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A QUIET WAR: THE JUDICIARY'S STEADY AND UNSPOKEN EFFORT TO LIMIT FELONY-MURDER

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INTRODUCTION

On a Wednesday afternoon a sixteen-year-old boy is hanging out after school with four of his friends.[1] He is your average sixteen-year-old; he has a girlfriend who works at Wendy's, and his current worry is about passing his driving test. He smokes some weed from time to time with his friends, but he has a clean criminal record. After complaining about being broke and deciding they have nothing better to do, the five friends elect to break into a seemingly vacant home in order to steal some items for resale. He is already thinking about what he will buy with the

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1. These facts are adapted from Blake Layman's felony-murder conviction in 2013. *See* Ed Pilkington, *Felony Murder: Why a Teenager Who Didn't Kill Anyone Faces 55 Years in Jail*, GUARDIAN (Feb. 26, 2015), [https://perma.cc/44WY-BDAM]. *See also* Layman v. State, 17 N.E.3d 957, 960-62 (Ind. Ct. App. 2014). Blake Layman is one of many defendants convicted of felony-murder who did not murder the victim. *See e.g.*, Wilson v. State, 68 S.W.2d 100, 101-02 (Ark. 1934) (holding defendant liable for victim's death when used as shield and shot by police); People v. Caldwell, 681 P.2d 274, 281 (Cal. 1984) (holding defendant liable for co-felon's death after robbery of Church's Fried Chicken and following police shoot-out); State v. Kress, 253 A.2d 481, 483, 485, 487 (N.J. Super. Ct. Law Div. 1969) (holding defendant liable for bystander's death caused by police during bank robbery); People v. Hernandez, 624 N.E.2d 661, 662 (N.Y. 1993) (defendant held liable for undercover officer's death caused by another officer during attempted robbery).

extra cash while knocking on the home's door to double-check that it is empty. He thinks he does not receive a reply, making the unarmed break-in easy. But within minutes, everything changes. The boys realize they are not alone, as evident by the homeowner's gun shots firing at the panicked teens. The kid has never even held a gun but is now shot in the leg. The sixteen-year-old's vision blurs from the pain, but not in time to miss his friend collapse dead beside him. Only four boys remain living when the police arrest them each for murder. Although none of the teenagers touched a weapon during the robbery, the surviving boys are each convicted of felony-murder in connection with the death of the fifth robber.

A young man, X, puts on his Bulls jacket before stepping out into a damp Chicago evening.[2] X meets up with a friend because the plan is to rob three others who have given them trouble. His job was to force one of the three down an alley with a gun, for added effect. All was going according to plan until something unexpected happened. The victim seized the gun and, now joined by his friends in the alley, X is outnumbered and gun-less as the trio beat him in the dark. X escapes and runs to an open street corner. During his flight, he hears gunshots and a woman scream. Still running, he turns his jacket inside out, hoping to blend in. The disguise does not prevent his police capture. And the fact that he did not kill the woman who died during his escape does not prevent his charge and conviction for her murder.

An abusive father takes his family on a camping trip a couple of hours away.[3] As a punishment, the father purposely impels his son's anal cavity with a stick before finishing the day's camping activities. The child's health quickly deteriorates on the drive home. Doctors pronounce the six-year-old dead later that evening. The father was charged with felony-murder.[4]

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2. These descriptions were created from the record in Antonio Lowery's prosecution in 1997. *See* People v. Lowery, 687 N.E.2d 973, 975 (Ill. 1997).

3. These facts are minimally adapted from Mauricio Torres' trial in 2019. *See* Torres v. State, 2019 Ark. 101, at 15, 571 S.W.3d 456, 466-67 (Womack, J., dissenting).

4. As of this article's completion in March 2020, Mauricio Torres had been convicted for murder of his son twice. Tracy Neal, *Judge Declares Mistrial in Arkansas Murder Case After Stepson Lunges at Defendant*, ARK. DEMOCRAT GAZETTE (Mar. 6, 2020), [https://perma.cc/VHL2-439J] [hereinafter Neal, *Mistrial*]. The first conviction was

These are the imbalanced stories that produce media headlines like "Charged With Murder Without Killing Anyone,"[5] "Controversial Law Charges People with Murder for Death at Others' Hand,"[6] and "In the US, You Don't Have to Kill to Be a Murderer."[7] The inconsistent, unreliable, and often absurd felony-murder convictions have flooded this nation's adversarial process since the first felony-murder statute. To be sure, reform efforts exist.[8] Legislators have, for instance, rewritten statutes in an effort to identify an optimal amendment.[9] As evident by the continued ambiguity in felony-murder convictions, those largely piecemeal efforts to clean-up a dated and widely criticized doctrine have failed.

This Article makes two arguments. First, it asserts that a recent Arkansas decision in *Torres v. State*[10] signals a subtle but important shift in judicial efforts to reform application of the felony-murder doctrine. Second, it challenges state courts to build on *Torres* and affirmatively impose a uniform judicial limitation on felony-murder statutes—wholly apart and notwithstanding any separate legislative reform efforts.

Part I examines the debated theories of how the felony-murder rule arrived in America and highlights the historic pattern of the jurisdictions choosing to limit the felony-murder doctrine. Part II assesses the fifty states' different applications of the legislature's textual limitations and further judiciary-imposed restrictions of the felony-murder doctrine.

Part III explores how Arkansas, in particular, has applied its felony-murder statute in comparison to other states with similar felony-murder rules. It then focuses on how *Torres v. State* narrowly construed application of the felony murder doctrine.

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overturned and remanded for retrial, and the second conviction was declared a mistrial during the sentencing phase. *Id.*

5. Christie Thompson, *Charged with Murder Without Killing Anyone*, MARSHALL PROJECT (Sept. 24, 2015), [https://perma.cc/BR6R-KTCA].

6. Duaa Eldeib, *Controversial Law Charges People with Murder for Death at Others' Hand*, CHI. TRIB. (Feb. 20, 2016), [https://perma.cc/LR2L-GL5X].

7. Jessica Lussenhop, *In the US, You Don't Have to Kill to Be a Murderer*, BBC NEWS (Apr. 9, 2018), [https://perma.cc/JS99-Y2WU].

8. *See generally infra* Part II and accompanying discussion.

9. *See generally infra* Part II and accompanying discussion.

10. Torres v. State, 2019 Ark. 101, 571 S.W.3d 456.

Next, Part III explains the correct analysis of jurisdictional statutes in relation to particular felonies and how that analysis changes with felony-murder. Part III then argues that Arkansas' treatment of the predicate felony in *Torres* was an incorrect and misguided attempt to limit the scope of the felony-murder doctrine. That restrictive approach, however, provides another illustration of ongoing judicial attempts to limit the scope of felony-murder. When considered historically, the judiciary's limiting efforts are, to put it charitably, disingenuous. In an effort to clarify the scope and reach of the felony-murder rule, some meaningful uniform approach is critically necessary. From that analysis, Part III concludes by challenging states to continue to judicially amend the felony-murder doctrine and proposes a uniform judicial limitation that strictly interprets felony-murder statutes when legislators continue to be silent in abolishing the doctrine.

I. FELONY-MURDER ARRIVAL AND ALTERATION: AN EARLY APPROACH

Common law felony-murder is a controversial doctrine and has been since its initial adoption, as seen through its commentator's critiques and diverse application across the states.[11] Common law felony-murder provides that if a homicide occurs during a felony or attempted commission of a felony, that homicide is murder.[12] Malice aforethought is the *mens rea* element of common law murder.[13] But malice, in the felony-murder context, is implied by the *mens rea* of the predicate felony.[14] Thus, proof of the underlying felony provides the

11. Jennifer DeCook Hatchett, *Kansas Felony Murder: Agency or Proximate Cause?*, 48 U. KAN. L. REV. 1047, 1047 (2000); Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads,* 70 CORNELL L. REV. 446, 446 (1985); *see generally* Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 465-75 (2011) [hereinafter Binder, *Making the Best*].

12. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 522 (5th ed. 2009); Hatchett, *supra* note 11, at 1047; 40 AM. JUR. 2D *Felony-murder* § 60 (2020).

13. *See* DRESSLER, *supra* note 12, at 522; Hatchett, *supra* note 11, at 1047; 40 AM. JUR. 2D *Felony-murder* § 60 (2020).

14. *See* DRESSLER, *supra* note 12, at 522; Hatchett, *supra* note 11, at 1047; 40 AM. JUR. 2D *Felony-murder* § 60 (2020).

malice requirement for murder.[15] That approach—imputing malice—enables the state to charge murder from a range of factual behavior, anywhere from a reckless disregard for the risk of human life to an entirely accidental death.[16] Application of the felony-murder doctrine varies across jurisdictions.[17] Depending on a specific statute's wording, it can reach the conduct of any felon, agent of the felon, or any person that proximately caused any death during the unlawful activity.[18]

Scholarly articles, courts, and legislative commentaries have heavily criticized the felony-murder doctrine.[19] The rule has allies in those who believe the doctrine deters criminals from committing felonies that could produce a death by encouraging them to be more careful during felonies that could potentially cause a death.[20] Supporters rationalize the rule on a retribution basis, in that a crime which involves a death "should be punished more severely than the same crime that does not [result] in death[.]"[21] The majority of commentators attack the expansive rule because of its uneven application to the defendant's actual conduct committed and the automatic result with which he is charged.[22] Moreover, they argue that a criminal would have to know about the felony-murder rule and its wide-casting

15. *See* DRESSLER, *supra* note 12, at 522; 40 AM. JUR. 2D *Felony-murder* § 60 (2020).

16. *See* DRESSLER, *supra* note 12, at 522; 40 AM. JUR. 2D *Felony-murder* § 60 (2020); Leonard Birdsong, *Felony Murder: A Historical Perspective by Which to Understand Today's Modern Felony Murder Rule Statutes*, 32 T. MARSHALL L. REV. 1, 1-2 (2006).

17. *See generally infra* Part II and accompanying discussion.

18. *See* 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 14.5(d), at 615-20 (3d ed. 2018). Causation is a required element of felony-murder cases, as in other homicide case. *Id.* at 615. It is possible, in the context of felony murder, the death could be either a response to the defendants conduct or a mere coincidence, only present to be acted upon by the defendant's acts. *Id.* at 616. Courts apply the foreseeability test to establish the defendant's unlawful act as the proximate cause. *Id.* at 615-16.

19. *See* Birdsong, *supra* note 16, at 3. The rule has been "described as 'astonishing' and 'monstrous,' an unsupportable 'legal fiction,' 'an unsightly wart on the skin of the criminal law,' and as an 'anachronistic remnant' that has 'no logical or practical basis for existence in modern law.'" Roth & Sundby, *supra* note 11, at 446. *See also* DRESSLER, *supra* note 12, at 521; LAFAVE, *supra* note 18, at 644-45.

20. *See People v. Washington*, 402 P.2d 130, 133 (Cal. 1965); Birdsong, *supra* note 16, at 2-3; Hatchett, *supra* note 11, at 1048; 40 AM. JUR. 2D *Felony-murder* § 60, (2020).

21. DRESSLER, *supra* note 12, at 523; Hatchett, *supra* note 11, at 1048; *see* Roth & Sundby, *supra* note 11, at 457-60.

22. Birdsong, *supra* note 16, at 3; Hatchett, *supra* note 11, at 1049; Roth & Sundby, *supra* note 11, at 446.

application before commencing the crime for either deterrence or retributive paralogical norms to appropriately apply.[23]

Despite the widespread criticism, the felony-murder doctrine is typically taught to every first-year law student in his or her criminal law course.[24] It remains taught because the doctrine is alive and well today.[25] Indeed, some form of a felony-murder statute can be found in almost every jurisdiction in the United States.[26] Although prevalent, current felony-murder statutes look vastly different from their historical common law predecessors.[27] This highlights an important question: why has the doctrine changed?

