

# ARIZONA FELONY MURDER: LET THE PUNISHMENT FIT THE CRIME

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## I. INTRODUCTION

One night, during the summer of 1990, two members of the University of Arizona Police Department were dispatched to a fraternity party. An alleged confrontation had developed involving teenaged visitors who refused to leave.<sup>1</sup> After arriving on the scene, one of the officers later claimed that he observed one of the visitors point a gun at him.<sup>2</sup> The officer fired his gun at the teen, hitting him in the arm. Tragically, the bullet continued on, striking the officer's partner and killing him.<sup>3</sup> The teen was initially charged with first degree murder,<sup>4</sup> the most serious form of homicide recognized by Arizona law, even though he did not fire the lethal bullet.<sup>5</sup>

In order to charge the teen with first degree murder, the state did not have to allege that he intended to kill the police officer. They needed only to allege that he was committing one of several enumerated felonies that resulted in the officer's death.<sup>6</sup> How is this possible? The answer is the felony murder rule. In Arizona, an individual who causes the death of another person, in the course of and in furtherance of committing or attempting to commit any of certain enumerated felonies, is guilty of first degree murder.<sup>7</sup> First degree

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1. Dee Ralles, *Out for a Party, They Stumbled into a Tragedy Scenario for a Killing at UA*, ARIZ. REPUBLIC, Mar. 21, 1991, at B3. The facts of this case have never been established at trial. Miriam Davidson, *Pain, Anger of UA Officer's Killing Revived, Home Arrest Fails to Close Divisive Case*, ARIZ. REPUBLIC, June 26, 1994, at B1.

2. Dee Ralles, *Out for a Party, They Stumbled into a Tragedy Scenario for a Killing at UA*, ARIZ. REPUBLIC, Mar. 21, 1991, at B3.

3. *Id.*

4. Dee Ralles, *Charge is Reduced in UA Officer's Death*, ARIZ. REPUBLIC, March 27, 1991, at B4. The teen subsequently pled guilty to manslaughter and aggravated assault. Miriam Davidson, *Pain, Anger of UA Officer's Killing Revived, Home Arrest Fails to Close Divisive Case*, ARIZ. REPUBLIC, June 26, 1994, at B1.

5. ARIZ. REV. STAT. ANN. § 13-1105(C) (amended 1994 by 1994 Ariz. Sess. Laws ch. 150) (first degree murder is punishable by life imprisonment or death).

6. "[T]he state maintains that [the teen] was committing a burglary, a felony, when he entered the fraternity's courtyard with a gun." *New Charges Filed in Officer's Killing*, ARIZ. REPUBLIC, March 15, 1991, at B2. Judge Pro Tem Howard Hantman of Pima County Superior Court reduced the murder charge against the teen from first to second degree homicide. No official explanation was given by the court, but it was reported that the burglary theory was rejected because the fraternity courtyard was not completely fenced. Dee Ralles, *Charge is Reduced in UA Officer's Death*, ARIZ. REPUBLIC, March 27, 1991, at B4.

7. ARIZ. REV. STAT. ANN. § 13-1105(A)(2).

felony murder carries a mandatory sentence of at least twenty-five years.<sup>8</sup>

The local reaction to the teen's arrest for first degree murder was strong and sharply divided.<sup>9</sup> Comments ranged from labeling felony murder "'a wicked law' that can create injustice by ignoring the circumstances" to a tool for insuring that felons are held responsible for the consequences of their actions.<sup>10</sup> However, the furor created by the teen's case was only the latest involving a running controversy surrounding Arizona's felony murder rule.<sup>11</sup> The question, simply put, is whether the felony murder rule extends too far, punishing behavior more severely than is justified.

Felony murder is often criticized,<sup>12</sup> and many scholars have called for its total abolishment.<sup>13</sup> Yet, its history in the United States has been one of limitation.<sup>14</sup> In keeping with recent trends, the Arizona Legislature recently proposed an affirmative defense to felony murder as part of its 1992 Criminal Code Revision Bill.<sup>15</sup> The defense would allow a defendant to escape a first

8. ARIZ. REV. STAT. ANN. § 13-1105(C). The court may sentence the defendant to prison for the remainder of his natural life. If the court does not sentence the defendant to natural life, the defendant will not be released until the completion of twenty-five years in prison if the victim was fifteen or more years old and thirty-five years if the victim was under the age of fifteen. ARIZ. REV. STAT. ANN. § 13-703(A) (Supp. 1993). A death sentence is possible, but only if the defendant was a major participant in the felony and acts with reckless indifference to human life. *State v. Scott*, 177 Ariz. 131, 142, 865 P.2d 792, 803 (1993) (citing *Tison v. Arizona*, 481 U.S. 137 (1987)). See generally Note, *Tison v. Arizona: A General Intent for Imposing Capital Punishment upon an Accomplice Felony Murderer*, 20 TOL. L. REV. 225 (1985).

9. See Sam Negri, *UA Shooting Fuels Slaying-law Debate; 1 Officer Killed Another, But Teen Held*, ARIZ. REPUBLIC, Sept. 24, 1990, at B1.

10. *Id.*

11. *Id.* "It's a law that has been the subject of debate, said Arizona State University law Professor Ralph Spritzer because, 'in your extreme cases, it makes somebody who may be more or less peripherally involved in a crime, rather than the central figure, subject to an extreme penalty.'" *Id.* See generally David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J. LAW & PUB. POL'Y 359, 359-60 (1985).

12. "The [felony murder] doctrine has been under attack for centuries." Crump & Crump, *supra* note 11, at 359 n.1 (listing articles that chronicle recent criticism of felony murder).

13. E.g., 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT JR., *SUBSTANTIVE CRIMINAL LAW* § 7.5(h), at 232 (1986) (arguing that felony murder should not be a separate category of murder); ROLLIN M. PERKINS, *CRIMINAL LAW* 44 (1969) (stating that the rationale for felony murder no longer exists); Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 446 (1985) (referring to felony murder as a rule which "provides commentators with an extreme example that makes it easy to illustrate the injustice of various legal propositions.").

14. See discussion *infra* part III.

15. Senate Bill 1490, Ariz. Senate, 40 Legis. 2d Sess., § 13-1105(C) & (D) (1992) states:

It is an affirmative defense to a charge of violating subsection A, paragraph 2 of this section [first degree felony murder] if all of the following apply to the defendant:

1. Was not the only participant in the underlying offense.
2. Did not cause the death or solicit, request, command, cause or aid in the commission of the death.
3. Was not armed with a dangerous or deadly weapon.
4. Had no reasonable ground to believe that another participant in the underlying offense intended to engage in conduct likely to result in death.
5. Had no reasonable ground to believe that another participant in the underlying offense was armed with a dangerous or deadly weapon.

degree murder conviction by proving that he was not individually culpable for the murder.<sup>16</sup> However, the governor vetoed the bill, singling out the affirmative defense as a major stumbling block.<sup>17</sup>

Arizona's felony murder rule, although popular with prosecutors, is under attack from academics and legislators who wish to limit its harshness in extreme cases.<sup>18</sup> This Note will trace the history of the felony murder doctrine, examine modern efforts to limit its scope, and analyze how each limiting doctrine supports the rationales behind felony murder. Finally, this Note will propose an amendment to Arizona's felony murder rule. The proposed amendment offers a compromise that will reduce much of felony murder's inherent harshness without diminishing its effectiveness as a prosecutorial tool.

## II. COMMON LAW FELONY MURDER

The doctrine of felony murder was developed in the English common law.<sup>19</sup> Murder was punishable by death<sup>20</sup> and required the killing be committed with "malice aforethought."<sup>21</sup> Malice could be express or implied.<sup>22</sup> Express malice required an intent to kill.<sup>23</sup> Even without intent, murder could still be established by implied malice.<sup>24</sup> Malice was implied when an accidental killing resulted from the commission of a crime.<sup>25</sup> For example, if a hunter accidentally killed another person while shooting at wild game, the homicide was excused because the act of shooting was not a crime. On the other hand, if a hunter knowingly shot at another's livestock and accidentally killed a person, he was guilty of murder because the act of shooting was unlawful.<sup>26</sup> The malice required by common law to convert the hunter's "accidental" homicide into murder was implied from his intention to commit the crime of conversion.<sup>27</sup> In 1644, Sir Edward Coke stated "that a death caused by any unlawful act is murder."<sup>28</sup> Later, "any unlawful act" was limited to only felonies<sup>29</sup>, hence the

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When the affirmative defense described in subsection C of this subsection is raised at a trial, the defendant has the burden of proving the defense by a preponderance of the evidence.  
*Id.*

16. See *infra* note 70 and accompanying text.

17. Kim S. Perkes & Mary J. Pitzl, *Easing of Crime Code Fails Symington; Symington Vetoes Bill*, ARIZ. REPUBLIC, July 11, 1992, at A1. "In his veto message, Symington singled out the felony-murder rule, the bill's most controversial provision, as the key reason for his veto." *Id.*

18. See *supra* notes 9-11, 15 and accompanying text.

19. See 2 FRANCIS WHARTON'S CRIMINAL LAW 201-04 (1979).

20. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 451 (1987).

