1 MAKING THE BEST OF FELONY MURDER

THE FELONY MURDER PROBLEM

A rapist chokes a distraught child victim to silence her. To his surprise, the child dies.[1] A robber aims his gun at a motel clerk's forehead. His finger slips and he "accidentally" shoots his target dead.[2] An arsonist burns down a storefront to collect insurance, coincidentally incinerating the family living on the other side of the wall.[3]

Intent on selfish aims, these killers do not recognize the obvious risks their conduct imposes on their victims. Though unintended, these killings are hardly accidental: such inadvertent but foreseeable killings are negligent. Yet "negligence" does not seem a sufficient epithet to capture the culpability of these killings, nor does "negligent homicide" seem a serious enough charge. These offenders callously impose risks of death in order to achieve other wrongful ends. In each case, the offender's felonious motive for imposing a risk of death aggravates his guilt for unintentionally, but nevertheless culpably, causing the resulting death. Accordingly, in most American jurisdictions, these killings would be punished as murder. The legal concept necessary to this result, the felony murder doctrine, is the subject of this book.

Although the felony murder doctrine is arguably necessary to achieve justice in cases like those described above, it is one of the most widely criticized features of American criminal law. Legal scholars are almost unanimous in condemning it as a morally indefensible form of strict liability.[4] Some have concluded that felony murder rules impose unconstitutionally cruel and unusual punishment by ascribing guilt without fault, or that they violate constitutional due process by presuming malice without proof.[5] Many view contemporary felony murder rules as descended from a sweeping "common law felony murder rule" holding all participants in all felonies responsible for all resulting deaths.[6] Some therefore see felony murder liability as an anachronism, a primitive relic of medieval law. Others may concede that modern

"reforms" have ameliorated the doctrine, but they regard these rules as pearl earrings on a pig, merely ornamenting an essentially barbaric principle of liability without fault.

Most criminal law scholars have assumed there is nothing to say on behalf of the felony murder doctrine, no way to rationalize its rules to the lawyers who will apply it, and no reforms worth urging on courts and legislatures short of its utter abolition.[7] Sanford Kadish, author of the leading criminal law textbook, called the felony murder doctrine "rationally indefensible,"[8] and the American Law Institute's Model Penal Code commentaries observed that "[p]rincipled argument in favor of the felony-murder doctrine is hard to find."[9] Such critics argue that felony murder liability is a morally arbitrary lottery, in which punishment depends on the fortuity that an unintended death occurs in the course of a felony, regardless of the felon's culpability for that death.

Now a killing can be very culpable even if it is not intended. Most felony murders are intentional shootings by armed robbers. A felony murder rule makes this type of killing murder without requiring the prosecutor to prove, or the jury to find, that the robber intended to kill. Many readers will not find these typical applications of felony murder liability troubling. Yet felony murder liability is sometimes imposed on felons who do not seem very culpable at all. Consider these ten cases:

1. Seven months after stealing a car, James Colenburg, a Missouri man, was driving down a residential street when an unsupervised two-year-old suddenly darted in front of the stolen car. The toddler was struck and killed. Colenburg was convicted of felony murder predicated on theft.[10]
2. Jonathan Miller, a fifteen-year-old Georgia youth, punched another boy in a schoolyard dispute. The second boy suffered a fatal brain hemorrhage. Miller was convicted of felony murder, predicated on the felonies of assault with a deadly weapon and battery with injury.[11]
3. Wrongly suspecting Allison Jenkins of drug possession, an Illinois police officer chased him at gunpoint. As the officer caught him by the arm, Jenkins tried to shake free. The officer tackled Jenkins and the gun fired as they fell, killing the officer's partner. Jenkins was convicted of felony murder, predicated on battery of a police officer.[12]
4. Jonathan Earl Stamp robbed a California bank at gunpoint. Shortly thereafter one of the bank employees had a fatal heart attack. Stamp was convicted of felony murder.[13]

5. New York burglar William Ingram broke into a home, only to be met at the door by the homeowner, who was brandishing a pistol. The homeowner forced Ingram to lie down, bound him, and called the police. After police took Ingram away, the homeowner suffered a fatal heart attack. Ingram was convicted of felony murder.[14]
6. Also in New York, Eddie Matos fled across rooftops at night after committing a robbery. A pursuing police officer fell down an airshaft to his death. Matos was convicted of felony murder.[15]
7. John Earl Hickman was present when a companion overdosed on cocaine in Virginia. He was convicted of felony murder predicated on drug possession.[16]
8. John William Malaske, a young Oklahoma man, got a bottle of vodka for his underage sister and her two friends. One of the friends died of alcohol poisoning. Malaske was convicted of felony murder predicated on the felony of supplying alcohol to a minor.[17]
9. Ryan Holle, a young Florida man, routinely loaned his car to his housemate. At the end of a party, the housemate talked with guests about stealing a safe from a drug dealer's home. The housemate asked Holle for the car keys. Holle, tired, drunk, and unsure whether the housemate was serious, provided the keys and went to bed. The housemate and his friends stole the safe, clubbing a resisting resident to death. Holle was convicted of felony murder and sentenced to life without parole.[18]
10. North Carolina college student Janet Danahey set fire to a bag of party decorations as a prank in front of an exterior door to her ex-boyfriend's apartment. To Danahey's surprise, the apartment building caught fire and four people died in the blaze. Danahey pled guilty to four counts of felony murder.[19]

These cases are indeed troubling. The *New York Times* featured the *Holle* case in a story portraying the felony murder doctrine as out of step with global standards of criminal justice.[20] Some readers will recognize the *Stamp* case as one that criminal law textbooks use to illustrate the harshness of the felony murder rule.[21] Janet Danahey's supporters present her case as an indictment of the felony murder doctrine.