The story begins with a debate over whether the American felony-murder doctrine was adopted from the English common law.[28] Rather than extensive judicial decisions interpreting the use of the felony-murder rule, the English common law seems to only note scholarly and clerical commentaries introducing the concept.[29] Rooted in Christian ethics, the first idea may have derived from the overarching view that unintended harms could be punished if they were the result of unlawful acts.[30]

In 1235, scholars paused for the first time to think about the potential implications of the expansive felony-murder doctrine and attempted to limit its applicability.[31] Commentator Henry de Bracton assessed the culpability of a person when an unintentional killing resulted from a lawful or unlawful act and concluded that accidental killings were not considered homicides because they lacked the intention to injure.[32] In contrast, in 1619,

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23. Hatchett, *supra* note 11, at 1049.

24. *See* DRESSLER, *supra* note 12, at 521-22; Birdsong, *supra* note 16, at 13; *see generally* LAFAVE, *supra* note 18, at 604.

25. *See* DRESSLER, *supra* note 12, at 521-22; Hatchett, *supra* note 11, at 1050; Birdsong, *supra* note 16, at 3; *see generally infra* Part II and accompanying discussion.

26. Birdsong, *supra* note 16, at 3; *see generally infra* Part II and accompanying discussion.

27. *See* LAFAVE, *supra* note 18, at 605-07; Birdsong, *supra* note 16, at 19.

28. *See generally* Birdsong, *supra* note 16, at 4-12.

29. *Id.* at 4-5; Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 73 (2004) [hereinafter Binder, *Origins*].

30. Birdsong, *supra* note 16, at 5; Binder, *Origins*, *supra* note 29, at 73.

31. Binder, *Origins*, *supra* note 29, at 74-75; Brian R. Gallini, *Equal Sentences for Unequal Participation: Should the Eighth Amendment Allow All Juvenile Murder Accomplices to Receive Life Without Parole?*, 87 OR. L. REV. 29, 80 n.281 (2008).

32. Binder, *Origins*, *supra* note 29, at 74-75; Gallini, *supra* note 31, at 80 & n.281.

commentator Michael Dalton made a general proposition that it was conceivable that an accidental killing in the course of an unlawful act could in fact be felonious.[33] Still later in 1628, Edward Coke asserted that a person should be charged for unintentional deaths even if they resulted from intentional unlawful acts.[34]

During the end of the seventeenth century, Sir Matthew Hale of Kent, Lord Chief Justice in England, further refined Coke's view of murder.[35] Lord Hale focused his interpretation on the unlawful act in order to establish a degree of homicide by requiring a mental state of "intent to harm," somewhat analogous with the particular enumerated felonies found in modern felony-murder statutes.[36] Although the concept of felony-murder was intertwined in scholarly discussions, skeptics of American felony-murder being adopted from English common law rely on the great lack of English judicial decisions actually using the doctrine.[37]

Early American colonies were further influenced to narrow the doctrine by Sir William Blackstone's *Commentaries on the Laws of England*, in which he proposed a rule focusing on the dangerousness of the predicate crime rather than its categorical quality as a "felony."[38] Blackstone's theory stated that the initial intent to commit one felony sufficed for the unintended felonious result, then applied an enhanced proportion of punishment applicable when an involuntary killing happened as the consequence of an unlawful act.[39] American jurisdictions' varied and dispersed adoption of felony-murder rules indicates the states' unwillingness to adopt the doctrine in its overly broad common law form.[40] Therefore, it is likely that colonial Americans were simply familiar with the expansive English common law felony-murder doctrine, introduced through English legal commentators and Blackstone's commentaries, then chose

33. Birdsong, *supra* note 16, at 8; Binder, *Origins*, *supra* note 29, at 81.
34. Binder, *Origins*, *supra* note 29, at 81-82.
35. Birdsong, *supra* note 16, at 11.
36. *Id.*
37. *Id.* at 14.
38. *Id*.
39. *Id*.
40. Binder, *Origins*, *supra* note 29, at 65.

to limit its application when adopting it into various American jurisdictions.[41]

In 1794, Pennsylvania became the first of many jurisdictions to take a shot at refining the doctrine.[42] Pennsylvania chose to affirmatively narrow felony-murder by introducing America's first statute that limited its application to specific felonies.[43] The murder grading statute aggravated murder liability based on participation in the specific listed felonies.[44] The statute stated: "[A]ll murder . . . *or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder in the first degree* . . . ."[45] The statute implied that any murder in the course of an enumerated felony did not require the willful, deliberate, and premeditated mindset element required elsewhere by the first-degree murder statute.[46] Yet, it restricted the breadth of felony-murder by deciding that the particular felonious acts listed ("arson, rape, robbery, or burglary") were the only legislatively selected inherently dangerous felonies.[47] Pennsylvania's reform sparked a nationwide overhaul of homicide statutes; thirty-one states adopted a version of its grading scheme, twelve of which made little to no textual changes.[48]

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41. Birdsong, *supra* note 16, at 25-26.

42. *See* Binder, *Origins*, *supra* note 29, at 119; Birdsong, *supra* note 16, at 17.

43. The Pennsylvania statute states:

> [A]ll murder, which shall be perpetrated by means of poison, or by laying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder in the first degree; and all other kinds of murder shall be murder in the second degree.

Act of Apr. 22, 1794, ch. 1766, § 2, 1794 Pa. Laws 186, 187 (current version at 18 PA. CONS. STAT. § 2502 (1978)); Binder, *Origins*, *supra* note 29, at 119; Birdsong, *supra* note 16, at 17.

44. Act of Apr. 22, 1794, ch. 1766, § 2, 1794 Pa. Laws 186, 187 (current version at 18 PA. CONS. STAT. § 2502); Binder, *Origins, supra* note 29, at 119; Birdsong, *supra* note 16, at 17.

45. Binder, *Origins, supra* note 29, at 119; Birdsong, *supra* note 16, at 17. Pennsylvania chose to statutorily limit application of felony-murder by providing that commission of only certain felonies could expose the defendant to capital punishment. Binder, *Origins, supra* note 29, at 119.

46. Birdsong, *supra* note 16, at 18.

47. *Id.* at 17-18.

48. *Id*.

The nineteenth century was a time of trial and error for the felony-murder doctrine through its widespread adoption and drastic differences in scope.[49] Jurisdictions tried defining felony-murder with variations of three different textual-limiting approaches, predicating liability on: (1) express or implied malice shown through the commission of any violent or dangerous felony; (2) one of the several dangerous enumerated felonies, or (3) any felony.[50]

In 1827, Illinois employed the first approach when the legislature attempted to textually limit its felony murder statute.[51] Illinois defined murder as an unlawful killing with express or implied malice and was the first to statutorily address unintended killings in the course of a felony.[52] Illinois's statute stated: "involuntary killing . . . in the commission of an unlawful act which in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, . . . shall be deemed and adjudged to be murder."[53] The Illinois judiciary then sought to further limit its application by applying the doctrine to only inherently dangerous felonies.[54]

Dissatisfied with current applications, New Jersey, only a couple of years later in 1829, arguably broadened the scope of the felony-murder doctrine.[55] The New Jersey murder statute included a killing "in committing, or attempting to commit sodomy, rape, arson, robbery, or burglary, or any unlawful act against the peace of this state, of which the probable consequence may be bloodshed . . . ."[56] Although New Jersey attempted to narrow the Illinois approach by enumerating specific inherently dangerous felonies, its catch-all "unlawful act" phrase created an

49. Binder, *Origins*, *supra* note 29, at 119.

50. *Id.* at 121, 161-62.

51. *Id.* at 120-21, 162.

52. *Id.* at 120-21; Birdsong, *supra* note 16, at 18-19.

53. Binder, *Origins*, *supra* note 29, at 121; Birdsong, *supra* note 16, at 19.

54. Binder, *Origins*, *supra* note 29, at 162.

55. *Id.* at 121; Birdsong, *supra* note 16, at 19.

56. Binder, *Origins*, *supra* note 29, at 121 (quoting Act of Feb. 17, 1829, § 66, 1828-1829 N.J. Acts 109, 128 (current version at N.J. STAT. ANN. § 2C:11-3 (West 2017)); Birdsong, *supra* note 16, at 19.

all-encompassing list that likely did nothing to alter the doctrine's previous application.[57]

That same year, the New York legislature enacted its own version of a felony-murder statute.[58] It defined murder as any killing "without any design to effect death, by a person engaged in the commission of any felony."[59] However, the judiciary, displeased with the text's expansive nature, again chose to narrow the application creating a "merge[r] limitation[,]" which required the predicate felony to have a purpose independent of the homicide.[60] Thus, if the predicate that caused the death was assaultive in nature, it merged with the death and disallowed an additional felony-murder charge.[61]

Moving forward, jurisdictions borrowed from these three approaches—inherently dangerous felony, enumerated felonies, or any felony—to create their own felony-murder statutes with the common goal of attempting to perfect a tailoring system for the expansive doctrine.[62] Further, when textual decisions by the legislature frustrated criminal justice, the judiciary stepped in to narrow the statutes' application.[63] Consequently, the various versions of the felony-murder rule only further complicated and diversified the doctrine's application from state to state.[64]

The varied scope of the rule from jurisdiction to jurisdiction displeased the bench, bar, and media alike.[65] In response, the American Law Institute (ALI) adopted the Model Penal Code (MPC) in 1962 to clarify and simplify the United States' criminal common law.[66] In the context of felony-murder, MPC § 210.2, the MPC's murder provision, states:

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57. *See* Binder, *Origins, supra* note 29, at 121; Birdsong, *supra* note 16, at 19.

58. Binder, *Origins*, *supra* note 29, at 171-72.

59. *Id*. at 121 & n.312, 171-72; Birdsong, *supra* note 16, at 19.

60. Binder, *Origins*, *supra* note 29, at 173 (internal quotations omitted); *see* People v. Rector, 19 Wend. 569, 592-93 (N.Y. Sup. Ct. 1838).

61. Binder, *Origins*, *supra* note 29, at 173.

62. *See* LAFAVE, *supra* note 18, at 607-10; *see generally infra* Part II and accompanying discussion.

63. *See generally infra* Part II and accompanying discussion.

64. Binder, *Origins*, *supra* note 29, at 121 & n.313; Birdsong, *supra* note 16, at 19.

65. *See* DRESSLER, *supra* note 12, at 30; MARKUS D. DUBBER, CRIMINAL LAW: MODEL PENAL CODE 8 (2002).

66. Herbert Wechsler, *Foreword* to MODEL PENAL CODE, at xi-xii (AM. L. INST. 1984); DRESSLER, *supra* note 12, at 30; DUBBER, *supra* note 65, at 8.

> [C]riminal homicide constitutes murder when . . . it is committed recklessly . . . [s]uch recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.[67]

Although, at first glance, it does not seem the MPC drastically clarified or altered the current interpretation of the doctrine,[68] the Explanatory Note for MPC § 210.2 makes plain that the MPC purposively departed from the traditional felony-murder rule.[69] The commentary indicates that the drafters intended to abandon felony-murder as an independent basis of liability.[70] Instead, it listed specific felonies that established a presumption of recklessness and indifference to the value of human life.[71] The drafters described the presumption as "a concession to the facilitation of proof" that was persuasive rather than the deciding liability factor.[72] This marked the first time that noted American law professors, judges, attorneys, and other professionals in the legal profession were outspoken with their disdain for the felony-murder rule by eliminating its existence in the proposed code.[73] Despite the MPC's efforts, inconsistent iterations of felony-murder persist at the state level to this day.[74]

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67. MODEL PENAL CODE § 210.2 (AM. L. INST. 1985).

68. *See* DRESSLER, *supra* note 12, at 548-49; DUBBER, *supra* note 65, at 5.

69. The explanatory note to Pt. II, Art. 210 provides as follows:

Section 210.2(1)(b) establishes a presumption that the requisite recklessness and indifference to the value of human life exist when a homicide is committed during the course of certain enumerated felonies. This presumption has the effect of abandoning the strict liability aspects of the traditional felony-murder doctrine but at the same time recognizing the probative significance of the concurrence of homicide and a violent felony.

MODEL PENAL CODE § 210.2 explanatory note.

