RECONSIDERING THE FELONY MURDER RULE IN LIGHT OF MODERN CRITICISMS: DOESN'T THE CONCLUSION DEPEND UPON THE PARTICULAR RULE AT ISSUE?

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By David Crump *

Introduction
I. For and Against the Felony Murder Rule: The Well-Worn Arguments
II. What Kind of Felony Murder Statute? Good Ones and Bad Ones
   A. Good Crime Definition (Although “Good” Is Always in the Eye of the Beholder)
   B. Bad Felony Murder Definition (Although “Bad” Is in the Eye of the Beholder Too)
III. Evaluating the Newer Arguments Against the Felony Murder Rule

Conclusion

The felony murder doctrine has long been a target for detractors.1 In some instances, the criticisms have had merit, or at least, they have had merit when aimed at certain ill-considered formulations of the rule.2 In other instances, however, the critics have had poorly reasoned arguments. Surprisingly, this label applies to the drafters of the Model Penal Code3 and to the Michigan Supreme Court,4 who saw no arguments whatsoever for the rule. There was a time, in

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1 See., e.g., Guyora Binder, The Culpability of Felony Murder, 83 NOTRE DAME L. REV. 965, 966 (2008) (asserting that commentators are “almost unanimous in condemning felony murder” and citing scholars).

2 See infra Pt. II B of this article.

3 The Model Penal Code purported to abolish the doctrine, largely on the asserted ground that it separated criminal liability from blameworthiness. The drafters wrote that “principled argument in favor of the felony-murder doctrine is hard to find.” MODEL PENAL CODE § 201.2 (1) (b) comments at 37-39 (Official Draft and Revised Comments 1985). But principled arguments can be found, in fact. See infra Pt. II of this article. Furthermore, the MPC actually retained a form of felony murder, with a highly ambiguous definition. See infra notes 27-30 and accompanying text.

4 People v. Aaron, 299 N.W. 304, 312-16 (Mich. 1980) (concluding that to the extent that various States have placed limits on the rule, they “call into question the continued existence of the doctrine itself”). This reason for abolishing the rule is solidly illogical. See infra notes 31-36 and accompanying text.
fact, when virtually no commentators could find anything to say in favor of retaining the rule, even though it had proven extraordinarily durable over time and even though almost every State had chosen to retain it.\(^5\) That history ought to have prompted scholars to consider whether, perhaps, there might be reasons for the near-universal retention of the felony murder doctrine, but for most of the rule’s existence, few scholars did so.

In 1985 my co-author and I attempted to do what had been neglected up to then: to describe the policies that arguably are served by the felony murder rule.\(^6\) The resulting article has been cited by a wide variety of courts and appears in almost every law school casebook covering Criminal Law.\(^7\) Our conclusion was that whether to retain the felony murder rule was a decision that could be argued either way, but that the decision should not be made with a blind eye toward the reasons for retaining the rule. Since that time, the debate has changed. There still are critics, as there should be. In fact, many academics are critics, as one would expect in academia, where the existence of criminal liability may be less popular than its retrenchment. But with relatively

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\(^5\) See supra note 3 (showing the absence of commentary in support); James J. Tomkovicz, The Endurance of the Felony Murder Rule: A Study of the Forces That Shape Our Criminal Law, 51 WASH. & LEE L. REV. 1429 (1994) (recognizing persistence of the rule).


\(^7\) For recent citations by courts, see e.g., People v. Hansen, 885 P.2d 1022, 1028 (Cal. 1994); McMillan v. State, 956 A.2d 716, 731 (Md. 2008); Bourman v. State, 172 P3d 681, 685 (Wash. 2007). For an excerpt in a casebook, see, e.g., JOSHUA DRESSLER, CRIMINAL LAW 310 (3d ed. 2003).
few exceptions, academics no longer argue that the felony murder rule is without any support. 8

The debate continues, of course. It largely consists of arguments that detract from the felony murder rule, although not entirely. But there are two remaining questions. First, what arguments, if any, can furnish answers to the newer criticisms of the rule? As was the case years ago, many of the criticisms are subject to answers or counter-criticisms, but the answers have not been uniformly developed. And second, given that most jurisdictions still retain the felony murder doctrine in some form, how should a statute expressing the rule be designed? As is the case with any other legal principle, there are good versions of the felony murder doctrine, and there are bad versions.

This article is an attempted reply to the critics, including the newest critics. It also contains an appraisal of different types of felony murder laws. The first section of the article briefly summarizes the older arguments for and against the felony murder doctrine, including the arguments contained in the earlier article referred to above. The second section describes various forms that the felony murder rule takes in various states and under various statutes today. Some of the versions are sound, and some are not. The third section considers some of the most salient new criticisms of the rule. This discussion shows that the relative merit of the criticisms depends heavily upon which version of the rule is at issue.

A final section contains the author’s conclusions. As before, the author recognizes that retaining the felony murder rule is a policy decision that can be argued either way but argues that the decision should not be made with a one-sided bias. In addition, the conclusion includes the observation that for evaluating the criticisms, a great deal depends upon which version of the rule is at issue.

Most critical articles at least recognize the contrary arguments. See Guyora Binder, supra note 1, at 966 (citing articles that support and criticize the rule). For more dubious commentary that instead asserts that the rule is “rationally indefensible,” see Sanford H. Kadish, Foreword: The Criminal Law and the Luck of the Draw, 84 CRIM. L. & CRIMINOLOGY 695-96 (1994).
felony murder doctrine the critics happen to choose to denounce. The better versions are responsive to, and can withstand, the critics’ assaults, while the less acceptable versions give ammunition to the critics.

I. FOR AND AGAINST THE FELONY MURDER RULE: THE WELL-WORN ARGUMENTS

The arguments against the felony murder rule have been asserted for many years, although the classic opposition, contained for example in the commentary to the Model Penal Code, is not well developed. The chief complaint of the MPC drafters appears to be that the felony murder doctrine causes convictions unrelated to individual blameworthiness.\(^9\) The underpinnings of this argument seem to include an assumption that the rule inevitably will be written to avoid any connection to individual blameworthiness, which is not true, as will be discussed below.\(^10\) The argument also seems to assume that felony murders are not, as a class, more blameworthy than felonies that do not result in death, although this assumption is debatable; and it further assumes that differences in moral blameworthiness cannot be addressed appropriately in sentencing laws. Ultimately, the drafters seem to be saying that mens rea is the only legitimate determinant of blameworthiness, that the traditional determinants of mens rea for murder are the only way to describe the appropriate mental states for murder, and that the felony murder rule cannot be crafted to create an equivalent requirement of moral blameworthiness. Again, the argument rests upon debatable propositions.

