structure continues to employ such definitions as a basis for affording preferential rates to gains from the sale or exchange of capital assets, American taxpayers will insist upon the "capital" characterization of assets sold to secure minimum tax liability.[84]

RECENT EXTENSIONS OF FELONY MURDER RULE

The requisite mens rea for murder is generally the intent to kill a human being.[1] An exception exists in felony-murder; there the intent to commit a felony suffices, and the felon who kills even accidentally while perpetrating a felony is guilty of murder.[2] An outgrowth of the common law,[3] this doctrine has become embedded in the murder statutes of most states[4] in spite of continued and increasing criticism.[5] Though

84. P. Miller, *supra* note 1, at 885.

1. In addition, "[I]f an unlawful act, dangerous to, and indicating disregard of, human life, caused the death of another, the perpetrator is guilty of murder, although he did not intend to kill." 40 C.J.S. § 20.

2. Blackstone's statement of the rule was: "When 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 its 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." 4 BL., COMM., § 192, § 193. *Cf.* CLARK & MARSHALL, CRIMES § 248 (1940). This was a substantial mitigation of the rule, as stated by Coke, that "[i]f the act be unlawful, it is murder." 3 Co. INST. 56 (1797), which was subjected to criticism because of its severity. "This is not distinguished by any statute but is the common law only of Sir Edward Coke." 6 HOBBES, ENGLISH WORKS 86 (1840).

3. Lord Dacres' Case, Moo. 216, 72 Eng. Rep. 458 (K. B. 1535), Lord Dacres, and others, unlawfully went into a forest to hunt. While he was some distance away, one of his companions killed a gamekeeper. All of the companions were adjudged guilty of murder. Also, in Mansell and Herbert's Case, 2 Dyer 128 b., 73 Eng. Rep. 279 (K. B. 1536), it was held that where persons assembled to seize goods by force and a woman was killed by a stone thrown by one of the assailants, this was murder in them all. These are apparently the earliest cases which involved application of the doctrine in a recognizable form.

4. See ALA. CODE tit. 14 § 314 (1940); ARIZ. CODE ANN. § 43-2902 (1939); ARK. STAT. § 41-2205 (1947); CAL. PEN. CODE § 187 (Deering 1950); COLO STAT. ANN. c. 48, § 32 (1935); CONN. GEN. STAT. § 8350 (1949); DEL. REV. CODE c. 11, § 571 (1953); D. C. CODE ANN. § 22-2401 (1951); FLA. COMP. GEN. LAWS, c. 782 § 782.04 (1953); GA. CODE § 26-1009 (1933); IDAHO CODE ANN. § 18-4003 (1947); ILL. ANN. STAT. c. 38, § 363 (1953); IND. ANN. STAT. § 10-3401 (Burns 1947); IOWA CODE § 690.2 (1954); KAN. GEN. STAT. § 21-401 (1949); LA. CODE CRIM. LAW & PROC. ANN. art. 740-30 (1943); MD. CODE art. 27, § 497 (1951); MASS. ANN. LAWS c. 265, § 1 (1952); MICH. COMP. LAWS § 750.316 (1948); MINN. STAT. § 619.08 (1953); MISS. CODE ANN. § 2220 (1942); MO. ANN. STAT. § 559.010 (Vernon 1949); MONT. REV. CODES ANN. § 94-2503 (1947); NEB. REV. STAT. § 28-401 (1943); NEV. COMP. LAWS § 10068 (1935); N.H. REV. LAWS, c. 1, § 1 (1942); N.J. REV. STAT. § 2A: 113-1 (1937); N.M. STAT. ANN. § 40-24-4 (1953); N.Y. PEN. LAW § 1044 (1944); N.C. GEN. STAT. § 14-17 (1953); N.D. REV. CODE § 12-2708 (1943); OHIO GEN. CODE ANN. § 12400 (1939); OKLA. STAT. tit. 21, § 701 (1951); ORE. COMP. LAWS ANN. c. 169, § 163.010 (1953); PA. STAT. ANN.

only Ohio has rejected the doctrine,[6] many states have restricted the operative effect of the felony-murder concept to a limited number of felonies, most commonly to arson, rape, robbery, and burglary.[7] In light of the disfavor evoked by this harsh doctrine, decisions which extend its ambit to encompass situations which heretofore have not entailed punishment for murder deserve careful scrutiny.

The most vigorous criticism of the felony-murder doctrine has been directed at its dependence on "transferred" or "imputed" intent.[8] It has been roundly condemned as an anachronistic remnant of an era which punished the results of acts irrespective of the intent which the actor held.[9] No harshness was seen in this doctrine at its inception inasmuch

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tit. 18, § 4701 (Purdon 1939); R.I. GEN. LAWS c. 606, § 1 (1938); S.D. CODE § 13.2007 (1939); TENN. CODE ANN. § 10768 (1934); TEX. PEN. CODE ANN. art. 1241 (1948); UTAH REV. STAT. § 76-30-3 (1953); VT. REV. STAT. § 8240 (1947); VA. CODE c. 4, § 18-30 (1950); WASH. REV. STAT. ANN. § 2392 (1952); W. VA. CODE ANN. § 5916 (1949); WIS. STAT. c. 340, § 340.02 (1953); WYO. COMP. STAT. ANN. § 9-201 (1945); 18 U.S.C. § 1111 (1953).

