


CRITICAL PERSPECTIVES ON CRIME AND LAW

FELONY MURDER



GUYORA
BINDER

Felony Murder

Guyora Binder



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Critical Perspectives on Crime and Law

Edited by Markus D. Dubber

For Judith

PREFACE

Although the felony murder rule is one of the most criticized features of American criminal law, no book has ever been written on the topic before.

Such a book is needed for many reasons. Felony murder liability is part of homicide law in almost every American jurisdiction. It is important that lawyers, lawmakers, and voters understand how it works and how it can be improved. Legal scholars have long viewed it as an irrational vestige of ancient English law that does not cohere with the rest of modern criminal law. This view is unfortunate. Felony murder law is more modern and less harsh than commonly believed. Excluding it from general accounts of criminal law as an archaic exception distorts our understanding of the overarching principles of modern criminal law. This book sets out to correct the historical record, explain modern felony murder law, identify needed reforms, and show how, by taking account of felony murder liability, we can improve our understanding of the basic principles of American criminal law.

I am grateful to many people who encouraged and assisted me in the preparation of this book.

George Fletcher, my teacher at Yale and my supervisor in a research fellowship at U.C.L.A., first awakened my interest in criminal law. In this regard, my experience is not unique. George has enlivened criminal law scholarship the world over and more or less invented the field of criminal law theory in the United States. Thus George not only enabled me to produce this book, but also created an audience for it.

Markus Dubber, my colleague at Buffalo for many years, has made indispensable contributions to this project at every stage. He first attracted my attention to the felony murder problem by inviting me to write a review essay on Samuel Pillsbury's excellent book on homicide, *Judging Evil*. Many opportunities followed to contribute to conferences and symposia too numerous to recount, and many of those papers informed this project. Co-teaching courses with Markus

on the history and theory of criminal law led to many conversations on the themes of culpability, common law history, and codification. Markus steadily encouraged me to publish a book on the topic, and eventually suggested that I contribute it to his series, "Critical Perspectives on Crime and Law."

Four other scholars have patiently encouraged the project, and improved it by commenting on its component papers. Robert Weisberg, my coauthor on a criminal law textbook and a theoretical work on law and literature, has taught me a great deal about both statutory and doctrinal interpretation, and instilled a conviction that deep questions lurk in the concrete details of homicide law. The remarkable theoretical work of Mark Kelman and Ken Simons on the concepts of strict liability and negligence has greatly shaped my own thinking. Both have generously shared their reactions and suggestions. Jonathan Simon's path-breaking work on the politics of criminal justice has helped me think about how to bring theoretical scholarship and democratic politics into dialogue on questions of criminal justice. Jonathan has also served as an acute reader.

Others have contributed by commenting at conferences and workshops. This includes audiences at the law schools of Arizona State University, Georgetown University, Pace University, the University at Buffalo, the University of Connecticut, the University of Toronto, and Yale University. I am particularly grateful to Paul Butler, Luis Chiesa, Jack Chin, Russell Christopher, Allison Danner, Antony Duff, Ken Ehrenberg, Angela Fernandez, Heidi Li Feldman, Jim Gardner, Bernard Harcourt, Carissa Hessick, Dan Kahan, Marty Lederman, Cynthia Lee, Allegra McLeod, Tracey Meares, Errol Meidinger, John Mikhail, Tom Morawetz, Jeffrie Murphy, Paul Robinson, Ken Shockley, Jack Schlegel, Mike Seidman, David Sklansky, Simon Stern, William Stuntz, Rick Su, Winni Sullivan, Doug Sylvester, and Leo Zaibert.

Other scholars have helped by commenting on papers or fielding my bibliographical and other questions. I am particularly indebted to Lyndsay Farmer, Barbara Fried, Tom Green, Adil Haque, George Hezel, Leo Katz, Fred Konesfsky, Gerald Leonard, Betty Mensch, Dennis Patterson, John Peradotto, Father Augustine Thompson, and Jim Wooten. Buffalo's indispensable and extraordinarily learned reference librarian Marcia Zubrow deserves special mention.

I have been blessed with very capable and enterprising research assistance from Melanie Beardsley, Alex Bouganim, Robert Carbone, Jenny Chang, Michael Court, Jennifer Johnson, Jared Garlip, Kelly-Anne Kelly-Williams, Jon Lamberti, Scott Ptak, Hisham Ramadan, Helen Root, Alicia Sim, Mark Welchons, and

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Dean Nils Olsen and Dean Makau Mutua of the State University of New York at Buffalo Law School both showed their passionate support of scholarship by encouraging the project in every possible way.

