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Criminal Law -- Felony Murder -- Homicide by Fright

David A. Irvin

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X, in committing armed robbery of a tavern, fires a warning shot into the ceiling to show he means business. *Y*, a customer in the tavern and one of the intended victims, has a heart attack and dies. May *X* be convicted of first degree murder? In *State v. McKeiver*,[1] a New Jersey Superior Court, applying its felony-murder statute,[2] held that this situation was sufficient to support an indictment for first degree murder. This note will attempt to examine the felony-murder rule, its purpose and the validity of this extended application.

At common law the felony-murder rule was simply that a homicide resulting from the perpetration or attempted perpetration of a felony was designated as murder.[3] Today, the rule, as generally codified in this country, is that a *murder*[4] committed in the perpetration or the attempted perpetration of one of the "dangerous" felonies[5] designated by statute is a first degree offense.[6] There are

[1] 89 N.J. Super. 52, 213 A.2d 320 (Super. Ct. 1965). This case has now been terminated as the State has accepted a plea to manslaughter.

[2] "Murder which . . . is committed in perpetrating or attempting to perpetrate arson, burglary, kidnaping, rape, robbery or sodomy, is murder in the first degree . . . ." N.J. REV. STAT. § 2A:113-2 (1953).

[3] HOLMES, THE COMMON LAW 57-59 (1881).

[4] Twenty-seven jurisdictions require this "murder" threshold. ARIZ. REV. STAT. ANN. § 13-452 (1956); ARK. STAT. ANN. § 41-2205 (1964); CAL. PEN. CODE § 189; COLO. REV. STAT. ANN. § 40-2-3 (1953); CONN. GEN. STAT. REV. § 53-9 (Supp. 1963); DEL. CODE ANN. tit. 11, § 571 (Supp. 1964); IDAHO CODE ANN. § 18-4003 (1948); IOWA CODE ANN. § 690.2 (1950); KAN. GEN. STAT. ANN. § 21-401 (1964); MD. ANN. CODE art. 27, § 410 (Supp. 1965); MASS. ANN. LAWS ch. 265, § 1 (1956); MICH. STAT. ANN. § 28.548 (1954); MO. ANN. STAT. § 559.010 (1953); MONT. REV. CODES ANN. § 94-2503 (1949); NEV. REV. STAT. § 200.030 (1957); N.H. REV. STAT. ANN. § 585:1 (1955); N.J. REV. STAT. § 2A:113-2 (1953); N.M. STAT. ANN. § 40A-2-1 (1964); N.C. GEN. STAT. § 14-17 (1953); N.D. CENT. CODE § 12-27-12 (1960); PA. STAT. ANN. tit. 18, § 4701 (1963); R.I. GEN. LAWS ANN. § 11-23-1 (1957); TENN. CODE ANN. § 39-2402 (1955); UTAH CODE ANN. § 76-30-3 (1953); VT. STAT. ANN. tit. 13, § 2301 (1958); VA. CODE ANN. § 18.1-21 (Supp. 1964); W. VA. CODE ANN. § 5916 (1961). Other jurisdictions give the felony-murder rule a broader coverage by designating as a first degree offense (a) "every homicide" committed during a dangerous felony, ALA. CODE tit. 14, § 314 (1959), or (b) "every unlawful killing" during a dangerous felony, see, *e.g.*, FLA. STAT. ANN. § 782.04 (1965); IND. ANN. STAT. § 10-3401 (1956); N.Y. PEN. § 1044; ORE. REV. STAT. § 163.010 (1963); WASH. REV. CODE ANN. § 9.48.030 (1961); WYO. STAT. ANN. § 6-54 (1959).

[5] Felony murder is considered a first degree offense in thirty-six Ameri-

two elements of felony murder: (1) the defendant must commit or attempt to commit a "dangerous" felony, and (2) the defendant must commit a murder. The second element generally requires malice and causation. Upon proof of these elements the state establishes a first degree murder charge.

The first element is a limitation imposed by the purpose of the rule—the prevention of the unintended, unpremeditated and sometimes accidental deaths that too often occur in the perpetration of certain felonies.[7] Since the common characteristic of these "dangerous" felonies is the creation of a substantial risk to human life, the first element is also important in establishing the second. Malice aforethought must be exhibited by a defendant in order to charge him with murder. This vague term was at first nothing more definite than a general intention to commit a wrong,[8] but it is now considered an unjustifiable, inexcusable and unmitigated man-endangering-state-of-mind.[9] This requisite mental state may be either express or implied, and because of the common characteristic of a "dangerous" felony, the courts will normally imply malice from the felon's actions. It has been said that

> this imputation is justifiable only on the assumption that the risk of death or serious bodily harm as a consequence of a felony, or the risk in concert with the felonious intent, is sufficient to imply malice on the ground that the felon demonstrates that he has no concern for human life.[10]

This does not mean, however, that the malice with which a "dangerous" felony is committed will always satisfy the murder requirement of the felony-murder rule, because the rule allows only malice

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can jurisdictions recognizing two degrees of murder. 66 YALE L.J. 427 n.1 (1957).

