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STRETCHING LIABILITY TOO FAR: COLORADO'S FELONY MURDER STATUTE IN LIGHT OF *AUMAN*

INTRODUCTION

Felony murder is a widely debated theory of accomplice liability.[1] Generally, felony murder liability is triggered if a death results during the commission of a specifically enumerated felony.[2] Some jurisdictions have expanded the scope of liability to include the immediate flight from the felony.[3] Most recently the Colorado Supreme Court has stated that even arrest does not automatically terminate the immediate flight stage of felony murder as a matter of law, and even worse, a co-felon can still be held liable for a death occurring after her own arrest.[4]

In *Auman v. People*[5] the Colorado Supreme Court stretched Colorado's felony murder statute beyond a reasonable scope. Auman was the first person in the state of Colorado to be convicted of murder while in official police custody.[6] The Colorado Supreme Court dodged the issue of immediate flight in this case and remanded it on a technicality.[7] The court refused to define the limitations of immediate flight, and stated that arrest, as a matter of law, does not cut off liability for felony murder.[8]

The felony murder rule should not be extended beyond the purpose it was designed to serve, namely, to deter felons from causing a homicide *during* the commission of the crime. Holding Auman liable for the death of Officer VanderJagt was not a rational function that the felony murder doctrine was designed to serve.[9] The *Auman* case sparked national controversy over the degree of culpability an individual should have while in police custody.[10] The mass amount of public outcry after the trial illustrates how the Colorado Supreme Court has gone too far.

This Comment criticizes the Colorado Supreme Court's ruling on the issue of arrest not terminating immediate flight as a matter of law.

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1. Lindsay Fortado, *A Tale of Murder, and Who Pays the Price Case Triggers Debate Over Felony Murder Rule*, NAT'L L. J., June 21, 2004, col. 1, at 6.
2. *See generally* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 515 (3d ed. 2001) ("Under most modern murder statutes, a death that results from the commission of an enumerated felony (usually a dangerous felony, such as arson, rape, robbery, or burglary) constitutes first-degree murder for which the maximum penalty is death or life imprisonment."); *See also* COLO. REV. STAT. § 18-3-102 (2004).
3. *See* COLO. REV. STAT. § 18-3-102 (2005); N.Y. PENAL LAW § 125.25 (Consol. 2005).
4. Auman v. People, 109 P.3d 647, 650 (Colo. 2005).
5. 109 P.3d 647 (Colo. 2005).
6. *Auman*, 109 P.3d at 650; Diane Carman, *Auman Case Hangs from a Split Hair*, DENVER POST, Sept. 14, 2004, at B01.
7. *Auman*, 109 P.3d at 650.
8. *Id.*
9. *See generally* DRESSLER, *supra* note 2, at 516 (explaining that the deterrence rationale does not, in fact, deter accidental killings during felonies).
10. Fortado, *supra* note 1, at 6.

The shooting of Officer VanderJagt was outside the scope of immediate flight, and an already in custody Auman should not have paid the price for the shooter's actions.[11] Part I addresses the facts that led the court to its holding in *Auman*. Part II addresses the majority opinion and Chief Justice Mullarkey's dissent. Part III summarizes the issues of causation and the justifications for felony murder statutes in general. Part IV examines felony murder liability from other jurisdictions across the United States, highlighting the trend to either eliminate or limit the scope of liability. Part V describes the current Colorado felony murder statute and traces the emergence of immediate flight. Part VI criticizes the court's ruling as an overly broad interpretation of Colorado's felony murder statute. This Part also offers a possible limitation to felony murder liability in specific instances.

I. FACTS OF *AUMAN V. PEOPLE*[12]

On November 12, 1997, Lisl Auman and four others broke the padlock on Auman's ex-boyfriend's apartment door and entered without his permission.[13] The group consisted of Auman's friend Demetria Soriano, Soriano's boyfriend Dion Gerze, and Gerze's friends: Mattaeus Jaehnig and Stephen Duprey.[14] Auman asked the group to assist her in gathering her belongings from Shawn Cheever's apartment.[15] The group took Auman's items and some of Cheever's personal property, loading them into two cars.[16] Auman then proceeded from Cheever's apartment with Jaehnig in a stolen Trans-Am.[17] The police pursued them into what turned into a high-speed chase.[18] At one point during the chase, Auman held the steering wheel, while Jaehnig fired a weapon at an officer's car.[19] Auman and Jaehnig eventually stopped at Jaehnig's apartment complex, and the two of them ran into an alcove.[20]

After hiding in the alcove for an extended period of time, Auman turned herself over to the police and was placed in the back of a police car.[21] While Auman was in police custody, the officers questioned her about Jaehnig's whereabouts and whether he was armed.[22] She did not

11. *Auman*, 109 P.3d at 650.
12. 109 P.3d 647 (Colo. 2005).
13. *Auman*, 109 P.3d at 652.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 653. Lisl Auman has stated, "I surrendered as soon as I could. I did not think I could have done anything to Mattaeus Jaehnig that could have changed the warpath he was on. He was in another world." Jeff Kass, *I Feel for Her, and I Feel for Her Little Girl*, ROCKY MTN. NEWS, Mar. 18, 2001, at 38A (interview with Lisl Auman, in Canon City Women's Prison).
20. *Auman*, 109 P.3d at 653.
21. *Id.*
22. *Id.*

answer the questioning.[23] She had been in police custody for approximately five minutes when Officer VanderJagt, while continuing his search for Jaehnig, looked around a corner and was fatally shot by Jaehnig.[24] Jaehnig then shot and killed himself with the officer's gun.[25]

Jaehnig was high on methamphetamines at the time of the crimes.[26] Moreover, he had a lengthy rap sheet consisting of an array of violent crimes and was a dedicated white supremacist.[27]

Although Auman was in police custody at the time of the shooting, the jury convicted her of second-degree burglary and first-degree felony murder.[28] She received a life sentence for the death of Officer VanderJagt.[29] Auman appealed her conviction to the Colorado Court of Appeals raising the issue that arrest, as a matter of law, terminates the immediate flight stage for felony murder.[30] The Court of Appeals affirmed both the convictions of burglary and felony murder.[31] Auman then appealed to the Colorado Supreme Court.[32] The Colorado Supreme Court initially granted certiorari to determine whether the Court of Appeals properly concluded that arrest does not terminate liability for felony murder as a matter of law.[33] However, after initial briefing and arguments, the Colorado Supreme Court asked for additional materials, including supplemental briefs and arguments, on the issue of whether the Court of Appeals had properly instructed the jury on the elements of felony murder.[34]

II. *AUMAN V. PEOPLE*[35]

The Colorado Supreme Court held that when a co-felon is arrested, that action alone does not automatically terminate liability for felony murder as a matter of law.[36] Moreover, liability is not cut off for the arrested co-felon when a co-participant, still in flight from the predicate felony, commits a murder.[37] The court stated that arrest, in other circum-

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23. *Id.* There is some dispute about what exactly Auman said after being placed in police custody. *See* Lisl.com, http://www.lisl.com/facts.htm (listing disputed facts).
24. *Auman*, 109 P.3d at 653.
25. *Id.*
26. *Id.* at 654.
27. *See* Lisl.com, Matthaeus Reinhart Jaehring Rap Sheet, http://www.lisl.com/jaehrap.htm (last visited Nov. 6, 2005).
28. *Auman*, 109 P.3d at 654-55.
29. *Id.* The prosecution decided not to charge the others involved with felony murder. All five accomplices went to the apartment that day. Only Auman was charged with felony murder. The District Attorney reviewed filing felony murder charges against the others, but did not file since he believed the prosecution would not meet the burden of proof on all the elements. Soriano, Gerze, and Duprey pled guilty to burglary. Duprey received four years in prison. Gerze and Soriano both received two years probation. Jeff Kass, *Cop Killing Case Brought Wide Range of Penalties; State's High Court Eyes Controversial Auman Sentence*, ROCKY MTN. NEWS, Jan. 15, 2004, at 33A.
30. *Auman*, 109 P.3d at 654.
31. People v. Auman, 67 P.3d 741 (Colo. Ct. App. 2002), *rev'd*, 109 P.3d 647 (Colo. 2005).
32. *Auman*, 109 P.3d at 647.
33. *Id.* at 655.
34. *Id.*
35. 109 P.3d 647 (Colo. 2005).
36. *Auman*, 109 P.3d at 650.
37. *Id.*

stances, might terminate liability, but strictly as a matter of law, it does not.[38] Auman, who had been in police custody for five minutes at the time her co-participant shot and killed a police officer, was sentenced to life in prison for the death of the officer.[39] Auman is no longer serving a life sentence in prison because the Colorado Supreme Court reversed her conviction on a faulty jury instruction for burglary.[40] However, the Colorado Supreme Court decision was not unanimous.[41] Chief Justice Mullarkey agreed with the majority's opinion up to the point where they determined that the erroneous jury instruction rose to the level of reversible error.[42] Chief Justice Mullarkey would not have reversed Auman's conviction.[43]

