"Once More Unto the Breach, Dear Friends, Once More": A Call to Re-Evaluate the Felony-Murder Doctrine in Wisconsin in the Wake of State v. Oimen and State v. Rivera

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"ONCE MORE UNTO THE BREACH, DEAR FRIENDS, ONCE MORE": A CALL TO RE-EVALUATE THE FELONY-MURDER DOCTRINE IN WISCONSIN IN THE WAKE OF STATE v. OIMEN AND STATE v. RIVERA

I. INTRODUCTION

Archaic methodologies are seldom reinvigorated in America's increasingly overwhelmed criminal justice system. In Wisconsin, however, the state supreme court recently expanded the scope of a criminal statute that traces its roots back to the sixteenth century English common law. Wisconsin Statutes Section 940.03, the felony-murder statute or its predecessors have remained in force despite repeated attempts to abolish them from the state's criminal code. Critics have continually battered the felony-murder doctrine since the Wisconsin Legislature began to revise the state's criminal code in 1956. After each of these analytical assaults on felony murder, however, the doctrine's political defenders rebuked the critics, and the statute remained in force.

The last attempt to abolish the doctrine began innocuously in 1982 when the Wisconsin Judicial Council formed its Special Committee on Homicide and Lesser-Included Offenses ("Special Committee"). The

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1. WILLIAM SHAKESPEARE, King Henry the Fifth, in THE COMPLETE WORKS OF WILLIAM SHAKESPEARE 458, 468 (Chancellor Press ed. 1987).

2. See infra note 15 and accompanying text.

3. The statute reads:

   940.03 Felony murder

   Whoever causes the death of another human being while committing or attempting to commit a crime specified in sec. 940.225(1) or (2)(a), 943.02, 943.10(2) or 943.32(2) may be imprisoned for not more than 20 years in excess of the maximum period of imprisonment provided by law for that crime or attempt.

   WIS. STAT. § 940.03 (1991-92).

4. See infra notes 52-59 and accompanying text.

5. See infra part II.B.

6. The Special Committee consisted of a distinguished panel of academics, judges, district attorneys, and criminal defense attorneys. The committee originally included Professor Walter Dickey, Chair; Wisconsin Supreme Court Justice Shirley Abrahamson; Judge Michael J. Barron; Asst. Atty. Gen. David J. Becker; William U. Burke; William M. Coffey; Francis R. Croak; Jerome L. Fox; State Sen. (now former Attorney General) Donald Hanaway; Asst. Dist. Atty. (now Judge) Michael Malmstadt; Judge Gordon Myse; Orlan L. Prestegard; Prof. Frank J. Remington; Asst. Pub. Def. (now Judge) Michael J. Rosborough; State Rep. James A. Rutkowski; Janet Schipper; and Prof. David E. Schultz. The committee reporter (now Executive Secretary of the Wisconsin Judicial Council) was James L. Fullin, Jr. Summary of Proceedings for Judicial Council Homicide and Lesser Included Offenses Committee 1, 1 (Sept.
Special Committee was originally charged with clarifying the criminal code's homicide provisions that had last seen major revision in 1956. Clarification soon turned to revision as the committee members realized "the confused state of the [homicide] law" in Wisconsin. The final recommendations of the committee formed the basis of the Wisconsin Legislature's revision of the homicide code that became effective on January 1, 1989. In this attempt to modernize and clarify the homicide statutes, however, the Special Committee and the legislature actually opened a breach in the historical and legal underpinnings of Wisconsin's felony-murder statute. The discussion which follows posits that this breach and the recent case law interpreting the new statute should be a signal to the legislature to once again evaluate whether the felony-murder doctrine should have a place in the modern criminal code.

In Part II, this Comment will chronicle the evolution of Wisconsin's felony-murder statute, from its common-law roots to its present incarnation under Wisconsin Statutes Section 940.03. Part III will focus on a
particularly vexing problem that states face when interpreting their felony-murder statutes: How far does criminal liability extend when a death is caused in the commission of a felony by someone other than the defendant? This question was only recently answered by the Wisconsin Supreme Court in *State v. Oimen*\(^{12}\) and *State v. Rivera*.\(^{13}\) The expansive reading the court gave to Section 940.03 in these cases makes a clear break with the historical development of the felony-murder doctrine in Wisconsin. This break with the past may give impetus to an eventual elimination of the felony-murder doctrine in this state. Accordingly, Part IV analyzes the justifications and criticisms of retaining the felony-murder doctrine in Wisconsin in the aftermath of *Oimen* and *Rivera* and concludes with a call to the Wisconsin Legislature to re-evaluate the necessity of Section 940.03.

