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### MAPPING AMERICAN CRIMINAL LAW Variations Across the 50 States: Ch. 5 Felony-Murder Rule

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# **MAPPING AMERICAN CRIMINAL LAW**

## **VARIATIONS AMONG THE 50 STATES**

### **Ch. 5 Felony-Murder Rule**

Paul H. Robinson  
Tyler Scot Williams

January 2, 2017

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## **5. FELONY-MURDER RULE**

The defendant plans to rob a liquor store by brandishing a pen knife to the clerk. If the sight of the knife does not induce the clerk to cooperate, defendant plans to immediately flee, an assumption that the clerk probably has a gun. When he enters the store, the clerk is not in fact intimidated and the defendant turns to leave but the clerk quickly grabs his gun and leaps over the counter but his gun discharges as he leaps the

ends up shooting himself in the leg. Because the bullet hits a vein, he bleeds to death before surgeons can repair the injury.

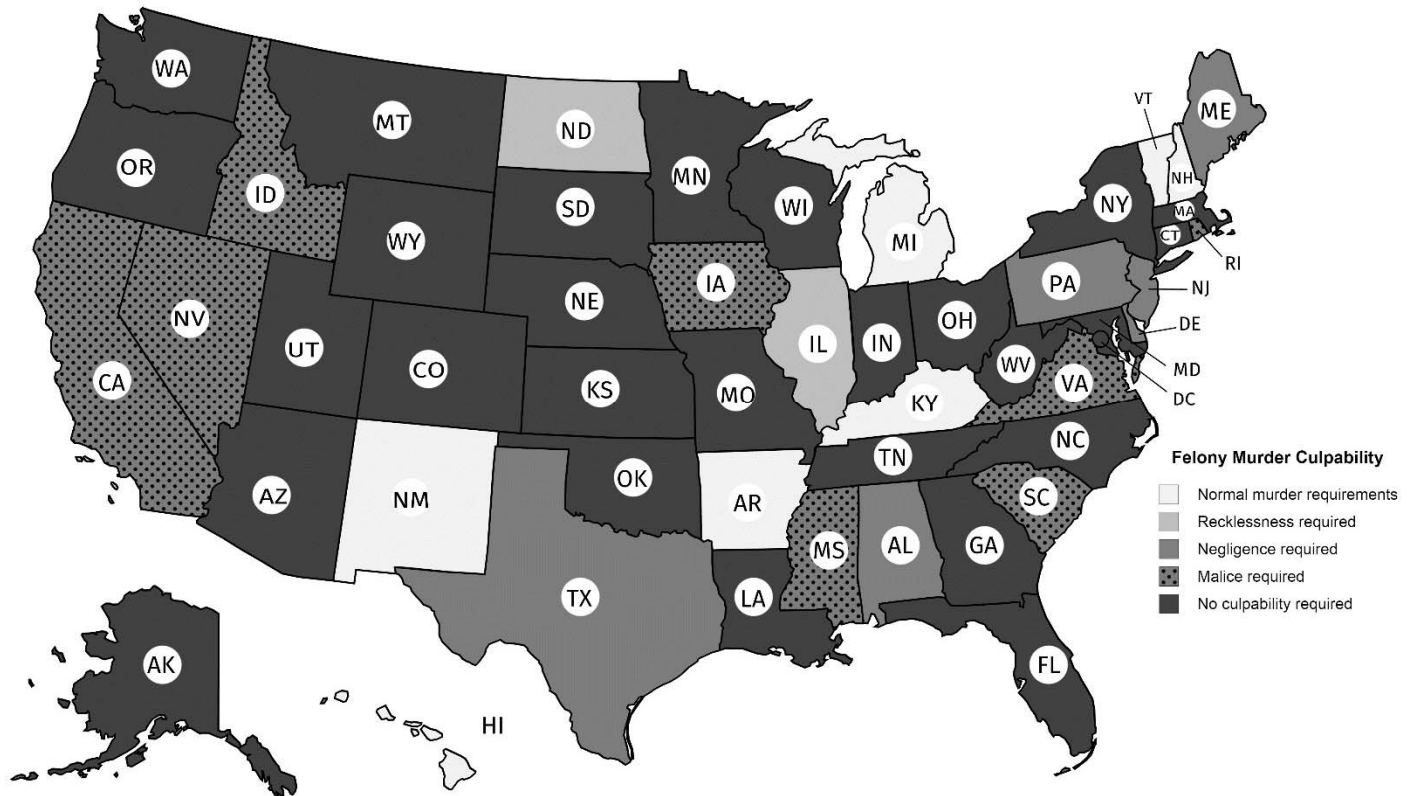
Under the standard scheme for graded homicide, the defendant's liability will mirror his level of culpability as to causing the death. These facts, when he robbed the liquor store brandishing his pen knife, he might have been only negligent (or less) or at most reckless as to causing the death. That is, a jury may conclude that he was aware of a substantial risk that his conduct in entering the store with the pen knife he created a substantial risk of causing death or, if was not aware of this, that a reasonable person would have been, or they might even conclude that a even reasonable person would not have thought that such conduct created a substantial risk of causing death. Depending on the conclusion the jury reached, the defendant would be held liable for manslaughter, negligent homicide, or no homicide, respectively.<sup>1</sup> (He obviously will be liable for his attempted robbery.)