A. Majority Opinion

In addressing Auman's arrest, the court determined that arrest does not automatically terminate immediate flight for purposes of felony murder liability when another participant is still in flight from the crime.[44] The court then concluded that the issue of whether a co-felon is still in the stages of immediate flight is a question for the jury.[45] The court further stated that the concept of immediate flight is "broad" and, that as a matter of law, "felony murder does not terminate where death occurs during continuous flight from the predicate felony, nor does it terminate where intervening events interrupt flight."[46] The Colorado Supreme Court did not find that arrest terminates liability as a matter of law because they did not want to take that issue away from the jury. The issue of whether arrest terminates immediate flight is not included in the felony murder statute; therefore, the jury must look at the unique facts of every case to make that determination.[47]

The jury must decide whether: (1) there is a "temporal connection between the predicate felony, flight and death" thereby making it "immediate" and (2) whether the death occurring after a defendant's arrest is still "in the course of or in furtherance of immediate flight."[48] The jury instruction submitted told the jury that they could find Auman liable for felony murder, if they found "beyond a reasonable doubt that Officer

38. *Id.* at 656. The court mentioned two instances where arrest might terminate liability: (1) when the defendant was acting alone and is subsequently placed under arrest; (2) when all co-participants of the underlying crime have been arrested. *Id.*
39. *Id.* at 653.
40. *Id.* at 671. After the Supreme Court remanded the case Auman accepted a plea bargain, pled guilty to burglary and accessory to first-degree murder, and was sentenced to 20 years in a community corrections facility. Jim Kirksey, *Auman Bid Gets Widow Backing*, DENVER POST, Aug. 17, 2005, at B-01.
41. *Auman*, 109 P.3d at 671-76 (Mullarkey, C.J., dissenting).
42. *Id.* at 671.
43. *Id.*
44. *Id.* at 650.
45. *Id.* at 659.
46. *Id.* at 657.
47. *Id.* at 659.
48. *Id.*

VanderJagt's death was caused by anyone 'in the course of or in the furtherance of burglary, or in the immediate flight therefrom.'"[49] Auman argued that this instruction was erroneous since it did not require the jury to find both a temporal and a causal connection between the immediate flight and the death.[50] The court agreed that the instruction was worded incorrectly but concluded that it was not a reversible error.[51]

Auman submitted a supplemental instruction for the jury that defined the limitations of immediate flight, but the trial court refused to submit it to the jury.[52] This instruction stated that immediate flight means that:

> no intervening event has broken the continuity of the underlying crime; a person is not in the immediate fight from a burglary if an entirely new episode of events has begun; nor is a person in immediate flight if she has reached a point of temporary safety or is subject to complete custody at the time the death is caused.[53]

For a defendant to be allowed an intervening cause instruction there has to be three conditions that are met: (1) "a defendant must introduce competent evidence to show that the ultimate harm would not have occurred in the absence of the claimed intervening cause;" (2) "a claimed intervening cause must be one that the defendant could not foresee;" and (3) "such a cause must be one in which the defendant does not participate."[54] Auman argued that Jaehnig was running from the police because the car was stolen and he was high on methamphetamines.[55] The court concluded that since Auman produced no evidence to demonstrate that Jaehnig's actions were an intervening cause, she was not entitled to the instruction.[56]

In addressing Auman's affirmative defense to felony murder, the court turned to the elements in the Colorado felony murder statute that require that the defendant "not only had nothing to do with the killing itself, but was unarmed and had no reason to believe that any of his confederates were armed or intended to engage in any conduct dangerous to life."[57] Moreover, if the defendant believes that a co-felon might be armed or might commit an act that would be dangerous, the defendant may relieve herself of liability if she were to immediately disengage herself from the felony or the flight therefrom.[58] The court concluded that Auman did not meet the requirements for the affirmative defense since

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49. *Id.* at 660.
50. *Id.*
51. *Id.*
52. *Id.* at 662.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* at 662-63.
57. *Id.* at 657.
58. COLO. REV. STAT. § 18-3-102(2) (2005).

she had knowledge that her co-participant was armed and dangerous, and she did nothing to disengage herself from the flight.[59] However, Auman did voluntarily relinquish herself over to police custody thereby, arguably, "disengaging" herself from the underlying felony.[60] The affirmative defense does not require a co-participant to warn policemen of other dangers.[61] It only requires that she disengage herself from the flight if there are reasonable grounds for her to believe that a co-participant might engage in actions that could lead to a death or serious injury.[62] If Auman had warned police of Jaehnig's whereabouts, she might have qualified for the affirmative defense.[63] Waving her Fifth Amendment right to silence in order to aid the police officers would have helped Auman's defense;[64] however, Auman had an absolute right not to say a word.[65] Nevertheless, the court determined that since she did not speak to police upon arrest, she did not qualify for the affirmative defense instruction.[66]

The jury convicted Auman of second degree burglary, which was then used as the predicate crime for felony murder.[67] The court considered whether the erroneous jury instruction on the predicate crime of burglary constituted plain error thereby necessitating reversal of the defendant's conviction.[68] Burglary is a specific intent crime that required Auman to *knowingly* break into the dwelling with the intent to commit a crime inside.[69] However, on appeal Auman claimed that the jury instruction omitted an essential element of the crime of theft.[70] The instruction submitted did not include the mental state of "knowingly" with the element "without authorization" in the elements of burglary.[71] Auman pled guilty to the charge of criminal trespassing, but insisted that she did not plan to steal Cheever's property upon initial entry into the room, thereby not committing a burglary.[72] Because of the faulty instruction, the jury could have convicted Auman of burglary without having to conclude that

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59. *Auman*, 109 P.3d at 657.
60. *Id.* at 654; *see also* Lisl.com, Facts, http://www.lisl.com/facts.htm (last visited Nov. 6, 2005).
61. § 18-3-102(2).
62. *Id.*
63. § 18-3-102(2); *Auman*, 109 P.3d at 654.
64. *See Auman*, 109 P.3d at 654.
65. U.S. CONST. amend. V; Judge John Webb wisely noted this issue and asked that if "[t]he officer was already dead, as was Jaehnig, so what difference did it make . . . what she said to the police officers?" Karen Abbott, *Judges Ask if Auman Still Fleeing When Cop Was Shot; Question Critical in Appeal of Murder Conviction in Death of Officer Shot by Her Accomplice*, ROCKY MTN. NEWS, May 1, 2002, at 5A (quoting a question asked by Judge John Webb during oral arguments before the Colorado Court of Appeals in People v. Auman, 67 P.3d 741 (Colo. Ct. App. 2002)).
66. *Auman*, 109 P.3d at 654.
67. *Id.* at 663 n.18.
68. *Id.* at 660.
69. *Id.* at 664. *See* COLO. REV. STAT. § 18-4-203(1) (2005) ("A person commits second degree burglary, if the person knowingly breaks an entrance into, enters unlawfully in, or remains unlawfully after a lawful or unlawful entry in a building or occupied structure with intent to commit therein a crime against another person or property.").
70. *Auman*, 109 P.3d at 663-64; COLO. REV. STAT. § 18-4-401 (2005) (elements of theft).
71. *Auman*, 109 P.3d at 663-64.
72. *Id.*

she intended to commit theft upon unlawfully entering Cheever's residence.[73]

Auman did not object to this instruction at trial, thereby not preserving the objection for appeal.[74] The court reviewed for plain error,[75] looking at whether the omission of the word "knowingly" affected a substantial right that damaged the fairness of Auman's trial.[76] The court relied on a prior opinion concluding that a similar jury instruction was reversible error since the instruction "allowed a guilty verdict to be returned without a determination that [the] defendant was aware of his lack of authority."[77] The court also weighed the amount of evidence against Auman.[78] If there was an overwhelming amount of evidence of her guilt, the evidence against her would have cured the instructional error.[79] However, because the issue of Auman's intent was contested at trial, there was not overwhelming evidence against her sufficient to cure the error.[80] Because the instruction omitted an essential element of the crime of burglary, the Colorado Supreme Court determined that Auman was deprived of a "full and fair jury consideration" of her defense.[81] Therefore, the court reversed the conviction based on this instructional error, since it was reasonable that a jury could have been misled by the instruction and convicted her without regard to her intent upon entering.[82]

To summarize, the majority opinion held, as a matter of law, that arrest does not automatically terminate immediate flight when another co-felon is still in the stage of immediate flight.[83] The court did not reverse on the arrest issue; instead, it dodged the issue by reversing only on the burglary instruction.[84]

B. Chief Justice Mullarkey's Dissent

Chief Justice Mullarkey disagreed with the majority opinion because Auman did not object to the jury instruction on burglary at trial, thereby not preserving the objection for review on appeal.[85] Chief Justice Mullarkey agreed that the erroneous instruction could only be reviewed if it affected substantial rights and was considered plain error.[86]

