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Capital Punishment and Crimes of Murder

Dorean M. Koenig*

“This was a worthless fellow: but Nihil Humanun, Alienum.”

Definitional distinctions in the substantive law of murder confront judges and juries every day. Unfortunately, these distinctions have little impact on the social control the criminal law seeks to accomplish. The two main branches of the substantive law of first degree murder, premeditated murder and felony murder, have developed so peculiarly that their current disparate standards of proof prompt questions concerning basic notions of fairness. Under the crime of premeditated murder, the state of mind with which the act is done is regarded as the defining characteristic upon which the degree of culpability is based. The physical act of killing is accorded secondary significance. Conversely, under felony murder, the actual act of killing during the commission of a felony is paramount, while the required mental state of the defendant in directly or indirectly causing the death may be satisfied with only a showing of an intent to commit some lesser crime. Yet,

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1. “Nothing human is foreign,” 2 C.F. Adams, THE WORKS OF JOHN ADAMS 239 (1850) (quoting John Adams, June 28, 1770). Upon being acquitted of a charge of rape at Worchester, the defendant stated: “God bless Mr. Adams; God bless his soul. I am not to be hanged and I don’t care what else they do to me.” Id.

2. See infra notes 35-56 and accompanying text.

3. See infra notes 57-86 and accompanying text.

4. Now inequality is in general the creature of positive law. . . . [I]nequalities resulting from the law must make sense. . . . The arbitrary though indispensable to many of law’s daily operations, is always suspect; it becomes unjust when it discriminates between indistinguishables. As human integers, men are indistinguishables. This natural fact imposes a limit on the classificatory discretion of positive law. The sense of justice does not tolerate juridic classes by which the integral status of man is violated. E. CAHN, THE SENSE OF INJUSTICE 14-15 (1949).

5. “Homicide, or the mere killing of one person by another, does not, of itself, constitute murder; . . . It is not, therefore, the act which constitutes the offense, or determines its character; but the quo animo, the disposition, or state of mind with which it is done.” Maher v. People, 10 Mich. 212, 217 (1862).

6. “If it happens during a robbery, it is murder in the first degree, and you therefore determine basically if a robbery was being committed, because if you decide it was, that carries you the whole distance.” Morris, The Felon’s Responsibility for the Lethal Acts of Others, 105 U. PA. L. REV. 50, 55 (1956) (quoting the directions of Judge Curtis Bok to the
both types of murder can result in the imposition of the death penalty.

The requirements for both premeditated and felony murder convictions are based upon archaic religious beliefs that have been, at once, exaggerated by notions of consciousness and neutralized by presumptions and other devices. As a result, one line of cases involving capital punishment for premeditated murder zealously protects and furthers subjectivist notions of consciousness and intentionality in jury instructions. In contrast, a second line of cases involving felony murder uses presumptive devices that do not discriminate between underlying offenses which should carry vastly different penalties.

This article will first examine the historical development of the crime of murder in English history. Next, the American development of degrees of murder as a method of limiting capital punishment and the development of a separate category of intentional murder will be discussed, including due process safeguards developed by the United States Supreme Court on presumptions of intent and burden of proof in wilful murder cases.

Lastly, this article will trace the separate development in the United States of the felony murder doctrine, including the absence of due process safeguards on presumptive devices. Recent United States Supreme Court cases addressing the problems of proportionality and fairness in felony murder cases, in light of the absence of such safeguards, will be discussed.

MURDER—A SEARCH FOR A DEFINITION

"Once we recognize that a definition is, strictly speaking, neither true nor false but rather a resolution to use language in a certain way, we are able to pass the only judgment that ever needs to be passed on a definition, a judgment of utility or inutility."

From the earliest documentation of English law, homicides were

jury in Commonwealth v. Wilson) [hereinafter cited as Morris].

In People v. Stamp, 2 Cal. App. 3d 203, 82 Cal. Rptr. 598 (1969), cert. denied, 400 U.S. 19 (1970), the court stated "a killing committed in either the perpetration of or an attempt to perpetrate robbery is murder of the first degree. This is true whether the killing is ... merely accidental or unintentional, and whether or not the killing is planned as a part of the commission of the robbery." 2 Cal. App. 3d at 209, 82 Cal. Rptr. at 602.

7. See infra notes 42-56 and accompanying text.
8. See infra notes 77-86 and accompanying text.
punishable by death. But generally all crimes, including homicide, on a first conviction could be atoned for by the payment of money. If the money were not paid, it was left to the family of the dead man to pursue the original course of slaying the slayer.

One of the earliest forms of punishment by payment of money was established by King Aethelbert in the Dooms, around 600 A.D. A tariff of a sum certain for acts of violence was imposed under this system. The purpose of the payment was to attempt to prevent a private blood feud by compelling the family of the victim to accept money payments as compensation for its loss. With some modification, the tariff system continued into the twelfth century. Throughout this period, there were no distinctions between civil and criminal law or between kinds of homicide.

Following the Norman conquest, differentiation in the crime of homicide began. The most serious type of homicide in England became the secret killing of a Norman. The term “murder” was used to describe only this secret killing. Glanville wrote at the end of the twelfth century that the “hundred” (township) was liable to a heavy fine called “Murdrum.” A presumption existed that a person found dead was a Norman who had been secretly killed. The presumption was rebutted only upon proof by the defendant that the person slain was born in England. Such proof relieved the “hundred” from having to pay the fine.