The classic arguments also assert that the felony murder rule cannot advance other goals of the criminal law, including those founded on utilitarian concepts, such as deterrence. This criticism sometimes asserts that the felony murder rule cannot deter accidental killings during

\(^9\) See supra note 3.

\(^10\) See infra Pt. II of this Article.
felonies because felons will not know the law and cannot conform their conduct to the minimization of accidental killings.\textsuperscript{11} Then, too, there is the argument that the exceptions or limits to the felony murder rule somehow undermine the rule.\textsuperscript{12} This position seems to be supported by an assumption that no rule should have exceptions, and the existence of any limits on a rule shows the rule itself to be illegitimate, even if the limits produce results consistent with the policy of the rule by avoiding its application when the rule could not carry out its policy. These arguments, too, are subject to criticism.

It should be immediately added, however, that for some formulations of the felony murder rule, these arguments might have more currency than for some other formulations. The California jurisprudence about felony murder, for example, is poorly designed, as this article will show in later sections.\textsuperscript{13} The California version of felony murder produces arbitrary distinctions that excuse from murder some individuals with greater moral blameworthiness than some individuals who become liable for murder. This is not the same thing, however, as detaching felony murder from considerations of moral blameworthiness, because the California decisions resulting in murder convictions do reflect moral blameworthiness; the problem is that California uses odd distinctions to exonerate some others who also are blameworthy.\textsuperscript{14} This is the perennial condition of the criminal law, which is written to minimize errors of conviction and which therefore creates anomalies of exoneration. But there is no doubt that the California rule is badly designed, and the moral blameworthiness rationale has something to do with the reasons. In any event, California’s approach is not the only way to do it. There are other types of felony murder

\textsuperscript{11} Justice Holmes, among others, offered this criticism. O. W. HOLMES, THE COMMON LAW 58 (1881).

\textsuperscript{12} See supra note 4 and accompanying text.

\textsuperscript{13} See infra part II B of this article.

\textsuperscript{14} See infra notes 61-63 and accompanying text.
statutes that do not reflect the disadvantages of California’s law, as a later section of this article will show.

Are there any arguable rationales for the felony murder rule? Yes, there are, and developing these arguments was one purpose of my earlier article, mentioned above. First, the felony murder rule may actually serve the policy of linking the criminal law to moral blameworthiness. At least arguably, the rule produces proportional grading of criminal offenses. This argument rejects the criticisms of the rule founded on a mens-rea-only assumption. The criminal law has never been limited to mens rea alone in assessing the severity of crime. Actus reus and results count, too. Murder is not the same offense as attempted murder, even though the two crimes have similar mentes reae. Murder is a more serious crime, even if the main difference is the result. The felony murder rule, like classical criminal law, is founded on the proposition that results are sometimes a factor that aggravates or reduces the severity of a crime. Specifically, the felony murder rule reflects a judgment that a robbery that causes a human death is not merely a robbery but something more serious. It is more akin to a murder than to a robbery.

Then, too, the ancient policy of deterring killings, which has justified the felony murder rule for many years, may have more truth to it than the critics recognize. It seems doubtful that felons are so different from other people that they cannot understand that a killing makes a criminal episode more serious. Surely, a robber who causes a human death during the crime

15 David Crump et al., supra note 6, at 361-77.
16 See Id. at 361-67.
17 See Id.
18 See Id.
19 See David Crump et al., supra note 6, at 369-70.
knows that he has bought more trouble for himself than if he had left everyone alive. Furthermore, the assumption that the rule cannot deter accidental killings is extravagant. If that were the case, the law would have long since discarded every principle based on negligence, as well as strict liability, on the ground that accidents are not deterrable. Furthermore, the rule may well deter intentional killings. If the defendant claims, falsely, that the gun discharged accidentally, and the jury cannot tell beyond a reasonable doubt whether this claim is true, the result would be acquittal, without the felony murder rule.²⁰

There are several other reasons for the rule. As the last example above shows, the rule removes some of the advantages of committing perjury and,²¹ as the California Supreme Court has recognized, it reserves finely calibrated (and scarce) trial resources for more substantial issues.²² The rule also performs a function involving condemnation, because it reaffirms the sanctity of human life by reserving severe sanctions for crimes that destroy human life.²³

In addition, the felony murder rule serves the purpose of providing clear and unambiguous crime definitions.²⁴ This is an important value in the criminal law, even though it is far from the only value.²⁵ Ambiguity encourages discriminatory and inconsistent adjudication. Clarity, on the other hand, confines the discretion of both jurors and judges to import invidious criteria into the decision of criminal liability.²⁶ A well-drafted felony murder statute, such as the one considered in the next section of this article, serves this goal. By way of contrast, the Model Penal Code attempts to cover the felony murder situation by an odd combination: a confusing

²⁰See Id.
²¹See Id. at 375-76.
²²See People v. Burton, 491 P.2d 793, 801-02 (Cal. 1971); David Crump et al., supra note 6, at 374-75.
²³David Crump, et al., supra note 6, at 367-68.
²⁴Id. at 371-74.
²⁵Id.
concept of recklessness coupled with a presumption. First, the MPC defines murder to include homicides committed “recklessly under circumstances manifesting extreme indifference to the value of human life.” This sentence contains several vague concepts that are likely to produce inconsistency and arbitrariness in verdicts. Then, the MPC provides that the requisite recklessness and indifference are “presumed” if the actor was engaged in any of several named felonies. A criminal presumption, of course, requires the judge to tell the jury that it can follow the presumption—or not, as it chooses. Arguably, a well-crafted felony murder law would provide clarity that would confine discretion better than the MPC’s back-door method of “abolishing” the rule but actually keeping it.

What about the exceptions to the rule? Do they destroy the legitimacy of the rule? Here, the critics’ argument involves a non sequitur, because every legal principle requires delimitation. The classic murder statute is limited both by its own terms and by exceptions that range from self defense to insanity. But no one advocates abolishing the crime of murder because it is subject to exceptions. These limits help the criminal law to carry out its policy by confining convictions for murder to cases that should be called murder.

