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Criminal Law -- Homicide -- Application of Felony-Murder Rule When Non-Felon Kills Felon

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ideas by words, pictures, or drawings; and that to uphold the Postmaster General's revocation would be saying that Congress granted him the power of censorship, or the power to alone determine whether a publication is good or bad for the public to read. This, said the court, would be a radical change from the other standards regarding classifications, and "such a power is so abhorrent to our traditions that it should not be easily inferred."²⁶

The Postmaster General in *Esquire* relied on the holding of *Milwaukee Publishing Company*, but as has been pointed out the matter involved in the latter case was completely nonmailable. It appears then that anything which the Postmaster General may properly declare nonmailable, he may exclude from the second-class without denying mailing privileges entirely, but where the matter involved is mailable he must objectively apply the standards set by Congress.

The basis of the court's decision in the *Esquire* case was that Congress had not intended to give to the Postmaster General the power of enforcing tests of "positive worth" in determining whether a periodical should be accorded second-class mailing privileges. The case suggests the question of whether Congress could delegate such powers. It could be argued that there is no constitutional right to cheap mail, that Congress is not attempting to regulate the businesses of newspapers and periodicals, but is merely performing a service, and in so doing may name its conditions for performance. On the other hand, it may readily be seen that the denial of second-class privileges would be likely to drive a publisher out of business,²⁷ and in this respect actually would be a regulation. The court of appeals in the *Esquire* case²⁸ considered this question and concluded that Congress might withdraw the second-class privilege completely if it felt that the benefits of wide circulation were not worth the cost of the subsidy, as there was no obligation to grant it in the first place, but that Congress may not use the privilege as a weapon to force compliance with its notions of what is worthwhile. To allow a "merit test" would be to deny what is meant by freedom of the press.

LEWIS H. PARHAM, JR.

Criminal Law—Homicide—Application of Felony-Murder Rule When Non-Felon Kills Felon

Under the common law a homicide, whether intentional or not, committed by a person in the perpetration of a felony, is murder by each

²⁶ *Hannegan v. Esquire*, 327 U. S. at 151.

²⁷ *Supra* note 8.

²⁸ *Esquire v. Walker*, 151 F. 2d 49 (D. C. Cir. 1945).

of the felons.¹ Commission of the felony supplies malice, which is an essential element of common law murder.² This doctrine undisputedly applies in cases where: (1) one of a group of robbers intentionally shoots a person in order to rob him; (2) one of the group accidentally shoots the victim of the robbery; (3) one of the group accidentally fires and kills a bystander.³ Statutes stemming from this doctrine have been enacted in all but four⁴ American states. The various statutes are not uniform in their requirements as to the felonies that must be committed for the ensuing homicide to be murder. It may be any felony⁵ or some similar provision;⁶ a crime punishable in certain ways;⁷ the specific felonies of arson, burglary, rape, and robbery;⁸ these plus other named felonies,⁹ the most common additions being mayhem and kidnapping; or the four previous named felonies "or any other felony."¹⁰

¹ The scope of this note does not permit an extended analysis of the felony-murder doctrine. For such an analysis see: WHARTON, *HOMICIDE* p. 112 (3rd ed. 1907); 26 AM. JUR., *Homicide* §§ 64-69 (1940); 40 C. J. S., *Homicide* § 21 (1944); Arent, *The Felony Murder Doctrine and Its Application Under the New York Statutes*, 20 CORN. L. Q. 228 (1934); Crum, *Causal Relations and the Felony-Murder Rule*, 1952 WASH. U. L. Q. 191; Perkins, *A Re-Examination of Malice Aforethought*, 43 YALE L. J. 537, 557 (1934); Perkins, *The Law of Homicide*, 36 J. CRIM. L. 391, 401 (1946).

² CLARK AND MARSHALL, *CRIMES*, § 248 (5th ed. 1952).

³ For a treatment of all the possible arrangements of parties in felony-murder situations see Hitchler, *The Killer and His Victim in Felony-Murder Cases*, 53 DICK. L. REV. 3 (1949).

⁴ Kentucky, Maine, South Carolina, Texas, and Wisconsin; but see KEN. REV. STAT. §§ 435.010-435.020 (1953); ME. REV. STAT. c. 130, § 1 (1954); S. C. CODE ANN. § 16-51 (1952); TEX. ANN. PEN. CODE §§ 1207-1228, 1241, 1256 (Vernon 1948). The common law felony-murder rules would apply to some extent in all these states.

