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FELONY MURDER AND CHILD ABUSE: A PROPOSAL FOR THE NEW YORK LEGISLATURE

I. Introduction

Lisa Steinberg's head was hit so hard her injuries matched those of a person who had fallen out of a three-story window.¹ Over the course of three months, investigators believed that Jessica Cortez was beaten numerous times with fists, a ruler, and a belt by her mother's companion who, in addition, sexually abused her.² Lisa and Jessica are only two of the many New York City children who have died as a result of child abuse in recent years; at least 126 other children died at the hands of abusive adults in 1988 alone.³ This alarming and ever-increasing statistic demonstrates the significant need for the criminal justice system to protect children from abuse.⁴

In the past decade, the annually reported instances of child maltreatment increased dramatically, from 669,000 in 1976 to over 1.9 million in 1985.⁵ There is a growing public sentiment,⁶ largely trig-

1. N.Y. *Newsday*, Nov. 30, 1988 at 3, col. 1. Lisa Steinberg was illegally adopted by Joel Steinberg, a New York criminal defense lawyer, who was convicted of first degree manslaughter. N.Y. *Times*, Jan. 31, 1989, at A1, col. 1. At the age of 6, she died from a subdural hematoma, a hemorrhage in the outer covering of the brain, which caused her brain to swell and crush against the skull. N.Y. *Newsday*, Nov. 30, 1988, at 3, col. 1.

2. See N.Y. *Times*, Dec. 16, 1988, at B1, col 5. Jessica's mother and Adrian Lopez, her companion, were charged with murdering Jessica, her body was found to have "numerous bruises over her entire body, her face and head, a broken left arm, a possible skull fracture, a two-inch ulcerated scar of her lip and bruises to her sexual area." *Id.* Lopez was sentenced to 22 years to life in prison after pleading guilty to charges of murder, assault and endangering the welfare of a child. See N.Y. *Times*, Nov. 10, 1989, at B3, col. 6.

3. See N.Y. *Post*, Jan. 5, 1989, at 22, col. 1. Child welfare officials reported a staggering 52% increase in drug-related child abuse and child neglect complaints in the twelve months ending June 30, 1988. Overall, New York City child protection services investigated some 58,300 cases in 1988. About one-third were found to have been justified. There were 21,000 children in city-sponsored foster care as of December 31, 1988 — many of them victims of abuse. *Id.*

4. Armstrong & Gillig, *Responding to Child Sexual Abuse and Exploitation: The Kentucky Approach*, 16 N. KENT. L. REV. 17 (1988) [hereinafter Armstrong]. "The state's obligation to its youngest citizens is that of *parens patriae*, the ultimate parent, and is strongest where its charges, by virtue of their age, are most vulnerable". *Id.* at 20.

5. N.Y. *Times*, Nov. 6, 1987, at A1, col. 4.

6. *Id.* "The growing public awareness of the prevalence of child . . . abuse has only recently been accompanied by increased sensitivity to the trauma that the child victim experiences from the criminal justice system itself." *Id.* at B2, col. 1. In 1984, of every thousand Kentucky two-year olds, 19 were known victims of neglect, six were physically abused, two were mentally or emotionally abused, and one was sexually abused. *Id.* In New York State, there were approximately 95,000 child abuse cases reported in 1986.

gered by the highly-publicized, tragic deaths of six-year-old Lisa and five-year-old Jessica, that the criminal laws ought to punish more severely those who commit such heinous crimes.

The charges most often brought against the abuser when the victim dies is intentional homicide, depraved mind murder, or in some states, felony murder, in which child abuse is the underlying predicate felony.⁷ A conviction for intentional homicide is difficult to obtain. First, the government must prove intent to cause death,⁸ a factor often absent in child abuse cases.⁹ Second, frequently the sole witness is the abuser, since such crimes usually occur in private.¹⁰ Moreover,

Too often, however, the system - the official network of social workers, counselors, and family court officers - fails. 10,000 children in the state suffer serious physical harm each year from beatings, scalding and other abuse, and 100 to 150 die. The large majority of those who die are very young children, generally two- and three-year-olds. Experts say the very fact that 100 children die of abuse in the city each year should be warning that changes are needed. N.Y. Times, Nov. 6, 1987, at A1, col. 4.

The numbers of abuse reports (cases nearly doubled between 1986 and 1989) and the erosion of families by drug abuse have overwhelmed the Special Services for Children agency. As a result, there are, too often, errors in determining whether a child should be removed from a household. Since June 1988, the agency has hired 614 caseworkers who are doing protective investigations to determine the validity of abuse reports. There are now roughly 1,000 caseworkers and the average caseload per caseworker is 18.9 compared with 35 in the prior year. N.Y. Times, Jan. 10, 1989, at B1, col. 3.

7. *E.g.*, N.Y. PENAL LAW § 125.25 (McKinney 1988). New York defines an individual who is guilty of second degree murder as:

1. With intent to cause the death of another person, he causes the death of such person or of a third person . . .
2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person; or
3. 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.

8. *See* N.Y. PENAL LAW § 125.25(1) (McKinney 1988).

9. *See* Reich, *Lisa: betrayed by the law*, Glamour Magazine, April, 1989, at 195 [hereinafter Reich]. "Prosecutors are . . . required to provide witnesses, as well as establish a motive and intent to kill, just as they would if an adult were murdered. Usually they can't — child abuse being the most private of tortures — so child killers are most often convicted of manslaughter, as was Joel Steinberg, and get a considerably lighter sentence." *Id.*

10. *See* Reich, *supra*, note 9. Charles Reich, the executive director of The LISA Organization to stop Child Abuse, Inc., in New York City, expressed his horror regarding the current inadequacies of penalizing child abusers in New York. He said that prosecutors are required to provide witnesses and establish an intent to kill but that this is rarely possible since child abuse is the "most private of tortures." *Id.* The government must often prove that the death occurred under circumstances evincing depraved indifference to human life, as an alternative to intent to kill, in order to obtain a second degree murder

it is difficult to convince a jury that a parent intentionally killed his child.¹¹ In fact, the government did not even attempt to charge Joel Steinberg, Lisa Steinberg's abuser, with intentional murder because of these difficulties.¹² A conviction for depraved indifference to human life¹³ is similarly difficult to prove.¹⁴ In such a case, the prosecution must prove that "[u]nder circumstances evincing a depraved indifference to human life, . . . [the defendant] recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person."¹⁵ This standard can be confusing to the jury because the terms "depraved indifference to human life"¹⁶ and "a grave risk of death"¹⁷ are very subjective and not easily definable.¹⁸ Moreover, a jury might confuse these terms with those associated with manslaughter in the first degree.¹⁹ A person is guilty of manslaughter in the first degree when, "[w]ith intent to cause serious physical injury to another person, he causes the death of such person or of a third person."²⁰ Thus, in the Steinberg case, it is quite

conviction. However, this concept often confuses jurors as to its meaning, especially when the government is attempting to prove that a parent showed depraved indifference to the life of his or her own child. It is precisely such a situation that the felony murder doctrine is intended to deter.

The Supreme Court of Kansas ruled that child abuse that results in death cannot be prosecuted as a felony murder. Robert T. Stephen, Attorney General of Kansas, emphasized the problems proving intent in such cases: "It's going to weaken our prosecution in [child abuse] cases . . . [and] [i]t's not likely you can get a first-degree murder conviction in such cases because of the necessity of proving premeditation." Nat'l L.J., July 25, 1988, at 6, col. 1.

11. See *supra* notes 9-10 and accompanying text.

12. See N.Y. Times, Jan. 31, 1989, at A1, col. 1.

13. See N.Y. PENAL LAW § 125.25(2) (McKinney 1988).

14. Steinberg's defense lawyer, Gerald Lefcourt, explained the difficulty in proving depraved mind murder to the jury in such a case. He stated that "it would have been difficult for jurors to agree on depraved indifference both because the legal concept is difficult to understand and because it is difficult to apply to the circumstances of the Steinberg case." N.Y. Daily News, Jan. 31, 1989 at 22, col. 1.