**II. The Evolution of Felony Murder in Wisconsin**

Like many aspects of the present legal system in Wisconsin, the felony-murder doctrine (or felony-murder rule) had its genesis in the common law. Therefore, before one can chronicle the doctrine's further development in this state, it is first necessary to discuss the origins of felony murder under the English common law and its subsequent adoption in early American law.\(^{14}\)

**A. Felony Murder Under the Common Law**

Felony murder in its earliest incarnations\(^{15}\) under English common law provided that one who, in the commission of a felony, caused the

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12. 184 Wis. 2d 423, 516 N.W.2d 399 (1994).
13. 184 Wis. 2d 485, 516 N.W.2d 391 (1994).

> "If the act be unlawful it is murder. As if A. meaning to steal a deer in the park of B., shooteth at the deer, and by the glance of the arrow killeth a boy that is hidden in a bush: this is murder, for that the act was unlawful, although A. had no intent to hurt the boy, nor knew not of him. But if B. the owner of the park had shot at his own deer, and without any ill intent had killed the boy by the glance of his arrow, this had been homicide by misadventure, and no felony.

> "So if one shoot at any wild fowle upon a tree, and the arrow killeth any reasonable creature afar off, without any evil intent in him, this is *per infortunium* [misadventure]:"
death of another person was guilty of murder. Because the rule operated under strict liability, the defendant's intent to cause the death or the likelihood that death could result from the commission of the felony made no difference. All that was needed for the prosecution to prove guilt was the commission or attempted commission of a felony that resulted in a death.

It is important to note that at the time the doctrine originated there were very few crimes classified as felonies, and all of these were capital crimes. Thus, "it made no difference whether a felon was executed for one felony or another." Therefore, the harsh nature of the rule was curtailed by the fact that only the most egregious crimes carried with

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for it was not unlawful to shoot at the wilde fowle: but if he had shot at a cock or hen, or any tame fowle of another mans, and the arrow by mischance had killed a man, this had been murder, for the act was unlawfull."  

Id. at 308-09 (quoting Edward Coke, The Third Part of the Institutes of the Laws of England 56 (London, E & R Brooke 1797). Professor George Fletcher suggests that "[t]he sources of the rule are not judicial decisions but [actually] scholarly commentaries." George P. Fletcher, Reflections on Felony-Murder, 12 Sw. U. L. Rev. 413, 421 (1980). Fletcher also posits that it was not until 1762 that the formal statement of felony murder took hold. He attributes this to Sir Michael Foster's reconstruction of the law of homicide in Discourse of Homicide. George Fletcher, Rethinking Criminal Law 281-82 (1978) (citing Michael Foster, Discourse II of Homicide, in Crown Law 255, 258 (Oxford, Clarendon Press 1762)). For Foster's description of felony murder see infra note 16. While its origins may remain unclear, there is no dispute that by the 18th century the doctrine was in full force in English courts and thus carried over to the American colonies. Fletcher, supra, at 283.

16. 2 Wayne R. LaFave & Austin W. Scott Jr., Substantive Criminal Law § 7.5, at 206 (2d ed. 1986). The classic illustration of felony murder at common law is: A. shooteth at the poultry of B., and by accident killeth a man; if his intention was to steal the poultry, which must be collected from the circumstances, it will be murder by reason of that felonious intent; but if it was done wantonly and without that intention it will be barely manslaughter.


17. Oliver W. Holmes, Jr., The Common Law, in The Common Law & Other Writings 1, 57-58 (The Legal Classics Library ed. 1982).


19. 2 LaFave & Scott, supra note 16, at 208. The felonies at common law were: rape, sodomy, robbery, burglary, arson, mayhem, and larceny. Id.