Do the exceptions to felony murder perform a similar function? Upon examination, the exceptions and limits to the felony murder rule similarly turn out to reflect instances in which a conviction for murder would not be justified by policy. Some jurisdictions have good

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28 For example, two juries can differ significantly enough over the kinds of indifference that are “extreme” so that they produce seriously inconsistent verdicts. Furthermore, some jurors may be motivated to find “extreme” indifference because of improper factors such as the defendant’s lifestyle, personality, or ethnicity.
30 See County Court of Ulster County v. Allen, 442 U.S. 140 (1979) (holding that this instruction to the jury is constitutionally required).
31 The Michigan Supreme Court reasoned that they did. See supra note 4.
32 For an analysis of this issue, see David Crump et al., supra note 6, 377-91.
exceptions and limits, so that they carry out the policies better, and some have clumsier ones. But the limits and exceptions are intended to serve this purpose in each type of jurisdiction.\textsuperscript{33} The merger doctrine, for example, keeps the felony murder rule from swallowing up the system of crime grading reflected in lesser homicides.\textsuperscript{34} The dangerous act (or less reliably, the dangerous felony) requirement is designed to confine the murder category to instances of blameworthiness.\textsuperscript{35} Causation doctrines are another kind of correlation with blameworthiness.\textsuperscript{36} Basing a blanket abolition of all types of felony murder doctrines on the existence of exceptions and limits is poor reasoning, but that has not kept it from being asserted.

Once again, it should be observed that both the critics’ arguments and the rationales for the felony murder rule depend to some extent upon which form of felony murder rule one is discussing. There are better felony murder statutes, and there are worse ones. The better statutes can stand up to the critics’ attacks more persuasively than the worse ones can.

\section*{II. WHAT KIND OF FELONY MURDER STATUTE? GOOD ONES AND BAD ONES}

\textbf{A. Good Crime Definition (Although “Good” Is Always in the Eye of the Beholder)}

A good felony murder statute would have several characteristics. For example, it would avoid interfering with the policies underlying other kinds of crime grading contained in statutes defining lesser homicides and possibly certain other kinds of crimes. It also would tie the murder definition to situations involving relatively high degrees of individual blameworthiness. It would maximize the extent to which it would carry out utilitarian policies such as deterrence. It would

\textsuperscript{33} Id.
\textsuperscript{34} Id. at 377-83.
\textsuperscript{35} Id. at 391-93.
\textsuperscript{36} Id. at 383-91.
avoid ambiguity, which is always a difficult problem in the criminal law. And it would minimize anomalies by which crime grading results in many crimes that are also blameworthy being labeled as less blameworthy than crimes that result in conviction.\textsuperscript{37}

As an example, consider the following state statute, which is excerpted here to remove other definitions of murder and to isolate the felony murder component, with the most important language set in italics:

\begin{quote}
. . . A person commits an offense if he:
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. . .
(3) commits or attempts to commit a felony, other than manslaughter, and in the course \textit{and in furtherance of the attempt}, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.\textsuperscript{38}
\end{quote}

This law is currently in place in at least one of our States. This article will maintain that it is a relatively good statute, considered by the criteria outlined above, although it is subject to some arguable criticisms. The purpose of this section of this article is to examine the reasons for calling this version a good one.

First, this statute is a good law because it ties the crime of murder to relatively high degrees of individual blameworthiness. It does not automatically apply if the defendant commits a felony and a death results, as one might think could happen under a crude definition of the crime. In fact, it does not automatically apply even if the felony, in the abstract, is “dangerous.”\textsuperscript{39}

It requires two kinds of actions that must be undertaken by the defendant. First, the defendant must be acting in the course of committing a felony. Most felonies are serious crimes requiring a

\textsuperscript{37} These criteria are distilled from the criticisms of and supporting arguments for felony murder laws generally, contained in \textit{supra} Pt. I of this article.

\textsuperscript{38} Tex. Penal Code § 19.02 (b) (c) (2008).

\textsuperscript{39} Thus, it differs in an important way from the approaches of some States, such as California. \textit{See infra} Pt. II B of this article.
mens rea of intent or knowledge. But second, and more importantly, the defendant must individually, himself, engage in an act that is “clearly dangerous to human life.”

Thus, under this statute, mere accident is not enough. In fact, dangerousness is not enough, because the act must be one that is “clearly” dangerous, and not just dangerous in the abstract, but “clearly dangerous to human life.” Furthermore, this clearly dangerous act must be the agency that “causes” the death of an individual. In summary, this is a statute that focuses upon individual blameworthiness more than some felony murder versions, by focusing upon the actions of the individual defendant.

Second, by the same token, the statute is confined to circumstances that are more readily subject to deterrence. Even though it is obvious that accidents in general are deterrable, this statute does not cover every situation that involves an accident. The defendant is called upon to avoid conduct “clearly dangerous to human life.” Defining murder in this way confines the label of murder to those situations in which the defendant has most reason to be both able and motivated to avoid liability for the crime.

The statute does not seem likely to require a great deal of interpretation. Its language is transparent enough to guide jury deliberation, and it can be used directly in jury instructions. In other words, it is not ambiguous, considered relatively to other criminal laws. And the statute seems less prone than other versions considered below to exonerate more blameworthy individuals while convicting less blameworthy individuals, since its “clearly dangerous act”

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40 But not all felonies require this mens rea. The criticism that might be addressed to this aspect of the statute is discussed below. See infra note 48-49 and accompanying text.

41 Neither dangerousness of the felony nor dangerousness of the act is enough, that is. The act must be “clearly” dangerous to human life.

42 For comparison, see the next section of this article infra.

43 See supra notes 19-20 and accompanying text.

requirement is targeted directly at blameworthy conduct.

A critic could certainly find ways to attack this statute. First, the “act clearly dangerous” component seems to require only an objective view of dangerousness. That is to say, the “clear dangerousness” requirement seems to require only that a reasonable, or average, or normal person be able to perceive the act as clearly dangerous, not the individual defendant, subjectively. A meticulous critic might argue that the statute should be written so that the defendant is liable only if “he knows” that the act is clearly dangerous to human life, and perhaps even then, only if he “intends” to commit the act anyway. But then, this meticulous critic would have much greater difficulty with other common kinds of crime definition, such as the widespread use of “depraved heart” murder statutes.\(^45\) Those statutes present more significant possibilities of misapplication.