[6] The "dangerous" felony requirement was the earliest restriction on the application of the felony-murder rule. Powers v. Commonwealth, 110 Ky. 386, 63 S.W. 976 (1901); People v. Pavlic, 227 Mich. 562, 199 N.W. 373 (1924). The usual felonies designated today are arson, burglary, rape and robbery. N.C. GEN. STAT. § 14-17 (1953) contains the language "or other felony" and it is still an open question whether any statutory felony or only a felony dangerous to life is intended. State v. Streeton, 231 N.C. 301, 56 S.E.2d 649 (1949).

[7] MODEL PENAL CODE § 201.2, comment 4, at 37 (Tent. Draft No. 9, 1959); REPORT OF ROYAL COMMISSION ON CAPITAL PUNISHMENT, CMD. No. 8932, at 35-36 (1949-53).

[8] 66 YALE L.J. 427, 430 (1957).

[9] Perkins, *A Re-Examination of Malice Aforethought,* 43 YALE L.J. 537 (1934).

[10] 71 HARV. L. REV. 1565 (1958).

and not the act of killing to be imputed to the felon. Causation must still be proved.[11] This should be only "but for" causation—a negative concept that unless the felony causes the death, no murder is committed.[12] Although there is judicial authority to the contrary,[13] the recent trend of decisions is to reject an affirmative application of proximate cause. Because of this rejection, a defendant is not guilty of felony murder for justifiable homicide by a policeman or excusable homicide by a victim committed during the course of the defendant's felony.[14] Thus the mere coincidence of homicide and felony is not sufficient to satisfy the requirements of the felony-murder rule.

The establishment of these elements enables the court and the jury to impose the severest penalty allowed by the state; this is the real significance of the felony-murder rule. It is not the imposition of criminal responsibility that should be criticized but rather the degree of responsibility the rule demands. The degree of responsibility was of little consequence at common law because all felonies were punishable by death.[15] But with the curtailment of capital punishment and the division of murder, its continued characterization as a first degree offense is of great importance. At common law, malice aforethought was the only requirement for murder, as it is for second degree murder today. First degree murder, to the layman, has the additional requirement of wilful, premeditated and deliberate action.[16] The felony-murder rule, however, relieves the state of the difficult burden of proving this mental state characterized by a design to kill. By eliminating inquiry into whether such design exists,[17] the rule greatly expands the application of first degree

[11] 5 SANTA CLARA LAW. 172, 176 (1964).

[12] 34 N.C.L. REV. 350, 353 (1956).

[13] Ludwig, *Foreseeable Death in Felony Murder,* 18 U. PITT. L. REV. 51 (1956).

[14] People v. Washington, 44 Cal. Rptr. 442, 402 P.2d 130 (1965) (disapproving any inconsistency in People v. Harrison, 176 Cal. App. 2d 330, 1 Cal. Rptr. 414 (Dist. Ct. App. 1959); Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958) (overruling Commonwealth v. Thomas, 382 Pa. 639, 117 A.2d 204 (1955)).

[15] James, *The Felony Murder Doctrine,* 1 AM. CRIM. L.Q. 33, 37 (1963).

[16] 66 YALE L.J. 427, 432-33 (1957).

[17] When a homicide is committed during a robbery, premeditation is not an element, robbery being the legal equivalent thereof. State v. Akins, 94 Ariz. 263, 383 P.2d 180 (1963). Affirmative defenses to the specific intent to kill also have no validity. *E.g.,* United States *ex rel.* Rucker v. Myers, 311 F.2d 311 (3d Cir. 1962) (intoxication); State v. Pastet, 152 Conn. 81, 203 A.2d 287 (1964) (temporary insanity).