5. "This astonishing doctrine has so far prevailed as to have been recognized as part of the law of England by many subsequent writers, although in a modified shape given to it long afterwards by Sir Michael Foster, who limits it to cases where the unlawful act amounts to a felony. It has been repeated so often that I amongst others have not only accepted it, though with regret, but have acted upon it." 3 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 57 (1883). Stephen regarded even Foster's limited version as "cruel and, indeed, monstrous" *id.* at 75. See also HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 234-35, 454-56 (1947); MORELAND, LAW OF HOMICIDE 42-54 (1952); STROUD, MENS REA 168-87 (1914); Turner, *The Mental Element in Crimes at Common Law,* 6 CAMB. L. J. 31 (1936); Wilner, *Unintentional Homicide in the Commission of an Unlawful Act,* 87 U. PA. L. REV. 811 (1939; Crum, *Causal Relations and the Felony-Murder Rule,* 1952 WASH. U. L. Q. 191.

6. Ohio requires a purpose and intent to kill. Turk v. State, 48 Ohio App. 489, 194 N.E. 425 (1934), *aff'd.* 129 Ohio St. 245, 194 N.E. 453 (1935). (Dcath resulting from perpetration of arson.) This substantial modification emasculates the Ohio "felony-murder" doctrine, except that it operates to raise such an unpremeditated killing to first-degree murder. See Note, 17OHIO ST. L.J. 130 (1956).

7. Alabama, Indiana, Michigan, Mississippi, Nebraska, Nevada, Rhode Island, Utah, Vermont, Virginia, West Virginia, Wyoming, and the United States. Arizona, California, Colorado, Idaho, Iowa, Missouri, and Montana add mayhem. Louisiana, New Hampshire, and Pennsylvania additionally include kidnapping. Arkansas, Tennessee, and Washington include larceny. For other variations, see, MORELAND, THE LAW OF HOMICIDE, 217-221 (1952); 1 WARREN, HOMICIDE, §§ 4-53 (1938).

8. See generally, works cited in note 4, *supra.* In the case of a robbery the carly rationalization of this fiction was based on the idea that the robber would kill the victim rather than forego getting his money. 3 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 50-51 (1883). Stephen points out that it is difficult to "presuppose" such an intent from the fact that a thief tripped a man and happened to kill him. Nor is it any easier to presuppose it when the defendant robber struck victim a blow on the chin which unexpectedly caused death, People v. Kaye, 43 Cal. App.2d 802,111 P.2d 679 (1941) (convicted of murder). Fictions aside, in the case of felony-murder it must be admitted that a man can be hanged when he had only an intent to rob, and one of his confederates in the robbery accidentally or unintentionally killed the deceased during the course of the robbery. This imputed intent to kill may not have been such a strained fiction when the underlying felonies were themselves punishable capitally, but it seems unreal today.

9. See MORELAND, THE LAW OF HOMICIDE, 42-54 (1952).

as the felon was destined to hang in any event since the underlying felonies themselves were punishable by death.[10] Increasing emphasis on more humane treatment of criminals, the mitigation of unduly severe punishment for crimes, and a tendency to stress the mental element[11] in crime have limited the application of the felony-murder doctrine.[12]

It appeared, in fact, that the whole theory had been laid to rest in *Reg.* v. *Serné*[13] which required that the underlying felony pose a foreseeable danger to human life. The *Serné* case, though approved by some following cases,[14] was overruled by the House of Lords in *Director of Public Prosecutions* v. *Beard*.[15] Though *Serné* has been followed in this country,[16] no substantial extension of that view is likely, since the legislatures

10. "[I]n the application of this imputed malice doctrine, a distinction was made resting upon the grade of the intended offense. If the crime intended was a felony, as at common law practically all felonies were punishable with death, either with or without benefit of clergy, the felonious intent of the intended crime was imputed to the committed act, and if it were a homicide, made it murder; for it was considered immaterial whether a man was hanged for one felony or another. . . . His intent, if successful, was worthy of death; the deed he did was worthy of death, if it had that intent. . . ." Powers v. Commonwealth, 110 Ky. 386, 413-414, 61 S.W. 735 (1901).

11. See HALL, THEFT, LAW AND SOCIETY 133-152 (1952).

12. In Reg. v. Horsey, 3 Fost. & Fin. 287, 176 Eng. Rep. 129 (Q.B. 1862), the defendant was indicted for murder when he set fire to straw stack and a person who apparently was sleeping in the stack was burned to death. The jury could not agree on a verdict. They were instructed again, palpably against the evidence, that, "The law, however, is that a man is not answerable except for the natural and probable result of his own act; and therefore if you should not be satisfied that the deceased was in the enclosure at the time the prisoner set fire to the stack but came in afterwards, then as his own act intervened . . . his death could not be the natural result of the prisoner's act." The jury subsequently brought in a verdict of manslaughter. And see, also, Reg. v. Whitmarsh, 62 Just. P. 711 (Q.B. 1898).