Additionally, the careful critic might note that the statute requires an act that “causes” the victim’s death. It does not require “proximate” causation.\(^46\) One can speculate that a felon who commits an act that is dangerous to human life from a clearly foreseeable cause, but that causes a death in some unpredictable way or even by a freak accident, might be swept up by this statute. For example, imagine that a criminal pours a large quantity of gasoline into the first floor of a building with a large number of people in it, and lights the fluid; but instead of death from fire, an individual falls because the floor is slippery, hits his head, and dies. Critics have speculated about odd causation scenarios, as we shall see later in this article.\(^47\) The statute quoted above


\(^46\) The word “causes” seems to imply only but-for causation or cause-in-fact. “Proximate” causation, on the other hand, requires foreseeability: a cause and effect that are linked by objectively reasonable expectation of the possibility that the result will occur. See BRYAN A. GARNER, BLACK’S LAW DICTIONARY 234 (8th ed. 2004).

\(^47\) See infra note 84 and accompanying text.
could, conceivably, produce a conviction in this odd and contrived circumstance. Many people would conclude that an arsonist who pours and lights gasoline with people trapped inside can be justly called a murderer even if the mechanism of death is not precisely the one that seems most likely, but for other people, the statute would be better if it required proximate causation. It seems doubtful that the difference in crime definition would be significant enough to warrant the change.

A more substantial problem arises because some felonies are capable of being committed through mentes reae lesser than intent or knowledge, and there even are some felonies that can be committed negligently. Negligent homicide is an example, if it is defined as a felony rather than as a misdemeanor. The statute above has a narrow merger exception that carves out only manslaughter and no other felony. Does someone who commits negligent homicide, and who commits an act clearly dangerous to human life, get bootstrapped into being convicted of murder, since the felony is “other than manslaughter” and all other elements of the crime are present? The courts in the state of this statute actually had to decide this question. They decided, “no”: negligent homicide is not a proper predicate felony for felony murder. Still, it might have been better if the statute had said so. In addition, there are other felonies that can be read as supporting a murder conviction, including aggravated assault and endangering a child. If child endangerment is capable of being committed negligently, and if it is in fact committed in a way that is clearly dangerous to the child’s life, can the actor be convicted of murder with only negligent conduct involved? Literally, yes, and the courts of this state have so interpreted the

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48 Lawson v. State, 64 S.W.3d 396, 403 (Tex. Crim. App. 2001). This anomaly in crime definition occurred through an understandable legislative oversight. Negligent homicide was a misdemeanor at the time that the felony murder statute in question was adopted. The legislature later elevated negligent homicide to a felony but did not notice that it needed to change the murder statute also. See DAVID CRUMP, supra note 45, at 345.
Perhaps, then, to some critics, there is value in the idea of requiring in the felony murder statute that the defendant act intentionally or knowingly in committing the object felony.

It seems doubtful, once again, that these changes would make significant differences in the actual incidence of murder convictions under the quoted felony murder rule. One might, however, conclude that the statute quoted above could be improved if it were amended to include additional language. The requirements that would be added are contained in the draft that follows, in italics:

... A person commits an offense if he:

...(3) intentionally or knowingly commits or attempts to commit a felony, other than manslaughter, and in the course and in furtherance of the attempt, or in immediate flight from the commission or attempt, he intentionally commits or attempts to commit an act while knowing that it is clearly dangerous to human life that proximately causes the death of an individual.  

Extra words in a jury charge cause confusion, of course, and in this instance it seems doubtful that the value of the extra words is worth it. Any definitional problems in the version quoted at the beginning of this section seem minor compared to more common definitions of various kinds of crimes.

It should be added that both the proposed statute immediately above and the actual statute further above resemble proposals by commentators such as Guyora Binder for a revised statute. 49 Perhaps, then, to some critics, there is value in the idea of requiring in the felony murder statute that the defendant act intentionally or knowingly in committing the object felony.

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50 The treatment of an act as murder with nothing in the definition requiring any higher mens rea than negligence seems dubious at first glance. On the other hand, one can find policy reasons for this seeming anomaly. Child abuse often happens so that only the adult defendant is able to testify about it, and usually the explanation offered then is that the killing was accidental.

51 See supra note 45 and accompanying text.

52 See Guyora Binder, supra note 1, at 987 (stating thesis that “felony murder liability is deserved for those who negligently cause death by attempting felonies inherently involving (1) violence or destruction and (2) an additional malign purpose independent of injury to the person killed”). Binder’s theory contains some additional elements, but those add little to the requirement of risk of death required in the actual statute. See also Kenneth W. Simons, When
modern felony-murder statute that they consider defensible against the arguments of the critics. Professor Binder advocates negligence theory as a basis for felony murder. She has not recognized the actual statute above as conforming to her idea, but it fits her proposal well, at least in a general way. Arguably, however, the statute is better than a formula based purely upon negligence. This article will explore the reasons in a later section, after the development of further background.53

B. Bad Felony Murder Definition (Although “Bad” Is in the Eye of the Beholder Too)

The definition of felony murder in California is bad. It is so bad that at least one respected supreme court justice has called for abolition of the California jurisprudence altogether, in favor of calling upon the legislature to pass something that makes more sense.54 The California felony murder rule is not even expressed in the statutes (except by the broadest kind of implication), and its nondefinition appears to be the product of a legislative oversight.55 The California Supreme Court has had to develop the state’s felony murder rule by fits and starts, without legislative guidance. Not surprisingly, the California rule fails some of the tests set out for a good felony murder doctrine at the beginning of the preceding section. For the reasons that follow, California’s doctrine does not correlate as well as it might with moral blameworthiness, is clumsy in its application to the deterrence purpose, contains a large amount of ambiguity, and results in exonerating some bad actors on dubious grounds while convicting other bad actors who seem no worse.

Is Strict Liability Just?, 87 CRIM. L. & CRIMINOLOGY 1075, 1121-24 (1997) (stating that felony murder rule is negligence-related but opposing the rule).

53 See infra notes 66-72 and accompanying text.

54 See People v. Howard, 104 P.3d 107, 115 (Cal. 2005) (dissenting opinion by Justice Brown, stating that the California doctrine should be “abrogate[ed]” so as to “leave it to the Legislature” to define the crime “precisely”).

55 See David Crump, supra note 45, at 331-32 (detailing history of enactment, which includes an apparently inadvertent legislative repeal of the felony murder doctrine followed by judicial implication of the doctrine as part of the broad concept of malice).
The principal limit upon the felony murder rule in California is the “inherently dangerous felony” requirement.\textsuperscript{56} This concept differs sharply from the “clearly dangerous act” requirement in the statute discussed above. In California, the relevant question is whether the felony, “in the abstract,” is inherently dangerous.\textsuperscript{57} This formulation is subject to criticism, first, because it divorces the definition of murder from the individual blameworthiness of the defendant. The defendant does not have to do anything dangerous, personally, other than committing the felony. Literally, a dangerous felony coupled with an unpredictable accident qualifies.