70. MODEL PENAL CODE § 210.2 explanatory note; DRESSLER, *supra* note 12, at 548-49.

71. MODEL PENAL CODE § 210.2 explanatory note.

72. MODEL PENAL CODE § 210.2 cmt. at 30; Roth & Sundby, *supra* note 11, at 472.

73. *See* MODEL PENAL CODE § 210.2 explanatory note.

74. *See generally infra* Part II and accompanying discussion.

II. CURRENT APPLICATION IN THE FIFTY STATES

Two centuries after Pennsylvania's first revision of the felony-murder doctrine, the doctrine remains in disarray.[75] Every jurisdiction arguably applies a different combination of applicable predicate felonies and interpretation of other judicial and textual limitations.[76] This Part explores statewide statutory and judicial reform efforts organized on a range, beginning first with the two states that have statutorily eliminated the felony-murder doctrine.[77] It then focuses on the great minority of states that chose not to include an enumerated list of predicate felonies by exploring their textual limitations and judicial application of the doctrine.[78] It finishes by examining the vast majority of states that enumerate specific felonies in the statutes' text and other limitations that either the legislators or judiciary chose to impose.[79]

Despite nearly uniform dissatisfaction with the felony-murder rule, only two jurisdictions have statutorily abolished the doctrine.[80] Hawaii, by statute, "eliminated from [Hawaii's] law the felony-murder rule."[81] The statute's commentary thoroughly explained that the legislator's choice to abolish was based off felony-murder's "history of . . . condemnation,"[82] a judicial trend limiting felony-murder rule's scope, and a concern about the doctrine's underlying illogic.[83] Hawaii discredited the doctrine's purpose—to deter—and highlighted that the felony-murder rule produced "extremely questionable results" across jurisdictions.[84]

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75. *See generally infra* Part II and accompanying discussion.

76. *See generally infra* Part II and accompanying discussion.

77. *See generally infra* p. 13 and accompanying discussion.

78. *See generally infra* pp. 13-15 and accompanying discussion.

79. *See generally infra* pp. 15-18 and accompanying discussion.

80. HAW. REV. STAT. § 707-701 cmt. (2016) (*Felony-Murder Rule*); KY. REV. STAT. ANN. § 507.020 Ky. Crime Comm'n cmt. (West 1974); Birdsong, *supra* note 16, at 20 n.135; Gallini, *supra* note 31, at 82.

81. HAW. REV. STAT. § 707-701 cmt. (*Felony-Murder Rule*).

82. HAW. REV. STAT. § 707-701 cmt. (2016) (*Felony-Murder Rule*)*; Criminal Law: Felony-Murder Rule—Felon's Responsibility for Death of Accomplice*, 65 COLUM. L. REV. 1496, 1496 (1965).

83. HAW. REV. STAT. § 707-701 cmt. (*Felony-Murder Rule*).

84. HAW. REV. STAT. § 707-701 cmt. (*Felony-Murder Rule*).

Kentucky also "abandon[ed] the doctrine . . . as an independent basis . . . of homicide."[85] Rather, deaths that occur in the course of another felony must either (1) be intentional; or (2) occur with wanton extreme indifference to human life.[86] The commentary explains the adaptation was a shift to model the MPC in its homicide statute.[87]

Judicial reform efforts to the felony-murder rule are, unlike statutory revisions, far more common.[88] That has, however, only served to create more confusion.[89] Only Michigan[90] and Massachusetts[91] have judicially abolished the felony-murder rule. In direct opposition, South Carolina is the only state that solely employs the common law felony-murder rule through judicial decision.[92]

Forty-seven states have adopted felony-murder by statute; however, each textual description and application of the rule greatly differs from state-to-state.[93] Consider first that only

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85. KY. REV. STAT. ANN. § 507.020 Ky. Crime Comm'n cmt. (West 1974).

86. KY. REV. STAT. ANN. § 507.020 Ky. Crime Comm'n cmt. Otherwise, if the death lacks extreme indifference, it is considered manslaughter.

87. KY. REV. STAT. ANN. § 507.020 Ky. Crime Comm'n cmt.

88. *See generally infra* pp. 14, 16-19 and accompanying discussion.

89. *See generally infra* pp. 14, 16-19 and accompanying discussion.

90. People v. Aaron, 299 N.W.2d 304, 324 (Mich. 1980). S*ee also* LAFAVE, *supra* note 18, at 645. However, the textual predicate felonies are still applied in the listed statute. *Aaron*, 299 N.W.2d at 321-22.

91. Commonwealth v. Brown, 81 N.E.3d 1173, 1191 (Mass. 2017) (deciding felony-murder will no longer be an independent theory of liability for murder outside its statutory rule).

92. S.C. CODE ANN. § 16-3-20(c)(a)(1) (2010). The South Carolina murder statute reads: "[m]urder is the killing of any person with malice aforethought, either express of implied." S.C. CODE ANN. § 16-3-10 (2019) (internal quotations omitted). The judiciary has chosen to adopt felony-murder yet has struggled with concretely defining malice in order to apply the doctrine. *See* Binder, *Making the Best*, *supra* note 11, at 446. In 2007, the South Carolina Supreme Court held that malice cannot be automatically presumed from participation in a felony. Lowry v. State, 657 S.E.2d 760, 764 (S.C. 2008). Although the court held that malice was a distinct element, it did not define malice in the context of felony-murder. *See id.* South Carolina's Pattern Jury Instruction is *slightly* more helpful. *See* Binder, *supra*, at 447. The proposed murder instruction defines malice as hatred or ill-will through a reckless disregard of a risk to human life or a "heart . . . fatally bent on mischief." RALPH KING ANDERSON JR., S.C. REQUESTS TO CHARGE: CRIM. § 2-1 (2d ed. 2012). The instructions also state that malice is intentionally doing a wrongful act without just cause or excuse; however, they do not clarify if these requirements are in addition or separate from one another. *See id.*; Binder, *supra*, at 447.

93. *See infra* Appendix I (listing forty-seven state statutes that have textually adopted felony-murder). A total of forty-eight states apply felony-murder when adding South

thirteen states[94] have statutes that apply to a defendant's commission or attempt to commit[95] "a felony,"[96] "any felony,"[97] "a forcible felony,"[98] or "an inherently dangerous felony."[99] Lacking any statutory limitations from the legislators, some judiciaries chose to limit the felony-murder doctrine only to "inherently dangerous" felonies; however, defining "inherently dangerous" differs from state-to-state.[100] To determine if the predicate felony is inherently dangerous, the judiciary applies either an "on the facts"[101] or "in the abstract"[102] test, both of which can yield different results using the same fact pattern.[103]

Carolina's judicial application. *See* S.C. CODE ANN. § 16-3-20(c)(a)(1). The District of Columbia also textually adopts felony-murder; however, it is not included in this "state" count. D.C. CODE § 22-2101 (2001).

94. ARK. CODE ANN. § 5-10-102 (2017); DEL. CODE ANN. tit. 11, § 636 (2013); GA. CODE ANN. § 16-5-1 (2014); 720 ILL. COMP. STAT. 5/9-1 (2020); IOWA CODE § 707.2 (2013); KAN. STAT. ANN. § 21-5402 (2018); MASS. GEN. LAWS ANN. ch. 265 § 1 (2020) (stating a crime punishable with death or life imprisonment is murder in the first degree); MO. REV. STAT. § 565.021 (2017); N.M. STAT. ANN. § 30-2-1 (1994); OHIO REV. CODE ANN. § 2903.02 (West 1972); 18 PA. CONS. STAT. § 2502 (1978); S.C. CODE ANN. § 16-3-20(c)(a)(1) (applying common law felony-murder); TEX. PENAL CODE ANN. § 19.02 (West 1994).

95. Variations of "commission or attempt to commit" greatly vary across states. *See infra* Appendix IV.

96. *See, e.g.*, ARK. CODE ANN. § 5-10-102; 18 PA. CONS. STAT. § 2502.

97. *See, e.g.*, MO. REV. STAT. § 565.021; N.M. STAT. ANN. § 30-2-1. Delaware adds "engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit any felony[.]" DEL. CODE ANN. tit. 11, § 636.

98. *See, e.g.*, 720 ILL. COMP. STAT. 5/9-1; IOWA CODE § 707.2.

99. *See, e.g.*, KAN. STAT. ANN. § 21-5402. Massachusetts uses the language "a crime punishable with death or imprisonment for life" in attempt to clarify inherently dangerous felony. MASS. GEN. LAWS ch. 265 § 1.

100. People v. Lopez, 489 P.2d 1372, 1376 (Cal. 1971). In Rhode Island, the predicate felony "escape" was found to be inherently dangerous on the facts. *See* State v. Miller, 161 A. 222, 225 (R.I. 1932). However, in California, escape was not inherently dangerous using in the abstract limitation. *See* People v. Lopez, 489 P.2d 1372, 1376 (Cal. 1971).

101. To apply an "on the facts" test, a court will consider the facts and circumstances of the particular case to determine if such felony was inherently dangerous in the manner and circumstances in which it was committed. DRESSLER, *supra* note 12, at 527. *See, e.g.*, Mosley v. State, 536 S.E.2d 150, 152-53 (Ga. 2000).

102. To apply an "in the abstract" test, a court will ignore the facts of a specific case and, instead, look at the offense as it is defined by the statute to see if the offense, by its very nature, cannot be committed without carrying a high probability that death will result. DRESSLER, *supra* note 12, at 526. *See, e.g.*, People v. Patterson, 778 P.2d 549, 553 (Cal. 1989).

103. *See supra* note 100. Note some jurisdictions apply both tests, finding a predicate felony sufficient for a felony-murder charge if it is inherently dangerous under either approach. DRESSLER, *supra* note 12, at 527.

By contrast, the other thirty-five states' legislators[104] attempted to statutorily limit felony-murder by enumerating particular felonies.[105] When it comes to the particular felonies listed, there is, again, inconsistency.[106] Statutes range from listing only six[107] or up to twenty-two predicate felonies.[108] Those may include a range of factual behaviors like delivery of a controlled substance[109] or shooting of a firearm with intent to kill.[110] Most states do enumerate a degree of arson, rape, robbery, burglary, and kidnapping.[111]

Beyond textually limiting the doctrine through an enumerated list, a range of inconsistent statutory limitations pervade.[112] For example, some jurisdictions textually limit liability based on who committed the killing.[113] A handful of jurisdictions' statutes limit felony-murder application to deaths caused by the defendant or another participant.[114] Other jurisdictions have textually limited the doctrine by eliminating a defendant's liability solely to when the deceased was a co-

104. Note that District of Columbia has also adopted felony-murder with an enumerated list; however, it is not noted in this "state" count. D.C. CODE § 22-2101 (2001).

105. *See infra* Appendix II (listing thirty-five state statutes that have enumerated particular felonies); Appendix III (mapping states with enumerated felonies); Birdsong, *supra* note 16, at 21-22, 24; *see* LAFAVE, *supra* note 18, at 610-11. Note that Michigan statutorily adopts felony-murder in the first degree with an enumerated list; however, judicially abolished the common law application of the doctrine. People v. Aaron, 299 N.W.2d 304, 324 (Mich. 1980).

106. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1105 (2009); CAL. PENAL CODE § 189 (West 2020); FLA. STAT. § 782.04 (2019).

107. *See, e.g.*, S.D. CODIFIED LAWS § 22-16-4 (2005); VT. STAT. ANN. tit. 13, § 2301 (2018).

108. *See, e.g.*, UTAH CODE ANN. § 76-5-203 (West 2009).

109. *See, e.g.*, 11 R.I. GEN. LAWS § 11-23-1 (2008).

110. *See, e.g.*, OKLA. STAT. tit. 21, § 701.7 (2012).

111. *See, e.g.*, OR. REV. STAT. § 163.115 (2020); TENN. CODE ANN. § 39-13-202 (2019); W. VA. CODE § 61-2-1 (1991).