In addition to the fine imposed for “murder,” other monetary

11. “The damages to be paid to the family of the deceased, and the satisfaction to be made to the person whose peace had been broken by the homicide, are much more prominent, and seem to have been regarded as much more important, than what we should call the criminal consequences of the offence.” Id. at 23.
12. F. Maitland & F. Montague, A Sketch of English Legal History 19-20 (1915) [hereinafter cited as Maitland & Montague].
13. Id. at 6. “If one man strike another with the fist on the nose—three shillings.”
17. “Murdrum” is the Latin form of “morth.” The offense thus evolved from a private wrong to an offense against the state to be paid for by the community. Stephen, supra note 10, at 26, 35.
19. Id.
penalties were attached to homicide. For example, fines called "wite," "bot," and "wer" were to be paid, respectively, in part to the King, to the lord of the township, and to the victim's family. The "wer" varied according to the social status of the victim. The progressive complexity and severity of the penalty system, however, eventually toppled the entire scheme.

During the twelfth century, the moral blameworthiness of the wrongdoer charged with homicide was rarely taken into account during the determination of the wrongdoer's guilt or innocence. Only in the punishment phase did blameworthiness play a role.

But in the thirteenth century, the growing power of the church strongly influenced the law of murder, a term that by then had outgrown its early restriction to the unnatural death of a Norman. The Canonists divided the human personality into the two entities of body and soul and created in the criminal law a division between act and moral guilt. The moral guilt that made an act criminal in the thirteenth century was general mens rea, or general moral blameworthiness. During the ensuing years, concepts of mens rea in the context of lesser crimes than murder developed and were tailored into particularized kinds of intent, such as intent to steal in the crime of larceny and intent to commit a felony therein for the crime of burglary. But the crime of murder had not yet been broken down into definitional categories and the law did not yet recognize distinctions between accidental or justifiable homicide. The criminal law, then, was slower to respond to definitional distinctions in the crime of murder based on particularization of kinds of intent. But as will be seen, this early general focus on moral blameworthiness provided fertile ground for development of the felony murder doctrine where a person's involvement in a wrongful act is sufficient to make that person liable for any resulting death.

20. Id. at 23-24; Maitland & Montague, supra note 12, at 19-20. See also the Laws of King Aethelbert, id. at app. I.
22. Sayre, supra note 14, at 981-82.
23. Id. at 983-84.
25. Sayre, supra note 14, at 999-1002.
26. "[T]he mens rea or 'malice' necessary for the felony is in every instance different from the mens rea or 'malice aforethought' required for murder; but for certain killings the law will allow the latter to be conclusively proved from the former." Morris, supra note 6, at
The pardon of the King and the infamous benefit of clergy evolved during the fourteenth and fifteenth centuries. Rather than inquire into the defendant's mental state, the court forgave the defendant for the commission of murder merely if he could read a line in a book or repeat a verse of the Psalms from memory. In addition, the right of sanctuary allowed a murderer to seek refuge in a church, confess his crime, and leave the realm. Excessive pardons for heinous crimes, however, brought reform. By the early sixteenth century, the King's pardon and benefit of clergy were unavailable for crimes of malice prepensed. This exclusion was accomplished by a series of statutes using that term. Originally, the term was construed in a popular religious sense as a kind of wickedness of heart. In these crimes, the underlying motive, not immediate intent, was critical. Sudden killings such as those occurring in a tavern fight, did not constitute malice prepensed. This construction of the term changed, however. Malice aforethought, the anglicized form of malice prepensed, became shortened over time to "malice" and became a term of art "signifying neither 'malice' nor 'afrothought' in the popular sense."

Under the sixteenth century statutes, malice was presumed; once a death was shown to have been caused by the defendant, it was the defendant's burden to establish the circumstances of justification, excuse, or mitigation to prove the crime was not of malice prepensed, that is, motivated by a wicked heart. The inability of the defendant charged with a malice prepensed crime to invoke such pardons as the benefit of clergy, even though evidence of actual malice had not been introduced, was justified by Lambard, Coke, and Hale on grounds that malice was "implied" in the law in three situations: 1) where the killing was voluntarily committed without provocation; 2) where the victim was an officer or minister of justice; and 3) where the defendant killed his victim while intending to commit a theft or burglary. These situations of im-

60. Maitland & Montague, supra note 12, at 71-73.
27. Id. at 69-71.
30. Sayre, supra note 14, at 997.
33. M. Hale, Pleas of the Crown 455 n.1 (1847). Note that the first situation now has been changed by Mullaney v. Wilbur so that the ultimate burden of proof is on the prosecution. The second situation generally has fallen into disuse in the United States. The strong-
plied malice were later translated into the modern concepts of ac-
tual or implied intent to kill.  

The shifting meanings attached, historically, to the term *malice*
reflect the split between those people who currently demand proof
of conscious wrongdoing for a murder conviction and those who
would base their determination on a variety of objective criteria.

**PREMEDITATED MURDER**

Notions of specific intent such as those which developed after
the thirteenth century for non-homicidal crimes were not applied
to the crime of murder until the introduction of degrees of murder
in the United States.

Wilful murder and wanton act murder were not differentiated in
England. In the eighteenth century, John Adams, as defense attor-
ney for the British soldiers charged with the Boston Massacre,
opened his case with a quote from Beccaria's then recently pub-
lished *An Essay on Crimes and Punishments:*  

"If, by supporting
the rights of mankind, and of invincible truth, I shall contribute to
save from the agonies of death one unfortunate victim of tyranny,
or of ignorance equally fatal, his blessing in tears of transport will
be sufficient consolation to me for the contempt of all mankind."