⁵ MINN. STAT. ANN. §§ 619.08, 619.10 (1947); N. M. STAT. ANN. § 40-24-4 (1953); N. Y. PEN. LAW § 1044; OKLA. STAT. ANN. tit. 21, § 701 (1937); S. D. CODE § 13.2007 (1939); WIS. CRIM. CODE § 940.03 (1955).

⁶ ILL. ANN. STAT. c. 38, §§ 358, 363 (Smith-Hurd 1955).

⁷ DEL. CODE ANN. tit. 11, § 571 (1953); GA. CODE ANN. § 26-1009 (1953); MASS. ANN. LAWS c. 265, § 1 (1933).

⁸ ALA. CODE ANN. tit. 14, § 314 (1940); IND. STAT. ANN. § 10-3401 (1942); MICH. STAT. ANN. § 28.548 (1954); MISS. CODE ANN. § 2215 (1942); OHIO REV. CODE ANN. § 2901.01 (Page 1954); ORE. REV. STAT. § 163.010 (1955); UTAH CODE ANN. § 76-30-3 (1953); VT. REV. STAT. § 8240 (1947); VA. CODE ANN. § 18-30 (Michie 1950); W. VA. CODE ANN. § 5916 (1955); WYO. COMP. STAT. ANN. § 9-201 (1945).

⁹ ARIZ. CODE ANN. § 43-2902 (1939); ARK. STAT. ANN. § 41-2205 (1947); CAL. PEN. CODE pt. 1, tit. 8, c. 1, § 189 (Deering Supp. 1953); COLO. REV. STAT. c. 40, § 2-3 (1953); CONN. GEN. STAT. § 8350 (1949); D. C. CODE §§ 22-2401, 2402 (1951) (31 STAT. c. 854); FLA. STAT. ANN. § 782.04 (Supp. 1954); IDAHO CODE vol. 4, c. 40, § 18-4003 (1948); IOWA CODE ANN. § 690.2 (1950); LA. REV. STAT. ANN. § 14:30 (West 1951); MD. ANN. CODE art. 27, §§ 495-497 (Flack 1951); MO. STAT. ANN. § 559.010 (Vernon 1953); MONT. REV. CODE ANN. § 94-2503 (1947); NEB. REV. STAT. vol. 2, § 28-401 (1948); NEV. COMP. LAWS ANN. § 10068 (1950); N. H. REV. STAT. ANN. c. 585, § 1 (1955); N. J. STAT. ANN. § 2:138-2 (1939); N. D. REV. CODE § 12-2712 (1943); PA. STAT. ANN. tit. 18, § 4701 (Purdon 1930); R. I. GEN. LAWS c. 606, § 1 (1938); TENN. CODE ANN. § 39-2402 (1955); WASH. REV. CODE § 9.48.030 (1952).

¹⁰ KAN. GEN. STAT. ANN. § 21-401 (Corrick 1949); N. C. GEN. STAT. § 14-17 (1953).

These and other differences¹¹ in the statutes must be kept in mind in any discussion of this problem.

In the recent case of *Commonwealth v. Thomas*,¹² a Pennsylvania case, two men held up the proprietor of a store. After emptying the cash register they ran out of the store and down the street in opposite directions. The proprietor chased one of the robbers and killed him in a gun battle. His cohort was tried and convicted of first degree murder under the Pennsylvania felony-murder statute, which declares that "all murder . . . which shall be committed in the perpetration of, or attempting to perpetrate any arson, rape, robbery, burglary, or kidnapping, shall be murder in the first degree."¹³ In a four to three decision the Supreme Court of Pennsylvania upheld the conviction, saying:

"If the defendant sets in motion the physical power of another, he is liable for its result. . . . The felon's robbery set in motion a chain of events which were or should have been within his contemplation when the motion was initiated. He therefore should be held responsible for *any death* which by direct and almost inevitable sequence results from the original criminal act."¹⁴

When a non-felon does the act causing death

Until recently it was uniformly held that the act causing death must be in furtherance of a common purpose in order to be murder by all the felons;¹⁵ thus, when someone other than one of the felons did the immediate act causing death, the felony-murder rule was not applicable.¹⁶ In *State v. Oxendine*,¹⁷ where an innocent bystander was accidentally killed by the intended victim of an assault with intent to kill, the North Carolina Supreme Court held that the defendants were not guilty of

¹¹ See notes 29 and 41 *infra*.

¹² — Pa. —, 117 A. 2d 204 (1955).