Finally, I am grateful for the patient and cheerful support of my family throughout the preparation of this book. My wife, Judith, to whom this book is dedicated, was a constant source of inspiration and made every day a joy. My children, Ari and Galia, kept me from taking myself or my projects too seriously.

Although many people have helped me research and write this book, all errors and opinions are my own.

This book incorporates substantial portions of three articles. Chapters 1, 9, 10, 11, and 12 include substantial portions of Guyora Binder, “Making the Best of Felony Murder,” 91 *Boston University Law Review* 403 (2011), reprinted with the permission of the *Boston University Law Review*. Chapters 5, 6, 7, and 8 include substantial portions of Guyora Binder, “The Origins of American Felony Murder Rules,” 57 *Stanford Law Review* 59 (2004), reprinted with permission of the *Stanford Law Review*. Chapters 2, 3, and 4 include substantial portions of Guyora Binder, “The Culpability of Felony Murder,” 83 *Notre Dame Law Review* 965 (2008), reprinted with permission of the author.

Felony Murder

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FELONY MURDER PRINCIPLES

Part One

1 MAKING THE BEST OF FELONY MURDER

THE FELONY MURDER PROBLEM

A rapist chokes a distraught child victim to silence her. To his surprise, the child dies.¹ A robber aims his gun at a motel clerk's forehead. His finger slips and he "accidentally" shoots his target dead.² An arsonist burns down a storefront to collect insurance, coincidentally incinerating the family living on the other side of the wall.³

Intent on selfish aims, these killers do not recognize the obvious risks their conduct imposes on their victims. Though unintended, these killings are hardly accidental: such inadvertent but foreseeable killings are negligent. Yet "negligence" does not seem a sufficient epithet to capture the culpability of these killings, nor does "negligent homicide" seem a serious enough charge. These offenders callously impose risks of death in order to achieve other wrongful ends. In each case, the offender's felonious motive for imposing a risk of death aggravates his guilt for unintentionally, but nevertheless culpably, causing the resulting death. Accordingly, in most American jurisdictions, these killings would be punished as murder. The legal concept necessary to this result, the felony murder doctrine, is the subject of this book.

Although the felony murder doctrine is arguably necessary to achieve justice in cases like those described above, it is one of the most widely criticized features of American criminal law. Legal scholars are almost unanimous in condemning it as a morally indefensible form of strict liability.⁴ Some have concluded that felony murder rules impose unconstitutionally cruel and unusual punishment by ascribing guilt without fault, or that they violate constitutional due process by presuming malice without proof.⁵ Many view contemporary felony murder rules as descended from a sweeping "common law felony murder rule" holding all participants in all felonies responsible for all resulting deaths.⁶ Some therefore see felony murder liability as an anachronism, a primitive relic of medieval law. Others may concede that modern

“reforms” have ameliorated the doctrine, but they regard these rules as pearl earrings on a pig, merely ornamenting an essentially barbaric principle of liability without fault.

Most criminal law scholars have assumed there is nothing to say on behalf of the felony murder doctrine, no way to rationalize its rules to the lawyers who will apply it, and no reforms worth urging on courts and legislatures short of its utter abolition.⁷ Sanford Kadish, author of the leading criminal law textbook, called the felony murder doctrine “rationally indefensible,”⁸ and the American Law Institute’s Model Penal Code commentaries observed that “[p]rincipled argument in favor of the felony-murder doctrine is hard to find.”⁹ Such critics argue that felony murder liability is a morally arbitrary lottery, in which punishment depends on the fortuity that an unintended death occurs in the course of a felony, regardless of the felon’s culpability for that death.

Now a killing can be very culpable even if it is not intended. Most felony murders are intentional shootings by armed robbers. A felony murder rule makes this type of killing murder without requiring the prosecutor to prove, or the jury to find, that the robber intended to kill. Many readers will not find these typical applications of felony murder liability troubling. Yet felony murder liability is sometimes imposed on felons who do not seem very culpable at all. Consider these ten cases:

1. Seven months after stealing a car, James Colenburg, a Missouri man, was driving down a residential street when an unsupervised two-year-old suddenly darted in front of the stolen car. The toddler was struck and killed. Colenburg was convicted of felony murder predicated on theft.¹⁰
2. Jonathan Miller, a fifteen-year-old Georgia youth, punched another boy in a schoolyard dispute. The second boy suffered a fatal brain hemorrhage. Miller was convicted of felony murder, predicated on the felonies of assault with a deadly weapon and battery with injury.¹¹
3. Wrongly suspecting Allison Jenkins of drug possession, an Illinois police officer chased him at gunpoint. As the officer caught him by the arm, Jenkins tried to shake free. The officer tackled Jenkins and the gun fired as they fell, killing the officer’s partner. Jenkins was convicted of felony murder, predicated on battery of a police officer.¹²
4. Jonathan Earl Stamp robbed a California bank at gunpoint. Shortly thereafter one of the bank employees had a fatal heart attack. Stamp was convicted of felony murder.¹³