15. See N.Y. PENAL LAW § 125.25(2) (McKinney 1988).

16. *Id.*

17. *Id.*

18. See *supra* note 10 and accompanying text.

19. See N.Y. PENAL LAW § 125.20 (McKinney 1988).

A person is guilty of manslaughter in the first degree when:

1. With intent to cause serious physical injury to another person, he causes the death of such person or of a third person;
2. With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance

.....

Id.

20. *Id.*

possible that in convicting Joel Steinberg of first degree manslaughter, and acquitting him of second degree depraved mind murder, the jury had difficulty distinguishing the two offenses.²¹

The felony murder rule, on the other hand, requires the government to prove only the underlying crime.²² The rule imputes the requisite intent for a murder conviction to one who commits a homicide during the perpetration of another felony.²³ This simplifies the task for the jury since the underlying crimes frequently involve clearer standards than those of intentional or depraved mind murder.²⁴ In New York, an individual perpetrates the crime of felony murder when:

[a]cting 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.²⁵

Although child abuse is as dangerous a crime as these predicate offenses,²⁶ New York's felony murder statute does not recognize child abuse as a predicate offense.²⁷

Crimes involving child abuse are contained in New York Penal Law section 260.10(1), which declares a person guilty of "endangering the welfare of a child" when "[h]e knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a male child less than sixteen years old or a female child less than sev-

21. See N.Y. Times, Jan. 31, 1988, at A1, col. 1. Indeed, the jury foreman told the press after the verdict that it was a very difficult vote because of the difficult issues of law and fact. *Id.* at B5, col. 1. Some jurors noted that the panel might have become a hung jury if it not had the option of first-degree manslaughter. *Id.* at A1, col. 2. Some jurors, though believing that Steinberg was guilty of murder, voted to acquit him on it to avoid a deadlock that would lay waste the effort of a three-month trial. *Id.* Moreover, a consultant, in explaining why the jurors had voted to acquit Steinberg on the second degree murder count, said, "[w]e felt there was a lack of proof of his depravity." *Id.* at B5, col. 1.

22. See *infra* notes 33-34 and accompanying text.

23. See Comment, *Merger & The California Felony-Murder Rule*, 20 UCLA L. REV. 250 (1972) [hereinafter Comment].

24. See *infra* notes 51-56 and accompanying text.

25. N.Y. PENAL LAW § 125.25(3) (McKinney 1988).

26. *Id.*

27. See Nat'l L.J., July 25, 1988, at 6, col. 1; see generally N.Y. PENAL LAW § 125.25(3) (McKinney 1988);

enteen years old"²⁸ This offense, a class A misdemeanor,²⁹ encompasses a wide range of conduct, including negligence, neglect, malnutrition, dehydration, physical torture, and a pattern of abuse. Because the offense includes active as well as passive activity, and violent as well as non-violent activity,³⁰ inclusion of it in the felony murder statute may, in some cases, impute too much liability. New York should thus follow the lead of other jurisdictions, which have distinguished different types of child abuse by specifying some as felonies and others as misdemeanors.³¹

This Note urges that the New York legislature adopt an "aggravated child abuse" statute, and proposes an amendment to the current felony murder statute to include the crime of "aggravated child abuse" as an underlying felony to support a felony murder charge. Part II discusses the felony murder rationale and examines its limitations. Part III articulates a new aggravated child abuse statute that should serve as an underlying felony for felony murder in New York. Finally, the Note concludes with legislative recommendations which would make easier the prosecution and conviction of child abusers as well as severely punish child abusers under the proposed statutory amendments.

II. Felony Murder Rationale and Its Limitations

A. Background of Felony Murder

The felony murder rule imputes the actor's culpable mental state in committing a felony to any homicide that occurs in furtherance of or during the commission of the felony.³² The rule, therefore, permits a murder conviction for an unintentional or accidental killing that occurred during the commission of an unrelated felonious offense.³³

28. N.Y. PENAL LAW § 260.10 (McKinney 1988).

29. *Id.* at § 260.10(2).

30. *Id.* at § 260.10(1).

31. See FLA. STAT. ANN. §§ 827.03-827.06 (West 1988); WIS. STAT. § 940.201 (1985-86); CAL. PENAL CODE §§ 273a, 273d (West 1988).

32. See Note, *The California Supreme Court Assaults the Felony-Murder Rule*, 22 STAN. L. REV. 1059 (1970) [hereinafter Note]. See Note, *People v. Dillon: Felony Murder in California*, 21 CAL. W.L. REV. 546 (1985) (authored by Miller) [hereinafter Miller]. The most common felonies which will support a conviction for felony murder under the usual state statute include rape, armed robbery, arson, and kidnapping. See CAL. PENAL CODE § 189 (West 1988); GA. CODE ANN. § 16-5-1(c) (1988); N.Y. PENAL LAW § 125.25(3) (McKinney 1987); KAN. STAT. ANN. § 21-3401 (1988); FLA. STAT. ANN. § 782.04 (West 1990). Assault is never on the list, whereas child abuse is sometimes on the underlying felony murder list. *Id.*

33. See Note, *Felony Murder in Texas: The Merger Problem*, 33 BAYLOR L. REV. 1035 (1981) (authored by Stewart) [hereinafter Stewart].

1. Policy Rationales

Although disfavored by many scholars, 46 out of 50 states recognized that the felony murder doctrine responds to certain policy goals, and consequently have adopted versions of the felony murder rule.³⁴ The felony murder rule is invaluable in meeting community and law enforcement goals.³⁵ The felony murder doctrine reflects the widespread public perception that death resulting from robbery, rape, or similar violent felonies is not simply a more serious version of these underlying acts. The death is perceived as the result of a qualitatively different crime, more comparable in seriousness to intentional murder, than to homicides such as vehicular manslaughter.³⁶ In fact, a recent study indicated that juries generally do not resist convicting under the felony murder doctrine, except where the possibility of the death penalty exists.³⁷

2. Deterrent Rationale

Deterrence is another argument proffered in favor of the felony murder rule.³⁸ Some scholars dismiss the rule's deterrent effect, opining that criminals who intend to commit the underlying felony are often unaware of the law.³⁹ Nevertheless, courts emphasize the deterrent effect of the felony murder rule. In *People v. Washington*,⁴⁰ the California Supreme Court explained that the "purpose of the felony-murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit."⁴¹

34. See Crump & Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL'Y 359, 360 n.4 (1985) [hereinafter Crump].

35. *Id.* at 363.

36. *Id.*

37. *Id.* at 365 n.22.

38. *Id.* at 369.

39. *Id.* at 370. See S. KADISH, S. SCHULHOFER & M. PAULSEN, *CRIMINAL LAW PROCESSES* 479 (4th ed. 1983) ("Principled argument in its defense is hard to find."); R. PERKINS, *CRIMINAL LAW* 44 (2d ed. 1969) (asserting that "the reason for the rule has ceased to exist"); W. LAFAVE & A. SCOTT, *HORNBOOK ON CRIMINAL LAW* 560-61 (1972) ("it is arguable that there should be no such separate category of murder").

40. 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965).

41. *Id.* at 781, 402 P.2d at 133, 44 Cal. Rptr. at 445; In *Washington*, the defendant was convicted of first degree murder based on felony murder. The underlying felony was his participation in a robbery where his accomplice was killed by the victim of the robbery. The Supreme Court of California reversed the first degree murder conviction on the ground that "[t]o impose an additional penalty for the killing would discriminate between robbers, not on the basis of any difference in their own conduct, but solely on the basis of the response by others that the robber's conduct happened to induce. An additional penalty for a homicide committed by the victim would deter robbery haphazardly at best." *Id.* at 781, 402 P.2d at 133, 44 Cal. Rptr. at 445.

