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Whose Crime is it Anyway?: Liability for the Lethal Acts of Nonparticipants in the Felony

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I. INTRODUCTION

Picture an old James Cagney movie, where three swaggering robbers enter a bank, point a gun at the young cashier, and demand her money or her life. A getaway car waits outside with the motor running. The cashier hands over a bag of money and begins to scream. The robbers grab the bag and run outside, where all bedlam breaks loose. The police arrive on the scene, a gun battle ensues, and bystanders run for cover. When the dust settles, an innocent bystander lies dead, killed by a bullet from a policeman's gun during the shootout.

Now, picture a drug deal that goes sour in an unlit stairway in a rundown apartment building.[1] The intended victim, an undercover police officer, seizes the weapon and a struggle develops.[2] The injured officer draws his revolver and begins shooting, a bullet hits his leg.[3] The backup team arrives and a fusillade of gunfire ensues.[4] The grim result is realized in the aftermath of the shooting—one of the police officers is dead from a single shot to the head.[5] The bullet is not recovered, and it is not known who fired the fatal shot.[6]

Both of these scenarios involve a similar issue: Who, if anyone, should be liable for the death of these two nonparticipants in the

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1. People v. Hernandez, 588 N.Y.S.2d 567-68 (N.Y. App. Div. 1992), *aff'd*, 624 N.E.2d 661 (N.Y. 1993).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*

crime? The felony-murder doctrine, which originated in England, generally provides that when a death occurs during the perpetration of a felony, the defendant is liable for homicide, even if defendant lacked the intent to kill.[7] Because of the harsh results imposed by the doctrine, it has received a substantial body of criticism, including being called a "'barbaric' concept that . . . erodes the relation between criminal liability and moral culpability . . . ."[8] Despite these criticisms, this theory of liability has survived for over 200 years.[9] However, the felony-murder doctrine has been subjected to many different modifications, that vary considerably from jurisdiction to jurisdiction.[10]

The most problematic issue surrounding the felony-murder doctrine is how far to extend the doctrine in imposing murder liability on a defendant who did not perform the act of killing when the act results in the death of a nonparticipant. Because the felony-murder doctrine does not require any intent, legislatures and courts have relied on the element of causation to either extend or restrict liability in that factual situation.[11] This approach has led to inconsistent and confusing results, stemming from imprecise draftsmanship, inaccurate understanding of the theories of causation, and differing policy reasons.

This Article explores the methodology that courts should employ when determining the liability of a defendant under the felony-murder doctrine, where the perpetration of a felony results in the death of a nonparticipant in the crime by another nonparticipant. Part I of the Article addresses the history of the doctrine, the policies that have sustained it throughout history, and the modern statutory promulgations of the rule. Part II explores not only how courts have handled the doctrine's causation requirement, but also how legislatures have responded to this requirement. Further, Part II discusses the court-created theories of agency and proximate cause.

Part III addresses the need for a consistent analytical framework and demonstrates the current confusion that has resulted from courts construing a statute to require different causation approaches. Part III submits that the courts' reliance on the agency theory, which requires an initial determination that a felon shot the fatal bullet, is inconsistent with both society's view towards crime and principles of statutory analysis. By applying the agency theory, the courts are using

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7. RONALD A. ANDERSON, 1 WHARTON'S CRIMINAL LAW AND PROCEDURE 539 (1957).

8. People v. Dillon, 668 P.2d 697, 709 (Cal. 1983) (citations omitted).

9. For a discussion of the felony-murder doctrine's historical development and ultimate survival, see sources cited *infra* notes 14-34 and accompanying text.

10. For a discussion of the numerous statutory modifications to the doctrine, see sources cited *infra* notes 51-71 and accompanying text.

11. For a discussion of the causation element of the doctrine, see sources cited *infra* notes 72-150 and accompanying text.

causation to restrict the application of the felony-murder doctrine, a responsibility that should be left to the legislature.

Part IV proposes a methodology that is consistent with both principles of statutory interpretation and society's view toward crime. This approach uses the ordinary rules of causation and modifies them to apply to felony-murder. As an example, the proposed methodology is applied to various factual scenarios where the person who does the killing is unknown, or is someone other than the defendant, and the victim is a nonparticipant in the felony. Under this analysis, courts can not only interpret the causation requirement of the felony-murder doctrine consistently, but can also ensure the uniform administration of justice.

II. THE HISTORY AND POLICIES UNDERLYING THE FELONY MURDER DOCTRINE

The felony-murder doctrine, although much maligned, is still a frequently used theory of liability. Its continued viability reflects the societal judgment that a felony resulting in a death, even if that death was not intended, should be punished more severely than a felony not resulting in a death.[12] The felony-murder doctrine should continue to exist if the above conclusion accurately represents society's judgment, and further, if the development of crimes should indeed depict societal judgment.[13] Thus, it is necessary to examine the history and policies behind the felony-murder rule, as well as the numerous statutory promulgations of the rule, to determine whether the doctrine has continued viability.

A. *The History of the Doctrine*

All homicides were considered to be criminal at early common law.[14] The mental state of the actor was deemed irrelevant.[15] All

12. David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL'Y 359, 363 (1985).

13. *Id.* The aim of criminal law is to prevent harm to society. It accomplishes that aim by punishing those who have done harm. Thus, it follows that criminal law must reflect those areas that society feels are deserving of punishment. *See generally* Joseph R. Gusfield, *On Legislating Morals: The Symbolic Process of Designating Deviance*, 56 CAL. L. REV. 54, 56-59 (1968).

14. People v. Burroughs, 678 P.2d 894, 903-04 (Cal. 1984) (Bird, C.J., concurring) (citing ROY MORELAND, THE LAW OF HOMICIDE 1-4 (1952); Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815, 823 (1980); Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 977-81 (1932)).

15. *Id.* (Bird, C.J., concurring) (citing ROY MORELAND, THE LAW OF HOMICIDE 1-4 (1952); Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815, 823 (1980); Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 977-81 (1932)).

homicides were punishable by death.[16] By the thirteenth century, "the law . . . recognized the need to distinguish between intentional and . . . [unintentional] killings."[17] Although an accidental killing would not entitle a defendant to an acquittal, he could be granted a royal pardon.[18]

The Church had a strong influence on the development of the law of homicide. Because the Church refused to impose capital punishment, submitting a case to the jurisdiction of the Church meant that instead of death the defendant was only subjected to the branding of his thumb and imprisonment.[19] Known as the "benefit of clergy," this practice was expanded to cover all persons who were literate, under the premise that those persons were clerics and thus ineligible for the death penalty.[20] Thus, the law began to impose degrees of punishment based on the accused's character rather than the nature of the offense.

As the injustice of this system became increasingly obvious, a series of statutes were promulgated in the fifteenth and sixteenth centuries that abolished the "benefit of clergy" for homicides that were committed with "malice aforethought" or "malice prepensed."[21] These more culpable homicides were called "murders," while the less culpable homicides for which "benefit of clergy" was still available became "manslaughter."[22]

It was at about this time that the felony-murder doctrine came into existence. Although the most frequently cited statement of the rule appears in Lord Coke's *Third Institute,* commentators have concluded that Coke's creation of the rule is without any legal foundation.[23] Coke's description of the rule was subsequently refined and

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16. *Id.* at 904 (Bird, C.J., concurring) (citing ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 14 (3d ed. 1982); Jeanne Hall Seibold, Note, *The Felony Murder Rule: In Search of a Viable Doctrine,* 23 CATH. LAW 133 n.1 (1978)).

17. *Id.* (Bird, C.J., concurring).

18. *Id.* (Bird, C.J., concurring) (citing McGautha v. California, 402 U.S. 183, 197 (1971); Rollin M. Perkins, *A Re-examination of Malice Aforethought,* 43 YALE L.J. 537, 539-40 (1934); Sayre, *supra* note 14, at 980).

19. *Id.* (Bird, C.J., concurring) (citing Sayre, *supra* note 14, at 996-97).

20. *Id.* (Bird, C.J., concurring) (citing Note, *Felony Murder as a First Degree Offense: An Anachronism Retained,* 66 YALE L.J. 427, 429 (1957)).

21. *Id.* (Bird, C.J., concurring).

22. *Id.* at 904-05 (Bird, C.J., concurring) (citing Perkins, *supra* note 18, at 543-44).

23. *Id.* at 905 (Bird, C.J., concurring). In his treatise, Lord Coke illustrates the rule but does not give any rationale for it. He states:

> "If the act be unlawful it is murder. 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 that the act was unlawful, although A. had no intent to hurt the boy, nor knew not of him. But if B. the owner of the park had shot at his own deer, and without any ill intent

limited to find murder when a killing is committed in the course of a felony, regardless of the defendant's intent.[24]

The felony-murder rule was abolished by the English Parliament in the Homicide Act of 1957.[25] The English statute now provides that "a killing in the course of a felony is not murder unless the essential element of malice is independently proved."[26] However, because the condition of English common law in 1776 served as the basis for the development of American common law, Blackstone's version of the felony-murder rule became an integral part of American jurisprudence.[27] Yet, for over two hundred years American courts and legislatures have dealt with the doctrine in myriad ways.

As early as 1794, the Pennsylvania Legislature broke away from the English tradition by dividing murder into two degrees, with only first degree murder punishable by death.[28] The Ohio Legislature

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had killed the boy by the glance of his arrow, this had been homicide by misadventure, and no felony."

Id. (Bird, C.J., concurring) (quoting LORD COKE, THIRD INSTITUTE 56 (6th ed. 1680)); *see also* People v. Aaron, 299 N.W.2d 304, 309 & n.22 (Mich. 1980) (quoting LORD COKE, THIRD INSTITUTES 56 (1797)). Although this statement went unquestioned for over two hundred years, no one seems to know the basis for the statement. *See Burroughs*, 678 P.2d at 905-06. While two sixteenth century cases have been suggested as support, courts and critics have since concluded that these cases stood for a different proposition. *Id.* at 905. For a discussion of those cases, see *id.* at 906 n.9 (Bird, C.J., concurring) (quoting *Aaron*, 299 N.W.2d at 307-08).

24. *Burroughs*, 678 P.2d at 905 (Bird, C.J., concurring) (stating that "the rule was redefined by Hale and Foster, who limited the murder designation to any killing in the course of a felony.") (citing 1 SIR MATTHEW HALE, PLEAS OF THE CROWN 465, 475 (1847); SIR MICHAEL FOSTER, CROWN CASES 258-59 (2d ed. 1791)).

25. *Id.* at 907 (Bird, C.J., concurring).

26. *Id.* (Bird, C.J., concurring). Chief Justice Bird notes the following with regard to the English Homicide Act of 1957:

> Section 1 of the act provided in relevant part:
>
> "Where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence."

Id. (Chief Justice Bird quoting Sidney Prevezer, *One English Homicide Act: A New Attempt to Revise the Law of Murder*, 57 COLUM. L. REV. 633-36 (1957)).

27. *Id.* at 908 (Bird, C.J., concurring). The rule is stated in Blackstone's as follows:

> [W]hen an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter according to the nature of the act which occasioned it. If it be in prosecution of a felonious intent, or in it's [sic] consequences naturally tended to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will only amount to manslaughter.

Id. n.17 (Bird, C.J., concurring) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES 192-93 (Tucker ed., 1803) (footnote omitted)).

28. Edwin R. Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759, 772-73 & n.99 (1949) (citing 4 J. OF SENATE 242 (Pa. 1794)).

promulgated the statutory abolition of felony-murder in 1854.[29] Further, Oliver Wendell Holmes questioned the Ohio rule's validity in 1881.[30]

Catapulted by the Model Penal Code, and Illinois and New York Penal Law revisions, a huge upsurge of reform took place in the 1960s and 1970s.[31] In total, more than half of the states' penal codes were revised during this period.[32] Consequently, the felony-murder rule went through numerous legislative modifications. These legislative modifications, coupled with court created interpretations, have led to many different versions of the rule. Despite all of the criticisms of the rule,[33] it currently remains in force in all but three jurisdictions.[34]

B. Policies Underlying the Doctrine

There have been various justifications for the felony murder doctrine over the years.[35] Under the theory of deterrence, proponents argue that co-felons will not resort to violence while committing a fel-

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29. *Burroughs*, 678 P.2d at 908 (Bird, C.J., concurring) (citing Robbins v. State, 8 Ohio St. 131, 188-90 (1857) (holding that intent is an essential ingredient of murder)).

30. *Id.* (Bird, C.J., concurring) (citing OLIVER WENDELL HOLMES, THE COMMON LAW 57-58 (1881)).

31. RICHARD G. SINGER & MARTIN R. GARDNER, CRIMES AND PUNISHMENT: CASES, MATERIALS, AND READINGS IN CRIMINAL LAW 388-91 (1989) (citing Model Penal Code § 210.2); ILL. REV. STAT. ch. 9, para. 9-1 (Supp. 1993); N.Y. PENAL LAW § 125.25 (McKinney 1987). *See generally* Jo Anne C. Alderstein, *Felony Murder in the New Criminal Codes*, 4 AM J. CRIM. L. 249 (1975-1976).

32. *See, e.g.*, ARK. CODE ANN. §§ 41-1501 to 1505 (Michie Supp. 1993) (revision in effect 1976); COLO. REV. STAT. § 18-3-102 (West 1993) (revision in effect 1972); CONN. GEN. STAT. § 53a-54c (West 1993) (revision in effect 1971); DEL. CODE ANN. tit. 11, § 635-035 (1993) (revision in effect 1973); FLA. STAT. ANN. § 782.04 (West 1993) (revision in effect 1975); GA. CODE ANN. § 26-1101 (Michie 1993) (revision in effect 1969); HAW. REV. STAT. § 701-04 (1993) (revision in effect 1973); ILL. ANN. STAT. ch. 38 para. 9-1 (Smith-Hurd 1993) (revision in effect 1962); KAN. STAT. ANN. § 21-3401 (1993) (revision in effect 1970); KY. REV. STAT. ANN. § 507.020 (Michie/Bobbs-Merrill 1993) (revision in effect 1975); ME. REV. STAT. ANN. tit. 17-A, § 201-03 (West 1993) (revision in effect 1976); MINN. STAT. ANN. § 609.185-195 (West 1993) (revision in effect 1963); MONT. CODE ANN. § 94-5-102 (1993) (revision in effect 1974). For others statutes, see the attached Appendix.