Beccaria, who was greatly influenced by Montesquieu, advanced
the proposition that punishment be made more proportionate to
the crime. The effect of this proposition on the new colonies was
obvious. Justice William Bradford of the Pennsylvania Supreme
Court prepared a memorandum to the Governor of Pennsylvania
which proposed, for the first time, that the crime of murder be
divided into two degrees, only one of which would be punishable
by death. Bradford found that only "deliberate assassination" should be capitally punished. The substance of the memorandum
later became the bill in Pennsylvania that provided: "Resolved,
that all murder perpetrated by poison or by lying in wait, or by

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36. 2 C.F. Adams, *The Works of John Adams* 238 (1850) (quoting John Adams, June 28,
1770).
any kind of wilful premeditated killing . . . shall be deemed murder of the first degree." On the second reading, the bill was amended on motion from the floor to add felony murder provisions: "or which shall be committed in the perpetration of or attempt to perpetrate any arson, rape, robbery, or burglary." The amended bill was passed by the Pennsylvania Assembly in 1794 and became law. Subsequently, many states adopted this scheme, and even those that did not were influenced by it.

As a result of the Pennsylvania statute, the crimes to which capital punishment applied were narrowed substantially. Two problems emerged, however: 1) how to define the higher degree of wilful murder, and 2) whether to continue the recognition of the common law presumptions regarding implied malice in wilful murder cases. The attempt to define wilful murder spawned a hopeless profusion of language pertaining to mental state and culpability. In some states, the mens rea or guilty mind notions of specific intent found in common law larceny and burglary gradually became engrafted onto the capital crime of wilful murder. Justice Benja-

39. The provisions of this statute as originally adopted in 1794 are currently contained in 18 PA. CONS. STAT. ANN. § 2502 (Purdon 1973).
40. The statute now includes murders which occur in the attempt, commission, or flight from commission, of "robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary, or kidnapping." 18 PA. CONS. STAT. ANN. § 2502(a) (Purdon 1973).
41. See, e.g., the Oklahoma murder statute, OKLA. STAT. ANN. tit. 21, § 701.7 (West 1981), which reads:

A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention lawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

B. A person also commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, first degree burglary or first degree arson.

Six states do not divide murder into degrees: Georgia, Illinois, Kentucky, Maine, Mississippi and South Carolina.


The necessary corollary to the court's particularization of a specific intent in wilful murder for first degree was the recognition of a lesser kind of "wanton act" murder, or second degree murder. People v. Morrin, 31 Mich. App. 301, 187 N.W.2d 434 (1971). Second degree murder is not capitaly punished. The two degrees of murder are also differentiated by the amount of time needed to make the decision to kill and, in some states, the degree of calmness required for first degree murder. Cf. Joint Comm'n on Continuing Legal Educ. of the ALI & ABA, The Problem of Premeditation, in The Problem of Punishing Homicide 7-16
Cardozo said of this new effort of particularizing the *mens rea* of wilful murder:

> I think the students of the mind should make it clear to the lawmakers that the statute is framed along the lines of a defective and unreal psychology. If intent is deliberate and premeditated whenever there is choice, then in truth it is always deliberate and premeditated, since choice is involved in the hypothesis of the intent.

The more important development, however, occurred with the abolishment of the presumptions in cases decided first by state courts and later by the United States Supreme Court. In 1951, the Supreme Court found an intent requirement in a federal statute based upon a common law crime. The Court noted that "wrongdoing must be conscious to be criminal," and that crime came only from "concurrence of an evil-meaning mind with an evil-doing hand." Almost twenty years later another link in the movement away from presumptions in wilful murder cases was forged in *In Re Winship*.

With this background, the Court reviewed the Maine statute for wilful homicide in *Mullaney v. Wilbur*. The Maine statute had been earlier interpreted to mean that once the prosecution established a homicide as being both intentional and unlawful, malice was conclusively presumed unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation. In rejecting the placing of this burden on the defendant, the Court, relying on *Winship*, found that the due

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(1962).

For an example of where no degrees of murder exist, see Banks v. State, 85 Tex. Crim. 165, 211 S.W. 217 (1919).

44. B. Cardozo, *Law and Literature* 100 (1931).

45. It was only natural that the intent requirements found so essential in crimes less than murder would form the basis upon which to overturn the presumptive devices relating to wilful murder found at the common law.


47. *Id.* at 252.

48. *Id.* at 251.


50. *Id.* at 364.

process clause "requires the prosecution to prove beyond a reason-
able doubt the absence of the heat of passion on sudden provoca-
tion when the issue is properly presented in a homicide case."\textsuperscript{52}

The Court acknowledged that the holding in \textit{Mullaney} created
for the prosecution the difficult task of proving a negative: that the
crime was \textit{not} reduced to manslaughter.\textsuperscript{53} The \textit{Mullaney} articula-
tion of the prosecutor's burden of proof was reinforced by the Su-
preme Court in \textit{Sandstrom v. Montana},\textsuperscript{54} which struck down a jury
instruction stating: "The law presumes that a person intends the
ordinary consequences of his voluntary acts."\textsuperscript{55} In \textit{Sandstrom}, the
defendant had admitted killing the victim but had alleged that he
did so as a result of a personality disorder which kept him from
having the knowledge and purpose required for murder. The Court
found that the jury instruction conflicted with the presumption of
innocence and invaded the factfinding function in violation of the
due process clause.\textsuperscript{56}

As a result of these cases, the due process clauses of the fifth and
fourteenth amendments of the United States Constitution have ef-
fectively eliminated the concept of "implied malice" in wilful mur-
der cases. Now, presumptive devices in these cases can no longer
be used to bridge evidentiary problems of proof of intent, nor can
the burden of proof of mitigation be placed upon the defendant.

