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FELONY MURDER LIABILITY FOR HOMICIDES BY POLICE: TOO UNFAIR & TOO MUCH TO BEAR

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On November 23, 2020, a fifteen-year-old boy was gunned down by five Oklahoma City police officers, after he exited a convenience store and dropped the gun that he and a sixteen-year-old partner had earlier used to rob the store's owner. Initially, the boy's non-present partner was charged with first-degree (felony) murder for this killing. But after months of efforts by the boy's mother and local activists, the district attorney also charged five officers with first-degree manslaughter for this same killing.

This case raises the question of whether Oklahoma—or any American state—can convict a defendant of felony murder based upon a killing that was a criminal homicide by a police officer. More broadly, it raises the question of whether a felony "participant" can be convicted of felony murder based upon a killing by a "nonparticipant," who killed while resisting the underlying felony. Killings by "nonparticipants" include killings by responding police officers, as well as by bystanders and victims of the original felony.

This is the first Article to address felony murder liability for homicides by nonparticipants. This Article presents a fifty-state survey of American law that determines which states maintain a traditional approach to felony murder (not requiring any culpable mens rea regarding a killing arising from a covered felony), which states are "agency states" (that limit felony murder to killings by participants), which are "proximate cause states" (that allow felony murder convictions for killings by nonparticipants), and which proximate cause states would potentially allow felony murder liability for a criminal homicide by a police officer, bystander, or victim.

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This Article maintains that even states that have adopted a broad proximate cause approach to felony murder should prevent such liability for killings by nonparticipants that are chargeable homicides and proposes some statutory and doctrinal approaches for doing so in a principled way.

INTRODUCTION: THE KILLING OF STAVIAN RODRIGUEZ

Just after 7:00 p.m. on Monday, November 23, 2020, five Oklahoma City Police Officers gunned down fifteen-year-old Stavian Rodriguez shortly after he exited the Okie Gas Express, a gas station convenience store in southwest Oklahoma City.[1] Rodriguez and his sixteen-year-old friend, Wyatt Cheatham, had apparently robbed the clerk/owner of the Okie Gas Express at gunpoint that night, taking cash and cigarettes and then leaving a few minutes later without anyone getting hurt.[2] After the teens had safely exited, however, Rodriguez went back by himself, perhaps to retrieve something he had left behind. This time, the clerk/owner managed to exit the store while Rodriguez was still inside—by going out the drive-through window—and then locked Rodriguez inside the store (by locking the front door from the outside) and flagged down someone nearby, who called 911.[3]

In a few minutes, numerous Oklahoma City (OKC) police officers began arriving at the scene.[4] Unsurprisingly, Wyatt Cheatham was long gone

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[1] That same night, local media outlets reported that an armed man, who had been involved in an armed robbery at the Okie Gas Express, was shot by Oklahoma City police after coming out of the building and refusing to cooperate with police commands. *See* Kaylee Douglas, *OKCPD Investigate Officer-Involved Shooting During Armed Robbery Call*, KFOR (Nov. 23, 2020, 10:07 PM), https://kfor.com/news/okcpd-investigate-officer-involved-shooting-during-armed-robbery-call (including video of news story by Peyton Yager reporting that Oklahoma City police indicated "white adult male" involved in armed robbery, followed by "standoff with police," was shot by five police officers after "armed" man "refused to cooperate" and "did not follow police orders"). By the next day, local media identified the victim of the police shooting as fifteen-year-old Stavian Rodriguez. *See, e.g.*, Josh Dulaney, *Teen Boy Killed by OKC Police in Suspected Armed Robbery Attempt*, OKLAHOMAN (Nov. 24, 2020, 12:58 PM), https://www.oklahoman.com/story/news/columns/2020/11/24/teen-boy-killed-by-okc-police-in-suspected-armed-robbery-attempt/313809007 (reporting person shot at Okie Gas Express was fifteen-year-old Stavian Rodriguez and that "authorities" said he "held a pistol and did not follow officers' commands").

[2] On April 19, 2021, Wyatt Cheatham pled guilty in Oklahoma County District Court (as an adult) to one count of robbery with a firearm, under OKLA. STAT. tit. 21, § 801 (1999), for his actions at the Okie Gas Express on November 23, 2020. Docket, Oklahoma v. Cheatham, No. CF-2020-6024 (Okla. Cnty. Dist. Ct. Dec. 17, 2020), https://www.oscn.net/dockets/GetCaseInformation.aspx?db=oklahoma&number=cf-2020-6024.

[3] Information & Attached Affidavit and Application for Arrest Warrant of Wyatt Allen Cheatham, No. CF-2020-6024, *supra* note 2, at 1 (on file with the author).

[4] Josh Dulaney, *"Shut Your Camera Off": OKC Police Quiet After Officers Charged, Body Camera Footage Part of Case*, OKLAHOMAN (Mar. 11, 2021, 6:29 PM), https://www.oklahoman.com/ story/news/2021/03/11/okc-police-body-camera-footage-crucial-stavian-rodriguez-shooting-case/4651535001 (Oklahoma County District Attorney acknowledged that there may have been as many as thirty officers on the scene and that around eighteen officers are visible in videos from that night).

by the time multiple police officers established a perimeter around the Okie Gas Express, with Rodriguez locked inside.[5] Both security camera video and bodycam videos worn by OKC police officers that night reveal a chaotic scene, with numerous officers shouting conflicting commands, including that Rodriguez should "come out," which he could not do (due to the locked front door), that officers "only want to talk," and that he should "show us your hands."[6] Rodriguez eventually followed the lead of the store clerk and exited through the store's drive-through window. The OKC Police Department initially reported that Rodriguez was holding a gun when he came out of the building and that he was shot when he refused to follow police commands.[7]

By the next day, however, this version of events began to be called into question, after witnesses at the scene indicated that Rodriguez was complying and had put down his gun before he was shot.[8] A video of the shooting taken by a local news employee from across the street also appeared to show Rodriguez putting his gun down shortly before he was shot.[9] In the weeks and months that followed, Cameo Holland, the mother of Stavian Rodriguez, pushed for release of the videos from the body cameras worn by officers at the scene.[10] And local activists and groups like Black Lives Matter

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[5] *Id.* (including video showing numerous officers at scene).

[6] *Id.*

[7] Douglas, *supra* note 1 (including video of OKC Police Department Master Sergeant Gary Knight stating that although he did not know all the details and had not seen the bodycam videos, "I do know that [Rodriguez] did come out of the window holding the gun in his hand."); Perris Jones, *Police Shoot, Kill Armed Robbery Suspect at Business in Southwest Oklahoma City*, KOCO NEWS 5 (Nov. 23, 2020, 10:15 PM), https://www.koco.com/article/officer-responding-to-armed-robbery-involved-in-shooting-in-southwest-okc-police-say/34764937 (including video of Knight stating as follows: "He came out with the gun in his hand. He did not follow officers' instructions while coming out with the gun in his hand. Ultimately, he was shot," *id.* at 00:28).

[8] *See, e.g.*, Jennifer Pierce, *OKC Teen Fatally Shot by Police Appeared to Have Put the Weapon on the Ground*, NEWS 9 (Nov. 24, 2020, 5:20 PM), https://www.news9.com/story/5fbd9521fdf49b0bb5c8af7f/okc-teen-fatally-shot-by-police-appeared-to-have-put-the-weapon-on-the-ground (reporting that officers shot Rodriguez moments after he put down his weapon and citing unnamed witnesses who were "shocked" that Rodriguez was shot after he put down his gun).

[9] *See* Jones, *supra* note 7 (including video of actual shooting taken from across the street by member of KOCO news team, who happened to be on the scene).

[10] On December 14, 2020, Cameo Holland's attorney contacted the City of Oklahoma City and the OKC Police Department and formally requested "all body camera footage and audio recordings" relevant to the shooting of her son. *See* Petition at Plaintiff's Exhibit A, *Holland v. City of Oklahoma City*, No. CJ-2021-462 (Okla. Cnty. Dist. Ct. Feb. 2, 2021), https://www.oscn.net/dockets/GetCaseInformation.aspx?db=oklahoma&number=CJ-2021-462&cmid=3946782. At a press conference held that same day, Holland's attorney emphasized that they wanted "all video footage, including body cams, . . . [and] evidence of

and the NAACP protested and called for action and accountability for what was perceived as another unjustified police killing of an unarmed citizen.[11]

Meanwhile, Oklahoma County District Attorney David Prater decided to file a first-degree felony murder charge regarding the killing of Stavian Rodriguez—by five OKC police officers—against Wyatt Cheatham, Rodriguez's apparent accomplice in the original armed robbery. And on December 18, 2020, Cheatham was charged, in Oklahoma County District Court, with two felony crimes: Count 1, Murder in the First Degree (felony murder), for the shooting death of Stavian Rodriguez during the commission of a robbery with a firearm, and Count 2, Robbery with a Firearm, for the armed robbery of Mostafizor Khan at the Okie Gas Express on November 23, 2020.[12]

Oklahoma, along with approximately eleven other states discussed *infra*,[13] allows an individual who was involved in a particular type of felony (such as armed robbery) that somehow results in a death to be charged with *murder* for the subsequent death—*even if* the individual charged had no expectation and no intent that someone would end up dead due to the felony *and even if* the actual killer (i.e., the person who, in fact, killed the victim) was a police officer, a victim of the original crime, or a bystander at the scene.[14] Many Oklahomans were quite shocked to learn that Wyatt

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video footage shot by witnesses at the scene preserved." *See* Jennifer Pierce, *Mother of Teen Killed by OCPD Seeks Justice Through Forthcoming Lawsuit*, News 9 (Dec. 14, 2020, 5:36 PM), https://www.news9.com/story/5fd7f6ecfa44ae0bce0eaebb/mother-of-teen-killed-by-ocpd-seeks-justice-through-forthcoming-lawsuit. On February 2, 2021, after not being provided any evidence, Holland formally sued Oklahoma City, under the Oklahoma Open Records Act, for this video and audio evidence. *See* Petition, *Holland*, No. CJ-2021-462, *supra* ¶ 15.

[11] *See, e.g.*, Brett Dickerson, *Response to Stavian Rodriguez Death Strains Police-Community Relations*, OKLAHOMA CITY FREE PRESS (Nov. 29, 2020, 2:31 PM), https://freepressokc.com/response-to-stavian-rodriguez-death-strains-police-community-relations (noting statement by Black Lives Matter Oklahoma City and comments by Executive Director Sheri Dickerson criticizing Rodriguez shooting, as well as joint statement by OKC City Manager Craig Freeman and OKC Police Chief Wade Gourley asking residents for "patience as the criminal and administrative investigations inside OCPD get under way"); Brett Dickerson, *Protesters Focus on Police Union Over Stavian Rodriguez Shooting Death*, OKLA. CITY FREE PRESS (Dec. 5, 2020, 8:17 PM), https://freepressokc.com/protesters-focus-on-police-union-over-stavian-rodriguez-shooting-death (noting protests against OKC Police Department and Fraternal Order of Police related to Rodriguez shooting, including call for criminal charges against five officers by Garland Pruitt, President of OKC NAACP).

[12] Information & Attached Affidavit, *Cheatham*, No. CF-2020-6024, *supra* note 3, at 1.

[13] *See* discussion *infra* Part III.

[14] Oklahoma's first-degree felony murder statute states as follows: "A person also commits the crime of murder in the first degree, regardless of malice, when that person *or any*

Cheatham—who was not even present when his friend was gunned down—could be charged with the first-degree murder of Rodriguez, who was clearly killed by police officers.[15]

Almost twelve weeks later, on March 10, 2021, various security and bodycam videos of the shooting of Stavian Rodriguez were released to the public and revealed a number of important facts. Rodriguez was *not* holding a weapon or anything at all when he exited the Okie Gas Express through the drive-through window. Rodriguez then showed police the gun in his left waistband by lifting up his shirt, while putting his hands up, as instructed. Rodriguez then voluntarily disarmed himself by gingerly removing the gun from his waistband with his left hand, holding the extended magazine between his thumb and index finger, and dropping the gun on the ground in front of him. And Rodriguez was then shot in an avalanche of bullets a few seconds later, when he lowered his hands and appeared to reach for his sagging pants, with his right hand near his right waistband and his left hand seemingly reaching toward or into his back left pocket.[16]

And on March 10, 2021, the same day that Oklahoma County District Attorney David Prater released the security camera and bodycam videos to

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other person takes the life of a human being during, *or if the death of a human being results from*, the commission or attempted commission of [one of 13 listed felonies]." OKLA. STAT. ANN. tit. 21, § 701.7(B) (West 1976) (all emphasis added).

[15] *See* Brett Dickerson, "*He's Not a Killer" Says Mother of Teen Accomplice in Robbery*, OKLA. CITY FREE PRESS (Feb. 1, 2021, 1:37 PM), https://freepressokc.com/hes-not-a-killer-says-mother-of-teen-accomplice-in-robbery (quoting Amanda Totsch, mother of Wyatt Cheatham, as stating that her son is "not a murderer" and "didn't kill anybody"); *see also id.* (noting Cheatham's murder charge had "increased the outrage" in the community and including picture of Totsch at protest against charge).

[16] *See* KOCO Staff, *Graphic Warning: Surveillance Video Shows Moments Before Teen Robbery Suspect Was Killed by OKC Police*, KOCO NEWS 5 (Mar. 10, 2021, 3:17 PM), https://www.koco.com/article/graphic-warning-surveillance-video-shows-moments-before-teen-robbery-suspect-was-killed-by-okc-police/35799669 (including security camera video and bodycam video from various officers at the scene of time period just before Rodriguez was shot); Tres Savage, *Stavian Rodriguez Shooting: 5 OKCPD Officers Charged with Manslaughter*, NONDOC (Mar. 10, 2021, 3:02 PM), https://nondoc.com/2021/03/10/5-okcpd-officers-charged-with-manslaughter (including security camera video and four extended bodycam videos from officers at scene); Nolan Clay, *The 15-Year-Old Robbery Suspect Had Dropped His Gun. Oklahoman Police Officers Fired Anyway. Now They Are Being Charged*, OKLAHOMAN (Mar. 11, 2021, 5:21 AM), https://www.oklahoman.com/story/news/2021/03/10/oklahoma-city-police-officers-charged-fatal-shooting/6940525002 (providing time-stamped images from security camera video of Rodriguez lifting shirt with both hands, getting gun from left waistband with left hand, and dropping gun on ground after officer commands, "Drop it!" while keeping right hand in air; Rodriguez then moves both hands toward his waist area, just before multiple officers fire, hitting him thirteen times; only eight seconds had passed since Rodriguez first emerged from the store).

the public, D.A. Prater also charged the five OKC police officers who used lethal force against Stavian Rodriguez with the crime of *first-degree manslaughter* for killing him.[17]

In addition to being a stunning development regarding the police shooting of Stavian Rodriguez—just weeks before the trial of former Minneapolis police officer Derek Chauvin for the callous police officer murder of George Floyd[18]—the filing of first-degree manslaughter charges against the five police officers who actually killed Rodriguez raised a huge legal question in the pending criminal case against Wyatt Cheatham. *Could the State of Oklahoma actually convict Cheatham of the first-degree felony murder of Rodriguez when the same district attorney who was prosecuting Cheatham for this indirect crime was also maintaining that the killing of Stavian Rodriguez—by the five officers who actually shot and killed him—was, in fact, a criminal homicide by the police*?

In other words, would Oklahoma law actually allow the State to convict someone of first-degree felony murder for the *homicide crime* of one or more police officers, simply because that individual had *earlier* committed or attempted a designated felony with the person who ended up dead, and the officers were present in response to that felony? Is Oklahoma felony murder law really so broad that it permits the first-degree murder conviction of

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[17] *See* Savage, *supra* note 16 (noting that Prater had released surveillance camera video and five bodycam videos and filed first-degree manslaughter charges against the five police officers who shot Rodriguez with regular bullets, but not against officer who fired first with "a nonlethal beanbag round"). The charging Information filed in the case alleges that five OKC police officers committed First-Degree Manslaughter when they "jointly, willfully, unlawfully, and unnecessarily killed Stavian Rodriguez by shooting him with a firearm, while resisting an attempt by the deceased to commit a crime or after such attempt had failed, and thereby caused his death." Information at 1, *Oklahoma v. Barton*, No. CF-2021-975 (Okla. Cnty. Dist. Ct. Mar. 10, 2021), https://www.oscn.net/dockets/GetCaseInformation.aspx?db=oklahoma&number=CF-2021-975&cmid=3955972; *see also* Nolan Clay, *Five Oklahoma City Officers Charged with First-Degree Manslaughter in Fatal Shooting of Teen Who Dropped Gun*, USA TODAY (Mar. 11, 2021, 7:49 PM), https://www.usatoday.com/story/news/nation/2021/03/10/stavian-rodriguez-shooting-5-oklahoma-city-police-officers-charged/6945418002. The Affidavit of Probable Cause filed with the Information clarifies that body camera footage revealed that the first officer fired "a 40mm less lethal round" and that the other five officers then "all unnecessarily fire lethal rounds at Stavian Rodriguez, striking him numerous times and inflicting mortal wounds, which cause his death." Affidavit of Probable Cause, *Barton*, No. CF-2021-975, *supra*, at 1. The Affidavit further notes that Rodriguez "suffered thirteen gunshot wounds," that he "had no weapons other than the firearm, which he dropped prior to being shot," and that a cellphone was recovered from his left rear pocket. *Id.* at 2.

[18] *See* Will Wright, *Takeaways from the First Day of the Derek Chauvin Trial*, N.Y. TIMES (Apr. 9, 2021), https://www.nytimes.com/2021/03/29/us/derek-chauvin-trial-takeaways.html.

persons who commit or attempt felonies, which eventually "result in" a death, even if the actual killing was a homicide by a responding police officer? Isn't holding a felony participant accountable for *first-degree murder based upon a law enforcement homicide* just too unfair and too much to bear?[19]

The felony murder charge against Cheatham for the killing of Stavian Rodriguez by five Oklahoma City police officers also raises the broader question of *which other states would plausibly allow a felony murder conviction for a felony participant* like Cheatham *when the actual killing was a homicide by someone not involved in the original felony*? Police officers are actually one of three categories of "nonparticipants" in the original felony who sometimes end up killing someone in response to that felony—a situation which is the focus of this Article. Victims of the original felony, bystanders, and police officers all constitute "nonparticipants" in the original felony, who sometimes kill in response to that felony. This situation raises the question of whether a *participant* in the original felony can then be held accountable for "felony murder" for that killing by a *nonparticipant*.

For the states that would potentially allow such a conviction (for a killing by a nonparticipant), this raises additional questions. Does it matter who is killed, i.e., whether the person killed was a participant or a nonparticipant in the original felony? Does it matter if the lethal actions of the nonparticipant were themselves unjustified, inappropriate, or even a chargeable homicide? *Does the fact that a felony participant "started it," by committing or attempting a felony, really mean that he or she is criminally accountable—as a "felony murderer"—for any death that later results, regardless of who kills who, how unreasonable or unforeseeable the killing was, and whether the killing was itself a crime*?

In Part I of this Article, I will begin addressing these questions by first providing some background regarding felony murder law generally and in America, in particular, with a special focus on felony murder liability for

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[19] In the actual case against Wyatt Cheatham, the question of felony murder liability for a police officer homicide apparently will not be answered due to a plea deal reached in the case. On April 19, 2021, in accord with a plea agreement with the State, Cheatham pled guilty to Robbery with a Firearm (for his role in the armed robbery of the Okie Gas Express), in exchange for the State's agreement to drop the First-Degree Felony Murder charge against him. *See* KOCO Staff, *Murder Charge Dropped Against Teen Accomplice in Robbery that Resulted in OCPD Shooting of Stavian Rodriguez*, KOCO NEWS 5 (Apr. 19, 2021), https://www.koco.com/article/murder-charge-dropped-against-teen-accomplice-in-robbery-that-resulted-in-ocpd-shooting-of-stavian-rodriguez/36164450 (reporting that Cheatham had entered guilty plea, as an adult, to armed robbery charge and had agreed to sentence of imprisonment for fifteen years, with first eight years in custody and the rest on probation). It should be emphasized in this regard that in Oklahoma, the minimum sentence for any first-degree murder conviction is life imprisonment. OKLA. STAT. tit. 21, § 701.9 (2004).

killings by nonparticipants in the original felony. The two basic approaches to such killings will be summarized, namely: (1) the "agency approach," which would *not* permit a felony murder conviction for a killing by a "non-agent" in the original felony and (2) the "proximate cause" approach, which *does* permit felony murder liability for many killings by "nonparticipants" (i.e., killings by victims, bystanders, and police officers) that were "proximately caused" by the original felony because the nonparticipants were somehow resisting or responding to that felony.

In Part II, I will categorize the murder laws of all fifty American states, noting how many and which states currently maintain a traditional approach to felony murder liability, i.e., one that does not require *any* culpable *mens rea* toward the death that evolved from the felony. I will then categorize the forty-one states that maintain this traditional approach as either agency states or proximate cause states regarding felony murder liability for killings by nonparticipants. By definition, true agency states do *not* permit felony murder convictions based upon killings by nonparticipants in the original felony. Hence, the twelve proximate cause states (and also Illinois) will be my focus.