112. *See, e.g.*, COLO. REV. STAT. § 18-3-102 (2019) (textually limiting liability extending to co-felon); OHIO REV. CODE ANN. § 2903.02 (West 1972) (requiring death be proximate cause of felony); OR. REV. STAT. § 163.115 (2020) (textually limiting liability extending co-felon or victim).

113. *See, e.g.*, FLA. STAT. § 782.04 (2019) (textually mitigating charge to second-degree murder if death was committed by co-felon); MONT. CODE ANN. § 45-5-102 (2013) (textually limiting liability to "any person legally accountable for the crime").

114. *See, e.g.*, ALA. CODE § 13A-6-2 (2016); ARK. CODE ANN. § 5-10-102 (2017).

felon.[115] Still other jurisdictions have chosen to put both of these limitations into their statutes' wording.[116]

When no statutory language expressly constrains the felony-murder rule, courts choose to either read in limitations or reject their application.[117] Courts have inconsistently interpreted the language of a statute to reach different results when deciding whether to extend liability to deaths caused by police officers[118] or victims of the intended felony.[119] More disarray exists when

115. *See, e.g.*, ALASKA STAT. § 11.41.100 (2002); COLO. REV. STAT. § 18-3-102; N.J. STAT. ANN. § 2C:11-3 (West 2017); N.Y. PENAL LAW § 125.27 (McKinney 2019); Hatchett, *supra* note 11, at 1060 n.97.

116. *See, e.g.*, OR. REV. STAT. § 163.115 (2019). For another example, Washington's first-degree murder statute states: "[h]e or she commits or attempts to commit the crime of [enumerated felonies] and in the course of or in furtherance of such crime or in immediate flight therefrom*, he or she, or another participant*, causes the death of a person *other than one of the participants* . . . ." WASH. REV. CODE § 9A.32.030 (1975) (emphasis added).

117. *Compare* State v. Bonner, 411 S.E.2d 598, 598-99 (N.C. 1992) (declining to extend liability to defendant when police killed co-felon), *and* State v. Canola, 374 A.2d 20, 30 (N.J. 1997) (holding liability does not extend to defendant when victim killed co-felon), *with* Mikenas v. State, 367 So. 2d 606, 609 (Fla. 1978) (upholding defendant's charge when police killed co-felon), *and* State v. Oimen, 516 N.W.2d 399, 404-05 (Wis. 1994) (judicially extending liability to defendant when victim killed co-felon). *See also* Sheriff, Clark Cty. v. Hicks, 506 P.2d 766, 768 (Nev. 1973) (refusing to extend liability to defendant when victim killed co-felon). *See generally* Hatchett, *supra* note 11, at 1063-78.

118. For example, both the California and Pennsylvania murder statute use the language "in the perpetration . . . of a felony[.]" CAL. PENAL CODE § 189 (West 2020); 18 PA. CONS. STAT. § 2502 (1978). Note that, California has an enumerated list of applicable felonies. CAL. PENAL CODE § 189. Although both jurisdictions share the same textual limitation, the California judiciary in *Caldwell*, expanded the doctrine to reach the defendant for conduct of the police officer; by contrast, Pennsylvania's judiciary in *Redline* refused to apply the doctrine. *Compare* People v. Caldwell, 681 P.2d 274, 281 (Cal. 1984) (judicially extending liability to defendant when police killed co-felon), *with* Commonwealth v. Redline, 137 A.2d 472, 482-83 (Pa. 1958) (refusing to extend liability to defendant when police killed co-felon).

119. *Compare* State v. Branson, 487 N.W.2d 880, 885 (Minn. 1992) (holding liability does not extend to defendant when victim killed bystander), *with* People v. Lowery, 687 N.E.2d 973, 977-78 (Ill. 1997) (extending liability to defendant when victim killed bystander).

courts decide to apply the doctrine when an officer inadvertently kills a victim,[120] bystander,[121] or another officer.[122]

Rather than parse out the role the shooter or victim played, some jurisdictions judicially interpret other statutory language in a limiting fashion.[123] Some states textually require only that the death be "in the course of and in furtherance of the [felony] . . . or in immediate flight[.]"[124] When explicit statutory language about flight is lacking, courts have interpreted liability to continue during flight from the predicate felony.[125] Then, courts, state-to-state, disagree about when flight ends.[126] Therefore, some courts have attempted to clarify the felony-murder rule's scope by narrowing the applicability only to deaths proximately caused by

120. *Compare* Wilson v. State, 188 Ark. 846, 68 S.W.2d 100, 101-02 (1934) (upholding defendant charge when police killed victim), *with* Commonwealth v. Balliro, 209 N.E.2d 308, 312-13 (Mass. 1965) (holding defendant not liable when police killed victim).

121. *Compare* State v. Kress, 253 A.2d 481, 487 (N.J. Super. Ct. Law Div. 1969) (holding defendant liable when police killed bystander), *with* Hill v. State, 295 S.E.2d 518, 521 (Ga. 1982) (denying liability to defendant when police killed bystander), *overruled by* State v. Jackson, 697 S.E.2d 757, 767 (Ga. 2010).

122. *Compare* People v. Hernandez, 624 N.E.2d 661, 662 (N.Y. 1993) (holding defendant liable when police killed another officer), *with* Commonwealth *ex. rel.* Smith v. Myers, 261 A.2d 550, 555 (Pa. 1970) (refusing to extend liability to defendant when police killed another officer).

123. Delaware's murder statute textually limits felony-murder to deaths caused recklessly, while the judiciary further limits the doctrine by requiring a causal connection between the death and predicate felony. DEL. CODE ANN. tit. 11, § 636 (2013); *see* Comer v. State, 977 A.2d 334, 338-39 (Del. 2009) (holding that a defendant is not liable for death caused by victim).

124. *See, e.g.*, ALA. CODE § 13A-6-2 (2016).

125. Commonly referred to as the *res gestae* requirement, the felony-murder rule applies to homicides that occur while the felony is being committed and "continues, *even after commission of the crime*, while the felon flees the scene." DRESSLER, *supra* note 12, at 530. *See, e.g.*, People v. Salas, 500 P.2d 7, 15 (Cal. 1972) (applying liability to defendant for death occurring in flight of predicate felony although limitation was not textually in statute).

126. *Compare* Auman v. People, 109 P.3d 647, 656 (Colo. 2005) (holding "immediate flight terminates when a sole participant in the subject felony is subject to complete custody, or, alternatively, when all participants in a predicate felony involving more than one participant are subject to complete custody"), *and* People v. Wilkins, 295 P.3d 903, 910 (Cal. 2013) (extending liability to deaths during "continuous transaction" of crime including flight until reached place of temporary safety), *with* State v. Lucero, 64 P.3d 191, 194 (Ariz. Ct. App. 2003) (holding "[n]o Arizona case has adopted the doctrine that flight ends when a suspect has reached a place of temporary safety").

the predicate felony.[127] Still unpleased with the doctrine's inconsistent and imbalanced results, multiple states, under certain circumstances, provide defendants with an affirmative defense that limits felony-murder to reasonably foreseeable deaths.[128]

Still other examples of statutory and judicial inconsistency exist.[129] One jurisdiction textually requires an additional *mens rea* beyond mere intent to commit the underlying felony.[130] Other courts limit felony-murder through the "merger doctrine,"[131] which requires that the predicate felony be independent from the homicide.[132] In other words, if the predicate felony is an assault, battery, or includes assaultive behavior that is an integral part of the killing, it merges with the homicide; thereby, preventing a felony-murder charge.[133] However, the jurisdictions that have chosen to use the merger doctrine still lack a unified application of that limitation.[134]

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127. Ohio textually requires the proximate cause limitation, while Illinois judiciary reads in the limitation. OHIO REV. CODE ANN. § 2903.02 (West 1974); *see* People v. Space, 103 N.E.3d 1019, 1030 (Ill. App. Ct. 2018).

128. The Maine statute states:

> It is an affirmative defense to prosecution . . . [if] the defendant . . . [d]id not commit the homicidal act or in any way solicit, command, induce, procure or aid the commission thereof; . . . [w]as not armed with a dangerous weapon, or other weapon which under circumstances indicated a readiness to inflict serious bodily injury; . . . [r]easonably believed that no other participant was armed with such a weapon; and . . . [r]easonably believed that no other participant intended to engage in conduct likely to result in death or serious bodily injury.

ME. STAT. tit. 17-A, § 202 (1991). *See, e.g.*, N.J. STAT. ANN. § 2C:11-3 (West 2017); N.D. CENT. CODE § 12.1-16-01 (1993); WASH. REV. CODE § 9A.32.030 (1975).

129. Ohio statutorily requires the death be the proximate cause of committing or attempting to commit the felony and judicially chooses to reject the merger doctrine. OHIO REV. CODE ANN. § 2903.02; *see* State v. Cherry, No. 20771, 2002 WL 1626105, at *5 (Ohio Ct. App. 2002).

130. Delaware defines murder in the first degree "[w]hile engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit any felony, the person *recklessly* causes the death of another person." DEL. CODE ANN. tit. 11, § 636 (2013) (emphasis added).

131. The merger doctrine is also referred to as the independent-felony or collateral-felony limitation. DRESSLER, *supra* note 12, at 527-28. *Compare* Huntley v. State, 518 S.E.2d 890, 893 (Ga. 1999) (declining to adopt the merger rule), *with* State v. Comitz, 443 P.3d 1130, 1134 (N.M. 2019) (applying collateral-felony rule).

132. DRESSLER, *supra* note 12, at 528.

133. *Id.*

134. Courts differ on applying the merger doctrine to felonies that involve assaultive conduct, such as kidnapping. *See* People v. Escobar, 55 Cal.Rptr.2d 883, 890-91 (Cal. Ct.

The shifting and unpredictable application of the felony-murder rule across all fifty states, not surprisingly, produces inconsistent charging results.[135] With every state seemingly limiting and applying the doctrine differently, it begs the question of whether an optimal reform solution exists.

III. JUDICIARY EMPOWERMENT

Since the felony-murder doctrine's arrival in the United States, courts have frequently stepped in to limit the rule in the absence of statutory limitations.[136] First, Part III(A) introduces *Torres v. State* as an example, showing the judiciary narrowly construing felony-murder through a new jurisdictional limitation. Part III(B) explains how jurisdictional statutes operate in relation to specific felonies and how that analysis changes with felony-murder offenses. Next, the Part examines how jurisdictional statutes, if interpreted correctly, can limit certain intrastate felony-murder offenses.[137] Part III(B) concludes that legislative efforts to cabin felony-murder have not worked; instead, inconsistent textual legislative revisions have only produced ambiguity while preserving nationwide unfettered prosecutorial charging. Part III(B) then proposes that if jurisdictions continue to retain the felony-murder doctrine, a harmonious limitation is needed and recommends a uniform "textual nexus" judicial interpretation will suffice to produce a proactive and consistent reform movement.

Part III(C) takes a second look at *Torres* and the appropriate interpretation of Arkansas' extraterritorial statute. Although the *Torres* majority's jurisdictional limitation was a misguided interpretation of Arkansas' extraterritorial statute in an attempt to narrow the scope of felony-murder, the spirit to limit the doctrine was sound. Part III(C) then applies the proposed harmonious "textual nexus" judicial interpretation to the *Torres* facts.

App. 1996); State v. Styers, 865 P.2d 765, 773 (Ariz. 1993). *See also* DRESSLER, *supra* note 12, at 529.

135. *See generally supra* Part II and accompanying discussion.

136. *See generally supra* Part II and accompanying discussion.

137. *See, e.g.,* People v. Stokes, 671 N.E.2d 1260, 1264 (N.Y. 1996); People v. Holt, 440 N.E.2d 102, 104 (Ill. 1982).

A. Arkansas' Attempt

Trial by jury is a rarity in our current criminal justice system—occurring in fewer than three percent (3%) of state and federal cases.[138] Perhaps unsurprisingly then, application of felony-murder during a recent trial in Arkansas received heavy media attention.[139] Arkansas's expansive textual adoption of the felony murder rule[140] provides the state a wide latitude to charge a defendant and pursue the death penalty.[141] Arkansas is one of twenty-eight states that legalizes capital punishment and has arguably been center-stage in the death penalty debate since 2017

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138. Nat'l Ass'n of Crim. Def. Laws., *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* (2018), [https://perma.cc/P8Q7-HAVM].

