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Cover Page Footnote

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FELONY MURDER AND THE MISDEMEANOR OF ATTEMPTED ESCAPE: A LEGISLATIVE ERROR IN SEARCH OF CORRECTION

Peter J. McQuillan*

I. Introduction

The felony murder doctrine defines as murder any death occurring in the course of a felony without regard to whether the death was the result of accident, negligence, recklessness or purpose.¹ Hence, a person is guilty of murder if he is criminally responsible for the underlying felony.² Since this doctrine requires no proof of any culpability with respect to the victim's death, the crime of felony murder is one of strict or absolute liability.

Commentators have criticized the felony murder concept almost from its inception as a harsh legal doctrine with insufficient policy justifications and theoretical underpinnings.³ While a substantial body of criticism supports the abolition of the doctrine, it continues in effect—although significantly modified in scope—in the vast majority of states, including New York.⁴

A recent article⁵ suggests that the infirmities of this doctrine may have reached constitutional stature.⁶ Consider the following hypo-

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1. N.Y. PENAL LAW § 125.25(3) (McKinney Supp. 1987).

2. *Id.*

3. See, e.g., Gegan, *Criminal Homicide in the Revised New York Penal Law*, 12 N.Y.L. FORUM 565, 586-87 (1965) [hereinafter Gegan]. See generally Rikard, *The Uncertain Status of the Felony Murder Rule in Massachusetts After Commonwealth v. Matchett*, 386 Mass. 492, 436 N.E.2d 400 (1982), 6 W. NEW ENGLAND L. REV. 1081 (1984); Saltzman, *Does Michigan Have a Felony Murder Rule*, 59 MICH. BAR J. 97 (Feb. 1980); Seibold, *The Felony Murder Rule: In Search of a Viable Doctrine*, 23 CATH. LAW. 133 (1978) [hereinafter Seibold]; Sudduth, *The Dillon Dilemma: Finding Proportionate Felony Murder Punishment*, 72 CALIF. L. REV. 1299 (1984); Violette, *The Felony Murder Rule and the Death Penalty: Enmund v. Florida—Overreaching by the Supreme Court*, 19 NEW ENGLAND L. REV. 255 (1984).

4. See N.Y. PENAL LAW § 125.25(3) (McKinney Supp. 1987).

5. Roth & Sundby, *The Felony Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446 (1985) [hereinafter Roth & Sundby].

6. See *id.* The authors made this observation:

Few legal doctrines have been as maligned and yet have shown as great a resiliency as the felony-murder rule. Criticism of the rule constitutes

thetical: Arthur T. Waterhouse, a fifty-seven year old cashier at a Manhattan restaurant embezzles \$300 from his employer on February 26, 1986. When Waterhouse's employer discovers the theft he notifies the police. Officer Tracy arrives at the restaurant and, after formally arresting Waterhouse for the felony of grand larceny in the third degree,⁷ places him in the back seat of the patrol car.

Never having had any prior contact with the law, Waterhouse panics and attempts escape by opening the door of the police car when it stops for a traffic light. Officer Tracy forcefully restrains Waterhouse and successfully prevents him from escaping.

Tracy, however, as a direct result of this trauma, suffers a massive heart attack. Other police officers quickly arrive at the scene. The police transport Waterhouse to the precinct where they book him for the class E felony of grand larceny in the third degree⁸ and the class A misdemeanor of attempted escape in the second degree.⁹ Tracy is promptly taken to the emergency room of a nearby hospital and dies three hours later.

Under the literal language of the present New York Penal Law, Waterhouse can be convicted of murder in the second degree¹⁰ and sentenced to imprisonment for not less than fifteen years to life.¹¹ This irrational and grotesque result—which the legislature patently did not intend¹²—is the product of the felony murder doctrine.

It has been commonly understood that the conduct immediately preceding the homicidal act must constitute a felony.¹³ If the actor's antecedent conduct constitutes only a misdemeanor, neither he nor an accomplice would be guilty of felony murder.¹⁴ Nevertheless, in New York, because of a legislative drafting error, it is indeed possible

a lexicon of everything that scholars and jurists can find wrong with a legal doctrine: it has been described as "astonishing" and "monstrous," an unsupportable "legal fiction," "an unsightly wart on the skin of the criminal law," and as an "anachronistic remnant" that has "no logical or practical basis for existence in modern law." Perhaps the most that can be said for the rule is that it provides commentators with an extreme example that makes it easy to illustrate the injustice of various legal propositions.

Id. at 446 (citations omitted).

7. See N.Y. PENAL LAW § 155.30 (McKinney Supp. 1987).

8. *Id.*

9. *Id.* § 205.10 (McKinney 1975).

10. *Id.* § 125.25(3) (McKinney Supp. 1987).

11. See generally *id.* (Sentence Chart I).

12. See *infra* notes 136-54 and accompanying text.

13. See *infra* notes 236-39 and accompanying text.

14. See *infra* note 237 and accompanying text.

for a person to be convicted of felony murder when his antecedent crime was only a misdemeanor.¹⁵

The felony murder doctrine has been part of the statutory law of New York since 1829.¹⁶ The legislature later incorporated it with some modifications in the Revised Penal Law of 1967.¹⁷ A cursory reading of New York's felony murder provision suggests that the legislature enumerated nine felonies,¹⁸ since the first four enumerated felonies are all crimes of degree.¹⁹ In fact, however, the legislature specified sixteen substantive felonies in the felony murder statute.²⁰ Furthermore, since the statute embraces the attempt stage²¹—and an attempt to commit a crime is a discrete crime—thirty-two offenses may actually constitute the predicate for felony murder, *i.e.*, the sixteen substantive offenses and the sixteen attempt offenses.²² In 1971, the

15. See *infra* notes 151-71 and accompanying text.

16. See *infra* notes 64-86 and accompanying text.

17. 1967 N.Y. Laws ch. 791, at 1313. Section 125.25(3) of that law, at the time of its enactment, provided that a person is guilty of murder when:

Acting either alone or with one or more other persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, escape in the first degree, or escape in the second degree, and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants

Id. at 1314. The felony murder doctrine articulated in this quoted section expressly embraces three separate stages with respect to the actor's underlying felonious conduct: (1) the attempt stage; (2) the commission of the felony stage; and (3) the stage of immediate flight from either one of the first two stages.

18. The New York Court of Appeals, in *People v. Gladman*, 41 N.Y.2d 123, 359 N.E.2d 420, 390 N.Y.S.2d 912, observed: "The 1967 Penal Law limited the application of the felony murder concept to nine serious and violent predicate felonies." *Id.* at 128, 359 N.E.2d at 424, 390 N.Y.S.2d at 916.

19. See N.Y. PENAL LAW § 125.25(3) (McKinney Supp. 1987) (robbery, burglary, kidnapping and arson).

20. See *id.*

21. See *id.* ("commits or attempts to commit").

22. See *id.* The 32 offenses enumerated in the felony murder statute are: (1) robbery third degree; (2) attempted robbery third degree; (3) robbery second degree; (4) attempted robbery second degree; (5) robbery first degree; (6) attempted robbery first degree; (7) burglary third degree; (8) attempted burglary third degree; (9) burglary second degree; (10) attempted burglary second degree; (11) burglary first degree; (12) attempted burglary first degree; (13) kidnapping second degree; (14) attempted kidnapping second degree; (15) kidnapping first degree; (16) attempted kidnapping first degree; (17) arson third degree; (18) attempted arson third degree; (19) arson second degree; (20) attempted arson second degree; (21) arson first degree; (22) attempted arson first degree; (23) rape first degree; (24) attempted rape first degree; (25) sodomy first degree; (26) attempted sodomy first degree; (27) sexual abuse first degree; (28) attempted sexual abuse first degree; (29) escape second degree; (30) attempted escape second degree; (31) escape first degree; and (32) attempted escape first degree. *Id.*

legislature added two felonies to the list,²³ and in 1984, the legislature added two more felonies to the list.²⁴

Because of a serious legislative drafting error, however, the legislature included two class A misdemeanors among the thirty-six crimes embraced within the felony murder statute.²⁵ Those two misdemeanors are attempted arson in the fourth degree²⁶—which is actually a non-existent crime²⁷—and attempted escape in the second degree.²⁸ The other thirty-four crimes are, in fact, felonies.²⁹

As will be demonstrated below, the legislature never intended conduct constituting a misdemeanor to be the predicate for a felony murder prosecution.³⁰ To the contrary, this Article maintains that the legislature unquestionably intended the actor's predicate conduct, attempted or completed, to be in fact a felony.³¹

To demonstrate that it was not the intent of the legislature to permit misdemeanor conduct to serve as the predicate for a felony murder prosecution, this Article examines the history of the doctrine, including: (1) the origin and development of the felony murder doctrine at common law;³² and (2) statutory antecedents to New York's 1967 felony murder statute³³ along with the 1963-1967 reports of the New York Law Revision Commission.³⁴ The Article discusses

23. See 1971 N.Y. Laws ch. 961, at 1540-41. The two felonies were arson in the fourth degree and attempted arson in the fourth degree, which raised the total of offenses that can constitute a predicate for felony murder to 34. The legislature merely relabeled the existing three degrees of arson, without any change in form or substance, as fourth, third and second degree arson and created a new crime of arson in the first degree. *Id.* at 1541. Thus, the crime of arson in the third degree became arson in the fourth degree without any change of substance or section number.

24. See 1984 N.Y. Laws ch. 210, at 350. These two felonies were aggravated sexual abuse and attempted aggravated sexual abuse, so that a total of 36 offenses can now constitute a predicate for felony murder.

25. See N.Y. PENAL LAW § 125.25(3) (McKinney Supp. 1987).

26. See *id.* § 150.05 (McKinney Supp. 1987) (arson fourth degree), § 110.05(7) (McKinney Supp. 1987) (attempt to commit class E felony).

27. See *id.* § 150.05. Since the class E felony of arson in the fourth degree requires that the actor recklessly damage a building, no crime of attempted arson in the fourth degree can exist. See *People v. Trepanier*, 84 A.D.2d 374, 380, 446 N.Y.S.2d 829, 833 (4th Dep't 1982).

28. See N.Y. PENAL LAW § 205.10 (McKinney Supp. 1987) (escape second degree); § 110.05(7) (McKinney Supp. 1987) (attempt to commit class E felony).

29. See *id.* § 125.25(3) (McKinney Supp. 1987).

30. See *infra* notes 136-54 and accompanying text.

31. See *Gladman*, 41 N.Y.2d at 128, 359 N.E.2d at 423-24, 390 N.Y.S.2d at 916 (1978).

32. See *infra* notes 40-58 and accompanying text.

33. See *infra* notes 59-121 and accompanying text.

34. See *infra* notes 122-71 and accompanying text.

both the principal theoretical objections to the doctrine,³⁵ as well as judicial and legislative limitations imposed upon the doctrine,³⁶ and then reviews a case involving a felony murder conviction in which the predicate offense was a misdemeanor.³⁷ Finally, the Article recommends judicial³⁸ and legislative³⁹ action to correct the patent error in New York's present felony murder statute.

II. Common Law Development

It is impossible to say precisely how the doctrine of felony murder originated and developed. In an illuminating 355-page study of the New York law of homicide from colonial times to 1937, the authors wrote that "it is not surprising that the decisions of the English courts and the writings of legal commentators are besprinkled with expressions of doubt concerning the soundness and indeed the very authenticity of the [felony murder doctrine].⁴⁰ In addition, in 1980, the Michigan Supreme Court observed that "[h]istorians and commentators have concluded that the [felony murder doctrine]" is of questionable origin and that the reasons for the [doctrine] no longer exist, making it an anachronistic remnant, 'a historic survivor for which there is no logical or practical basis for existence in modern law.'"⁴¹

It appears that Sir Edward Coke (1552-1634), who is generally credited with initially reducing the common law to an orderly system, first articulated the felony murder doctrine.⁴² The early English common law was largely what Coke said it was.⁴³ Modern biographers have noted, however, that Coke would occasionally stretch a reported decision to conform to his rule or exaggerate the meaning or holding of a particular decision.⁴⁴ This flaw in scholarship was probably responsible for Coke writing:

35. See *infra* notes 172-85 and accompanying text.

36. See *infra* notes 186-205 and accompanying text.

37. See *infra* notes 206-25 and accompanying text.

38. See *infra* notes 226-61 and accompanying text.

39. See *infra* notes 262-64 and accompanying text.

40. New York Law Revision Commission Study of Homicide: The Eighteenth Century to 1937, [1937] N.Y. LAW REV. COMM'N REP. 660 [hereinafter *Homicide Study*].

41. *People v. Aaron*, 409 Mich. 672, 689, 299 N.W.2d 304, 307 (1980) (citation omitted).

42. See E. COKE, 3 INSTITUTES OF THE LAW OF ENGLAND 56 (1644) [hereinafter COKE].

43. See J.F. STEPHEN, 3 A HISTORY OF THE CRIMINAL LAW OF ENGLAND 57 (1883) [hereinafter STEPHEN].

44. *Id.*

If the act be unlawful, it is murder. As if A meaning to steale 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 unlawful, 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.⁴⁵

A distinguished historian of criminal law, "upon careful search into Coke's authority" concluded that Coke's statement was "entirely unwarranted by the authorities which he quotes," and characterized it as "astonishing" and "monstrous."⁴⁶ Another commentator wrote that Coke's hypothetical of the deer stealer "is the common law only of Sir Edward Coke."⁴⁷ And another has characterized the genesis of the felony murder doctrine "as a blunder by Coke in the translation and interpretation of a passage from Bracton."⁴⁸

Nearly 120 years after the publication of Coke's Third Institute was published, Sir Michael Foster wrote:

Accidental Homicide: In order to bring the case within this description, the 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 intent went no farther than to commit a bare trespass, manslaughter: though, I confess, Lord Coke seemeth to think otherwise.⁴⁹

Foster, therefore, would convict a person of murder when, with the intent to steal a chicken, he shoots at the chicken but accidentally and without any negligence kills a person whose presence behind

45. COKE, *supra* note 42, at 56.

46. STEPHEN, *supra* note 43, at 57, 75.

47. Molsel, *A Survey of Felony Murder*, 28 TEMP. L.Q. 453, 453 n.3 (1955) (quoting 6 T. HOBBS, *Dialogue of the Common Law*, in ENGLISH WORKS 86-87 (1840)).

48. *Criminal Law: Felony-Murder Rule—Felon's Responsibility for Death of Accomplice*, 65 COLUM. L. REV. 1496, 1496 n.2 (1965).

49. M. FOSTER, CROWN LAW 258 (1762) [hereinafter FOSTER]. Foster proffered this hypothetical:

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.

Id. at 258-59. The only authority cited by Foster is dictum in a 1707 case that cited no other authority than Coke.

the barn could not have been suspected.⁵⁰ Not until Foster's work in 1762, did a case or commentary mention a connection between a felony and a murder.

In 1765 Blackstone adopted Foster's position on felony murder in his Commentaries on the Laws of England:

[W]hen 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 consequences 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.⁵¹

It is because of Blackstone that the felony murder doctrine became widely known in the United States at the end of the eighteenth century and the beginning of the nineteenth century. Indeed, it was Blackstone who bequeathed the felony murder doctrine to American legislators who, after placidly accepting it, codified it in their nineteenth century penal laws.⁵² American judges also contributed to its

50. See STEPHEN, *supra* note 43, at 75. Stephen remarked:

Cruel and, indeed, monstrous as such an illustration may appear to us, it is put forward by Foster as a mitigation of the views of Coke, and such no doubt it is. It certainly is less objectionable to say that unintentional homicide committed in the prosecution of a felonious design is murder, than to say that unintentional homicide committed by any unlawful act is murder. Foster's own illustration, however, shows clearly that the one rule is less bad than the other, principally because it is narrower.

Id. In 1881, United States Supreme Court Justice Oliver Wendall Holmes commented on Foster's chicken hypothetical: "If the object of the [felony murder doctrine] is to prevent such accidents, it should make accidental killing with firearms murder, not accidental killing in effort to steal; while, if its object is to prevent stealing it would do better to hang one thief in every thousand by lot." O.W. HOLMES, *THE COMMON LAW* 58 (1881). One commentator recently observed that "[f]or Foster, it is essential that the 'unlawful act' be a felony, and in the view of his rationale of transferred felonious intent, it is presumably immaterial whether the felony is dangerous." G. FLETCHER, *RETHINKING CRIMINAL LAW* 282 (1978) [hereinafter FLETCHER].

51. G. CHASE, *CHASE'S BLACKSTONE* 940 (4th ed. 1914).

52. FLETCHER, *supra* note 50, at 283. One theory suggested frequently as to why commentators did not challenge the felony murder doctrine is that at that time practically all felonies were punishable by death. These commentators did not know that the execution rates varied among the capital felonies at common law. Fletcher notes:

[This] is an example where arguing from the law on the books, rather than the practice of the courts, can easily lead us astray. It is simply false to say that it made no difference whether one was convicted of larceny or of murder and that therefore there was no harm in Foster's

development by reading the doctrine into the common law of homicide, *i.e.*, by adopting the fictions of implied malice aforethought and constructive murder.⁵³

At the end of the eighteenth century, the common law developed what later became known as the misdemeanor manslaughter rule, *i.e.*, an actor could be guilty of involuntary manslaughter if the victim's death occurred while the actor was committing an unlawful act not amounting to a felony. One rationale for this rule, and perhaps for the felony murder doctrine itself, is that one who violates the law has no moral basis to complain about being held responsible for an unexpected and unintended result. Of course, the misdemeanor manslaughter rule provided a rough basis for criminal responsibility at a time before the development of the concepts of recklessness and criminal negligence as we know them today. Many nineteenth century courts and commentators repeatedly asserted that the felony murder doctrine was part of the common law of England.⁵⁴ Although its origin is uncertain and doubtful,⁵⁵ the doctrine appears to have been critically accepted and developed simply through repetition.⁵⁶

During this time, however, English judges sought to limit the application of the felony murder doctrine.⁵⁷ Consequently, in the

upgrading every case of larceny-causing-death to the level of murder.

Id.