33. For a discussion of criticisms of the felony-murder doctrine, see People v. Aaron, 299 N.W.2d 304 (Mich. 1980).

34. The felony-murder statute was abolished by the legislature in Hawaii and Kentucky. HAW. REV. STAT. § 707-710 (1976); KY. REV. STAT. ANN. § 507.020 (Michie/Bobbs Merrill 1975). It was held to be unconstitutional by the Michigan Supreme Court in People v. Aaron, 299 N.W.2d 304 (Mich. 1980). Other states, while not abolishing the felony-murder doctrine, have required some level of mens rea. See *infra* note 54 and accompanying text.

35. *See generally* Nelson E. Roth & Scott E. Sundby, *The Felony- Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 450-60 (1985).

ony if they may be held liable for murder.[36] The doctrine has also been viewed as a deterrent to dangerous felonies.[37] The deterrence rationale has been criticized widely as illogical and illegitimate. Those opposing the rationale argue that an unintended act cannot be deterred.[38] Another criticism is that few felons, if any, will know about the felony-murder doctrine or believe that a killing will actually result.[39] Finally, the critics maintain that there is no evidence that a disproportionate number of killings occur during felonies.[40]

The problem with such criticism is that it may be overly simplistic.[41] Although it is likely that most felons cannot cite to the felony-murder statute, it is equally probable that the general population is at least aware of the basic premise of the felony-murder doctrine. In addition, the premise that accidental killings cannot be deterred is inconsistent with the expanding amount of strict liability crimes, which often rely on a deterrence rationale.[42] There is no empirical evidence to suggest that a felon would not be deterred from committing a violent crime, yet there is evidence to suggest that serious crime

36. *Id.* at 450. The authors conclude that the deterrence rationale consists of two strains: defendants are deterred from committing accidental or negligent killings during felonies, and defendants are deterred from committing dangerous felonies. *Id.* at 450-51; *see also* Robert Mauldin Elliot, Comment, *The Merger Doctrine as a Limitation on the Felony Murder Rule: A Balance of Criminal Law Principles*, 13 WAKE FOREST L. REV. 369, 374 (1977) ("[M]ost jurisdictions have characterized the purpose to be . . . the deterrence of negligent or accidental killings during the perpetration of a felony."). *But see* Jonathan K. Van Patten, Comment, *Merger and the California Felony-Murder Rule*, 20 UCLA L. REV. 250, 258-59 n.41 (1972) (finding it difficult to see how an accidental homicide can be deterred).

37. *See* People v. Washington, 402 P.2d 130, 139, (Cal. 1965) (Burke, J., dissenting) (the purpose of the felony-murder rule is to deter felons from undertaking inherently dangerous felonies); State v. Williams, 254 So. 2d 548, 550-51 (Fla. 1971) (The felony-murder statute creates "a deterrent effect to the commission of [inherently dangerous] felonies by substituting the mere intent to commit those felonies for the premeditated design to effect death . . . .").

38. Van Patten, *supra* note 36, at 258-59 n.41.

39. *See generally* Philip D. Zelikow, Comment, *The Constitutionality of Imposing the Death Penalty for Felony Murder*, 15 HOUS. L. REV. 356, 376-79 (1978).

40. Enmund v. Florida, 458 U.S. 782, 799-800 (1982) (finding, in its summation of statistical data, that only one-half of one percent of all robberies result in homicide).

41. *See* Crump & Crump, *supra* note 12, at 369-71 (concluding that deterrence is a valid rationale).

42. One argument advanced in justification of strict liability in public welfare offenses is that the protection of societal interests requires a high standard of care which people will be more likely to maintain if they know that lack of intent will not excuse them. *See generally Regina v. City of Sault Ste. Marie*, 2 S.C.R. 1299 (Can. 1978); Kathleen F. Brickey, *Criminal Liability of Corporate Officers for Strict Liability Offenses—Another View*, 35 VAND. L. REV. 1337 (1982); *Developments in the Law-Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227 (1979).

is subject to deterrence if the consequences are communicated to the potential defendant.[43]

Courts and commentators have also justified the doctrine on the basis that the defendant committed a felony which resulted in a killing. Because the defendant has committed a heinous act, he deserves to be severely punished. This retribution or condemnation theory of punishment focuses on punishing the defendant based on the seriousness of the harm, rather than his intent.[44] Again, although the justification of retribution has been severely criticized,[45] it continues to be cited by the courts as a rationale for the doctrine.[46]

The felony-murder doctrine does communicate that a crime that takes a human life is different from one that does not, and is thus deserving of a more severe punishment.[47] Thus, through retribution and condemnation, societal norms and values are reinforced; the "bad person" is punished, and the conduct of good persons is rewarded. As one court stated, one goal of sentencing is "community condemnation . . . or [the] reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves."[48] Fear of crime continues to pervade our society.[49] Some researchers have explained that this fear of crime is an indication of perceived social disorder.[50] This social disorder can be restructured through retribution and punishment.

Although critics have maligned the policies underlying the felony-murder doctrine, its continued viability suggests that those policies reflect a strong societal interest. A felony that results in a death should be punished more severely than a felony that does not, even if there was no intent to cause the death. Since the evolution of crimes should indeed represent societal judgment, the felony-murder doctrine continues to thrive despite all the criticisms.

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43. *See* Crump & Crump, *supra* note 12, at 369-371.

44. *See* State v. O'Blasney, 297 N.W.2d 797, 798 (S.D. 1980); WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW 640 (2d ed. 1986); Comment, 24 RUTGERS L. REV. 591, 593-96 (1970).

45. Roth & Sundby, *supra* note 35, at 458-59.

46. *Id.* at 460.

47. Crump & Crump, *supra* note 12, at 367-78.

48. State v. Chaney, 477 P.2d 441, 444 (Alaska 1970).

49. *Gallup Poll: High Fear of Crime,* CRIME CONTROL DIG., Feb. 28, 1983, at 1, 8 (finding that "45 percent of Americans are afraid to go out alone at night within a mile of their homes").

50. Chris E. Marshall, *Fear of Crime, Community Satisfaction and Self-Protective Measures: Perceptions From a Midwestern City,* 14 J. CRIME & JUST. 97, 101 (1991).

C. *The Present Day Statute*

Although there are some states where the felony-murder statutes broadly restate the common law doctrine without any restrictions,[51] most jurisdictions have modified the common law rule. Some jurisdictions have mitigated the doctrine by requiring that the defendant exhibit a mens rea in addition to the mere intent to commit a felony.[52] Although New Hampshire is the only state that has adopted the Model Penal Code formulation,[53] which provides a rebuttable presumption of recklessness and extreme indifference,[54] other states have required varying degrees of intent. Delaware's homicide statute requires criminal negligence for a first degree felony-murder charge based upon an enumerated felony; otherwise, the prosecution must prove recklessness.[55] Arkansas requires that the actor cause the death under circumstances requiring extreme indifference to human life.[56] Tennessee requires a mens rea of recklessness.[57]

Other jurisdictions have mitigated the felony-murder rule by downgrading the offense and reducing the applicable penalty.[58]

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51. *See, e.g.*, GA. CODE ANN. § 16-5-1(c) (Michie 1992); IOWA CODE § 707.2 (1979); KAN. STAT. ANN. § 21-3401(a) (Supp. 1992); MASS. GEN. LAWS ANN. ch. 265, § 1 (West 1990); N.M. STAT. ANN. § 30-2-1(A) (Michie 1984); S.C. CODE ANN. § 16-3-10 (Law Co-op 1985); TEX. PENAL CODE ANN. § 19.02(a)(3) (West 1989); VA. CODE ANN. § 18.2-32 (Michie Supp. 1993).

52. Although the drafters of the Model Penal Code originally concluded that the felony-murder rule should be abandoned, concern over political opposition led them to insert a provision in the definition of reckless murder that states that recklessness and extreme indifference to human life are presumed if the actor is engaged in a felony-murder situation. *See* MODEL PENAL CODE § 210.2(1)(b) (Official Draft 1962); MODEL PENAL CODE § 201.2 cmt 4 (Tent Draft No. 9 1959); Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1446 (1968).

53. N.H. REV. STAT. ANN. § 630:1-6 (1986) (effective 1974).

54. The New Hampshire formulation provides a rebuttable presumption of recklessness in its second degree murder statute if the defendant is engaged in the commission of certain enumerated felonies. *Id.* § 630:1-b. Its first degree murder statute requires a showing of knowledge or purpose. *Id.* § 630:1-a (Supp. 1992).

55. DEL. CODE ANN. tit. 11, § 635-636 (Supp. 1992).

56. ARK. CODE ANN. § 5-10-101, 102 (Michie Supp. 1991).

57. TENN. CODE ANN. § 39-13-202(a)(2) (1991).

58. The majority of jurisdictions, however, still classify felony-murder as first-degree or capital murder. *See, e.g.*, ALA. CODE § 13A-6-2 (1982); ARIZ. REV. STAT. ANN. § 13-1105(A) (1989); ARK. CODE ANN. § 5-10-101 (Michie Supp. 1991); CAL. PENAL CODE § 189 (West 1988); COLO. REV. STAT. § 18-3-101 (Supp. 1992); CONN. GEN. STAT. ANN. § 53a-54c (West 1985); DEL. CODE ANN. tit. 11, § 636 (Supp. 1992); D.C. CODE ANN. § 22-2401 (1991); GA. CODE ANN. § 16-5-1(c) (Michie 1992); IDAHO CODE § 18-4003 (Supp. 1993); ILL. REV. STAT. ch. 9, para. 9-1 (Supp. 1993); IND. CODE ANN. § 35-42-1-1 (West Supp. 1992); IOWA CODE ANN. § 707.2 (West 1979); KAN. STAT. ANN. § 21-3401(a) (Supp. 1992); MASS. GEN. LAWS ANN. ch. 265, § 1 (West 1990); MICH. COMP. LAWS ANN. § 750.316 (West 1991 & Supp. 1992); MISS. CODE ANN. § 97-3-19 (Supp. 1992); MO. REV. STAT. § 565.003 (1979); MONT. CODE ANN. § 45-5-102 (1992); NEB. REV. STAT. § 28-303 (1989); NEV. REV. STAT. § 200.030 (1991); N.J. STAT. ANN. § 2C:11-

Maine and Wisconsin have classified felony-murder as third degree murder, with a minimum imprisonment of up to twenty years in Maine and fifteen years in Wisconsin.[59] In Ohio, felony-murder is treated as involuntary manslaughter with imprisonment of up to twenty five years.[60] Oklahoma, Utah, and Idaho seem to have downgraded the felony murder rule through imprecise draftsmanship.[61]

Legislatures have also modified the felony-murder rule by providing an affirmative defense for accomplices who did not participate in the acts that caused the victim's death.[62] For example, the Arkansas statute provides the defendant with an affirmative defense if he did not commit the homicidal act, was not armed, reasonably believed that no other participant was armed, and reasonably believed that no other participant intended to engage in conduct that could result in a death.[63]

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3 (West Supp. 1992); N.M. STAT. ANN. § 30-2-1(A) (Michie 1984); N.C. GEN. STAT. § 14-17 (1992); N.D. CENT. CODE § 12.1-16-01(1)(c) (1985); OHIO REV. CODE ANN. § 2903.01 (Anderson 1993); OKLA. STAT. ANN. tit. 21, § 701.7 (West Supp. 1993); OR. REV. STAT. § 163.115 (1)(b) (1991); R.I. GEN. LAWS § 11-23-1 (Supp. 1992); S.C. CODE ANN. § 16-3-10 (Law Co-op 1985); S.D. CODIFIED LAWS ANN. § 22-16-4 (Supp. 1993); TENN. CODE ANN. § 39-13-202 (1991); TEX. PENAL CODE ANN. § 19.02 (a)(3) (West 1989); UTAH CODE ANN. § 76-5-203 (Supp. 1992); VT. STAT. ANN. tit. 13, § 2301 (Supp. 1992); VA. CODE ANN. § 18.2-32 (Michie Supp. 1993); WASH. REV. CODE ANN. § 9A-32-030 (West Supp. 1993); W. VA. CODE § 61-2-1 (1992); WYO. STAT. § 6-2-101 (Supp. 1992).

Although some states classify felony-murder as second degree murder, the penalties are still extremely harsh. *See e.g.*, FLA. STAT. ANN. § 782.04 (West 1992); LA. REV. STAT. ANN. § 30.1 (West Supp. 1993); MINN. STAT. ANN. § 609.185 (West Supp. 1993); N.H. REV. STAT. ANN. § 630:1-b (1986); N.Y. PENAL LAW § 125.25 (McKinney 1987); PA. STAT. ANN. tit. 18, § 2502(b) (1983).

59. ME. REV. STAT. ANN. tit. 17-A, § 1251 (West Supp. 1992); WIS. STAT. § 940.03 (Supp. 1992).

60. OHIO REV. CODE ANN. §§ 2929.11(A)(B)(1), 2903.04 (Anderson 1993). Ohio also has an aggravated murder section which treats murders committed during enumerated felonies as capital offenses with greater punishment. *Id.* § 2903.01(B). Under § 2903.01(B), the required mens rea is purposeful.

61. *See* Alderstein, *supra* note 31, at 259-60; *see also* IDAHO CODE § 18-4003 (Supp. 1993); OKLA. STAT. ANN. tit. 21, §§ 701.7, 701.8 (West. Supp. 1993); UTAH CODE ANN. § 76-5-203 (Supp. 1992).