139. Allie Lynch, *Juror on Torres Trial Speaks About Shocking Arkansas Supreme Court Ruling*, 5NEWS (Apr. 21, 2019), [https://perma.cc/XJ7H-CEZG]; Benjamin Hardy, *State Supreme Court Orders New Trial in Torres Capital Murder Case*, ARK. TIMES (Apr. 18, 2019), [https://perma.cc/3MHF-FVY4] [hereinafter Hardy, *New Trial in Torres*]; Benjamin Hardy, *Update: Mauricio Torres Found Guilty of Capital Murder in Death of 6-year-old Son*, ARK. TIMES (Nov. 15, 2016), [https://perma.cc/L2LC-T8DW] [hereinafter Hardy, *Update*]; Benjamin Hardy, *A Child Beaten, Slain Despite Red Flags*, ARK. TIMES (Apr. 22, 2015), [https://perma.cc/R4V6-PAJR] [hereinafter Hardy, *Child Beaten*]. A television reporter was found in contempt of court and sentenced to three days in jail for recording a hearing in the *Torres* proceeding. *Arkansas TV Reporter Gets 3-day Sentence for Taping in Court*, KATV (Nov. 19, 2019), [https://perma.cc/4KNV-4J8G].

140. ARK. CODE ANN. § 5-10-102 (2017).

141. The capital murder statute textually differs by creating an enumerated list of applicable felonies. ARK. CODE ANN. § 5-10-101 (2019). Arkansas's capital murder statute states:

> A person commits capital murder if . . . [a]cting alone or with one . . . or more other persons . . . [t]he person commits or attempts to commit: (i) Terrorism, as defined in § 5-54-205; (ii) Rape, § 5-14-103; (iii) Kidnapping, § 5-11-102; (iv) Vehicular piracy, § 5-11-105; (v) Robbery, § 5-12-102; (vi) Aggravated robbery, § 5-12-103; (vii) Residential burglary, § 5-39-201(a); (viii) Commercial burglary, § 5-39-201(b); (ix) Aggravated residential burglary, § 5-39-204; (x) A felony violation of the Uniform Controlled Substances Act, §§ 5-64-101—5-64-508, involving an actual delivery of a controlled substance; or (xi) First degree escape, § 5-54-110; and . . . [i]n the course of and in furtherance of the felony or in immediate flight from the felony, the person or an accomplice causes the death of a person under circumstances manifesting extreme indifference to the value of human life . . . [or] . . . [a]cting alone or with one . . . or more other persons . . . [t]he person commits or attempts to commit arson, § 5-38-301; and . . . [i]n the course of and in furtherance of the felony or in immediate flight from the felony, the person or an accomplice causes the death of any person . . . .
>
> ARK. CODE ANN. § 5-10-101.

when it executed four inmates in an eight-day span.[142] Statewide attention continued when 2019 headlines described *Torres v. State*,[143] a local boy's brutal death caused by his father's rape and chronic child abuse.[144] Arkansas news intently followed and published details of what became a capital murder case revealing the failed 2014 Department of Human Services (DHS) investigation of the young boy's possible abuse.[145] It is not surprising, then, that the Arkansas Supreme Court's reversal[146] of the felony-murder conviction involving egregious facts and a capital punishment sentencing, further enhanced the state's curiosity.[147]

To fully appreciate *Torres*, one must first understand Arkansas' unique combination of textual and judicial limitations to felony-murder.[148] The Arkansas murder statute states:

> A person commits murder in the first degree if . . . [a]cting alone or with one . . . or more other persons . . . [t]he person commits or attempts to commit a felony; and . . . [i]n the course of and in the furtherance of the felony or in immediate flight from the felony, the person or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life . . . .[149]

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142. *Death Penalty Fast Facts*, CNN (Aug. 4, 2020), [https://perma.cc/V6ER-NSHP]. Four of the eight inmates were executed. *Id.*

143. Torres v. State, 2019 Ark. 101, at 1, 571 S.W.3d 456, 456.

144. *See* Hardy, *Child Beaten*, *supra* note 139; Zuzanna Sitek, *Bella Vista Boy's Death Caused by Rape and Chronic Child Abuse, Prosecutor Says*, 5NEWS (Apr. 8, 2015), [https://perma.cc/F9DC-J9MD].

145. Hardy, *Child Beaten*, *supra* note 139. The case sparked several potential DHS policy changes, including additional staff training on performing searches, changes to the system itself and requiring local offices to keep unsubstantiated reports for a longer period of time. *Id.* Further, the *Torres* case got additional media coverage because of the astronomical cost associated with capital murder trials. Tracy Neal, *Torres, Holly Cases Show Cost for Defense*, ARK. DEMOCRAT GAZETTE (Mar. 19, 2017), [https://perma.cc/QGL3-ELVL] [hereinafter Neal, *Cost for Defense*]. Torres' case total cost including, the defense, prosecutors' and jurors' expenses, totaled $102,904. *Id.*

146. *Torres* was reversed and remanded for new trial in February of 2020. *Torres*, 2019 Ark. 101, at 15, 571 S.W.3d at 465; *New Trial Date Set for Mauricio Torres in Benton County*, 4029 NEWS (Oct. 7, 2019), [https://perma.cc/R5HQ-GSH5].

147. Hardy, *New Trial in Torres*, *supra* note 139; Lynch, *supra* note 139; Neal, *Cost for Defense*, *supra* note 145.

148. *See generally infra* pp. 22-24 and accompanying discussion.

149. ARK. CODE ANN. § 5-10-102 (2017).

Textually, the statute does not spell out which felonies qualify as predicates for felony-murder.[150] Rather, Arkansas requires that a death occur in the course of and in furtherance of any felony.[151] Moreover, the statute textually extends liability to co-felon deaths and those that occur in immediate flight from the felony but limits application to deaths caused by either the defendant or an accomplice.[152] Finally, Arkansas requires an additional *mens rea* of manifesting extreme indifference to the value of human life.[153]

Beyond statutory limitations, the Arkansas judiciary has followed the historical pattern of pursuing other ways to limit the doctrine by, for example, applying its own version of the merger doctrine.[154] Rather than merge every assaultive felony, it requires the felony and the murder to have independent objectives—regardless of the conduct's assaultive nature.[155] Thus, for the felony-murder rule to apply, "the defendant must have an intent or objective to commit the underlying felony as opposed to the primary goal of murder."[156] If the defendant unlawfully entered a home intending to commit murder, then the defendant could not be charged with felony-murder using burglary as the predicate felony.[157] By contrast, felony-murder applies to the defendant who shoots at an occupied car with intent to cause property

150. ARK. CODE ANN. § 5-10-102.

151. ARK. CODE ANN. § 5-10-102.

152. ARK. CODE ANN. § 5-10-102. Doing so eliminates liability when a police officer or a victim causes a death.

153. ARK. CODE ANN. § 5-10-102. Having the mindset of extreme indifference to the value of human life is typically considered a second-degree murder type killing. *See* ARK. CODE ANN. § 5-10-103 (2005). The defendant must consciously disregard a substantial and unjustifiable risk of causing the general social harm, death. *See* DRESSLER, *supra* note 12, at 519. Substantive is a gross deviation from the way a reasonable person would approach seen through extremely reckless behavior towards human life. *Id.* Determining an unjustifiable risk, involves balancing the risk of the harm, here death, and the probability of the harm with the defendant's reason for acting. *Id.* If the risk of harm and probability outweigh the defendant's reason, the risk is unjustifiable. *Id.*

154. *See* Noble v. State, 2017 Ark. 142, at 4-6, 516 S.W.3d 727, 730-31.

155. *See id.*

156. *Id.* at 5, 516 S.W.3d at 731; *see also* Parker v. State, 292 Ark. 421, 427, 731 S.W.2d 756, 759 (1987); Craig v. State, 70 Ark. App. 71, 80-81, 14 S.W.3d 893, 899 (2000).

157. *See Parker*, 292 Ark. at 427, 731 S.W.2d at 759.

damage and in the course and furtherance of that felony, causes the death of another.[158]

Arkansas courts tend to further undermine the legislature through the interpretation of the doctrine as applied to co-felon actions.[159] Through an Arkansas Model Jury Instruction, the courts instruct the jury that when two or more persons are criminally responsible for an offense, each person is liable only for the degree of the offense consistent with that defendant's own culpable mental state.[160] The instruction allows accomplice felons having negligent mindsets to mitigate a first-degree murder charge requiring extreme indifference to the value of human life to a lesser included offense.[161]

Arkansas courts have introduced one other felony-murder limitation that does little to actually limit the doctrine.[162] That arose when it interpreted "immediate flight" by construing the plain language of the word "immediate."[163] However, it offered no other guidance for the jury to consider when determining what constitutes "reasonabl[e] temporal event[s]."[164] By contrast, other courts have held that flight ends once the defendant reaches "a place of temporary safety"[165] or is in "complete custody."[166]

The Arkansas judiciary addressed the felony-murder doctrine again in 2019.[167] In *Torres*, Mauricio Torres, a resident of Bella Vista, Arkansas, took his family on a camping trip to nearby Missouri.[168] He and his wife, Cathy Torres, awoke one

158. *See Noble*, 2017 Ark. 142, at 5-6, 516 S.W.3d at 731 (finding the independent objective to commit terroristic acts rather than murder).

159. *See* Binder, *Making the Best*, *supra* note 11, at 513 n.687.

160. The accomplice jury instruction states: "[w]hen two or more persons are criminally responsible for an offense, each person is liable only for the degree of the offense that is consistent with the person's own [culpable mental state] [or] [accountability for an aggravating fact or circumstance]." 1 ARK. MODEL JURY INSTRUCTIONS—CRIM. AMCI 2d 405 (2020) (brackets in original).

161. ARK. CODE ANN. § 5-10-102(a)(1) (2017). Felony manslaughter is a lesser included offense of first-degree felony-murder. ARK. CODE ANN. § 5-10-104(a)(4) (2007).

162. Kauffeld v. State, 2017 Ark. App. 440, at 7-8, 528 S.W.3d 302, 308-09.

163. *Id.* at 7-8, 528 S.W.3d at 308-09. The court defined "immediate" according to the *Black's Law Dictionary* definition: "a reasonable time in view of particular facts and circumstances of the case under consideration." *Id.* at 8, 528 S.W.3d at 308.

164. *Id.* at 8, 528 S.W.3d at 308-09.

165. *See supra* note 126 and accompanying text.

166. *See supra* note 126 and accompanying text.

167. *See* Torres v. State, 2019 Ark. 101, at 14, 571 S.W.3d 456, 465.

168. *Id.* at 18, 571 S.W.3d at 466 (Womack, J., dissenting).

morning to discover their six-year-old son, Isaiah, had eaten a piece of cake for breakfast.[169] As punishment, Torres inserted a stick into his son's rectum and forced him to do squats.[170] Displeased with Isaiah's performance, Cathy pushed Isaiah down, driving the stick deeper and piercing the child's rectum.[171] By the time the family returned home to Bella Vista that night, Isaiah was unresponsive.[172] Nearing midnight, Torres called for medical care; however, Isaiah soon died after transport to a Benton County hospital.[173]

At trial, the state spent three days building its case with overwhelming evidence against Torres.[174] Isaiah's nine-year-old sister, who witnessed years of abuse leading up to the camping trip, and the forensic pathologist who examined Isaiah's body, were both called to testify.[175] The defense rested without calling

169. *Id.* at 18, 571 S.W.3d at 466; *see also* Benjamin Hardy, *As Torres Trial Nears End, Jury Hears Graphic Details of Alleged Child Abuse, Autopsy*, ARK. TIMES (Nov. 10, 2016), [https://perma.cc/NK2J-FWTF] [hereinafter Hardy, *Graphic Details*].

170. *See Torres*, 2019 Ark. 101, at 18, 571 S.W.3d at 466 (Womack, J., dissenting).