53. *Id.* at 291-92. Fletcher asserted:

[I]t is simply false to hold that the English common law contained a general rule to the effect that any killing in the course of a felony was murder. . . . The English case law never supported the rule of law that one finds quoted in the American cases, namely, that any killing, even an accidental killing, would be murder if committed in the perpetration of a felony. Certain dangerous felonies such as rape and robbery were linked for a period with the proof of malice [aforethought], but the doctrine never encompassed accidental deaths incidental to felonies.

Id.

54. See STEPHEN, *supra* note 43, at 57.

55. *People v. Aaron*, 409 Mich. 672, 698, 299 N.W.2d 304, 312 (1980). The court explained:

Thus, an examination of the felony murder rule indicates that the doctrine is of doubtful origin. Derived from the misinterpretation of case law, it went unchallenged because of circumstances which no longer exist. The doctrine was continuously modified and restricted in England, the country of its birth, until its ultimate rejection by Parliament in 1957.

Id.

56. STEPHEN, *supra* note 43, at 57. "This astonishing doctrine has so far prevailed as to have been recognized as part of the law of England by many subsequent writers It has been repeated so often that I amongst others have not only accepted it, though with regret, but have acted upon it." *Id.* (citation omitted).

57. In the much-cited case of *Regina v. Serne*, 16 Cox, Crim. Cas. 311 (1887), the court instructed the jury:

[I]nstead of saying that any act done with intent to commit a felony

first half of the twentieth century, English prosecutors rarely invoked the felony murder doctrine. Indeed, Parliament abolished the doctrine in 1957.⁵⁸

III. The Felony Murder Doctrine in New York From Colonial Times to 1967

During the colonial era, the province of New York applied the common law of crimes and supplemental statutory law.⁵⁹ No statute or reported decision during this period dealt with the felony murder doctrine. Following the American Revolution, that part of the common law that formed the law of the colony of New York on April 19, 1775, continued to be the law of the State of New York, "subject to such alterations as the legislature shall make concerning the same."⁶⁰ The first homicide statute provided, *inter alia*, that "all wilful killing by poisoning of any person . . . shall be . . . deemed wilful murder of malice prepense."⁶¹ This statute, however, did not constitute a comprehensive treatment of homicide. As a result, the common law of homicide, whatever it may have been, continued to apply.

At the start of the nineteenth century, critics characterized the common law of crimes as being filled with fictions, contradictions and incongruities.⁶² The mounting criticism generated a movement to codify the law.⁶³

A. The 1829 Revised Statutes

The legislature responded by enacting the Revised Statutes of 1829, which contained the first comprehensive codification of the criminal law in New York.⁶⁴ The Revised Statutes provided that "[t]he killing

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.

Id. at 313.

58. See generally Prevezer, *The English Homicide Act: A New Attempt to Revise the Law of Murder*, 57 COLUM. L. REV. 624 (1957).

59. See, e.g., 1 COLONIAL LAWS OF NEW YORK 20 (1894).

60. N.Y. CONST. art. I, § 14; see also *Waters v. Gerard*, 189 N.Y. 302, 309, 82 N.E. 143, 145 (1907) (principles and rules of common law continue in force unless abrogated or modified by express constitutional or statutory enactment).

61. 1787 N.Y. Laws 336.

62. See *Homicide Study*, *supra* note 40, at 660.

63. See 1825 N.Y. Laws 446.

64. *Homicide Study*, *supra* note 40, at 525. The New York State Law Revision Commission concluded:

of a human being, without the authority of law, . . . is either murder, manslaughter, or excusable or justifiable homicide, according to the facts and circumstances of each case."⁶⁵ In the notes to the section that defined murder, the 1829 revisers wrote: "There is no departure from the present law, except in the case of implied malice, arising from being engaged in an unlawful act."⁶⁶ This comment referred to the fiction of the "implied malice doctrine," which the revisers believed had previously applied to an unintended killing in the course of committing any "unlawful act."⁶⁷

In any event, the revisers dealt with an "unlawful act" homicide as follows: (1) a homicide in the course of a felony was murder;⁶⁸

What general basic views with regard to criminal law were entertained by the revisers in 1829 . . . we can only surmise. Possibly they held no reasoned convictions with regard to the underlying purposes and principles of a proper penal code. An examination of their notes reveals no decisive statement of their views

Id. at 529.

65. N.Y. Revised Statutes of 1829, part IV, ch. I, tit. I, § 4. Section 5 defined the degreeless crime of murder as follows:

Such killing, unless it be manslaughter or excusable or justifiable homicide . . . shall be murder in the following cases: 1. When perpetrated from a premeditated design to effect the death of the person killed, or of any human being: 2. When perpetrated by any act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual: 3. When perpetrated without any design to effect death, by a person engaged in the commission of any felony.

Id. § 5. Manslaughter in the first degree was defined as follows:

The killing of a human being, without a design to effect death, by the act, procurement or culpable negligence of any other, while such other is engaged, 1. In the perpetration of any crime or misdemeanor not amounting to felony: or, 2. In an attempt to perpetrate any such crime or misdemeanor, In [sic] cases where such killing would be murder at the common law. . . .

Id. tit. II, art. 1, § 6. Manslaughter in the third degree was defined as follows:

The involuntary killing of a human being, by the act, procurement, or culpable negligence of another, while such other person is engaged in the commission of a trespass or other injury to private rights or property, or engaged in an attempt to commit such injury. . . .

Id. tit. II, art. I, § 13.

66. See *Homicide Study*, *supra* note 40, at 545 n.60 (quoting notes to homicide provisions of Revised Statutes, ch. I, tit. I, § 5, as reported to state senate, Nov. 2, 1827).

67. *Homicide Study*, *supra* note 40, at 545. This, of course, was Coke's view which may never have actually been the law. See *id.* at 540. The objective view obviously simplifies the prosecutor's problems of proof—the prosecutor need not prove the defendant's state of mind at the time he acted. Every offense, in other words, would be one of strict or absolute culpability.

68. *Id.* at 533.

(2) a homicide in the course of a misdemeanor was manslaughter in the first degree;⁶⁹ and (3) a homicide in the course of a private wrong was manslaughter in the third degree.⁷⁰

Thus, the revisers significantly changed the law in three ways. First, the definition of murder was different from the common law definition—"a killing with malice aforethought."⁷¹ Since the statute articulated a self-contained substantive rule of law that a killing "shall be murder . . . [w]hen perpetrated . . . by a person engaged in the commission of any felony,"⁷² a New York court no longer had to rely upon the fictions⁷³ of implied "malice aforethought" or "constructive murder" or "transferred intent."⁷⁴

Second, the 1829 felony murder statute was cast in terms of "a person engaged in the commission of any felony."⁷⁵ Thus, unlike the manslaughter statutes, the felony murder statute contained no

69. *Id.* at 534-35.

70. *See supra* note 66 and accompanying text.

71. *See* N.Y. Revised Statutes of 1829, part IV, ch. I, tit. I, § 5(3).

72. *Id.*

73. *See, e.g.,* *People v. Berzups*, 49 N.Y.2d 417, 427, 402 N.E.2d 1155, 1160, 426 N.Y.S.2d 253, 258 (1980) ("in felony murder the underlying felony is not so much an element of the crime but instead functions as a replacement for the *mens rea* or intent necessary for common law murder"); *see also* W. LAFAVE & A. SCOTT, JR., *CRIMINAL LAW* 545 n.2 (1972) ("[t]his sort of talk is pure fiction, and it is better to recognize felony murder as a category of murder separate from intent-to-kill murder") [hereinafter LAFAVE & SCOTT].

74. *See* 1787 N.Y. Laws 336-38. The words "malice aforethought" do not appear in the 1829 statute, and indeed, were never used in any New York penal statute. *See* N.Y. Revised Statutes of 1829, part IV, ch. I, tit. I, § 5(3). Between 1787 and 1829, the New York statutory law referred to "murder of malice prepense." *See id.* Indeed, in defining malice aforethought murder, the revisers used the term "premeditated design." *Id.* Nevertheless, from the time of the enactment of the revised statutes to less than 20 years ago, prosecutors in New York continued to charge the defendant with a "malice aforethought killing," and courts would discuss in detail the concept of express malice aforethought and the fictions of transferred intent and implied malice aforethought. This peculiar and profoundly confusing development arose from the following statement made by the New York Court for the Correction of Errors a few years after the Revised Statutes took effect:

Where an offense is created by statute, which was not an offense by the common law, it is a general rule that the indictment must charge the offense to have been committed under the circumstances and with the intent mentioned in the statute, which of course contains the only appropriate definition of the crime It is otherwise in indictments for common law offenses Thus, in an indictment for murder, the terms *murder of his malice aforethought* are considered absolutely necessary in describing the offense; and if these words are left out of the indictment, it will be deemed a case of manslaughter only.

People v. Enoch, 13 Wend. 159, 172-73 (N.Y. 1834).

75. N.Y. Revised Statutes of 1829, part IV, ch. I, tit. I, § 5(3).

express reference to an attempt to commit a felony.⁷⁶ Any such reference, however, was unnecessary, because under the revised statutes, an attempt to commit a felony was itself the commission of that particular felony.⁷⁷

Third, the statute defined manslaughter in the first degree as a killing by a person "engaged . . . [i]n the perpetration of any crime or misdemeanor not amounting to a felony . . . [i]n cases where such killing would be murder at the common law."⁷⁸ This latter clause—" [i]n cases where such killing would be murder at the common law"—was predicated solely upon the reviser's understanding that, at common law, an actor was guilty of murder if he committed a homicide while committing any one of the following four unlawful acts: (1) a substantive felony; (2) an attempt to commit a substantive felony (at common law an attempt to commit any felony was a misdemeanor); (3) any substantive crime or misdemeanor not amounting to a felony; and (4) an attempt to commit any crime or misdemeanor not amounting to a felony.⁷⁹ Of these four unlawful acts, the first constituted murder under the 1829 Act.⁸⁰ The other three constituted manslaughter in the first degree.⁸¹ Therefore, it is reasonable to infer that the revisers intended to exclude attempts to commit a felony that constituted a misdemeanor from the scope of felony murder.

New York's first felony murder statute raised some questions. For example, if, in the future, the legislature created a new felony, might the new offense be the predicate for a felony murder conviction? Or, if, in the future, the legislature reclassified as a misdemeanor what had previously been a felony, might that reclassified offense thereafter serve as the predicate for a felony murder con-

76. *See id.*

77. *See id.* tit. VII, §§ 3, 12, 13, 30. The one exception relates to an attempt to commit a felony punishable "for any term less than four years." *Id.* § 3(3). Such an attempt was a misdemeanor. *See id.* A review of the revised statutes does not reveal any felony that has ever served as the basis for a felony murder prosecution for which the penalty was less than four years. Thus, in essence, under the revised statutes, an attempt to commit a felony was itself a felony for purposes of the felony murder doctrine.

78. *Id.* tit. II, art. I, § 6.

79. *See id.*

80. *See id.* tit. I, § 5(3).

81. *See id.* tit. II, art. I, § 6. The revisers also understood that at common law, an actor was guilty of manslaughter if he committed: (1) a trespass or other injury to private rights or property; or (2) an attempt to commit an injury. *Id.* § 13. Under the 1829 statutory scheme, these two unlawful acts fall within the definition of manslaughter in the third degree. *See id.*

viction? In 1834, Chancellor Walworth answered the former question in the affirmative and the latter in the negative.⁸²

One clear and reasonable inference may be drawn from the 1829 statutory language: to be guilty of felony murder, the actor had to be engaged in felonious conduct—either conduct constituting a substantive felony or attempt conduct itself constituting a felony—at the time of the homicide. If the attempt to commit a felony constituted only a misdemeanor then the felony murder doctrine was inapplicable. Hence, the focus of the statute was on the nature and quality of the crime that the defendant had committed at the time of the homicide.⁸³ In the view of one authority, the intent of the revised statutes was to preclude prosecution for illegal acts that did not constitute felonies.⁸⁴ Indeed, the highest appeals court at that time, concluded that the 1829 legislature had intended that certain lesser offenses were excluded from the scope of the felony murder doctrine.⁸⁵

82. *Enoch*, 13 Wend: at 175. The court stated:

[A]s often as the legislature creates new felonies, or raises offenses which were only misdemeanors at the common law, to the grade of felony, a new class of murders is created. . . . So, on the other hand, when the legislature abolishes an offense which, at the common law, was a felony, or reduces it to the grade of a misdemeanor only, the case of an unlawful killing, by a person engaged in the act which was before a felony, will no longer be considered to be murder, but manslaughter merely. Such changes in the law of murder have often occurred [T]he killing is adjudged to be murder or manslaughter, according to the nature and quality of the crime that the offender was perpetrating at the time the homicide was committed.

Id.

83. *See id.*

84. *Homicide Study*, *supra* note 40, at 734. The manslaughter provisions of the 1829 Revised Statutes:

[R]epresented an attempt by the revisers to reduce the grade of culpability of certain homicides below the rank they were thought to have occupied at common law. Sufficient authoritative force may have remained in Coke's dictum to have compelled a feeling that express statutory provision should be made to prevent the application of the doctrine in its full scope; while continuing the rule that "unlawful act" homicides were murder when the unlawful acts causing death were felonies, it is not too farfetched to suppose that the intention was to make certain that liability for murder would not be imposed for death-causing "unlawful acts" which were not felonies.

Id. at 734-35.

85. *Enoch*, 13 Wend. at 173-74. The legislature, according to the court, Unquestionably succeeded in restricting some cases to the grade of manslaughter, which, upon the principles of the common law, never ought to have been considered or adjudged to be offenses of a higher grade; such as the unintentional killing of a person, by an offender who was

Thus, New York's first felony murder statute excluded from its scope an actor who at the time of the homicide was engaged in overt conduct that in law was classified as a misdemeanor. Except for the unintended aberration in the 1967 revision with respect to the misdemeanor of attempted escape in the second degree,⁸⁶ this has been the felony murder rule in New York continuously from 1829 to the present.

B. The 1860 Felony Murder Statute

The homicide provisions of the 1829 Revised Statutes essentially remained unchanged until 1860, when the legislature adopted a radically different definition of murder.⁸⁷ Although the statute provided that first degree murder was punishable by death⁸⁸ and second degree murder by life imprisonment,⁸⁹ the legislature failed to define the term "murder" in the statute. Although second degree murder included "all other kinds of murder,"⁹⁰ its scope and meaning was less than clear.

The felony murder definition also contained ambiguities. Defining felony murder as a "murder" committed in the perpetration of an enumerated felony,⁹¹ the legislature did not definitively indicate whether unintended killings were within its scope.

Nevertheless, the 1860 first degree felony murder statute did enumerate the predicate offenses.⁹² With respect to the crimes of arson, rape, robbery and burglary, the statute made express reference to an attempt to perpetrate one of these crimes.⁹³ In fact this statute

engaged in a riot or other offense, that was a mere misdemeanor, and not a felony.

Id. at 174.

86. See N.Y. PENAL LAW § 125.25(3) (McKinney Supp. 1987).

87. 1860 N.Y. Laws ch. 410, at 712. Section 2 of the statute read:

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 the attempt to perpetrate any arson, rape, robbery or burglary, or in any attempt to escape from imprisonment, shall be deemed murder of the first degree, and all other kinds of murder shall be deemed murder of the second degree

Id. § 2, at 712-13.

88. See *id.* § 1, at 712.

89. See *id.* § 6, at 713.

90. See *id.* § 2, at 712-13.

91. See *id.*

92. See *id.* ("perpetration or the attempt to perpetrate any arson, rape, robbery or burglary, or in any attempt to escape from imprisonment").

93. See *id.*

was the first New York felony murder statute that expressly included an attempt.⁹⁴

Although two sections of the revised statutes expressly dealt with an attempt to escape from imprisonment,⁹⁵—one dealing with a felony⁹⁶ and the other with a misdemeanor⁹⁷—the 1860 felony murder statute referred to “any attempt to escape from imprisonment.”⁹⁸ Although a literal reading of this phrase may suggest that it embraced both sections, it is simply inconceivable that the 1860 legislature intended that a misdemeanor be a predicate for a felony murder conviction because up until 1860, “any felony” could serve as the foundation for a murder prosecution, and the 1860 statute narrowed

94. *Id.* The reason for this explicit reference is obvious—the predicate felonies were expressly listed in the 1860 statute. The first felony murder statute enacted in 1829, as well as a subsequent one, referred to the commission of “any felony.” See 1873 N.Y. Laws ch. 644, § 5, at 1014-15. Since an attempt to commit any felony was itself a felony, there was no need to refer expressly to an attempt when the predicate was statutorily declared to be “any felony.”

Each of the four crimes of arson, rape, robbery and burglary under the revised statutes was a felony in every degree. See N.Y. Revised Statutes of 1829, part IV, ch. I, tit. III, art. 1, § 9 (prescribing four degrees of arson—each a felony). There were two degrees of rape, and both were felonies. *Id.* tit. II, art. 2, §§ 22, 23. There were two degrees of robbery, and both were felonies. *Id.* tit. III, art. 5, § 57. There were three degrees of burglary, and each was a felony. *Id.* art. 2, § 21. An attempt to commit arson, rape, robbery, or burglary, in any degree, was in and of itself a felony. *Id.* tit. VII, art. 1, § 3. The enumerated crime of any attempt to escape from imprisonment presents an interesting question. See *id.* tit. IV, art. 3, § 23. Entitled “Of Escapes from Prisons, and assisting therein,” article 3 contained 12 sections, numbered 13-24. Section 23 dealt with the completed crime of escaping from state prison. *Id.* § 23. Section 24 dealt with the completed crime of escaping from a county jail. *Id.* § 24.

Section 23 read as follows:

Every person, lawfully imprisoned in a state prison for any term less than life, who shall attempt, by force or violence to any person, to escape from such prison, whether such escape be effected or not; shall, upon conviction, be adjudged to imprisonment in a state prison for a term not exceeding five years, to commence after the termination of the imprisonment to which such person shall have been sentenced, at the time of such attempt.

Id. § 23.

Section 24 stated:

Every person lawfully imprisoned in a county jail, for any cause whatever, who shall forcibly break the prison, with intent to escape therefrom, or who shall attempt, by any force or violence, to escape from such prison, although no escape be effected, shall, upon conviction, be punished by imprisonment in a county jail not exceeding one year.

Id. § 24.