13. 16 Cox C.C. 311 (1887). Serné and another were indicted for the murder for the death of a boy allegedly caused by the defendants arsonious burning of a dwelling house. Stephen, J., instructed the jury: "I think that, instead of saying that any act done with intent to commit a felony and which eauses death amounts to murder, it would be reasonable to say that any act known to be dangerous to life, and likely in itself to eause death, done for the purpose of committing a felony which eaused death should be murder. . . ." 16 Cox C.C. 311, 313 (1887). This, in effect, vitiated the whole notion of imputed intent. "[Stephen] seemed inclined to require for murder, in such a case, the same degree of wanton and willful disregard for human life which would constitute malice aforethought if no felony were being attempted." Perkins, *A Re-examination of Malice Aforethought*, 43 YALE L. J. 537, 539 (1934).

14. Reg. v. Bottomly, 115 L.T.J. 88 (1903); Rex. v. Lumley, 22 Cox C.C. 635 (1911). These cases are limited by the fact that the death resulted from the perpetration of an abortion, a non-violent felony as compared with rape, robbery, arson, etc.

15. [1920] A.C. 479. As to whether the Beard case re-established the old "Absolute liability" for murder perpetrated during a felony, or was only a modifieation of Serné providing that the test of foresecability was objective rather than subjective, there is some conflict. *Compare* MORELAND, THE LAW OF HOMICIDE 46-48 (1952) *with* Turner, *The Mental Element in Crimes at Common Law*, 6 CAMB. L. J. 31, 64 (1936), and Hall, *Intoxication and Criminal Responsibility*, 57 HARV. L. REV. 1045, 1069 (1944).

16. People v. Goldvarg, 346 Ill. 398, 178 N.E. 892 (1931); Williams v. Commonwealth, 258 Ky. 830, 81 S.W.2d 891 (1935); People v. Pavlic, 227 Mich. 562, 199 N.W. 373 (1924) (Selling liquor, a statutory felony, was cause of death. The defendant was not convicted).

of many jurisdictions have in effect decreed that the restrictive list of felonies encompassed by their statutes inevitably give rise to a serious risk of injury or death incidental to their perpetration.[17] Following *Serné* would result in substantial change or obliteration of the felony-murder doctrine.[18] That this will occur eventually is possible; that it will take place in the immediate future is believed to be unlikely.[19]

One of the traditional limitations on the operation of the felony-murder doctrine has been the *res gestae* requirement that the killing take place in the course of the perpetration of the underlying felony.[20] Defendants have variously been convicted when they or their confederates killed in the attempt,[21] commission, or withdrawal[22] stages of a felony. The problems *res gestae* has presented in terms of time and distance have not yet resulted in the formulation of a concrete and predictable standard.[23] In certain cases the requirement apparently limits the operation

17. See, *e.g.*, Cole v. State, 192 Ind. 29, 134 N.E. 867 (1922) (robbery); State v. Glover, 330 Mo. 709, 50 S.W.2d 1049 (1932) (arson); State v. Greenleaf, 71 N.H. 606, 54 A. 38 (1902) (rape); Lovejoy v. State, 18 Okla. Cr. 335, 194 S.W. 1087 (1921) (abortion, a statutory felony).

18. See, MORELAND, *op. cit. supra* note 9, 53, 54.

19. Changes will take place slowly, particularly if they demand legislative action, because of the fact that legislators are none too anxious to espouse a cause involving mitigation of criminal punishment until public opinion has so crystallized that the step is politically safe. The judicial extension of the Mann Act in Caminetti v. United States, 242 U.S. 470 (1916), for instance, has never been remedied by legislation. Few legislators would dare take a firm stand and say: We really shouldn't punish non-commercial fornication or adultery this severely.

20. State v. Adams, 339 Mo. 926, 98 S.W.2d 632 (1936), "It is held in many jurisdictions . . . that when the homicide is within the res gestae of the initial crime and is an emanation thereof, it is committed in the prepetration of that crime in the statutory sense. Thus it has often been ruled that the statute applies where the initial crime and the homicide were parts of one continuous transaction, and were closely related in point of time, place and causal relation. . . ."

21. Commonwealth v. Dillard, 313 Pa. 420, 169 A. 138 (1933) (attempted robbery). And see, Cadmus, *The Beginning and End of Attempts and Felonies Under the Statutory Felony Murder Doctrine*, 54 DICK. L. REV. 12 (1946).