Similarly, in *People v. Miller*,⁴² the New York Court of Appeals emphasized that the purpose of felony murder is "to reduce the disproportionate number of accidental homicides which occur during the commission of the enumerated predicate felonies"⁴³ In *People v. Benson*,⁴⁴ the trial court summarized the deterrent rationale for the felony murder rule:

[t]he Legislature has said in effect that this deterrent purpose outweighs the normal legislative policy of examining the individual state of mind of each person causing an unlawful killing to determine whether the killing was with or without malice, deliberate or accidental, and calibrating our treatment of the person accordingly. Once a person perpetrates or attempts to perpetrate one of the enumerated felonies, then in the judgment of the Legislature, he is no longer entitled to such fine judicial calibration, but will be deemed guilty of first degree murder for any homicide committed in the course thereof.⁴⁵

3. *Jury Deliberations/Predictability*

The felony murder rule also provides juries with a clear and relatively straightforward standard to guide their deliberations.⁴⁶ In New York's felony murder statute, the prosecutor must merely prove that the underlying felony has been committed or attempted,⁴⁷ and that, "in the course of and in furtherance of such crime," the defendant or another participant caused the death of a person.⁴⁸ The state is not required to prove an intent to murder⁴⁹ or depraved indifference to human life.⁵⁰ Instructions that require the jury to distinguish homicidal mental states are a source of confusion and may render verdicts based more on a misapplication of complex law than on a proper assessment of evidence presented at trial.⁵¹ Intent to murder can be difficult to prove to a jury, particularly when the murderous action is spontaneous, quick and results from the defendant's intangible "mental impulses."⁵² If properly defined, a felony murder instruction

42. 32 N.Y.2d 157, 297 N.E.2d 85, 344 N.Y.S.2d 342 (1973).

43. *Id.* at 161, 297 N.E.2d at 87, 344 N.Y.S.2d at 346.

44. 125 Misc. 2d 843, 480 N.Y.S.2d 811 (Sup. Ct., Kings Co. 1984).

45. *Id.* at 847, 480 N.Y.S.2d at 814 (quoting in part *People v. Burton*, 6 Cal. 3d 375, 378, 491 P.2d 793, 801, 99 Cal. Rptr. 1, 9 (1971)).

46. *See Crump, supra* note 34, at 372.

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

48. *Id.*

49. *See id.*

50. *See id.*

51. *See Crump, supra* note 34, at 372.

52. *Id.*

relieves the jury from having to distinguish the nuances among intent, depraved indifference and criminal negligence.⁵³

Thus, the felony murder rule is beneficial in that "it clearly defines the offense, [and] simplifies the task of the judge and jury with respect to questions of law and fact."⁵⁴

B. Limitations and Justifications

Although a majority of states employs some form of the felony murder doctrine,⁵⁵ states have limited the rule in different ways.⁵⁶

1. Enumerated and Unenumerated Statutes

Generally, the felony murder rule operates in two different contexts. Some state felony murder statutes expressly list the felonies that may support a felony murder charge ("enumerated statutes"),⁵⁷

53. See *id.* "The mental state of intention to commit robbery, rape, or kidnapping is less ambiguous than the terms generally governing homicidal mental states." *Id.*

54. *Id.* at 375. The California Supreme Court in *People v. Burton* explained this rationale:

The Legislature has said in effect that this deterrent purpose [of the felony murder rule] outweighs the normal legislative policy of examining the individual state of mind of each person causing an unlawful killing to determine whether the killing was with or without malice, deliberate or accidental, and calibrating our treatment of the person accordingly. Once a person perpetrates or attempts to perpetrate one of the enumerated felonies, then in the judgment of the Legislature, he is no longer entitled to such fine judicial calibration, but will be deemed guilty of first degree murder for any homicide committed in the course thereof.

6 Cal. 3d 375, 388, 491 P.2d 793, 801-02, 99 Cal. Rptr. 1, 9-10 (1971).

55. See Miller, *supra* note 32, at 547; Adlerstein, *Felony-Murder in the New Criminal Codes*, 4 AM. J. CRIM. L. 249, 250 (1975-76); Siebold, *The Felony Murder Rule: In Search of a Viable Doctrine*, 23 CATH. LAW. 133, 134 (1978).

56. See Roth & Sundby, *The Felony-Murder Rule: A Doctrine At Constitutional Crossroads*, 70 CORNELL L. REV. 446 (1985).

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 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."

Id.

A vast majority of states maintain the felony murder rule, even in the face of widespread criticism. *Id.* Kentucky and Hawaii have abolished the rule by statute. HAW. REV. STAT. §§ 701-707 (1972); KY. REV. STAT. ANN. § 507.020 (Michie/Bobbs-Merrill 1990). Michigan has eliminated the rule by judicial decision. *People v. Aaron*, 409 Mich. 672, 299 N.W.2d 304 (1980).

57. See N.Y. PENAL LAW § 125.25(3) (McKinney 1987) (lists predicate offenses, such as rape in the first degree, robbery and kidnapping which support a felony murder charge but omits child abuse from its list of underlying felonies). Florida considers ag-

while other states use felony murder schemes which provide that *any* felony will suffice to support a felony murder conviction ("unenumerated statutes").⁵⁸ Although the felony murder rule originally applied to "any felony,"⁵⁹ the majority of states that have a felony murder rule implement it by enumerated statute.⁶⁰ New York is one such state.⁶¹ The 1967 Penal Law limited the application of the felony murder rule to nine serious and violent felonies. The underlying rationale of including certain crimes as predicates to felony murder is summarized as follows:

[w]hat the enumerated felonies always seem to have in common is the element of danger or violence. By holding a felony-murderer strictly accountable, even though the homicide is unintended, the law is attempting to protect innocent lives — victims, law enforcement officers, bystanders. The law is not attempting merely to deter the commission of dangerous or violent felonies; presumably, the punishment authorized by law for such felonies is sufficiently severe to accomplish that purpose. But rather, the law is attempting to deter the commission of such felonies in a dangerous or violent way.⁶²

gravated child abuse a specific underlying felony that supports a charge of first degree felony murder. A charge of felony murder may be brought against one who either a) commits aggravated battery on a child; b) willfully tortures a child; c) maliciously punishes a child; or d) willfully and unlawfully cages a child. FLA. STAT. ANN. §§ 782.04(2)(h), 827.03 (West 1989 & Supp. 1990).

Even prior to Florida's 1989 addition of aggravated child abuse to its list of underlying felonies, the Florida courts had consistently held that fatal child abuse did not merge with the homicide and thus may serve as an underlying felony for felony murder. *See* Mahaun v. State, 377 So. 2d 1158 (Fla. 1979); *Mapps v. State*, 520 So. 2d 92 (Fla. Dist. Ct. App. 1988). In *Mapps*, the court upheld a felony murder conviction predicated on aggravated child abuse. In *Mapps*, the defendant was convicted of killing his ten-month old child by throwing, shaking, and striking the child, causing a fractured skull. 520 So. 2d at 94.

58. *See* CAL. PENAL CODE §§ 189, 273d (West 1988); GA. CODE ANN. § 16-5-1(c) (1988); KAN. STAT. ANN. § 21-3401 (1988). Moreover, several states have first-degree murder statutes and lesser included offenses encompassing "all other murder." In such a statute, it is possible that unlisted felonies will be held to suffice for felony murder of that lesser degree. *See* W. LAFAVE & A. SCOTT, *HORNBOOK ON CRIMINAL LAW* 625 (2d ed. 1986).

59. *See* McQuillan, *Felony Murder and the Misdemeanor of Attempted Escape: A Legislative Error in Search of Correction*, 15 *FORDHAM URBAN L.J.* 821 (1986-87) [hereinafter McQuillan].

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

61. *Id.* *See supra* note 7 and accompanying text.

62. *People ex rel. Culhane v. Sullivan*, 139 A.D.2d 315, 319, 531 N.Y.S.2d 287, 289 (2d Dep't 1988).

