committee that such a broad rule had never been applied and was not then the law. The true rule, Blackburn averred, was that an act of personal violence committed in carrying out a crime could give rise to murder liability. He approvingly mentioned a case in which a rapist had been found guilty of murder for unintentionally smothering his victim. The justices took Russell's treatise to task for its vigorous support of a sweeping felony murder rule. The next edition of Russell's treatise responded with sheepish equivocation: "The law appears to be that anyone who deliberately attempts to commit a felony and thereby occasions death, is guilty of murder. But in this respect, the law seems unreasonable." In 1879 the second English Criminal Code Commission proposed a detailed statute providing that "culpable homicide" would be murder if it resulted from (1) an act likely to cause death, committed for an unlawful object, or (2) any effort to seriously injure, sedate, or suffocate perpetrated in the attempt of or flight from the offenses of piracy, prison break, resisting arrest, murder, rape, kidnapping, robbery, burglary, or arson.

By the end of the nineteenth century, English law clearly conditioned felony murder liability on a foreseeably dangerous act. The famous 1887 case of R. v. Serné made this requirement of foreseeable dangerousness explicit. Like Horsey, the case involved murder liability predicated on the felony of

189. See Wharton, supra note 15, at 39-43 & 39 n.3; Wechsler & Michael, supra note 22, at 701, 703 n.8, 713 n.47.
190. See Wharton, supra note 15, at 40 n.3.
191. See id. at 41 n.3.
192. See id. at 42 n.3.
193. See id. at 42-43 n.3.
194. See id. at 39-41 n.3.
195. 1 WILLIAM OLDNALL RUSSELL & SAMUEL PRENTICE, A TREATISE ON CRIMES AND MISDEMEANORS 761 n.(w) (5th ed. 1877).
197. 16 Cox’s Crim. L. Cas. 311 (Cent. Crim. Ct. 1887).
arson. Serné was charged with causing the death of his two sons by burning down his home and shop to collect an insurance policy. Here the defendant clearly knew the victims were in the building. Justice Stephen charged the jury as follows:

I think that, instead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life, and likely in itself to cause death done for the purpose of committing a felony which caused death, should be murder.198

Here too, the jury acquitted. In the 1898 case of R. v. Whitmarsh,199 the defendant was convicted of murder after administering mercury to a woman in an attempt to cause an abortion, then a felony in England. The court instructed the jury, somewhat equivocally, that if the defendant “may not have contemplated the possibility of death,” or if he “as a reasonable man, could see no possibility of death,” the verdict should be manslaughter rather than murder.200 A 1914 update of Blackstone’s Commentaries concluded that “[a]fter much difference of opinion . . . it may now be taken that homicides resulting from the commission of a felony, not involving danger to life, amount only to manslaughter.”201

Finally, in the 1920 case of Director of Public Prosecutions v. Beard202 the House of Lords returned to the “violence” formula of Franz and Lee. Beard appealed his murder conviction for suffocating a thirteen-year-old girl in the course of raping her. The House of Lords rejected Beard’s argument that the jury should have considered whether his intoxication negated the intent to kill. The court held that his intoxication was relevant only to the intent to commit rape, because rape was a sufficiently “violent” predicate felony to trigger the felony murder rule, thereby rendering intent to kill unnecessary for murder liability.203 A 1933 treatise reported, however, that juries were then being instructed according to the dangerousness formula of Serné rather than the slightly different “violence” formula of Franz, Lee, and Beard:

Where a person whilst committing or attempting to commit a felony does an act which is known to be dangerous to life and likely in itself to cause death, and the death of another person results as a consequence of that act though not intended by the person committing it, the law implies malice aforethought,

198. Id. at 313.
199. 62 J.P.R. 711 (Cent. Crim. Ct. 1898).
200. Id. at 712.
and the person causing the death is guilty of murder.\textsuperscript{204}

From their first applications of the felony murder rule, the English courts consistently resisted the notion that the mere intent to commit any felony supplied the malice required for murder. Some intent to injure or at least endanger a person was required.

These results accorded with the general direction of case law on the mental element of offenses, which rejected Hawkins's theory of transferred malice. We have seen that courts rejected Hawkins's rule for accomplices in the 1830s. In the 1870s, they did so with respect to principals as well, at least for statutory offenses. In the 1874 case of \textit{R. v. Pembliton},\textsuperscript{205} a conviction for malicious damage to property was overturned where the defendant was found to have accidentally broken a window while trying to hit a group of persons with a rock. Judges Coleridge, Blackburn, and Lush all wrote opinions suggesting that a finding that the defendant was aware of a risk of breaking the window would have permitted the conviction, but that no such finding had been made. Both Coleridge and Blackburn insisted that their rulings were purely statutory and would not alter what the common law viewed as "sufficient to constitute malice in the case of murder."\textsuperscript{206} Yet their ruling suggested that the malice implied by felony murder must rest on some foundation besides Hawkins's "general rule" that the intent to commit any felony supplied the requisite mens rea for any other. Indeed, we know that Blackburn thought that personal violence in furtherance of crime supplied the requisite malice for murder.

A different foundation for malice was suggested in another malicious damage case, the famous 1877 case of \textit{R. v. Faulkner}.\textsuperscript{207} Here, a sailor bent on stealing a draft of rum from the hold accidentally set fire to his ship. The Court of Crown Cases Reserved overturned his conviction for malicious damage of property because the damage was unintentional. Judge Fitzgerald wrote:

\begin{quotation}
Counsel for the prosecution in effect insisted that the defendant, being engaged in the commission of, or in an attempt to commit a felony, was criminally responsible for every result that was occasioned thereby. . . . No authority has been cited for a proposition so extensive, and I am of the opinion that it is not warranted by law.\textsuperscript{208}
\end{quotation}

While Fitzgerald rejected Hawkins's simple rule of transferred mens rea, he did not view the intent to commit a felony as irrelevant to the defendant's culpability for a collateral offense. Thus, he wrote:

\begin{quotation}
[T]he intention of the accused forms an element in the crime to the extent that it should appear that the defendant intended to do the very act with which he is charged, or that it was the necessary consequence of some other felonious or
\end{quotation}

\textsuperscript{204} 9 \textit{Halsbury's Laws of England} 437 (2d ed. 1933).
\textsuperscript{205} 12 Cox's Crim. L. Cas. 607 (Crim. App. 1874).
\textsuperscript{206} \textit{Id.} at 611 (Coleridge, C.J.); \textit{id.} (Blackburn, J.).
\textsuperscript{207} 13 Cox's Crim. L. Cas. 550 (Cr. Cas. Res. 1877).
\textsuperscript{208} \textit{Id.} at 557.
criminal act in which he was engaged, or that having a probable result which
the defendant foresaw, or ought to have foreseen, he, nevertheless, persevered
in such other felonious or criminal act. 209

For Fitzgerald, then, the intention to commit some other felony meant that
knowledge, recklessness, or negligence with respect to a proscribed result could
substitute for intent and thereby supply the mental element of a collateral
crime. This is a general principle that could support murder liability for one
causing death recklessly or negligently by means of a dangerous felony.

Let us sum up the English development of the felony murder rule. The
principle that an actor is criminally responsible for unintended harm caused in
the course of an unlawful act is ancient, with roots in Christian ethics and
canon law. Yet that principle does not logically entail that the perpetrator is as
responsible as one who intends the result. Thus, it does not entail that an
unintended homicide in the course of an unlawful act will be graded as murder.
Indeed, murder did not exist as the highest grade of homicide until the sixteenth
century. No suggestion was then made that unintended deaths in the course of
felonies should be graded as murders. On the other hand, courts held and
writers opined that an unintended killing in the course of an unlawful act of
violence could be murder. This idea solved three problems that the modern
criminal law solves in other ways. First, it provided murder liability for deaths
resulting from unprovoked assaults on the victim, even if the victim later gave
provocation by resisting. Second, in a context in which attempt liability had not
yet been developed, it provided a way of punishing at least those attempts
caus ing concrete harm. Third, it provided murder liability for many grossly
reckless acts in an era when limited medical knowledge made any wound
potentially fatal. Courts also treated all who had joined in or encouraged the
fatal violence as accomplices in murder whether or not their actions directly
caused death.

Only in the eighteenth century was it suggested that the punishment of an
unlawful act as a felony, rather than its violent character, should trigger murder
liability for an accidental death, or accomplice liability for murder by a
confederate. The reasons for these proposals remain obscure. Possibly they
rested on the idea that since all felonies were capital y punishable, the intent to
commit any one felony was as bad as the intent to commit any other. Of course,
that all felonies were capital y punishable was false as a practical matter: some
were clerg yable, and pardons were widely available. 210 Perhaps the proposal to
predicate unintended murder on the attempt of a felony built on the notion that
the use of deadly force was justified in resisting a felony, so that an attempted
felony was a breach of the peace, challenging all opposers to a violent
confrontation. In any case, Foster placed the proposed felony murder rule on

209. Id.
210. 1 RADZINOWICZ, supra note 170, at 151, 153, 159 (1948); Hay, supra note 126, at
22-23, 43-49.
the quite different ground that malice was a kind of character or disposition, one manifested by the commission of any felony. A few courts gave credence to the principle that participation in a felony made one an accessory to murder by a confederate, but none seem to have supported the doctrine of felony murder liability for accidental death. Nevertheless, by the beginning of the nineteenth century, most English scholars believed that one who caused death unintentionally in the course of committing or attempting a felony could be guilty of murder. Whether murder liability could be predicated on any felony, or only on violent or dangerous felonies, was less clear.

These questions were answered over the course of the next century. Felons would have to cause death by an intentional act of violence to some person, or by an act apparently dangerous to human life, in order to be liable for an unintended death. Mere participation in a felony would not be enough for complicity in murder. The general principle that the mental element of any felony could substitute for the mental element of any other felony was rejected. Instead, recklessly or negligently causing a result in the course of one felony could substitute for intentionally causing that result in fulfilling the mental element of a second felony. This principle, approved in *Faulkner*, accounts for the approach taken in contemporaneous felony murder cases.

In 1957 England abolished the felony murder rule by statute. Its provenance as a valid doctrine of English law was surprisingly brief, perhaps only a century. During that time, it never became a rule that felons were strictly liable for accidental deaths in the course of any felony. Instead, the felony had to be violent or manifestly dangerous. The death had to be at least foreseeable, and so had to be caused with a degree of culpability amounting at least to negligence. The much-criticized and supposedly ancient rule of strict liability never existed in English law. It was not part of the common law at the time of the American Revolution, and therefore it could not have been inherited. Such a rule could only have become part of the law of any American jurisdiction if that particular jurisdiction enacted it.

### III. SOURCES OF AMERICAN HOMICIDE LAW

#### A. Homicide in the Course of Crime in Colonial America

Even if the English common law had developed a felony murder rule in the seventeenth and eighteenth centuries, such a rule would not necessarily have been applicable in the colonies. Some of these colonies were settled in the early seventeenth century by religious dissenters eager to legislate for themselves. Accordingly, Gerhard Mueller argued, "it is rather difficult to accept the frequently held notion that the English common law of crimes was transplanted

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211. *See* Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11, § 1 (Eng.).
to, and continued an uninterrupted existence in, America."212 Indeed, the authority of the English common law in colonial America was a complicated question. Coke's 1608 decision in Calvin's Case213 held that English law, whether customary or statutory, did not automatically extend to conquered territories. While territories conquered from other Christian sovereigns retained their foreign law, territories conquered from infidels were to be governed by natural equity until the Crown legislated for them. Late in the seventeenth century, Chief Justice Holt held that English settlers took English law with them to uninhabited territory, but not to conquered territory.214 Yet Holt clearly understood that the colonists had settled inhabited land, holding in a case involving slavery that "the laws of England do not extend to Virginia, being a conquered country their law is what the King pleases."215 On the eve of the American Revolution, Blackstone agreed.216 The colonial charters conferred by the Crown did not declare the applicability of the common law as such.217 Instead, they generally authorized local authorities to promulgate laws as compatible with English laws as was "convenient."218 Thus, the applicability of common law rules depended largely on local decision-making, about which little is known today.219 A few colonial jurisdictions passed statutes declaring the common law and certain British statutes to be in force.220 And some

212. MUELLER, supra note 146, at 10 (citing, with disapproval, WILLIAM L. CLARK & WILLIAM L. MARSHALL, A TREATISE ON THE LAW OF CRIMES 23 (6th ed. 1958)); see also GEORGE LEE HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS 56, 186 (1960) (discussing the hostility of Massachusetts settlers toward common law).


216. 1 BLACKSTONE, supra note 125, at 104-05.

217. BROWN, supra note 214, at 6.

218. See Charter to Sir William Raleigh (1584), reprinted in 1 FRANCIS NEWTON THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 53, 55 (1909); The Second Charter of Virginia (1609), reprinted in 7 THORPE, supra, at 3790, 3801; The Charter of New England (1620), reprinted in 3 THORPE, supra, at 1827, 1833; The Charter of Maryland (1632), reprinted in 3 THORPE, supra, at 1677, 1680; Grant of the Province of Maine (1639), reprinted in 3 THORPE, supra, at 1625, 1628; Charter of Carolina (1663), reprinted in 5 THORPE, supra, at 2743, 2746; Charter of Rhode Island and Providence Plantations (1663), reprinted in 6 THORPE, supra, at 3211, 3215; Charter for the Province of Pennsylvania (1681), reprinted in 5 THORPE, supra, at 3035, 3038. But see The Charter of Massachusetts Bay (1629), reprinted in 3 THORPE, supra, at 1846, 1853 (omitting convenience clause). Some required royal approval of local laws. See Charter for the Province of Pennsylvania (1681), reprinted in 5 THORPE, supra, at 3035, 3039; The Charter of Massachusetts Bay (1691), reprinted in 3 THORPE, supra, at 1846, 1857; Charter of Georgia (1732), reprinted in 2 THORPE, supra, at 765, 772.

219. BROWN, supra note 214, at 19-21.

220. See, e.g., Act of Dec. 12, 1712, no. 322, reprinted in 2 THE STATUTES AT LARGE OF SOUTH CAROLINA 401 (Thomas Cooper ed., 1837); An Act for the More Effectual Observing of the Queen's Peace, and Establishing a Good and Lasting Foundation of
scholars claim that belief in the authority of the common law was widespread in eighteenth-century colonial America.\textsuperscript{221}

But even where the common law was formally accepted, its authority remained an abstraction. Few colonial Americans were trained in the law or had access to law books.\textsuperscript{222} Courts were often administered by lay judges until well into the eighteenth century.\textsuperscript{223} Generally speaking, it seems probable that the common law exerted little influence over the administration of justice before the eighteenth century, but a good deal by the middle of the eighteenth century.\textsuperscript{224} But the common law put into practice in any particular colony may have differed a great deal from the common law in England.\textsuperscript{225}

About half of the colonies enacted murder statutes of their own, usually imposing the death penalty for “willful” or “malicious” murder, often without further specification. Thus, a 1611 compilation of laws for the Jamestown Colony provided that “[h]e that upon pretended malice, shall murthor or take away the life of any man, shall bee punished with death.”\textsuperscript{226} A 1641 Massachusetts Bay law was more elaborate:

(4) If any person shall commit any wilfull MURTHER, which is Man slaughter, committed upon premeditate malice, hatred, or crueltie not in a mans necessary and just defense, nor meer casualty against his will, he shall be put to death. . . .

(5) If any person slayeth another suddenly in his ANGER, or CRUELTY of passion, he shall be put to death. . . .

(6) If any person shall slay another through guile, either by POYSONING, or other such devilish practice, he shall be put to death.\textsuperscript{227}

A 1662 law for the Rhode Island Colony said only that “whoever shall be Convicted of . . . Wilful Murder . . . shall be Punished . . . according to the Statute Laws of the Realm of England, with Death . . . .”\textsuperscript{228} A 1672 Government in North-Carolina (1715), \textit{reprinted in} \textsc{Laws of the State of North-Carolina} 17 (James Iredell ed., 1791).

\textsuperscript{221.} \textit{See}, e.g., Horwitz, \textit{supra} note 17, at 6.

\textsuperscript{222.} Mueller, \textit{supra} note 146, at 13.


\textsuperscript{224.} Mueller, \textit{supra} note 146, at 1415; Hall, \textit{supra} note 223, at 794, 797; Paul Samuel Reinsch, \textit{The English Common Law in the Early American Colonies, in 1 Select Essays in Anglo-American Legal History} 367 (Ernst Freund et al. eds., 1907).

\textsuperscript{225.} Brown, \textit{supra} note 214, at 20.


\textsuperscript{227.} The Book of the General Lauues and Libertyes Concerning &c (1648), \textit{reprinted in 1} \textsc{The Laws and Liberties of Massachusetts, 1641-1691}, at 7, 11 (John D. Cushing ed., 1976).

\textsuperscript{228.} An Act for Punishing Criminal Offences, para. 5 (1662), \textit{reprinted in The Earliest Acts and Laws of the Colony of Rhode Island and Providence
compilation of laws for the Plymouth Colony provided that “[i]f any Person shall Commit wilfull Murther by killing any Man, Woman or Childe, upon premeditated Malice, Hatred or Cruelty, not in a way of necessary and just Defence, nor by casualty against his Will; he shall be put to Death.” 229 The 1675 Duke of York’s Laws, covering what are now New York, New Jersey, Pennsylvania, and Delaware, provided that “[i]f any person shall Commit any wilful and premeditated Murder, he shall be put to Death.” 230

William Penn’s 1682 law for Pennsylvania imposed the death penalty for anyone who “shall with Malice or premeditation Kill or be accessory to the death” of another. 231 The following year willfulness was substituted for malice in this formula, 232 and a 1705 Pennsylvania statute provided “[t]hat if any person within this Province shall willfully and premeditately Kill another Person, or willfully and premeditately be the Cause of, or accessory to the Death of any person, such person . . . shall suffer Death . . . .” 233

Edwin Keedy and others have seen some reformist significance in the substitution of willfulness for malice. Keedy argues that willfulness was a higher degree of culpability than malice, and that the substitution reflected an effort to avoid Coke’s expansive conception of implied malice. 234 I am dubious, however. Coke was not the first to use the terms “malice” or “implied malice.” The term “wilfull” was taken from the Duke’s Laws, rather than being an innovation of Penn’s. Willfulness and malice were often used together, or interchangeably, at the time. Thus, a 1697 Massachusetts Bay statute imposed death on “whosoever shall commit wilful Murder upon premeditated Malice or Hatred . . . .” 235 A 1716 New Hampshire law proclaimed that “whosoever shall commit wilful Murder upon premeditated Malice, or Hatred . . . shall be put to Death,” 236 while a contemporaneous provision extended the same punishment

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to those who "wilfully" killed an "Indian or Negro Servant." While colonial North Carolina had no homicide statute, a 1774 statute prescribed a twelve-month sentence for anyone "guilty of wilfully and maliciously killing a Slave, so that, if he had in the same Manner killed a Freeman, he would by the Laws of the Realm be held and deemed guilty of Murder . . . ." Possibly the requirement of willfulness restricted murder to intentional killings in Pennsylvania and other colonies, but we cannot be sure.

The one colonial murder definition coming closest to a felony murder rule is found in a 1647 code of laws for the Providence Colony decreeing that

murder is, when a man, upon malice pretended, precedent and with his will, doth kill another feloniously, that is, with a premeditated and malicious mind; and for a man to kill an officer or any of his aid, in the execution of his office, shall also be adjudged murder: So for a thief to kill a true man, shall be judged murder: All that are present aiding and abetting are principals, though they never give a stroke.

This is the one colonial statute apparently drafted in contemplation of the concept of implied malice developed by English jurists. The phrase "true man" refers to one resisting a theft or robbery, and is a clear reference to Dalton’s discussion of implied malice. Indeed, Dalton’s treatise has been identified as the principal source for the Providence Colony’s entire code. The Providence statute does not say whether murder liability can be predicated on the commission or attempt of any offenses other than theft, nor does it indicate whether it covers accidental or only intentional killing. But in relying on Dalton, it incorporated Lambarde’s implied-malice concept, which precluded mitigation to manslaughter of intentional killings provoked by violent resistance to crime. We have no reports of cases applying the Providence robbery-murder statute.

With this one exception, no colonial statute or case established a rule predicing murder liability on the attempt to commit a collateral crime. Nevertheless, the scholarly support for a felony murder rule that developed in eighteenth-century England had some influence on American scholarly writing.

Two scholarly authorities on Virginia law addressed the subject of homicide in the course of crime. George Webb, in his 1736 treatise, defined murder as killing with malice aforethought, express or implied. He then

240. BRADLEY CHAPIN, CRIMINAL JUSTICE IN COLONIAL AMERICA, 1606-1660, at 6 (1983).
241. GEORGE WEBB, THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE 231-32
added that express malice included the cases where "a Man is resolved to do an unlawful Act, as to rob, or steal, and Death ensues," and "if a Man intends to kill, stab, shoot, or poison another, and the Death of a Third Person ensues." Webb's examples of predicate crimes were all felonies, but he did not explicitly limit such crimes to felonies. His term "resolved to do an unlawful Act" suggests that he meant not just "intending" to commit an unlawful act, but being committed to completing it in the face of resistance, as in Lord Dacres. Webb also included in his discussion of implied malice the principle that "[i]f several Persons come with Intent to rob, kill, or steal, or to commit any other unlawful Act, and One of them commits Murder, tho' not in View or Presence of the Rest, all are principal Murderers." Finally, he added that "Malice may be collected out of Circumstances, shewing the Temper and Intent of the Person killing; as if one assaults another with Intention to rob, but being resisted, kills the Person he assaulted, it's Murder."

Starke's 1774 treatise The Virginia Justice endorsed the felony murder rule proposed by Hawkins and Foster. Starke repeated Coke's view that death caused accidentally in the course of an unlawful act would be murder, giving Coke's example of one who, while trying to hunt game in another man's park, shoots a boy hidden in a bush. Starke then qualified Coke's position by citing Foster's view that the accidental killing of a man in the attempt to shoot another man's domesticated fowl would be murder because of the felonious intent. He also invoked Hawkins's "general rule" that "wherever a Man intending to commit one Felony happens to commit another, he is as much guilty as if he had intended the felony which he actually commits." Finally, Starke followed Hale in the view that because abortion is unlawful, it is murder to cause a woman's death in the course of attempting to abort her pregnancy.

It is possible that Webb's or Starke's treatise was used in instructing Virginia jurors, but we have no reported cases so indicating.

Of course, we know very little in general about the actual application of the criminal law in colonial America, due to the sparseness of records. So far as we know, however, homicide in the course of crime was a rare phenomenon. Of thirty homicide cases brought to trial in the colonies before 1660, only one appears to have been committed in the course of a felony. This case, Plymouth v. Arthur Peach, involved the armed robbery of a Native
American. Bradley Chapin argues that at this early stage of colonial development, opportunities for property crimes were rare, and forcible sexual assaults were unlikely in close-knit religious communities. If so, occasions to apply a felony murder rule would have been rare in these early decades. In any case, colonial Americans may have thought of murder simply as intentional killing, and probably had little familiarity with the elaborate common law treatise literature on homicide in the course of crime until Blackstone’s Commentaries appeared on the eve of the American Revolution.

B. Common Law and Statute in the New Republic

During and after the Revolution, a number of states enacted statutes or constitutional provisions accepting the common law in default of legislation, either with respect to crimes in particular or more generally. A 1777 Georgia statute continued in force the criminal law imposed by the statute and common law of England, as did a 1778 North Carolina law. A 1776 Virginia statute recognized the authority of “the common law of England . . . [and] all statutes . . . made in aid of the common law prior to the fourth year of the reign of king James the first . . .” This statute was also binding in Kentucky, which was formed out of Virginia. Similar ordinances were adopted for the Northwest Territories and later became law in Indiana and Illinois. However, most of the original states adopted constitutional or statutory provisions continuing in force either (1) preexisting law, or (2) the common law and

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Records of the Colony of New Plymouth in New England 96 (Nathanial B. Shurtleff & David Pulsifer eds., 1855); see also CHAPIN, supra note 240, at 116.

251. CHAPIN, supra note 240, at 123-25.

252. In addition, there would have been less occasion to record and apply general rules of homicide law. Far more than at present, juries were considered judges of law as well as fact, even in criminal cases. Jury instructions were rarely standardized and lawyers generally made arguments of law to juries. See WILLIAM NELSON, AMERICANIZATION OF THE COMMON LAW 23-30 (2d ed. 1994).


255. An Ordinance to Enable the Present Magistrates and Officers to Continue the Administration of Justice, and for Settling the General Mode of Proceedings in Criminal and Other Cases Till the Same Can Be More Amply Provided For, para. 6 (1776), in 9 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 126, 127 (William Walter Hening ed., 1821). St. George Tucker, Blackstone’s American editor, read this statute to incorporate only the presettlement common law. 5 BLACKSTONE’S COMMENTARIES *436 n.1 (photo. reprint 1969) (St. George Tucker ed., 1803) [hereinafter BLACKSTONE’S COMMENTARIES (Tucker ed.)].

256. BROWN, supra note 214, at 129.

257. Id. at 158, 159, 162, 165.

258. See, e.g., MASS. CONST. of 1780, ch. 6, art. 6, reprinted in 3 THORPE, supra note
British statutes as previously applied in that particular jurisdiction. Vermont initially adopted "common law, as it is generally practised and understood in the New-England States," later modifying this to "so much of the common law of England, as is applicable to the local situation, and circumstances, and is not repugnant to the constitution . . . ." Connecticut enacted no provision applying the common law, and waited forty years to adopt a provision continuing in force preexisting law. Ohio initially passed, but then quickly repealed, a statute authorizing application of the common law.

Insofar as state constitutions and statutes applied common law to resolve unprovided-for cases, what common law did they apply? Arguably, their own, since English law made common law rules authoritative in the colonies only insofar as local lawmakers enacted them. Most of the original states authorized application of the common law only as locally practiced. Thus, in the event of a conflict between local and English precedent, local precedent would be authoritative. Hugh Brackenridge's 1814 treatise on Pennsylvania law held that only so much of the common law "could have been carried by the emigrants to this state, as was applicable to their situation and therefore so much of it only in force. What of it was applicable must be determined by the courts . . . ." An early Virginia decision held that the statute authorizing application of the common law conferred no authority on contemporary British decisions. Indeed, the Pennsylvania, New Jersey, and Kentucky legislatures, and the New Hampshire Supreme Court, forbade the citation of postindependence British cases. George Tucker, Blackstone's American editor, agreed that

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262. Hall, supra note 223, at 800.

263. See CONN. CONST. of 1818, art. 10, § 3, reprinted in 1 THORPE, supra note 218, at 536, 546.


265. HUGH HENRY BRACKENRIDGE, LAW MISCELLANIES 37 (photo. reprint 1972) (1814).


267. See BROWN, supra note 214, at 41; Hall, supra note 223, at 806; Roscoe Pound,
independence deprived subsequent British decisions of any authority.268 He also argued that the common law was different in each state because it was a creature in each state of local decisions during the colonial period.269 Madison agreed.270 Zephaniah Swift, author of a 1795 treatise on Connecticut law, held that common law rules were authoritative in Connecticut only insofar as Connecticut courts had approved them on grounds of their reason and expedience.271 In general, then, the common law applicable in American jurisdictions after independence derived its authority from local enactment and was a different law in each jurisdiction.272 The common laws of the states were independent of the common law of England, and independent of one another.

When it came to criminal law, many post-Revolution Americans were particularly skeptical of the common law. Tucker commented that he could not find any more reason for admitting the penal code of England to be in force in the United States, (except so far as the states, respectively, may have adopted it, within their several jurisdictions) than for admitting that of the Roman empire, or of Russia, Spain, or any other nation, whatever.273 Reformers saw the English criminal law, with its great abundance of capital crimes, as archaic and bloody.274 Jefferson particularly objected to the felony murder rule described by Foster and Blackstone. His 1779 proposed Virginia criminal code contained a provision that

where persons meaning to commit a trespass only, or larceny, or other unlawful deed, and doing an act from which involuntary homicide hath ensued, have heretofore been adjudged guilty of manslaughter or of murder,

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268. 5 BLACKSTONE'S COMMENTARIES (Tucker ed.), supra note 255, at *436 n.1.

269. Id. at 8-9 (quoting approvingly from Justice Chase's opinion in United States v. Worrall, 2 U.S. (2 Dall.) 384 (C.C.D. Pa. 1798)).


271. 1 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 43-45 (1795) (citing Wilford v. Grant, 1 Kirby 114 (Conn. Super. Ct. 1786)).

272. Kathryn Preyer, Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic, 4 LAW & HIST. REV. 223 (1986). Even some of those Federalists who supported a federal common law conceded that federal law incorporated the common law only insofar as enacted by the Constitution or federal statute, and only so much as was "fit for the general government of a republican nation." STEPHEN B. PRESSER, THE ORIGINAL MISUNDERSTANDING 81-83 (1991).

273. 1 BLACKSTONE'S COMMENTARIES (Tucker ed.), supra note 255, app. at 430.

274. Id. at 438-39 (quoting a Virginia resolution of Jan. 11, 1800 calling the common law of crimes a "code of sanguinary criminal law, both obsolete and unknown, and either wholly rejected or essentially modified in almost all it's [sic] parts by state institutions"); Madison, supra note 270, at 53; see also Keedy, supra note 232, at 764-70.
by transferring such their unlawful intention to an act, much more penal than they could have in probable contemplation; no such case shall hereafter be deemed manslaughter unless manslaughter was intended, nor murder, unless murder was intended. 275

Jeffersonians objected not just to the content of the common law of crimes, but to its undemocratic source. Particularly after the political struggles of the 1790s, Republicans associated the judicial power to punish common law crimes with politically repressive prosecutions for sedition and conspiracy. 276 Strong opposition therefore developed to the exercise of extrastatutory criminal jurisdiction by federal courts. 277

Ironically, the notoriously partisan Federalist, Justice Samuel Chase, formulated the most influential argument against a federal common law of crimes. 278 Chase argued in the 1798 case of United States v. Worral 279 that the diversity of common law rules in the different states, and their independent sources in local enactments, meant that there was no judicially administrable standard of general criminal law to apply in federal cases. While Chase may have initially stood in the minority among his colleagues on the Supreme Court, 280 and may even have changed his mind, 281 his arguments ultimately triumphed. The Court eventually yielded to public opinion 282 in its 1812 decision in United States v. Hudson & Goodwin. 283 holding that there was no federal common law of crimes. Only Justice Story continued to argue that such


277. PRESSER, supra note 272, at 79-80, 98.

278. Id. at 79.

279. 2 U.S. (2 Dall.) 384 (C.C.D. Pa. 1798).

280. Compare PRESSER, supra note 272, at 95-96, and 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 159 n.1 (rev. ed. 1947) (arguing that most early Supreme Court Justices supported federal common law crimes), with Robert C. Palmer, The Federal Common Law of Crime, 4 LAW & HIST. REV. 267 (1986), and Preyer, supra note 272 (arguing that most early Supreme Court Justices doubted that the Constitution incorporated the common law, and that only a few supported a common law of crimes).