22. State v. Metalski, 116 N.J.L. 543, 185 A. 351 (1936); People v. Ryan, 192 Wash. 160, 73 P.2d 735 (1937).

23. For an extensive analysis of this area, see Cadmus, *op. cit. supra* note 21. Cadmus concludes that the res gestae "Begins at the point where an indictable attempt is reached and ends where the 'chain of events' between the attempt or felony is broken, such question usually being a question of fact for the jury," and is apparently satisfied with the standard. An opposite view is expressed by Crum, *Causal Relations and The Felony Murder Rule*, 1952, WASH. U.L.Q. 191, 198-99. "To speak of such cases as turning upon doctrines of res gestae is actually pointless. Reference may be made here to the point that the term has apparently crept into the felony-murder cases as an import from the law of evidence and has proved no more satisfactory there. Wigmore, speaking of the term, refers to it caustically as 'ambiguous,' 'unmanageable,' and a 'shibboleth.' Thayer denounces it in much the same language, remarking that 'judges, text-writers and students have found themselves sadly embarrassed by the growing and intolerable vagueness of the expression.' In view of the fact that Thayer's comments appeared some seventy years ago, the survival of the term in modern cases is a sad commentary upon the slowness of change in the law."

of the felony-murder doctrine,[24] while in others it has been so applied that it extends the felony beyond a point consonant with a common-sense approach to the problem.[25]

In New York, the "merger" rule has been formulated[26] because there the felony-murder doctrine extends to all felonies.[27] Where the elements of intent and conduct required to constitute the underlying felony are inseparable from those which produced the death, the felon may not be convicted under the felony-murder theory. Though "merger" was demanded by the scheme of the murder statutes[28] and it is logically justified, its application may lead to farcical results.[29] Nevertheless the concept serves its purpose of amelioration.

The felony-murder doctrine is thus a coalescence of accretions. While some tend to extend its ambit, others are obviously calculated to limit it. The clear pattern in Pennsylvania is toward extension to cover situations which are of relatively common frequency, and yet have been infrequently and unsuccessfully prosecuted in other jurisdictions.[30] By holding felons responsible for deaths not directly caused by them, and for the justifiable killing of their co-felons by others, a trilogy of Peun-

24. See People v. Marwig, 227 N.Y. 382, 125 N.E. 535 (1919).

25. Particularly was this true in State v. Metalski, 116 N.J.L. 543, 185 A. 351 (1936). The robbery of a tavern was committed in Pennsylvania. The two robbers escaped unpursued into New Jersey in a stolen car. They stopped at a restaurant and ate. Continuing their "escape," some four to six hours after the robbery and sixty miles from the tavern, one of the robbers shot and killed a police officer who was pursuing them for speeding. One of the robbers later committed suicide. The survivor was tried and convicted. The conviction was affirmed 9-4. The theory of prosecution for felony murder was upheld. And see, People v. Ryan, 192 Wash. 160, 73 P.2d 735 (1937) (several hours after, and 40 miles from scene of the robbery.)

26. "[T]o constitute a felony murder the elements of the felony must be so distinct from those of the homicide as not to be an ingredient of the homicide, indictable therewith or convictable thereunder. But the killing of a woman during the commission of rape is felony murder. The reason for this is that although violence is an essential ingredient of this felony, there is, in addition to the violence, an element neither essential nor common to homicide, that is, sexual intercourse." Corcoran, *Felony Murder in New York,* 6 FORD. L. REV. 43, 49 (1937).

27. N.Y. PENAL LAW § 1044 (1944).

28. Otherwise in every case where a criminal assault resulted in death of the victim of the assault it would be first-degree murder, and manslaughter involves such an assault. "Such a holding would mean that every homicide, not justifiable or excusable, would occur in the commission of a felony, with the result that intent to kill and deliberation and premediation would never be essential." Cardozo, C.J., in People v. Moran, 246 N.Y. 100, 158 N.E. 35 (1927).

29. Thus where D assaults A intending to severely harm, but not to kill, and A dies as a consequence, this is not first degree murder. But if B, attempting to help A, is accidentally struck and killed by D, D is then guilty of first-degree murder as to B. See, Corcoran, *op. cit. supra* note 26, at 48.

30. See, *e.g.,* cases cited in note 34, *infra,* and Butler v. People, 125 Ill. 641, 18 N.E. 338 (1888); Commonwealth v. Campbell, 89 Mass. 541 (1863); People v. Garippo, 292 Ill. 293, 127 N.E. 75 (1920).

sylvania cases has provided precedents which may spur prosecutions once thought unwarranted.

In *Commonwealth* v. *Almeida,*[33] the outgrowth of a robbery, the evidence was contradictory as to the origin of the fatal shot.[34] Defendant relied on the limitation enunciated in other jurisdictions requiring that the killing force must have been one set in motion by the felons[35] and, additionally, one designed to further the perpetration of the

31. Commonwealth v.Almeida, 362 Pa. 596,68 A.2d 595, 12 A.L.R.2d 183 (1949), *cert. den.* 339 U.S. 924 (1950); Commonwealth v. Bolish, 381 Pa. 500, 113 A.d 464 (1955); Commonwealth v. Thomas, 382 Pa. 639, 117 A.2d 204 (1955). In Almeida the victim was an off-duty policeman who was killed by a shot either fired at or by the robbers. In Bolish the victim was one of the arsonists whose death was a direct result of burns received from the fire set to consummate an arson plot. In Thomas the deceased was one of a pair of robbers, killed by a shot fired in resistance by the robbery victim. In all the cases the defendants were the surviving robbers or arsonists who were tried for first-degree murder.