Under the felony-murder rule, however, the defendant will be liable for murder on these facts, because he caused the death of another person in the course of committing a felony. His culpability level as to causing the death becomes irrelevant. In its strictest form, the rule essentially imputes to the defendant the standard culpability required for murder – typically intentionally or knowingly causing the death – based upon his commission of the underlying felony. The states may be divided into five categories for the approach they take in felony-murder cases, as presented in the map below.<sup>2</sup>

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<sup>1</sup> See PAUL ROBINSON & MICHAEL CAHILL, CRIMINAL LAW 15.1, 15.2 (2d ed., 2012).

<sup>2</sup> What is described here might be called the "aggravation of culpability" aspect of felony-murder rule. The traditional rule also has a "complicity aspect," which applies the same imputation of murder culpability to all accomplices in the underlying felony. There exists significant diversity among the states on how they deal with this aspect of the felony-murder rule as well. See PAUL ROBINSON & MICHAEL CAHILL, CRIMINAL LAW 15.3 (2d ed., 2012).



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## A. Normal Murder Requirements

The first group, represented on the map without shading, has effectively rejected the felony-murder rule. These seven jurisdictions either do not have a felony murder rule or, if they do have felony-murder, the culpability required for it is the same as that required for murder liability. In other words, their felony-murder rule does not expand murder liability to actors other than those liable for murder. Arkansas, Hawaii, Kentucky, Michigan, New Hampshire, New Mexico, and Vermont take this view.<sup>3</sup> Each of the states takes a somewhat different approach in their murder formulation.<sup>4</sup>

<sup>3</sup> Ark. Code Ann. § 5-10-102 (2006); Ark. Code Ann. § 5-10-103 (2006); Haw. Rev. Stat. § 707-701 (2006) (no felony murder rule); Ky. Rev. Stat. Ann. § 507.020 (1984) (no felony murder rule); *People v. Aaron*, 409 Mich. 672, 708-09, 299 N.W.2d 304 (1980); N.H. Rev. Stat. Ann. § 630:1-b (1974); N.H. Rev. Stat. Ann. § 626:7 (2) (1971); N.M. Stat. § 30-2-1 (1978); *State v. Ortega*, 112 N.M. 554, 563, 817 P.2d 1196, 1205 (1991); *State v. Doucette*, 143 Vt. 573, 579, 470 A.2d 676, 680 (1983), from Guyora Binder, *Felony Murder* 183-89 (2012).

<sup>4</sup> “A person commits the offense of murder in the first degree if the person intentionally or knowingly causes the death of: (a) More than one person in the same or separate incident; (b) A law enforcement officer, judge, or prosecutor arising out of the performance of official duties; (c) A person known by the defendant to be a witness in a criminal prosecution and the killing is related to the person's status as a witness; (d) A person by a hired killer, in

The effect of this approach is consistent with that recommended by the Model Penal Code, which defines murder as follows:

Section 210.2. Murder.