In Part III, I will consider the two main groups of proximate cause states when it comes to killings by nonparticipants: (1) states with broad *statutory* liability for killings by nonparticipants and (2) states with broad *case-based* liability for killings by nonparticipants (often despite rather narrow statutory language). Within this summary I will consider whether the proximate cause approach within each of these states contains adequate limitations, such that it would, at a minimum, prevent felony murder liability based upon a criminal *homicide* committed by a nonparticipant victim, bystander, or police officer. This Article will take the position that even within the context of broad-based and often disproportionate criminal liability under traditional felony murder law, there is something deeply and terribly wrong with allowing a person to be convicted of felony murder based upon a criminal homicide committed by his or her adversary.

And in Part IV, I will briefly propose some potential solutions to avoiding this kind of grave injustice.

I. FELONY MURDER AND KILLINGS BY NONPARTICIPANTS

Felony murder law in America sometimes allows a State to charge and convict a person of "murder" if that person was involved in committing or attempting a felony that somehow resulted in some *other* person—who did not in any way participate in the original crime—killing someone. For the purposes of this Article, persons who participate in the original felony and those who assist in attempting to commit a felony (including accomplices)

will be referred to as "participants," whereas persons who did not participate in the original felony but were somehow impacted by it (and may have responded to it) will be referred to as "nonparticipants." In the felony murder context, the term "killings by nonparticipants" includes killings by three different groups of people: victims of the original felony, bystanders at or near the scene of that felony, and police officers responding to that felony in some way.

The *victims* of felony murder killings by nonparticipants (i.e., the ones who end up dead) can include both *other* participants in the original felony, as well as other nonparticipant bystanders, police officers, and victims (of the original felony). For example, if a person who was a victim of an attempted armed robbery by two men pulls a gun out of her purse and shoots and kills one of the robbers, this would be a killing by a nonparticipant of a participant, for which the surviving armed robber could potentially be held liable for "felony murder." And if that same robbery victim shoots at the fleeing robbers as they run away, but accidentally hits and kills someone else—such as a bystander in the area or a police officer attempting to apprehend the robbers—this too would be a killing by a nonparticipant (this time of another nonparticipant), for which the robbers could potentially both be held liable for "felony murder."

But before getting too far into this particular subset of felony murder law, it may be helpful to review some basic principles of felony murder law in general, particularly the American version.

A. BACKGROUND AND SOME FELONY MURDER LAW BASICS

According to the traditional account, "felony murder" criminal liability was brought to America, along with many other features of our criminal legal architecture, via the common law of England.[20] Nevertheless, the actual history, scope, and content of the common-law understanding of "felony murder" is a matter of substantial scholarly debate, into which I will not wander.[21] Most scholars regarding the British common-law version of felony

[20] *See, e.g.*, WAYNE R. LAFAVE, CRIMINAL LAW 985 (West Acad. Publ'g 6th ed. 2017); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 476–77 (Carolina Acad. Press 8th ed. 2018).

[21] *See, e.g.*, 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, 1442–43 (1994) (reviewing some of the known historical evidence and concluding that "the origins" of the felony murder doctrine are neither "clearly documented [nor] ascertainable" and that "neither the cases nor the commentators furnish evidence that the doctrine was the product of a conscious, deliberate reasoning process designed to reflect or implement penal policies"). Some scholars contest even the basic "myth" of broad felony murder liability as born in

murder emphasize the various historical realities that effectively limited the range, scope, and impact of this early form of felony murder.[22] Hence, despite the seemingly obvious potential for injustice in terms of modern conceptions of appropriate criminal culpability, the specific and limited context of British common law within which felony murder evolved significantly limited its potential for harm and perceived injustice.[23]

Nevertheless, England abolished the felony murder rule by statute in 1957.[24] The felony murder rule has fared much better in its adopted homeland, where it remains quite alive in a broad range of forms across America.[25]

The "basic math" of the traditional concept of felony murder criminal law liability is remarkably simple and seemingly compelling: a felony + a killing = a felony murder.[26] In other words, if an individual is committing or

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English common law and transported to America. *See, e.g.*, Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965, 976 (2008) ("[The] conventional account of the history of felony murder is misleading in almost every respect. . . . American felony murder rules were enacted primarily by legislatures in the mid-nineteenth century. England developed its felony murder rule even later in the nineteenth century."). Binder insists that unlike the felony murder doctrine that developed later in America, the English common law "did not punish accidental deaths in the course of felonies as murder," though it "did punish unintended killings in the course of felonies as murder." *Id.* at 977*; see also* Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 63 (2004) (summarizing the article as "expos[ing] the harsh 'common law' felony murder rule as a myth" and "demonstrat[ing] that the draconian doctrine of strict liability for all deaths resulting from all felonies was never enacted into English law or received into American law").

[22] The limited, serious, and very harsh context of common-law British criminal law dulled the potential for the felony murder doctrine to appear especially unjust. First, the number of British common-law felonies was quite short. *See* Tomkovciz, *supra* note 21, at 1445. So, the list of crimes from which a felony murder could potentially result was likewise quite short. Second, "all common-law felonies were serious offenses that were inherently morally wrong, and most of them engendered a fair degree of danger to human life." *Id.* at 1445–46. Hence, the possibility of felony murder arising from involvement in a non-serious, non-dangerous felony did not exist. Third, *all* common-law felonies were punishable by death. *Id.* at 1446. Thus, the potential for a felony murder conviction to result in a capital sentence was not so stunningly disproportionate.

[23] *See id.* ("[T]he typical effect of the [common-law felony murder] rule was to brand as murderers only those who had performed seriously immoral acts of a life-threatening nature."); *see also* LAFAVE, *supra* note 20, at 985 n.184 ("At the time the felony-murder rule developed, all felonies were punishable by death, so it made little difference whether the felon was hanged for the felony or for the murder.").

[24] *See* Homicide Act of 1957, 5 & 6 Eliz. 2 c. 11, § 1 (Eng.).

[25] *See* Tomkovicz, *supra* note 21, at 1430 ("Abandoned by its motherland, the felony-murder rule, like so many outcasts, has found a niche in America.") (footnote omitted).

[26] *See id.* at 1429–30, 1433 ("In its starkest, broadest form, the felony-murder rule provides that the killing of another human being in the furtherance of *any* felonious enterprise

attempting a felony and that felony or attempt somehow causes someone else to die, the person who was committing/attempting the felony that somehow resulted in a death has committed "felony murder," *even if* that individual did not intend or want to cause a death, did not expect to cause a death, and was not even reckless about potentially causing a death.[27]

The common-law crime of "murder" traditionally required that the person being held accountable have the *mens rea* (mental state or attitude) of "malice aforethought" regarding the death that he or she caused.[28] And the "malice" required for malice aforethought murder included when the killer caused a death with (1) the intent that someone die, (2) the intent that someone be seriously injured, or (3) a "depraved heart," meaning with reckless disregard for whether the actions at issue would cause a death.[29] Felony murder is typically listed fourth on this traditional "malice aforethought" list,[30] though it doesn't quite fit because it is more about the circumstances of the killing than the killer's mental attitude toward the killing.[31] Under the traditional conception of "malice aforethought" felony murder liability, the fact that the person at issue was *committing a felony* that somehow resulted in a death suffices to establish the "malice" that is

constitutes the crime of murder."); *see also* LAFAVE, *supra* note 20, at 985 ("[T]he English common law felony-murder rule was that one who, in the commission or attempted commission of a felony, caused another's death, was guilty of murder, without regard to the dangerous nature of the felony involved or to the likelihood that death might result from the defendant's manner of committing or attempting the felony.").

[27] *See* DRESSLER, *supra* note 20, at 489.

[28] *See, e.g.*, *id.* at 476 ("The common law definition of 'murder' is 'the killing of a human being by another human being with malice aforethought.'") (citation omitted). Professor Dressler notes that true "aforethought," in terms of requiring some type of prior reflection or premeditation before a killing can be a murder, gradually lost its significance in English common law and "has always been superfluous to the definition of murder in American law." *Id.* at 477. In addition, as explained *infra*, the "malice" requirement of common-law murder law does not necessitate actual ill will toward the victim. *See id.* Hence, the common-law murder requirement of "malice aforethought," as it evolved in England and was brought to America, required neither actual malice nor actual aforethought. *See* LAFAVE, *supra* note 20, at 959 (noting that "in modern times" this "misleading" phrase "does not even approximate its literal meaning").

[29] *See* DRESSLER, *supra* note 20, at 476; LAFAVE, *supra* note 20, at 959. If someone kills another with the intent or purpose to kill that person, this is considered "express malice." DRESSLER, *supra* note 20, at 477. Whereas if a person intends to seriously injure another *or* acts in a way that is likely to kill another (while recognizing and disregarding this lethal risk), these types of reckless disregard for the well-being of the other are considered "implied malice." *Id*.

[30] *See, e.g.*, DRESSLER, *supra* note 20, at 477; LAFAVE, *supra* note 20, at 959.

[31] *See* Tomkovicz, *supra* note 21, at 1429 (recognizing felony murder as "one of four traditional branches on the tree of murder, yet clearly the odd one out") (footnote omitted).

otherwise required to make a killing "a murder," even if the death that evolved from the original felony was unintended, unexpected, unforeseeable, accidental, and even totally undesired.[32]

Because this traditional version of felony murder does not require *any* sort of *mens rea*, wrongful intent, knowledge, or even recklessness toward the death that somehow results from the underlying felony, it has the potential to result in great injustice. It can declare a death that may be merely accidental and quite undesired and unexpected to be *a murder*, i.e., traditionally the most heinous of crimes, which is potentially subject to the most severe of punishments, including imprisonment for life or even a death sentence.[33] And because of the doctrine's potential to result in grave and stunning injustice, felony murder (particularly the American version) has long been excoriated by scholars, courts, and commentators.[34]

Nevertheless, and as generally acknowledged by these same scholars, courts, and commentators, felony murder liability has endured, evolved, and sometimes even expanded in America.[35] Ironically, it seems entirely possible

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[32] Hence, felony murder, like the other forms of malice aforethought murder where the killer did not actually *intend* that someone die, is an example of implied malice murder. *See* DRESSLER, *supra* note 20, at 477; LAFAVE, *supra* note 20, at 960-61. It should also be noted herein that regardless of the killer's *mens rea* toward the killing, if the killing at issue was either justified (e.g., a lawful act of self-defense), excused (e.g., the product of qualifying "insanity" in the jurisdiction), or "adequately provoked" (under the manslaughter law of the jurisdiction), the killing would not be punishable as a "murder." *See, e.g.*, DRESSLER, *supra* note 20, at 477.

[33] *See* Tomkovicz, *supra* note 21, at 1429–30 (noting that felony murder doctrine "permits severe punishment for the most heinous of offenses in some cases that can appropriately be described as accidents").

[34] *See, e.g.*, MODEL PENAL CODE § 210.2 cmt. at 37 (AM. L. INST. 1980) (noting that it is difficult to find "[p]rincipled argument in favor of felony-murder"); Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 404 (2011) (describing felony murder doctrine as "scorned as irrational by academics" and "one of the most widely criticized features of American criminal law") (footnote omitted); Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 446 (1985) ("Criticism of the [felony-murder] rule constitutes a lexicon of everything that scholars and jurists can find wrong with a legal doctrine[.]"); Tomkovicz, *supra* note 21, at 1430–31 n.8 (while disclaiming "purpose to demonstrate how fundamentally flawed the crime of felony-murder is," because "[t]hat path is much too worn," also acknowledging sharing perspective of "most scholars" that felony-murder doctrine is "misguided in principle, unnecessary in practice, and inappropriate in symbolism").

[35] *See, e.g.*, DRESSLER, *supra* note 20, at 488 (despite being "richly criticized" in America, felony murder "still thrives" in U.S.); Tomkovicz, *supra* note 21, at 1431–32 (examining how "a rule of law that has been maligned so mercilessly for so long and that is putatively irreconcilable with basic premises of modern criminal jurisprudence has survived and promises to persist," at least for a good while longer, in America and proposing that our

that some of the significant restrictions that have been placed on this doctrine in America (which are not the focus of this Article and will not be summarized herein)—often by courts with some level of skepticism or hostility toward the doctrine or by legislatures concerned about its overbreadth and potential for injustice—may also have enabled the doctrine to survive and even thrive in America, despite the occasional glaring injustice or over-punishment enabled by the doctrine.[36]

B. KILLINGS BY NONPARTICIPANTS

When it comes to killings by *nonparticipants* (in the original felony) that somehow evolve from a prior felony or felony attempt, American jurisdictions generally take one of two different approaches to the question of whether a *participant* in the original felony can be convicted of the "felony murder" of the person killed: the agency approach or the proximate cause approach.[37] For the purposes of this Article, these approaches will be defined as follows. Under the agency approach, felony murder liability can only result when participants in an underlying felony are acting together (as each other's "agents"), in furtherance of a common plan to commit that felony, when one of these participants somehow kills someone or causes the death of someone.[38] Hence, the agency approach can result in a felony murder conviction only if a co-agent participant in the underlying felony causes a death during the perpetration or attempted perpetration of the underlying felony or during flight thereafter. Thus, the agency approach only applies to

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"[h]istory, the politics of law and order and of life and death, the restricted scope of the felony-murder rule in modern times, and the public's and lawmakers' conceptions of culpability, blameworthiness, and criminal liability have all contributed to the rule's perpetuation") (footnote omitted).

[36] *See, e.g.*, Tomkovicz, *supra* note 21, at 1469 ("In sum, the evolved restrictions on the scope of felony-murder have probably contributed to its endurance. By keeping it on a leash, legislatures and courts have prevented it from behaving in ways that could attract public attention and antipathy.").

[37] This Article was originally inspired by the case discussed in the Introduction and the desire to investigate the potential criminal liability of felony participants when a *police officer* responding to a felony ends up killing someone. Yet the laws, principles, and cases considered herein apply equally to killings by nonparticipant bystanders and victims. In other words, the type of "nonparticipant" who kills does not typically affect the potential felony murder liability of the original felony participant(s) for the killing. On the other hand, the status of the person killed, i.e., whether *the victim of the killing* was a participant in the original felony or not, often *can* make a difference in the potential felony murder liability of any (still-living) original felony participant. *See* notes 279, 281 *infra* (noting state statutes that limit felony murder liability to deaths of nonparticipants).

[38] *See, e.g.*, State v. Pina, 233 P.3d 71, 75 (Idaho 2010) (summarizing agency and proximate cause approaches to felony murder liability).

killings by participants and does not allow for felony murder liability when a nonparticipant in the underlying felony kills someone while responding to that initial felony.[39]

Under the proximate cause approach, participants in the underlying felony can be convicted of felony murder if the perpetration or attempted perpetration of the underlying felony (or flight thereafter) "proximately causes" a death, regardless of whether the death was directly caused by a participant in the underlying felony or by a victim of that underlying felony, a bystander in the area, or a police officer responding to the underlying felony. Hence, the proximate cause approach allows for felony murder convictions regardless of whether the dead victim was killed by a participant or a "nonparticipant" in the original felony, i.e., by a victim, bystander, or police officer, who was somehow responding to the prior felony. Thus, the proximate cause approach allows participants in the underlying felony to be convicted of felony murder based upon *killings by nonparticipants*, who were acting in opposition to the participants and may even have killed one of the participants.[40] The main "limitation" on this felony murder liability is the concept of "proximate causation," which is determined by deciding whether it was "reasonably foreseeable" that attempting or committing the underlying felony might "reasonably be expected" to *somehow* ultimately result in a death.[41] Yet, as the cases discussed *infra* in Part III will show, reasonable foreseeability is defined quite broadly in this context.

In terms of the historical basis for imposing felony murder liability for the actions (let alone the crimes) of nonparticipants in the original felony, Professor Guyora Binder has noted that early felony murder case law in both England and America had a very limited notion of the propriety of holding a felony participant accountable even for a killing by another participant.[42] And

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[39] The agency approach would seem to include even some forms of indirect killing, such as if a police officer chasing an armed robber lost control of her vehicle and was killed in a one-car accident—though it does *not* include the death of another caused by the responding actions of a (nonparticipant) person, such as if a police officer chasing an armed robber lost control of her vehicle and crashed into another responding officer, who then died. This would be a nonparticipant killing (of another nonparticipant) for which the agency approach would not allow felony murder liability to be attributed to the fleeing armed robber (participant).

[40] Although some states have moved to limit felony murder liability for killings by nonparticipants when the person killed was a participant in the original felony, many proximate cause states allow felony murder liability when a nonparticipant kills either a participant or another nonparticipant. *See infra* Parts III.A and III.B (discussing Florida, Missouri, Ohio, Oklahoma, Georgia, Arizona, Indiana, and Wisconsin).

[41] *See, e.g.*, *Pina*, 233 P.3d at 75.

[42] Binder, *The Culpability of Felony Murder*, *supra* note 21, at 978 ("Accomplice liability for felony murder was quite limited in nineteenth-century England and America. Early

the idea of felony murder liability for a killing by a *nonparticipant* in the original felony was essentially unheard of in nineteenth-century America.[43] Binder has also noted, however, that during the later twentieth century in America, as some state penal codes expanded their definitions of felony murder, a few jurisdictions also began to hold felony participants liable for "killings by resisters," though "most did not."[44] Binder acknowledges, however, that "undeserved felony murder liability" expanded in twentieth-century America and that among the causes for this expansion were "the tendency of some courts to expand the scope of accomplice liability for culpable killings" and "to find increasingly attenuated connections between felonies and such killings."[45] And when such liability-expanding tendencies and causation-minimalist approaches are accompanied by opening the door to felony murder liability for killings by nonparticipant resisters to crime (i.e., to killings by victims, bystanders, and police officers), the potential for holding a felony participant responsible for even a *crime* by such a resister is born.

II. STATE-BY-STATE ANALYSIS OF AMERICAN FELONY MURDER LAW REGARDING KILLINGS BY NONPARTICIPANTS

America currently has forty-one traditional felony murder states and nine states that have either expressly rejected "felony murder" or limited the application of this doctrine such that it does not appear to qualify as "traditional felony murder."[46] For the purposes of this Article, the following

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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."); *id.* at 978–79 (noting that in nineteenth-century America, in "almost every case where a felon was held liable for murder without having struck the fatal blow, he either participated in the fatal assault, or the felony inherently involved violence or great danger of death").

[43] *Id.* at 979 (finding "only one reported [felony murder] case in nineteenth-century America involving a fatal blow possibly struck by a nonparticipant in the felony," which killed a robbery victim who was forced into the path of fire by the defendant and finding zero "nineteenth-century American cases holding felons liable for the killing of co-felons by resisting victims or interveners") (footnote omitted).

[44] *Id.* at 979–80. Binder cites Arizona, California, Illinois, Maryland, Missouri, Oklahoma, and Wisconsin as states that expanded felony murder liability to cover killings by nonparticipant felony "resisters." *Id.* at 980 n.60.

[45] *Id.* at 980. Binder also acknowledges, as a "troubling development" within twentieth-century American felony murder law, the "legislative expansion of predicate felonies combined with reluctance by some courts to require an independent felonious purpose, or a genuinely dangerous felony." *Id.* (footnote omitted).

[46] For the purposes of this Article, "traditional felony murder" will be defined as treating a killing as "murder" simply because it arises from the commission of or attempt to commit a

nine states have rejected traditional felony murder liability: Arkansas, Delaware, Hawaii, Kentucky, Massachusetts, Michigan, New Hampshire, New Mexico, and Vermont. These states have either entirely rejected "felony murder" liability or require some level of culpable *mens rea* toward the death that occurred (such as recklessness or extreme indifference) in order to sustain a "felony murder" conviction, which is contrary to the traditional approach to felony murder.

Hawaii and Kentucky have acted decisively in this realm, by specifically eliminating felony murder criminal liability by statute.[47] And in Michigan, Vermont, and Massachusetts, the traditional felony murder doctrine has been eliminated by judicial decisions.[48]

The New Mexico Supreme Court has likewise transformed New Mexico's felony murder doctrine (such that it does not qualify as "traditional felony murder") because it requires that the defendant "intend to kill" or be "knowingly heedless that death might result from his conduct," in order to be

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felony, without requiring *any* culpable *mens rea* regarding the killing. The various states and approaches considered herein will effectively define the idea of "arises from" quite differently (and may impose limitations on this type of causation), but if a state imposes a requirement of culpable *mens rea* regarding the killing/causing of death (such as requiring that the felony participant be acting "recklessly" or with "extreme indifference" toward the possibility of causing the death of another), such a state will not be counted as a "traditional felony murder state" herein.

[47] *See* HAW. REV. STAT. § 707-701 (1972) (Commentary) (noting Hawaii has chosen to follow the lead of England and India in entirely abolishing felony murder); KY. REV. STAT. ANN. § 507.020 (West 1974) (Commentary) (noting abandonment of felony-murder doctrine "as an independent basis for establishing an offense of homicide").