What should be done about such cases? If the felony murder doctrine is designed to produce results like these, it should indeed be abolished. Yet the three cases described in our first paragraph show that felony murder liability is some-

times necessary to satisfy our intuitions about deserved punishment. Thus it should be possible to identify a principle distinguishing justified from unjustified impositions of felony murder liability and to reform the felony murder doctrine in light of that principle. That is the aim of this book.

I should be clear from the outset about two limits on the scope of my argument. First, this book is concerned only with murder liability for unintended killing in the context of felonies. It is particularly concerned with homicides that would not be graded as murder without the killer's participation in a felony. Thus, it does not address how participation in a felony should affect the grading or punishment of intentional or grossly reckless killings that would otherwise be punished as murder.

This limit gives rise to a second essential limit on the scope of the argument: *this is not a book about the death penalty*. Without venturing an opinion on the legitimacy of capital punishment generally, I proceed from the premise that American law reserves it for the most heinous murders. The Supreme Court has determined that capital punishment is not applicable to those who participate in fatal felonies without intent to kill or gross recklessness (sometimes referred to as "extreme" or "depraved" indifference to human life).[22] It has not explicitly required that felons who kill must also act with intent to kill or gross recklessness, but this is the logical implication of its holdings. Many death penalty jurisdictions treat participation in certain felonies as aggravating circumstances that can trigger capital liability for intentional killings. Such feloniously motivated intentional killings are beyond the scope of this book. This book is concerned only with the imposition of very significant sentences of incarceration for killings that would not be murder without a felonious motive. It argues that murder liability is justified for some feloniously motivated inadvertent killings. *It does not justify capital punishment in such cases.*

CONSTRUCTIVE INTERPRETATION

In proposing principled reform of felony murder rules rather than abolition, this book serves to *make the best* of the felony murder doctrine. By this, I mean two things.

First, like it or not, we are stuck with the felony murder doctrine. To be sure, we could get along without it. We could abolish it and still capture many of the most culpable cases with rules conditioning murder on grossly reckless killing. Yet we are not likely to do so. Legislatures have persisted in supporting felony murder for many decades in the teeth of academic scorn. Although most states

revised their criminal codes in response to the American Law Institute's Model Penal Code, only a few accepted the ALI's proposal to abolish felony murder.[23] Today, criminal justice policy is less likely than ever to be influenced by academic criticism, as candidates for office find themselves competing to appear tougher on crime than their opponents.[24] Moreover, as we shall see, in adhering to the felony murder doctrine, legislatures appear to be in tune with popular opinion.[25] Felony murder liability is not going away and we are going to have to learn to live with it.

Second, we should try to make felony murder law better. If felony murder liability is ever justifiable, felony murder rules can be improved by confining them to the limits of their justifying principles. Even readers who disagree with those justifying principles should prefer that felony murder liability be applied in a principled way rather than haphazardly.

Accordingly, this book endeavors to make felony murder "the best it can be," in Ronald Dworkin's phrase. Dworkin's influential account of normative legal argument aims to integrate the concerns of lawyers, judges, legislators, citizens, and legal theorists in a single conversation.[26] Although participating in the legal process in different roles, each of these speakers addresses a common question: how to make the law of some particular political community "the best it can be."[27] For Dworkin, legal reasoning is always at once positive and normative. It draws on the authority of institutions that are accepted as legitimate, while remaining mindful that the legitimacy of those institutions is always open to question and always contingent on the acceptance and commitment of other legal actors. Thus an appeal to settled authority never suffices to warrant a legal claim. Such claims also depend upon some normative legal theory; yet such legal theories are always also interpretations of the history of some particular legal system.

Dworkin uses the concept of "principle" to capture this complex ambiguity of legal argument between claims about how the law is and claims about how it should be. For Dworkin, rules and precedents are never self-interpreting. Decision makers cannot apply sources of law without first constructing some more general account of their purposes and values, and of how they fit within the larger body of law that makes them authoritative. These justifying accounts of the purposes and values of rules within a particular legal system are what Dworkin calls "principles."

Many other legal theorists have also argued that applying rules involves constructing their purposes.[28] But Dworkin adds that these ordering purposes are best understood as moral principles rather than as instrumental policies.