\textbf{Felony Murder}

While premeditated murder is characterized by its underlying
mental state, felony murder is marked by an extraordinary attenu-
ation between act and intent. The felony murder doctrine, in its
broadest sense, provides that a defendant commits felony murder
whenever a death is caused by his commission of or attempt to
commit specific crimes or any felony. Some states have limited by
various methods the extent of the felony-murder doctrine,\textsuperscript{57} while

\begin{footnotes}
\item 52. \textit{Id.} at 704.
\item 53. \textit{Id.} at 701. But the Court found the requirement to impose "no unique hardship on
the prosecution." \textit{Id.} at 702.
\item 54. 442 U.S. 510 (1979).
\item 55. \textit{Id.} at 513.
\item 56. \textit{Id.} at 524.
\item 57. Some states have limited the felony murder rule in the English tradition by requir-
ing that the felony be committed in a manner inherently dangerous to human life. \textit{Cf.}
\textit{People v. Aaron}, 409 Mich. 672, 299 N.W.2d 304 (1980). Some states have limited the harsh
application of the doctrine to situations where the killing is performed by the felon, his
accomplices, or an associate. \textit{Weick v. State}, 420 A.2d 159 (Del. 1980). Florida requires the
personal presence of the aider and abettor. \textit{Hite v. State}, 364 So. 2d 771 (Fla. 1978), \textit{cert.}
\end{footnotes}
others have allowed it to expand in an amorphous manner.\textsuperscript{58} Moreover, under some state felony murder statutes, the death penalty may be imposed.\textsuperscript{59}

\textbf{Historical Perspective}

The earliest descriptions of felony murder indicate that the doctrine was applied originally to a narrow range of crime. Bracton, writing about 200 years after the Norman Conquest, was one of the first to note that a "causal homicide" during an unlawful act was unlawful, but he did not label it as murder.\textsuperscript{60} It was Lambard, in 1610, who stated:

And therefore if a thief do kill a man whom he never saw before and whom he intended to rob only, it is murder in the judgment of law, which implyeth a former malicious disposition in him rather to kill the man than not to have his money from him.\textsuperscript{61}

In this hypothetical, Lambard may have been referring to a sudden intentional killing in the course of a robbery. The felony murder doctrine was broadened in 1628 by Coke in a manner that the early nineteenth century jurist Stephen found astonishing.\textsuperscript{62}


\textsuperscript{59} See infra notes 114-16 and accompanying text. See also Estelle v. Smith, 451 U.S. 454 (1981) (co-defendant shot and killed a storekeeper); Lockett v. Ohio, 438 U.S. 596 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976) (defendant, who was drunk, was struck in the face and threatened, went along with three others in a robbery, but remained in the car as a look-out); People v. Earl, 29 Cal. 3d 894, 105 Cal. Rptr. 831 (1973) (killed while shoplifting); Commonwealth v. Bolish, 391 Pa. 556, 138 A.2d 447 (1958), reh'g denied, 357 U.S. 931 (1958) (co-felon accidentally killed himself while perpetrating an arson).

\textsuperscript{60} 3 J. \textsc{Stephen}, A \textit{History of the Criminal Law of England} 32-33 (1883). Bracton classifies under the same heading homicide by a sword, homicide by a blow with a fist, homicide by a person provoked in the highest degree, and homicide by a robber. This concept predates the emergence of the distinction between murder and manslaughter. \textit{See 2 Pollack & Maitland, The History of English Law} 484 (2d ed. 1898).

\textsuperscript{61} \textsc{Stephen}, supra note 10, at 50-51.

\textsuperscript{62} Id. at 57.
asserted that if a homicide occurred, and "[i]f the act be unlawful it is murder." In support of his statement, Coke offered the following example:

As if A., meaning to steal a deer 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 the act (of stealing the deer) was unlawful, although A. had no intent to hurt the boy and knew not of him.

This unfortunate statement by Coke has been discredited by later historians as being based on a misinterpretation of either Bracton or earlier cases.

Following many years of limiting the rule, England eventually abolished its felony murder rule in 1957. In contrast, the felony murder doctrine in the United States has persisted. But even in the United States the doctrine has been criticized periodically throughout its existence.
At common law the list of felonies punishable under the felony murder rule was limited. Under modern statutory enactments, however, the rule has been extended so as to include any number of statutory crimes which were not felonies at common law. In addition, common law felonies were more narrowly defined than their modern counterparts. Burglary, for example, was the breaking and entering of the dwelling of another in the nighttime with intent to commit a felony.\(^6\) The modern statutory felony of burglary often does not require a breaking,\(^7\) includes businesses and other non-dwelling units,\(^8\) and usually includes daytime as well as nighttime trespasses.\(^9\)

Moreover, state legislatures have not with any uniformity placed limitations on the felonies that can be punished as first degree felony murder.\(^10\) The statutory scheme of at least one state includes the felony of extortion and the misdemeanor of petty larceny within its felony murder rule.\(^11\) Even more disconcerting than the kind of felonies that constitute felony murder in this state is the fact that this felony murder statute has been incorporated into a bill making such conduct punishable by death.\(^12\) Under the proposed statute, then, a person whose theft of a candy bar causes a person to have a heart attack could face the death penalty, regardless of whether the defendant is armed, or, indeed, whether he touches or injures the victim in any way. The net effect of this statutory proposal and other existing statutory schemes is a tre-