[48] *See* People v. Aaron, 299 N.W.2d 304, 324-26 (Mich. 1980) (abolishing traditional felony murder doctrine by reinterpreting "malice" as not established by mere commission of another felony); People v. Reichard, 949 N.W.2d 64, 67–68 (Mich. 2020) (recognizing that post-*Aaron* "felony murder" conviction in Michigan requires a separate showing of "malice," in the form of culpable *mens rea* towards death caused); State v. Doucette, 470 A.2d 676, 682 (Vt. 1983) (abolishing traditional felony murder rule by following approach of *Aaron* and concluding that "a jury may not find malice merely from an intent to commit the underlying felony"); State v. Baird, 175 A.3d 493, 495–96 (Vt. 2017) (Vermont law forbids first-degree "felony murder" conviction based merely on commission of underlying felony and requires at least *mens rea* of "wanton disregard for human life" (citing *Doucette*, 470 A.2d at 682)); Commonwealth v. Brown, 81 N.E.3d 1173, 1191 (Mass. 2017) (Gants, C.J., concurring) (court majority insists "murder" conviction requires "actual malice," not merely "constructive malice" due to commission of a felony); Commonwealth v. Fredette, 101 N.E.3d 277, 283 (Mass. 2018) (citing *Brown*, 81 N.E. 3d at 1191, which "prospectively abolished the concept of constructive malice, which in turn eliminated our common-law felony murder rule as an independent theory of murder").

convicted of felony murder.[49] New Mexico does continue to refer to killings arising from felonies that meet this *mens rea* requirement as "felony murder," and it applies an agency approach to require that only killings by participants in the underlying felony can constitute felony murder.[50] But because New Mexico requires that a felony participant have the culpable *mens rea* of being at least "knowingly heedless" regarding the potential for death to result from the felony, it is not a traditional felony murder state.

Taking a more legislative approach, Arkansas, Delaware, and New Hampshire have added *mens rea* culpability elements to their felony murder *statutes*, such that they also no longer qualify as traditional felony murder states. Arkansas's felony murder statutes require the *mens rea* of "extreme indifference to the value of human life" on the part of the felony participant who caused the death.[51] And the Arkansas Supreme Court has recently ruled that this provision requires "a mental state on the part of the accused to engage in some life-threatening activity against the victim."[52] Thus, Arkansas has rejected traditional felony murder liability, though it would be considered an agency state regarding the felony murder liability that it does still have.[53]

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[49] *See, e.g.*, State v. Groves, 478 P.3d 915, 926-27 (N.M. 2020) (recognizing that "felony murder" liability in New Mexico requires "proof that the defendant *intended* to kill (or was knowingly heedless that death might result from his conduct)" and that "[a]n unintentional or accidental killing will not suffice" (quoting State v. Ortega, 817 P.2d 1196, 1205 (N.M. 1991), which established this approach)). Hence, the New Mexico Supreme Court has insisted upon some culpable *mens rea* for a death arising from a felony to constitute "felony murder," even though the first-degree felony murder statute requires only that the killing be "in the commission of or attempt to commit any felony." *See* N.M. STAT. ANN. § 30-2-1(A)(2) (West 1994).

[50] *See, e.g.*, State v. O'Kelly, 84 P.3d 88, 93 (N.M. Ct. App. 2003) ("[W]e find that New Mexico espouses an agency theory that does not hold defendants responsible for lethal acts of third parties who are not accomplices."); Jackson v. State, 589 P.2d 1052, 1053 (N.M. 1979) (adopting agency approach and holding that felony murder liability cannot arise from killing committed by victim resisting felony).

[51] *See* ARK. CODE ANN. § 5-10-102(a)(1) (West 2017) (defining first-degree murder to include when person "commits or attempts to commit a felony . . . under circumstances manifesting extreme indifference to the value of human life"); *cf.* ARK. CODE ANN. § 5-10-101(a)(1) (West 2019) (defining capital murder to include when "the person or an accomplice causes the death . . . under circumstances manifesting extreme indifference to the value of human life.").

[52] Terry v. State, 600 S.W.3d 575, 579 (Ark. 2020) (citations omitted). It is worth noting that although the *Terry* court affirmed the aggravated-robbery-based first-degree murder conviction in that case, the court did not refer to this conviction as a "felony murder" conviction. *See id.* at 577–80.

[53] *See* ARK. CODE ANN. §§ 5-10-101(a)(1) & 5-10-102(a)(1) (limiting felony-based murder liability to deaths caused by "the person or an accomplice").

Delaware has two felony murder statutes—one of which requires recklessness toward the death caused, while the other requires criminal negligence.[54] Delaware requires only "criminal negligence" for the causation of death by a person committing, attempting, or fleeing from a felony for second-degree "felony murder," which appears to be the most minimal *mens rea* required by the "non-traditional" felony murder states. However, Delaware still excludes felony murder liability for causing a non-negligent accidental death, which *is* permitted by the traditional approach to felony murder. In addition, Delaware takes an agency approach to killings by nonparticipants in its version of "felony murder" liability.[55]

And New Hampshire's first-degree felony murder statute requires that the felony participant "knowingly" cause the death of another "while" committing or attempting a specified felony.[56] Thus, New Hampshire does not have traditional felony murder liability because it requires the *mens rea* of "knowingly" causing a death. In addition, it appears to take an agency approach to its version of felony murder because both the idea of "knowingly" causing a death and doing so "while" committing or attempting a felony suggest that the person causing the death must be a participant.

It seems worth noting that South Carolina may also be moving away from the traditional approach to felony murder. South Carolina has a very sparse murder statute, which simply states: "'Murder' is the killing of any person with malice aforethought, either express or implied."[57] The South Carolina Supreme Court recognized, in 1973, that this is not a true "felony-murder statute," but that South Carolina "follow[s] the common law rule" regarding felony murder.[58] That court likewise concluded that South Carolina allows for a felony murder conviction based upon a daytime breaking and entry and larceny from a home, followed by a police chase during which one

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[54] *See* DEL. CODE ANN. tit. 11, § 636 (a)(2) (West 2013) (requiring for first-degree murder liability that "[w]hile engaged in the commission of, or attempt to commit, or flight after . . . any felony, the person recklessly causes the death of another person"); DEL. CODE ANN. tit. 11, § 635 (West 2004) (requiring for second-degree murder liability that "[w]hile engaged in the commission of, or attempt to commit, or flight after . . . any felony, the person, with criminal negligence, causes the death of another person").

[55] *See* Comer v. State, 977 A.2d 334, 337, 342 (Del. 2009) (including section titled "The Agency Theory of Felony Murder Applies in Delaware" and criticizing proximate cause approach for making felony participants "strictly liable for killings by others not engaged in the felony.").

[56] N.H. REV. STAT. ANN. § 630:1-a(I)(b) (2018).

[57] S.C. CODE ANN. § 16-3-10 (1962).

[58] Gore v. Leeke, 199 S.E.2d 755, 757 (S.C. 1973).

of the felony participants shot and killed a highway patrolman.[59] The court emphasized that it was not concluding that "any" felony could be the basis for such a conviction, but that the crime at issue was "malum in se" (rather than merely "malum prohibitum") and that it was both "inherently dangerous" and "foreseeably dangerous" in that case.[60] Hence, South Carolina appears to be a "traditional" felony murder state, at least when it comes to deaths resulting from the commission of traditional common-law crimes, such as robbery and burglary.

On the other hand, more recent South Carolina Supreme Court decisions suggest significant reluctance regarding the potential injustice of allowing "malice" to be too easily "implied" in this realm.[61] Consequently, although South Carolina does still qualify as a traditional felony murder state, it appears possible that this status could change over time, particularly since the state's murder statute lacks specific language demonstrating a clear legislative intent to retain traditional felony murder liability.

Regarding the forty-one states that appear to retain a traditional approach to felony murder, a review of the relevant statutes and case law within these states suggests that there are currently twenty-nine agency states

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[59] *Id.* at 756–59.

[60] *Id.* at 757–59.

[61] The South Carolina Supreme Court has recently overruled authority allowing the jury to be instructed that it can infer the "malice" required for murder from the use of a deadly weapon in a killing—because this instruction inevitably and improperly suggests that the jury *should* infer malice from this fact. State v. Burdette, 832 S.E.2d 575, 582–83 (S.C. 2019). The *Burdette* court emphasized that although malice could be inferred from use of a deadly weapon and that the State could argue that a jury should make this inference, the trial court should not endorse this approach. *Id.* at 582. Similarly, the South Carolina Supreme Court recently held that if there is *any* evidence that a defendant acted in self-defense, the trial court is forbidden to instruct on "implied malice" in an attempted murder case, based upon the defendant committing a contemporaneous felony at the time of the alleged attempt. *See* State v. Smith, 845 S.E.2d 495, 496–98 (S.C. 2020) (per curiam) (reversing attempted murder conviction where trial court instructed on "implied malice," due to defendant's unlawful possession of gun, where defendant claimed he shot in self-defense, even though bullet hit bystander). The *Smith* court emphasized its discomfort with the idea of "implied malice," invoking both *Burdette*, *id.* at 496 nn. 2–3, and its prior request that the South Carolina General Assembly "re-evaluate" the language of the state's attempted murder statute, noting that the idea of "implied" malice is "arguably inconsistent with a specific-intent crime," such as attempted murder. *Id.* at 498 (citing and quoting State v. King, 810 S.E.2d 18, 27 n.5 (S.C. 2017)). Such cases suggest that the modern South Carolina Supreme Court is becoming increasingly uncomfortable with the traditional felony murder approach of "implying" malice from the mere commission of an underlying felony.

and twelve proximate cause states in America today.[62] Although some states have multiple felony murder statutes, which vary regarding whether they allow felony murder liability for killings by nonparticipants, I will categorize a state as a "proximate cause state" if it allows for *any* felony murder liability for a killing by a nonparticipant, even if another version of that state's felony murder laws prohibits such liability.[63]

Based upon their felony murder statutes and relevant case law, the following twenty-nine traditional felony murder states also appear to be agency states: Alabama, California, Colorado, Connecticut, Idaho, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Minnesota, Mississippi, Montana, Nebraska, Nevada, North Carolina, North Dakota, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming.[64]

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[62] The "non-traditional" felony murder states of Arkansas, Delaware, New Hampshire, and New Mexico also appear to be "agency states." *See supra* notes 49–56 and accompanying text.

[63] Oklahoma, for example, has both a proximate cause felony murder provision, *see* OKLA. STAT. ANN. tit. 21, § 701.7 (West 2012) (allowing first-degree felony murder liability based on killing by "any person" that "results from" attempt/commission of listed felony), and an agency felony murder provision, *see* OKLA. STAT. ANN. tit. 21, § 701.8 (West 1976) (defining second-degree felony murder as "perpetrated by a person engaged in the commission of any felony" other than those listed in first-degree felony murder statute). Hence, I consider Oklahoma to be a proximate cause state, and its proximate cause felony murder statute is addressed *infra* in Part III.

[64] *See* ALA. CODE § 13A-6-2(a)(3) (2016) (limiting felony murder to deaths caused by "participant"); CAL. PENAL CODE § 189(e) (2019) (limiting felony murder to deaths caused by participants and accomplices); COLO. REV. STAT. ANN. § 18-3-103(1)(b) (West 2021) (limiting felony murder to deaths of nonparticipants caused by "participant"); CONN. GEN. STAT. ANN. (West 2015) § 53a-54c (limiting felony murder to deaths of nonparticipants caused by "participant"); IDAHO CODE ANN. § 18-4003(d) (West 2002) (defining first-degree felony murder as killing "in the perpetration of, or attempt to perpetrate" listed felony); State v. Pina, 233 P.3d 71, 74–78 (Idaho 2010) (Idaho applies agency approach to felony murder); 720 ILL. COMP. STAT. ANN. 5/9-1(a)(3) (West 2021) (limiting felony murder to deaths caused by "participant"); IOWA CODE ANN. § 707.2(1)(b) (West 2013) (limiting felony murder to person who kills "while participating" in forcible felony); KAN. STAT. ANN. § 21-5402(a)(2) (West 2018) (defining first-degree felony murder as killing "in the commission of, attempt to commit, or flight from any inherently dangerous felony"); State v. Sophophone, 19 P.3d 70, 76–77 (Kan. 2001) (finding Kansas felony murder law does not apply when felony participant killed by lawful act of police officer responding to underlying felony); State v. Murphy, 19 P.3d 80, 84 (Kan. 2001) (Kansas felony murder law does not apply when felony participant killed by lawful act of victim acting in self-defense). *But see* State v. Bryant, 78 P.3d 462, 465–66 (Kan. 2003) (distinguishing *Sophophone* and *Murphy* and upholding felony murder conviction based on killing of co-robber by victim engaged in felony drug distribution at time of robbery and killing); *id.* at 466 (establishing exception to agency approach when killing by nonparticipant victim of underlying felony was *not* "lawful act" by either police officer or

victim). *See* LA. STAT. ANN. § 14:30.1(2) (2015) (defining felony murder as killing "[w]hen the offender is engaged in the perpetration or attempted perpetration of" listed felony); State v. Small, 100 So.3d 797, 806-08 (La. 2012) (emphasizing that Louisiana follows agency approach to felony murder liability); ME. REV. STAT. tit. 17-A, § 202(1) (West 1991) (limiting felony murder to deaths caused by "participant"); MD. CODE ANN., CRIM. LAW § 2-201(a)(4) (West 2020) (defining first-degree felony murder as killing "in the perpetration of or an attempt to perpetrate" listed felony); Campbell v. State, 444 A.2d 1034, 1042 (Md. 1982) (Maryland applies agency approach to felony murder); MINN. STAT. ANN. § 609.19 (West 2014) (defining second-degree felony murder as causing death "while committing or attempting to commit a felony offense" other than listed felonies); State v. Branson, 487 N.W.2d 880, 884-85 (Minn. 1992) (Minnesota follows agency approach to felony murder); MISS. CODE. ANN. § 97-3-19(1)(c) (West 2017) (defining first-degree felony murder as killing "by any person engaged in the commission of any felony" other than listed felonies); MONT. CODE ANN. § 45-5-102(1)(b) (West 2013) (limiting felony murder to deaths caused by "person legally accountable for" underlying felony); NEB. REV. STAT. ANN. § 28-303 (West 2002) (defining first-degree felony murder as killing "in the perpetration of or attempt to perpetrate" listed felony); State v. Rust, 250 N.W.2d 867, 875 (Neb. 1977) (rejecting proximate cause approach to felony murder as inconsistent with Nebraska law); NEV. REV. STAT. ANN. § 200.030(1)(b) (West 2013) (defining first-degree felony murder as killing "in the perpetration or attempted perpetration of" listed felony); Sheriff of Clark Cnty. v. Hicks, 506 P.2d 766, 768 (Nev. 1973) (requirement that killing be committed "in the perpetration or attempted perpetration of" felony precludes liability for killing by one "resisting" the felony); N.C. GEN. STAT. ANN. § 14-17(a) (West 2017) (defining first-degree felony murder as killing "in the perpetration or attempted perpetration of" listed felony); State v. Bonner, 411 S.E.2d 598, 599, 604 (N.C. 1992) (holding North Carolina felony murder does not include killing by nonparticipant "adversary" and adopting agency approach); N.D. CENT. CODE ANN. § 12.1-16-01(1)(c) (West 1993) (limiting felony murder to deaths caused "in the course of and in furtherance of" underlying felony or flight therefrom by "participant" in felony); OR. REV. STAT. ANN. § 163.115(1)(b) (West 2020) (limiting felony murder to death of nonparticipant caused by "participant" acting "in the course of and in furtherance of" underlying felony, felony attempt, or flight therefrom); 18 PA. STAT. & CONS. STAT. ANN. § 2502(b) (West 1974) (limiting second-degree murder to criminal homicide committed "while defendant was engaged as a principal or an accomplice in the perpetration of a felony"); Commonwealth v. Redline, 137 A.2d 472, 473–83 (Pa. 1958) (adopting agency approach to Pennsylvania felony murder and rejecting prior proximate cause approach, at least where killing by nonparticipant was "justified"); Commonwealth *ex. rel.* Smith v. Myers, 261 A.2d 550, 553–60 (Pa. 1970) (declaring final "burial" of Pennsylvania's felony murder proximate cause heritage by officially overruling Commonwealth v. Almeida, 68 A.2d 595 (Pa. 1949), and "plunging it downward into the bowels of the earth"); S.C. Code Ann. § 16-3-10 (defining "murder" as simply "the killing of any person with malice aforethought, either express or implied"); S.D. CODIFIED LAWS § 22-16-4 (2005) (defining first-degree felony murder as homicide "by a person engaged in the perpetration of, or attempt to perpetrate" listed felony); State v. Rough Surface, 440 N.W.2d 746, 758–59 (S.D. 1989) (defining first-degree felony murder as causing death "while engaged in the perpetration of" the underlying felony); TENN. CODE ANN. § 39-13-202(a)(2) (West 2021) (defining first-degree felony murder as "killing of another committed in the perpetration of or attempt to perpetrate" listed felony); State v. Severs, 759 S.W.2d 935, 938 (Tenn. Crim. App. 1988) (adopting agency approach to felony murder based on language of Tennessee statute and "traditional concept of felony-murder"); TEX. PENAL CODE ANN. § 19.02(b)(3) (West 1994) (defining felony murder as committing or attempting

Based upon their felony murder statutes and relevant case law, which will be discussed below in Part III, the following twelve traditional felony murder states appear to be proximate cause states: Alaska, Arizona, Florida, Georgia, Indiana, Missouri, New Jersey, New York, Ohio, Oklahoma, Rhode Island, and Wisconsin.

III. PROXIMATE CAUSE FELONY MURDER STATES: MURDER CONVICTIONS FOR KILLINGS BY AN ADVERSARY

A survey of the American states taking the "proximate cause" approach to felony murder liability for killings by nonparticipants reveals that there are basically two different types of states: (1) states that take a broad approach to such liability based upon the broad felony murder *statute* at issue and (2) states that take a broad approach to such liability based upon *case law*, i.e., broad interpretation of such liability by state appellate courts, often regardless or in spite of the actual statutory language at issue. There really should be at least one more group of states, i.e., proximate cause states that impose *some* sensible limitations on the extent of felony murder liability that is allowed for killings by nonparticipant victims, bystanders, and police officers—such as forbidding such liability for an *unforeseeable*, *unreasonable*, or even a *criminal* killing by a nonparticipant—but the relevant cases do not reflect much actual limitation in this regard.

"a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt" or flight therefrom, the person commits "an act clearly dangerous to human life that causes the death of an individual"); UTAH CODE ANN. § 76-5-203(2)(d) (West 2009) (defining felony murder as when nonparticipant in felony "is killed in the course of the commission, attempted commission, or immediate flight from . . . any predicate offense"); VA. CODE ANN. § 18.2-32 (West 2021) (defining first-degree felony murder as "murder . . . in the commission of, or attempt to commit" listed felony); Wooden v. Commonwealth, 284 S.E.2d 811, 813–16 (Va. 1981) (rejecting proximate cause approach and holding that felony murder conviction cannot be based upon killing of felony participant by victim); WASH. REV. CODE ANN. § 9A.32.030(1)(c) (West 1990) (limiting first-degree felony murder to death of nonparticipant caused by "participant" "in the course of or in furtherance of" listed felony or flight therefrom); WASH. REV. CODE ANN. § 9A.32.050(1)(b) (West 2003) (limiting second-degree felony murder to death of nonparticipant caused by "participant" "in the course of and in furtherance of" "any [non-first-degree] felony" or flight therefrom); W.VA. CODE ANN. § 61-2-1 (West 1991) (defining first-degree felony murder as killing "in the commission of, or attempt to commit" listed felony); Davis v. Fox, 735 S.E.2d 259, 265 (W.Va. 2012) (adopting agency approach to felony murder based upon common-law foundation); WYO. STAT. ANN. § 6-2-101 (West 2021) (defining first-degree murder as killing "in the perpetration of, or attempt to perpetrate" listed felony); Bouwkamp v. State, 833 P.2d 486, 492 (Wyo. 1992) ("To occur in the perpetration of a felony the killing must occur in the unbroken chain of events comprising the felony. . . . [F]or a finding of felony murder, the killing must occur as part of the *res gestae* or 'things done to commit' the felony.").

A. BROAD STATUTORY FELONY MURDER LIABILITY FOR KILLINGS BY NONPARTICIPANTS

Some states take a broad approach to felony murder liability for killings by nonparticipants based upon broad language in the state felony murder statute at issue. Alaska, Florida, Missouri, New Jersey, Ohio, and Oklahoma all have felony murder *statutes* that clearly include potential felony murder liability for killings by nonparticipants. In these six states, the language of one or more felony murder statutes clearly establishes that at least some killings by nonparticipants—typically, killings by victims of the original felony, bystanders, or police officers responding to the felony—can be the basis for felony murder liability for a participant in the original felony, even when it is clear that the felony participant did not kill anyone.