281. LEONARD W. LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY xv-xvi (1963); PRESSER, supra note 272, at 95-96.

282. PRESSER, supra note 272, at 98.

283. 11 U.S. (7 Cranch) 32 (1812).
a power was needed to ensure cooperation with federal maritime policies during the War of 1812. While conceding that the federal courts had no power to criminalize conduct which Congress had no enumerated power to regulate, Story contended that the federal courts retained common law powers over matters, such as shipping, that were constitutionally subject to federal legislation.\textsuperscript{284} Justice Johnson responded that the Constitution properly consigned these subjects to legislative rather than judicial resolution. He added that, logically, the English common law could retain no force in America, given the common law's own rule that it had no application in colonial America.\textsuperscript{285} Soon thereafter, the Supreme Court rejected even Story's narrow claim for a federal common law of maritime crimes.\textsuperscript{286}

Concern about judicial definition of crimes extended beyond the federal context as well. Vermont Chief Justice Nathaniel Chipman declared that "no Court, in this State, ought ever to pronounce sentence of death upon the authority of a common law precedent, without the express authority of a statute."\textsuperscript{287} Zephaniah Swift criticized courts' common law power to define misdemeanors as "not only incompatible with justice, and dangerous to civil liberty, but unnecessary for the preservation of government."\textsuperscript{288} He added that

\begin{quote}
[i]t is the supreme excellency of a code of criminal laws consists in defining every act that is punishable with such certainty and accuracy, that no man shall be exposed to the danger of incurring a penalty without knowing it, and which shall not give to courts . . . an unbounded discretion in punishment.\textsuperscript{289}
\end{quote}

Swift argued that punishment could only fulfill its principal purpose of deterrence if based on statutes clearly defining proscribed conduct in advance.\textsuperscript{290} The Ohio attorney John Goodenow argued in 1819 that criminal laws were positive rather than natural law, and were properly enacted only by a representative legislature in a democracy.\textsuperscript{291} Edward Livingston based his proposed Louisiana criminal code on such sentiments,\textsuperscript{292} while Robert Rantoul

\begin{itemize}
\item \textsuperscript{284} See United States v. Coolidge, 25 F. Cas. 619 (C.C.D. Mass. 1813) (No. 14,857).
\item \textsuperscript{285} Trial of William Butler for Piracy 21-29 (1813) (original pamphlet in Buffalo & Erie County Public Library) (copy on file with author).
\item \textsuperscript{287} Nathaniel Chipman, A Dissertation on the Act Adopting the Common and Statute Laws of England, in Reports and Dissertations, in Two Parts 117, 134 (1793).
\item \textsuperscript{288} 2 Swift, supra note 271, at 365.
\item \textsuperscript{289} Id.
\item \textsuperscript{290} Id. at 366-67.
\item \textsuperscript{291} John Goodenow, Historical Sketches of the Principles and Maxims of American Jurisprudence, in Contrast with the Doctrines of the English Common Law on the Subject of Crimes and Punishments (photo. reprint 1972) (1819); see also John Goodenow, A Review of the Question Whether the Common Law of England, Respecting Crimes and Punishments, is in Force in the State of Ohio 13-21 (1817).
\item \textsuperscript{292} See Edward Livingston, A System of Penal Law for the State of Louisiana 7-9, 54-59 (1833); see also Beckman, supra note 275, at 159-68.
\end{itemize}
demanded in his 1836 "Oration at Scituate" that "a uniform written code" replace the common law, which "had its origin in folly, barbarism, and feudality," and "from its nature, must always be ex post facto." 293

Early nineteenth-century American skepticism regarding the common law definition of crimes has a number of implications for the myth of American reception of a common law felony murder rule. First, even if English common law had included a felony murder rule in the eighteenth or early nineteenth centuries, felony murder liability still would not have been part of the common law of any American jurisdiction until and unless received and applied there. Second, even if some states enacted felony murder rules judicially, we should not assume that all did. Nor should we assume that the felony murder rules developed in different states were all the same. At least where criminal law was concerned, the common law was widely understood to be jurisdictionally specific in post-Revolution America. Finally, because common law crimes were controversial, we should not hastily assume that American judges exercised their common law powers to apply novel theories of murder liability. Americans did innovate in criminal law, particularly in the area of homicide law, but they innovated more by legislation than by adjudication.

C. Legislative Reform of Homicide Law

Following independence, the first homicide statutes resembled their colonial predecessors. Thus, the 1787 New York homicide legislation merely added the categories of willful poisoning, unprovoked stabbing, and petty treason to the crime of murder. 294 A 1785 Massachusetts statute merely imposed the death penalty for "wilful murder, of malice aforethought." 295 A 1784 Connecticut compilation included a law prescribing death to those who would commit any "wilful Murder, upon Malice, Hatred, or Cruelty; not in a Man's just and necessary Defence; nor by Casualty against his Will: Or shall slay or kill another through Guile, either by Poisoning, or other such atrocious Practices." 296 Vermont had passed an almost identical law in 1779. 297 A 1790 federal statute punished "wilful murder" or "murder" in places subject to federal jurisdiction. 298 Many states retained this simple approach to defining

298. Act of Apr. 30, 1790, § 3, reprinted in 2 Annals of Cong. 2273, 2274 (1790) (stating that "willful murder" "within... any... place or district of country, under the sole
murder, or left murder undefined by statute, until well into the nineteenth century. Nevertheless, most American states reformed their homicide laws during the nineteenth century, adopting more detailed statutes that included provisions addressing homicide in the course of crime.

The most popular legislative reform involved dividing murder into degrees. This new and distinctively American approach to homicide jurisprudence originated with Pennsylvania’s 1794 reform statute, which restricted capital punishment to first degree murder. The Pennsylvania statute was an outgrowth of a protracted movement to reduce and differentiate penalties that was inspired by such Enlightenment figures as Montesquieu and Beccaria and was promoted by James Wilson, Benjamin Rush, and Pennsylvania Supreme Court Justice William Bradford. A report prepared in 1792 by Justice Bradford for Pennsylvania’s governor concluded that the death penalty should be reserved for “deliberate assassination.” This report prompted a resolution of one legislative house that “all murder . . . perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing shall be deemed murder in the first degree,” and that all other kinds of murder shall be murder in the second degree. The following year, a bill along these lines was presented to both houses. During legislative debates, murder in the course of enumerated felonies was added to the category of first degree murder.

While the Pennsylvania statute did not formulate a felony murder rule, or define the elements of murder at all, it identified participation in certain felonies as a grading element that aggravated murder liability. Thus, it prescribed that

all murder, which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which
shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder in the first degree; and all
other kinds of murder shall be deemed murder in the second degree . . .

By implication, murder in the course of the enumerated felonies did not require willful, deliberate, and premeditated killing. Yet this language was compatible with a requirement that all murder required intent to kill or some other culpable

and exclusive jurisdiction of the United States” would be punishable with death); id. § 8 (stating that any “murder . . . which, if committed within the body of a county, would by the laws of the United States be punishable by death” that took place “upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular State” would also be punishable with death).

300. Id. at 770 (quoting WILLIAM BRADFORD, AN ENQUIRY HOW FAR THE PUNISHMENT OF DEATH IS NECESSARY IN PENNSYLVANIA 35 (1793)).
301. Id. at 771 (quoting 4 JOURNAL OF THE SENATE 38 (Pa. 1793)).
302. Id. at 772-73 (quoting 4 JOURNAL OF THE SENATE 242 (Pa. 1794)).
mental state, such as gross recklessness, or intent to wound. There was nothing in the statute’s language to suggest that the mere causing of death in the course of a felony was always murder. Any felony murder rule found in a statute of this form would have to be put there by construction. I will refer to statutes like Pennsylvania’s, which aggravated murder liability based on participation in certain felonies, but did not clearly require the imposition of felony murder liability, as “felony aggravator statutes.”

The Pennsylvania statute was enormously influential, shaping homicide reform statutes in two-thirds of the states by the end of the nineteenth century. Twelve states adopted Pennsylvania’s grading scheme with little or no modification, and another nineteen adopted somewhat modified grading schemes.

These modifications of the Pennsylvania grading statute took three major forms. A few states—Kansas, Missouri from 1845 to 1878, and North Carolina after 1893—aggravated murder to first degree murder if committed in the attempt of any felony, not just enumerated felonies. Many states combined Pennsylvania’s grading scheme with a simple definition of murder in terms of malice. These included Indiana, Iowa, Maine, Nebraska after 1873, Ohio, Washington, and Wyoming. Finally, a large number of states combined the Pennsylvania grading scheme with statutory provisions imposing felony murder liability. These included Alabama, California, Idaho, Missouri, Montana, Nevada, New York, Oregon, Texas, and Utah.

Thus, felony murder liability was the other major legislative innovation in nineteenth-century American homicide law. The first felony murder statute was

304. In chronological order, these states are Virginia in 1796, Kentucky from 1798 to 1801, Maryland in 1810, Louisiana from its admission in 1812 to 1855, Tennessee in 1829, Michigan in 1838, Arkansas in 1838, New Hampshire in 1842, Connecticut in 1846, Delaware in 1852, Massachusetts in 1858, and West Virginia, entering the Union with such a statute in 1863. See Part V.B infra for citations to, and discussion of, these statutes. A word of caution on the dates offered here and below for the adoption of homicide reform statutes: In a few instances I have relied on the first appearance of such a provision in a compiled code, rather than a session law. Some of these provisions may have been passed in an earlier year. If so, that would not alter my claim that these reform statutes generally preceded the imposition of felony murder liability.

305. In chronological order, these states are Ohio in 1815, Maine in 1840, Alabama in 1841, Missouri in 1845, Iowa in 1851, Indiana in 1852, California in 1856, Texas in 1858, New York in 1860, Kansas (entering the Union with such a law in 1861), Oregon in 1864, Nevada (entering the Union with such a law in 1864), Nebraska in 1873, Montana (entering the Union with such a law in 1889), Washington (entering the Union with such a law in 1889), Idaho (entering the Union with such a law in 1890), Wyoming (entering the Union with such a law in 1890), North Carolina in 1893, and Utah (entering the Union with such a law in 1896).

306. The Kansas and North Carolina statutes are discussed in Part V.B infra. The Missouri statute is discussed in Part VI.B infra.

307. See Part V.C infra for citations to, and discussion of, these statutes.
AMERICAN FELONY MURDER RULES

passed in Illinois in 1827.\textsuperscript{308} This statute defined murder as unlawful killing with express malice—intent to kill—or malice implied by circumstances showing "an abandoned and malignant heart."\textsuperscript{309} It added that an "involuntary killing . . . in the commission of an unlawful act which in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, . . . shall be deemed and adjudged to be murder."\textsuperscript{310} Two years later New Jersey enacted a statute that included within murder killing "in committing, or attempting to commit sodomy, rape, arson, robbery, or burglary, or any unlawful act against the peace of this state, of which the probable consequence may be bloodshed . . . ."\textsuperscript{311} That same year, New York passed a statute defining murder as including killing "without any design to effect death, by a person engaged in the commission of any felony."\textsuperscript{312} By the end of the nineteenth century, nineteen states had adopted such felony murder statutes.\textsuperscript{313}

The Illinois, New Jersey, and New York homicide reform statutes illustrate three different strategies for defining felony murder: (1) predicating murder liability on implied malice as well as a felony, as in Illinois; (2) predicating murder liability on dangerous felonies, as in New Jersey; or (3) predicating murder liability on any felony, as in New York.

The implied-malice strategy was the most popular, employed by a total of ten states. California, Colorado, Georgia, Idaho, Montana, Nebraska (briefly), Nevada, and Utah all followed Illinois in providing murder liability for "involuntary killings" in the perpetration of any felony, when the circumstances showed an "abandoned and malignant heart."\textsuperscript{314} Five of these "abandoned and malignant heart" states—California, Idaho, Montana, Nevada, and Utah—also employed Pennsylvania's grading scheme.\textsuperscript{315} Thus, they graded murder in the course of enumerated dangerous felonies as first degree. Texas defined murder as killing with express or implied malice and graded murder in the course of enumerated felonies as first degree murder. In addition, Texas enacted a felony

\textsuperscript{308}. \textit{See} ILL. REV. CODE, Crim. Code, §§ 22, 24, 28 (1827).

\textsuperscript{309}. \textit{Id.} § 24.

\textsuperscript{310}. \textit{Id.} § 28.


\textsuperscript{312}. N.Y. REV. STAT. pt. 4, ch. 1, tit. 1, § 5 (1829).

\textsuperscript{313}. These states, listed chronologically in terms of their enactment of felony murder laws, are Illinois (1827), New Jersey (1829), New York (1829), Georgia (1833), Mississippi (1839), Alabama (1841), Missouri (1845), Wisconsin (1849), California (1850), Texas (1857), Minnesota (entering the Union with such a law in 1858), Nevada (entering the Union with such a law in 1864), Oregon (1864), Nebraska (1866, though repealing the law in 1873), Florida (1868), Colorado (entering the Union with such a law in 1876), Idaho and Montana (both entering the Union with such laws in 1889), and Utah (entering the Union with such a law in 1896).

\textsuperscript{314}. The Illinois, Georgia, Colorado, and Nebraska statutes are discussed in Part VI.A.1 \textit{infra}.

\textsuperscript{315}. These statutes are discussed in Part VI.A.2 \textit{infra}.
murder rule by means of a unique provision transferring intent from any attempted felony to any unintended, but felonious, result.\textsuperscript{316}

New York's broad rule imposing murder liability for killing "without design to effect death" in the course of any felony was also influential. Mississippi adopted it between 1839 and 1857. Missouri and Oregon adopted similarly broad, but less directly expressed rules.\textsuperscript{317} Missouri imposed felony murder liability indirectly by declaring that killings "without a design to effect death" in the course of misdemeanors, but not felonies—that is, killings that were murder at common law—would be graded as manslaughters.\textsuperscript{318} This implied that at least some unintended killings in the course of some felonies had been murder at common law and would remain so under the statute.\textsuperscript{319} Missouri graded all murders in the course of felonies as first degree until 1879, thereafter restricting first degree felony murder to enumerated felonies.\textsuperscript{320} Oregon's felony murder rules were implied by provisions (1) requiring additional evidence of malice beyond killing for first degree murder not in the course of enumerated felonies,\textsuperscript{321} and (2) conditioning second degree murder on unpunished malice or a nonenumerated felony.\textsuperscript{322} Three other states—Florida (after 1868), Minnesota, and Wisconsin—defined killings committed without design to effect death during felonies as murders in the third degree, meriting as little as seven years in prison.\textsuperscript{323}

Finally, two states joined New Jersey in explicitly limiting felony murder to killings committed in attempting enumerated or dangerous felonies. These were Alabama and Mississippi after 1857.\textsuperscript{324}

Let us sum up: The American Revolution, followed by Jeffersonian and Jacksonian suspicion of judicial lawmaking, gave rise to a movement to codify the criminal law. Early nineteenth-century Americans generally believed that the common law's authority depended on local enactment and was subject to local modification. American reformers were critical of English criminal law's excessive reliance on the threat of capital punishment. Jeffersonian Republicans were particularly fearful of the potentially repressive uses of judicial definition of the criminal law, and sought to ground criminal liability in legislation.

\textsuperscript{316} Act of Aug. 28, 1856, § 1, arts. 49, 590 (codified in Tex. Penal Code (1857)). The Texas statute is discussed in Part VI.A.3 infra.

\textsuperscript{317} The statutes in Mississippi (up to 1857), Missouri, New York, and Oregon are all discussed in Part VI.B infra.

\textsuperscript{318} Mo. Rev. Stat. ch. 47, art. 2, § 7 (1845).

\textsuperscript{319} Although the Missouri Supreme Court for a time disagreed. See State v. Earnest, 70 Mo. 520 (1879); State v. Hopper, 71 Mo. 425 (1880).

\textsuperscript{320} See Mo. Rev. Stat. § 1232 (1879).

\textsuperscript{321} See Act of Oct. 19, 1864, tit. 1, § 516 (codified at Or. Laws, Crim. Code, tit. 1, § 520 (1874)).

\textsuperscript{322} Id. § 503 (codified at Or. Laws, Crim. Code, tit. 1, § 507 (1874)).

\textsuperscript{323} These third degree murder statutes are discussed in Part VI.C infra.

\textsuperscript{324} These dangerous felonies statutes are discussed in Part VI.D infra.
Nineteenth-century legislatures were particularly energetic in legislating on the subject of homicide law. By the end of the nineteenth century, all but eight American jurisdictions (the United States, Kentucky, Louisiana, North Dakota, Rhode Island, South Carolina, South Dakota, and Vermont) had legislation on the subject of homicide in the course of crime, in the form of a felony murder statute or a felony aggravator statute. Nineteenth-century Americans may have mistakenly believed that the English common law imposed sweeping felony murder liability, but they deliberately left little scope for the application of the English common law of crimes. Nor did they develop a general American common law of crimes, applicable in all jurisdictions. Where the common law continued to be a source of criminal law, it was the common law as developed in each particular jurisdiction.

IV. JURISDICTIONS WITHOUT FELONY MURDER LEGISLATION

While most states eventually adopted either enumerated felony grading statutes or felony murder statutes, many jurisdictions left murder essentially undefined for parts of the eighteenth and nineteenth centuries. These included the United States, South Carolina, Rhode Island, and Vermont throughout the period from the Revolution through the end of the nineteenth century, and twenty-seven other jurisdictions for shorter intervals. If a


326. See S.C. REV. STAT. ch. 128, § 1 (1873) ("Murder is the killing of any person with malice aforethought, either express or implied."); 2 S.C. REV. STAT. pt. 5, § 108 (1894) (same language); State v. Coleman, 8 S.C. 237 (1876) (holding that this statute does not change the common law definition of murder).

327. See An Act in Amendment of an Act, Entitled "An Act to Reform the Penal Laws," 1814 R.I. Laws 22, 22-23. On its face, this statute left murder undefined, but arguably should have been interpreted to have perpetuated the authority of the Providence Colony's definition of murder, including the killing of a "true man" by a thief. See William R. Staples, History of the Criminal Law of Rhode Island (1854), in 1854 R.I. Acts app. at 1, 9 (showing that the 1647 laws remained in force except where modified by subsequent statutes, and showing that there were no new definitions of murder through 1853). On the other hand, Rhode Island had no reported opinions discussing the felony murder rule throughout the nineteenth century.

328. See VT. REV. STAT. ch. 94, § 1 (1840) ("Every person, who shall commit the crime of murder, shall suffer the punishment of death for the same.").

329. These were North Carolina until 1893; Massachusetts until 1858; Delaware until 1852; Connecticut until 1846; New Hampshire until 1842; Georgia until 1833; New York until 1829; New Jersey until 1829; Maryland until 1810; Virginia until 1796; Pennsylvania until 1794; Tennessee, from 1792 to 1829; Kentucky after 1801; Ohio, from 1803 to 1817; Indiana, from 1816 to 1852; Mississippi, from 1817 to 1839; Illinois, from 1818 to 1827; Alabama, from 1819 to 1841; Maine, from 1820 to 1840; Missouri, from 1821 to 1845; Florida, from 1845 to 1868; Texas, from 1845 to 1856; Iowa, from 1846 to 1851; Louisiana after 1855; Oregon, from 1859 to 1864; and North and South Dakota after they became states in 1889.
common law felony murder rule were operative in the United States in the eighteenth and nineteenth centuries, we would expect to find it being applied in jurisdictions like these, which left the definition of murder to common law development. But, as this Part will show, almost none of the courts that could have developed a common law felony murder rule did so. We will examine the problem of homicide in the course of crime in jurisdictions without felony murder legislation from two points of view. First, we will examine the scholarly writing on the problem available to American courts trying to define murder without legislative guidance. Second, we will examine reported decisions on the felony murder question in jurisdictions without felony murder statutes or felony aggraverator statutes.

A. American Views on Felony Murder as Common Law

American scholarly writing on criminal law during the nineteenth century was sparse. Until the middle of the nineteenth century, most American lawyers relied on American editions of such English treatises as Blackstone, East, and Russell. As we have seen, these treatises misleadingly reported that the felony murder rule proposed by Holt, Hawkins, and Foster was the law in England.

In a few of the states without reform-homicide statutes, lawyers could turn to treatises on their own state’s common law. In antebellum Connecticut, lawyers could consult Swift’s aforementioned treatise. Swift followed the general approach of Hawkins and Hale in treating the commission of a dangerous or violent offense as evidence of malice prepense. Thus, Swift wrote, where an act causing death “shews that depravity of mind, and wicked malignant heart, which evidences that the offender is capable of any mischief however dangerous to the community, it will be sufficient proof of malice prepense.” Swift added that

Where two, or more assemble for the purpose of doing any unlawful act against the peace, and of which the probable consequence may be bloodshed, as to beat a man, or commit a riot, and one of them kills a man, it is murder in all, because of the illegality of the act, and the premeditated wickedness of the design.

Rather than endorsing a felony murder rule as such, he held that in Connecticut unintentional killing was murder only if committed in the course of another capital crime:

The general rule is, that when an unintentional homicide happens in consequence of an unlawful act, it will be murder or manslaughter, according to the nature of the act which occasioned it. If it be in the commission, or in

330. MUELLER, supra note 146, at 18-25.
331. 2 SWIFT, supra note 271, at 300.
332. Id.
the attempt of committing a capital crime, it will be murder: as if a man should
kill a woman in attempting to commit a rape, it would be murder: if the crime
be not capital . . . it will be manslaughter. — There can be no doubt of the
justice and propriety of making the unintentional killing of a person, murder,
where the real intent was to commit a crime of as high nature.333

Thus, consistent with his jurisdictionally specific account of the authority of the
common law, Swift adapted what he believed to be the English common law
felony murder rule to the local circumstance of Connecticut’s more humane
schedule of punishment. The logic of transferring intent among crimes of like
gravity had a narrower application in a democratic society than in a hierarchical
one. An enlightened democratic society graded crime on the basis of harm to
societal interests rather than on the basis of disobedience to social authority.
Only if all violations of law were equal in expressing defiance of superior
authority could intent transfer among them all. Swift’s treatise implies a
political rationale for what became the prevailing American approach to felony
murder: its restriction to a very narrow group of very heinous predicate
felonies.

Another early treatise on local criminal law took a different approach to the
problem of homicide in the course of crime. The Kentucky legislature
authorized an official summary and interpretation of the penal laws, published
in 1804-06 by Harry Toulmin and James Blair. While Kentucky adopted
Pennsylvania’s grading statute in 1798, it replaced it in 1801 with a cryptic
statute identifying murder in the course of enumerated felonies as one of
several forms of felonious capital homicide.

Toulmin and Blair defined murder as

The killing any rational creature in being and under the peace of the
commonwealth, without lawful authority, not by accident, nor in self-defence,
nor on sudden quarrel, but with malice aforethought, either express or implied,
or in the perpetration or attempt to perpetrate any arson, rape, robbery,
burglary, or any other unlawful act.334

Thus they endorsed the sweeping unlawful act murder doctrine attributed to
Coke, possibly excluding accidental death, but possibly including such a death
if it was caused in the attempt of an unlawful act. They wrote that “[t]he law
presumes malice in cases where a murder happens in the execution of an
unlawful action, principally intended for someother [sic] purpose, and not to do
a personal injury to him in particular who happens to be slain.”335 They added
that “whenever a man happens to kill another in the execution of a deliberate
purpose to commit any felony; he is guilty of murder . . . .”336 Of the 1801
statute, Toulmin and Blair wrote that it did not change what they regarded as

333. Id. at 306.
334. 1 HARRY TOULMIN & JAMES BLAIR, A REVIEW OF THE CRIMINAL LAW OF THE
COMMONWEALTH OF KENTUCKY 3-4 (photo. reprint 1983) (1804) (emphasis added).
335. Id. at 46.
336. Id. at 47.
the common law rule that "malice is implied wherever a killing happens in the execution of an unlawful action . . .".337

On the other hand, Toulmin and Blair qualified this sweeping rule by restricting the meaning of "killing." They defined "killing" in such a way as to include direct causation by an act of violence, and indirect causation by a recklessly dangerous act:

not only he, who by a wound or blow, or by poison, or by lying in wait, or by strangling, famishing or suffocation, &c. directly causes another's death, but also in many cases he who by wilfully and deliberately doing a thing which visibly and clearly endangers another's life, thereby occasions his death, shall be considered to kill him.338

They list examples of five types of "killing" in the execution of an unlawful action: (1) killing by striking blows against one who resists a theft;339 (2) poisoning an unintended victim while attempting to kill another by poison;340 (3) killing a pregnant woman by administering an abortifacient;341 (4) unintentionally killing one who attempts to break up an assault;342 and (5) killing by any of several conspirators who "resolve generally to resist all opposers in the commission of any breach of the peace, the execution of which is attended with such circumstances as naturally tend to produce tumult & disorder."343 Toulmin and Blair understood the very concept of "killing" to already incorporate certain forms of culpability: a transferable intention to kill or injure, a reckless awareness of a risk of death, or an intention to forcibly overcome lawful resistance. A "killing" was not necessarily intentional, but it was never faultless. As we will see, this restricted conception of killing was fairly typical of nineteenth-century American courts, except that few jurisdictions viewed unlawful abortion as the kind of violent assault that could count as a killing if it caused an unintended death.

The first general treatises on American substantive criminal law appeared at midcentury. The most influential antebellum American commentators were Francis Wharton and Joel Prentiss Bishop. Bishop's 1856-58 treatise offered a particularly broad felony murder rule. Bishop wrote that "whenever one does an act with the design of committing any felony, though not a felony dangerous to human life, yet if the life of another is accidentally taken, his offence is murder. In the application of this rule, statutory felonies are the same as felonies at common law."344 Bishop cited the English sources Hawkins, East,
and Plummer, as well as Gore, the transferred-intent case. Bishop’s only American source was the case of State v. Smith, an 1851 case applying Maine’s grading statute to impose second degree felony murder liability for the nonenumerated felony of abortion.345

Bishop offered a general analysis of culpability based on Hawkins’s rule of transferring intent among felonies. According to Bishop, crimes ordinarily required a “general” intention to do some “wrong,” combined with a harmful result. Yet the resulting harm did not have to be the intended harm. As long as the intended result was roughly as bad as the result produced, the unlawful intent would transfer to the actual, but unintended, result. There were exceptions to this rule, crimes requiring a “specific intent” to achieve only a particular harm. But aside from these “specific intent” crimes, liability required only a general intent to cause harm of a certain level of gravity.346 So for Bishop, a felony murder rule was integral to the logic of Anglo-American criminal law. He was little troubled by the problem Swift posed for an intent-transferring theory of felony murder—namely, whether all felonies were regarded as equally malicious and equally deserving of punishment in the American context.

Wharton’s 1855 treatise on homicide also supported a broad felony murder rule, on the basis of similar evidence. Wharton cited English treatises, the English cases of Plummer and Woodburne, and Maine’s Smith decision.347 He wrote:

[I]t may be regarded as a general rule, that if the act on which death ensue be malum in se, it will be murder or manslaughter, according to the circumstances; if done in prosecution of a felonious intent, but death ensued against or beside the intent of the party, it will be murder; but, on the other hand, if the intent went no further than to commit a bare trespass, it will be manslaughter. As where A. shoots at the poultry of B., and, by accident, kills B. himself: if his intent were to steal the poultry, which must be collected from circumstances, it will be murder, by reason of that felonious intent . . . 348

While Wharton restricted his felony murder rule to inherently malicious predicate felonies, this was not much of a restriction. Wharton added that “homicide . . . committed in the pursuit of an unlawful felonious act, is murder at common law, no matter what that act be, even if it be so light a thing as the shooting of a tame fowl.”349 Wharton discussed the application of this felony murder rule to situations of riot:

Each individual is not only responsible for such acts of his associates as spring

345. 32 Me. 369 (1851). Later, however, Bishop discussed New York’s felony murder statute. 2 BISHOP, supra note 344, § 648, at 422.
346. 1 BISHOP, supra note 344, §§ 251-60, at 220-29.
347. FRANCIS WHARTON, A TREATISE ON THE LAW OF HOMICIDE IN THE UNITED STATES 46 (1855).
348. Id.
349. Id. at 345-46.
from the general design, but for such collateral acts as may be committed by his associates, with this distinction, that if the original unlawful act was a trespass, the murder, to affect all, must be done in prosecution of the design. If the unlawful act be a felony, it will be murder in all, although the death happen collaterally, or beside the original design. 350

The apparent source for this distinction between designed and collateral killings was a jury charge issued by Justice Story in an early nineteenth-century federal case discussed below. Wharton, however, attempted to distinguish “collateral acts growing out of the general design” (for which cofelons would be liable) from “independent acts growing out of the particular malice of individuals” (for which they would not). 351 Wharton gave several examples of such “independent acts,” but gave no examples of killings “collateral” to “the original design.” Wharton proceeded to discuss several English cases, none apparently supporting his rule of accomplice murder liability for killings “collateral” to a felony. 352

Wharton’s second edition, however, repudiated his original endorsement of felony murder. Published immediately after Stephen, Bramwell, and Blackburn testified against the traditionally broad understanding of the rule, Wharton’s treatise quoted their arguments at length. In the preface to his second edition, Wharton identified himself firmly with a reform movement that, he said, had revolutionized the law of homicide in the twenty years since his first edition. Wharton claimed that modern law treated malice as an actual mental state rather than a “presumption[] of law,” required “that between the defendant’s malice and the deceased’s death there should be established a causal connection, consisting of the sequence of ordinary and well recognized physical laws,” and rejected “the old doctrine that a collateral felonious intent can be tacked to unintended homicide, so that a man who in stealing a fowl accidentally kills the fowl’s owner, can be held guilty of murder.” 353 Wharton commented:

[T]here is reported no modern conviction of common law murder, in a case in which there was no evidence of malicious intent towards the deceased, and in which the felonious intent proved was simply an intent to commit a collateral felony. And that an intent to commit larceny cannot be now used to prove an intent to kill is emphatically declared by a learned English judge (Blackburn, J.) in his testimony in 1874, before the Homicide Amendment Committee . . . 354

350. Id. at 346 (citing the federal cases of United States v. Ross, 27 F. Cas. 899 (C.C.D.R.I. 1813) (No. 16,196) and United States v. Travers, 28 F. Cas. 204 (C.C.D. Miss. 1814) (No. 16,537), both discussed below).

351. Id.

352. Id. at 348-50 (discussing, among others, Plummer, and concluding that for one to be liable for an accomplice’s killing, “the killing must be in pursuance of such unlawful purpose and not collateral to it”).

