

University of Pennsylvania Carey Law School

## Penn Law: Legal Scholarship Repository

---

Faculty Scholarship at Penn Law

---

2006

### Murder after the Merger: A Commentary on Finkelstein

Kimberly Kessler Ferzan

*University of Pennsylvania Carey Law School*

Follow this and additional works at: [https://scholarship.law.upenn.edu/faculty\\_scholarship](https://scholarship.law.upenn.edu/faculty_scholarship)



Part of the [Criminal Law Commons](#), and the [Law and Philosophy Commons](#)

---

#### Repository Citation

Ferzan, Kimberly Kessler, "Murder after the Merger: A Commentary on Finkelstein" (2006). *Faculty Scholarship at Penn Law*. 2589.

[https://scholarship.law.upenn.edu/faculty\\_scholarship/2589](https://scholarship.law.upenn.edu/faculty_scholarship/2589)

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Law by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact [PennlawIR@law.upenn.edu](mailto:PennlawIR@law.upenn.edu).

## Murder after the Merger: A Commentary on Finkelstein

Kimberly Kessler Ferzan<sup>†</sup>

Critics have long sought the abolition of the felony murder rule, arguing that it is a form of strict liability.<sup>1</sup> Despite widespread criticism, the rule remains firmly entrenched in many states' criminal statutes.<sup>2</sup> In "Merger and Felony Murder,"<sup>3</sup> Professor Claire Finkelstein reconciles herself to the current state of affairs, and seeks to make "an incremental improvement" to the doctrine. She offers a new test for felony murder's merger limitation, which she believes will make merger less "mysterious" and its application "substantially clearer."<sup>4</sup> Briefly put, Finkelstein claims that to understand merger, we must recognize that it is an analytically necessary part of felony murder that the defendant commit two acts—a felony and a killing.<sup>5</sup> Thus, a killing merges with the felony when we have only one act

---

<sup>†</sup> Associate Professor of Law and Co-Director, Institute for Law and Philosophy, Rutgers University, School of Law—Camden. An earlier version of this commentary was presented at the Special Part Conference at Louisiana State University Law School. I would like to thank the conference organizers, Antony Duff and Stuart Green, for inviting me to participate. I would also like to thank Doug Husak, Claire Finkelstein, Dennis Patterson, and Rick Singer for helpful suggestions, and Sunny Rubino for research assistance.

1. See Guyora Binder, *The Origins of the American Felony Murder Rules*, 57 *Stan. L. Rev.* 59, 60 n.2 (2004) (citing commentators making this claim). Binder's thorough historical analysis dispels the myth that our current felony murder statutes derive from an English common law rule that held felons strictly liable for unintended killings. See *id.* Of course, whatever felony murder's historical origins, it is a separate question whether jurisdictions have remained faithful to felony murder's original rationale or have expanded felony murder's application to include strict liability. For example, California courts employ strict liability language. E.g., *People v. Stamp*, 82 Cal. Rptr. 598, 603 (Cal. Ct. App. 1969) ("a felon is held strictly liable for All killings committed by him or his accomplices in the course of the felony").

2. Joshua Dressler, *Understanding Criminal Law* § 31.06 (3d ed. 2001).

3. Claire Finkelstein, *Merger and Felony Murder*, in *Defining Crimes: Essays on the Special Part of the Criminal Law* 218, 219 (R.A. Duff & Stuart P. Green eds., 2005).

4. *Id.* at 220-21.

5. *Id.* at 229.

instead of two.<sup>6</sup> To make this determination, Finkelstein articulates a “redescriptive” test that tells us when the felony can be redescribed as a killing.<sup>7</sup>

Despite this project’s potential, I believe that Finkelstein’s proposed merger test, far from improving our understanding of merger, further confuses the doctrine. Finkelstein starts from the false conceptual premise that felony murder requires both a felony and a killing. There is simply no support for this claim. Nor does the promise of this project bear out in the application of Finkelstein’s test to actual cases. First, the test cannot be squared with two other limitations on felony murder liability. Second, Finkelstein’s test is guilty of the very arbitrary application for which she criticizes other tests. Finally, Finkelstein unsettles the law by turning paradigmatic cases on their heads. Finkelstein’s theory, while claiming to refine felony murder, ultimately abolishes the doctrine as we know it and replaces it with a doctrine that seems even more unacceptable.