But that is not all. The California court has had a great deal of trouble deciding just which felonies are “dangerous.” For example, does a felon who commits his particular felony by possessing a sawed-off shotgun when he is a previously convicted felon, and who points the weapon directly at another person, commit murder if the weapon discharges and kills the victim? The issue, in California, boils down to whether the felony of being a felon in possession of a sawed-off shotgun is “inherently dangerous in the abstract.”\textsuperscript{58} One might think that there would be a sound possibility that the answer from a California court would be “yes, absolutely!” California presumably outlawed sawed-off shotguns for previously convicted felons because they are . . . well, dangerous! But the court’s opinion did not take that (perhaps too straightforward) approach. Instead, the court reasoned that this particular felony could possibly be committed in ways that were not dangerous—one might speculate, for instance, if the felon kept the sawed-off unloaded and in a locked case all the time—and therefore the felony was not dangerous in the abstract. As an even more outlandish example, the court itself(!!) offered the possibility that the felon might keep his sawed-off shotgun (perhaps together with many others of

\textsuperscript{56} See Id. at 334-40.
\textsuperscript{57} See Id. at 335. See also People v. Satchell, 489 P.2d 1361, 1367 (Cal. 1971) (announcing this rule).
\textsuperscript{58} Satchell, 489 P.2d at 1367.
differing shapes and sizes) “as a keepsake or a curio.” The trouble with this reasoning is that every felony is at least theoretically capable of being committed in “safe” ways, ways that are not dangerous to human life. A criminal can rob someone without using a weapon, and an arsonist can search the premises before committing the act of setting a fire. Thus, even these hard-core felonies can be carefully committed so that they pose little danger to human life. This reasoning ultimately leads to the conclusion that there are no dangerous felonies, although the California court has decreed that there are. Not surprisingly, the list of felonies that the California court has found to be dangerous looks completely arbitrary when compared to this list that it has found not to be dangerous:

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

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

But why is recklessly possessing a destructive device “inherently dangerous” while intentional possession of a concealed weapon by a felon (or possession of a sawed-off shotgun) is not? Likewise, why is manufacturing methamphetamine inherently dangerous while furnishing phencyclidine is not? And then, there is yet another seeming contradiction, since “grossly negligent discharge of a firearm” is inherently dangerous, but practicing medicine without a license “under conditions creating a risk of great bodily harm, serious physical or

59 489 P.2d at 1370.
60 See infra note 61 and accompanying text.
mental illness, or death” is not. These are distinctions that have no apparent anchor in reality, and even worse, they disrespect the legislative language. The California rule, as a result, gives the appearance of a disconnect between moral blameworthiness and crime definition.62

The California rule also seems to miss opportunities for deterrence. If you are a felon in possession of a sawed-off, for example, the act of pointing it directly at another person could possibly be deterred, assuming we can give the criminal law any credit for deterrence at all. The idea of a dangerous felony is so ambiguous that the state supreme court has not decided more than a few questions about which felonies qualify. The law remains unclear and probably will forever. And the California doctrine exonerates some truly bad actors while convicting other bad actors who may legitimately think their conduct is less bad,63 and this circumstance—although it is a constant problem in criminal justice—ought to be minimized, because it tends to encourage disrespect for the law.

We have not yet considered the California version of the merger rule, which also contains some surprising anomalies.64 All in all, California would do well to address the problem with legislation, perhaps of the type contained in the preceding section. And there are other kinds of murder definitions that seem inferior to good felony murder definition. As a preceding section of this article has shown, the Model Penal Code, for example, defines murder in situations involving neither intent nor knowledge, but only recklessness, and then, it “presumes” recklessness in situations involving felonies.65 One can question whether this back-door method of abolishing the felony murder rule, and yet keeping it through a presumption, introduces

62 For a more detailed critique of the California rule, see David Crump, supra note 45, at 334-40.
63 See supra note 61 and accompanying text.
64 For a discussion of the California merger doctrine, see David Crump, supra note 45, at 341-43.
65 See supra notes 27-29 and accompanying text.
ambiguity and confusion that outweigh any perceived disadvantages of keeping the felony murder rule, but defining it better.

At this point, it may be valuable to consider modern proposals for negligence-related justifications of the felony murder rule and to compare them to the two approaches discussed in this section. Professor Binder, for example, claims to have produced the “long-missing principled defense of the felony murder doctrine” and explains her thesis as follows:

[F]elony murder liability is deserved for those who negligently cause death by attempting felonies inherently involving (1) violence or destruction and (2) an additional malign purpose independent of injury to the victim killed. How can merely negligent homicide deserve punishment as murder? Because the felon’s additional depraved purpose aggravates his culpability for causing death carelessly. To impose a foreseeable risk of death for such a purpose deserves severe punishment because it expresses a commitment to particularly reprehensible values. In defending felony murder liability as deserved in cases like those described above, I will be defending an expressive theory of culpability that assesses blame for harm on the basis of two dimensions of culpability: (1) the actor’s expectation of causing harm and (2) the moral worth of the ends for which the actor imposes this risk.  

The three elements combined by Professor Binder arguably correspond to an amalgamation of parts taken from the better statute quoted above (requiring an “act clearly dangerous to human life,” which encompasses Binder’s negligence element, although it requires more) and from the less satisfactory approach described above (requiring an “inherently dangerous felony,” which California has construed to correspond to her second and third elements, i.e., felonies “inherently involving violence or destruction” and including an “additional malign purpose”). Binder’s theory is a useful contribution to the understanding of the much-maligned and often-caricatured doctrine called felony murder.

66 Guyora Binder, supra note 1, at 966-67. See also Kenneth W. Simons, supra note 52, at 1121-24 (arguing that the doctrine is negligence-relating, but opposing the doctrine).