353. WHARTON, supra note 15, at iii-iv.

354. Id. at 39.
Wharton added that if the common law did not impose felony murder, American grading statutes modeled on the Pennsylvania statute did not alter the situation:

[I]t must be remembered that the statutes under criticism do not say that “Homicide,” when so committed, shall be murder in the first degree, but that “Murder,” when so committed, shall be murder in the first degree. Nothing, therefore, that is not murder at common law can be murder either in the first or second degree . . . .

Thus, Wharton argued, neither the common law nor the most prevalent American statutes established the felony murder rule.

Wharton next asked whether courts could serve justice or prudence by creating a felony murder rule. Wharton answered this question with an emphatic “no”:

[W]hen there is no statutory enactment, the doctrine that the intent to commit a felony, when collateral to an accidental homicide, constitutes murder, must be rejected for the following reasons. — A man who does not intend to commit murder is held guilty of murder, an offence to which a malicious intent to take life or to do grievous bodily harm is essential. How can we justify the conviction when this intent is confessedly wanting, and this in the teeth of the ordinary presumption of innocence . . . ?

. . . . The defendant, supposing him to be intending to steal, has not a general felonious intent, but simply an intent to do a particular thing which is utterly distinct from the killing of a human being. Supposing that in unlawfully shooting a chicken the chicken’s owner is accidentally shot, no doubt this is manslaughter, for the use of fire-arms in such a way is negligence which makes the party using them responsible for negligent homicide. The correct course, under such circumstances, would be to indict the offender for the larceny of the chicken, and for manslaughter of the chicken’s owner. That this course was not, in the old law, pursued, may be attributed in a large measure to the fact that the stealing a chicken was as much a capital offence as was murdering a man . . . :

But this reason, such as it is, no longer exists. Larceny and murder have assigned to them distinct punishments; and it is no longer a matter of indifference to the defendant for which he is to be tried. Nor is it a matter of indifference to juries. A jury must feel itself far more willing to convict a man of larceny than to convict him of murder simply because he intended to kill a tame fowl.

Wharton approvingly quoted the arguments Lord Macaulay had made against the felony murder rule in his report on the widely admired penal code he drafted for India. Macaulay had begun by arguing that it would be “barbarous” to hold someone liable for an “innocent” act because it produces unforeseeable harm. Next, he had argued that placing such an unforeseeably

355. Id. at 153.
356. Id. at 44-45.
dangerous act in the context of a crime should not change a defendant’s desert with respect to the resulting death. He gave the example of a nonnegligent but fatal boat accident occurring in the course of an act of obstruction of justice, kidnapping, smuggling, or espionage.357 Finally, Macaulay had turned to the deterrent value of punishment and argued that holding felons liable for causing deaths nonnegligently can do nothing to deter killing but can only deter felonies, and that such a punishment lottery is an ineffective way of doing so: “Surely the worst mode of increasing the punishment of an offence is to provide that, besides the ordinary punishment, every offender shall run an exceedingly small risk of being hanged. The more nearly the amount of punishment can be reduced to a certainty the better . . . .”358

Wharton illustrated his own view of the common law of murder by discussing homicide in the course of arson:

No doubt if a person sets fire to a dwelling-house under such circumstances that its inmates, as an ordinary sequence of the fire, are burned and die, then . . . malice is to be inferred . . . . The case would be that of a reckless and malicious firing into a crowd, which is murder at common law, if death ensue. But suppose that when perpetrating the arson the defendant, in accidentally discharging a gun, killed some one either in the house or in its neighborhood. Now . . . the malice aforethought necessary to constitute murder cannot be inferred, in face of the fact that the killing was in no way within the scope of the defendant’s plan, from the mere fact of the arson.359

So Wharton, the foremost American authority on the law of homicide, joined the English reformist scholars, who had repudiated the concept of felony murder in favor of gross recklessness murder.

Oliver Wendell Holmes also questioned the rationality of a broad felony murder rule in his 1881 commentary on the common law. Adverting to Coke’s example of shooting a man inadvertently while attempting to steal chickens, Holmes offered the argument that

The only blameworthy act is firing at the chickens, knowing them to belong to another. It is neither more nor less so because an accident happens afterwards; and hitting a man, whose presence could not have been suspected, is an accident. The fact that the shooting is felonious does not make it any more likely to kill people. If the object of the rule is to prevent such accidents, it should make accidental killing with firearms murder, not accidental killing in the effort to steal; while, if its object is to prevent stealing, it would do better to hang one thief in every thousand by lot.360

Holmes argued that such a rule could be rational if the predicate felonies were

357. Id. at 43 n.3 (quoting T. MACAULAY ET AL., A PENAL CODE PREPARED BY THE INDIAN LAW COMMISSIONERS (1837)).
358. Id. at 44 n.3 (quoting MACAULAY, supra note 357).
359. Id. at 154.
known by the legislature to be "peculiarly dangerous," even if the dangers were not known to "common experience." Yet he concluded by expressing skepticism that a broad felony murder rule was, as an empirical matter, justifiable on such grounds. He also doubted that it "would be generally applied in this country." Like Wharton, Holmes was influenced by Stephen and other utilitarian English reformers to recharacterize felony murder liability as a device for regulating dangerous activities rather than as a rule of transferring culpability among morally equivalent wrongs.

So American lawyers were taught to believe that the English common law imposed felony murder liability in the eighteenth and early nineteenth centuries, when it did not. Yet early Americans did not necessarily see this supposed English rule as applicable in America even in default of legislation. The American common law was local, and rejection of the English proliferation of capital crimes arguably gave Hawkins's intent-transferring theory a much narrower scope in America. By thus narrowing the scope of intent-transferring, American lawyers developed the idea of predating felony murder liability only on a small number of enumerated serious crimes. This logic may have been expressed in the Pennsylvania grading statute; certainly it would shape the application of such statutes in nineteenth-century America. By the end of the nineteenth century, when England had finally developed a narrow felony murder rule, American scholars had come to recognize that felony murder liability had little foundation in English customary law and little support among modern English scholars. Under the influence of these scholars, American writers reinterpreted enumerated felony murder rules as dangerous-felony murder rules, recharacterizing felony murder as a form of recklessness rather than a form of transferred malice.

Nineteenth-century American courts trying to apply common law treatises to determine whether a criminal motive aggravated a particular killing to murder would have faced a ticklish problem. The treatise literature suggested that a felonious motive could aggravate a homicide, but only if sufficiently malicious or dangerous. Such a standard could not be applied without the exercise of considerable discretion, in a political context that disfavored judicial definition of crimes. It might have seemed altogether more prudent to leave this difficult question of morality and policy to legislative resolution.

B. Jurisdictions Leaving Murder Undefined

As we have seen, some thirty American jurisdictions left the definition of murder to judicial development during some part of the eighteenth and nineteenth centuries. Courts in these jurisdictions could have applied the felony

361. Id. at 49.
362. Id.
363. Id. at 49-50.
murder rule endorsed by eighteenth-century English authorities if they thought they were bound by the English common law. They could have found some support for such a rule in the limited American treatise literature if they thought they were bound by an American common law of crimes. But by and large, American courts did not establish felony murder rules until they had a legislative mandate to do so.

The opportunities for courts to define the law of homicide were largely gone by the Civil War. Table 1 shows, by decade, how many American jurisdictions enacted statutes defining homicide in the course of crime. The first two columns indicate how many jurisdictions (including states and the federal government) had adopted felony murder or felony aggravator (grading) statutes by the year indicated. The second column represents this number as a percentage of the total. The third column indicates how many such jurisdictions had no statute on the subject. The fourth column represents this number as a percentage of the total.

Table 1. Prevalence of Felony Murder and Felony Aggravator Statutes, 1790-1900

<table>
<thead>
<tr>
<th>Year</th>
<th>Jurisdictions with a felony murder or felony aggravator statute (number)</th>
<th>Jurisdictions with a felony murder or felony aggravator statute (percentage)</th>
<th>Jurisdictions without a felony murder or felony aggravator statute (number)</th>
<th>Jurisdictions without a felony murder or felony aggravator statute (percentage)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1790</td>
<td>0</td>
<td>0</td>
<td>14</td>
<td>100</td>
</tr>
<tr>
<td>1800</td>
<td>3</td>
<td>18</td>
<td>14</td>
<td>82</td>
</tr>
<tr>
<td>1810</td>
<td>3</td>
<td>17</td>
<td>15</td>
<td>83</td>
</tr>
<tr>
<td>1820</td>
<td>5</td>
<td>21</td>
<td>19</td>
<td>79</td>
</tr>
<tr>
<td>1830</td>
<td>9</td>
<td>36</td>
<td>16</td>
<td>64</td>
</tr>
<tr>
<td>1840</td>
<td>15</td>
<td>54</td>
<td>13</td>
<td>46</td>
</tr>
<tr>
<td>1850</td>
<td>21</td>
<td>64</td>
<td>12</td>
<td>36</td>
</tr>
<tr>
<td>1860</td>
<td>26</td>
<td>74</td>
<td>9</td>
<td>26</td>
</tr>
<tr>
<td>1870</td>
<td>32</td>
<td>82</td>
<td>7</td>
<td>18</td>
</tr>
<tr>
<td>1880</td>
<td>33</td>
<td>83</td>
<td>7</td>
<td>17</td>
</tr>
<tr>
<td>1890</td>
<td>35</td>
<td>81</td>
<td>8</td>
<td>19</td>
</tr>
<tr>
<td>1900</td>
<td>37</td>
<td>82</td>
<td>8</td>
<td>18</td>
</tr>
</tbody>
</table>

As Table 1 demonstrates, by the start of the Civil War, the vast majority of American jurisdictions had adopted legislation on the question of homicide in the course of crime. Moreover, beginning in the 1830s, almost every new state adopted such legislation within a few years after its admission, usually as part of a comprehensive criminal code. By codifying their criminal law, new states avoided the intractable problem of identifying what kind of common law—presettlement British, pre-Revolution British, contemporary British, general American, or local—would govern. Common law development of penal law was largely confined to the original states and to the antebellum period.
While common law definition of crime was an early nineteenth-century phenomenon in America, felony murder liability was a late nineteenth-century phenomenon. As you might expect, felony murder liability was almost always imposed under a felony murder statute or a statute grading murder liability on the basis of participation in a felony. As noted above, I have identified eighty-five reported nineteenth-century American cases that concluded with a valid felony murder conviction.\(^{364}\) Table 2 organizes these cases chronologically. It

also indicates whether these convictions were under felony murder statutes, felony aggravator statutes, or common law felony murder rules. Of eighty-five reported American felony murder convictions during the nineteenth century, only three were in the first half, when judicial definition of homicide crimes was common. On the other hand, eighty-five percent of the convictions were in the last three decades of the century, when over eighty percent of American jurisdictions had legislation on homicide in the course of crime. Only three felony murder convictions were obtained in jurisdictions that left the definition of murder to common law development. All three were near the end of the nineteenth century.

<table>
<thead>
<tr>
<th></th>
<th>Total number of convictions</th>
<th>Convictions under a felony murder statute</th>
<th>Convictions under a felony aggravator statute</th>
<th>Convictions under common law felony murder rules</th>
</tr>
</thead>
<tbody>
<tr>
<td>1791-1800</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>1801-1810</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
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<tr>
<td>1811-1820</td>
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<tr>
<td>1821-1830</td>
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<td>0</td>
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<td>0</td>
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<tr>
<td>1831-1840</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>1841-1850</td>
<td>3</td>
<td>1</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>1851-1860</td>
<td>6</td>
<td>3</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>1861-1870</td>
<td>4</td>
<td>2</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>1871-1880</td>
<td>13</td>
<td>7</td>
<td>6</td>
<td>0</td>
</tr>
<tr>
<td>1881-1890</td>
<td>19</td>
<td>15</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>1891-1900</td>
<td>40</td>
<td>25</td>
<td>13</td>
<td>2</td>
</tr>
<tr>
<td>Total</td>
<td>85</td>
<td>53</td>
<td>29</td>
<td>3</td>
</tr>
</tbody>
</table>

Only a handful of American courts even considered the question of felony murder liability without legislative prompting. One early North Carolina opinion implied the existence of some form of unlawful act murder. In discussing the adequacy of provocation required to reduce a killing from murder to manslaughter, the judge defined malice as “a circumstance attending the fact, that cuts off the slayer from all manner of excuse.” He then listed among these excuses killing “undesignedly” while “doing a lawful act in a proper manner.” In this way, he implied that an unlawful act might render an unintended death malicious. But he did not expand upon the point, which was

365. Deschamps, 7 So. 703 (Louisiana); Levelle, 13 S.E. 319 (South Carolina); Reddick, 33 S.W. 416 (Kentucky).
367. Id. at 445.
368. Id.
irrelevant to the dispute before him.

A more serious judicial effort to establish felony murder liability can be credited to Justice Story, in the case of United States v. Ross. Ross may be understood as part of Story’s failed attempt to launch a federal common law of crimes as an instrument of naval warfare. Ross was the leader of an armed band that seized a vessel. One member of this band killed a resisting passenger in the course of this struggle, and all were charged under the 1790 federal statute punishing murder on the high seas. But Ross argued that as the unlawful seizure of a vessel was not defined and punished as a felony, his participation in this crime did not implicate him in the ensuing murder. Story reasoned that even if the crime planned were not a felony, the conspirators would still be liable for a death caused in furtherance of the conspiracy, especially if the planned crime was very dangerous. This was consistent with Hale’s position and with Herbert. Story added that all should be held liable for murder if the conspirators had resolved to kill any who might oppose them, the rule of Lord Dacres. But he also instructed the jurors that if death ensued from a conspiracy “to commit a felony, it is murder in all, although the death take place collaterally, or beside the principal design.” This was an innovation directly contrary to Holt’s dictum in Plummer, which required that murder predicated on a felony be in furtherance of, rather than collateral to, the felony. Since the killing was in furtherance of the conspiracy, the case did not test the furthest extent of Story’s instructions. Nor does it appear that the seizure of the vessel was a felony, defined by federal statute. In any case, the jury acquitted of murder. So Ross did not establish Story’s proposal that participation in a felony makes one responsible for an unforeseeable killing by a cofelon.

Story’s effort to read a felony murder rule into federal criminal law won at least one adherent. District Judge Davis discoursed on felony murder in his jury charge in the 1814 case of United States v. Travers, even though there was no allegation that Travers had killed in the course of a felony. In explicating the law of homicide, Davis invoked Blackstone’s formula:

[When an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, according to the nature of the act which occasioned it. If it be in the prosecution of a felonious intent, or if in its consequences it naturally tended to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will only amount to manslaughter.]

Nevertheless, Story proved no more successful in his campaign for a federal felony murder rule than in his larger campaign for federal reception of the

369. 27 F. Cas. 899 (C.C.D.R.I. 1813) (No. 16,196).
370. Id. at 901.
372. 28 F. Cas. 204 (C.C.D. Mass. 1814) (No. 16,537).
373. Id. at 209.
common law of crimes. There were no reported federal felony murder convictions during the nineteenth century. So far as we know, no federal court ever applied Story's rule.

The next reported federal case to address homicide in the course of crime, the 1890 case of *United States v. Boyd*,374 followed the recklessness approach favored by Stephen and Wharton and rejected Story's broad felony murder rule. Boyd shot his victim in the course of a robbery. The trial court instructed the jury that killing in the course of an unlawful act that is violent or otherwise dangerous to life is murder. The court included the traditional felonies of robbery, burglary, arson, and rape among such violent or dangerous crimes, but did not emphasize their status as felonies.375 The court explicitly rejected Coke's claim that an accidental shooting in the course of stealing chickens would be murder, calling this rule deficient in justice and humanity.376 On the other hand, the court approvingly cited the Illinois case of *Lamb v. People* (discussed below),377 which required awareness that the predicate crime is dangerous to life. Finally, the court reinterpreted Story's murder instruction in *Ross*, emphasizing the dangerousness and violence of seizing a ship by force and the determination of the conspirators to accomplish their end by violent means if necessary. The court suppressed Story's claim that the felonious character of an offense broadens accessorial liability for a resulting death. It was the dangerous and violent character of an offense, not its grade, which supplied the requisite malice. In short, the *Boyd* court rejected the felony murder rules proposed by Holt, Hawkins, Foster, and Story in favor of the dangerous-unlawful-act doctrine favored by Hale, Stephen, and Wharton. However, the court held that the four traditionally enumerated felonies were sufficiently dangerous to life to imply malice, thereby endorsing results consistent with felony murder rules as actually put into practice in most states.

We might expect to find felony murder rules in antebellum Connecticut and Kentucky, where early treatises on local law endorsed such rules. In Connecticut, however, no felony murder rule developed until long after the 1846 adoption of a felony aggravator statute. In Kentucky, a common law felony murder rule did emerge eventually, but not until late in the nineteenth century. This felony murder rule was narrower than the broad rule endorsed by Toulmin and Blair, requiring some form of negligence or recklessness with respect to the resulting death.

While Kentucky abandoned grading in 1801, it retained the Pennsylvania statute's enigmatic discussion of killing in the course of crime. According to the new statute,

375. *Id.* at 860-63.
376. *Id.* at 861, 865-66.
377. *Id.* at 864-65 (citing *Lamb v. People*, 96 Ill. 73 (1880)).
[a]ny person . . . who shall be guilty of murder, and shall perpetrate the same by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or who shall commit the same in the perpetration, or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed a felon; and every other kind or species of killing, which shall be committed with malice aforethought, either express or implied, shall be deemed felony, and shall be punished with death. 378

This cryptic statute did not resolve whether murder in the course or attempt of enumerated felonies required malice, either express or implied, or whether malice might be implied by the attempt of such felonies. In the vain hope of clarifying the situation, the Kentucky legislature passed the following provision a year later:

[Whereas doubts have been entertained, whether such killing as may happen in the perpetration or attempt to perpetrate any unlawful act, be murder within the meaning of the act to amend the penal laws, passed at the last session of the general assembly, unless it be in the case of arson, rape, robbery, or burglary: Be it enacted, that the said act shall not be so construed as any way to alter or change the idea of murder as it stands at common law. 379

This provision certainly implied that some killings occurring in the course of unenumerated offenses would be murder (although the previous statute did not restrict capital homicide to murder). The phrase “such killing as may happen” appeared to include unintentional killings. But whether these murders would include accidental killings and which offenses they would be predicated on, the statute does not say. Instead, it invokes the common law concept of murder, which, we have seen, did not clearly resolve these questions either. Perhaps the term “killing” should be understood as restricted to causing death by an intentional battery or wound, but we have no Kentucky case law to confirm this speculation.

As we have seen, Toulmin and Blair read a broad felony murder rule into these provisions in their official interpretation. Yet the Kentucky courts never applied their interpretation. Moreover, Toulmin and Blair’s comments arguably became a dead letter in 1825 when the legislature, in an apparent effort to restore the 1798 provisions on manslaughter, simply repealed the 1801 provision on murder and manslaughter without passing any replacement. 380 Finally, in 1827 the legislature passed another statute declaring that “nothing in the before recited act, or any other act, shall be construed to alter or change the definition and punishment of wilful murder, by the common law . . . .” 381 An 1873 statute restated this agnostic position more directly: “If any person be guilty of willful murder, he shall be punished with death, or confinement in the

The first Kentucky cases to address the felony murder question were decided the same year. Each endorsed a form of felony murder. In Chrystal v. Commonwealth, the court approved Wharton’s original view that a party whose negligence causes the death of another is in like manner responsible, whether the business in which he was engaged was legal or illegal. If the business was of such a character as to be felonious, the offense, it is clear, is murder. But even where the business is perfectly legal, negligence in the discharge of it when producing homicide is manslaughter.\(^\text{383}\)

Of course, Wharton’s revised treatise would soon repudiate this formulation. In Mickey v. Commonwealth, the court held that the defendant could not be “convicted of murder upon the hypothesis that he aided and abetted the parties committing the homicide unless it is made to appear . . . that he had confederated with them to make the attack or to commit a felony or trespass . . . .”\(^\text{384}\) The 1888 decision in Peoples v. Commonwealth formulated, but found inapplicable, a rule that “whenever an unlawful act, one malum in se, is done in the prosecution of a felonious intention, or the perpetration of a collateral felony, and death ensues, it is murder.”\(^\text{385}\) Finally, in 1895, Kentucky actually imposed felony murder liability on this basis. In Reddick v. Commonwealth,\(^\text{386}\) the Kentucky Supreme Court affirmed a felony murder conviction based on the dictum in Peoples. The court approved an instruction that if the defendant “willfully, maliciously, and feloniously set fire to and burned” a hotel being used as a residence “and that by reason of that burning” the victim “lost her life,” he was guilty of murder.\(^\text{387}\) The court commented:

This instruction, we take it, embraces a correct principle of the law, and that same is so uniformly held and acted upon in all criminal prosecutions as to need no special citation of authorities. The offense of feloniously, willfully, and maliciously burning the hotel . . . was a felony. It clearly belonged to the cases “malum in se,” and not merely “malum prohibitum.” The felonious intent and purpose of accused in doing which, if guilty, the law certainly transfers to a consequence and result of same so natural as that the inmates of the house might by such fire lose their lives.\(^\text{388}\)

Thus, at the end of the nineteenth century, Kentucky courts regarded as murder any death foreseeably caused by an act that was (1) negligent, (2) malum in se, and (3) motivated by felonious intent. Yet they applied this rule only once,

\(^\text{382}\) K.Y. GEN. STAT. ch. 29, art. 3, § 3 (1873).

\(^\text{383}\) 72 Ky. (9 Bush) 669, 672 (1873) (citing 2 Francis Wharton, A Treatise on the Criminal Law of the United States § 1004 (1846)).

\(^\text{384}\) 72 Ky. (9 Bush) 593, 596 (1873).

\(^\text{385}\) 9 S.W. 509, 511 (Ky. 1888) (imposing manslaughter liability for recklessly causing the death of a pregnant woman in the course of an illegal abortion that was, however, nonfelonious because the fetus had not yet quickened).

\(^\text{386}\) 33 S.W. 416 (Ky. 1895).

\(^\text{387}\) Id. at 417.

\(^\text{388}\) Id.
predicating murder liability only on the felony of arson. The Mickey case suggested that complicity in a felony would entail murder liability for any death negligently caused in its pursuit, but this broad rule was not applied.

Like Kentucky, Louisiana repealed its grading statute (though not until 1855) and left the definition of murder to the common law. It had no decisions addressing the felony murder question until State v. Deschamps in 1890. The victim in this case died of a drug overdose. The trial court instructed the jury that if the victim died as a result of a drug administered for the purpose of rape or sodomy, it would be murder. The defendant’s murder conviction was upheld on the ground that “homicide committed by an accused, while he is actually engaged in the perpetration of a known felony, such as rape, is murder.”

South Carolina had three cases during the nineteenth century addressing homicide in the course of crime. The first rejected the felony murder doctrine; the second endorsed it and may have applied it. The third clearly applied it and extended it beyond any justifiable limits. In the 1867 case of State v. Jenkins, two defendants were convicted of murder when they participated in a fatal mob attack by throwing bricks at the victim. The appellate court upheld the conviction on ordinary principles of culpability and complicity, rejecting any doctrine of unlawful act murder: “The circumstance, that a riot was in progress at the time, and the killing occurred in the prosecution of such riot, does not in law distinguish the homicide either in kind or degree.”

In 1889, however, a South Carolina court took the opposite stance, endorsing the relevance of criminal motive to homicide culpability. In State v. Alexander, the court upheld a murder conviction on an instruction that an assault and battery supplied the requisite malice for murder and that intent to kill was not required. The trial court added that malice embraced both the intent to kill and the intent to violate the law. The court defended the latter proposition while narrowing it to the intent to commit a felonious, violent, or dangerous act:

[T]he substance of his honor's charge was that murder might be committed, as the result of some illegal act, whether the design to take life was actually present or not. This was in accordance with the common law as found in Blackstone, where he says: “And in general, where an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, according to the nature of the act which occasioned it. If it be in prosecution of a felonious intent, or in its consequences naturally tended to bloodshed, it will be murder; but if no more was intended than a mere civil

389. 7 So. 703 (La. 1890).
390. Id. at 705.
392. Id. at 225.
393. 8 S.E. 440, 441 (S.C. 1889).
394. Id. at 442.
trespass, it will amount only to manslaughter." 395

So the court justified the murder conviction as an application of an unlawful act murder rule that embraced felony murder and gross recklessness murder. Which was involved here? Alexander split his wife’s head open with an axe. This method of killing is of course strong evidence of intent to kill. It is even stronger evidence of grossly reckless indifference to human life. Finally, it is compelling evidence of the intent to injure traditionally required for felony assault. But is the assault malicious because it is unlawful and a felony, or because it “naturally tends to bloodshed”? Consider that assault is a problematic predicate for felony murder because it does not meet Hawkins’s requirement of an independent felonious purpose. Application of a felony murder rule in a case like this would preclude mitigation to manslaughter if the defendant were adequately provoked. So the better rationalization of the jury instructions would be that a dangerous assault provides the requisite malice, absent adequate provocation. The felony murder rule seems unnecessary and inapposite in explaining the result in this case.

Two years after Alexander, the South Carolina Supreme Court applied a sweeping felony murder rule in the troubling case of State v. Levelle. 396 Levelle alleged that he had killed his wife accidentally in attempting suicide. The trial court instructed the jury:

In the eye of the law, self-destruction—suicide—is an offense; it is an unlawful act; and, if a man with a deadly weapon undertakes to take his own life, he is doing an unlawful act; and if in the commission, or attempted commission, of that act, he takes the life of an innocent party standing by, then, in the eye of the law, that is murder. 397

The appellate court commented:

To this instruction there is no well-founded exception. In 1 Russ. Crimes (3d Amer. Ed.) 424, it is said: “Whenever an unlawful act, an act malum in se, is done in prosecution of a felonious intention, and death ensues, it will be murder.” Now, as suicide is an unlawful act, malum in se, and is a felony, (1 Bish. Crim. Law, §§ 511-615), there can be no doubt that the proposition laid down by the judge is correct. 398

While admitting that suicide was not criminally punished in South Carolina, the court argued that suicide should still be considered a felony because the South Carolina statute providing forms for coroner’s inquests referred to suicide as “felonious[].” 399 This stretching of the concept of felony to include acts neither criminally punishable nor ordinarily dangerous to others is unique in American criminal law. It illustrates the risks of leaving homicide law to judicial

395. Id. at 441 (citing Blackstone).
397. Id. at 321.
398. Id.
399. Id.
definition based on a mythical common law—the risks well avoided by the vast majority of American jurisdictions.

So was there a common law felony murder rule in nineteenth-century America? There was not—at least there was no general common law rule. Of thirty jurisdictions that were without legislation on the subject of homicide in the course of crime during some part of the nineteenth century, only three applied a felony murder rule—and they did so in only a handful of cases, almost all at the end of the nineteenth century. These rules were of local application only, and of varying content. The Kentucky and Louisiana rules appear to have been limited rules compatible with the enumerated or dangerous felony approaches prevailing in states with felony murder or felony aggravator legislation. The South Carolina courts, however, adopted an unusually—and unjustifiably—broad felony murder rule.

V. FELONY AGGRAVATOR STATUTES

Most American states adopted new homicide statutes during the nineteenth century. The most popular reform involved dividing murder into degrees. Such statutes usually aggravated murder to the first degree if committed in the attempt of one of several enumerated felonies. These enumerated felony aggravator statutes did not necessarily reduce the culpability required for murder in the course of these felonies. Nor did they necessarily impose second degree felony murder liability for causing death unintentionally in the course of other, nonenumerated felonies. Thus a felony murder statute, which imposes felony murder liability explicitly, is distinguishable from a felony aggravator statute. A felony aggravator statute leaves the criteria of murder liability to judicial discretion. Such statutes were enacted in twenty-two states: Arkansas, Connecticut, Delaware, Indiana, Iowa, Kansas, Kentucky (briefly), Louisiana (until the 1850s), Maine, Maryland, Massachusetts, Michigan, Nebraska, New Hampshire, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, Washington, West Virginia, and Wyoming. In six of these states—Indiana, Iowa, Maine, Nebraska, Ohio, and Washington—the statute also defined murder in terms of the culpable mental state of malice. This definition might be thought to preclude felony murder liability by requiring intent to kill or gross recklessness for murder in the attempt of a felony. Alternatively, it might be thought to impose felony murder liability by conditioning murder on any malicious motive, rather than only on intent to kill.

This Part poses a number of questions regarding judicial application of felony aggravator statutes during the nineteenth century. First, where, when, and how often were such statutes applied to impose felony murder liability? Second, when courts did impose felony murder liability, did they base it on the grading provisions of the statute, or did they read it into the term “murder” itself? Third, did they restrict felony murder liability to the enumerated predicate felonies supporting first degree murder, or did they also recognize
second degree felony murder liability predicated on other felonies? Fourth, did they restrict the predicate felonies supporting unintended murder liability with some other criterion, such as dangerousness or malicious motive? Fifth, did they restrict felony murder to certain means of causing death? Sixth, did they require some form of culpability with respect to death? Seventh, how were these rules applied to accomplices of felons who caused death? We will first examine judicial construction of the Pennsylvania statute that inspired the others. Then we will consider application of similar felony aggravator statutes. Finally, we will take up statutes combining aggravation on the basis of enumerated felonies with a requirement of malice.

A. Felony Murder in Pennsylvania

The Pennsylvania legislature gave its grading statute an authoritative construction in 1810 in an instruction manual for grand jurors. The manual reflects extensive familiarity with English precedents and commentary on homicide in the course of crime. Consistent with the English case law, it conditions murder on the intent to injure or endanger in the course of crime, rather than on felonious motive as such. Defining murder as killing with malice, the grand juror manual explained that

> [m]alice, express or implied, is an essential ingredient to make the killing a person murder.—Malice express, is a design formed of taking away another man's life, or of doing some mischief to another, in the execution of which design, death ensues.—Malice implied, is collected either from the manner of doing, or from the person slain, or the person killing.—Thus, willfully poisoning implies malice;—or doing an act that apparently must do harm, with an intent to do harm, and death ensues:—or, if a man kills another without sufficient provocation. And where the circumstances of deliberation and cruelty concur, the fact is undoubtedly murder, as flowing from a wicked heart, a mind grievously depraved, and acting from motives highly criminal, which is the genuine notion of malice in the English law. And most, if not all, the cases of implied malice . . . will be found to turn upon this single point, that the fact hath been attended with such circumstances, as carry in them the plain indications of an heart regardless of social duty, and fatally bent on mischief.400

Although drawing on Foster's language, this definition of malice did not predicate murder liability on felonies. Yet it included within malice "motives highly criminal" and any intention to "do[] some mischief to another." And implied malice consisted of circumstances indicating disregard of social duty and, again, an intention to do "mischief" or "harm" that is "fatal" in result. In

400. Pa. Legislature, Addendum to Act of April 5, 1790 (1810), in 2 THE LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 542, 562 (1810) (citations omitted). The addendum's stated purpose was "to exhibit the state of the criminal code of Pennsylvania . . . in such a manner as to be understood by every reader, and to be useful to Grand Juries, in their chamber." Id. at 542.
this way it accorded with Hale's proposal that deaths resulting from unlawful acts committed with the "ill intent" to "hurt another" be deemed murders.