In other words, laws are best understood as setting up cooperative institutions to share the burdens of achieving public goods. Thus interpreted, laws have an additional basis of legitimacy beyond their democratic pedigree and their efficacious consequences: they can be defended as fair, and therefore worthy of the support even of those who opposed them.[29]

A jurisprudence of principle is one kind of "constructive interpretation."[30] Constructive interpretation is a two-part process of judgment as to how to continue a practice. A constructive interpreter must first construct a purpose that explains and justifies the history of that practice and, second, apply that purpose to resolve dilemmas that arise within that practice. The validity of a constructed purpose depends upon two different considerations: how well it fits with or explains the past history of the practice and how normatively appealing it is on its own terms. Thus a legal principle is valid insofar as it explains authoritative legal sources in a way that seems just. The principles that "best" reconcile these two considerations of fit and justice make the law "the best it can be."[31]

Although Dworkin insists that the conventions of legal reasoning require that lawyers and judges treat legal questions as having "right answers,"[32] his account of legal reasoning explains why legal theorists often describe law as indeterminate. After all, the principles that best fit enacted laws may not be the ones that seem most just. Indeed, the descriptive question of the content and validity of enacted laws is not entirely separable from the question of their justice.[33] As Dworkin admits, the constructive interpretation of law is a "creative" process depending on something like aesthetic judgment.[34] Both judges and legislators have discretion, but neither is free to develop laws whimsically; both should maintain the integrity of the legal system even as they improve it.[35] Every legal actor, in every legal decision, should strive to make the legal system as a whole the best it can be.

Because constructive interpretation involves a trade-off between explanation and justification, a constructed purpose need not "fit" past practice perfectly. Like any legitimating rationale it has critical as well as justificatory implications. An interpretive legal theory may demand some reforms as the price of maintaining integrity with the principle justifying the remainder of the law.

THE PRINCIPLE OF DUAL CULPABILITY

Proceeding by the method of constructive interpretation, this book offers a principled defense of the felony murder doctrine, rooted in its history, justifying much current law, and urging reform of the rest. It argues that felony mur-

der liability is deserved for those who negligently cause death by attempting felonies involving (1) violence or apparent danger to life and (2) a sufficiently malign purpose independent of injury to the victim killed. How can merely negligent homicide deserve punishment as murder? Because the felon's additional malevolent purpose aggravates his culpability for causing death carelessly. To impose a foreseeable risk of death for such a purpose deserves severe punishment because it expresses particularly reprehensible values and shows a commitment to put them into action. In defending felony murder liability as deserved in cases like those described in its opening paragraph, this book develops an expressive theory of culpability that assesses blame for harm on the basis of two dimensions of culpability: (1) the actor's expectation of causing harm and (2) the moral worth of the ends for which the actor imposes this risk.[36]

Thus felony murder liability rests on a simple and powerful idea: that the guilt incurred in attacking or endangering others depends on one's reasons for doing so. Killing to prevent a rape is justifiable, while killing to avenge a rape is not. And yet killing to redress a verbal insult is worse, and killing to enable a rape worse still. Even when inflicting harm is wrong, a good motive can mitigate that wrong and a bad motive can aggravate it.

The same considerations can affect our evaluations of risk taking. We justify speeding a critically injured patient to a hospital; we condemn the same behavior in the context of drag racing or flight from arrest. As a society, we tolerate the nontrivial risks of death that ordinarily attend driving, light plane aviation, hunting, boxing, and construction as costs worth paying. For reasons that are far from obvious, our society views the risks of recreational drug use very differently. We are quicker to condemn failure to provide medical care to a child if motivated by cruelty or indifference than if motivated by religious conviction.[37] And most pertinently, we regard the risk of death associated with robbery as less acceptable than the *greater* risk of death associated with resisting robbery.[38] Thus we evaluate action based not only on its expected danger but also on the moral worth of its motives. Indeed, because harm results from the interaction of competing activities, we can hardly assign risk to one activity without evaluating its aims in comparison to those of competing activities.

The intuition that our guilt for causing harm depends on our reasons for acting implies that criminal culpability is properly understood as the product of two factors: the harm reasonably expected from an action and the moral worth of the ends for which it is committed. The expected harm is the *cognitive* dimension of culpability, and the moral worth of the actor's ends is the

normative dimension of culpability. Let us call the view that the punishment deserved for homicide depends on both dimensions, the *principle of dual culpability*. Today, courts generally explain felony murder as a crime of risk imposition, in which a dangerous activity leads to death.[39] Previously courts explained it as a crime of transferred intent, in which a malicious purpose justifies liability for a different, unintended result.[40] The principle of dual culpability reveals that felony murder must involve both the negligent imposition of risk and a distinct malicious purpose. This book explains felony murder liability as a means of imposing deserved punishment in accordance with this principle of dual culpability.

The dual culpability principle seems to accord with the views of many Americans. Opinion research shows that most respondents think homicides deserve more punishment if they are committed in perpetrating another crime. Paul Robinson and John Darley found that their subjects recommended only ten months' imprisonment for negligent killing, but twenty-two to twenty-seven years for negligent killing by a robber, in the perpetration of a robbery.[41] This is not to say that public opinion would support every felony murder rule currently in force. For example, Robinson and Darley's subjects recommended only a six- to nine-year homicide sentence for a robber whose accomplice killed in the course of the robbery.[42] Nevertheless, this evidence suggests that public opinion supports some degree of penalty enhancement for criminally motivated homicides. So when criminal law theorists dismiss felony murder liability as rationally indefensible, they ignore popular ideas of justice and fail to give legislators guidance on how to realize those ideas in a principled way. This book is intended to provide such guidance.