1. Alaska

Alaska allows for both first-degree and second-degree felony murder liability based upon a killing committed by a nonparticipant. Alaska's first-degree murder statute states:

> A person commits the crime of murder in the first degree if . . . (3) acting alone or with one or more persons, the person commits or attempts to commit a sexual offense against or kidnapping of a child under 16 years of age and, in the course of or in furtherance of the offense or in immediate flight from that offense, *any person causes the death of the child*.[65]

Alaska likewise provides for this same sort of first-degree felony murder liability if "acting alone or with one or more persons, the person commits or attempts to commit" either "criminal mischief in the first degree" *or* "terroristic threatening in the first degree," under Alaska law, "and, in the course of or in furtherance of [either] offense or in immediate flight [therefrom], *any person causes the death of a person other than one of the participants*."[66]

Alaska also provides for second-degree felony murder liability based upon a more traditional list of underlying felonies.[67] And this provision likewise allows for felony murder liability for a killing by a nonparticipant, i.e., when "any person" causes a death, as long as the person killed was a

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[65] ALASKA STAT. ANN. § 11.41.100(a)(3) (West 2002) (emphasis added).

[66] *Id.* § 11.41.100(a)(4) & (a)(5) (emphasis added).

[67] ALASKA STAT. ANN. § 11.41.110(a)(3) (West 2019) (listing underlying felonies such as first-degree arson, kidnapping, first-degree sexual assault, first-degree burglary, and robbery).

nonparticipant.[68] Alaska also provides for this same type of second-degree felony murder liability for a person who "commits or attempts to commit a crime that is a felony" while "acting with a criminal street gang."[69] In all of these situations, Alaska provides for broad *statutory* felony murder liability when "any person" (including, obviously, a nonparticipant) "causes a death" in connection with the attempt or commission of a covered felony—without *any* apparent limitation on the circumstances of such a killing or the reasonableness or legality of the killing by the nonparticipant—except that Alaska *does* clearly limit this felony murder liability to the deaths of nonparticipants.[70] Hence, Alaska provides for very broad statutory felony murder liability when police officers, victims, or bystanders kill police officers, victims, or bystanders in connection with a felony, but forbids any such liability when these nonparticipants kill one of the original felony participants.[71]

2. Florida

Florida allows for first-degree felony murder liability based upon a long list of underlying felonies and allows for a death sentence based upon such a conviction, but this liability is limited to killings by participants.[72] On the other hand, Florida's second-degree felony murder provision allows for quite broad (non-capital) liability that appears specifically designed to cover killings by nonparticipants:

> When a human being is killed during the perpetration of, or during the attempt to perpetrate, any [listed felony] *by a person other than the person engaged in the*

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[68] *Id.* (defining second-degree felony murder to include when "the person commits or attempts to a commit [a listed felony] and, in the course of or in furtherance of that crime or in immediate flight from that crime, *any person causes the death of a person other than one of the participants*.") (emphasis added).

[69] *Id.* § 11.41.110(a)(4).

[70] *See id.* (emphasis added).

[71] Consequently, Alaska would not allow for a felony murder conviction for someone like Wyatt Cheatham, whose *co-participant* was killed by police, though it would seem to allow for felony murder liability if a nonparticipant victim, bystander, or police officer inappropriately or even criminally killed someone else—as long as the person killed was not involved in committing or attempting the original felony.

[72] FLA. STAT. ANN. § 782.04(1)(a)(2) (West 2019) (listing nineteen underlying felonies that can be basis for first-degree felony murder, but killing must be "committed by a person engaged in the perpetration of, or in the attempt to perpetrate" one of these felonies). First-degree murder liability can also be based upon a death "[w]hich resulted from the unlawful distribution by a person 18 years of age or older" of any of various controlled dangerous substances or a mixture containing any such substance, "when such substance or mixture is proven to be the proximate cause of the death of the user." *Id.* § 782.04(1)(a)(3).

> *perpetration of or in the attempt to perpetrate such felony*, the person perpetrating or attempting to perpetrate such felony commits murder in the second degree . . . punishable by imprisonment for a term of years not exceeding life.[73]

This provision puts no limits on second-degree felony murder liability for a killing committed by a nonparticipant victim, bystander, or police officer, as long as the person who dies is killed "during" the perpetration or attempted perpetration of any one of the eighteen listed felonies.[74] And, unlike in Alaska, this liability *does* include when a felony participant is killed by a nonparticipant since felony participants certainly qualify as "human beings." Hence, the statute appears to establish remarkably broad liability for felony participants, regardless of the circumstances of the killing at issue or the reasonableness/legality of the actions of the nonparticipant who actually kills. Thus, this provision subjects felony participants to a conviction for second-degree murder (and up to a life sentence) for the fatal actions of a victim, bystander, or police officer—which may have been unjustified, unreasonable, or even criminal—simply because this killing by a nonparticipant occurred "during" the felony initially engaged in or attempted by the original participant(s).

And Florida's seemingly broad (and perhaps unlimited) second-degree felony murder statutory liability for the fatal actions of a nonparticipant has indeed been confirmed by longstanding decisions of the Florida Supreme Court. Back in 1978, in *Mikenas v. State*,[75] that court took up this issue in a case in which an armed robbery of a convenience store resulted in a deputy sheriff shooting and killing the defendant's brother (i.e., his accomplice and co-participant in the robbery), for which the defendant was convicted of second-degree felony murder.[76] Hence, *Mikenas* involved the applicability of Florida's second-degree felony murder statute to the killing of a felony participant by a nonparticipant law enforcement officer.[77]

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[73] *Id.* § 782.04(3) (emphasis added).

[74] *See id.*

[75] 367 So. 2d 606, 607–08 (Fla. 1978) (per curiam).

[76] Defendant Mikenas also personally killed a police officer who came into the store during the robbery, for which he pled guilty to a first-degree murder charge; but Mikenas pled "nolo contendere" to the second-degree murder charge (for the killing of his brother by the deputy), in order to reserve his challenge to the applicability of Florida's felony murder statute to this death. *Id.*

[77] The only differences between the Florida second-degree felony murder statute at issue in *Mikenas* and the current version of this statute (quoted *supra*) are: (1) the earlier version referred to a person being killed "in" the perpetration of or attempt to perpetrate a felony, whereas the current version refers to a person being killed "during" the perpetration of or attempt to perpetrate a felony; (2) the earlier version referred to the victim as "a person" who was killed, whereas the current version refers to "a human being" who is killed; and (3) the

The *Mikenas* court had little trouble rejecting the defendant's challenge to his felony murder conviction and his assertion that the statute only applies when an "innocent" person is killed during the perpetration of a felony.[78] The court emphasized the statute's broad language, which it interpreted as applying to the killing of "any person," and noted that if the Florida Legislature had wanted to limit the statute's applicability to only cases where the victim was "innocent" regarding the original felony, it could have done so by using the word "innocent" within the statute.[79]

One year later, in *State v. Wright*, the Florida Supreme Court again considered the applicability of Florida's second-degree felony murder statute to the killing of an armed robbery participant by a nonparticipant police officer.[80] The case involved an armed robbery by three men that resulted in "a gun battle," during which one of the felony participants (the getaway car driver) was shot and killed by a police officer.[81] The opinion provides very few facts about the sequence of events leading up to the shooting of the getaway car driver, which leaves open the possibility that the shooting was, in fact, inappropriate or unjustified at the time it occurred.[82] Without even considering the potential relevance of such a fact, the *Wright* court emphasized its recent decision in *Mikenas* and the breadth and unlimited nature of Florida's second-degree felony murder statute.[83] Yet, just as the broad and clear language of Florida's second-degree felony murder statute imposes no limitation that the victim in such a case must be "innocent," it likewise imposes no limitation that the killing of such a person (by a nonparticipant) must be reasonable, justified, or even noncriminal.[84] Hence, Florida *does* seem to allow a felony participant to be convicted of second-degree felony murder when a nonparticipant police officer (or victim or

seven underlying felonies listed in the 1975 version of the statute have since ballooned to eighteen underlying felonies. *Compare* FLA. STAT. ANN. § 782.04(3) (1975) (quoted in *Mikenas*, 367 So.2d at 608), *with* FLA. STAT. ANN. § 782.04(3) (West 2019).

[78] *Mikenas*, 367 So.2d at 608–09.

[79] *Id.* at 609. The *Mikenas* court further noted that "there is nothing in the clear language or history of Section 782.04(3) which limits its application to innocent persons killed by one perpetrating or attempting to perpetrate a felony." *Id.*

[80] 379 So.2d 96, 96 (Fla. 1979).

[81] *Id.*

[82] *See id.* ("As they were attempting to leave after the robbery, the police intercepted the trio and a gun battle resulted. The defendant and Robertson were apprehended, but Robertson was fatally wounded by a bullet originating from the gun of one of the policemen.").

[83] *See id.* (emphasizing the *Mikenas* court's finding that "the clear language" of Florida's second-degree felony murder statute imposes no limitation regarding whether the victim was "innocent" regarding the felony at issue).

[84] *See* FLA. STAT. ANN. § 782.04(3) (West 2019).

bystander) kills someone else (including a co-participant in the felony) "during" the felony participant's perpetration or attempted perpetration of the underlying felony, *even if* the act of killing by the officer or other nonparticipant was itself unnecessary, inappropriate, or even a criminal homicide.[85]

3. Missouri

Missouri's second-degree felony murder statute establishes very broad felony murder liability for when "another person is killed as a result of" any felony or felony attempt:

> A person commits the offense of murder in the second degree if he or she: . . . (2) Commits or attempts to commit any felony, and, *in the perpetration or the attempted perpetration of such felony or in the flight from the perpetration or attempted perpetration of such felony, another person is killed as a result of the perpetration or attempted perpetration of such felony* or [flight thereafter].[86]

The use of the passive voice in reference to a person who "is killed as a result of" a felony strongly suggests that the statute is not intended to be limited to cases in which a participant actually kills (i.e., the agency approach), and the statute also does not limit who the victim can be or what the underly felony can be, i.e., "any felony" will work.[87] Hence, Missouri second-degree felony murder liability appears to apply to killings by participants and nonparticipants of participants and nonparticipants that somehow "result from" any felony at all.

The Missouri Court of Appeals interpreted this provision accordingly in *State v. Burrage*.[88] The *Burrage* court affirmed a second-degree felony murder conviction resulting from a marijuana sale, in which the "buyers" actually intended to rob the sellers, and the encounter ended in a shootout, which left one buyer-robber dead and resulted in at least one seller (Burrage) charged with his felony murder, even though he did not shoot anyone.[89] It was unclear if the victim was shot by Burrage's co-participant in the drug sale felony or one of the other buyer-robbers.[90] The court emphasized that

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[85] Consequently, Florida would seem to allow for second-degree felony murder liability for a person like Wyatt Cheatham, even if the killing of his co-participant and friend, Stavian Rodriguez, was itself a homicide by one or more police officers.

[86] MO. ANN. STAT. § 565.021(1)(2) (West 2017) (emphasis added).

[87] *See id.*

[88] 465 S.W.3d 77, 80–81 (Mo. Ct. App. 2015).

[89] *See id.* at 78–79. The proposed sale was for three pounds of marijuana for $1,950. *Id.* at 78.

[90] *Id.* at 79.

Missouri uses "a 'foreseeability-proximate cause concept of homicide responsibility' in felony murder cases" and that "[t]he identity of the actual killer is irrelevant."[91] The court also invoked a broad approach to the concept of foreseeability, noting that "it is foreseeable a death could result [from] an illegal drug deal."[92] And the court emphasized that it didn't matter that the encounter *could* be characterized as a "robbery gone bad" (which would make the drug sellers "nonparticipants" in the underlying felony of robbery), rather than a "drug deal gone bad" (making the drug sellers felony participants), "[b]ecause the robbery itself was also a foreseeable part of the drug deal," and the robbery "could not have been attempted" if it weren't for the attempted drug sale.[93]

The decision in *Burrage* seems to allow for a felony murder conviction based upon even a *homicide* by an adverse party. The facts left open the possibility that the victim was killed by his own partner in the attempted robbery and that this shooting was a criminal homicide because it was part of an unlawful attempt to kill an adversary (one of the sellers), even though the actual victim was not the intended victim. The Missouri Supreme Court's 1980 decision in *State v. Baker*[94] also strongly suggests that Missouri would interpret its second-degree felony murder statute to include even a homicide by a nonparticipant victim, bystander, or police officer.

In *Baker*, the Missouri Supreme Court found that a (first-degree) felony murder conviction could be based upon the intentional shooting of a participant robber by an armed robbery victim—even if the male robbery victim shot the female co-robber (who had been left behind) simply because he was "startled" when he saw her in his home.[95] Even though the first-degree felony murder statute in effect at the time strongly suggested an agency approach (which would preclude felony murder liability for a killing by a nonparticipant victim),[96] the *Baker* court relied upon a decision by the same court one year earlier (allowing for first-degree felony murder liability when

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[91] *Id.* at 80 (citations omitted).

[92] *Id.* (citation omitted).

[93] *Id.* at 81.

[94] 607 S.W.2d 153, 155–57 (Mo. 1980) (en banc).

[95] *Id*. The male robbery victim had been fired upon by two male co-robbers, who then fled, and when he was then walking through his home and "was startled by a noise, [he] turned and fired," killing the female co-robber. *Id.*

[96] *See id.* at 155 (quoting MO. ANN. STAT. § 565.003 as limited to killing "committed *in the perpetration of or in the attempt to perpetrate* arson, rape, robbery, burglary, or kidnapping" (emphasis added)). This first-degree felony murder statute was later repealed and not replaced. *See* MO. ANN. STAT. § 565.020 (West 2016).

a bystander killed a bystander)[97] and concluded, "[I]t is of no concern that the fatal shot was fired by a person acting to thwart rather than further the commission of the underlying felony unless the act of the person directly causing the death was an independent intervening cause."[98]

Hence, the Missouri Supreme Court in *Baker* basically ignored the agency language of the first-degree felony murder statute at issue (just as it had one year earlier).[99] The *Baker* court also affirmed a first-degree murder conviction for a non-present robber based upon a seemingly inappropriate (and perhaps even criminal) killing by a nonparticipant robbery victim, by summarily rejecting the idea that the shooting by the "startled" victim was an intervening cause that broke the causal chain of felony murder liability for the convicted male robber, who had fled the scene well before his female co-robber was shot.[100]

Even though Missouri no longer has a first-degree felony murder statute, the decision of the Missouri Court of Appeals in *Burrage*, which invoked and relied upon the broad proximate cause approach adopted by the Missouri Supreme Court in *Baker* (and *Moore*), strongly suggests that Missouri is a proximate cause state that will allow second-degree felony

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[97] *See* State v. Moore, 580 S.W.2d 747, 751–53 (Mo. 1979) (en banc) (affirming first-degree felony murder conviction for killing of bystander by bystander without ever addressing limiting language of governing Missouri statute); *see id.* at 752 ("Whether the fatal act was done by the defendant, an accomplice, another victim, or a bystander is . . . not controlling. The significant factor is whether the death was the natural and proximate result of the acts of the appellant or an accomplice."). The Eighth Circuit Court of Appeals granted habeas corpus relief in the *Moore* case, finding that in moving from the agency approach to the proximate cause approach, the Missouri Supreme Court had unforeseeably expanded the scope of Missouri's felony murder law; thus, it violated due process to apply this expansion of criminal law retroactively. *See* Moore v. Wyrick, 766 F.2d 1253, 1254–59 (8th Cir. 1985).

[98] *Baker*, 607 S.W.2d at 156 (invoking *Moore* as basis for this statement).

[99] *See id.* at 157 ("If the killing *emanated* from the attempted robbery, it was committed *in* the attempt to perpetrate robbery in the statutory sense." (emphasis added)); *see also Moore*, 580 S.W.2d at 752 (finding robbery "set into motion the chain of events which caused the death" of the bystander victim). Hence, if Missouri had not later *repealed* its first-degree murder statute, this entire discussion would belong in the *next* Section of this Article, dealing with overly broad interpretations of agency statutes.

[100] 607 S.W.2d at 156–57 (finding defendant's earlier gunfire "set into motion the chain of events" resulting in later killing of his female co-robber and concluding that this later killing "was not an independent intervening cause because it was the [earlier] shots fired by the felons that provoked [the victim's] reaction of shooting after being startled").

murder liability for killings by nonparticipants, perhaps even when those killings are unjustified or criminal.[101]

4. New Jersey

New Jersey's murder statute establishes very broad felony murder liability for killings by nonparticipants, though it also includes a thoughtful limitation on overbroad felony murder liability regarding unexpected killings by another participant.[102] New Jersey's murder statute defines felony murder as follows:

> when the actor, acting either alone or with one or more other persons, is engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit [a listed felony] . . . and in the course of such crime or of immediate flight therefrom, *any person causes the death of a person other than one of the participants*."[103]

Hence, New Jersey clearly allows for felony murder liability for a killing by a nonparticipant because its felony murder statute includes deaths caused by "any person." On the other hand, it specifically limits felony murder liability to the deaths of *nonparticipants*; hence, it could only apply if a nonparticipant (officer, victim, or bystander) killed another nonparticipant (officer, victim, or bystander).[104]

In *State v. Martin*,[105] the New Jersey Supreme Court specifically recognized that in 1979 and 1981, New Jersey amended its felony murder statute in response to the New Jersey Supreme Court's 1977 decision in *State v. Canola*.[106] In *Canola*, the New Jersey Supreme Court adopted the "agency" approach and rejected the "proximate cause" approach to felony murder liability and concluded that the state's felony murder law did *not* cover the situation in which a (nonparticipant) robbery victim fatally shot one of the robbery participants.[107] The *Martin* court specifically noted that the 1979 amendment "eliminated the requirement that the death be caused by one of

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[101] Hence, Missouri would seem to potentially allow felony murder liability based upon a killing by a nonparticipant *even* if that killing was itself a crime and *regardless* of whether the person killed was a participant or a nonparticipant.

[102] *See* N.J. STAT. ANN. § 2C:11-3(a)(3) (West 2017).

[103] *Id.* (listing eight underlying felonies) (emphasis added).

[104] *Id.* Hence, New Jersey would not allow felony murder liability for someone like Wyatt Cheatham because the person killed (i.e., Stavian Rodriguez) was a participant in the underlying felony.

[105] 573 A.2d 1359, 1370–71 (N.J. 1990).

[106] 374 A.2d 20, 30 (N.J. 1977).

[107] *Id.* at 20–30.

the participants" and provided for felony murder liability if the death was caused by "any person."[108] The *Martin* court also noted that the prior "in furtherance" of the felony statutory language was likewise eliminated from New Jersey's felony murder provision in 1981, to avoid any finding that a death "caused by a non-participant such as a felony victim or a police officer" could not qualify because such a killing would not be "in furtherance" of the felony at issue.[109]

On the other hand, the *Martin* court concluded that New Jersey law regarding causation in the criminal context (which is based upon the Model Penal Code) imposes limitations on felony murder liability when it comes to unforeseeable deaths arising from a felony and that a felony murder "defendant should be exculpated . . . *when a death occurs in a manner that is so unexpected or unusual that he or she could not justly be found culpable for the result*."[110] Hence, the *Martin* court declared that in felony murder cases, the jury should be instructed that a defendant can be held liable for felony murder "only if the death is not too remote, accidental in its occurrence, *or too dependent on another's volitional act to have a just bearing on the defendant's culpability*."[111]

Thus, although New Jersey certainly allows for felony murder liability for a killing by a nonparticipant (of another nonparticipant), there is a strong argument to be made (based on *Martin*) that *if* such a killing was unreasonable or at least if it was *criminal*, this would be too "unexpected" and "unusual" and "too dependent on another's volitional act" to "justly" result in a felony murder conviction for the original felony participant(s). In New Jersey, there is reason to believe that juries and courts would impose *some* limitations on felony murder liability for nonparticipant killings (of other nonparticipants), even under the very broad felony murder statutory language at issue.

In addition, New Jersey's felony murder statute provides a specific affirmative defense for killings by another person where the felony participant at issue (a) did not in any way cause, promote, or aid in the killing,

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[108] 573 A.2d at 1370. It is worth noting that the amended statute still would not cover the situation in *Canola*, however, because the victim killed in the *Canola* case was a participant in the robbery at issue. *See Canola*, 374 A.2d at 207.

[109] 573 A.2d at 1371.

[110] *Id.* at 1374–75 (emphasis added); *see also* MODEL PENAL CODE § 2.03(3)(b) (AM. L. INST., Proposed Official Draft 1962) (limiting criminal liability where actual result of conduct is "not within the risk of which the actor is aware" or is "too remote or accidental in its occurrence to have a [just] bearing on the actor's liability").

[111] 573 A.2d at 1375 (emphasis added).

(b) was unarmed, (c) had no reason to believe any other participant was armed, and (d) had no reason to believe any other participant intended to engage in conduct likely to result in death or serious injury.[112] The *Martin* court addressed New Jersey's adoption of this affirmative defense, noted that New Jersey was following the lead of New York in in this regard (as well as in other aspects of its revised felony murder statute), and emphasized that the four affirmative defense elements "focus on whether the [felony participant charged] undertook a homicidal risk or could have foreseen that the commission of the felony might result in death."[113] Hence, the affirmative defense seems designed to limit unfair and overbroad felony murder liability when a co-participant in a felony unexpectedly kills someone else.