32. "It would not be seriously contended that one accidentally killing himself while engaged in the commission of a felony was guilty of murder. If the defendant herein is guilty of murder because of the accidental killing of his co-conspirator then it must follow that [the co-conspirator] was also guilty of murder . . ." People v. Ferlin 202 Cal. 587, 596, 265 P.230 (1928), (where defendant's conviction on a charge of murder growing out of death of co-arsonist as a result of the arson plot was reversed.) In Commonwealth v. Moore, 121 Ky. 97, 100, 88 S.W. 1085 (1905), where the robbers were held not liable criminally for the death of a third person caused by shots fired in resistance to the robbery, the court stated: "The defendants can in no sense be said to have aided or abetted [the shooter], for he was firing at them; and to hold them responsible criminally for the accidental death of a bystander . . . would be carrying the rule of criminal responsibility for the acts of others beyond all reason."

33. 362 Pa. 596, 68 A.2d 595, 12 A.L.R.2d 183 (1948) *cert. den.* 339 U.S. 924 (1950) (conviction of murder affirmed.) Three robbers stole a car and robbed a supermarket, indulging in some inaccurate shooting when one of the employees threw a can of corn at them. As they fled toward their car, a police car approached, and an off-duty policeman simultaneously tackled one of the robbers. One of the robbers fired at the police in the car, who returned the fire. Another of the robbers fired three shots point-blank at the off-duty policeman (according to the testimony of the policeman's widow and two children who were in a nearby parked car.) One of the shots which was fired during this exchange killed the policeman. As an indication of the vagaries of the jury system, the only one who did not receive a death sentence purportedly fired three times at the victim. He was sentenced to life imprisonment. Almeida, who fired the shots in the supermarket, received a death sentence.

34. In the trial of the robber who received only a life sentence, it became apparent that the Commonwealth of Pennsylvania had suppressed evidence which conclusively established that the killing bullet had been fired by a police weapon. Almeida succeeded, by a habeas corpus proceeding, in obtaining a new trial. U.S. *ex rel* Almeida v. Baldi *et al.* 195 F.2d 815 (3 Cir. 1952).

35. Apparently all the cases supporting this view stem from Commonwealth v. Campbell, 89 Mass. (7 Allen) 541 (1863) where the court set out the following hypothetical illustration: "Suppose, for example, a burglar attempts to break into a dwelling house, and the owner or occupant, while striving to resist and prevent the unlawful entrance, by misadventure kills his own servant, can the burglar in such case be deemed guilty of criminal homicide? Certainly not. The act was not done by him, or with his knowledge or consent; nor was it a necessary or natural consequence of the commission of the offense in which he was engaged. He could not, therefore, have contemplated or intended it." This case has been condemned in Beale, *The Proximate Consequences of An Act,* 33 HARV. L. REV. 633, 649 (1920).

felony.[36] The court, exhaustively considering precedents dealing with causation in criminal cases, concluded that since the felony was the proximate cause of the fatality it was immaterial whether the shot was fired by or at the robbers.[37] The dissent would have required that the jury pass on the issue of causation.[38] Though the majority opinion is a masterpiece of legal legerdemain, narrowly confining certain cases[39] while expanding others[40] seemingly beyond the scope intended by the deciding benches, it is submitted that—premising the beneficial and deterrent value of the felony-murder doctrine—the decision is logically sustainable, even demanded.[41]

In *Commonwealth* v. *Bolish*,[42] subsequent to *Almeida*, defendant's accomplice in an arson plot was fatally burned while setting the fire.[43] The majority held, as a matter of law, that the victim's own actions were not such as to supersede and relieve the Defendant from the charge of

36. See People v. Ferlin, 203 Cal. 587, 597, 265 P.230 (1928), where conviction was reversed when defendant was tried for murder of his co-arsonist who died in the fire. "It cannot be said . . . that defendant and deceased had a common design that deceased should accidentally kill himself. Such an event was not in furtherance of the conspiracy, but entirely opposed to it."

37. "A knave who feloniously and maliciously starts 'a chain reaction' of acts dangerous to human life must be held responsible for the natural fatal results of such acts. . . . When men engaged in a scheme of robbery arm themselves with loaded revolvers they show that they expect to encounter forcible opposition and that to overcome it they are prepared to kill anyone who stands in their way. If in the course of their felonious enterprise they open fire upon policemen or others and if in self-defense and to vindicate the law the fire is returned and someone is killed by a bullet fired in the exchange of shots, who can challenge the conclusion that the proximate cause of the killing was the malicious criminal action of the felons? No other genesis can justly be assigned to the homicide. The felons should be adjudged guilty . . . of murder in the first degree." Commonwealth v. Almeida, 362 Pa. 596, 634 (1950).