FELONY MURDER AS A CRIME OF DUAL CULPABILITY

The principle of dual culpability renders some unintended homicides punishable as murder that would otherwise be lesser offenses. Yet it does *not* justify murder liability for otherwise faultless killings in the perpetration of felonies. Imagine that a bank robber drives away from the crime scene with the stolen loot, proceeding at a safe speed. A pedestrian suddenly darts out into traffic and the robber's car hits him fatally. Here the robber's felonious motive has not subjected the pedestrian to any greater risk than he would have faced from any other motorist. The robber's greed has placed other persons at risk, such as those he has threatened, but this death seems outside the scope of that risk. His felonious motive cannot aggravate his responsibility for a death unless it plays

some causal role in the death. The felonious motive can aggravate cognitive culpability, but it cannot substitute for it.

While the felonious purpose must motivate a negligent act that creates a risk of death, it must also transcend that risk in order to add culpability. The felony cannot simply be an assault aimed at injuring or endangering the victim. This lacks the additional element of exploitation that compounds the defendant's culpability for imposing risk. Nor can the felony consist simply of an inherently dangerous act, such as firing a weapon or exploding a bomb. These offenses do not require any wrongful purpose. They are punished only because they impose danger. Causing death by means of a dangerous act is merely reckless homicide if one is aware of the danger and negligent homicide if one is not. It can be murder only if there is some further culpability. This culpability is supplied by a wrongful purpose, independent of injury or risk to the victim's physical health. The traditional predicate felonies—robbery, rape, arson, burglary, and kidnapping—all involve a wrongful purpose to do something other than inflict physical injury.

These considerations justify imposing felony murder liability when an actor negligently causes death for a felonious purpose independent of physical injury to the victim killed. But should we also impose murder liability on an accomplice in that felony? When critics claim that the felony murder doctrine holds felons strictly liable for killings in the course of felonies, they often mean they are liable for unforeseeable killings by co-felons. But such a rule would not be justified by the foregoing principles. An accomplice in a felony should be held liable for a resulting death only on the same basis as the principal. Like the killer, the co-felon must be negligent with respect to the resulting death. Moreover, the co-felon must share in the purpose that aggravates this negligence. One who reluctantly provides goods or services that he or she suspects will be used in a crime lacks the exploitative motive for imposing foreseeable risk that warrants condemnation as a murderer. Recall that Robinson and Darley's subjects supported far less punishment for accomplices than for those who killed negligently.[43] In the face of this skepticism, legislatures and courts must take special care to ensure that any accomplices punished as felony murderers are fully as culpable as the perpetrators.

REALIZING THE PRINCIPLE OF DUAL CULPABILITY

A felony murder law can use a variety of different doctrinal devices to achieve these limitations. To understand these doctrinal devices it is useful to analyze

felony murder liability into its component parts. Felony murder is a kind of homicide, an offense ordinarily combining an act that causes death with a culpable mental state. Felony murder also requires a felony and some linkage between the act causing death and the felony. Where a fatal felony has multiple participants, felony murder liability may depend on additional criteria of accomplice liability. Thus, a fully specified felony murder rule should provide: (1) any required culpable mental state with respect to death; (2) a list or class of predicate felonies; (3) criteria of causal responsibility for the death; and (4) criteria of accomplice liability.

The most straightforward way to condition felony murder liability on negligence with respect to death is simply to make this culpable mental state part of the mental element of the crime. Yet this is not necessarily the best approach, because negligence is arguably not really a mental state at all but a normative characterization of conduct as unreasonable under the circumstances. Conduct is negligent with respect to a harmful result when an actor engaging in such conduct has reason to foresee the harm (and no sufficiently good reason to risk the harm). This may be true of any instance of conduct generally understood to be dangerous. Examples might be driving much faster than the posted speed limit, driving an unbelted child, or handling a loaded gun without the safety catch on. Indeed, as the speed limit example illustrates, the law can play a role in providing notice to actors that conduct is dangerous. By proscribing and punishing conduct, criminal law can alert actors to its risks, rendering a failure to advert to those dangers unreasonable per se.

Accordingly, felony murder laws can require negligence by requiring apparently dangerous conduct. This can be done by limiting predicate felonies to a list of enumerated dangerous felonies, or to the category of inherently dangerous felonies. Such a limited felony murder offense works as a per se negligence *rule*, defining certain conduct as negligent per se. For reasons we will explore below, dangerousness is sometimes defined in terms of force or violence rather than quantifiable risk. Alternatively, felony murder laws can require an apparently dangerous act committed in furtherance of the felony. This is a per se negligence *standard*, defining conduct as culpably committed if it exhibits a certain quality, foreseeable dangerousness. These per se approaches to requiring negligence have the effect of fully incorporating cognitive culpability for the resulting death into the intent to commit the felony. Thus they accord with the traditional characterization of felony murder, as a crime of transferred intent rather than a crime of strict liability.