67 See supra notes 38-43 and accompanying text.

68 See supra Pt. II B of this article.
It is submitted, however, that the better statute quote above, which already exists, may arguably improve upon Binder’s formulation. Instead of requiring mere negligence, it imposes a higher standard, by requiring objectively that the causal act be “clearly” dangerous. Furthermore, it does not call merely for negligence of a generalized sort. Instead, it requires that the lethal act be clearly dangerous “to human life.” And the better statute is superior, it could be argued, precisely because it omits Binder’s reference to the “inherent” dangerousness, violence, or destructibility of the underlying felony, upon which Binder would make liability depend. The policy underlying the element of an inherently violent felony is well covered, instead, by the requirement that the act be clearly dangerous to human life, and thus, the statute avoids the arbitrariness that inevitably would accompany the quixotic effort to classify felonies as “inherently violen[t] or destruct[ive].” California has shown convincingly how messy this distinction can be, and a few examples may enhance the showing. Is a felony involving destruction of property “inherently violen[t] or destruct[ive]”? What about a felony involving reckless (or drunk) driving? Abuse of a corpse? Sexual assault by fraud? The comparison quoted above of California’s recognized inherently dangerous felonies, and felonies that assertedly are not inherently dangerous (and yet seem just as dangerous), demonstrates how unsatisfactory this element would prove in actual adjudication.

And yet Binder’s theory may be fundamentally sound. Her approval of a revised felony murder rule, designed to depend upon “two dimensions of culpability: (1) the actor’s expectation of causing harm and (2) the moral worth of the ends for which the actor imposes this risk,” seems to encapsulate a sensible way of defining liability in this controversial area. The point,

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69 See supra note 38 and accompanying text.
70 See supra notes 61-62 and accompanying text.
71 See supra notes 61-62 and accompanying text.
however, is that a statute that focuses on the actor’s conduct, requiring that it be clearly
dangerous to human life as well as that it be tied to ends that have low moral worth (since the
end is a felony), seems better than an approach that attempts to parse felonies for their “inherent”
dangerousness. And again, this description fits the better statute quoted above.\textsuperscript{72}

\section*{III. EVALUATING THE NEWER ARGUMENTS AGAINST THE FELONY MURDER RULE}

In some instances, the arguments of today are the old arguments. It is somewhat
surprising to read allegations by a few commentators, still, to the effect that there are no rational
arguments supporting the felony murder rule.\textsuperscript{73} These commentators may be tacitly concluding
that the arguments sketched in part I of this article are unmeritorious or are insubstantial
compared to the counter-arguments that they perceive. If so, it would be better if these critics
explained why they reject the arguments supporting the rule, rather than asserting as they do that
there are no such arguments.

Another argument that still is sometimes stated is that the felony murder rule disconnects
criminal liability from blameworthiness.\textsuperscript{74} But that conclusion depends in large measure upon the
type of felony murder rule at issue. If the version of felony murder under discussion were to state

\textsuperscript{72} See \textit{supra} note 38 and accompanying text.

\textsuperscript{73} For a particularly dubious example, see Sara Sun Beale, \textit{What's Law Got to Do with It?: Influencing the Development of (Federal) Criminal Law, The Political, Social, Psychological and Other Non-Legal Factors}, 1 Buff. Crim. L. Rev. 23, 45 (1995) (arguing that the rule “has received nearly universal scholarly criticism” and suggesting that it may be retained because of public attitudes at variance with those of “experts”(!)—statements that no longer are accurate and that apparently assume that the rule’s detractors have “expertise” that its scholarly supporters do not). As a more balanced but still unexplained example, see Michael S. Moore, \textit{The Independent Moral Significance of Wrongdoing}, 1994 J. Contemp. Legal Issues 237, 280 & n.107 (classifying felony murder among “unfair doctrines” because although results matter, “they don’t matter that much or in that way,” at least in Professor Moore’s view, although others may conclude that “they do”).

\textsuperscript{74} There is “huge disagreement” about mentes reae that can morally support imposition of felony murder liability in light of blameworthiness concerns, as well as about the theories set out in the original Crump article (David Crump, \textit{supra} note 6). Christopher Slogobin, \textit{The Civilization of the Criminal Law}, 58 VAND. L. REV. 121, 168 & n.115 (2005).
merely the rough and unpolished proposition that commission of any felony that results however unpredictably in a death is murder, maybe there would be some cases in which blameworthiness would be disconnected from criminal liability. But that version of the rule, today, is a caricature. At early common law, felonies generally were punishable by death, so the use of a rough rule without careful limits may not have made much difference.\footnote{See WAYNE R. LAFAVE, CRIMINAL LAW 744 & n.5 (4th ed. 2003).} Today, however, every jurisdiction imposes limits on the felony murder rule.\footnote{See \citeauthor{crump} \citeyear{crump}, supra note 45, at 329-30.} The requirement of “an act clearly dangerous to human life,” in addition to the commission of a felony, creates a clear link between liability and blameworthiness.\footnote{See supra Pt. II A of this article.} Thus, a well-written felony murder statute is far less vulnerable to this criticism. Even the California version of the rule, which requires the defendant to have engaged in a “dangerous” felony, links liability to blameworthiness, although in what this article concludes is a less satisfactory manner.\footnote{See supra Pt. II B of this article.}

Perhaps some of the critics mean, by the blameworthiness argument, that the felony murder rule is underinclusive.\footnote{E.g., Michael T. Cahill, Attempt, Reckless Homicide, and the Design of Criminal Law, 78 U. COLO. L. REV. 879, 911-13, 937 & n.173 (2007) (advocating abolition of felony murder rule, but without specifying the version of the doctrine being considered; suggesting that basing liability on conduct without “culpability” may result in “underinclusiveness”; strangely, advocating instead a crime of “attempted reckless homicide”).} It results in the convictions of some bad actors, who are blameworthy, but some others who are equally or more blameworthy escape similar convictions.\footnote{For examples, see supra note 61 and accompanying text.} There are at least two answers to this claim. First, underinclusiveness is built into criminal justice. Simply by requiring proof beyond a reasonable doubt, we allow some bad actors to escape. The proof standard is a different issue, of course, but every time we use words to define a crime, and we try to confine the category so that it does not blindly sweep in less...
blameworthy people, we inevitably let some blameworthy people escape. The solution to this problem is to undertake the clearest and best crime definition that we can achieve, not to throw out the entire category of crime because it does not and never will catch all of the marplots.

The second answer is more important, but it is suggested by the first. The degree of underinclusiveness depends upon the particular version of the felony murder rule that the jurisdiction in question uses. The California Supreme Court, for example, has held that discharging a firearm into an occupied residence is a proper predicate felony for felony murder, if the bullet kills an individual inside;\(^{81}\) but strangely, a California court of appeals has said that discharging a firearm into an occupied vehicle, although also a felony, is not a proper predicate for felony murder, even if the bullet kills an occupant of the vehicle, because it is not inherently dangerous.\(^{82}\) The individual shooting into the residence who is convicted of murder for killing someone may argue that it is not fair for the individual shooting into a car and killing someone else to be exonerated on the ground that the latter is not a “dangerous” felony. But still, one can question whether the critic’s apparent conclusion follows—that because one is exonerated, both should be exonerated—but nevertheless, it certainly does follow that the result is anomalous. In any event, the solution is easy. No other State should blindly follow the California jurisprudence, and California should revise its law. In any event, better written statutes, such as the one in the preceding section,\(^{83}\) requiring an act “clearly dangerous to human life,” do not exhibit such dramatic underinclusiveness.