2. *Inherently Dangerous to Human Life*

Other limitations have been imposed on the felony murder doctrine, applicable to both enumerated statutes and unenumerated statutes, to prevent abuse by the prosecution.⁶³ In *People v. Williams*,⁶⁴ the California Supreme Court discussed the inherently dangerous to human life limitation:⁶⁵

[the felony murder rule] has little relevance to a felony which is not inherently dangerous. If the felony is not inherently dangerous it is highly improbable that the potential felon will be deterred; he will not anticipate that any injury or death might arise solely from the fact that he will commit the felony.⁶⁶

In determining whether a felony is inherently dangerous, a court must view the felony in the abstract. This means that the court must not look to the specific facts of the underlying act in assessing dangerousness, but rather "to the genus of crimes known as felonies and determine whether the [commission of the act] by one who has been convicted of *any crime within that genus* is an act inherently dangerous to human life which, as such, justifies the extreme consequence (*i.e.*, imputed malice) which the felony-murder doctrine demands."⁶⁷

This analysis is necessary because every case where the rule might potentially be applied involves a killing.⁶⁸ If a court examines the particular facts of the case prior to establishing whether the underlying felony is inherently dangerous, the court might conclude that it is inherently dangerous simply because the victim died.⁶⁹

Thus, the primary element of the underlying offense must first be reviewed. Then the court determines "whether the felony, taken in the abstract, is inherently dangerous to human life, or whether it possibly could be committed without creating such peril."⁷⁰ Deterrence is the major rationale for the felony murder rule; therefore, application of the rule should not include a felony that does not comport

63. See Comment, *supra* note 23, at 250; Stewart, *supra* note 33, at 1036.

64. 63 Cal. 2d 452, 406 P.2d 647, 47 Cal. Rptr. 7 (1965) (quoting 2 WHARTON, CRIMINAL LAW § 145 (14th ed. 1979)).

65. Stewart, *supra* note 33, at 1036. See *infra* notes 64-65 and accompanying text.

66. 63 Cal. 2d 452, 457-58 n.4, 406 P.2d at 650 n.4, 47 Cal. Rptr. at 10 n.4 (1965) (citations omitted). See also *People v. Phillips*, 64 Cal. 2d 574, 582, 414 P.2d 353, 361, 51 Cal. Rptr. 225, 233 (1966).

67. *People v. Satchell*, 6 Cal. 3d 28, 40, 489 P.2d 1361, 1369, 98 Cal. Rptr. 33, 41 (1971).

68. See *People v. Burroughs*, 35 Cal. 3d 824, 830, 678 P.2d 894, 897, 201 Cal. Rptr. 319, 322 (1984).

69. *Id.* at 830, 678 P.2d at 897-98, 201 Cal. Rptr. at 322-23.

70. *Id.* at 830, 678 P.2d at 898, 201 Cal. Rptr. at 323; see *People v. Satchell*, 6 Cal. 3d 28, 39-40, 489 P.2d 1361, 1369, 98 Cal. Rptr. 33, 41 (1971).

with the rationale for the rule.⁷¹

3. *The Merger Doctrine*

In states with unenumerated felony murder statutes, courts can limit application of the felony murder rule by using the "merger doctrine."⁷² The merger doctrine treats certain felonious acts as integral parts of the resulting homicides, precluding their use as underlying offenses for felony murder prosecutions.⁷³ A felonious act is said to "merge" with a homicide when the predicate crime lacks an independent or collateral⁷⁴ purpose distinct from the homicide.⁷⁵ For example, assault⁷⁶ is a crime that is consistently held to merge with the homicide. Many homicides result from felonious assaults. When assault, however, is considered in conjunction with murder, it is difficult to differentiate between the intent to injure and the intent to kill.⁷⁷ If the felony murder rule were applicable to a simple assault that resulted in death, the prosecution would be able to obtain a murder conviction simply by proving the intent to cause injury.⁷⁸ This could eliminate entirely the category of manslaughter.⁷⁹ When the underlying felony is so closely related to the homicidal conduct,⁸⁰ a court, in applying the merger doctrine, will not impute the intent to kill from that felony.⁸¹

71. See *Williams*, 63 Cal. 2d 452, 457-58 n.4, 406 P.2d 647, 650 n.4, 47 Cal. Rptr. 7, 10 n.4 (1965).

Allowing a felony which is an integral part of the homicide to activate the felony murder rule will allow the jury to ignore the issue of malice in those cases — a majority of homicides — where there has been a felonious assault upon the victim. Since many homicides involve a felonious assault, this application of the rule provides the prosecution with an open option to proceed on a felony murder theory.

Comment, *supra* note 23, at 259.

72. See *Stewart*, *supra* note 33, at 1036.

73. See *Miller*, *supra* note 32, at 548.

74. "Collateral" is defined as:

Additional or auxiliary; supplementary; co-operating; accompanying as a secondary fact, or acting as a secondary agent. Related to, complementary; accompanying as a co-ordinate.

BLACK'S LAW DICTIONARY 261 (6th ed. 1990).

75. See *Stewart*, *supra* note 33, at 1036.

76. Assault in the third degree is defined as "[w]ith intent to cause physical injury to another person, he causes such injury to such person or to a third person." N.Y. PENAL LAW § 120.00 (McKinney 1987).

77. See *McQuillan*, *supra* note 59, at 860.

78. *Id.*

79. *Id.* See *People v. Miller*, 32 N.Y.2d 157, 159-60, 297 N.E.2d 85, 87-88, 344 N.Y.S.2d 342, 344-45 (1973); *McQuillan*, *supra* note 59, at 860 n.193, 873 n.261.

80. See *McQuillan*, *supra* note 59, at 860.

81. See *id.*

In states with enumerated statutes courts rarely apply the merger doctrine because the legislature has predetermined the crimes that will support a felony murder conviction.⁸² The merger doctrine is relevant, however, in the threshold determination of whether or not to include a crime in the enumerated statutes.⁸³ The decision to include a particular felony among the predicate felonies in an enumerated statute must be made so as not to render the felony murder rule a tool of abuse.⁸⁴ If a felony that is an integral part of the homicide is permitted to support a felony murder instruction, a jury would almost never have to address the issue of intent to murder.⁸⁵ Thus, for the very same reasons that it is said to merge with homicide in the context of unenumerated statutes, assault is uniformly excluded from enumerated statutes as well. In *People v. Ireland*,⁸⁶ the California Supreme Court held that:

to allow [assault to be used as an underlying felony in connection with] the felony-murder rule would effectively preclude the jury from considering the issue of malice aforethought in all cases wherein homicide has been committed as a result of a felonious assault — a category which includes the great majority of all homicides. This kind of bootstrapping finds support neither in logic nor in law. We therefore hold that a second degree felony-murder instruction may not properly be given when it is based upon a felony which is an integral part of the homicide and which the evidence produced by the prosecution shows to be an offense included in fact within the offense charged.⁸⁷

In *People v. Miller*,⁸⁸ the New York court held that “[s]ince a fortiori, every homicide, not excusable or justified, occurs during the commis-

82. See *People v. Miller*, 32 N.Y.2d 157, 297 N.E.2d 85, 344 N.Y.S.2d 342 (1973). Indeed, the court refused to extend the merger doctrine where there was a burglary based on intent to assault, because the doctrine was developed to remedy a fundamental defect in the old felony-murder statute (N.Y. PENAL LAW § 1044 (Consol. 1909)). Under that statute, any felony, including assault, could be the predicate for a felony murder. Since every homicide occurs during the commission of assault, every homicide would constitute a felony murder. This defect was remedied by the Legislature in 1965 by including in the revised Penal Law a list of specified felonies having a basis for felony murder. The legislative purpose for the 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 159-60, 297 N.E.2d at 87-88, 344 N.Y.S.2d at 345 (quoting N.Y. PENAL LAW § 125.25 (McKinney 1975)).