If the felony is inherently dangerous to life, the mental element of the felony should itself supply the requisite negligence. But if the felony is dangerous only because of the way it is committed, the felon is negligent only if aware of the particular circumstances making commission of the felony dangerous. Where danger does not inhere in the felony, it is important to prove that accomplices in felony murder shared culpability with respect to a dangerous act or circumstance.

Another approach to requiring negligence is to build a requirement of apparently dangerous conduct into criteria of "killing," or "homicide" or "causation of death." Thus one may require not only that a homicidal act be a necessary condition to the resulting death but also that it impose a foreseeable risk of such a death. This approach resonates with tradition, in that before the twentieth century English and American law usually defined homicide in terms of "killing," which meant causing death by intentionally inflicting physical harm. Rather than defining murder in terms of a mental state, eighteenth-century English law defined murder simply as killing absent certain exculpatory circumstances that would show that the killing was not maliciously motivated.[44] Modern felony murder law may similarly define a measure of culpability into the act element of the offense. Many jurisdictions use a proximate cause test, conditioning causal responsibility on an act necessary to the death that also imposes a foreseeable danger of death. A minority of jurisdictions use an agency approach that excludes liability when an actor who is not party to the felony commits a subsequent act necessary to the resulting death, even if foreseeable. Yet even agency jurisdictions may require that the felon's act create a foreseeable risk of death or involve an intentional battery—and we shall see that most do. An agency rule also can have the effect of requiring that the act deemed to cause death serve the felonious purpose.

Finally, lawmakers may build a requirement of negligence into the linkage between the predicate felony and the resulting death by requiring that death occur in a way that was foreseeable as a result of the predicate felony. This is particularly useful for ensuring that accomplices in the felony are negligent with respect to death.

Like the requirement of negligence, the requirement of an independent felonious purpose can also be achieved in a variety of ways. One approach is simply to restrict enumerated predicate felonies to those involving a purpose independent of injuring or endangering the physical health of the victim. Another approach is an independence requirement sometimes referred to as a "merger" limitation, excluding certain predicate felonies such as manslaughter or assault

as lesser included offenses of murder itself. Courts applying such a doctrine may interpret it to require that the felony have a purpose, threaten an interest, or involve conduct independent of physical injury. A third device is a linkage requirement that the act causing death be in furtherance of the felony. A few courts have construed an "in furtherance" standard to require that the act causing death serve a purpose independent of endangering or injuring the victim.

Lawmakers should also ensure that accomplices in felony murder share in the required negligence and independent felonious purpose. One way to do this is simply to require that the predicate felony involved an apparent danger of death and an independent felonious purpose. Then, if criteria of complicity in the felony are sufficiently demanding, an accomplice in the felony will automatically have had the requisite culpability. It does not suffice, however, to require that the felony was committed in a dangerous way without also requiring that the accomplice expected that danger. Most jurisdictions deal with this problem by holding the co-felon complicit in only those fatal acts that were in furtherance of and foreseeable as a result of the felony. This foreseeability test requires that the accomplice's participation in the felony entailed some degree of culpability with respect to the risk of death. If, however, jurisdictions require neither an inherently dangerous felony nor that death was foreseeable to the accomplice as a result of the felony, they leave the accomplice open to strict liability, even when death has been caused in a way foreseeable to the perpetrator. This would violate the principle of dual culpability.

DUAL CULPABILITY IN THE HISTORY OF FELONY MURDER

Constructive interpretation requires that a legal principle, however just, should also cohere with authoritative legal materials. One part of the case against felony murder liability is the claim that modern felony murder rules, even if narrowly predicated on dangerous felonies, are descended from an ancient strict liability rule. Thus American lawyers have long been taught that the English common law imposed strict murder liability on felons for all deaths caused—even accidentally—in the course of all felonies.[45] They have long learned that this cruel and ancient common law rule was automatically received into American law with independence[46] and produced terrible injustice as legislative proscription of new felonies expanded its already sweeping scope.[47] According to this mythology, the English rule remained in force in every jurisdiction until ameliorated by legislatures or courts and indeed remains authoritative to this day in default of such reform.

This widely believed account of the origins of felony murder liability undermines its legitimacy in two ways. First, it implies that modern felony murder rules must be interpreted in light of their supposed origins, with gaps and ambiguities resolved in favor of strict liability. Second, it implies that even limited modern rules are not justified by any principle but represent incoherent compromises between felony murder liability and enlightened principles that condemn it as barbaric.

This book will show that the conventional account of felony murder's origins is misleading in almost every respect. Thus felony murder liability was not an ancient rule of the English common law. Indeed, it was not part of the law of England at any time before the American Revolution and so could not have been received into American law from England. In fact, English constitutional law held that the English common law of crimes had no authority in the American colonies except insofar as received and adapted in each jurisdiction. So we have no reason to think felony murder was part of colonial American law unless we find it enacted in colonial statutes or applied by colonial courts—and we don't. American felony murder rules were enacted primarily by legislatures over the course of the nineteenth century. Thus each jurisdiction's felony murder rule was logically independent of every other jurisdiction's rule; each jurisdiction had only the limited rule that it enacted. England began to apply a felony murder rule in the nineteenth century as well. In both countries felony murder liability developed in the effort to reform the law of murder by codifying its elements. In both countries the rule was limited by concerns about culpability from the very outset. The ameliorative "reform" of the felony murder doctrine was contemporaneous with its enactment into law.