62. *See, e.g.*, ALASKA STAT. § 11-41-110 (1989); ARK. CODE ANN. § 5-10-101 (Michie Supp. 1991); CONN. GEN. STAT. ANN. § 53a-54c (West 1985); ME. REV. STAT. ANN. tit. 17-A, § 202 (West 1983); N.J. STAT. ANN. § 2C:11-3 (West Supp. 1992); N.Y. PENAL LAW § 125.25 (McKinney 1987); N.D. CENT. CODE § 12.1-16-01 (1985); OR. REV. STAT. § 163.115 (West Supp. 1993); WASH. REV. CODE ANN. § 9A.32.030 (West Supp. 1993).

63. ARK. CODE. ANN. § 5-10-104(b) (Michie 1987). For examples of other states whose statutes contain affirmative defenses, see COLO. REV. STAT. § 18-3-101 (Supp. 1992); CONN. GEN. STAT. ANN. § 53a-54c (West 1985); ME. REV. STAT. ANN. tit. 17-A, § 202 (West 1983); N.J. STAT. ANN. § 2C:11-3 (West Supp. 1992); N.Y. PENAL LAW § 125.25 (McKinney 1987); N.D. CENT. CODE § 12.1-16-01 (1985); OR. REV. STAT. § 163.115 (Supp. 1993); WASH. REV. CODE ANN. § 9A-32-030 (West Supp. 1993). Because the elements of the defense are conjunctive, there is no reported decision demonstrating an accomplice who has prevailed on the defense. *See* Richard Cosway, *The*

Finally, the statutes of thirty-nine jurisdictions specifically enumerate the felonies that must be committed to give rise to a felony-murder charge.[64] Some examples of these felonies are arson, rape, robbery, and kidnapping.[65] The enumerated felonies reflect the legislature's intent to deter the most dangerous and violent felonies.[66]

There are other revisions that some legislatures have adopted to narrow the scope of the doctrine. In some codes, the victim of the homicide must be someone other than one of the felons.[67] Other codes require that the death occur in the course of the felony or within the immediate flight from the felony, thus restricting the time period within which the defendant can be held liable.[68]

Revised Washington Criminal Code's Vital Structure: The Burden of Proof, Felony Murder, and Justification Provisions, 48 WASH. L. REV. 57, 76 (1972); Bernard E. Gegan, *Criminal Homicide in the Revised New York Penal Law*, 12 N.Y.L. F. 565, 690 (1966).

64. ALA. CODE § 13A-6-2 (1982); ALASKA STAT. § 11-41-110 (1989); ARIZ. REV. STAT. ANN. § 13-1105 (1989); ARK. CODE ANN. § 5-10-101 (Michie Supp. 1991); CAL. PENAL CODE § 189 (West 1988); COLO. REV. STAT. § 18-3-101 (Supp. 1992); CONN. GEN. STAT. ANN. § 53a-54c (West 1985); DEL. CODE ANN. tit. 11, § 636 (Supp. 1992); D.C. CODE ANN. § 22-2401 (1981); FLA. STAT. ANN. § 782-04 (West 1992); IDAHO CODE § 18-4003 (Supp. 1993); ILL. REV. STAT. ch. 9, para. 9-1 (Supp. 1993); IND. CODE ANN. § 35-42-1-1 (West Supp. 1992); LA. REV. STAT. ANN. § 30.1 (West Supp. 1993); ME. REV. STAT. ANN. tit. 17-A, § 202 (West Supp. 1992); MICH. COMP. LAWS ANN. § 750.316 (West 1991); MISS. CODE ANN. § 97-3-19 (Supp. 1992); MO. REV. STAT. § 565.003 (1979); MONT. CODE ANN. § 45-5-102 (1992); NEB. REV. STAT. § 28-303 (1989); NEV. REV. STAT. § 200.030 (1991); N.J. STAT. ANN. § 2C:11-3 (West Supp. 1992); N.Y. PENAL LAW § 125.25 (McKinney 1987); N.C. GEN. STAT. § 14-17 (1992); N.D. CENT. CODE § 12.1-16-01 (1985); OKLA. STAT. ANN. tit. 21, § 701.7 (West Supp. 1993); OR. REV. STAT. § 163.115 (1991); PA. STAT. ANN. tit. 18, § 2502(b) (1983); R.I. GEN. LAWS § 11-23-01 (Supp. 1992), S.D. CODIFIED LAWS ANN. § 22-16-4 (Supp. 1993); TENN. CODE ANN. § 39-13-202 (1991); UTAH CODE ANN. § 76-5-203 (Supp. 1992); VT. STAT. ANN. tit. 13, § 2301 (Supp. 1992); VA. CODE ANN. § 18-2-32 (Michie Supp. 1993); WASH. REV. CODE ANN. § 9A-32-030 (West Supp. 1993); W. VA. CODE § 61-2-1 (1992); WIS. STAT. ANN. § 940.03 (West Supp. 1992); WYO. STAT. § 6-2-101 (Supp. 1992).

65. *See, e.g.*, ARK. CODE ANN. § 5-10-101 (Michie Supp. 1991); DEL. CODE ANN. tit. 11, § 636 (Supp. 1992); MISS. CODE ANN. § 97-3-19 (Supp. 1992); WASH. REV. CODE ANN. § 9A-32-030 (West Supp. 1993).

66. Interestingly, the stated purpose of writing the underlying felonies to certain enumerated ones in New York was to "exclude rare instances of accidental or not reasonably foreseeable fatality, and especially those that might happen to occur in a most unlikely manner in the course of a non-violent felony." STAFF NOTES OF THE COMMISSION ON REVISION OF THE PENAL LAW, PROPOSED NEW YORK PENAL LAW 275 (1965). Thus, the limitation seems to go towards limiting causation rather than deterring the underlying felony. *See also* N.Y. PENAL LAW § 125.25 (McKinney 1983) (Practice Commentary).

67. *See, e.g.*, ALASKA STAT. § 11-41-110 (1989); COLO. REV. STAT. § 18-3-101 (Supp. 1992); CONN. GEN. STAT. ANN. § 53a-54c (West 1985); N.J. STAT. ANN. § 2C:11-3 (West Supp. 1992); N.Y. PENAL LAW § 125.25 (McKinney 1987); OR. REV. STAT. § 163.115 (1991); UTAH CODE ANN. § 76-5-203 (Supp. 1992); WASH. REV. CODE ANN. § 9A-32-030 (West Supp. 1993).

68. *See, e.g.*, ALA. CODE § 13A-6-2 (1992); ALASKA STAT. § 11.41.110 (1989); ARIZ. REV. STAT. ANN. § 13-1105 (1989); ARK. CODE ANN. § 5-10-101 (Michie Supp. 1991); COLO. REV. STAT. § 18-3-101 (Supp. 1992); CONN. GEN. STAT. ANN. § 53a-54c (West

Besides the modifications created by state legislatures, courts have imposed restrictions and limitations through their interpretations of the doctrine. Some of these modifications were eventually adopted by the legislature as part of the statutory language,[69] while others arise as a result of construing ambiguous language.[70] There are also court-created modifications that exist in addition to the requirements of the statute.[71]

Despite the substantial amount of criticism supporting the abolition of the doctrine, the doctrine continues to be viable. The Model Penal Code has had virtually no impact on reforming the doctrine; as a result of piecemeal changes, state statutes are frequently ambiguous and inconsistent. Rather than clarifying these ambiguities, the courts have added to the confusion through court imposed changes and restrictions. Perhaps the longevity of the doctrine is an indication of the current societal view towards crime and morality. Instead of abolishing the doctrine, the legislature should concentrate on creating a statute that is unambiguous, that can be facilely construed by the courts, and that represents society's need to punish deserving defendants.

III. THE ELEMENTS OF FELONY-MURDER

Generally, crimes are divided into two elements: mens rea and actus reas.[72] Mens rea is the mental state needed to complete the crime while actus reas is the wrongful act committed by the defend-

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1985); DEL. CODE ANN. tit. 11, § 636 (Supp. 1992); ME. REV. STAT. ANN. tit. 17-A, § 202 (West 1983); MONT. CODE ANN. § 45-5-102 (1992); N.H. REV. STAT. ANN. § 630:1-b (1986); N.J. STAT. ANN. § 2C:11-3 (West Supp. 1992); N.Y. PENAL LAW § 125.25 (McKinney 1987); N.D. CENT. CODE § 12.1-16-01 (1985); OR. REV. STAT. § 163.115 (1991); PA. STAT. ANN. tit. 18, § 2502(b) (1983); TEX. PENAL CODE ANN. § 19.02(a)(3) (West 1989); UTAH CODE ANN. § 76-5-203 (Supp. 1992); WASH. REV. CODE ANN. § 9A.32.030 (West Supp. 1993) (all requiring either immediate flight or in the course of the felony).

69. For example, Alabama included the inherently dangerous limitation in the text of its statute. ALA. CODE § 13A-6-2(a)(3) (1975 & Supp. 1993) (stating that a person who causes the death of another in the course of a felony that is inherently dangerous to human life commits murder).

70. For example, *compare* People v. Satchell, 489 P.2d 1361 (Cal. 1971) (holding that the felony of possession of a concealable weapon by an ex-felon is not a felony inherently dangerous to human life) *with* State v. Goodseal, 553 P.2d 279 (Kan. 1976) (holding that a jury must decide in the light of the circumstances whether the felony is inherently dangerous and that a convicted felon's possession of a firearm used to frighten a victim is a felony inherently and foreseeably dangerous to human life, therefore supporting a conviction of felony murder). Another example is the construction of "immediate flight." *See* People v. Gladman, 359 N.E.2d 420 (N.Y. 1976) (holding that immediate flight is a question of fact for the jury).

71. *See* Garrett v. State, 573 S.W.2d 543 (Tex. 1978) (holding that, in addition to statutory requirements, the purpose of the felony must be independent of the killing).

72. *See generally* LAFAVE & SCOTT, *supra* note 44, at 7.

ant.[73] Where a crime requires a specific result, such as a death, the prosecution must also prove that the defendant caused the result.[74] The common law felony-murder doctrine generally states that if a death occurs in the course of the commission or attempted commission of a felony, the defendant is guilty of homicide, even if there was no intent to cause the death.[75] Thus, unlike traditional crimes, felony-murder has no mens rea requirement for the homicide as long as there is intent to commit the underlying felony.[76] Although no mens rea is required for the homicide, there still must be a causal relationship between the underlying felony and the resulting homicide.

There must be a connection (more than mere coincidence between time and place) between the conduct and the result of the conduct in order to satisfy the element of causation in any result-oriented crime.[77] In crimes with mens rea, the conduct must have factually caused the result, and the forbidden result which actually occurs must be similar to the result or manner that the defendant intended.[78] This ensures that the defendant may fairly be held responsible for the actual result even if the result occurs in a different way than that intended by the defendant.[79] In the felony-murder situation, however,

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73. *Id.*

74. *Id.*

75. *Id.*

76. Courts have used different rationales to support the lack of mens rea. Some courts have held that the intent of the underlying felony is transferred to the intent to commit the murder. *See* Shanahan v. United States, 354 A.2d 524, 526 (D.C. 1976) (holding that intent is implied from the commission of the underlying felony) (citing Goodall v. U.S., 180 F.2d 397, 399-400 (D.C. Cir. 1950). Other courts have determined that no intent is required. *See, e.g.*, People v. Root, 524 F.2d 195, 198 (9th Cir. 1975) (holding that intent to kill is not required under the felony-murder rule). Some courts have held that there is constructive intent. *See, e.g.*, Commonwealth *ex rel* Smith v. Myers, 261 A.2d 550, 553 (Pa. 1970) (holding the malice necessary to make a killing murder is constructively inferred from the malice incident to the perpetration of the initial felony). *See generally* Note, *Felony Murder: A Tort Law Reconceptualization*, 99 HARV. L. REV. 1918, 1920 (1986) (comparing the absence of mens rea in felony-murder to tort concepts); Roth & Sundby, *supra* note 35, at 453-60 (conceptualizing the lack of mens rea as transferred or constructive intent).

77. People v. Mulcahy, 149 N.E. 266 (Ill. 1925).

78. *See, e.g.*, State v. Hall, 633 P.2d 398 (Ariz. 1981). The felon's blows to the victim's head caused immobility and hospitalization. *Id.* at 400. Although the victim later died of a pulmonary embolism, this was held to be a natural consequence of immobilization. *Id.* at 403-04.

79. This scenario assumes that the required mens rea for the crime is intent. If the required mens rea is recklessness or negligence, then the forbidden result must be similar enough to and occur in a manner which the defendant's reckless or negligent conduct created a risk of happening. For further discussions of causation in general, see JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW ch. 8 (2d ed. 1960); LAFAVE & SCOTT, *supra* note 44, at 246-67; Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323 (1985); David J. Karp, *Causation in the Model Penal Code*, 78 COLUM. L. REV. 1249 (1978); Paul K. Ryu, *Causation in Criminal Law*, 106 U. PA. L. REV. 773 (1958).

where intent is not required, liability for a caused death results not because the felon intended to kill the victim, but because he had a different bad intention (committing a felony) and was acting in a way to carry out that different intention. Thus, the causation analysis becomes a little different in cases proceeding under a theory of felony-murder. The result of the defendant's acts can no longer be viewed in relation to the defendant's intent to cause that result.

When a victim is killed during the course of a felony by one of the felons, the causation analysis is generally not problematic. The courts generally look at whether the death is a foreseeable result of the underlying felony. For example, in *State v. Casper*,[80] the court held that there was sufficient evidence for a felony-murder conviction when the victim of an attempted robbery, upon being threatened with castration, ran into a river, where his dead body was found a few days later. Similarly, a defendant was found guilty of felony-murder when an elderly victim suffered a heart attack three days after an attempted robbery.[81] Both of these courts held that it was foreseeable that the defendant's conduct could lead to the victims' deaths.[82] Because the felon came prepared to engage in violence towards a particular victim, and violence in fact occurred, it does not offend principles of fairness to find that the felonious conduct caused the death.