83. See *Miller*, *supra* note 32, at 548.

84. See Comment, *supra* note 23, at 259.

85. *Id.* See *People v. Ireland*, 70 Cal. 2d 522, 539, 450 P.2d 580, 590, 75 Cal. Rptr. 188, 198 (1969).

86. 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969).

87. *Id.* at 539, 450 P.2d at 590, 75 Cal. Rptr. at 198.

88. 32 N.Y.2d 157, 297 N.E.2d 85, 344 N.Y.S.2d 342 (1973).

sion of assault, every homicide would constitute a felony murder."⁸⁹

III. Child Abuse as an Underlying Felony in New York

A. Current Problems Prosecuting Fatal Child Abuse and an Aggravated Child Abuse Proposal

Florida's Penal Law defines "aggravated child abuse" as a felony in the second degree;⁹⁰ "child abuse" as a felony in the third degree or a misdemeanor in the first degree;⁹¹ "negligent treatment of children" as a misdemeanor in the second degree;⁹² and "persistent nonsupport" as a misdemeanor in the first degree.⁹³

Florida's legislature has apparently distinguished the wide variety of child abuse according to degrees of maliciousness and negligence, activeness and passiveness, and violence and non-violence. Willful

89. *Id.* at 160, 297 N.E.2d at 88, 344 N.Y.S.2d at 345. In *People v. Moran*, 246 N.Y. 100 (1927), the court held that the felonious assault on a police officer was not independent of the homicide but was the homicide itself. The court stated that "[t]he felony that eliminates the quality of the intent must be one that is independent of the homicide and of the assault merged therein, as, e.g., robbery or larceny or burglary or rape." *Id.* at 102.

90. See FLA. STAT. ANN. § 827.03 (West 1990) which defines "aggravated child abuse" as:

one or more acts committed by a person who:

- (a) Commits aggravated battery on a child;
- (b) Willfully tortures a child;
- (c) Maliciously punishes a child; or
- (d) Willfully and unlawfully cages a child.

(2) A person who commits aggravated child abuse is guilty of a felony of the second degree

91. *Id.* Florida defines "child abuse" as:

(1) Whoever, willfully or by culpable negligence, deprives a child of, or allows a child to be deprived of, necessary food, clothing, shelter, or medical treatment, or who, knowingly or by culpable negligence, inflicts or permits the infliction of physical or mental injury to the child, and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to such child, shall be guilty of a felony of the third degree

(2) Whoever, willfully or by culpable negligence, deprives a child of, or allows a child to be deprived of, necessary food, clothing, shelter, or medical treatment, or who, knowingly or by culpable negligence, inflicts or permits the infliction of physical or mental injury to the child, shall be guilty of a misdemeanor of the first degree

FLA. STAT. ANN. § 827.04 (West 1990).

92. *Id.* § 827.05 defines "negligent treatment of children" as:

Whoever, though financially able, negligently deprives a child of, or allows a child to be deprived of, necessary food, clothing . . . or permits a child to live in an environment, when such deprivation or environment causes the child's physical or emotional health to be significantly impaired or to be in danger of being significantly impaired shall be guilty of a misdemeanor of the second degree.

93. *Id.* § 827.06 defines one guilty of "persistent nonsupport" as: "[a]ny person who, after notice, fails to provide support which he is able to provide to children . . . shall be guilty of a misdemeanor of the first degree. . . ."

torture of a child is a felony, whereas willful or negligent deprivation of food, shelter, clothing or medical treatment is a misdemeanor. Further, in Florida, aggravated child abuse serves as an underlying felony in its felony murder statute. In *Mapps v. State*,⁹⁴ the defendant's throwing, shaking, and striking caused the death of a ten-month old child. The Florida court held that "[i]t is obvious that our legislature did not intend that the felonies specified in the felony-murder statute merge with the homicide to prevent conviction of the more serious charge of first-degree murder."⁹⁵

By contrast, New York's one child abuse statute includes without distinction, both active and passive conduct, and violent and non-violent conduct.⁹⁶ Moreover, section 260.10 characterizes all such conduct as "endangering the welfare of a child," punishable only as a misdemeanor.⁹⁷ A statute such as New York's "Endangering the welfare of a child," which encompasses every type of child abuse, can be vague and indefinite.⁹⁸ For example, in *People v. Villacis*,⁹⁹ the court held that Penal Law section 260.10(1) "is vague in describing prohibited conduct."¹⁰⁰ That section makes a person guilty of endangering the welfare of a child when he/she knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child. The court emphasized that the statute covers a wide range of potential acts, and its vagueness as to the prohibited conduct allows arbitrary or discriminatory police enforcement.¹⁰¹ In holding the statute unconstitutional, the court stated that "Penal Law section 260.10(1) is not sufficiently definite in that it fails to give a reasonable person subject to it, notice of the nature of what conduct is prohibited and what conduct is required of him or her."¹⁰²

Section 260.10(1) was *not* originally intended to protect children from violent physical abuse in their homes. The legislative history indicates that the intent of the 1970 Amendment to Penal Law section 260.10(1) was to aid in the prosecution of those who exploit young people, particularly female runaways.¹⁰³ Because physical violence and torture of children were not subject to wide publicity, it is under-

94. 520 So. 2d 92 (Fla. Dist. Ct. App. 1988).

95. *Mapps*, 520 So. 2d at 93.

96. See N.Y. PENAL LAW § 260.10(1) (McKinney 1989).

97. *Id.* at § 260.10(2) (McKinney 1989).

98. See *People v. Villacis*, 143 Misc. 2d 568, 541 N.Y.S.2d 178 (Sup. Ct., Kings Co. 1989).

99. 143 Misc. 2d 568, 541 N.Y.S.2d 178 (Sup. Ct., Kings Co. 1989).

100. *Id.* at 572, 541 N.Y.S.2d at 180.

101. *Id.*

102. *Id.* at 572, 541 N.Y.S.2d at 181.

103. See NEW YORK STATE LEGISLATIVE ANNUAL, ch. 389 (1970). In recent years,

standable that the legislature drafted the section, "Endangering the welfare of a child," as it did. Now that violent crimes against children have become widely publicized, however, the legislature must respond by drafting a new statute specifically designed to protect children from repeated in-home physical abuse and torture.

Specifically, the legislature should adopt a more carefully and specifically worded statute that addresses today's concerns. And, the penal sanctions must be more severe for active child abuse that is likely to result in death. This Note proposes the adoption of the following statute, which makes the most violent and dangerous acts of child abuse felonies:

A person is guilty of "Aggravated child abuse" when such person:

- (a) commits a pattern of aggravated battery upon a child;
- (b) intentionally tortures a child; or
- (c) maliciously punishes or maliciously disciplines a child.

A person who subjects a child to such cruel maltreatment, including but not limited to, severe bruising, lacerations, fractured bones, burns, internal injuries or any injury constituting great bodily harm, is guilty of a felony in the first degree.¹⁰⁴

B. Merger Doctrine Should Not Prevent the New York Legislature from Amending the Felony Murder List to Include Child Abuse

1. Child abuse is analogous to existing predicate felonies.

The merger doctrine is rarely applied by courts in states with enumerated felony murder statutes since those legislatures have predetermined which crimes will serve as felony murder predicates.¹⁰⁵ Therefore, once a legislature enumerates a particular crime on its felony murder list, a court in that state will rarely consider whether such a crime merged with the homicide.¹⁰⁶ Although New York is a state with an enumerated felony statute, the merger doctrine should not preclude child abuse from being added to the list of predicate felonies. Child abuse should be included in New York's felony murder statute because of its close analogy to existing predicate felonies, particularly

New York City officials have found that adults exploit and victimize young visitors. Such conduct impairs the children's physical and moral welfare.