In seventeenth- and eighteenth-century England, murder liability depended primarily on the characteristics of the act. The required act was not the causation of death but "killing," a term historically associated with striking a blow.[48] If death resulted from an intentional and unprovoked blow with a weapon, it was murder whether the intent was to cause death or merely to cause pain and injury.[49] Such an attack was conventionally understood as an expression of "malice," that is, gratuitous hostility undiluted by the respect implied in a challenge to duel and unmitigated by the righteous indignation provoked by a prior attack.[50] A merely dangerous act—driving a coach at an unsafe speed down a narrow street, for example—might cause death but was not therefore a killing and expressed no malice.[51] These rules were unaffected by the context of a felony. A fatal stabbing during a robbery was murder; a

fatal cart collision during a robbery was not. The chief significance of a criminal context for homicide was that resistance to a crime—any crime, not just a felony—could not constitute provocation. Thus the attempted commission of a felony did not substitute for intent to kill or any other mental state, because no such mental state was required for murder.[52] So the English common law *did* punish unintended killings in the course of felonies as murder, but only because it punished *most* unintended killings as murder. But it did not punish accidental deaths in the course of felonies as murder. It is likely that colonial Americans understood murder in the same way. Colonial statutes simply punished "willful" or "malicious" murder, with these terms likely signifying intentionally wounding with a weapon, followed by fatal results.

While a criminal context could not turn an accidental death into murder in eighteenth-century England, it could implicate the participants in an accomplice's culpable killing. A pair of sixteenth-century cases held that co-felons who joined in or agreed to violence against resisting victims were liable for any resulting deaths.[53] By the eighteenth century, some judges had suggested that mere participation in a crime sufficed to implicate one in a codefendant's murder.[54] It appears that by the late eighteenth century, a few judges were applying this sweeping standard, but most limited accomplice liability for murder to those who had actually participated in the fatal violence.

The reform of homicide law in nineteenth-century England and America took place against this background. Already during the early eighteenth century, religiously motivated reformers had sought to restrict the number of capital crimes in some colonies, and such views became common among enlightened reformers during the revolutionary period.[55] In post-revolutionary Pennsylvania, reformers sought to increase reliance on incarceration and reduce the scope of capital punishment. Thus in 1794 Pennsylvania enacted an influential statute restricting capital murder to premeditated intentional murder or murder in the course of robbery, rape, burglary, or arson.[56] This reform, adopted in many other states, left the definition of murder unaffected but reduced its punishment in most cases.[57] Murder still included unprovoked battery with weapons that happened to prove fatal. Murder still did not include accidental death. Many other states adopted statutes defining murder as killing either intentionally, or in the course of enumerated felonies, or with an abandoned and malignant heart.

American reformers did not, by and large, see felony murder liability as strict liability, but instead saw felonious motive as one of a number of forms of culpability aggravating already culpable homicides to murder, or to murder of a

higher degree. Felony murder liability was limited from the outset to deaths resulting from acts of violence committed in the furtherance of particularly dangerous felonies. We will see that the great majority of the felony murder convictions appearing in reported cases during the nineteenth century involved death from the intentional infliction of a violent blow; and the great majority were predicated on the traditional felonies of robbery, burglary, arson, and rape. Predicate felonies almost always involved a felonious purpose independent of injury to the victim, and a few decisions made this requirement explicit.[58]

Accomplice liability for felony murder was quite limited in nineteenth-century England and America. Early-nineteenth-century English cases established the principle that an accomplice in a felony was not liable for a killing by a co-felon unless he joined in or agreed to the fatal violence.[59] In the United States, few jurisdictions clarified rules governing accomplice liability for felony murder, but where they did articulate standards, courts usually required that the killing be in furtherance of the felony or a foreseeable or probable result of the felony. In almost every case where a felon was held liable for murder without having struck the fatal blow, either he participated in the fatal assault or the felony inherently involved violence or great danger of death. Thus from its inception American felony murder law largely conformed to the requirements of the dual culpability principle.

DUAL CULPABILITY IN CURRENT LAW

This book will also support a constructive interpretation of felony murder as a crime of dual culpability by showing that this principle accounts for many features of contemporary felony murder law. This analysis focuses on three issues: requirements of cognitive culpability, dangerousness, and causal responsibility that condition liability on negligence; standards of complicity and collective liability that determine the culpability required for non-killing participants in felonies; and requirements of an independent predicate felony that condition liability on normative culpability.