In what follows, I briefly explain the current limitations on the application of felony murder, including the merger doctrine, and set forth Finkelstein’s argument against current merger tests and her proposed “redescriptive” test for merger. I then demonstrate that Finkelstein’s initial claim about the structure of felony murder is unsupported, and that her test cannot be reconciled with other felony murder limitations, is arbitrary and ad hoc, and leads to counterintuitive results in paradigmatic cases.

Nearly every state criminalizes felony murder, punishing, as murder, killings that result from the defendant’s commission of all, or at least some enumerated, felonies.<sup>8</sup> To limit the broad reach of such provisions, many courts have engrafted restrictions onto these rules. The first common restriction is that the underlying felony has

---

6. *Id.* at 230.

7. *Id.*

8. Dressler, *supra* note 2, § 31.06[A].

to be inherently dangerous.<sup>9</sup> A second typical restriction is that the killing must be in furtherance of the felony, thus limiting liability when a felon is killed or when a police officer does the killing.<sup>10</sup>

Finally, in some jurisdictions, there is no felony murder liability when the underlying felony merges.<sup>11</sup> To explicate, if the defendant intentionally kills his victim, he must first point the gun at the victim to accomplish this feat. This action, assault with a deadly weapon, is itself a felony. If this crime could serve as the underlying felony for felony murder, the prosecution would never have to prove that the defendant *intentionally* killed the victim. Rather, the prosecutor could simply bootstrap from the assault charge to a felony murder charge. To prevent such a result, courts have held that some felonies *merge* into the homicidal act and cannot support felony murder liability.

In Finkelstein's view, the combination of the inherently dangerous test and the merger doctrine render felony murder ad hoc.<sup>12</sup> When both rules are applied, we are reminded of "Goldilocks and the Three Bears"—felony murder liability seems to exist only in an odd middle ground in which the felony is sufficiently serious to be deemed inherently dangerous but is not *too* serious because intentional homicides merge.<sup>13</sup>

To remedy this problem, Finkelstein focuses on the merger doctrine, for "[i]t is here that the felony murder rule encounters its greatest source of confusion, with results that sometimes border on incoherence."<sup>14</sup> She demonstrates the haphazard results brought about by California's integral/included in fact and independent felonious purpose tests.<sup>15</sup> These tests yield the asymmetric holdings that

---

9. See generally id. § 31.06[C][1].

10. See generally id. § 31.06[C][4].

11. See generally id. § 31.06[C][2].

12. Finkelstein, *supra* note 3, at 220 ("Not only do such results seem ad hoc, but it is hard even to imagine what a rationale for a doctrine with such wildly inconsistent outcomes could look like.").

13. *Id.*

14. *Id.* at 219.

15. *People v. Ireland*, 450 P.2d 580 (Cal. 1969); *People v. Burton*, 491 P.2d

active child abuse merges because the parent's intention is to assault but passive child abuse—i.e., failure to provide food and water—does not merge because the parent does not intend any assault.<sup>16</sup> Finkelstein also argues against Texas's same act doctrine because courts lack "the crucial underlying concept of an 'act'" rendering the theory inconsistent.<sup>17</sup> Another approach, deference to legislative judgment, fails according to Finkelstein, because it leaves unanswered whether the legislature had considered the possibility of merger and also threatens to abolish felony murder, as every instance of strict liability felony murder undermines the legislative proscription that murder requires purpose, knowledge, or extreme indifference.<sup>18</sup> Finally, Finkelstein critiques jurisdictions that do not apply merger because they leave open the possibility that intentional killings, provoked killings, and reckless killings may all be treated as felony murders.<sup>19</sup>

Finkelstein finds the root of the error to be functionalist reasoning, the view that felony murder is justified on deterrence grounds.<sup>20</sup> Finkelstein claims that felony murder, rather than being an instrument of deterrence, is a descendant of the Catholic doctrine that one is responsible for "all the bad effects of his intentional wrongdoing."<sup>21</sup> The conclusion implicit in Finkelstein's argument is this: because courts have constructed merger tests to serve deterrence rationales, such tests are doomed for failure.