70. W. LaFave & A. Scott, Handbook on Criminal Law 710 n.23 (listing 22 jurisdictions that no longer require a breaking). See People v. Earl, 29 Cal. 3d 894, 105 Cal. Rptr. 831 (1973). In Earl, a shoplifter killed a guard while resisting arrest. The court held that this was first degree felony murder in the course of a burglary. The entry was held to be illegal because it was done with the intent to steal. The thief was guilty of burglary when he entered through the door. The death sentence was set aside.
71. A fence creating an enclosure was held to be a "structure" under a statute delineating all "structures" as coming within the scope of statutory breaking and entering. State v. Roadhs, 71 Wash. 2d 705, 430 P.2d 586 (1967).
mendous broadening in the application of the common law predecessor of the modern felony murder rule. 76

The strict liability of the felony murder doctrine has been extended to a form of vicarious strict liability. For example, cases have held a defendant guilty of felony murder when his co-defendant kills himself, 77 or is killed by a third party. 78 One felony murder case even involves a fireman who was killed while putting out an arsonist's fire. 79 Moreover, the felony murder doctrine has been extended beyond its common law underpinnings through the abolition of distinctions between principals in the first and second degree 80 and between an accessory before or at the fact and a principal. 81 There is intimation in some felony murder cases that an accessory after the fact, such as a person who hides a body, can be guilty as the principal. 82 With these modern modifications, then, all are made responsible for collateral crimes under the felony murder doctrine. 83

76. While riding on the bus, a black man scared a 57 year-old white man, who had a bad heart, by pleading with him for money for a fictitious eviction victim. The man was not physically touched by the black man. Less than five minutes later, the white man died. The black man was charged with first degree murder in the course of an extortion. See A Chance Encounter on the Bus: Why the Law Called it Murder, Detroit Free Press, June 2, 1974, at 1-D. Cf. People v. Morales, 49 Cal. 3d 134, 122 Cal. Rptr. 157 (1975); People v. Stamp, 2 Cal. App. 3d 203, 82 Cal. Rptr. 598 (1969), cert. denied, 400 U.S. 19 (1970).


79. State v. Glover, 330 Mo. 709, 50 S.W.2d 1049 (1932).

80. "A principal in the first degree is the immediate perpetrator of the crime while a principal in the second degree is one who did not commit the crime with his own hands but was present and abetting the principal." Perkins, supra note 69, at 656. For a general discussion, see Westerfield, supra note 57. See also Lanham, Accomplices, Principals and Causation, 12 Mell. U. L. Rev. 490 (1980).

81. An accessory before the fact differs from a principal in the second degree only in that the former is absent and the latter is present, either actually or constructively. See Perkins, supra note 69, at 658.

82. Leviness v. State, 247 S.W.2d 115 (Tex. Crim. App. 1952). "The acts of appellant in concealing the body and driving Goleman away from the scene alone would be sufficient to constitute him a principal to the murder, in endeavouring to secure the safety of his companion who committed such crime in his presence. See White v. State, Tex. Cr. App., 228 S.W.2d 165." Id. at 118.

83. In Thompson v. State, the defendant pleaded guilty to attempted escape by the use of a firearm, and the state proved a robbery in the course of the escape by some of the co-principals. "Since there is sufficient evidence showing that some of the principals had committed the robbery during the execution of the attempted jail escape, the evidence is sufficient to find the appellant, an admitted principal in the attempted escape, guilty of robbery." 514 S.W.2d 275, 276 (Tex. Crim. App. 1974). State v. Moore, 580 S.W.2d 747, 752 (Mo. 1979): "Whether the fatal act was done by the defendant, an accomplice, another victim or a bystander is, under the facts here, not controlling." See State v. Baker, 607 S.W.2d
With the removal of distinctions between principals in the first and second degrees in some felony murder statutes, the prosecutor must show only that the defendant was presently assisting with the commission of a crime in some way and that the crime resulted in the death of another person. Indeed, even if a principal is found incapable of committing the crime, this may not defeat the liability of an aider-abettor. Thus, a defendant, under the aider-abettor version of the felony murder rule, need not be armed or even present during the commission or attempted commission of a crime. The defendant, to be found guilty of a felony murder, need not have counseled another to commit a crime nor need the crime committed be inherently dangerous.

One final striking feature of the felony murder rule is that the only mens rea that a prosecutor must establish for a finding of guilt under a felony murder count is that the defendant intended to commit the underlying crime, usually a specified felony, and in the course of committing the crime someone died. Thus, the requisite mens rea need not include any homicidal intent or purpose.

The felony murder rule, then, has become one of vicarious liability for certain conduct. Yet the amorphous nature of the crime of

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In People v. Bowen, 12 Mich. App. 438, 162 N.W.2d 911 (1968), the court noted "all that is necessary is that the defendant undertook the robbery with the intent to commit a felony, not necessarily to commit murder." Id. at 440, 162 N.W.2d at 912. See also Perkins, supra note 69, at 37: "Even without an intent to kill or injure, or an act done in wanton and willful disregard of the obvious likelihood of causing such harm, homicide is murder if it falls within the scope of the felony murder rule."
"[I]t is no defense that those who did not actually participate in the killing did not intend that life should be taken in the perpetration of the robbery, or had forbidden their associate to kill, or regretted that it has been done." People v. Cabaltero, 31 Cal. 2d 52, 61, 87 P.2d 364, 369 (1939).
One court even held a defendant guilty of felony murder when he accidentally killed his co-defendant. State v. Blackman, 587 S.W.2d 292 (Mo. Ct. App. 1979).
felony murder is problematic not because many felony murder defendants may not be guilty of the most heinous crimes, but rather because the prosecutor, in establishing a case in which the death penalty may be applied, does not have to prove very much.