A third of felony murder jurisdictions explicitly condition felony murder on the culpable mental states of negligence or malice. Jurisdictions conditioning felony murder on malice have usually interpreted it to require apparently dangerous conduct. Almost all felony murder jurisdictions condition the offense on per se negligent conduct by requiring a dangerous felony. A requirement of an inherently dangerous felony ensures that all participants in the felony are negligent with respect to death. A requirement of foreseeable danger ensures that at

least one participant, usually the actual killer, acted negligently. Of twenty felony murder jurisdictions predicating felony murder on unenumerated felonies, all but a few require that these felonies be inherently or foreseeably dangerous. Most felony murder convictions are predicated on enumerated felonies, however. With the important exceptions of burglary and some drug offenses, most such enumerated felonies are dangerous. Finally, most felony murder jurisdictions require negligence indirectly by defining homicide as the foreseeable causation of death. This includes most of the jurisdictions enumerating felonies that are not inherently dangerous.

Most felony murder jurisdictions condition vicarious felony murder liability on negligence, although they use a variety of doctrinal devices to achieve this. A few jurisdictions completely restrict predicate felonies to inherently dangerous crimes. Some jurisdictions define felony murder simply as participation in a felony foreseeably causing death. Most felony murder jurisdictions condition complicity in felony murder on foreseeable or inherent danger, or expected violence. A number of them provide an affirmative defense for accomplices without notice of danger.

Felony murder jurisdictions have usually conditioned causal responsibility and complicity on normative as well as cognitive culpability. Most require an instrumental or causal relationship between the felony and the death. The required linkage between the felony and the fatality implies that culpability is being transferred from the felony to the killing. Thus felonious motive is part of the culpability required for felony murder in most jurisdictions. Negligence toward death and felonious motive combine to justify murder liability as deserved.

The dual culpability required for felony murder—negligence and felonious motive—explains the purpose and the contours of the "merger" doctrine, precluding the predication of felony murder on felonious assault. Felonies aimed at injuring some interest other than the life and health of the victim—such as rape, robbery, arson, or aggravated burglary for purposes of theft—supply normative culpability that aggravates the cognitive culpability implicit in endangering the victim. Requiring an independent felonious purpose ensures that the felony will supply enough normative culpability to aggravate a negligent homicide to murder.

Yet the principle of dual culpability does not require that every predicate felony have an independent felonious purpose. Murder liability may be deserved on the basis of depraved indifference rather than felonious motive when

death is caused by a felony entailing depraved indifference to human life. Although the dual culpability principle precludes murder predicated on simple aggravated assaults, it may permit murder predicated on a property offense committed for the purpose of an aggravated assault, an aggravated assault on a vulnerable dependent, or a particularly cruel and demeaning assault, such as mayhem. A legislature may rationally conclude that these predicate felonies express depraved indifference to human life.

Most jurisdictions have limited predicate felonies in conformity with these principles. To be sure, only a few jurisdictions have explicitly adopted the merger doctrine. Yet few other jurisdictions have violated the principles underlying the merger doctrine.

In sum, most felony murder jurisdictions condition the offense on negligence through a combination of culpability requirements, enumerations of predicate felonies, dangerous felony limits, foreseeable causation requirements, and complicity rules. In addition, most jurisdictions condition the offense on felonious motive through a combination of enumerated felonies, causal linkage requirements, and merger limitations. Thus felony murder law conforms to the principle of dual culpability in most respects in most jurisdictions.

A CRITICAL PRINCIPLE

While the American law of felony murder is broadly consistent with the dual culpability principle, it is far from perfect. This much is clear from the ten unjust convictions described earlier in this chapter. Yet the dual culpability principle explains *why* felony murder liability was not justified in those ten cases. In each case, at least one of the two required forms of culpability was missing.

Many of the cases lacked the requisite cognitive culpability. In the first eight cases, the likelihood of death from the defendant's conduct was low, too low even for negligence. To be sure, robbery creates a significant risk of death, but not a significant risk that anyone will drop dead or fall down a hole. In cases three through eight, no participant in the felony caused death directly. There was no fatal act of violence.

Many of the cases lacked the requisite normative culpability. Thus, in case one the defendant's fatal act did not serve the felonious end—it had no felonious purpose. In cases two, three, seven, and eight, the act imposing risk did not advance any independent felonious purpose. Thus felonies like assault and distribution of drugs or alcohol are punished primarily because they endanger life and health, not because they aim at some other wrongful end that justifies

aggravating a resulting death to murder. In case nine the defendant assisted in a felony that proved fatal but did not appear to share the felonious end. In case ten, the defendant had no discernible felonious purpose. These two defendants probably should not have been convicted of the predicate felonies, let alone of felony murder.

Thus the injustice exemplified by these ten cases results from misapplication of the felony murder doctrine. We will see that in some of these cases courts misapplied existing law. It should therefore not be necessary to abolish the felony murder doctrine to prevent such cases. It is necessary only to conform it to its justifying purpose. Doing so will require statutory changes in some jurisdictions. But justice can be done in most jurisdictions if courts apply existing statutes with a clearer conception of when and why felony murder liability is deserved. Legal scholars do not encourage principled application of felony murder rules by portraying them as inherently arbitrary and unfair.