This can easily be distinguished, however, from the situation where someone is killed by someone other than one of the felons. In this scenario, it is possible that the felons did not even have a weapon at the time that they committed the felony.[83] In that situation, not only did the defendant not intend the result, but it is also possible that he did not intend the circumstances that led up to the resulting dealth. Consequently, one of the areas of causation in felony-murder cases that continues to give difficulty to both legislatures and courts is the question of whether to extend liability to co-felons who did not actually perform the act of killing. The courts have used the causation

80. 219 N.W.2d 226 (Neb. 1974).

81. *In re* Anthony M., 471 N.E.2d 447 (N.Y. 1984).

82. State v. Casper, 219 N.W. 2d 226 (Neb. 1974); *In re Anthony M.*, 471 N.E.2d at 448; *see also* State v. Amaro, 436 So. 2d 1056 (Fla. Dist. Ct. App. 1983) (holding that a defendant who has already been arrested and is out of the house is criminally liable when a co-felon kills a police officer who is searching the house).

83. For example, in State v. Chambers, 373 N.E.2d 393-94 (Ohio Ct. App. 1977), the defendant and his partner, who were both unarmed, were surprised by the owner of the home they were burglarizing. The owner shot and killed one of the felons as he attempted to escape. *Id.* at 394. Although Ohio does not have a felony-murder rule, it is involuntary manslaughter for a person to "cause the death of another as a proximate result of the offender's committing or attempting to commit" a felony. OHIO REV. CODE ANN. § 2903.04(A) (Anderson 1993). The court convicted the co-felon for the death of his partner, concluding that the killing was a foreseeable consequence of the felony. *Chambers*, 373 N.E.2d at 396.

analysis to restrict the doctrine in these situations because of the inherent injustice that could be part of a finding of liability.[84]

There are many factual variations of this scenario. If the defendant and his accomplices commit a felony on a victim, the act causing the death can originate from the defendant, codefendant, victim, police officer, or even an innocent bystander. That act can cause the death of a codefendant, victim, police officer, or an innocent bystander.[85] Some of these scenarios are less problematic than others. When the act causes the death of a co-felon, liability has generally not been extended to a surviving felon.[86] When the act of killing is done by a co-felon and results in the death of a police officer, innocent bystander or victim, liability has generally been extended to all of the co-felons.[87] Finally, where a victim or innocent bystander is killed because he has been used as a shield or taken hostage by a defendant, liability has been extended regardless of who did the act of killing.[88]

Considerable confusion and inconsistency remain in those cases where the act of killing is done by a police officer, victim, or innocent bystander, and the act results in the death of a police officer, victim, or innocent bystander. In determining whether there should be liability, courts have construed felony-murder statutes according to different causation doctrines. Depending on which doctrine is used, the results of the analysis vary considerably.

A. Statutory Language of Causation

Although most causation analysis is common law, some states have dealt with causation through statutes. The threshold requirement of statutory interpretation is that if a statute is unambiguous, the

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84. *Chambers*, 373 N.E.2d at 395.

85. For a further discussion, see Walter H. Hitchler, *The Killer and his Victim in Felony-Murder Cases*, 53 DICK. L. REV. 3 (1948); Frederick C. Moesel, Jr., *A Survey of Felony Murder*, 28 TEMP. L.Q. 453 (1955).

86. Many statutes now specifically contain language that limits the doctrine to situations where the person killed is not a participant in the felony. *See, e.g.*, ALASKA STAT. § 11-41-110 (1989); COLO. REV. STAT. § 18-3-101 (Supp. 1992); CONN. GEN. STAT. ANN. § 53a-54c (West 1985); N.J. STAT. ANN. § 2C:11-3 (West Supp. 1992); N.Y. PENAL LAW § 125.25 (McKinney 1987); OR. REV. STAT. § 163.115(1)(b) (1991); VA. CODE ANN. § 18-2-32 (Michie Supp. 1993); WASH. REV. CODE ANN. § 9A-32-030 (West Supp. 1993).

Even in states where the statutes do not contain that language, courts have held that a defendant is not liable for a codefendant's death under the felony-murder doctrine. *See, e.g.*, People v. Washington, 402 P.2d 130, 133 (Cal. 1965); People v. Austin, 120 N.W.2d 766, 775 (Mich. 1963); State v. Canola, 374 A.2d 20, 30 (N.J. 1977).

87. *See* Campbell v. State, 444 A.2d 1034 (Md. 1982) (discussing the felony-murder doctrine).

88. *See* Jackson v. State, 408 A.2d 711, 719 n.5 (Md. 1979) (stating that courts generally reason that the defendant's action in forcing the victim into such a dangerous position is as much a cause of the death as if the defendant had actually fired the fatal shot) (citing Wilson v. State, 68 S.W.2d 100 (Ark. 1934)).

court must apply its plain meaning to resolve the question before it.[89] Thus, the easiest way to determine which causation theory to apply is if the statute itself clearly states the applicable requirement.

Generally, the statutory language falls into two categories. Some statutes do not contain the word "cause" at all, but instead require that the murder be committed in the perpetration or attempted perpetration of certain felonies.[90] Other statutes contain language that states that a person is guilty of felony-murder when he commits or attempts to commit a felony, and in the course of or in furtherance of such crime, he causes the death of a person.[91] This statutory language neither specifies the theory of causation nor does it tell the court what to do in those cases where the fatal shot is fired by someone other than one of the defendants.

There have been some states that have drafted statutes to specifically explain the causation requirement. For example, the old New York felony-murder statute made "the killing of a human being murder in the first degree, when done without a design to effect death by a person engaged in the commission of or in an attempt to commit a felony . . . ."[92] Thus, this statute, by its particular wording, seemed to require that the killing be committed by the defendant or a co-felon.[93] Another example is Maine's felony-murder statute which provides that a person is guilty if "acting alone or with one or more other persons in the commission of or attempt to commit, or immediate flight after committing [enumerated felonies] the person or another participant in fact causes the death of a human being, and the death is a reasonably foreseeable consequence of such commission, attempt, or flight."[94] Thus, under the Maine statute, it does not matter who fired

89. *See* F. REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 229-33 (1975); NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.01 (5th ed. 1992).

90. *See, e.g.*, CAL. PENAL CODE § 189 (West 1988); FLA. STAT. ANN. § 782.04 (West 1992); IDAHO CODE § 18-4003 (Supp. 1993); KAN. STAT. ANN. § 21-3401(a) (Supp. 1992); LA. REV. STAT. ANN. § 30.1 (West Supp. 1993); NEB. REV. STAT § 28-303 (1989); NEV. REV. STAT. § 200.030 (1991); N.M. STAT. ANN. § 30-2-1(A) (Michie 1984); N.C. GEN. STAT. § 14-17 (1992); R.I. GEN. LAWS § 11-23-1 (Supp. 1992); S.D. CODIFIED LAWS ANN. § 22-16-4 (Supp. 1993); W. VA. CODE § 61-2-1 (1992); WYO. STAT. § 6-2-101 (Supp. 1992).

91. *See, e.g.*, ALA. CODE § 13A-6-2 (1982); ALASKA STAT. § 11-41-110 (1989); ARIZ. REV. STAT. ANN. § 13-1105(A) (1989); ARK. CODE ANN. § 5-10-101 (Michie Supp. 1991); CONN. GEN. STAT. ANN. § 53a-54c (West 1985); D.C. CODE ANN. § 22-2401 (1991); MASS. GEN. LAWS ANN. ch. 265, § 1 (West 1990); N.D. CENT. CODE § 12.1-16-01(1)(c) (1985); OR. REV. STAT. § 163.115(1)(b) (1991); TEX. PENAL CODE ANN. § 19.02 (West 1989); UTAH CODE ANN. § 76-5-203 (Supp. 1992); WASH. REV. CODE ANN. § 9A-32-030 (West Supp. 1993).

92. People v. Wood, 167 N.E.2d 736 (N.Y. 1960).

93. *Id.*

94. ME. REV. STAT. ANN tit. 17-A, § 202 (West Supp. 1992). The Penal Code in Maine also has a provision that specifically defines causation to require both factual causation and foreseeability. *Id.* § 33.

the fatal shot as long as the death of the victim is reasonably foreseeable.[95]

Similarly, the Colorado statute states that a person is guilty of felony-murder if, during the course of a felony, the death of a person, other than one of the participants is caused by anyone.[96] Therefore, it does not matter who fired the fatal shot under the Colorado statute.

In New Jersey, the legislature specifically amended the felony-murder statute in response to a decision that held that a felon could not be liable for the death of a co-felon caused by someone resisting the commission of the felony.[97] The legislature responded by amending the felony-murder statute to eliminate the requirement that the death be caused by one of the participants and provided that the requirement was satisfied if the death was caused by "any person."[98] By making this change, the legislature made it clear that a felon could be held liable under the felony-murder doctrine even if the death was caused by the victim.

In 1981, the New Jersey Legislature again amended the felony-murder rule by deleting the requirement that the death occur in furtherance of the commission of the felony.[99] As explained by the Senate Judiciary Committee, the legislature was concerned that the "in furtherance" language might result in a felon avoiding liability if the death was caused by a non-participant such as a victim or police officer.[100] Thus, the purpose of the amendments was to ensure

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95. State v. Reardon, 486 A.2d 112 (Me. 1984).

96. COLO. REV. STAT. § 18-3-102 1(b) (Supp. 1993). *But see* sources cited *supra* note 86 and accompanying text.

97. State v. Canola, 374 A.2d 20 (N.J. 1977). In *Canola*, four felons attempted to rob a jewelry store. *Id.* During the course of the robbery, the owner killed one of the felons and then was killed himself. *Id.* at 21. The defendant was convicted of felony-murder of both the owner and the co-felon. *Id.* The appellate division affirmed the conviction and the New Jersey Supreme Court reversed, holding that a felon could not be liable for any death, even of a non-felon, when the death was caused by someone other than a participant in the felony. *Id.* at 30. Thus, *Canola* limits the felony-murder rule to killings committed by a participating felon.

98. State v. Martin, 573 A.2d 1359 (N.J. 1990) (construing the legislative amendments).

99. *Id.* at 1371.

100. The committee statement that accompanied the amendment reads:

> Under 2C:11-3, a person committing a serious crime (i.e. robbery or arson) is guilty of murder if during the course of or in furtherance of that crime a homicide occurs. This is what is commonly referred to as the "felony-murder" doctrine. The felony-murder provision is only intended to prohibit murder prosecutions in cases where the victim is a co-felon. However, including in this definition the phrase "in furtherance of" could be read to preclude prosecution for murder in certain circumstances. For instance, when during a robbery, the shopkeeper fires at the robber but instead kills an innocent bystander, the robber might not be charged with murder because, although the killing occurred during the course of the robbery, the killing was not in furtherance of the robbery. Therefore, in order to clarify

that the felony-murder rule applies regardless of who fires the fatal shot.[101]

Additionally, New Jersey's Penal Code includes a statutory definition of causation.[102] Although the felony-murder statute does not define causation, the New Jersey court has held that the penal code defines causation not only for intentional homicide, but for all crimes including felony-murder.[103] According to the statute, the causation element is not established unless the actual result is a probable consequence of the actor's conduct.[104] The court has interpreted that language to require the prosecution to prove that the death occurred in the course of the crime, that the death would not have occurred but for the crime, and that the death is not too remote or accidental in its occurrence.[105]

Thus, jurisdictions have used different statutory language to define the parameters of the causation doctrine under the felony-murder rule. In many jurisdictions, however, the statute is silent with respect to how a nonparticipant killing of an innocent party should be addressed. The courts have therefore used various theories of causation to resolve that question.

> that a robber could be charged with murder under such circumstances, section 14 would delete the phrase "in furtherance of" from 2C:11-3.

Id. (quoting SENATE JUDICIARY COMMITTEE, STATEMENT TO SENATE COMM. SUBSTITUTE, No. 1537, § 14 (1981)).

101. Many states have helpful information about the way that the felony-murder statute should be interpreted in the Committee comments. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-203 (1989); DEL. CODE ANN. tit. 11, § 261 (1987); HAW. REV. STAT. § 702-214 (1985); KY. REV. STAT. ANN. § 501.060 (Michie/Bobbs-Merril 1990); MONT. CODE ANN. § 45-2-201 (1992); N.J. STAT. ANN. § 2C:2-3 (West Supp. 1992); PA. STAT. ANN. tit. 18, § 302 (1983).

102. N.J. STAT. ANN. § 2C:2-3 (West Supp. 1992).

103. *Martin*, 573 A.2d at 1371-72. That reasoning is also supported by a 1985 addition to the Model Penal Code commentary on section 2.03(4), which states that:

> The most important application [of the causation requirement] may be in jurisdictions where strict liability continues to play a role in determining the gravity of some offenses. Under the felony-murder rule, for example, a person committing a felony is strictly liable for deaths caused during the felony. The principle of this subsection is that there should be no liability unless the actual result is a probable consequence of the actor's conduct. Thus, suppose the moment a bank robber stepped into the bank, an employee pushing the button for a burglar alarm was electrocuted. The robber would not be liable for the death of the employee.
>
> In general, strict liability is based on a desire to secure extreme care in areas in which it is imposed. This objective is not significantly furthered by finding liability for improbable results, nor would such an approach be just.

Id. at 1371-72 (quoting MODEL PENAL CODE § 2.03(4) cmt. at 264 (1985)).

104. N.J. STAT. ANN. § 2C:2-3 (West. Supp. 1992).

105. *Martin*, 573 A.2d at 1364.