**ENMUND v. FLORIDA**

The extension of the death penalty to one who does not intend to kill is a harsh doctrine especially when the defendant is not indirectly involved as a perpetrator of the underlying felony. In *Enmund v. Florida*, the latest felony murder case decided by the Supreme Court, the Court was presented with the question of whether a person participating in a crime resulting in death could be subjected to the death penalty following a conviction based solely on a theory of vicarious liability.

**Background**

On April 1, 1975, an elderly couple was murdered during the course of a robbery at their home in Florida. Witnesses observed a man inside a parked car outside the couple's home on the morning of the murder. The man inside the car was Earl Enmund. Enmund and one of his co-defendants were tried together for the felony and the murders. Enmund was convicted of two counts of first degree murder and one count of robbery. After returning Enmund's verdict of guilt on all counts, the jury recommended the death penalty for Enmund and the co-defendant with whom he was tried. The sentence of death was imposed upon Enmund by the trial court. The trial court found no mitigating circumstances in Enmund's case to outweigh the aggravating factors.

On appeal to the Florida Supreme Court, Enmund argued in part that the Florida law in existence at the time of the crimes

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87. 102 S. Ct. 3368 (1982).
88. See infra notes 99-101 and accompanying text.
89. 399 So. 2d 1362, 1364, 1370 (Fla. 1981).
90. Id. at 1363. Both were convicted of first-degree murder and robbery.
91. Id.
92. Id.
93. The findings of the trial judge are set out at 399 So. 2d at 1371-73.
94. (1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of sev-
made his participation punishable at most as second degree murder, for which the death penalty could not be imposed. The court found, instead, that the Florida law of second degree murder, under these facts, applied only if the defendant was not personally present at the scene of the crime:

[A]n individual who personally kills another during the perpetration or attempt to perpetrate one of the enumerated felonies is guilty of first degree murder. The felon's liability for first degree murder extends to all of his co-felons who are personally present. As perpetrators of the underlying felony, they are principals in the homicide. In Florida, as in the majority of jurisdictions, the felony murder rule and the law of principals combine to make a felon generally responsible for the lethal acts of his co-felon. Only if the felon is an accessory before the fact and not personally present does liability attach under the second degree murder provision.

...
In response, Enmund argued that he was not personally present. The court responded:

There was no direct evidence at trial that Earl Enmund was present at the back door of the Kersey home when the plan to rob the elderly couple led to their being murdered. . . . [The] only evidence of the degree of his participation is the jury's likely inference that he was the person in the car by the side of the road near the scene of the crimes. The jury could have concluded that he was there, a few hundred feet away, waiting to help the robbers escape with the Kersey's money.

In finding this evidence sufficient, the court relied on a theory of "constructive presence:"

[T]he presence of the aider and abetter need not have been actual, but it is sufficient if he was constructively present, provided the aider, pursuant to a previous understanding, is sufficiently near and so situated as to abet or encourage, or to render assistance to, the actual perpetrator in committing the felonious act or in escaping after its commission.

Thus, the evidence was sufficient, according to the Florida Supreme Court, to find that Enmund was a principal in the second degree. Such a finding supported a verdict of murder in the first degree based on the felony murder portion of the Florida murder statute. The Florida Supreme Court affirmed both the finding of guilt and the sentences imposed. In addition, Enmund argued that because the evidence did not establish that he intended to take a life the death sentence was impermissible under the eighth amendment's ban on cruel and unusual punishment. The Florida Supreme Court rejected all arguments.

The United States Supreme Court granted certiorari. In his brief, Enmund argued among other points, that "in light of [his] lack of personal responsibility for homicide, his sentence of death is unconstitutionally excessive and disproportionate under the

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100. Id. at 1368.  
101. Id. at 1370.  
102. Id. at 1370 (quoting Pope v. State, 84 Fla. 428, 446, 94 So. 865, 871 (1922)).  
103. Id.  
104. Id.  
105. Id. at 1373.  
106. Id. at 1371.  
107. Id. at 1373.  
Eighth and Fourteenth Amendments.” The State of Florida argued that “absent a showing of irrationality, state legislatures have always been accorded great deference in fixing the intent elements of crimes,” and that rules “on intent should not be constitutionalized.”

Supreme Court Oral Argument

At oral argument before the Supreme Court, the Justices’ questions focused on Coker v. Georgia and Lockett v. Ohio.

In Coker, the Court ruled that the death penalty was disproportionate to the crime of rape of an adult woman. Coker found that the eighth amendment bars not only those punishments that are “barbaric” but also those that are “excessive” in relation to the crime committed. A punishment was said to be “excessive” if it: “(1) makes no measureable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground.”

