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## Is Felony Murder the New Depraved Heart Murder: Considering the Appropriate Punishment for Drunken Drivers Who Kill

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**IS FELONY MURDER THE NEW DEPRAVED HEART MURDER?  
CONSIDERING THE APPROPRIATE PUNISHMENT FOR DRUNKEN  
DRIVERS WHO KILL**

Dora W. Klein \*

I. INTRODUCTION.....	2
II. PRECEDENT-SETTING CASES.....	7
A. <i>Missouri</i> .....	7
B. <i>Texas</i> .....	9
III. THE FIRST PROBLEM: THE SPECIFIC OR THE GENERAL? .....	11
A. <i>In Pari Materia</i> .....	11
B. <i>Prosecutorial Discretion</i> .....	12
IV. THE SECOND PROBLEM: FELONY MURDER’S LIMITING DOCTRINES .....	13
A. <i>Merger</i> .....	14
B. <i>Inherently Dangerous</i> .....	15
C. <i>Res Gestae</i> .....	17
V. THE THIRD PROBLEM: STRICT LIABILITY OR RECKLESS INDIFFERENCE? ....	19
A. <i>Felony Murder and Felony DWI as Strict Liability Offenses</i> .....	19
B. <i>The Allure of Transferred Intent</i> .....	22
C. <i>Strict Liability for Murder?</i> .....	24
D. <i>Punishment in Excess of Culpability?</i> .....	26
1. <i>How Culpable is Becoming Intoxicated?</i> .....	27
2. <i>How Culpable is Driving While Intoxicated?</i> .....	28
VI. WHY LEGISLATURES SHOULD ACT .....	30
A. <i>Culpability is Not Always Inherent</i> .....	31
B. <i>Fair Notice</i> .....	32
VII. CONCLUSION .....	33

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## I. INTRODUCTION

It would be hard to say which is the more maligned offense, depraved heart murder or felony murder. Depraved heart murder has been criticized as “archaic, without rational content, and merely pejorative.”<sup>1</sup> Felony murder, meanwhile, has been called “a living fossil,”<sup>2</sup> “an unconstitutional fiction,”<sup>3</sup> and “a conundrum without principle.”<sup>4</sup>

These two offenses have evoked such criticisms because they both are means of punishing non-intentional killings as murder.<sup>5</sup> Depraved heart murder elevates a reckless killing, which typically would be punished as manslaughter, to murder based on an exceptional, extreme recklessness that demonstrates an indifference to the value of human life.<sup>6</sup> Felony murder punishes as murder a

1. David Crump, “Murder, Pennsylvania Style”: *Comparing Traditional American Homicide Law to the Statutes of Model Penal Code Jurisdictions*, 109 W. VA. L. REV. 257, 307 (2007) (quoting *Thomas v. State*, 83 P.3d 818, 827 (Nev. 2004)).

2. *Tison v. Arizona*, 481 U.S. 137, 159 (1987) (Brennan, J., dissenting).

3. Lynne H. Rambo, *An Unconstitutional Fiction: The Felony-Murder Rule as Applied to the Supply of Drugs*, 20 GA. L. REV. 671 (1986).

4. Rudolph J. Gerber, *The Felony Murder Rule: Conundrum Without Principle*, 31 ARIZ. ST. L.J. 763 (1999); see also Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 446 (1985) (quoting *People v. Aaron*, 299 N.W.2d 304, 307 (Mich. 1980); *State v. Harrison*, 564 P.2d 1321, 1324 (N.M. 1977); 3 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 57, 65 (1883); H.L. Packer, *Criminal Code Revision*, 23 U. TORONTO L.J. 1, 4 (1973)) (“Criticism of the rule constitutes a lexicon of everything that scholars and jurists can find wrong with a legal doctrine: it has been described as ‘astonishing’ and ‘monstrous,’ an unsupportable ‘legal fiction,’ ‘an unsightly wart on the skin of the criminal law,’ and as an ‘anachronistic remnant’ that has ‘no logical or practical basis for existence in modern law.’”). Such criticism is not a recent development. See Note, *Felony Murder As a First Degree Offense: An Anachronism Retained*, 66 YALE L.J. 427, 427 (1957) (“The felony murder doctrine occupies an anomalous and much criticized position in the American law of homicide.”).

5. See *Tison*, 481 U.S. at 170–172 (Brennan, J., dissenting).

6. As Professor Victoria Nourse has explained:

Depraved heart murder is fundamentally about indifference to others. The depraved heart murderer is someone who fails to do something that all of us do every day to those who are immediately before us: The murderer acts in defiance of the consequences of his actions for others who rightly make an immediate claim on his attentions. Whether, as was once said, for whim or fancy, or for no reason at all, the depraved heart murderer acts in contempt of his and our shared humanity. His crime is important precisely because he appears to proceed on the assumption that he is the only man in the world.

V.F. Nourse, *Hearts and Minds: Understanding the New Culpability*, 6 BUFF. CRIM. L. REV. 361, 378–79 (2002) (emphasis omitted).

death that occurs during the course of a felony regardless of mental culpability for causing the death.<sup>7</sup>

Nearly one-quarter of the states have abolished depraved heart murder, limiting the definition of murder to include only deaths that are caused intentionally, knowingly, or “with malice,” and felony murder.<sup>8</sup> What happens in a jurisdiction that lacks a provision for depraved heart murder to those defendants whose extreme recklessness has caused death? On one hand, it might be expected that eliminating depraved heart murder would mean that those who kill recklessly would be convicted of manslaughter rather than murder, given that one of the ways of elevating a reckless killing to murder has been foreclosed.<sup>9</sup> And murder would be foreclosed altogether for someone who killed recklessly while not committing a felony. On the other hand, given the abundance of felony offenses, it seems probable that someone who killed recklessly also would have been committing some sort of felony. The broadness of felony murder—particularly the common-law formulation of felony murder, lacking such limiting doctrines as merger and inherent dangerousness—suggests that in jurisdictions where depraved heart murder has been eliminated, those who kill with extreme recklessness will not necessarily be convicted of manslaughter but instead might be convicted of felony murder.

This Article considers a particular kind of reckless killing that, according to one scholar, is “easily captured” by “classic depraved heart murder doctrine”: “the case of the intoxicated driver who hits another car head-on while traveling

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7. See James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces that Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429, 1433 (1994) (“In its starkest, broadest form, the felony-murder rule provides that the killing of another human being in the furtherance of *any* felonious enterprise constitutes the crime of murder.”).

8. The states that have eliminated depraved heart murder include Connecticut, Hawaii, Indiana, Louisiana, Missouri, Montana, Nebraska, New Jersey, Ohio, Tennessee, and Texas. CONN. GEN. STAT. ANN. § 53a-54b (2015); HAW. REV. STAT. § 707-701 (LexisNexis 2007); IND. CODE ANN. § 35-42-1-1 (LexisNexis 2009); LA. STAT. ANN. §14:30.1 (2014); MO. ANN. STAT. § 565.021 (West 2015); MONT. CODE ANN. § 45-5-102 (West 2015); NEB. STAT. ANN. § 28-303 (West 2015); N.J. STAT. ANN. § 2C:11-3 (LexisNexis 2015); OHIO REV. CODE ANN. § 2901.22(B); TENN. CODE ANN. § 39-11-302(b) (2013); TEX. PENAL CODE ANN. § 6.03(b) (2015). Hawaii has also abolished felony murder.

HAW. REV. STAT. § 707-701 (2007) (“In recognition of the trend toward, and the substantial body of criticism supporting, the abolition of the felony murder rule, and because of the extremely questionable results which the rule has worked in other jurisdictions, the Code has eliminated from our law the felony-murder rule.”). A few jurisdictions have eliminated felony murder but retained depraved heart murder. See KY. REV. STAT. ANN. § 507.020 (LexisNexis 2014); *Aaron*, 299 N.W.2d at 335 (declaring “the offense popularly known as felony-murder, which, properly understood, has nothing to do with malice and is not a species of common-law murder, shall no longer exist in Michigan, if indeed it ever did”).

9. See Crump, *supra* note 1, at 312 (citing TEX. PENAL CODE ANN. § 19.04 (West 2015)) (suggesting that “with evidence of recklessness, Texas would authorize indictment and conviction for manslaughter”).

the wrong way down an expressway at speeds up to 100 miles per hour.”<sup>10</sup> Of course, intoxication presents several tricky questions for depraved heart murder prosecutions. One question is whether “depraved heart” is a mens rea element; another is whether intoxication can negate it if it is a mens rea element.<sup>11</sup> In some jurisdictions, legislatures have answered (or sidestepped) such questions by enacting statutes that disallow voluntary intoxication as a mens rea-negating defense.<sup>12</sup> In other jurisdictions, courts have achieved the same result by ruling that defendants who become voluntarily intoxicated cannot argue that they were too intoxicated to act recklessly because the mens rea of recklessness is satisfied by the choice to become intoxicated under circumstances that risk causing harm to others.<sup>13</sup> Another difficulty is determining whether driving while intoxicated is so reckless as to demonstrate “depraved indifference to the value of human

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10. Kyrn Huigens, *Homicide in Aretaic Terms*, 6 BUFF. CRIM. L. REV. 97, 127 (2002); see also Cristina Yu, Book Note, 38 SANTA CLARA L. REV. 1001, 1007 (1998) (reviewing MICHAEL KURLAND, *HOW TO TRY A MURDER: A HANDBOOK FOR ARMCHAIR LAWYERS* (1997)) (explaining that “sometimes drunk drivers who kill are convicted of second degree murder; by drinking and driving these people show such a reckless disregard for their victims that it is tantamount to an intention to kill”).

11. For example, the New York Court of Appeals has stated, “The phrase ‘under circumstances evincing a depraved indifference to human life’ is not a *mens rea* element focusing on the subjective intent of the defendant but rather involves ‘an objective assessment of the degree of risk presented by defendant’s reckless conduct.’” *People v. Gomez*, 478 N.E.2d 759, 761 (N.Y. 1985) (quoting *People v. Register*, 457 N.E.2d 704, 707 (N.Y. 1983)); see generally Bernard E. Gegan, *More Cases of Depraved Mind Murder: The Problem of Mens Rea*, 64 ST. JOHN’S L. REV. 429 (1990) (discussing the *mens rea* element of depraved heart murder).

12. See Monrad G. Paulson, *Intoxication as a Defense to Crime*, 1961 U. ILL. L.F. 1, 7 (1961).

13. See, e.g., *Register*, 457 N.E.2d at 709 (deciding that intoxication is not a defense to charge of depraved-heart murder because it is a form of recklessness). As Justice Traynor of the Supreme Court of California explained:

[A] drunk man is capable of forming an intent to do something simple, such as strike another, unless he is so drunk that he has reached the stage of unconsciousness. What he is not as capable as a sober man of doing is exercising judgment about the social consequences of his acts or controlling his impulses toward antisocial acts. He is more likely to act rashly and impulsively and to be susceptible to passion and anger. It would therefore be anomalous to allow evidence of intoxication to relieve a man of responsibility for the crimes of assault with a deadly weapon or simple assault, which are so frequently committed in just such a manner.

*People v. Hood*, 462 P.2d 370, 379 (Cal. 1969). The drafters of the Model Penal Code similarly explained that becoming very drunk can establish the culpability for engaging in prohibited conduct:

[A]wareness of the potential consequences of excessive drinking on the capacity of human beings to gauge the risks incident to their conduct is by now so dispersed in our culture that we believe it fair to postulate a general equivalence between the risks created by the conduct of the drunken actor and the risks created by his conduct in becoming drunk.