The grand juror manual also touched on homicide in the course of unlawful acts in discussing homicide by risk-taking.

[I]f a person do a wanton, idle action, which cannot but be attended with manifest danger; or an action unlawful in itself, deliberately, and with an intention of mischief, either to particulars, or indiscriminately, fall where it may, and death ensue, though against the original intention of the party, it will be murder.—Thus, riding a horse, known to be used to kick, among a multitude of people, though only to divert himself, or frighten them, and one is killed, it is murder. If one throw a stone over a wall, among a multitude, intending only to frighten them, or hurt them lightly, and a man is killed, it is murder upon the same principle. The act was unlawful. But if such mischievous intention does not appear, but the act was done heedlessly and incautiously, it is manslaughter; not accidental death, for the act was unlawful.401

The form of murder described here is recognizable to the modern reader as gross recklessness murder. It involved death accompanied by two mental elements: a "mischievous" intention to harm or frighten, combined with either recklessness or the commission of a crime. Once again, the felonious status of the crime was irrelevant: it was the malicious intent to injure or frighten that made the unlawful imposition of risk murderous.

A more extensive discussion of homicide in the course of crime was primarily concerned with accessorial liability for deaths resulting from intentional batteries committed pursuant to a criminal plan.

When a man does an unlawful act, and death ensues, it is murder; as if a man rob an orchard, and being rebuked by the owner, kills him. So, if a man commits a riot, and in doing it, another is killed. Divers come to commit a riotous, unlawful act, in pursuit of which, one of them commits murder or manslaughter, all are guilty. Divers come to steal deer in a park, the park-keeper shot at them; they fled, he pursued, they returned and killed the park-keeper, held to be murder in all. The law presumes they came with intent to oppose all that should hinder their design. So, if A. begins a riot, which continues for an hour, and then B. is killed by another, it will be murder in A. So, if A. assaults B. to rob him, though without any precedent intention of killing him; yet if in the attempt, whether B. resists or not, A. kills him, it is murder. . . . But to render it murder, the killing must be in pursuit of that unlawful act they were all engaged in. Thus, smugglers assemble to run wool; officers oppose; a smuggler fires a gun and kills another smuggler. If it does not appear that it was leveled at the officers, the other smugglers present are not guilty. For it does not appear it was in prosecution of the purpose for which they assembled. So, divers committing an unlawful act, one of them meets with D. with whom he had a former quarrel, and kills him, the rest are not guilty, for it was not within the compass of their original intention. Three soldiers go to rob an orchard, two get up the tree, the third stands at the gate

401. Id. at 564 (citations omitted). Hawkins is the principal source here.
with a drawn sword; the owner's son comes and seizes him; he stabs him. Those in the tree are not guilty, otherwise, if they had come with a general resolution against all opposers, which may be collected from their number, arms, or behaviour, at, or before. 402

Let us take a hand at construing this difficult paragraph. The first clause of the first sentence, taken in isolation, appears to accept the broad proposition attributed to Coke, that causing death in the course of any unlawful act is murder. Yet the third sentence, which cites Hale, asks us to work out the consequences of a manslaughter in the course of an unlawful act. Clearly not all deaths resulting from crime are murders. So perhaps we should take the first sentence as a whole, stating the much narrower proposition that when a man does an unlawful act like robbery, and he causes death by killing the victim, it is murder. All of the deaths described seem to result from an intentional battery; many seem to be intentional killings. Thus the paragraph seems to be making two claims, one about liability for principals and one about liability for accomplices. The first claim is that one who strikes a fatal blow in overcoming resistance to a crime receives murder liability rather than the manslaughter liability ordinarily meted out to the survivor of a fatal fight. The killer's criminal purpose justifies the victim's resistance and so deprives the killer of a provocation defense. The second claim is that any participant in the crime who agreed to the use of force to overcome resistance is an accomplice in murder if such force causes death. Notice that nothing in the paragraph conditions murder liability on the crime being a felony.

The grand juror manual's final discussion of murder in the course of crime concerned second degree murder:

All murder which follows felonious acts, which were not formerly capital crimes . . ., or in consequence of offensive language, which has been deemed to be no provocation, and the murder not premeditated, or on revenge predetermined; or in consequence of acts prohibited by law, called mala prohibita; in consequence of riots and unlawful assemblies; in consequence of trespasses committed upon the property or possession of another; in all similar cases where it is evident there has been no precedent intention to kill; and more particularly in cases closely bordering on manslaughter, will be but murder in the second degree . . . 403

While this paragraph discussed murder in the course of nonenumerated felonies, it did not quantify all deaths caused in the course of felonies as murders. Instead, it treated murder in the course of nonenumerated felonies in exactly the same way that it treated murder in the course of such other unlawful acts as mala prohibita, riots, and trespasses. It characterized these murders as involving "no precedent intention to kill," but never suggested that second degree murder could be committed with no intent to kill or injure. Like the passages discussed above, this one gave the felonious status of a predicate

402. Id. at 566-67 (citations omitted).
403. Id. at 573.
unlawful act no independent significance.

The first formulation of a felony murder rule in Pennsylvania law came in the 1826 case of *Commonwealth v. Green*, in which the defendant was convicted of second degree murder after fatally shooting one who had earlier assaulted him. The trial court ascribed a felony murder rule to the common law, criticized it as inhumane, and then implied that it had been retained for enumerated felonies and could impose second degree murder liability for killing in the course of some, or even all, other felonies:

Some of [the common law's] . . . features, are . . . hardly accordant with either [reason or humanity]. Among these are the whole doctrine of what may be termed constructive murder, in which a party taking human life is involved in the guilt of murder, when all the circumstances of the homicide, clearly negative any intention to kill. Thus, if in shooting a tame fowl, with intent to steal it, the death of a man accidentally ensues . . . [it is murder] at common law, and punishable with death, and . . . [was] so in Pennsylvania, previous to our act of Assembly.

. . . By the admirable act of 1794, [however,] the whole doctrine of constructive murder, as it may be called, ceased in Pennsylvania, so far as to involve the life of the accused; such murders being nothing more than murders in the second degree. To constitute murder in the first degree, the unlawful killing must be accompanied by a clear intent to take life. . . . In England, if death ensues from any unlawful act of violence, the slayer, although there existed no intention to kill, but only to do bodily harm, is guilty of murder. In Pennsylvania, except in the cases enumerated in the act of Assembly, the malice in any homicide must be directed against the life of an human being, in order to render the slayer guilty of murder in the first degree.

This passage had two important implications: First, some formerly “constructive murder[s]” continued to be murders in Pennsylvania. These possibly included accidental killings in the course of nonviolent felonies (like theft of poultry), but more likely were limited to deaths resulting from “unlawful act[s] of violence,” involving the “intention . . . to do bodily harm.” The second implication was that murder in the course of enumerated felonies did not require “intention to kill” or “malice . . . directed against the life of an human being,” but again, probably required violence and the intent to do bodily harm.

The doctrine of second degree murder liability for unintended killings in the course of nonenumerated felonies was reiterated as dictum in the 1855 case of *Johnson v. Commonwealth*. Yet the case reports do not record a single second degree felony murder conviction in Pennsylvania during the nineteenth

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405. *Id.* at 298-99.
406. 24 Pa. 386 (1855). The *Johnson* opinion also decreed that “a premeditated intention to destroy life is an indispensable ingredient” of first degree murder, *id.* at 389, presumably meaning only of that form of first degree murder requiring “willful, deliberate and premeditated” killing, *id.*
century. Certainly the Pennsylvania courts did not impose second degree murder liability for accidental death in the course of nonviolent felonies. Instead, the Pennsylvania courts imposed second degree murder liability for deaths caused in violently overcoming resistance to a criminal act, whether it was a felony or a misdemeanor. Thus, in the 1844 case of Commonwealth v. Hare,\(^\text{407}\) the court instructed the jury that rioters who fired shots at one another were all guilty of manslaughter if one among them was killed, but second degree murder if an innocent bystander was fatally hit. The court reasoned that the killing of an opponent in a fight was provoked, whereas an innocent bystander could offer no provocation. The intent to do bodily harm would transfer, while the defendant’s “hot blood” would prevent the deliberation required for first degree murder.\(^\text{408}\)

In the companion case of Commonwealth v. Daley, the Court instructed the jury that second degree murder required malice, but that malice included any intended violence and was not restricted to the intent to kill.\(^\text{409}\) As riot was a misdemeanor,\(^\text{410}\) no felony murder rule played a role in either case. Where no enumerated felony was involved, a criminal motive played an indirect role in aggravating the defendant’s liability in nineteenth-century Pennsylvania: precluding justification and provocation,\(^\text{411}\) and possibly aggravating reckless homicide from manslaughter to murder. Felony murder based on nonenumerated felonies remained a myth, a supposed vestige of ancient English law invoked only to emphasize the modernity and humanity of Pennsylvania’s reforms.

By contrast, Pennsylvania courts embraced the doctrine of murder liability for unintended deaths in the course of enumerated felonies. In the 1844 case of Commonwealth v. Flanagan,\(^\text{412}\) an appellate court affirmed a first degree murder conviction, based on a felony murder instruction, for a killing in the course of a burglary. This may be the earliest reported felony murder conviction in American history. This instruction held that

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\text{in cases of homicide committed in the perpetration of certain offences, viz., arson, rape, robbery, burglary, all idea of intention was excluded. The act in which the malefactor was engaged was of such a nature, so deep a crime, involving such turpitude of mind, and protection against which was so}
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\(^{407}\) 4 Pa. L.J. 257 (1844).

\(^{408}\) See Wharton, supra note 347, at 386 (discussing this theory of the case).

\(^{409}\) See Charge of Judge King, on the Trial of John Daley for Murder (1844), reprinted in Wharton, supra note 347, at 466, 474.

\(^{410}\) See Wharton, supra note 347, at 46.

\(^{411}\) According with this rule is Brooks v. Commonwealth, 61 Pa. 352 (1869), in which the defendants intentionally shot and killed the victim in trying to escape a citizen’s arrest for a “robbery” (larceny, in fact). The trial court recognized a right of private citizens to arrest for a felony, and so rejected any defenses of self-defense or provocation. The jury convicted the defendants of first degree murder, on the ground of premeditated intent to kill. An appellate court affirmed, stating that killing in resisting felony arrest is murder.

\(^{412}\) 7 Watts & Serg. 415 (Pa. 1844).
necessary to the peace and welfare of all good citizens, that our Legislature considered the intention as of no consequence, and accordingly decreed death to be the penalty of such offences. . . . [1] If the homicide took place in the commission or attempt to perpetrate any of the . . . offences enumerated . . . , it is . . . murder in the first degree.413

This instruction placed the enumerated felonies in a special category of danger to the "peace and welfare" of the citizenry, justifying the imposition of murder liability without the intention otherwise required, based on an alternative form of culpability: great "turpitude of mind." Thus, the Flanagan court's reasoning was restricted to the enumerated felonies and implied no support for second degree felony murder predicated on nonenumerated felonies.

Felony murder convictions were appealed in eight Pennsylvania cases between the Flanagan decision and the turn of the century. All involved first degree murder convictions predicated on enumerated felonies. Two convictions were overturned on the ground that there was not a tight enough temporal and instrumental connection between the killing and the predicate felony.414 The other six were upheld. Thus, in the 1860 case of Commonwealth v. Miller,415 two men were convicted of murdering a third by drowning him. While the evidence suggested that the victim had been robbed, one of the defendants was convicted of second degree murder, and one of first degree murder. The trial court instructed the jury that "if death ensues in the perpetration or attempt to perpetrate any . . . robbery . . . , the offence is murder of the first degree, and this without regard to the question of how far the parties entered into a conflict . . . ."416 In Commonwealth v. Hanlon,417 the defendant was convicted of first degree murder, on the basis that he killed in perpetration of rape, without regard to his intent. Hanlon strangled his six-year-old victim in the course of a rape producing extensive injuries, but claimed he was only trying to quiet her. In Brown v. Commonwealth,418 the defendant was convicted on a felony murder instruction for bludgeoning his victim during a robbery. The instruction did not restrict the felony murder rule to enumerated felonies: if killing "was done in the perpetration of some felony . . . the law implies malice

413. Id. at 418.
414. Kelly v. Commonwealth, 1 Grant 484, 487-88 (Pa. 1858) (holding that evidence did not establish the killing had taken place during attempted rape, and that had the state established this connection, it would not have had to prove any "specific intent to kill"); Rhodes v. Commonwealth, 48 Pa. 396, 399-400 (1864) (noting that the defendant was shown to have burglarized the victim's house and killed her about a quarter of a mile away, but that there was insufficient proof that the killing was in perpetration of robbery).
416. Id. at 196. The court instructed on other theories of murder as well, and it is impossible to tell whether the jury convicted one defendant of first degree murder on the basis of the robbery, or on the premise that the killing was premeditated. Id. at 210.
418. 76 Pa. 319 (1874).
and the killing is murder." In *Commonwealth v. Manfredi*, the defendant broke into his victim's home and shot his victim fatally in the chest in the course of a struggle. The Pennsylvania Supreme Court affirmed a conviction on an instruction that a killing in the course of burglary or robbery is murder in the first degree. In *Commonwealth v. Eagan*, the defendants fatally beat, bound, and gagged an intended robbery and burglary victim, but were frightened from the scene before taking any money or entering his house. The Pennsylvania Supreme Court upheld a first degree murder conviction on the grounds that the acts causing death were committed in the attempt to perpetrate robbery and burglary, and that the killing was also premeditated. Finally, in *Commonwealth v. Epps*, the defendant strangled a robbery victim in her home, with an accomplice. The Pennsylvania Supreme Court affirmed the defendant's first degree murder conviction, reasoning that "whether it was his intent to kill the victim he had robbed was wholly immaterial; the killing occurred in the perpetration of a robbery by him . . . ."

While courts in these cases repeatedly emphasized that intent to kill was not required for first degree murder liability in the course of enumerated felonies, none of these cases involved what we might call accidental death. All of these deaths resulted from batteries engaged in to kill, injure, or overcome a victim by force. These killings would certainly have been manslaughter at least, without the enumerated felony. If unprovoked, such killings might have been considered second degree murders without any felony murder rule. And if committed in overcoming resistance to a crime of any degree, such killings could not have been considered adequately provoked. In sum, the Pennsylvania legislature accepted, and the Pennsylvania courts enforced, traditional English rules that an unprovoked intent to do bodily harm sufficed as the mental element of murder, that such an intent could transfer to an unintended victim, and that a criminal motive barred mitigation on the ground of provocation. The Pennsylvania legislature reduced such murder liability for unintended killing to noncapital murder, except when committed in the course of enumerated felonies. The Pennsylvania courts interpreted the statute to eliminate any requirement of intent for first degree felony murder, although in practice they confined the element of killing to causing death by a battery, a blow committed with the intent to do bodily harm. A felonious motive, as such, had no significance in Pennsylvania homicide law. What mattered was the motive to commit an enumerated felony, characterized by great danger and moral turpitude.

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419. *Id.* at 330.
420. 29 A. 404 (Pa. 1894).
421. 42 A. 374 (Pa. 1899).
422. 44 A. 570 (Pa. 1899).
423. *Id.* at 571.
B. The Pennsylvania Model in Other States

In 1796 Virginia adopted a comprehensive criminal code based on Thomas Jefferson’s draft, first proposed in 1779. Jefferson’s draft, which explicitly disapproved the felony murder rule, was rejected by the Virginia legislature by one vote in 1786. The 1796 draft that passed the legislature replaced Jefferson’s murder provisions with the Pennsylvania formula. The Pennsylvania statute was also adopted by Kentucky from 1798 to 1801; Maryland in 1810; Louisiana, which entered the Union with it in 1812 and retained it until 1855; Michigan in 1838; Arkansas in 1838; New Hampshire in 1842; and Connecticut in 1846. West Virginia entered the Union with Virginia’s statute in 1863. Substantially similar statutes were adopted in Tennessee in 1829, Delaware in 1852, and Massachusetts in 1858, differing only in their list of enumerated predicate felonies for first


428. Act of July 3, 1805, ch. 4, § 1, 1805 Terr. of Orleans Acts 36, 36-37. This statute differed slightly from the Pennsylvania statute in providing that the definition of all offenses, including murder, would be provided by the common law of England. The division of murder into degrees was repealed in 1855, leaving the definition of murder entirely to the common law of England. See Act of Mar. 14, 1855, no. 120, 1855 La. Acts 130; see also Louisiana v. Mullen, 14 La. Ann. 570 (1859).


degree murder. Kansas, upon admission in 1861, and North Carolina in 1893, adopted statutes grading murder in the first degree when committed on the basis of any felony. This section will review the application of these Pennsylvania-influenced felony aggravator statutes.

Felony murder liability was imposed very rarely during the nineteenth century in the states adopting enumerated felony aggravator statutes. Courts approved the doctrine in Virginia, Tennessee, New Hampshire, Arkansas, Michigan, and Massachusetts before the Civil War, but only Tennessee actually applied it during this period. The doctrine was not actually applied until after the Civil War in New Hampshire, Delaware, and Massachusetts, and not until the last decade of the nineteenth century in Virginia, Michigan, North Carolina, and Connecticut. Maryland and Kansas courts never endorsed or applied a felony murder rule during the nineteenth century. Arkansas never applied it, and Louisiana neither applied nor approved such a rule until after repealing its grading statute. West Virginia never applied it during the nineteenth century but perhaps inherited Virginia's approval of it. Kentucky kept the Pennsylvania grading structure for only three years and had no felony murder cases in that brief time. On the other hand, not a single state with a Pennsylvania-style felony aggravator statute explicitly rejected felony murder liability. In all, there were eleven reported felony

437. See Act of Feb. 3, 1859, ch. 28, §§ 1-2, 1859 Kan. Laws 231, 231 (implementing a Pennsylvania grading statute, but with "arson, rape, robbery, burglary, or other felony" giving rise to first degree murder); KAN. GEN. LAWS ch. 33, § 1 (1862) (same). Kansas entered the Union in 1861.

438. Act of Feb. 11, 1893, ch. 85, 1893 N.C. Laws 76; Act of Mar. 4, 1893, ch. 281, 1893 N.C. Laws 228. Prior to 1893, North Carolina legislation left murder undefined. See, e.g., Act of Dec. 23, 1817, ch. 18, 1817 N.C. Laws 18, 18-19 (stating that the killing of slaves "shall partake of the same degree of guilt when accompanied with the like circumstances that homicide now does at common law").


446. State v. Pike, 49 N.H. 399 (1869).


451. State v. Covington, 23 S.E. 337 (N.C. 1895); see also State v. Gadberry, 23 S.E. 477 (N.C. 1895). In Gadberry, the defendant abducted a child and shot her in the back at point-blank range to prevent her from getting away. Conceding that these circumstances could support first degree murder, the court overturned the conviction on a procedural point.

452. State v. Cross, 46 A. 148 (Conn. 1900).
murder convictions in these states during the nineteenth century. Seven of these were first degree murder convictions based on the enumerated felonies of robbery and rape. One was a first degree murder conviction predicated on theft in a jurisdiction that aggravated murders in the course of all felonies to first degree. The facts in this case would also have supported robbery or burglary under modern law: the defendant shot and killed a shopkeeper while breaking into his store to steal.

Courts in six of the states (Delaware, Massachusetts, Michigan, New Hampshire, Tennessee, and Virginia) appeared to endorse predicking second degree murder on nonenumerated felonies, but only Tennessee and Delaware did so. In the Tennessee case, the predicate felony was attempted murder of a different victim. In one of the two Delaware cases, the predicate felony was robbery, an enumerated felony in most other states. In the other Delaware case, the predicate felony was abortion.

Several courts rooted the authority of felony murder rules of varying scope in the English common law. Opinions in the 1828 Virginia case of Whiteford v. Commonwealth and the 1892 Delaware case of State v. Lodge both invoked Coke's claim that killing accidentally in shooting at poultry in order to steal it was murder at common law. In the 1849 case of State v. McNab, the

453. Bratton v. State, 29 Tenn. (10 Hum.) 103, 109 (1849); State v. Pike, 49 N.H. 399 (1869); State v. Boice, 1 Houst. Crim. Cas. 355 (Del. Ct. Oyer & Terminer 1871); Pemberton, 118 Mass. at 43-44; Poe v. State, 78 Tenn. 673 (1882); Willett, 62 N.W. 1115 (Michigan); State v. Lodge, 33 A. 312 (Del. Ct. Oyer & Terminer 1892); Robertson, 20 S.E. 362 (Virginia); Commonwealth v. Gilbert, 165 Mass. 45 (1895); Covington, 23 S.E. 337 (North Carolina); Cross, 46 A. at 148 (Connecticut).

454. Pike, 49 N.H. 399; Pemberton, 118 Mass. at 43-44; Poe, 78 Tenn. 673 (predicating murder on the enumerated felonies of “robbery” or “theft” rather than burglary, in a situation where the defendants shot two witnesses who surprised them exiting a store they had broken into and stolen from, presumably because the break-in was not in a dwelling); Robertson, 20 S.E. 362 (Virginia).

455. Willett, 62 N.W. 1115 (Michigan); Gilbert, 165 Mass. 45; Cross, 46 A. 148 (Connecticut).


457. Lodge, 33 A. 312.


463. Bratton, 29 Tenn. (10 Hum.) 103.


466. 27 Va. (6 Rand.) 721.

467. 33 A. 312.

468. 20 N.H. 160 (1849).
New Hampshire Supreme Court invoked the authority of Russell and East in support of a felony murder rule. In the 1875 Massachusetts case of Commonwealth v. Pemberton, the court cited Hawkins for the proposition that “at common law, where the homicide happens ‘in the execution of a deliberate purpose to commit any felony,’ it is murder, as, ‘where one sets upon a man to rob him, and kills him in making resistance.’”469 In the 1858 case of People v. Potter, the Michigan Supreme Court wrote that Michigan retained the “common law” definition of murder, according to which “if death ensued from an act accompanying an unlawful collateral act . . . the killing would be murder . . . .”470

On the other hand, some courts rooted felony murder rules in the felony aggravator provisions themselves. Thus, opinions in the 1829 Virginia case of Commonwealth v. Jones,471 the 1849 Tennessee case of Bratton v. State,472 and the 1850 Arkansas case of Bivens v. State473 read felony aggravator provisions to obviate proof of intent to kill. The 1882 Connecticut decision in Smith v. State viewed the felony aggravator clause as a source of “implied malice” attending killings in the course of enumerated felonies.474 Other opinions read felony aggravator provisions to authorize reception of a common law rule. In the 1869 New Hampshire case of State v. Pike, the court reasoned:

The term ‘murder’ in sec. 1, ch. 264, Gen. Stat., is intended to include all kinds of unlawful killing which were murder at common law . . . . At common law the killing of a man while the slayer was engaged in perpetrating a robbery was murder.

The legislature did not intend that this species of killing should be murder of the first degree only when accompanied by a deliberate, premeditated, design to kill; for if such a design had been a necessary ingredient to constitute murder of the first degree, the latter part of section first would not have been added.475

In the Massachusetts case Commonwealth v. Chance, Justice Holmes said of his state’s felony aggravator provision:

[The]most authoritative statements of the common law . . . recognize that an accidental homicide may be made murder if it occurs in the course of an attempt to commit a felony . . . . Although the proposition has received severe and well known criticisms . . . . it would be hard to overrule it in view of the section of the Public Statutes to which we may have referred.476

Of course, as we have seen, neither the common law nor the language of

469. 118 Mass. 36, 43-44 (1875) (quoting Hawkins).
470. 5 Mich. 1, 7 (1858).
471. 28 Va. (1 Leigh) 598 (1829).
472. 29 Tenn. (10 Hum.) 103, 109 (1849).
473. 11 Ark. 455, 459 (1850).
474. 50 Conn. 193, 197 (1882).
475. 49 N.H. 399, 403 (1869).
476. 54 N.E. 551, 552 (Mass. 1899).
felony aggravator statutes required felony murder liability. Certainly these sources could provide little guidance on the scope of such liability. Thus we might hope to find courts in these jurisdictions attempting to justify felony murder liability and delineate its scope. Only a few courts did so, however. In an 1859 decision the Michigan Supreme Court explained that

where, in the attempt to commit some other offense which is malum in se and not merely malum prohibitum, human life is taken without an express design to take it, . . . the crime is held to be murder, because resulting from the same species of depravity or maliciousness which characterizes that offense when committed designedly. 477

This dictum appeared to condition murder liability on the degree of malignancy or depravity of motive revealed by the predicate offense, rather than its felonious character. Yet a later Michigan decision treated a felonious motive as inherently malicious, while reasoning that a misdemeanor could be malicious if very dangerous. 478

Two Massachusetts decisions offered a fuller account of the kind of depraved or malicious motive that could substitute for intent to kill. The 1875 decision in Commonwealth v. Pemberton treated killing the resisting victim of a robbery as a paradigm case of malice implied by a felony:

In such a case the presumption of malice is not rebutted even if the circumstances show a desire on the part of the assailant not to kill. . . . If the purpose of the defendant was to commit robbery, and if in the execution of that purpose, and in order to overcome the resistance and silence the outcries of the victim, he made use of violence that caused her death, no further proof of premeditation or of wilful intent to kill is necessary. Robbery committed by force and violence, and in spite of all resistance, is of course malicious, and if in the perpetration of that crime the person robbed is killed, it is a killing with malice aforethought; in other words, it is murder, and by the express terms of the statute, it is murder in the first degree. 479

Here the deliberate use of violence to overcome the will of the victim made the felony murder “malicious” in the absence of intent to kill. A similar account of implied malice appeared in the jury instructions in the 1895 case of Commonwealth v. Gilbert, 480 where the defendant had raped and killed a nine-year-old girl. The court emphasized the felon’s pursuit of his unlawful end in reckless disregard of the will and welfare of his victim:

[T]he word ‘malice’ . . . includes not only anger, hatred, revenge, which are sometimes spoken of as express malice, but also every other unlawful and unjustifiable motive. The wilful purpose of carrying out one’s own determinations without any regard for the rights of others is enough of itself in
the meaning of the law to constitute malice. This word comprehends every unlawful motive, every wicked intent or mischievous purpose. Any taking of human life with such an unlawful purpose or from such an unlawful motive is, accordingly, malicious.

... [Did] this defendant ... take the life of this girl ... while engaged ... in the prosecution of his own unlawful ends, without regard, with a wanton disregard, of her rights? ... If ... [he] did, why then he has murdered her. 481

These few cases do not tell us the scope and meaning of felony murder liability in the felony aggravator jurisdictions that imposed it. But they do accord with the facts that liability was imposed rarely, and usually for enumerated felonies involving the violent coercion of the victim.

C. The Pennsylvania Model Modified: Felony Aggravator Statutes with Culpability

Several states adopted Pennsylvania's grading scheme, but added an explicit definition of the mental element of murder. These states were Ohio, beginning in 1815; Maine, beginning in 1840; Iowa, beginning in 1851; Indiana, beginning in 1852; Nebraska, beginning in 1873; Washington, entering the Union with such a statute in 1889; and Wyoming, entering the Union with such a statute in 1890.

By defining the mental element of murder, these statutes forced courts to explain how any homicide punished as murder exhibited the required mental states. This did not necessarily preclude applying a felony murder rule, since courts could characterize a felonious motive as supplying the requisite culpability. But the need to link killing in the context of crime to a specific mental state put pressure on courts to develop moral and psychological rationales for felony murder liability, and to conform the scope of felony murder liability to the limits of these rationales.

Whether the attempt of some or all felonies supplied the requisite culpability for murder was a question that would be answered differently in different states. The diversity of views is illustrated by the diametrically opposed interpretive approaches taken in the first two states to adopt such statutes: Ohio, which rejected felony murder altogether, and Maine, which imposed both first and second degree felony murder liability.

Ohio adopted its modified version of Pennsylvania's grading statute in 1815,482 and its courts ultimately construed this formula as precluding a felony

481. Id. at 49-50.

murder rule. The Ohio statute provided "[t]hat if any person shall purposely, of deliberate and premeditated malice, or in the perpetration or attempt to perpetrate any rape, arson, robbery or burglary, kill another, every such person . . . shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death." Second degree murder was defined as killing "purposely and maliciously, but without deliberate and premeditated malice." In the 1857 case of Robbins v. State, the Ohio Supreme Court held that, as defined by this statute, both first and second degree murder required intent to kill. This is explicit in the second degree murder provision. The court argued that this fact, combined with the placement of the comma immediately after "purposely" in the first degree murder provision, required reading that provision as requiring purpose both for premeditated murder and for murder in the course of the enumerated felonies. Four other states adopted Ohio's formulation of the law of murder—Indiana, Nebraska, Washington, and Wyoming—but only Ohio explicitly repudiated the felony murder rule in all cases.

Indiana adopted first and second degree murder provisions in 1852 that were almost identical to Ohio's. Thus Indiana, like Ohio, clearly required intent to kill for second degree murder. This was confirmed by the 1856 case of Reed v. State, which held that the unintended killing of one man in the attempt to murder another could not be murder, because murder was not an enumerated predicate felony.

Yet Indiana's first degree provision had no comma after the word "purposefully," which suggested that the attempt of an enumerated felony or the use of poison might substitute for purpose as well as premeditation in supplying the mental element of first degree murder. The 1855 case of Stocking v. State upheld a murder conviction on an instruction that "to kill a man purposely, and with premeditated malice, or to kill a man in the commission or in the attempt to commit a crime—a robbery or an arson—is murder in the first degree." The defendant and his accomplices had, after a robbery and assault, returned to strike more blows against their prostrate victim, and then set the building where the robbery occurred on fire and left the victim to burn. Although the killing was clearly purposeful, the decision established that

484. Id. § 3. An 1835 revision of the first degree murder statute added poisoning to the enumerated felonies and added the word "and" immediately before the phrase "of deliberate and premeditated malice." Act of Mar. 7, 1835, § 1, 1834-1835 Ohio Acts 33, 33.
485. 8 Ohio St. 131 (1857).
486. Id. at 176-77.
487. 2 IND. REV. STAT. pt. 3, ch. 5, §§ 2, 7 (1852).
488. 8 Ind. 200, 200-01 (1856).
489. "Purposefully" appeared in Indiana's statute where "purposely" appeared in Ohio's.
490. 7 Ind. 326, 331 (1855).
purpose was unnecessary for first degree murder when the killing was pursuant to an enumerated felony.