---

793, 801 (Cal. 1971). The inconsistencies resulting from these tests were, in fact, recognized by the California Supreme Court when it abandoned both tests in favor of a case-by-case approach. *People v. Hansen*, 885 P.2d 1022 (Cal. 1994).

16. *People v. Smith*, 678 P.2d 886 (Cal. 1984); *People v. Shockley*, 145 Cal. Rptr. 200 (Cal. Ct. App. 1978).

17. Finkelstein, *supra* note 3, at 224. This was Texas's test. Like California, the Texas court recognized the inconsistency of the results, and altered its test. *Johnson v. State*, 4 S.W.3d 254, 257-58 (Tex. Crim. App. 1999) (limiting the applicability of the same act test).

18. Finkelstein, *supra* note 3, at 226.

19. *Id.* at 227.

20. *Id.* at 220, 229.

21. *Id.*

In Finkelstein's view, the rationale for the merger doctrine is not functional—it is “structural.”<sup>22</sup> According to Finkelstein, “it is an analytically necessary part of felony murder that there be, at a minimum, two separate things the defendant is doing: one that counts as a felony that is not a killing, and another that is a killing. Merger takes place when instead of two activities, we have only one.”<sup>23</sup>

Merger thus turns on a determination of whether there is one act or two,<sup>24</sup> and Finkelstein proposes the “redescriptive test” as the test of merger:

[I]f the act in virtue of which the defendant satisfies the offense definition for the predicate felony can itself be redescribed in terms of the resulting death, we have only one act under two descriptions [and thus, there is merger]. If, on the other hand, the act cannot be redescribed in terms of the victim's death, but the defendant did in fact cause the victim's death by performing some act, then the act whereby the defendant satisfies the predicate felony and the act whereby he caused the victim's death are separate [and thus, there is no merger].<sup>25</sup>

To illustrate, if the defendant commits arson and inadvertently kills someone in the building, the act by which the defendant is guilty of arson is the same act as the act by which the defendant kills the victim, and the arson merges.<sup>26</sup>

As Finkelstein recognizes, this redescriptive test runs into immediate difficulties. Under the Davidsonian account of action identity that she adopts, an action can always be redescribed in terms of its consequences.<sup>27</sup> But then, the

---

22. *Id.* at 220.

23. *Id.* at 229.

24. *Id.* at 230.

25. *Id.*

26. *Id.* at 231.

27. *Id.* Finkelstein asserts that Davidson's view is the “standard account,” *id.*, and does not defend it against other theories of action identity. In contrast to Davidson, Alvin Goldman claims that flicking a light switch and turning on a light are not the same action. Alvin I. Goldman, *A Theory of Human Action* 5 (1970). Why? Because the relationship between the two is asymmetric and

merger exception swallows the felony murder rule. In every case where felony murder might be thought to apply, the death is certainly a consequence of the commission of the felony.<sup>28</sup> To illustrate, Finkelstein presents a hypothetical case in which she decides to hold up a liquor store, points a gun at the cashier, and the gun accidentally discharges.<sup>29</sup> Because a consequence of “robbing the store” was “killing the cashier,” the redemptive test yields that the felonious action can be redescribed as a killing; thus, the robbery merges. Such a result is problematic, according to Finkelstein, because “a killing during an armed robbery is the classic case of felony murder.”<sup>30</sup>

To resolve this problem, Finkelstein amends Davidson’s test and argues that an action cannot be redescribed in terms of all of its consequences, at least insofar as we view the consequences of an action to be those things for which the action is a necessary antecedent (roughly, a but-for cause).<sup>31</sup> While rejecting the concept of proximate causation in favor of the language of redescription,<sup>32</sup> Finkelstein incorporates Hart and Honoré’s direct cause test into her theory of action identity.<sup>33</sup> The result is that a predicate felony cannot be redescribed as a

---

irreflexive. *Id.* That is, we cannot switch the order—I do not flick the switch by turning on the light (indicating an asymmetric causal relationship) and I do not turn on the light by turning on the light (thus it is irreflexive). *Id.* Hence, to Goldman, these items cannot be identical, and are therefore different actions. Of course, had Finkelstein adopted Goldman’s view, felonies would never merge because there would always be two actions.