21. 4 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 198-99 (Dawson of Pall Mall, 1966) (1769). Malice aforethought is defined as "[t]he intentional doing of an unlawful act which was determined before it was executed." BLACK'S LAW DICTIONARY 957 (6th ed. 1980) (citing *State v. Lane*, 371 S.W.2d 261, 263 (Mo. 1963)).

22. BLACKSTONE, *supra* note 21, at 199.

23. DRESSLER, *supra* note 20, at 449.

24. *Id.*

25. *Id.* "[I]f one intends to do another felony, and undesignedly kills a man, this is... murder." BLACKSTONE, *supra* note 21, at 201.

26. WHARTON, *supra* note 19, at 204.

27. *Id.*

28. *Id.* (citing to 3 SIR JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 52-57 (1883).

29. *Id.*

name "felony murder." This was essentially the version of felony murder that was first adopted by American courts.<sup>30</sup>

Common law felony murder runs counter to traditional notions of criminal culpability in two ways. First, felony murder requires no culpable *mens rea* for the act of killing.<sup>31</sup> This gives the doctrine a "strict liability" character.<sup>32</sup> The only *mens rea* required is an intent to commit the underlying felony.<sup>33</sup> Second, the doctrine holds participants in the felony liable for the homicidal actions of their accomplices.<sup>34</sup> In Arizona, criminal accountability principles hold that an intentional participant in a crime is responsible only for reasonably foreseeable deviations in the felonious plan.<sup>35</sup> The felony murder doctrine holds accomplices to the underlying felony liable regardless of the foreseeability of their accomplices' homicidal actions.<sup>36</sup>

Consider the following example:

Felon 1 (F1) and Felon 2 (F2) are planning a burglary. They observe a home for a week and learn that the owner lives alone and goes to work at the same time every night. The following night, F1 and F2 drive to the home and watch the owner leave on schedule. Neither F1 nor F2 is carrying any weapons. F2 breaks into the home while F1 waits in the car as a lookout. A neighbor witnesses the crime and calls the police. A police officer (P1) enters the house through the front door with his gun drawn. F1 tries to flee and P1 chases after him. He trips and his gun accidentally discharges, killing another police officer (P2) who entered the house through a rear door. Because F1 and F2 did not intend to kill P2, they are not guilty of express malice murder.<sup>37</sup> However, they are both guilty of common law felony murder because they did intend to commit the burglary that resulted in P2's death.<sup>38</sup>

30. *Id.*

31. See PERKINS, *supra* note 13, at 37-38.

32. DRESSLER, *supra* note 20, at 463. "The felony-murder rule authorizes strict liability for a death that results from a felony that is intentionally committed." *Id.*

33. See *id.*; State v. Atwood, 171 Ariz. 577, 832 P.2d 593 (1992); State v. Clayton, 109 Ariz. 587, 514 P.2d 720 (1973).

34. DRESSLER, *supra* note 20, at 463.

35. State v. Collins, 111 Ariz. 303, 307, 528 P.2d 829, 833 (1974); State v. Marchesano, 162 Ariz. 308, 315, 783 P.2d 247, 254 (App. 1989). In *Marchesano*, the court stated:

Defendant and [triggerman] entered the restaurant with a weapon and committed a robbery within. The evidence supported an inference that defendant willingly participated in doing whatever was necessary to complete the robbery and the escape. The jury could reasonably have inferred, not only from defendant's participation in the robbery, but also from his having supplied the weapons, that defendant accepted the risk that his accomplice would deliberately shoot to kill during the robbery or escape. Because [triggerman's] attempted murder of the restaurant owner was a readily foreseeable incident of their flight from the scene of an armed crime, accomplice liability attached to defendant...

*Id.* Other jurisdictions are split as to whether accomplice liability should extend to "aiding or reckless or negligent conduct." 2 LAFAYE & SCOTT, *supra* note 13, §6.7, at 136.

36. See 2 LAFAYE & SCOTT, *supra* note 13, § 7.5(c), at 211-12. Felony murder rule extends implicitly to accomplices involved in felonies regardless of personal *mens rea*. DRESSLER, *supra* note 20, at 463; Frederick J. Ludwig, *Foreseeable Death in Felony Murder*, 18 U. PITT. L. REV. 51, 52 (1956) (stating that felony murder sometimes works to make an accomplice liable for a murder that "he might not otherwise be liable for").

37. See *supra* note 23 and accompanying text.

38. See *supra* notes 25-30 and accompanying text.

Consider the following alternative example:

Assume the same facts as above, except F2 took P1's gun and shot P2 while escaping. In this case, it is possible that F1 would not be an accomplice to the murder because F2's use of the officer's gun may not be found to be a reasonably foreseeable consequence of the unarmed burglary.<sup>39</sup> However, F1 would be guilty of common law felony murder as a willing accomplice to the burglary.<sup>40</sup>

### III. LIMITING DOCTRINES

Strict adherence to common law felony murder can produce harsh results. This became apparent as common law felonies expanded to include crimes normally not dangerous to human life.<sup>41</sup> As a result, American legislatures limited the felony murder doctrine by dividing felony murder into different grades or designating it as a lower grade of homicide.<sup>42</sup> A small number of jurisdictions have abolished felony murder altogether.<sup>43</sup> However, many states,<sup>44</sup> including Arizona, have limited felony murder to dangerous felonies.<sup>45</sup> This Note will concentrate on three common doctrines used to limit felony murder in this manner. Each may be distinguished based on: (1) the extent to which traditional notions of *mens rea* and accountability are reincorporated into felony murder, and (2) who ultimately decides the doctrine's scope in terms of dangerousness and individual culpability: the legislature or the trier of fact.

#### A. Inherently Dangerous Felonies - The Arizona Approach

Arizona limits the scope of felony murder to certain enumerated underlying felonies.<sup>46</sup> Two themes run through the Arizona statute. First, the enumerated felonies, in general, all present a risk of danger or violence.<sup>47</sup> The

39. See 2 LAFAVE & SCOTT, *supra* note 13, § 7.5(c), at 213.

40. See *supra* note 34-36 and accompanying text.

41. MODEL PENAL CODE § 210.2, commentary at 31-32 (Official Draft 1980); Powers v. Commonwealth 61 S.W. 735, 741 (Ky. 1901).

42. MODEL PENAL CODE, *supra* note 41, § 210.2, commentary at 32 (Official Draft 1980). The felony murder doctrine was also limited in England. See 2 LAFAVE & SCOTT, *supra* note 13, § 7.5 (a) at 207; PERKINS, *supra* note 13, at 39. "As with advancing civilization the savage cruelty of the ancient English common law, under which some hundreds of offenses were punished with death, became softened by statutory amendment, this doctrine [felony murder], even in Great Britain, became modified." Powers, 61 S.W. at 741. In 1957, England abolished the felony murder rule. MODEL PENAL CODE, *supra* note 41, commentary at 39-40.

43. MODEL PENAL CODE, *supra* note 41, commentary at 32. Felony murder has been abandoned by statute in Hawaii and Kentucky and by judicial decision in Michigan. Roth & Sundby, *supra* note 13, at 446 n.6.

44. 2 LAFAVE & SCOTT, *supra* note 13, § 7.5, at 208.

45. *Id.*, American jurisdictions have limited the scope of common law felony murder in several other ways. The most common are: (1) strictly interpreting the proximate and legal cause requirements; (2) limiting the time period which constitutes the commission of the felony; (3) mandating that the homicide and the underlying felony be independent. *Id.* § 7.5, at 206.

46. ARIZ. REV. STAT. ANN. § 13-1105(A)(2).

47. See WHARTON, *supra* note 19, at 207 ("What the enumerated felonies always seem to have in common is the element of danger or violence."); DRESSLER, *supra* note 20, at 463-64 (referring to arson, rape, robbery, and burglary as dangerous felonies); MODEL PENAL CODE, *supra* note 41, commentary at 41 ("Virtually all recent codifications limit felony murder to a list

Arizona Legislature settled on its present list of enumerated felonies because all "involve the use or threatened use of force or risk of harm to innocent victims."<sup>48</sup> Second, the statute works to limit the doctrine to felonies that are *inherently* dangerous.<sup>49</sup> There is no requirement that the felony be perpetrated in a dangerous manner, only that it be committed.<sup>50</sup> In our example<sup>51</sup>, one could argue that F1 and F2 committed the burglary in a non-dangerous manner because they broke into an unoccupied residence and were not carrying any weapons. However, under Arizona law, the manner in which the crime is perpetrated is irrelevant.<sup>52</sup> F1 and F2 are guilty of first degree murder because they committed the inherently dangerous crime of burglary and someone died as a result.

Felony murder is traditionally held to impose strict liability because the state does not have to prove a culpable mental state for the act of killing.<sup>53</sup> However, Arizona, in limiting felony murder to inherently dangerous felonies, implicitly requires a *mens rea* of at least criminal negligence. The commission of an enumerated felony constitutes criminal negligence because a reasonable person would know that committing a dangerous crime creates a substantial risk of death or serious bodily harm.<sup>54</sup> Recklessness is not the proper standard because there is no requirement that the felon have actual knowledge of the

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of specified felonies, each of which involves some fair prospect of violence.").