murder and places at the disposal of law enforcement officials a formidable weapon. Of course, it is evident that in many instances the felon deserves the severest penalty allowed by law, as where a robber kills his victim to prevent identification. Such punishment could be obtained by a straight first degree murder indictment without the support of the felony-murder rule. In absence of facts establishing a wilful, premeditated and deliberate killing, as in the principal case, the maximum offense, theoretically justifiable, would be second degree murder. Moreover, in the rare case where the chances of death resulting from the commission of the felonious act is so remote that no reasonable man would have taken it into account, only a manslaughter conviction should be sustained.[18] Although it is foreseeable in the perpetration of *armed* robbery that violence may erupt causing death, it is arguable that in the principal case death by heart attack is not foreseeable.[19] Even if the state is able to establish factual causation through medical evidence and the "thin skull" doctrine,[20] the real question of whether liability should attach still remains. "[T]his is a question not of causation but of culpability."[21] However, the consideration of whether the legislature intended to impose this severe penalty on such conduct is excluded by operation of law, and the homicide is classified as first degree murder. Professor Packer states that

> in form, this means that absolute liability for murder is being imposed. In substance, however, the felony-murder rule simply relieves the jury of having to infer what can usually be inferred with great ease, that the actor foresaw that death might result from his conduct. The irrationality of the rule, which has long drawn the attack of scholars, lies in the result that it compels in

[18] Perkins, *supra* note 9, at 560.

[19] Such an argument is no longer strengthened by the fact that death was not caused by corporal harm. Today, of course, most jurisdictions impose criminal responsibility for death from fright resulting from battery upon the deceased. *E.g.*, Snowden v. State, 133 Md. 624, 106 Atl. 5 (1919); State v. Knight, 247 N.C. 754, 102 S.E.2d 259 (1958). But jurisdictions also impose such responsibility even though no hostile demonstration or overt act was directed at the deceased. People v. Studer, 59 Cal. App. 547, 211 Pac. 233 (Dist. Ct. App. 1922); In the Matter of Heigho, 18 Idaho 566, 110 Pac. 1029 (1910); Graves v. Commonwealth, 273 S.W.2d 380 (Ky. 1954) (rev'd on other grounds). For a general discussion of homicide by fright or shock, see Annot., 47 A.L.R.2d 1072 (1956).

[20] Although this is a tort concept, the idea that one takes his victim as he finds him may be applicable here.

[21] Packer, *The Model Penal Code and Beyond,* 63 COLUM. L. REV. 594, 603 (1963).

> the rare case in which the evidence shows the absence of culpable foresight. It is this *automatic* and *conclusive* imputation of culpability that has been rightly criticized.[22]

What is the justification for such a special ban? It may be said to be warranted as vengeance or retribution for fearful harm. But in those felony homicides lacking the additional requirements for first degree murder, the community would not demand the most severe penalty and, in fact, to do so weakens the concept of first degree murder.[23] Most proponents of the felony-murder rule expound its deterrent effect.[24] Even though it can be argued that the deterrent effect is dubious, it is more important to point out that mere increase in punishment beyond that provided for the underlying felony or warranted by the evidence of culpability is not the correct method.[25]

One solution to this problem in any legal system is to abolish the rule, as England and Ohio have done.[26] However, this solution is undesirable, for it ignores the valuable insight drawn from common experience that unintended deaths too often occur during certain felonies. Moreover, abolishing the rule is not necessary. By lowering the degree of criminal responsibility imposed upon the felon, who unintentionally "causes" a death, a rational basis may be maintained in attempting to prevent crime and to preserve human life. While in the majority of cases, an enactment that embodies the felon-murder rule within second or third degree murder[27] will punish the offender according to his state of mind or culpability, there still remains the rare instance where the remote death occurs

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[22] *Id.* at 598.

[23] Morris, *The Felon's Responsibility For the Lethal Acts of Others,* 105 U. PA. L. REV. 50, 66 (1956).

[24] *E.g.,* People v. Washington, 44 Cal. Rptr. 442, 447, 402 P.2d 130, 135 (1965) (dissent).

[25] The efficacy of punishment in preventing crime depends both on its severity and its certainty. Centuries of common law experience have demonstrated that certainty of punishment is more effective in deterring potential offenders than severity. It has also demonstrated that excessive severity may diminish certainty of punishment. This is so because the criminal law depends for its enforcement on laymen as complainants, witnesses and jurors.

Ludwig, *supra* note 13, at 61-62.

[26] English Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11; OHIO REV. CODE ANN. §§ 2901.01, 2901.05 (Page 1958). In the MODEL PENAL CODE § 201.2, comment 4, at 35-36 (Tent. Draft No. 9, 1959) these two statutes are discussed in conjunction with the doctrine's rejection or nonexistence in other foreign countries.