171. *Id.*

172. *Id.*

173. *Id.* at 18, 571 S.W.3d at 466-67.

174. Hardy, *Update*, *supra* note 139.

175. Isaiah's sister testified to witnessing repeated beatings and abuse to her brother, including, "a lot" of hitting with a stick or cable. Hardy, *Graphic Details*, *supra* note 169. She also testified that Isaiah would have marks, be in pain, and scream or cry during the abuse. *Id.* She told the court Isaiah was forced to sleep in a cage and that the was not allowed to eat the same food as his sisters. *Id.* The sister testified witnessing her father once pour bleach over Isaiah's back, giving him chemical burns, and her father forcing Isaiah to eat his father's feces. *Id.*; *Torres*, 2019 Ark. 101, at 19, 571 S.W.3d at 467 (Womack, J., dissenting). The chemical exposure was later confirmed and discovered from a 2014 examination at Children's Hospital in Little Rock, alleged as an accident. Hardy, *Graphic Details*, *supra* note 169. The medical examiner's testimony corroborated the sister's testimony of chronic abuse by presenting graphic autopsy photos of extensive bruising in different stages of recovery, scars, puncture wounds, and lacerations covering his torso, head, back, face, mouth, legs, abdomen, and internal organs. *Id.*; *Torres,* 2019 Ark. 101, at 18, 571 S.W.3d at 467. The doctor affirmed that Isaiah died from the ultimate fatal issue of acute fecal purulent peritonitis, a bacterial infection in the abdomen cavity due to traumatic disruption of his rectum from a foreign object, but Isaiah also was subjected to a prolonged period of abuse. *Torres*, 2019 Ark. 101, at 18-19, 571 S.W.3d at 467; Hardy, *Graphic Details*, *supra* note 169. The autopsy revealed thick scar tissue lining Isaiah's skull cap from repeated, significant, and traumatic head injuries and multiple acute blunt force injuries to his head, back, and abdomen. *Torres*, 2019 Ark. 101 at 19, 571 S.W.3d at 467. His teeth had been forcibly removed and he had defensive wounds on his hands and arms. *Id.* at 19, 571 S.W.3d at 467. Moreover, upon investigation, Isaiah's blood was found splattered throughout the Torres home and camper. *Id.*

any witnesses.[176] After a short deliberation,[177] the jury unanimously convicted Torres of capital murder and sentenced him to death.[178]

But the Arkansas Supreme Court reversed Torres' conviction and sentence.[179] In a 4-3 decision, the Court held that Arkansas did not have jurisdiction to prosecute the alleged rape; the trial court therefore lacked authority to permit a conviction on a felony-murder charge predicated on rape.[180] The court reasoned there were two opportunities for Arkansas' extraterritorial jurisdiction statute to apply: first, "the conduct—the alleged rape—occur[ed] within Arkansas," or second, "[the] result that is an element of the offense—the alleged rape—occur[ed] within Arkansas."[181] The court found that Arkansas' extraterritorial jurisdiction did not to reach the alleged rape because the conduct occurred entirely in Missouri, and the result—death—is not an element of rape.[182] Further, the court reasoned, if "the elements of rape could not have been met in this state . . . rape cannot serve as an element of capital [felony] murder."[183] The court held that a rape-felony-murder charge was legally insufficient, and because of the prosecution's use of a general verdict form,[184] the jury possibly convicted Torres on an inadequate theory.[185]

The dissent accused the majority of "misunderstanding . . . [Arkansas'] extraterritorial jurisdiction statute[.]"[186] After

176. Hardy, *Update*, *supra* note 139.

177. *Id.*

178. *Torres*, 2019 Ark. 101, at 1, 571 S.W.3d at 458 (majority). Torres was also found guilty of first-degree battery. *Id.*

179. *Id*. at 15, 571 S.W.3d at 465; Hardy, *New Trial in Torres*, *supra* note 139. A juror in the case told a news station that the Torres trial was "two weeks she will remember for the rest of her life." and she could not believe the Arkansas Supreme Court's decision to overturn his conviction. Lynch, *supra* note 139.

180. *Torres*, 2019 Ark. 101, at 14-15, 571 S.W.3d at 464-65.

181. *Id.* at 11, 571 S.W.3d at 463; ARK. CODE ANN. § 5-1-104 (1975).

182. *Torres*, 2019 Ark. 101*,* at 11, 571 S.W.3d at 463.

183. *Id.* at 13-14, 571 S.W.3d at 464.

184. A general verdict form directs the jury to find the ultimate issue without list specific theories, findings, or disputed issues. *See General Verdict*, LEGAL INFO. INST., [https://perma.cc/K43Z-N8YY] (last visited Nov. 25, 2019).

185. *Torres*, 2019 Ark. 101, at 14-15, 571 S.W.3d at 465. Under these circumstances, where the verdict is supportable on one ground, but not on another, the court requires the verdict to be set aside because it is impossible to determine which ground the jury selected. *Id.*

186. *Id.* at 17, 571 S.W.3d at 466 (Womack, J., dissenting).

detailing the horrific facts the majority omitted, the dissent explained felony-murder, rather than rape, was the "offense" that should have been analyzed.[187] The dissent reasoned, because Torres was charged with felony murder predicated on rape, the underlying felony—rape—is only needed to replace the required *mens rea* for murder.[188] Therefore, for jurisdictional purposes, the state did not need jurisdiction over the predicate felony; rather, only the felony-murder that was charged.[189] Based on this understanding, Arkansas would have jurisdiction to charge for Isaiah's death because "the elements of capital felony murder include (1) the attempt or commission of an underlying felony, and (2) the resulting death of a person."[190] The dissent concluded that the "plain language of [Arkansas'] extraterritorial jurisdiction statute ma[d]e[] clear that Arkansas ha[d] jurisdiction to convict Torres of felony murder for the Arkansas death of his son, Isaiah, predicated on the Missouri rape."[191]

Mauricio Torres is currently held without bond in the Bentonville county jail awaiting his second jury trial rescheduled for February 18, 2020.[192] The prosecution has stated that during retrial, it still plans on pursuing the death penalty for the remaining child-abuse murder theory.[193]

B. Extraterritorial Jurisdiction 101

States' extraterritorial jurisdiction statutes govern their ability to prosecute a criminal defendant whose crime was not wholly intrastate, and while specific statutory language may slightly vary, states generally take the same approach.[194] Statutes typically permit an exercise of jurisdiction by any state in which

187. *Id.* at 20-21, 571 S.W.3d at 468.

188. *Id.*

189. *Id.* at 20-21, 571 S.W.3d at 468.

190. *Torres*, 2019 Ark. 101, at 21, 571 S.W.3d at 468 (Womack, J., dissenting).

191. *Id.* at 23, 571 S.W.3d at 469.

192. Tracy Neal, *Judge Sets Retrial Date for Northwest Arkansas Man Accused of Killing Son,* ARK. DEMOCRAT GAZETTE (Oct. 8, 2019), [https://perma.cc/BFZ9-BAKJ] [hereinafter Neal, *Retrial*].

193. Lynch, *supra* note 139.

194. *See generally* Wendell Berge, *Criminal Jurisdiction and the Territorial Principle*, 30 MICH. L. REV. 238, 253-59 (1932) (discussing further the specific ways statutes expand jurisdiction).

either the conduct or the result of a crime occurred.[195] Then to convict, the prosecution must prove both the conduct and result aspects of a crime. [196] The *actus reus* and *mens rea* make up the criminal conduct portion of an offense.[197] The *actus reus,* the external part of an offense, includes (1) a voluntary act, and (2) a social harm.[198] The *mens rea* is the mental culpability required for criminal liability.[199] For conduct-based crimes, the analysis stops there because the social harm society wishes to deter is the conduct itself.[200] However, when the harmful result is the activity society wants to prevent, an additional result component is required.[201] The criminal result portion for result-based crimes consists of the actual and proximate causation analysis, necessarily linking the defendant's voluntary act to the "result[ing]" social harm.[202]

Examples are often helpful. For instance, possession of a controlled substance is solely a conduct crime because *having* illegal drugs is the criminal conduct society wishes to prevent.[203] Larceny is another conduct-based offense.[204] Once the prosecution has proved the taking and carrying away of personal property with the intent to permanently deprive, the resulting deprival is irrelevant because the criminal conduct of "taking . . . personal property of another with the intent to permanently deprive the possessor" is what society wishes to prohibit.[205]

On the other hand, criminal homicide is arguably the most straight forward result-based crime because the social harm—the killing of a human being by another human being—is the harmful result society prohibits.[206] "Criminal homicide" is further divided

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195. *See* Larry Kramer, *Jurisdiction over Interstate Felony Murder*, 50 U. CHI. L. REV. 1431, 1437-38 (1983). *See e.g.,* ARIZ. REV. STAT. ANN. § 13-108 (1978); MINN. STAT. § 609.025 (1986).

196. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 193-94 (4th ed. 2006).

197. *Id.* at 91.

198. *Id.*

199. *Id.* at 125.

200. *See id.* at 193.

201. *See* DRESSLER, *supra* note 196, at 193.

202. *Id.*

203. *See id.* at 193-94.

204. *See id.* at 592.

205. *Id.*

206. DRESSLER, *supra* note 196, at 539.

by statute into "murder" and other lesser included forms like "manslaughter" depending on the requisite *mens rea* of the defendant.[207] The specific statute's textual *mens rea* requirement greatly regulates what homicide conviction is appropriate for the defendant's actions and mindset.[208] Further, to ensure conviction, the prosecution must prove the causation link that the defendant's voluntary act caused the resulting killing.[209] Rape is another result-based crime; the harmful result that society wishes to protect against is forcible sexual intercourse.[210] To convict for rape, the prosecution would have to prove the defendant engaged in sexual intercourse by force without consent of the victim.[211] However, unlike the specific *mens rea* outlined in differing homicide statutes, the defendant is guilty of rape if he possessed *any* morally blameworthy state of mind.[212] Although the causation analysis in a rape is rarely litigated, the defendant's voluntary act—intercourse—must result in the forcible, non-consensual intercourse outlined in the statute.[213]

The analysis changes when one of these conduct or result-based crimes serves as the predicate felony in a felony-murder charge.[214] Prosecution of felony-murder requires that a death result from the commission of a felony.[215] The intent to commit the predicate felony constitutes the specific *mens rea* otherwise required for murder.[216] Thus, the felony-murder rule applies if the predicate felony's conduct, including its *actus reus* and *mens rea*, results in a death.[217] For example, when rape is the predicate felony in a felony-murder charge, the intent-to-rape *mens rea* replaces the typical murder intent-to-kill *mens rea* requirement.[218]

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207. *Id.* at 543.

208. *See id*. at 547-55.

209. *Id.* at 193-94.

210. *Id.* at 625-28.

211. DRESSLER, *supra* note 196, at 626-28. Statute language and judiciary interpretation of rape statutes varies greatly from state to state. *Id.*

212. *Id.* at 637-38. Defendant's mental culpability may be excused for genuine and reasonable mistakes to consent or force in limited circumstances. *Id.*

213. *Id.* at 625.

214. *Id.* at 557.

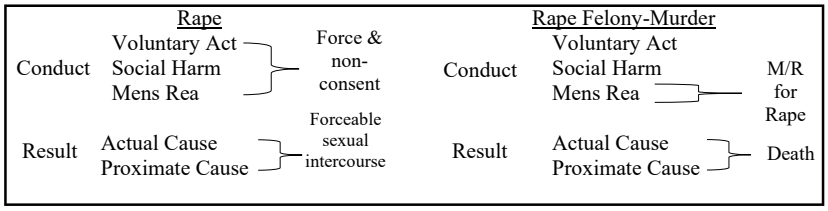
215. *Id.*

216. DRESSLER, *supra* note 196, at 557.

217. *See id.*

218. *See.id*. at 557.