The authority of this first degree felony murder rule was confirmed in the 1876 case of Bissot v. State,\textsuperscript{491} in which burglars returned fire from a watchman, killing him. The Indiana Supreme Court defined the scope of this rule quite broadly:

The intention of the legislature, in enacting the section, was, doubtless, to class certain homicides in the highest degree of murder without containing the ingredient of premeditation, malice, or intention, which otherwise could not possibly be of a higher degree than manslaughter, and, in many cases, might not amount to criminal homicide at all. In this case, take away the elements of burglary which surround it, and the prisoner might plausibly contend that he had committed nothing more than excusable homicide; for it appears that the deceased shot at him first, and thus put his life in immediate jeopardy. It could not be higher than manslaughter, at most; and in such cases it might be accidental, and then, if held not to be "in the perpetration" of the burglary, would be excusable.\textsuperscript{492}

The court reiterated this sweeping rule four years later in Moynihan v. State,\textsuperscript{493} affirming the first degree murder conviction of a robber who fatally beat his victim. The court upheld an instruction that no intent to kill is required for felony murder, and that an arsonist unaware of a victim inside a building he torched would be guilty of first degree murder.\textsuperscript{494} The court based this conclusion not on the language of the statute, but on the "depravity" of those felonies. On this basis, the court distinguished felony murder from murder by poison, even though both forms of murder appeared in the same clause and bore the same grammatical relationship to the term "purpose." The court required purpose to kill for murder by poison, but not for felony murder:

By the innocent administration of poison no penal law is violated, no moral turpitude is shown. To hang a man for such a mistake, or incarcerate him for life, is a barbarity not inflicted by the law of any civilized and enlightened people.

The case, however, is entirely different where a homicide is committed in the perpetration of, or the attempt to perpetrate, a rape, arson, robbery, or burglary. The perpetration of, or the attempt to perpetrate . . . these offences, involves great moral depravity and an utter disregard of the rights of person and property . . . . The party who perpetrates, or attempts to perpetrate, [one of] those offences, intends a great wrong in the commission of the offence, and if death ensue he must take the consequences which result.\textsuperscript{495}

This reasoning also explained Indiana's disparate standards for murder in the course of enumerated and nonenumerated felonies, whereas the Ohio courts

\textsuperscript{491} 53 Ind. 408 (1876).
\textsuperscript{492} Id. at 412.
\textsuperscript{493} 70 Ind. 126 (1880).
\textsuperscript{494} Id. at 127-28.
\textsuperscript{495} Id. at 130.
required purpose to kill for both.

In 1873 Nebraska adopted the entire Ohio criminal code, including its definitions of first and second degree murder. The Nebraska courts did not consider the implications of this statute for felony murder until 1897. In *Henry v. State*, while overturning a first degree murder conviction on other grounds, a court approved an instruction permitting first degree murder if the defendant "unlawfully, purposely, and of deliberate and premeditated malice," or, in the perpetration or attempt of robbery or burglary, "unlawfully" killed the victim. The court seemed unaware of the construction of the same statute in Ohio. Later that year, however, *Morgan v. State* explicitly considered the precedent of *Robbins* in a case involving the killing of an eleven-year-old girl in the course of rape. Affirming a first degree murder conviction, the court overruled *Robbins* as authority in Nebraska, noting that many other states had read felony murder rules into felony aggravator statutes. The court quoted at length from Stephen's opinion in *Serné*, endorsing his proposition that "death resulting from a known dangerous act, done in the commission of a felony" is murder. The court found particularly pertinent to the case Stephen's example of a rapist strangling a victim while attempting only to overpower or silence her, and without intent to kill; it also noted Stephen's comment that "[i]f a man once begins attacking the human body in such way he must take the consequences if he goes further than intended when he began." This reliance on *Serné* suggests that the *Morgan* court required some measure of recklessness for felony murder, perhaps seeing such recklessness as implicit in the enumerated felonies of robbery, rape, and arson; or perhaps conditioning the concept of killing on great violence. As in Ohio and Indiana, the Nebraska statute clearly precluded second degree felony murder.

Washington also adopted Ohio's murder and manslaughter provisions, including its explicit rejection of second degree felony murder. First degree felony murder liability was imposed in the 1895 case of *State v. Myers*, where the victim died in a hotel fire set by the defendant. Surprisingly, the defendant failed to cite *Robbins* or argue that first degree murder required purpose to kill.

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496. *See Neb. Gen. Stat.* ch. 58, pt. 1, ch. 2, §§ 3-4 (1873); *see also id.* § 5 ("If any person shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, every such person shall be deemed guilty of manslaughter . . . .").
497. 70 N.W. 924, 924 (Neb. 1897).
498. 71 N.W. 788 (Neb. 1897).
499. *Id.* at 794.
500. *Id.*
501. *Id.* at 794-95 (quoting *R. v. Serné*, 16 Cox's Crim. L. Cas. 311 (Cent. Crim. Ct. 1887)).
503. 40 P. 626 (Wash. 1895).
Wyoming’s first murder statute was Indiana’s variation on the Ohio statute. Thus, it explicitly rejected second degree felony murder, and could be read to endorse or reject first degree felony murder. But as there were no reported felony murder cases in Wyoming before the end of the nineteenth century, it cannot be said that Wyoming had a felony murder rule at that time.

Maine, in 1840, adopted a statute which defined murder as “the unlawful killing of a human being, with malice aforethought, either express or implied . . . .” The statute added that “[w]hoever shall commit murder with express malice aforethought, or in perpetrating or attempting to perpetrate any crime, punishable with death, or imprisonment . . . for life, or for an unlimited term of years, shall be deemed guilty of murder of the first degree . . . .” All other murder was deemed second degree. By including the phrase “implied malice,” and by eschewing the term “purpose,” the Maine statute offered a more hospitable home for a felony murder rule than did the Ohio statute. In the 1851 case of State v. Smith, a Maine court instructed the jury that this statute imposed murder liability for unintended “killings” in the course of any felony. The court offered, as an example of such an unintended killing, death resulting from a blow struck with a deadly weapon in overcoming resistance to a robbery. The court added that “[a]s the wilful causing of an abortion is ‘punishable in the state prison,’ it is a felony; and if, in the perpetration of that offence, a killing occurs, the malice, making it murder in the second degree, may be implied.”

Iowa adopted the Pennsylvania language with respect to the grading of murder in 1851. Yet the Iowa murder provision, like the Maine statute, also defined murder as killing “with malice aforethought either express or implied . . . .” The most extensive discussion of the law of first degree felony murder was in dictum in the 1883 case of State v. Wells. Here the defendants had fatally drugged a guard in effectuating escape from a jail. They were convicted of first degree murder on a theory of death from poisoning rather than death in the course of a felony. But in determining that murder through the use of poison required only a “bad motive” rather than intent to kill, the court reasoned:

It has been held under similar statutes that, where murder is committed in the perpetration of rape or robbery, it is not essential that there should be

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504. See Act of Mar. 14, 1890, ch. 73, §§ 13, 16, 1890 Wyo. Terr. Laws 127, 129 (containing no comma after “purposely”); see also id. § 17.
505. ME. REV. STAT. ch. 154, § 1 (1840).
506. Id. § 2.
507. 32 Me. 369 (1851).
508. Id. at 373-74.
509. IOWA CODE §§ 2569, 2570 (1851).
510. Id. § 2568.
511. 17 N.W. 90 (Iowa 1883).
512. Id. at 93.
established that there was a specific intent to kill. It is sufficient if death ensues from violence inflicted when the defendant is engaged in the commission of the offenses named.\textsuperscript{513}

So felony murder required violence inflicted for a felonious motive. Iowa used such a standard in convicting two robbers of first degree felony murder during the 1880s.\textsuperscript{514}

Two Iowa cases considered the problem of accomplice liability for felony murder. The 1859 case of \textit{State v. Shelledy} approved an instruction, based on Story's dictum in \textit{Ross}, that would have imposed liability on cofelons for all "collateral[]" deaths.\textsuperscript{515} \textit{Shelledy} was not in fact a felony murder case, however. In the 1895 case of \textit{State v. Weems}, the court disapproved an instruction that

\begin{quote}
[i]f two or more persons conspire or confederate together to commit an unlawful act, and, in pursuit of such conspiracy and commission of such unlawful act, such persons, or either of them, aided and abetted by the other, takes the life of or kills a human being, such taking of life is murder.\textsuperscript{516}
\end{quote}

Nevertheless, the court upheld a first degree murder conviction because it was clear that the unlawful act in question was the felony of robbery.\textsuperscript{517} Thus, \textit{Weems} suggested that an accomplice is guilty of murder only if he or she aids or abets another to "kill" in "pursuit" of a felony, rather than aiding or abetting another to commit a felony that coincidentally causes death.

The scope of predicate felonies for second degree felony murder liability in Iowa was considered in a series of cases on the problem of illegal abortion resulting in the death of the pregnant woman. In the first of these, the 1868 case of \textit{State v. Moore},\textsuperscript{518} the court upheld a second degree murder conviction, even though abortion was only a misdemeanor, because the act causing death was both unlawful and dangerous to life. Two later cases upheld second degree murder convictions after abortion had been graded a felony.\textsuperscript{519}

This Part has examined the application of felony aggravator statutes defining murder by reference to some form of culpability. Such a combination of an enumerated felony grading provision with a requirement of purpose or malice creates an indeterminate text. States adopting such statutes embraced disparate interpretations. Ohio and Wyoming recognized no felony murder rule and imposed neither first nor second degree felony murder liability. Indiana, Nebraska, and Washington confined felony murder to felonies enumerated by

\begin{itemize}
\item \textsuperscript{513} \textit{Id.} at 92.
\item \textsuperscript{514} \textit{State v. Wiese}, 4 N.W. 827 (Iowa 1880); \textit{State v. Johnson}, 34 N.W. 177 (Iowa 1887).
\item \textsuperscript{515} 8 Iowa 477, 505 (1859).
\item \textsuperscript{516} 65 N.W. 387, 394 (Iowa 1895).
\item \textsuperscript{517} \textit{Id.}
\item \textsuperscript{518} 25 Iowa 128, 134 (1868).
\item \textsuperscript{519} \textit{State v. Leeper}, 30 N.W. 501 (Iowa 1886); \textit{State v. Minard}, 65 N.W. 147 (Iowa 1895).
\end{itemize}
statute. Maine and Iowa equated felonious motive with "implied malice" and approved both first and second degree murder liability. In general, felony murder liability was imposed infrequently in these states. First degree felony murder liability was imposed in eight reported cases, five based on robbery (one of these also involving arson), and one each based on arson, rape, and burglary. Second degree felony murder was imposed in three reported cases, all involving illegal abortion.

D. Summary

In all, twenty-two states had felony aggravator statutes in force during some part of the nineteenth century, without statutory felony murder rules. In fourteen of these jurisdictions, courts created felony murder rules through statutory interpretation, imposing felony murder liability in a total of twenty-nine reported cases. Only four jurisdictions imposed second degree felony murder liability for killing in the course of nonenumerated felonies, in a total of six reported cases. Many courts rested the authority of first degree felony murder liability on statutory felony aggravator provisions. A number of courts explained the imposition of felony murder liability for killings in the course of enumerated felonies by asserting the special "depravity" or dangerousness of these crimes. Some particularly emphasized the exploitative character of robbery and rape, which endanger their victims while appropriating them as instruments of the perpetrator's will.

In addition to these limits on the predicate felonies, some courts appeared to restrict felony murder to causing death by "violent" acts, or attempts to

520. These states were Arkansas, Connecticut, Delaware, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Nebraska, New Hampshire, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, Washington, West Virginia, and Wyoming.

521. These jurisdictions—and the years in which their courts created the rules—were Pennsylvania (1844), Tennessee (1849), Maine (1851), Indiana (1855), New Hampshire (1870), Delaware (1871), Massachusetts (1875), Iowa (1880), Virginia (1894), Michigan (1895), North Carolina (1895), Washington (1895), Nebraska (1897), and Connecticut (1900). One additional jurisdiction, Arkansas, approved such liability in dictum, without ever applying it.

522. These were Delaware, Iowa, Maine, and Tennessee.


524. See Flanagan, 7 Watts & Serg. at 418 (Pennsylvania); People v. Scott, 6 Mich. 287, 293 (1859); Moynihan v. State, 70 Ind. 126, 130 (1880).

commit bodily harm. Application of felony murder rules in felony aggravator states generally conformed to this restriction. Exceptions were four second degree murder convictions predicated on abortion, and one first degree murder conviction predicated on the obviously reckless felony of arson.

Courts in felony aggravator jurisdictions had little to say on the question of accomplice liability for felony murder. The Pennsylvania grand juror manual appeared to condition accomplice liability for murder in the course of crime on agreement to use deadly force against resisters. One Iowa court suggested that any killing in the course of a felony would implicate all cofelons in murder, while another implied that the accomplice must aid or abet a killing in furtherance of the felony to be liable for it.

VI. FELONY MURDER STATUTES

The majority of reported decisions imposing felony murder liability during the nineteenth century were made pursuant to felony murder statutes. Nineteen states enacted such statutes during the nineteenth century, imposing felony murder liability in fifty-three reported cases.

Most felony murder statutes defined murder by reference to malice, express or implied. These statutes added, in a separate provision, that involuntary killings in the commission of felonies were murder rather than manslaughter or some other form of homicide. Several other statutes simply defined murder as including killings in the commission of a felony “without design to effect death,” or without “purpose and malice.” Some of these statutes, however, graded felony murder as murder in the third degree, only a bit more punishable than manslaughter. A few statutes predicated felony murder only on dangerous felonies. This Part describes these statutes and their application in the courts.

A. Implied Malice Felony Murder Statutes

Ten states enacted statutes combining felony murder provisions with a requirement of “malice, express or implied.” Several states followed Illinois in defining implied malice by reference to Foster’s phrase “abandoned and malignant heart.” Another group followed California in adding Pennsylvania’s grading provision to the Illinois formula. Finally, Texas eschewed the “abandoned and malignant heart” phrase, added Pennsylvania’s grading provision, and also added a provision transferring intent among felonies.

526. See, e.g., Green, 1 Ashmead at 298-99 (Pennsylvania); Pemberton, 118 Mass. at 43-44; State v. Wells, 17 N.W. 90, 92 (Iowa 1883).
528. State v. Shelledy, 8 Iowa 477, 505 (1859).
Implied malice felony murder statutes account for thirty of the reported felony murder convictions in America during the nineteenth century, although twenty-two of these occurred in Texas alone.

1. The Illinois model: “Abandoned and malignant heart”

Illinois’s 1827 statute defined murder as unlawful killing “with malice aforethought, either express or implied,”\(^\text{530}\) with express malice being the “deliberate intention” to kill\(^\text{531}\) and implied malice existing “where no considerable provocation appears, or where all the circumstances of the killing show an abandoned and malignant heart.”\(^\text{532}\) The felony murder rule appeared in the definition of involuntary manslaughter, as a felony exception to an unlawful act manslaughter rule:

> Involuntary manslaughter, shall consist in the killing of a human being, without any intention to do so, but in the commission of an unlawful act, or a lawful act, which probably might produce such a consequence in an unlawful manner: Provided, always, That where such involuntary killing shall happen in the commission of an unlawful act which in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offence shall be deemed and adjudged to be murder.\(^\text{533}\)

Illinois’s felony murder provision received no judicial definition before the 1880s.\(^\text{534}\) When the Illinois Supreme Court applied the felony murder statute, however, it held that felony murder liability required that the predicate felony involve danger or violence. In this way the court honored the statutory requirement that unintended murder manifest an abandoned and malignant heart.

In the 1879 case of *Lamb v. People*,\(^\text{535}\) a policeman was shot by one of a group of burglars unloading their stolen goods at a pawnshop after the burglary. The defendant successfully established that accessorial liability for felony murder required (1) aiding or encouraging the homicide, (2) agreeing to a criminal plan likely to involve the taking of life, or (3) encouraging the taking of life on some contingency. The court reasoned:

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531. *Id*. § 23.
532. *Id*. § 24.
533. *Id*. § 28.
534. However, an 1854 case addressed the issue of accessorial murder liability for a killing in the course of an unlawful act. The court held that one is guilty of homicide if he intentionally encourages or aids an unlawful act which causes death, whether or not he intends the death. This case involved participants in a fatal beating by a mob. The resulting homicide was graded a murder, not because the beating was felonious (it was not), but apparently because it was dangerous and violent, or involved the intent to injure. *Brennan v. People*, 15 Ill. 511, 516-17 (1854).
535. 96 Ill. 73 (1879).
[W]here [the accused] has entered into a conspiracy with others to commit a felony or other crime, under such circumstances as will, when tested by experience, probably result in the unlawful taking of human life, he must be presumed to have understood the consequences which might reasonably be expected to flow from carrying into effect such unlawful combination, and also to have assented to the doing of whatever would reasonably or probably be necessary to accomplish the objects of the conspiracy, even to the taking of life. But further than this the law does not go . . . .

. . . . [T]he criminal liability of the accused in this case turns altogether upon whether the agreement between the conspirators to conceal and dispose of the stolen goods at the time, place, and in the manner proposed, constituted an enterprise of such dangerous character as to render the unlawful taking of life probably necessary in carrying it into execution.

[1]f the unlawful act agreed to be done is dangerous or homicidal in its character, or if its accomplishment will necessarily or probably require the use of force and violence, which may result in the taking of life unlawfully, every party to such agreement will be held criminally liable for whatever any of his co-conspirators may do in furtherance of the common design, whether he is present or not. 536

The court cited the English cases of Horsey, which conditioned felony murder liability on the foreseeability of the death, and Lee, which conditioned felony murder liability on intent to commit violence. 537

In the 1884 case of Adams v. People, 538 the defendants robbed victims at gunpoint and forced them to jump from a moving train, resulting in one victim striking his head and dying. The defendants appealed the trial court's refusal to instruct jurors that murder liability required that the defendants intended to kill "or that the killing was the probable and reasonable result of such jump." 539

The court responded that death need not have been probable so long as it was a substantial risk imposed on the victim for the purpose of harming him. The court understood felony murder to require both indifference to a danger of death and a cruel motive:

Intent to kill does not enter into the definition of murder. It is enough if the unlawful killing be with malice aforethought, either express or implied. Nor was it essential that death should have been the probable and reasonable result of the act which the defendants forced the deceased to do. It is sufficient that death or great bodily harm was the natural result . . . . Malice may be proved by evidence of gross recklessness of human life, where, in any manner, the life of another is knowingly, cruelly and grossly endangered, whether by actual violence, or by inhuman privation or exposure, and death is caused thereby. Malice may be inferred where an act unlawful in itself is done deliberately, and with intention of mischief or great bodily harm to those on whom it may

536. Id. at 82-83.
537. Id. at 84.
538. 109 Ill. 444 (1884).
539. Id. at 449.
chance to light, and death is occasioned by it.\textsuperscript{540} Adams was decided the year after another case defining abandoned and malignant heart murder by reference to recklessness combined with the intention to produce mischief or harm.\textsuperscript{541} The court in Adams, by using these same phrases, conditioned the felony murder liability implied by the statutory definition of manslaughter on the abandoned and malignant heart required in the definition of implied malice. Adams was the only reported decision imposing felony murder liability in Illinois during the nineteenth century.

Georgia in 1833 adopted statutory language almost identical to that of Illinois, but with a minor difference: instead of excepting from involuntary manslaughter unintended killings in pursuit of felonious intent, it excepted killings in pursuit of riotous intent, or a crime punishable by imprisonment or death.\textsuperscript{542} The Georgia statute was applied only once in a reported case during the nineteenth century. In the 1860 case of McGinnis v. State, the trial court defined riot as a “violent” act committed by two or more persons, and instructed the jury that rioters would be liable only for killings done in prosecution of the riotous intent.\textsuperscript{543} The appellate court upheld this instruction, and offered, as an example of an unintended murder in pursuit of riotous intent, a crowd of men forcibly tying a victim to a hot air balloon that later crashed.\textsuperscript{544} Other states adopting the basic Illinois formula were Nebraska, for a brief period,\textsuperscript{545} and Colorado.\textsuperscript{546} Neither applied the Illinois language in a reported case during the nineteenth century.\textsuperscript{547}

2. The California model: Implied malice with enumerated felonies

Several western states, beginning with California, combined the Illinois “abandoned and malignant heart” formula with the Pennsylvania grading rules that aggravated murder on the basis of enumerated dangerous felonies. California adopted statutory language almost identical to Illinois’s in its 1850 penal code,\textsuperscript{548} and then added Pennsylvania’s grading scheme in 1856.\textsuperscript{549} In

\begin{itemize}
\item \textsuperscript{540} Id. at 449-50.
\item \textsuperscript{541} Mayes v. People, 106 Ill. 306 (1883).
\item \textsuperscript{542} Act of Dec. 23, 1833, div. 4, § 9, 1833 Ga. Laws 143, 148-49. This language was substantially altered in 1895.
\item \textsuperscript{543} 31 Ga. 236, 249 (1860). The latter point accords with the holding in McPherson v. State, 22 Ga. 478 (1857).
\item \textsuperscript{544} McGinnis, 31 Ga. at 263.
\item \textsuperscript{546} See Col. Rev. Stat. ch. 22, §§ 18-20, 24 (1868).
\item \textsuperscript{547} Colorado courts addressed the felony murder rule only once, in dictum, endorsing the uncontroversial proposition that a felon killing a resister cannot plead self-defense. Boykin v. People, 45 P. 419, 423 (Colo. 1896).
\end{itemize}
1874, California added mayhem to the list of enumerated felonies. California courts discussed the felony murder rule in a number of nineteenth-century cases.

Dicta in several early cases suggested that there were limits to the concept of killing involuntarily in the pursuit of a felonious intent. An opinion in the 1861 case of People v. Bealoba implied that felony murder might require intent to harm or injure, “as if the criminal shot at the deceased for the purpose of disabling him, or the like.” In the 1864 case of People v. Foren, the California Supreme Court explained that the felony murder rule “imputed” the intent to kill required for murder on the basis of acts “malum in se” which “natural[ly]” result in death. Also in 1864, the opinion in People v. Sanchez emphasized enumerated felonies, reasoning that “where the killing is done in . . . [an] attempt to perpetrate some one of the felonies enumerated in the statute . . . the occasion is made conclusive evidence of premeditation.” The trial court in the 1867 case of People v. Nichol used this language in a jury instruction and added that the “infliction” of “a mortal wound” under circumstances of a felony is murder. These formulas perhaps limit felony murders to fatal batteries. California’s first actual felony murder case was the 1865 case of People v. Pool, in which stagecoach robbers were convicted of murder when one intentionally killed an arresting officer. The court approved an instruction, reminiscent of Lord Dacres, that if several conspire to rob and kill all opposers if necessary, and death ensues in “the prosecution of the design, it is murder in all who are present aiding and abetting in the common design.”

Later California cases suggested a broader rule. In the 1874 case of People v. Doyell, the California Supreme Court invoked Bishop’s theory of transferred or “general” intent in advocating a rule imposing murder liability for accidental death in the pursuit of any felony:

Whenever one, in doing an act with the design of committing a felony, takes the life of another, even accidentally, this is murder. In such homicides the law super adds the intent to kill to the original felonious intent thus imputed. The thing done having proceeded from a corrupt mind, is to be viewed the same, whether the corruption is of one particular form or another.

In the 1875 case of People v. Vasquez, the California Supreme Court upheld a

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551. 17 Cal. 389, 399 (1861).
552. 25 Cal. 361, 366 (1864).
553. 24 Cal. 17, 29 (1864).
554. 34 Cal. 211, 213 (1867).
555. 27 Cal. 572 (1865).
556. Id. at 581.
557. 48 Cal. 85, 94 (1874) (citations omitted).
first degree murder conviction on the following instruction:

It is no defense to a party associated with others in, and engaged in a robbery, that he did not propose or intend to take life in its perpetration, or that he forbade his associates to kill, or that he disapproved or regretted that any person was thus slain by his associates. If the homicide in question was committed by one of his associates engaged in the robbery, in furtherance of their common purpose to rob, he is as accountable as though his own hand had intentionally given the fatal blow . . . . 558

The court thereby erased Pool’s implication that accomplice liability for felony murder depended on an agreement to use deadly force under the circumstances in which it was used.

In upholding a felony murder conviction in the 1889 case of People v. Olsen, 559 the California Supreme Court expanded the scope of California’s felony murder rule in three ways. First, the defendant’s second degree murder conviction was predicated on larceny, confirming that nonenumerated felonies could support felony murder liability. 560 Second, the court rejected the defendant’s argument that an accomplice should be liable for his cofelon’s intentional killing only if it was “the ordinary and probable effect of the wrongful act especially agreed on.” 561 This denied the implication of Foren that the predicate felony or the act causing death must be so dangerous as to make death probable. Third, the court approved Doyell’s transferred-intent formula. 562 On the other hand, Olsen left undisturbed the implication of previous cases that “involuntary killing” meant inflicting a mortal wound in the course of an intentional battery. 563

California’s legislative approach to unintended homicide was followed by several western territories. Nevada, which entered the Union in 1864, adopted the California provisions in its territorial code of 1861. 564 Early cases repeated the proposition, from California’s Sanchez case, that enumerated felonies triggered a presumption of premeditation, 565 and hinted that unintentional killing in the course of any felony might be murder. 566 Nevada’s first reported felony murder conviction occurred in the 1885 case of State v. Gray. 567 In the

558. 49 Cal. 560, 562-63 (1875). In fact, the evidence indicated that Vasquez had himself been the killer.
559. 22 P. 125 (Cal. 1889).
560. Id. at 126.
561. Id.
562. Id. at 126-27.
563. California had one other reported felony murder conviction in the nineteenth century, in which the defendant intentionally shot one victim in the head while attempting to break into a house to kill another victim. The sole significance of the felony murder rule was to grade the murder as first degree. People v. Miller, 53 P. 816 (Cal. 1898).
565. State v. Hymer, 15 Nev. 49 (1880); State v. Lindsey, 5 P. 822 (Nev. 1885).
567. 8 P. 456 (Nev. 1885).
course of a burglary and robbery, the defendant confronted a victim with a gun. According to the defendant, the victim attempted to wrest the gun away from him, whereupon the defendant was blinded by his own disguise and stumbled while trying to get away. This caused the gun to discharge accidentally, killing the victim. The court concluded that intent to kill was not required for a murder in the course of enumerated felonies, and that abandonment of an attempt did not eliminate a defendant’s causal responsibility for its results.

The territories of Idaho and Montana also adopted the California homicide provisions and applied these statutes to provide first degree murder liability for killings during enumerated felonies even when there was no proof of intent or premeditation. Shortly before statehood, however, Idaho adopted a version of the California statute which excepted from unlawful act involuntary manslaughter any killing in the course of a felony, but did not explicitly provide that involuntary killing in the course of a felony was murder. Utah adopted a similar statute, which was applied in the 1900 case of State v. Morgan, where the defendant shot and killed a pursuing officer in a gunfight after the defendant and his accomplice fled from a robbery. Citing the California case of Bealoba, the court reasoned that Morgan would have been guilty of first degree murder even if his accomplice had fired the shot and had intended only to disable rather than kill. A shared commitment to forcibly resist arrest for the felony would make a cofelon guilty of first degree murder. Implicitly, mere participation in the felony would not.

3. The Texas “transferred intent” statute

Texas was the felony murder center of America during the nineteenth century, with about one-fourth of all the reported felony murder convictions in the country. The Texas Penal Code, as amended in 1858, provided that “[e]very person with a sound memory and discretion, who shall unlawfully kill any reasonable creature in being within this State, with malice aforethought, either express or implied, shall be deemed guilty of murder.” It also included a
grading scheme based on the Pennsylvania statute, which aggravated murder committed with "express malice" or in the perpetration or attempt of enumerated felonies.\(^{574}\) The Code defined two other homicide offenses: voluntary manslaughter and negligent homicide. Voluntary manslaughter was confined to intentional killing.\(^{575}\) There was no involuntary manslaughter. Negligent homicide in the second degree comprised causing death by negligence in the course of a misdemeanor or civil wrong.\(^{576}\) The Code added, "When one in the execution of, or in attempting to execute, an act made a felony by the penal law, shall kill another, though without an apparent intention to kill, the offence does not come within the definition of negligent homicide."\(^{577}\) So the only possible category for such unintentional killings was murder based on implied malice. Finally, the Code contained a provision prescribing Hawkins's rule for transferring intent among felonies: "If one intending to commit a felony, and in the act of preparing for or executing the same, shall, through mistake or accident, do another act, which, if voluntarily done, would be a felony, he shall receive the punishment affixed by law to the offence actually committed."\(^{578}\)

The concepts of express and implied malice were defined in the important 1860 case of *McCoy v. State*,\(^ {579}\) which relied on Blackstone and on Hale's discussion of *Salisbury*. According to the court, express malice included: (1) the intent to kill the person killed; (2) the intent to grievously injure the person killed; (3) the intent to do any unlawful act likely to kill the person killed; (4) the intent to kill one of a group of persons including the person killed; and (5) the intent to kill or seriously injure any person opposing the commission of a felony (when such a person is killed). Implied malice indicated simply the transferring of any of these intentions to a victim outside of the class of intended victims.\(^ {580}\) It should be clear that this conception of malice excludes any general rule imposing murder liability for accidental killings in the course of felonies. Instead, murder liability is predicated on the intention to inflict death, grievous injury, or to unlawfully inflict the risk of death on some person. If the risk or harm intended to befall one victim is misdirected onto another victim, who dies as a result, it is also murder. But such a death is not

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\(^{574}\) Act of Feb. 12, 1858, ch. 121, pt. 1, tit. 17, ch. 15.

\(^{575}\) *TEX. PENAL CODE* art. 595.

\(^{576}\) *Id.* arts. 577, 578, 587, 589.

\(^{577}\) *Id.* art. 590.

\(^{578}\) *Id.* art. 49. Little help is provided by the provision that "[t]he principles of the common law shall be the rule of construction, when not in conflict with the Penal Code . . . ." Act of Feb. 12, 1858, ch. 121, pt. 1, tit. 1. As we have seen, the common law of England had no clear position on killing in the course of felonies at the time of American independence.

\(^{579}\) 25 Tex. 33 (1860).

\(^{580}\) *Id.* at 39-41.
accidental: only the identity of the victim is an accident. The McCoy court seemed willing to transfer the intent to commit a felony to the death of a victim only if the felony involved violence or great risk.

The 1879 case of Pharr v. State\textsuperscript{581} reasserted the independent significance of the malice requirement. Pharr shot his victim in the head and took his effects, but claimed to have shot him in self-defense. The Texas Court of Appeals overturned his first degree murder conviction, complaining that

the court charged, in effect, that if the jury believed that the . . . killing was unlawful . . . and was committed in the perpetration or in the attempt at the perpetration of robbery . . . then the jury were instructed to find the defendant guilty of murder in the first degree. The defect in this portion of the charge is that it ignores malice, the indispensable requisite in all murder; without malice, either express or implied, there can be no murder. Again: it is not homicide committed in the perpetration or attempt at the perpetration of robbery which is by the Code murder in the first degree, but it is all murder committed in this manner that constitutes the crime of murder in the first degree.\textsuperscript{582}

In the 1895 case of Richards v. State,\textsuperscript{583} two important propositions were established: first, that nonenumerated felonies could support felony murder liability; and second, that the Texas felony murder rule was based on the intent-transferring provision in the Texas Penal Code. Richards unintentionally shot and killed his victim while attempting to murder her husband. Since murder is not one of the enumerated felonies supporting first degree felony murder, Richards was charged with and convicted of second degree murder. This was the only second degree felony murder conviction reported in Texas during the nineteenth century.