A number of other states have adopted a parallel felony murder affirmative defense for situations where there is an unexpected and unforeseeable killing by another *participant*—as long as the felony participant at issue was unarmed; did not in any way cause, promote, or aid in the killing; had no reason to believe that the other participant was armed; and had no reason to believe that the other participant intended to engage in potentially lethal conduct. In particular, Arkansas, Colorado, Connecticut, Maine, New Jersey, New York, North Dakota, Oregon, and Washington have all adopted a felony murder affirmative defense for unarmed felony participants, when it comes to unassisted and unforeseeable killing by co-participants in the original felony.[114]

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[112] New Jersey's felony murder statute provides as follows:

> [I]t is an affirmative defense that the defendant: (a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and (b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and (c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and (d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

N.J. STAT. ANN. § 2C:11-3(a)(3) (West 2021).

[113] 573 A.2d at 1369–70.

[114] *See* ARK. CODE ANN. § 5-10-102 (2017) (affirmative defense for unassisted, unforeseeable killing by accomplice); COLO. REV. STAT. ANN. § 18-3-103(1)(b) & (1.5) (West 2021) (affirmative defense for unassisted, unforeseeable killing by co-participant); CONN. GEN. STAT. ANN. § 53a-54c (West 2015) (same); ME. REV. STAT. tit. 17-A, § 202 (1991) (same); N.J. STAT. ANN. § 2C:11-3(a)(3) (West 2021) (same); N.Y. PENAL LAW § 125.25(3) (McKinney 2019) (same); N.D. CENT. CODE ANN. § 12.1-16-01(1) (West 1993) (same); OR. REV. STAT. ANN. § 163.115(1)(b) & (3) (West 2019) (same); WASH. REV. CODE ANN. §§ 9A.32.030(1)(c) & 9A.32.050(1)(b) (West 2003) (same).

It is worth noting that (with the exception of New York), the other states that have adopted this reasonable limitation on liability for unexpected killings by another participant have also entirely *rejected* felony murder liability when it comes to *killings by nonparticipants*.[115] New York will be discussed further *infra*, including the fact that its felony murder statute appears to adopt an agency approach regarding killings by nonparticipants,[116] even though the New York Court of Appeals has allowed for proximate cause liability in this realm.[117]

New Jersey and New York appear to be the only states that have adopted this salutary affirmative defense to limit overbroad felony murder liability for an unforeseeable and undesired killing by a co-participant, while leaving the door open to broad (proximate cause) felony murder liability for an unforeseeable and undesired killing by a nonparticipant victim, bystander, or police officer (of another nonparticipant). On the other hand, it does seem like this affirmative defense could possibly also apply to such nonparticipant killings, as long as the defendant was unarmed, did not in any way assist in or encourage any killing, and had no reason to believe that any felony participant was armed or intended to engage in any lethal conduct (or if there were no armed felony participants). Hence, the affirmative defense would seem potentially applicable when a felony participant had little reason to expect that a felony would have a fatal result, but a nonparticipant ended up killing another nonparticipant.[118]

5. Ohio

Ohio's felony murder statute is worded rather differently than the other felony murder statutes discussed in this Section (and most felony murder statutes); and of the six state statutes addressed herein, Ohio's statute is the least explicit in its applicability to killings by nonparticipants. (Hence,

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[115] *See supra* text accompanying note 53 (noting that Arkansas is an agency state) and note 64 (noting that Colorado, Connecticut, Maine, North Dakota, Oregon, and Washington are agency states).

[116] *See* N.Y. PENAL LAW § 125.25(3) (McKinney 2019) (limiting second-degree felony murder liability to when defendant "or another participant . . . causes the death of a person other than one of the participants").

[117] *See* People v. Hernandez, 624 N.E.2D 661, 665–66 (N.Y. 1993) (adopting proximate cause approach to felony murder liability for killings by nonparticipants).

[118] Overall, New Jersey law would seem to potentially allow for felony murder liability for an unreasonable or even criminal killing by a nonparticipant—but only of another nonparticipant, which would exclude the killing of Rodriguez—at least where the felony participant charged was armed or had reason to know that another felony participant was armed. But New Jersey law does place some important, thoughtful limits on this liability.

arguably Ohio could be placed in the next Part.) Nevertheless, the fact that Ohio's statute invokes the language of "proximate causation" and places no limits on the "type" of killers whose actions can result in felony murder liability for others suggests that it fits with the other five states in this Section. Ohio's felony murder statute states: "No person shall *cause the death of another as a proximate result of the offender's committing or attempting to commit an offense* of violence that is a felony of the first or second degree and that [does not constitute voluntary or involuntary manslaughter]."[119]

Although the Ohio Supreme Court does not appear to have addressed the issue thus far, the Ohio Court of Appeals recently recognized, in its 2021 decision in *State v. Long*,[120] that Ohio's felony murder statute is based upon the "proximate cause" theory of liability, which applies to killings by nonparticipants in response to a felony.[121] The *Long* court asserted, "Under Ohio law, a defendant can be held criminally responsible for a killing 'regardless of the identity of . . . the person whose act caused the death, so long as the death is the "proximate result" of Defendant's conduct in committing the underlying felony offense.'"[122] The *Long* court further declared:

> Under the "proximate cause theory," it is irrelevant whether the killer was the defendant, an accomplice, or some third party[,] such as the victim of the underlying felony or a police officer. Neither does the guilt or innocence of the person killed matter. Defendant can be held criminally responsible for the killing . . . so long as the death [was] the "proximate result" of Defendant's conduct in committing the underlying felony offense; that is, a direct, natural, reasonably foreseeable consequence, as opposed to an extraordinary or surprising consequence, when viewed in the light of ordinary experience.[123]

The surviving felony participant in the *Long* case was convicted of felony murder for the killing of the other felony participant by a nonparticipant victim, and this defendant maintained that this killing was *not*

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[119] OHIO REV. CODE ANN. § 2903.02(B) (West 1998) (emphasis added).

[120] 175 N.E.3d 1021, 1032–33 (Ohio Ct. App. 2021).

[121] *Long* involved two men who had burglarized a family home and brutally assaulted an adult son (leaving him unconscious and bleeding), while stealing guns from the home, but who were intercepted when three other adult family members returned home. *Id.* at 1024 25. A massive, prolonged, and violent struggle ensued between the armed felony participants and members of the family, which included a struggle for the guns the men were stealing and shots being fired from those guns. *Id.* at 1025. Ultimately, an adult son in the home was able to get one of the felony participants in a "rear naked choke" hold, in order to hold him until the police arrived, but the held man was "dead from asphyxia" by the time police arrived. *Id.* at 1025–26.

[122] *Id.* at 1032 (citation omitted).

[123] *Id.*

foreseeable because it involved the felony victim putting the defendant's co-participant in a choke hold, which killed him—which was an "unforeseeable intervening cause" that absolved the defendant of criminal liability.[124] The *Long* court emphasized a much more *general* idea of foreseeability, namely, that when the felony participants decided to commit an aggravated burglary and armed robbery in an occupied home, it was "a direct, natural, and reasonably foreseeable consequence that such actions would result in the death of another."[125] The court emphasized "the natural inclination of the victim, if present, to protect and defend his abode and his family" and thus that the risk of *someone* being killed *by someone* was quite foreseeable, even if the manner of this particular killing was unusual.[126] Although the *Long* court did not consider whether the victim was justified in asphyxiating the other burglar/robber or whether the "choke hold" used was reasonable under the circumstances, the court's generalized approach to proximate causation and the idea of "foreseeability" under Ohio's felony murder statute suggests that the courts of Ohio will be quite expansive in upholding felony murder convictions for killings by nonparticipants, even if the killing by the nonparticipant was questionable or unreasonable—and perhaps even if it was criminal.[127]

6. Oklahoma

Oklahoma currently has what appears to be the most expansive felony murder statute in the country, at least in terms of killings by nonparticipants. As early as 1978, the Oklahoma Court of Criminal Appeals asserted that "[t]he primary function of the Felony-Murder Doctrine is to relieve the prosecution of the necessity of proving actual malice or premeditated intent . . . in the commission of the homicide," thereby allowing the accused to "be found guilty of murder even though the killing is unintentional."[128] Nevertheless, in 1993, the same court took up the issue of whether Oklahoma's first-degree and second-degree felony murder statutes took an "agency" or "proximate cause" approach to felony murder liability for a killing by a nonparticipant and concluded that "the express language of Oklahoma's felony-murder statutes *precludes* prosecutions where the victim

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[124] *Id.* at 1033–34.

[125] *Id.* at 1034.

[126] *Id.*

[127] Although felony murder law in Ohio is not well-developed regarding killings by nonparticipants, it does seem possible that Ohio's broad felony murder statute would be interpreted to include liability for someone like Wyatt Cheatham.

[128] Wade v. State, 581 P.2d 914, 916 (Okla. Crim. App. 1978).

was killed by someone other than the defendant or an accomplice."[129] Hence, the Oklahoma Court of Criminal Appeals concluded that the Oklahoma felony murder statutes in effect in 1993 compelled an agency approach to felony murder liability.[130]

In 1996, the Oklahoma legislature responded by adopting Oklahoma's current first-degree felony murder statute, which states:

> A person also commits the crime of murder in the first degree, regardless of malice, when that person *or any other person* takes the life of a human being during, *or if the death of a human being results from*, the commission or attempted commission of [a listed felony].[131]

The impact of this greatly expanded statutory language was addressed by the Oklahoma Court of Criminal Appeals in 2003, in *Kinchion v. State*.[132] The case involved an armed robbery of a convenience store, in which the defendant's co-robber was shot by the store's owner.[133] The *Kinchion* plurality opinion asserted that the 1996 amendment to Oklahoma's first-degree felony murder statute "broadened" it "to include deaths which occur at the hands of the intended victim of the underlying felony, police officers, or innocent bystanders," i.e., to killings by nonparticipants.[134]

The *Kinchion* plurality emphasized both the *foreseeability* of defendant's co-robber being killed and that the (unarmed) defendant "set in motion" the events leading up to this death:

> [I]t is reasonably foreseeable that threatened with a weapon, the store clerk might shoot at his assailant. While [the defendant] did not personally carry the loaded gun into the store during the second robbery, his criminal conduct of planning and carrying out the armed robbery *set in motion "a chain of events so perilous to the sanctity of human life" that the likelihood of death resulting was foreseeable*.[135]

The *Kinchion* plurality concluded that "setting in motion a chain of events" that foreseeably resulted in a death was enough for liability under

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[129] Jones v. State, 859 P.2d 514, 514–15 (Okla. Crim. App. 1993) (emphasis added).

[130] Oklahoma's second-degree felony murder statute has not been amended since 1976. *See* OKLA. STAT. ANN. tit. 21, § 701.8(2) (West 1976). Consequently, under *Jones*, second-degree felony murder in Oklahoma apparently still requires an agency approach and should *not* be applied to a killing by a nonparticipant.

[131] OKLA. STAT. ANN. tit. 21, § 701.7(B) (West 1996) (emphasis added).

[132] 81 P.3d 681, 683–84 (Okla. Crim. App. 2003).

[133] *Id.* at 682–83.

[134] *Id.* at 683–84.

[135] *Id.* (emphasis added).

Oklahoma's expanded first-degree felony murder statute, even though neither of the robbers directly killed anyone.[136]

And in 2005, in *Dickens v. State*,[137] the Oklahoma Court of Criminal Appeals upheld the first-degree felony murder conviction of a defendant whose co-robber was shot and killed by police officers (after the co-robber fired at them). The plurality quoted Oklahoma's first-degree felony murder statute and had no trouble concluding that the language providing for felony murder liability—when "any other person takes the life of a human being," as a result of the attempt/commission of an enumerated felony—covers when an officer kills one's co-robber after the co-robber fires at the officer.[138]

In fact, the language of Oklahoma's first-degree felony murder statute is *so* (ridiculously) broad that it seems to allow for a first-degree felony murder conviction of *anyone at all* (i.e., "A person") simply because *someone else* (i.e., "any other person") killed someone while that "other person" was committing or attempting a listed underlying felony.[139] Surprisingly, the statutory language imposes no requirement that the "any other person" who kills have any connection to the individual who is charged with first-degree felony murder.[140] Indeed, it would seem that a law professor sitting in her Oklahoma City office working on an article about felony murder could herself be charged with first-degree felony murder if someone else, somewhere in Oklahoma, killed somebody while that "any other person" was committing or attempting a felony listed in Oklahoma's first-degree felony murder statute—or if a death "results from" any such felony/attempt. The statute's reach appears virtually limitless.

It is possible that the Oklahoma Court of Criminal Appeals will eventually impose some logical limitation on this overbroad statutory language—such as insisting that "any other person" felony murder liability must be limited to killings by felony participants and killings by nonparticipant victims, bystanders, and police officers who are in some way

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[136] *Id.*

[137] 106 P.3d 599, 600–01 (Okla. Crim. App. 2005).

[138] *See id.* (quoting OKLA. STAT. ANN. tit. 21, § 701.7(B) (West 1996)).

[139] OKLA. STAT. ANN. tit. 21, § 701.7(B) (West 2012) ("A person also commits the crime of murder in the first degree, regardless of malice, when that person or any other person takes the life of a human being during, or if the death of a human being results from, the commission or attempted commission of [a listed felony]."). If one fills in one's own name for the references to "a person" and "that person" in this statute, the unbounded nature of felony murder liability becomes clear, since it makes one liable for felony murder when "any other person takes the life of a human being" during or as a result of committing/attempting a covered felony.

[140] *See id.*

responding to a felony *in which the defendant participated*. But the court has not imposed any such limitation thus far. Furthermore, it seems quite unlikely that the Oklahoma Court of Criminal Appeals will limit vicarious first-degree felony murder liability under this statute to *lawful* killings by victims, bystanders, and police officers because that court has neither suggested nor imposed such a limitation in other felony murder cases in this realm.[141]

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[141] In fact, the application of Oklahoma's first-degree felony murder statute within a much-publicized case from 2009 suggests that it *would* also be possible for youthful-armed-robber Wyatt Cheatham to be convicted of first-degree felony murder for the fatal shooting of his youthful co-felon, Stavian Rodriguez, *even if* the shooting of Rodriguez was a criminal homicide by the five officers who fired lethal rounds at him. In the 2009 case of Oklahoma pharmacist Jerome Ersland, who executed a youth who had just been part of an armed robbery at Ersland's pharmacy (as the youth lay unconscious and bleeding on the floor, due to an initial shot to the head by Ersland), the Oklahoma Court of Criminal Appeals upheld the first-degree (malice) murder conviction of pharmacist Ersland on the same day that it also upheld the first-degree *felony* murder conviction of one of the two adults who originally orchestrated the armed robbery (with the two youths who carried it out). *See* Docket, Ersland v. Oklahoma, No. F-2011-638 (Okla. Crim. App. June 20, 2013), https://www.oscn.net/dockets/GetCaseInformation.aspx?db=appellate&number=F-2011-638&cmid=107495 (affirming first-degree malice murder conviction of Jerome Ersland for killing sixteen-year-old Antwun Parker); Docket, Morrison v. Oklahoma, No. F-2011-624 (Okla. Crim. App. June 20, 2013), https://www.oscn.net/dockets/GetCaseInformation.aspx?db=appellate&number=F-2011-624&cmid=107472 (affirming first-degree felony murder conviction of Anthony Morrison, based upon planning armed robbery with fourteen-year-old Jevontai Ingram and Antwun Parker); Nolan Clay, *Former Pharmacist Jerome Ersland Loses Appeal*, OKLAHOMAN (June 20, 2013, 10:10 PM) (summarizing results in *Ersland* and *Morrison* cases and noting that Emanuel Mitchell, the other adult charged with planning the pharmacy robbery, was granted new trial based upon his right to represent himself). Thus, the court upheld the felony murder conviction of a non-present robbery accomplice (Anthony Morrison), even though the actual killing of his youthful co-robber was itself a *malice* murder by the armed robbery "victim," Jerome Ersland. Ultimately, three armed robbery accomplices were convicted of *felony* murder based upon the *malice* murder killing of 16-year-old co-robber Antwun Parker by nonparticipant robbery victim Jerome Ersland. Emanuel Mitchell was convicted of first-degree felony murder (twice), and his second felony murder conviction was affirmed on appeal. *See* Mitchell v. Oklahoma, 387 P.3d 934, 937, 946 (Okla. Crim. App. 2016). Unfortunately, the Oklahoma Court of Criminal Appeals declined to provide a published opinion discussing the applicability of Oklahoma's first-degree felony murder statute to a killing by a "victim" of the original felony. *See id.* at 941 (referencing earlier unpublished opinion in *Morrison* case on applicability of felony murder statute). Jevontai Ingram, the fourteen-year-old co-robber who managed to survive, pled guilty to first-degree felony murder as a "youthful offender" and was released when he turned 18. *See* Oklahoma v. Ingram, No. CF-2009-3297, (Okla. Cnty. Dist. Ct. May 29, 2009), https://www.oscn.net/dockets/GetCaseInformation.aspx?db=oklahoma&number=CF-2009-3297&cmid=2477975.

B. BROAD CASE-BASED FELONY MURDER LIABILITY FOR KILLINGS BY NONPARTICIPANTS

Whereas the six proximate cause states discussed *supra* take a broad approach to felony murder liability for killings committed by nonparticipants based upon broad language in their state felony murder *statutes*, quite a few other states allow for broad felony murder liability for killings by nonparticipants *despite* rather narrow language in their felony murder statutes or based upon language that does not clearly suggest such vicarious liability (for the fatal actions of an adversary). Arizona, Georgia, Indiana, New York, Rhode Island, and Wisconsin all have rather narrow felony murder statutes, in terms of seeming to limit felony murder liability to killings committed by *participants* in the felony at issue. Nevertheless, binding appellate courts in these states have interpreted their state's felony murder statutes quite broadly, such that they cover killings committed by nonparticipants—making these states proximate cause states too. The case law in these states is quite revealing in terms of demonstrating just how substantially appellate courts can expand the reach of rather narrow felony murder statutes . . . when they are inclined to do so.

Illinois, on the other hand, may be a state in transition. In 2021, the Illinois General Assembly amended the Illinois felony murder statute, in an apparent attempt to more *specifically* limit its scope in this regard, i.e., to mandate an agency approach.[142] Nevertheless, as will be discussed *infra*, the case law of the Illinois Supreme Court is particularly striking in terms of that court's apparent determination to develop and maintain a broad proximate cause approach to felony murder liability, including for (all?) killings by nonparticipants—despite the language of the narrow "agency-type" felony murder statute that has been in effect in that state for sixty years.[143] Hence, this Section will conclude with Illinois, even though Illinois may well be found not to belong in this Section in years to come.

1. Georgia

Georgia defines the offense of felony murder as follows: "A person commits the offense of murder *when, in the commission of a felony, he or she*

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[142] *See* 720 ILL. COMP. STAT. ANN. 5/9-1(a)(3) (West 2021).

[143] *See* ILL. REV. STAT. ch. 38, § 9-1(a)(3) (1967) ("A person who kills an individual without lawful justification commits murder *if, in performing the acts which cause the death: . . . [h]e is attempting or committing a forcible felony* other than voluntary manslaughter.") (emphasis added). This felony murder provision was adopted within the Illinois General Assembly's adoption of Illinois's new Criminal Code in 1961. *See* Criminal Code of 1961, § 9-1(a)(3), 1961 Ill. Laws 1983, 2003.

causes the death of another human being irrespective of malice."[144] Hence, the Georgia statute suggests that felony murder is limited to when an individual felon, himself or herself, "causes the death of another human being," though it has been interpreted to include accomplice liability.[145] And although this statute is not as clear as some of the felony murder statutes that will be considered in this Section, it does signal an agency approach because it limits felony murder liability to when "in the commission of a felony" the defendant causes a death—phrasing that numerous other states have recognized as indicating an agency approach to felony murder liability.[146] Quite simply, a death caused by a nonparticipant is *not* committed while such a person is "in the commission of a felony" (or at least *not* the kind of felony referenced in the felony murder statute).[147] The whole category of "nonparticipants" is based upon the premise that such persons were *not* "committing" or participating in the underlying felony at issue. Hence, the Georgia *statute* indicates that Georgia is an agency state.

Nevertheless, since its 2010 decision in *State v. Jackson*,[148] the Supreme Court of Georgia has taken a *proximate cause* approach to felony murder and allowed for felony murder liability for killings committed by nonparticipants responding to a felony.[149] And the court has even upheld a felony murder

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[144] GA. CODE ANN. § 16-5-1(c) (West 2014) (emphasis added). Felony murder in Georgia is punishable by death or imprisonment for life or for life without parole. *Id.* § 16-5-1(e)(1).

[145] *See id.* § 16-5-1(c).

[146] The top appellate courts of Idaho, Kansas, Louisiana, Maryland, Nebraska, Nevada, North Carolina, Virginia, West Virginia, and Wyoming have all interpreted parallel "in the commission of" or "in the perpetration of" language in their felony murder statutes (and without other agency-signaling language) as indicating or consistent with the agency approach adopted in these states. *See supra* note 64.

[147] This Article is focused upon the specific situation where the act of the nonparticipant that kills the victim is *itself* a criminal homicide. Nevertheless, such a homicide would still *not* be the (underlying) "felony" that is referenced in all the felony murder statutes that are considered herein. The "underlying felony," i.e., the felony referred to in all felony murder statutes, is, by definition, the felony either attempted or committed by the original felony participants, to which any nonparticipant victim, bystander, or police officer would have been responding.