(1) Except as provided in Section 210.3(1)(b), criminal homicide constitutes murder when:

- (a) it is committed purposely or knowingly; or
- (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. *Such 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. . . .*

Notice that the last sentence of subsection (1)(b) seems to provide something like a felony-murder rule: it allows the recklessness and indifference that would constitute murder under subsection (1)(b) to be presumed under felony-murder-like conditions. However, the practical effect of this apparent presumption is essentially vitiated by Model Penal Code section 1.12(5)(b), which defines the effect of presumptions in such a way as to render them of little practical effect. The jury is still instructed that they must find the recklessness and extreme indifference required for murder beyond a reasonable doubt.

## B. Recklessness Required

Two other jurisdictions, represented on the map with light shading – Illinois and North Dakota<sup>5</sup> – do have true felony-murder rules, but their rules are formulated in such

Except as provided in section 707-701, a person commits the offense of murder in the second degree if the person intentionally or knowingly causes the death of another person.” Haw. Rev. Stat. Ann. § 707-701.5 (West).

“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 . . . .” Ark. Code Ann. § 5-10-102 (West).

“Murder in the first degree is the killing of one human being by another without lawful justification or excuse, by any of the means with which death may be caused . . . in the commission of or attempt to commit any felony . . . .” N.M. Stat. Ann. § 30-2-1 (West).

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which event both the person hired and the person responsible for hiring the killer shall be punished under this section; (e) A person while the defendant was imprisoned . . . .” Haw. Rev. Stat. Ann. § 707-701 (West). “. . .

“[P]roof that a killing occurred during the commission or attempted commission of a felony will no longer suffice to establish murder in the first degree. In addition to proof that the defendant caused (or aided and abetted) the killing, . . . there must be proof that the defendant intended to kill (or was knowingly heedless that death might result from his conduct). An unintentional or accidental killing will not suffice [for felony murder liability.]” *State v. Ortega*, 1991-NMSC-084, 112 N.M. 554, 563, 817 P.2d 1196, 1205.

“[T]he prosecution [must] prove the defendant acted with the mens rea commensurate with second-degree murder to secure a felony-murder conviction . . . .” *State v. Marquez*, 2016-NMSC-025, 376 P.3d 815, 833.

<sup>5</sup> See 720 Ill. Comp. Stat. 5/9-1 (a) (3) (2010); 720 Ill. Comp. Stat. 5/2-8 (1996); 720 Ill. Comp. Stat. 5/9-1 (a) (2) (2010); 720 Ill. Comp. Stat. 5/9-1 (1961), Illinois Laws 1961, 1983, § 9-1 (Criminal Code of 1961 committee a way as to require proof of at least recklessness as to causing the death of another human being in the course of committing a felony. Without the felony-murder rule, such actors would be liable for a lesser offense of reckless homicide or manslaughter. Again, the two jurisdictions take different approaches in reaching a similar result.<sup>6</sup>

### C. Negligence Required

Six jurisdictions, with medium shading on the table – Alabama, Delaware, Maine, New Jersey, Pennsylvania, and Texas<sup>7</sup> – impose telling-murder liability but only on actors for at least negligent as to causing the death of another human being in the course of felony. Without a felony-murder rule, an actor in these jurisdictions might otherwise be liable for negligent homicide or involuntary manslaughter. The jurisdictions reach this result through a number of different formulations.<sup>8</sup>

comment at 15); *People v. McEwen* 157, 510 N.E.2d 74,79 Ill. App. 3d 222, 228-29 (Ill. App. Ct. 1987); *People v. Guest*, 115 Ill.2d 72, 503 N.E.2d 255 (1986); N.D. Cent. Code § 12.1-02-02.3 (1973); N.D. Cent. Code § 12.1-02-02.1, 2.2 (1973); N.D. Cent. Code § 12.1-16-01 (1993).

<sup>6</sup> “A person is guilty of murder . . . if the person . . . [a]cting either alone or with one or more other persons, commits or attempts to commit treason, robbery, burglary, kidnapping, felonious restraint, arson, gross sexual imposition, a felony offense against a child . . . , or escape and, in the course of and in furtherance of such crime or of immediate flight therefrom, the person or any other participant in the crime causes the death of any person.” N.D. Cent. Code Ann. § 12.1-16-01 (West).