95. See *id.* §§ 23, 24.

96. See *id.* § 23 (attempt to escape state prison).

97. See *id.* § 24 (attempt to escape from county jail).

98. See 1860 N.Y. Laws ch. 410, at 713.

the scope of the felony murder doctrine to certain felonies: arson, rape, robbery and burglary.⁹⁹ As a result, it is not reasonable to infer that the legislature intended to include the misdemeanor of attempted escape.¹⁰⁰ The only reasonable conclusion is that a drafting error occurred—one remarkably similar to the error made a century later.¹⁰¹

C. Revision of 1860 Felony Murder Statute

The 1860 felony murder statute was shortlived. In enacting a radically different murder provision, the legislature made at least two major drafting blunders: (1) the new murder statute was intended to be applicable retroactively; and (2) it repealed the 1829 murder statute without a savings clause.¹⁰²

In an effort to correct quickly the threatened chaos to the criminal justice system, the 1861 session of the legislature enacted a bill¹⁰³ declaring the 1829 murder statute “revived” and “made operative” with respect to offenses committed prior to the enactment of the 1860 statute. It further prescribed that a defendant convicted of murder under the “revived” statute had the unqualified right to choose a sentence of death or life imprisonment.¹⁰⁴

In 1862, the legislature, undoubtedly cognizant of the near-fatal drafting errors made two years earlier, repealed the 1860 murder statute and enacted a new scheme that, among other things, further modified the felony murder doctrine.¹⁰⁵ The 1862 statute provided specifically enumerated circumstances in which a killing constituted first degree murder. If not first degree murder, a killing could be manslaughter or a justifiable homicide.¹⁰⁶

99. *See id.*

100. *See infra* note 153.

101. *See* N.Y. PENAL LAW § 125.25(3) (McKinney Supp. 1987).

102. In *People v. Hartung*, 22 N.Y. 95, 102-103 (1860), the court, citing basic *ex post facto* principles, held that the new law could not apply to crimes committed prior to its effective date; and, citing a common law principle that there ceases to be any criminal liability if a penal statute is repealed without a savings clause, declared void all proceedings based on the former statute.

103. 1861 N.Y. Laws ch. 303, at 693.

104. *Id.* at 694.

105. 1862 N.Y. Laws ch. 197, at 368. However, the 1862 legislation also contained serious drafting errors with respect to the felony murder doctrine. For example, if read literally, the statute abolished the felony murder doctrine with the exception of the one underlying felony of first degree arson. *Id.* at 369.

106. *Id.* The statute provided:

[A killing] shall be murder in the first degree, in the following cases:
First. When perpetrated from a premeditated design to effect the death

This 1862 statute eliminated felony murder as a category of first degree murder. The only exception was a homicide resulting from the commission of arson in the first degree.¹⁰⁷ The 1862 murder law

of the person killed, or of any human being; Second. When perpetrated by any act imminently dangerous to others, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual; Third. When perpetrated in committing the crime of arson in the first degree. Such killing, unless it be murder in the first degree, or manslaughter, or excusable or justifiable homicide, as hereinafter provided, or when perpetrated without any design to effect death by a person engaged in the commission of any felony, shall be murder in the second degree.

Id. at 369. Murder in the first degree was punishable by death; murder in the second degree was punishable "by imprisonment in a state prison for any term not less than ten years." *Id.*

107. See, e.g., *Lanergan v. People*, 34 How. Pr. 390 (Sup. Ct. Gen. T. New York County 1867), *rev'd on other grounds*, 39 N.Y. 39 (1868). The court stated:

The definition of murder in the second degree is exceedingly obscure, under the act of 1862. A slight verbal alteration will make it definite and certain, and not unreasonable, or perhaps it is better to say, not without reason. As it reads literally, there is no affirmative definition of murder in the second degree A further reference to the statutes is in vain to find what is committed by the killing of a human being, "when perpetrated without any design to effect death, by a person engaged in the commission of any felony." As the statutes now read, such killing is not murder in the first degree, and it is excepted from the definition of murder in the second degree, nor is it found in any other portion of the statutes punishable as a crime. Clearly, it could not have been the intention of the legislature to exempt such a class of crime from any punishment . . . [I] suggest that an obliteration of the last "or" occurring in the sentence . . . defining murder in the second degree, will remove obscurity now existing.

Id. at 401; *Fitzgerrold v. People*, 37 N.Y. 413 (1868). In the same year, the *Fitzgerrold* court added:

By this [1862] amendment, a killing, when perpetrated in committing the crime of arson in the first degree, still constituted the offense of murder in the first degree. When, however, the killing was perpetrated without any design to effect death by a person engaged in the commission of a felony, other than that of arson in the first degree, it was murder in the second degree only. This was the entire effect of the amendment of 1862. This section is obscure, and has been sometimes read as if the words "or when perpetrated without any design to effect death by a person engaged in the commission of any felony," formed an exception, like the words "or manslaughter" or "justifiable homicide." Upon this construction no crime of murder in the second degree is created. The very crime intended to be thereby created is by this construction declared not to be such crime. A more reasonable construction should be put upon the language, and effect given to the evident intention of the legislature. The statute may be thus paraphrased: ". . . Such killing, unless it be murder, or manslaughter, or excusable or justifiable homicide, as hereinafter provided, shall be murder in the second degree, when

remained unchanged until 1873, when the legislature adopted a new definition of first degree and second degree murder.¹⁰⁸ The new law classified all felony murders—not merely first degree arson—as first degree murder.¹⁰⁹ The legislature, abandoning the salutary approach of listing the predicate felonies, adopted verbatim the definition of felony murder that was contained in the Revised Statutes of 1829.¹¹⁰

perpetrated without a design to effect death, by a person engaged in the commission of any felony." This was the evident intent of the framers of the statute, and in my judgment is a justifiable construction of the language.

Id. at 419 (citations omitted); *Homicide Study*, *supra* note 40, at 559-60. The 1937 New York Law Revision Commission Report summarized the situation:

The unclear second degree murder provision . . . placed the courts in a dilemma. They were faced with the necessity of declaring that the provision was a residuary definition negatively phrased or that felony murder was the sole kind of homicide comprehended within the definition of murder in the second degree. Acceptance of the first solution would have meant a finding that the doctrine of felony murder had been abolished and that henceforth all homicides committed in the course of felonies other than arson in the first degree could not be punished as murder. The second horn of the dilemma would force the courts to do obvious violence to the words of the statute and frustrate the apparent intention of the Legislature to mitigate the rigor of the rules relating to intentional murder . . . [T]he Court of Appeals concluded all doubt by definitely choosing the second course.

Id.

108. 1873 N.Y. Laws ch. 644, at 1014-15.

109. *Id.* at 1015.

110. *See id.* at 1014-15. The 1873 statute (which also, incidentally contained a carefully crafted savings clause) provided that a killing, unless it be manslaughter or excusable or justifiable homicide:

[S]hall be murder in the first degree, in the following cases: First, when perpetrated from a deliberate and premeditated design to effect the death of the person killed, or of any human being. Second, when perpetrated by an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual. Third, when perpetrated without any design to effect death by a person engaged in the commission of any felony. Such killing, unless it be murder in the first degree, or manslaughter, or excusable or justifiable homicide, as hereinafter provided, shall be murder in the second degree when perpetrated intentionally but without deliberation and premeditation.

Id. *See supra* notes 64-85 and accompanying text for a discussion of the revised statutes of 1829.

In *Dolan v. People*, 6 Hun. 493 (N.Y. Sup. Ct. Gen. T. 1st Dep't), *aff'd*, 64 N.Y. 485 (1876), a case involving a felony murder prosecution, the meaning of the statutory phrase when perpetrated "without any design to effect death" was questioned. *Id.* at 497-98; *see also* *Buel v. People*, 78 N.Y. 492, 499 (1879) (striking out words "without any design to effect death" in order to avoid necessity of showing there was such intention).

In 1876, in response to the question raised in *Dolan*, the legislature eliminated

D. New York's First Penal Code

In 1865, the Commissioners of the Code (known as the Field Commissioners) submitted to the legislature a proposed penal code,¹¹¹ which in 1881 became New York's first Penal Code and Code of Criminal Procedure.¹¹² Its definition of felony murder expressly referred to "a person engaged in the commission of or in an attempt to commit a felony."¹¹³ The Field Commissioners proposed this "attempt" language, intending solely to parallel the long existing attempt language in the manslaughter sections of the revised statutes.¹¹⁴

the quoted phrase from the statutory definition of felony murder. 1876 N.Y. Laws ch. 333, at 317. However, five years later, the quoted phrase reappeared in the new Penal Code's definition of felony murder. 1881 N.Y. Law ch. 676, at 1. It may be that the legislature focused on a draft of a proposed Penal Code prepared 11 years before the *Dolan* decision, and that the legislature simply overlooked the change it made in 1876.

111. See generally Proposed 1865 N.Y. Penal Law.

112. See 1881 N.Y. Laws ch. 676, at 1. Section 183 of the Penal Code of 1881 reads as follows:

The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed either 1. From a deliberate and premeditated design to effect the death of the person killed, or of another; or 2. By an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a design to effect the death of any individual; or 3. Without design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise; or 4. When perpetrated in committing the crime of arson in the first degree.

Id. Subdivision four, relating to felony murder when the predicate is arson in the first degree, was the product of another legislative error. As noted earlier, between 1862 and 1873 felony murder, as a capital offense, was limited to first degree arson; all other felonies formed the predicate for second degree felony murder. The person who drafted the murder provision of the 1881 Penal Code was simply confused. Subdivision three stated the broad felony murder doctrine. Subdivision four was patently redundant. *Id.* § 183.

In *People v. Greenwall*, 115 N.Y. 520, 22 N.E. 180 (1889), the court wrote:

Why subdivision 4 was added cannot certainly be perceived. Its grammatical structure is such as to lead us to suppose that it was added by some one after the prior portions of the section had been drafted and completed by another. The draftsman of subdivision 4 clearly did not have a clear comprehension of the force and effect of the prior subdivision.

Id. at 524-25, 22 N.E. at 181.

113. N.Y. PENAL CODE § 183 (1881).

114. See *id.* § 85. The Field Commissioners' commentary is as follows: "If the accused was committing a felony when he perpetrated the homicide, it is murder, though unintentional. If he was committing a *misdemeanor*, the homicide is manslaughter in the first degree. The sections embodying these two ideas should correspond in language." *Id.* (emphasis in original).

The legislature generally did not label specific crimes as felonies or misdemeanors in the Penal Code of 1881. Rather, the punishment determined the classification. In some sections that defined crimes, however, the legislature neither described the conduct as a felony or a misdemeanor nor prescribed any punishment. A catchall statute filled this gap.¹¹⁵

An attempt to escape, by a person in confinement or custody on a charge or conviction for a felony, formed the basis for a felony murder prosecution under both the Penal Code of 1881 and the Penal Law of 1909.¹¹⁶ Hence, the felony murder doctrine, as expressed in the statutory law of New York between 1829 and 1967 always required that the defendant be engaged in, or be criminally responsible for, a felony at the time of the homicidal conduct.¹¹⁷

115. See N.Y. PENAL CODE (1881). The Penal Code of 1881 prescribed, in essence, that an attempt to commit a felony was itself a felony. *Id.* §§ 5, 14. The Code dealt with the crime of escape in sections 84-93. Section 85, for example, provided that if a person was in prison or custody and escaped from such prison or custody, he was guilty of a felony, if such confinement or custody was upon a charge, conviction or commitment for a felony. And, of course, an attempt to escape from such confinement or custody constituted a felony. The Penal Law of 1909 produced no revision of the attempt, escape and homicide statutes, so that these provisions in the 1881 Penal Code were simply reenacted without substantial change and continued in effect until 1967 when the revised Penal Law became operative.

116. See *People v. Johnson*, 110 N.Y. 134, 141, 17 N.E. 684, 686 (1888) (defendant's attempted escape while killing took place held felony); see also *People v. Huter*, 184 N.Y. 237, 240, 77 N.E. 6, 7 (1906); *People v. Flanigan*, 174 N.Y. 356, 366, 66 N.E. 988, 991 (1903); *People v. Wilson*, 145 N.Y. 628, 633, 40 N.E. 392, 393 (1895); *People v. Oddy*, 16 A.D.2d 585, 586, 229 N.Y.S.2d 983, 985 (4th Dep't 1962).

117. See *People v. Berzups*, 49 N.Y.2d 417, 427, 402 N.E.2d 1155, 1160, 426 N.Y.S.2d 253, 258 (1980) (in felony murder, underlying felony is not so much element of crime but instead functions as replacement for intent necessary for common law murder); *People v. Murray*, 40 N.Y.2d 327, 340, 353 N.E.2d 605, 614, 386 N.Y.S.2d 691, 700 (1976) (Jasen, J., dissenting) (vital item in felony murder is predicate felony), *cert. denied*, 430 U.S. 948 (1977); *People v. LaMarca*, 3 N.Y.2d 452, 465, 144 N.E.2d 420, 428, 165 N.Y.S.2d 753, 764, *amended*, 3 N.Y.2d 933, 145 N.E.2d 892, 167 N.Y.S.2d 955 (1957) (necessary qualification engrafted on felony murder rule that underlying felony must be independent of homicide), *cert. denied*, 355 U.S. 920 (1958); *People v. Luscomb*, 292 N.Y. 390, 396, 397, 55 N.E.2d 469, 474 (1944) (felony murder statutes prior to 1967 require independent felony); *People v. Roper*, 259 N.Y. 170, 178, 181 N.E. 88, 91 (1932) (defendant must be guilty of independent felony during which homicide occurred); *People v. Lytton*, 257 N.Y. 310, 314-15, 178 N.E. 290, 292 (1931) (defendant must be engaged in commission of another felony); *id.* at 317, 178 N.E. at 293 (Crane, J., concurring) ("important proof in a felony murder is the felony, because this makes the act of killing murder in the first degree, even though the defendant did not intend to kill The felony . . . must be proved beyond a reasonable doubt"); *People v. Nichols*, 230 N.Y. 221, 226, 129 N.E. 883, 884 (1921) (evidence of engagement in commission of another felony proves malice and felonious

From the adoption of the Revised Statutes of 1829¹¹⁸ to the enactment of the Revised Penal Law of 1967,¹¹⁹ New York's statutory law of homicide always recognized the misdemeanor manslaughter rule.¹²⁰ Thus, if a defendant was charged with felony murder and the proof suggested that the defendant may have been engaged in a misdemeanor rather than a felony at the time of the killing, the trial court had to submit to the jury the lesser included offense of manslaughter.¹²¹

intent necessary for conviction of murder); *People v. Marendi*, 213 N.Y. 600, 611, 107 N.E. 1058, 1061 (1915) (to justify conviction of murder in first degree for unintentional homicide on ground that it was committed while defendant was actually engaged in commission of felony, every essential element of latter crime must be established); *People v. Huter*, 184 N.Y. 237, 244, 77 N.E. 6, 8 (1906) (felony separate and independent from homicide required to support felony murder conviction); *People v. Foster*, 50 N.Y. 598, 602 (1872) (felony murder exists only when killer was engaged at time in commission of felony).

In 1960, the court of appeals succinctly traced the development of this view:

[F]elony murder doctrine had its origin in the common law during an era when nearly all felonies were punishable by death. Because this often resulted in a barbaric application, the doctrine passed through a series of judicial and later legislative restrictions and limitations. However, both at common law and under the New York statute, a felonious homicide is made murder in the first degree by operation of the legal fiction of transferred intent, which thereby characterizes the homicide as committed with malice prepenze. It is the malice of the underlying felony that is attributed to the felon.

People v. Wood, 8 N.Y.2d 48, 51, 167 N.E.2d 736, 738, 201 N.Y.S.2d 328, 331 (1960) (citations omitted).

118. See 1829 N.Y. Laws part IV, ch. 1, tit. I.

119. See 1967 N.Y. Laws ch. 791, at 1309.

120. In *People v. Stacy*, 119 A.D. 743, 104 N.Y.S. 615 (3rd Dep't 1907), *aff'd without opinion*, 192 N.Y. 577, 85 N.E. 1114 (1908), the court affirmed a manslaughter conviction under the misdemeanor manslaughter rule although it expressed doubt as to whether the defendant's predicate conduct was a misdemeanor or a felony. *Id.* at 748, 104 N.Y.S. at 619. However, there appears to be no reported case in New York or any other jurisdiction that affirmed a felony murder conviction while expressing doubt as to whether the underlying crime was a felony or a misdemeanor.

121. In *People v. Koerber*, 244 N.Y. 147, 155 N.E. 79 (1926), the court wrote:

Generally speaking murder . . . connotes the specific or particular intent to kill, while manslaughter . . . is felonious homicide when the intent to kill is absent. But when one engaged in the commission of a felony, his mind being fatally bent on mischief but without a design to effect death, kills a human being, at common law, the killing is said to be with malice aforethought and so murder, and the Penal Law attaches to the act the consequences of murder in the first degree. The People on an indictment for felony murder may fail to establish that defendant was engaged in the commission of a felony, but may offer evidence tending to show that the homicide was committed by him when engaged in a misdemeanor, which would reduce the offense to manslaughter in the first degree or in the commission of a trespass or other invasion of a private right, which would reduce it to manslaughter in the second

IV. Law Revision Commission: 1961-1967

In 1961, the New York Legislature created a Temporary Commission on Revision of the Penal Law and Criminal Code, which, among other things, revised the felony murder statute.¹²² Shortly after its organization, the Commission issued its first interim report, observing: "Other major phases of Penal Law legislation which suggest a need for thorough analysis and re-examination include our laws of homicide with their various degrees of murder and manslaughter, considered by some to be outmoded in certain important respects"¹²³ In its second interim report, the Commission stated its intent to propose a rewritten homicide statute,¹²⁴ and remarked that "the whole theme of the proposed [homicide] article . . . [is] substantially taken from the recent Model Penal Code of the American Law Institute"¹²⁵ Defining "felony" in a way essentially

degree. Where the facts would justify a verdict based on such a theory, the degrees of manslaughter should be submitted to the jury.

Id. at 152-53, 155 N.E. at 82 (citations omitted).