B. *Court-Created Theories of Causation*

1. *Agency Theory*

Although courts have used the agency theory as a theory of causation, it really rests on the act requirement.[106] The agency theory, borrowed from principles of conspiracy, is based on the premise that co-conspirators are only responsible for acts done in furtherance of the conspiracy, and not for those act committed outside the common design. The premise was extended to the felony-murder doctrine, resulting in the conclusion that there can be no liability unless the act causing the death is an act of one of the felons that occurs in furtherance of the felony. Accordingly, under this theory, neither a defendant nor his confederates can be liable if the act of killing is done by a police officer, innocent bystander, or victim. The identity of the killer becomes the threshold requirement for finding liability under the felony-murder doctrine.[107]

Courts that have adopted the agency theory have done so based on different rationales. For example, in *State v. Campbell*,[108] a co-felon was killed during an armed robbery by nine bullet wounds, two that were inflicted by the victim and seven that were inflicted by a police officer.[109] The Maryland felony-murder statute provided that "all murder which shall be committed in the perpetration of, or attempt to perpetrate . . . armed robbery . . . shall be murder in the first degree."[110] The court held that no criminal liability could be imputed to the surviving felon when the lethal act was committed by a non-felon.[111] The court reasoned that the statute required that the killing be committed in the perpetration of the felony and that the language of the statute dictated that the act be committed by a felon or one of

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106. Moesel, *supra* note 85, at 461. A classic statement of the agency theory appears in Commonwealth v. Campbell, 89 Mass. 541 (1863). The defendant was participating in a riot. *Id.* The issue was whether under the felony-murder doctrine, the defendant could be guilty of murder if another person was killed by a soldier who was resisting the mob's attack. *Id.* at 545-46. The court held:

> There can be no doubt of the general rule of law, that a person engaged in the commission of an unlawful act is legally responsible for all of the consequences which may naturally or necessarily flow from it, and that, if he combines and confederates with others to accomplish an illegal purpose he is liable . . . for the acts of each and all who participate with him . . . . As they all act in concert for a common object, each is the agent for all the others, and the acts done are therefore the acts of each and all. . . . [N]o person can be held guilty of homicide unless the act is either actually or constructively his, and it cannot be his act in either sense unless committed by his own hand or by some one acting in concert with him . . . ."

Id. at 543-44.

107. Moore v. Wyrick, 766 F.2d 1253, 1255 (8th Cir. 1985).

108. 444 A.2d 1034 (Md. 1981).

109. *Id.* at 1036.

110. *Id.*

111. *Id.* at 1037.

his confederates.[112] Because this killing was committed to thwart the felony and not to perpetrate it, the felony-murder statute did not apply.[113]

In a case involving similar facts, a California court also refused to extend liability to a defendant when a co-felon was killed by a victim during the course of an attempted robbery.[114] Again, the court reasoned that the felony-murder statute requires that the felon or an accomplice commit the killing; otherwise, the killing does not perpetrate the felony. "To include such killings within section 189 would expand the meaning of the words 'murder . . . which is committed in the perpetration . . . [of] robbery' beyond common understanding."[115] The court specifically stated, however, that it did not make this finding based on the identity of the person who fired the fatal shot.[116] Instead, the court recast the issue as whether a defendant can be convicted of murder for the killing of any person by another who is resisting the felony.[117]

In *Alverez v. District Court of Denver*,[118] a Colorado court applied the agency theory, but based the application of the theory on a different rationale. In *Alverez*, a police officer, mistaking the victim for one of the robbers, killed him with a shotgun blast to the head.[119] The Colorado felony-murder statute provides that a person is guilty of

112. *Id.* at 1042.
113. *Id.* at 1038.
114. People v. Washington, 402 P.2d 130 (Cal. 1965).
115. *Id.* at 133. But California has created a unique kind of vicarious liability called provocative act murder to find liability when a killing is committed by a nonfelon. *Id.* at 134. In a series of cases, the California courts have held that a defendant may be vicariously liable for the lethal acts of someone resisting the felony if the defendant, by engaging in conduct that is likely to kill, acts with conscious disregard for human life. *Id.* This rule was first enunciated in *Washington*, where the robbery victim killed one of the felons. *Id.* at 132. Although the court held that the felony-murder rule did not apply, the court determined that a defendant who initiates a gun battle may be found liable for murder if his victims resist and someone is killed. *Id.* at 134. Under these circumstances, the defendant has shown a "'wanton disregard for human life. . .'" *Id.* (quoting People v. Thomas, 261 P.2d 1, 7 (Cal. 1953)); *see also* People v. Gilbert, 408 P.2d 365 (Cal. 1965), *vacated on other grounds*, Gilbert v. California, 388 U.S. 263 (1967).

In Taylor v. Superior Court, 477 P.2d 131 (Cal. 1970), the court extended the scope of this theory by holding that threats alone can be sufficient to hold a defendant liable for a killing committed by a resisting victim. If felons initiate gunfire by their threatening conduct, they can be vicariously liable for a resulting death. *Id.* at 135. This approach seems to be more of a change in terminology than a departure from the felony-murder doctrine. In discussing the California approach, a Nevada court noted a trial court's observation that a "rose, the felony murder rule, is still a rose by any other name, vicarious liability." Sheriff v. Hicks, 506 P.2d 766, 768 n.7 (Nev. 1973).
116. *Washington*, 402 P.2d at 134.
117. *Id.*
118. 525 P.2d 1131 (Colo. 1974) (en banc).
119. *Id.* at 1131.

murder when he "commits or attempts to commit . . . robbery . . . and in the course of or in furtherance of the crime . . . or of immediate flight therefrom . . . the death of a person, other than one of the participants, is caused . . . ."[120] The trial court held that where a participant mistakenly kills a nonparticipant during the course of a felony, the perpetrators of the felony are criminally responsible.[121] The Colorado Supreme Court reversed, holding that the act of killing must be committed by a felon or co-felon.[122]

The court concluded that the statutory language failed to designate who must cause the death for criminal liability to attach.[123] The court looked to legislative history and determined that the legislative intent was to narrow the application of the rule.[124] The court reasoned that the new statute was identical in meaning to its predecessor and that felony-murder was therefore to remain limited to killings by one of the participants.[125] The dissent, however, noted that the statutory language is in plain English and argued that the wording supports only one conclusion: Who does the killing is irrelevant as long as there is proximate cause.[126]

Thus, even when the court articulates a different rationale for using the agency theory, the reasoning still seems to be based on an interpretation of the old felony-murder statute that requires that the killing occur in the perpetration of the felony. The effect, however, of applying the agency theory is that the state must prove as a threshold matter that the defendant, or an accomplice, actually killed the victim. If the state cannot establish this element, the defendant cannot be found guilty of felony-murder.[127]

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120. *Id.* at 1132.
121. *Id.* at 1131.
122. *Id.* at 1132.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 1134.
127. The Pennsylvania courts first provided insight into the problems associated with the two theories of causation. In Commonwealth v. Almeida, 68 A.2d 595 (Pa. 1949), *cert. denied*, 339 U.S. 924 (1950), a police officer was killed by a bullet which may have been fired by another police officer. Based on the proximate cause theory, the court held that the felon was guilty of murder because the killing was a natural consequence of the robbery. *Id.* at 601. In Commonwealth v. Thomas, 117 A.2d 204 (Pa. 1955), the court continued to extend the felon's liability, holding a felon liable for the death of a co-felon who was killed by the intended victim. The court reasoned that the death of a co-felon was just as foreseeable as the death of an innocent bystander. *Id.* at 206.

In Commonwealth v. Redline, 137 A.2d 472 (Pa. 1958), the court overruled *Thomas*, holding that the rule enunciated in *Almeida* does not apply when the person killed is a co-felon. The court based its decision on the reasoning that because the killing of the co-felon was justifiable, it could not support a charge of murder. *Id.* at 483. Finally, in Commonwealth v. Myers, 261 A.2d 550 (Pa. 1970), the court overruled *Almeida* and adopted the agency theory of liability. In rejecting the reasoning

2. Proximate Causation

Another theory of causation is borrowed from tort law. Under the tort concept of proximate causation,[128] the defendant must have a duty to the plaintiff, the risk must be the actual or a "but for" cause of the result, and the risk must be foreseeable.[129] An intervening or superseding event can break the chain of causation, absolving the defendant from liability.[130] Courts that have applied these tort concepts in the criminal context have used various combinations.

Some courts have found liability in felony-murder cases in the absence of foreseeability, based only on "but for" causation. While this approach has been given different names, such as "cause in fact," the test is the same: But for the defendant's act, the death would not have occurred.[131] In *Wade v. State of Oklahoma*,[132] the defendant was convicted of second degree murder under an Oklahoma statute that imposes liability when a person effects the death of any individual while engaged in the commission of certain felonies not enumerated in the first degree murder statute. In upholding the conviction, the court held that under the felony-murder doctrine, the state is not required to establish that the felony perpetrated by the defendant is the proximate cause of the victim's death.[133] The only limitation on the

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enunciated in *Redline*, the court held that "to make the result hinge on the character of the victim is, in many instances, to make it hinge on the marksmanship of resister." *Id.* at 558.

Numerous other jurisdictions have followed the agency theory and refused to extend liability to a felon if it could not be proven that the defendant fired the fatal shot. *See* Commonwealth v. Balliro, 209 N.E.2d 308 (Mass. 1965) (felon found not guilty where it could not be prove who fired the fatal bullet); Butler v. People, 18 N.E. 338 (Ill. 1888) (felon found not guilty even though rowdy conduct resulted in the killing of bystander by the town marshall). *But see* People v. Hickman, 319 N.E.2d 511 (Ill. 1974), *cert. denied*, 421 U.S. 913 (1975) (felon held liable for death of police officer shot accidentally by another police officer); Commonwealth v. Moore, 88 S.W. 1085 (Ky. 1905) (felon not guilty where victim of robbery killed a bystander); State v. Oxedine, 122 S.E. 568 (N.C. 1924) (felon not guilty where victim of assault killed a bystander).

128. For an in-depth discussion, see Note, *supra* note 76, at 1918.

129. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS §§ 42, 43, at 272-74 (5th ed. 1984).

130. *Id.* § 42, at 273-75.

131. LaFave and Scott describe cause in fact as "'but for' the antecedent conduct the result would not have occurred." LAFAVE & SCOTT, *supra* note 44, at 279. *Compare* State v. Wiley, 698 P.2d 1244, 1259 (Ariz. 1985) (holding that defendant's act was an act "but for" which the death would not have occurred); People v. Bowman, 669 P.2d 1369, 1379 (Colo. 1983) (holding that defendant's act of committing arson was an act "but for" which death of fireman would not have occurred). The problem with "but for" causation is that it is always present since the outcome without the defendant's conduct is impossible to predict. For a discussion of causation issues in relation to cases involving drug overdoses, see Lynne H. Rambo, Note, *An Unconstitutional Fiction: The Felony-Murder Rule as Applied to the Supply of Drugs*, 20 GA. L. REV. 671 (1986).

132. 581 P.2d 914 (Okla. Crim. App. 1978).

133. *Id.* at 915.

doctrine is that there must be a nexus between the underlying felony and the death of the victim.[134]

In *People v. Stamp*,[135] a robbery victim died of a heart attack twenty minutes after the defendants committed the crime. The defendants argued on appeal that the felony-murder doctrine was inapplicable because the killing did not occur in perpetration of the felony.[136] Although the jury was instructed on the definition of proximate cause,[137] the appellate court specifically stated:

> The [felony-murder] doctrine is not limited to deaths which are foreseeable. . . . As long as the homicide is the direct causal result of the robbery the felony-murder rule applies whether or not the death was a natural or probable consequence of the robbery. So long as the victim's predisposing physical condition, regardless of its cause, is not the *only* substantial factor bringing about his death, that condition, and the robber's ignorance of it, in no way destroys the robber's criminal responsibility for the death.[138]

Many courts, however, have required both "but for" causation and "foreseeability." In *State v. Moore*,[139] a Missouri court examined whether the defendant could be liable under the felony-murder doctrine for the death of an innocent bystander who was killed by an intended victim who was attempting to abort an armed robbery. The defendant argued on appeal that the felony-murder rule requires a finding that the defendant or an accomplice fired the fatal shot.[140] The felony-murder statute in effect at the time provided that "every homicide which shall be committed in the perpetration or attempt to perpetrate any . . . robbery . . . shall be deemed murder in the first degree."[141]

Although precedent seemed to indicate that Missouri followed the agency theory, the court adopted the causation theory of proxi-

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134. *Id.* at 916.

135. 82 Cal. Rptr. 598 (Cal. Ct. App. 1969), *cert. denied sub nom*, 400 U.S. 819 (1970).

136. *Stamp*, 82 Cal. Rptr. at 598.

137. The court stated in its instructions to the jury:

> To constitute a felonious homicide there must be, in addition to the death of a human being, an unlawful act which proximately caused that death.
>
> The proximate cause of death is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the death, and without which the result would not have occurred.

Id. at 603 n.4. The defendant objected to the instruction. *Id.* at 600.

138. *Id.* at 603 (citations omitted).

139. 580 S.W.2d 747 (Mo. 1979) (en banc).

140. *Id.* at 750.

141. *Id.*; MO. REV. STAT. § 559.010 (1969) (repealed September 28, 1975).

mate cause.[142] The court held that the test is whether the homicide is a natural and proximate result of which the defendant was reasonably bound to anticipate.[143] If the felony sets in motion a chain of events that were or should have been within the defendant's contemplation at the time the act was instigated, then it is immaterial whether the defendant fired the fatal bullet.[144] The court in *Moore* found that it was reasonably foreseeable that a robbery attempt would meet resistance.[145] This set in motion the chain of events that caused the death of the victim.[146] Therefore, the conviction was affirmed.[147]

Thus, depending on which approach the courts use, factually similar cases will produce very different results. In those states where the felony-murder statute has been interpreted as embracing the proximate cause theory of causation, liability is not precluded even if the defendant or an accomplice did not kill the victim. The state is not required to prove the identity of the killer, but still must prove that the felon's actions set in motion a chain of events that directly led to a foreseeable death. Under the proximate cause theory, therefore, a defendant can sometimes be held liable even when the shot is fired by a victim, police officer, or bystander, and the death occurs to a victim, police officer, or bystander.[148]

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142. State v. Moore, 580 S.W.2d 747, 751 (Mo. 1979).