“For the purposes of this title, a person engages in conduct . . . 'Willfully' if he engages in the conduct intentionally, knowingly, or recklessly. . . . If a statute or regulation thereunder defining a crime does not specify any culpability and does not provide explicitly that a person may be guilty without culpability, the culpability that is required is willfully.” N.D. Cent. Code Ann. § 12.1-02-02 (West).

<sup>7</sup> Ala. Code § 13A-6-1 (2006); Ala. Code § 13A-6-2 (2006); Ala. Code § 13A-6-2 (2006) (Official Commentary, 256); *Ex parte Mitchell*, 936 So. 2d 1094 (Ala. Crim. App. 2006); *Witherspoon v. State*, 2009 WL 1164989 (Ala. Crim. App. 2009); *Lewis v. State*, 474 So. 2d 766 (Ala. Crim. App. 1985); Ala. Code § 13A-2-4 (b) (1977); Del. Code Ann. tit. 11 § 636 (2009); Del. Code Ann. tit. 11 § 635 (2004); Me. Rev. Stat. Ann. tit. 17-A § 202 (1991); N.J. Stat. Ann. § 2C:2-2 (1981); N.J. Stat. Ann. § 2C:2-3 (1978); *State v. Martin*, 119 N.J. 2, 31, 32, 573 A.2d 1359 (1990); 18 Pa. Cons. Stat. § 302 (A) (1973); 18 Pa. Cons. Stat. § 2501 (1973); 18 Pa. Cons. Stat. § 2502 (1978); *Commonwealth v. Hasein*, 490 A.2d 438, 454, 340 Pa. Super. 318, 348 (Pa. Super. Ct. 1985); Tex. Penal Code Ann. § 19.01 (1993); Tex. Penal Code Ann. § 6.02 (2005); *State v. Kuykendall*, 609 S.W.2d 791 (Tex. Crim. App. 1980); *State v. Rodriguez*, 953 S.W.2d 342 (Tex. App. 1997).

<sup>8</sup> “A person is guilty of felony murder if acting alone or with one or more other persons in the commission of, or an attempt to commit, or immediate flight after committing or attempting to commit, murder, robbery, burglary, kidnapping, arson, gross sexual assault, or escape, the person or another participant in fact causes the death of a human being, and the death is a reasonably foreseeable consequence of such commission, attempt or flight. . . . It is an affirmative defense to prosecution under this section that 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. Rev. Stat. tit. 17-A, § 202.

“A person is guilty of criminal homicide if he intentionally, knowingly, recklessly or negligently causes the death of another human being. . . . Criminal homicide shall be classified as murder, voluntary manslaughter, or involuntary manslaughter.” 18 Pa. Stat. and Cons. Stat. Ann. § 2501 (West).

“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[, defined as] engaging in or being an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit

## D. Malice Required

The eight jurisdictions shown on the map with medium shading plus dots impose felony-murder liability but nonetheless require that the government prove malice: California, Idaho, Iowa, Mississippi, Nevada, Rhode Island, South Carolina, and Virginia.<sup>9</sup> Malice is generally presumed when the actor should have foreseen the danger in his conduct—that is, when the actor was *negligent* in causing the death, perhaps by engaging in inherently dangerous conduct or conduct dangerous under the circumstances. Possibly, in some jurisdictions, malice may be imputed to the actor even when the actor could not have foreseen the danger. In such cases, felony murder per se is a strict-liability offense.<sup>10</sup> In other words, these “malice” jurisdictions end up requiring something in the nature of negligence or less, although without the clear and specific definitions typically found in modern American criminal codes using the Model Penal Code’s culpability definitions. Again, the actual formulations within this group jurisdictions varies considerably.<sup>11</sup>

robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.” 18 Pa. Stat. and Cons. Stat. Ann. § 2502 (West).