Therefore, the rape accounts for the conduct portion of a felony-murder charge.[219] Another change with felony-murder is the causation analysis, which critically no longer focuses on the predicate felony.[220] Rather, in a felony-murder prosecution, the harmful result society wishes to protect against is death.[221] Per the above explanation, the following chart demonstrates the important changes in the analysis.



There is another layer added when the felony-murder's predicate felony occurs in one state, but the resulting death occurs in another.[222] Generally, a state's extraterritorial jurisdiction statute provides that state has the ability to prosecute a rape felony-murder if either the conduct—rape—or the result—death—happened within its borders.[223] Therefore, the state in which the death occurred would have jurisdiction over the defendant for a felony-murder charge, regardless of the extraterritorial rape.

Using jurisdictional restrictions is a plausible way to regulate felony-murder charges. Courts in New York and Illinois have attempted to confer jurisdiction in a way that limits the felony-murder charging applicability.[224] New York upheld the state's jurisdiction over a prosecution for felony-murder of an in-state death resulting from a felony committed in Connecticut.[225] In *People v. Stokes*, after witnessing an armed robbery in Connecticut, detectives pursued the getaway car of the two

219. *See id.*
220. *See id.*
221. *See* DRESSLER, *supra* note 196, at 559-60, 567.
222. *See generally* Kramer, *supra* note 195, at 1431-44.
223. *See id.* at 1439-41.
224. People v. Stokes, 671 N.E.2d 1260, 1264 (N.Y. 1996); People v. Holt, 440 N.E.2d 102, 104-05 (Ill. 1982).
225. *Stokes*, 671 N.E.2d at 1264.

fleeing individuals.[226] A highspeed chase ensued, which crossed New York state lines.[227] Attempting to evade capture, the getaway car eventually crossed an intersection and rammed into a glass bus shelter, ultimately killing a woman inside.[228] The New York Court of Appeals held that New York had jurisdiction to prosecute the defendant for felony-murder because the death of a nonparticipant in New York, in the course and furtherance of a designated felony or immediate flight therefrom, constitutes an element of the crime of felony-murder.[229]

In *People v. Holt*, the Illinois Supreme Court held that it did not have jurisdiction over a death that occurred in Wisconsin although the predicate felony—kidnapping—originated in Illinois.[230] The Illinois Supreme Court reasoned that conviction for the predicate felony is not an element of felony-murder with independent significance; rather, the predicate felony is only a precondition to the ultimate charge of felony-murder because the felon could not do anything "in the course of and in furtherance of" without a felony.[231] The court held that the murder was not in furtherance of the kidnapping and therefore not "*conduct* which is an element of the offense."[232]

Although conferring jurisdiction between states does limit a small portion of interstate felony-murder prosecutions, thereby adding yet another judicial limitation into the mix, inconsistent prosecutorial charging discretion persists. Admittedly, *Stokes* and *Holt* addressed wholly interstate felony murders, but those judiciaries' focus on whether the death occurred "in the course of and in furtherance of" the particular felony provides a blueprint for judicially limiting all felony-murder prosecutions.[233] Focusing on this language can narrow the application of felony-murder while encouraging prosecutors to replace felony-murder charges with a more narrowly-tailored offense.

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226. *Id.* at 1261.
227. *Id.*
228. *Id.*
229. *Id.* at 1264.
230. People v. Holt, 440 N.E.2d 102, 104-05 (Ill. 1982).
231. *Id.*
232. *Id.*
233. *Holt*, 440 N.E.2d at 106-07; *Stokes*, 671 N.E.2d at 1262.

As noted in Part II, state statutes currently use four predominate textual phrases related to the nexus between the felony and the murder.[234] Requiring that the death in some way furthers the underlying felony creates a nexus that the judiciary can proactively enforce despite the textual language with which it is presented.[235] Although only eleven states have the exact textual language "in the course of and in furtherance of" in their statutes,[236] the judiciary should interpret that language to require a "felony-death nexus."[237] To be sure, many jurisdictions have judicially already adopted that or a similar limitation,[238] but continued judicial adoption and strict interpretation is needed to advance uniformity.

C. Textbook Theory into Arkansas Application

The *Torres* prosecution caused an unsettling felony-murder outcome. This time, however, the imbalance arose from another attempt to judicially limit felony-murder's use in favor of a new court-imposed jurisdictional limitation.[239] The *Torres* dissent

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234. *See infra* Appendix IV. This map identifies which state statutes use particular nexus language. Originally, I believed a pattern might emerge through the circuits; however, the only pattern seems to possibly be geographical.

235. Although Illinois statute did not textually require the limitation, the judiciary read in the limitation by requiring the death be a part of "*one continuous plan, design and intent*[.]" *Holt*, 440 N.E.2d at 106-07.

236. *See infra* Appendix IV. This map identifies which state statutes use particular nexus language. Originally, I believed a pattern might emerge through the circuits; however, the only pattern seems to possibly be geographical.

237. The Illinois and New York respective statutes varied greatly—one enumerating specific felonies and textually requiring "in the course of and in furtherance of" limitation and the other having neither textual limitation present—yet both applied the in the course of and in furtherance of limitation. *Holt*, 440 N.E.2d at 105-07; *Stokes*, 671 N.E.2d at 1262.

238. *See, e.g.*, Comer v. State, 977 A.2d 334, 339-40 (Del. 2009); Lee v. United States, 699 A.2d 373, 385-86 (D.C. 1997); Lester v. State, 737 So. 2d 1149, 1151 (Fla. Dist. Ct. App. 1999); State v. Hokenson, 527 P.2d 487, 492 (Idaho 1974); State v. Mauldin, 529 P.2d 124, 127 (Kan. 1974); Mumford v. State 313 A.2d 563, 566 (Md. Ct. Spec. App. 1974); Commonwealth v. Ortiz, 560 N.E.2d 698, 700 (Mass. 1990); State *ex rel.* Murphy v. McKinnon, 556 P.2d 906, 910 (Mont. 1976); Romero v. State, 164 N.W. 554, 555 (Neb. 1917); Nay v. State, 167 P.3d 430, 434-35 (Nev. 2007); Gore v. Leeke, 199 S.E.2d 755, 759 (S.C. 1973); State v. Pierce, 23 S.W.3d 289, 294-95 (Tenn. 2000); Haskell v. Commonwealth, 243 S.E.2d 477, 483 (Va. 1978); State *ex rel.* Painter v. Zakaib, 411 S.E.2d 25, 26 (W. Va. 1991). *See also* Binder, *Making the Best*, *supra* note 11, at 518 & n.727.

239. Torres v. State, 2019 Ark. 101, at 1, 571 S.W.3d at 458. Torres' second jury trial was originally scheduled to begin January 21, 2020. *Id.*

rightfully concluded that the majority misinterpreted the jurisdictional analysis of felony-murder.

The analysis of Arkansas' specific extraterritorial jurisdiction statute should look familiar. In Arkansas, in order for a court to have jurisdiction over an offense, "[e]ither the conduct or a result that is an element of the offense [must] occur[] within th[e] state."[240] Mauricio Torres was charged with was capital felony-murder;[241] "the elements of capital felony murder include (1) the attempt or commission of an underlying felony, and (2) the resulting death of a person."[242] Likewise, the statute notes in subsection (b), when the offense is homicide, as it is here for felony-murder, either the death of the victim or the physical contact causing death constitutes a "result" for purposes of jurisdiction.[243] Therefore, Isaiah's in-state death is a "result" for jurisdictional purposes.[244] The *Torres* majority declined to adopt this analysis despite the dissent's repeated scrutiny of the flaws in the majority's reasoning.[245] For support, the dissent cited Arkansas precedent,[246] the controlling state statute,[247] and other persuasive authority to show Arkansas' clear jurisdiction to charge Mauricio Torres with felony-murder.[248]

Consider this Article's proposed textual interpretation of the nexus phrasing "in the course of and in furtherance of" as applied to the *Torres* facts. It still produces the same outcome reached by the *Torres* majority, but does so without misapplying the territorial jurisdiction limitation. Arkansas is primed to judicially adopt this Article's proposal; after all, the felony-murder statute

240. ARK. CODE ANN. § 5-1-104(a)(1) (1975).

241. *Torres*, 2019 Ark. 101, at 20-21, 571 S.W.3d 456, 468 (Womack, J., dissenting).

242. *Id.* at 21, 571 S.W.3d at 468.

243. ARK. CODE ANN. § 5-1-104(b).

244. ARK. CODE ANN. § 5-1-104(b); *Torres*, 2019 Ark. 101, at 10-11, 571 S.W.3d at 462-63 (majority).

245. *Torres*, 2019 Ark.101, at 20-23, 571 S.W.3d at 467-69 (Womack, J., dissenting).

246. Gardner v. State, 263 Ark. 739, 748, 569 S.W.2d 74, 78 (1978). In *Gardner*, the defendant argued there was no evidence that the alleged rape took place in Arkansas; therefore, it would not have jurisdiction. *Id.* The court held that "if the requisite elements of the crime are committed in different jurisdictions, any state in which an essential part of the crime is committed may take jurisdiction." *Id.* (citing State v. Scofield, 7 Ariz. App. 307, 438 P.2d 776 (1968)).

247. ARK. CODE ANN. § 5-1-104(b); *Torres*, 2019 Ark. 101, at 10-11, 571 S.W.3d at 462-63 (majority).

248. *Torres*, 2019 Ark. 101, at 22-23, 571 S.W.3d at 468-69 (Womack, J., dissenting).

already includes the textual "in the course of and in furtherance of" language.[249] In *Torres*, the felony—rape—was complete before the later death.[250] The rape started and concluded in Missouri, hours before Isaiah's death in Arkansas.[251] Therefore, the death was not in the course of, and nor did it further, the rape.[252] This strict reading allows a court to limit the felony-murder doctrine as applied to both intra- and interstate felony-murders, thereby providing an interpretive model for other courts seeking to uniformly narrow the doctrine.

CONCLUSION

Reform of the felony-murder doctrine began almost contemporaneously with its creation. But legislative textual amendments have not fixed the ongoing felony-murder charging and application inconsistencies. With only two jurisdictions having completely abolished the doctrine, a "next-best" solution for uniform reform is for the judiciary to strictly interpret the statutory phrase "in the course of and in furtherance of" to create a nexus between the underlying felony and the death it produced. If legislators are determined to maintain felony-murder as a part of this nation's law, the courts should feel empowered by the Arkansas judiciary's proactive spirit to limit the doctrine's applicability and reach.

249. ARK. CODE ANN. § 5-10-102 (2017).

250. *See Torres*, 2019 Ark. 101, at 14, 571 S.W.3d at 465 (Womack, J., dissenting).

251. *See id.*

252. This Article does not purport justifying Mauricio Torres' actions. Not only does the felony-murder doctrine cause ambiguity, too often the doctrine is used as a redundant homicide source when the death reasonably could have been charged under a different homicide method. This Article rather views the judiciary's effort to limit the felony-murder doctrine, despite the heinous facts, as the court's expression of disdain toward the felony-murder's expansive application.