143. *Id.* at 752.

144. *Id.* at 751 (citing Johnson v. State, 386 P.2d 336 (Okla. Crim. App. 1963)).

145. *Id.* at 752.

146. *Id.*

147. Following his conviction, the defendant sought habeas corpus relief on the grounds that the Missouri state court retroactively applied a new and expansive construction of the Missouri felony-murder statute when it followed the proximate cause theory of causation. Moore v. Wyrick, 766 F.2d 1253-54 (8th Cir. 1985). The circuit court held that the change in law was constitutionally unforeseeable and could not be applied retroactively. *Id.* at 1258. Thus, the defendant's petition was granted. *Id.* at 1259.

148. The proximate cause theory has been used by some courts in determining whether a felon can be liable under the felony-murder doctrine even when the fatal shot comes from the hands of a third party. For example, in People v. Hickman, 319 N.E.2d 511 (Ill. 1974), a police officer was shot by a fellow police officer during the course of police pursuit of the defendants, who were fleeing the scene of a burglary. The court looked at the wording of the felony-murder statute, which stated that "[a] person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death: . . . [h]e is attempting to commit a forcible felony." *Id.* at 512. The court referred to the committee notes to that section, which stated that it is immaterial whether the killing is committed by a third party trying to prevent the commission of the felony. *Id.* at 512-13.

The court held that based on Illinois statutory and case law, it did not matter who fired the fatal shot as long as the resulting death is foreseeable. *Id.* at 513-14 Because it is foreseeable that an escape will invite "retaliation, opposition and pursuit," the defendant could be liable for murder. *Id.* at 513; *see also* People v. Allen, 309 N.E.2d 544 (Ill. 1974) (affirming the murder conviction of a conspirator for the slaying of a police officer when the police officer was killed by another police officer).

Under the agency theory of causation, however, there can be no liability unless there is proof beyond a reasonable doubt that the shot that killed the victim was fired by the defendant or an accomplice. Thus, where it is unclear who fired the fatal shot, liability for the murder can never be imputed on to the defendant. The prosecution must prove, as a threshold matter, the identity of the killer; for without that information, the jury cannot examine the question of causation.

The present trend seems to be for courts to use the agency theory to limit criminal culpability under the felony-murder doctrine to lethal acts committed by the felons themselves or their accomplices.[149] Thus, courts in several jurisdictions have appeared to abandon the proximate cause theory in favor of the agency theory.[150]

The result of these divergent approaches is that the liability of a defendant depends not only on the state in which the defendant is tried, but also on the court within that state. This is an unsatisfactory result because the courts are using the agency theory of causation to restrict the application of the felony-murder rule in a way that is not necessarily consistent with principles of statutory analysis, societal views about crime, and general criminal law principles.

The next section discusses the need for a more uniform approach towards causation in felony-murder cases, and the last section proposes such a method. The methodology balances the need to prevent unfettered application of the felony-murder doctrine with the need for a careful, consistent analysis that provides the most just result.

IV. The Need For a Consistent Rule

The felony-murder rule is statutory. Yet, courts retain a powerful role in interpreting and applying the rule because of imprecise language and the drafters' inability to anticipate different factual scena-

149. One reason for refusing to extend the felony-murder doctrine is that it would not achieve the underlying purpose of the rule. People v. Washington, 402 P.2d 130, 133 (Cal. 1965). Another reason is that some courts feel that the tort liability concept of proximate cause has no place in the criminal context because of the difference in the underlying rationales of tort law and proximate cause. State v. Canola, 374 A.2d 20, 30 (N.J. 1977). The theory of proximate cause can be modified, however, so that it provides a closer and more direct causal connection, thus in keeping with the differences in the rationales.

150. *Compare* State v. Burton, 325 A.2d 856, 858-59 (N.J. Super Ct. Law Div. 1974) (proximate cause) *with Canola*, 374 A.2d at 22, 29 (agency); *and* Commonwealth v. Thomas, 117 A.2d 204 (Pa. 1955) (proximate cause) *with* Commonwealth v. Redline, 137 A.2d 472 (Pa. 1958) (agency, overruling *Thomas*); *and* Commonwealth v. Almeida, 68 A.2d 595, 601-10 (Pa. 1949), *cert. denied*, 339 U.S. 924 (1950) (proximate cause) *with* Commonwealth v. Myers, 261 A.2d 550, 555-57 (Pa. 1970) (agency, overruling *Almeida*). *But compare* People v. Garippo, 127 N.E. 75, 77-78 (Ill. 1920) (agency) *with Hickman*, 319 N.E.2d at 513 (proximate cause, overruling *Garippo*); *and* State v. Majors, 237 S.W. 486, 488 (No. 1922) (agency) *with Moore*, 580 S.W.2d at 752 (proximate cause, overruling *Majors*).

rios that come within its parameters.[151] The causation requirement and its application to the factual scenario of a nonparticipant killing a nonparticipant involves both of these problems. The courts have responded to these difficulties in various ways, often leading to inconsistent and faulty conclusions.

It is submitted that the true reasons for the confusion is the dissatisfaction with the felony-murder doctrine, and the courts' use of the agency theory of causation as a means of limiting the doctrine. This limitation distorts the felony-murder doctrine's requirement of causation. Unless the statute is specifically written to require that a felon fire the fatal shot, courts should use a modified theory of proximate cause to keep the doctrine within bounds. To illustrate the problem, this section will examine the ways that the causation requirement has been interpreted under the New York felony-murder statute.

New York courts have been unable to reach a consistent view on whether the felony-murder statute should be interpreted as embracing the agency theory or the proximate cause theory. For example, the case of *People v. Wood*[152] has frequently been cited for the proposition that New York follows the agency theory.[153] In *Wood*, a gun battle outside a tavern resulted in the deaths of a bystander and a co-felon.[154] Shots were fired by the victim in an effort to assist the police officer.[155] The felony-murder statute in effect at the time stated that "the killing of a human being . . . is murder in the first degree, when committed . . . without a design to effect death, by a person engaged in the commission of, or in an attempt to commit, a felony."[156] The court of appeals upheld dismissal of the indictment, holding that the legislature intended that the act of killing must be committed by one of the felons for the felony-murder doctrine to apply.[157] The court relied in part on the "peculiar wording" of the statute to conclude that the word "person" must be a principal in the underlying felony.[158]

In 1965, the New York revised its felony-murder statute. It now provides that a person is guilty of second degree murder when "acting alone or with one or more other persons, he commits or attempts to

151. "Statutes as well as constitutional provisions at times embody purposeful ambiguity or are expressed with a generality for future unfolding." Justice Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528 (1947).

152. 167 N.E.2d 736 (N.Y. 1960).

153. For cases within New York, see People v. Matos, 568 N.Y.S.2d 683, 686 (N.Y. Sup. Ct. 1991); People v. Lewis, 444 N.Y.S.2d 1003, 1005 (N.Y. Sup. Ct. 1981); People v. Ozarowski, 344 N.E.2d 370, 375 (N.Y. 1976); People v. Jayner, 257 N.E.2d 26, 27 (N.Y. 1970). For cases outside of New York, see Alvarez v. District Court of Denver, 525 P.2d 1131-32 (Colo. 1974); Campbell v. State, 444 A.2d 1034, 1039 (Md. 1984).

154. *Wood*, 167 N.E.2d at 737.

155. *Id.* at 738.

156. *Id.*

157. *Id.* at 740.

158. *Id.*

commit [enumerated felonies] 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."[159] Since the revision, the New York courts have been split on whether the agency theory or the proximate cause theory applies. This split has led to inconsistent results in the lower courts.

In *People v. Guraj*,[160] shots fired during a robbery resulted in the victim's death. It could not be determined if the shots were fired by the defendant or another victim.[161] The court held that the present statute requires the state to prove that the defendant fired the shot under the agency theory.[162] Similarly, in *People v. Ramos*[163] the victim was killed during a burglary. It was unclear whether the defendant or the victim's wife fired the fatal shot.[164] The court held that the defendant must actually commit the homicidal act for the felony-murder statute to apply.[165]

Other courts, however, have held that the felony-murder statute requires proximate cause. In *People v. Flores*,[166] a police officer was killed during a high speed chase following a robbery. No witnesses saw the actual crash nor was there any evidence of contact between the defendant's vehicle and the police car.[167] Construing the element of causation under the felony-murder statute, the court held that the defendant's action must be found to be "'a sufficiently direct cause of [the ensuing] death.'"[168] The ultimate harm does not have to be intended by the actor.[169] It is enough if the ultimate harm is something that should have been foreseen as being reasonably related to the acts of the defendant.[170] The court held that although the defendant did bring into motion a chain of events that led to the death of the police officer, there was no affirmative act by the defendant that directly caused the accident because there was no evidence of contact between the vehicles.[171] In addition, there were factors such as the condition of the road that were considered to be a superseding event breaking

159. N.Y. PENAL LAW § 125.25(3) (McKinney 1991).
160. 431 N.Y.S.2d 925 (N.Y. Sup. Ct. 1980).
161. *Id.* at 926.
162. *Id.*
163. 496 N.Y.S.2d 443 (N.Y. App. Div. 1986).
164. *Id.* at 444.
165. *Id.*
166. 476 N.Y.S.2d 478 (N.Y. Sup. Ct. 1984).
167. *Id.* at 480.
168. *Id.* (quoting People v. Kibbe, 321 N.E.2d 773 (N.Y. 1974)). In *Kibbe*, the homicide was prosecuted under a theory of depraved indifference to human life, not felony-murder. *Kibbie*, 321 N.E.2d at 776. Nevertheless, the *Flores* court held that the analysis of proximate causation is the same as felony-murder. *Id.*
169. *Flores*, 476 N.Y.S. 2d at 480.
170. *Id.*
171. *Id.* at 481.

the chain of causation.[172] Thus, the felony-murder charges against the defendant were dismissed.[173]

In *People v. Matos*,[174] a police officer was killed while pursuing the defendant following a robbery. The police officer either fell or was pushed over a roof during the chase.[175] The defendant was charged with felony-murder for the death of the police officer.[176] The court applied a two-prong test of causation: first, the defendant's conduct must be an actual cause of death,[177]and, second, the death must be a reasonably foreseeable consequence of the defendant's action.[178] The court found that the element of causation was satisfied in this case.[179]

The court also specifically stated that the applicable causation analysis is that applied in all other homicide cases.[180] In distinguishing *Ramos* and the agency theory of causation, the court stated that the cases were factually different because there was no evidence here that anyone other than the defendant could have caused the police officer to fall.[181] The court also noted that *Wood* had been decided under the old felony-murder statute with its "peculiar wording," and that the revised statute rejected that wording in favor of general language of causation.[182] Thus, the court concluded that because the facts did not involve a death caused by anyone other than the felon, neither *Ramos* nor *Wood* applied.[183] Instead, this case was governed by ordinary rules of causation.[184] The court further opined that in view of the new penal code, a felon can be guilty of murder even if he did not shoot the fatal bullet if he sets into motion a chain of events that leads to death.[185]

Finally, in *People v. Hernandez*[186] the court rejected the defendant's reliance on *Wood* where a police officer was killed in a gun battle. Although it could not be determined who had fired the fatal shot, the court refused to dismiss the felony-murder charge.[187] The court specifically held that *Wood* interpreted the predecessor statute and that in adopting the new statute the legislature specifically deleted all lan-

172. *Id.*
173. *Id.*
174. 568 N.Y.S.2d 683 (N.Y. Sup. Ct. 1991).
175. *Id.* at 684.
176. *Id.*
177. *Id.* at 685.
178. *Id.*
179. *Id.* at 687.
180. *Id.*
181. *Id.* at 686.
182. *Id.* at 687.
183. *Id.*
184. *Id.*
185. *Id.*
186. 588 N.Y.S.2d 567 (N.Y. App. Div. 1992).
187. *Id.* at 569.

guage that could be interpreted as the agency theory.[188] The court applied the ordinary rules of proximate causation, finding that it was foreseeable that a bullet could go astray during a gun battle in a residential building.[189] In holding that the plain words of the statute require a finding of proximate cause, the court held that as long as the defendant "sets in motion [the] machinery which ultimately results in the victim's death," the defendant can be liable.[190]

Thus, the New York courts have reached differing opinions on the applicability of *Wood* and the agency theory of causation.[191] If the agency theory is applied to that group of cases where the act of killing is done by someone other than the defendant or one of his cohorts, there can never be any liability imposed for the death of the victim, police officer, or innocent bystander. The proximate cause theory, on the other hand, allows liability as long as the defendant sets into motion a chain of events that leads to a foreseeable death. As the New York courts seem to be realizing, this approach is more fair and is in keeping with both statutory interpretation and the policies underlying the felony-murder doctrine.

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188. *Id.*

189. *Id.*

190. *Id.*

191. The Florida courts have also had difficulty in determining what causation theory to apply. There are Florida cases which hold that a killing need not actually be done by any of the perpetrators in order to support a felony-murder charge. *See* Hornbeck v. State, 77 So. 2d 876 (Fla. 1955) (police officer shot by either robber or fellow officer); Griffith v. State, 171 So. 2d 597 (Fla. Dist. Ct. App. 1965) (bystander shot by robbery victim). *But see* State v. Andreu, 222 So. 2d 449 (Fla. Dist. Ct. App. 1969) (police officer shot by fellow police officer held not to be felony-murder).