104. See WIS. STAT. § 940.201 (1985-86).

105. See *supra* note 89 and accompanying text.

106. See *supra* note 89 and accompanying text.

rape¹⁰⁷ and robbery.¹⁰⁸ One common theme is the inherent dangerousness involved with each of the crimes.¹⁰⁹ In *People v. Benson*,¹¹⁰ the court stated that the New York State Legislature had clearly determined that only felonies involving violence or substantial risk of serious injury or death should provide a basis for felony murder.¹¹¹

Like robbery and rape, some forms of child abuse are inherently dangerous to human life. In particular, the very language of the proposed "aggravated child abuse" statute implies strongly that any violation of it would be per se inherently dangerous.¹¹² Aggravated battery, torture, or malicious punishment or malicious disciplining of a child cannot possibly be committed without creating such peril.¹¹³ Clearly, if a crime such as armed robbery is deemed "inherently dangerous" even though no injury or death need result from it, aggravated child abuse must logically be considered inherently dangerous as well. This is because injury *must* result to even trigger the statute.¹¹⁴

Since felony murder applies to rape in virtually every enumerated felony murder statute,¹¹⁵ it should apply as well to child abuse. The acts involved in rape, armed robbery, or child abuse involve a high probability that an accidental homicide will result.¹¹⁶ If the felony

107. See N.Y. PENAL LAW § 125.25(3) (McKinney 1975).

108. See *infra* note 119 and accompanying text.

109. See N.Y. PENAL LAW §§ 130.35, 125.25(3) (McKinney 1975). In *People v. Jackson*, 109 Misc. 2d 582, 440 N.Y.S.2d 814 (Crim. Ct., Kings Co. 1981), the court held that: [t]he history of New York's felony murder statute furnishes the court with the Legislature's thinking regarding certain violent crimes. . . . Under the current felony murder statute, subdivision 3 of section 125.25 of the Penal Law, the crime of murder in the second degree is narrowed by the enumeration of a list of specified felonies—all involving violence or a substantial risk of physical injury—as the only ones forming a basis for felony murder. Rape in the first degree is one of the enumerated felonies that the Legislature thought involved violence or a substantial risk of physical injury.

Id. at 584, 440 N.Y.S.2d at 816.

110. 125 Misc. 2d 843, 480 N.Y.S.2d 811 (Sup. Ct., Kings Co. 1984).

111. *Id.* at 849, 480 N.Y.S.2d at 815.

112. See *Burroughs*, 35 Cal. 3d at 828-29, 678 P.2d at 896-97, 201 Cal. Rptr. at 321-22; *Satchell*, 6 Cal. 3d at 36-40, 489 P.2d at 1367-69, 98 Cal. Rptr. at 39-41.

113. See *supra* notes 63-71 and accompanying text.

114. See *supra* note 7 and accompanying text.

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

116. See *Jackson*, 109 Misc. 2d 582, 440 N.Y.S.2d 814 (Crim. Ct., Kings Co. 1981). "Civil rights and women's rights groups have long been aware of the problems that women as potential victims of nonconsensual sex offenses faced in terms of proving the guilt of sex offenders." *Id.* at 585, 440 N.Y.S.2d at 816.

Thus, "in 1974, the legislature recognized some of these problems and eliminated the need to corroborate the complainant's testimony to prosecute and to convict a defendant of the crimes of forcible rape, sodomy, or sexual abuse." *Id.* at 585, 440 N.Y.S.2d at 816.

Child abuse is also such a violent crime involving substantial risk of physical injury,

murder rule is to be used at all, it should be used to deter and punish conduct highly likely to result in death.

2. *Child abuse has an independent felonious purpose distinct from homicide.*

Although the merger doctrine is applied most often when the underlying felony is a felonious assault,¹¹⁷ "the mere fact that an assault is part of the underlying felony is not necessarily determinative of the issue."¹¹⁸ Thus, one reason that the merger doctrine rarely applies to felonies like rape and robbery is because they are said to have independent felonious purposes. The independent felonious purpose of rape is non-consensual sexual intercourse, and the independent felonious purpose of armed robbery is forced acquisition of money or property belonging to another.¹¹⁹ Forcible rape and armed robbery each involve an assault with an intent to force the victim to act.¹²⁰ While each act involves a dangerous assaultive element, assault is not the ultimate goal.¹²¹

In states with enumerated statutes, rape and armed robbery invariably appear on the list of predicate felonies,¹²² or in states with unenumerated statutes, the two crimes generally support a felony murder instruction. The result is not so uniform when the crime at issue is child abuse. Among the states with unenumerated statutes,¹²³ some courts have applied the merger doctrine, and have refused to

whereby it is difficult for the prosecution to prove intent or depraved indifference. Thus, just as there was a specific need to lessen the prosecution's burden with regard to rape and sexual assault, there is a need for special protections with regard to defenseless children.

The court in *Jackson* held that "[d]espite amendments in the Penal Law that tend to lessen the burden that the prosecutor and the female victim of a sex crime need to sustain in order to convict, no legislature or law can lessen the physical pain, mental anguish, fear and longterm impairment to the physical and mental health of a rape victim." *Id.* at 586, 440 N.Y.S.2d at 817. Thus, the legal community has acknowledged the violent nature of the crime of rape by including rape on the felony murder statute. *Id.*

117. See *supra* notes 72-89 and accompanying text.

118. See *People v. Jackson*, 172 Cal. App. 3d 1005, 218 Cal. Rptr. 637, 641 (1st Dist. 1985) (official opinion withdrawn by order of the court, Jan. 23, 1986).

119. See Note, *supra* note 32, at 1067, 1070; Miller, *supra* note 32, at 546. The California Supreme Court, in *People v. Mattison*, indicated that the intent to injure short of death is an independent felonious design. 4 Cal. 3d 177, 481 P.2d 193, 93 Cal. Rptr. 185 (1971); see Comment, *supra* note 23, at 270.

120. *Id.*

121. See Note, *supra* note 32 and accompanying text.

122. See *supra* note 7 and accompanying text.

123. See CAL. PENAL CODE § 189 (West 1988); Child abuse is a basis in Kansas. KAN. STAT. ANN. § 21-3401 (1988 & Supp. 1989); GA. CODE ANN. § 16-5-1 (1988).

permit child abuse as a basis for felony murder.¹²⁴ The primary rationale is that child abuse lacks an independent felonious purpose apart from assault. Other jurisdictions, however, have discerned an independent felonious purpose, and therefore do not apply the merger doctrine.¹²⁵ The New York State Legislature has apparently also concluded that "endangering the welfare of a child" is not simple assault, as evidenced by its designation as a separate crime.¹²⁶ The Arkansas

124. See, e.g., *People v. Smith*, 35 Cal. 3d 798, 678 P.2d 886, 201 Cal. Rptr. 311 (1984).

125. See, e.g., *People v. Jackson*, 172 Cal. App. 3d 1005, 218 Cal. Rptr. 637 (1st Dist. 1985) (official opinion withdrawn by order of the court, Jan. 23, 1986); *People v. Northrop*, 132 Cal. App. 3d 1027, 182 Cal. Rptr. 197 (1st Dist. 1982).

126. See N.Y. PENAL LAW § 260.10 (McKinney 1988) (defining "endangering the welfare of a child"); N.Y. PENAL LAW § 120.10 (McKinney 1988) (defining "assault"). If the legislature declines to adopt the proposed "aggravated child abuse" statute, the fact that "endangering the welfare of a child" is a class A misdemeanor should not prevent the legislature from including it on the felony murder list.

New York's present felony murder statute refers to a person who "commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, aggravated sexual abuse, escape in the first degree, or escape in the second degree." N.Y. PENAL LAW § 125.25(3) (McKinney 1988). This provision contains thirty-six predicate crimes are in fact felonies, two such crimes are misdemeanors — attempted arson in the fourth degree and attempted escape in the second degree.