28. Finkelstein, *supra* note 3, at 231.

29. *Id.* at 232.

30. *Id.*

31. *Id.* She presents the following example:

A stabs B, with the result that B is seriously wounded and must be rushed to the hospital. While in the hospital, C, a malicious interloper, disguises himself as a surgeon and intentionally operates badly on B, with the result that B dies. B’s dying is among the consequences of A’s stabbing B. But did A kill B? I do not think he did.

*Id.*

32. *Id.* at 232-35 & n.40 (“it seems to me more helpful to speak of redescription than of causation”).

33. *Id.* at 235 n.40; see generally H.L.A. Hart & Tony Honoré, *Causation in the Law* 68-83 (2d ed. 1985).

killing in those instances where Hart and Honoré would claim that a coincidence or a voluntary human actor intervened.

Finkelstein next applies her test to a host of cases. Kidnapping typically will not merge because the act of unlawfully “removing a person from her home does not carry death with it as among the ordinary consequences of the act.”<sup>34</sup> Moreover, when the kidnapper intentionally kills the victim, such a case will not merge because the defendant’s own voluntary act breaks the “redescriptive” chain.<sup>35</sup> Both active and passive child abuse cases will merge because in both instances, the natural consequence is the death of the child.<sup>36</sup> Finkelstein also claims that robberies and burglaries typically will not merge.<sup>37</sup>

Finally, Finkelstein addresses two seemingly peculiar features of her test. First, arsons, contrary to previous treatment, will now merge, and secondly, the redescriptive test will give different answers to the same underlying felony depending upon the act by which the defendant satisfies the offense definition.<sup>38</sup> Thus, a burglary perpetrated by breaking likely will not merge but a burglary perpetrated by remaining might.<sup>39</sup>

I must say that I admire the order that Finkelstein attempts to bring to merger. Bringing clarity to doctrinal chaos is an admirable goal. Finkelstein’s project is all the more worthwhile because, rather than make another cry for abolition that will fall upon deaf ears, she hopes to practically, if only incrementally, improve a problematic doctrine. Unfortunately, I believe that Finkelstein’s project is misconceived from the inception and that a theory of action identity has little to tell us about merger or felony murder.

---

34. Finkelstein, *supra* note 3, at 235.

35. *Id.*

36. *Id.* at 236.

37. *Id.* at 235-36.

38. *Id.* at 237-39.

39. *Id.* at 239.



Finkelstein's entire test and its later application depend on her claim that it is an "analytically necessary" part of felony murder that there be both a felony and a killing.<sup>40</sup> For this claim there is no support.<sup>41</sup> Finkelstein's move from the claim that felony murder is a descendant of the Catholic doctrine that one is responsible for all the bad *effects* of one's wrongful action to the claim that felony murder requires two separate *actions* is a non sequitur.<sup>42</sup> Indeed, if anything, Finkelstein's discussion of felony murder's ancestry seems to point in just the opposite direction. Why is it that felony murder requires two separate acts, as opposed to one wrongful act with bad effects? Finkelstein provides no argument. There is simply no reason to believe that felony murder requires both a felony and a killing.

Additionally, Guyora Binder's extensive study of felony murder rules does not support Finkelstein's claim. After examining the origins of felony murder statutes as they were promulgated in individual states, Binder's assessment is that "felony murder liability has no single rationale or function, no necessary form or scope."<sup>43</sup> Thus, the various and disparate uses of felony murder liability in individual states belie Finkelstein's broad generalization about the necessary structure of felony murder.

Even though the grounds for Finkelstein's redescriptive test are dubious, we may nevertheless wish to consider whether it is effective. Does it make merger less "mysterious" and "substantially clearer?"<sup>44</sup> I am afraid it does not.

---

40. *Id.* at 229.