In Florida v. Williams, 254 So.2d 548 (Fla. Dist. Ct. App. 1971), the court reviewed a case where a codefendant was killed while committing arson. Although the court held that the surviving defendant could not be held liable for the death of his accomplice, it held that the felony-murder statute is applicable when an innocent person is killed as a result of circumstances set in motion by one or more persons acting in furtherance of an intent to commit one of the felonies in the statute. *Id.* at 551. Because the facts of *Williams* did not involve an innocent person, the defendant could not be liable under the felony-murder doctrine. *Id.* The court, however, stated, in dicta, that the proximate cause theory achieves the most equitable result, while the agency theory appears unduly to limit the scope of the felony-murder concept. *Id.* The dissent went even further, arguing that the defendant should be liable for a codefendant's death under the statute, as long as the death is foreseeable. *Id.* at 555 (Pierce, C.J., dissenting). In 1975, the Florida Legislature re-defined second degree felony murder, creating a new offense under which all principals, whether present or absent, are culpable for any killings which are committeed during the felony by nonparticipants in the felony. Florida v. Dene, 533 So. 2d 265 (Fla. 1988). Thus, second degree felony murder requires that the killing be done by a nonprincipal. *Id.* at 269. *See also* Webster v. State, 540 So. 2d 124 (Fla. Dist. Ct. App. 1989).

V. A Proposed Analysis

Because most of the felony-murder statutes that are in effect today are not clear on the requirement of causation, courts must use the rules of statutory interpretation to ascertain the meaning of the statute.[192] Although "any conflict between the legislative will and the judicial will must be resolved in favor of the former,"[193] statutory interpretation is not a mechanical application of rules.[194] Because much of statutory interpretation is discretionary, the courts' approach to statutory interpretation is very important.

There are certain principles that underlie the rules of statutory interpretation. First, the rules help to ensure that the proper distribution of power between the courts and the legislature is maintained. The courts' power is limited to the interpretation of statutes while the legislature has the power to create the law.[195] The rules guide courts in their interpretation of the statute so that the courts do not overstep their boundaries.[196] Secondly, rules of statutory interpretation promote uniformity and consistency in the meaning of statutes. A set of guidelines helps to prevent the "unbridled discretion of the judiciary."[197] If courts employ a consistent interpretive approach, the results will be equitable and will promote the uniform administration of justice.

In interpreting the causation requirement of the felony-murder doctrine, these principles have frequently been forgotten. Courts reach conclusions about which theory to use based on faulty analytical reasoning, often legislating and providing inconsistent results. The legislative history provides little guidance, and those courts that rely on it seem to do so only to support a more restrictive view of the felony-murder doctrine. For example, although the court in *Alvarez* relied on legislative history to determine that the agency theory

192. If a statute is clear and unambiguous, the court must apply the plain meaning of the statute to resolve the question before it. If the plain meaning of the statute is not apparent, the court must examine the larger context of the statute. The courts have used various contextual approaches to statutory interpretation. Some courts have held that unless the statutory language clearly answers the question, the preferred interpretation is that which advances the purposes of the statute. *See* State v. Delafose, 441 A.2d 158, 160 (Conn. 1981). Another view, based on the law and economics movement, is that the interpretation should reproduce the answer that would have been reached by the legislature that originally enacted the statute. Some courts look at that original intent, and then interpret the intent as it reflects present conditions and societal views. *See generally* Gina Limandri, Note, *Realism and Reasonableness in Statutory Construction:* People v. Anderson, 40 Hastings L.J. 805 (1989).

193. Dickerson, *supra* note 89, at 8.

194. Frankfurter, *supra* note 151, at 529.

195. Quintin Johnstone, *An Evaluation of the Rules of Statutory Interpretation*, 3 Kan L. Rev. 1 (1954).

196. *Id.* at 8-9.

197. *Id.* at 9.

applies,[198] the court interpreted the legislative history to show that the new statute meant the same thing as the old statute.[199] Because the principal debate during the recodification concerned the affirmative defense, the *Alvarez* court found that there was no history to suggest that the scope of the doctrine should be expanded.[200] Thus, to be consistent with the rules of statutory interpretation, courts should not apply the agency theory of causation unless the statute specifically states that the fatal shot must be fired by one of the felons.[201]

Similarly, to only require "but-for" causation is not sufficient.[202] In the felony-murder situation there is no mens rea requirement for the homicide. In the situation where the victim is killed by a nonparticipant in the felony, there is also no intent for the underlying felony. Therefore, to only require factual causation is inherently unfair and does not place a sufficient burden on the prosecution.[203] The following analysis is both fair to the defendant and consistent with statutory interpretation.

In the felony-murder situation, the analysis of causation requires a two-tiered approach. First, when defining the felonious act, the court must look:

> [N]ot only [at] the actual facts of the transaction, and the circumstances surrounding it, but [also at] the matters immediately antecedent to and having a direct causal connection with it, as well as acts immediately following [sic] it and so

198. Alvarez v. District Court of Denver, 525 P.2d 1131-32 (Colo. 1974).

199. *Id.*

200. *Id.* at 1133. Another example is found in State v. Garner, 115 So. 2d 855 (La. 1959). In *Garner*, the deceased was killed by a shot from a pistol fired by the bartender, who was firing at the defendant in self-defense. *Id.* at 857. The prosecution argued that the defendant had set into motion a series of events that led to the victim's death, and that because the defendant should have known that the bartender would try to defend himself, the defendant should be liable for murder. *Id.* at 859-60. The Louisiana statute in effect at the time stated that a person is guilty of murder when the offender is engaged in the perpetration or attempted perpetration of various enumerated felonies. *Id.* at 863. The court looked toward legislative intent and determined that the word "offender" means actual killer. *Id.* at 864. Thus, the court applied the agency theory and concluded that to adhere to the proximate cause theory would be to amend and enlarge the statute's scope. *Id.*

201. In holding that the correct theory is proximate cause, the court in State v. Williams, 254 So. 2d 548, 550 (Fla. Dist. Ct. App. 1971), stated that the test is predicated upon the ultimate purpose of the felony-murder statute, which is to prevent the death of innocent persons likely to occur during the commission of inherently dangerous felonies. The statute is designed to protect the innocent public. *Id.* at 551.

202. *See* State v. Martin, 573 A.2d 1359, 1364 (N.J. 1990).

203. The rationale for only requiring "but-for" causation may rest on an attempt to justify those cases where a defendant could be liable for the death of an innocent bystander who is killed by a third party, but could not be liable for the death of a co-felon who is killed by a third party. It could be argued that "but-for" causation is present in the first scenario but not in the second, thus reconciling those two fact patterns.

> closely connected with it as to form in reality a part of the occurrence.[204]

Thus, the court must determine, as a first step, whether the conduct causing the death is conduct that is causally related to the felony.

The statutory language that conveys this connection is "in perpetration of," "in furtherance of," "in the commission of" and "in immediate flight." Although some courts have construed the language "in perpetration of" to be evidence of the agency theory,[205] this construction is not accurate. The word "perpetrate" means the act of someone committing the crime either with his own hands or by some means or instrument or through some innocent agent.[206] Thus, perpetration goes toward the act requirement and not toward the causation requirement.

Similarly, the courts construing the newer statute have found that the words "in furtherance of," and "in the commission of" are words that mean that the killing must be done by the felon or co-felon.[207] Again, this is a misleading analysis. Those words go toward the act requirement and require a finding that the act of killing takes place within the felonious act. The purpose of those words is to exclude the situation where a killing occurs after the felony has been completed. For example, in *Doane v. Commonwealth*[208] a defendant ran a stop sign and killed a person while he was driving a car that he had stolen the day before. The court held that the larceny could not be used to make this a felony-murder because the killing occurred outside the res gestae of the felony.[209] Compliance with the "in furtherance" language ensures that a defendant's conduct at the time of the killing is conduct that falls within the scope of the underlying felony.[210] Thus, the court must first determine whether the defendant's felony dictated the conduct which led to the homicide. If so, and the time and

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204. State v. Fouquette, 221 P.2d 404, 417 (Nev. 1950), *cert. denied*, 341 U.S. 932 (1951).

205. *See supra* part III B.1.

206. BLACK'S LAW DICTIONARY 1140 (6th ed. 1990).

207. Other courts, however, have found that the "in furtherance" language is legislative intent of proximate cause. *See* State v. Young, 469 A.2d 1189 (Conn. 1983); People v. Lewis, 444 N.Y.S.2d 1003 (N.Y. Sup. Ct. 1981); *see also supra* part III B.1.

208. 237 S.E.2d 797 (Va. 1977).

209. *Id.* at 798.

210. In making this determination, the courts generally look at whether the homicide and the felony are closely connected in time, place, and continuity of action. *See, e.g.*, State v. Hearron, 619 P.2d 1157 (Kan. 1980); State v. Adams, 98 S.W.2d 632 (Mo. 1936); State v. Wayne, 289 S.E.2d 480 (W. Va. 1982). Cases from other jurisdictions differ considerably on what constitutes sufficient time, place, and continuity of action to find the necessary nexus. Generally, this determination is a question for the jury. People v. Gladman, 359 N.E.2d 420 (N.Y. 1976).

place are not too remote, then the first tier of the analysis is satisfied.[211]

Once there is evidence to support that finding, the court must determine if the requirement of causation has been met. Although the older statutes do not have any specific language that speaks to causation, the requirement of causation is inherent in every result-oriented crime.[212] The newer statutes contain the language "causes the death of any person"[213] which is the same causation language that is used in all homicides that require a mens rea.[214] Thus, the tier of the causation analysis requires an approach that is similar to the approach used by the courts in other homicide cases.

The court must determine whether the felonious act caused the victim's death. In making that assessment, the court must use a two-prong analysis: There must be both "but-for" causation and foreseeability. To satisfy "but for" causation, the court must find that the result could not have happened in the absence of the conduct of the defendant. But-for causation alone, however, is not sufficient. There must also be legal or proximate causation.[215]

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211. *See* State v. Harrison, 564 P.2d 1321, 1323 (N.M. 1977), (finding that it is insufficient to conclude that there is felony-murder whenever the " 'homicide is within the *res gestae* of the initial crime.' ") (quoting State v. Adams, 98 S.W.2d 632, 637 (Mo. 1936)). There must also be the requirement of causation which consists of those acts of the defendant "initiating and leading to the homicide without an independent force intervening." *Id.* at 1324.

212. LAFAVE & SCOTT, *supra* note 44, at 277.

213. *See, e.g.*, ALA. CODE § 13A-6-2 (1982); ALASKA STAT. § 11.41.110 (1989); ARIZ. REV. STAT. ANN. § 13-1105(A) (1989); ARK. CODE ANN. § 5-10-101 (Michie Supp. 1991); COLO. REV. STAT. § 18-3-101 (Supp. 1992); CONN. GEN. STAT. ANN. § 53a-54c (West 1985); DEL. CODE ANN. tit. 11, § 636 (Supp. 1992); GA. CODE ANN. § 16-5-1(c) (Michie 1992); ILL. REV. STAT. ch. 9, para. 9-1 (Supp. 1993); ME. REV. STAT. ANN. tit. 17-A, § 202 (West 1983); N.J. STAT. ANN. § 2C:11-3 (West. Supp. 1992); N.Y. PENAL LAW § 125.25 (McKinney 1987); N.C. GEN. STAT. § 14-7 (1992); N.D. CENT. CODE § 12.1-16-01(1)(c) (1985); OR. REV. STAT. § 163.115(1(b) (1991); UTAH CODE. ANN. § 76-5-203 (Supp. 1992); WASH. REV. CODE ANN. § 9A.32.030 (West Supp. 1993); WIS. STAT. ANN. § 940.03 (West 1992). Other statutes use the word "kills." *See, e.g.*, IND. CODE ANN. § 35-42-1-1 (Burns Supp. 1992); IOWA CODE ANN. § 707.2 (West 1979); NEB. REV. STAT. § 200.030 (1991); WYO. STAT. § 6-2-101 (Supp. 1992).

214. *See* sources cited *supra* note 213.

215. *See supra* notes 128-30. There have been arguments both for an against proximate cause. Those in favor of the doctrine argue that it is justified in terms of the underlying goals of felony-murder. It is not fair to hold a person responsible for deaths that are not related to the felonious conduct. The goal of deterrence is also not met if the homicide is not a foreseeable result of the defendant's conduct. *See* Crump & Crump, *supra* note 12, at 384. Those against proximate cause argue that it inappropriately extends the felony-murder rule because the goal of deterrence can never be achieved by holding felons strictly responsible for killings committed by persons not acting in furtherance of the felony. People v. Washington, 402 P.2d 130, 133 (Cal. 1965). Some also argue that the tort liability concept of proximate cause can never be appropriate in the criminal context because of the difference between the rationales underlying tort and criminal law. State v. Canola, 374 A.2d 20, 30 (N.J.

In regular homicide cases, the problems of proximate cause arise when the actual result of the defendant's conduct is different from the result that the defendant intended.[216] In a felony-murder situation, however, a defendant may not have intended the result at all. In fact, in the situation where someone other than one of the defendants kills an innocent bystander, the defendant may not even be in the vicinity at the time of the killing.[217] The question of proximate cause then becomes whether because of the nature of the underlying conduct, the death is foreseeable.

Courts have not had difficulty in applying the foreseeability test in felony-murder cases where the felon caused the victim's death. In these cases, the courts look at the intervening act and determine whether it breaks the chain of foreseeability. The intervening act can be the act of a third person, the victim himself, or a non-human entity. This intervening act can be a coincidence, where the defendant's conduct puts the victim at a certain place at a certain time. Or, the intervening act can be a response, where it is a reaction to conditions that were created by the defendant. Generally, if the intervening act creates a coincidence, that act will break the causal chain unless it was foreseeable. If the intervening act is a response to the conditions created by the defendant, the intervening act will only break the causal chain if it is an abnormal response. The same analysis should apply in the situation where a nonparticipant in the felony kills a police officer or innocent bystander.