A more sophisticated criticism, advanced by more thoughtful critics of the rule, focuses not on underinclusiveness, but overinclusiveness. These commentators are concerned that the

\(^{81}\) People v. Hansen, 885 P.2d 1022 (Cal. 1994) (en banc).

\(^{82}\) That is, it is not dangerous if the motive lacks an “independent felonious” purpose. People v. Chun, 65 Cal. Rptr.3d 738 (Cal. App. 2007), review granted, 173 P.3d 415 (2007) (pending).

\(^{83}\) See supra note 38 and accompanying text.
felony murder rule might make a murderer out of someone who has done virtually nothing that
would perceptibly cause danger to a human life, but who has merely committed a garden-variety
felony that produced a freak accident. Thus, for example, Professor Dressler, one of our most
eminent and balanced scholars, criticizes the blameworthiness and condemnation arguments
supporting the felony murder rule with the following example:

Consider two pickpockets, P1 and P2. P1 puts her hands in V1’s pocket and finds
a wallet containing two hundred dollars. P2 puts her hand in V2’s pocket and
discovers a wallet with the same amount of money, but V2 dies of shock from the
experience. . . . [T]he culpability of P1 and P2 as to the thefts is identical.
Therefore, as to the larcenies, they should be punished alike.

As for the social harm of the death, P2 is no more culpable than P1, as the death
was unforeseeable. It is true, of course, that P2 caused a death, but in terms of
mens rea, her culpability (as that of P1) is that of an intentional thief, and no
more. Even if it were concluded that P2 should pay some debt for the
unforeseeable death, it surely violates ordinary concepts of just deserts to treat the
unlucky pickpocket as deserving of punishment equal to that of an intentional,
premeditated killer. . . .

This criticism was leveled not at the felony murder rule generally, but at the argument that the
rule is supported by condemnation-related considerations, or reaffirmation of the value of human
life. Still, the criticism depends upon questionable assumptions. First, it assumes that all crimes
of any given category must be sentenced alike, without regard to lesser mentes reae. The
suggestion that the unlucky pickpocket faces a punishment “equal to that of an intentional
premeditated killer” is dubious. Second and more importantly here, however, the criticism
depends once again upon the version of the felony murder rule that the particular jurisdiction
happens to follow. The only way that one might speculate that Professor Dressler’s example
could, indeed, result in a murder conviction is by assuming that the jurisdiction applied the
rawest and least defensible form of felony murder: a jurisdiction holding that death resulting

from the commission of a felony is murder, without any limits or other requirements.\(^{85}\)

But again, this primitive form of felony murder is a caricature. Every jurisdiction confines the felony murder rule.\(^{86}\) Even the California “dangerous felony” approach requires at least that the defendant engage in a dangerous felony, although the California rule does seem to remain at least partially vulnerable to Professor Dressler’s criticism. A robber who did nothing perceptibly dangerous to life could be considered a murderer if a freak accident caused a death—and if there were no requirement of proximate causation. The requirement of proximate causation, instead of mere but-for causation, addresses the issue directly by requiring a foreseeable cause.\(^{87}\) Therefore, even with California’s clumsy statute, either a dangerous felony approach or a requirement of proximate causation should produce an adjudication that Professor Dressler’s hapless pickpocket is a criminal but not a murderer. And if the better statute set out above\(^ {88}\) is in force, the requirement of an act clearly dangerous to human life removes the problem virtually entirely.

Another newer attack on the felony murder rule is a broadside, aimed at the entire rule. Some commentators invoke concepts of moral luck, and they argue that the felony murder rule violates these concepts. The basic concern of moral luck philosophy is to describe the conditions that may allow us to visit the consequences of accidental results on actors who had incomplete knowledge of the risks at issue, and what kinds of conditions do not.\(^ {89}\) For example, imagine that two equally astute stock speculators buy shares of two different companies, with wildly disparate results—so that one receives a bonanza and the other holds a worthless asset. It seems

\(^{85}\) See supra, notes 75-76 and accompanying text.

\(^{86}\) See supra notes 75-76 and accompanying text.

\(^{87}\) See supra notes 46-47 and accompanying text.

\(^{88}\) See supra note 38 and accompanying text.

\(^{89}\) See Meir Dan-Cohen, Moral Luck, Theoretical Inquiries in Law (Jan. 2008).
appropriate to allow the successful investor to keep his gains, and not require him to give half to the other investor, even if the result depends only on luck. Or, imagine that one robber points his pistol at the convenience store clerk and kills no one, while a second, equally competent robber points his pistol with the result that it discharges, unintentionally, and kills the clerk. Is it morally acceptable to visit the consequences of the unintended result on the second robber by adjudicating that he is guilty of murder?\footnote{Compare, e.g., David Enoch, \textit{Luck between Morality, Law, and Justice}, THEORETICAL INQUIRIES IN LAW (Jan. 2008) (proposing that outcomes dependent upon luck should not be a factor in the law because “There is no moral luck,” and “If there is no moral luck, there should be no legal luck”) \textit{with} Orie Simchen, \textit{Comment on David Enoch’s Luck between Morality, Law and Justice}, THEORETICAL INQUIRIES IN LAW (Jan. 2008) (disagreeing on the ground that the premise that “If there is no moral luck, there should be no legal luck” is erroneous).}

At some point, it may make sense to say, “This particular criminal was not engaged in actions that should result in a murder conviction, even though (or perhaps because) he was spectacularly unlucky.” Professor Dressler’s hypothetical pickpocket who causes fatal fright to another person might evoke this reaction. He would not be convicted, however, under either of the statutes considered in this article.\footnote{There is no inherently dangerous felony here (see \textit{supra} Pt. II B of this article), nor is there an act clearly dangerous to human life (see \textit{supra} Pt. II A of this article).} On the other hand, if he engages in more risky behavior, at some point it may be moral to say that the defendant has engaged in conduct that does justify the imposition upon him of the consequences of his actions. A requirement that the defendant must have engaged in an act clearly dangerous to human life, arguably, supplies that situation.