48. ARIZONA CRIMINAL CODE COMMISSION, ARIZONA REVISED CRIMINAL CODE, §1104, commentary at 129 (1975). The 1977 Legislature adopted all enumerated felonies as recommended by the Code Commission. The Legislature also added the crimes of child molestation and certain narcotic offenses. RULDOPH J. GERBER, CRIMINAL LAW OF ARIZONA 156 (1978).

49. See DRESSLER, *supra* note 20, at 467. Some states, such as California, chose to limit felony murder to inherently dangerous felonies without enumerating specific felonies. This approach conceivably opens felony murder to include any dangerous felony. However, courts are required to consider the elements of the felony in the abstract and not in terms of the specific facts of the crime. *Id.*

50. See *State v. Woratzeck*, 134 Ariz. 452, 455, 657 P.2d 865, 868 (1982). However, Arizona's does not limit its inquiry to the inherent danger involved in general categories of felonies. Those statutory variations of the common law felonies which do not have especially dangerous elements are not included in the felony murder statute. For example, felony murder is limited to dangerous drug offenses, narcotic offenses "involving or using minors", and intentional and knowing child abuse committed "[u]nder circumstances likely to produce death or serious physical injury". *Id.*

51. See *supra* hypothetical example of felony murder.

52. See *supra* notes 6-8 and accompanying text.

53. DRESSLER, *supra* note 20, at 463. In Arizona, the intent to commit the felony provides the premeditation otherwise required for first degree murder. *State v. Clayton*, 109 Ariz. 587, 598, 641 P.2d 720, 731 (1973); *State v. McLoughlin*, 139 Ariz. 481, 485-86, 679 P.2d 504, 508-09 (1984); *State v. Arias*, 131 Ariz. 441, 443-44, 641 P.2d 1285, 1287-88 (1982).

54. "[N]egligent homicide is established when a person fails to perceive a substantial and unjustifiable risk, and when the failure to perceive the risk is a gross deviation from the standard of care which a reasonable person would observe." *State v. Walton*, 133 Ariz. 282, 291, 650 P.2d 1264, 1273 (App. 1982); *State v. Fisher*, 141 Ariz. 227, 248, 686 P.2d 750, 771 (1984); ARIZ. REV. STAT. ANN. § 13-1102(A) (Supp. 1993). Arizona's enumerated felonies were chosen because they are inherently dangerous. See *supra* note 47-48 and accompanying text. "Dangerous" crimes are described as violent or forceful acts which create a substantial risk of death or serious bodily injury. See *People v. Patterson*, 778 P.2d 549, 551 (Cal. 1989) (holding that felonies are inherently dangerous when there is a high probability that they will result in death). See also DRESSLER, *supra* note 20, at 468 (stating that the dangerous felony limitation brings felony murder closer to extreme recklessness murder); ARIZ. REV. STAT. ANN. § 13-1104 (1994) (defining reckless homicide "under circumstances manifesting extreme indifference to human life" as second degree murder).

dangerousness of his crime.<sup>55</sup> For example, F1 and F2 may have actually believed their actions were non-dangerous because of the manner in which they planned and carried out the burglary. Even so, both were criminally negligent under the inherent approach, because a reasonable person would know that all burglaries carry a risk of violence.<sup>56</sup>

### *B. Factually Dangerous Felonies*

Other states reject the inherent danger approach and instead limit felony murder to those crimes which are, in fact, dangerous.<sup>57</sup> The factual approach differs from the inherent approach in two ways. First, the facts of the individual case, and not the crime's inherent nature, determine the dangerousness of the underlying felony.<sup>58</sup> The factual approach recognizes that inherently dangerous felonies can be perpetrated in a non-dangerous manner.<sup>59</sup> Second, the factual approach expands the scope of felony murder to include all felonies as potentially dangerous.<sup>60</sup> Therefore, even inherently non-dangerous felonies can potentially implicate the felony murder rule.<sup>61</sup> The overall result is that the trier of fact, and not the legislature, determines the dangerousness of the underlying felony and thus the scope of felony murder.<sup>62</sup>

55. "Recklessly causing the death of another person" is manslaughter. ARIZ. REV. STAT. ANN. § 13-1103(A)(1) (1994). The difference between negligent homicide and manslaughter is that under manslaughter, the accused is aware of the risk. *State v. Fisher*, 141 Ariz. 227, 247-48, 686 P.2d 750, 770-71 (1984). *But see* *People v. Patterson*, 778 P.2d 549, 557 (Cal. 1989) (holding that "defendant should not be allowed to excuse himself by saying he was unaware of the danger to life because, by declaring the conduct to be felonious, society has warned him of the risk involved.").

56. See *supra* note 53-55 and accompanying text.

57. DRESSLER, *supra* note 20, at 468. See, e.g., TEXAS PENAL CODE ANN. § 19.02 (1974) which states:

A person commits [first degree murder] if he commits or attempts to commit a felony, other than voluntary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

*Id.*

58. 2 LAFAVE & SCOTT, *supra* note 13, § 7.5(b), at 209; DRESSLER, *supra* note 20, at 468.

59. See DRESSLER, *supra* note 20, at 468.

60. See, e.g., *Richardson v. State*, 823 S.W.2d 710, 714 (Tex.App. 1992) ("Texas authorizes any felony, except the designated manslaughters, to be the underlying felony in applying the felony murder rule.").

61. 2 LAFAVE & SCOTT, *supra* note 13, § 7.5(b), at 209. "Thus, while it may be said as an abstract proposition that the theft felonies (larceny, embezzlement and false pretenses) do not involve danger to life, a thief may commit his theft crime in a way which does create a foreseeable danger to life; under [the factual approach] it would be felony murder if death did result under these circumstances." *Id.* See also JoAnne C. Alderstein, *Felony-Murder in the New Criminal Codes*, 4 AM. J. CRIM. L. 258 n.12 (1975-76); *Richardson v. State*, 823 S.W.2d 710 (Tex.App. 1992) (underlying felony of unauthorized use of vehicle sufficient for felony murder where owner was killed while hanging on to outside of vehicle while defendant drove away); *State v. Chambers*, 524 S.W.2d 826 (Mo. 1975) (stating that jury may decide if car theft is sufficiently dangerous to constitute second degree felony murder where stolen car was towed without proper lighting on dark street).

62. See, e.g., *State v. Harrison*, 564 P.2d 1321, 1324 (N.M. 1977) (jury to decide the dangerousness of felony based on facts). The *Model Penal Code* offers a compromise between legislative and judicial determination of a felony's dangerousness. A killing is murder when "it is committed recklessly under circumstances manifesting extreme indifference to the value of

The factual approach also implicitly creates a *mens rea* requirement of criminal negligence.<sup>63</sup> However, there is no presumption of negligence based on the commission of an inherently dangerous felony.<sup>64</sup> In effect, the state must prove that a reasonable person would have understood that his actions were dangerous based on the facts of the individual case. Under the factual approach, F1 and F2 would be permitted to argue that the officer's death was not a foreseeable consequence of an unarmed burglary. Again, recklessness is not the proper standard because the state does not have to prove that F1 and F2 were aware that the burglary was dangerous.<sup>65</sup>

Unlike the Arizona approach, the factual approach also reincorporates elements of criminal accountability into felony murder. Common law felony murder operates against general accountability principles because there is no requirement for individual culpability in the act of killing.<sup>66</sup> Criminal accountability principles require that accomplices be held responsible for only reasonably foreseeable deviations in a felonious plan.<sup>67</sup> Under the factual approach, the dangerousness of the felony is determined by the defendant's own actions, as well as the actions of his accomplices that are foreseeable.<sup>68</sup> For instance, in the alternative fact pattern,<sup>69</sup> F1 may escape a felony murder charge if the trier of fact finds that F1 did not act dangerously and that F2's shooting of P2 was not foreseeable.

### C. Individual Culpability and the Affirmative Defense

Some jurisdictions have enacted an affirmative defense that allows a defendant to escape a felony murder conviction where he lacks the necessary culpability for the homicidal behavior of his accomplices.<sup>70</sup> A typical defense requires that the defendant prove, by a preponderance of the evidence, that he:

(1) did not commit the act of killing and did not cause, aid, or solicit the act; and

(2) was not armed with a deadly weapon; and

(3) had no reason to believe that any accomplice was armed with a dangerous weapon; and

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human life." However, such recklessness is presumed if the underlying felony is "robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape." MODEL PENAL CODE § 210.2, *supra* note 41.

63. See *supra* notes 53-55 and accompanying text.

64. See *supra* notes 57-59 and accompanying text.

65. See *supra* note 55 and accompanying text.

66. See *supra* notes 34-36 and accompanying text; Roth & Sundby, *supra* note 13, at 459. Felony murder, under Arizona law, requires "no specific mental state other than what is required for the commission of any of the enumerated felonies." ARIZ. REV. STAT. ANN. § 13-1105(B).

67. See *supra* note 35 and accompanying text.

68. It would be possible to apply the factual approach in a manner similar to the Arizona method where the overall dangerousness of the felony is imputed to all participants in the felony. However, in actual practice, this is not the case. See, e.g., *Commonwealth v. Moran*, 442 N.E.2d 399, 403 (Mass. 1982) (in felony murder based on unarmed robbery, jury must find that "defendant consciously disregarded human life."); TEX. PENAL CODE ANN. § 19.02 (1994) (for felony murder, defendant must commit or attempt to commit an "act clearly dangerous to human life that causes death of an individual.").