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73. *Id.*
74. *Id.*
75. *Id.* The United States Court of Appeals for the Tenth Circuit adopted the following definition of plain error: "plain error is '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done'" United States v. Coppola, 486 F.2d 882, 884 (10th Cir. 1973) (quoting United States v. Summerour, 279 F. Supp. 407, 410 (E.D.Mich. 1968)).
76. *Auman*, 109 P.3d at 665.
77. *Id.* at 664 (citing People v. Bornman, 953 P.2d 952 (Colo. Ct. App. 1997)).
78. *Id.* at 669.
79. *Id.*
80. *Id.*
81. *Id.* at 650.
82. *Id.* at 671.
83. *Id.* at 651.
84. *Id.* at 671.
85. *Id.* (Mullarkey, C.J., dissenting).
86. *Id.*

However, Chief Justice Mullarkey argued that the erroneous jury instruction on the predicate crime of burglary did not rise to the level of plain error, and therefore the conviction should have been upheld.[87]

Chief Justice Mullarkey stated that all the instructions must be looked at as a whole, not as separate entities.[88] In doing so, the Chief Justice did not agree that the erroneous instruction had a direct effect on the outcome of the case.[89] In her opinion, the phrase "by deception" included in the instruction implied that the defendant acted "knowingly."[90] In view of the fact that the phrase included "by deception," there was, in effect, no error in the instruction.[91] She further contended that it was a possibility that the burglary instruction could have misled a juror, but that the error did not contribute to the burglary conviction.[92] Looking at all the evidence as a whole in light of the instructions and the verdicts, Chief Justice Mullarkey believed that the jury understood the elements of each instruction, and therefore, rejected Auman's defense when it convicted her of second-degree burglary.[93]

III. HISTORY

The history of felony murder is quite convoluted. Some scholars declare that the United States inherited the doctrine from the common law in England,[94] while others believe it was created by our own system of statutes and judicial interpretation.[95] Overall, "[t]he existence and scope of the felony-murder doctrine have perplexed generations of law students, commentators and jurists in the United States and England . . . ."[96] Regardless of whether the United States inherited this doctrine, or created it within the judicial and legislative processes, felony murder is a troubling doctrine.[97] On its face, felony murder is a theory of accomplice liability that operates as a way to punish those individuals who participate in enumerated crimes that involve inherent danger and risk of death.[98] These felonies include "arson, robbery, burglary, kidnapping, certain forms of sexual assault and sexual assault on a child, and the crime of escape."[99] Felony murder holds individuals liable for committing felonies that result in a death. In Colorado, deaths occurring during either the commission of the predicate felony or during the immediate

87. *Id.*
88. *Id.* at 673.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *See* Fortado, *supra* note 1, at 6 (contending that the felony murder rule was not inherited from England).
95. *Id.*
96. People v. Aaron, 299 N.W.2d 304, 306 (Mich. 1980).
97. *See* James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces that Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429, 1442-48 (1994).
98. DRESSLER, *supra* note 2, at 515.
99. *Id.*; *see also* COLO. REV. STAT. § 18-3-102(1)(b) (2005).

flight trigger liability under the felony murder doctrine.[100] Liability will attach even if the defendant did not possess the intent to kill and even if the defendant did not do the actual killing.[101] The theory of felony murder is based on transferred intent between crimes.[102] Therefore the intent to kill "is imputed from the participant's intent to commit the predicate felony."[103] The theory of transferred intent, as used in the felony murder doctrine, allows for the judicial system to manipulate the boundaries and limitations of the rule.

A. Felony Murder Causation

One of the primary arguments against the felony murder rule in general is that it ignores proximate cause,[104] thereby making one "responsible for consequences that are unforeseen or unlikely in the extreme."[105] Early versions of the felony murder doctrine were in tune with the requirements of proximate cause.[106] As the doctrine developed over time, the original rationale of the death being within the foreseeable scope of the felony, has been slowly evaporating.[107] Moreover, case law, such as *Auman*, stretches the doctrine beyond the reasonable foreseeability that the proximate cause element demands.[108]

The theory of proximate cause in felony murder cases has been justified simply as "when a felon's attempt to commit a forcible felony sets in motion a chain of events which were or should have been within his contemplation when the motion was initiated, he should be held responsible for any death which by direct and almost inevitable sequence results from the initial criminal act."[109] This premise is sound: the law should hold individuals responsible for their own actions and the fore-

100. *Id.*
101. Auman v. People, 109 P.3d 647, 655 (Colo. 2005).
102. *Id.*
103. *Id.* (citing Whitman v. People, 420 P.2d 416, 418 (Colo. 1966)).
104. Rudolph J. Gerber, *The Felony Murder Rule: Conundrum Without Principle*, 31 ARIZ. ST. L.J. 763, 774-75 (1999) ("The felony murder doctrine is simply indifferent to these principles of causation.").
105. Jeff Kass, *Lawyers Debate Centuries-Old Legal Concept*, ROCKY MTN. NEWS, March 18, 2001, at 38A (quoting William Pizzi, University of Colorado Law Professor).
106. *See generally*, DRESSLER, *supra* note 2, at 522-26 (discussing different approaches to felony murder causation).
107. *See* Gerber, *supra* note 104, at 774 ("The felony murder doctrine is simply indifferent to these principles of causation"); *see also* ARIZ. REV. STAT. § 13-1105(A)(2) (LexisNexis 2005) Arizona expanded felony murder to include more than the standard inherently dangerous felonies. *See id.* The statute states that it is first-degree murder if one is "[a]cting either alone or with one or more other persons the person commits or attempts to commit sexual conduct with a minor . . . sexual assault . . . molestation of a child . . . terrorism . . . marijuana offenses . . . dangerous drug offenses . . . narcotics offenses . . . kidnapping . . . burglary . . . arson . . . robbery . . . escape . . . child abuse . . . unlawful flight from a pursuing law enforcement vehicle . . . and in the course of and in furtherance of the offense or immediate flight from the offense, the person or another person causes the death of any person." *Id.*
108. DRESSLER, *supra* note 2, at 525; *see also* Lynne H. Rambo, *An Unconstitutional Fiction: The Felony-Murder Rule as Applied to the Supply of Drugs*, 20 GA. L. REV. 671, 691-92 (1986) (discussing expansion of felony murder to suppliers of drugs as ignoring proximate causation).
109. People v. Lowery, 687 N.E.2d 973, 976 (Ill. 1997).

seeable results.[110] Some attorneys believe that the statute is well within a reasonable scope of liability and that "you are guilty for the logical consequences of your actions."[111] However, modern statutes, like Colorado's,[112] have taken this theory and stretched it too far. Felony murder historically only applied to the commission of the felony and any deaths that occurred therein.[113] Furthermore, a causal connection between the underlying felony and the death must be proved.[114] Now, juries in Colorado may hold defendants responsible for actions that were committed by another after the defendant was physically incapable of preventing the death from occurring because they were in police custody.[115]

Holding a felon responsible for actions of another co-felon committed after she is in custody is arguably beyond the scope of proximate cause.[116] The basic theory of proximate cause in the field of criminal law was simply stated as the "natural and probable consequences of [the defendant's] acts."[117] Furthermore, the death cannot have been a "result of an independent intervening cause in which the accused does not participate, and which he could not foresee."[118] It was not foreseeable, and therefore not a proximate cause, that when Lisl Auman went to her ex-boyfriend's home to retrieve her belongings that Officer VanderJagt would be killed. The Colorado Supreme Court refused to reverse the trial courts ruling disallowing the jury to take into consideration intervening causes that cut off the chain of causation.[119] Arrest, logically, should cut the chain of events for purposes of felony murder liability.[120] This ruling stretched the felony murder doctrine beyond its original rationale of foreseeability.[121]

B. *Justifications for Felony Murder Rule*

The felony murder rule, since its first codified appearance,[122] has transformed into a doctrine that, in some instances, lacks justification and purpose. The Model Penal Code attempted to eliminate felony murder liability.[123] However, this model was not widely adopted and many

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110. Hamrick v. People, 624 P.2d 1320, 1324 (Colo. 1981) (stating that people should be held responsible for the natural and probable consequences of their acts).

111. Fortado, *supra* note 1, at 6.

112. COLO. REV. STAT. § 18-3-102(1)(b).

113. Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 199-207 (2004); *see also* DRESSLER, *supra* note 2, at 515.

114. DRESSLER, *supra* note 2, at 523.

115. *Auman*, 109 P.3d at 650.

116. *See* DRESSLER, *supra* note 2, at 523 (explaining justification for proximate cause in felony murder).

117. *Hamrick*, 624 P.2d at 1324; *see also* People v. Rostad, 669 P.2d 126, 128 (Colo. 1983).

118. *Hamrick*, 624 P.2d at 1323.

119. *Auman*, 109 P.3d at 662-63.