Thus, since New York's felony murder statute includes misdemeanors, there is no impediment to adding "endangering the welfare of a child" to the underlying felony list. Further, at the time of its enactment, 1967, such a crime was not widely publicized, perhaps a factor in designating it a misdemeanor.

Moreover, in *People ex rel. Culhane v. Sullivan*, the appellate court held that "[n]owhere in the felony murder statute of the revised laws of 1967 does it indicate that the predicate for murder under Penal Law section 125.25 must be a *felony*." 139 A.D.2d 315, 319, 531 N.Y.S.2d 287, 290 (2d Dep't 1988). The supreme court noted and considered the use of the phrase "felony murder" as a term of art only. See *People ex rel. Culhane v. Sullivan*, 133 Misc. 2d 181, 188, 506 N.Y.S.2d 620, 625 (Sup. Ct., Westchester Co. 1986).

The supreme court reasoned that its reading of the comments of the staff of the States Commission on Revision of the Penal Law and Criminal Code, justified the court's own belief that what both the Commission and the prior legislative history of the law dictates is that it was the *underlying conduct*, i.e., the substantive crime itself and not its classification as a misdemeanor and/or felony, which served both the original purpose of the doctrine and its continued viability in that such conduct of crime and their attempts were in and of themselves so potentially dangerous to human life that such constitutes a predicate basis for the charge of murder, should death occur. *Id.* at 189, 506 N.Y.S.2d at 626. The court continued that:

[i]n construing the provisions of the Penal Law, the legislature has stated that the enumerated crimes therein are such as to, inter alia, 'proscribe conduct which unjustifiably and inexcusably causes or threatens substantial harm to individual or public interests . . . to differentiate . . . and prescribe proportionate penalties therefor . . . [and to] insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences

Id. at 190, 506 N.Y.S.2d at 626.

Supreme Court, in *Midgett v. State*,¹²⁷ found that in cases where a child is abused over a period of time, the reasonable inference is that the defendant did not expect the death of the child, but expected "the child [to] live so that the abuse may be administered again and again."¹²⁸ Additionally, maliciously punishing or maliciously disciplining a child has an independent purpose, other than to simply injure the child. Punishment and chastisement are means used to bend a child's actions into conformity with a parent's idea of propriety, and to impress upon the child the virtue of obedience.¹²⁹

California courts have held that child abuse may serve as an underlying felony for felony murder.¹³⁰ The felony of inflicting cruel or inhuman corporal punishment on a child is described in Section 273d of the California Penal Code as: "[the] willful[] inflict[ion] upon any child [of] any cruel or inhuman corporal punishment or injury resulting in a traumatic condition . . ."¹³¹ According to the California Court of Appeals in *People v. Jackson*,¹³² "conduct violative of Penal Code section 273d is abstractly and by definition inherently dangerous and will support a second degree felony-murder instruction."¹³³ The court held that child abuse may have several independent purposes: to punish, to chastise, to force the child's conformity with the father's idea of propriety, and to impress upon the child the virtues of obedience and discipline.¹³⁴ While an intent such as chastisement is not in itself felonious, the "intent to chastise in a 'cruel or inhuman' (inherently dangerous) manner is felonious."¹³⁵

Even though abuse was included within the facts of the homicide, *Jackson* reasoned that a court still may determine whether the conduct that ultimately caused the homicide had an independent felonious purpose, rather than a single course of conduct with a single

127. 292 Ark. 278, 729 S.W.2d 410 (1987).

128. *Id.* at 285, 729 S.W.2d at 413.

129. See *infra* note 152 and accompanying text.

130. See, e.g., *People v. Jackson*, 172 Cal. App. 3d 1005, 218 Cal. Rptr. 637 (1st Dist. 1985) (official opinion withdrawn by order of the court, Jan. 23, 1986); *People v. Northrop*, 132 Cal. App. 3d 1027, 182 Cal. Rptr. 197 (1st Dist. 1982).

131. CAL. PENAL CODE § 273d (West 1988).

132. 172 Cal. App. 3d 1005, 218 Cal. Rptr. 637 (1st Dist. 1985) (official opinion withdrawn by order of the court, Jan. 23, 1986). In *Jackson*, the defendant appealed a conviction of second degree murder of his son on the ground that the trial court erred in instructing the jury on second degree felony murder. That decision was subsequently affirmed. Thereafter, the Supreme Court granted a hearing and retransferred the case to the Court of Appeals for reconsideration in light of its decision in *People v. Smith*, 35 Cal. 3d 798, 678 P.2d 886, 201 Cal. Rptr. 311 (1984).

133. 218 Cal. Rptr. at 640.

134. *Id.* at 641.

135. *Id.*

purpose to inflict physical harm.¹³⁶

The *Jackson* court, in holding that the defendant had such an independent purpose, relied heavily on the testimony of a psychiatrist,¹³⁷ who testified that the defendant's motive in inflicting pain and suffering on the child "was to make the child become aware, remember and give him respect and become an obedient child, for the purpose of making him into an obedient adult."¹³⁸ The court declared that the father had no intention of killing his son when he began to chastise him; he intended to discipline, not murder his child.¹³⁹ It is precisely such an unintentional but "imminently foreseeable" death that the felony murder rule was designed to prevent and punish.¹⁴⁰

In contrast, the Supreme Court of California, in *People v. Smith*,¹⁴¹ held that "[i]n cases in which the violation of section 273a, subdivision (1), is a direct assault on a child that results in death, . . . it is plain that the purpose of the child abuse was the 'very assault which resulted in death.'"¹⁴² Section 273a(1) provides: "[a]ny person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of such child to be injured, or willfully causes or permits such child to be placed in such situation that its person or health is endangered, is punishable by imprisonment in the county jail not exceeding 1 year . . ."¹⁴³

In *Smith*, the defendant mother not only permitted her live-in companion to beat her daughter, but she assisted him in striking, biting, and inflicting unjustifiable pain upon the two-year old girl, causing the child's death.¹⁴⁴ The *Smith* court held that the child abuse merged

136. *Id.*

137. *See id.*

138. *Id.*

139. *Id.* at 643.

140. *Id.* Similarly, the California Court of Appeals in *People v. Northrop* held that felony child abuse may be committed without an intent to inflict injuries, thus having a felonious design independent of the resulting homicide. 132 Cal. App. 3d 1027, 182 Cal. Rptr. 197 (1st Dist. 1982). In that case, the 22-month old victim died from organ damage and bone injuries resulting from the infliction of blunt force. *Id.* at 1032, 182 Cal. Rptr. at 199.

141. 35 Cal. 3d 798, 678 P.2d 886, 201 Cal. Rptr. 311 (1984)

142. *Id.* at 806, 678 P.2d at 891, 201 Cal. Rptr. at 316. Although *Jackson* distinguished *Smith* legally in that the latter was based upon § 273a(1), rather than upon § 273d, *Jackson* did not appear to limit its holding to such a legal distinction.

143. *See CAL. PENAL CODE* § 273a (West 1988).

144. *See Smith*, 35 Cal. 3d at 801, 678 P.2d at 887, 201 Cal. Rptr. at 312. The *Smith* court rejected *Northrop* because the former found no "independent design when the

into the homicide and could not constitute an underlying felony for felony murder.

In *Jackson*,¹⁴⁵ the defendant had appealed a conviction of second degree murder of his son on the ground that the trial court erred in instructing the jury on second degree felony murder.¹⁴⁶ That decision was subsequently affirmed.¹⁴⁷ Thereafter, the United States Supreme Court granted a hearing and remanded the case to the California Court of Appeals for reconsideration in light of its decision in *People v. Smith*.¹⁴⁸ The California Court of Appeals, conceding that the two cases were factually close, distinguished them on the legal issues presented: in *Smith*, the issue was the validity of a felony murder instruction based upon violation of Penal Code section 273a(1), whereas *Jackson* concerned the validity of such an instruction based upon violation of Penal Code section 273d.¹⁴⁹ The *Jackson* court determined that *Smith* did not control.¹⁵⁰ Although *Jackson* distinguished *Smith* statutorily, it did not appear to limit its holding to that distinction.¹⁵¹ The *Jackson* court found an independent motive of discipline; in *Smith* the Supreme Court did not find, on the facts, such an independent purpose.¹⁵²

crime of felony child abuse of the assaultive variety is willfully committed under such circumstances." *Smith*, 35 Cal. 3d at 808, 678 P.2d at 892, 201 Cal. Rptr. at 317. However, in concluding that child abuse under § 273d did not merge with the homicide, the California Court of Appeal in *Jackson*, agreed with *Northrop's* reasoning that child abuse may have an independent purpose, depending upon the circumstances of the case.