38. Jones, J., dissented. "The only factual issue submitted to the jury . . . was whether the defendant was engaged in a 'holdup' at the time Mr. Ingling was killed. . . . Thus, the . . . charge . . . 'Was this a holdup? . . . If you have any reasonable doubt about the fact that this was a hold-up, you must give this defendant the benefit of it and say, not guilty, but the doubt must be reasonable.' Virtually a directed verdict of guilt in the circumstances." *Id.* at 642.

39. Particularly is this true of People v. Garippo, 292 Ill. 293, 127 N.E. 75 (1922); Butler v. People, 125 Ill. 641, 18 N.E. 338 (1888). Commonwealth v. Campbell, 89 Mass. (7 Allen) 541 (1863); and Commonwealth v. Moore, 121 Ky. 97, 88 S.W. 1085 (1905) are squarely rejected.

40. Wilson v. State, 188 Ark. 846, 68 S.W.2d 100 (1934); Keaton v. State, 41 Tex. Cr. 621, 57 S.W. 1125 (1900); Taylor v. State, 41 Tex. Cr. 564, 55 S.W. 961 (1900).

41. See Notes: 23 TEMP. L.Q. 423 (1950); 2 ALA. L. REV. 327 (1950).

42. 381 Pa. 500, 113 A.2d 464 (1955). (reversing conviction and remanding for new trial because of improper admission of evidence.)

43. Defendant and deceased apparently entered into an agreement whereby deceased was to burn down a certain empty house in order to collect the insurance. Deceased, in the empty house, set a jug of inflammable liquid on an electric hotplate and turned on the current. Before deceased could exit, the jug exploded and he received burns from which he later died. It was not clear whether defendant was actually at the house when the fire was set.

felony-murder.[44] The concurring opinion rested on *Almeida*, viewing the fact that the victim in this case was the co-felon as immaterial.[45] The dissent squarely opposed the notion that an arsonist's death, resulting from his own acts, could justify a conviction.[46]

The foundations were thus laid in the *Almeida* and *Bolish* cases to support an extreme application of the felony-murder theory. In *Commonwealth* v. *Thomas*,[47] the defendant was indicted for the murder of his accomplice in an armed robbery.[48] In fleeing the scene of the robbery, the accomplice and the defendant separated. The erstwhile victim of the robbery pursued and killed the accomplice. At the trial, the defendant's demurrer at the close of the prosecution's evidence was sustained, and the Commonwealth took a direct appeal to the Supreme Court of Pennsylvania. The majority held that though the killing was justified as to the actual slayer, the defendant, on the facts, could properly be prosecuted for murder.

The majority view was that the legislature intended any killing proximately caused by the robbery to be first degree murder attributable to the robbers, regardless of the identity of the victim or the identity of the actual slayer, so long as the force which killed was one which was naturally and foreseeably brought into existence by the robbery.[49] One

44. "Even if it be assumed that [deceased] was an accomplice there was . . . no evidence in this case which was legally sufficient to make any act of [his] a superseding cause and thus relieve defendant from the natural consequences of his malicious, felonious arson. To charge on the complicated subject of proximate or intervening or superseding cause, when the court determines there has been no superseding cause, is unnecessary; (citations omitted) it is unwise, since it would merely tend to confuse the jury with the result that society would not be adequately protected and many dangerous criminals would never be convicted of their crimes." 381 Pa. at 520-21.

45. "The defendant is therefore triable for murder either because the death occurred as a result of an act of his confederate while furthering the felony, or from the defendant's having ordered his dupe to perform an act of inherently great danger." *Id.* at 527.

46. "I do not believe that the framers of this criminal statute (enacted originally March 31, 1860) ever intended it to cover a situation such as the one involved here." *Id.* at 528. "In order to have constructive murder, there must be an unbroken continuity of circumstances between the attempted or completed felony and the death . . . [I]n the case at hand the death . . . was not within something within the scope of the arson plan. Instead of its being in furtherance of the criminal design, it was actually in hindrance of it. The death of an accomplice . . . might well cause a collapse of the entire criminal venture." *Id.* at 529-530.

47. 382 Pa. 639, 117 A.2d 204 (1955).

48. The prosecution's evidence tended to show that Thomas and the deceased entered a store and held up the owner. The deccased had a gun, defendant apparently was unarmed. Deceased took the cash and both left the store and ran off in opposite directions. The owner seized a gun and pursued the deceased, and after an exchange of shots killed him.