The annotator of the case points out that a man can resist the perpetration of a felony by force even to the extent of killing the felon, and, therefore, if a person is engaged in
them the possibility of the felony-murder penalty. Nonetheless, the harshness of the rule led to much criticism among legal scholars, particularly in the last forty years as states began to abolish the common law and codify their criminal codes.\textsuperscript{22}

Because all states have replaced the criminal common law with statutory codes, these jurisdictions now face the difficult task of justifying a doctrine which no longer comports with modern theories of criminal law.\textsuperscript{23} Most jurisdictions (including Wisconsin) classify homicide offenses and penalties to reflect a theory of proportionality to the severity of the crime.\textsuperscript{24} Thus, one of the factual predicates of the original doc-

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the commission of a felony for which he can be lawfully killed, the presumption is that the felon would kill if necessary and such implied intent is sufficient to make it murder.

\textit{Id.}


\textsuperscript{23}. See 8 JOINT COMM. ON CONTINUING LEGAL EDUC. OF THE AMERICAN LAW INST., \textit{THE PROBLEM OF PUNISHING HOMICIDE} 29 (1962); see also Jo Anne C. Adlerstein, \textit{Felony-Murder in the New Criminal Codes}, 4 AM. J. CRIM. L. 249, 267 (1975-76). Fletcher discusses whether felony-murder evinces one of two modes of \textit{"unrefined ways of thinking about criminal responsibility."} Fletcher, \textit{supra} note 15, at 426. The first is the theory of \textit{"tainting"} which results from the causation of a death, regardless of the actor's culpability.

In thirteenth-century England, the assumption was that if one person caused the death of another, the killing itself upset the natural order; some response was necessary to expiate the killing and thus to expunge the taint. . . .

The model of taint and expiation haunts the way our courts think about criminal homicide. The felon must answer for a human death for no reason other than that he or his accomplice causes it. The felon is tainted by causing and the state responds by seeking expiation. It is important to distinguish expiating the taint of killing from justly punishing for faultfully causing death. The taint arises regardless of fault or blame; punishment is just only so far as it is proportional to fault. The notion of expiating a taint reflects a conception of the world that, if brought to consciousness, most lawyers would vehemently reject. Yet the notion of tainting might be one of the subconscious props for the contemporary persistence of the felony-murder rule.

\textit{Id.} The other mode of rationale is that someone who:

engages in a felony lowers the threshold of moral responsibility for the resulting death. If there is a principle behind this way of thinking, it is that a wrongdoer must run the risk that things will turn out worse than she expects. . . . If the act is wrong, even as the defendant conceives the facts to be, then she presumably has no grounds for complaining if the facts turn out to be worse than she expects. . . . If wrongdoing justifies disregarding mistakes about aggravating circumstances, then felonious wrongdoing can justify disregarding whether the deadly outcome of the felony is accidental or culpable.

\textit{Id.} at 427 (citations omitted).

\textsuperscript{24}. See WIS. STAT. § 940.01-10, -12 (1991-92). Classification of crimes into degrees of severity accomplishes the societal goal of proportionality between the severity of the crime
trine—that all felonies carried the same penalty—no longer exists. It is no surprise, then, that many jurisdictions have modified, limited, or abolished the felony-murder rule as a component of their criminal codes.25

Over the years jurisdictions have developed a variety of methods to limit the harsh effects26 of the felony-murder rule. English courts began to limit the applicability of the doctrine early in its history.27 This coin-


25. See generally Adlerstein, supra note 23. Three states have abolished the rule: two by statute, Hawaii and Kentucky; and one by judicial decision, Michigan. HAW. REV. STAT. §§ 707-711 (1972), KY. REV. STAT. ANN. § 507.020 (Baldwin 1985), and People v. Aaron, 299 N.W.2d 304, 328-29 (Mich. 1980); see also Nelson E. Roth & Scott E. Sundby, The Felony-Murder Rule: A Doctrine at Constitutional Crossroads, 70 CORNELL L. REV. 446, 446 n.6 (1985); Note, Felony Murder: A Tort Law Reconceptualization, 99 HARV. L. REV. 1918, 1918 n.2 (1986) [hereinafter Tort Law]. One state, Ohio, has incorporated felony murder into its involuntary manslaughter statute, thereby effectively eliminating it. Roth & Sundby, supra, at n.7; Tort Law, supra, at 1918 n.2.

It is also interesting to note that the felony-murder rule is no longer in effect in its birthplace jurisdiction. The English Parliament abolished it in 1957:

Where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence.