[148] 697 S.E.2d 757, 757–58 (Ga. 2010).

[149] *See id.* (adopting proximate cause approach and overruling 1981 Georgia Supreme Court decision holding that Georgia statute did *not* allow for felony murder liability when felony victim killed felony participant). The *Jackson* court focused entirely on the word "causes" in the Georgia felony murder statute and emphasized that "causes," in the context of Georgia criminal law, implies *proximate* causation, which is interpreted quite broadly (e.g., to include being "a substantial part in bringing about" a result). *See id.* at 759–61, 763. Despite its lengthy argument for its new approach, the *Jackson* court failed entirely to address the significance of the statutory language requiring that the causation at issue occur "in the

conviction in a situation where the facts strongly suggest the nonparticipant killing was *itself* a homicide.

In *Robinson v. State*,[150] the Georgia Supreme Court upheld the felony murder conviction of a get-away car driver (Robinson), whose armed robbery partner (Carter) was killed by a robbery victim, who shot Carter in the back as he fled.[151] The pair had apparently robbed a particular business two days earlier (obtaining approximately $2,000) and decided to return, with Carter again being the one who entered the business.[152] This time, it was the owner of the business (Johnson) who was working, and he recognized Carter from studying the store's security camera footage.[153] Johnson "warned Carter that he knew who he was" and "placed his hand on a gun that he was carrying."[154] When Carter then fled the business, Johnson pursued.[155] Johnson testified that he "felt like his life was in danger" as he chased Carter, and "[b]ased on this belief, Johnson drew his gun and shot Carter in the back."[156] Although Carter made it to the truck where Robinson was waiting, "Carter later died of a gunshot wound to the back."[157]

The *Robinson* court relied on its decision in *Jackson* to establish that "causing" the death of a human being under Georgia's felony murder statute "means proximate causation."[158] And the *Robinson* court also relied on *Jackson* for an extremely broad notion of such causation:

> Proximate causes exists if Robinson's crime of attempted robbery "directly and materially contributed to the happening of a subsequent accruing immediate cause of the death, or if . . . the homicide [was] within the res gestae of the felony . . . and is one of the incidental, probable consequences of the execution of the design to commit the [predicate felony]."[159]

The *Robinson* court had little trouble upholding the felony murder conviction at issue under this broad test: "Here, it was reasonable to foresee that Carter, who was attempting an armed robbery, could be fatally wounded in

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commission of a felony." *See id.* at 758–67. Three justices dissented and maintained that the court's prior unanimous approach was "compelled by the plain and unambiguous language" of Georgia law. *Id.* at 768 (Hunstein, J., dissenting).

150 782 S.E.2d 657, 660–61, 665 (Ga. 2016).

151 *Id.* at 660-61, 665.

152 *Id.* at 660.

153 *Id.*

154 *Id.*

155 *Id.*

156 *Id.*

157 *Id.* at 660-61.

158 *Id.* at 661 (citing *Jackson*, 697 S.E.2d 757).

159 *Id.* at 662 (quoting *Jackson*, 697 S.E.2d 757).

attempting such a highly dangerous enterprise."[160] Yet, if all that is needed for a finding of "proximate causation" is (1) a death emerging in some way from an armed robbery, and (2) the obvious observation that a person "who [is] attempting an armed robbery[] could be fatally wounded," then *any* felony murder conviction based upon the killing of one's co-robber will be upheld—no matter how unexpected, unforeseeable, or even *criminal* the actual cause of the co-robber's death is in the case at issue.

In fact, the *Robinson* case strongly suggests that this is indeed the de facto law in Georgia. For although the court referenced the concept of an "intervening cause" limitation on Georgia's doctrine of proximate causation,[161] the *Robinson* court never even *considered* whether Johnson's actions of not merely ridding his business of an armed robber—but of chasing after him and shooting him in the back as he fled—were a potential "intervening cause" of the man's death.[162] Even the court's summary of the facts suggests a vigilante execution by an enraged business owner, rather than an act of victim "self-defense." In addition, in response to Robinson's challenge to the definition of "self-defense" given his jury, the court upheld the instruction as "proper" because "the jury was instructed that 'the standard is whether the circumstances were such that they would excite the fears of a reasonable person.'"[163] But if inducing "fear" in a reasonable person is all that is required to justify pursuing and executing a fleeing felon, then it would appear to be legal in Georgia to do so in response to virtually *any* armed robbery—and then to convict any surviving co-robber of felony murder, if the fleeing robber was successfully killed by the pursuing "victim."[164] But this really seems like too much.

2. Arizona

The Arizona Supreme Court has not yet clearly held that Arizona is a proximate cause state or that Arizona's first-degree felony murder statute can be applied to killings by nonparticipants. But a 1992 decision by the Arizona Court of Appeals has held as much, despite limiting language in the statute at issue, and the Arizona Supreme Court has not said otherwise thus far.

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[160] *Id.* at 662.

[161] *See id.* at 661 ("Proximate causation imposes liability for the reasonably foreseeable results of criminal . . . conduct if there is no sufficient, independent, and unforeseen intervening cause.") (quoting *Jackson*, 697 S.E.2d 757).

[162] *See id.* at 661–65.

[163] *Id.* at 664 (citation omitted).

[164] Hence, it appears Georgia would potentially allow felony liability murder based upon a homicide by a nonparticipant victim, bystander, or police officer.

Arizona defines first-degree felony murder as follows:

> A person commits first degree murder if . . . (2) Acting alone or with one or more other persons[,] the person commits or attempts to commit [a listed felony] and, *in the course of and in furtherance of the offense or immediate flight from the offense*, the person or another person causes the death of any person.[165]

Although this statute does not explicitly limit who the killer can be (as the basis for felony murder liability), the fact that the person who causes a death must do so "in the course of *and* in furtherance of" or in "flight from" the felony strongly suggests that this statute embodies an *agency* approach, as has been recognized by the various agency states that have interpreted parallel and even less suggestive language.[166] In addition, the requirement that the death must be caused by a person acting "in furtherance of" or in "flight from" the underlying felony suggests that the statute's generic reference to a killing by "another person" is intended to be limited to other *participant* persons, who were referred to earlier in the same provision, i.e., to "the other persons" that the charged felony participant was committing or attempting a felony with.

In *State v. Lopez*,[167] the Arizona Court of Appeals addressed a case in which a group of men intended to rob a group of cocaine sellers, but it turned out that the "sellers" were DEA agents, supported by undercover police officers. The attempted armed robbery by the cocaine "buyers" resulted in one of the co-robbers getting shot and killed by one of the police officers.[168] Two of the men involved in the robbery attempt were then convicted of first-degree felony murder under the Arizona statute quoted above.[169] The *Lopez* court asserted: "The primary issue is whether a death occurred 'in furtherance' of a felony under Arizona's felony murder statute when a police officer, in thwarting an attempted armed robbery, shot a co-felon, and the shooting occurred when the two other co-felons claim they were under

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[165] ARIZ. REV. STAT. ANN. § 13-1105(A)(2) (2009) (emphasis added). First-degree felony murder in Arizona is punishable by death or imprisonment for life. *Id.* § 13-1105(D).

[166] As noted *supra*, the top appellate courts of Idaho, Kansas, Louisiana, Maryland, Nebraska, Nevada, North Carolina, Virginia, West Virginia, and Wyoming have interpreted "in the commission of" and "in the perpetration of" language in their respective felony murder statutes as indicating or consistent with the agency approach of these states, even without the additional and *more* agency-suggesting language of "and in furtherance of" language that is included in the Arizona statute. *See supra* note 64.

[167] 845 P.2d 478, 479–80 (Ariz. Ct. App. 1992).

[168] *Id.*

[169] *Id.* at 480–81.

arrest."[170] Hence, the primary issue was whether Arizona's felony murder statute covers killings by nonparticipant police officers.

The *Lopez* court began by recognizing that the victim of a first-degree felony murder "can include a co-felon" because the statute applies to "the death of any person."[171] The court also recognized that Arizona's first-degree felony murder statute requires that the death be caused "in the course of and in furtherance of" a designated felony and invoked an Arizona Supreme Court decision finding that this phrase means: "[D]id the death result from an action taken to facilitate the accomplishment of one or more of the felonies enumerated in § 13-1105(A)(2)?"[172] The *Lopez* court acknowledged that it was a police officer who shot and killed the felony participant and that "the shooting resulted from Officer Dillard's attempts to *thwart* and not 'facilitate the accomplishment of' the robbery."[173]

This would seem to portend a win for the defendants, but then the *Lopez* court shifted to authority from the Missouri Supreme Court to redefine what "in furtherance of" a felony could mean, asserting: "However, where the killing 'emanates' from the crime itself and is a natural and proximate result thereof, it is committed in furtherance of the felony within the meaning of the statute."[174] And the *Lopez* court quoted from this same Missouri decision at length, which focused upon the idea of proximate causation and the foreseeability of a death resulting from a felony, rather than on whether the death was caused by a person acting "in furtherance" of a felony.[175] The *Lopez* court ultimately affirmed the felony murder convictions at issue even though the key jury instruction in the case required only that the defendant's acts "set in motion a chain of events" resulting in death (i.e., proximate causation), rather than that the fatal acts be "in furtherance" of the underlying felony.[176]

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[170] *Id.* at 479.

[171] *Id.* at 481.

[172] *Id.* (quoting State v. Arias, 641 P.2d 1285, 1287 (Ariz. 1982)).

[173] *Id.* (emphasis added) (quoting *Arias*, 641 P.2d at 1287).

[174] *Id.* (citing State v. Moore, 580 S.W.2d 747, 751 (Mo. 1979)). It should be noted that although *Moore* involved a felony murder statute requiring that the killing be "in the perpetration of" the felony, the *Moore* decision never explained how a killing by a nonparticipant satisfied this statutory requirement; and habeas corpus relief was later granted by the Eighth Circuit in *Moore*, based upon the "unforeseeable" expansion of Missouri felony murder law in this regard. *See supra* note 97.

[175] *Id.* at 482 (quoting *Moore*, 580 S.W.2d at 752 ("The significant factor is whether the death was the natural and proximate result of the acts of the appellant or of an accomplice.")).

[176] The court noted that the jury was instructed: "A person whose deliberate acts in perpetrating a robbery or offer to sell narcotics have set in motion a chain of events which

The *Lopez* court noted, with approval, that the jury could have based the felony murder convictions on the fact that "Lopez's action in pointing the gun at [DEA agent] Silva's head set into motion a chain of events which resulted in the death of Richard."[177] Yet this didn't impact the *Lopez* court's *earlier* recognition that the shooting of the co-robber victim by a police officer was done to "thwart" the underlying robbery felony, not "in furtherance" of it, as required by the statute. The *Lopez* court made clear that it was adopting a proximate cause approach to the Arizona statute, while also finding that it did not matter if Lopez had been arrested at the time his felony co-participant was killed by police, because Lopez's actions "started it."[178]

The Arizona Supreme Court denied the appellant's request for review in *Lopez*[179] and has not since directly addressed whether Arizona's first-degree felony murder statute can be appropriately applied to killings by nonparticipants, though it has cited *Lopez* approvingly.[180] Hence, it appears that Arizona is a proximate cause state, despite the (agency-suggesting) "in furtherance" of the felony language within its felony murder statute.[181]

3. Indiana

Indiana defines felony murder as follows: "A person who . . . (2) *kills another human being while committing or attempting to commit* [a listed felony]; [or] (3) *kills another human being while committing or attempting to commit* [a listed drug felony] . . . commits murder, a felony."[182] This statute certainly seems to reflect an agency approach to felony murder liability because it specifically requires (in both relevant provisions) that the felony participant *"kills* [someone] *while committing or attempting"* a

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cause the death of another person, which was a risk reasonably to be foreseen, is guilty of first-degree murder." *Id.*

[177] *Id.*

[178] *Id.* at 483 ("Even if Lopez had been handcuffed or, like Peterson, ordered to lie on the ground, the jury still could have found him guilty of felony murder because his actions were *the proximate cause* of Richard's death." (emphasis added)); *see also id.* (quoting State v. Hitchcock, 350 P.2d 681, 683 (Ariz. 1960) (emphasizing "chain of events which defendant's deliberate acts had set in motion")).

[179] The Arizona Supreme Court denied review on February 17, 1993. *Id.* at 478.

[180] *See* State v. Jones, 937 P.2d 310, 319–21 (Ariz. 1997) (citing *Lopez*, 845 P.2d at 481, in support of affirming felony murder conviction on theory that defendant assaulted victim, leading to her death, "in furtherance of" sexual assault felony).

[181] It is unclear whether Arizona would allow felony murder liability even if a nonparticipant killing was a homicide, but if Arizona continues to follow Missouri in this regard, it is certainly possible. *See* text accompanying notes 88–101 *supra*.

[182] Murder, IND. CODE ANN. § 35-42-1-1 (West 2018) (emphasis added).

felony.[183] The statute seems to clearly preclude the possibility of imposing felony murder liability for a killing by a nonparticipant victim, bystander, or police officer, since if such a person kills in connection with a felony, they do so while *resisting* the felony, not while "committing" or "attempting" it.

Nevertheless, in *Palmer v. State*,[184] the Supreme Court of Indiana concluded (in a 3-2 vote) that this felony murder statute *did* cover the killing of a kidnapping co-participant by a nonparticipant police officer/victim, in response to a felony kidnapping. After quoting the language of Indiana's felony murder statute, the *Palmer* court asserted as follows: "The statutory language 'kills another human being while committing' does not restrict the felony murder provision only to instances in which the felon is the killer, but may also apply equally when, in committing any of the designated felonies, the felon contributes to the death of any person."[185] Hence, the *Palmer* court upheld the conviction at issue.[186]

This is nonsense. The Indiana statute clearly *does* require that the killer at issue "kills . . . while committing or attempting to commit" a felony. The statute does *not* provide for felony murder liability when a felony participant merely "contributes" to someone's death. Thus, the killer must be one of the felony participants upon whose felony the felony murder charge is based. Two of the five justices on the Indiana Supreme Court dissented in *Palmer*, based upon the plain language of Indiana's felony murder statute.[187]

In 2015, the Indiana Supreme Court explicitly "affirmed the continued validity of *Palmer* and its progeny,"[188] including *Jenkins v. State*,[189] but distinguished these cases on their facts to reverse the felony murder

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[183] *Id.* (emphasis added).

[184] 704 N.E.2d 124, 125–26 (Ind. 1999).

[185] *Id.* at 127.

[186] *Id.* (concluding defendant's conduct "clearly raised the foreseeable possibility that the intended victim might resist or that law enforcement would respond, and thereby created a risk of death to persons present"). The *Palmer* court quoted an Indiana Court of Appeals decision in support of its (proximate cause) approach, but this decision likewise lacked any cogent analysis of Indiana's felony murder *statute*, focusing instead on broad themes of criminal responsibility and foreseeability. *See id.* (quoting Sheckles v. State, 684 N.E.2d 201, 205 (Ind. Ct. App. 1997)).

[187] *Id.* at 127–28 (Sullivan, J., concurring in part and dissenting in part) (joined by Shepard, C.J.) ("Palmer here did not kill another human being: his co-perpetrator was killed by a law enforcement official. Under the terms of the felony murder statute, Palmer is not guilty of felony murder.").

[188] *See* Sharp v. State, 42 N.E.3d 512, 516 (Ind. 2015); *see also* Layman v. State, 42 N.E.3d 972, 979 (Ind. 2015) (companion case based on same underlying facts).

[189] Jenkins v. State, 726 N.E.2d 268, 268-71 (Ind. 2000) (upholding felony murder conviction of robber based upon killing of co-robber by robbery victim, based upon *Palmer*).

convictions of a group of teenagers, whose participation in an unarmed home burglary resulted in the death of one of their felony participant friends, who was shot by the victim homeowner (whom the teens did not expect to be home).[190] The Indiana Supreme Court asserted that "the common thread" unifying *Palmer* and *Jenkins*, as well as some cases where the fatal act was committed by a felony participant, was "an armed defendant engaged in violent and threatening conduct, either as a principle or an accessory, that resulted in . . . a co-perpetrator's death," whereas in the current case the entire group was unarmed, and no one engaged in "any dangerously violent and threatening conduct."[191] Hence, the unanimous court declared that the conduct of the teen burglars (though sufficient to constitute felony burglary) did not cause their friend's death and that they could not, therefore, be convicted of felony murder based upon their friend's death.[192]

While this result may appear to be a victory for justice and moderation, attempting to limit the non-statutory *Palmer* (proximate cause) approach to felony murder to cases in which felony participants engage in "violent and threatening conduct" is not particularly convincing; and (like *Palmer*) it has no basis in the text of Indiana's felony murder statute, which clearly (and simply) requires that a felony participant "kills another human being *while* committing or attempting to commit" a felony.[193] The teen burglars should not have been convicted of felony murder for the killing of their friend by the robbery victim, but neither should any *other* Indiana felony participant be convicted of felony murder based upon a killing by a nonparticipant, according to the clear language of Indiana's felony murder statute.[194]

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[190] *See Sharp*, 42 N.E.3d at 513–14, 516–17.

[191] *Id.* at 518.

[192] *Id.*

[193] In *Layman*, which involved the same underlying facts, the Indiana Supreme Court addressed a direct request that it overrule *Palmer* under a "plain reading" of Indiana's felony murder statute. *Layman*, 42 N.E.3d at 978. The court invoked *stare decisis* and the fact that the Indiana Legislature had amended the felony murder statute since *Palmer*, without specifically undoing its impact: "Thus, both the doctrines of *stare decisis* as well as legislative acquiescence counsel against overruling [*Palmer*]." *Id.* at 977–78. Yet the court also declined to find that *Palmer* was correctly decided, offering (weakly) instead: "[W]e perceive no urgent reason to revisit our long-standing precedent nor are we convinced that *Palmer* is clearly erroneous." *Id.* at 978.

[194] It is unclear whether Indiana would allow a felony murder conviction based upon a homicide by a nonparticipant. The Indiana Supreme Court seems cognizant of potential injustice in this realm, though its approach appears driven by whether the *felony participant's* actions were violent/threatening, rather than an examination of the legality/propriety of a nonparticipant's deadly actions.

4. New York

New York defines second-degree felony murder as follows:

> A person is guilty of murder in the second degree when: . . . (3) Acting either alone or with one or more other persons, he commits or attempts to commit [a listed felony], *and, in the course of and in furtherance of such crime or immediate flight therefrom, he or another participant,* if there be any, *causes the death of a person other than one of the participants.*[195]

This statute seems to clearly limit felony murder liability to situations in which a *participant* in the felony is the one who actually kills because it both: (1) limits felony murder liability to *when* a person, who is committing/attempting a felony, "causes" a death *while* acting "in the course of *and* in furtherance of such crime," and (2) limits the persons *who* can cause a death that results in felony murder liability to the original felony participant "or another participant." Thus, this statute seems to very specifically and intentionally limit felony murder "death causers" to *participants* in the underlying felony, in addition to limiting felony murder "victims" to *nonparticipants* in that felony.[196]

Nevertheless, in *People v. Hernandez*,[197] the New York Court of Appeals held that this statute *could* result in felony murder liability when a police officer was shot by another police officer, during a gun battle following an attempted robbery.[198] *Hernandez* is a rather stunning opinion. Most importantly, it never provides or considers the full text of the felony murder provision at issue (and quoted above), though it cites to "Penal Law § 125.25(3)," which has been the same since at least 1990.[199] In fact, the only language of the felony murder statute that the *Hernandez* court considers is the phrase "causes the death of a person other than one of the participants."[200]

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[195] Murder in the second degree, N.Y. PENAL LAW § 125.25(3) (McKinney 2019) (all emphasis added).

[196] *See id.* (covering deaths of "a person other than one of the participants").

[197] 624 N.E.2d 661, 662 (N.Y. 1993).

[198] The case involved a robbery plot by two men, who intended to rob a man coming to buy drugs, but the intended "victim" was an undercover officer, who was being backed up by other officers. *See id.* When one of the robbers put a gun to the officer's head, the officer pulled out his own gun and started firing. *Id.* When defendant Hernandez then ran from the building, he encountered other officers and "aimed his gun at" one of them. *Id.* When the other officers then began firing at Hernandez, one of the officers shot and killed another officer. *Id.* Both of the original robbers were convicted of felony murder based upon this killing. *Id.*

[199] *See id.*; *see also* 1990 N.Y. Sess. Laws 477 (McKinney).

[200] *See Hernandez*, 624 N.E.2d at 664 (quoting this phrase and asserting that subsequent to the 1965 revision of the felony murder statute, the phrase "'causes the death' . . . is now the operative language of the Penal Law").