49. "If the defendant sets in motion the physical power of another, he is liable for its result. . . . As has been said many times, such a rule is equally consistent with reason and sound public policy. The felons' robbery set in motion a chain of events which were or should have been within his contemplation when the motion was initiated. He

of the dissenters took the position that the act which was the immediate cause of death had to be an act perpetrated in furtherance of the robbery, implying that the killing force must have been one directly set in motion by one of the robbers.[50] He would classify *Almeida* as sui generis, properly to be confined to situations where the deceased was not one of the felons. The other dissent would have refused ever to penalize for murder any killing which was "justifiable" as between the actual slayer and the victim[51] or, more accurately, that the legislature intended the felony-murder rule only to penalize for the killing of "innocent" persons.[52]

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therefore should be held responsible for *any death* which by direct and almost inevitable sequence results from the initial criminal act." 382 Pa. at 642. Justice Bell, in concluding his concurring opinion stated: "We must not turn back the clock. If there could be any reasonable doubt as to the meaning and application of the felony murder doctrine, it should not be restricted by hair-splitting technicalities or illogical or unrealistic distinctions, the sole and inevitable effect of which is to absolve murderous robbers from the killings which are the natural and likely result of their felonious hold-ups. For the protection and welfare of the people of this Commonwealth, the Public and the Courts must stop coddling criminals, young as well as old, otherwise the terrible brutal crime wave which is sweeping our State and Country will never be halted." *Id.* at 658-659.

50. "The thing which is imputed to a felon for a killing incidental to his felony is malice and not the act of killing. . . . [I]n order to convict for felony-murder, the killing must have been done *by the defendant, or by an accomplice or confederate or by one acting in furtherance of the felonious undertaking.*" *Id.* at 638.

51. PA. STAT. ANN., tit. 18, § 4701 (Purdon 1939) provides inter alia "all murder . . . which shall be committed in the perpetration . . . of . . . any . . . robbery . . . shall be murder in the first degree." Justice Musmanno, criticized the majority opinion: "If the sovereign power of the Commonwealth believes that robbers should be put to death, the Legislature should enact a statute to that effect. . . . But until the General Assembly so speaks, this Court or any other Court has no right to read into the statute what is not there . . . Although the majority opinion covers some 1200 words it never succeeds in explaining how the word 'murder' in the Act . . . can be made to mean anything else. In fact at the end it practically concedes its arbitrariness when it says that [the] death was a *killing* in the perpetration of a robbery." *Id.* at 680.

Justice Musmanno can himself be criticized thus: (1) Murder, in Pennsylvania (as pointed out by the concurring opinion of Bell, J.) is not defined by statute; the statute only fixes punishment. (2) As between the owner of the store and the victim, the killing may have been justifiable; but this does not mean that, as between the defendant and the victim, this must be so. Thus, if A tortiously were to start a conflagation and, to keep it from spreading, B were forced to destroy the house of C, would it be seriously contended that if the destruction by B was justified then A would ipso facto escape liability? To so hold would be to ignore the whole concept of proximate cause and such liability as is incident to the application of that principle. It can be said that the court, once it determined that such a killing was felony-murder at common law, could only go to the statute where such crime is classified as first degree murder.

52. "The *obvious* intent of the Act of 1939 was to punish with the severest possible penalty all those engaged in robbery if, during the unfolding of the robbery . . . some *innocent* person was killed." Commonwealth v. Thomas, 382 Pa. 639, 679 (1955) (Italics added). This was no doubt *an* intent of the legislature, but Justice Musmanno infers that this was the *only* intent—giving no reasons. *But Cf.* "You may have observed that I have not yet used the word "intention.' All these years I have avoided speaking of the 'legislative intent' and I shall continue to be on my guard against using it. The objection to 'intention' was indicated in a letter by Mr. Justice Holmes which the recipient kindly put at my disposal: 'Only a day or two ago—when counsel talked of the intention of a legislature, I was indiscreet enough to say I don't care what their intention was. I only want to know what the words mean.' . . . The difficulty in many instances

Elsewhere the causal mechanics invoked in these cases by the Pennsylvania court have been analyzed and approved,[53] but more basic to the problem presented is the position into which the court was placed by the wording of the statute.[54] The same problem is posed by the statutes of other jurisdictions.[55] Absent some legislative declaration *aliunde* the statutes, it is doubtful that their true purpose in this respect can be determined. In the abstract it can be stated, however, that society seeks to avoid the killing of any citizen except when mandated by society itself through its regular governmental processes. Thus criminal actors who feloniously create circumstances likely to result in the death of citizens should be penalized for the death which ensues as a natural and foreseeable consequence. To differentiate solely on the basis of the victim's temporary character would be to make a questionable value judgment. But in particular application to this situation the felony-murder doctrine gives rise to what can only be described as an emotional reaction, not one based on logical and abstract principles. This doctrine which penalizes as murder certain killings which after they happened are easily determined as foreseeable by hindsight,[56] but were almost certainly not sub-

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where a problem of meaning arises is that the enactment was not directed towards the troubling question." Frankfurter, *Some Reflections on the Reading of Statutes,* 47 COLUM. L. REV. 527, 538-39 (1947).