¹³ PA. STAT. ANN. tit. 18, § 4701 (Purdon 1930).

¹⁴ *Commonwealth v. Thomas*, — Pa. —, —, 117 A. 2d 204, 205 (1955).

¹⁵ *Wilson v. State*, 24 S. W. 409 (Tex. Cr. App. 1893); *People v. Sobieskoda*, 235 N. Y. 411, 139 N. E. 558 (1923).

¹⁶ *People v. Garippo*, 292 Ill. 293, 127 N. E. 75 (1920); *Butler v. People*, 125 Ill. 641, 18 N. E. 338, 1 L. R. A. 211 (1888) (dictum, for a felony was not being committed); *Commonwealth v. Moore*, 121 Ky. 97, 88 S. W. 1085, 2 L. R. A. (N. S.) 719 (1905); *Commonwealth v. Campbell*, 89 Mass. (7 Allen) 541, 545, 83 Am. Dec. 705, 709 (1863) (where it was said by Bigelow, C. J., that if a man in defending his home from a burglar were to kill someone else, "Can the burglar in such a case be deemed guilty of criminal homicide? Certainly not."); *State v. Majors*, 237 S. W. 486 (Mo. Sup. 1922); *Commonwealth v. Thompson*, 321 Pa. 327, 184 Atl. 97 (1936) (where the charge of the court, indicating that defendant rather than an outsider would have had to have fired the fatal shot to be guilty of murder, was held to be proper); *Commonwealth v. Mellor*, 294 Pa. 339, 144 Atl. 534 (1928) (where a charge that if the fatal bullet was fired by one trying to stop the robbery defendants would not be guilty of murder, was characterized by the supreme court, not as incorrect, but as favorable to the defendant).

¹⁷ 187 N. C. 658, 122 S. E. 568 (1924).

culpable homicide, there being no concert or purpose between defendants and their intended victim.¹⁸

The first variation from this rule came in the so-called "shield" cases—cases in which the felon forced someone to occupy a position in the line of fire of those trying to avert the felony, hoping, of course, that his assailants would hold their fire. When the "shield" was killed, it was held that the felon was guilty of murder because he had forced the deceased to occupy a place of danger, causing his death.¹⁹

To tie in with felony-murder the theory of proximate cause, on which theory the principal case is based, is not a new idea.²⁰ The very nature of the offence necessitates an application of some causation rule, but there is a divergence of opinion as to what the rule should be. The role of proximate cause under the classical view is that *unless* the felony proximately causes the death *no murder* is committed. This rule is negative in concept, preventing an inference of murder in such a case as when a house burns down, killing the occupants, a burglar being in the house at the time the fire started. But recent decisions tend to hold that a felon is guilty of murder when a third person is killed by gunfire intended for the felon in the prevention of the felony.²¹ This trend, of

¹⁸ In the opinion it was said: "Suppose instead of killing an innocent bystander, Proctor Locklear had killed . . . one of his assailants, would the law, under these circumstances, hold the surviving assailants or confederates . . . criminally responsible for the homicide? We think not." *Id.* at 662, 122 S. E. at 570.

¹⁹ *Wilson v. State*, 188 Ark. 846, 68 S. W. 2d 100 (1934); *Keaton v. State*, 41 Tex. Crim. 621, 57 S. W. 1125 (1900); *Taylor v. State*, 41 Tex. Crim. 564, 55 S. W. 961 (1900).

²⁰ "The killing must have had an intimate relation and close connection with the felony, and not be separate, distinct, and independent from it; and when the act constituting the felony is in itself dangerous to life, the killing must be naturally consequent to the felony. The death must have occurred as a result or outcome of the attempt to commit the felony." WHEARTON, *HOMICIDE* p. 184 (3rd ed. 1907).