English Homicide Act, 1957, 5 & 6 Eliz. 2, ch. 11, § 1(1) (Eng.).


27. Moesel, supra note 20, at 455; see also 2 LAFAVE & SCOTT, supra note 16, at 207.

Judge James Fitzjames Stephen was particularly hostile to the Foster reformulation of the felony-murder doctrine, and this may have led to the English courts restraint in applying it. FLETCHER, supra note 15, at 283; see 3 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 75 (London, MacMillan 1883). Stephen’s discontent with the early formulations of the felony-murder rule is extremely important because he presided as trial judge in Regina v. Serné, 16 Cox Crim. Cases, 311, 313 (Central Crim. Ct. 1887), which is considered the birthplace of the modern felony-murder rule. FLETCHER, supra note 15, at 283. Serné is important in Wisconsin law because the Wisconsin Court of Appeals declared that Serné was the case upon which the Wisconsin common law crime of felony murder had developed. State v. Noren, 125 Wis. 2d 204, 209, 371 N.W.2d 381, 384 (Ct. App. 1985); see infra notes 103-04 and accompanying text.

Stephen’s Serné test is:

In my opinion the definition of the law which makes it murder to kill by an act done in the commission of a felony might and ought to be narrowed, . . . . I think that, instead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life, and likely in itself to cause death done for the purpose of committing a felony which caused death, should be murder. Serné, 16 Cox. Crim. Cases at 313.
cided with the courts' general alleviation of the entire original punishment scheme for the common-law crime of murder. The limits the English courts placed on felony murder were two-fold; they required either: (1) "that the defendant's conduct in committing the felony involve[d] an act of violence in carrying out a felony of violence," or (2) "that the death be the natural and probable consequence of the defendant's conduct in committing the felony."

American legislatures and courts, however, have remained remarkably varied in their approaches to the felony-murder doctrine. Although some states retain the language of the original common-law statement of the rule, in practice they limit the applicability to the two situations listed above. Other states specifically limit the doctrine to a certain set of inherently dangerous felonies. Still others require that the death caused be a "'natural and probable consequence' of the defendant's conduct."

The drafters of the Model Penal Code (the "Code") originally would have eliminated the rule, but the realization that it would be politically difficult to do so led them to include the doctrine, albeit in a much more restricted form. Nonetheless, only New Hampshire followed the example of the Code's felony-murder provision when it rewrote its crim-
inal statutes. In fact, the Code's felony-murder provision is one of its least followed recommendations.

As can be seen from the above discussion, the original common-law description of felony murder has diverged into a multitude of formulations. Each of these variations attempts to mollify the absolute liability created under the common law. To understand why each jurisdiction developed its own distinct felony-murder statute, it is necessary to trace the historical development of the doctrine in that state. Therefore, the next section will chronicle the evolution of felony murder in Wisconsin from its genesis to its current form.

B. Felony Murder in Wisconsin from Common Law to the 1988 Revision

1. Early Statutory Definitions

The felony-murder doctrine has existed in Wisconsin in one form or another since the state's early days as a federal territory. Like most other American jurisdictions, the doctrine was derived from the common-law definition of murder. The Wisconsin territorial statutes in 1839 provide an early codification of this common-law description: "That every person who shall commit the crime of murder, shall suffer the punishment of death for the same." Once Wisconsin achieved statehood, early statutory enactments broke this common-law crime into a system of three degrees of mur-

36. Roth & Sundby, supra note 25, at 473 n.152.
37. Fletcher, supra note 15, at 415.
38. Hogan v. State, 36 Wis. 226, 238 (1874). The Wisconsin Supreme Court in Hogan stated:

At common law, there were two crimes of homicide only, murder and manslaughter. Murder was the unlawful killing of a human being, with malice aforethought, express or implied; manslaughter was the unlawful killing, without malice, express or implied. But homicide was sometimes murder by malice imputed by law to the conditions under which it was committed.

The terms, express or implied, as applied to malice aforethought, led to some confusion in the books. Express malice was sometimes considered as malice positively appearing; sometimes as actual malice, whether positively or inferentially appearing. Implied malice was sometimes considered as malice, not positively, but inferentially appearing sometimes as malice not at all appearing, but imputed by law: constructive malice. This was not only confusion of terms, but led to confusion of guilt, leaving the distinction between murder and manslaughter sometimes doubtful.