69. See *supra* note 39 and accompanying text.

70. See 1 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 104, at 504-05 (1984 & Supp. 1993).



(4) had no reason to believe that any accomplice intended to engage in conduct that was likely to result in death or serious injury.<sup>71</sup>

Like both the inherent and factual approaches, the affirmative defense requires that the defendant overcome a presumption of criminal negligence.<sup>72</sup> A reasonable person would know that a felony is dangerous in a case where any of the above elements are not satisfied. Furthermore, like the factual approach, the affirmative defense works to reincorporate criminal accountability principles. Part one serves to limit the defense to felony accomplices that have no direct participation in the act of killing: so-called "non-triggermen." Such an individual, by proving the remaining elements of the defense, is able to refute a felony murder conviction due to a lack of individual culpability for the act of killing.<sup>73</sup> In the alternative example,<sup>74</sup> F1 could successfully assert the defense if he could show that, from his perspective, F2's violent behavior was not reasonably foreseeable. This is consistent with criminal accountability principles because it may be argued that the officer's death was not a reasonably foreseeable consequence of their felonious plan.<sup>75</sup>

However, the affirmative defense differs from the factual approach as to who decides the doctrine's scope in terms of individual culpability. Although the jury must eventually apply the defense to the facts of the case,<sup>76</sup> the legislature is responsible for specifically defining the standard of culpability. For example, no matter how unforeseeable a death might appear to a jury after reviewing the totality of the circumstances, the defense would not be available to a defendant who knew or should have known that one of his accomplices was armed.<sup>77</sup>

#### IV. RATIONALES

There are four rationales typically offered for the retention of the felony murder rule.<sup>78</sup> The first two, retribution and transferred intent, argue for the doctrine's inherent fairness in spite of its strict liability nature.<sup>79</sup> The last two, deterrence and judicial efficiency, focus on felony murder's necessary role in fighting violent crime.<sup>80</sup> This section will first analyze each rationale under the Arizona approach of limiting felony murder to enumerated, inherently dangerous felonies. Next, it will consider how the factual dangerousness

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71. *Id.* Several jurisdictions include other requirements. 2 LAFAVE & SCOTT, *supra* note 13, § 7.5(c), at 213 n.34. These include a requirement that the defendant not be the only participant in the underlying crime and that he disengage from the crime as soon as it becomes reasonable to believe that his partners are armed or intend to engage in dangerous behavior. *Id.*

72. *See supra* notes 53-55, 63-64 and accompanying text.

73. 1 ROBINSON, *supra* note 70, § 104 at 504-505.

74. *See supra* note 39 and accompanying text.

75. *See supra* note 35 and accompanying text.

76. *See* 1 ROBINSON, *supra* note 70, § 104 at 507. *See also, e.g.,* *People v. Bornholdt*, 350 N.Y.S.2d 369, 378 (Ct. App. 1973); *People v. Donovan*, 385 N.Y.S.2d 385, 387 (App. Div. 1976).

77. *See supra* note 71 and accompanying text.

78. *See generally*, DRESSLER, *supra* note 20, at 464-467; Crump & Crump, *supra* note 11, at 361-76, Roth & Sundby, *supra* note 13, at 450-60.

79. *See discussion infra* part IV, A & B.

80. *See discussion infra* part IV, C & D.

approach and the affirmative defense might affect the overall justification for felony murder in light of the four rationales.<sup>81</sup>

### A. Retribution

Retribution has been used to justify the felony murder doctrine.<sup>82</sup> The rationale holds that a crime which ends in death should be punished more severely than the same crime that does not end in death.<sup>83</sup> To do otherwise, may constitute a "devaluation of human life."<sup>84</sup> Critics of the felony murder rule's strict liability nature often ignore the outcome of the crime as a significant factor in determining punishment.<sup>85</sup> For example, a reckless driver who kills will be punished much more severely than an identically situated driver who does not kill, even though they have identical *mens rea*.<sup>86</sup> Similarly, the felony murder doctrine is justified on the ground that a felon who kills is significantly more culpable than a felon who does not and the punishment should so reflect.<sup>87</sup>

However, the retribution rationale breaks down because Arizona punishes both felony and premeditated murder as first-degree murder.<sup>88</sup> A rational system of measuring culpability considers the mental state of the defendant, as well as the consequences of a crime in order to achieve proportionality in punishment.<sup>89</sup> This is required in order to adhere to the principle of "just desserts."<sup>90</sup> Premeditated murder is considered especially heinous<sup>91</sup> because it requires that a person purposely kill another after reflection.<sup>92</sup> Felony murder,

81. See Crump & Crump, *supra* note 11, at 377-96. "Apart from questions about the retention of felony murder, the articulations of supporting policies may influence the proper scope and limitation of the doctrine." *Id.* at 377.

82. See DRESSLER, *supra* note 20, at 465; Crump & Crump, *supra* note 11, at 361-69; Roth & Sundby, *supra* note 13, at 457-60. This Note combines the labels of "general culpability", "proportionality" and "condemnation" under the single heading of retribution.

83. Crump & Crump, *supra* note 11, at 367-68. "[C]haracterizing a robbery-homicide solely as robbery would have the undesirable effect of communicating to the citizenry that the law does not consider a crime that takes a human life to be different from one that does not...." *Id.* at 368. Crump & Crump state that "reaffirming the sanctity of human life" is only one aspect of felony murder's condemnation rationale. Others include an "expression of solidarity with the victims of crime" and expiation, a process by which the convicted felon can adequately repay his debt to society. *Id.* at 367-69.

84. *Id.* at 368.

85. *Id.* at 366-67.

86. In Arizona, "[r]ecklessly causing the death of another person" is a class 2 felony. ARIZ. REV. STAT. ANN. § 13-1103. On the other hand, reckless endangerment is at most a class 6 felony. ARIZ. REV. STAT. ANN. § 13-1201 (1993); *State v. Reim*, 26 Ariz. App. 528, 530, 549 P.2d 1046, 1048 (1976) (holding that vehicle must be aimed at victim with intent to use the vehicle as a deadly weapon in order to constitute assault with a deadly weapon); *State v. Adams*, 155 Ariz. 117, 120, 745 P.2d 175, 178 (1987) (holding that Arizona has no crime of attempted manslaughter).

87. Crump & Crump, *supra* note 11, at 367. "Simply put, if one must categorize a robbery causing death as either a robbery or a murder, it is the latter category that is the 'better fit'; calling such a crime robbery, and robbery only, would distort its significance in the scheme of crime grading." *Id.*

88. See ARIZ. REV. STAT. ANN. § 13-1105.

89. DRESSLER, *supra* note 20, at 465.

90. *Id.*

91. But see, Crump & Crump, *supra* note 11, at 363-64 (citing to Bureau of Justice statistics from a national public survey of the seriousness of hypothetical legal events. "Apparently unintentional" homicides involving rape and robbery were ranked higher on the severity scale than certain express-malice killings involving family members).

92. *State v. Clabourne*, 142 Ariz. 335, 345, 690 P.2d 54, 64 (1984). Jurisdictions differ

on the other hand, requires only that the defendant be criminally negligent in causing the death.<sup>93</sup> Proportionality requires that a killer with a *mens rea* of premeditation be punished more severely than a killer with a *mens rea* of negligence. Arizona, by equating felony murder and premeditated murder,<sup>94</sup> ignores proportionality because the defendant is being punished without regard to his true level of culpability.<sup>95</sup> Retribution for taking a life can be justified only if tempered by an evaluation of the defendant's homicidal *mens rea*. Therefore, proportionality, and not retribution, must be an objective of any felony murder sentencing scheme.

Arguably, the factual approach and the affirmative defense would be somewhat effective in reducing the disproportionate effects of Arizona's felony murder statute. Both would insure that an "accidental" death was not punished under felony murder, with the factual approach determining dangerousness according to the circumstances of the felony,<sup>96</sup> and the affirmative defense using statutorily defined criteria.<sup>97</sup> However, both limiting doctrines fall short of the goal of proportionality. Both limit felony murder only by defining its scope, and therefore, can offer only "all or nothing" solutions.<sup>98</sup> Proportionality, on the other hand, requires varying the degree of punishment to fit the crime.<sup>99</sup> The limiting doctrines fail because, in cases where felony murder is found to apply, the felon is punished without regard to his individual culpability. Proportionality is achieved by punishing the felon who kills, even accidentally, but only relative to his homicidal *mens rea*.

### B. Transferred Intent

Transferred intent is also used to justify felony murder.<sup>100</sup> Under this rationale, the intent to commit the underlying felony is transferred to the act of killing, thus satisfying the *mens rea* requirement for murder.<sup>101</sup> However, this theory has been criticized because, while it is generally acceptable to transfer intent within the same criminal act, it is not acceptable to do so between separate crimes.<sup>102</sup> For example, if a person intends to shoot A and by mistake

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as to the amount of time required for reflection. See, e.g. *State v. Kreps*, 146 Ariz. 446, 449, 706 P.2d 1213, 1216 (1985) (premeditation may be "as instantaneous as successive thoughts of the mind"); *State v. Roberts*, 709 S.W.2d 857, 863 (Mo. 1986) (en banc) (plan to commit murder may be formed during a period of time before the killing "however short"); *People v. Van Ronk*, 217 Cal. Rptr. 581, 583 (1985) (holding that "[p]remeditation and deliberation require 'substantially more reflection' than required for intent to kill").