²¹ A policeman shot himself in a struggle with a felon for the felon's gun; the felon was held guilty of murder, for "the shooting was a consequence naturally to be expected from plaintiff in error's acts"; *People v. Krausner*, 315 Ill. 485, 506, 146 N. E. 593, 601 (1925). In trying to prevent a robbery one intended victim shot another; defendants were held guilty of murder because such a result "might reasonably might be anticipated"; *People v. Payne*, 359 Ill. 246, 255, 194 N. E. 539, 543 (1935). In a fact situation similar to that in the *Payne* case defendants were held guilty of murder; "for whatever results follow from that natural and legal use of retaliating force, the felon must be held responsible"; *Commonwealth v. Moyer*, 357 Pa. 181, 191, 53 A. 2d 736, 742 (1947), 17 *FORDHAM L. REV.* 124 (1948), 96 PA. L. REV. 278 (1948), 22 *TUL. L. REV.* 325 (1948). A policeman, in trying to prevent the escape of robbers, shot another policeman; the robbers were held guilty of murder, with reliance on the *Moyer* case; *Commonwealth v. Almeida*, 362 Pa. 596, 68 A. 2d 595, 12 A. L. R. 2d 183 (1949), *cert. denied*, 339 U. S. 924 (1950), *rehearing denied*, 339 U. S. 950 (1950), *cert. denied*, 340 U. S. 867 (1950), 30 B. U. L. REV. 422 (1950), 23 *TEMP. L. Q.* 423 (1950). In trying to prevent a robbery deceased was killed when he wrested the gun away from defendant and hit him with it, causing it to fire; defendant was held guilty of murder because he set in motion the "cause which occasioned the death of deceased"; *Miers v. State*, 157 Tex. Crim. 572, 578, 251 S. W. 2d 404, 408 (1952). See also *People v. Podolski*, 332 Mich. 508, 52 N. W. 2d 201, *cert. denied*, 344 U. S. 845 (1952), *rehearing denied*, 344 U. S. 888 (1952), 1952 *INTRA. L. REV.* (U. C. L. A.) 67, following the *Moyer* case; *Hornbeck v. State*, 77 So. 2d 876 (Fla. 1955) (dictum).

which the principal case is a culmination, maintains that *if* the felony proximately causes the death the felon *is guilty of murder*. This affirmative application of proximate cause is not merely a different expression of the earlier negative approach; it is an entirely different rule of causation, not necessarily following from the earlier rule.²²

That this affirmative application of proximate cause is a new concept in felony-murder cases does not necessarily mean that the result reached where a non-felon has immediately caused the death of another non-felon is subject to criticism. In all of the cases which have followed this trend the felony involved was one imminently dangerous to human life,²³ for the felon was armed and could expect armed resistance.²⁴ If the cases holding the felons guilty of murder when a non-felon kills a non-felon are limited to those situations where danger to others should have been anticipated by the felons, they are not subject to strong criticism, for this trend is but an extension of the "shield" cases²⁵ and is analogous to the concept of implying malice from wanton disregard of human life.²⁶ It must be remembered, however, that this trend is contrary to the earlier line of cases²⁷ and perhaps reaches a less desirable result in not fitting the punishment to the crime actually committed by the felon.

When a felon is killed

In the principal case, not only was the death-dealing force delivered by someone other than one of the felons, but in addition the person killed was one of the felons. The only other cases in which it has been seriously contended that one felon should be held guilty of murder when

²² The difference between these two rules can be illustrated by a more concrete example: Unless a man strike another, he cannot be guilty of a battery. But it does not follow from this that if a man strikes another he is guilty of a battery, for there are many circumstances under which the striking of a person does not amount to a battery.

²³ Indeed, this seems to be the situation in *all* modern applications of the felony-murder rule. According to Perkins, ". . . a study of the cases which repeat the formula that homicide committed while perpetrating a felony is murder, will disclose that the other felony actually involved is one which may properly be classified as 'dangerous,' . . ." *A Re-Examination of Malice Aforethought*, 43 *YALE L. J.* at 561. But in a case where it was not raised in the record, the North Carolina Supreme Court refused to express an opinion "as to whether the words 'other felony' as used in the statute [N. C. GEN. STAT. § 14-17 (1953)] mean any statutory felony, or are limited under the *ejusdem generis* principle to felonies dangerous to life." *State v. Streeton*, 231 N. C. 301, 305, 56 S. E. 2d 649, 653 (1949).

²⁴ Cases cited note 21 *supra*.

²⁵ Cases cited note 19 *supra*. The only difference in reasoning in the two situations is that in the "shield" cases the felon caused the deceased to assume a place of danger for protection, while in the recent trend the felon caused the deceased to be in a place of danger by the commission of a dangerous felony.

²⁶ *People v. Jernatowski*, 238 N. Y. 188, 144 N. E. 497 (1924); *State v. Capps*, 134 N. C. 622, 46 S. E. 730 (1904); *State v. Saunders*, 108 W. Va. 148, 150 S. E. 519 (1929).