Hence, without *any* discussion of the agency language emphasized above—which would seem to compel the conclusion that second-degree felony murder liability in New York can only be based upon a killing by a felony participant—the *Hernandez* court concluded that this provision could be applied to a killing by a *nonparticipant* police officer, by emphasizing that the phrase "causes the death" is used broadly (in *other* parts of the New York Penal Code) to include when a "defendant's culpable act is 'a sufficiently direct cause' of the death so that the fatal result was reasonably foreseeable."[201]

Remarkably, the *Hernandez* court referred repeatedly to the importance of language in interpreting the meaning of a statute, while completely ignoring the relevant limiting language of the felony murder statute at issue.[202] The *Hernandez* court acknowledged that its 1960 decision, *People v. Wood*,[203] had adopted an *agency* approach to felony murder liability based upon "the plain terms of the statute" at issue in that case, which required that the killing be by a person "engaged in the commission of" a felony or felony attempt.[204] The *Hernandez* court then emphasized that this phrase did not appear in the post-1965 version of New York's felony murder statute—without addressing the fact that the later version actually included substantially *more* language indicating that the New York Legislature intended to maintain an agency approach.[205]

Strangely, in a section of the opinion assuring the reader that the proximate cause approach adopted in *Hernandez* would not "extend criminal liability unreasonably," the court asserted: "First, New York law is clear that felony murder does not embrace any killing that is coincidental with the felony but instead is *limited to those deaths caused by one of the felons in furtherance of their crime*."[206] But the court neither acknowledged that the source of this limitation was the language of the *statute* itself, nor did the court explain how allowing felony murder liability for a killing by a

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[201] *Id.* at 664 (citations omitted); *see also id.* at 665 (emphasizing that "causes" "has consistently been construed by this Court," in the homicide context, to mean "that the accused need not commit the final, fatal act to be culpable for causing death").

[202] *See id.* at 665 ("Analysis begins with the statute."); *id.* at 665–66 (arguing that if legislature desired a narrow interpretation of "causation," it could have provided for one, without considering whether *unaddressed* terms of the statute at issue actually did so).

[203] People v. Wood, 167 N.E.2d 736, 737–40 (N.Y. 1960).

[204] *See Hernandez*, 624 N.E.2d at 662–63 (citing and quoting *Wood*, 167 N.E. 2d at 736).

[205] *See id.* at 664–65.

[206] *Id.* at 665 (emphasis added) (citing a single case).

nonparticipant police officer was consistent with this "clear" limitation within New York law.[207]

Instead, the *Hernandez* court simply adopted a proximate cause approach to the felony murder statute,[208] suggested that the "intervening cause" doctrine would protect against unfair results (without explaining *how* this doctrine should be interpreted and applied so as to limit inappropriate felony murder liability),[209] and then made clear that felony murder liability *could* be based upon a combination of but-for causation and a very thin notion of "foreseeability."[210] The *Hernandez* court declined to consider whether specific agency language within the second-degree felony murder statute precluded the approach it seemed determined to take, relying instead on a broad general notion of proximate causation.[211]

5. Wisconsin

Wisconsin has a statute titled "felony murder," which defines this crime as follows: "Whoever causes the death of another human being *while committing or attempting to commit* [a specified felony] may be imprisoned for not more than 15 years in excess of the maximum term of imprisonment provided by law for that crime or attempt."[212] Once again, this statute appears

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[207] *See id.*

[208] *See id.* ("Unlike defendants and those courts adopting the so-called agency theory, we believe New York's view of causality, based on a proximate cause theory, to be consistent with fundamental principles of criminal law.").

[209] *See id.* at 664, 665 (suggesting liability is limited to "when the felons' acts are a sufficiently direct cause of the death" and that "[w]hen the intervening acts of another party are supervening or unforeseeable, the necessary causal chain is broken, and there is no liability for the felons" (citations omitted)).

[210] The court asserted that "[t]he language of Penal Law § 125.25(3) evinces the Legislature's desire to extend liability broadly to those who commit serious crimes in ways that endanger the lives of others." *Id.* at 667. The court then determined that the jury had been adequately instructed because it was told that "it must find the fatal result was the sufficiently direct and foreseeable result of Hernandez's acts." *Id.* And the court concluded that an officer killing another officer *was* a foreseeable result of Hernandez's attempt to rob a would-be drug buyer (who turned out to be an undercover cop) because "it was foreseeable that police would try to thwart the crime" and that "it is simply implausible for defendants to claim [they] could not have foreseen a bullet going astray when Hernandez provoked a gun battle outside a residential building in an urban area." *Id.* This seems to beg the question of the point in *time* to which the foreseeability question should be directed.

[211] It is unclear whether New York would allow felony murder liability based upon a homicide by a nonparticipant, but the court's approach in *Hernandez* suggests it is focused more on the culpable acts of the felony participants who started the affray than the propriety/legality of any lethal actions by responding nonparticipants.

[212] Felony Murder, WIS. STAT. ANN. § 940.03 (West 2021) (emphasis added).

to adopt an agency approach to felony murder because it limits liability to when someone causes a death "while committing or attempting to commit" a felony, which would seem to include only killings by felony participants.[213]

Nevertheless, in *State v. Oimen*,[214] the Wisconsin Supreme Court concluded that "a defendant can be charged with felony murder for the death of a co-felon when the killing was committed by the victim of the underlying felony."[215] The *Oimen* court described Wisconsin's felony murder statute as containing "two elements": "the defendant must cause a death and the defendant must cause the death while committing or attempting to commit one of the five listed felonies."[216] But then the court asserted that "[a]n actor causes death if his or her conduct is a 'substantial factor' in bringing about that result."[217] The court emphasized that it was "irrelevant" under the felony murder statute that "the rifle fired by Stoker was the immediate cause of McGinnis's death" because "[a] 'substantial factor' need not be the sole cause of death."[218] Hence, the court made clear that "causes the death" under the statute does not mean "kills." Although it was clearly the robbery victim who killed McGinnis, co-robber Oimen could still be convicted of felony murder for "causing" this death.[219]

But what about Wisconsin's requirement that this death-causing must occur "while committing or attempting to commit" a felony? Oimen

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[213] *See supra* note 64 (noting Minnesota's agency interpretation of parallel "while committing" felony murder statute and approaches of other agency states construing similar "in the commission of" and "in the perpetration of" statutes).

[214] 516 N.W.2d 399, 401 (Wis. 1994).

[215] The case involved a planned burglary/robbery, in which Oimen persuaded two other men (McGinnis and Hall) to rob "a bookie" (Stoker) in his home, assuring them that Stoker would be unarmed, was "meek and mild," had up to $200,00 in his home, and would not report the crime. *Id.* at 401–02. The pair went to the home with a BB gun, a pool cue butt, a small billy club, and a pocket knife. *Id.* at 402. Stoker was actually armed with an automatic hunting rifle, which he obtained and loaded as the men burst into his home. *Id.* The intruders approached Stoker, with McGinnis pointing the BB gun at him, but turned and ran back out of the home when they realized, "He's got a gun." *Id.* Stoker then pursued them and shot McGinnis, who was on the porch and who fell into the snow and soon died. *Id.* Stoker testified that McGinnis pointed a gun at him and appeared to be coming back. *Id.*

[216] *Id.* at 404. The only substantive difference between the language of the felony murder statute cited *supra* and the one quoted in *Oimen* is that the version cited in *Oimen* provides for a 20-year sentencing enhancement, rather than 15. *See id.* at 404.

[217] *Id.* (citation omitted). And the court insisted that it was "irrelevant" *both* that the shooting victim was a co-robber *and* that a shot fired by the robbery/burglary victim "was the immediate cause of McGinnis's death." *Id.*

[218] *Id.* at 404–05 (citations omitted).

[219] The court noted, "Oimen was essentially the ringleader *who set into motion the events that led to McGinnis' death*." *Id.* at 405 (emphasis added).

emphasized this statutory language and the fact that the trial court instructed his jury that if there was a "causal connection" between the felony and the death, "the killing may take place at some time before or after the commission or the attempt to commit the underlying felony,"[220] which seems to contradict the requirement that the death be caused *while* the felony is being attempted/committed. The *Oimen* court noted "a genuine issue of fact in the present case as to whether the killing occurred *during* the commission of the attempted felony,"[221] but then expanded the language of the Wisconsin statute to include flight *after* a felony or felony attempt:

> We conclude as a matter of law that the phrase in sec. 940.03, "while committing or attempting to commit", encompasses the immediate flight from a felony. Even if the jury did not believe that McGinnis had turned and pointed his gun at Stoker, the uncontroverted evidence indicates that the killing occurred no later than during the first moments of flight.[222]

Thus, the court acknowledged the implausibility of Stoker's testimony—that terrified, fleeing robber McGinnis suddenly decided to turn back and re-confront rifle-wielding Stoker, thereby giving Stoker justification for shooting him—but the court *still* insisted on the reasonableness of Stoker gunning down McGinnis on his porch because "[o]nly seconds before Stoker shot McGinnis, McGinnis had been standing down the hall from Stoker pointing a gun at him," and "Stoker followed and shot McGinnnis moments later, while McGinnis was still at the scene of the felony."[223] Hence, the *Oimen* court seemed to give Stoker a pass for what may well have been an unjustified, criminal homicide *and* gave the trial court a pass for a jury instruction that conflicted with the governing statute.[224]

The *Oimen* court acknowledged that "the vast majority of state courts that have addressed this issue have concluded that the applicable [state] statute does not make a felon liable for murder when the killing was done by a victim of the felony," which it described as the "agency approach."[225] Still, the court maintained that the language and legislative history of Wisconsin's statute "indicate that the legislature did not intend to impose liability only

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[220] *Id.* at 409.

[221] *Id.* (emphasis added).

[222] *Id.*

[223] *Id.*

[224] Hence, Wisconsin does seem to be another state in which a felony participant like Wyatt Cheatham could be held liable for felony murder even for an unjustified or criminal killing by a nonparticipant, who was "responding" to the original felony (whether lawfully or not).

[225] *Id.* at 407.

when there is an 'agency' relationship."[226] The court concluded that "[t]he Wisconsin legislature chose to limit felony murder liability by restricting it to situations involving a limited number of inherently dangerous underlying felonies," but that "[t]he legislature placed no further restrictions on felony murder liability."[227] Hence, the *Oimen* court simply declined to recognize the limiting impact of the statutory language that the felony murder death had to be caused "while" someone was attempting or committing a listed felony.

6. Rhode Island

Although Rhode Island's felony murder statute has been interpreted as embodying a proximate cause approach to felony murder, its application to killings by nonparticipants remains unclear. Rhode Island's murder statute is based upon a traditional common law approach to murder, which begins as follows: "The unlawful killing of a human being with malice aforethought is murder."[228] Rhode Island then lists various different traditional approaches to murder as constituting first-degree murder, including the following definition of felony murder: "Every murder . . . committed *in the perpetration of, or attempt to perpetrate*, any [listed felony], *or committed during the course of the perpetration, or attempted perpetration, of* [a specified drug offense] . . . is murder in the first degree."[229]

Because Rhode Island's felony murder statute requires that the unlawful killing occur "in" or "during" the perpetration or attempted perpetration of a covered felony, its felony murder provision does seem to embody an agency approach.[230] On the other hand, because this statute lacks any other specific limits on causation or who the killer can be, this felony murder provision seems less suggestive of an agency approach than the other statutes considered in this Section.

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[226] *Id.* at 407–08.

[227] *Id.* at 408. In fact, Wisconsin's felony murder statute actually functions as a "penalty enhancement to the penalty imposed for the underlying felony," rather than treating felony murder as akin to other "murders" under state law, *id.* at 403 n.3, which itself is a rather unique and limiting approach to felony murder liability.

[228] 11 R.I. GEN. LAWS ANN. § 11-23-1 (West 2008).

[229] *Id.* (emphasis added). The statute further states: "Any other murder is murder in the second degree." *Id.* And the Rhode Island Supreme Court has held that an unlawful killing committed "in the course of" a felony that is *not* listed in the first-degree murder provision can be the basis for a second-degree felony murder conviction, as long as the felony at issue is "inherently dangerous." *See, e.g., In re* Leon, 410 A.2d 121, 124 (R.I. 1980).

[230] *See supra* note 64 (noting numerous states that have interpreted parallel language as compelling or consistent with an agency approach to felony murder).

Thus far, the Rhode Island Supreme Court has seemingly applied a "proximate cause" approach to this felony murder provision.[231] On the other hand, the Rhode Island Supreme Court has not yet addressed the application of felony murder liability to a killing by a *nonparticipant* victim, bystander, or police officer. Hence, it is unclear whether Rhode Island would actually allow its felony murder statute to be extended to such killings.

7. Illinois?

In 2021, the Illinois General Assembly amended Illinois's first-degree felony murder statute, such that it appears to clearly and explicitly limit felony murder liability to killings by "participants":

> *A person who kills* an individual without lawful justification commits first degree murder *if, in performing the acts which cause the death . . . he or she, acting alone or with one or more participants,* commits or attempts to commit a forcible felony other than second degree murder, *and in the course of or in furtherance of such crime* or flight therefrom, *he or she or another participant causes the death of a person*.[232]

Hence, Illinois is now apparently an agency state, which will (or should) only allow felony murder liability for killings committed by participants and will (or should) prohibit felony murder liability for killings by nonparticipant victims, bystanders, and police officers.[233] On the other hand, most of the "agency indicating" language of the new law was also part of Illinois's prior felony murder statute.[234] Yet, as will be discussed below, the Illinois Supreme

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[231] *See Leon*, 410 A.2d at 122–25 (upholding felony murder liability when act of arson by youth in youth correctional center resulted in death of co-arsonist and "bystander" because "act of the felon foreseeably produced the fatal injury," which establishes "proximate causation"); *see also* State v. Stewart, 663 A.2d 912, 917–18 (R.I. 1995) (noting "[i]n Rhode Island second-degree murder has been equated with common-law murder," which includes "if the death results from the perpetration or attempted perpetration of an inherently dangerous felony") (citing *Leon*, 410 A.2d at 124)).

[232] 720 ILL. COMP. STAT. ANN. 5/9-1(a)(3) (West 2021) (all emphasis added).

[233] *See* Restore Justice Illinois, *Final Felony Murder Language in House Bill 3653, Senate Amendment 2 as Passed, January* 2021, (Feb. 2, 2021, 10:55 PM), https://restorejustice illinois.org/faq-final-felony-murder-language-in-hb3653sa2-as-passed-january-2021 (summarizing "proximate cause theory of felony murder" in effect in Illinois prior to amendment, noting that changes to felony murder statute were aimed to "move Illinois away from a proximate cause theory of liability to an agency theory of liability," and concluding that "[w]ith an asterisk, Illinois has moved to an agency theory for felony-murder, which means the death has to be actually caused by the defendant or another participant in the underlying felony").

[234] The previous version of Illinois's first-degree felony murder statute stated as follows: "*A person who kills* an individual without lawful justification commits first degree murder *if, in performing the acts which cause the death: . . . he or she is attempting or committing a forcible felony* other than second degree murder." 720 ILL. COMP. STAT. ANN. 5/9-1(a)(3)

Court has long insisted that Illinois is a *proximate cause* state and one that seems to allow felony murder liability even for *homicides* by nonparticipants. Consequently, if the clear legislative intent behind the recent amendments to Illinois's felony murder law is faithfully enforced, it will be a huge shift regarding liability for killings by nonparticipants, in a state that has allowed remarkably broad liability in this realm.

It all began in 1935 with *People v. Payne*.[235] *Payne* involved five men who were convicted of murder for an armed robbery of two brothers in their home, which resulted in one of the brothers being shot.[236] Illinois lacked a specific felony murder statute at the time, but the Illinois Supreme Court looked to Illinois's involuntary manslaughter statute to craft a felony murder doctrine and then pronounced: "A killing which happens in the prosecution of an unlawful act which in its consequences naturally tends to destroy the life of a human being is murder."[237] But the *Payne* court also faced the challenge that the victim may have been shot by his own brother, who was firing at the robbers.[238] Again, the *Payne* court responded creatively, stating:

> It reasonably might be anticipated that an attempted robbery would meet with resistance, during which the victim might be shot either by himself or someone else in attempting to prevent the robbery, and those attempting to perpetrate the robbery would be guilty of murder.[239]

The *Payne* court thereby effectively declared that Illinois felony murder liability was based upon the reasonable foreseeability that attempting a dangerous felony could result in a felony victim being killed *by someone* and that it did not matter if the killing was the act of a felon, a victim, or someone else "attempting to prevent" the felony.[240] Thus, the Illinois Supreme Court

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(West 2019) (all emphasis added). This felony murder provision was first adopted in 1961, as part of Illinois's new Criminal Code, and its key language remained the same up until the 2021 amendments. *See Final Felony Murder Language in House Bill 3653*, *supra* note 233.

[235] 194 N.E. 539 (Ill. 1935).

[236] *Id.* at 540–41.

[237] *Id.* at 542–44. Illinois's "involuntary manslaughter" statute at the time provided that "where an involuntary killing shall happen in the commission of an unlawful act which in its consequences naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged to be murder." *Id.* at 542–43 (citation omitted).

[238] *Id.* at 543.

[239] *Id.* (citation omitted).

[240] Hence, Payne could be convicted of felony murder based upon the predictable consequences of joining a robbery conspiracy, even if the death that later resulted was caused by a victim/bystander/officer resisting the robbery. *Id.* at 543–44.

seemed to discover an expansive felony murder doctrine (in an involuntary manslaughter statute), including for foreseeable killings by nonparticipants.

Almost forty years passed before the Illinois Supreme Court decided another significant felony murder case involving a killing by a nonparticipant, until 1974, when it decided two such cases. In *People v. Allen*,[241] the court addressed a felony murder conviction based upon an attempted armed robbery of an armored truck, which resulted in a police officer being shot and killed, possibly by another police officer, in a gunfire exchange with three of the intended robbers. The court noted the text of the felony murder statute then in effect: "*A person who kills* an individual without lawful justification *commits murder if, in performing the acts which cause the death . . . [h]e is attempting or committing a forcible felony* other than voluntary manslaughter."[242]

This language strongly suggests an agency approach to *who* must do the killing for felony murder liability, i.e., the felony murderer must be "[a] person who kills" without lawful justification and who "perform[s] the acts which cause the death," and who does so while "attempting or committing a forcible felony."[243] Though it may be reasonable to allow this narrow language to be expanded to include liability for killings committed by one's felony conspirators and accomplices, i.e., to killings by other felony participants, it does *not* seem reasonable to allow felony murder liability under this provision when the killing is done by an adversary/nonparticipant, who is attempting to *prevent* the felony, and who is *not*, at the time of the killing, "attempting or committing a forcible felony."

Nevertheless, the Illinois Supreme Court had little trouble rejecting Allen's claim that he could not be convicted of felony murder if the officer victim was killed by another officer, without *any* discussion of the limitations of Illinois's felony murder statute.[244] Instead, the *Allen* court invoked *Payne's* statement that "[i]t reasonably might be anticipated that an attempted robbery would meet with resistance, during which the victim might be shot either by himself or someone else . . . and those attempting to perpetrate the robbery would be guilty of murder."[245] The *Allen* court also cited "the Committee Comments to section 9-1 of the Criminal Code," asserted that these comments "indicate that it was the intent of those who drafted the felony-murder section of the statute to incorporate therein the holding in *People v.*

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[241] 309 N.E.2d 544, 545–48 (Ill. 1974).

[242] *Id.* at 547 (quoting ILL. REV. STAT. ch. 38, § 9-1(a)(3) (1967) (all emphasis added)).

[243] *See id.*

[244] *See Allen*, 309 N.E.2d at 548-49.

[245] *Id.* at 548 (quoting *Payne*, 194 N.E. at 543).

Payne," and quoted these Comments as stating: "It is immaterial whether the killing in such a case is intentional or accidental, or is committed by a confederate without the connivance of the defendant . . . or even by a third person trying to prevent the commission of the felony."[246] The court concluded, "We therefore hold that the defendant in this case may be held liable for the death of Officer Singleton whether the fatal shot was fired by a co-felon in furtherance of the attempted robbery or by another police officer in opposition to the attempted robbery."[247]

Later that same year, in *People v. Hickman*,[248] the Illinois Supreme Court took up the felony murder convictions of two men involved in the burglary of a liquor warehouse, based upon the shooting of a police officer responding to that burglary by another officer (who thought the victim officer was one of the burglars fleeing the scene).[249] The appellants argued that the shooting by the officer could not be the basis for a felony murder conviction because under Illinois law, "the fatal act must be done in furtherance of the forcible felony, and it must have been done by one of the co-felons."[250] The *Hickman* court recognized that this argument was based upon the text of Illinois's felony murder statute but summarily rejected it anyway: "While this narrow interpretation is arguable, based on the wording of the felony-murder statute, it is not, in our opinion, correct."[251]

Instead, the court emphasized that the defendants' felonious acts "set in motion" the events that resulted in the officer's death and that this death was a "foreseeable" result of the defendants' acts:

> The commission of the burglary, coupled with the election by defendants to flee, set in motion the pursuit by armed police officers. The shot which killed Detective Loscheider was a shot fired in opposition to the escape of fleeing burglars, and it was a direct and foreseeable consequence of defendants' actions.[252]

The *Hickman* court noted, "We are aware that other jurisdictions have determined that a felon is not responsible, under the felony-murder rule, for

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[246] *Id.* at 548–49 (quoting S.H.A., ch. 38, § 9-1, Comm. Cmts., 9 (1972)).

[247] *Id.* at 549.