39. Statutes of the Territory of Wisconsin § 1, at 347 (1839); see also 1 Thomas J. Hammer & Robert D. Donohoo, Substantive Criminal Law in Wisconsin 219-20 (1988).
der,\textsuperscript{40} with third-degree murder constituting felony murder.\textsuperscript{41} For example, the 1849 statutes provided that the killing of a human being \textquoteleft\textquoteleft[w]hen perpetrated without any design to effect the death, by a person engaged in the commission of any felony shall be murder in the third degree, and shall be punished by imprisonment in the state prison for not more than fourteen years nor less than seven years.\textsuperscript{42} The underlying felony was defined as \textquoteleft\textquoteleftan offense for which the offender, on conviction, shall be liable to be punished by imprisonment in a state prison.\textsuperscript{43}

This classification of murder into three degrees also distinguished between murder with express malice and murder with implied malice.\textsuperscript{44} Third-degree murder fell into the latter classification with the malice for the killing imputed from the commission of the underlying felony.\textsuperscript{45} In order for the malice to attach, this felony needed an \textquoteleft\textquoteleftintimate relation and close connection with the killing, and [could not] be separate, distinct and independent from it.\textsuperscript{46} If the felony was itself \textquoteleft\textquoteleftdangerous to life, the killing must be naturally consequent to the felony.\textsuperscript{47}

The connection between the commission of the felony by the defendant and murder was further delineated in \textit{Hoffman v. State}.\textsuperscript{48} In \textit{Hoffman}, the defendant was convicted of third-degree murder after engaging in a felonious assault on one patron of a tavern and then shortly after unintentionally killing another patron.\textsuperscript{49} The Supreme Court of Wisconsin overturned his conviction, concluding that there was no legal rela-

\begin{footnotesize}
\textsuperscript{40} Piemling \textit{v. State}, 46 Wis. 516, 519, 1 N.W. 278, 279 (1879). \textquoteleft\textquoteleftThe offense of murder in the three degrees, as defined by our statute . . . is but the adoption or introduction into the statute, of the common law description of the crime.\textsuperscript{41} \textit{Id.} at 519, 1 N.W. at 280 (citing \textit{People v. Enoch}, 13 Wend. 159 (1834)).

\textsuperscript{41} REV. STAT. OF WIS. ch. 133, § 2 (1849).

\textsuperscript{42} \textit{Id.}

\textsuperscript{43} \textit{State v. Hammond}, 35 Wis. 315, 318 (1874).

\textsuperscript{44} \textit{Piemling}, 46 Wis. at 519, 1 N.W. at 279.

\textsuperscript{45} It is sometimes stated that the object of this classification is to make a distinction between murder with express malice and murder with implied malice. In the killing without the design to effect death, there can be no actual malice or intention in the act itself; and in murder in the third degree such malice and felonious intent, necessary to make it murder, is derived from the felony by the commission of which, or in the commission of which, the killing happens. \textit{Id.} at 519, 1 N.W. at 280; \textit{see also} \textit{Hogan}, 36 Wis. at 226, 238.

\textsuperscript{46} \textit{Piemling}, 46 Wis. at 519, 1 N.W. at 279.

\textsuperscript{47} \textit{Id.} at 521, 1 N.W. at 281.

\textsuperscript{48} For further discussion of felonies that are dangerous to life see 2 LAFAVE & SCOTT, supra note 16, at 208-10.

\textsuperscript{49} 88 Wis. 166, 59 N.W. 588 (1894).

\textsuperscript{49} \textit{Id.} at 167-68, 59 N.W. at 589.
\end{footnotesize}
tionship between the two acts.\textsuperscript{50} In so doing, the court established a necessary causal link between the felony and the death:

There must be such a legal relation between the two that it can be said that the killing occurred by reason and as part of the felony, or, as in this case, that the killing occurred before the assault . . . was at an end; so that the assault had a legal relation to the killing, and was concurrent with, in part at least, and a part of, it, in an actual and material sense.\textsuperscript{51}

From these early statutes and their immediate successors the felony-murder doctrine remained much the same until the major revision of Wisconsin's criminal code became effective in 1956.\textsuperscript{52} The Wisconsin Legislative Council initiated the revision in 1949 and, after several partial drafts, a complete criminal code was introduced to the legislature in February 1953.\textsuperscript{53} The proposed code repealed the felony-murder statute,\textsuperscript{54} but this change had many opponents:

[T]he . . . code dropped the felony-murder . . . [concept] on the ground that punishing a [person] for unintended consequences had little place in a modern system of criminal law. But the critics of the 1953 code insisted on reestablishing felony-murder, although yielding to the extent of agreeing to treat the death as an aggravating factor in the principal felony.\textsuperscript{55}

\textsuperscript{50} Id. at 179, 59 N.W. at 592-93.