Before the death penalty can be imposed, murder statutes typically require that the defendant be shown to have purposefully killed the victim. This is the legislative judgment. In felony murder situations, however, the intent requirement can be vicariously supplied. In Lockett v. Ohio, the jury was charged with the presumption that one who: “purposely aids, helps, associates himself/herself with another for the purpose of committing a crime is regarded as if he or she were the principal offender and is just as guilty as if the person performed every act constituting the offense. . . .” The lower court in Lockett further instructed that as to intent:

A person engaged in a common design with others to rob by force and violence an individual or individuals of their property is presumed to acquiesce in whatever may reasonably be necessary to accomplish the object of their enterprise. . . . If the conspired robbery and the manner of its accomplishment would be reasona-
bly likely to produce death, each plotter is equally guilty with the principal offender as an aider and abettor in the homicide. . . . An intent to kill by an aider and abettor may be found to exist beyond a reasonable doubt under such circumstances.110

In *Lockett*, the defendant, a twenty-one year-old black woman, upon conviction for aggravated murder was to receive a mandatory death sentence unless certain statutorily prescribed mitigating circumstances were presented. The Supreme Court reversed the defendant's subsequent death sentence on grounds that mitigating circumstances could not be limited to those listed in the Ohio statute.117

Justice Blackmun, writing a separate concurrence in *Lockett*,118 found the application of the Ohio aggravated murder statute "particularly harsh" in its coverage of even accidental killings in the course of a robbery. While doubting that a "bright-line" rule of disproportionality in sentencing could be drawn, Justice Blackmun nevertheless stated: "It might be that to inflict the death penalty in some situations would skirt the limits of the Eighth Amendment proscription, incorporated in the Fourteenth Amendment, against gross disproportionality, . . ."119 Justice Blackmun concluded, however, that the states will be sufficiently limited by requiring the consideration of participation by a non-triggerman in assessing "punishment for actions less immediately connected to the deliberate taking of human life."120

In his concurrence in the judgment of the Court, Justice Marshall noted that the principle of proportionality was violated in that the Ohio death penalty statute made no distinction between "a willful and malicious murderer and an accomplice to an armed robbery in which a killing unintentionally occurs."121

Justice White found that it "violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim."122 He noted

116. *Id.*
117. *Id.* at 608.
118. *Id.* at 613.
119. *Id.* at 613-14.
120. *Id.* at 616.
121. *Id.* at 620. As stated by Westerfield, *supra* note 57, at 166, "The answer to the problem is to revise the law of accomplice liability so that it reflects realistically the degree of culpability and wrongdoing of each party to a crime, imposing penalties appropriate to each of those degrees."
122. 438 U.S. at 624.
that out of 363 reported executions for homicide since 1954, only eight clearly involved individuals who did not personally commit the murder, and that at least some of those did include defendants "who intended to cause the death of the victim." Justice White observed that the rarity of capital punishment for such offenders invoked the rule in *Furman v. Georgia,* that unfettered discretion in the imposition of the death penalty rendered the penalty cruel and unusual punishment. In the *Lockett* context, Justice White concluded, "[t]he value of capital punishment as a deterrent to those lacking a purpose to kill is extremely attenuated."  

**Supreme Court Decision**

On July 2, 1982, the United States Supreme Court reversed Enmund's death sentence as violative of the eighth and fourteenth amendments. In a five to four opinion delivered by Justice White, the Court concluded that the eighth amendment does not permit

imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed.

Thus, *Enmund* represents a clear rejection of the death penalty for accomplice liability in felony murder cases. The rationale of the decision, however, goes much deeper and may be viewed as a leap toward an abridgement between wilful murder and felony murder in capital cases.

In reaching this decision, the Court first surveys the death penalty statutes of all thirty-six states that permit the death penalty, the sentencing decisions of capital juries, and the nation's death row population before finding a societal rejection of the death penalty for accomplice liability in felony murder. For the first time, the Court rejects the notion that the death penalty can be imposed for any involvement in a felony in which someone is killed. Regardless of the state legislative judgment, the Court finds that eighth amendment limitations require an inquiry into the underlying sub-

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123. *Id.* at 624-25.
125. 438 U.S. at 625.
127. *Id.* at 3376-77.
stantive offense, even for felony murder. In Coker v. Georgia, the death penalty, “unique in its severity and irrevocability,” was held excessive for the crime of rape. That rationale is now extended to felony murder cases with the Court stating that the death penalty “is an excessive penalty for the robber who, as such, does not take human life.”

The recent decision clearly abolishes vicarious liability for felony murder. Less clear is the effect of the decision on accidental homicides occurring in the course of a felony where the defendant is the perpetrator of the accidental death. At one point, the Court states that “[i]t is fundamental that ‘causing harm intentionally must be punished more severely than causing the same harm unintentionally.’” The Court concludes that the death penalty will be an unconstitutional punishment unless it measurably contributes to the goal of either retribution or deterrence of capital crimes by prospective offenders.

In rejecting the transfer of culpability from robbery to murder for one who aids and abets a robbery in the course of which a murder is committed, the Court states as to deterrence:

We are quite unconvinced, however, that the threat that the death penalty will be imposed for murder will measurably deter one who does not kill and has no intention or purpose that life will be taken. Instead, it seems likely that “capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation,” Fisher v. United States, 328 U.S. 463, 484 ... (1946) (Frankfurter, J., dissenting), for if a person does not intend that life be taken or contemplate that lethal force will be employed by others, the possibility that the death penalty will be imposed for vicarious felony murder will not “enter into the cold calculus that precedes the decision to act.” Gregg v. Georgia, supra, 428 U.S., at 186 ....