120. Collier v. State, 261 S.E.2d 364, 372 (Ga. 1979) (overruled on other grounds).

121. *See* Binder, *supra* note 113, at 204 (stating that proximate cause requires forseeability); *see also* DRESSLER, *supra* note 2, at 523.

122. 1827 Ill. Laws ch. 124-65.

123. MODEL PENAL CODE § 210 introductory n., at 2 (1962) ("The final innovation of Section 210.2 is its departure from the traditional rule of felony murder. Section 210.2(1)(b) establishes a

states still continue to utilize felony murder for prosecution.[124] There are two primary justifications for the endurance of the felony murder rule.[125] First, it is meant as a means of deterring accidental deaths during the commission of felonies.[126] Second, society continues to uphold the doctrine because it reaffirms the sanctity of human life.[127] These two policy reasons for the continuance of felony murder liability are touted for their justifications, but upon closer examination of the doctrine, felony murder liability has been expanded beyond any rational reason for its original invention.

1. Deterrence

The most commonly cited reason underlying the purpose of the felony murder doctrine is that it acts "to deter felons from killing negligently or accidentally by holding [defendants] strictly responsible for the killings they commit."[128] If individuals are held liable for any death that occurs during the commission of a felony, the deterrence theory asserts that the felon will proceed with the felony in a more careful manner that will be less likely to result in a death.[129] This reasoning is illogical: "Quite simply, how does one deter an unintended act?"[130] The deterrence theory is a crude attempt to justify the broadening of the felony murder doctrine. The felony murder doctrine "does not punish an actor for the social harm caused by her intentional conduct. Instead, it looks beyond the intentional conduct to punish the social harm caused by an unintended, perhaps unforeseeable result – and it does so with the severest possible penalties available under law."[131] Moreover, even though the statistical data is hard to find and usually unreliable, homicides during the commission of felonies are not very common.[132] One source cites that "only one-half of one percent of all robberies end up in a homi-

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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 violent felony.").

124. Guyora Binder, *Felony Murder and Mens Rea Default Rules: A Study in Statutory Interpretation*, 4 BUFF. CRIM. L. REV. 399, 400-01 (2000) ("It is commonly said that almost every state in the country has retained some form of the felony murder rule and so repudiated the Model Penal Code's proposed reform.").

125. DRESSLER, *supra* note 2, at 516-18.

126. *Id.*

127. *Id.*

128. People v. Washington, 402 P.2d 130, 133 (Cal. 1965); *see also* MODEL PENAL CODE § 210.2 cmt. 6, at 37-8 (1962); Gerber, *supra* note 104, at 779-82; Tomkovicz, *supra* note 97, at 1448-58.

129. DRESSLER, *supra* note 2, at 516.

130. Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 451 (1985).

131. Brief for National Association of Criminal Defense Lawyers as Amici Curiae Supporting Petitioner at 1, Auman v. People, 109 P.3d 647 (Colo. 2005), *available at* http://www.nacdl.org (follow "Amicus Briefs" hyperlink; then follow "Auman v. State" hyperlink).

132. DRESSLER, *supra* note 2, at 517.

cide."[133] This begs the question: what exactly does the felony murder doctrine deter?

The deterrence theory of felony murder is illogical when viewed in light of the current structure of the Colorado felony murder statute. If the felony murder doctrine is used as a means to deter felons from causing a death, its purpose failed in the *Auman* case.[134] In *People v. Washington,*[135] the California Supreme Court stated that "The purpose of the felony-murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit. . . . This purpose is not served by punishing them for killings committed by their victims."[136] Similarly, the purpose of the felony murder doctrine is not served by punishing a co-participant who voluntarily surrendered before the killing occurred. If arrest did not prevent Auman from being held liable for Jaehnig's murderous actions, it is wholly unsound that the application of the felony murder doctrine in this case was for deterrence reasons.[137] Norm Mueller of the National Association of Criminal Defense Lawyers stated that the Colorado Supreme Court's interpretation of the felony murder statute was "not just a stunningly bad interpretation of the felony murder law, it's awful public policy."[138] This type of broad interpretation, instead of deterring accidental death, could have the opposite effect and place police officers at risk since there will not be an incentive to surrender when fleeing from a felony.[139] This would more likely deter surrender and not deter homicides.[140] When felony murder liability is stretched so far that even arrest does not terminate it, the deterrence theory of felony murder appears to be a fallacy.

2. Reaffirms Sanctity of Human Life

One of the reasons for the enduring felony murder rule is that the doctrine "reaffirms the sanctity of human life."[141] The rule reflects society's view that the crime of homicide that occurs during a felony deserves a harsher punishment than for a felony that does not result in a death.[142] However, what makes felony murder distinct from other first-

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133. DRESSLER, *supra* note 2, at 517 (citing Enmund v. Florida, 458 U.S. 782, 799-800 nn.23-4 (1982) (reporting the data)).

134. *See* DRESSLER, *supra* note 2, at 516-17; *Auman*, 109 P.3d at 650.

135. 402 P.2d 130 (Cal. 1965).

136. *Washington*, 402 P.2d at 133 (citations omitted).

137. *See* People v. Williams, 406 P.2d 647, 650 (Cal. 1965) (stating that deterrence purpose of felony murder doctrine was not served when the doctrine was used with a non-inherently dangerous crime); *see also* DRESSLER, *supra* note 2, at 516-17.

138. Diane Carman, *Auman Case Complicated But Crucial*, DENVER POST, Jan. 21, 2004, at B01.

139. *Id.*

140. *Id.*

141. DRESSLER, *supra* note 2, at 517-18; State v. La Grand, 734 P.2d 563, 572 (Ariz. 1987) ("The felony murder rule, designed as it is to protect human life, represents sounds public policy, is reasonably related to the end sought to be accomplished, and is not constitutionally impermissible.").

142. DRESSLER, *supra* note 2, at 517.

degree murder is that the death is accidental or negligent.[143] Since the death is accidental, the felon should not pay for the crime with the same degree of punishment as a vicious murderer.[144] This use of the rule is not reasonable, and furthermore, is not in the interests of justice, to punish a criminal who did not have the mens rea to commit a premeditated murder with punishments reserved for first-degree murderers.[145] Moreover, an individual who did not actually pull the trigger on the gun, and who was physically incapable of committing the murder, or preventing it, should not be forced to serve the time for another's actions.[146] This in no way "reaffirms the sanctity of human life."[147] The justification for reaffirming society's ideal of the sanctity of life is merely a guise for allowing a punishment that does not fit the crime.[148] Furthermore, when the doctrine is stretched to include an individual such as Auman, who has voluntarily turned herself over to police custody, the justification no longer is logical.[149] The Colorado Supreme Court's interpretation of the doctrine has expanded the felony murder rule beyond its original premise.

IV. FELONY MURDER ACROSS THE UNITED STATES

A. Other States' Felony Murder Statutes

Throughout the years, each jurisdiction struggled to define and codify felony murder. In the past century there was a trend, in some jurisdictions, to limit felony murder, either by scope or by punishment.[150]

The first felony murder statute emerged in Illinois in 1827.[151] At this point in time, felony murder was used to only hold liable those persons who engaged in felonies that resulted in a death.[152] The death, though unintentional, still needed to be reasonably foreseeable.[153] Since the codification of this felony murder rule, the doctrine has been expanded and contracted depending on the jurisdiction.[154]

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143. *Id.*
144. *Id.*
145. *Id.*
146. *See* DRESSLER, *supra* note 2, at 517 ("Even if a felony that results in a death should be punished more severely than one that does not result in a homicide, it hardly follows that a felon who accidentally takes a life should be subject to the severe penalties, including death or life imprisonment, reserved for murderers."); *but see Auman*, 109 P.3d at 650 (holding, as a matter of law, that Auman's arrest did not terminate felony murder liabilty).
147. DRESSLER, *supra* note 2, at 517-18.
148. *See* Tomkovicz, *supra* note 97, at 1457 (describing the justifications for felony murder as a delusion).
149. *See generally id.*
150. *See* DRESSLER, *supra* note 2, at 519 ("Many courts have engrafted limitations on the felony-murder rule . . . . "); Roth & Sundby, *supra* note 130, at 446-47.
151. Ill. Rev. Code, Crim. Code, 22, 24, 28 (1827).
152. *See* Binder, *supra* note 113, at 65 ("Beginning in the 1820s, many American legislatures passed true felony murder statutes, imposing murder liability for all killings in the attempt of certain felonies.").
153. *Id.* at 121 (statutes during this time period used language such as "naturally" and "probable consequences" to include an element of foreseeability).
154. *See* Auman v. People, 109 P.3d 647, 650 (Colo. 2005); *see* DRESSLER, *supra* note 2, at 519.