41. In *Garrett v. State*, the Texas court faced the question of whether an aggravated assault could support felony murder. 573 S.W.2d 543 (Tex. Crim. App. 1978). The court noted that allowing this sort of bootstrapping would undermine the legislative intent, and thus, set forth a "same act" test. *Id.* at 546. In articulating this test, the court engaged in functional, not structural, analysis, and thus, the case provides no support for Finkelstein's claim. Notably, the same act test has now been limited in Texas to the specific crime at issue in *Garrett*. *Johnson v. State*, 4 S.W.3d 254, 257-58 (Tex. Crim. App. 1999).

42. Finkelstein, *supra* note 3, at 229.

43. Binder, *supra* note 1, at 203.

44. Finkelstein, *supra* note 3, at 220-21.

One significant difficulty is that Finkelstein's merger test cannot be squared with two other limitations on felony murder—that the felony must be inherently dangerous and that the killing must be in furtherance of the felony. Finkelstein's test ultimately eviscerates both of these limitations. Consider the marriage of Finkelstein's merger test with the inherently dangerous felony limitation. Finkelstein claims that "*we can entirely dispense with the inherently dangerous requirement*" once we apply her merger test.<sup>45</sup> Not only can we dispense this requirement, we have to. There is just about nothing left of felony murder after we restrict felony murder to those felonies that foreseeably risk death but find merger whenever the felony may be redescribed as a killing. If the death is foreseeable (and thus inherently dangerous) then it should also merge, because such a foreseeable death is unlikely to be a coincidence under Hart and Honoré's test, which requires, *inter alia*, that the event be statistically unlikely and that the second event (the putative coincidence) be independent of the defendant's conduct.<sup>46</sup> Combining the tests, it seems that only bizarre cases would not merge: a death must be foreseeable but the causal route by which this particular death occurs must be deviant. Hence, felony murder is almost nonsensical if we both apply Finkelstein's redescriptive test and require that the felony be inherently dangerous.<sup>47</sup> Thus, to preserve Finkelstein's merger test, we

---

45. *Id.* at 237 (emphasis added).

46. See *People v. Patterson*, 778 P.2d 549 (Cal. 1989) (defining inherently dangerous as requiring that the offense carry a "high probability" that death will result); Hart & Honoré, *supra* note 33, at 78 (setting forth the requirements for a coincidence that breaks the causal chain).

47. The only alternative to this result is to view felony murder provisions as a way of grading murders. That is, murders that occur within the course of a felony are first-degree murders. The Michigan Supreme Court interpreted its felony murder statute in this manner, and found that the statute abrogated the common law felony murder rule, which held defendants strict liable for deaths that occurred during the course of a felony. *People v. Aaron*, 299 N.W.2d 304 (Mich. 1980). But given that the California Supreme Court ultimately rejected such a reading of its identical statute, one cannot say that felony murder must *as a matter of analytical necessity* be a grading mechanism. See *People v. Dillon*, 668 P.2d 697 (Cal. 1983). What prevents California from choosing to punish *unintentional* killings during the course of a felony as murder?

must dispense with the inherently dangerous limitation—a result that Finkelstein both recognizes and endorses.

The question is whether Finkelstein should count among the arguments for her position that her test eviscerates the inherently dangerous felony requirement. Or, why is it that “the imposition of an inherently dangerous requirement tends to get matters backwards”?<sup>48</sup> It seems perfectly legitimate for jurisdictions to limit the application of the felony murder rule to those felonies, like rape and robbery, which are inherently dangerous. Indeed, Guyora Binder’s extensive study of the history of felony murder tells us that felony murder, rather than having the broad, strict liability application previously supposed, was often limited to specific enumerated felonies where the commission of such felonies demonstrated recklessness.<sup>49</sup> Yet, Finkelstein’s rule renders the commission of many inherently dangerous felonies, especially those that demonstrate recklessness, as ineligible for felony murder under a merger theory. Why is this the preferable result?