93. See *supra* notes 53-56 and accompanying text.

94. See ARIZ. REV. STAT. ANN. § 13-1105.

95. See Roth & Sundby, *supra* note 13, at 459 (stating that felony murder causes a killing to be punished as murder "regardless of the defendant's culpability").

96. See *supra* note 58 and accompanying text.

97. See *supra* notes 76-77 and accompanying text.

98. See *supra* notes 58, 68, and accompanying text. Of course, depending on the degree of the defendant's culpable *mens rea*, the killer may invoke a lesser degree of homicide than first degree murder. See ARIZ. REV. STAT. ANN. §§ 13-1102 (negligent homicide), 13-1103 (manslaughter) & 13-1104 (second degree murder).

99. See *supra* notes 89-90 and accompanying text.

100. Roth & Sundby, *supra* note 13, at 453-57; DRESSLER, *supra* note 20, at 466; *People v. Lewis*, 444 N.Y.S.2d 1003, 1005 (Sup. Ct. 1981); *People v. Northrop*, 182 Cal. Rptr. 197, 200 (App. 1982); *State v. Gardner*, 340 S.E.2d 701, 710 (N.C. 1986).

101. Roth & Sundby, *supra* note 13, at 453; *State v. McLoughlin*, 139 Ariz. 481, 679 P.2d 504 (1984) (holding that intent to commit the felony supplies the *mens rea* requirement for first degree murder).

102. See Roth & Sundby, *supra* note 13, at 454. "[F]irmly entrenched in the law...is the

shoots B, he is guilty of intentionally shooting B.<sup>103</sup> On the other hand, if a person intends to steal goods from a warehouse and accidentally sets the building on fire, he can not be found guilty of intentional arson.<sup>104</sup> Likewise, the argument goes, a person who intends burglary and accidentally kills another, is not guilty of intentional murder.<sup>105</sup>

The above argument, although technically correct, misses the point. Punishing premeditated murder more severely than intentional murder is justified because the defendant had the opportunity to reflect before acting.<sup>106</sup> Likewise, although premeditation is not a required *mens rea* element for any of Arizona's enumerated felonies,<sup>107</sup> felonious behavior undoubtedly involves some degree of planning or deliberation. Therefore, a person committing a dangerous felony likely had an opportunity to reflect on the possibility that injury or death might result from the crime. This establishes a culpable *mens rea* for the resulting homicide,<sup>108</sup> further justifying the transfer of intent.

The doctrine of transferred intent is more persuasive when the dangerousness of the felony is judged by the facts of the individual case, rather than the inherent nature of the crime. If a felon is held liable because he had an opportunity to reflect on the possibility of death, fairness would dictate that death be a reasonably foreseeable consequence. The transferred intent rationale fails under the Arizona statute when an enumerated felony is perpetrated in a non-dangerous manner such that death is not a reasonably foreseeable consequence. The factual approach ensures that death was a reasonably foreseeable consequence of the actual criminal behavior.<sup>109</sup> The affirmative defense strives for a similar result, except from within the bounds of statutorily defined elements.<sup>110</sup>

### C. Deterrence

Felony murder is often supported because it is believed to deter violent crime.<sup>111</sup> Arizona's felony murder rule potentially deters violent crime in two ways. First, it may deter negligent killings during the commission of enumerated felonies. Felons will be encouraged to avoid dangerous behavior in order to minimize the likelihood of a homicide.<sup>112</sup> In response, some assert that

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principle that 'where the state of mind which prompted the action does not constitute the particular *mens rea* required by law for the offense charged,' the doctrine of transferred intent is inapplicable." *Id.*

103. See DRESSLER, *supra* note 20, at 466.

104. *Id.* (citing to Regina v. Faulkner, 13 Cox Crim. Cas. 550 (1877) (Eng.) (sailor who intended to steal rum and accidentally set ship on fire, was not guilty of arson)).

105. Roth & Sundby, *supra* note 13, at 454.

106. See Michael Wechsler, *A Rationale for the Law of Homicide I*, 37 COLUM. L. REV. 701 n.27 (1937) (time sufficient for reflection on choice to kill or not); *but see*, MODEL PENAL CODE § 210.6, *supra* note 41, commentary at 126-28 (finding this distinction "unsound").

107. See, e.g., ARIZ. REV. STAT. ANN. § 13-1406 (amended 1994 by 1994 Ariz. Sess. Laws ch. 236) (knowledge and intent required for sexual assault); ARIZ. REV. STAT. ANN. § 13-1304 (1989) (knowledge and intent required for kidnapping).

108. *But see* Roth & Sundby, *supra* note 13, at 457 (stating that the underlying intent to commit the felony has little significance in demonstrating that the killing was likely premeditated).

109. See *supra* notes 63-68 and accompanying text.

110. See *supra* notes 73-77 and accompanying text.

111. See generally, DRESSLER, *supra* note 20, at 464-65; Crump & Crump, *supra* note 11, at 369-75; Roth & Sundby, *supra* note 13, at 450-53.

112. See generally WHARTON, *supra* note 19, at 208; DRESSLER, *supra* note 20, at 464;

it is impossible to deter unintentional behavior.<sup>113</sup> However, this argument ignores the fact that felons usually have control over the manner in which the felony is perpetrated. Second, Arizona's felony murder rule may deter the commission of enumerated felonies altogether.<sup>114</sup> A potential felon may conclude that the potential rewards of committing an inherently dangerous felony are not worth risking a first-degree murder conviction.

The factual approach will be less effective than Arizona's felony murder statute in deterring both negligent homicides and underlying felonies. The more clearly the consequences of a crime are communicated, the stronger the deterrent effect will be.<sup>115</sup> The factual approach, by placing the question of dangerousness into the hands of the jury,<sup>116</sup> clouds the certainty of punishment, thereby reducing the deterrent effect. This uncertainty may also encourage an already committed felon to engage in more risky behavior to increase the likelihood of the felony's success.<sup>117</sup> For example, a bank-robber may be tempted to use an unloaded gun if he believes that a jury will not find the behavior dangerous enough to warrant a felony murder conviction. However, the factual approach does offer the advantage of broadening the scope of potential deterrence to include those felonies not implicated by Arizona's felony murder rule.<sup>118</sup>

Like the factual approach, the affirmative defense weakens felony murder's deterrent effect by placing the final decision regarding culpability with the jury.<sup>119</sup> However, additional factors may make its effect on deterrence even more severe. Potential felons may be encouraged because the affirmative defense, in effect, provides a blueprint for minimizing individual homicidal liability.<sup>120</sup> Furthermore, negligent killings may also be more likely. The defense, by allowing a felon to deny foreknowledge of his accomplices' behavior, provides incentive for accomplices to distance themselves from each other.<sup>121</sup> The inherent approach, on the other hand, encourages felons to exert control over their accomplices' behavior because each will be held jointly liable for any resulting homicide.<sup>122</sup>

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State v. Hobbs, 807 P.2d 120 (Kan. 1991) (stating that felony murder's purpose is to deter negligent and accidental killings). *See also*, People v. Washington, 402 P.2d 130, 133 (Cal. 1965) (holding that "[t]he purpose of the felony-murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit.").

113. DRESSLER, *supra* note 20, at 464; *see also* Roth & Sundby, *supra* note 13, at 451 (arguing that the felony-murder rule would not be effective in preventing killings caused by a third party, such as a victim or policeman). *But see* Comment, *Merger and the Felony-Murder Rule*, 20 U.C.L.A. L. REV. 250, 258-59 n.41 (1973) (stating that the purpose of felony murder should be limited to negligent, and not accidental homicides).

114. *See generally* Roth & Sundby, *supra* note 13, at 451 n.28 (citing People v. Washington, 402 P.2d 130, 139 (Cal. 1965) (Burke, J. dissenting) (purpose is to deter felons from undertaking inherently dangerous felonies)).

115. Crump & Crump, *supra* note 11, at 370; *cf.* ERNEST VAN DEN HAAG, PUNISHING CRIMINALS 113 (1975); FRANKLIN E. ZIMRING & GORDON J. HAWKINS, DETERRENCE 141-42 (1973).

116. *See supra* note 62 and accompanying text.

117. *See supra* note 62 and accompanying text.

118. *See supra* notes 60-61 and accompanying text.

119. *See supra* note 76 and accompanying text.

120. *See supra* note 71 and accompanying text.

121. *See supra* note 77 and accompanying text. This is also possible under the factual approach, although not expressly defined. *See supra* notes 66-68.

122. *See supra* parts III, A & B. *See supra* notes 34-36, 66.