The defendant argued that the killing was not murder because it lacked malice aforethought, not manslaughter because it was unintended, and not negligent homicide because it occurred in the attempt of a felony, not a misdemeanor. The court responded that the concept of malice aforethought at common law included transferred intent to kill,\textsuperscript{584} so the Texas Penal Code provision transferring intent from one felony to another could support murder liability.\textsuperscript{585} The court added that it was a "well settled" rule that "where a party, in attempting to commit a felony, kills another, whether by accident or intention, with malice aforethought, nothing less than murder could be the result."\textsuperscript{586} Thus, the court implied, as long as the predicate felony involved malice towards someone, that malice could transfer to a different victim killed unintentionally. But the court thereby also confirmed that a felony lacking

\textsuperscript{581} 7 Tex. Ct. App. 472 (1879).
\textsuperscript{582} Id. at 477.
\textsuperscript{583} 30 S.W. 805 (Tex. Crim. App. 1895).
\textsuperscript{584} See id. at 805.
\textsuperscript{585} Id. at 806.
\textsuperscript{586} Id.
malice could not give rise to felony murder liability.

While malice remained an independent element of felony murder, a felonious purpose could make a killing malicious that would not be otherwise. In the 1899 case of Hedrick v. State, the defendant was convicted of first degree murder when he killed a resisting victim during a burglary. The defendant shot blindly when the victim attempted to wrest the gun away from him. The court rejected the defendant's requested instruction that to be convicted of first degree murder, he must have committed what would be at least second degree murder absent the burglary. Conceding that murder depended on malice, and that "a party could commit a homicide in the perpetration of burglary, and not be guilty of either [first or second degree] murder," the court concluded that the shooting in this case implied malice. So felony murder required something more than accidental death, and probably something more than the negligence otherwise necessary for "homicide." On the other hand, felony murder required something less than intent to kill, and probably less than intent to injure. It appears that the Hedrick court agreed with the McCoy court that an unlawful act likely to kill—a reckless act—would supply the requisite malice. Like the McCoy, Pharr, and Richards courts, the Hedrick court implied that not just any intent to commit a felony would constitute transferable malice.

Texas felony murder cases reflected this limited rule. Richards was the only second degree felony murder conviction in nineteenth-century Texas, and involved a predicate felony of attempted murder. So there were no felony murder convictions predicated on nondangerous felonies. Moreover, almost all of the cases involved the deliberate infliction of violence. In Singleton v. State, the defendant slashed his robbery victim's throat and shot him in the head. In Gonzales v. State, the defendant bound his robbery victim and shot him in the head. In Mendez v. State, the defendant shot two robbery victims repeatedly at point-blank range. In Wilkins v. State, the defendant shot his robbery victim with both a pistol and a shotgun, and boarded up the victim's house to conceal the body. In Elizondo v. State, the defendant beat a feeble elderly robbery victim and then shot him in the back of the head. In Sharpe v.

588. Id. at 254.
589. Id. at 255.
590. Although in Ex parte Fatheree, 31 S.W. 403 (Tex. Crim. App. 1895), reversing a denial of bail, the court offered the dictum that "if the death of the mother was occasioned by an abortion... or by an attempt to effect the same, it is murder, but it does not follow by any means that it would be murder in the first degree." Id. at 404.
State, Smith v. State, and Parker v. State the defendants shot robbery victims. In Stanley v. State, the defendant deliberately split a victim’s head open with an axe during a burglary. In Washington v. State, the defendant slashed the victim’s throat from ear to ear in the course of a rape, robbery, and burglary. In Cook v. State, the defendant instead strangled his rape victim. Several robbers bludgeoned their victims to death, using a pistol, axe, iron bar, or log. Three of these defendants concealed or burned the body.

There were four Texas cases where robbers were held liable for murder without having had the intent to injure or kill. One of these was a train robbery where the robbers deliberately wrecked the train, with predictable, albeit unintended, loss of life. The other three cases involved shootings where some of the participants in the robbery were physically remote from the scene of the killing. In one of these cases, Darlington v. State, the court articulated a “natural and probable consequence” standard for accomplice liability for felony murders:

[I]f appellant . . . unlawfully entered into an agreement to rob this train with these parties, and, in the course of the effort to rob the train, deceased was killed, and such killing was the natural and probable consequence likely to result from the attempt to commit the offense of robbery, then the defendant would be guilty of murder in the first degree.

B. Felony Murder Statutes Without Malice

Statutes in four states—New York, Mississippi, Missouri, and Oregon—identified unintended killings in the course of felonies as first or second degree murder. These states account for twenty-one reported felony murder convictions during the nineteenth century.

In 1829, New York adopted a provision defining the killing of a human
being, without the authority of law, as murder "[w]hen perpetrated without any
design to effect death, by a person engaged in the commission of any
felony." 611 In 1860, New York divided murder into degrees by adopting the
Pennsylvania statute, although without repealing its own 1829 definition of
murder, which had established a felony murder rule. 612 Eventually, in 1873,
New York expanded first degree felony murder to include killing in the course
of any felony, rather than only the felonies enumerated in the Pennsylvania
statute. 613

Early cases suggested a very broad felony murder rule. In 1834, an
appellate panel of the New York Supreme Court argued that, rather than
creating a new crime, the felony murder provision reduced the scope of the
common law's unlawful act murder doctrine:

The offence of murder, as defined in [the statute] . . . was so before the
statute . . .

. . . The crime of murder might have been committed before the revised
statutes from implied malice, where the prisoner, while engaged in an
unlawful act, under the degree of felony, such as a riot or other misdemeanor,
killed another against his intention. By the third subdivision, such unlawful act
must now be of the degree of felony. 614

As we have seen, the English common law in fact imposed murder liability
only for deaths caused by unlawful acts of violence. Yet the court made no
mention of this limitation (unless we read the term "killing" as implying death
resulting from battery). The court apparently attributed Coke's broad
formulation of unlawful act "murder" to the English common law, and
reasoned, like Holt, that restricting the predicate offenses to felonies would
ameliorate this harsh rule. On further appeal, the Court for the Correction of
Errors commented that

Malice was implied in many cases at the common law, where it was evident
that the offenders could not have had any intention of destroying human life,
merely on the ground that the homicide was committed while the person who
did the act was engaged in the commission of some other felony, or in an
attempt to perpetrate some offence of that grade . . . [N]early all [felonies]
were punishable with death, with or without benefit of clergy. In such cases,
therefore, the malicious and premeditated intent to perpetrate one kind of

thereafter, New York briefly limited first degree felony murder to killing in the course
shall be murder in the first degree . . . [w]hen perpetrated in committing the crime of arson in
the first degree.").
the phrase "without design to effect death," apparently in order to include intentional as well
as unintentional felony murders. Act of May 15, 1876, ch. 333, 1876 N.Y. Laws 317
(amending Act of May 29, 1873).
614. People v. Enoch, 13 Wend. 159, 165 (N.Y. 1834) (quoting unreported opinion of
Supreme Court below).
felony, was, by implication of law, transferred from such offense to the
homicide which was actually committed, so as to make the latter offence a
killing with malice aforethought, contrary to the real fact of the case as it
appeared in evidence. This principle is still retained in the law of
homicide . . . 615

Thus the court adopted an account of the felony murder rule that accorded with
Hawkins's "general rule" of transferred culpability. On this reasoning, any
felony was as bad as murder to the extent that it was similarly punishable.

Yet the New York courts did impose some limits on this broad rule,
beginning with the 1838 case of People v. Rector, which formulated a
"merge[r]" limitation. 616 This required that the predicate felony have some
purpose independent of the victim's death or serious injury. Absent this
limitation, all manslaughters would be automatically aggravated to murders.
Rector involved a killing resulting from an assault with a heavy iron bar. The
court upheld a murder conviction, reasoning that an intention to inflict serious
injury sufficed for murder liability because it manifested the depraved
indifference to human life that the statute identified as one form of the
culpability requisite for murder. Yet the court also considered and rejected a
characterization of the killing as a felony murder. Such a characterization
depended on the fallacious argument "that the blow cannot be a misdemeanor
when it results in death, because the act is then a felony, to wit, manslaughter,
\textit{ergo} it is murder." 617

A second area of limitation was accomplice liability. An 1845 decision,
People v. Van Steenburgh, 618 recorded the murder conviction of two men for
killing a sheriff "without design to effect death," in the perpetration of the
felony of riot or resistance to legal process while being armed or disguised. The
defendants were participants in a mob of about 150 men, armed and disguised
as Native Americans, who assembled to prevent the sale of a tenant farmer's
cattle and other personal property to pay back rent. The evidence showed that
several of these men responded to an order from a leader to fire at the horses of
those attempting to proceed with the sale. The sheriff was wounded and died.
While some fifty participants were identified and convicted of varying crimes,
only these two were convicted of murder, apparently because there was
evidence they had fired their guns. Unfortunately, the report of the case does
not indicate whether the jury was instructed that defendants had to personally

\begin{footnotes}
615. Id. at 174-75.
616. 19 Wend. 569, 593 (N.Y. 1838).
617. Id. at 592. A statutory change in 1881 may have been aimed at overturning this
merger doctrine: first degree felony murder was redefined to include killing in the attempt or
commission of a felony "either upon or affecting the person killed or otherwise." Act of July
26, 1881, ch. 676, § 183, 3 1881 N.Y. Laws 1, 44. The merger doctrine survived this change,
however. See People v. Huter, 77 N.E. 6 (N.Y. 1906); People v. Schleiman, 90 N.E. 950
(N.Y. 1910).
\end{footnotes}
kill the victim, had to aid or encourage or agree to the killing of the victim, or merely had to aid or encourage or agree to the armed resistance to legal process. The restriction of murder liability to identified shooters, combined with the absence of evidence that these defendants shot the fatal bullets, suggests that murder liability hinged on whether the pair aided or encouraged the *shooting*, and not merely on whether they aided or encouraged the underlying *felony*.

An 1871 case, *Ruloff v. People*,619 involved an intentional killing of a resisting store clerk during a burglary. Although not a felony murder case, it held that all threeburglars were liable for the killing “[i]f . . . committed . . . in the prosecution of an unlawful purpose or common design” and “[i]f there was a general resolution against all opposers, and to resist to the utmost all attempts to detain or hold in custody any of the parties.”620 On the other hand, in the 1895 case of *People v. Wilson*,621 the court rejected an instruction that one burglar who assaulted an arresting officer was not guilty of his partner’s killing of the same officer unless he had agreed to it.

The New York felony murder rule was broad in two ways. First, it was applied to felonies beyond the usual quartet of burglary, robbery, rape, and arson. I have already mentioned *Van Steenburgh*, which predicated felony murder on the offense of rioting in disguise. In the 1886 case of *People v. Willett*,622 the predicate felony was grand larceny. In the 1888 case of *People v. Deacons*,623 involving an intentional strangling, first degree murder was predicated on the felony of assault or unauthorized entry by a “tramp.” In the 1894 case of *People v. Miles*,624 the court upheld a first degree murder conviction based on an instruction that fatally shooting one person in an attempt to wound or kill another would be first degree felony murder. In the 1888 case of *People v. Johnson*,625 first degree murder liability was predicated on the felony of escape from custody while being held for a felony, in this case burglary and grand larceny.

New York law also expanded the category of killing beyond simply shooting or stabbing.626 In *Johnson*, the defendant fatally clubbed a sheriff’s...

619. 45 N.Y. 213 (1871).
620. Id. at 216-17.
621. 40 N.E. 392, 394-95 (N.Y. 1895).
622. 6 N.E. 301 (N.Y. 1886). Unfortunately, the opinion tells us little about how the defendant killed the victim.
623. 16 N.E. 676 (N.Y. 1888).
624. 38 N.E. 456 (N.Y. 1894). The court concluded that there was also overwhelming evidence that Miles had in fact intended to kill the person he did kill. The trial court instructed the jurors that if they believed he had shot merely to frighten rather than wound another, there would be no murder liability.
625. 17 N.E. 684 (N.Y. 1888).
626. New York did have some of these more conventional felony murder convictions: both *People v. Greenwall*, 22 N.E. 180 (N.Y. 1889), and *People v. Meyer*, 56 N.E. 758 (N.Y. 1900), involved shootings during burglaries.
deputy with an iron bar. The defendant caused death by similar means in the course of a burglary in *Dolan v. People*.

In *Buel v. People*, where the defendant strangled a rape victim, the court affirmed an instruction that the defendant was guilty of murder even if he had put the rope around the victim’s neck only in order to silence or restrain rather than kill her. In *Cox v. People*, the victim died in a struggle with a burglar, perhaps of a heart attack. The court affirmed an instruction that “[t]he killing if done by the accused when engaged in the commission of a felony constitutes the offence of murder in the first degree although the killing was casual and unintentional.” The court commented, “If his violence so excited the terror of the deceased that she died from the fright, and she would not have died except for the assault, then the prisoner’s act was in law the cause of her death.” Notice that even this heart attack case, the only nineteenth-century American heart attack case I have found, still was predicated on a battery.

In 1839 Mississippi adopted New York’s murder definition, including its language imposing murder liability for unintended killings in the course of any felony. Then, in 1857, the Mississippi legislature limited this form of murder to unintended killings in the course of the enumerated felonies of rape, burglary, arson, and robbery. Mississippi’s only nineteenth-century case addressing felony murder, *Mask v. State*, was decided after the change, but based on a shooting that preceded it. Mask went to the house of R.J. Smith to shoot him for having testified against Mask in an earlier theft prosecution. Mask shot and wounded Smith’s son, William, and then shot and killed Smith’s daughter, Susan, when she told him to leave. The Mississippi Supreme Court upheld an instruction that the jury should convict for murder “if ... the defendant was endeavoring to kill William Smith, or commit a felony upon him, and killed in that attempt the deceased, either accidentally or willfully.” The court treated this instruction as harmless error, because instructions were also given on a theory of intentional murder, which the court deemed proven beyond a reasonable doubt. Presumably the Mississippi court was reluctant

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627. 64 N.Y. 485 (1876).
628. 78 N.Y. 492 (1879). The court in *Buel* declined to apply New York’s merger doctrine to rape.
629. 80 N.Y. 500 (1880).
630. *Id.* at 514.
631. *Id.* at 516.
634. 36 Miss. 77 (1858).
635. *Id.* at 92.
636. *Id.* at 92-93.
to apply the felony murder rule to a killing resulting from a mere assault, because of the lack of a sufficiently independent felonious purpose. Perhaps the court also sought to avoid predicated liability on a subsequently repealed felony murder provision.

Missouri’s first homicide statute, passed in 1825, simply punished murder without defining it. Missouri adopted the Pennsylvania grading scheme in 1845, but with one crucial modification: it added the phrase “or [any] other felony” to the Pennsylvania enumeration of felonies triggering first degree murder liability. Missouri’s 1845 legislation also contained an implied felony murder provision in an elliptical definition of involuntary manslaughter:

The killing of a human being, without a design to effect death, by the act, procurement or culpable negligence of another, while such other is engaged in the perpetration or attempt to perpetrate any crime or misdemeanor, not amounting to a felony, in cases when such killing would be murder at the common law, shall be deemed manslaughter in the first degree.

This proviso clearly implied that some unintentional killings were murder at common law, including some, but not all, killings in the course of misdemeanors. Presumably these would have been unintended killings committed in the course of violent or dangerous misdemeanors, implying recklessness or cruelty. The exclusion of felonies from the class of crimes supporting involuntary manslaughter implied more severe liability—murder liability—for at least some unintended killings in the course of at least some felonies. Left unclear was whether this implied felony murder rule applied to all unintended killings in the course of all felonies, or only to those that would have been “murder at the common law.” The latter interpretation perhaps would have limited Missouri’s felony murder rule to unintended killings arising in the course of dangerous or violent felonies.

Accepting the premises that (1) the Missouri statute implied that those unintended killings in the course of felonies that were murders at common law remained so, and that (2) the New York statute also restricted unlawful act murder at common law to murders in the course of felonies, the two statutes posed similar interpretive problems, especially during the periods when each statute graded all murder in the course of felonies as murder in the first degree. In 1879, however, Missouri restricted first degree felony murder to murders in the course of arson, burglary, rape, robbery, and mayhem.

The Missouri Supreme Court applied the 1845 murder statute in two first degree murder cases in the 1850s involving the predicate felony of assault with

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637. But recall that a New York court was willing to predicate felony murder on an assault on a different victim in People v. Miles, 38 N.E. 456 (N.Y. 1894).
640. Id. § 7 (emphasis added).
intent to injure. In the 1853 case of *State v. Jennings*, the court upheld a conviction of first degree murder for a participant in the sustained whipping of a man who died as a result. The court upheld the following instruction:

If the jury should believe . . . that the prisoner went with . . . others, without any intention on his part to commit a felony, or do Willard great bodily harm, and . . . others killed Willard, or intended to do Willard great bodily harm, and in carrying out said intention death ensued, without the consent and aid of prisoner, they will acquit.643

Thus, the court implied that killing in the course of a felony, or causing death with the intent to commit great bodily harm, was murder. The court also upheld an instruction that if the prisoner had intended great bodily harm, he was guilty of first degree murder, because inflicting great bodily harm is a felony.644 In the 1857 case of *State v. Nueslein*, the court applied *Jennings* to uphold an instruction that causing death while intending to inflict great bodily harm was murder in the first degree, again because inflicting great bodily harm was a felony. The trial court required that the act causing death be accompanied by malice, but instructed the jury that malice could be presumed from striking a blow with a weapon likely to produce death or great bodily harm.646 The use of felony assault as a predicate felony in these two cases implied a rejection of New York’s requirement of an independent felonious purpose.

Two Missouri Supreme Court cases from 1877 supported the view that all homicide in the course of felonies was murder. In *State v. Wieners*, the court defined malice in terms of the unlawful infliction of bodily harm or the commission of a dangerous and unlawful act. Yet the court then concluded that “[i]f one in perpetrating or attempting to perpetrate a felony, kill a human being, such killing is murder, although not specifically intended, for the law attaches the intent to commit the other felony to the homicide. The law conclusively presumes the intent to kill.” In *State v. Green*, the court upheld a first degree murder conviction based on the predicate felony of resisting arrest for a felony. The court cited *Jennings* and *Wieners* in support of the principle that homicide in the course of any felony was murder.652

642. 18 Mo. 435 (1853).
643. *Id.* at 443.
644. *Id.* at 441, 444.
645. 25 Mo. 111, 125-26 (1857).
646. *Id.* at 121-22.
647. 66 Mo. 13 (1877). Note that *Wieners* is not a felony murder case.
648. *Id.* at 20 (citing 1 Hale, History of the Pleas of the Crown, *supra* note 100, at 450).
649. *Id.* at 15 (citing 1 East, *supra* note 163, at 231); *id.* at 17 (citing 2 Bishop, *supra* note 344, § 617).
650. *Id.* at 22 (citing 1 East, *supra* note 163, at 231).
651. 66 Mo. 631 (1877).
652. *Id.* at 647, 649.
These cases provoked a reassessment of the felony murder rule in Missouri. The following year, an article appeared in Missouri's *Central Law Journal* criticizing the *Wieners* case.\(^{653}\) The author argued that the Missouri statute punished only malicious killings in the course of felonies as murder, not all homicides. He then proposed a definition of malice as "a condition of the mind evidenced by the intentional doing of a wrongful act, not in the 'heat of passion,' which might reasonably be expected to result in death or bodily harm to some human being."\(^{654}\) The author relied heavily on Wharton's critique of the felony murder rule in the 1875 edition of his treatise on homicide.\(^{655}\)

Also in 1878, the Missouri Supreme Court embraced New York's requirement of an independent predicate felony, thereby overruling *Jennings*. In the case of *State v. Shock*,\(^{656}\) the court overturned a first degree murder conviction for the killing of a child in a vicious beating. The court held that the felony of inflicting great bodily harm could not support felony murder:

> [T]he words "other felony" used in the first section refer to some collateral felony, and not to those acts of personal violence to the deceased which are necessary and constituent elements of the homicide itself, and are, therefore, merged in it, and which do not, when consummated, constitute an offense distinct from the homicide.\(^{657}\)

The court also hinted that in future cases it would hold that only the traditional common law felonies would support felony murder liability: "As this section . . . includes only such murders as were murders at common law, it may well be doubted whether the words 'other felony' can be held to include offenses which were not felonies at common law. This point, however, we do not now decide."\(^{658}\) The following year these views prevailed in the Missouri legislature, as the murder statute was revised to predicate first degree murder only on arson, burglary, robbery, rape, and mayhem.\(^{659}\) During the remainder of the nineteenth century, there were no reported convictions of second degree felony murder, that is, murder predicated on nonenumerated felonies.

The Missouri Supreme Court temporarily restricted Missouri's felony murder rule even further. In the 1879 case of *State v. Earnest*,\(^{660}\) the court upheld a first degree murder conviction for the killing of a robbery victim, but rejected as harmless error the trial court's instruction that any homicide

\(^{653}\) J.H.S., *The Degrees of Murder*, 6 CENT. L.J. 225 (1878) [hereinafter J.H.S., *The Degrees of Murder*]; see also J.H.S., Correspondence, 10 CENT. L.J. 37 (1880).

\(^{654}\) J.H.S., *The Degrees of Murder*, supra note 653, at 225.

\(^{655}\) See *Wharton*, supra note 15, at iii-iv, 39.

\(^{656}\) 68 Mo. 552 (1878).

\(^{657}\) Id. at 556 (citing *Wharton*, supra note 15, at 38-46); see also id. at 557 (citing People v. Rector, 19 Wend. 569, 605 (N.Y. 1838)).

\(^{658}\) Id. at 562. The court nevertheless opined that there could be no second degree felony murder. Id. at 560.

\(^{659}\) MO. REV. STAT. § 1232 (1879).

\(^{660}\) 70 Mo. 520 (1879).
committed in the course of any felony was first degree murder. By a 3-2 majority, the court held that “[t]he statute does not declare that every homicide committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery, &c., shall be murder in the first degree, but that any murder, so committed, shall be deemed murder of the first degree.” 661 The same justices reiterated this position in the 1880 case of State v. Hopper. 662 Here they again upheld a first degree murder conviction for the killing of a robbery victim and again rejected the trial court’s instructions as harmless error. Citing Wharton, the majority wrote, “Those homicides which are made murder in the first degree by our statute, are only such as were murder at common law, and are only mentioned . . . for the purpose of classification, not of definition.” 663

By 1884, however, the makeup of Missouri’s supreme court had changed. In State v. Hopkirk, 664 a 3-2 majority of the court rejected Earnest and Hopper. Again affirming a first degree murder conviction for the killing of a robbery victim, the court approved the trial court’s refusal to require premeditation and deliberation:

Our statutes provide that a killing in such circumstances should be murder in the first degree, as much so as when committed by means of poison or lying in wait . . . . The phrase, “every murder” . . . is only used as a means of classification of the crime of murder; i.e., the section makes no homicide murder that was not murder at common law . . . . To say that a man may kill another in the attempt to rob him, is not murder in the first degree, is to fly into the face of the plainest statutory provisions.

The rule at common law was . . . “that a homicide committed in the perpetration of a felony was murder, and this, whether there was any precedent intention of doing the homicidal act or not.” 665

Subsequent to this decision, there were five more reported first degree murder convictions during the nineteenth century, all involving killings in the course of robberies. 666 The ultimate result, then, was a compromise between those who

661. Id. at 522.
662. 71 Mo. 425 (1880).
663. Id. at 429.
664. 84 Mo. 278 (1884).
665. Id. at 287 (Sherwood, J.) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 200 (Thomas McIntyre Cooley ed., n.d.); 1 EAST, supra note 163, at 255 (1806); 1 HALE, HISTORY OF THE PLEAS OF THE CROWN, supra note 100, at 465; 1 HAWKINS, supra note 115, at 112). Chief Justice Henry, who authored the majority opinions in Earnest and Hopper, dissented from their overruling, while concurring in affirming the conviction. He quoted extensively from Wharton on Homicide in support of a standard that limited felony murders to deaths caused by the danger or violence inherent in the felony. He also quoted Wharton’s conclusion that there was no modern case of a felony murder conviction without one of these forms of “malicious intent towards the deceased.” Id. at 290-91 (Henry, C.J., dissenting). Justice Ray agreed only that the killing of a robbery victim by a robber was necessarily murder. Id. at 289 (Ray, J., concurring).
666. State v. Avery, 21 S.W. 193 (Mo. 1893) (shooting); State v. Donnelly, 32 S.W. 1124 (Mo. 1895) (bludgeoning); State v. Schmidt, 38 S.W. 719 (Mo. 1897) (shooting); State
regarded the enumerated felonies merely as a grading element for intentional murders and those who saw all unintended killings in the course of any felony as murder. Ultimately, murder liability was imposed for unintended killings only in the context of enumerated felonies.

Oregon adopted a criminal code in 1864 with a grading provision identical to the Ohio provision held, in Robbins v. State, to require purpose to kill for all first degree murder. Yet Oregon combined this first degree murder provision with two other provisions implying that purpose was not required for first degree murder. One prescribed that “[t]here shall be some other evidence of malice than the mere proof of the killing, to constitute murder in the first degree, unless the killing was effected in the commission or attempt to commit a felony . . . .”669 The other was Oregon’s second degree murder provision: “If any person shall purposely and maliciously, but without deliberation and premeditation, or in the commission or attempt to commit any felony, other than rape, arson, robbery or burglary, kill another, such person shall be deemed guilty of murder in the second degree.”670 Since all premeditated killings were graded first degree murder, the disjunction in the second degree murder provision had to be between (1) purposeful but unpremeditated killings and (2) nonpurposeful killings in the commission or attempt of nonenumerated felonies.

While Oregon’s statute clearly imposed second degree felony murder liability, Oregon had no reported cases during the nineteenth century involving second degree felony murder charges. It did, however, have one case that confirmed that purpose to kill was not required for first degree felony murder. In State v. Brown, Brown and his codefendants robbed a pawn shop, knocking the proprietor cold. A policeman pursued them for a few blocks, whereupon they stopped and Brown shot at him, killing a bystander. The court affirmed a first degree murder conviction, upholding an instruction that

it is not necessary to prove . . . a purpose to kill . . . . [I]t is only required that the robbery and the killing, in the manner alleged, during the robbery, be proven . . . . In such a case, and under such proof, the intent to kill and the deliberate and premeditated malice are incontrovertibly implied.672

The court dismissed without discussion Brown’s argument that the court should require purpose to kill on the authority of Robbins.673

v. Foster, 38 S.W. 721 (Mo. 1897) (shooting); State v. Sexton, 48 S.W. 452 (Mo. 1898) (shooting).

667. See OR. LAWS, Crim. Code, tit. 2, ch. 2, § 506 (1874) (noting that this and related sections were passed on Oct. 19, 1864).

668. 8 Ohio St. 131 (1857).


670. Id. § 507 (footnote omitted).

671. 7 Or. 186 (1879).

672. Id. at 204.

673. Id. at 197-98.
C. Third Degree Felony Murder Statutes

Three states, Wisconsin, Florida, and Minnesota, graded killings "without design to effect death" that occurred in the course of any felony as third degree murder, but these statutes were rarely used.

Wisconsin's 1849 criminal code prescribed that

[the killing of a human being, without the authority of law . . . [w]hen perpetrated without any design to effect death, by a person engaged in the commission of any felony shall be murder in the third degree, and shall be punished by imprisonment . . . not more than fourteen years nor less than seven years.674

Second degree murder required killing by a dangerous act manifesting depraved indifference to human life, while first degree murder required premeditated intent to kill.675 There was only one reported third degree murder conviction under this statute, of a robber whose cofelon shot the victim. The trial court instructed the jury that the defendant's participation in the robbery made her guilty of third degree murder even if she had no expectation her cofelon would kill.676 Unlike Mississippi, Missouri, and New York, Wisconsin rejected the merger rule, permitting assault677 and maiming678 as predicate felonies for third degree murder. The Wisconsin Supreme Court reversed several third degree murder convictions on the ground that the predicate felony had not been proven.679 In another case, the court imposed a narrow timeframe on the predicate felony, holding that an assault on one victim concluded the instant the defendant turned his attention to attacking the victim he killed.680

Minnesota adopted Wisconsin's three-degree scheme in 1853,681 but did not apply the felony murder provision in any reported case. Florida, from the time of its admission to the Union until 1868, left the definition of murder to

675. Id.
677. See Boyle v. State, 15 N.W. 827 (Wis. 1883) (reversing second degree murder conviction, but stating that a killing with intent to do great bodily harm is done in the course of felony assault and therefore is murder in the third degree); Terrill v. State, 42 N.W. 243 (Wis. 1889) (reversing third degree murder conviction on other grounds); Hoffman v. State, 59 N.W. 588 (Wis. 1894) (reversing third degree murder conviction on other grounds).
678. See State v. Hammond, 35 Wis. 315 (1874) (reversing third degree murder conviction on other grounds).
679. Hammond, 35 Wis. 315 (maiming); Terrill, 42 N.W. 243 (felony assault); see also Pliemling v. State, 1 N.W. 278 (Wis. 1879). The supposed predicate felony in Pliemling was rape. Here it was apparent that the slaughters of a woman and her three children were first degree murders, but that the jury had convicted of third degree murder because there was insufficient proof of the killer's identity.
681. Act of Mar. 5, 1853, ch. 2, § 7, 1853 Minn. Laws 5, 7. Note, however, that Minnesota did not enter the Union until 1858.
the common law. \textsuperscript{682} In 1868, however, Florida adopted the Wisconsin statute. \textsuperscript{683} Florida's only reported third degree murder conviction during the nineteenth century was overturned. \textsuperscript{684} One court suggested that dangerous felonies would give rise to second degree murder liability because they inherently manifested depraved indifference to human life. \textsuperscript{685} Finally, in 1892, unintended killings in the course of the traditional quartet of dangerous felonies—arson, rape, robbery, and burglary—were moved up to first degree murder. \textsuperscript{686}

D. Dangerous Felonies Statutes

In addition to Mississippi (after 1857), two other states adopted statutes conditioning murder liability on causing death in the course of particular dangerous felonies: New Jersey and Alabama. These two statutes were little used.