Whether or not they approve of the felony murder doctrine, legal scholars should acknowledge the rationality of the popular majorities who support it. By dismissing the felony murder doctrine as rationally indefensible, legal scholars deprive themselves of meaningful roles in reforming felony murder rules. By refusing to acknowledge any common ground with supporters of the felony murder doctrine, scholars offer legislators and voters no reason to listen to them. Moreover, by insisting that felony murder has no justifying purpose, legal scholars perversely encourage lawmakers to make the law of felony murder less rational and less just than it could be. Lectured that felony murder rules necessarily violate desert, legislators may assume they must abandon considerations of justice in designing felony murder rules. Told that felony murder rules reflect cynical political pandering, courts will assume they are properly deferring to legislative intent when they impose undeserved punishment. Instructed by scholars that the felony murder doctrine imposes strict liability, courts will more likely instruct juries to impose strict liability. In demanding abolition rather than reform, legal scholars make their narrow conception of the best the enemy of the good. The result is a self-fulfilling prophecy that encourages the arbitrariness and injustice it professes to condemn.

Because American felony murder rules rest on a widely supported and theoretically plausible moral principle, the most democratic approach to critiquing them is to test them against that principle. The most pragmatic strategy for improving the law of felony murder is to show lawmakers how to bring it into conformity with that principle.

PLAN OF THE BOOK

This book is divided into three parts. The remainder of Part One develops a normative defense of felony murder liability as deserved in some cases based on an expressive theory of culpability combining cognitive and normative dimensions. Chapter 2 first argues that felony murder needs such a retributivist defense, because utilitarian defenses of felony murder liability as enhancing deterrence are not persuasive. Chapter 2 then focuses on the cognitive dimension of culpability and considers several variants of the charge that felony murder rules impose strict liability. It argues that these charges rest on an implausibly formalistic conception of culpability that has little to do with moral fault and that felony murder rules can be conditioned on negligence by various means, including per se negligence rules and causation standards requiring foreseeability.

Chapters 3 and 4 focus on the normative dimension of culpability and critique the view that felonious motive is irrelevant to culpability. Chapter 3 attributes this view to a narrowly cognitive theory of culpability that prevails among criminal law theorists, arguing that this theory cannot give an adequate account of culpability for crimes of result like homicide. It argues that assessments of causal responsibility must involve an evaluation of actors' ends. Chapter 4 develops an expressive conception of culpability. It shows how such a conception makes sense of popular intuitions supporting felony murder liability and argues that an expressive conception better explains many other doctrines of American criminal law than does a purely cognitive conception. Chapter 4 also defends an expressive conception of culpability against the charge that evaluating offenders' motives violates the neutrality required of a liberal state.

Part Two debunks the myth of felony murder's origins in a common law rule of strict liability and shows the deep roots of the dual culpability principle in the history of American law. Chapter 5 demonstrates that England did not develop a felony murder rule until well after American independence. Chapter 6 shows that the English common law of crimes had far less authority in early America than is usually assumed and that nineteenth-century homicide law was largely statutory. Chapter 7 examines the development of felony murder law in jurisdictions with statutes that graded murder as first degree when committed in an enumerated felony. Chapter 8 examines the development of felony murder law in jurisdictions with statutes that imposed murder liability for killing in certain felonies. Both of these chapters show that nineteenth-century felony murder law generally required a dangerous felony and a violent act, while complicity required that the killing be in furtherance and foreseeable

as a result of the felony. Thus felony murder law generally conformed to the principle of dual culpability from its inception.

Part Three examines contemporary felony murder law in light of the principle of dual culpability. It demonstrates that contemporary felony murder law conforms to the principle in most respects in most jurisdictions. This has two implications. First, felony murder law sufficiently conforms to the principle to warrant the principle as a constructive interpretation. Second, the principle condemns deviations as anomalies, at odds with the purposes that justify a felony murder rule.

Chapter 9 is concerned with felony murder as a crime of negligent killing. It examines the contemporary use of mental elements, dangerous felony requirements, and causation standards to condition felony murder liability on the killer's negligence. It expresses concern that some enumerated felonies—notably burglary and drug offenses—are not nearly as dangerous as legislatures may assume, but it concludes that other doctrines will usually prevent strict liability for causing death.

Chapter 10 examines criteria of vicarious liability for killings committed by co-felons. It finds that most jurisdictions require that death result foreseeably and in furtherance of the felony in most cases. It expresses concern that some jurisdictions do not adequately require culpability for death on the part of accomplices in felonies that are not inherently dangerous. It also observes that unjust attributions of complicity in felony murder often result from misattributions of complicity in the predicate felony. Finally, it condemns the small minority of statutes permitting felony murder liability without proof of causation or complicity.

Chapter 11 is concerned with felony murder as a crime of felonious motive and focuses primarily on the "merger" problem. It finds that most jurisdictions restrict predicate felonies to those involving either an independent felonious purpose or enough violence to manifest gross recklessness. It urges that legislatures take greater care to ensure that child abuse and other assault offenses enumerated as predicate felonies require extreme indifference. It also urges that all courts adopt merger rules in jurisdictions with unenumerated felonies.

Chapter 12 concludes the volume by reviewing the entire argument. It reiterates that unjust results can be avoided if felony murder law is properly understood and applied in light of its principles, while denunciations of felony murder liability as inherently irrational paradoxically permit its imposition without the constraints of principle.