122. See 1961 N.Y. Laws ch. 346, at 518. The legislature directed the agency:

[S]tudy . . . existing provisions of the penal law and . . . prepare, for submission to the legislature, a revised, simplified body of substantive laws relating to crimes More specifically the commission shall make such changes and revisions as will: a. restate, enumerate and accurately define substantive provisions of law relating to crimes and offenses by adding or amending language where necessary so as to improve substantive content and remove ambiguity and duplication; b. eliminate existing substantive provisions of law which are no longer useful or necessary;

Id.

123. N.Y. LEG. DOC. NO. 41, 185th Sess. 15 (1962).

124. See N.Y. LEG. DOC. NO. 8, 186th Sess. 38-39 (1963). The Commission wrote:

[T]he basic . . . articles are being . . . re-written Among these are completely revised articles and sections dealing with homicide . . . [A] new homicide article—virtually completed except for two or three as yet unsettled controversial points . . . presents an entirely new structure Since this proposal . . . is soon to be circulated for study with a detailed explanatory memorandum, a complete description of the article . . . will not be attempted here.

One of its features is a single, degreeless murder statute, replacing the existing two-degree pattern. Containing three subdivisions, this section defines the three traditional, basic forms of murder: (1) intentional killing, (2) the wanton or depraved type, and (3) felony murder.

Id.

125. *Id.* The Model Penal Code was approved by the American Law Institute on May 24, 1962. The Code provides:

[C]riminal homicide constitutes murder when . . . it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery,

similar to that of New York,¹²⁶ the Model Penal Code contains a felony murder provision that specifically enumerates seven crimes.¹²⁷ The first six are classified as felonies: robbery; forcible rape; forcible deviate sexual intercourse; arson; burglary; and kidnapping.¹²⁸ An attempt to commit any one of these crimes is also a felony.¹²⁹ The seventh crime is "felonious escape."¹³⁰ This provision, however, excludes escape conduct that merely constitutes a misdemeanor.¹³¹

In October, 1963, New York's Penal Law Revision Commission received a tentative draft revision of the Penal Law.¹³² The proposed felony murder provision read as follows:

A person is guilty of murder when: 3. Either alone or in concert with others, he commits or attempts to commit a felonious crime of robbery, burglary, kidnapping, arson, escape or a forcible, felonious sex crime, and, in the course of and in furtherance of such crime or of the immediate flight of the perpetrators thereof or any one of them, one or more commits an act inherently dangerous to human life which causes the death of a person other than one of the perpetrators.¹³³

The use of the terms "felonious crime" and "felonious sex crime" belied an intention to change the traditional requirement for a felony murder conviction—that is that the predicate conduct (completed or attempted) constitute a felony not a misdemeanor.¹³⁴ In addition,

rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape."

MODEL PENAL CODE § 210.2 (1962).

126. *See id.* § 1.04(2) (authorizes sentence of imprisonment in excess of one year).

127. *See id.* § 210.2.

128. *See id.* § 222.1 (robbery); *id.* § 213.1 (forcible rape); *id.* § 213.2 (forcible deviate sexual intercourse); *id.* § 220.1 (arson); *id.* § 221.1 (burglary); *id.* § 212.1 (kidnapping).

129. *See id.* § 5.05(1) (attempt is crime "of the same grade and degree as the most serious offense that is attempted").

130. *Id.* § 242.6. Section 242.6 defines in detail the crime of escape. *See id.* Escape is classified as a felony except that certain escape conduct constitutes a misdemeanor—for example, a person under arrest for a misdemeanor who escapes without employing force or a dangerous weapon. Thus, the Model Penal Code's felony murder section uses the term "felonious escape" to exclude escape conduct constituting a misdemeanor. *Id.* §§ 210.2(b), 242.6(4). A person who attempts to commit the crime of felonious escape is, of course, guilty of a felony. *Id.*

131. *See id.*

132. *See generally* Tentative Draft Revision of the Penal Law, State of New York Temporary Commission on Revision of the Penal Law and Criminal Code (1963) [hereinafter 1963 Tentative Draft Revision].

133. Proposed N.Y. Penal Law (Sen. Int. 3918, Ass. Int. 1964) § 130.25(3) [hereinafter Proposed N.Y. Penal Law].

134. *See id.* For a further discussion of the Commission's and the legislature's intent, see *infra* notes 147-71 and accompanying text.

the enumerated crimes in this draft were identical to those listed in the felony murder provision of the American Law Institute's Model Penal Code.¹³⁵

Unfortunately, the October 1963 draft contained a subtle and unintended error. Although escape constituted a felony under the felony murder statute, the draft's crime of escape consisted of three degrees.¹³⁶ Escape in the first and second degrees were class D and class E felonies.¹³⁷ Escape in the third degree, however, was a class A misdemeanor.¹³⁸

The section on punishment for attempt, however, provided—as it does today—that an attempt to commit a felony itself constitutes a felony—with the narrow exception that an attempt to commit a class E felony is a class A misdemeanor.¹³⁹ Thus, unintentionally, the draft included the class A misdemeanor of an attempt to commit the class E felony of escape in the second degree in the murder provision. The draft similarly included the class A misdemeanor of an attempt to commit the class E felony of arson in the third degree (which, as discussed earlier, is a non-existent crime and therefore unimportant).¹⁴⁰

In May 1963, the Commission reviewed the proposed draft¹⁴¹ and, unaware that a misdemeanor crime was secreted within the proposed felony murder statute, approved numerous changes.¹⁴² After further changes and revised drafts¹⁴³ the Commission approved the felony

135. Compare MODEL PENAL CODE § 210.2 (1962) with Proposed N.Y. Penal Law, *supra* note 133, § 130.25(3).

136. See Proposed N.Y. Penal Law, *supra* note 133, §§ 210.05 to .15.

137. See *id.* §§ 210.10, 210.15.

138. See *id.* § 210.05.

139. See *id.* § 110.05.

140. See *id.* § 155.05. This section provided that arson in the third degree was a class E felony and, pursuant to § 110.05(5), an attempt to commit a class E felony constituted a class A misdemeanor.

141. See generally 1963 Tentative Draft Revision, *supra* note 132.

142. See generally New York Legislative Document No. 14, Third Interim Report of the State of New York Temporary Commission on Revision of the Penal Law and Criminal Code (1964).

143. See *id.* The proposed statute read as follows:

A person is guilty of murder when: . . . 3. Either alone or in concert with others, he commits or attempts to commit a felonious crime of robbery, burglary, kidnapping, arson, escape or a felonious sex crime, and, in the course of and in furtherance of such crime or of the immediate flight of the perpetrator thereof or any one of them, one or more commits an act inherently dangerous to human life which causes the death of a person other than one of the perpetrators; except that it shall constitute an affirmative defense to a prosecution under this subdivision that a defendant, though a participant in the underlying felony: (a) Did

murder provision with certain changes,¹⁴⁴ and on February 1, 1964, submitted a proposed revised Penal Law to the legislature as a study bill.¹⁴⁵ The legislature eventually enacted a later, but essentially similar version of this proposed Penal Law.¹⁴⁶

not commit the homicidal act or in any way solicit, counsel, encourage, cause or aid the commission thereof; and (b) Was not armed with any deadly weapon, or any implement, article or substance capable of inflicting serious injury and of a sort not ordinarily carried about in public places by law-abiding persons; and (c) Did not know that any of his confederates was armed with such a weapon, implement, article or substance; and (d) Never contemplated committing, under any circumstances, an act inherently dangerous to human life; and (e) Had no reasonable ground to believe that any of his confederates intended, under any circumstances, to commit such an act.

Author's note of the Penal Law revision meetings (available at *Fordham Urban Law Journal* office).

144. See Author's note of the Penal Law revision meetings (available at *Fordham Urban Law Journal* office). The Commission offered the following changes: (1) delete the phrase "under any circumstances" from paragraph (e); (2) delete paragraph (d); (3) amend the phrase "a felonious sex crime" to read "a forcible, felonious sex crime." *Id.* Again, the Commission members and staff were unaware that the felony murder provision included as a predicate the class A misdemeanors of attempted escape in the second degree and attempted arson in the third degree. The latter, in fact, is a non-existent crime, and as a result, its inclusion within the letter of the statute is meaningless.

145. See Proposed New York Penal Law, Temporary State Commission on Revision of the Penal Law and Criminal Code (1964). The felony murder provision stated:

A person is guilty of murder when: . . . 3. Either alone or in concert with others, he commits or attempts to commit a felonious crime of robbery, burglary, kidnapping, arson, escape or a forcible, felonious sex crime, and, in the course of and in furtherance of such crime or of the immediate flight of the perpetrators thereof or any one of them, one or more commits an act inherently dangerous to human life which causes the death of a person other than one of the perpetrators; except that it shall constitute an affirmative defense to a prosecution under this subdivision that a defendant, though a participant in the underlying felony: (a) Did not commit the homicidal act or in any way solicit, counsel, encourage, cause or aid the commission thereof; and (b) Was not armed with any deadly weapon, or any implement, article or substance capable of inflicting serious injury and of a sort not ordinarily carried about in public places by law-abiding persons; and (c) Did not know that any of his confederates was armed with such a weapon, implement, article or substance; and (d) Had no reasonable ground to believe that any of his confederates intended to commit an act inherently dangerous to human life.

Id. at 76-77.

146. See generally 1965 N.Y. Laws ch. 1030, at 1529. The revised Penal Law introduced at the 1965 legislative session was enacted into law, effective September 1, 1967. The felony murder provision reads as follows:

A person is guilty of murder when: . . . 3. Acting either alone or with one or more other persons, he commits or attempts to commit robbery,

Notwithstanding the long history of the felony murder doctrine in New York and the Commission's intent that only feloniously violent conduct should constitute the foundation for a felony murder conviction, an extremely subtle error remained in the statute.¹⁴⁷ It is clear, however, that the legislature was unaware of this error.¹⁴⁸ Indeed, purposefully including the misdemeanor of an attempt to com-

burglary, kidnapping, arson, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, escape in the first degree, or escape in the second degree, and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants, except that in any prosecution under this subdivision, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

- (a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and
- (b) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and
- (c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and
- (d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

Id. at 1585-86.

A comparison of this enacted felony murder statute with the counterpart provision in the 1964 study bill reveals only one substantive change—that is, the deletion, as recommended by the District Attorneys' Associations, of the phrase "an act inherently dangerous to human life."

All other changes were stylistic. Thus, the deletion from the 1964 study bill of the phrase "a participant in the underlying felony" and the substitution in the 1965 statute of the words "participant in the underlying crime" does not show that the Commission believed that a misdemeanor constituted a foundation for a felony murder conviction. The change appears to be one of style only and not substance.

147. See *supra* notes 152-71 and accompanying text.

148. The felony murder error was not the only flaw that developed at the 1967 session of the legislature. Some brief background to understanding this error is necessary. Former New York Penal Law § 1044 defined murder in the first degree in four subdivisions. N.Y. PENAL LAW § 1044 (McKinney 1944). Subdivision one dealt with an intentional killing. Subdivision two dealt with the two distinct fact situations of depraved indifference murder and felony murder. Subdivisions three and four were superfluous. See *id.*

Prior to 1937, the death sentence was the only authorized penalty for murder in the first degree. After that date, a jury was authorized to recommend life imprisonment if the conviction was for murder in the first degree as defined in subdivision two; that is, either depraved indifference murder or felony murder. 1937 N.Y. Laws ch. 67, at 121. The mandatory death sentence continued for convictions under subdivisions one, three and four. *Id.*

In 1963, the penalty scheme for murder in the first degree was amended to

mit a felony within the felony murder doctrine would have constituted a throwback to the common law rule that permitted a felony murder

remove the requirement of a mandatory death sentence for convictions under subdivisions one, three and four. 1963 N.Y. Laws ch. 994, at 3018. The so-called two-stage procedure was enacted at the same time. *Id.* at 3018-19.

In 1965, the penalty scheme was again amended: the death sentence was limited solely to first degree murder convictions under subdivision one, if the victim was a peace officer or if the defendant was serving a life sentence. 1965 N.Y. Laws ch. 321, at 1022. In 1966, the scheme was further amended to include not only a conviction under subdivision one, but also one situation of the two covered by subdivision two—that is, felony murder. 1966 N.Y. Laws ch. 66, at 608-609.

The revised Penal Law, as enacted at the 1965 session, with an effective date of September 1, 1967, did not physically include the 1965 and 1966 changes relating to the qualified abolition of the death penalty which were separately enacted at the two sessions. Nevertheless, the legislature intended that these separately enacted changes be incorporated into the revised Penal Law. 1965 N.Y. Laws ch. 321, at 1021-22.

In 1967, the staff of the Penal Law Revision Commission prepared a bill to incorporate into the revised Penal Law all changes made to the former Penal Law at the 1965 and 1966 sessions. 1967 N.Y. Laws ch. 791, at 2131.

In drafting the provision prescribing the sentence for murder, *see id.* at 2138, the staff intended to authorize a jury to return the death penalty for a defendant convicted of murder as defined in subdivision one, *id.* (intentional murder), or subdivision three, *id.* (felony murder), because these subdivisions were the analogous provisions of former law authorizing the death penalty. As a result of a drafting blunder, however, the enacted bill erroneously referred to "subdivision one or two." *Id.* If correctly drafted, the bill would have referred to "subdivision one or three."

The error went undetected by the legislature and the Governor, and by those solicited to review the proposed legislation. Indeed, it was several months after the law took effect before this error gained the attention of the Commission's staff. At the 1968 legislative session, a bill accomplished the necessary correction by deleting from the appropriate section the word "two" and substituting in its place the word "three." 1968 N.Y. Laws ch. 949, at 1903.

Thus, as a result of an undetected drafting error, for a period of nearly ten months the Penal Law prescribed the death penalty for a crime (depraved indifference murder) that the legislature clearly intended not to be a capital offense, and, for the same period, that law prescribed a maximum penalty of imprisonment for a crime (felony murder) that the legislature clearly intended to be punishable by death.

In 1979, the legislature enacted a bill that made "a person thirteen, fourteen, or fifteen years old . . . criminally responsible for acts constituting" felony murder. 1978 N.Y. Laws ch. 481, at 11; *see* McQuillan, *Felony Murder and the Juvenile Offender*, N.Y.L.J., Aug. 25, 1978, at 1, col. 2 (outlining defects in this legislation). The legislature corrected the deficiencies at its next session. 1979 N.Y. Laws ch. 411, at 1.

These two post-1965 statutory flaws respecting the felony murder doctrine illustrate that, even when dealing with such subjects as murder and the death penalty, serious legislative drafting errors do occur. Bill drafters and legislators in other states are not immune from "nodding" while a deficient statute proceeds to passage. *See* *People v. Dillon*, 34 Cal. 3d 441, 668 P.2d 697, 194 Cal. Rptr. 390 (1983). The California Code Commission made a profound error with respect to that state's felony murder doctrine. The California Supreme Court stated: "It is possible that

conviction when the predicate conduct consisted of the misdemeanor of an attempt to commit a felony.¹⁴⁹ As previously mentioned, the Revised Statutes of 1829 expressly rejected that common law rule.¹⁵⁰ For a prestigious New York Commission, 130 years later, to resurrect knowingly that rule in order to expand the scope of the felony murder doctrine is simply unthinkable. It would have been patently regressive for the Commission to extend the felony murder doctrine beyond what it had always been in New York. Such an extension incontestably would have evoked considerable discussion and comment by the Commission and others and there was no discussion or comment by anyone respecting this egregious drafting error.¹⁵¹

Moreover, the phrase "though a participant in the underlying felony" in the proposed statute demonstrates the Commission's purpose and understanding that the felony murder doctrine required the participant to be involved in the commission of an "underlying

the [California] Legislature intended to reenact the common law felony murder rule and failed through inadvertence or oversight. But the fact remains that the legislature did not reenact that rule. . . ." *Id.* at 503, 668 P.2d at 737, 194 Cal. Rptr. at 430 (Broussard, J., concurring and dissenting). The California Supreme Court in *Dillon* opined that "[a] thorough legislative reconsideration of the whole subject would seem to be in order." *Id.* at 472 n.19, 668 P.2d at 715 n.19, 194 Cal. Rptr. at 408 n.19.

149. See *supra* notes 75-77 and accompanying text.

150. See *supra* notes 64-86 and accompanying text.

151. N.Y. LEG. DOC. No. 28, 189th Sess. 9 (1966). In its 1966 report to the legislature, the Penal Law Revision Commission wrote:

The Commission is by no means of the view that the new Penal Law represents perfection because it has been enacted into law. The task of ironing out flaws and eliminating weaknesses which are inevitably discoverable in a project of this magnitude is continuing. Accordingly, the Commission is preparing for submission to the Legislature (at the 1967 session) an omnibus bill which, if enacted, would amend the new Penal Law in a number of respects The substance of the 1965 [and 1966] amendments to the existing Penal Law must be . . . meshed into the new Penal Law in the form of individual statutes, placed in proper context and rephrased to conform to the new Penal Law pattern. Some of the proposed amendments under preparation deal with this problem. One, for example, would explicitly limit the kinds of murder for which the death penalty may be imposed in order to conform the new Penal Law to the 1965 [and 1966] amendment to the existing Penal Law relating to abolition of capital punishment. Other of the proposed amendments under preparation . . . derive from suggestions advanced by public and private groups and agencies A number of the amendments are designed to eliminate gremlins and close gaps pointed out by these organizations.

Id.

felony.”¹⁵² A person who engages in conduct that constitutes the misdemeanor of an attempt to commit the felony of escape in the second degree is not, of course, guilty of any “underlying felony.”¹⁵³

152. See Proposed N.Y. Penal Law, *supra* note 133, § 130.25, at 77.

153. *Id.* A person is guilty of the completed felony of escape in the second degree at the moment when he leaves the detention facility or terminates custody. If, at that point, “in the course of and in furtherance of such crime or of the immediate flight of the perpetrators thereof [he] . . . causes the death of a person,” then, under the traditionally understood doctrine, he is guilty of felony murder. *Id.*

The Commission’s failure to detect the drafting error that inadvertently included a misdemeanor as a predicate for a felony murder conviction is explainable in part by comparing the prior law that remained in effect until September 1, 1967, respecting punishment for an attempt, see N.Y. PENAL LAW § 261 (1909), with its proposed revision. Proposed N.Y. Penal Law, *supra* note 133, § 130.25. Under the Penal Law of 1909, an attempt to commit any felony was itself a felony—that is, an attempt to commit a felony was “punishable by imprisonment for not more than half of the longest term . . . prescribed upon a conviction for the commission of the offense attempted.” N.Y. PENAL LAW § 261 (1909).