²⁷ Cases cited in note 16 *supra*.

his co-felon was killed in the perpetration of their crime here cases where (1) one of the felons killed another felon,²⁸ or (2) the deceased felon accidentally caused his own death during the commission of the felony. In *People v. Fertin*,²⁹ a California case, one arsonist was killed in the fire; the other was held not guilty of murder because the death was opposed to the conspiracy and not in furtherance of it. But in *Commonwealth v. Bolish*³⁰ in a similar situation, the defendant was held guilty of murder on the proximate cause theory as previously expounded in Pennsylvania.³¹

In only two cases previous to the principal case had the question of murder even arisen when a felon in the perpetration of a felony was killed by a *non-felon*. In *People v. Garippo*,³² an Illinois case, convictions of murder were reversed because, under the instructions given, "plaintiffs in error might be held responsible for shooting done by another person when there was no concert of action between him and them."³³ In *People v. Udwin*,³⁴ decided under the New York statutes,³⁵ it was implicit that if deceased had been killed by a prison guard instead of by one of his fellow rioting prisoners the latter would not have been guilty of murder.

Thus the *Bolish* case is the only previous case in which the death of a felon otherwise than at the hands of his co-felons resulted in their conviction of murder, and this on the theory of proximate cause. The result reached in the *Bolish* case was criticized in able dissenting

²⁸ Such killing, of course, must not be totally unconnected with the furtherance of the felony undertaken. When *D1* became "trigger happy" and took some shots at a passing automobile, *D2* became furious at the needless risk of detection and killed *D1*. Both *D2* and *D3* were held guilty of first degree murder. *People v. Cabaltero*, 31 Cal. App. 52, 87 P. 2d 364 (1939).

²⁹ 203 Cal. 587, 265 Pac. 230 (1928). In *People v. LaBarbera*, 159 Misc. 177, 287 N. Y. Supp. 257 (1936), the same result was reached. This case is distinguishable, however, because the New York statutes declare that homicide is "the killing of one human being by an act, procurement, or omission of another," N. Y. PEN. LAW § 1042 (Emphasis added), and that "the killing of a human being . . . is murder in the first degree, when committed . . . by a person engaged in the commission of, or in the attempt to commit a felony. . . ." N. Y. PEN. LAW § 1044. (Emphasis added.)

In addition to New York eleven states (Delaware, Indiana, Minnesota, Mississippi, Nebraska, Ohio, Oklahoma, Oregon, South Dakota, Washington, and Wyoming) and the District of Columbia have statutes indicating a requirement that one of the felons do the act causing death. Ohio and Wyoming statutes require that the act be done "purposely" as does the statute of the District of Columbia, but in the last only in cases where the offence perpetrated is not one of the enumerated felonies but any other act punishable by imprisonment.

³⁰ 381 Pa. 500. 113 A. 2d 464 (1955). The decision of the lower court, which the Supreme Court of Pennsylvania reversed on other grounds, is noted in 59 DICK. L. REV. 183 (1955).

³¹ Pennsylvania cases cited note 21 *supra*.

³² 292 Ill. 293, 127 N. E. 75 (1920).

³³ *Id.* at 300, 127 N. E. at 78.

³⁴ 254 N. Y. 255, 172 N. E. 489 (1930).

³⁵ See note 29 *supra*.

opinions both in the lower court³⁶ and the Supreme Court of Pennsylvania.³⁷

When a felon is killed by a non-felon

Therefore, the result in the principal case was reached under the following status of the law: (a) controlling state authority on the possibility of murder when a non-felon does the act causing death, but a split of outside authority; (b) controlling state authority of the possibility of murder when a felon is killed, but with all outside authority contrary; (c) absence of authority anywhere that a felon is guilty of murder when his co-felon is justifiably killed by one attempting to prevent the commission of the felony.

Only through the proximate cause theory, that a felon is guilty of murder if any death results from the commission of the felony, can the holding in the principal case be justified. The decision is contrary to the formerly well-established rule that the homicide must be in furtherance of the felony.³⁸ It cannot be justified on the ground that the accused caused the deceased to be in a place of danger, for the deceased voluntarily entered what he knew would be a dangerous undertaking. Deterrence of criminal activity has been advanced as a justification of the decision. Whether general acceptance of the view of this case would have an appreciable deterrent effect is doubtful.³⁹ At any rate, deterrence is a factor to be considered not by the court but by the legislature.⁴⁰

This proximate cause theory of Pennsylvania, applied in the principal case, caused a man to be convicted of murder for a justifiable homicide

³⁶ 55 Lack. Jur. 213, 235 (1954).