145. 172 Cal. App. 3d 1005, 218 Cal. Rptr 637 (1 Dist. 1985) (official opinion withdrawn by order of the court, Jan. 23, 1986).

146. 218 Cal. Rptr. at 638.

147. *Id.*

148. 35 Cal. 3d 798, 678 P.2d 886, 201 Cal. Rptr. 311 (1984).

149. *Jackson*, 218 Cal. Rptr. at 638.

150. 218 Cal. Rptr. at 641.

151. *Id.*

152. Factually, it was conceivable for the Court in *Smith* to have determined that the defendant also was bent upon discipline, however the Court declined to do so. *See Smith*, 35 Cal. 3d at 801, 678 P.2d at 887, 201 Cal. Rptr. at 312.

Thus, the purpose behind child abuse is often an independent or collateral one, separate from the intent to inflict great bodily harm. The intent to inflict bodily harm without causing death is not in itself a collateral purpose, and is therefore the reason for applying the merger doctrine to assault.

Similar to California and Kansas, Georgia's Official Criminal Code declares that "[a] person . . . commits the offense of murder when, in the commission of a felony he causes the death of another human being irrespective of malice." *See GA. CRIM. CODE* § 16-5-1(c) (Official version 1988). The Georgia courts have permitted child abuse to serve as the underlying felony for felony murder, thus rejecting the merger doctrine as applied to child abuse. *See Hendrick v. State*, 257 Ga. 514, 361 S.E.2d 169 (1987); *White v. State*, 251 Ga. 482, 306 S.E.2d 636 (1983). In *Hendrick*, the defendant was convicted of murdering his two-year old son, who was found with arm fractures, bruises, and head injuries which had occurred over a period of several weeks. *See Hendrick*, 257 Ga. at 515, 361

Smith held that the statute underlying the defendant's prosecution merged with the homicide. Section 273a of the California Criminal Code, however, criminalized a broad range of conduct, including active and passive, as well as violent and non-violent. This statute is strikingly similar to New York's Penal Law section 260.10, "endangering the welfare of a child." Since both statutes are overbroad it is understandable why the *Smith* Court applied the merger doctrine.

In contrast, because the proposed "aggravated child abuse" statute that this Note proposes involves only dangerous and active crimes against children, it is sufficiently narrow to distinguish it from the two statutes. Indeed, the proposed "aggravated child abuse" is more similar to section 273d of the California Criminal Code, which *Jackson* held did not merge with the homicide.

4. *Child Abuse is a unique crime.*

Child abuse is most often committed in the privacy of the abuser's home, where there are no witnesses other than the abuser himself. As a result, it is extremely difficult to prosecute child abuse cases, and even more difficult to obtain a murder conviction when death results.

Because child abuse is omitted from the list of underlying felonies for felony murder in New York, the most severe penalty realistically available to the government is manslaughter.¹⁵³ The recent *Steinberg* case illustrates this limitation.¹⁵⁴ The jury acquitted Joel Steinberg of the most serious charge of second degree murder based on depraved indifference to human life and convicted him of first degree manslaughter because several jurors doubted whether his failure to get medical aid constituted "depraved indifference."¹⁵⁵ The availability of felony murder in this case would have enabled the jury to avoid making difficult, subtle distinctions among depraved indifference to human life, intent to cause serious physical injury, and recklessly causing the death of another human being.¹⁵⁶ The jury would then have been able to convict Steinberg of second degree murder once it found that the defendant committed the abuse that resulted in the

S.E.2d at 170. The cause of death was blunt head trauma that damaged the brain. *Id.* In *White*, the child died of peritonitis caused by rough, rapid insertion into the child's rectum by some object at least two to three inches long with a sharp roughened point. See *White*, 306 S.E.2d at 638, 251 Ga. at 483. In both cases, the court allowed the child abuse to serve as the predicate for felony murder. See *Hendrick*, 257 Ga. at 515, 361 S.E.2d at 170; *White*, 251 Ga. at 485, 306 S.E.2d at 639.

153. See Reich, *supra* note 9 and accompanying text.

154. See *supra* note 1 and accompanying text.

155. See N.Y. Times, Jan. 31, 1989, at A1, col. 2.

156. See N.Y. Times, Jan. 31, 1989, at B5, col. 2.

death of the six-year old child.¹⁵⁷

IV. Conclusion

Applying the felony murder rule to child abuse will serve three very important functions. First, the rule provides greater clarity to the jury by removing from its consideration imprecise definitions of intent and depraved indifference.¹⁵⁸

Second, by severely punishing those who cause the death of children through some form of abuse, the rule will deter parents from beating, neglecting, or "playing" with their children in an inhumane manner.¹⁵⁹ This public policy was emphasized by the court in *Jackson*, which observed that:

[a] rational and well-ordered society through its judicial system should seek to protect its most fragile and vulnerable members by providing, as a deterrent to deaths occurring in the course of 'cruel or inhuman' attacks against them, a harsher penalty for killings resulting therefrom[.] [This] seems to us to be entirely congruent with fundamental principles of elementary justice and sound legislative policy.¹⁶⁰

Third, the felony murder rule satisfies society's sense of outrage¹⁶¹ over the killing of a child. Our laws must severely punish those who violate the sanctity of a child's life, in order to preserve the public's trust in and need for justice.¹⁶²

The felony murder rule will help to protect a child from an abusive situation in which there is a great probability of serious injury or death.¹⁶³ If the "aggravated child abuse" statute is not adopted to serve as an underlying felony to felony murder, then a parent who

157. See generally N.Y. PENAL LAW § 125.25(3) (McKinney 1988). N.Y. Times, Jan. 31, 1989, at B5, col. 2. Professor Stephen Gillers, New York University School of Law, expressed the feelings of many when he said, referring to Joel Steinberg, "I think he got away with murder." Daily News, Jan. 31, 1989, at 22, Col. 1.

158. See Crump, *supra* note 34, at 382.

159. See *People v. Jackson*, 172 Cal. App. 3d 1005, 218 Cal. Rptr. 637, 641 (1st Dist. 1985) (official opinion withdrawn by order of the court, Jan. 23, 1986).

160. 218 Cal. Rptr. at 642 n.2. The court in *Jackson* said:
[w]e are painfully aware of the fact that in the area of child abuse greater deterrence is sorely needed. Statistics from the State of California reveal that in 1981, 28,579 cases of physical abuse were reported statewide, of which 79 resulted in fatalities. The moral cost of these terrifying statistics is incalculable.
218 Cal. Rptr. at 642 n.2.

161. 218 Cal. Rptr. at 642 n.2. See *supra* note 5. "Outrage" is defined as: "A grave injury; injurious violence." BLACK'S LAW DICTIONARY 1102 (6th ed. 1990).

162. See generally *People v. Jackson*, 172 Cal. App. 3d 1005, 218 Cal. Rptr. 637 (1st Dist. 1985) (official opinion withdrawn by order of the court, Jan. 23, 1986).

163. See *People v. Jaramillo*, 98 Cal. App. 3d 830, 159 Cal. Rptr. 771 (2d Dist. 1979).

beats a child to death may never be convicted of murder, which is the ultimate crime.¹⁶⁴

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164. See Reich, *supra* note 9.