That law defined a “felony” as “a crime which is or may be punishable by: 1. Death; or 2. Imprisonment in a state prison.” *Id.* § 2. That law further provided that “[n]o person shall be sentenced to imprisonment in a state prison if the term or minimum term for which he is sentenced be less than one year” *Id.* § 2182(2). Thus, with respect to any felony punishable by two years or more, an attempt to commit such felony would itself be a felony. If the penalty for a completed crime was exactly two years, an attempt to commit such crime (punishable by exactly one year) was deemed a felony. *Id.*

Under the Penal Law of 1909 there seems not to have been any completed felony punishable by less than two years. See Proposed N.Y. Penal Law, *supra* note 133, App. A: Survey of the New York State Sentencing Structure as of 1963, at A-1 to A-8. Thus, under the 1909 Penal Law, an attempt to commit any felony was itself a felony. Such was the well established state of the law known to the bench and bar and the staff and members of the Penal Law Revision Commission.

The Commission was probably not aware that the proposed punishment section for an attempt would result in attempt crimes, theretofore classified as felonies and serving as the foundation for a felony murder conviction, being downgraded to misdemeanors. This reclassification would occur if a less severe sentence was prescribed for an attempt.

The Commission seems to have been unaware that the penalties it proposed for an attempt would be less severe than under the existing Penal Law of 1909. See Proposed N.Y. Penal Law, *supra* note 133, § 110.05, at 67. Indeed, in the commentary to the 1964 study bill section that prescribed the punishment for an attempt, the Commission stated the exact opposite view: “This section establishes a penalty scheme rendering an ‘attempt to commit a crime’ the most serious of all the inchoate and accessorial offenses Dropping the penalty only one notch below that of the crime attempted, the section penalizes ‘attempts’ relatively more severely than does the existing Penal Law [section 261].” *Id.* practice commentary at 327. This comment is incorrect with respect to an attempt to commit a felony punishable by imprisonment for a maximum term of four years—what we now know as a class E felony. Under the prior law an attempt to commit such felony was itself a felony and was punishable by a maximum term of two years. Under

Indeed, the spirit and purpose of the felony murder statute are indicated by its title "felony murder." This label has a communicative

the proposed revised Penal Law, which was later approved by the legislature, an attempt to commit such crime constituted a misdemeanor punishable by a definite sentence of one year or less. *Id.* at 67.

The revised Penal Law actually punishes such attempts less severely than did the former Penal Law of 1909. *Id.* Indeed, the revised scheme with respect to a class E felony resembles the common law rule that an attempt to commit a felony was itself only a misdemeanor. The staff commentary respecting the felony murder provision, which accompanied the 1964 study bill, conclusively demonstrated the Commission's understanding that the defendant or an accomplice must in fact be liable for an "underlying felony" as a condition precedent to criminal responsibility for felony murder. *Id.* practice commentary at 339-40. The Commission stated:

Subdivision 3, the felony murder provision, would change the existing law . . . in several respects. Though not in reality a change of substance, it may first be noted that this provision expressly imposes murder liability not only upon the killer but upon the non-killer accomplice in the *underlying felony*. The existing provision . . . penalizes only the killer; the liability of the non-killer accomplices has been engrafted upon the felony murder doctrine by case law

Secondly, the crime is broadened to cover killings committed during "immediate flight" from the *underlying felony*. The existing law, strictly limiting felony murder to homicides perpetrated in the course of the commission of the felony, is, in the Commission's opinion, unduly restrictive.

Thirdly, the scope of the crime is narrowed by (1) predicating a *selective list of specified felonies as the only ones which may form a foundation for felony murder*, and (2) requiring that the homicidal act be of a sort that is "inherently dangerous to human life." The effect of these changes probably would not be very marked, since felony murders are almost invariably committed in the course of one or another of the specified felonies, and almost invariably by an act inherently dangerous to human life. The purpose of the indicated limitations is to exclude rare instances of accidental or not reasonably foreseeable fatality, and especially those which might happen to occur in a most unlikely manner in the course of a *non-violent felony*. It should be observed that, currently, the vast majority of American felony murder statutes limit the capital crime by a selective list of felonies comparable to that here proposed, and that New York is one of a very few jurisdictions that does not.

Finally, the most novel change appears in the exception extending a defendant an opportunity to fight his way out of a felony murder charge by persuading a jury, by way of affirmative defense, that he not only had nothing to do with the killing itself but was unarmed and had no idea that any of his confederates was armed or intended to engage in any conduct dangerous to life. This phase of the provision is based upon the theory that the felony murder doctrine, in its rigid automatic envelopment of all participants in the underlying felony, may be unduly harsh in particular instances; and that some cases do arise, rare though they may be, where it would be just and desirable to allow a non-killer defendant of relatively minor culpability a chance of extricating himself

function that succinctly defines the crime's scope. It throws light on the meaning of the statute and is an available tool for the resolution of doubt.

During 1964, the Commission received and reviewed numerous suggestions, comments and criticisms concerning the proposed revised Penal Law.¹⁵⁴ At no time, however, did anyone bring to the Commission's attention the fact that, under the proposed felony murder statute, two misdemeanors could form the foundation for a murder conviction.¹⁵⁵ In fact, a person can discover the two concealed misdemeanors¹⁵⁶ only if he scrutinizes the language of the statute and is familiar with five other Penal Law sections¹⁵⁷. During the same period, the Penal Law Revision Commission held public hearings throughout New York State on the study bill. Whenever witnesses or Commission members discussed the felony murder proposal, all assumed that only a felony could constitute an underlying predicate. No one noted that two misdemeanors were in the list of "dangerous felonies."¹⁵⁸ Thus, the legislature was never informed of this fact.

from liability for murder—though not, of course, from liability for the underlying felony.

Id. (emphasis added).

Indeed, the concluding sentence contemplates that a defendant who successfully invokes the affirmative defense does not extricate himself "from liability for the underlying felony." *Id.*

154. In fact, in its own 1964 report to the legislature the Commission wrote:

The reasons for submitting this proposed Penal Law for study purposes only are apparent. Its scope and magnitude are such that no legislative body could hope to absorb it, much less analyze it thoroughly, in the brief period between its submission and the termination of the current legislative session. It proposes numerous controversial changes of both substance and form which call for legislative and public discussion.

N.Y. LEG. DOC. NO. 14, 187th Sess. 9 (1964).

155. Proposed N.Y. Penal Law, *supra* note 133, § 210.05 (attempted escape in the third degree); *id.* § 155.05 (attempted arson in the third degree).

156. *See supra* note 155.

157. Proposed N.Y. Penal Law, *supra* note 133, §§ 10.00(4), 70.00(2), 110.05, 155.05, 210.05.

158. Proposed N.Y. Penal Law, *supra* note 133. For example, at a public hearing held in Rochester on November 19, 1964, a representative of a committee of the Monroe County Bar Association stated (hearing transcript 20-21):

Members of the Commission, the topic I have been assigned is that of felony murder.

Now, . . . the Committee unanimously agree that presently constituted 1044 is somewhat odorous in that any felony, the commission of any killing, intentional, accidental, or otherwise, in the act of any felony is a little erroneous, and we do feel that some revision was in order.

Now, . . . the proposed change of the felony murder statute by limiting it, first of all to the so-called dangerous felonies of robbery, burglary, etc., we feel this is a very good byway of restriction. But, however, the

The revised Penal Law introduced at the 1965 legislative session was enacted into law, effective September 1, 1967.¹⁵⁹

second part of the restriction requiring that the act itself be one that is inherently dangerous to human life, we feel that the restrictive effect of both of these conditions is somewhat too great. In other words, first of all, to limit it to the five or six dangerous felonies listed is fine, but then in addition to say that the homicidal act itself is one that must be inherently dangerous, the combination of the two would be somewhat too restricted.

[At this point, the Commission Chairman Richard J. Bartlett interrupted and said:]

Dangerousness is established by the underlying felony itself.

[The witness continued:]

Yes, in other words, if you restrict it to your burglary, robbery, arson, etc., then any killing while in the commission of any of those dangerous serious felonies would seem it would be a long way from the constituted 1044, wherein it is just any felony, any killing.

Hearing on Proposed N.Y. Penal Law before New York Law Revision Commission, at 20-21 (Nov. 19, 1964) (statement of Joseph Demaria). At a public hearing held in New York City on November 24, 1964, a representative of a committee of the Association of the Bar of the City of New York referred to the "substantial narrowing of the crime of felony murder." Hearing on Proposed N.Y. Penal Law Before New York Law Revision Commission, at 384 (Nov. 24, 1964) (statement of Richard Uviller). The committee spokesman did not allude to the misdemeanors of attempted escape in the second degree and attempted arson in the third degree which constituted an unprecedented, and substantial expansion of the crime of felony murder.

At the same public hearing, the president of the District Attorneys' Association objected to the language that "provides that the death of a person during the commission or furtherance of a felony must be caused by an act inherently dangerous to human life." *Id.* at 412 (statement of Bernard Smith). The Commission chairman, in response, referred to "our listing of the dangerous felonies." *Id.* at 413 (statement of Richard J. Bartlett).

Incidentally, while commenting on other provisions in the proposed draft in a context that was wholly and completely unrelated to the felony murder doctrine, the District Attorneys' representative recommended that the crime of escape in the third degree "be more than a misdemeanor." *Id.* at 438 (statement of Bernard Smith). This recommendation was not adopted by the Commission; nor is it part of the 1965 Penal Law as enacted. See 1965 N.Y. Laws ch. 1030, at 1529.

159. 1965 N.Y. Laws ch. 1030, at 1529. The bill was thoroughly debated before being proposed:

In November of 1964, after the proposal had been in circulation for almost six months, the Commission culminated its efforts to obtain informed opinions on its work by holding a state-wide series of public hearings in Albany, Syracuse, Rochester, Buffalo and finally, three days in New York City. Many witnesses testified, either as individuals or as representatives of organizations, and a substantial number of them also submitted position papers amplifying their testimony.

Upon completion of the hearings, the Commission, in a series of meetings, undertook the re-examination of the study bill, taking into consideration the suggestions and criticisms it had received and the expressions of opinion voiced at the public hearings. As a result, a number of substantive changes and a greater number of formal and style changes

Further evidence is found in its 1965 report commenting on the changes in the statute resulting from the public hearings.¹⁶⁰ In this report the Commission noted the differences between the 1964 study bill and the one being submitted to the 1965 session¹⁶¹ focusing on the felony murder provision specifically.¹⁶²

In the first sentence of this comment, the Commission referred to "any felony or felony attempt."¹⁶³ This reference reflects the Commission's understanding of the felony murder doctrine—with respect to the attempt stage of a crime, the attempt must itself constitute a felony murder conviction. Furthermore, the comment specifically refers to the new requirement that the underlying crime be a felony of an inherently violent or dangerous nature.¹⁶⁴ This language thus belies an intent to broaden the application of the felony murder statute.

In fact, in enumerating the predicate offenses, the principal thrust

were made. These are incorporated in the proposed revision which the Commission is introducing for passage at the 1965 session.

N.Y. LEG. DOC. NO. 25, 188th Sess. 9 (1965).

160. See N.Y. LEG. DOC. NO. 25, 188th Sess. 11 (1965).

161. See *id.* The report stated:

The proposed Penal Law being submitted for passage at the 1965 legislative session differs in a number of respects from the study bill submitted at the 1964 session. There are some important changes of substance, many minor changes of substance, some structural changes and literally hundreds of purely phraseological changes made for purposes of clarity and conformity. The ensuing comments do not, in the main, explain alterations of mere form and language but are largely addressed to changes of substance.

Id.

162. See *id.* at 30. The Commission made the following comment respecting felony murder:

Under existing law, felony murder includes any killing, whether culpable in itself or accidental, committed in the course of *any* felony or felony attempt. . . .

The [1964 study bill] felony murder section modifies that doctrine in two respects: first, it limits the underlying crimes to a list of specified felonies of an inherently violent or dangerous nature; and, second, it requires that the killing itself be caused by "an act inherently dangerous to human life". . . .

The latter element is eliminated in the new section by deletion of the last quoted words. . . .

It is believed that the harshness of the existing doctrine is sufficiently alleviated by the requirement that the underlying crime be one of the dangerous offenses enumerated without a further requirement that the particular homicidal conduct also be of an "inherently dangerous" nature.

Id. (emphasis in original).

163. *Id.*

164. See *id.*

of the Commission's effort was to restrict rather than expand the felony murder doctrine.¹⁶⁵ The proposed statute contained only one expansion—"immediate flight from the underlying felony"—which the Commission expressly alluded to and discussed in its reports.¹⁶⁶

Finally, in 1973, the New York Court of Appeals expressed its understanding that only felonies involving violence or risk of physical harm may form the basis for a felony murder conviction.¹⁶⁷ Hence, if the legislature intended to exclude a non-violent felony then, *a fortiori*, it also intended to exclude every misdemeanor.

The unintended inclusion of the misdemeanor of attempted escape in the second degree, therefore, extends the felony murder doctrine beyond any rational function it was ever designed to serve. It is simply anomalous to convict a person of felony murder when no participant in the underlying conduct is criminally responsible for a felony. The history of the felony murder doctrine,¹⁶⁹ judicial precedent,¹⁷⁰ and the reports of the Penal Law Revision Commission¹⁷¹ confirm this conclusion. Thus, a thorough reconsideration by the legislature of the whole subject of felony murder is in order.

V. The Principal Deficiency of the Felony Murder Doctrine

Today, there is widespread recognition that punishment should be tailored to a defendant's personal responsibility or moral guilt. The defendant's state of mind should be the prime consideration in determining the degree of his culpability with respect to all *mala in*

165. See *supra* notes 134-35 and accompanying text.

166. See *supra* notes 132-33 and accompanying text.

167. See *People v. Miller*, 32 N.Y.2d 157, 297 N.E.2d 85, 344 N.Y.S.2d 342 (1973). The court stated:

[T]he legislature in 1965 . . . [included] in the revised Penal Law a list of specified felonies—all involving violence or substantial risk of physical injury—as the only felonies forming a basis for felony murder. The legislative purpose for this limitation was "to exclude from felony murder, cases of accidental or not reasonably foreseeable fatality occurring in an unlikely manner in the course of a non-violent felony."

32 N.Y.2d at 160, 297 N.E.2d at 87, 344 N.Y.S.2d at 345 (citing N.Y. PENAL LAW § 125.25(3), commentary at 236 (McKinney 1965); see also *People v. Gladman*, 41 N.Y.2d 123, 128, 359 N.E.2d 420, 424, 390 N.Y.S.2d 912, 916 (1976) (legislature intended that felony murder statute in revised Penal Law be limited in application to violent felonies; certainly, it did not intend revised law to encompass misdemeanors).

168. See *People v. Miller*, 32 N.Y.2d 157, 297 N.E.2d 85, 344 N.Y.S.2d 342 (1973).

169. See *supra* notes 40-121 and accompanying text.

170. See *infra* notes 186-205 and accompanying text.

171. See *supra* notes 122-71 and accompanying text.

se offenses. A civilized principle of modern criminal law is that criminal responsibility for causing a prohibited result is not justified in the absence of some culpable mental state—*i.e.*, *mens rea*—with respect to the result element of the crime charged.¹⁷² The Supreme Court in *Enmund v. Florida*¹⁷³ has recently emphasized the importance of a nexus between mental culpability and criminal responsibility,¹⁷⁴ and some thirty years ago, a prestigious Royal Commission addressed the question of moral culpability and concluded that it was inconsistent to find a person guilty of murder if he involuntarily killed another in the course of committing a felony.¹⁷⁵ Indeed, the proportionality concept of the eighth amendment requires some connection between the punishment imposed and the defendant's moral blameworthiness.¹⁷⁶ It is clear that the progressive tendency of Anglo-

172. See Hart, Book Review, 74 *YALE L.J.* 1325 (1965) (reviewing T. WOOTON, *CRIME AND THE CRIMINAL LAW* (1963)).

173. 458 U.S. 782 (1982).

174. See *id.* at 801. The Court wrote:

American criminal law has long considered a defendant's intention—and therefore his moral guilt—to be critical to . . . “the degree of [his] criminal culpability” and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing . . . [A defendant's] punishment must be tailored to his personal responsibility and moral guilt.

Id. at 800-801 (citation omitted).

175. See GR. BRIT. ROYAL COMMISSION ON CAPITAL PUNISHMENT REPORT 34-35 (1949-53). The report stated:

The main objection to the doctrine can be briefly stated. It is a fundamental principle of our law . . . that no person is liable to be punished . . . for an act which he has done unless it is also proved that he had a wrongful intention. It is not inconsistent with this principle to hold that, if a man foresaw the consequences of his act, he cannot be heard to say that he did not intend to bring them about, even though he may not have desired to do so. There is nothing “constructive” about this rule, since “the only possible way of discovering a man's intention is by looking at what he actually did, and by considering what must have appeared to him at the time the natural consequence of his act. . . .” A person may therefore properly be convicted of murder if he has caused death either by an act intended to kill or do grievous bodily harm and committed with reckless disregard of the consequences. But it is quite inconsistent with the general principle of criminal liability to say that, if a person kills another inadvertently while committing a felony . . . malice is implied and he is guilty of murder, although he neither intended to cause death or grievous bodily harm nor foresaw that he was likely to do so. Moreover, it is argued, not only is it unjust to punish a man for an effect which he neither foresaw nor intended, but to exact such a penalty would in practice seldom be effective as a deterrent to others.

Id. (citation omitted).