It is not sufficient that the plaintiff in error killed Herzog [the victim]; but, in order to render him guilty of murder in the third degree, at the time the homicide was committed it was requisite that he should have been engaged in an assault on Robert Risto [the victim of the original assault] with intent to do great bodily harm. This might occur in various ways, as if, during the assault, Herzog had come between the parties, and received a mortal blow or wound, intended for or aimed at Risto, or he had been intentionally stricken down by a mortal blow or wound in an attempt to reach Risto.

\textsuperscript{51} Id. at 178, 59 N.W. at 592.

\textsuperscript{52} 1 \textsc{Hammer} \& \textsc{Donohoo}, supra note 38, at 219-20.

\textsuperscript{53} Platz, supra note 8, at 351-52.

\textsuperscript{54} 5 \textsc{Wisconsin Legislative Council, Judiciary Committee Report on the Criminal Code 265 (1953).}

\textsuperscript{55} Platz, supra note 8, at 357 (footnotes omitted). The specific reasons for the retention of the felony-murder doctrine in the 1955 revision are difficult to ascertain beyond the usual mention of the politically unpalatable nature of removing any crime from the code. However, one set of commentators has provided some insight:

Professor Frank Remington, who participated in development of the revised criminal code, recalls that the late Judge Herbert Steffes was particularly influential in the decision to retain felony murder. The primary reason for retaining the offense was that its penalty, which was less than that for second-degree murder, provided an alternative charge which might be useful in plea bargaining.

Dickey et al., supra note 6, at 1366.
Thus, the 1955 enactment, while retaining felony murder,\textsuperscript{56} dropped the previous statutory language that the murder be committed "without any design to effect death."\textsuperscript{57} Additionally, following similar changes in other jurisdictions,\textsuperscript{58} the new statute included the new condition that the death be a "natural and probable consequence of the commission of or attempt to commit the felony."\textsuperscript{59}

In 1977, Wisconsin legislators once again attempted to repeal the felony-murder statute; this time the move was made during the legislature's reclassification of the penalties for criminal code offenses.\textsuperscript{60} As in the

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\textsuperscript{56} While the code retained felony murder under the auspices of third-degree murder, felony murder was no longer a independent crime, but an aggravation of the underlying felony, the maximum penalty of which was increased by 15 years. Platz, supra note 8, at 370.
\textsuperscript{57} See Wis. Stat. § 940.03 (1955).
\textsuperscript{58} Dickey et al., supra note 6, at 1365.
\textsuperscript{59} The full statute provided:
940.03 Third-degree Murder. Whoever in the course of committing or attempting to commit a felony causes the death of another human being as a natural and probable consequence of the commission of or attempt to commit the felony, may be imprisoned not more than 15 years in excess of the maximum provided by law for the felony. Wis. Stat § 940.03 (1955).
\textsuperscript{60} One commentator noted that the 1955 felony-murder statute appeared to be a hybrid between the traditional criminal law definition of felony murder and its close cousin in civil law jurisdictions which treats the killing in the course of another crime as a penalty-enhancer to the underlying crime.

The statute in Wisconsin, which is somewhat unique, appears to be a "cross" between the approach of the common law and the civil law. Under the Wisconsin statute, it is murder in the third degree when a person causes the death of another as a natural and probable consequence of the commission of or attempt to commit a felony; and the offender "may be imprisoned not more than 15 years in excess of the maximum provided by law for the felony." It resembles common law felony-murder because the offense is called 'murder' and because it involves an "unintended" homicide. At the same time, it closely resembles the civil law doctrine because the basis for punishment is the "felony", i.e., the punishment for the felony may be increased by 15 years because it resulted in the commission of a homicide.