Another problem with Finkelstein’s merger test is how it awkwardly incorporates the “in furtherance” requirement. If a police officer intervenes in the robbery, shoots at the defendant, but misses and kills the victim, is this an instance of felony murder? This is now a merger problem under Finkelstein’s analysis. To analyze this problem under Hart and Honoré’s test, we might say the police officer’s actions were not voluntary, as they were done out of necessity, and they were not coincidental. Thus, there is no break in the causal/redescriptive chain, and the police officer’s shooting of the victim qualifies as an action by the defendant. Thus, according to Finkelstein, there should be merger and no felony murder liability. This result, of course, is directly contrary to the “proximate cause” test adopted by a minority of jurisdictions where it is the very fact that the police officer’s behavior was proximately caused by the defendant that renders the defendant liable for felony murder.<sup>50</sup>

---

48. Finkelstein, *supra* note 3, at 237.

49. Binder, *supra* note 1, at 207.

50. See Dressler, *supra* note 2, § 31.06[C][4][c].

More troubling still is squaring this result with the majority rule—the agency approach, which holds that a defendant is not liable for acts of non-felons.<sup>51</sup> While both Finkelstein’s merger test and the agency test hold that felons are not responsible for the acts of third parties, the theories behind the tests are diametrically opposed. Finkelstein’s test yields that because the “redescriptive chain” between the felon’s action and the ultimate killing of the victim is not broken by the police officer, the police officer’s action *is the defendant’s action*. This is antithetical to the agency approach’s rationale, which claims that the police officer is not the felon’s agent, and thus the felon is not responsible for the police officer’s actions.

At this point, Finkelstein is asking us to take much on faith. She offers no underlying rationale for her test, and now, we must accept her test not only for merger but also as the only significant limitation applicable to felony murder. The burden now is extremely high for Finkelstein. We should expect that Finkelstein’s test makes incremental progress (at the very least), and gives us a more coherent approach to merger. It does not.

First, Finkelstein’s test is just as arbitrary and ad hoc as the tests that Finkelstein criticizes. Finkelstein’s test ultimately includes only those cases where the defendant commits a felony and then commits a second voluntary act. So, if a rapist continuously presses his hand against the victim’s throat, thereby satisfying the force requirement for rape while simultaneously killing the victim, he will not be guilty of felony murder. There is only one act. But if this same rapist stops for a moment to scratch his nose and then reapplies force that kills the victim, then there is felony murder liability. I see no principled rationale for such a distinction.

Finkelstein partially responds to this complaint when she discusses what she terms the “double assault” case—e.g., two punches in the nose where the second one results

---

51. See id. § 31.06[C][4][b].

in death,<sup>52</sup> but her solution is ad hoc. She states, “[w]here there are two acts of the defendant’s of the same type, followed in quick succession by one another, we should regard the defendant as engaged in a single activity and treat the merger requirement for felony murder as not [sic] met.”<sup>53</sup> Finkelstein leaves wholly unexplained the range of cases to which her rule applies or what grounds this amendment to action identity theory. This is simply an ad hoc attempt to deal with a counterintuitive aspect of her proposal.

Second, Finkelstein’s test leads to counterintuitive results in paradigmatic cases. Consider armed robbery. Returning to Finkelstein’s liquor store robbery (wherein she points the gun at the cashier and the gun accidentally discharges), she claims that this robbery does not merge “because it is only in an attenuated sense that my threat causes the death of clerk.”<sup>54</sup> Why? Robbery requires the threat of serious bodily injury,<sup>55</sup> and pointing a gun at someone constitutes reckless endangerment.<sup>56</sup> Given that Finkelstein views arson as merging because “setting a building or a truck on fire is a highly dangerous activity, one that may very well lead to a loss of human life in the ordinary course of events,”<sup>57</sup> it seems that this case of robbery should also merge. Yet, as Finkelstein herself claims, armed robberies of this type are classic cases of felony murder.<sup>58</sup>

Now, consider a second typical felony murder case. Imagine that the cashier sees the gun and dies of a heart attack.<sup>59</sup> Under Finkelstein’s analysis, this case cannot

---

52. Finkelstein, *supra* note 3, at 239.

53. *Id.*

54. *Id.* at 235.