It would be very different if the likelihood of a killing in the course of a robbery were so substantial that one should share the blame for the killing if he somehow participated in the felony. But competent observers have concluded that there is no basis in experience for the notion that death so frequently occurs in the course of a felony for which killing is not an essential ingredient.

130. 102 S. Ct. at 3377.
131. Id. (quoting H. HART, PUNISHMENT AND RESPONSIBILITY 162 (1968)).
132. Id. at 3377.
that the death penalty should be considered as a justifiable deter-
rent to the felony itself (citation omitted).

With respect to retribution as a justification for the death sen-
tence, the Court states:

American criminal law has long considered a defendant's inten-
tion - and therefore his moral guilt - to be critical to “the degree of [his] criminal culpability,” Mullaney v. Wilbur, 421 U.S. 684, 698 . . . (1975), and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrong-
doing. . . . For purposes of imposing the death penalty, En-
mund's criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his per-
sonal responsibility and moral guilt.

Justice O'Connor, writing for the four dissenters, would also 
reverse the death penalty, but would do so on the basis that the 
trial judge fundamentally misunderstood the petitioner's role in the crimes in imposing sentence. Justice O'Connor criticizes the 
majesty “because today's holding interferes with state criteria for 
assessing legal guilt by recasting intent as a matter of federal con-
stitutional law.”

CONCLUSION

The various crimes of homicide called murder vary greatly, espe-
cially in the distinctions which have developed between wilful mur-
der and felony murder. While wilful murder has been constantly 
narrowed in its application, felony murder has been expanded to a 
doctrine of vicarious liability for crimes not contemplated at com-
mon law.

A significant constitutional difference has been recognized be-
tween the death penalty and lesser punishments, sufficient to jus-
tify intrusion into a state’s legislative judgment as to the applica-
tion of the death penalty: "It is of vital importance to the 
defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than

133. Id. at 3377-78.
134. Id. at 3378.
135. Id. at 3379 (O'Connor, J., dissenting).
136. See supra notes 69-86 and accompanying text.
caprice or emotion."\textsuperscript{138}

Capital punishment for murder has been conceptualized and upheld as a sentencing decision.\textsuperscript{139} However, with increasing frequency the Supreme Court is having to review the imposition of the death penalty in light of the defendant's participation in the homicide.\textsuperscript{140} There is a functional necessity, ultimately, that a state's calculated decision to kill a human being should be restricted as a penalty to a very narrow class of human conduct. If we look only to sentencing principles, we come of necessity to an "eugenic" definition as a basis for executing persons who have participated in a non-homicidal crime wherein someone is killed.\textsuperscript{141}

"Actus Non Facit Reum Nisi Mens Sit Rea"\textsuperscript{142} has been the most sacred principle of criminal jurisprudence for hundreds of years, reflective of moral belief that the only actions for which a person is responsible are those for which he has the requisite mens rea.\textsuperscript{143} Whether or not a state should be allowed to impose the death penalty engenders great debate. Certainly, then, such penalty should be conservatively imposed only on a class of prisoners where the state has produced evidence of homicidal mens rea.


\textsuperscript{141} Even the Code of Hammurabi set as a limitation on the harshness of the early law the limitation of "An eye for an eye and a tooth for a tooth," which is why the inquiry is appropriate here, despite Justice Rehnquist's dissenting comment in Lockett that "there is nothing in the prohibition against cruel and unusual punishments contained in the Eighth Amendment which sets that injunction as a limitation on the maximum sentence which society may impose." 438 U.S. at 635-36. Legal analysts since Justice Stephens have been unable to justify the overbreadth of the felony-murder doctrine in capital cases. Although Justice Rehnquist states that the felony-murder doctrine is supported by "centuries of common law doctrine," it is quite clear as Professor Fletcher states "There is no authority whatever for the principle that any felonious intent is sufficient to constitute malice aforethought." G. Fletcher, Rethinking Criminal Law 282 (1978).

\textsuperscript{142} "An act does not make [the doer of it] guilty, unless the mind be guilty; that is unless the intention be criminal." Black's Law Dictionary 34 (rev. 5th ed. 1979).

\textsuperscript{143} "Guilty mind." See Sayre, Mens Rea, 45 Harv. L. Rev. 974 (1931-32). "The conception of blameworthiness or moral guilt is necessarily based upon a free mind voluntarily choosing evil rather than good; there can be no criminality in the sense of moral shortcoming if there is no freedom of choice or normality of will capable of exercising a free choice." Id. at 1004.

Conscience is defined as the "sense or consciousness of the moral goodness or blameworthiness of one's own conduct, intentions, or character together with a feeling of obligation to do right or be good." Webster's New Collegiate Dictionary 238 (1981).
In *Enmund*, the Supreme Court began to bridge the sharp division between wilful murder and felony murder in capital cases. Conceptualizing capital punishment as a sentencing decision rather than a decision to be imposed only on limited crimes of homicide has caused the present dilemma. Only those murders in which there is evidence of the most serious moral culpability directly related to the homicide should be allowed to be punished by death.

The unacceptable substitution of legislative presumptions in lieu of proof in felony murder capital cases offends principles of proportionality, and denigrates the respect and confidence of the community in the fair and just utilization of governmental power.

The death penalty should require individual culpability, and in order for society to purposefully kill another human being, the least that should be required is that there be evidence that that human being have had a purpose to kill his or her victim.

This will pose an additional burden of proof on the prosecution, one indeed difficult at times to elucidate. That difficulty has not, however, caused the Court to hesitate when dealing with questions of the mitigation of murder to manslaughter.¹⁴⁴

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