The Modern Felony Murder Doctrine

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STUDENT NOTES

THE MODERN FELONY MURDER DOCTRINE

Since the earliest times, murder convictions for unintentional homicide resulting from an unlawful act have been the subject of much criticism. There have been a number of limitations placed on the felony murder rule,¹ and it is the purpose of this note to discuss their effect.

In the Institutes,² Coke expressed the rule as he conceived it to be in his day by saying, “If the act be unlawful, it is murder.” Thus, if one accidentally killed another in the commission of any misdemeanor or felony, he was as a matter of law guilty of murder. Coke’s doctrine, however, was apparently never accepted.³ Being considered too harsh it was limited to acts which were felonious.⁴ With this limitation, namely, that a homicide produced during the commission of a felony was murder, the felony murder rule stood until the famous case of Regina v. Serne⁵ was decided in the year 1883.

Regina v. Serne imposed an important limitation on the felony murder rule. In his decision of the case, Stephen, J., said: “I think that, instead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life, and likely in itself to cause death done for the purpose of committing a felony which caused death, should be murder.” ⁶ A majority of the American courts in interpreting this limitation, say that as a matter of law certain felonies are dangerous to life, and if a homicide results during the commission

¹ At common law, murder was homicide with malice aforethought. Malice aforethought consisted of any of the following states of mind:
   “(a) An intention to cause the death of, or grievous bodily harm to any person, whether such person is the person actually killed or not.
   (b) Knowledge that the act or omission which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.
   (c) An intent to commit any felony whatever. (Italics supplied.)
   (d) An intent to oppose by force any officer of justice in arresting or keeping in custody a person when he has a right to arrest or keep in custody, or in keeping the peace.” ³ Stephen, History of the Criminal Law of England (1883) 22.
² 3 Coke, Institutes (1630) 56.
³ Corcoran, Felony Murder in New York (1938), 6 Fordham Law Rev. 43, 52.
⁴ Rex v. Plummer, 84 Eng. Reprints 1103 (1701).
⁵ 16 Cox, C.C. 311 (1887).
⁶ 16 Cox, C.C. 311, 313 (1887).
of such felony, the felon is guilty of murder. These courts do not take into consideration the manner in which the supposedly dangerous felony is committed, and they entirely disregard the nature of the act causing the death. Accordingly, one who unintentionally kills another in the commission of a dangerous felony is guilty of murder.

A few hypothetical cases may help to show the harsh propensities of the American view. W, X, Y, and Z, with intent to defraud an insurance company, set fire to a country dwelling house after a thorough search for occupants. The four men stand guard, one at each corner, to keep anyone from entering. M, a tramp intending to steal some food, knocks X unconscious, goes into the house, and is burned to death. Under the above rule, the four men would be guilty of murder. Again, suppose that X, a young college boy badly in need of fifty dollars, enters the home of his good friend at three o'clock in the morning with intent to steal that sum. Realizing that he might become frightened and hurt someone if he went into the house armed, he enters unarmed, goes upstairs, and takes fifty dollars. In making his exit, X jumps from a second story window landing on a tramp, who has "passed out" under a shrub, and kills him. As in the first case, X would be guilty of murder, for he has killed another while perpetrating a felony dangerous to life.

The explanation for the presence of the felony murder doctrine is that it was smuggled into the common law, and that no objections were originally made because always the underlying felony during which the homicide was committed was itself punishable by death, and it was immaterial on what grounds the felon was hanged. The theory behind the doctrine is the punishment of the felon for his evil intent. Because he intended to commit a felony and had an evil mind, he should be guilty of murder if he killed another in the commission of the felony, regardless of the nature of the act causing the death. Such a theory has been outmoded by a change in the basic purpose of our criminal law. The purpose of our criminal law today is to protect society from certain external acts, and the punishment is measured in accordance with the risk to the general security of the public. The manner in


"So, if a man does an act with intent to commit a felony, and thereby accidentally kills another; for instance, if he fires at chickens, intending to steal them, and accidentally kills the owner, whom he does not see. Such a case as this last seems hardly to be reconciled with the general principles which have been laid down. It has been argued somewhat as follows: The only blameworthy act is firing at the chickens, knowing them to belong to another. It is neither more nor less so because an accident happens afterwards; and hitting a man,
which the felonies in the above hypothetical cases were committed was such as to render them not dangerous to life and likely to cause death, and the fact that the defendants were committing a felony should be entirely disregarded. The courts should consider the act as a whole and determine in each case whether or not it was dangerous to life and likely in itself to cause death.