In 1829, New Jersey enacted a provision that conditioned murder liability on enumerated felonies or other unlawful acts dangerous to human life:

\begin{quote}
[I]f any person or persons in committing, or attempting to commit sodomy, rape, arson, robbery or burglary, or any unlawful act against the peace of this state, of which the probable consequence may be bloodshed, shall kill another, or if the death of any one shall ensue from the committing, or attempting to commit any such crime or act as aforesaid... then such... persons... shall be adjudged guilty of murder, and shall suffer death. \textsuperscript{687}
\end{quote}

The New Jersey Supreme Court applied this statute in the 1833 case of \textit{State v. Cooper}, holding that a conviction for arson barred a subsequent conviction for murder resulting from the arson. \textsuperscript{688} The court read the statute as an expression of the "well established principle of the common law, that if a person, whilst doing or attempting to do another act, undesignedly kill a man, if the act done or attempted, were a felony, the killing is murder; especially if death were a probable consequence of the act." \textsuperscript{689} Thus, the court inferred that those felonies enumerated by the statute were selected because of their dangerousness to human life. This understanding of the basis of felony murder liability helps explain the court's position on the double jeopardy question. Malice having

\begin{footnotes}
\item[682.] Act of Feb. 10, 1832, no. 55, § 1, 1832 Fla. Terr. Laws 63, 63 (providing that the common law of crimes was in force except as modified by legislation); \textit{id.} § 2 (providing capital punishment for murder without defining the offense).
\item[683.] Act of Aug. 6, 1868, no. 13, ch. 3, §§ 1-2, 1868 Fla. Laws 61, 63.
\item[684.] Collins v. State, 12 So. 906 (Fla. 1893) (holding there was insufficient evidence of the predicate felony of mayhem).
\item[685.] Johnson v. State, 4 So. 535, 538 (Fla. 1888).
\item[686.] FLA. REV. STAT. § 2380 (1892).
\item[687.] Act of Feb. 17, 1829, § 66, 1828-1829 N.J. Laws 109, 128.
\item[688.] 13 N.J.L. 361, 370 (1833).
\item[689.] \textit{Id.} at 370.
\end{footnotes}
been established by the defendant’s commission of a dangerous act, no further culpability need be proved to establish murder liability—neither intent to kill nor actual foresight of the death. Moreover, where death resulted from the burning there was no need to prove any additional act, such as striking a night watchman who attempted to interfere.

But our sense of justice is shocked by the idea, that a man shall be convicted and punished for the arson, with that measure of punishment which the laws mete out to those guilty of that crime; and that afterwards for perfectly accidental and involuntary killing, he shall be liable to the same punishment of death which is inflicted on the wilful and malicious murderer. In the case before us, the killing was a simple consequence of the burning, and there is no pretence that it was, in point of fact, intentional. The law makes a man answerable for even the unexpected consequences of his crimes, and for this purpose, imputes the intention to produce the consequence, as well as the original act. But to constitute a crime there must be an act of the will, and imputed intent must have real intent as its basis: not to accomplish the precise result, but to do something. Some act of commission or omission lies at the foundation of every crime. And that a simple consequence of an act should be severed from the act itself, and possess independently all the necessary ingredients of crime, is a violation of sound philosophy, and, as I think, of law. In this case the killing disconnected with the arson, is but involuntary homicide.690

It was the arson that rendered the killing culpable, because of its danger to life, so that to punish the killing on top of the arson would punish the same act of risk-taking twice. New Jersey had no reported felony murder convictions during the nineteenth century.

Alabama adopted the Pennsylvania grading language in 1841, although with two pertinent differences. First, rather than defining first degree murder to include all murder committed in the perpetration or attempts to perpetrate enumerated felonies, the Alabama statute defined first degree to include all homicide committed under such circumstances.691 In this way, Alabama implied that at least reckless or negligent killing in the course of enumerated felonies would be murder. Second, the Alabama statute defined second degree murder as all other homicide constituting “murder at the common law.”692 This provision left open the question of second degree felony murder for unintended killing in the course of nonenumerated felonies, although no second degree felony murder convictions appear in the reported Alabama cases from the nineteenth century. The Alabama felony murder provision was little applied, but Alabama courts explained felony murder liability as a form of transferred intent.

An 1862 case commented on, but did not apply, the felony murder

690. Id. at 371-72.
692. Id. § 2.
doctrine. *Isham v. State* concerned a slave convicted of the offense of "voluntary manslaughter of a white man," the races of the perpetrator and victim together constituting an aggravating circumstance. In holding that the race of the victim was a strict liability element, the court invoked the felony murder doctrine as evidence that the criminal law did not require a strict correlation between the wrong intended and the wrong punished:

[H]e who, aiming to accomplish one wrongful act, fails in that, but perpetrates another, is not excused. The wrongful intent, and the wrongful act, are said to coalesce and make the crime.—Bishop on Cr. Law, § 254. Numerous illustrations of this doctrine are to be found in the books. Where there is design to commit a felony, and a homicide ensues, against or beyond the intent of the party, he is guilty of murder; but, if the intent went no further than to commit a bare trespass, it will be manslaughter.—1 East's Cr. Law, 255.

Commenting on Bacon's maxim about the transferability of intent to crimes of like grade (invoked by the defense), the court argued:

If the maxim import that there must be a perfect correspondence between the intent and the act, it can not be harmonized with principles too well established to be controverted. A homicide, not intended, but committed, in the perpetration of burglary or arson, would be murder, notwithstanding the offenses intended are not, in our law, of as high a grade, or subject to as severe penalties, as murder.

In *Kilgore v. State*, a felony murder conviction based upon the repeated stabbing of a prostrate robbery victim, the court explained that the criminal intent involved in the statutorily enumerated felonies "gives complexion to, and determines the character of" the unlawful killing perpetrated in their commission. "It supplies the place of 'malice aforethought' of the common law."

As noted above, Mississippi in 1857 restricted its New York-style felony murder statute to enumerated dangerous felonies, but there are no reported convictions under this statute during the nineteenth century.

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693. 38 Ala. 213 (1862).
694. The victim was one of three whites disguised in blackface, slinking about the woods in search of runaways. The defendant, fearing that these three were themselves runaways bent on robbing his master's house, shot and killed the victim. The defendant's excuse of reasonably mistaken defensive force was barred by the fact that his master had not authorized the shooting. Isham appealed on the ground that his reasonable mistake about the race of his victim should at least preclude his liability for that aggravating circumstance.
695. *Isham*, 38 Ala. at 219.
696. *Id.* at 220.
697. 74 Ala. 1 (1883).
698. *Id.* at 8-9.
699. *Id.* at 8 (quoting Fields v. State, 52 Ala. 348, 354 (1875)).
700. MISS. REV. CODE ch. 64, art. 165 (1857); see also Hoffheimer, *supra* note 633, at 57-74.
The law of felony murder varied in the nineteen states that enacted felony murder statutes during the nineteenth century. Only a few states imposed felony murder liability often enough, or articulately enough, to define the law of felony murder with any precision.

In Illinois, which lacked an enumerated felony aggravator statute, courts read the language of "abandoned and malignant heart" to require a felony malum in se, an act of violence, and reckless disregard of a danger of death (although amounting to less than a probability). Accomplice liability for felony murder also required culpability with respect to death in Illinois. In California, which had an enumerated felony aggravator provision, courts conditioned felony murder on an act of violence, but otherwise required neither a dangerous felony nor any particular culpability with respect to death. Yet this apparently sweeping rule was applied infrequently and narrowly. The Texas felony murder statute was the most frequently applied, yet, in a sense, it was also the most narrowly applied. Texas courts held that malice was an independent constraint on felony murder liability, requiring a dangerous felony and an act of violence or extreme recklessness. New York had the broadest rule, applying to a wide variety of felonies, some not very dangerous. Missouri, after a vigorous debate concerning the proper scope of felony murder liability, confined it, through a combination of judicial and legislative action, to unintended killing in the course of enumerated felonies. Several other states also conditioned felony murder on enumerated felonies or dangerous acts, while another group limited felony murder to third degree murder; but none of these states applied their felony murder rules often enough to determine their scope.

Of the fifty-three reported felony murder convictions in states with felony murder statutes, forty-three were predicated on traditionally enumerated felonies, with the great majority involving robberies. Of the remaining ten convictions, five were in New York and three were in Missouri before 1879 when it had a New York-style statute that contained neither an enumeration of felonies nor a requirement of malice. Only two of the fifty-three convictions were second degree murder convictions in states that enumerated predicate felonies for first degree murder. One of these cases had a fact scenario that would probably be considered robbery today. The other involved an attempted murder that killed the wrong victim. Almost all of the

701. People v. Van Steenburgh, 1 Parker's Crim. Rep. 39 (N.Y. Ct. Oyer & Terminer 1845); People v. Willett, 6 N.E. 301 (N.Y. 1886); People v. Deacons, 16 N.E. 676 (N.Y. 1888); People v. Johnson, 17 N.E. 684 (N.Y. 1888); People v. Miles, 38 N.E. 456 (N.Y. 1894).
702. State v. Jennings, 18 Mo. 435 (1853); State v. Nueslein, 25 Mo. 111 (1857); State v. Green, 66 Mo. 631 (1877).
deaths were caused directly by acts of violence: shooting, stabbing, strangling, or clubbing. One case involved deliberately wrecking a train; one involved forcing a victim off a train; and one unfortunate case, the only one of its kind in nineteenth-century America, involved a possible heart attack during a struggle with a burglar.

Courts in Illinois, California, Utah, Texas, and New York addressed the scope of accomplice liability for felony murder. Most of these decisions required some degree of culpability on the part of accomplices with respect to the act causing death. The accomplice must have agreed to the act or to use force against all opposers, or the act must have been the natural and probable consequence of the crime or at least in furtherance of the crime.

VII. THE ORIGINAL LIMITS OF AMERICAN FELONY MURDER RULES

Contemporary criticism of felony murder is often based on speculation about the unfair imposition of murder liability possible under some versions of a felony murder rule. These speculations are premised on a misconception of felony murder liability as strict liability for accidental deaths occurring in the context of felonies. Yet our review of actual applications of the felony murder rules actually in force in nineteenth-century America shows that felony murder liability was deservedly imposed, according to defensible criteria of culpability, in almost all cases. American felony murder rules were usually limited in two ways: by predicate felony and by means of killing. Each of these limitations effectively conditioned felony murder on culpability requirements and prevented the imposition of strict liability for an accidental death. After summarizing the scope and effect of these two limitations in nineteenth-century American felony murder law, we will examine their application in cases of accomplice liability.

708. Lamb v. People, 96 Ill. 73 (1880).
709. People v. Pool, 27 Cal. 572 (1865); People v. Olsen, 22 P. 125 (Cal. 1889).
710. State v. Morgan, 61 P. 527 (Utah 1900).
713. Van Steenburgh, 1 Parker’s Crim. Rep. 39 (New York); Lamb, 96 Ill. at 82; cf. Wilson, 40 N.E. 392 (New York).
714. Pool, 27 Cal. 572; Ruloff, 45 N.Y. at 216-17; Morgan, 61 P. 527 (Utah).
715. Lamb, 96 Ill. at 73; Darlington, 50 S.W. 375 (Texas); cf. People v. Olsen, 22 P. 125 (Cal. 1889).
716. People v. Vasquez, 49 Cal. 560 (1875).
A. Predicate Felonies

Many nineteenth-century American felony murder rules predicated murder liability on enumerated dangerous felonies—usually robbery, burglary, arson, and rape. We have seen that of fourteen states applying enumerated felony aggravator statutes to impose felony murder liability, 717 ten did so only in cases predicated on enumerated felonies. 718 In all, twenty-three of twenty-nine felony murder convictions in states with felony aggravator statutes were first degree felony murder convictions predicated on enumerated felonies. 719 Of the eight 720 states with both felony murder statutes and grading based on enumerated felonies did not impose second degree murder liability at all. In these eight graded felony murder states, there were thirty-four first degree murder convictions predicated on enumerated felonies and just two second degree murder convictions predicated on nonenumerated felonies. 721 Altogether, of twenty-two states that had felony aggravator grading statutes and also enacted felony murder rules, sixteen restricted felony murder to enumerated felonies. Those states that did predicate second degree felony murder on nonenumerated felonies did so rarely. Only eight of sixty-five felony murder convictions in states with enumerated felony aggravator provisions involved nonenumerated felonies. 722 The predicate felony in four of these cases was abortion, 723 and in one was theft. 724 The other cases were based on the obviously dangerous predicate felonies of murder 725 and robbery. 726

There are two possible explanations for this pattern. First, some prosecutors and courts may have understood the statutory enumeration of predicate felonies to be exhaustive. In Indiana, for example, courts recognized only a first degree felony murder rule, rejecting murder charges based on even

717. These states were Connecticut, Delaware, Indiana, Iowa, Maine, Massachusetts, Michigan, Nebraska, New Hampshire, North Carolina, Pennsylvania, Tennessee, Virginia, and Washington.

718. The exceptions were Delaware, Iowa, Maine, and Tennessee.

719. The states were Alabama, Idaho, Missouri after 1879, Nevada, Oregon, and Utah. Of these, all but Idaho had at least one first degree felony murder conviction.

720. The eight states were Alabama, California, Idaho, Missouri after 1879, Nevada, Oregon, Texas, and Utah.


722. Bratton v. State, 29 Tenn. (10 Hum.) 103, 109 (1849); State v. Smith, 32 Me. 369 (1851); State v. Boice, 1 Houst. Crim. Cas. 355 (Del. Ct. Oyer & Terminer 1871); State v. Leeper, 30 N.W. 501 (Iowa 1886); Olsen, 22 P. 125 (California); State v. Lodge, 33 A. 312 (Del. Ct. Oyer & Terminer 1892); State v. Minard, 65 N.W. 147 (Iowa 1895); Richards, 30 S.W. 805 (Texas).

723. Smith, 32 Me. 369; Leeper, 30 N.W. 501 (Iowa); Lodge, 33 A. 312 (Delaware); Minard, 65 N.W. 147 (Iowa).

724. Olsen, 22 P. 125 (California).

725. Bratton, 29 Tenn. (10 Hum.) 103; Richards, 30 S.W. 805 (Texas).

726. Boice, 1 Houst. Crim. Cas. 355 (Delaware).
the nonenumerated felony of murder. Alabama's felony murder statute predicated felony murder liability only on enumerated felonies. Mississippi's did the same after 1857. Missouri's legislature restricted first degree felony murder to enumerated felonies immediately after Missouri's supreme court suggested that only such felonies supplied the requisite malice for murder.

Second, prosecutors and courts may have seen enumerations as illustrative of the type of dangerous felonies that could legitimately support felony murder liability. In Texas, for example, the penal code's provision on transferring intent among felonies clearly established second degree felony murder liability for unintentional killing in the course of nonenumerated felonies. Yet the Texas code also required malice, which the case of McCoy v. State defined as intent to kill, intent to injure, or recklessness. Texas courts required a knowing imposition of a probability of death in felony murder cases. Of twenty-two Texas felony murder convictions during the nineteenth century, only one, Richards v. State, was predicated on a nonenumerated felony. This was also the only Texas felony murder case to specifically cite the intent-transferring provision. The nonenumerated felony in question here was murder of another victim. It seems that, outside the context of enumerated felonies, Texas courts construed the intent-transferring provision in the narrowest possible way, so as to conform to the requirement of malice.

In Massachusetts, courts endorsed second degree felony murder liability in the abstract, but apparently never applied it. Here, too, they appeared to take the enumerated felonies as prototypes for the coercive and dangerous imposition of risk that implied malice. In Pennsylvania, which reported no second degree felony murder convictions during the nineteenth century, courts saw the special danger and moral "turpitude" attending the enumerated felonies as a justification for ignoring "intention." In Michigan, which reported no second degree felony murder convictions, one court reasoned that the predicate felony must display as much "malice" and "depravity" as murder to justify the

727. Reed v. State, 8 Ind. 200, 200-01 (1856).
transferring of intent. 737 In Connecticut, which reported no second degree felony murder convictions during the nineteenth century, Justice Swift’s influential treatise had argued that intent-transferring should be limited to capital crimes. In California, which reported no second degree felony murder convictions until late in the nineteenth century, an early opinion conditioned intent-transferring on acts malum in se and dangerous to life. 738 So it appears that, across many states, courts took the enumerated aggravating felonies as models for the kind of morally reprehensible and dangerous felony that would support murder liability for unintended killing.

Where jurisdictions did not enumerate felonies, they still tended to require that predicate felonies be dangerous to life. New Jersey’s felony murder statute did so explicitly. 739 Illinois construed its “abandoned and malignant heart” felony murder statute to require some degree of dangerousness to life. 740 Of twenty felony murder convictions in jurisdictions without enumerated predicate felonies, ten involved the traditional predicate felonies of arson, rape, robbery, and burglary. 741 Several others were predicated on felonies involving violence, such as the murder of another victim, 742 escape or resisting arrest, 743 and “inflicting great bodily harm.” 744 Many of the remaining predicate offenses (e.g., riot, 745 assault by a tramp, 746 and suicide 747) raise troubling issues of liberty and legality, but are nevertheless violent felonies. One conviction was predicated on “theft.” 748

Overall, sixty-seven of our eighty-five nineteenth century felony murder convictions were predicated on the traditional predicate felonies of robbery. 749

740. Lamb v. People, 96 Ill. 73 (1880); Adams v. People, 109 Ill. 444 (1884).
741. Miller v. State, 25 Wis. 384, 388-89 (1870) (robbery); Dolan v. People, 64 N.Y. 485 (1876) (burglary); Buel v. People, 78 N.Y. 492 (1879) (rape); Cox v. People, 80 N.Y. 500 (1880) (burglary); Adams, 109 Ill. 444 (robbery); People v. Greenwall, 22 N.E. 180 (N.Y. 1889) (burglary); State v. Deschamps, 7 So. 703 (La. 1890) (rape); People v. Wilson, 40 N.E. 392 (N.Y. 1895) (burglary); Reddick v. Commonwealth, 33 S.W. 416 (Ky. 1895) (arson); People v. Meyer, 56 N.E. 758 (N.Y. 1900) (burglary).
742. People v. Miles, 38 N.E. 456 (N.Y. 1894).
743. State v. Green, 66 Mo. 631 (1877); People v. Johnson, 17 N.E. 684 (N.Y. 1888).
744. State v. Nueslein, 25 Mo. 111, 125-26 (1857); see also State v. Jennings, 18 Mo. 435, 435 (1853) (involving a victim who was whipped to death).
748. People v. Willett, 6 N.E. 301 (N.Y. 1886).
burglary,\textsuperscript{750} rape,\textsuperscript{751} and arson,\textsuperscript{752} with more than half being predicated on robbery. An additional seven convictions were predicated on the obviously dangerous felonies of murder,\textsuperscript{753} prison-break or resisting arrest,\textsuperscript{754} and inflicting grievous bodily injury.\textsuperscript{755} The remaining eleven convictions were based on the more dubious predicates of riot,\textsuperscript{756} theft,\textsuperscript{757} assault by a tramp,\textsuperscript{758}


\textsuperscript{750} Commonwealth v. Flanagan, 7 Watts & Serg. 415 (Pa. 1844); Dolan v. People, 64 N.Y. 485 (1876); Bissot v. State, 53 Ind. 480 (1876); Cox v. People, 80 N.Y. 500 (1880); Stanley v. State, 14 Tex. Ct. App. 315 (1883); Gray, 8 P. 456 (Nevada); \textit{Washington}, 8 S.W. 642 (Texas); People v. Greenwall, 22 N.E. 180 (N.Y. 1889); Commonwealth v. Manfredi, 29 A. 404 (Pa. 1894); People v. Wilson, 40 N.E. 392 (N.Y. 1895); People v. Miller, 53 P. 816 (Cal. 1898); \textit{Eagan}, 42 A. 374 (Pennsylvania); Hedrick v. State, 51 S.W. 252 (Tex. Crim. App. 1899); People v. Meyer, 56 N.E. 758 (N.Y. 1900).


\textsuperscript{752} \textit{Stocking}, 7 Ind. 326; State v. Myers, 40 P. 626 (Wash. 1895); Reddick v. Commonwealth, 33 S.W. 416 (Ky. 1895).

\textsuperscript{753} Braden v. State, 29 Tenn. (10 Hum.) 103 (1849); People v. Miles, 38 N.E. 456 (N.Y. 1894); Richards v. State, 30 S.W. 805 (Tex. Crim. App. 1895).

\textsuperscript{754} State v. Green, 66 Mo. 631 (1877) (resisting arrest); People v. Johnson, 17 N.E. 684 (N.Y. 1888) (escape).

\textsuperscript{755} State v. Jennings, 18 Mo. 435 (1853); State v. Nueslein, 25 Mo. 111 (1857).


\textsuperscript{757} People v. Willett, 6 N.E. 301 (N.Y. 1886); People v. Olsen, 22 P. 125 (Cal. 1889); State v. Covington, 23 S.E. 337 (S.C. 1895).

\textsuperscript{758} People v. Deacons, 16 N.E. 676 (N.Y. 1888).
Finally, two other limitations on predicate felonies were developed in the relatively few jurisdictions with felony murder statutes unrestricted by enumerated felonies or dangerousness limitations. One was the requirement of independent felonious purpose, developed in New York and briefly applied in Missouri and, possibly, Mississippi. Any jurisdiction that restricts felony murder liability to the traditional enumerated felonies also thereby imposes a requirement of independent felonious purpose, as these all involve aims distinct from simply injuring or endangering the victim. The other alternative to dangerousness limitations involved limiting the punishment imposed for felony murder. This was the approach taken in Wisconsin, Minnesota, and Florida, where felony murder was graded as murder in the third degree, subject to a minimum term of only seven years of incarceration, comparable to penalties for manslaughter in some other states.

The limitation of predicate felonies to dangerous felonies ensures that felony murder is not a crime of strict liability with respect to the risk of death, but is instead conditioned on a form of per se gross negligence. To commit a dangerous felony is to create a particularly unjustifiable risk of death. The reasonable person is on notice that the felony is considered very dangerous because it is proscribed and severely punished. If the felony is an enumerated predicate for unintentional murder, this notice is even more explicit. The requirement of an independent felonious purpose, whether accomplished through a “merger” doctrine or an enumeration of predicate felonies, ensures that murder liability is also conditioned on an evil motive and not merely on a miscalculation of risks.

759. State v. Smith, 32 Me. 369 (1851); State v. Leeper, 30 N.W. 501 (Iowa 1886); State v. Lodge, 33 A. 312 (Del. Ct. Oyer & Terminer 1892); State v. Minard, 65 N.W. 147 (Iowa 1895).
762. State v. Shock, 68 Mo. 552, 559-63 (1878).
763. Mask v. State, 36 Miss. 77 (1858).
765. See Act of Dec. 15, 1796, ch. 2, § 11, reprinted in 2 The Statutes at Large of Virginia, supra note 425, at 7 (voluntary manslaughter punishable by two to ten years incarceration, and six to fourteen years for a second offense); Mass. Rev. Stat. ch. 125, § 9 (1836) (manslaughter punishable by up to twenty years incarceration); Act of Apr. 19, 1856, ch. 139, § 3, 1856 Cal. Stat. 219, 219 (manslaughter punishable with up to ten years of incarceration); N.H. Gen. Laws ch. 282, § 10 (1878) (up to thirty year penalty for first degree manslaughter; up to ten year penalty for second degree manslaughter); Act of July 26, 1881, ch. 676, § 192, 3 1881 N.Y. Laws 1, 46 (first degree manslaughter punishable with five to twenty years of incarceration).
766. For elaboration of this account of felony murder culpability as the negligent infliction of a substantial risk of death for a felonious motive, see John Kaplan, Robert Weisberg & Guyora Binder, Criminal Law 472-75 (4th ed. 2000); Binder, Meaning and Motive, supra note 27, at 770-74; Binder, Rhetoric of Motive and Intent, supra note 27, at 84-86; Simons, supra note 20, at 1121-24.
B. Means of Killing

Perhaps the most important limitation on felony murder liability in nineteenth-century America is also the least apparent to modern observers. For modern lawyers, murder means causing death with one of a number of alternative culpable mental states comprising “malice.” By “causing death,” the modern lawyer means little more than committing an act or omission that is a necessary condition to a death. By contrast, lawyers in the seventeenth and eighteenth centuries generally conceived of murder quite differently, as killing absent certain exculpatory or mitigating circumstances. Ordinarily, the malice characterizing murder was implicit in the act of killing, a hostile and dangerous attack on the person, which happened to prove fatal. The nineteenth-century statutes and cases that formulated felony murder rules in America and England marked an intermediate point between these two conceptions of murder. They struggled to define the mental element of murder, but they also retained the older conception of killing as an inherently malicious act. These statutes and cases narrowed the scope of common law murder not because they restricted a preexisting felony murder doctrine, but because they restricted a preexisting unintentional murder doctrine to killings in furtherance of certain felonies.

Nineteenth-century statutes and cases rarely conditioned murder liability merely on maliciously “causing death.” They defined murder as malicious “killing,” and felony murder as “killing” in the course of certain felonies. And the nineteenth-century usage of “killing” in felony murder cases shows that the term had a much narrower meaning than causing death or even causing death foreseeably. This narrower concept of “killing” is discernible in this formulation of a felony murder rule, from the aforementioned 1864 English case of \textit{R. v. Lee}:

\begin{quote}
[I]f a man in the committal of a felony uses violence to the person, which causes death, even although he did not intend it, he is guilty of murder, and \ldots if two or more persons go out to commit a felony, with intent that personal violence shall be used in its committal, and such violence is used and causes death, then they are all equally guilty of murder, even although death was not intended.\footnote{768}
\end{quote}

This court limited killing in the course of a felony to causing death by intentional battery. In so doing, it made explicit the restrictive conception of killing we found implicit in eighteenth-century murder trials at the Old Bailey. The major late nineteenth-century English cases on the felony murder rule, \textit{R. v. Desmond} and \textit{R. v. Serné}, expanded the category of killing in the course of a felony to include causing death by recklessly subjecting others to the great

\footnote{767. The “little more” is that the act or omission is not superseded by a subsequent independent culpable act or omission necessary to the death, or that the act or omission foreseeably contributes to the death.}

\footnote{768. 176 Eng. Rep. 468, 469-70 (Kent Assizes 1864).}
dangers of explosives or fire. We see a similar notion of killing in American felony murder cases in the nineteenth century. "Killing" usually referred to causing death by intentionally injuring, hurting, or forcibly restraining another. In a much smaller number of cases, it refers to causing death by doing an unlawful act imposing obvious dangers of death. Thus conceived, a "killing" is always a criminal offense, unless justified or excused. If so, a crime of "killing" in the attempt of a serious felony always involves a culpable attack on the victim. The resulting death is never merely "accidental."

The method of killing was described in seventy-nine of the eighty-five reported felony murder convictions in nineteenth-century America. A total of thirty-four cases involved causing death by intentionally shooting another person. In an additional thirty cases, death resulted from some form of direct physical contact by the perpetrator, aimed at injuring, hurting, or physically controlling the victim. Five involved stabbing or slashing (although one of these was also a shooting case, counted previously), six involved strangling or drowning, and twelve involved blows to the head. In eight cases, the

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769. R. v. Desmond, 11 Cox's Crim. Cas. 146 (1868); R. v. Senné, 16 Cox's Crim. Cas. 311 (1887).

770. Reported convictions with no reported means of killing include Commonwealth v. Flanagan, 7 Watts & Serg. 415 (Pa. 1844); State v. Pike, 49 N.H. 399 (1869); State v. Wiese, 4 N.W. 827 (Iowa 1880); State v. Hopkirk, 84 Mo. 278 (1884); People v. Willett, 6 N.E. 301 (N.Y. 1886); and People v. Olsen, 22 P. 125 (Cal. 1899).


victim died as a result of some other sort of battery. One of these was a prolonged whipping.\textsuperscript{775} One was an undisclosed infliction of "great bodily harm,"\textsuperscript{776} and another was a killing by some unstated "force and violence."\textsuperscript{777} There were two other cases of beatings.\textsuperscript{778} One victim died during a struggle with a burglar.\textsuperscript{779} Two child rape victims died of various wounds and lacerations.\textsuperscript{780} In addition to these sixty-four cases of shooting or direct battery, there were three cases of death from intentional battery by less direct means. One was an intentional burning: robbers beat their victim unconscious and set fire to the building in which they left him.\textsuperscript{781} Another group of robbers forced their victim to leap from a speeding train, and he died on impact.\textsuperscript{782} The third case was an intentional poisoning, although not intended to be fatal: a rapist deceived his victim into taking a knockout drug.\textsuperscript{783} Like shooting, these three cases involve intentionally harming or incapacitating a victim through physically remote means. Accordingly, they should be seen as unproblematic applications of the concept of battery. Altogether, sixty-seven of the seventy-nine nineteenth-century American felony murder cases for which we know the cause of death involved death by intentional battery. These sixty-seven cases illustrate the traditional meaning of the verb "to kill," which involves causing death by physically contacting another person, without his or her consent and in violation of his or her rights, in order to injure, hurt, or physically compel him or her.

The remaining twelve cases involve metaphoric extensions of this core concept, some more defensible than others. In seven cases, the victim did not

\begin{itemize}
\item State v. Jennings, 18 Mo. 435 (1853).
\item State v. Nueslein, 25 Mo. 111 (1857).
\item Commonwealth v. Pemberton, 118 Mass. 36 (1875).
\item Moynihan v. State, 70 Ind. 126 (1880); Commonwealth v. Eagan, 42 A. 374 (Pa. 1899).
\item Cox v. People, 80 N.Y. 500 (1880).
\item Commonwealth v. Gilbert, 165 Mass. 45 (1895); Morgan v. State, 71 N.W. 788 (Neb. 1897).
\item Stocking v. State, 7 Ind. 326 (1855).
\item Adams v. People, 109 Ill. 444 (1884).
\item State v. Deschamps, 7 So. 703 (La. 1890).
\end{itemize}
die from the direct effects of an intentional battery. Instead, the victim died because the defendant recklessly subjected victims to a substantial danger of death. In one case, the defendants deliberately wrecked a train in order to rob it.\footnote{Williams v. State, 17 S.W. 408 (Tex. Ct. App. 1891).} Another set of train robbers knowingly forced a railroad employee into a crossfire between robbers and resisters.\footnote{Keaton v. State, 57 S.W. 1125 (Tex. Crim. App. 1900).} In two other cases, arsonists unintentionally caused the deaths of residents of hotels they burned down.\footnote{State v. Myers, 40 P. 626 (Wash. 1895); Reddick v. Commonwealth, 33 S.W. 416 (Ky. 1895).} One rapist attacked his victim in a rowboat, threatening to drown her; she fell overboard in the struggle and did drown.\footnote{People v. Willett, 62 N.W. 1115 (Mich. 1895).} One death resulted from bank robbers shooting at random in a town in order to create a diversion.\footnote{Nite v. State, 54 S.W. 763 (Tex. Crim. App. 1899).} Another involved shooting at the victim’s mount.\footnote{People v. Van Steenburgh, 1 Parker’s Crim. Rep. 39 (N.Y. Ct. Oyer & Terminer 1845).} In all of these cases, the defendants at least should have been aware that they were subjecting others to a substantial risk of death, in violation of their rights, for the defendants’ own selfish ends. Because these defendants were very culpable regarding these deaths, it seems fair to regard them as “killers,” even though they did not cause death by intentional battery.