### D. Prosecutorial Efficiency

Perhaps the most compelling explanation for the resiliency of the felony murder rule comes, not from its ability to deter violent crime, but from its value as a prosecutorial tool.<sup>123</sup> Felony murder makes a murder conviction more likely in two ways. First, it removes the state's burden to prove homicidal *mens rea*.<sup>124</sup> Second, it gives the prosecution significant bargaining leverage during plea negotiations involving felony homicides.<sup>125</sup>

It is generally accepted that many felony murders do not involve innocent killings.<sup>126</sup> However, prosecutors will almost invariably pursue a conviction on felony murder grounds when available.<sup>127</sup> Premeditation is difficult to prove and often a source of jury confusion which may lead to unpredictable results.<sup>128</sup> Arizona's felony murder rule, when available, essentially eliminates this problem. The prosecutor need only prove a sufficient mental state for the commission of an enumerated felony in order to reach a first degree murder conviction.<sup>129</sup>

Arizona's felony murder rule also makes it easier for the prosecution to obtain convictions for second degree murder. Intent, knowledge and extreme recklessness are also often difficult to prove in court.<sup>130</sup> However, in a felony homicide situation involving intent, knowledge or extreme recklessness, the prosecution can bring a first degree murder charge in order to obtain a second degree murder plea from the defendant.<sup>131</sup> Arguably, the state would benefit by securing a "just" conviction while avoiding a lengthy and costly murder trial. Given that our justice system has limited resources, the money saved in avoiding litigation can be used to achieve greater justice elsewhere.<sup>132</sup> The danger of using felony murder in a coercive manner to obtain convictions outside the court system, rather than on the merits of the case, is obvious. However, it may be argued that justice does not require that scarce resources be used to ensure that the defendant's punishment *precisely* fits his crime.<sup>133</sup>

123. See generally, DRESSLER, *supra* note 20, at 466-67; Crump & Crump, *supra* note 11, at 374-75.

124. See *infra* notes 126-29 and accompanying text.

125. See *infra* notes 130-33 and accompanying text.

126. See e.g., DRESSLER, *supra* note 20, at 466.

127. *Id.*

128. Crump & Crump, *supra* note 11, at 371-72.

Imprecision in homicide definition is particularly prevalent and troublesome. Jury instructions on the presence or absence of premeditation, on conditions required for reduction to voluntary manslaughter, on the double misnomer embodied in "malice aforethought," and on the fine gradations between intent, knowledge, recklessness, and criminal negligence are typical sources of confusion.

*Id.*

129. ARIZ. REV. STAT. ANN. § 13-1105(B) (stating that felony murder only requires the mental state required for the commission of the underlying felony).

130. See *supra* note 128 and accompanying text.

131. See George P. Fletcher, *Reflections on Felony Murder*, 12 SW. U. L. REV. 413, 417-18 (1980-81).

132. See Crump & Crump, *supra* note 11, at 374.

133. In *People v. Burton*, 491 P.2d 793 (Cal. 1971), the California Supreme Court stated: The Legislature has said in effect that this deterrent purpose [of felony murder] outweighs the normal legislative policy examining the individual state of mind of each person causing an unlawful killing to determine whether the killing was with or without malice, deliberate or accidental, and calibrating our treatment of the

The factual approach makes it more difficult for the prosecution to obtain homicide convictions. The burden would be greater for first degree felony murder because the state, in effect, would need to prove, at the very least, criminal negligence by showing that the defendant was a willing participant in a dangerous felony.<sup>134</sup> This, in turn, would also make plea bargaining more difficult because a felony murder charge would carry less impact given the greater uncertainty of punishment. However, except in those cases where the killing was truly "accidental", the added burden of proving criminal negligence<sup>135</sup> would appear slight compared to proving premeditation, intent, knowledge or even extreme recklessness.

The affirmative defense would also create a hurdle for prosecutors in cases where the defendant did not commit the act of killing. The state would have to refute the defendant's claims that he lacked sufficient culpability for the murder.<sup>136</sup> Potentially, the affirmative defense opens the door for a whole pool of "non-triggermen" felons to escape liability. However, four factors serve to mitigate the prosecutor's burden in refuting the defense. First, the burden of proof is with the defendant to establish the elements of the defense.<sup>137</sup> Second, the defense's elements are conjunctive, failure to establish any one will result in the defense being inapplicable.<sup>138</sup> Third, the defense's elements are objective, in that, the reasonable person standard applies.<sup>139</sup> The subjective knowledge of the defendant need not be demonstrated. And fourth, the presence of weapons is likely to invalidate the defense for all but the most isolated accomplices.<sup>140</sup> The fear that the defense "opens the door" seems somewhat misplaced by the reality that it will be difficult to assert the defense due to its conjunctive nature.<sup>141</sup>

## V. PROPOSED AMENDMENT

The objective of any revision to Arizona's felony murder rule should be to eliminate the doctrine's inherent harshness without negatively impacting its usefulness as a tool to combat violent crime.<sup>142</sup> The felony murder doctrine is further justified when issues of transferred intent and proportionality are addressed by an examination of the facts of the underlying felony and the

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persons accordingly. Once a person perpetrates or attempts to perpetrate one of the enumerated felonies, then in the judgment of the Legislature, he is no longer entitled to such fine calibration, but will be deemed guilty of first degree murder for any homicide committed in the course thereof.

*Id.* at 801-02.

134. See discussion *supra* part III, B.

135. See *supra* notes 63-65 and accompanying text.

136. See *supra* notes 72-75 and accompanying text.

137. See *supra* note 71 and accompanying text.

138. See *supra* note 71 and accompanying text.

139. See *supra* note 71 and accompanying text.

140. See *supra* note 71 and accompanying text.

141. Alderstein, *supra* note 61, at 264-65; Richard Cosway, *The Revised Washington Criminal Code's Vital Structure: The Burden of Proof, Felony-Murder, and Justification Provisions*, 48 WASH. L. REV. 57, 76 (1972). "[I]t is the rare accomplice who can establish that he/she had 'nothing to do with the killing itself...was unarmed and had no idea that any of his confederates was armed or intended to engage in any conduct dangerous to life.'" N.Y. PENAL LAW § 125, practice commentaries at 496 (McKinney 1987).

142. See discussion *supra* part I.

individual culpability of the defendant.<sup>143</sup> However, attempts by other states to require closer examination of homicidal culpability have failed to adequately address the issue of proportionality and potentially threaten the felony murder rule's usefulness as a prosecutorial tool.<sup>144</sup> In order for a felony murder amendment to have any chance of success, it must achieve a better balance between the conflicting goals of fairness and utility.

Arizona's current felony murder statute serves as a barrier to proportionality because of its inflexibility. The rule is buried within a homicide classification scheme which is based on the defendant's homicidal mental state.<sup>145</sup> Felony murder is difficult to place proportionately within this structure because of the conflict between its implied *mens rea* requirement of criminal negligence<sup>146</sup> and its common law designation of murder.<sup>147</sup> Arizona classifies killings resulting from negligent and reckless behavior not as murder, but rather as negligent homicide and manslaughter, respectively.<sup>148</sup> Exactly where felony murder belongs on the homicidal culpability continuum has been the focus of much controversy.<sup>149</sup>

Unlike common law, civil law does not designate a killing in the course of crime as a distinct form of murder. Instead, the civil law equivalent of felony murder provides that if an unintended homicide occurs during the commission of a crime, the punishment for the underlying crime is increased in order to account for the resulting death.<sup>150</sup> In effect, the killing acts as an aggravating circumstance serving to increase the punishment for the underlying felony. This Note will suggest an alternative approach that instead uses the defendant's lack of individual culpability as a mitigating factor in reducing the penalty currently prescribed by Arizona's felony murder rule. By following an approach congruous to the civil law and freeing felony murder from the inflexibility of Arizona's homicidal sentencing scheme, greater proportionality can be gained by tailoring punishment to better fit the crime.

This Note proposes the following amendment to Arizona's felony murder rule:

§ 13-711. Sentence for Felony Murder

A. A person guilty of first degree murder as defined by § 13-1105(B) [felony murder] who did not commit, cause, aid, or solicit the act of killing and who has not previously been convicted of second degree murder as defined by § 13-1104 or a class 2 or 3 felony involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury on another shall be sentenced to a presumptive term of twenty-five calendar years if the victim was fifteen or more years of age and thirty-five years if

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143. See discussion *supra* parts III, A & B.

144. See discussion *supra* parts IV, A & D.

145. See ARIZ. REV. STAT. ANN. § 13-1105.

146. See *supra* notes 53-55 and accompanying text.

147. See discussion *supra* part II.

148. ARIZ. REV. STAT. ANN. §§ 13-1102 (negligent homicide) & 13-1103 (1994) (manslaughter).

149. See *supra* part IV, B. See, e.g., *supra* note 11 and accompanying text.

150. WHARTON, *supra* note 19, at 204-05.



the victim was under fifteen years of age. The presumptive term imposed pursuant to this subsection may be mitigated by up to ten years, pursuant to terms of subsection B. The defendant shall not be released on any basis until the full sentence has been served.

B. Mitigating circumstances to be considered shall be the following:

1. The age of the defendant.
2. The defendant's capacity to appreciate the dangerousness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.
3. The defendant was under unusual or substantial duress, although not such as to constitute a defense to prosecution.
4. The degree of the defendant's participation in the underlying felony was minor, although not so minor as to constitute a defense to the prosecution of the underlying felony.
5. The defendant was not armed with a dangerous or deadly weapon.
6. The defendant had no reasonable ground to believe that another participant in the underlying offense intended to engage in conduct likely to result in death.
7. The defendant had no reasonable ground to believe that another participant in the underlying offense was armed with a dangerous or deadly weapon.
8. The defendant endeavored to disengage himself from the underlying offense or flight therefrom immediately upon having reasonable grounds to believe that another participant in the underlying offense was armed with a dangerous or deadly weapon or intended to engage in conduct likely to result in death.