[248] 319 N.E.2d 511, 511–12 (Ill. 1974).

[249] *Id.* at 511.

[250] *Id.* at 512.

[251] *Id.* The *Hickman* court again relied heavily on the Committee Comments to Illinois's felony murder statute and the *Payne* decision, as well as *Allen*, which "conclude[d] that it was the intent of those who drafted the felony-murder statute to incorporate therein the holding in *Payne*." *See id.* at 513.

[252] *Id.* at 513.

the lethal acts of a nonfelon."[253] Nevertheless, the court upheld the felony murder convictions at issue (for a killing by a nonparticipant police officer) and proclaimed: "Our statutory and case law . . . dictate a different, and we believe preferable, result."[254] Hence, despite the (very) agency-sounding language of its felony murder statute, the Illinois Supreme Court twice declared, in 1974, that Illinois was a proximate cause state.

And in 1997, in *People v. Lowery*,[255] the Illinois Supreme Court went a step further and unanimously rejected a challenge to a felony murder conviction based upon a killing by a nonparticipant, which appears to have been a criminal homicide. In this case, Lowery and a companion ("Capone") planned an armed robbery of three men (Robert Thomas and brothers Maurice and Marlon Moore), who were walking along Leland Avenue in Chicago.[256] Lowery pulled out a gun and forced Maurice into an alley, where Lowery demanded his money, while Capone remained with the two other men on the sidewalk.[257] But when Maurice resisted and struggled with Lowery for his gun, the gun discharged, and although no one was hit, co-robber Capone (who was apparently unarmed) ran off, with Thomas chasing after him.[258] Meanwhile, Marlon joined his brother Maurice in the protracted struggle in the alley, which eventually moved back toward the street, where Lowery's gun discharged two more times.[259] After Lowery eventually dropped the gun, he ran off down Leland Avenue, running past two women who were walking down the street.[260] Meanwhile, Marlon picked up the gun, chased after Lowery, and fired at Lowery as he ran into the darkness.[261] Tragically, the bullet hit one of the women who was walking down the street

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[253] *Id.* at 513–14.

[254] *Id.* at 514.

[255] 687 N.E.2d 973, 975–79 (Ill. 1997).

[256] *Id.* at 975. The opinion of the Appellate Court of Illinois in the case noted that it was almost midnight and that the three men had just left a night club. *See People v. Lowery*, 666 N.E.2d 834, 835 (Ill. App. Ct. 1996), *rev'd*, 687 N.E.2d 973.

[257] 687 N.E.2d at 975.

[258] 666 N.E.2d at 835. The Appellate Court opinion contains more details about the events leading up to the fatal shooting in the case. *See id.* at 835–36.

[259] *Id.* at 835. No one was hit or injured by the shots fired during the struggle. *Id.*

[260] *Id.*

[261] *Id.*

in the left eye, killing her.[262] Lowery was charged and convicted of felony murder, as well as armed robbery and attempted armed robbery.[263]

The Illinois Supreme Court recognized the issue at stake as "whether the felony-murder rule applies where the intended victim of an underlying felony, as opposed to the defendant or his accomplice, fired the fatal shot which killed an innocent bystander."[264] This court contrasted "the two theories of liability" that could plausibly apply in this felony murder context, i.e., "the agency theory" and the "proximate cause theory," and declared that "Illinois follows the 'proximate cause theory.'"[265] The court acknowledged that "the majority of jurisdictions employ an agency theory of liability" and noted that the appellant had urged it to overrule *Payne* and *Hickman* and argued that *Hickman* "failed to follow the plain language" of Illinois's felony murder statute.[266] Although the court quoted the statute, it again provided no textual argument for how its chosen proximate cause approach was consistent with the language of the statute, asserting simply, "We fail to see how the plain language of the statute demonstrates legislative intent to follow the agency theory."[267] Instead, the *Lowery* court declared that proximate causation in the civil torts context is equivalent to proximate causation in the criminal context and that this approach should be applied without limitation within the felony murder context in Illinois.[268]

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[262] *Id*. The victim was about a half block away when she was shot. *Id.* After Maurice approached the women to inquire whether they were all right—one was dying and the other was crying—Marlon returned, and the brothers left the scene together. *Id.*

[263] *Id.* The Appellate Court reversed Lowery's felony murder conviction, finding that even though it was bound by precedent to apply "the proximate cause theory of felony murder," the evidence was still insufficient to uphold Lowery's conviction. *See id.* at 837–39. The court emphasized that Marlon "fired at the defendant's back after he had been disarmed and was running from the scene" and that ordinary citizens are not justified in using deadly force against a fleeing felon. *Id.* at 838.

[264] 687 N.E.2d at 975.

[265] *Id.*

[266] *Id.* at 976–77.

[267] *Id.* at 977.

[268] *Id.* at 976. The *Lowery* court wrote:

> In the law of torts, the individual who unlawfully sets in motion a chain of events which in the natural order of things results in damages to another is held to be responsible for it.
>
> It is equally consistent with reason and sound public policy to hold that *when a felon's attempt to commit a forcible felony sets in motion a chain of events which were or should have been within his contemplation when the motion was initiated, he should be held responsible for any death which by direct and almost inevitable sequence results from the initial criminal act*. . . Moreover, we believe that the intent behind the felony-murder doctrine would be thwarted if we did not hold felons responsible for the foreseeable consequences of their actions.

The *Lowery* court posed the criminal accountability issue at stake as "whether the victim's death in this case was a direct and foreseeable consequence" of the defendant's crime(s).[269] Yet the *Lowery* court did not seem to demand actual foreseeability of the ultimate death, but rather only that the defendant's acts "set in motion" the chain of events that, in fact, resulted in a death: "If decedent's death resulted from Marlon's firing the gun as defendant attempted to flee, it was, nonetheless, defendant's action that *set in motion the events leading to the victim's death*."[270] The *Lowery* court also rejected the argument that Marlon's act of shooting at him was *not* foreseeable, but was instead the unexpected action of a "vigilante" taking the law into his own hands, which should be seen as an *intervening* and *supervening* cause and the *real* proximate cause of the victim's death.[271]

But again, the *Lowery* court seemed to demand only the most minimal level of causation by the original felony participant and focused upon the policy goals of the felony murder doctrine:

> It is true that an intervening cause completely unrelated to the acts of the defendant does relieve the defendant of criminal liability. However, the converse of this is also true: when criminal acts of the defendant have contributed to a person's death, the defendant may be found guilty of murder . . . .
>
> Here, we do not believe that Marlon's act of firing at defendant was intervening or coincidental. Marlon's resistance was in direct response to defendant's criminal acts and did not break the causal chain between defendant's acts and decedent's death. It would defeat the purpose of the felony-murder doctrine if such resistance—an inherent danger of the forcible felony—could be considered a sufficient intervening circumstance to terminate the underlying felony.[272]

The *Lowery* court simply refused to seriously consider whether the impropriety of Marlon's act of shooting at the defendant, as he ran away down a dark Chicago street, should absolve the defendant of felony murder liability for the death of the woman Marlon killed: "Regardless of how

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Id. (emphasis added) (citations omitted). The breadth and policy-based nature of this analysis are rather stunning—and totally detached from the statute at issue. The *Lowery* court also did not seem to abide by its own characterization of how this causation doctrine would be limited to events which "by direct and almost inevitable sequence result[] from the initial criminal act." *Id.* It's hard to describe the killing in the *Lowery* case—when a would-be armed robbery victim ultimately obtained the robber's gun and shot at the robber as he fled, but instead hit an innocent bystander, who was walking down the street—as an "almost inevitable sequence" of events resulting from the original armed robbery.

269 *Id.* at 977.

270 *Id.* at 978 (emphasis added).

271 *Id.*

272 *Id.* (citations omitted).

unreasonable Marlon's conduct may, in hindsight, be perceived, his response was not based on a deliberate attempt to take the law into his own hands, but on his natural, human instincts to protect himself."[273] Yet Marlon's need to "protect himself" would seem to have ended after the two robbers had both run away.

The *Lowery* court likewise rejected the argument that Marlon was not legally justified in firing at the defendant, describing this argument as "misplaced" because "the proper focus of this inquiry is not whether Marlon was justified in his actions, but whether defendant's actions *set in motion a chain of events that ultimately caused the death of decedent*."[274] Hence, the *Lowery* decision seemed to make clear that felony murder "proximate causation" requires *only* that an original felony participant "set in motion" the events that resulted in a death. Furthermore, even if a nonparticipant victim was the one who actually killed, the Illinois Supreme Court would not consider such a killing to be an "intervening cause"—thereby breaking the causal chain and preventing the felony participant from being held liable for felony murder—*even if* the killing by the nonparticipant victim was both unreasonable and unjustified. In fact, the *Lowery* decision seems to endorse convicting a felony participant of first-degree felony murder even if the actual killing was itself a criminal homicide by a nonparticipant victim.

Subsequent decisions by the Illinois Supreme Court likewise reflect this extensive and nearly unlimited approach to felony murder liability for killings by nonparticipants—despite the glaring conflict with the agency language of the Illinois felony murder statute at issue in these cases.[275] Consequently, given the Illinois Supreme Court's steadfast commitment to its own version of broad proximate cause felony murder liability for killings by nonparticipants, it remains to be seen whether the Illinois General Assembly's 2021 amendments to Illinois's first-degree felony murder statute—to even more clearly reflect an agency approach to felony murder liability—will, in fact, mean that Illinois actually becomes an agency state. Only time will tell whether Illinois is now an agency state, where a felony participant can be held liable for felony murder based upon the actions of an

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[273] *Id.* The court references no facts in the record for this conclusion, nor does the court address whether its analysis would be different if, for example, Marlon had shot into a crowd of people in his attempt to bring down Lowery. *Id.*

[274] *Id.* at 979 (emphasis added).

[275] *See, e.g.*, People v. Dekens, 695 N.E.2d 474, 475–78 (Ill. 1998) (affirming first-degree felony murder conviction based on killing of defendant's co-participant by undercover police officer/victim); People v. Hudson, 856 N.E.2d 1078, 1079–80, 1088 (Ill. 2006) (affirming first-degree felony murder conviction based on killing of defendant's co-participant by off-duty police officer/victim).

agent, i.e., for killings by other participants, but *not* for killings committed by nonparticipant victims, bystanders, and police officers.[276]

IV. PREVENTING FELONY MURDER LIABILITY FOR HOMICIDES BY NONPARTICIPANTS

It seems rather obvious that it is quite unjust and inappropriate to allow a person to be convicted and punished for *murder* if the killing at issue was, in fact, a criminal homicide committed by that person's adversary. It likewise seems quite unjust and inappropriate to allow a felony participant to be convicted of felony murder if the killing at issue was, in fact, a criminal homicide committed by a responding police officer, bystander, or victim, simply because the felony participant "started" the conflict (by committing the antecedent felony) and because it was vaguely "foreseeable" that someone might end up dead. It is one thing to be held accountable for the crimes of one's "teammates," under basic agency and accomplice liability principles, but quite another to be held accountable for a criminal homicide committed by an adversary. Nevertheless, this appears to be a quite feasible outcome in most of the proximate cause states discussed herein.

On the other hand, none of these jurisdictions openly admit that this has happened or maintain that it is an acceptable result. Even in the most-criticized decisions discussed herein, none of the appellate courts actually acknowledge that their approach to felony murder and proximate causation potentially allows responding police officers, bystanders, and crime victims to commit criminal homicides with impunity and that such crimes can instead be "pinned on" the persons whose misdeeds started the affray. Nor do any of these courts openly assert that this would ever be a fair and acceptable result. The issue simply isn't discussed, even when it is clearly raised by the facts, which further suggests that this is, indeed, a quite untenable, unjust, and inappropriate result, which should be avoided.

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[276] *See Final Felony Murder Language in House Bill 3653*, *supra* note 233 (noting potential undermining of legislature's attempt to move Illinois to being "agency state" if Illinois Supreme Court interprets "causes"—in the new statutory phrase "he or she or another participant causes the death"—in broad, tort-law way, i.e., to include "where a death results as a direct and foreseeable consequence of a chain of events set in motion by [the] commission of the underlying felony," which could include killing committed "by a third person trying to prevent the commission of the felony"). Hence, if the Illinois Supreme Court continues to insist upon its *proximate cause* approach to causation, "then deaths caused by police responding to the underlying felony or by people resisting the felony . . . could all still be swept into this new version of the felony-murder law." *Id.*

If the goal is to avoid allowing felony murder liability for homicides committed by police officers, bystanders, and victims who are responding to a felony, there are a range of options for pursuing this goal.[277] Most dramatically, a jurisdiction could decide to rid itself entirely of traditional felony murder liability and thereby avoid any unjust felony murder convictions, though this seems quite unlikely in the jurisdictions at issue.[278] A jurisdiction could also choose to redefine felony murder such that it requires *both* that a felony participant actually kill the victim *and* that the killing be done with culpable *mens rea*, such as at least reckless disregard for life, as a basis for felony murder liability. This would be a powerful method of limiting injustice in this realm, but it would also mean rejecting the proximate cause approach to felony murder, which would require decisive action in the proximate cause jurisdictions at issue (which is a tall order).[279]

For a jurisdiction that wants to retain traditional felony murder liability but avoid allowing a felony participant to be convicted of (felony) murder for the killing of another participant by a resisting victim, bystander, or police officer, the statutory definition of felony murder could be amended to cover only the deaths of "nonparticipants." Some states have already adopted this approach as a way of limiting felony murder to the killing of "innocents," i.e., nonparticipants in the original felony.[280] A state could also choose to more directly pursue an agency approach to felony murder by specifically limiting felony murder to killings by "participants."[281] And some states have

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[277] This Part merely suggests some possibilities in this realm, with the intention of further exploring these possibilities and an approach for deciding among them in a future article.

[278] It could be argued that making *any* of the doctrinal "improvements" described hereafter simply helps to sustain a paradigm (i.e., felony murder) that should be rejected entirely—just as many of the doctrinal limitations on the current version of felony murder liability in America have arguably helped sustain a doctrine that has been cast aside entirely by its British homeland. *See supra* note 24. Nevertheless, since it appears that the most expansive and potentially unjust proximate cause approach to felony murder liability has been adopted by jurisdictions that *favor* broad felony murder liability, it seems unlikely that *these* jurisdictions are anywhere close to rejecting the felony murder paradigm entirely. Hence, limiting the injustice and unfairness of the doctrine (when it comes to homicides by responding nonparticipants) is a laudable and worthy goal.

[279] *See supra* notes 46–56 and accompanying text (noting jurisdictions that have eliminated traditional felony murder liability or modified it to include some level of culpable *mens rea* toward the death that resulted from a felony).

[280] *See, e.g.*, ALASKA STAT. ANN. § 11.41.100(a)(4) & (a)(5) (West 2002) (limiting first-degree felony murder to deaths of nonparticipants); N.J. STAT. ANN. § 2C:11-3(a)(3) (West 2017) (limiting felony murder to deaths of nonparticipants); N.Y. PENAL LAW § 125.25(3) (McKinney 2019) (limiting second-degree felony murder to deaths of nonparticipants).

[281] *See, e.g.*, ALA. CODE § 13A-6-2(a)(3) (2016) (limiting felony murder to when a "participant" causes death); ARK. CODE ANN. § 5-10-102 (2017) (limiting first-degree felony

already combined these approaches by specifically excluding the deaths of "participants" from felony murder coverage, while also requiring that a felony participant be the one who kills or "causes a death."[282]

Regarding the language of "kills" versus "causing a death," the felony murder statutes discussed throughout this Article overwhelmingly refer to "causing a death" rather than "killing." The concept of "causing a death" is certainly broader, which is often desired by jurisdictions that want to ensure that their felony murder statute(s) cover all deaths that are "caused" in connection with an attempt or commission of a covered felony. And the idea of "causing death," rather than "killing," is certainly preferred by jurisdictions that want to maintain a broad proximate cause approach to felony murder liability. On the other hand, if a jurisdiction does want to adopt a rigorous and limited agency approach to felony murder liability, using the term "kills," rather than a phrase like "causes a death," is much more likely to result in felony murder liability that is limited to deaths that are *directly* caused by agents, i.e., to killings by agents. The word "directly" could also be used to limit the concept of causation in this realm (e.g., "directly causes"), but using the word "kills" seems more likely to successfully limit felony murder liability to a true agency approach, if that is what is desired.

And if a jurisdiction desires only to prevent felony murder liability for actual criminal homicides committed by responding police officers, bystanders, and victims, i.e., the most specific version of the "danger" addressed herein, it could legislatively exempt killings that are chargeable homicides by nonparticipants, e.g., by excluding from the definition of felony murder any killing for which there is "probable cause" to charge a nonparticipant with a homicide offense. Such jurisdictions could either forbid the charging of felony murder in such cases, specifically provide for a "chargeable homicide" defense in felony murder cases where the killer was a nonparticipant, or both. Jurisdictions could also declare (by statute) that if a police officer, bystander, or victim is, in fact, charged with a homicide

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murder to when person or "accomplice" causes death); ME. REV. STAT. tit. 17-A, § 202 (1991) (limiting felony murder to when "participant" causes death); N.D. CENT. CODE ANN. § 12.1-16-01(1)(c) (West 1993) (limiting felony murder to when "participant" causes death).

[282] *See, e.g.*, COLO. REV. STAT. ANN. § 18-3-103(1)(b), (1.5) (West 2021) (limiting felony murder to death of nonparticipant caused by "participant"); CONN. GEN. STAT. ANN. § 53a-54c (West 2015) (limiting felony murder to death of nonparticipant caused by "participant"); OR. REV. STAT. ANN. § 163.115(1)(b) (West 2019) (limiting felony murder to death of nonparticipant caused by "participant"); UTAH CODE ANN. § 76-5-203(2)(d) (limiting felony murder to when "person other than a party" is "killed" by "party to the predicate offense") (West 2009); WASH. REV. CODE ANN. § 9A.32.030(1)(c) (West 1990) (limiting first-degree felony murder to death of nonparticipant caused by "participant").

crime for a particular killing, such a charge would automatically preclude any felony participant thereafter being charged or convicted of felony murder for the same death. This approach, however, seems to leave too much unchecked power in the hands of prosecutors to simply decide whom they prefer to prosecute, which is essentially the system already in existence in the proximate cause states at issue, and is unlikely to significantly impact "the problem" addressed herein.[283]

In addition to such statutory approaches to the problem, there is also a key interpretive paradigm at stake regarding the numerous felony murder statutes already in force, namely, the doctrines of intervening and superseding causation as a natural limitation on overbroad felony murder liability, even in proximate cause states. There is a strong doctrinal and intuitive argument to be made that although a *killing* by a nonparticipant victim, bystander, or police officer in response to a felony may be foreseeable and even justified, a criminal *homicide* by a nonparticipant in response to a felony is *not* foreseeable or justified. Hence, a killing that is a chargeable homicide should be seen as an intervening cause that breaks the causal chain between the original felony and the ultimate death. If a killing by a nonparticipant responding to a felony is itself a chargeable homicide—because it is an unlawful and unjustified killing—such a killing should be considered a *superseding* cause of the death that occurred, which precludes felony murder liability based merely upon a felony participant's attempt or commission of a preceding felony.

A number of the cases discussed in Part III.B that allowed for broad proximate cause felony murder liability—perhaps even for criminal homicides by nonparticipants—referenced the idea of intervening causation. Yet, of the cases that arguably allowed for felony murder liability based upon a homicide by a nonparticipant, none provided any significant analysis regarding why the killing by the nonparticipant should not be considered a "superseding" cause of the death that occurred—and thereby prohibit felony murder liability for the original felony participant(s) in the case. For appellate courts that desire to rationally limit felony murder liability in this realm, the doctrines of intervening and superseding causation appear to provide a helpful paradigm for placing reasonable limits on blatantly unfair and unjust

[283] Any of these statutory approaches would *seem* to be viable methods to prevent a result like the conviction of Wyatt Cheatham for the killing of his friend/co-felon, Stavian Rodriguez, by police officers. However, if there wasn't a video of what happened, a public whose attention was drawn to the incident, and a prosecutor willing to charge the officers who used lethal force unnecessarily (or a jury that would conclude that the shooting of Rodriguez was unjustified), it seems quite possible that Cheatham would, indeed, have been convicted of felony murder, perhaps even in a state that had adopted the statutory limitations noted herein.

outcomes, even in broad proximate cause jurisdictions, when it comes to chargeable homicides by nonparticipants.

On the other hand, as revealed by many of the cases discussed in Part III.B, if an appellate court is determined to affirm a felony murder conviction or to adopt a nearly all-encompassing and merely "but-for" approach to proximate causation in this realm, there may be little that a legislature can do to prevent such a result—beyond severely limiting or eliminating statutory felony murder liability or specifically limiting such liability to "killings" by "participants" in the underlying felony. Both appellate courts and legislatures play a critical role in this realm, and both appellate courts and legislatures should recognize that even in the context of broad felony murder liability—and even within a proximate cause approach to such liability—if a killing by a nonparticipant victim, bystander, or police officer is itself a criminal homicide, it should *not* result in a felony murder conviction based simply upon a defendant's participation in the original underlying felony. It's just too much.