MODEL PENAL CODE § 2.08 cmt. at 9 (Tent. Draft No. 9 1959).

life.”<sup>14</sup> Many courts have found that it is,<sup>15</sup> although others have ruled that it is not.<sup>16</sup> Some commentators have argued that because driving while intoxicated is statistically unlikely to cause death, it is categorically different from those acts that are so likely to cause death—such as firing a gun into a crowd of people—as to be evidence of a “depraved heart.”<sup>17</sup>

Felony murder, on the other hand, avoids all of these mens rea problems by simply eliminating from the definition of the offense any requirement to prove mental culpability for causing death.<sup>18</sup> Felony murder punishes those who cause death in the course of committing a felony, even if the death was wholly accidental.<sup>19</sup>

Given that in some cases driving while intoxicated is a felony, is felony murder an appropriate way to punish those who cause death in the course of driving while intoxicated?<sup>20</sup> The answer to this question depends not only upon whether felony DWI is an appropriate predicate for felony murder but also upon the interaction between felony murder and more specific offenses created to punish drunken drivers who kill. During the 1970s, most states enacted statutes

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14. See *infra* note 15.

15. See, e.g., *United States v. Fleming*, 739 F.2d 945, 948 (4th Cir. 1984); *Allen v. State*, 611 So. 2d 1188, 1193 (Ala. Crim. App. 1992); *People v. Watson*, 637 P.2d 279, 282 (Cal. 1981); *People v. McCarnes*, 224 Cal. Rptr. 846, 851 (Ct. App. 1986); *State v. Doub*, 95 P.3d 116, 121 (Kan. Ct. App. 2004); *Walden v. Commonwealth*, 805 S.W.2d 102, 105 (Ky. 1991); *Hamilton v. Commonwealth*, 560 S.W.2d 539, 543 (Ky. 1977) (“The facts in this case demonstrate that the accident was not the typical automobile accident where a driver makes a gross error of judgment and is tried for manslaughter or reckless homicide. Rather, Hamilton’s conduct surpasses the usual vehicle manslaughter case and demonstrates ‘wanton’ conduct and extreme indifference to human life.”); *People v. Daniels*, 698 N.Y.S.2d 120, 120 (N.Y. App. Div. 1999) (quoting *Gomez*, 478 N.E.2d at 761); *Commonwealth v. Taylor*, 337 A.2d 545, 547–548 (Pa. 1975); *Commonwealth v. Urbanski*, 627 A.2d 789, 793–94 (Pa. Super. Ct. 1993).

16. See, e.g., *People v. Mays*, 243 Cal. Rptr. 444, 447 (Ct. App. 1988) (“While the evidence of his driving clearly manifests a careless indifference and, at times, a grossly negligent operation of a motor vehicle in terms of unsafe speed and passing, it does not adequately reflect or support the requisite conscious disregard for human life from which malice may be implied.”); *Blackwell v. State*, 369 A.2d 153, 158 (Md. Ct. Spec. App. 1977) (“We do not believe that an inference of ‘viciousness’ or ‘extreme indifference to the value of human life’ may be drawn from the past, although persistent, drinking habits of an accused. While there may be depraved persons who persistently drink, it does not follow that those who do drink are implicitly depraved. The practice may be reprehensible, but it is not felonious.”); *State v. Bindrup*, 655 P.2d 674, 676 (Utah 1982) (“The record before us reflects that there is insufficient evidence to support a conviction for the offense of second degree murder, but that there is sufficient evidence to support a conviction for the included offense of manslaughter, *supra*. Particularly is this so in light of the defendant’s own admission at trial that he was aware of the risk occasioned by his conduct and that he consciously chose to disregard it.”).

17. See *infra* notes 104–07 and accompanying text.

18. See *Gerber*, *supra* note 4, at 763.

19. Some jurisdictions also require that the death be “in furtherance of” the felony. See *infra* notes 108–13 and accompanying text.

20. See *Guyora Binder, Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 448–82 (2011).

to address the particular problem of drunken drivers who kill.<sup>21</sup> These offenses are generally known as “vehicular manslaughter” or “intoxication manslaughter” and seem to represent legislatures’ assessment that manslaughter is the proper charge in these cases.<sup>22</sup> However, even after the enactment of these statutes, some drunken drivers who kill have been prosecuted under a theory of depraved heart murder.<sup>23</sup> Additionally, in recent years—especially in some states that lack depraved heart murder provisions—drunken drivers who kill have been convicted of felony murder.<sup>24</sup>

The purpose of this Article is not to undertake a general assessment of felony murder.<sup>25</sup> Rather, in recognition of the increasing use of felony-murder statutes to prosecute drunken drivers who kill, this Article considers various criticisms and defenses of the felony-murder rule as they apply specifically to felony DWI cases.<sup>26</sup> Part II of this Article discusses several recent precedent-setting cases in which drunken drivers who killed were prosecuted under felony murder statutes.<sup>27</sup> Part III explores whether such prosecutions are proper, given the existence of special narrower vehicular manslaughter provisions that a

21. See ALA. CODE § 32-5A-191 (2010 & Supp. 2014); ALASKA STAT. § 28.35.030 (2012); ARIZ. REV. STAT. ANN. § 28-1381 (2014); ARK. CODE ANN. § 5-65 (2005 & Supp. 2011); CAL. VEH. CODE §§ 23152-23229.1 (West 2014 & Supp. 2015); COLO. REV. STAT. § 42-4-1301 (2014); CONN. GEN. STAT. § 14-227A (2014); DEL. CODE ANN. tit. 21, § 4177 (2013 & Supp. 2014); D.C. CODE § 50-2201.05 (2001 & Supp. 2013); FLA. STAT. § 316.193 (2014 & Supp. 2015); GA. CODE ANN. § 40-6-391 (2014 & Supp. 2015); HAW. REV. STAT. § 291-E (2010 & Supp. 2012); IDAHO CODE § 18-8004 (2004 & Supp. 2013); 625 ILL. COMP. STAT. 5/11-500 to 5/11-505 (2014); IND. CODE § 9-30-5 (2010 & Supp. 2011); KAN. STAT. ANN. § 8-10 (2014); KY. REV. STAT. ANN. § 189.A (LexisNexis 2009 & Supp. 2014); LA. STAT. ANN. § 32:661 (2014); ME. REV. STAT. ANN. tit. 29-A, § 2411 (2014); MD. CODE ANN., TRANSP. § 21-902 (LexisNexis 2012); MASS. GEN. LAWS ch. 90, § 24 (2014); MICH. COMP. LAWS §§ 257.625–257.626c (2014); MINN. STAT. § 169A (2014); MISS. CODE ANN. § 63-11-30 (2013 & Supp. 2014); MO. REV. STAT. §§ 577.0–5770.54 (2014); MONT. CODE ANN. § 61-8-401 (2014); NEB. REV. STAT. § 60-6,196 (2014); NEV. REV. STAT. § 484C (2010 & Supp. 2011); N.H. REV. STAT. ANN. § 265:82 (2006); N.J. STAT. ANN. § 39:4-50 (West 2014); N.M. STAT. ANN. § 66-8-102 (LexisNexis 2009 & Supp. 2012); N.Y. VEH. & TRAF. LAW § 1192 (McKinney 2014); N.C. GEN. STAT. § 20-138.1 (2006); N.D. CENT. CODE § 39-08-01 (2008 & Supp. 2013); Ohio Rev. Code Ann. §§ 4511.19 to 4511.197 (LexisNexis 2004); OKLA. STAT. TIT. 47 § 11-902 (2014); OR. REV. STAT. §§ 813.010 to 813.616 (2014); 75 PA. CONS. STAT. § 3802 (2014); 31 R. I. GEN. LAWS §§ 31-27-2 to 31-27-3 (2010 & Supp. 2012); S.C. CODE ANN. § 56-5-2930 (2006); SD. CODIFIED LAWS § 32-23-1 (2015); TENN. CODE ANN. § 55-10-401 (2012 & Supp. 2014); TEX. TRANSP. CODE ANN. § 49.04 (West 2014); UTAH CODE ANN. § 41-6a-502 (LexisNexis 2010 & Supp. 2013); VT. STAT. ANN. tit. 23, § 1201 (2007 & Supp. 2012); VA. CODE ANN. § 18.2-266 (2014 & 2015 Supp.); WASH. REV. CODE § 46.61.502 (2014); W. VA. CODE § 20-7-18B (LexisNexis 2013); WIS. STAT. § 346.63 (2006); WYO. STAT. ANN. § 31-5-233 (2013).

22. See *id.* Whether it was a legislature’s intent that vehicular manslaughter be the sole offense that applies in these cases is discussed *infra* Part IIA.

23. See, e.g., *People v. Heidgen*, 980 N.E.3d 657, 667 (N.Y. 2013); *People v. Taylor*, 949 N.Y.S.2d 209, 210 (N.Y. App. Div. 2012).

24. See *infra* Parts IIA–B.

25. See *infra* Part II.

26. See *infra* Part III.

27. See *infra* Part II.

legislature might have intended to be the sole means of prosecuting drunk drivers who kill.<sup>28</sup> Part IV discusses three particular limiting doctrines—merger, inherent dangerousness, and *res gestae*—as applied to cases in which felony DWI is the basis for a felony murder charge.<sup>29</sup> Part V explores the culpability of the repeat offender drunken driver who kills. Although felony murder and felony drunken driving are both often described as “strict liability” offenses, this part concludes that the repeat-offender drunk driver demonstrates a degree of culpability that is not dissimilar to the culpability of defendants who have committed felonies, such as robbery and arson, that have traditionally been accepted as predicates for felony murder.<sup>30</sup> Part VI argues that even if prosecution of repeat DWI offenders is permissible under felony murder rules, legislatures should revise driving while intoxicated statutes to impose murder liability directly. Driving while intoxicated statutes that impose murder liability directly, rather than allowing indirect imposition through the felony murder statutes, would help ensure that only the most culpable DWI offenders are punished for murder, and would also help promote a sense of fairness and respect for the law.

The Article concludes that although felony murder prosecution of drunken drivers who kill and who have previously been convicted of a DWI offense is within the bounds of the felony murder doctrine, legislatures should—in the interest of fair notice—revise penal codes to make clear that drunken drivers who kill are subject to prosecution not only for manslaughter but also for murder.<sup>31</sup>

## II. PRECEDENT-SETTING CASES

Of the dozen states that have eliminated depraved heart murder, two—Missouri and Texas—have in recent years been especially active in prosecuting drunken drivers who kill under felony murder provisions.<sup>32</sup>

### A. *Missouri*

In 1996, a Missouri jury convicted Kenneth Pembleton of three counts of second-degree felony murder for causing the deaths of three people.<sup>33</sup> The victims were killed when Pembleton, after a night of heavy drinking, was speeding, failed to stop at a stop sign, and crashed his car into another car

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28. *See infra* Part III.

29. *See infra* Part IV.

30. This argument is not meant as a general endorsement of the felony murder rule; instead, it is meant as a suggestion that if any felonies are sufficiently culpable to warrant felony-murder liability, then repeat offender DWI felonies can be included.

31. *See infra* Part VI.

32. *See infra* Parts II.A–B.

33. *State v. Pembleton*, 978 S.W.2d 352, 353 (Mo. Ct. App. 1998).



causing both cars to travel over an embankment.<sup>34</sup> More than an hour after the crash, Pembleton's blood-alcohol level was more than twice the legal limit.<sup>35</sup>

Under Missouri law, both the felony murder statute and the involuntary manslaughter statute potentially applied to Pembleton's case.<sup>36</sup> According to Missouri's felony murder statute, "A person commits the crime of murder in the second degree if he: . . . (2) commits . . . any felony, and, in the perpetration of such felony . . . another person is killed as a result of the perpetration of such felony."<sup>37</sup> Under the involuntary manslaughter statute, "A person commits the crime of involuntary manslaughter if he: . . . (2) While in an intoxicated condition operates a motor vehicle in this state and, when so operating, acts with criminal negligence to cause the death of any person."<sup>38</sup>

For a first offense, involuntary manslaughter is at most a Class B felony,<sup>39</sup> which is punishable by "a term of years not less than five years and not to exceed fifteen years."<sup>40</sup> Felony murder, on the other hand, is a Class A felony, punishable by "a term of years not less than ten years and not to exceed thirty years, or life imprisonment."<sup>41</sup>

Because Pembleton had two prior convictions for driving while intoxicated, he was charged as a persistent offender, which is a felony.<sup>42</sup> This enabled the prosecutor to charge Pembleton with felony murder, with felony DWI as the predicate felony.<sup>43</sup> The jury found him guilty and sentenced him to 25 years on each of the three counts, to run concurrently.<sup>44</sup>

A year after the *Pembleton* case, Robin Mayer was similarly convicted of felony murder with felony DWI as the underlying felony.<sup>45</sup> Mayer's driver's license had been revoked because of seven previous DWI convictions, and at the time that his truck struck a car and killed a ten-year-old child, his blood-alcohol level was "nearly 0.30, three times the legal limit for intoxication."<sup>46</sup> Mayer was convicted not only of felony murder but also of eight other charges related to the

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34. *Id.* at 353–54.