176. U.S. CONST. amend. VIII. In *Enmund*, the Court held that the eighth amendment prohibits the imposition of the death penalty on the non-killer defendant

American law during the past century has been to repudiate severe penalties for unintended results.¹⁷⁷ Today, aside from offenses of a strict liability nature (that is, regulatory offenses), modern criminal law does not predicate liability on objective conduct by an actor that causes a particular prohibited result.¹⁷⁸

The felony murder doctrine, however, contravenes this philosophy by convicting the defendant of the paradigmatic *malum in se* crime—murder—by using a theory of strict liability. Thus, a person is guilty of felony murder even when the victim's death was demonstrably unintended or concededly accidental. Under the traditional felony murder doctrine, the jury does not make an affirmative finding of defendant's culpability.¹⁷⁹ The issue is objectively and starkly simple: Did death occur during the commission of a felony?

convicted of felony murder who, merely aiding others in the commission of a violent felony, did not intend that a killing take place. See *Enmund*, 458 U.S. at 798. The Court stressed two factors: the lack of a legitimate penological justification and the lack of a justifiable retribution interest. See *id.* at 801. Application of the death penalty hinges on the defendant's "culpability, not on that of those who committed the robbery and shot the victims, for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence,' . . . It is fundamental that 'causing harm intentionally must be punished more severely than causing the same harm unintentionally.'" *Id.* at 798 (quoting H. HART, PUNISHMENT AND RESPONSIBILITY 62 (1968)).

177. See, e.g., *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978). The *Gypsum* Court, emphasizing the severity of the sanctions specified by Congress for Sherman Act violations, held that in a criminal action the result element of the Act (fixing prices) could no longer be deemed one of strict liability and that it would thereafter require proof of intent. See *id.* at 443. The Court carefully and elaborately defined the requisite *mens rea* for future prosecutions. See *id.* at 436-43.

178. See *Gegan*, *supra* note 3, at 586. "If one had to choose . . . the most basic principle of the criminal law in general . . . it would be that criminal liability for causing a particular result is not justified in the absence of some culpable mental state in respect to that result." *Id.*

179. In *People v. Washington*, 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965), the California Supreme Court cogently observed that the felony murder doctrine "erodes the relation between criminal liability and moral culpability." *Id.* at 783, 402 P.2d at 134, 44 Cal. Rptr. at 446; see also *Morissette v. United States*, 342 U.S. 246 (1952). In *Morissette*, Justice Jackson expressed this idea in the following, much-quoted, passage:

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory . . . "But I didn't mean to" . . .

Id. at 250-51; LAFAYE & SCOTT, *supra* note 73, at 560 n.81 ("[t]he implication from this terminology is that there is something wrong with this type of murder; it is all right to punish regular murder, but it is not quite right to pretend that something is murder which is not").

Thus, felony murder, a quintessential strict liability offense, erodes the link between criminal liability and moral culpability. It embraces a situation in which a person is killed because of reckless conduct, ordinary negligence or a pure accident. Indeed, it is irrelevant whether the victim's death was highly probable, conceivable, possible or wholly unforeseeable.

In addition, the felony murder doctrine is often unnecessary. When felons are acting intentionally or recklessly in pursuit of a "kill-if-need-be" plan, the state may prove the guilt of a conspiratorial non-killer without the felony murder doctrine on broad principles of accessorial responsibility.¹⁸⁰ Concluding that it is difficult to discern a principled argument in favor of the felony murder doctrine the American Law Institute recommended the abolition of the doctrine with the caveat: For the purpose of establishing murder by an act committed recklessly under circumstances manifesting "extreme indifference to the value of human life,"¹⁸¹ courts may find that the fact that the actor is "engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing robbery, rape by force or intimidation, arson, burglary, kidnapping or felonious escape"¹⁸² creates a rebuttable presumption that the required indifference and recklessness existed.¹⁸³

180. See Seibold, *supra* note 3, at 135. Seibold states:

It is submitted that this is one of the most persuasive arguments in favor of abolition of the doctrine: it is not necessary to the establishment of criminal liability in the majority of cases in which it has been applied, and its application to those cases in which death occurred wholly by accident, i.e., without intent or likelihood of harm, is contrary to the modern trend toward establishment of culpability as the basis of criminal liability.

Id. at 135 n.4.

181. MODEL PENAL CODE § 201.2 (Tent. Draft 1959).

182. *Id.*

183. *Id.* In support of this proposal, the Model Penal Code reporters made these comments:

We are . . . entirely clear that it is indefensible to use the sanctions that the law employs to deal with murder, unless there is at least a finding that the actor's conduct manifested an extreme indifference to the value of human life. The fact that the actor was engaged in a crime of the kind that is included in the usual . . . felony murder enumeration or was an accomplice in such crime will frequently justify such a finding. The probability is high enough . . . to warrant the presumption of extreme indifference But liability depends, as we believe it should, upon the crucial finding. The result may not differ often under such a formulation from that which would be reached under the present rule. But what is more important is that a conviction on this basis rests upon sound ground.

Id. § 201.2 (comment 4); see also *Jackson v. Virginia*, 443 U.S. 307 (1979). The Supreme Court noted, "[t]he constitutional necessity of proof beyond a reasonable

In addition, in 1953, the Royal Commission on Capital Punishment detailed the many deficiencies of the "Constructive Malice" doctrine—the British version of the felony murder doctrine—and recommended that it be abolished.¹⁸⁴ Recently, the Michigan Supreme Court, alluding to the incongruity of permitting a murder conviction when the result element is one of strict liability, abolished the common law felony murder doctrine.¹⁸⁵

doubt is not confined to those defendants who are morally blameless Under our system of criminal justice even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar." *Id.* at 323-24.

184. See GR. BRIT. ROYAL COMMISSION ON CAPITAL PUNISHMENT 29-41 (1949-53). The Commission report stated:

This doctrine of "constructive malice" has been much criticised on grounds both of humanity and of logic. We think there can be no doubt that the severity of the old rules has been mitigated by judicial decisions during the last 100 years and that the law is now no longer as stated by Stephen So far as we are aware, the doctrine that any killing in the course of the commission of any felony is murder has never been expressly overruled by the courts; and judicial witnesses gave it as their opinion that in strict theory this was probably still the law. They hastened to add, however, that in practice it had been dead for many years, and that if the killing was unintentional a modern Judge would direct the jury to bring in a verdict of manslaughter unless the felony was one involving violence As we have seen, the practical operation of the law, if not the law itself, has been greatly mitigated by the courts. Our witnesses were unanimous that the ancient rule was absurd and objectionable At the same time the amendment of the law was not of great practical importance, since nowadays neither prosecutor nor Judge nor jury would wish to convict a man of murder, if he never intended to kill anyone and was doing something, however wrong, which could not be reasonably regarded as imperilling anyone's life We have no doubt that, as a matter of general principle, persons ought not to be punished for consequences of their acts which they did not intend or foresee. The doctrine of constructive malice clearly infringes this principle and in our view it ought to be abolished We are satisfied . . . that the representatives of the police, and other witnesses who were opposed to any change in the existing law, exaggerated the dangerous consequences likely to result from such a change. As we have seen, the practical effect of the doctrine of constructive malice at the present day is very limited, and we cannot think that its abolition would lead to any striking change in the practice of the courts.

Id.

185. *People v. Aaron*, 409 Mich. 672, 733, 299 N.W.2d 304, 328-29 (1980). The court stated:

The basic infirmity of felony murder lies in its failure to correlate, to any degree, criminal liability with moral culpability. It permits one to be punished for a killing, usually with the most severe penalty in the law, without requiring proof of any mental state with respect to the killing. This incongruity is simply more than we are willing to permit our criminal jurisprudence to bear.

Id. at 744, 299 N.W.2d at 334 (Ryan, J., concurring).

VI. Judicial and Legislative Efforts to Limit the Scope of the Felony Murder Doctrine

Judicial interpretation of the felony murder doctrine has varied considerably. A number of states, including New York prior to 1967, have expanded the scope of the felony murder doctrine by use of the vicarious liability concept.¹⁸⁶ These courts have held that a person who participates in a crime of the first or second degree or as an accessory before the fact, is criminally responsible for any death caused during the commission of the felony.¹⁸⁷ Many courts in the United States, however, recognizing the inherent practical and theoretical deficiencies of the felony murder doctrine, have limited the broad scope of its application by employing the canons of statutory construction.¹⁸⁸

186. Courts in this category have adopted different reasoning to attain their result. *See, e.g.*, *People v. Michalow*, 229 N.Y. 325, 128 N.E. 228 (1920) (immaterial whether one or all conspirators intended to use force, whether armed or unarmed, or actually present when murder committed); *People v. Giro*, 197 N.Y. 152, 90 N.E. 432 (1910) (conspirators engaged in commission of felony are engaged in commission of crime and homicide within common purpose); *Ruloff v. People*, 45 N.Y. 213 (1871) (all present at time of committing offense are principals although only one acts, if confederates engaged in common design of which offense is part).

187. *See supra* note 186.

188. *See, e.g.*, *Smith v. Myers*, 438 Pa. 218, 227, 261 A.2d 550, 555 (1970) (“[w]e do want to make clear how shaky are the basic premises on which [the felony murder doctrine] rests. With so weak a foundation, it behooves us not to extend it further and indeed, to restrain it within the bounds it has always known”).

Twenty years ago, the California Supreme Court “recognized that the felony murder doctrine expresses a highly artificial concept that deserves no extension beyond its required application. Indeed, the rule itself has been abandoned by the courts of England, where it had its inception. It has been subjected to severe and sweeping criticism.” *People v. Phillips*, 64 Cal. 2d 574, 582-83, 414 P.2d 353, 360, 51 Cal. Rptr. 225, 232 (1966).

Three years ago, that same court made these comments:

Defendant emphasizes the dubious origins of the felony murder doctrine, the many strictures levelled against it over the years by courts and scholars, and the legislative and judicial limitations that have increasingly circumscribed its operation. We do not disagree with these criticisms; indeed, our opinions make it clear we hold no brief for the felony murder rule. We have repeatedly stated that felony murder is a “highly artificial concept” which “deserves no extension beyond its required application” And we have recognized that the rule is much censured “because it anachronistically resurrects from a bygone age a ‘barbaric’ concept that has been discarded in the place of its origin” . . . and because “in almost all cases in which it is applied it is unnecessary” and “it erodes the relation between criminal liability and moral culpability”

People v. Dillon, 34 Cal. 3d 441, 462, 668 P.2d 697, 708-709, 194 Cal. Rptr. 390, 401 (1983) (quoting *Phillips*, 64 Cal. 2d at 582, 583 n.6, 414 P.2d at 360, 360 n.6, 51 Cal. Rptr. at 232 n.6; *People v. Washington*, 62 Cal. 2d 777, 783, 402 P.2d 130, 134, 44 Cal. Rptr. 442, 446 (1965)).

Although the original felony murder doctrine applied to "any felony,"¹⁸⁹ the majority of states, have rejected this idea by enumerating specific felonies within their respective felony murder statutes.¹⁹⁰ In states that have failed to enumerate the predicate felonies, many courts, engaging in statutory construction, have required that the felonious act be dangerous to life¹⁹¹ a common law felony or a felony that is *malum in se*. Some of these courts look to the statutory definition of the felony in the abstract—that is, abstracted from the particular factual situation before the court.¹⁹²

All of the states with nonenumerated felony murder statutes have, by virtue of judicial construction of the statute, adopted a so-called "merger rule"—requiring the predicate felony to be distinct from the homicidal act itself.¹⁹³ For example, the felony of assault is so closely related to the act of killing that it should be regarded as merged with the homicidal act.

Prior to 1967, New York County applied the merger rule.¹⁹⁴ Al-

189. See *People v. Wood*, 8 N.Y.2d 48, 51, 167 N.E.2d 736, 738, 201 N.Y.S.2d 328, 331 (1960). "Although most jurisdictions limit [the] application [of the felony murder doctrine] to specified violent felonies (e.g., arson, rape, robbery and burglary), New York and the minority make homicide during the commission of *any* felony murder in the first degree." *Id.* at 51 n.2, 167 N.E.2d at 738 n.2, 201 N.Y.S.2d at 331 n.2 (emphasis in original).

190. See *id.* These predicate felonies generally are violent or clearly dangerous to human life. In some of these states, a killing in the course of a non-enumerated felony is characterized as manslaughter.

191. See *State v. Underwood*, 228 Kan. 294, 615 P.2d 153 (1980); Annotation, *What felonies are inherently or foreseeably dangerous to human life for purposes of felony murder doctrine*, 50 A.L.R.3d 397 (1973).

192. See *People v. Lopez*, 6 Cal. 3d 45, 489 P.2d 1372, 98 Cal. Rptr. 44 (1971). The California Supreme Court rejected the argument that the felony of escape from prison is inherently dangerous in the abstract; thus, in that state a felony escape may not support a felony murder prosecution. *Id.* at 51-52, 489 P.2d at 1376, 98 Cal. Rptr. at 48.

193. See Annotation, *Application of felony murder doctrine where the felony relied upon is an includable offense within the homicide*, 40 A.L.R.3d 1341 (1971); see also Corcoran, *Felony Murder in New York*, 6 FORDHAM L. REV. 43, 46-52 (1937).

194. See *People v. Miller*, 32 N.Y.2d 157, 159-60, 297 N.E.2d 85, 87, 344 N.Y.S.2d 342, 344 (1973). In 1973, the New York Court of Appeals explained the pre-1967 merger doctrine as follows:

[The] merger doctrine [was developed] . . . to remedy a fundamental defect in the old felony-murder statute. . . . Under that statute, any felony, including assault, could be the predicate for a felony murder. Since, *a fortiori*, every homicide, not excusable or justifiable, occurs during the commission of assault, every homicide would constitute a felony murder.

Id. That same court, 58 years earlier, had also held that the felony of unlawful possession of a firearm was merged in the homicidal act. *People v. Marendi*, 213 N.Y. 600, 606, 107 N.E. 1058, 1060 (1915).

though New York's pre-1967 felony murder statute embraced "any felony," the court of appeals engaged in statutory construction "to remedy a fundamental defect in the old felony murder statute,"¹⁹⁵ and excised two felonies from the scope of the statute.

Although the minimal requirement in a felony murder prosecution is the coincidence of homicide and felony, most courts require something more than mere coincidence—that is, the killing must be the result of a felonious act done in furtherance of the felonious plan.¹⁹⁶ Some states have also required that the victim's death be a natural and probable consequence of the felonious act and that such result be proximately caused.¹⁹⁷ Most courts have required that the victim be some person other than a participant and that the person causing the victim's death be one of the participants in the underlying felony.¹⁹⁸

As a means to limit the operation of the felony murder doctrine, some courts have imposed temporal and spatial limitations on the predicate felony by narrowly construing the period during which the felony is in the process of commission.¹⁹⁹ In New York, prior to 1967, only killings committed during the period between the inception of the attempt to commit the felony²⁰⁰—and the attempt itself was always a felony—and the consummation of the felony or the frustration and abandonment of the attempt were treated as felony murder.²⁰¹

195. *Miller*, 32 N.Y.2d at 159, 297 N.E.2d at 87, 344 N.Y.S.2d at 345.

196. *See id.*

197. *See, e.g.*, WIS. STAT. ANN. § 940.02(2) (West 1982); *see also* *Powers v. Commonwealth*, 110 Ky. 386, ___, 61 S.W. 735, 741-42 (1901); *Commonwealth v. Matchett*, 386 Mass. 492, 502-508, 436 N.E.2d 400, 407-10 (1982); *People v. Aaron*, 409 Mich. 672, 700, 299 N.W.2d 304, 313 (1980); *Burton v. State*, 122 Tex. Crim. 363, ___, 55 S.W.2d 813, 814 (1932).

198. *See* Annotation, *Criminal liability where act of killing is done by one resisting felony or other unlawful act committed by defendant*, 56 A.L.R.3d 239 (1974); *see also* *State v. Canola*, 73 N.J. 206, 209-11, 374 A.2d 20, 21-22 (1977) (regressive to extend felony murder rule to lethal acts if third persons not in furtherance of felonious scheme).

199. *See* Annotation, *What constitutes termination of felony for purpose of felony murder rule*, 58 A.L.R.3d 851 (1974); *see also* *People v. Walsh*, 262 N.Y. 140, 148, 186 N.E. 422, 424 (1933) (killing must occur while defendants were engaged in securing plunder or doing something immediately connected with underlying crime to be felony murder); *People v. Huther*, 184 N.Y. 237, 243-44, 77 N.E. 6, 8-9 (1906) (assault on police officer by defendant in flight from burglary scene merged in homicide and was improper basis for felony murder).

200. *See* *People v. Sullivan*, 173 N.Y. 122, 133, 65 N.E. 989, 992 (1903) (court discusses when felony may be said to have begun, *i.e.*, when attempt stage is reached).

201. The question of when the felony (either the attempt or the crime itself) ended was constantly litigated. *See, e.g.*, *People v. Jackson*, 20 N.Y.2d 440, 231

A number of state legislatures have recently downgraded the offense of felony murder and consequently reduced the punishment.²⁰² Several recently revised state codes expressly require proof of a *mens rea* beyond the intent to commit a felony.²⁰³ Other states have simply abolished the felony murder doctrine.²⁰⁴ At least one commentator supports this latter approach.²⁰⁵

N.E.2d 722, 285 N.Y.S.2d 8 (1967), *cert. denied*, 391 U.S. 928 (1968) (felony murder must occur while defendant or confederate was engaged in securing plunder or committing act immediately connected to underlying crime); *People v. Ryan*, 263 N.Y. 298, 189 N.E. 225 (1934) (application of felony murder rule confined to killing committed between inception of attempt to commit felony and consummation or abandonment of attempt); *People v. Walsh*, 262 N.Y. 140, 186 N.E. 422 (1933) (killing must be immediately connected with underlying crime); *People v. Moran*, 246 N.Y. 100, 158 N.E. 35 (1927) (if defendant trying to escape, first felony necessarily over and assault thereafter resulting in death is merged in homicide); *People v. Marwig*, 227 N.Y. 382, 125 N.E. 535 (1919) (error to charge attempted escape proper as basis for felony murder when attempted robbery had been abandoned before shooting occurred).

202. *See, e.g.*, WIS. STAT. ANN. § 940.02(2) (West 1982). In Wisconsin, felony murder is a class B felony. Every class B felony is punishable by imprisonment not to exceed 20 years. *Id.* at § 939.50.

203. Delaware's first degree murder statute requires that the defendant cause death recklessly in the course of a felony or with at least criminal negligence in the course of one of the enumerated felonies. DEL. CODE ANN. tit. 11, § 636 (1974). It defines as second degree murder a death caused with criminal negligence in the course of non-enumerated felonies. *Id.* § 635.