55. Model Penal Code § 221.1(1)(b) (Proposed Official Draft 1962).

56. *Id.* § 211.2.

57. Finkelstein, *supra* note 3, at 238.

58. *Id.* at 232.

59. Original application of the felony murder rule did not include heart attack cases. Binder, *supra* note 1, at 196. However, current courts do apply felony murder rules in these situations. *People v. Stamp*, 82 Cal. Rptr. 598 (Cal. Ct. App. 1969); *State v. Dixon*, 387 N.W.2d 682 (Neb. 1986).

support felony murder liability. First, it seems likely that this case should merge because pointing the gun should be redescribed as the killing. Such a situation is quite frightening, and thus, a victim having a heart attack is hardly coincidental. Second, even if this case does not merge, we now have a second problem. We still do not know if this is a case of felony murder. For felony murder, we need two things according to Finkelstein: an act that is the felony and an act that is the killing. That is, Finkelstein has given us a new requirement for felony murder. Not only must we look to see if the defendant's conduct can be redescribed as a killing, but if it cannot, we still need a second act—a killing—by the defendant. In the heart attack case, however, there is no second act. The defendant points the gun, it scares the victim, and the victim dies. So, if pointing the gun is the killing, there is merger, but if pointing the gun is not the killing, then no one kills the cashier because there is not a second voluntary act by the defendant that can be described as a killing.

Finally, let us apply Finkelstein's test to what has always been viewed as the definitive case for merger: provoked killings, e.g., those cases that are mitigated from murder to manslaughter because reasonable provocation led the defendant to kill the victim. Notably, Finkelstein criticizes jurisdictions that do not have a merger rule because, among other reasons, they "eliminate any opportunity for defendants to claim provocation."<sup>60</sup> So, we should expect to find merger under Finkelstein's test in provocation cases.

Let us assume that the defendant, having witnessed the victim horribly attack her child (but without any ability to intervene), follows the victim home, breaks into his house, pulls a gun, and shoots the victim. First, we might consider burglary as the predicate felony. Here, Finkelstein tell us the answer: this type of burglary will not merge: "entering a dwelling, even when the purpose is to bring about a later killing, cannot itself be redescribed as

---

60. Finkelstein, *supra* note 3, at 227.

killing. . . . [because] the defendant's own later voluntary act (of attacking, assaulting, or killing) breaks the redescriptive chain from entering a dwelling to the victim's death."<sup>61</sup> So, the provoked killer who commits a burglary in order to commit her killing can be guilty of felony murder.

Let us tighten the hypothetical a bit then. Forget the burglary. After the defendant witnesses a reasonably provoking event, the defendant simply points a gun at the victim and then fires. I submit that under Finkelstein's burglary analysis, there is still no merger in this case. Why? Let us assume that the predicate felony is assault with a deadly weapon. Now, it certainly seems likely that death will result here. But as Finkelstein notes, voluntary human actors break the chain, including voluntary human actions by the defendant.<sup>62</sup> Thus, pointing the gun and threatening the victim with the gun—those actions that satisfy the offense definition for assault with a deadly weapon—do not proximately cause the victim's death. Rather, the defendant's later voluntary action of "pulling the trigger" causes the death. Thus, assault with a deadly weapon fails the redescriptive merger test, the defendant's pulling the trigger was a second act of killing, and provoked killings support felony murder liability.

I find these results wildly implausible. From armed robberies to heart attack cases to instances of voluntary manslaughter, we are left with a felony murder rule that does not seem to capture what this admittedly confused doctrine should.

In summary, Finkelstein does not present a viable alternative to current merger tests. Finkelstein's claim—that felony murder requires both a felony and a killing—is false, and thus, her test, which rests upon this premise, fails. Felony murder, after Finkelstein's merger, is even more incoherent and arbitrary than it was before. We are left without the inherently dangerous and in furtherance limitations, in a world where armed robberies merge but

---

61. *Id.* at 236.

62. *Id.* at 235.

2006]            *MURDER AFTER THE MERGER*            575

provoked killings do not. Our current regime may resemble that of Goldilocks, but Finkelstein asks us to venture into Wonderland. I suggest we decline her invitation.