2 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW 205 (14th ed. 1979).
\textsuperscript{60} 1 HAMMER & DONOHOO, supra note 38, at 220. The reasons for this renewed attempt to repeal the felony-murder statute were listed in the legislative record:
The bill proposing the repeal of third-degree felony-murder, Senate Bill 14, section 28, 1977 S.B., included a note explaining that third-degree felony-murder was superfluous because a person who caused another's death in the course of committing a felony could be convicted under one of the other homicide statutes. The proponents explained the proposed repeal as follows:
"Present law already permits the sentencing of offenders on multiple counts for different crimes arising from the same act. For example, a person committing homicide while committing a robbery can be sentenced to concurrent or consecutive terms for both robbery and homicide. Therefore, the third degree murder statute is unnecessary." State v. Gordon, 111 Wis. 2d 133, 144, 330 N.W.2d 564, 568-69 (1983)(quoting S. 14, 1977 Leg. Sess. § 28.).
past, this attempt failed; however, the legislature did abolish felony murder as a separate offense and included it as one variation of second-degree murder.\(^6\)

Although there were two major revisions of the felony-murder statute within two decades, it is surprising that there is little case law interpreting the precise language of the statute. The four cases that follow, however, may provide insight into the evolving implementation of this common-law derived doctrine in a legal world increasingly hostile to its validity.

2. Wisconsin Case Law Interpretations of Felony Murder

In *Brook v. State*,\(^6\) the issue was whether a trial court erred when it denied a defendant's request to instruct the jury with alternative instructions for second-degree murder, third-degree murder, or manslaughter.\(^6\) The defendant and his brother burglarized a school and left the scene in the defendant's car.\(^6\) Shortly after leaving the scene, they were detained by a police officer investigating the dangling front license plate on the defendant's car.\(^6\) The police officer neither had knowledge of the burglary nor suspected the defendant's involvement in a felony.\(^6\) The defendants shot and killed the officer and disposed of the squad car and the body.\(^6\) The defendant was convicted of first-degree murder and appealed this conviction contending that the officer's death occurred while the defendant was engaged in an escape after the burglary.\(^6\) For this reason the defendant contended the jury should have been given instructions for third-degree murder since the death was in actuality a felony murder.\(^6\)

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61. There is no official record as to why felony murder was amended to the second-degree murder statute. *Gordon*, 111 Wis. 2d at 144, 330 N.W.2d at 569. The new statute provided: 940.02 Second-degree Murder. Whoever causes the death of another human being under either of the following circumstances is guilty of a Class B felony:

1. By conduct imminently dangerous to another and evincing a depraved mind, regardless of human life; or
2. As a natural and probable consequence of the commission of or attempt to commit a felony.

**Wis. Stat.** § 940.02 (1977).

62. 21 Wis. 2d 32, 123 N.W.2d 535 (1963).
63. *Id.* at 40, 123 N.W.2d at 539.
64. *Id.* at 35, 123 N.W.2d at 537.
65. *Id.*
66. *Id.* at 41, 123 N.W.2d at 539.
67. *Id.* at 36-37, 123 N.W.2d at 537.
68. *Id.* at 41, 123 N.W.2d at 539.
69. *Id.* at 40-41, 123 N.W.2d at 539.
The supreme court rejected this argument by declaring that even if the facts as given by the defendant were truthful, the death would still not be a felony murder.\(^\text{70}\) Further, the court stated that even if the officer had been in hot pursuit of the defendants for the commission of the burglary, it had "grave doubt[s]" that this death would be "a natural and probable consequence of the commission' of the burglary."\(^\text{71}\) The court quoted the legal relationship test from \textit{Hoffman}\(^\text{72}\) while declaring that the officer's death did not "occur by reason of or as part of such burglary."\(^\text{73}\) By adopting the \textit{Hoffman} analysis the court implicitly stated that even if the express language of the felony-murder statute had changed since the days of \textit{Hoffman}, the court intended to apply a similar test to determine the causal relationship between the felony and the death. It is also possible that \textit{Brook} reflects the court's reluctance to allow defendants a wide latitude in using felony murder as a lesser-included offense in homicide prosecutions. Whatever the policy reason for its holding, the court clearly placed the felony-murder statute within a historical context to reach its conclusion.\(^\text{74}\)