35. *Id.* at 354.

36. *Id.* (citing MO. ANN. STAT. §§ 565.021, 565.024 (West 2015)).

37. § 565.021.

38. § 565.024.

39. *Id.* ("Involuntary manslaughter in the first degree under subdivision (1) or (2) of subsection 1 of this section is a class C felony. Involuntary manslaughter in the first degree under subdivision (3) of subsection 1 of this section is a class B felony. A second or subsequent violation of subdivision (3) of subsection 1 of this section is a class A felony.")

40. MO. ANN. STAT. § 558.011 (West 2015).

41. *Id.*

42. *State v. Pembleton*, 978 S.W.2d 352, 354 (Mo. Ct. App. 1998).

43. *Id.*

44. *Id.*

45. *State v. Mayer*, 3 S.W.3d 423, 424 (Mo. Ct. App. 1999).

46. Tim Rowden, *Hillsboro Man's Murder Conviction is Upheld in Crash that Killed Girl Driver's Daughter was also Paralyzed in Two-Car Accident Blood-Alcohol Level was Nearly 0.3*, THE ST. LOUIS POST-DISPATCH, Oct. 11, 1999, 1999 WLNR 929471.

fatal crash, and he was sentenced to an aggregated prison term of forty-two years, six months.<sup>47</sup>

### B. Texas

In 2002, Mark Wayne Lomax became the first person to be prosecuted under Texas's revised penal code for felony murder on the basis of felony driving while intoxicated.<sup>48</sup> Under this code's felony murder provision, a person commits the offense of murder if he "commits or attempts to commit a felony, other than 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."<sup>49</sup> Lomax also could have been charged with intoxication manslaughter, which provides that "a person commits an offense if the person: (1) operates a motor vehicle in a public place . . . and (2) is intoxicated and by reason of that intoxication causes the death of another by accident or mistake."<sup>50</sup>

Driving while intoxicated is generally a misdemeanor offense, but the offense is elevated to a felony after two prior convictions.<sup>51</sup> Because Lomax had two prior convictions, he was charged with felony DWI and also with felony murder, rather than intoxication manslaughter.<sup>52</sup> If Lomax had been convicted of intoxication manslaughter—a second-degree felony<sup>53</sup>—the maximum penalty would have been 20 years in prison.<sup>54</sup> A conviction for felony murder—a first-degree felony—allowed for a sentence of up to life in prison.<sup>55</sup> Lomax admitted to "speeding, weaving in and out of traffic, and tailgating," and his blood alcohol content was nearly three times the legal limit an hour after the crash that killed a

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47. *Mayer v. Dormire*, No. 4:03CV1562 FRB, 2005 WL 2454028, at \*1 (E.D. Mo. Oct. 3, 2005).

48. *Lomax v. State*, 233 S.W.3d 302, 303 (Tex. Crim. App. 2007). A previous version of the penal code had also been interpreted to allow felony murder prosecutions based on felony DWI. *See, e.g.*, *Fox v. State*, 165 S.W.2d 733, 734 (Tex. Crim. App. 1942) (stating that defendant was indicted for violating a felony statute by driving while intoxicated and killing someone while doing so).

49. TEX. PENAL CODE ANN. § 19.02(b)(3) (West 2015).

50. TEX. PENAL CODE ANN. § 49.08(a) (West 2015).

51. TEX. PENAL CODE ANN. § 49.09(b)(2) (West 2015).

52. Carol Christian, *Murder Charge brought in DWI Death*, HOUSTON CHRONICLE, Apr. 12, 2002, 2002 WLNR 13584984.

53. TEX. PENAL CODE ANN. § 49.08 (West 2015).

54. TEX. PENAL CODE ANN. § 12.33(a) (West 2015) ("An individual adjudged guilty of a felony of the second degree shall be punished by imprisonment in the Texas Department of Criminal Justice for any term of not more than 20 years or less than 2 years.").

55. TEX. PENAL CODE ANN. § 12.32(a) (West 2015) ("An individual adjudged guilty of a felony of the first degree shall be punished by imprisonment in the Texas Department of Criminal Justice for life or for any term of not more than 99 years or less than 5 years.").

five-year-old child.<sup>56</sup> A jury found Lomax guilty and sentenced him to 55 years in prison.<sup>57</sup>

Since *Lomax*, an increasing number of repeat DWI offenders are being prosecuted under Texas's felony murder statute.<sup>58</sup> In some jurisdictions, felony murder has become the standard offense for prosecuting repeat DWI offenders whose drunken driving causes death.<sup>59</sup> In San Antonio, for example, a recent news article reported:

“Anytime that we can pursue them as felony murders based on DWIs, that’s the direction we’re almost always going to move in,” said Assistant District Attorney David Henderson, who recently took charge of the office’s DWI unit. “When we’ve had to (prosecute) twice before, it’s an appropriate response.”<sup>60</sup>

Although so far the Missouri and Texas courts of appeals, as well as the federal courts on collateral review, have affirmed all of these felony murder convictions of repeat DWI offenders who killed,<sup>61</sup> these prosecutions raise a number of problematic questions. The first issue is whether intoxication-specific manslaughter offenses preempt general homicide offenses. The second problem is whether application of felony murder limiting doctrines precludes felony DWI as a basis for felony murder liability. Additionally, there is the question whether felony DWI is sufficiently culpable to warrant felony murder liability. Finally, the complexity of the legal rules required to prosecute felony DWI as felony murder means that the average person is likely to be surprised to learn that drunken drivers who kill are subject to murder liability.

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56. *Lomax v. State*, No. 10–03–00156–CR, 2006 WL 871723, at \*4 (Tex. Ct. App. Mar. 29, 2006), *aff’d*, 233 S.W.3d 302 (Tex. Crim. App. 2007).

57. *Lomax v. State*, 233 S.W.3d 302, 303 (Tex. Crim. App. 2007).

58. *See, e.g.*, *Hollin v. State*, 227 S.W.3d 117, 119 (Tex. Ct. App. 2006); *Mendoza v. State*, No. 08–04–00369–CR, 2006 WL 2328508, at \*1 (Tex. Ct. App. Aug. 10, 2006); *Stickland v. State*, 193 S.W.3d 662, 664 (Tex. Ct. App. 2006).

59. *See, e.g.*, Craig Kapitan, *Drunk Driving can be Murder; Repeat DWI Offenders to Face Harsher Charge*, SAN ANTONIO EXPRESS-NEWS, Mar. 25, 2013, 2013 WLNR 7443041 (reporting that drunk driving can be murder).

60. *Id.*

61. *See Adams v. Stephens*, No. 3:13–CV–854–M, 2014 WL 3728603, at \*1 (N.D. Tex. July 28, 2014); *Strickland v. Thaler*, No. 4:09–CV–746–Y, 2010 WL 4181266, at \*9 (N.D. Tex. Sept. 9, 2010); *Lomax v. Thaler*, No. H–09–0705, 2010 WL 3362203, at \*18 (S.D. Tex. Aug. 25, 2010); *Mayer v. Dormire*, No. 4:03CV1562 FRB, 2005 WL 2454028, at \*4 (E.D. Mo. Oct. 3, 2005).

## III. THE FIRST PROBLEM: THE SPECIFIC OR THE GENERAL?

A. *In Pari Materia*

One question that arises when drunken drivers who kill are charged with felony murder—a general offense—rather than vehicular or intoxication manslaughter—a more particular offense that applies to the same conduct and result—is whether such charges are contrary to the intent of the legislature. This question is based on the possibility that by enacting a specific provision that punishes drunken drivers who kill, the legislature might have meant that the particular provision should govern such cases, and also meant that more general provisions should not apply. For example, Pembleton argued that “the legislature intended for involuntary manslaughter to be the only crime that a person could be prosecuted for when he kills another person while driving in an intoxicated state.”<sup>62</sup> What does it mean that a legislature has enacted a statute that specifically criminalizes causing a death by means of driving while intoxicated?

Courts faced with this question turn to the principle of *in pari materia*—the principle that two related statutes should be read together in a way that achieves the intent of the legislature.<sup>63</sup> Based on the reasoning that there is nothing inconsistent about having two provisions that criminalize causing death by means of driving while intoxicated, courts have found that legislatures intended for both to apply and have found no need to choose the specific over the general.<sup>64</sup> For example, in *Lomax*, the Texas Court of Criminal Appeals first noted that the language of the felony murder provision “does not exclude felony DWI as an underlying felony for a felony-murder prosecution.”<sup>65</sup> The court then reasoned that “a general and a more specific statute might be viewed as proscribing the same conduct does not, standing alone, compel a conclusion that the Legislature intended that this conduct be prosecuted exclusively under the more specific statute.”<sup>66</sup> The court explained that two statutes are *in pari materia* only when:

one statute deals with a subject in comprehensive terms and another deals with a portion of the same subject in a more definite way. The

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62. *State v. Pembleton*, 978 S.W.2d 352, 355 (Mo. Ct. App. 1998).

63. *Id.* (citing *Bartley v. Special Sch. Dist.*, 649 S.W.2d 864, 867 (Mo. 1983)).

64. *See, e.g., Pembleton*, 978 S.W.2d at 355; *Lomax v. State*, 233 S.W.3d 302, 309 (Tex. Crim. App. 2007); *Hollin v. State*, 277 S.W.3d 117, 121 (Tex. App. 2006); *Strickland v. State*, 193 S.W.3d 662, 668 (Tex. App. 2006). *But see Blackwell v. State*, 369 A.2d 153, 158 (Md. App. 1977) (“[W]e have held that in enacting the manslaughter by automobile statute, Md.Code, Art. 27, § 388, the legislature intended to preempt the subject matter of *unintended* homicides resulting from the operation of a motor vehicle.”).

65. *Lomax*, 233 S.W.3d at 309.

66. *Id.* Two intermediate courts of appeals reached the same conclusion. *See Hollin*, 227 S.W.3d at 121; *Strickland*, 193 S.W.3d at 665–66.

rule is not applicable to enactments that cover different situations and that were apparently not intended to be considered together. The two statutes at issue here (felony murder and intoxication manslaughter) obviously cover different situations and apparently were not intended to be considered together. The felony-murder statute covers a variety of homicides during the commission of a felony while the intoxication manslaughter statute is specifically limited to a DWI homicide.<sup>67</sup>

Not all of the justices agreed, however. Two justices dissented on the grounds that the specific intoxication manslaughter provision does conflict with, and therefore should prevail over, the general felony murder provision.<sup>68</sup> As the dissenting opinion argued: “The felony-murder section is general, applying to a wide range of offenses. The intoxication manslaughter statute deals specifically with causing a death as a result of driving while intoxicated, whether the DWI offense is the first, third, or twenty-third.”<sup>69</sup> This difference means, the dissent argued, that “the special provision should prevail—a death that results from driving while intoxicated must be prosecuted as intoxication manslaughter.”