When a victim dies as a result of a shot that is not fired by one of the defendants, the death is the result of an intervening act following the defendants' conduct, which is the committing of the felony. The intervening act is the act of a third party, the nonparticipant in the felony.[218] When determining whether the defendant should be liable,

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1977). Although courts have held that there should be a closer and more direct causal connection between the felony and the killing than the causal connection required under the tort concept of proximate cause, no valid test has been suggested. *See id.*; Commonwealth v. Myers, 261 A.2d 550, 556-57 (Pa. 1970); Note, *Recent Cases—Defendant not Guilty of Felony Murder for Death of Co-felon Justifiably Shot by Policeman*-Commonwealth v. Redline (Pa. 1958), 71 HARV. L. REV. 1565 (1958). It would seem that a requirement of foreseeability as required under that proximate cause test is better than no test at all. *See* sources cited *supra* notes 128-30 and accompanying text.

216. That is assuming that the homicide results from a crime of intention. Otherwise, the homicide must vary from the result that the conduct created a risk of happening.

217. *See* People v. Priest, 672 P.2d 539 (Colo. Ct. App. 1983) (holding defendant liable under the felony-murder doctrine, even though he was sixty miles away at the time of the murder, because he supplied information, tools, his car, and his apartment for planning sessions, therefore knowing that the armed robbery was going to take place).

218. The intervening act can also be the act of the victim himself, or something that is nonhuman. In the felony-murder situation, however, the intervening act is generally the person doing the shooting.

a court must first examine the intervening act of the third party to see if it is a coincidence or a response to the defendant's conduct. If the intervening act is a response to the defendant's conduct, the defendant should be liable unless the response was abnormal. If the intervening act is merely a coincidence, the defendant should be liable as long as the act should have been foreseeable to the defendant.

Thus, the rules of statutory interpretation do not support the application of the agency theory to felony-murder cases. Cases that involve a death where the bullet was not fired by one of the felons or where it is not clear who fired the fatal shot, should be treated in the same way as cases where the felon fired the fatal shot. After determining whether the conduct that caused the death is within the felonious act, the court should then apply a two-prong causation analysis. If there is both factual and legal causation, then the defendant should be held liable for the death. This analysis results in a more consistent and uniform approach and reflects society's views toward justice.

VI. An Application of the Proposed Analysis

When this analysis is applied a set of facts, a consistent and just result is reached. Assume, for example, that two co-felons rob a store and are pursued by police officers. During the confusion of the chase, a police officer mistakenly shoots and kills another police officer, believing that he is one of the felons. Assume that the statute does not specifically state whether the shot must be fired by one of the felons for liability to attach. The first inquiry is whether the conduct that caused the death is within the felonious act. Here, the shooting occurred during the flight from the felony, so the conduct clearly falls within the scope of the underlying felony.

There is also "but-for" causation here. But for the defendants' initial conduct of robbery, the police officer's death would not have occurred. The final inquiry is whether there is proximate cause. The shooting by the police officer is an intervening act that was a response to the defendants' initial conduct, which was the robbery. It was not an abnormal response; in fact those who commit forcible felonies know that they may encounter resistance, both to their affirmative actions and to any escape. Thus, the death was foreseeable and the defendants may be criminally liable under the felony-murder doctrine.

However, liability may not always attach. A bank robber would not be liable under the felony-murder doctrine if at "the moment a bank robber stepped into the bank, an employee pushing the button for a burglar alarm was electrocuted."[219] A more limited view of causation might be employed to keep the felony-murder doctrine within reasonable bounds where the victim dies from excitement as a consequence of watching the gun battle or where an innocent bystander is

219. Model Penal Code § 2.03(4) cmt. at 264 (1985).

killed by vigilantes who are chasing the felon. In those cases, the death of the victim would be "too remote, accidental in its occurrence, or too dependent on another's volitional act to have a just bearing on the defendant's culpability."[220]

As these examples illustrate, when a nonparticipant is killed by a nonparticipant during the course of a felony, the focus should be on the relationship between the victim's death and the felony, not on the individual roles of the felons. A defendant should be exculpated only when a death is so unexpected that it would be unjust to hold the defendant responsible for the result. An analysis that requires a nexus between the death and the felony in terms of time and place, as well as "but-for" causation and foreseeability, accomplishes this purpose.

VII. CONCLUSION

Although there are many different variations of the felony-murder rule, most of them do not directly address the element of causation. Consequently, the courts have relied on different theories of causation to either restrict or expand liability in felony-murder cases. These different theories gain even greater significance when they are applied to the situation where someone other than the defendant kills a nonparticipant in the underlying felony. Under the agency theory, some courts have held that the prosecution must prove, as a threshold matter, that the shot that killed the victim came from the gun of the defendant or one of his confederates. Under this theory, therefore, there can never be liability in the situation where an innocent bystander is killed by a police officer in a gun battle.

Although some courts have required only factual causation, and others have required both factual causation and foreseeability, the analytical framework for these requirements has been inconsistent and unclear. Although the courts look toward legislative history for direction, there is generally little guidance. The proposed analysis provides a framework that reflects the canons of statutory interpretation and allows the consistent administration of justice, even in those cases where it is not clear who fired the fatal shot.

The felony-murder doctrine, though much maligned, continues to exist and be used as a theory of liability in forty-seven states. In fact, as society's fear of crime continues to escalate, the doctrine, even with all of its shortcomings, will continue to flourish. The courts must, therefore, treat the doctrine carefully and interpret its provisions cautiously and consistently. The proposed analysis of the causation requirement serves this purpose by reflecting society's view toward criminal liability and promoting the uniform administration of justice.

220. State v. Martin, 573 A.2d 1359, 1375 (N.J. 1990).

Author's note: Just prior to publication of this Article, the New York Court of Appeals released its opinion in *People v. Hernandez*, 624 N.E.2d 661 (N.Y. 1993). In affirming the defendants' convictions, the court ended the confusion surrounding the approach that should be taken by the New York lower courts in determining whether the felony murder doctrine applies when a nonparticipant in the crime is killed by another nonparticipant. In its analysis, the unanimous *Hernandez* court applied the familiar tenets of statutory construction in interpreting the causation requirement for felony murder. The court held that "causes the death" should be construed in the same way as the identical language in other homicide statutes. Thus, the court applied the broad language of proximate causation that is the law in New York.

The *Hernandez* opinion represents an example of the court following the analysis proposed by this author. The court's use of the proximate cause theory of causation instead of the agency theory focuses on the relationship between the victim's death and the underlying felony, and not on the particular roles of the felons. The decision reflects the court's tradition of rigorously adhering to principles of statutory construction, and accomplishes the goal of the consistent administration of justice.

APPENDIX

Statute	Intent Required	In the perpetration of	In the course of and in furtherance of	Or in immediate flight of	Enumerated Felonies	Causes the Death of any Person	Other than one of the partic.	Attempts Covered	Affirmative Defense	Other
ALABAMA ALA. CODE § 13A-6-2 (1982)			X	X	X	X		X		
ALASKA ALASKA STAT. § 11.41.110 (1989)			X	X	X	X	X	X		
ARIZONA ARIZ. REV. STAT. ANN. § 13-1105 (A)(1989)			X	X	X	X		X		
ARKANSAS ARK. CODE ANN. § 5-10-101 (Michie Supp. 1991)	1		X	X				X	X	
CALIFORNIA CAL. PENAL CODE § 189 (West 1988)		X			X			X		
COLORADO COLO. REV. STAT. § 18-3-101 (Supp. 1992)		commits	X	X	X		X	X		10
CONNECTICUT CONN. GEN. STAT. ANN. § 53a-54c (West 1985)			X	X	X	X	X	X	X	
DELAWARE DEL. CODE ANN. tit. 11, § 636 (Supp. 1992)	2		X	X	X	X		X		
FLORIDA FLA. STAT. ANN. § 782.04 (West 1992)		X			X			X		

APPENDIX (CONTINUED)

Statute	Intent Required	In the perpetration of	In the course of and in furtherance of	Or in immediate flight of	Enumerated Felonies	Causes the Death of any Person	Other than one of the partic.	Attempts Covered	Affirmative Defense	Other
GEORGIA										
GA. CODE ANN. § 16-5-1 (C) (Michie 1992)		commits				X				
HAWAII										
No Felony-Murder Statute										
IDAHO										
IDAHO CODE § 18-4003 (Supp. 1993)		X			X			X		
ILLINOIS										
ILL. REV. STAT. ch. 9, para. 9-1 (Supp. 1993)			X	X	X	X		X	mitigates	
INDIANA										
IND. CODE. ANN. § 35-42-1-1 (Burns Supp. 1992)		commits			X	kills		X		
IOWA										
IOWA CODE ANN. § 707.2 (West 1979)						kills				
KANSAS										
KAN. STAT. ANN. § 21-3401(a) (Supp. 1992)		X						X		
KENTUCKY										
KY. REV. STAT. ANN. § 507.020 (Baldwin 1989)	3					X				
LOUISIANA										
LA. REV. STAT. ANN. § 30.1 (West Supp. 1993)		X			X	kills		X		

APPENDIX (CONTINUED)

Statute	Intent Required	In the perpetration of	In the course of and in furtherance of	Or in immediate flight of	Enumerated Felonies	Causes the Death of any Person	Other than one of the partic.	Attempts Covered	Affirmative Defense	Other
MAINE										
ME. REV. STAT. ANN. tit. 17-A, § 202 (West 1983)		commits		X	X	X		X	X	11, 12
MARYLAND										
MD. CRIM. LAW ANN. CODE of 1957 § 202 (1992)		X			X	murders		X		
MASSACHUSETTS										
MASS. GEN. LAWS ANN. ch. 265, § 1 (West 1990)		commits						X		
MICHIGAN										
MICH. COMP. LAWS ANN. § 750.316 (West 1991)	4	X			X			X		
MINNESOTA										
MINN. STAT. ANN. § 609.185 (West Supp. 1993)	5	commits			X			X		
MISSISSIPPI										
MISS. CODE ANN. § 97-3-19 (Supp. 1992)		commits			X			X		
MISSOURI										
MO. REV. STAT. § 565-003 (1979)	6	X			X			X		
MONTANA										
MONT. CODE ANN. § 45-5-102 (1992)		commits		X	X			X		11
NEBRASKA										
NEB. REV. STAT. § 28-303 (1989)		X			X	kill		X		

APPENDIX (CONTINUED)

Statute	Intent Required	In the perpetration of	In the course of and in furtherance of	Or in immediate flight of	Enumerated Felonies	Causes the Death of any Person	Other than one of the partic.	Attempts Covered	Affirmative Defense	Other
NEVADA NEV. REV. STAT. § 200.030 (1991)		X			X			X		
NEW HAMPSHIRE N.H. REV. STAT. ANN. § 630:1-b (1986)	7	commits			X			X		
NEW JERSEY N.J. STAT. ANN. § 2C:11-3 (West Supp. 1992)			X	X	X	X	X	X	X	11
NEW MEXICO N.M. STAT. ANN. § 30-2-1(A) (Michie 1984)		*commits*						X		
NEW YORK N.Y. PENAL LAW § 125.25 (McKinney 1987)			X	X	X	X	X	X	X	
NORTH CAROLINA N.C. GEN. STAT. § 14-17 (1992)		X			X			X		
NORTH DAKOTA N.D. CENT. CODE § 12.1-16-01(1)(C) (1985)		*commits*	X	X	X	X		X	X	
OHIO OHIO REV. CODE ANN. § 2903.01 (Anderson 1993)	8	commits		X	X	X		X		
OKLAHOMA OKLA. STAT. ANN. tit. 21, § 701.7 (West 1993)		commits			X					

APPENDIX (CONTINUED)

Statute	Intent Required	In the perpetration of	In the course of and in furtherance of	Or in immediate flight of	Enumerated Felonies	Causes the Death of any Person	Other than one of the partic.	Attempts Covered	Affirmative Defense	Other
OREGON										
OR. REV. STAT. § 163.115 (1)(b) (1991)			X	X	X	X	X	X	X	
PENNSYLVANIA										
PA. STAT. ANN. tit. 18, § 2502 (b) (1991)		X		X	X			X		
RHODE ISLAND										
R.I. GEN. LAWS § 11-23-1 (Supp. 1992)		X			X			X		
SOUTH CAROLINA										
S.C. CODE ANN. § 16-3-10 (1985)		X			X			X		
SOUTH DAKOTA										
S.D. CODIFIED LAWS ANN. § 22-16-4 (Supp. 1993)		X			X					
TENNESSEE										
TENN. CODE ANN. § 39-13-202 (1991)	9	X			X					
TEXAS										
TEX. PENAL CODE ANN. § 19-02(a)(3) (West 1989)			X	X						13
UTAH										
UTAH CODE ANN. § 76-5-203 (Supp. 1992)		commits			X	X	X	X		
VERMONT										
VT. STAT. ANN. tit. 13, § 2301 (Supp. 1992)		commits			X			X		

APPENDIX (CONTINUED)

Statute	Intent Required	In the perpetration of	In the course of and in furtherance of	Or in immediate flight of	Enumerated Felonies	Causes the Death of any Person	Other than one of the partic.	Attempts Covered	Affirmative Defense	Other
VIRGINIA VA. CODE ANN. § 18.2-32 (Michie Supp. 1993)		X			X					
WASHINGTON WASH. REV. CODE ANN. § 9A.32.030 (West Supp. 1993)			X	X	X	X	X	X	X	
WEST VIRGINIA W. VA. CODE § 61-2-1 (1992)		commits			X			X		
WISCONSIN WIS. STAT. ANN. § 940.03 (West 1992)		commits			X	X		X		
WYOMING WYO. STAT. § 6-2-101 (Supp.1992)		X			X	kills		X		

KEY:
1. Extreme indifference (murder), negligence (manslaughter)
2. Criminal negligence
3. Intentional wanton extreme indifference
4. Malice
5. Intent
6. Unlawfully
7. Knowingly
8. Purposely
9. Recklessly
10. Is caused by anyone
11. Penal Code defines causation
12. Reasonably foreseeable consequence
13. An act clearly dangerous to human life