But the five remaining cases seem further removed from the core concept of death-by-battery, and so are less appropriately called “killings.” One of these cases was \textit{State v. Levelle},\footnote{13 S.E. 319 (S.C. 1891).} in which the defendant shot his wife unintentionally in attempting to shoot himself. We have already noted one problem with this case, the fact that there was no felony to predicate felony murder liability on. But another problematic aspect of this case is the characterization of this unintended shooting as a “killing.” Suicide does not ordinarily impose risk on others, unless the means involve the unpredictable destructive power of fire or explosion. Nor does it involve the violation of another person’s rights. So it lacks the two elements of danger to others and hostility to the interests of others that make the dangerous offenses described above analogous to intentional batteries.

The other four dubious “killings” were cases where the victim died as a result of an abortion.\footnote{State v. Smith, 32 Me. 369 (1851); State v. Leeper, 30 N.W. 501 (Iowa 1886); State v. Lodge, 33 A. 312 (Del. Ct. Oyer & Terminer 1892); State v. Minard, 65 N.W. 147 (Iowa 1895).} Now, abortion certainly involves direct physical contact with the pregnant patient. But, like any other medical procedure, it is not a battery, because it is consented to. It is not intended to injure, hurt, or physically control the pregnant patient. Perhaps abortion was a very dangerous
procedure in the nineteenth century, at least if not performed by a qualified doctor. But, as long as we consider only the consenting pregnant patient, it does not violate the rights or harm the interests of another. On this analysis, abortion may have had one of the two elements that make a dangerous offense analogous to a battery, but not both. It may have been dangerous, but was not offensive to the victim.

Of course, the analysis changes if we view abortion as an unjustified assault on the life of the fetus. I think we must assume that those courts that predicated felony murder on abortion did view abortion in this way, as an attack on another person rather than just a dangerous medical treatment of a pregnant woman. If abortion is a form of intentional homicide that also poses inherent risks to the life of the mother, then the unintended death of the mother seems as much a "killing" as any other instance of killing the "wrong" victim. If we understand the abortion-murder cases in this way, they support rather than disconfirm our account of killing as organized around the paradigm of death by intentional battery. Abortion-murder liability is troubling now, and was controversial even in the nineteenth century, because of disagreement concerning the moral status of fetal life and concerning the wrongfulness of abortion itself. But given strongly antiabortionist moral beliefs, abortion-murder liability for the death of the mother appears to follow from traditional conceptions of killing and of murder.

But even on strongly antiabortionist premises, we should still be troubled by felony murder liability for an abortionist who "kills" the mother. If abortion is felonious homicide, the consenting mother is a cofelon. And we have seen no other cases in nineteenth-century America of felony murder liability for the death of a cofelon. So in this respect, abortion-murder liability for the death of the consenting patient is anomalous, even on antiabortionist moral premises.

Indeed, in order to see how limited felony murder liability was in nineteenth-century America, it is worth pointing out some of the other fact patterns missing from our litany of nineteenth-century American felony murder cases. Not only are there no cases in which the victim is a cofelon (apart from the abortion cases), there is only one case in which the act causing death may have been committed by someone other than a felon. In this one case, liability was premised on the defendant knowingly forcing the victim into the path of gunfire. There are no cases of a victim voluntarily contributing to his or her own death. There are no suicides, no voluntary drug overdoses, no overzealous police officers plunging off roofs or into icy rivers or in front of carriages while pursuing felons. There are no cases of victims having heart attacks out of mere fright (although there is one case in which a victim died while struggling with an assailant). There are no cases of victims getting the wrong medicine or contracting diseases at hospitals, or getting killed

793. Cox v. People, 80 N.Y. 500 (1880).
accidentally in traffic (unless you consider a planned train wreck accidental).\textsuperscript{794} Perhaps most importantly, there are no cases of feloniously shooting at livestock or game and unforeseeably hitting a man. The exception that proves this rule is the one case involving an animal as a target, the \textit{Van Steenburgh} case where the defendant recklessly shot at a mounted horse.\textsuperscript{795} So the proposal in the English treatises to predicate murder liability on accidental death in stealing poultry was \textit{never} put into practice in England or America.

In reviewing nineteenth-century American felony murder convictions, we come across no freak accidents of any kind. In most cases there are fatal intentional batteries that kill the victim. In a few cases the assault misfires and kills an unintended victim. And in a few cases death is caused by acts that recklessly place a number of persons in danger, rather than by assaults against one particular victim. But the kinds of remote, accidental, or improbable deaths resulting from felonies that prevail in criminal law examination hypotheticals are nowhere to be found. They are not part of the early history of the felony murder rule. An important reason for this pattern was that felony murder liability was conditioned on "killing" rather than "causing death" in nineteenth-century American law. This concept was organized around the paradigm of death by battery. Judging by the case law, to "kill" apparently required either (1) an intent to injure, hurt, or physically compel another person, or (2) the grossly negligent imposition of a risk of death for the purpose of violating another person's legal rights. If this is correct, then culpability requirements were built into the actus reus element of felony murder.

C. Accomplice Liability

A narrow conception of killing may ensure that principals convicted of felony murder acted with substantial culpability, but what about accomplices? If an accomplice in a felony did not share in the intent to injure, hurt, physically compel, or impose a risk of death on a victim, could he or she still be liable for felony murder in nineteenth-century America? A partial answer to this question is provided by the limitation of predicate felonies. The requisite culpability inheres in felonies necessarily involving risk of death (e.g., arson, murder, perhaps burglary of a dwelling) or physical coercion (e.g., robbery, rape, resisting arrest, forcible escape). Participation in such felonies therefore inculpates accomplices who do not strike the fatal blow, as long as the fatal blow was within the scope of the danger ordinarily imposed by the predicate felony.

Few American jurisdictions clearly determined the scope of accomplice liability for felony murders during the nineteenth century. Courts or legislatures

\textsuperscript{795} 1 Parker's Crim. Rep. 39 (N.Y. Ct. Oyer & Terminer 1845).
addressed the issue in only eleven jurisdictions. These few jurisdictions often articulated disparate and potentially conflicting standards. At least four different standards of accomplice liability for felony murder appeared in the American case law and treatise literature.

Collateral deaths. The most expansive standard of accomplice liability was Justice Story's proposal that all deaths occurring "collateral" to a federal felony would result in murder liability for all cofelons, a proposal later rejected in United States v. Boyd. Wharton endorsed Story's "collateral death" standard in the first edition of his homicide treatise, but later rejected felony murder liability altogether. The Iowa Supreme Court approved Story's standard in dictum in Shelledy, but did not follow it in the felony murder case of Weems.

Killings in furtherance of the felony. Weems implicitly made felony murder liability hinge on whether the killing was in furtherance of the felonious aims agreed to. Similar requirements that the killing be instrumental to the felony were also supported by the Pennsylvania grand juror's manual, McGinnis v. State (Georgia), People v. Pool (California), People v. Vasquez (California), and Ruloff v. People (New York).

Foreseeable killings. Several courts went further, and required that accomplices be in a position to anticipate violence or the danger of death in order to be held liable for felony murder. Lamb v. People (Illinois) required that death be a "probable" result of the act agreed to, although Adams v. People (Illinois) rejected this standard in favor of the requirement that an accomplice agree to an act of violence. Darlington v. State (Texas) required that death be a "natural and probable consequence" of the act agreed to, while State v. Morgan (Utah) required that the accomplice share an intent to use force. In

796. These jurisdictions were California, Georgia, Illinois, Iowa, Kentucky, New York, Pennsylvania, Texas, the United States, Utah, and Wisconsin.
798. 45 F. 851 (C.C.W.D. Ark. 1890), rev'd on other grounds, Boyd v. United States, 142 U.S. 450 (1892).
799. WHARTON, supra note 347, at 346.
800. 8 Iowa 477, 505 (1859).
801. 65 N.W. 387, 394 (Iowa 1895).
802. Id.
804. 31 Ga. 236 (1860).
805. 27 Cal. 572, 580-82 (1865).
806. 49 Cal. 560, 562-63 (1875).
807. 45 N.Y. 213, 216-17 (1871).
808. 96 Ill. 73, 83-84 (1880).
809. 109 Ill. 444, 449-50 (1884).
811. 61 P. 527, 530 (Utah 1900).
People v. Van Steenburgh (New York),\textsuperscript{812} murder liability was apparently limited to those disguised rioters who actually fired guns. While we cannot be sure if this limit was imposed by the court, the jury, or the prosecution, the result is compatible with a standard requiring either intent to use force or expectation of significant risk. On the other hand, several courts rejected a requirement that accomplices in a felony murder agree to or expect a killing.\textsuperscript{813}

Resolutions to overcome resistance. Finally, several courts and commentators invoked the accessorial liability standard from \textit{Lord Dacres}, which implicated all those accomplices who joined in a “resolution against opposers.”\textsuperscript{814} Supporters of this “resolution” test included Webb’s treatise on colonial Virginia law,\textsuperscript{815} Toulmin and Blair’s official commentary on Kentucky law,\textsuperscript{816} the Pennsylvania grand juror’s manual,\textsuperscript{817} Story’s instructions in \textit{United States v. Ross},\textsuperscript{818} and cases in California\textsuperscript{819} and New York.\textsuperscript{820} It remained unclear whether any of these authorities would have excluded accessorial liability \textit{absent} such a resolution to overcome resistance by force.

Overall, it appears that Story’s sweeping collateral-death standard was not accepted in nineteenth-century American law. Most jurisdictions that considered the question limited accomplice liability for felony murder to killings that were in furtherance of and foreseeable as a result of the predicate felony.

In assessing the application of felony murder rules to accomplices, it is useful to distinguish between four types of cases: (1) some cofelons participate in a violent assault, but do not all strike a fatal blow; (2) some cofelons participate in a felony necessarily involving violence or the imposition of risk, but do not personally participate in the fatal violence; (3) some cofelons participate in a crime which may necessitate violence, depending on the circumstances, but do not personally participate in the fatal violence; and (4) some cofelons participate in a crime which ordinarily does not necessitate violence or risk, and do not personally participate in any fatal violence. Most observers will probably find accomplice liability for murder acceptable in the first two situations and unacceptable in the fourth situation. In the third situation, they might condition murder liability on further proof that a particular

\begin{itemize}
\item \textsuperscript{812} 1 Parker’s Crim. Rep. 39 (N.Y. Ct. Oyer & Terminer 1845).
\item \textsuperscript{813} Miller v. State, 25 Wis. 384, 388-89 (1870); People v. Olsen, 22 P. 125, 126-27 (Cal. 1889); People v. Wilson, 40 N.E. 392, 394-95 (N.Y. 1895). Consistent with this position, albeit less explicit, is \textit{Mickey v. Commonwealth}, 72 Ky. 593 (1873).
\item \textsuperscript{814} 72 Eng. Rep. 458, 458 (K.B. 1535).
\item \textsuperscript{815} \textit{WEBB}, supra note 241, at 233.
\item \textsuperscript{816} 1 TOULMIN \& BLAIR, supra note 334, at 51.
\item \textsuperscript{817} Pa. Legislature, supra note 400, at 566-67.
\item \textsuperscript{818} 27 F. Cas. 899, 901 (C.C.D.R.I. 1813) (No. 16,196).
\item \textsuperscript{819} People v. Pool, 27 Cal. 572, 581 (1865).
\item \textsuperscript{820} Ruloff v. People, 45 N.Y. 213, 217 (1871).
\end{itemize}
accomplice encouraged, facilitated, or expected violence.

Among the eighty-five reported nineteenth-century American felony murder convictions I have discovered, seventeen appear to impose felony murder liability on cofelons who may not have struck the fatal blow. Nine of these cases are of type (1), in which the defendants participated in the fatal attack.\(^{821}\) Notable among these is New York's *Van Steenburgh* case, where only those rioters who shot at a rider's mount were held liable for murder. An additional seven cases were of type (2), all predicated on the necessarily forcible felony of robbery.\(^{822}\) In one such case, the defendant robbed a bank at gunpoint while his accomplices opened fire on a neighboring street to create a diversion, with fatal results.\(^{823}\) In another, the defendant participated in a train robbery while his accomplices in another part of the train killed victims they were assigned to subdue at gunpoint.\(^{824}\) The most troubling case was another fatal train robbery in which the defendant's participation was physically and temporally remote from the violence: he fraudulently insured packages of money and mailed them aboard the train in preparation for filing a false insurance claim, the ultimate purpose of the robbery.\(^{825}\) Another case in which the defendant professed to have no expectation that a fellow robber might kill involved only third degree murder liability.\(^{826}\) One nineteenth-century case appears to be of type (3): in the California case of *People v. Olsen*, at least one of the participants shot and killed a pursuer during a theft. There were no nineteenth-century cases of type (4).

In California, then, expansive criteria of accomplice liability combined with a willingness to predicate murder liability on nonenumerated felonies to

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821. People v. Van Steenburgh, 1 Parker's Crim. Rep. 39 (N.Y. Ct. Oyer & Terminer 1845) (punishing shooters in the course of a riot); State v. Jennings, 18 Mo. 435 (1853) (punishing assailants who committed felony of grievous bodily injury); McGinnis v. State, 31 Ga. 236 (1860) (punishing participants in riot, defined as an act of violence); Bissot v. State, 53 Ind. 408 (1876) (punishing the shooter of a resisting watchman during burglary); Moynihan v. State, 70 Ind. 126 (1880) (punishing one who battered another during a robbery); Poe v. State, 78 Tenn. 673 (1882) (punishing shooters who committed "theft or robbery"); Adams v. People, 109 Ill. 444 (1884) (punishing a participant in a robbery who helped push a robbery victim off a moving train); People v. Wilson, 40 N.E. 392 (N.Y. 1895) (punishing the batterer of a policeman shot by an accomplice during escape); Commonwealth v. Eagan, 42 A. 374 (Pa. 1899) (punishing a batterer who attempted to commit robbery).


823. *Nite*, 54 S.W. 763 (Texas).

824. *Darlington*, 50 S.W. 375 (Texas).

825. *Isaacs*, 38 S.W. 40 (Texas).


827. 22 P. 125 (Cal. 1889). The opinion does not say whether the defendant knew his cofelons were armed, or whether he was aware of any danger of resistance or pursuit.
create a danger of undeserved accomplice liability for felony murder. But overall, accomplice liability appears to have conformed to the standards enunciated by some courts, requiring that vicarious felony murders be instrumental to and foreseeable as a result of the predicate felonies agreed to. With one exception, accomplice liability was limited to those actually participating in the fatal assault, or to participants in the inherently violent felony of robbery. In other words, the dangerous felony limitation and the requirement of causing death by violence restricted felony murder liability for accomplices as well as principals.

In sum, most American jurisdictions limited felony murder to (1) causing death through either violence or the reckless imposition of risk, in the course of inherently dangerous felonies; or (2) participating in felonies foreseeably involving acts of violence that resulted in death. In these ways, most American jurisdictions built culpability requirements into the actus reus of felony murder, and so avoided holding felons strictly liable for accidental death.

CONCLUSION: THE CHANGING FUNCTIONS OF FELONY MURDER RULES

Criminal law teaching, scholarship, and adjudication have often made two assumptions about the original source and scope of American felony murder rules: (1) that the English common law long held felons strictly liable for all deaths caused in the course of all felonies; and (2) that the English common law of crimes became the law in every American jurisdiction upon independence—and in subsequently formed territories and states upon their creation—and remained the law until altered by statute. Based on these premises, lawyers have assumed that broad felony murder liability was the default rule in American jurisdictions with no statute on the subject; they have read American felony murder statutes as simply continuing in force this broad rule; and they have treated statutes or court decisions explicitly limiting felony murder liability as half-hearted confessions that any form of felony murder rule perpetuates an anachronistic and unfair basis for liability.

Both assumptions are myths. First, English common law had no felony murder rule at the time of the American Revolution. If Coke proposed a general rule of murder liability for deaths resulting accidentally from unlawful acts (itself a dubious proposition), such a rule was emphatically rejected by English courts and commentators. While a rule that any felony resulting in death was murder was proposed in opinions in the eighteenth-century cases of R. v. Plummer and R. v. Woodburne, and supported by Hawkins and Foster during that century, such a rule does not appear to have been applied by any English court at any time. Prior to the American Revolution, English courts had only imposed murder liability on those who (1) mistakenly killed one person in an attempt to kill or wound another, (2) killed in defending themselves against resistance to a crime, or (3) agreed with others to kill or wound for a criminal purpose, when one of them killed for that purpose. In other words, English law
equated the intention to wound and the intention to kill, transferred the intention to kill or wound from one victim to another, and attributed the act of each accomplice to others who shared the same culpable intent. But it did not equate the intent to commit a felony with the intent to murder.

Second, English rules of criminal law were authoritative in the United States only insofar as they were enacted by legislatures and courts. English constitutional law denied the automatic authority of the common law in the colonies, so that the reception of any particular rule of English law depended on enactment by competent local authorities. After independence, Americans mostly recognized the continuing authority only of their own common laws, the practices and precedents of courts in their own states. Some Americans were particularly critical of English criminal law, which they saw as unduly punitive and as undemocratic in origin and content. Americans were generally opposed to judicial definition of crimes in the early nineteenth century, and quickly set about enacting codes of criminal legislation.

Felony murder rules developed in the United States only after this process of codification was underway. Felony aggravator statutes began to spread in the 1790s, and felony murder statutes began to proliferate in the 1820s. Yet the first American felony murder convictions were not reported until the 1840s. Indeed, reported felony murder convictions were quite rare until the last three decades of the nineteenth century, by which time the vast majority of jurisdictions had passed felony aggravator or felony murder statutes. A majority of reported nineteenth-century felony murder convictions took place in states with felony murder statutes. In jurisdictions with felony aggravator statutes only, felony murder liability was usually confined to killings in the course of statutorily enumerated felonies, suggesting that the courts considered the statutes to be the source of felony murder liability. Only three felony murder convictions were reported in jurisdictions with neither felony murder nor felony aggravator statutes—all at the end of the nineteenth century, after statutory felony murder liability had become widespread. In short, Americans created their felony murder rules primarily by statute rather than by common law adjudication.

These statutorily based felony murder rules had a much narrower scope than the mythical "common law felony murder rule" is supposed to have had. In the great bulk of jurisdictions and the great bulk of cases, felony murder liability was predicated on the dangerous felonies of robbery, burglary, rape, arson, or murder. Apart from one case predicated on a bungled suicide and four cases predicated on putatively consensual abortions, none of the known felony murders punished in nineteenth-century America could plausibly be described as accidental. In almost all of these cases, death resulted from the deliberate infliction of violence. In a few cases defendants knowingly imposed a great risk of death on their victims in pursuit of their criminal ends. In short, the felony murder rules put into practice in nineteenth-century America had requirements of culpability built into the requisite felonies and the common law’s
traditionally restrictive concept of killing. As noted, there are a handful of troubling cases that depart from this prevailing pattern. Yet these cannot be taken as indications of the scope of the American "felony murder rule" generally, because there was no such general rule. Since each jurisdiction enacted its own rule, unjust decisions were of precedential value only where they were decided. We can criticize unjustly defined and applied felony murder rules, but that does not condemn other felony murder rules defined more narrowly and applied more justly.

The critic may respond that the most expansive applications of felony murder liability more authentically represent the essential principle underlying felony murder liability, because they better accord with the "original" felony murder rule proposed in the early eighteenth century. But this retort fails for two reasons.

First, as this Article has demonstrated, American felony murder rules are not, in fact, descendent from these eighteenth-century proposals. These proposals never acquired authority as law in England or the colonies. American felony murder rules were enacted after independence, by statute or statutory construction, as part of a distinctively American project of codifying criminal law.

Second, felony murder liability has no single rationale or function, no necessary form or scope. There are several different ways of conceptualizing felony murder liability. For example, we can think of the homicide as generating or aggravating liability for attempting the felony. The intent-transferring principle proposed by Holt and Hawkins in the early eighteenth century fits this conception of felony murder liability. It was designed to permit the capital punishment of failed attempts to commit felonies that resulted in unintended harms that would be capitally punishable if produced intentionally. This intent-transferring principle was premised on the absence of felony liability for attempted felonies, the absence of effective alternatives to capital punishment, the capital punishment of all felonies, and the limitation of felonies to crimes deserving of capital punishment. The last two premises were already dubious in the early eighteenth century. The first two premises were true in the early eighteenth century, but became obsolete with the development of attempt liability in the latter part of the eighteenth century and of the penitentiary in the early nineteenth century. Perhaps for these reasons, the proposed rule was never enacted.

Another way of conceptualizing felony murder liability is to think of the attempted felony as generating or aggravating liability for the homicide. But the attempted felony can enhance homicide liability in a variety of ways. One approach is to use the attempted felony as a bar to defenses. Suppose causing death by certain means (e.g., battery) and with a particular intent (e.g., to kill or injure) is murder absent the defenses of self-defense or legally adequate provocation. The context of an attempted felony could generate murder liability, or aggravate manslaughter to murder, by barring these defenses. Of
course, less serious offenses might also preclude justifications for killing a resister or for being provoked to anger. But one might reason that only a felony could justify the use of deadly force by a resister, thereby depriving the felon of a right to use deadly force in defending himself. It is clear that some such rule barring the justification and mitigation of homicides in the course of crime was part of the law of defenses in England from the sixteenth century onward, and in nineteenth-century America as well.

In making sense of some of the more extravagant formulations of felony murder liability in the common law treatises, it is important to understand that the law of defenses formerly had a larger role in the criminal law than it does today. Before the nineteenth century, accident and mistake were often thought of as excuses, rather than as circumstances negating a mental element. Thus, if a criminal purpose could bar the justification and mitigation of the use of deadly force, it might seem that a criminal purpose should also bar the exculpation of unintended killing on the ground of accident or mistake. Such a proposition would have been particularly appealing if “killing” were defined narrowly enough to imply some culpability, and “accident” and “mistake” were defined broadly enough to include unintended but nevertheless culpable harm. A felony murder rule would then be a way of severely punishing some unintended deaths that were nevertheless highly culpable because very reckless or caused with an intent to injure. There might still be faultless deaths occurring during the attempt of felonies that would not be considered “killings” or not considered to be sufficiently related to the dangers posed by the felony to trigger the rule.

Yet another conception of felony murder liability makes it part of the law of offenses rather than defenses. Here, certain classes of offenses might inherently satisfy some requisite of the act element of murder. Thus, if the act element of murder requires a battery, and if such a battery is inherent in such offenses as rape, robbery, kidnapping, mayhem, or resisting arrest, then causing death by means of one of these offenses satisfies the act element. If murder requires proximately causing death, which in turn requires foreseeability, then dangerous crimes like those just mentioned, as well as arson and residential burglary, would help satisfy the act element.

Alternatively, certain types of offenses might inherently fulfill some part of the mental element of murder or aggravated murder. If intent to injure suffices to make a homicide murder, some forms of aggravated assault, like mayhem, will supply that automatically. If some form of recklessness or negligence suffices, a dangerous offense will imply such a mental state. Finally, certain offenses may entail a sufficiently depraved motive to aggravate liability for causing death. Where felonious motive is used in this way, it should be distinct from the culpability with respect to death or bodily injury. Thus, rape and robbery involve sufficiently independent depraved purposes; assault, mayhem, and involuntary manslaughter do not. Predicate felonies that are inherently dangerous, while also involving depraved purposes independent of the danger,
provide a reason for holding a felon causally responsible for a resulting death (it was foreseeable) and a reason for further aggravating the felon’s liability for that death (the foreseeable danger was imposed for a depraved motive).

Finally, participation in a felony or other crime can provide a criterion of accessorial liability for secondary crimes. Again, the recklessness or intent to injure inherent in some crimes can supply the culpability required for complicity in murder. Participation in a criminal plan involving the contingent use of violence—such as the proverbial “resolution against opposers”—might be said to encourage any fatal violence committed in pursuit of the plan. Imposing accomplice liability on all participants in a fatal felony might seem particularly attractive where it is difficult to establish who among a gang of assailants struck the fatal blow.828

As we have seen, a felonious context for homicide can aggravate liability in a variety of different ways and for a variety of different reasons. Understanding the effect and evaluating the purpose of any enacted felony murder rule therefore requires locating it within a larger network of rules defining causation, culpability, attempts, defenses, and complicity in a particular legal system. Accordingly, critics of felony murder cannot treat all felony murder rules at all times and in all jurisdictions as expressions of a single principle of liability.

Given the range of different principles of liability that a felony murder rule can express, how should we interpret the felony murder rules enacted in nineteenth-century America? Certainly not as the legacy of Hawkins’s general principle equating all felonies. Attempt liability became part of the common law in the late eighteenth century. The development of penitentiaries in the nineteenth century permitted differentiation in the severity of punishment for serious crimes. Americans greatly reduced the number of capital felonies. Courts, and even legislatures, occasionally invoked the intent-transferring principle in nineteenth-century America, but this principle had lost its logical basis. A compelling demonstration of this is the fate of the Texas Penal Code’s intent-transferring provision. Even though this provision seemed to authorize a broad felony murder rule along the lines Hawkins proposed, the Texas courts applied no such broad rule. Instead, they generally restricted felony murder to intentional or reckless killings in the course of enumerated felonies. They invoked the intent-transferring provision in only one felony murder case, predicated on the felony of murder itself.

With the end of the eighteenth century, the issue of culpability was reconceptualized as part of the prosecution’s case, rather than as a defense to be raised by the defendant. Murder statutes that punished malicious or willful

828. See R. v. Phararo (Old Bailey Apr. 16, 1790), http://hri.shef.ac.uk/luceneweb/bailey/highlight.jsp?ref=t17900416-1 (concerning three traveling companions of the victim found in possession of his property near his bloody corpse; all were convicted of murder despite absence of evidence as to which killed him).
murder, or that defined express and implied malice more elaborately, were part of this process of defining a mental element for each offense. While malice had traditionally meant little more than the intent involved in striking a hostile blow, nineteenth-century reformers saw intent to kill as the paradigmatic form of malice. But they also understood that intent to kill was too restrictive a definition of the mental element of murder for a number of reasons. First, there was the problem of proving mental states. A burglar shooting a pursuing police officer could always claim he shot to wound. A robber shooting a victim could always claim a sudden movement startled him or that the gun went off inadvertently in a struggle. A rapist could always claim he strangled his victim accidentally in an effort to quiet her. An arsonist could claim he thought the hotel residents would escape in time. A felony murder rule allows jurors to convict in these cases even if they are not certain the defendant is lying. In this respect, it performs the same kind of function as a rule conditioning murder liability on intent to injure or extreme recklessness. But even intent to injure or recklessness can be denied. The burglar might have shot merely to frighten the police officer; the arsonist might not have recognized the possibility that fire could spread from an empty store to a neighboring hotel. In short, the felon may have been catastrophically negligent rather than reckless.

The second reason to avoid narrowing the concept of malice to intent to kill was the moral intuition that different kinds of culpability might be sufficiently heinous to warrant murder liability. Even by itself, intent to kill is a complex form of culpability rather than a single mental state. It embraces both the cognitive state of expecting death to result and the desiderative state of acting for the purpose of bringing death about. As Alan Michaels has recently argued, the cognitive state of expecting death is only culpable because proceeding in the face of such an expectation implies the desiderative state of accepting death as the price of achieving some other goal. On the other hand, we would probably not treat the hope of causing death as sufficiently culpable unless accompanied by at least some realistic prospect of achieving it. So intent embraces two different alternative combinations of cognitive and desiderative elements.

The other mental states usually seen as included within malice similarly combine cognitive and desiderative elements. Intent to injure combines a heinous and malicious desire with knowledge of circumstances justifying an expectation of risk to life. Standards like gross recklessness, depraved indifference to human life, or abandoned and malignant heart often combine knowledge of a substantial risk to life with some other heinous desiderative state, such as the desire to frighten or humiliate or motives of greed and


830. Mayes v. People, 106 Ill. 306 (1883) (holding that abandoned and malignant heart murder requires recklessness and intended mischief, in a case where the defendant threw
dishonesty. Felony murder fits this general pattern insofar as it predicates murder liability on an offense involving both danger to life and an independent felonious purpose. The dangerousness of the offense should alert the felon to risk, while the independent felonious purpose implies that the felon is willing to impose this risk as the price of realizing a particularly heinous desire. So where extreme indifference murder often requires recklessness for an antisocial purpose, felony murder typically requires gross negligence for an extremely depraved purpose.

This conception of malice as a collection of combinations of cognitive and desiderative states fits with the battery paradigm of killing discussed in the previous Part. The battery paradigm organizes the law of criminal homicide around familiar images of violence: shooting, stabbing, clubbing, strangling. This focus on violent death gives the proscription of homicide a more complex moral meaning than simply condemning disrespect for the value of life. Battery inherently violates another's physical integrity, thereby endangering his or her health, and violates another's autonomy, thereby demeaning him or her. If "killing" means to cause death through intentional battery, the intent to batter rather than the intent to cause death is the paradigmatic culpable mental state for homicide. If "murder" is aggravated homicide, then malice should be seen as an aggravated form of the complex culpability associated with battery. In other words, "malice" is part of the vocabulary of the complex and culturally contingent idea of violence, rather than part of some antiseptic, actuarial vocabulary of life expectancy. If malice is the moral dimension of extreme violence, it includes the unprovoked intent to kill, but it can also include other mental states, like the unprovoked intent to injure, or the willingness to expose others to great danger for nasty motives like cruelty, domination, and greed.

One function of a felony murder rule, then, is to work in conjunction with other rules of criminal liability to map a particular society's moral intuitions about violence and malice. This means that there can be no universally valid answer to the question of the justice of "the" felony murder rule. Instead, we must evaluate each felony murder rule as it is defined and put into practice in a particular jurisdiction, in a particular legal and cultural context. It appears that in nineteenth-century America, felony murder rules were rarely defined with great precision, but were applied fairly in most jurisdictions. We have inherited crockery in anger at his wife and daughter, igniting the wife by breaking an oil lamp in her hands); Commonwealth v. Malone, 47 A.2d 445 (Pa. 1946) (holding that abandoned and malignant heart murder requires recklessness and "wicked disposition," in a case where the defendant intimidated a younger child into playing Russian roulette).

831. People v. Protopappas, 246 Cal. Rptr. 915 (Ct. App. 1988) (holding that abandoned and malignant heart murder requires recklessness and a "base, anti-social purpose," illustrated in this case by a dental surgeon who knowingly provided less than a safe and professional standard of care in order to cut costs).

no irrationally draconian common law felony murder rule from the Middle Ages. But we have inherited from our nineteenth-century forebears a defensible tradition of aggravating liability for culpable homicides committed in the pursuit of depraved motives.