³⁷ 381 Pa. 500, 527, 113 A. 2d 464, 478 (1955).

³⁸ See notes 15 and 16 *supra*.

³⁹ Certainty of punishment, rather than harshness, would seem to be the deterrent factor in a situation such as this, and in all these cases the criminal is certain to be punished for a felony if he gets caught. For a brief discussion of the deterrence factor, see Ball, *The Deterrence Concept in Criminology and Law*, 46 J. CRIM. L. 347 (1955).

⁴⁰ "With all the will in the world to wish otherwise, I can only see in the Majority's Opinion an arbitrary exercise of power rising out of a zeal to combat criminals, which zeal does not surpass that of the writer's. However, zeal must be channeled into the ways of the law as *written*." Justice Musmanno (dissenting) in *Commonwealth v. Thomas*, — Pa. —, —, 117 A. 2d 204, 222 (1955).

"If it should be deemed essential to the public safety and security that felons be made chargeable with murder for *all* deaths occurring in and about the perpetration of a felony, . . . the legislature should be looked to for appropriate exercise of the State's sovereign police power to an end never yet legislatively enacted." Justice Jones (dissenting), *Id.* at —, 117 A. 2d at 221.

The 1955 Legislature of Wisconsin enacted a new criminal code which embodies this proximate cause idea in the third degree murder statute: "Whoever in the course of committing or attempting a felony causes the death of another human being as a natural and proximate consequence of the commission of or attempt to commit the felony, may be imprisoned not more than 15 years in excess of the maximum provided by law for the felony." WIS. CRIM. CODE § 940.03 (1955).

and under circumstances in which the deceased should be considered to have "assumed the risk" of the undertaking. This carries the affirmative proximate cause idea to its logical conclusion and points out the inadequacy of this theory when applied as the sole criterion for establishing the implied crime of felony-murder. The split decision in this case shows a dissatisfaction within the court which has advanced the theory most strongly.⁴¹

The use of affirmative proximate cause is not necessary for the obtaining of murder convictions when such *ought* to be obtained.⁴² If its use is helpful in the understanding of what the law is doing in felony-murder cases, such use should be limited to those cases where a person trying to prevent a felony dangerous to human life accidentally kills someone other than one of the felons.

JAMES P. CREWS.

Damages—Loss of Profits—Standard of Certainty

Calling our attention to a much litigated area of damage law is the case of *Evergreen Amusement Corporation v. Milstead*.¹ The plaintiff had contracted to perform the excavation for an outdoor theater, but delayed completion two and one-half months beyond the date specified. To the plaintiff's action to recover the agreed price for the job, the defendant filed a counterclaim seeking damages for the lost profits caused by the delay. The Court of Appeals of Maryland refused to allow recovery of such profits holding them to be too speculative for the jury to

⁴¹ The three dissenting judges based their dissents mainly on the fact that the killing was justifiable, and thus concluded that no one, either legally or morally, should have been held guilty of murder. This question involves to some extent a consideration of the wording of the Pennsylvania statute. "All murder . . . which shall be committed in the perpetration of, or attempting to perpetrate any arson, rape, robbery, burglary, or kidnapping, shall be murder in the first degree." PA. STAT. ANN. tit. 18, § 4701 (Purdon 1930). It was an obvious begging of the question if such wording was meant to declare certain killings murder. All such a statute can do is raise certain murders to first degree murder. Whether or not the killing is murder depends on the common law definition.

In thirteen states (Florida, Georgia, Illinois, Indiana, Louisiana, Minnesota, Mississippi, Nebraska, New York, Ohio, Oregon, Washington, and Wyoming) and the District of Columbia, some form of the word "kill" is used instead of "murder"; thus these statutes are definitive in nature. The same is true in Alabama, Missouri, Oklahoma, and South Dakota, where "homicide is used. The Wisconsin statute refers to causing the death. The rest of the felony-murder statutes are like Pennsylvania's in using "murder."

⁴² A casual polling of laymen has revealed no one who felt that the defendant in this case ought to be considered a murderer. The principal case deals with a set of facts never previously considered in a reported decision in the United States. Appeal would follow automatically on such an unsettled issue if prosecution were brought. It would be absurd to say that a similar set of facts never existed before. The reason for failure to prosecute for murder in such a case must be the failure on the part of the states' officials to consider it appropriate, or even to consider it at all.

¹ 206 Md. 610, 112 A. 2d 901 (1955).