5. New York burglar William Ingram broke into a home, only to be met at the door by the homeowner, who was brandishing a pistol. The homeowner forced Ingram to lie down, bound him, and called the police. After police took Ingram away, the homeowner suffered a fatal heart attack. Ingram was convicted of felony murder.¹⁴
6. Also in New York, Eddie Matos fled across rooftops at night after committing a robbery. A pursuing police officer fell down an airshaft to his death. Matos was convicted of felony murder.¹⁵
7. John Earl Hickman was present when a companion overdosed on cocaine in Virginia. He was convicted of felony murder predicated on drug possession.¹⁶
8. John William Malaske, a young Oklahoma man, got a bottle of vodka for his underage sister and her two friends. One of the friends died of alcohol poisoning. Malaske was convicted of felony murder predicated on the felony of supplying alcohol to a minor.¹⁷
9. Ryan Holle, a young Florida man, routinely loaned his car to his housemate. At the end of a party, the housemate talked with guests about stealing a safe from a drug dealer's home. The housemate asked Holle for the car keys. Holle, tired, drunk, and unsure whether the housemate was serious, provided the keys and went to bed. The housemate and his friends stole the safe, clubbing a resisting resident to death. Holle was convicted of felony murder and sentenced to life without parole.¹⁸
10. North Carolina college student Janet Danahey set fire to a bag of party decorations as a prank in front of an exterior door to her ex-boyfriend's apartment. To Danahey's surprise, the apartment building caught fire and four people died in the blaze. Danahey pled guilty to four counts of felony murder.¹⁹

These cases are indeed troubling. The *New York Times* featured the *Holle* case in a story portraying the felony murder doctrine as out of step with global standards of criminal justice.²⁰ Some readers will recognize the *Stamp* case as one that criminal law textbooks use to illustrate the harshness of the felony murder rule.²¹ Janet Danahey's supporters present her case as an indictment of the felony murder doctrine.

What should be done about such cases? If the felony murder doctrine is designed to produce results like these, it should indeed be abolished. Yet the three cases described in our first paragraph show that felony murder liability is some-

times necessary to satisfy our intuitions about deserved punishment. Thus it should be possible to identify a principle distinguishing justified from unjustified impositions of felony murder liability and to reform the felony murder doctrine in light of that principle. That is the aim of this book.

I should be clear from the outset about two limits on the scope of my argument. First, this book is concerned only with murder liability for unintended killing in the context of felonies. It is particularly concerned with homicides that would not be graded as murder without the killer's participation in a felony. Thus, it does not address how participation in a felony should affect the grading or punishment of intentional or grossly reckless killings that would otherwise be punished as murder.

This limit gives rise to a second essential limit on the scope of the argument: *this is not a book about the death penalty*. Without venturing an opinion on the legitimacy of capital punishment generally, I proceed from the premise that American law reserves it for the most heinous murders. The Supreme Court has determined that capital punishment is not applicable to those who participate in fatal felonies without intent to kill or gross recklessness (sometimes referred to as “extreme” or “depraved” indifference to human life).²² It has not explicitly required that felons who kill must also act with intent to kill or gross recklessness, but this is the logical implication of its holdings. Many death penalty jurisdictions treat participation in certain felonies as aggravating circumstances that can trigger capital liability for intentional killings. Such feloniously motivated intentional killings are beyond the scope of this book. This book is concerned only with the imposition of very significant sentences of incarceration for killings that would not be murder without a felonious motive. It argues that murder liability is justified for some feloniously motivated inadvertent killings. *It does not justify capital punishment in such cases.*

CONSTRUCTIVE INTERPRETATION

In proposing principled reform of felony murder rules rather than abolition, this book serves to *make the best* of the felony murder doctrine. By this, I mean two things.

First, like it or not, we are stuck with the felony murder doctrine. To be sure, we could get along without it. We could abolish it and still capture many of the most culpable cases with rules conditioning murder on grossly reckless killing. Yet we are not likely to do so. Legislatures have persisted in supporting felony murder for many decades in the teeth of academic scorn. Although most states