Appendix I

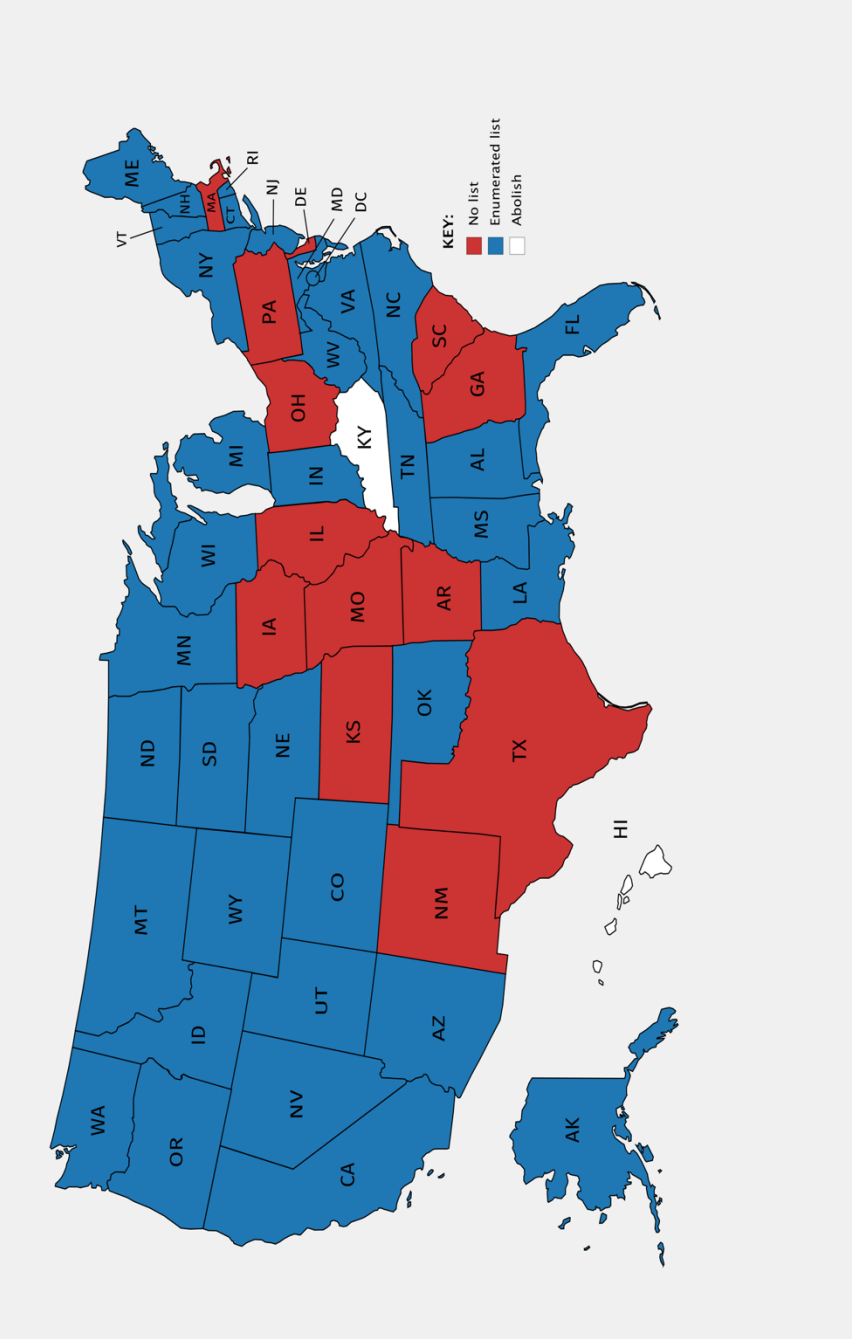
Forty-seven state statutes that have textually adopted felony-murder:

ALA. CODE § 13A-6-2 (2016); ALASKA STAT. § 11.41.100 (2002); ARIZ. REV. STAT. ANN. § 13-1105 (2009); ARK. CODE ANN. § 5-10-102 (2017); CAL. PENAL CODE § 189 (West 2020); COLO. REV. STAT. § 18-3-102 (2019); CONN. GEN. STAT. § 53a-54c (2015); DEL. CODE ANN. tit. 11, § 636 (2013); FLA. STAT. § 782.04 (2019); GA. CODE ANN. § 16-5-1 (2014); IDAHO CODE § 18-4003 (2002); 720 ILL. COMP. STAT. 5/9-1 (2020); IND. CODE § 35-42-1-1 (2018); IOWA CODE § 707.2 (2013); KAN. STAT. ANN. § 21-5402 (2018); LA. STAT. ANN. § 14:30 (2015); ME. STAT. tit. 17-a, § 202 (1991); MD. CODE ANN., CRIM. LAW § 2-201 (West 2019); MASS. GEN. LAWS ch. 265 § 1 (2020); MICH. COMP. LAWS § 750.316 (2014); MINN. STAT. § 609.185 (2014); MISS. CODE ANN. § 97-3-19 (2017); MO. ANN. STAT. § 565.021 (2017); MONT. CODE ANN. § 45-5-102 (2013); NEB. REV. STAT. § 28-303 (2020); NEV. REV. STAT. § 200.030 (2013); N.H. REV. STAT. ANN. § 630:1-a (2018); N.J. STAT. ANN. § 2C:11-3 (West 2017); N.M. STAT. ANN. § 30-2-1 (1994); N.Y. PENAL LAW § 125.27 (McKinney 2019); N.C. GEN. STAT. § 14-17 (2017); N.D. CENT. CODE § 12.1-16.01 (1993); OHIO REV. CODE ANN. § 2903.02 (West 1998); OKLA. STAT. tit. 21, § 701.7 (2012); OR. REV. STAT. § 163.115 (2019); 18 PA. CONS. STAT. § 2502 (1978); 11 R.I. GEN. LAWS § 11-23-1 (2008); S.D. CODIFIED LAWS § 22-16-4 (2005); TENN. CODE ANN. § 39-13-202 (2009); TEX. PENAL CODE ANN. § 19.02 (West 1994); 2009 UTAH CODE ANN. § 76-5-203 (West 2009); VT. STAT. ANN. tit. 13, § 2301 (2018); VA. CODE ANN. § 18.2-32 (1998); WASH. REV. CODE § 9A-32-030 (1975); W. VA. CODE § 61-2-1 (1991); WIS. STAT. § 940.03 (2019); WYO. STAT. ANN. § 6-2-101 (2013).

Appendix II

Thirty-five states' statutes enumerating particular felonies:

ALA. CODE § 13A-6-2 (2016); ALASKA STAT. § 11.41.100 (2002); ARIZ. REV. STAT. ANN. § 13-1105 (2009); CAL. PENAL CODE § 189 (West 2019); COLO. REV. STAT. § 18-3-102 (2019); CONN. GEN. STAT. § 53a-54c (2015); FLA. STAT. § 782.04 (2019); IDAHO CODE § 18-4003 (2002); IND. CODE § 35-42-1-1 (2018); LA. STAT. ANN. § 14:30 (2015); ME. STAT. tit. 17-a, § 202 (1991); MD. CODE ANN., CRIM. LAW § 2-201 (West 2019); MICH. COMP. LAWS § 750.316 (2014); MINN. STAT. § 609.185 (2014); MISS. CODE ANN. § 97-3-19 (2017); MONT. CODE ANN. § 45-5-102 (2013); NEB. REV. STAT. § 28-303 (2002); NEV. REV. STAT. § 200.030 (2013); N.H. REV. STAT. ANN. § 630:1-a (2018); N.J. STAT. ANN. § 2C:11-3 (West 2017); N.Y. PENAL LAW § 125.27 (McKinney 2019); N.C. GEN. STAT. § 14-17 (2017); N.D. CENT. CODE § 12.1-16.01 (1993); OKLA. STAT. tit. 21, § 701.7 (2012); OR. REV. STAT. § 163.115 (2019); 11 R.I. GEN. LAWS § 11-23-1 (2008); S.D. CODIFIED LAWS § 22-16-4 (2005); TENN. CODE ANN. § 39-13-202 (2018); 2009 UTAH CODE ANN. § 76-5-203 (West 2009); VT. STAT. ANN. tit. 13, § 2301 (2018); VA. CODE ANN. § 18.2-32 (1998); WASH. REV. CODE § 9A.32.030 (1975); W. VA. CODE § 61-2-1 (1991); WIS. STAT. § 940.03 (2019); WYO. STAT. ANN. § 6-2-101 (2013).


KEY:
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Enumerated list
Abolish
ME
VT
NH
MA
RI
CT
NJ
DE
MD
DC
NY
PA
VA
NC
SC
GA
FL
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KY
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IA
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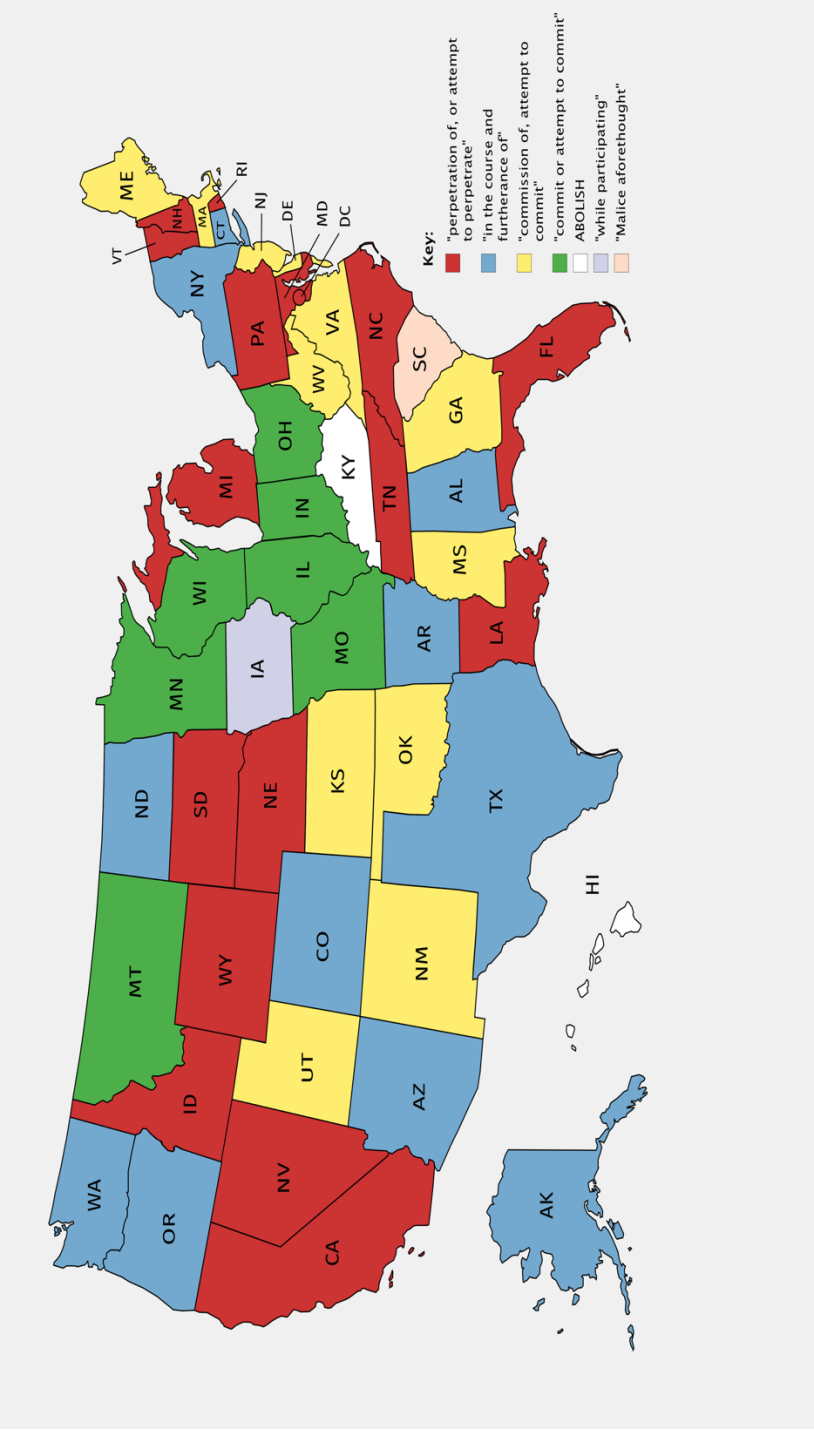
OR
CA
AK
HI


Key:
"perpetration of, or attempt to perpetrate"
"in the course and furtherance of"
"commission of, attempt to commit"
"commit or attempt to commit"
ABOLISH
"while participating"
"Malice aforethought"
ME
VT
NH
MA
CT
RI
NJ
DE
MD
DC
NY
PA
VA
NC
SC
FL
GA
WV
OH
KY
TN
AL
MS
LA
MI
IN
IL
WI
MN
IA
MO
AR
ND
SD
NE
KS
OK
TX
MT
WY
CO
NM
HI
ID
UT
AZ
NV
CA
OR
WA
AK