<sup>9</sup> Cal. Penal Code § 189 (2002); *People v. Washington*, 62 Cal. 2d 777 (1965); *People v. Chun*, 203 P.3d 425 (Cal. 2009); Idaho Code Ann. § 18-4001, 4003 (2002); *State v. Lankford*, 781 P.2d 197, 116 Idaho 860, 866 (1989); Iowa Code Ann. § 707.1; *State v. Taylor*, 287 N.W.2d 576, 577 (Iowa 1980); *State v. Ragland*, 420 N.W.2d 791 (Iowa 1988) (overruled on other grounds); *State v. Bennet*, 503 N.W.2d 42, 45 (Iowa Ct. App. 1993); *State v. Heemstra*, 721 N.W.2d 554 (Iowa 2006); Miss. Code Ann. § 97-3-19(c) (2004); *Boyd v. State*, 2006-KAA-00562-SCT, 977 S. 2d 329 (Miss. 2008); *Lee v. State*, 98-CA-00015-SCT, 759 S. 2d 390 (Miss. 2000); Nev. Rev. Stat. § 200.010 (2005); *Nay v. State*, 123 Nev. 326, 332, 167 P.3d 430, 434 (2007); *Labastida v. State*, 986 P.2d 443, 115 Nev. 298 (1999); R.I. Gen. Laws § 11-23-1 (2008); *In re Leon*, 122 R.I. 548, 553, 410 A.2d 121, 124, quoting *Perkins*, *Criminal Law* 44 (2d ed. 1969); S.C. Code Ann. § 16-3-10 (1962); *State v. Norris*, 328 S.E.2d 339, 285 S.C. 86, 91 (1985) (overruled on

other grounds); *Gore v. Leeke*, 199 S.E.2d 755, 261 S.C. 308 (1973); *Lowry v. State*, 657 S.E.2d 760, 376 S.C. 499 (2008); S.C. Jury Instr.–Crim. § 2–1, SC JI CRIMINAL § 2–1 (Lexis 2007) (jury instructions on murder); S.C. Jury Instr.–Crim. § 2–3, SC JI CRIMINAL § 2–3 (Lexis 2007) (jury instructions on felony murder); Va. Code Ann. § 18.2–33 (1999); *Wooden v. Commonwealth*, 284 S.E.2d 811, 814, 222 Va. 758, 762 (1981); *Cotton v. Commonwealth*, 35 Va.App. 511, 515, 546 S.E.2d 241, 243 (Va. Ct. App. 2001) (quoting John L. Costello, *Virginia Criminal Law and Procedure* § 3.4–3, 33 (2d ed. 1995)); accord *Kennemore v. Commonwealth*, 653 S.E.2d 606, 50 Va. App. 703 (Va. Ct. App. 2007); see also *Guyora Binder, Felony Murder 186* (2012) (describing these jurisdictions as conditioning felony murder on malice, which is characterized by “the imposition of danger”).

<sup>10</sup> See *GUYORA BINDER, FELONY MURDER 186–89* (2012) (describing the various constructions of malice in these jurisdictions).

<sup>11</sup> “Murder is the unlawful killing of a human being . . . with malice aforethought . . .” Idaho Code Ann. § 18-4001 (West). “Any murder committed in the perpetration of, or attempt to perpetrate, aggravated battery on a child under twelve (12) years of age, arson, rape, robbery, burglary, kidnapping or mayhem, or an act of terrorism, . . . or the use of a weapon of mass destruction, biological weapon or chemical weapon, is murder of the first degree.” Idaho Code Ann. § 18-4003 (West). “The term malice does not necessarily import ill will toward the individual injured, but signifies rather a general malignant recklessness toward the lives and safety of others. Malice may be shown from the fact that an unlawful killing took place during the perpetration or attempted perpetration of the crime of robbery.” *State v. Lankford*, 116 Idaho 860, 866, 781 P.2d 197, 203 (1989) (quoting jury instructions in approval).