For instance, Michigan requires an accomplice to have intent to kill and therefore, entirely abolished the common law felony murder rule through case law.[155] Similarly, Hawaii and Kentucky have abolished their felony murder statutes.[156] Ohio eliminated the felony murder statute and changed it to involuntary manslaughter.[157] Minnesota and Wisconsin have likewise reduced the degree of felony murder and the punishment that couples it.[158] Moreover, the state supreme court in New Mexico determined that there must be a mens rea requirement for felony murder.[159] Other states have reduced the punishment that accompanies felony murder. Alaska, Louisiana, New York, Pennsylvania, and Utah all have reduced felony murder to second degree murder instead of first degree murder.[160] Other states have added an affirmative defense.[161] Furthermore, England, the source of American common law, abolished its felony murder rule in 1957.[162]

However, even these attempts to reduce the harshness of the felony murder doctrine have met criticism because "they do not resolve [the rule's] essential illogic."[163] Even with legislation reducing the scope and punishments that accompany felony murder convictions, this rule continues to be stretched beyond reason.[164]

B. Other States' Felony Murder Case Law

Other states have looked at the issue of arrest in the context of felony murder liability. For instance, a Georgia case deliberately stated that "[t]he underlying felony can . . . terminate for the purpose of the felony-murder rule if the perpetrator is arrested."[165] Likewise, in *Coleman v.*

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155. People v. Aaron, 299 N.W.2d 304, 335 (Mich. 1980) ("Today we simply declare that the offense popularly known as felony murder, which, properly understood, has nothing to do with malice and is not a species of common-law murder, shall no longer exist in Michigan, if indeed it ever did."); *see also* DRESSLER, *supra* note 2, at 515.

156. HAW. REV. STAT. § 707-701 (2004) (First-degree murder statute does not include felony murder); KY. REV. STAT. ANN. § 507.020 (LexisNexis 2004) (same); *see also* DRESSLER, *supra* note 2, at 515 n.110.

157. OHIO REV. CODE ANN. § 2903.01, 2903.04 (LexisNexis 2005).

158. *Aaron*, 299 N.W.2d at 315 (Minnesota reduced felony murder to a third degree offense); WIS. STAT. § 940.03 (2005) (Wisconsin reduced felony murder to class B felony that includes no more than a twenty year prison sentence).

159. State v. Ortega, 817 P.2d 1196, 1204 (N.M. 1991); *see also* DRESSLER, *supra* note 2, at 515 n.110.

160. *See Aaron*, 299 N.W.2d at 315 (discussing other jurisdictions handling of felony murder statutes); ALASKA STAT. § 11.41.110(a)(3) (2005); LA. REV. STAT. ANN. § 14:30.1(A)(2)(a) (2005); N.Y. PENAL LAW § 125.25 (Consol. 2005); 18 PA. CONS. STAT. § 2502(b) (2005) ("A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony."); UTAH CODE ANN. § 76-5-202(1)(d) (2005).

161. *E.g.*, N.Y. PENAL LAW § 125.25 (Consol. 2005).

162. Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11, § 1 (Eng.); *see also* DRESSLER, *supra* note 2, at 515.

163. Roth & Sundby, *supra* note 130, at 447 (quoting MODEL PENAL CODE § 210.2 cmt. 6, at 36 (1962)).

164. *See, e.g.*, *Auman*, 109 P.3d at 650; *see also* ARIZ. REV. STAT. § 13-1105(A)(2) (LexisNexis 2005).

165. Collier v. State, 261 S.E.2d 364, 372 (Ga. 1979) (overruled on other grounds).

United States,[166] the issue on review was whether there was "such an 'arrest' of the appellant as to break the essential link between the robbery and the killing."[167] If a determination could be made that the arrest did break the essential link between the felony and the death, arrest would have terminated the immediate flight stage and cut off felony murder liability.[168]

In *People v. Irby*,[169] a New York court was faced with a question of whether the temporary police custody of the defendant terminated the underlying felony.[170] At the trial court, the jury was not instructed on the issue of arrest. The New York Court of Appeals determined that Irby was entitled to have a proper trial where the jury would be instructed on the significance of her police custody or arrest.[171] The court further determined that it was error for the appellate division to deem the issue of arrest irrelevant.[172]

A California court reversed a defendant's conviction for first-degree murder when he and a co-participant robbed a store and the owner of the store shot and killed the co-participant.[173] The court concluded that holding the defendant liable for his co-participant's death was an absurd use of the felony murder doctrine.[174] Furthermore, this court likened the result with that of a robber being held responsible for a co-participant's actions when he himself was already under arrest and in police custody at the time the accomplice was killed.[175]

The California case is analogous to the situation in the *Auman*.[176] Though Auman's accomplice was not the one killed, it parallels the situation.[177] The California court condemned this exact application of the felony murder doctrine that Colorado applied in *Auman*.[178] The Colorado Supreme Court concluded that a co-participant will still be found responsible for acts committed by other participants, even while in police custody. This is a legally absurd use of the felony murder doctrine.

Yet, in deciding *Auman*, the court refused to conclude that as a matter of law arrest should terminate liability.[179] The court decided to leave

166. 295 F.2d 555 (D.C. Cir. 1961).
167. *Coleman*, 295 F.2d at 561.
168. *Id.* at 560–61.
169. 47 N.Y.2d 894 (N.Y. 1979).
170. *Irby*, 47 N.Y.2d at 895.
171. *Id.*
172. *Id.*
173. People v. Washington, 402 P.2d 130, 135 (Cal. 1965).
174. *Washington*, 402 P.2d at 134.
175. *Id.*
176. *Id.*; *see also Auman*, 109 P.3d at 653.
177. *Id.*
178. *Washington*, 402 P.2d at 134.
179. *Auman*, 109 P.3d at 650.

the issue to the jury and remanded the case.[180] Unfortunately, because the court dodged the issue at hand, the law in Colorado now stands that arrest as a matter of law does not terminate the immediate flight stage of felony murder.[181] In fact, because the court refused to discuss the issue of terminating immediate flight, the stage of immediate flight in felony murder could possibly be endless.[182] The court needed to define the limitation and scope of the immediate flight stage of felony murder.[183] Arrest is so significant to an individual's culpability concerning felony murder that in Colorado arrest should terminate immediate flight in felony murder as a matter of law.

V. BACKGROUND

The scope of felony murder can, and has, been stretched to cover those felons who are not even in the course of committing the felony but are in the flight therefrom.[184] Colorado amended its felony murder statute in 1971 to include the phrase "immediate flight therefrom."[185] This concept has been codified into the current Colorado statute[186] and was derived both from New York's penal law and Colorado cases decided before the revision of the code.[187] Currently, Colorado has one of the most stringent felony murder statutes in the United States.[188]

A. Overview of Colorado's Felony Murder Statute

Colorado's felony murder statute has been deemed one of the harshest felony murder statutes in the country.[189] In the state of Colorado, felony murder is classified as first-degree murder,[190] which carries with it the equally harsh sentence of life imprisonment without parole.[191] In 1971, Colorado's General Assembly modeled the Colorado felony murder statute on New York's penal law.[192] New York added the words "immediate flight therefrom" to "clarify that felony-murder liability does not terminate upon the completion of the predicate felony."[193] The for-

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180. *Id.* at 671.
181. *Id.* at 650.
182. *See generally* Erwin S. Barbre, Annotation, *What Constitutes Termination of Felony for Purposes of Felony-Murder Rule*, 58 A.L.R. 3D 851 (2004).
183. *Id.* § 9.
184. *Id.*
185. Act of June 2, 1971, ch. 121, sec. 1, 1971 Colo. Sess. Laws 388, 418; COLO. REV. STAT. § 40-3-102(1)(b) (1971).
186. COLO. REV. STAT. § 18-3-102(1)(b) (2005).
187. § 40-3-102(1)(b); *see also* Auman v. People, 109 P.3d 647, 657-58 (Colo. 2005).
188. § 18-3-102(1)(b).
189. *See Auman*, 109 P.3d at 650 (ruling in case expanded liability by stating that even arrest will not automatically terminate immediate flight from felony). For less harsh felony murder statutes, see *supra* Part IV.
190. § 18-3-102(1)(b).
191. § 18-3-102(3) ("Murder in the first degree is a class 1 felony."); COLO. REV. STAT. § 18-1.3-401(V)(A) (2005) (requiring a minimum sentence of life imprisonment, a maximum sentence of death coupled with no mandatory period of parole for class 1 felonies).
192. *See* N.Y. PENAL LAW § 125.25(3) (Consol. 2004).
193. *Auman*, 109 P.3d at 658 (reciting reasons for including "immediate flight therefrom" language within revision of felony murder statute); COLO. REV. STAT. § 40-3-102(1)(b) (1971).

mer Colorado felony murder statute did not include the words "immediate flight therefrom,"[194] but the Colorado Supreme Court interpreted this statute to encompass immediate flight within felony murder liability.[195] Within Colorado case law, the expansion of felony murder liability encompassing immediate flight first began to emerge.[196]