### *B. Prosecutorial Discretion*

In *Lomax*, the Texas Court of Criminal Appeals relied on the text of the statutes to determine that in enacting the intoxication manslaughter statute, the legislature had not meant to make that offense the sole means of punishing drunken drivers who kill.<sup>70</sup> In *Pembleton* and subsequent cases, the Missouri courts of appeals have examined the question of legislative intent one step further, attempting to harmonize the specific and general statutes by assuming that the legislature meant to give prosecutors the option to choose to prosecute under either of the statutes, given that prosecutors generally possess discretion to determine which charges best fit the facts of particular cases.<sup>71</sup> As the court explained in *Pembleton*, “because a prosecutor has the discretion of choosing which statute to proceed on when two statutes proscribe the same behavior, there is no conflict between the more specific DWI statute and the general criminal statute.”<sup>72</sup> And in a later case, the court further explained:

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67. *Lomax*, 233 S.W.3d at 312 (citations omitted). In California, the legislature has codified its intent that the vehicular manslaughter statute does not supersede or preempt the murder statute. CAL. PENAL CODE § 191.5(e) (West 2015) (“This section shall not be construed as prohibiting or precluding a charge of murder under Section 188 upon facts exhibiting wantonness and a conscious disregard for life to support a finding of implied malice, or upon facts showing malice, or upon facts showing malice consistent with the holding of the California Supreme Court in *People v. Watson*, 30 Cal. 3d 290.”)

68. *Id.* at 313 (Johnson, J., dissenting).

69. *Id.*

70. *Id.* at 309.

71. *State v. Pembleton*, 978 S.W.2d 352, 355 (Mo. Ct. App. 1998).

72. *Id.*

It is axiomatic that a single act may constitute an offense under two different statutes. It is then the responsibility of the prosecutor to elect under which statute to proceed. For example, in *State v. Pembleton*, this Court examined whether a drunk driver could properly stand convicted of second-degree felony-murder rather than involuntary manslaughter for the three deaths he caused. The defendant argued that he should have been prosecuted under the more specific involuntary-manslaughter statute. We upheld the convictions for second-degree murder, noting that only when two statutes cannot be reasonably harmonized does the more specific prevail over a more general statute. More importantly, we held that because Missouri courts recognize that a prosecutor has discretion to prosecute under either of two statutes, the statutes were reasonably harmonized.<sup>73</sup>

In cases that could be prosecuted under either the specific intoxication manslaughter statute or the more general felony murder statute, it is logical to think, as did the dissenting justices in *Lomax*, that the legislature might have intended for the specific to govern.<sup>74</sup> However, given that many cases can only be prosecuted as one or the other, it is unlikely that the legislature intended for the intoxication manslaughter statute to displace the felony murder statute. On the other hand, to the extent that the average citizen would be justified in thinking that intoxication manslaughter is the sole homicide offense that applies to cases in which a drunken driver kills, the problem is not preclusion but notice.<sup>75</sup> The desirability of making clear to the public that drunken drivers who kill are subject not only to manslaughter charges but also to murder charges is addressed in Part IVB.

#### IV. THE SECOND PROBLEM: FELONY MURDER'S LIMITING DOCTRINES

Felony murder is an offense that requires no proof of mental culpability with respect to causing death. Although many critics have alleged that punishing as murder an accidental killing that occurs during the commission of a felony serves no legitimate purpose, courts and legislatures have continued to accept and even embrace the felony murder rule.<sup>76</sup> Historically, the felony murder rule applied to any death that occurred during the commission of robbery, rape,

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73. *State v. Kaiser*, 139 S.W.3d 545, 552 (Mo. Ct. App. 2004) (citing *State v. Koen*, 468 S.W.2d 635, 629 (Mo. 1971); *Pembleton*, 978 S.W.2d at 355–56; *State v. Grady*, 691 S.W.2d 301, 303 (Mo. Ct. App. 1998)).

74. *Lomax*, 233 S.W.3d at 313–14 (Tex. Crim. App. 2007) (Johnson, J., dissenting).

75. *See, e.g., id.* at 305 (majority holding that Texas' felony-murder statute dispenses with a culpable mental state).

76. *See* Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 60 (2004).

arson, burglary, or kidnapping.<sup>77</sup> At common law, these felonies were themselves capital offenses, and so as a practical matter a defendant who was convicted of felony murder for causing a death during a robbery was subject to the same sentence—death—that he would have received had he been convicted only of the robbery.<sup>78</sup>

As legislatures adopted lesser punishments for felonies other than murder, as well as designated additional crimes as felonies, questions have arisen regarding which felonies can and should serve as a predicate for felony murder.<sup>79</sup>

Under modern statutes, in a few jurisdictions any felony at all can serve as a basis for felony murder.<sup>80</sup> Most states, however, have adopted one or more doctrines that limit which felonies can give rise to felony murder liability.<sup>81</sup> Three doctrines that are especially important to felony murder as applied to the drunken driver who kills are the merger doctrine, the inherently dangerous felony doctrine, and the *res gestae* doctrine.<sup>82</sup>

#### A. Merger

Under the merger doctrine, the felony murder rule does not apply if the underlying felony is an integral part of and is included in fact in the death.<sup>83</sup> Operation of the merger doctrine thus prohibits simple assault from serving as the basis for felony murder, if the act of assaulting the victim is the cause of the victim's death.<sup>84</sup> Similarly, manslaughter cannot serve as a basis for felony

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77. *Id.* at 60–61 (citing 1 WILLIAM L. CLARK & WILLIAM L. MARSHALL, A TREATISE ON THE LAW OF CRIMES 514–16 (1900)).

78. Rollin M. Perkins, *A Re-Examination of Malice Aforethought*, 43 YALE L.J. 537, 558 (1934); MODEL PENAL CODE § 210.2 at 31 n.74 (AMER. LAW. INST., Official Draft 1980). On the other hand, even though all felonies were punishable by death, in actual practice felonies other than murder might have been less likely to be punished by death. *See Tomkovicz, supra* note 7, at 1446 n.75.

79. *See generally* WAYNE R. LAFAVE, CRIMINAL LAW 785–86 (5th ed. 2010) (discussing history of the felony-murder doctrine and limitations to certain felonies).

80. *See, e.g.*, MO. ANN. STAT. § 565.021 (West 2015) (“A person commits the crime of murder in the second degree if he: . . . (2) commits . . . any felony, and, in the perpetration . . . of such felony . . . another person is killed as a result of the perpetration . . . of such felony.”).

81. *See generally* LAFAVE, *supra* note 79, at 786–89 (discussing limitation to certain felonies).

82. *See generally id.* at 785–807 (discussing felonies that merge into the murder, felonies which are inherently dangerous, and killings that occur in the *res gestae* of the felony).

83. *See Binder, supra* note 20, at 90.

84. Robert L. Simpson, Annotation, *Application of Felony-Murder Doctrine Where the Felony Relied Upon is an Includible Offense with the Homicide*, 40 A.L.R.3d 1341, 1345 (1971) (“It has been held or recognized in a number of cases that the felony-murder doctrine is not applicable in cases of felonious assault resulting in death, on the ground that the assault merges into the homicide.”).

murder; otherwise, every reckless killing would be felony murder.<sup>85</sup> A proper predicate for felony murder includes some act aside from the act that caused the victim's death.<sup>86</sup>

As applied to drunken drivers who kill, application of the merger doctrine might mean that felony DWI cannot serve as the basis for felony murder. The Texas court of appeals considered this argument in *Lomax*.<sup>87</sup> The defendant argued that he could not be convicted of felony murder because “the act of killing someone while driving while intoxicated cannot be separated from the felony offense of intoxication manslaughter; therefore, the two merge and prosecution under the felony murder statute is precluded.”<sup>88</sup>

In Texas, however, courts have interpreted the penal code's felony murder provision to mean that the only offense that merges with the homicide, and thus cannot serve as a basis for felony murder, is manslaughter (or a lesser included offense).<sup>89</sup> This is because of the specific language of the felony murder statute, which states that someone commits felony murder if he “commits or attempts to commit a felony, other than manslaughter . . .”<sup>90</sup> Felony DWI is not a lesser included offense of manslaughter and thus under Texas law, felony DWI does not merge with an accidental killing that occurs during the commission of that felony.<sup>91</sup>

### B. *Inherently Dangerous*

In most jurisdictions, only certain enumerated felonies can serve as a predicate for felony murder.<sup>92</sup> Typical enumerated felonies include those that were punishable by death at common law—burglary, arson, rape, and kidnapping.<sup>93</sup> Other jurisdictions limit predicate felonies to those that are

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85. See, e.g., *Malone v. State*, 232 S.E.2d 907, 908 (Ga. 1977) (“[V]oluntary manslaughter, and the felony of involuntary manslaughter where it applies, are not themselves felonies which will invoke the felony murder rule”).

86. *Simpson*, *supra* note 84, at 1343 (“[T]he rule is that the felony-murder doctrine does not apply unless the felony committed during the homicide is so distinct from it as not to be an ingredient of it, indictable therewith, or convictable thereunder.”).

87. *Lomax v. State*, No. 10-03-00156-CR, 2006 WL 871723, at \*1 (Tex. Ct. App. Mar. 29, 2006), *aff'd*, 233 S.W.3d 302 (Tex. Crim. App. 2007).

88. *Id.* at \*3. *Lomax* did not raise the merger issue on appeal to the Court of Criminal Appeals.

89. *Id.* (“The merger doctrine . . . applies only to prosecutions for felony murder under Section 19.02(a)(3) where the underlying felony is manslaughter or a lesser included offense of manslaughter.” (citing *Homan v. State*, 19 S.W.3d 847, 849 n. 4 (Tex. Crim. App. 2000)).

90. TEX. PENAL CODE ANN. § 19.02(b)(3) (West 2015).

91. *Lomax*, 2006 WL 871723, at \*3; see also *Lomax v. State*, 233 S.W.3d 302, 311 (Tex. Crim. App. 2007) (“We nevertheless decide that felony DWI is not a lesser included offense of intoxication manslaughter.”).

92. See *People v. Aaron*, 299 N.W.2d 304, 316 n.79 (Mich. 1980) (observing that “[t]he majority of states which have a statutory felony-murder rule enumerate the felonies”).

93. See, e.g., ME. REV. STAT. tit. 17-A, § 202 (2014) (“murder, robbery, burglary, kidnapping, arson, gross sexual assault, or escape”); N.J. STAT. ANN. § 2C:11-3 (West 2014)



“inherently dangerous to human life.”<sup>94</sup> In Texas, any felony (other than manslaughter) can serve as the basis for felony murder if “in the course of and in furtherance of” the felony, the actor “commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.”<sup>95</sup> In Missouri, the felony murder statute does not include any language limiting the predicate felony to a dangerous felony; thus, any felony may serve as the predicate for felony murder.<sup>96</sup>

Among the states that enumerate the felonies that can serve as a basis for felony murder, none include driving while intoxicated on the list.<sup>97</sup> Among states that specify only that the predicate felony must be “inherently dangerous,” at least some have found that felony drunken driving is inherently dangerous.<sup>98</sup> In Virginia, for example, several appellate courts have ruled that driving while intoxicated is an inherently dangerous felony.<sup>99</sup> As one court recently explained,

driving while intoxicated or recklessly is a felony considered to be “inherently dangerous.” By implication, it presents a substantial risk to life. “[T]he increased risk of death or serious harm occasioned by the commission of” appellant’s felony of driving while intoxicated demonstrated appellant’s “lack of concern for human life” and constitutes the justification for imputing malice.<sup>100</sup>

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(“murder, robbery, sexual assault, arson, burglary, kidnapping, carjacking or the crime of contempt”).

94. See, e.g., *People v. Burroughs*, 678 P.2d 894, 897 (Cal. 1984) (en banc) (“At the outset we must determine whether the underlying felony is ‘inherently dangerous to human life.’”); *State v. Brantley*, 691 P.2d 26, 28 (Kan. 1984) (“[T]o invoke the felony murder rule there must be proof a homicide was committed in the perpetration of or an attempt to perpetrate a felony and that the collateral felony was one inherently dangerous to human life.”).