The hardest cases come about when there are multiple parties to the crime, and some, but not all, of the parties engage in acts clearly dangerous to human life. A confederate shoots a clerk, to the surprise of the getaway car driver. A confederate accidentally kills a bystander several blocks away by a stray bullet during a gun battle. A police officer justifiably kills a confederate criminal who threatened the officer. Can another participant in the robbery, who provably was involved in the crime but who did not personally commit any of the dangerous acts...
described here, be convicted of murder?

Different jurisdictions have answered this question in different ways. The longstanding rule of *Commonwealth v. Redline*\(^\text{92}\) cuts off liability for the lawful death of a cofelon, largely on the ground that the result is not part of the criminal design. The death is not itself criminal, and therefore does not involve the other cofelon in blameworthiness for the death, or so the reasoning goes. At the opposite philosophical pole, there is the cone-of-violence argument, which holds that one who participates in armed criminal conduct should anticipate that violence will grow, cannot be contained, and is legally the responsibility of all who set it in motion.\(^\text{93}\) Perhaps the extreme example is one modern case in which the defendant’s cofelon threatened to kill a police officer by raising his gun toward him, the cofelon was lawfully killed in turn by the officer, and the court upheld the defendant’s conviction for murder although the defendant did not participate in the ultimate act that caused his cofelon’s death, but only in the robbery. In fact, the defendant was in custody at the time of the shooting.\(^\text{94}\)

There is appeal to the cone of violence theory. Certainly, one reason for marking armed robberies as serious crimes is the realization that escalation of violence in all directions is one outcome that can be anticipated. But perhaps the *Redline* result, which rejects this kind of liability, has appeal, too. And so the moral luck argument gains its most traction, arguably, in these multiple-party cases. Requiring an act clearly dangerous to human life to have been engaged in personally by the defendant, or to have within the reasonable expectation of the defendant, would go a long way toward addressing the moral luck concern of the critics. This solution, however, might require reconsideration of well-established vicarious liability doctrines.

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\(^{92}\) 137 A.2d 204 (1955). For discussion see David Crump et al., *supra* note 6, at 384-91.


CONCLUSION

Almost all jurisdictions have retained the felony murder, in some form, in spite of the criticisms. Those lawmaking bodies that have abolished it have provided poor reasoning for doing so. The persistence of the rule is not due merely to knee-jerk politicians or to its having been generated by common law judges. Rather, its persistence reflects the existence of sound rationales, sound enough to be accepted at least by some people, that support the felony murder rule. Chief among these rationales is that, in spite of the critics’ arguments to the contrary, the felony murder doctrine does arguably result, generally, in crime gradation that corresponds to blameworthiness. Also, the age-old argument from deterrence may have some merit, and the critics’ arguments that felons do not know the law and that accidents cannot be deterred do not. Felons know enough to figure out that they have bought much more trouble if their actions result in killing someone, and the persistence of our law of negligence and strict liability—in both civil and criminal cases—shows, instead, a conclusion that accidents are, if not perfectly deterrollable, at least deterrollable to some degree.

Comments to the effect that there are no rationales for the felony murder rule ignore the literature. Modern arguments that the felony murder rule divorces the definition of murder from blameworthiness paint with too broad a brush, and they generally ignore the cases in which the rule results in linking blameworthiness to liability. It must immediately be added, however, that this conclusion depends upon the version of the felony murder doctrine that is under discussion.

There are better definitions of felony murder, and there are worse ones. Too often, the critics assume a law that produces a conviction for murder upon the mere coincidence of a felony and a death. But that version of the rule, if ever it existed, is as distant a memory as many other unjust laws. Every state applies limits and exceptions to the definition of felony murder. How
these are written determines the value of the critics’ arguments. The California law, for example, focuses on the type of felony in the abstract, demanding that it conform to concepts of inherent dangerousness before it can serve as a predicate for a murder conviction. This limit is better than nothing, but it is more vulnerable than other formulations to the critics’ argument that it divorces the definition of murder from blameworthiness. A better crime definition would tie liability to the defendant’s individual blameworthiness. Requiring that the defendant actually commit an act clearly dangerous to human life, and that this act be what causes the death, produces a better statute. Careful critics might also demand that the statute require intentional or knowing commission of the act (and of the felony) by the defendant, as well as requiring proximate causation. These suggestions seem subject to the complaint that they amount to what writers have called gilding the lily, or making something that already works more clumsy, but perhaps the critics can argue that these changes produce minor improvements.

A better-written felony murder statute links liability and blameworthiness more satisfactorily than other formulations. It also arguably avoids the critics’ complaints of underinclusiveness and overinclusiveness. By directly requiring blameworthy conduct from the defendant personally and not merely from the class of felony at issue, the better statute avoids criminalizing conduct that produces unforeseeably accidental results. Similarly, by avoiding the anomalous jurisprudence in California about dangerous felonies, and by focusing instead on the defendant’s own actions, a better statute would minimize the degree to which it may acquit more blameworthy criminals than those it acquits. Furthermore, the better statute would be more consistent with the proper treatment of moral luck. It is far less offensive to convict someone for a happening, though unintended, that the actor’s conduct was “clearly” in danger of causing.

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95 Technically, this phrase is a misquotation of Shakespeare. “To gild refined gold, to paint the lily, / To throw a perfume on the violet / . . . Is wasteful and ridiculous excess.” King John, act iv, scene 2. But “gilding the lily” has become the favored version.
The hardest cases remain those with multiple parties. That is, the hardest cases involve group-committed felonies in which one actor does something particularly blameworthy, and a resulting unintended death is attributed also to an arguably less blameworthy codefendant. The critics’ argument that this result violates fair treatment of moral luck is understandable. Unfortunately, the cone of violence theory—the theory that if a person undertakes armed criminal activity personally, that person appreciates or should appreciate the likelihood of escalation—also is persuasive. Perhaps the argument of the critics should prove influential here, but in a way that still gives some weight to the cone of violence theory. The law could hold, for example, that no one can be convicted of felony murder by vicarious liability unless the defendant personally appreciated or should have appreciated the risk of the cofelon’s clearly dangerous act.

With that, with other minor changes, and with the selection of a better version of the felony murder rule, the doctrine should be considered on its merits. The felony murder doctrine serves important positive purposes. The critics can make some valid points by targeting only the clumsier versions, but their arguments are much less persuasive when considered against well drafted formulations of the rule.