1. Colorado – Emergence of Immediate Flight in Felony Murder Liability

Colorado's previous felony murder statute stated that murder committed in the perpetration or the attempted perpetration of a specific felony would be considered first-degree murder.[197] The statute did not specify any limitations on when and where perpetration of a crime terminates. Without a statute that clarified and defined immediate flight from an underlying felony, Colorado courts were free to set limitations of liability or to expand upon it.[198]

Before the phrase "immediate flight therefrom" was codified in Colorado, the Colorado Supreme Court interpreted this phrase to be within the scope of felony murder liability. For instance, in *Bizup v. People*,[199] the defendant robbed a taxi-cab driver and shot and killed him later in the evening.[200] The defendant was convicted of first-degree murder, although he contended that the murder occurred after the robbery had ended.[201] The court affirmed his first-degree murder conviction and held that "[t]he robbery and the killing which followed were all part of the same transaction. They were so closely connected in point of time, place, and continuity of action as to be one continuous transaction."[202] The court, in this case, demonstrated how actions committed after the initial felony could still be considered part of the crime for purposes of felony murder liability.[203]

Furthermore, in *People v. McCrary*,[204] the court affirmed the defendant's felony murder conviction based on the fact that he and the co-felon were still in the immediate flight from the felony.[205] The defendant and the co-felon had robbed a doughnut shop and kidnapped an em-

194. *See* COLO. REV. STAT. § 40-2-3(1) (1963) (amended 1971) (current version at § 18-3-102(1)(b)).
195. *See* Bizup v. People, 371 P.2d 786 (Colo. 1962); *Auman*, 109 P.3d at 657.
196. *See Bizup*, 317 P.2d at 788; People v. McCrary, 549 P.2d 1320, 1331 (Colo. 1976).
197. § 40-2-3(1) ("All murder . . . which is committed in the perpetration or attempt to perpetrate any arson, rape, robbery, mayhem, or burglary . . . shall be deemed murder of the first degree . . . .").
198. § 40-3-102(1)(b).
199. 371 P.2d 786 (Colo. 1962).
200. *Bizup*, 371 P.2d at 787.
201. *Id.* at 788.
202. *Id.*
203. *Id.*
204. 549 P.2d 1320 (Colo. 1976).
205. *McCrary*, 549 P.2d at 1332.

ployee.[206] In this case, the felons, after kidnapping their victim, stopped at a bar for approximately twenty to thirty minutes to have a drink.[207] They left the bar and eventually stopped again down the road.[208] The defendant's co-participant murdered the employee while the defendant had stepped out of the car.[209] Even though the felony murder statute in force at the time did not mention immediate flight as an element of felony murder, the court interpreted the statute to cover flight from a felony.[210] In this case the court concluded that immediate flight had not terminated even though the felons had left the scene of the crime, entered a new location and found a place of temporary safety.[211] This case demonstrates the court's ability to broaden the scope of felony murder and the ease with which the court could expand upon liability.[212]

When these cases were decided, Colorado's previous felony murder statute was still in effect.[213] This prior statute did not specifically state that immediate flight could trigger felony murder liability.[214] However, the court determined that "escape from the scene of the underlying felony is part of the *res gestae* of a crime so that a murder committed to facilitate the flight can be felony murder."[215] The court interpreted the statute to include immediate flight from the predicate crime because the actions of the defendant were "one continuous integrated attempt to successfully complete his crime and escape detention."[216] The Colorado General Assembly would later take these decisions and codify them into what is presently the felony murder statute in Colorado.[217]

Colorado modeled its felony murder statute after a similar New York statute.[218] Prior to 1965, New York's statute only covered a killing that occurred during the commission of a felony.[219] However, New York included the phrases "in the furtherance of" and "immediate flight therefrom" in the statute to reinforce the fact that liability does not end when the underlying crime is completed.[220] After New York added the "immediate flight" language to the statute, Colorado followed suit in 1971.[221] The present felony murder statute in Colorado states in part that:

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206. *Id.* at 1324.
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.* at 1331–32.
211. *Id.*
212. *Id.*
213. COLO. REV. STAT. § 40-2-3(1) (1963).
214. *See McCrary*, 549 P.2d at 1331 n.13; § 40-2-3(1).
215. *McCrary*, 549 P.2d at 1331. Res Gestae is defined as "the events at issue, or other events contemporaneous with them." BLACK'S LAW DICTIONARY 1335 (8th ed. 2004).
216. *McCrary*, 549 P.2d at 1332 (quoting *Bizup*, 371 P.2d at 788).
217. COLO. REV. STAT. § 18-3-102(1)(b) (2005).
218. *See* N.Y. PENAL LAW § 125.25; *see also Auman*, 109 P.3d at 658.
219. People v. Donovan, 385 N.Y.S.2d 385, 389 (App. Div. 1976).
220. N.Y. PENAL LAW § 125.25; *see Auman*, 109 P.3d at 658.
221. *See supra*, note 185.

> A person commits the crime of murder in the first degree if . . . [a]cting either alone or with one or more persons, he or she commits or attempts to commit . . . burglary . . . and, in the course of or in furtherance of the crime that he or she is committing or attempting to commit, or of immediate flight therefrom, the death of a person, other than one of the participants, is caused by anyone.[222]

Colorado courts have now interpreted this statute to include actions in furtherance of the immediate flight and have stated that even arrest of a co-felon does not automatically terminate immediate flight as a matter of law.[223] The Colorado felony murder rule has now transformed into a rule that disregards individual intent and foreseeability, ignoring other states' attack on the doctrine.[224]

VI. ANALYSIS

Upon granting certiorari, the Colorado Supreme Court acknowledged that the law was unsettled on the issue of immediate flight and when liability terminates.[225] The court had the opportunity to define the limitations of immediate flight but did not step up to the task. Instead, the court expanded liability for felony murder by stating that, as a matter of law, arrest does not automatically terminate immediate flight when a co-felon still remains in flight.[226]

The *Auman* case sparked a national controversy over the degree of Lisl Auman's culpability.[227] Proponents of the Colorado Supreme Court's ruling in *Auman* hold strong that Officer VanderJagt was killed because Auman set into action the course of events that led to the chase of an enraged skinhead with a death wish.[228] Others believe that the underlying events that Auman was involved in terminated once she was placed in police custody.[229]

The outcome of the *Auman* case is troubling for defendants and defense counsel alike.[230] Critics of the expansion of felony murder liability hold firm that Colorado should place a well-defined limitation on the scope of immediate flight.[231] The most shocking aspect of the Colorado Supreme Court's ruling was how far the court was willing to stretch the

222. § 18-3-102(1)(b).
223. *Auman*, 109 P.3d at 651.
224. *See supra* Part IV.A.
225. Auman v. People, 109 P.3d 647, 655 (Colo. 2005).
226. *Auman*, 109 P.3d at 651.
227. Fortado, *supra* note 1, at 6.
228. *Id.*; Diane Carman, *Auman Case Complicated But Crucial*, DENVER POST, Jan. 21, 2004, at B01.
229. Karen Abbott & Jeff Kass, *Auman's Life Term Argued in High Court; "Harsh Result" Divisive After Officer's 1997 Slaying*, ROCKY MTN. NEWS, Jan. 16, 2004, at 6A. Justice Gregory Hobbs stated that "This is a harsh result . . . She gets life imprisonment. She didn't commit the murder. She's not committing the burglary, and she's no longer in flight at the time this occurred." *Id.* (quoting oral arguments in Auman v. People, 109 P.3d 647 (Colo. 2005)).
230. Carman, *supra* note 228.
231. Reggie Rivers, *Felony Murder Law Too Inflexible*, DENVER POST, April 1, 2005, at B7.

boundaries of felony murder liability.[232] The ruling on immediate flight is illogical and could lead to prosecution of participants, like Auman, who happen to be in the wrong place at the wrong time, and who voluntarily surrender themselves over to police custody.[233]

Critics of the felony murder doctrine believe that the rule is being stretched too far under the guise of "deterring" felonies.[234] When the rule is stretched beyond its reasonable limits, legally unsound results will follow that are out of line with the general purpose of the felony murder doctrine.[235] The felony murder rule "should not be extended beyond any rational function that it is designed to serve."[236] Was holding Auman liable for the death of Officer VanderJagt a rational function that the felony murder rule was designed to serve? The amount of attention this case has gathered demonstrates that the Colorado Supreme Court has stretched felony murder liability too far.[237]

A. Broadening the Scope of Felony Murder

Examining the purpose behind felony murder, it becomes clear that Colorado has lost all sight of the original intent of the rule – namely to deter accidental and unintentional deaths.[238] In addition, felony murder is based on the notion that there is a reasonably foreseeable possibility that a death could occur during some element of the underlying felony.[239] But when arrest does not cause the chain to be broken in the immediate flight element, the purpose behind the felony murder doctrine disappears.[240] Liability should be cut off when it no longer is foreseeable that a death might result in an underlying felony. Liability, also, should be terminated, as a matter of law, upon arrest.