95. TEX. PENAL CODE ANN. § 19.02(b)(3) (West 2015).

96. *State v. Pembleton*, 978 S.W.2d 352, 356 (Mo. Ct. App. 1998) (“It is true that many jurisdictions have enacted legislation that limits the application of the felony murder rule to cases where the underlying felony is either a ‘dangerous’ felony or one that is *malum per se*. However, as we illustrated above, section 565.021.1(2) states that a person is guilty of second degree felony murder if he commits *any* felony and in the perpetration of that felony, another person is killed.”) (internal citations omitted); see also MO. ANN. STAT. § 565.021 (West 2015) (“A person commits the crime of murder in the second degree if he: . . . (2) commits . . . any felony, and, in the perpetration . . . of such felony . . . another person is killed as a result of the perpetration . . . of such felony.”).

97. See *Aaron*, 299 N.W.2d at 316 n.79.

98. See, e.g., *Burroughs*, 678 P.2d at 897 (“At the outset we must determine whether the underlying felony is ‘inherently dangerous to human life.’”); *Brantley*, 691 P.2d at 28 (“[T]o invoke the felony murder rule there must be proof a homicide was committed in the perpetration of or an attempt to perpetrate a felony and that the collateral felony was one inherently dangerous to human life.”).

99. See, e.g., *Montano v. Commonwealth*, 739 S.E.2d 241, 243 (Va. Ct. App. 2013) (quoting *Davis v. Commonwealth*, 404 S.E.2d 377, 380 (Va. Ct. App. 1991)).

100. *Id.* (quoting *Davis v. Commonwealth*, 404 S.E.2d 377, 380 (Va. Ct. App. 1991); *Spain v. Commonwealth*, 373 S.E.2d 728, 732–33 (Va. Ct. App. 1988)); accord *State v. Smoot*, 737 N.W.2d

Is felony driving while intoxicated a dangerous felony? Certainly an intoxicated driver is more likely to cause a fatal crash than a non-intoxicated driver.<sup>101</sup> Critics, however, assert that drunken driving is not an especially dangerous activity, given that many people drive while intoxicated yet do not cause death.<sup>102</sup> On the other hand, none of the other felonies that have traditionally served as predicates for felony murder is especially statistically dangerous either. For example, according to one scholar, “only about .6 percent of all armed robberies end in death.”<sup>103</sup> But do such statistics really mean that armed robbery is not a dangerous activity? Not necessarily: “If the average robbery takes an hour (probably a high estimate), that means one homicide occurs every 166 hours of robbery. If everyday activities were as dangerous as robbery, and if the average person is awake 16 hours a day, then the average person would kill one person every eleven days.”<sup>104</sup> In sum, although any specific incident of driving while intoxicated does not pose a statistically great risk of death, driving while intoxicated is no less dangerous than other felonies that have traditionally served as predicates for felony murder.

### C. *Res Gestae*

The *res gestae* limitation imposes felony murder liability for deaths that are caused by a felony and excludes from felony murder liability deaths that are merely coincidental to the felony.<sup>105</sup> As one court explained,

Generally, in determining whether a felony murder has been committed, the critical factor is the existence of a causal connection between the

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849, 852 (Minn. Ct. App. 2007) (“An impaired person who drives, operates, or takes physical control of a vehicle poses an indisputable risk to human life.”).

101. Additionally, “[d]rivers with a BAC of .08 or higher involved in fatal crashes were seven times more likely to have a prior conviction for driving while impaired (DWI) than were drivers in fatal crashes with no alcohol.” NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP’T OF TRANSP., TRAFFIC SAFETY FACTS: 2012 DATA, ALCOHOL-IMPAIRED DRIVING (December 2013).

102. For example, one justice of the Supreme Court of California argued: “While driving intoxicated is dangerous, injury is not probable. Thousands, perhaps hundreds of thousands, of Californians each week reach home without accident despite their driving intoxicated.” *Taylor v. Super. Ct. of L.A.*, 598 P.2d 854, 864 (Cal. 1979) (Clark, J., dissenting).

103. Kevin Cole, *Killings During Crime: Toward A Discriminating Theory of Strict Liability*, 28 AM. CRIM. L. REV. 73, 105 (1991) (citing MODEL PENAL CODE § 210.2 cmt. 6, at 38 n.96 (AM. LAW INST., Official Draft 1980)); see also *Enmund v. Florida*, 458 U.S. 782, 799–800 nn.23–24 (1982) (referencing statistics that show that only about one-half of one percent of robberies end in homicide).

104. Cole, *supra* note 103, at 105. Additionally, as Professor Glanville Williams suggested, “the risk involved in taking one gun from a group of one million guns, only one of which is loaded, and firing it at another reasonable creature is unreasonable given the total absence of social utility in the conduct.” Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 664 n.220 (1984) (citing GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 59–61 (2d ed. 1961)).

105. *Montano*, 739 S.E.2d at 244.

felony and the accidental killing. A felon is not necessarily subject to criminal liability under the felony murder rule for every death which occurs while a felony is being committed. Otherwise, the felony-murder doctrine would make a felon absolutely liable for the accidental death of another person even though that death was a mere coincidence and not a consequence of the felony. Therefore, a “mere nexus” between the felony and the accidental death will not invoke the felony murder doctrine. Rather, the act or acts causing death must have been directly calculated to further the felony or necessitated by the commission of the felony.<sup>106</sup>

In the prototypical felony murder case, the robber shoots the victim to effect the robbery. The death thus occurs not only in the course of but also in furtherance of the felony. It has been argued by some defendants that when a drunken driver causes a death, the death is not in furtherance of the felony of driving while intoxicated.<sup>107</sup>

It is true that the drunken driver who causes death by driving the wrong way on the interstate, for example, or who crosses the center line, is not like the robber who causes death by shooting the victim so that he can complete the robbery. The drunken driver does not kill for the purpose of completing the offense of driving while intoxicated. On the other hand, in many cases in which a defendant has caused death during a felony, the deaths were not strictly in furtherance of the felony. For example, in the case of arson, the arsonist’s purpose is to burn down the building. Whether anyone is killed is beside the point of the felony. However, if the arsonist burns down a building that is occupied and the occupant dies, then the arsonist has committed felony murder. As one court explained,

In this case, the elements of *res gestae* were proved. The expert testimony made clear that the car accident which killed the victim occurred because appellant was highly intoxicated while he was driving. Appellant’s vision, motor skills, and reaction time were all adversely affected by his intoxication, and nothing in the record suggests that the accident likely would have occurred had appellant not been under the

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106. *Davis v. Commonwealth*, 404 S.E.2d 377, 378–79 (Va. Ct. App. 1991) (citing *King v. Commonwealth*, 368 S.E.2d 704, 706–709 (Va. Ct. App. 1988)); see also Dana K. Cole, *Expanding Felony-Murder in Ohio: Felony-Murder or Murder-Felony?*, 63 OHIO ST. L.J. 15, 22–23 (2002).

107. See, e.g., *Montano*, 739 S.E.2d at 244 (noting appellant’s argument that “the unintended death that occurred as a result of the accident was not in furtherance of either driving under the influence or driving with a suspended license, and, therefore, should not be considered within the *res gestae* of the felonies”) (internal punctuation omitted); *Bigon v. State*, No. 03-05-00692-CR, 2006 WL 2852476, at \*5 (Tex. Ct. App. Oct. 4, 2006), *aff’d*, 252 S.W.3d 360 (Tex. Crim. App. 2008) (“Appellant argues that the State failed to prove that his act of driving into the oncoming lane of traffic was ‘in furtherance’ of the felony DWI with a child passenger.”).

influence of alcohol. On the contrary, the evidence established that the underlying felony of driving while intoxicated caused the collision and resulted in an accidental death. . . . Appellant's intoxicated operation of his vehicle was, thus, inextricably linked and integral to the victim's death.<sup>108</sup>

The fact that an intoxicated driver caused a death does not necessarily mean that the driver's *intoxication* caused the death. This is an issue not only in felony murder cases but in intoxication manslaughter cases as well. In some states, the prosecution must prove "that the intoxication was a cause of the victim's death."<sup>109</sup> In other states, though, "under the vehicular homicide statute, it is not necessary to establish that the intoxication was the proximate cause of the victim's death."<sup>110</sup> In order for the victim's death to be within the *res gestae* of a defendant's felony DWI, the prosecution should be required to prove that the defendant's intoxication caused the victim's death. Thus, the *res gestae* doctrine is most likely to limit application of the felony murder rule in felony DWI cases if a defendant can plausibly claim that the death would have occurred even if the defendant had not been intoxicated.<sup>111</sup>

## V. THE THIRD PROBLEM: STRICT LIABILITY OR RECKLESS INDIFFERENCE?

### A. Felony Murder and Felony DWI as Strict Liability Offenses

Felony murder has been criticized as imposing strict liability for murder.<sup>112</sup> As criminal law casebooks routinely explain to first-year law students, strict liability offenses were enacted to combat particular problems created by industrialization, especially the problem that factories could produce large quantities of goods that were harmful, potentially injuring or killing large numbers of people.<sup>113</sup> Investigation and prosecution of these harms on an individualized level was impractical, and so legislatures sought to prevent such harms by imposing criminal liability based solely on committing an act that caused such harm, regardless of any intent, knowledge, recklessness, or even negligence in committing the act.<sup>114</sup> Typically, strict liability offenses are aimed

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108. *Montano*, 739 S.E.2d at 244.

109. Eric A. Johnson, *Wrongful-Aspect Overdetermination: The Scope-of-the-Risk Requirement in Drunk-Driving Homicide*, 46 CONN. L. REV. 601, 605 (2013) (quoting *Lupro v. State* 603 P.2d 468, 475 (Alaska 1979)).

110. *Id.* at 606 n.18 (quoting *People v. Acosta*, 860 P.2d 1376, 1381 (Colo. App. 1993)).

111. *See id.*; *State v. Guzman*, 96 P.3d 1173, 1178 (N.M. Ct. App. 2004)).

112. *See Tomkovicz, supra* note 7, at 1433.

113. *See Staples v. United States*, 511 U.S. 600, 606 (1994); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437–38 (1978); *Morissette v. United States*, 342 U.S. 246, 250 (1952).

114. *See Staples*, 522 U.S. at 606; *U.S. Gypsum Co.*, 438 U.S. at 437–38; *Morissette*, 343 U.S. at 250.

at protecting the general health and welfare of the public, would be difficult to investigate and prosecute on a case-by-case basis, are *malum prohibitum* rather than *malum in se*, and impose limited punishment.<sup>115</sup>

Statutes that impose strict liability mean that anyone, regardless of any degree of culpability, may be convicted.<sup>116</sup> Strict liability for criminal offenses is contrary to the basic tenets of the law: “To inflict substantial punishment upon one who is morally entirely innocent, who caused injury through reasonable mistake or pure accident, would so outrage the feelings of the community as to nullify its own enforcement.”<sup>117</sup>

Some defenders of the felony murder doctrine have responded that felony murder does not punish wholly innocent conduct; instead, the mens rea of the underlying felony provides the mens rea for the murder.<sup>118</sup> But what if the underlying felony itself requires no proof of a particular mens rea? Is felony murder then a wholly strict liability offense, punishing conduct in the absence of any culpable mental state? This is an issue in felony murder prosecutions of drunken drivers who kill, because felony DWI statutes typically do not require proof of any mens rea.

In these cases, courts have done a bad job addressing the issue of strict liability. In *Pembleton*, for example, the Missouri court of appeals asserted that “under Missouri’s felony murder statutory scheme, any underlying felony supplies the requisite mens rea for second-degree felony murder” and “the state proved that defendant acted with the requisite mens rea to commit the underlying felony of DWI, third offense,” and therefore “the state proved that defendant acted with the requisite mens rea to commit the underlying felony of DWI, third

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115. See *Staples*, 522 U.S. at 606; *U.S. Gypsum Co.*, 438 U.S. at 437–38; *Morissette*, 343 U.S. at 250; *United States v. Greenbaum*, 138 F.2d 437, 438 (3d Cir. 1943) (“Where the offenses prohibited and made punishable are capable of inflicting widespread injury, and where the requirement of proof of the offender’s guilty knowledge and wrongful intent would render enforcement of the prohibition difficult if not impossible (i.e., in effect tend to nullify the statute) the legislative intent to dispense with mens rea as an element of the offense has justifiable basis”); Kimberly D. Kessler, *The Role of Luck in the Criminal Law*, 142 U. PA. L. REV. 2183, 2193 n.46 (1994) (“Strict liability imposes liability without regard to whether the defendant made a mistake or the act (or harm) was accidental. Impure food and drug regulations are one category of this type of prohibited conduct. Because such regulations are not typically based on those things that are bad in and of themselves (*malum in se*) but rather those that are bad because the law says they are (*malum prohibitum*), strict liability does not carry with it the same moral force.”).

116. Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 731 (1960).

117. *Id.* (quoting Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 56 (1933)).

118. See, e.g., *Roary v. State*, 867 A.2d 1095, 1100 (Md. 2005) (quoting *Fisher v. State* 786 A.2d 706, 732 (Md. 2001); WAYNE R. LAFAYE, *SUBSTANTIVE CRIMINAL LAW* § 14.5 (2d. ed. 2003)); *Commonwealth v. Prater*, 725 N.E.2d 233, 241–243 (Mass. 2000) (citations omitted); *Heacock v. Commonwealth*, 323 S.E.2d 90, 93 (Va. 1984) (quoting *Wooden v. Commonwealth*, 284 S.E.2d 811, 814 (Va. 1981)).

offense.”<sup>119</sup> But the underlying felony in this case did not require proof of any particular mens rea.<sup>120</sup> Under Missouri law, “A person commits the crime of ‘driving while intoxicated’ if he operates a motor vehicle while in an intoxicated or drugged condition.”<sup>121</sup> Intoxication is defined as a being “under the influence of alcohol, a controlled substance, or drug, or any combination thereof.”<sup>122</sup> A persistent offender is someone “who has pleaded guilty to or has been found guilty of two or more intoxication-related traffic offenses.”<sup>123</sup>

Arguably, the court in *Pembleton* gave the matter of mens rea insufficient attention, not even acknowledging that felony DWI as a predicate for felony murder is a departure from the traditional felony murder model. In *Mayer*, the court acknowledged the departure but simply concluded that the legislature wrote the felony murder statute that way.<sup>124</sup> In sum, the Missouri appellate courts seem untroubled by the prospect of murder as a strict liability offense. It is possible that what the *Pembleton* court meant by “under Missouri’s felony murder statutory scheme, any underlying felony supplies the requisite mens rea for second degree felony murder” is that by committing a felony, *Pembleton* acted with sufficient culpability to justify the murder conviction.<sup>125</sup> This might have been true at common law, when all felonies were *malum in se* as well as punishable by death, but certainly modern penal codes include many felonies that cannot supply the culpability for murder.<sup>126</sup>

Courts in Texas have also failed to seriously address the argument that using felony DWI as a predicate for felony murder converts murder into a wholly strict liability offense.<sup>127</sup> In *Lomax*, the Texas Court of Criminal Appeals granted review specifically to consider the question: “Can a felony murder conviction be based on an underlying felony that expressly requires no mens rea, despite the fact that in a felony-murder conviction, the mens rea for the act of murder is supplied by the mens rea of the underlying felony?”<sup>128</sup> Although the court seemed ready to give this question serious consideration,<sup>129</sup> in the end it decided the matter solely on the basis of what it determined to be the Texas legislature’s intent in drafting the felony murder statute.<sup>130</sup> Because the legislature meant to

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119. *State v. Pembleton*, 978 S.W.2d 352, 356 (Mo. Ct. App. 1998) (citing *State v. Mannon*, 637 S.W.2d 674, 677 (Mo. 1982) (emphasis omitted)).

120. *Id.*

121. MO. ANN. STAT. § 577.010(1) (West 2015).

122. § 577.001(13).

123. § 577.023(5)(a).

124. *State v. Mayer*, 3 S.W.3d 423, 425–26 (Mo. Ct. App. 1999) (citing *Pembleton*, 978 S.W.2d at 355).

125. *Pembleton*, 978 S.W.2d at 356.

126. *Id.*

127. *Id.*

128. *Lomax v. State*, 233 S.W.3d 302, 304 (Tex. Crim. App. 2007).

129. *Id.*

130. *Id.*

dispense with a mens rea element for felony murder, no mens rea element is required.<sup>131</sup>

The Court of Criminal Appeals acknowledged that the felony murder statute “might contain some features not normally associated with ‘strict liability’ offenses,” but the court ignored any problems with the possibility of murder as a strict liability offense, concluding that “on balance these features do not overcome the clear legislative intent to plainly dispense with a culpable mental state.”<sup>132</sup> The Court did not describe the “features” that comprised its “balancing” test. The Court simply concluded that its decision that a mens rea is not required for felony murder “is consistent with the historical purpose of the felony-murder rule,<sup>133</sup> the very essence of which is to make a person guilty of an ‘unintentional’ murder when he causes another person’s death during the commission of some type of a felony.”<sup>134</sup>

Considering these cases on collateral review, federal district courts have found that felony murder convictions predicated on felony DWI charges do not violate due process, even though neither offense requires proof of any mens rea.<sup>135</sup> Three federal district courts in Texas have considered this issue, and all have rejected the claim that the convictions are unconstitutional.<sup>136</sup> As one court explained, “the United States Supreme Court has never articulated a general constitutional doctrine of mens rea, and it has never held that a state’s definition of a crime must include a mens rea element.”<sup>137</sup>

### B. *The Allure of Transferred Intent*

In explaining the felony murder doctrine, many courts turn to the doctrine of transferred intent.<sup>138</sup> The basic idea is simple: “The malice which plays a part in the commission of the felony is transferred by the law to the homicide. As a result of the fictional transfer, the homicide is deemed committed with malice; and a homicide with malice is common law murder.”<sup>139</sup>

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131. *Id.* at 305.

132. *Lomax v. State*, 233 S.W.3d 302, 305 (Tex. Crim. App. 2007).

133. *Id.*

134. *Id.*

135. *Adams v. Stephens*, No. 3:13-CV-854-M, 2014 WL 3728603, at \*3 (N.D. Tex. July 28, 2014); *Strickland v. Thaler*, No. 4:09-CV-746-Y, 2010 WL 4181266, at \*4 (N.D. Tex. Sept. 9, 2010); *Lomax v. Thaler*, No. H-09-0705, 2010 WL 3362203, at \*5 (S.D. Tex. Aug. 25, 2010); *Mayer v. Dormire*, No. 4:03CV1562 FRB, 2005 WL 2454028, at \*4 (E.D. Mo. Oct. 3, 2005).

136. *Adams*, 2014 WL 3728603, at \*3; *Strickland*, 2010 WL 4181266, at \*4; *Lomax*, 2010 WL 3362203, at \*5; *Mayer*, 2005 WL 2454028, at \*4.

137. *See State v. Cheatham*, 6 P.3d 815, 821 (Idaho 2000); *State v. O’Blasney*, 297 N.W.2d 102, 107 (Tenn. 1999). Although some courts recognize that transferred intent is a fiction, others take the idea rather literally, as if there is some intent that is transferred. *See, e.g., State v. Gardner*, 340 S.E.2d 701, 710 (N.C. 1986).

138. *State v. Gardner*, 340 S.E.2d 701, 710 (N.C. 1986) (citing 2 CHARLES E. TORCIA WHARTON’S CRIMINAL LAW § 145 (15th ed. 1979)).

139. *See Rodriguez v. State*, 548 S.W.2d 26, 28–29 (Tex. Crim. App. 1977).

Prior to *Lomax*, the Texas Court of Criminal Appeals, like many other courts, had used the transferred intent theory to reject claims that felony murder imposed strict liability for murder.<sup>140</sup> The precedent-establishing case was *Rodriguez*, in which the court explained that “the culpable mental state for the act of murder is supplied by the mental state accompanying the underlying committed or attempted felony giving rise to the act. The transference of the mental element establishing criminal responsibility for the original act to the resulting act conforms to and preserves the traditional mens rea requirement of the criminal law.”<sup>141</sup>

However, when felony DWI is the predicate for felony murder, there is no proven intent to transfer, because felony DWI does not require proof of any mens rea. This difficulty required the Texas Court of Criminal Appeals in *Lomax* to overrule *Rodriguez*, at least regarding the transferred intent matter.<sup>142</sup> The *Lomax* court explained that although in *Rodriguez* the court had “decided that the culpable mental state for ‘the act of murder’ is supplied by the culpable mental state accompanying the underlying felony,” this decision was wrong, because “the very nature of the felony-murder rule is that there is no culpable mental state ‘for the act of murder.’”<sup>143</sup> Thus, the court decided to overrule “that portion of the holding in *Rodriguez* that a culpable mental state is required for the act of murder in a felony-murder prosecution and that the mental state of the underlying felony supplies this culpable mental state.”<sup>144</sup>

In *Mayer*, the Missouri court of appeals also became entangled in the “transferred intent” quagmire.<sup>145</sup> Mayer argued that because the underlying felony of driving while intoxicated lacks a mens rea requirement, there was no mens rea to “transfer” to the murder.<sup>146</sup> The court responded that while transferred intent might have been part of the historical conception of felony murder, felony murder is now a matter of statutory definition.<sup>147</sup> The court quoted that definition—“A person commits the crime of murder in the second degree if he: . . . Commits or attempts to commit any felony, and, in the perpetration or attempted perpetration of such felony . . . another person is killed as a result of the perpetration or attempted perpetration of such felony”—and then observed that this definition is “full and complete on its face, and the transferred intent analysis is not required by its terms.”<sup>148</sup>

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140. *Id.*

141. *Lomax v. State*, 233 S.W.3d 302, 307 (Tex. Crim. App. 2007).

142. *Id.* at 306–07.

143. *Id.* at 307.

144. *State v. Mayer*, 3 S.W.3d 423, 425 (Mo. Ct. App. 1999).

145. *Id.*

146. *Id.*

147. *Id.* at 426 (quoting MO. ANN. STAT. § 565.021.1(2) (West 2015)).

148. See Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1085–93 (1997) (discussing substantive and formal strict liability).



This is arguably the right result for the wrong reason. The *Lomax* and *Mayer* courts rejected the transferred intent rule because felony murder does not require intent to commit the murder—but certainly felony murder requires some intent, otherwise felony murder would be a true, substantive strict liability offense rather than, as it has always been understood, an offense that imposes formal strict liability with respect to causing a death during the commission of a felony.<sup>149</sup> But “transferred intent” never does any real work in supplying intent.<sup>150</sup> When used properly, the concept of transferred intent is just a shorthand method—a heuristic—for explaining that the actor did act with the required intent. For example, if A intends to kill B but instead kills C, A’s intent to kill B can be said to transfer to C, for the purpose of proving that A had the necessary intent—intent to kill another person—to be convicted of murder. “Transferred intent” reaches the correct result in this case because A intended to kill a person, and it does not matter whether A actually killed B or C, so long as both B and C are persons.

### C. *Strict Liability for Murder?*

If culpability for felony murder is not transferred from the predicate felony, then is felony murder a true, substantive strict liability offense? Neither felony murder nor felony DWI is a true strict liability offense. While neither requires proof of a particular mens rea, it is not possible to be convicted of either without having acted with a fairly high level of mental culpability. As one scholar has stated,

Even the much-criticized felony murder rule does not impose liability without fault: At worst, it leads to a grossly excessive penalty for what is usually an intentional and serious underlying felony. In many cases, the defendant was reckless as to the risk of death, and so might justly have been convicted of at least manslaughter even without the rule.<sup>151</sup>

The offender might be punished in excess of his culpability for the murder but he is not punished in the absence of any culpability at all. This is not to suggest that

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149. See William L. Prosser, *Transferred Intent*, 45 TEX. L. REV. 650, 650 (1967).