C. The defendant has the burden of proving the mitigating circumstances by a preponderance of the evidence to a judge at a sentencing hearing.

The proposal leaves the elements, felony classification, scope and *mens rea* requirement of Arizona's current felony murder rule unchanged.<sup>151</sup> The proposal only affects the sentencing criteria for felony murder. Under the current statute, felony murder carries a penalty of death or a life sentence of at least twenty-five years without parole.<sup>152</sup> The proposed amendment alters this by creating a presumptive term of twenty-five years without parole for those

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151. See ARIZ. REV. STAT. ANN. § 13-1105(C).

152. ARIZ. REV. STAT. ANN. §§ 13-1105(C) & 13-703. In Arizona, a natural life or death sentence may be imposed as a result of a first degree murder conviction premised on either premeditation or felony murder. See *supra* note 8 and accompanying text. In removing this possibility for felony murder in ARIZ. REV. STAT. § 13-711 (author's Proposed Draft 1994), this Note does not intend to directly address the issue of a sentencing ceiling that must apply to every felony murder case. See *Tison v. Arizona*, 481 U.S. 137 (1986); *State v. McDaniel*, 136 Ariz. 188, 199-200, 665 P.2d 70, 81-82 (1983).

felons who were not directly involved in the act of killing and who do not have a past history of violent crime. The presumptive term may be reduced to as low as fifteen years based on a judge's evaluation of statutorily defined mitigating circumstances designed to evaluate the defendant's homicidal culpability. The defendant will have the burden of proving, by a preponderance of the evidence, the existence of these mitigating circumstances.

The proposed amendment achieves a balance between proportionality and utility that is lacking in Arizona's current felony murder statute and which cannot be adequately remedied by the other limiting doctrines formerly discussed.<sup>153</sup> Proportionality is attained by balancing the need to punish the convicted felon for causing the loss of human life with the defendant's individual culpability.<sup>154</sup> The proposed amendment, by incorporating the elements of the affirmative defense, makes homicidal culpability a factor in determining the punishment for felony murder.<sup>155</sup>

Like the affirmative defense,<sup>156</sup> the proposed amendment is available only to those felons who do not commit, cause or aid in the act of killing.<sup>157</sup> Only "non-triggermen" accomplices to the underlying felony will be given the opportunity to mitigate their sentences. Of course, for the amendment to have any effect, the term "cause"<sup>158</sup> must be construed narrowly to exclude mere participation in the underlying felony that resulted in the death.

The proposed amendment is broader in scope than the affirmative defense submitted in the 1992 Criminal Code Revision Bill.<sup>159</sup> Arizona's proposed version was limited to defendants who were not "the only participant in the underlying offense."<sup>160</sup> The proposed amendment,<sup>161</sup> on the other hand, does not have this requirement and recognizes that felony homicides may be caused by events that are not directly attributable to any of the felony's participants. For example, even if F2 had acted alone in committing the burglary, he would not be any more culpable for P2's death, given the circumstances of the case.<sup>162</sup>

The proposed amendment also mirrors the affirmative defense by incorporating the defense's remaining elements as mitigating sentencing factors.<sup>163</sup> This brings felony murder in line with accountability principles because the mitigating factors help resolve the issue of whether the homicide was a foreseeable deviation in the felonious plan.<sup>164</sup> Suppose again, that F2 intentionally shot P2 with his own gun.<sup>165</sup> If F1 was aware that F2 was carrying a gun, it is reasonable to conclude that F2's use of the weapon in a confrontation with police was a foreseeable deviation in F1's felonious plan.

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153. See discussion *supra* part IV.

154. See discussion *supra* part IV, A.

155. See *infra* notes 156-66 and accompanying text.

156. See *supra* note 71.

157. See *supra* ARIZ. REV. STAT. § 13-711(A) (author's Proposed Draft 1994).

158. See *supra* ARIZ. REV. STAT. § 13-711(A) (author's Proposed Draft 1994).

159. See *supra* note 15 and accompanying text.

160. *Id.*

161. See *supra* ARIZ. REV. STAT. § 13-711 (author's Proposed Draft 1994).

162. See *supra* ARIZ. REV. STAT. § 13-711 (author's Proposed Draft 1994).

163. See *supra* ARIZ. REV. STAT. § 13-711(B) (author's Proposed Draft 1994).

164. See *supra* notes 34-36 and accompanying text.

165. See *supra* ARIZ. REV. STAT. § 13-711 (author's Proposed Draft 1994).

Therefore, F1, as a willing participant in the felony, shares a significant degree of homicidal culpability with F2 and should be punished accordingly. Furthermore, the proposed amendment accounts for changing degrees of foreseeability over the course of a felony. Under the amendment, a felon is expected to disengage from a crime as soon as danger becomes readily apparent.<sup>166</sup>

Unlike the affirmative defense, the proposed amendment achieves the goal of proportionality in punishment. The affirmative defense fails to do so because it offers an "all or nothing" solution.<sup>167</sup> In contrast, the proposed amendment solves this problem by using the factors in part B to adjust the defendant's sentence.<sup>168</sup> Under the proposed amendment, the sentencing judge begins with a presumptive term of twenty-five years. The judge may then decrease this sentence by up to ten years, based on the presence of statutorily-defined mitigating factors.<sup>169</sup> Many of these factors have been borrowed from the affirmative defense.<sup>170</sup> The remainder have been taken from Arizona's current non-capital offense sentencing statute<sup>171</sup> and include age, capacity, duress and the defendant's level of participation in the underlying felony. These additional factors are important because they allow the judge to better "pinpoint" the defendant's level of culpability and reduce the risk of arbitrary sentencing due to the broad nature of the elements found in the alternative defense.<sup>172</sup> The amendment also improves on the affirmative defense by looking beyond the underlying felony. For example, sentence mitigation is not available to defendants who have been previously convicted of violent, or potentially violent, felonies.<sup>173</sup> Convicted offenders have been forewarned about the possible consequences of violent crime and should be held to a higher standard of culpability.

For a punishment to be proportionate, the consequences of criminal behavior must also be considered.<sup>174</sup> The proposed amendment insures that felons will be punished for the loss of human life by mandating a minimum sentence of fifteen years<sup>175</sup> for even the most "accidental" of felony homicides. The minimum sentence is almost equal to the presumptive term currently provided under Arizona law for a first-time conviction of second degree murder.<sup>176</sup> In fact, the minimum penalty under the proposed amendment is more severe than the minimum penalty under second degree murder.<sup>177</sup> This minimum fifteen year sentence should alleviate any concerns that judicial discretion in sentencing will result in failure to punish the felon for the death he

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166. See *supra* ARIZ. REV. STAT. § 13-711(B)(8) (author's Proposed Draft 1994).

167. See *supra* note 98 and accompanying text.

168. See *supra* ARIZ. REV. STAT. § 13-711(A) (author's Proposed Draft 1994).

169. See *supra* ARIZ. REV. STAT. § 13-711(A) (author's Proposed Draft 1994).

170. See *supra* note 69 and accompanying text.

171. ARIZ. REV. STAT. ANN. § 13-702 (1994).

172. Such precision is not possible in the affirmative defense because its elements are considered in a conjunctive manner and are not used to guide judges in sentencing. See *supra* note 71 and accompanying text.

173. See *supra* ARIZ. REV. STAT. ANN. § 13-711(A) (author's Proposed Draft 1994).

174. See *supra* notes 72-87 and accompanying text.

175. See *supra* ARIZ. REV. STAT. ANN. § 13-711(A) (author's Proposed Draft 1994).

176. ARIZ. REV. STAT. ANN. §§ 13-1104 (intentional, knowing, or "extreme recklessness" murder) & 13-710 (amended 1994 by 1994 Ariz. Sess. Laws ch. 236).

177. ARIZ. REV. STAT. ANN. §§ 13-1104, 13-710 (1994).

has caused.

No sentencing criteria is perfect, and the final sentence in any given case is unlikely to appear proportionate to everyone. The sentencing boundaries proposed by this Note have been shaped primarily by Arizona's current felony murder sentencing scheme,<sup>178</sup> as well as the state's present opposition to any tampering with the doctrine's operation.<sup>179</sup> However, there is no reason why the proposed amendment's sentencing structure cannot be adjusted in order to come to a more favorable result.<sup>180</sup> Furthermore, an approach more in line with the civil law may be considered where the presumptive term would be set according to the penalty for the underlying felony and the sentence adjusted upwards to account for the killing.<sup>181</sup> While there are many options, proportionality requires that Arizona's current felony murder sentencing scheme be amended to reflect the defendant's homicidal culpability.

The proposed amendment further justifies the felony murder doctrine in terms of transferred intent.<sup>182</sup> The argument for transferred intent is strengthened when the felon is punished for foreseeable dangerous behavior.<sup>183</sup> The proposed amendment addresses the issue of foreseeability in two ways. First, sentence mitigation will not be available to repeat offenders who have been put on notice about the dangerousness of their behavior.<sup>184</sup> Second, the defendant's presumptive sentence will be adjusted according to factors which measure the defendant's ability to foresee the dangerousness of the felonious plan.<sup>185</sup> Therefore, felony murder is further supported because, under the proposal, the defendant is punished in proportion to the foreseeability of the crime's consequences.