53. See Note 2 How. L.J. 132 (1956); 29 TEMP. L.Q. 205 (1956); 28 TEMP. L.Q. 453 (1955). The Pennsylvania Courts have followed the principles of foreseeability and the proximate cause principles as stated in Beale, *The Proximate Consequences of An Act,* 33 HARV. L. REV. 633, 658 (1920). "To sum up the requirements of proximity of result: 1) The defendant must have acted (or failed to act in violation of a duty). 2) The force thus created must (a) have remained active itself or created another force which remained active until it directly caused the result: or (b) have created a new active risk of being acted upon by the active force that caused the result."

54. It is submitted that the dissents in the Thomas case are inspired by the harshness of the penal sanction—either life imprisonment or a death sentence—which are automatically called into operation by a conviction of felony-murder, regardless of whether the defendant is a vicious intentional trigger-pulling killer or one who is being tried on an imputed intent cum proximate cause theory.

55. With a few exceptions, such as in the case of New York, "The *killing* of a human being . . . is murder in the first degree, *when committed*: . . . by a *person engaged* in the cimmission of . . . a felony." N.Y. PENAL LAW § 1044 (1944), (Emphasis supplied).

56. "[The assumption that a juror can negate the existence of the injury which has once been presented to his knowledge] is a false one . . . [W]hen two things have been vividly connected they can seldom, if ever, be separated again in our thinking . . . The jury for days, and sometimes weeks, have had the act and injury presented to them as inevitably connected. The two are presented in close association. . . . When they retire to consider their verdict these two things are vividly in their minds. They cannot, therefore, negate the injury and treat it as though it had never existed. Nor can they look at the act uninfluenced by the existence of the injury," Levitt, *Cause, Legal Cause and Proximate Cause,* 21 MICH. L. REV. 34, 50, 51 (1922). It is submitted that the above applies when a jury is asked to determine proximate cause or foreseeability. In felony-murder the task of the jury is further complicated by the psychologieal effect of the defendant's characterization as "robber," "rapist," or some other similar epithet. In prosecutions for "ordinary" murder, the jury may find the defendant guilty of a

jectively contemplated by the defendant nor intended by him, has been far-extended by the Pennsylvania court. In many minds this is punishing a robber as a murderer because of an almost fortuitous and unintended consequence.[57]

The present state of the law of felony-murder in Pennsylvania conjures up a host of borderline situations which, though thought of in the past as tragic accidents, might be successfully prosecuted as murder under these precedents.[59] The inconsistent and sharply divergent judicial treatment of similar statutes calls for action specifically directed at approving or rejecting the application of felony-murder as presented in the *Almeida, Bolish,* and *Thomas* cases.[60] The instant decisions present an orderly and logical development of this attenuated form of murder, but one which culminates in a penalty which might be regarded as neither justified by the state of mind of the defendant nor demanded by the consequences to society of the killing of a co-felon.

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lesser degree of murder or manslaughter. In felony-murder, they can only bring in a verdict of guilty or of not guilty. Thus they are faced either with letting the defendant escape punishment for the killing, or of imprisoning a "robber" for life. Though they may doubt that the moral guilt of the defendant deserves the punishment, they can righteously shift the burden to the legislature.

57. But, of course, this is the basis of the whole felony-murder rule. "It is the cases where the killing was unintentional or by accident, moreover, which rest upon the longest line of authority in the felony-murder cases. As Coke's illustration of the boy in the bush killed by the chance glance of an arrow [loosed by a poacher] demonstrates, the rule that unintentional killings committed during the course of a homicide [felony] are murder is really the keystone of the entire structure of law which has been built about the felony-murder doctrine." Crum, *Causal Relations and the Felony-Murder Rule,* 1952 WASH. U.L.Q. 191, 207.

58. *E.g.,* during hold-up, victim dies of heart failure. Fear, a natural consequence, brought on the heart-attack, and the death of victim, a foreseeable result, takes place. An arson causes fire-engines to rush to scene and a child is run over. Conceivably, in an emotion-packed trial, convictions on cases so extreme could be secured. But these situations are far removed, as far as intent is concerned, from the situation where an arsonist sets fire to an inhabited house, or where a rapist strangles his victim "to keep her quiet," where no qualms are felt when felony-murder is applied.

59. "There is little to show that the present rule is effective as a deterrent upon criminal enterprises. It appears to have grown out of a medieval legal system which punished small crimes with death as quickly as large ones . . . Indeed it is this very factor which has been used as a defense for the rule. Wharton [WHARTON, HOMOCIDE § 59 (1875)] tells us that Chief Justice Fortescue, exhibiting the superiority of the English over the Roman law, used this very illustration [Lord Dacre's Case, 72 Eng. Rep. 458 (1935)]. 'Crime was repressed so he leaves us to infer, because criminals of all grades were exterminated.' The law should not, in modern times, continue a rule with such a sanguinary basis." Crum. *op. cit. supra* note 59 at 210.

60. It does not appear from volumes 11-25 UNIFORM CRIME REPORT, covering the period 1940-1954, that the incidence rates of robbery and burglary of the state of Ohio, which has no felony-murder rule, are significantly different from the rates in many other states. The deterrent effect of the doctrine seems to apply only to the specific defendant who may be permanently removed as a threat to society.