150. David P. Bryden, *Reason and Guesswork in the Definition of Rape*, 3 BUFF. CRIM. L. REV. 585, 587 (2000); see also Kent Greenawalt, “Uncontrollable” Actions and the Eighth Amendment: Implications of *Powell v. Texas*, 69 COLUM. L. REV. 927, 965 (1969) (“His only real complaint is that his penalty is disproportionate to his blameworthiness.”); Robinson, *supra* note 104, at 665 (“An evidentiary theory would justify a felony-murder rule under the argument that such killings probably are purposeful, knowing, or at least reckless under circumstances manifesting an extreme indifference to the value of human life. The creation of risk to life for the purpose of engaging in a felony manifests an actor’s indifference to the value of human life.”).

151. Binder, *supra* note 20, at 435 (quoting *People v. Suarez*, 844 N.E.2d 721, 729 (N.Y. 2005)).

disproportionate punishment is not a problem, only that it is a different problem than strict liability.

Additionally, as another commentator has suggested, recklessness can aggravate culpability, which is the basis for the depraved heart murder doctrine: “a sufficiently bad reason for acting can aggravate culpability for imposing risk. This principle can explain the prevalent rule that aggravates a reckless homicide from manslaughter to murder, if the killing manifests an ‘abandoned and malignant heart’ or ‘depraved indifference to human life.’”<sup>152</sup> This principle can also support the felony murder rule that imposes liability for murder when a death occurs during the course of a felony—or at least certain felonies, including the felony of repeated DWI offenses.<sup>153</sup>

A true, substantive strict liability offense is one that risks imposing punishment in the complete absence of mental culpability.<sup>154</sup> But someone cannot be convicted of felony DWI on the basis of prior DWI convictions—and thus cannot be convicted of felony murder with repeat offender DWI as the predicate felony—and not have acted with extreme recklessness. The prior convictions serve as a warning that the conduct of driving while intoxicated is risky.<sup>155</sup> The person who chooses to drink and drive despite this warning can reasonably be regarded as indifferent to the consequences of his choices. As one commentator observed, “Prior intoxicated acts signify subjective awareness of one’s propensities to cause harm.”<sup>156</sup> Or as one judge observed during sentencing of a repeat DWI offender whose second DWI offense caused the deaths of three people:

Sentencing is not about generalities. It’s about the specifics. In your situation, I considered the fact that you had a previous alcohol-related offense, so I want you to understand this. I considered the fact that you in 1998 were convicted of driving while intoxicated with a point one-seven reading, and less than three to four years later, basically went and

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152. *Id.*

153. See, e.g., Sanford H. Kadish, *Excusing Crime*, 75 CALIF. L. REV. 257, 267 (1987) (“Strict liability imposes guilt without regard to whether the defendant knew or could reasonably have known some relevant feature of the situation.”).

154. *People v. Hendrix*, 153 Cal. Rptr. 3d 740, 761 (Ct. App. 2013) (“Knowledge of the dangers of driving while under the influence can be obtained through the general experience of having suffered a driving under the influence conviction”); *People v. McCarnes*, 224 Cal. Rptr. 846, 849–850 (Ct. App. 1986) (“Defendant also contends that his previous convictions for driving under the influence were not probative on the knowledge element of implied malice, because the convictions showed only that he knew such driving was unlawful, but not that he knew it was dangerous. However, the reason that driving under the influence is unlawful is because it is dangerous, and to ignore that basic proposition, particularly in the context of an offense for which the punishment for repeat offenders is more severe, is to make a mockery of the legal system as well as the deaths of thousands each year who are innocent victims of drunken drivers.”).

155. Derrick Augustus Carter, *Bifurcations of Consciousness: The Elimination of the Self-induced Intoxication Excuse*, 64 MO. L. REV. 383, 424 (1999).

156. Ronald A. Silkworth, *State of Maryland v. Michael Reck Unofficial Transcript of the Sentencing Statement*, 6 GREEN BAG 2d 305, 309–10 (2003).

did the very, very same thing. Except this time, you were unfortunate. More importantly, the three victims in this case and their families were unfortunate. So I do consider that an aggravating circumstance.<sup>157</sup>

The defendant who is a repeat DWI offender had actual rather than hypothetical or fictional awareness that his decision to drink and drive was criminal. His failure to abide by the law even after he had been punished for a prior transgression justifies the belief that he was acting with not just awareness of but indifference to the risks that his behavior created.<sup>158</sup>

#### D. *Punishment in Excess of Culpability?*

The most compelling criticism of felony murder is that it allows for the possibility of punishment in excess of culpability.<sup>159</sup> Because felony murder does not require proof of culpability for a death that occurs during the commission of a felony, even accidental killings can potentially be punished as murder.<sup>160</sup> This, of course, is contrary to the basic principle that intentional wrongdoing is more culpable<sup>161</sup> and therefore ought to be punished more severely than non-intentional wrongdoing.<sup>162</sup>

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157. See Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L. REV. 953, 962–63 (1998); Samuel H. Pillsbury, *Crimes of Indifference*, 49 RUTGERS L. REV. 105, 118–20 (1996); Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 486–89 (1992); see also *Jeffries v. State*, 90 P.3d 185, 193 (ALASKA CT. APP. 2004), *aff'd*, 169 P.3d 913 (Alaska 2007) (concluding that murder “can be established not only through evidence that the defendant engaged in egregiously dangerous driving, but also through evidence of the defendant’s extreme intoxication, the defendant’s decision to ignore warnings not to drive, the defendant’s past convictions for driving while intoxicated, the defendant’s refusal to participate in court-ordered treatment for alcohol abuse imposed as part of the defendant’s sentence or conditions of probation from previous DWI convictions, and the defendant’s decision to drive despite a license suspension or revocation stemming from previous DWI convictions.”).

158. See, e.g. Jeanne H. Seibold, Note, *The Felony-Murder Rule: In Search of a Viable Doctrine*, 23 CATH. LAW. 133, 160 (1978) (“The concept of basing the degree of punishment on the seriousness of the result of the criminal act seems grossly misplaced in a legal system which recognizes the degree of mental culpability as the appropriate standard for fixing criminal liability.”).

159. *Id.* at 153.

160. *Id.* at 142.

161. *Tison v. Arizona*, 481 U.S. 137, 155 (1987) (“Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished.”); see also *id.* at 171 (Brennan, J., dissenting) (quoting *Enmund v. Florida*, 485 U.S. 782, 798 (1981)) (“It is fundamental that ‘causing harm intentionally must be punished more severely than causing the same harm unintentionally.’”). *Morissette v. United States*, 342 U.S. 246, 250–51 (1951) (“The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.”).

162. *But see* Paul H. Robinson, *supra* note 104, at 669–71.

Felony murder does not, however, necessarily result in excessive punishment. Although some defendants who are convicted of felony murder are no doubt punished in excess of their culpability, it is also likely true that many defendants do deserve this punishment. The question raised by the use of felony DWI as a predicate for felony murder is whether these particular felony murder convictions necessarily or even likely impose punishment in excess of the punishment that a defendant deserves.

### 1. *How Culpable is Becoming Intoxicated?*

Becoming intoxicated is generally understood to be reckless.<sup>163</sup> In no jurisdiction is voluntary intoxication a general defense to a crime.<sup>164</sup> Although in some jurisdictions intoxication might be a defense to a crime that requires a mens rea of intent or knowledge,<sup>165</sup> in most jurisdictions intoxication cannot negate recklessness.<sup>166</sup> As the Model Penal Code explains, “[w]hen recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.”<sup>167</sup>

Not only is intoxication generally not a defense, but intoxication is commonly viewed as aggravating reckless behavior.<sup>168</sup> As the Fourth Circuit

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163. *See* *Montana v. Egelhoff*, 518 U.S. 37, 49–50 (1996).

164. *See, e.g.*, ALASKA STAT. § 11.81.630 (1996) (providing intoxication “is relevant to negate an element of the offense that requires that the defendant intentionally cause a result”); CAL. PENAL CODE § 29.4(b) (West 2015) (“intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent”); COLO. REV. STAT. § 18-1-804(3) (1998) (“A person is not criminally responsible for his conduct if, by reason of intoxication that is not self-induced at the time he acts, he lacks capacity to conform his conduct to the requirements of the law”). Some states do not allow evidence of voluntary intoxication to negate any mens rea. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-503 (1989); ARK. CODE ANN. § 5-2-207 (1987); DEL. CODE ANN. tit. 11, § 421 (1995); GA. CODE ANN. § 16-3-4 (1998); HAW. REV. STAT. § 702-230 (1993); MO. REV. STAT. § 562.076 (1994); MONT. CODE ANN. § 45-2-203 (1997).

165. *See, e.g.*, CAL PENAL CODE § 29.4(b) (West 2015) (“Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought.”).

166. MODEL PENAL CODE § 2.08(2) (AMER. LAW INST., Tent. Draft No. 9, 1959); *see also* *United States v. Fleming*, 739 F.2d 945, 948 n.3 (4th Cir. 1984) (“Defendant’s state of voluntary intoxication thus would not have been relevant to whether the jury could have inferred from the circumstances of the crime that he was aware of the risk created by his conduct.”); *State v. Cameron*, 514 A.2d 1302, 1307 (N.J. 1986); *State v. Trott*, 130 S.E. 627 (N.C. 1925).

167. *See* *People v. Register*, 457 N.E.2d 704, 709 (N.Y. 1983) (“The common-law courts viewed the decision to drink to excess, with its attendant risks to self and others, as an independent culpable act . . . [i]n utilitarian terms, the risk of excessive drinking should be added to and not subtracted from the risks created by the conduct of the drunken defendant for there is no social or penological purpose to be served by a rule that permits one who voluntarily drinks to be exonerated from failing to foresee the results of his conduct if he is successful at getting drunk.”).

168. *Fleming*, 739 F.2d at 949.

Court of Appeals wrote in affirming a decision that drunken driving could imply malice,

In the present case . . . danger did not arise only by defendant's determining to drive while drunk. Rather, in addition to being intoxicated while driving, defendant drove in a manner that could be taken to indicate depraved disregard of human life, *particularly* in light of the fact that *because he was drunk* his reckless behavior was all the more dangerous.<sup>169</sup>

## 2. *How Culpable is Driving While Intoxicated?*

Although the felony murder doctrine has been criticized for imposing potentially excessive punishment, it is possible that in certain cases, or certain categories of cases, defendants are sufficiently culpable to warrant a murder conviction. As a formal matter, felony murder does not require proof of mental culpability. As a practical matter, however, there are many cases in which mental culpability is evident: "Requiring proof of culpability for the separate act of killing may not change the result in many cases. If a defendant undertakes a dangerous felony, he probably has exhibited the extreme recklessness or malice aforethought necessary for a conviction of murder."<sup>170</sup> Thus, in many cases felony murder "represents a formal approximation of extremely reckless homicide."<sup>171</sup>

Courts have typically been unsympathetic to defendants' claims that driving while intoxicated is not highly culpable.<sup>172</sup> The Supreme Court of Tennessee once proclaimed that "driving an automobile while under the influence of an intoxicant or in such a manner as to endanger the lives of others is conduct

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169. Roth, *supra* note 4, at 491; *see also* MODEL PENAL CODE § 210.2 cmt. 6 at 36–37 (AM. LAW INST., Official Draft 1980). The Model Penal Code rejected a traditional felony murder offense but did include a depraved heart murder provision, which additionally provided for a presumption of "extreme indifference to the value of human life" when the actor was engaged in certain criminal conduct. *Id.* at 38. "[C]riminal homicide constitutes murder when . . . (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape. MODEL PENAL CODE § 210.2. (AM. LAW INST., Official Draft 1980).

170. Roth, *supra* note 4, at 459 n.73 (quoting Fletcher, *Reflections on Felony-Murder*, 12 SW. U.L. Rev. 413, 420 (1981)).

171. *But see* Hamilton v. Commonwealth, 560 S.W.2d 539, 544 (Ky. 1977) (Palmore, C. J., dissenting) ("I concede that fatal carelessness in the operation of a motor vehicle calls for stern punishment, but murder is something else. There simply is a difference in culpability between committing an act that endangers people whose presence is known and an act that endangers people whose presence should be anticipated but in fact is not known.").