The proposed amendment, while making the punishment for felony murder more proportionate, should not significantly impact the rule's value in fighting violent crime. The proposal will not have an appreciable effect on the rule's ability to deter the commission of enumerated felonies.<sup>186</sup> Sentences will be close or equal to those penalties currently prescribed for felony murder, especially for those crimes, like armed robbery, for which the current felony

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178. See *supra* notes 7-8 and accompanying text.

179. See *supra* notes 15-17 and accompanying text.

180. There are several factors which may be manipulated to achieve a more just result. If the sentences are deemed too arbitrary, factors may be assigned different relative weights depending on each factor's importance in measuring culpability. If the penalties are too lenient, the minimum sentence of fifteen years may be raised. If the penalties are held to be too harsh, the presumptive term may be reduced or parole instituted.

181. Wisconsin's felony murder statute states: "Whoever causes the death of another human being while committing or attempting to commit a [robbery, burglary, rape or kidnapping] may be imprisoned for no more than 20 years in excess of the maximum period of imprisonment provided by law for that crime or attempt." WIS. STAT. ANN. § 940.03 (West 1981). Wisconsin's approach would allow the punishment for felony murder to incorporate dangerousness as a factor in punishment. The more dangerous the underlying felony, the longer its penalty is likely to be. Individual culpability factors could be used in controlling judicial discretion in setting the additional punishment over and above the maximum penalty proscribed by the felony.

182. See discussion *supra* part IV, B.

183. See *supra* notes 109-10 and accompanying text.

184. See *supra* note 173 and accompanying text.

185. See *supra* ARIZ. REV. STAT. § 13-711(B) (author's Proposed Draft 1994).

186. See discussion *supra* part IV, C.

murder rule appears most appropriate.<sup>187</sup> Furthermore, even inherently dangerous felonies committed in a non-dangerous manner will be significantly punished if death occurs as a result.<sup>188</sup>

Under the proposed amendment, felons will still be encouraged to take steps to avoid negligent deaths during the commission of their crimes. A felon has an incentive to make the crime as non-dangerous as possible because a felony perpetrated in a dangerous manner will reduce the potential for future sentence mitigation.<sup>189</sup> It may be argued that, like the affirmative defense, the proposed amendment may discourage a felon from exerting control over his accomplices.<sup>190</sup> However, the potential impact is reduced because, unlike the affirmative defense, the proposed amendment mandates a severe penalty even in cases where the defendant can demonstrate lack of foreseeability.<sup>191</sup> Therefore, the proposed amendment will not have a significant detrimental effect on felony murder's deterrent value.

Finally, the proposed amendment will not significantly affect the state's ability to prosecute the felon who kills during the commission of his crime.<sup>192</sup> Often, the mental state of premeditation or intent is difficult to prove beyond a reasonable doubt based on the surrounding felony's facts.<sup>193</sup> Felony murder has traditionally provided the state with a vehicle for blocking the convicted felon from avoiding a murder charge by claiming lack of intent or premeditation.<sup>194</sup> Under the proposed amendment, felons who are likely to have intentionally killed, and therefore most deserving of first or second degree murder charges, will not be successful in obtaining reduced sentences under a system where a showing of criminal negligence will preclude most of the defendant's opportunity for mitigation.<sup>195</sup>

Even in those cases where criminal negligence is not obvious, the proposed amendment still eases the prosecutor's burden of establishing the defendant's culpability in two ways. First, the dangerousness of the defendant's behavior need only be demonstrated to the satisfaction of a judge during a sentencing hearing with the defendant bearing the burden of proof by a preponderance of the evidence.<sup>196</sup> Absent felony murder, a murder conviction would require the prosecution to prove a culpable *mens rea* to a jury beyond a reasonable doubt.<sup>197</sup> Second, while establishing the actual mental state of a defendant can be quite difficult,<sup>198</sup> the proposed mitigating circumstances are based primarily on objective criteria.<sup>199</sup> For example, the state need not

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187. See *supra* ARIZ. REV. STAT. § 13-711 (author's Proposed Draft 1994).

188. The minimum penalty under the proposed amendment is fifteen years in prison without parole. See *supra* ARIZ. REV. STAT. § 13-711 (author's Proposed Draft 1994).

189. See *supra* ARIZ. REV. STAT. § 13-711(B) (author's Proposed Draft 1994).

190. See *supra* note 121 and accompanying text.

191. See *supra* note 174-77 and accompanying text.

192. See discussion *supra* part IV, D.

193. See DRESSLER, *supra* note 20, at 466; Crump & Crump, *supra* note 11, at 372.

194. See Crump & Crump, *supra* note 11, at 376 ("the denial of harmful intent in [a homicide] situation is too facile. Sources of contrary evidence persuasive beyond a reasonable doubt are likely to be absent even if the defensive theory is perjurious." *Id.* at 376).

195. See *supra* notes 72-73 and accompanying text.

196. See *supra* ARIZ. REV. STAT. § 13-711(C) (author's Proposed Draft 1994).

197. State v. Hunter, 136 Ariz. 45, 664 P.2d 195 (1983).

198. See *supra* note 128 and accompanying text.

199. See *supra* ARIZ. REV. STAT. § 13-711(B) (author's Proposed Draft 1994). Factors

demonstrate that the defendant planned to use a weapon, only that he possessed one.<sup>200</sup> Similarly, the state would not have to prove that the defendant, in fact, knew his accomplices were armed. It would only need to show that a reasonable person would have known this to be the case. Common sense dictates that the evidence would need to be quite compelling for a judge to be persuaded that a defendant involved in an armed felony was not aware of the presence of weapons.<sup>201</sup>

It is true that, under the proposal, the court would be burdened with an additional sentencing hearing of a nature not normally required after a felony murder conviction.<sup>202</sup> However, the extra burden on the court system should not be determinative for two reasons. First, the procedure for considering aggravating and mitigating circumstances at sentencing time is already an important part of the Arizona criminal system.<sup>203</sup> Second, the above use of limited judicial sentencing discretion has been recognized as a suitable approach for balancing the need for an efficient judicial system with the defendant's right to proportionate punishment.<sup>204</sup> Under this scheme, juries are assigned the responsibility of determining general issues of guilt or innocence, leaving the judge to deal with the more complicated task of fine tuning the sentence to the defendant's degree of culpability. Only by requiring the court to analyze the facts of the case in determining the sentence can we ensure proportionality in punishment under the felony-murder doctrine.

## VI. CONCLUSION

This Note is premised on the theory that the current controversy surrounding the felony murder rule is due primarily to its harshness in extreme cases where the defendant could not have reasonably foreseen that death would result from his crime.<sup>205</sup>

Although many commentators have called for significant restrictions on the doctrine's scope<sup>206</sup>, one must consider the political reality that felony murder is perceived as an effective and highly visible tool for fighting dangerous crime. Any proposed change that threatens the rule's overall usefulness will be attacked and most likely suffer the same fate as Arizona's affirmative defense.<sup>207</sup>

The proposed amendment<sup>208</sup> strikes a compromise that will be acceptable

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which go directly to the defendant's knowledge are based on the reasonable person standard. *Id.* § 13-711(B) (6), (7), & (8).

200. See *supra* ARIZ. REV. STAT. § 13-711 (author's Proposed Draft 1994).

201. See *supra* note 141 and accompanying text.

202. See ARIZ. REV. STAT. ANN. § 13-1105(C) (1994) (separate sentencing hearing required to determine if death sentence will be imposed).

203. See *supra* note 144 and accompanying text. See also ARIZ. REV. STAT. ANN. §§ 13-702 & 13-703 (Supp. 1993).

204. See MODEL PENAL CODE, *supra* note 42, arts. 6-7, at 15 (listed as a favored approach amongst jurisdictions); ANDREW VON HIRSCH, *DOING JUSTICE* 98-104 (1976); Twentieth Century Fund Task Force on Criminal Sentencing, *Presumptive Sentencing*, in SENTENCING 318-20 (Hyman Gross and Andrew von Hirsch eds., 1981).

205. See *supra* notes 9-18 and accompanying text.

206. See *supra* notes 12-14 and accompanying text.

207. See *supra* notes 14-17 and accompanying text.

208. See *supra* ARIZ. REV. STAT. § 13-711 (author's Proposed Draft 1994).

to both camps. The majority of states adhering to the dangerous felony limitation have adopted the factual approach.<sup>209</sup> Given the severity of punishment for first degree murder, the defendant has a right to a fair evaluation of his true culpability which can only be achieved by a factual analysis of his conduct. And yet, the proposed amendment, by leaving the basic elements of the felony murder rule intact, insures that all felons who kill during the commission of a felony will be punished.

Much of the controversy surrounding the felony murder rule derives from its application in extreme cases where the felon has little direct involvement in the act of killing. However, by requiring the court to consider the presence of mitigating circumstances when determining the sentence, punishment for felony murder will be more proportionate and, most likely, less controversial. This is because the proposed amendment has the advantage of articulating to the public the precise nature of the defendant's culpability for the killing.<sup>210</sup>

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209. See DRESSLER, *supra* note 20, at 468.

210. See *supra* ARIZ. REV. STAT. § 13-711 (author's Proposed Draft 1994).