The *Auman* court dissected Colorado's felony murder statute to justify the ruling on immediate flight.[241] The Colorado felony murder statute states that a defendant acting "either alone or with one or more persons" is subject to felony murder liability, even during the "immediate flight therefrom."[242] The court interpreted this language to indicate that either a *sole* participant's liability during immediate flight might be ter-

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232. *Auman*, 109 P.3d at 650.
233. *See* Rivers, *supra* note 231, at B7.
234. *See supra* Part III.B.1 (discussing deterrence theory of felony murder).
235. *See* People v. Washington, 402 P.2d 130, 134 (Cal. 1965) (discussing absurd results of felony murder doctrine).
236. *Id.*
237. *See* Fortado, *supra* note 1, at 6; Carman, *supra* note 228 (quoting Norm Mueller of the National Association of Criminal Defense Lawyers calling the ruling "dangerous"); Abbott & Kass, *supra* note 229; Rivers, *supra* note 231 ("By mandating a life sentence for anyone convicted of this crime, the legislature has created the potential for situations like Auman's, where she's not totally innocent, but her punishment is unjust because it's too severe for her role in the crime.").
238. *See supra* Part III.B.1; *see also* COLO. REV. STAT. § 18-3-102(1)(b) (2005).
239. *See supra* Part III.A (discussing proximate cause in felony murder).
240. *See supra* Part III (examining the purposes and justifications of felony murder doctrine).
241. *Auman*, 109 P.3d at 656-57.
242. § 18-3-102(1)(b).

minated by arrest, or that *all* the participants must be in custody for arrest to terminate the immediate flight stage.[243] However, the Colorado Supreme Court gave no authority for this reading of the statute. The felony murder statute does not clarify whether all of the participants, some or just one of them must be in police custody for immediate flight to terminate.[244] Therefore, it is plausible that there is another logical reading of the statute. The arrest of only one participant should not preclude a finding that the immediate flight stage has been terminated for that one individual.[245] The court relied on the fact that the General Assembly did not specifically write this particular instance into the statute, and therefore, concluded that the non-existence of any wording to indicate that the arrest of only one participant could terminate the immediate flight stage was *not* unintentional.[246]

The notion that people should be held responsible for the natural and probable consequences of their acts is at the center of criminal law jurisprudence.[247] In the State of Colorado, felony murder has been applied and upheld in cases where a killing occurred because of the natural and probable consequences of the defendant's actions.[248] *Auman* is not one of these cases. There is a fine line to be drawn between "but for" causation, that the jury used to hold Auman liable, and the point where liability terminates.[249] Using the overly simple "but for" causation test in all felony murder cases, every slight action of every person involved could result in numerous people being held liable for first-degree murder. "But for" causation does not leave room for intervening causes or unforeseeable results.[250]

The Colorado Supreme Court, in *People v. Calvaresi,*[251] defined the standard of intervening causes in death cases:

> To warrant a conviction for homicide, the death must be the natural and probable consequence of the unlawful act, and not the result of an independent intervening cause in which the accused does not participate, and which he could not foresee. If it appears that the act of the accused was not the proximate cause of the death for which he is

243. *Auman*, 109 P.3d at 656.

244. § 18-3-102(1)(b).

245. *See* Barbre, *supra* note 182 (noting that the issue of arrest terminating liability for felony murder purposes has been raised with varying degrees of success.) Most existing case law on this topic "can be read as supporting the view that under certain circumstances arrest could terminate the underlying felony." *Id.*

246. *Auman*, 109 P.3d at 656-57 (citing Zamarripa v. Q & T Food Stores, Inc., 929 P.2d 1332, 1339 (Colo. 1997)).

247. *See* Hamrick v. People, 624 P.2d 1320, 1324 (Colo. 1981).

248. *See id.*

249. *See generally* DRESSLER, *supra* note 2, at 523 ("The but-for causal connection is often easy to satisfy.").

250. *See* Brief for National Association of Criminal Defense Lawyers as Amici Curiae Supporting Petitioner, *supra* note 131, at 15 ("The broad 'but for' theory of felony murder causation argued by the prosecution in Ms. Auman's case does not increase the deterrence value of the felony murder rule enough to justify the increased harshness of its results.").

251. 534 P.2d 316 (Colo. 1975).

> being prosecuted, but that another cause intervened, with which he was in no way connected, and but for which death would not have occurred, such supervening cause is a defense to the charge of homicide.[252]

The Colorado Supreme Court stated that Auman did not qualify for an instruction on intervening cause since both she and Jaehnig were still running from the burglary.[253] However, the court could have issued an instruction to the jury regarding arrest being a sufficient intervening cause.[254] The *Auman* court did conclude that arrest is an issue for the jury;[255] therefore, the *Auman* case warranted a jury instruction on the issue of intervening causes since there was an issue of arrest as a supervening cause.

The court held that as a matter of law an arrest of a co-felon does not terminate liability while another participant is still in the immediate flight stage of the predicate crime.[256] This rule may bring about legally absurd results in the justice system. In most burglaries, there is a reasonably foreseeable possibility that a death could ensue.[257] However, in the *Auman* case, it was an unforeseeable result that Jaehnig would kill the officer once Auman was already placed in police custody.[258] In general terms, holding a co-participant liable for the death of an officer after being taken into police custody and having no further control over the actions of the co-participant, is a legally unsound result.

B. A Solution: Let the Punishment Fit the Crime

The felony murder doctrine has been slated as an "ancient rule" that has been "created apart from any constitutional considerations and has been bombarded by intense criticism and constitutional attack."[259] One attack on felony murder is that the punishment does not fit the crime in some circumstances.[260] In *Auman*, the punishment was excessive in relation to the crime that was committed. She did not actually pull the trigger, but was charged, in essence, as if she had.[261] She was sentenced

252. *Id.* at 319 (quoting 1 F. WHARTON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 200, at 448 (12th ed. 1957)).
253. *Auman*, 109 P.3d at 663.
254. *See Calvaresi*, 534 P.2d at 319.
255. *Auman*, 109 P.3d at 651.
256. *Id.* at 650.
257. *See generally* DRESSLER, *supra* note 2, at 515 (noting that burglary is an inherently dangerous felony); *see also* MODEL PENAL CODE § 210.2, cmt. 6, at 37 (1962) ("For the vast majority of cases it is probably true that homicide occurring during the commission or attempted commission of a felony is murder independent of the felony-murder rule.").
258. *Auman*, 109 P.3d at 653.
259. State v. Maldonado, 645 A.2d 1165, 1171 (N.J. 1994).
260. *See* Roth & Sundby *supra* note 130, at 446; Donald Baier, Note, *Arizona Felony Murder: Let the Punishment Fit the Crime*, 36 ARIZ. L. REV. 701, 703 (1994) ("[F]elony murder rule, although popular with prosecutors, is under attack from academics and legislators who wish to limit its harshness in extreme cases.").
261. *See supra* note 191 (Felony murder is a class I felony and carries with it a minimum sentence of life in prison with no mandatory period of parole).

with life imprisonment without parole – a sentence that should be reserved for those who commit first-degree murder.[262]

Felony murder "turns on fortuitous events that do not distinguish the intention or moral culpability of the defendants."[263] One scholar even declares that "neither state legislatures nor the courts have sought to bring the felony-murder rule into line with well-accepted criteria of individual accountability and proportionate punishment."[264]

The common punishment for felony murder is either the death penalty (under specific circumstances) or life sentence without parole.[265] For a non-triggerman to be punished with a life sentence without parole is equally excessive and disproportionate when taken in perspective with the seriousness of the underlying felony.[266] If Auman, for instance, had only been convicted of burglary without felony murder attaching, she would not have been sentenced to a life sentence without parole.[267] She did not pull the trigger and kill the officer, but she was sentenced with the punishment as if she did.[268]

In *Enmund v. Florida*,[269] the United States Supreme Court stated that "[i]t is fundamental that 'causing harm intentionally must be punished more severely than causing the same harm unintentionally.'"[270] This ruling should likewise extend to the excessive punishment of life without parole in specific cases where the harm was caused unintentionally.[271] After the Court's holding in *Enmund*, the Colorado Supreme Court's holding in *Auman* seems unjust and excessive.[272] The punishment should fit the crime.

In *Auman*, the Colorado Supreme Court ignored the development in other jurisdictions of limiting felony murder liability.[273] Other states have placed well-defined limitations on felony murder, and some have abolished this theory altogether based on the "widespread trend, both in the Model Penal Code and in other states, to abolish or narrow a rule

262. *See* DRESSLER, *supra* note 2, at 517 ("it hardly follows that a felon who accidentally takes a life should be subject to the severe penalties, including death or life imprisonment, reserved for murderers.").

263. Locket v. Ohio, 438 U.S. 586, 620 (1978) (Marshall, J., concurring); *see also* People v. Aaron, 299 N.W.2d 304, 328 (Mich. 1980).