172. Hardin v. State, 356 S.W.2d 595, 595–96 (Tenn. 1962) (citing Edwards v. State, 304 S.W.2d 500 (Tenn. 1957)).

*malum in se* which supplies the necessary criminal intent and eliminates the necessity of showing that death was the natural and probable result of the criminal act.”<sup>173</sup> The public, too, seems unsympathetic. As one commentator has suggested,

One who chooses to become voluntarily intoxicated to such an extent forfeits his right to close scrutiny of culpability and is punished for the harmful acts that result from the “guilty” decision to become intoxicated. In essence, these intoxication doctrines reflect the view that a “guilty” drunken individual who causes harm without the normally required mental state, but while in a self-induced, impaired condition, is quite unlike a truly “innocent” sober individual who causes harm without the requisite mental state.<sup>174</sup>

To find an intoxicated driver reckless, most courts look not to the moment when he ran the stop sign at 65 mph or crossed over the center line into oncoming traffic, but instead look to the moment when he undertook to drive while intoxicated.<sup>175</sup> This time-framing manipulation has been criticized.<sup>176</sup> But adopting a wide time frame might not pose the same problems in felony murder cases as it does in other cases. As one scholar has observed, “the decision to frame time narrowly makes sense as a general rule of criminal law; wide-ranging inquiries into an actor’s pre-harm experiences and thought processes as a method for determining that an accident was criminal would invite both over-deterrence and under-security.”<sup>177</sup> Felony murder, though, is different, because “the decision to frame time narrowly is less sensible in the felony-murder setting, where neither over-deterrence nor under-security should concern us.”<sup>178</sup>

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173. Tomkovicz, *supra* note 7 at 1477 n.189.

174. *People v. Whitfield*, 868 P.2d 272, 281 (Cal. 1994) (“The circumstance that a defendant, when a fatal traffic collision occurs, is unconscious as a result of voluntary intoxication, does not preclude a finding that the defendant harbored malice, because malice may have been formed prior to that time.”).

175. See Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 593–94, 600–16, 664–65 (1981).

176. Cole, *supra* note 103 at 109.

177. *Id.*

178. Additionally, it has been argued that mental culpability is not the sole determinate of appropriate punishment:

The criminal law has never been limited to mens rea alone in assessing the severity of crime. Actus reus and results count, too. Murder is not the same offense as attempted murder, even though the two crimes have similar menses rea. Murder is a more serious crime, even if the main difference is the result. The felony murder rule, like classical criminal law in general, is founded on the proposition that the result is sometimes a factor that aggravates or reduces the severity of a crime. Specifically, the felony murder rule reflects a judgment that a robbery that causes a human death is not merely a robbery but something more serious; it is more akin to a murder than to a robbery.

David Crump, *Reconsidering the Felony Murder Rule in Light of Modern Criticisms: Doesn't the Conclusion Depend Upon the Particular Rule at Issue?*, 32 HARV. J.L. & PUB. POL'Y 1155, 1162 (2009).

For purposes of assessing culpability, one important factor is whether a defendant has previously been convicted of a DWI offense. A prior conviction for DWI means that the defendant has actual, objective information that his behavior is illegal and considered to be dangerous. He himself might assess things differently and decide that his behavior is not dangerous, but he is on notice that he is taking a risk. He is certainly not an innocent or even negligent actor; he is necessarily consciously disregarding a risk that his behavior is dangerous.<sup>179</sup>

Absent prior DWI convictions, the question whether a defendant was consciously aware of the risk is harder to answer. Thus, whether felony murder prosecutions on the basis of felony DWI are likely to impose disproportionate punishment depends upon why the DWI is a felony. When the DWI is a felony because of prior DWI convictions, it is less likely that punishment will be excessive. However, prior DWI convictions are just one way that a DWI charge can be a felony offense. When a DWI is a felony for reasons unrelated to culpability, then the risk of excessive punishment is increased. For example, under Texas law a DWI is a felony if the drunken driver is driving with a passenger under the age of fifteen. But the drunken driver who drives with a fourteen-year-old passenger is not more culpable for causing death than is the drunken driver who drives with a sixteen-year-old passenger.

This problem of circumstances unrelated to culpability for causing death meaning the difference between murder and manslaughter is one of several reasons why legislatures should revise intoxication manslaughter statutes to make repeat offender DWI an aggravating factor that subjects drunken drivers who kill to murder liability directly rather than by application of the felony murder statute.

## VI. WHY LEGISLATURES SHOULD ACT

In certain cases of drunken drivers who kill, conviction for felony murder results in an appropriate—or at least not necessarily disproportionate—punishment. When a defendant has previously been convicted of a DWI offense, then there is compelling evidence that he was consciously aware that his behavior created an unacceptable risk of harm. In disregarding that risk, he can be regarded as culpably equivalent to someone who takes a gun to a robbery. When the intoxicated driver crashes his car and kills someone, or the robber shoots his gun and kills someone, no one is surprised. If felony murder is appropriate in any cases, such cases would seem to include repeat DWI offenders whose intoxicated driving causes death.<sup>180</sup>

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179. See *Missouri v. Mayer*, 3 S.W.3d 423, 426 (Mo. Ct. App. 1999); *State v. Pembleton*, 978 S.W.2d 352, 356 (Mo. Ct. App. 1998); *Lomax v. State*, 233 S.W.3d 302 (Tex. Crim. App. 2007).

180. TEX. PENAL CODE ANN. § 49.045 (West 2003). Under this statute:

Even though felony murder is arguably appropriate in some cases in which a drunken driver kills, it is not appropriate in all cases—otherwise every intoxication manslaughter case would be felony murder. The problem is that an assortment of aggravating factors can enhance a DWI charge to a felony, and not all of those factors necessarily make a defendant appropriately liable for murder. Although the repeat offender is necessarily culpable, because his prior convictions provide actual notice that his behavior is dangerous, other aggravating factors—those that are either beyond the control of the defendant or that do not increase the culpability of his conduct—impose felony-murder liability on the basis of contingent circumstances rather than on the basis of enhanced culpability.

*A. Culpability is Not Always Inherent*

Whether a particular defendant who has caused a death in the course of driving while intoxicated can be said to have necessarily acted with enhanced or extreme recklessness depends upon why the DWI offense is a felony. In *Pembleton*, *Mayer*, and *Lomax*, the DWI offenses were felonies because the defendants were repeat DWI offenders. In these cases, the defendants necessarily had notice that their behavior was unacceptably dangerous. However, prior DWI offenses is not the only grounds for a DWI to be a felony. For example, under Texas law, driving while intoxicated a felony if the intoxicated driver is driving with a passenger under the age of fifteen.<sup>181</sup> This statutory provision was used to convict Edwin Glen Bigon of felony murder.<sup>182</sup> But nothing about the fact that Bigon had decided to drive while intoxicated with a passenger who happened to be a child made his decision necessarily more culpable regarding the risk of causing death than if he had decided to drive while intoxicated without a passenger, or with a passenger who was an adult. Bigon's culpability for causing death was not enhanced because of the age of his passenger, and thus the age of his passenger should not be the basis for imposing felony murder liability.

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(a) A person commits an offense if:

- (1) the person is intoxicated while operating a motor vehicle in a public place; and
- (2) the vehicle being operated by the person is occupied by a passenger who is younger than 15 years of age.

(b) An offense under this section is a state jail felony.

181. *Bigon v. State*, No. 03-05-00692-CR, 2006 WL 2852476, at \*5 (Tex. Ct. App. Oct. 4, 2006).

182. In Texas, for example, the factors that make a DWI offense a felony are found in one provision of the penal code (TEX. PENAL CODE ANN. § 49.09 (West 2015)) while the offense of DWI is defined in another (TEX. PENAL CODE ANN. § 49.04 (West 2015)).



*B. Fair Notice*

Prosecutions of drunken drivers who kill for felony murder are based on the interplay of at least two statutes: the felony murder statute and the driving while intoxicated statute. Additionally, determining whether a DWI offense is a felony likely requires consideration of more than one statutory provision.<sup>183</sup> Appreciating that a drunken driver who kills can be guilty of murder requires understanding the complex connections among these already complex statutes. Meanwhile, intoxication manslaughter or vehicular manslaughter statutes are straightforward: a single statute declares that a drunken driver who kills is guilty of manslaughter. Given the complexity of the statutory scheme that allows prosecution of drunken drivers who kill for felony murder, and the simplicity of the manslaughter statute, the average citizen could reasonably think that manslaughter is the only homicide offense that applies to these cases.

The California legislature recently revised its DWI statute to require that people who are convicted of DWI offenses be warned that DWI offenses can be punished as murder:

(a) The court shall advise a person convicted of a violation of Section 23103, as specified in Section 23103.5, or a violation of Section 23152 or 23153, as follows: “You are hereby advised that being under the influence of alcohol or drugs, or both, impairs your ability to safely operate a motor vehicle. Therefore, it is extremely dangerous to human life to drive while under the influence of alcohol or drugs, or both. If you continue to drive while under the influence of alcohol or drugs, or both, and, as a result of that driving, someone is killed, you can be charged with murder.”<sup>184</sup>

Of course, the average citizen is expected to know the law.<sup>185</sup> On the other hand, felony murder prosecutions of drunken drivers who kill are, as one court suggested, a “novel or imaginative use” of the law.<sup>186</sup> If this novelty amounts to “an unforeseeable judicial enlargement of a criminal statute,” then it could be a

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183. CAL. VEH. CODE § 23593 (West 1999).

184. *See State v. Woods*, 179 A. 1, 2 (Vt. 1935) (“The maxim, ‘Ignorantia legis non excusat,’ and the corresponding presumption that everyone is conclusively presumed to know the law, are of unquestioned application in Vermont as elsewhere, both in civil and in criminal cases.”).

185. *State v. Jones*, 516 S.E.2d 405, 413 (N.C. App. 1999), *aff’d in part, rev’d in part*, 538 S.E.2d 917 (N.C. 2000).

186. *Marks v. United States*, 430 U.S. 188, 192 (1977) (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 353–54 (1964)); *see also United States v. Burnom*, 27 F.3d 283, 284 (7th Cir. 1994) (“The due process clause . . . supplies criminal defendants protection against novel developments in judicial doctrine.”). The dissenting opinion in *Jones* argued that the novel use of the felony murder statute did violate due process. *See Jones*, 516 S.E.2d at 423 (arguing that “defendant was not provided fair notice that his conduct would subject him to the felony-murder rule”).

violation of due process.<sup>187</sup> As the Supreme Court has explained, “the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties is fundamental to our concept of constitutional liberty.”<sup>188</sup>

Even if the novelty of felony DWI as a predicate for felony murder is not so novel as to be a due process violation, prosecutors and courts—and especially legislatures, who write the statutes—should be concerned that statutory schemes that allow for novel or imaginative prosecutions can undermine respect for the law. Legislatures can remedy this complexity and lack of clarity by revising DWI statutes to impose murder liability for repeat DWI offenders whose drunken driving causes death.

## VII. CONCLUSION

Driving while intoxicated and felony murder are both offenses that do not require proof of a particular mens rea. Nevertheless, for those drunken drivers who kill—and who can be prosecuted for felony murder on the basis of prior DWI convictions that make their present DWI offense a felony—a felony murder conviction does not necessarily result in punishment that is disproportionate to culpability. The novelty of such prosecutions, however, combined with the well-known offense of intoxication or vehicular manslaughter, means that the average person could reasonably believe that deaths caused by drunken driving are punishable as manslaughter and not murder. To make clear that drunken drivers who kill are subject to punishment for murder, legislatures should amend driving while intoxicated statutes to impose this liability directly.

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187. Marks, 430 U.S. at 191 (1977); *see also* United States v. Lanier, 520 U.S. 259, 266 (1997) (explaining that “due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope”).

188. *See* Julie Rose O’Sullivan, *Skilling: More Blind Monks Examining the Elephant*, 39 *FORDHAM URB. L.J.* 343, 358 (2011) (observing that “a code that does not give fair notice will undermine faith in the criminal justice system as a whole, and undercut the moral stigma upon which the credibility of the system must rest”).