204. *See, e.g.*, HAW. REV. STAT. § 701-07 (1985); KY. REV. STAT. ANN. § 507.020 (Michie/Bobbs-Merrill 1985). The Kentucky and Hawaii legislatures have abolished the felony murder doctrine. The commentary to Hawaii's murder statute succinctly states the reason why the state has eliminated the doctrine:

Even in its limited formulation the felony murder rule is still objectionable. It is not sound principle to convert an accidental, negligent, or reckless homicide into a murder simply because, without more, the killing was in furtherance of a criminal objective of some defined class. Engaging in certain penally-prohibited behavior may, of course, evidence a recklessness sufficient to establish manslaughter, or a practical certainty or intent, with respect to causing death, sufficient to establish murder, but such a finding is an independent determination which must rest on the facts of each case In recognition of the trend toward, and the substantial body of criticism supporting, the abolition of the felony murder rule, and because of the extremely questionable results which the rule has worked in other jurisdictions, the Code has eliminated from our law the felony murder rule.

HAW. REV. STAT. § 701-07, commentary at 347 (1985).

205. The reporter of the Model Penal Code, who was also a member of the New York State Penal Law Revision Commission (1961-1970), preferred "to follow the British example by dispensing with constructive murder wholly, but such a course was thought to be impolitic, given the weight of prosecutive opposition." Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1446 (1986). He continued:

The numerous modifications and restrictions placed upon the common

VII. The *Culhane* Case

Just one year after the enactment of the revised Penal Law a felony murder case arose in which the predicate crime was the class A misdemeanor of attempted escape in the second degree.²⁰⁶

In this case, *People v. Culhane*,²⁰⁷ the state charged the defendants Culhane and McGivern with murder in a one-count indictment.²⁰⁸ The underlying predicate for the crime was attempted escape in the second degree—a class A misdemeanor.²⁰⁹

law felony murder doctrine by courts and legislatures reflect dissatisfaction with the harshness and injustice of the rule. Even though the felony murder doctrine survives in this country, it bears increasingly less resemblance to the traditional felony murder concept. To the extent that these modifications reduce the scope and significance of the common law doctrine, they also call into question the continued existence of the doctrine itself.

Id.

206. N.Y. PENAL LAW § 110.05(7) (McKinney Supp. 1987).

207. 33 N.Y.2d 90, 305 N.E.2d 469, 350 N.Y.S.2d 381 (1973). The facts are related in the court's opinion:

On September 13, 1968 three prisoners, Culhane, Bowerman, and McGivern were being taken by auto from the Auburn State Prison to White Plains in connection with a *coram nobis* hearing on behalf of Culhane. The two escorting Deputy Sheriffs were riding in the front seat of the car. The car was Deputy Sheriff Fitzgerald's personal car so there was no screen separating the prisoners from the two Deputy Sheriffs, Singer and Fitzgerald, who were riding in the front seat. Each deputy carried a .38 caliber revolver at his side. Prisoners Culhane and McGivern were handcuffed to a loop in front of their security belt. Each belt buckled in the back. Prisoner Bowerman's belt was fastened in the front with a chain and a hasp to which the handcuffs were attached. None of the belts were attached to each other. At the time of the incident in question, Culhane was sitting behind the driver, McGivern was in the middle and Bowerman was on the right, behind the passenger side of the front seat. They never reached White Plains, for the trip ended in violence in Ulster County, during the course of which the appellants were wounded and the prisoner Bowerman and Deputy Sheriff Fitzgerald were killed.

Id. at 95, 305 N.E.2d at 472, 350 N.Y.S.2d at 385.

208. *Id.* The indictment read:

The Grand Jury of the County of Ulster, by this indictment, accuse the defendants of the crime of murder, committed as follows: The defendants, in the County of Ulster, State of New York, on or about the 13th day of September, 1968, acting alone and with each other and with another person, attempted to commit the crime of escape in the second degree and, in the course and furtherance of such crime, the defendants caused the death of William Fitzgerald, not a participant in the said crime, by gunshot wounds from a revolver.

Id. The indictment charged neither defendant with intentional murder nor reckless depraved indifference murder. *See id.* Nor were the defendants charged with reckless manslaughter or criminally negligent homicide. *See id.*

209. *See* N.Y. PENAL LAW § 110.05(7) (McKinney Supp. 1987).

The first trial of the defendants ended in a mistrial because the jury was unable to agree upon a verdict.²¹⁰ Found guilty and sentenced to death at their second trial,²¹¹ the defendants appealed directly to the court of appeals.²¹² In their appeal brief, the defendants raised ten points. The eighth point, consisting of four and one-half pages, addressed the misdemeanor issue.²¹³ The district attorney, however, argued that the misdemeanor-felony distinction was purely semantic.²¹⁴ In ordering a new trial the court failed to address the issue of a misdemeanor serving as a foundation for a felony murder conviction.²¹⁵ Rather, it based its reversal on an error in the selection of prospective jurors.²¹⁶

210. See *People v. Culhane*, 57 A.D.2d 418, 395 N.Y.S.2d 517 (3d Dep't 1977), *aff'd*, 45 N.Y.2d 757, 380 N.E.2d 315, 408 N.Y.S.2d 489, *cert. denied*, 439 U.S. 1047 (1978).

211. See *People v. Culhane*, 33 N.Y.2d 90, 305 N.E.2d 469, 350 N.Y.S.2d 381 (1973).

212. See *id.*

213. Appellant's Brief at 68-72, *People v. Culhane*, 33 N.Y.2d 90, 305 N.E.2d 469, 350 N.Y.S.2d 381 (1973). The brief stated:

It appears that the State Commission on Revision of the Penal Law was unaware that attempted escape second degree is now a misdemeanor It is respectfully submitted that inclusion of attempted second degree escape as a predicate for first degree murder deprives defendant of substantive due process and of his right to equal protection of the law Not only is the whole history of the felony murder doctrine inconsistent with the inclusion of a misdemeanor among the underlying crimes for constructive first degree murder, but to expand that doctrine to lesser offenses is to arbitrarily—and hence unconstitutionally—allow conviction of a misdemeanor for the gravest of crimes.

Id.

214. Respondent's Brief at 17, *People v. Culhane*, 33 N.Y.2d 90, 305 N.E.2d 469, 350 N.Y.S.2d 381 (1973). The brief countered:

Based as it is on a false premise, the fallacy of this semantic argument is readily recognized. Defendants were not charged with attempted escape. They were charged with felony murder. The one count indictment is carefully couched in the language of the statute. Said statute enumerates a list of certain crimes, all involving violence or real risk of physical injury, and deliberately declares that the commission or the attempt to commit any such specified crime forms the basis for felony murder. Escape in the second degree is one of the specified crimes Statutory language should be interpreted according to its natural and obvious meaning Patently, defendants' false conception of the function of the underlying crime in a felony murder prosecution would place a truly evil premium on the failure of a wrongful act. And it can be considered certain that the Legislature never intended that the frustration of a heinous crime be so rewarded.

Id.

215. *Culhane*, 33 N.Y.2d at 110, 305 N.E.2d at 483, 350 N.Y.S.2d at 400 (1973).

216. See *id.* The court, in an opinion by Judge Wachtler, wrote:

In view of our recent decision in *People v. Fitzpatrick*, 32 N.Y.2d 499,

In the retrial,²¹⁷ each defendant again was convicted of felony murder and this time sentenced to a prison term of twenty-five years to life.²¹⁸ The Appellate Division, Third Department, affirmed the judgments of conviction in a three to two decision.²¹⁹

In their appeal to the court of appeals, the defendants failed to raise or reargue the misdemeanor issue.²²⁰ In contrast, in the state's brief the district attorney argued: "[t]he total evidence established defendants' participation in the underlying felony and thus proved their guilt beyond a reasonable doubt."²²¹ The district attorney failed to note, however, that the case involved no "underlying felony." The court affirmed the order of the appellate division without addressing the "underlying misdemeanor" issue.²²²

Thus, in *Culhane*, the murder conviction was based on the felony murder theory without any underlying felony. The fact that at least three other theories may have supported a murder charge is legally and constitutionally irrelevant since the prosecutor chose to proffer only one theory.²²³ If this case had arisen before the enactment of the revised Penal Law, the defendants, in attempting to escape, would have been guilty of a felony and thus a "real" felony murder.²²⁴

346 N.Y.S.2d 793, 300 N.E.2d 139 (1973), *cert. denied*, 414 U.S. 1033 (1973), declaring this State's death penalty statute unconstitutional, we should—as a minimum—remand this case for resentencing. The appellants, however, raise several issues which they claim require reversal of the conviction and a new trial, one of which—relating to the court's refusal to excuse four prospective jurors for cause—has substantial merit.

Id. at 95, 305 N.E.2d at 472, 350 N.Y.S.2d at 385.

217. *See* *People v. Culhane*, 57 A.D.2d 418, 395 N.Y.S.2d 517 (3d Dep't 1977), *aff'd*, 45 N.Y.2d 757, 380 N.E.2d 315, 408 N.Y.S.2d 489, *cert. denied*, 439 U.S. 1047 (1978).

218. *See id.*

219. *See id.*

220. *People v. Culhane*, 45 N.Y.2d 757, 380 N.E.2d 315, 408 N.Y.S.2d 489, *cert. denied*, 439 U.S. 1047 (1978).

221. District Attorney's Brief at 14, *People v. Culhane*, 45 N.Y.2d 757, 380 N.E.2d 315, 408 N.Y.S.2d 489 (1978).

222. *Culhane*, 45 N.Y.2d at 759-60, 380 N.E.2d at 317, 408 N.Y.S.2d at 492.

223. In *People v. Moran*, 246 N.Y. 100, 158 N.E. 35 (1927), the New York Court of Appeals stated that it:

[M]ay not "sustain a conviction erroneously secured on one theory on the conjecture that it would have followed just the same if the correct theory had been applied" A criminal, however shocking his crime, is not to answer for it with forfeiture of life or liberty till tried and convicted in conformity with law.

Id. at 105, 158 N.E. at 37.

224. N.Y. PENAL LAW §§ 261, 1694, 1699 (McKinney Supp. 1966). In 1984, the legislature amended the escape sections of the Penal Law to provide that a person is guilty of a class E felony if he attempts to escape from custody after having

Under the new law, however, an attempt to escape from custody is only a class A misdemeanor.²²⁵

VIII. Recommendations

It is clear that the felony murder statute contains an error that egregiously expands the scope of the doctrine that, if anything, should be limited. It is therefore recommended that the error be corrected—either by the legislature, or, until the legislature acts, by judicial interpretation.

A. Recommendation for the Judiciary

No court may sit as a super-legislature, with the power to abrogate a statute judicially, merely because it is unwise.²²⁶ The wisdom of legislation is never a proper subject for judicial inquiry; that is, judges may not legislate under the guise of statutory construction.²²⁷ If the legislative intent is not in doubt, judges may not revise a statute.²²⁸ Rather, a court is required to ascertain and carry out legislative intent.²²⁹

If it were clear that the legislature purposefully and knowingly included a misdemeanor as a predicate for a felony murder conviction, then a court may not, under the guise of statutory con-

been convicted of a class A or class B felony. 1983 N.Y. Laws ch. 277, at 483-84. Prior to this amendment and subsequent to September 1, 1967 (the revised penal law), such conduct constituted a class A misdemeanor. 1967 N.Y. Laws ch. 791, at 1310-11. And, as noted, for many years prior to 1967, such conduct constituted a felony and in several reported decisions properly formed a predicate for a felony murder prosecution. *See supra* notes 87-121 and accompanying text. Notwithstanding the historical classification, the fact remains that upon a literal reading of the present felony murder statute, a misdemeanor may serve as a predicate for a conviction. In addition, even after the 1984 amendment, no reported decision in New York or elsewhere has ever expressly approved the idea that a misdemeanor may form the predicate for a felony murder conviction. *See People v. Lozano*, 107 Misc. 2d 345, 348, 434 N.Y.S.2d 588, 590 (Sup. Ct. N.Y. County 1980).

225. N.Y. PENAL LAW § 110.05 (McKinney 1966). Indeed, at the second *Culhane* trial, the court gave these instructions to the jury: "By the way, the crime of attempted escape in the second degree is a misdemeanor." Record at 1392, *People v. Culhane*, 45 N.Y.2d 757, 380 N.E.2d 315, 408 N.Y.S.2d 489 (1978).

226. *See People ex rel Culhane v. Sullivan*, 133 Misc. 2d 181, 189-90, 506 N.Y.S.2d 620, 626 (1986).

227. *See id.*

228. *See id.*

229. *See Rankin v. Shanker*, 23 N.Y.2d 111, 114, 242 N.E.2d 802, 804, 295 N.Y.S.2d 625, 628 (1968). "[A] primary command to the judiciary in the interpretation of statutes is to ascertain and effectuate the purpose of the Legislature. In finding such purpose, one should look to the entire statute, its legislative history and the statutes of which it is made a part." *Id.*

struction, excise that crime from the murder statute. In the absence of a clear, explicit and unambiguous indication of its intention, however, a court may readily and properly infer that the legislature did not intend to overturn the long established rule of law, that only a felony may serve as a foundation for a felony murder prosecution.

What policies did the legislature have in mind when it enacted the existing felony murder statute?²³⁰ Penal Law section 5.00 offers an instructive rule: "The general rule that a penal statute is to be strictly construed does not apply to this chapter, but the provisions herein must be construed according to the fair import of their terms to promote justice and effect the objects of the law."²³¹

It would be improper to interpret the felony murder statute in the abstract, without taking into consideration its antecedents. Thus, in construing New York's present felony murder statute, a court properly may consider its pre-enactment history,²³² its enactment history²³³ and its post-enactment history.²³⁴ These histories reveal that the legislature intended that the actor or his accomplice be engaged in a felony at the time of the killing.²³⁵ That determination is consistent with legislative intent, justice and common sense.

1. *The Legislative History of the Felony Murder Statute*

The 1965 felony murder statute sought to abolish the former "any felony" rule and to limit the predicate to certain violent felonies.²³⁶ Neither the Penal Law Revision Commission nor the legislature intended to broaden the felony murder doctrine to include a misdemeanor.²³⁷ An examination of all the previous felony murder statutes in New York²³⁸ and the legislative history of the statute supports this conclusion.²³⁹

230. See *Cherkis v. Impellitteri*, 307 N.Y. 132, 148, 120 N.E.2d 530, 538 (1954). ("[i]t is a familiar canon of construction that statutes are to be interpreted so as to fulfill policies which the Legislature evidently had in mind").

231. N.Y. PENAL LAW § 5.00 (McKinney 1975).

232. See *supra* notes 40-121 and accompanying text.

233. "In construing a statute, the courts frequently consider the common law rule and then follow the course of legislation on the subject, the lineage of the act being thought to illuminate the intent of the legislature." N.Y. STATUTES LAW § 124 (McKinney 1971).

234. See *supra* notes 172-205 and accompanying text.

235. See *supra* notes 122-72 and accompanying text.

236. 1965 N.Y. Laws 1529.

237. See *supra* notes 40-205 and accompanying text.

238. See *supra* notes 59-121 and accompanying text.

239. See *supra* notes 40-205 and accompanying text.

From 1829 until the enactment of the revised Penal Law in 1967, the clearly expressed legislative policy of New York was to include only felonious conduct as the predicate for a felony murder conviction.²⁴⁰ The Reports of the Penal Law Revision Commission are extremely persuasive on the question of legislative purpose. Those reports conclusively demonstrate that the purpose was to narrow the scope of the felony murder doctrine by rejecting the prior "any felony" rule and specifying certain felonies that may serve as a predicate for conviction.²⁴¹

The felony murder statute should be construed in the light of common sense. It should be conclusively presumed that the 1965 legislature intended to enact a felony murder statute that was reasonable. That statute, accordingly, must be given an interpretation consonant with that presumption. It is simply unreasonable to suppose that the legislature intended to broaden the felony murder doctrine to include a misdemeanor.

2. *Judicial Role in Interpreting Statutes*

To promote and further legislative intent, courts may, if required, modify language, add or delete punctuation, add language, transpose words, or delete words when their presence is obviously a mistake.²⁴² In fact, judicial variation of the literal meaning of statutory language often either enlarges or narrows the scope of the statute.²⁴³ In order to ascertain and effectuate legislative intent, a court may be required to avoid interpreting words in a statute literally,²⁴⁴ *i.e.*, statutory

240. *See supra* notes 59-121 and accompanying text.

241. *See id.*

242. *See, e.g.*, *People v. Liberta*, 64 N.Y.2d 152, 161, 474 N.E.2d 567, 571, 485 N.Y.S.2d 207, 211 (1984).

243. *Id.* In this case, because of overriding policy concerns, the Court deleted words from a penal statute and thereby enlarged its scope.

244. *See Central Hanover Bank & Trust Co. v. Commissioner of Internal Revenue*, 159 F.2d 167, 169 (2d Cir. 1947). Judge Learned Hand made this oft-quoted observation:

There is no more likely way to misapprehend the meaning of language—be it in a constitution, a statute, a will or a contract—than to read the words literally, forgetting the object which the document as a whole is meant to secure. Nor is a court ever less likely to do its duty than when, with an obsequious show of submission, it disregards the overriding purpose because the particular occasion which has arisen, was not foreseen.

Id.

At one time, courts interpreted statutes in accordance with the plain meaning rule—that statutory language should be interpreted according to its natural and obvious meaning. *See, e.g.*, This rule of literalism required a court to put on blinders and obscure from view everything but the statutory text.

language is subservient to legislative intent.²⁴⁵ The literal meaning of words in a statute should never be allowed to defeat or frustrate legislative purpose.²⁴⁶ The proper judicial construction of a statute requires recognition and implementation of the underlying purpose.²⁴⁷ A judge performing this sensitive function should be literate, not literal.

3. *How Courts Should Interpret the Felony Murder Statute*

The spirit of the existing felony murder statute—as distinguished from its strictly literal meaning—is that only felonious conduct may

For the last fifty years, however, the United States has moved away from this literal approach and instead adopted an approach that considers extrinsic evidence of legislative intent whenever such evidence is persuasive. See *Argosy Ltd. v. Hannigan*, 404 F.2d 14, 20 (5th Cir. 1968). “[S]tatutory construction must not occur in a vacuum. Statutes are contextual as well as textual Their proper interpretation requires more than mere linguistic seriation. Courts must also look to the logic of [the legislature] and to the broad . . . policy which prompted the legislation.” *Id.* (citation omitted).