“The unlawful killing of a human being with malice aforethought is murder. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing, or committed in

## **E. No Culpability Required**

A final group of twenty-eight states appear in black on the map: Alaska, Arizona, Colorado, Connecticut, District of Columbia, Florida, Georgia, Indiana, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, New York, North Carolina, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Utah, Washington, West Virginia, Wisconsin, and Wyoming.<sup>12</sup> These jurisdictions impose felony-murder liability on actors who unlawfully cause the death of a human being in the course of committing felonies, even where the actor was not negligent in causing the death, including actors who reasonably believe that their participation in the felony does not impose risk of death. These jurisdictions take variety of different approaches in reaching this result.<sup>5</sup>

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<sup>5</sup> “A person is guilty of murder when, acting either alone or with one or more persons, such person commits or attempts to commit robbery, home invasion, burglary, kidnapping, sexual assault in the first degree, aggravated sexual assault in the first degree, sexual assault in the third degree, sexual assault in the third degree with a firearm, escape in the first degree, or escape in the second degree and, in the course of and in furtherance of such crime or of flight therefrom, such person, or another participant, if any, causes the death of a person other than one of the participants, except that in any prosecution under this section, in which the defendant was not the only participant in the underlying crime, it shall be an affirmative defense that the defendant: (1) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and (2) was not armed with a deadly weapon, or any dangerous instrument; and (3) had no reasonable ground to believe that any other participant was armed with such a weapon or instrument; and (4) had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.” Conn. Gen. Stat. Ann. § 53a-54c.

“A person commits the crime of murder in the second degree if he [k]nowingly causes the death of another person or, with the purpose of causing serious physical injury to another person, causes the death of



## F. Observations and Speculations

the perpetration of, or attempt to perpetrate, any arson . . . , rape, any degree of sexual assault or child molestation, burglary or breaking and entering, robbery, kidnapping, or committed during the course of the perpetration, or attempted perpetration, of felony manufacture, sale, delivery, or other distribution of a controlled substance otherwise prohibited by [state law], . . . is murder in the first degree.” 11 R.I. Gen. Laws Ann. § 11-23-1 (West). “Homicide is murder if the death results from the perpetration or attempted perpetration of an inherently dangerous felony.” In re Leon, 122 R.I. 548, 553, 410 A.2d 121, 124 (1980) (quoting Perkins, Criminal Law 44 (2d ed. 1969)).

<sup>12</sup> See, e.g., Conn. Gen. Stat. Ann. § 53a-54c; D.C. Code Ann. § 22-2101; Fla. Stat. Ann. § 782.04; Md. Code Ann., Crim. Law § 2-201; Mo. Ann. Stat. § 565.021; Okla. Stat. Ann. tit. 21, § 701.7; see also GUYORA BINDER, FELONY MURDER 183–89 (2012) (sorting the nation’s jurisdictions by what culpability requirement is required for felony murder liability).

What accounts for the relatively broad level of disagreement among the states over the felony-murder rule? One can see the appeal of the many sides in this disagreement. On the one hand, the rule has a certain appeal to it: the person who undertakes a serious crime, felony, someone who is already demonstrated their willingness to disregard societal norms and to put their interests ahead of others. Why shouldn’t they be criminally liable for everything that follows?

On the other hand, criminal law has increasingly tried to capture the blameworthiness nuance of each offense situation. That is, the liquor store robber who goes in to the store with the intention of stabbing the clerk to death and the robber in our hypothetical at the start of the chapter, who goes in with his pen knife and ready to run away, are people of two very different degrees moral blameworthiness. A just criminal law is one that will distinguish these two cases and give greater punishment, as deserved, the robber who intends the death. The jurisdictions that have rejected the felony-murder rule may do so on this reasoning.

Notice that the Model Penal Code formulation recognizes that one can have the blameworthiness of an intentional murderer one creates a substantial risk of causing death “under circumstances manifesting an extreme indifference the value of human

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another person; . . . or [c]ommits or attempts to commit any felony, and, in the perpetration or the attempted perpetration of such felony or in the flight from the perpetration or attempted perpetration of such felony, another person is killed as a result of the perpetration or attempted perpetration of such felony or immediate flight from the perpetration of such felony or attempted perpetration of such felony.” Mo. Ann. Stat. § 565.021.