[27] See, MINN. STAT. § 609.195 (1964).

during a felony. Thus the best solution[28] appears to be that adopted in the Model Penal Code.[29] The Code provides that homicides occurring in the course of the commission of felonies "will only constitute murder if they are committed purposely or knowingly, or recklessly where the recklessness demonstrates extreme indifference to the value of human life, subject, however, to a presumption of such recklessness if the actor is committing"[30] one of the dangerous felonies normally found in a felony-murder statute. This presumption of extreme recklessness is rebuttable,[31] and the jury may find that the recklessness lacks extreme indifference.[32] The homicide, however, may still be adjudged reckless, in which event it constitutes manslaughter.[33] In this manner, the Code recognizes and corrects the real evil of the felony-murder rule, *i.e.,* the irrelevant issue of whether the homicide was purposely or accidentally committed.[34] The Code's effect is concisely stated by Professor Packer.

> In short, the felony-murder rule is transformed from a rule of law to a rule of evidence. The principle of *mens rea,* as it applies in the law of homicide, is fully preserved, but the jury's attention is explicitly directed to the justifiable evidentiary implication of homicide in the course of a felony.[35]

The results may not often differ,[36] but a conviction under the Code would rest upon sound grounds.

Whether the defendant in the *McKeiver* case could overcome the presumption of extreme indifference will not be discussed here.

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[28] One attempt at punishing according to culpability is the declaration that homicide in the commission or attempted commission of a crime punishable by death or life imprisonment is first degree murder. MASS. ANN. LAWS ch. 265, § 1 (1956). Another solution that has been suggested is to increase the penalty for the underlying felony. Morris, *supra* note 23, at 77. "If the object of the rule is to prevent such accidents, it should make accidental killing with fire-arms murder, not accidental killing in the effort to steal; while, if the object is to prevent stealing, it would be better to hang one thief in every thousand by lot." HOLMES, THE COMMON LAW 58 (1881).

[29] MODEL PENAL CODE § 210.2 (Proposed Official Draft 1962).

[30] MODEL PENAL CODE § 201.2, comment 4, at 33 (Tent. Draft No. 9, 1959).

[31] *Ibid.*

[32] MODEL PENAL CODE § 201.2, comment 2 (Tent. Draft No. 9, 1959).

[33] MODEL PENAL CODE § 201.2, comment 4, at 33 (Tent. Draft No. 9, 1959).

[34] MODEL PENAL CODE § 201.2, comment 4, at 39 (Tent. Draft No. 9, 1959).

[35] Packer, *supra* note 21, at 599.

[36] The Code declares that murder is a first degree felony which may have the death sentence. MODEL PENAL CODE § 210.2(2) (Proposed Official Draft 1962).

The writer only suggests that to impose first degree murder automatically without inquiry into whether the actor had the requisite culpability with respect to the result threatens the very foundation of the criminal law—the principal of punishing according to culpability. If the Code with its firm foundation has not been accepted, the law enforcement officials must analyze each fact situation and if necessary, as in the principal case, punish *only* the justifiable crimes —armed robbery and manslaughter. The system should not be jeopardized in an attempt to gain the maximum penalty in every case.

DAVID A. IRVIN

Eminent Domain—Cul-de-Sac Doctrine

In *Wofford v. Highway Comm'n*,[1] the North Carolina Supreme Court abolished the doctrine of eminent domain known as the cul-de-sac principle.[2] If a public authority blocks or vacates a portion of a road, leaving any owner whose land abuts the remaining road without access from one direction, the situation is generally called a cul-de-sac. In the 1931 decision of *Hiatt v. City of Greensboro*,[3] the court held that the creation of a cul-de-sac was compensable under eminent domain.[4] The rationale of the court was that the owner whose property abuts a road has a private easement to have the street remain open in both directions, and that the damage to abutting owners was different in kind as well as in degree from that of the general public. The court stated that the majority of courts agreed with this view.

Since *Hiatt* the court has gradually restricted the application of

[1] 263 N.C. 677, 140 S.E.2d 376 (1965).

[2] Cul-de-sac is French for "the bottom of a bag." The North Carolina Supreme Court has defined the cul-de-sac principle as:

> The rule that an abutting owner has a right of access to the general system of streets and to the remainder of his street with all of its connections to a point where they cease to be of more than remote advantage to him, and that when one end of the street is closed he is entitled to compensation . . . .

Snow v. Highway Comm'n, 262 N.C. 169, 172, 136 S.E.2d 678, 681 (1964).

[3] 201 N.C. 515, 160 S.E. 748 (1931).

[4] North Carolina has no eminent domain provision in its constitution. However, just compensation for the taking of private property for public use has been considered necessary under art. I, § 17 of the North Carolina Constitution. Town of Morganton v. Hutton & Bourbonnais Co., 251 N.C. 531, 112 S.E.2d 111 (1960); Eller v. Board of Educ., 242 N.C. 584, 89 S.E.2d 144 (1955).