The courts in England and a few of the American jurisdictions have followed exactly the limitation as laid down in the case of Regina v. Serne by placing the emphasis on the act done in the commission of the felony. In these jurisdictions the felons in the above hypothetical cases would not be held for murder, for, aside from the fact that the felony is one which is generally considered dangerous to life, the act done in the commission of the felony must be dangerous to life and likely in itself to cause death. It is submitted that this is the better rule.

The similarity of the felony murder doctrine with the last limitation, and (B) of Stephen's analysis is apparent. Under (B), Stephen says that one is guilty of murder if he kills another while committing an act which will probably cause the death of someone even though it is accompanied by a wish that it will not. Have not the English courts and the minority of American jurisdictions by their interpretation of the case of Regina v. Serne done away with the need of the felony murder doctrine? Can not a conviction for murder for a homicide resulting from the commission of a felony be obtained under (B) of Stephen's analysis? It is submitted that the answer to these questions is in the affirmative. First, as the courts have required that the act be one likely to cause death, the standard of conduct has become the same whose presence could not have been suspected, is an accident. The fact that the shooting is felonious does not make it any more likely to kill people. If the object of the rule is to prevent such accidents, it should make accidental killing with firearms murder, not accidental killing in the effort to steal; while, if its object is to prevent stealing, it would do better to hang one thief in every thousand by the lot.” Holmes, The Common Law (1881), 57-58. “Our modern objective tends more and more, in the direction, not of awarding adequate punishment for moral wrongdoing, but of protecting social and public interests.” Sayre, Mens Rea (1932), 45 Har. L.R. 974, 1017; “As the aim of the law is not to punish sins, but is to prevent certain external results.” Commonwealth v. Kennedy, 170 Mass. 18, 48 N.E. 770 (1906).

"Where a person whilst committing or attempting to commit a felony does an act which is known to be dangerous to life and likely in itself to cause death, and the death of another person results as a consequence of that act though not intended by the person committing it, the law implies malice aforethought, and the person causing the death is guilty of murder.” 9 Halsbury’s Laws of England (2d ed., 1933) 437.

31 State v. Glover, 330 Mo. 709, 50 S.W. (2d) 1049 (1932); Pliemling v. State, 46 Wis. 516, 1 N.W. 278 (1879).
32 Division of Public Prosecution v. Beard, (1920) A.C. 479; Rex v. Lumley, 22 Cox, C.C. 635 (1911); Pliemling v. State, 46 Wis. 516, 1 N.W. 278, 279 (1879).
33 Supra n. 1.
as under (B) of Stephen’s analysis. Secondly, if there is any difference in the two standards, the requirements for a conviction under the felony murder doctrine are higher; for under this rule the courts require that the act be done for the purpose of committing a felony, while under (B) illegality of the act is not material.

It is submitted that the explanation for the fact that the courts cling to the outmoded felony doctrine is their fondness for "pegs" upon which to base their convictions. It is also submitted that it would be expedient for the courts to entirely abolish the doctrine and obtain their convictions for unintentional homicides resulting from the commission of a felony under (B) of Stephen’s analysis. Such would not be a revolutionary step in our criminal law, for (D) of Stephen's analysis has been entirely abolished, and the courts are now basing their convictions on (B) of his analysis. There is also a marked tendency in the late decisions to abolish the rule that one shall be guilty of involuntary manslaughter if he accidentally kills another while in the commission of an act “malum in se.”

To summarize, it has been shown that the felony murder doctrine as followed by a majority of the American jurisdictions is entirely too harsh and has been outmoded by the trend toward objectiveness in the law of homicides; and that the courts in England and a few American jurisdictions have in reality done away with the usefulness of the doctrine by setting up in effect the same standard as found in (B) of Stephen's analysis. It is submitted that the courts should formally abolish the felony murder doctrine and accept (B) of Stephen's analysis to base their convictions for homicide resulting from the commission of a felony.

J. G. Clark

THE FELONY MURDER DOCTRINE DISTINGUISHED FROM CRIMINAL NEGLIGENCE

The felony murder doctrine of the ancient English common law would sustain a conviction of murder when the perpetrator of any felony caused a homicide to occur during the perpetration of the felony. During these early years the only felonies that existed were

14 See Perkins, Rationale of Mens Rea (1939), 52 Har. L.R. 905, 915–19.
15 People v. Townsend, 214 Mich. 267, 183 N.W. 177 (1921).
1 At common law, murder was homicide with malice aforethought. Malice aforethought consisted of any of the following states of mind:
1. An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person killed or not.
2. Knowledge that the act or omission which causes death will probably cause the death of, or grievous bodily harm to some person, whether the person killed or another, although, such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.
3. An intent to commit any felony whatever.
4. An intent to oppose by force any officer of justice in arresting