“A person . . . commits the crime of murder in the first degree, regardless of malice, when that person or any other person takes the life of a human being during, or if the death of a human being results from, the commission or attempted commission of murder of another person, shooting or discharge of a firearm or crossbow with intent to kill, intentional discharge of a firearm or other deadly weapon into any dwelling or building . . . , forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, eluding an officer, first degree burglary, first degree arson, unlawful distributing or dispensing of controlled dangerous substances or synthetic controlled substances, trafficking in illegal drugs, or manufacturing or attempting to manufacture a controlled dangerous substance.” Okla. Stat. Ann. tit. 21, § 701.7.

life” and that such recklessness and indifference might exist in some felony-murder cases. In other words, there is a kernel of truth to the fact that the felony-murder situation can, under the circumstances, raise a reckless killing to the same level as intentional or knowing killing. This kernel may have helped sustain the felony-murder rule even in those jurisdictions committed to following a principle of strict proportionality between the extent of punishment and the extent of punishment.

The moral complexity in the situation may help explain the many jurisdictions that seek some middle ground between the abolitionists and the adherence to the strict rule, that is, those jurisdictions that keep the rule but limited by requiring some minimum culpability as to causing the death – recklessness, malice, or at least negligence. Perhaps these jurisdictions see their limitation as excluding from the operation of the rule what would be the most egregious injustices those having the results of the rule at least in practice generally approximate the proportionality between blameworthiness and punishment.

The analysis above has been one that focuses exclusively on desert as a distributive principle, but it seems very likely that many, if not most, of the jurisdictions are influenced by alternative distributive principles, especially one of general deterrence.<sup>6</sup> A felony-murder rule may be attractive under a general deterrence program because the threat of greater punishment may be thought to induce felons to be more careful, and indeed may provide some additional disincentive for the commission of the underlying felony itself. On the other hand, as has been detailed elsewhere, it may be unrealistic to think that such calculations by lawmakers can have any real-world effect. For example, given the diversity among the states, how likely is it that the potential liquor store robbers out there will even know what the felony murder rule is in their jurisdiction?<sup>7</sup>

The trend appears to be a move away from distributive principles that conflict with just deserts, as reflected, for example, in the 2007 amendment to the Model Penal Code’s “purposes” section – the only amendment to the Model Code since its promulgation by the American Law Institute in 1962.<sup>8</sup> If this be the case, then one might expect the number of abolition states to grow, or at least to expect a number of strict application states to migrate to groups that provide greater limitations on the rule. Of course, this assumes that legislatures actively re-examine the appropriateness of their

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<sup>6</sup> See, e.g., Model Penal Code §1.02 (2007) (defining the general purposes of the Model Code’s provisions governing the sentencing and correction of individual offenders to include goals of rehabilitation, general deterrence, incapacitation, and restorative justice, “provided that these goals are pursued within the boundaries” of what is required by desert).

<sup>7</sup> See generally PAUL H. ROBINSON, DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH 21-98 (2008) (discussing general deterrence).

<sup>8</sup> See *id.* At 240-246; see generally Paul H. Robinson, *The A.L.I.’s Proposed Distributive Principle of “Limiting Retributivism”: Does It Mean in Practice Anything Other Than Pure Desert?*, 7 *Buff. Crim. L. Rev.* 3 (2003).

criminal law rules, when the truth may be that the force of inertia is greater than the force of regular re-examination.<sup>9</sup>

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<sup>9</sup> Robinson, *The Rise and Fall and Resurrection of American Criminal Codes*, Conference Keynote Address, 53 U. Louisville Law Review 173-191 (2015); Robinson Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 Hastings Law Journal 633-655 (2005).

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## PREFACE

It is common for criminal law scholars from outside the United States to discuss the “American rule” and compare it to the rule of other countries.<sup>1</sup> As this volume makes clear, however, there is no such thing as an “American rule.” Each of the states, plus the District of Columbia and the federal system, have their own criminal law; there are fifty-two American criminal codes.

American criminal law scholars know this, of course, but they too commonly speak of the “general rule” as if it reflects some consensus or near consensus position among the states. But the truth is that the landscape of American criminal law is one of almost endless diversity, with few, if any, areas in which there is a consensus or near consensus. Even most American criminal law scholars seem to fail to appreciate the enormous diversity and disagreement among the fifty-two American jurisdictions.