245. See *People v. Ryan*, 274 N.Y. 149, 152, 8 N.E.2d 313, 315 (1937). “In the interpretation of statutes, the spirit and purpose of the act and the objects to be accomplished must be considered. . . . Literal meanings of words are not to be adhered to or suffered to ‘defeat the general purpose and manifest policy intended to be promoted’” *Id.*; accord *Capone v. Weaver*, 6 N.Y.2d 307, 309, 160 N.E.2d 602, 603, 189 N.Y.S.2d 833, 835 (1959); *New York Post Corp. v. Leibowitz*, 2 N.Y.2d 677, 685, 143 N.E.2d 256, 260, 163 N.Y.S.2d 409, 415 (1957).

246. See *People ex rel. Twenty-Third Street R.R. v. Commissioners of Taxes*, 95 N.Y. 554, 558-59 (1884). The court stated:

It is the object of all interpretation and construction of statutes to ascertain the intention of the lawmakers, and this is generally accomplished by a literal reading of the words used. But there are many cases where the words do not express that intention perfectly, but exceed it or fall short of it, and then it is allowable to adopt what writers upon the civil law sometimes call a rational interpretation and to collect the intention from rational or probable conjecture only.

Id.

247. See 2A F. SUTHERLAND, STATUTORY CONSTRUCTION § 54.06, at 582 (4th ed. 1984) [hereinafter SUTHERLAND]. Sutherland maintains:

When the natural or literal meaning of statutory language embraces applications which would not serve the policy or purpose for which the statute was enacted . . . , the courts may construe it restrictively in order not to give it an effect beyond its equity or spirit. “It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute because not within its spirit, nor within the intention of its makers.” A restricted interpretation is usually applied where the effect of a literal interpretation will result in injustice and absurdity, or, in the words of one court, the language must be so unreasonable “as to shock general common sense” The language of criminal statutes has often been narrowed where the letter includes situations inconsistent with the legislative plan.

Id. (footnotes omitted).

serve as a foundation for invocation of the felony murder doctrine.²⁴⁸ The fact that the felony murder statute may be facially unambiguous does not preclude a court from disregarding the literal words²⁴⁹ in order to effectuate legislative intent.²⁵⁰ Courts should not sacrifice

248. See *People v. Gladman*, 41 N.Y.2d 123, 359 N.E.2d 420, 390 N.Y.S.2d 912 (2d Dep't 1976). The New York Court of Appeals observed that "[t]he 1967 Penal Law limited the application of the felony murder concept to nine serious and violent predicate felonies." *Id.* at 128, 359 N.E.2d at 424, 390 N.Y.S.2d at 916.

249. See *People ex rel. Westchester Fire Ins. Co. v. Davenport*, 91 N.Y. 574, 585 (1883). "[A] principle of construction of universal authority is that which requires the court to limit and restrict the operation of a statute when its language, if applied in its literal sense, would lead to an absurdity, or manifest injustice." *Id.* (citation omitted); see also *Kelly v. Sugarman*, 12 N.Y.2d 298, 300, 189 N.E.2d 613, 615, 239 N.Y.S.2d 114, 116 (1963). "Words contained in a statute must, of course, be given the meaning to which they are reasonably entitled but this does not mean that we must accept the language in all of its sheer literalness and forget completely the object which the statute was designed to accomplish." *Id.*

250. See *New York State Bankers Ass'n v. Albright*, 38 N.Y.2d 430, 343 N.E.2d 735, 381 N.Y.S.2d 17 (1975). The court stated:

It has been said often, but with less than meticulous analysis, that an "unambiguous" statute permits of no inquiry into legislative intention Absence of facial ambiguity is, however, rarely, if ever, conclusive. The words men use are never absolutely certain in meaning; the limitations of finite man and the even greater limitations of his language see to that. Inquiry into the meaning of statutes is never foreclosed at the threshold; what happens is that often the inquiry into intention results in the conclusion that either there is no ambiguity in the statute, or that for policy or other reasons the prior history will be rejected in favor of the purportedly explicit statement of the statute Then it is often said with more pious solemnity than accuracy, that the clarity of the statute precludes inquiry into the antecedent legislative history. As the Supreme Court stated . . . : "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination." The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function. This duty requires one body of public servants, the judges, to construe the meaning of what another body, the legislators, has said. Obviously there is danger that the courts' conclusion as to legislative purpose will be unconsciously influenced by the judges' own views or by factors not considered by the enacting body.

the manifest legislative purpose of the felony murder statute to a literal reading of the words used in defining the crime.²⁵¹ When words have inadvertently crept into a statute that are clearly repugnant to legislative intent, a court may correct the inadvertence by excising those words from the statute.²⁵²

If the court can put two constructions upon an ambiguous statute, it should avoid the one that would cause an injustice.²⁵³ It is a

A lively appreciation of the danger is the best assurance of escape from its threat but hardly justifies an acceptance of a literal interpretation dogma which withholds from the courts available information for reaching a correct conclusion

Id. at 436-37, 343 N.E.2d at 738-39, 381 N.Y.S.2d at 20-21 (citations omitted).

251. See SUTHERLAND, *supra* note 247, § 46.07, at 110. Sutherland states:

The literal interpretation of the words of an act should not prevail if it creates a result contrary to the apparent intention of the legislature and if the words are sufficiently flexible to allow a construction which will effectuate the legislative intention. The intention prevails over the letter, and the letter must if possible be read to conform to the spirit of the act.

Id.

252. See *id.* § 46.06 at 104 (“words and clauses which are present in a statute only through inadvertence can be disregarded if they are repugnant to what is found, on the basis of other indicia, to be the legislative intent”). Sutherland also states:

Courts permit the elimination of words for one or more of the following reasons: where the word is found in the statute due to the inadvertence of the legislature, where it is necessary to give the act meaning, effect, or intelligibility, where apparent from the context of the act that the word is surplusage, where the use of the word would lead to an absurdity or irrationality, where the inclusion of the word was a mere inaccuracy, or clearly apparent mishap, or it was obviously erroneously inserted, where the use of the word is the result of a typographical or clerical error, where it is necessary to avoid inconsistencies and to make the provisions of the act harmonize, where the words of the statute do not have any useful purpose or are entirely foreign to the subject matter of the enactment, or where it is apparent from the caption of the act or body of the bill that the word is surplusage.

Id. § 47.37, at 258 (footnotes omitted).

253. See *id.* § 45.12, at 54. Sutherland explains:

It has been called a golden rule of statutory interpretation that unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result. It is a “well established principle of statutory interpretation that the law favors rational and sensible construction.” It is fundamental, however, that departure from the literal construction of a statute is justified when such a construction would produce an absurd and unjust result and would clearly be inconsistent with the purposes and policies of the act in question.

Id. (footnotes omitted).

principle of statutory construction that the law favors a rational and sensible construction.²⁵⁴

For instance, the predicate offenses in the present felony murder statute range from a class A misdemeanor to a class A-I felony.²⁵⁵ For the class A-I felony offenses—first degree kidnapping and first degree arson—the penalty prescribed for felony murder is the very same penalty prescribed for the predicate crime.²⁵⁶ For the class A misdemeanor—attempted escape in the second degree—the difference in the penalties prescribed for felony murder and the predicate offense is colossal—a difference that has no semblance of proportionality.²⁵⁷ This wide range of predicate offenses offends not only a salient principle of punishment, that the punishment should fit the crime, but also a specific purpose of the Penal Code: “To differentiate on reasonable grounds between serious and minor offenses and to prescribe proportionate penalties therefor.”²⁵⁸

254. See 1 N.Y. STATUTES LAW § 362 (McKinney 1971).

As a general rule, unless it is fairly evident that a mistake has been made, the judiciary should not assume the existence of error and change the plain language of a statute to make it conform to a supposed intent

.....

However, where it is possible to remedy a defect in a statute by construction so as to sustain its validity, the courts will apply a reasonable construction toward that end to carry out the legislative intent. Thus, where the legislative intent is plain, and the mistake is clearly due to inadvertence or clerical error, the courts will adopt a construction which will remedy the defect in the legislation. Stated differently, if the clear intent of the legislature is obvious in the statutory history, the court may supply a word or phrase where an obvious draftsman's error would otherwise lead to absurd results; and words obviously inserted in a statute by mistake, will be considered surplusage, and will be disregarded.

Id. Similarly, § 145 provides:

An intent patently absurd is not to be attributed to the Legislature, and it will be presumed that the Legislature did not intend an absurd result to ensue from the legislation enacted. In other words, an absurd or frivolous purpose is not to be attributed to the Legislature, and if a construction sought to be placed on a statute produces an absurdity it is, as a general rule, to be discarded.

Id. § 145 (McKinney 1971).

255. See N.Y. PENAL LAW § 125.25(3) (McKinney Supp. 1987).

256. See *id.*

257. See FLETCHER, *supra* note 50, at 319.

258. N.Y. PENAL LAW § 1.05 (McKinney Supp. 1987); *id.* § 125.25 (McKinney Supp. 1987). This surgery may be mechanically effectuated by adding three words (“or . . . he commits”) to the present felony murder statute: “A person is guilty of murder in the second degree when: . . . 3. Acting either alone or with one or more other persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape . . . sexual abuse in the first degree, aggravated sexual abuse, [or] escape in the first degree, or [he commits] escape in the second degree, and, in the course of and in furtherance of such crime or of immediate flight therefrom,

In addition, it is clear that New York courts have corrected legislative errors in the past. For the past century, faulty draftsmanship has marred New York's felony murder statutes. Nevertheless, courts have corrected these legislative errors through the judicious use of the canons of statutory construction.²⁵⁹ For example, the court of appeals restricted the language in the felony murder statute of 1909.²⁶⁰

Similarly, in 1973, the court of appeals, referred to "a fundamental defect in the old felony-murder statute," and recounted how the court removed the error by corrective surgery, *i.e.*, judicial excision of the felony of assault from the face of the statute.²⁶¹

B. Recommendation for the Legislature

New York's present felony murder statute, in enumerating the predicate crimes, refers to a person who "commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, aggravated sexual abuse, escape in the first degree, or escape in the second degree."²⁶² A cursory reading of this provision suggests that the legislature has enumerated ten felonies. The provision, however, actually contains thirty-six predicate crimes.²⁶³

To remedy this potential for confusion, the legislature should amend the felony murder statute by specifically enumerating each predicate crime (both substantive and attempted) by name, degree and section number. The legislature should of course omit the mis-

he, or another participant, if there be any, causes the death of a person other than one of the participants" *Id.*

259. *See* *People v. Fitzgerald*, 37 N.Y. 413 (1868). For example, the 1862 felony murder statute contained many flaws. The New York Court of Appeals "paraphrased" the statute in order to give effect to "the evident intent of the framers of the statute." *Id.* at 419. The rewriting of the statute, said the Court, was "a justifiable construction" necessary to carry out "the evident intention of the legislature." *Id.*

260. *See* *People v. Grieco*, 266 N.Y. 48, 193 N.E. 634 (1934) (court limited scope of former misdemeanor manslaughter rule by not reading literally); *see also* *People v. Wagner*, 245 N.Y. 143, 156 N.E. 644 (1927) (broad inclusive term "any felony" restrictively interpreted to exclude felonies of assault and carrying dangerous weapon); *People v. Sobieskoda*, 235 N.Y. 411, 139 N.E. 558 (1923) (phrase "without a design to effect death" effectively excised); *People v. Marendi*, 213 N.Y. 600, 107 N.E. 1058 (1915) (every essential element of felony must be established by evidence).

261. *People v. Miller*, 32 N.Y.2d 157, 159, 297 N.E.2d 85, 87, 344 N.Y.S.2d 342, 344 (1973) (assault cannot be proper basis for felony-murder since *a fortiori* every homicide occurs during commission of assault).

262. N.Y. PENAL LAW § 125.25 (McKinney Supp. 1987).

263. *See id.*; *supra* notes 22-24 and accompanying text.

demeanors unintentionally included in the current statute. Such an amendment would clarify the precise crimes that may serve as a foundation for a felony murder prosecution,²⁶⁴ and ensure that no

264. Three other penal law provisions enacted after the adoption of the Penal Law in 1965 illustrate the commendable drafting technique of referring to felony crimes by name, degree and section number. The first provision is violent felony offenses. See N.Y. PENAL LAW § 70.02 (McKinney Supp. 1987) (added by 1978 N.Y. Laws ch. 481, § 3, at 861). This provision enumerates each "violent felony" by name, degree, section number and classification. It expressly addresses the issue of an attempt to commit a violent felony. For example, § 70.02(1)(b) reads:

Class C violent felony offenses: an attempt to commit any of the class B felonies set forth in paragraph (a); assault in the first degree as defined in section 120.10, burglary in the second degree as defined in section 140.25, robbery in the second degree as defined in section 160.10, criminal possession of a weapon in the second degree as defined in section 265.03 and criminal use of a firearm in the second degree as defined in section 265.08.

Id.

The second provision is juvenile offenders. See N.Y. PENAL LAW § 10.00(18) (McKinney Supp. 1987) (added by 1978 N.Y. Laws ch. 481, at 827). This provision enumerates by name, degree, and section number (and, in many instances, the particular subdivision of a section) the felony that may serve as the foundation for a prosecution of a juvenile in the adult courts. Like § 70.02, it meticulously addresses the issue of an attempt to commit a felony by specifically referring to an attempt to commit two of the 13 designated substantive felonies. For example, § 10.00(18) provides, in part:

"Juvenile offender" means . . . a person fourteen or fifteen years old who is criminally responsible for acts constituting the crimes defined in . . . section 135.25 (kidnapping in the first degree); 150.20 (arson in the first degree); subdivisions one and two of section 120.10 (assault in the first degree); 125.20 (manslaughter in the first degree); subdivisions one and two of section 130.35 (rape in the first degree); subdivisions one and two of section 130.50 (sodomy in the first degree); 130.70 (aggravated sexual abuse); 140.30 (burglary in the first degree); subdivision one of section 140.25 (burglary in the second degree); 150.15 (arson in the second degree); 160.15 (robbery in the first degree); or subdivision two of section 160.10 (robbery in the second degree) of this chapter; or defined in this chapter as an attempt to commit murder in the second degree or kidnapping in the first degree.

Id.

The third provision is eavesdropping warrants. See N.Y. CRIM. PROC. LAW § 700.05 (McKinney 1984 & Supp. 1987).

Criminal Procedure Law § 700.05 also enumerates 113 crimes by name and section number, or, in some cases, the penal law article number wherein the crime is defined. It expressly and clearly addresses the issue of an attempt to commit one of the enumerated substantive crimes. Specifically, the attempt must relate to an enumerated substantive crime that is a felony and, additionally, the attempt itself must constitute a felony. Thus, with respect to an attempt to commit an enumerated substantive crime, the latter must be greater than a class E felony. See, e.g., *id.* § 700.05(8). This subdivision states in part:

'Designated offense' means any one or more of the following crimes:

one reading the law would be left in doubt or uncertainty as to what predicate conduct may trigger an invocation of the felony murder doctrine.

More importantly, such an amendment would have the salutary effect of affording to the legislature an opportunity to give separate and distinct consideration to each discrete crime that may form the basis for a felony murder prosecution. Listing each predicate crime by name, degree and section number may also minimize the likelihood of a future drafting error that includes a misdemeanor or an unintended felony within the statute.

A properly constructed felony murder doctrine is of great importance to the administration of justice. The statute should not list in an abbreviated, cursory manner the crimes that may serve as a foundation for a felony murder prosecution. Rather, it should meticulously specify each and every crime—both substantive and attempted offenses.

(a) A conspiracy to commit any offense enumerated in the following paragraphs of this subdivision, or an attempt to commit any felony enumerated in the following paragraphs of this subdivision which attempt would itself constitute a felony;

(b) Any of the following felonies: assault in the second degree as defined in section 120.05 of the penal law, assault in the first degree as defined in section 120.10 of the penal law, . . . rape in the third degree as defined in section 130.25 of the penal law, rape in the second degree as defined in section 130.30 of the penal law, rape in the first degree as defined in section 130.35 of the penal law, . . . arson in the fourth degree as defined in section 150.05 of the penal law, arson in the third degree as defined in section 150.10 of the penal law, arson in the second degree as defined in section 150.15 of the penal law, arson in the first degree as defined in section 150.20 of the penal law, . . . escape in the second degree as defined in section 205.10 of the penal law, escape in the first degree as defined in section 205.15 of the penal law

(c) Criminal possession of a controlled substance in the seventh degree as defined in section 220.03 of the penal law, criminal possession of a controlled substance in the sixth degree as defined in section 220.05 of the penal law

(e) Criminal usury, as defined in article one hundred ninety of the penal law; . . .

(g) Bribing a witness, bribe receiving by a witness, bribing a juror and bribe receiving by a juror, as defined in article two hundred fifteen of the penal law;

(h) Promoting prostitution in the first degree, as defined in section 230.32 of the penal law, promoting prostitution in the second degree, as defined by subdivision one of section 230.30 of the penal law; . . .

Id.

Each of the three statutory schemes briefly reviewed refers with maximum specificity to crimes defined elsewhere.

IX. Conclusion

The felony murder doctrine has been continually and widely criticized. Its origins are dubious. Many legislative and judicial limitations have circumscribed its operation and the doctrine is unnecessary for effective and just law enforcement. More importantly, it erodes the relation between criminal liability and moral culpability. That relation is vital to a mature and civilized system of criminal justice. A legislative reconsideration of the existing New York felony murder doctrine is timely and essential.

The legislature should give serious consideration to the action taken by Parliament nearly thirty years ago when it abolished the felony murder doctrine in England. If abolition is deemed to be impolitic, then New York's felony murder doctrine should be limited to not more than twenty predicate crimes: the two class A-I felonies of kidnapping first degree and arson first degree, the nine class B violent felony offenses, and the nine class C violent felony offenses. At the very least, the legislature should remove attempted escape in the second degree from within the ambit of felony murder liability.