264. George P. Fletcher, *Reflections on Felony-Murder*, 12 SW. U. L. REV. 413, 418 (1981).

265. *See* Enmund v. Florida, 458 U.S. 782, 789-90 (1982) (concluding that death penalty for a non-triggerman charged with felony murder violated Eighth Amendment).

266. *See id.* at 797.

267. COLO. REV. STAT. § 18-4-202(2) (2005) (naming burglary as a class 3 felony, bringing with it a minimum of four years and maximum of twelve years imprisonment).

268. *Auman*, 109 P.3d at 650 (affirming conviction of felony murder).

269. 458 U.S. 782 (1982).

270. *Enmund*, 458 U.S. at 798 (quoting H. HART, PUNISHMENT AND RESPONSIBILITY 162 (1968)).

271. *Id.*

272. *Id.*

273. *See supra* Part IV; *see also* MODEL PENAL CODE § 210.2, cmt. 6, at 30 (1962) ("[I]t is the submission of the Model Code that the felony-murder doctrine should be abandoned as an independent basis for establishing the criminality of homicide.").

universally viewed as unprincipled."[274] The Colorado felony murder statute's definition of "immediate flight" needs to be clarified and have limitations set.

One suggestion for eliminating the vastly unsound results that could appear in future cases based on the *Auman* ruling, is that the statute, in general, could carry with it a less harsh punishment: one that fits the crime. In a criminal trial the jurors are not advised of the effect of the conviction.[275] The jury does not know what the sentencing or penalty will be.[276] For instance, an average juror would not know that convicting a defendant of felony murder carries with it a mandatory life sentence without parole.[277] In fact, juror Linda Chin regretted convicting Auman, and stated that "[w]hat happened to Lisl [Auman] is wrong, absolutely wrong. This is one of those rare issues that is so clearly unjust that it leaves no room for doubt or argument."[278] To eliminate future unjust results, the Colorado statute should be reformed. Other jurisdictions have both first-degree and second-degree felony murder statutes.[279] Colorado only has first-degree requiring a mandatory life sentence if convicted.[280] There is no steadfast rule mandating that it be first-degree murder;[281] that determination is left solely to the legislatures and those in charge of sentencing.[282]

There are various degrees of mens rea within the crime of homicide.[283] This division of culpability is divided by the intent the individual

274. Judge Rudolph J. Gerber, *On Dispensing Injustice*, 43 ARIZ. L. REV. 135, 147 (2001); *see also* MODEL PENAL CODE § 210.2, cmt. 6, at 30 (1962) ("The effect of the Model Penal Code, therefore, is to abandon felony murder as a separate basis for establishing liability for homicide . . . . ").

275. One pattern jury instruction states that:

> The question of possible punishment of the defendant is of no concern to the jury and should not, in any sense, enter into or influence your deliberations. The duty of imposing sentence rests exclusively upon the court. Your function is to weigh the evidence in the case and to determine whether or not the defendant is guilty beyond a reasonable doubt, solely upon the basis of such evidence. Under your oath as jurors, you cannot allow a consideration of the punishment which may be imposed upon the defendant, if he is convicted, to influence your verdict, in any way, or, in any sense, enter into your deliberations.

1 MODERN FEDERAL JURY INSTRUCTIONS – CRIMINAL § 9.01(Matthew Bender 2005).

276. *Id.*

277. *See supra* note 191 (sentencing for class I felonies).

278. Free Lisl! Press Conference and Rally, at 7, http://www.lisl.com/documents/free_lisl_press_transcpt.pdf (transcript of Linda Chin's statement, as read by Kathy Sparks, at a May 14, 2001 rally for Lisl Auman on the steps of the Colorado State Capitol building).

279. *See supra* Part IV; *see also* MODEL PENAL CODE § 210.2, cmt. 6, at 41-42 (1962).

280. COLO. REV. STAT. § 18-3-102(1)(b) (2004); *see also supra* note 191 (sentencing for class I felonies).

281. *See supra* Part IV (noting that each individual jurisdiction can define scope of felony murder statute).

282. *See id.*

283. *See generally* DRESSLER, *supra* note 2, at 115-42 (stating that *mens rea* includes intentionally, knowingly, willfully, negligent or reckless); *see also* MODEL PENAL CODE § 210, introductory n., at 1 (1962) (stating that the Model Penal Code has abandoned the degree structure of criminal law and instead "classifies all criminal homicides into the three basic categories of murder, manslaughter, and negligent homicide.").

had upon committing the crime.[284] For example, if one accidentally causes the death of another in an automobile collision, it is usually deemed as a reckless act, specifically vehicular homicide.[285] However, for felony murder, there is no actual intent for the homicide, only the intent for the underlying felony.[286] This needs to be taken into consideration in sentencing felony murder defendants.

Jurisdictions across the United States have dealt with felony murder sentencing in different capacities.[287] Following the trend that "[l]esser culpability yields lesser liability,"[288] some states have divided felony murder itself into degrees.[289] For instance, New York has second-degree felony murder.[290] The sentencing for second-degree is not as harsh as that for first-degree, thereby providing a more reasonable sentence for those individuals who did not have the requisite culpability to commit first-degree murder.[291] Other jurisdictions have eliminated the felony murder rule completely.[292] When Hawaii abolished the felony murder statute, it inserted the following commentary into its statutes:

> Even in its limited formulation the felony-murder rule is still objectionable. It is not sound principle to convert an accidental, negligent, or reckless homicide into murder simply because, without more, the killing was in furtherance of a criminal objective of some defined class. Engaging in certain penally-prohibited behavior may, of course, evidence a recklessness sufficient to establish manslaughter, or a practical certainty or intent, with respect to causing death, sufficient to establish murder, but such a finding is an independent determination which must rest on the facts of each case. In recognition of the trend toward, and the substantial body of criticism supporting, the abolition of the felony-murder rule, and because of the extremely questionable results which the rule has worked in other jurisdictions, the Code has eliminated from our law the felony-murder rule.[293]

If the Colorado Supreme Court is unwilling to pull the reigns in on felony murder liability, it is up to the legislature to provide a more reasonable and fitting approach to felony murder.[294] The felony murder rule is not being used for its original purpose.[295] In Colorado, the addition of

284. *See* DRESSLER, *supra* note 2, at 115-42.
285. *See* COLO. REV. STAT. § 18-3-106 (2005).
286. *See* DRESSLER, *supra* note 2, at 515.
287. *See supra* Part IV; *see also* DRESSLER, *supra* note 2, at 515.
288. MODEL PENAL CODE § 210.2, cmt. 6, at 36 (1962).
289. *See supra* Part IV.
290. N.Y. PENAL LAW § 125.25 (Consol. 2005).
291. *See supra* Part IV.
292. *See id.*
293. People v. Aaron, 299 N.W.2d 304, 314 (Mich 1980) (quoting HAW. REV. STAT. § 707-701, commentary). *Aaron* gives an extensive overview of the history of felony murder in England and the United States in support of Michigan abolishing the felony murder doctrine. *Id.* at 307-27.
294. *See* Rivers, *supra* note 231, at B7 (calling for the legislature to review felony murder statute and define a level of intent and to define when flight terminates).
295. *See supra* Part III.

the affirmative defense was the legislature's attempt to reform the felony murder doctrine to allow for an accomplice to be excluded from liability.[296] If this is the extent of reform that the legislature is willing to participate in, it is up to the courts to bring felony murder into accord with other jurisdictions and countries around the world.[297]

CONCLUSION

In *Auman v. People*,[298] the Colorado Supreme Court expanded liability and held that an arrest, as a matter of law, does not terminate liability for purposes of felony murder when a co-felon is still in the immediate flight stage.[299] The court increased liability for felony murder, ignoring the elements of proximate cause, such as foreseeability and intention, and refused to acknowledge an intervening cause.[300] Results such as *Auman*, are illogical and legally unsound when viewed in light of the history and justifications of the felony murder doctrine.[301] The felony murder rule should not be extended beyond the purpose for which it was designed to serve.[302] Holding Auman liable for the death of Officer VanderJagt was an illogical extension of the felony murder rule.[303] Further abuse of the doctrine can be avoided if the Colorado felony murder statute is solidified in regards to placing a well-defined limitation on the immediate flight stage.

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296. *See* Fletcher, *supra* note 264, at 420.
297. *See id.*; *see supra* Part IV; *see also* GEORGE FLETCHER, RETHINKING CRIMINAL LAW 321-40 (1978) (discussing French, German and Soviet homicide laws).
298. 109 P.3d 647 (Colo. 2005).
299. *Auman*, 109 P.3d at 650.
300. *See supra* Part III.A.
301. *See supra* Part III.B.
302. *See id.*
303. *See generally* DRESSLER, *supra* note 2, at 516-17 (explaining that the deterrence rationale does not, in fact, deter accidental killings during felonies).

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