The best one can do in most instances is to talk of a “majority rule,” but even this is extremely difficult business. Every jurisdiction recognizes a person’s right to defend himself against unlawful force, for example. But what is the “majority rule” in the United States in the formulation of that defense? Jurisdictions disagree on a wide variety of issues within self-defense, most prominently: (a) What constitutes the “unlawful force” that triggers a right to use defensive force? (b) What temporal requirement must be met for an actor’s conduct to be truly “necessary” at that time? (c) What amount of force may be used? (d) When may deadly force may be employed? (e) When may an initial aggressor claim self-defense? (f) What is the legal effect, if any, of the defendant provoking the encounter? (g) What is the legal effect of mutual combat on self-defense? (h) Is there a right to resist an unlawful arrest? (i) Is there a duty to retreat from unlawful aggression before using deadly force?<sup>2</sup> There is disagreement among the states on every one of these issues.<sup>3</sup>

Further, as some of us have demonstrated elsewhere, even when the research is done, it is not so easy to construct the majority American rule. To continue with the self-defense example above, not only do American jurisdictions disagree on each of the self-defense issues listed above, but the pattern of states making up the majority view on each individual issue varies from issue to issue. In other words, at the end of the day the “majority rule” for self-defense in the United States is a rule that no jurisdiction actually adopts. It is necessarily a composite of the American “majority rule” on each of the sub-issues.<sup>4</sup>

Unfortunately, there has been little work done to map the enormous diversity among the states, perhaps because it is an extremely burdensome project, in part for the reasons just noted. Every legal issue requires a major research project investigating the criminal codes and/or caselaw of all fifty-two American jurisdictions, and a single legal doctrine may have a half-dozen dozen sub-issues that must each be separately resolved.

While the paucity of such diversity research is understandable, it is nonetheless most regrettable, for it is the matters of disagreement that often point to the most interesting issues for scholars. Why is it that there is disagreement on a particular point? Why hasn't a consensus formed? What are the advantages and disadvantages of the each of the alternative positions such that none have won the day? Or, is it simply out of ignorance among the legislatures of the alternative positions that has perpetuated the continuing differences? That is, does diversity exist not because of genuine disputes about which position is best but rather because there is simply no debate on the issue because the conflicting positions are not readily known?

The goal of this volume is, first, to raise awareness of the enormous diversity among the states on issues across the criminal law landscape, to document this diversity with a host of specific illustrations on a wide range of issues, to encourage criminal law scholars to investigate these and the many other points of disagreement that exist among the states, and to encourage legislatures to look to this new diversity scholarship and to the positions taken by other states when the legislature sets out to codify or recodify their criminal law (or to encourage judges to do the same in those jurisdictions that continue to allow judicial criminal law making<sup>5</sup>).

In each of the next thirty-two chapters, we examine the different areas of American criminal law and identify the major groupings among the states on an issue in each area. This is hardly a comprehensive list of the issues on which there are disagreement; it is only a representative sampling. Indeed, we know of no area of American criminal law on which there is not disagreement among the jurisdictions. The only American criminal law universal is its universal diversity.

Nor are the points of disagreement that we map the only points of diversity within each of the thirty-two issues that we examine. On the contrary, we commonly pick one particular point of disagreement among the states that seems particularly interesting or important, but it is commonly only one of many points of inter-state disagreement on the issue.

For the issue that we take up in each chapter, we group all the American jurisdictions according to the position they take. However, there is such diversity in approach that even jurisdictions within the same group commonly take slightly different approaches (which we generally attempt to document in footnotes). Thus, even our groupings of states, usually three to seven groups on each issue, understates the extent of American criminal law diversity.

Each chapter provides a map of the United States with each of the states visually coded according to its approach to the issue. These maps, the reader will see, often raise interesting hypotheses about geographic or other state factors that might explain the patterns of agreement and disagreement (red states versus blue states, rural versus urban, rich versus poor, West Coast versus East Coast, etc.). The last two chapters of the book illustrate how this mountain of research and the state groupings for each issue can be used by scholars in many disciplines – including political scientists, criminologists, criminal law scholars, and sociologists, among others – to investigate alternative hypotheses about why we see the patterns of agreement and disagreement that we see.