The 1958 Wisconsin Supreme Court decision of \textit{State v. Carlson}\(^\text{75}\) placed new restrictions on the operation of the felony-murder statute. Police arrested the defendant after an early morning fire in a Milwaukee apartment building claimed the life of a woman who was sleeping inside.\(^\text{76}\) The defendant was charged and convicted of both arson\(^\text{77}\) and felony murder\(^\text{78}\) for causing a death as a "consequence of the arson."\(^\text{79}\) The trial court sentenced the defendant to prison for fifteen years for arson and not more than thirty years for the felony murder, with the sentences running concurrently.\(^\text{80}\)

\(^{70}\) \textit{Id.} at 41, 123 N.W.2d at 539. "[T]here is no evidence that the burglary had even been detected at the time Officer Eiler stopped defendant's car. Therefore, there was no connection between the burglary and such stopping." \textit{Id.}

\(^{71}\) \textit{Id.}

\(^{72}\) See supra text accompanying notes 48-51.

\(^{73}\) \textit{Brook}, 21 Wis. 2d at 41, 123 N.W.2d at 540.

\(^{74}\) The importance that the Wisconsin courts place on the historical development of the felony-murder doctrine is not unique to this jurisdiction. Many state-courts, when grappling with the interpretive problems of the doctrine, reach back to common-law reasoning to justify the continuing existence of the rule. See \textit{Weick v. State}, 420 A.2d 159, 162-63 (Del. 1980); \textit{Commonwealth v. Matchett}, 436 N.E.2d 400, 409 (Mass. 1982).

\(^{75}\) 5 Wis. 2d 595, 93 N.W.2d 354 (1958).

\(^{76}\) \textit{Id.} at 597, 93 N.W.2d at 355.

\(^{77}\) Wis. Stat. § 943.02(1)(a) (1957).

\(^{78}\) Wis. Stat. § 940.03 (1957).

\(^{79}\) \textit{Carlson}, 5 Wis. 2d at 596-97, 93 N.W.2d at 355.

\(^{80}\) \textit{Id.}
The supreme court held that the defendant could not be convicted of both arson and felony murder. The court stated that the 1956 revision to the statute changed the operation of the felony-murder doctrine. The court stated, "[p]utting it in different words, . . . [felony murder] is a combination of a felony or attempted felony, and the fact that in the commission or attempt, a death was caused." Thus, the court concluded that the felony-murder charge actually added an additional element to the arson—the causing of a death—affecting the maximum sentence. The charging and conviction of both the underlying felony and felony-murder violated the defendant's constitutional protection against double jeopardy. The jury could still receive instructions for felony murder and arson, but the arson instruction would be considered a lesser-included offense to the felony murder.

While Brook and Carlson dealt with the felony-murder statute before it had been encapsulated in second-degree murder; State v. Noren specifically addressed the "natural and probable consequence" language of the post-1977 revised statute. In Noren, the court of appeals faced a new factual situation. The defendant, while committing a robbery, struck the victim three times with his closed fist. The victim was extremely drunk at the time and suffered from a pre-existing respiratory condition. The defendant's assault caused the victim to lose consciousness and he later

81. Id. at 607-08, 93 N.W.2d at 361. Because the sentences were concurrent, the court stated that the defendant really suffered no injury, but it nonetheless reversed the judgment in order to clarify the record. Id.
82. See id.
83. Id. at 608, 93 N.W.2d at 361.
84. Id. The court stated:
The information charging [the] defendant with third-degree murder in effect charged the arson and alleged the causing of the death as an additional element affecting the maximum sentence; the verdict of guilty of third-degree murder in effect found the defendant guilty of arson and of the additional element of causing the death; upon such conviction the defendant was properly sentenced to imprisonment for not more than thirty years (fifteen, the maximum for the arson . . ., plus fifteen, the additional number of years provided by [the felony-murder statute]).
85. Id.
86. Id. "There was no occasion for a separate information charging arson and if the two proceedings had been tried separately, jeopardy in the first would have been a defense in the second." Id.
87. Id. at 608-09, 93 N.W.2d at 361.
88. 125 Wis. 2d 204, 371 N.W.2d 381 (Ct. App. 1985).
89. Id. at 206, 371 N.W.2d at 383.
90. Id. The victim's blood alcohol content was .38% at the time of his death; in addition the victim suffered from a condition that impeded his body from removing mucus from his lungs. Id.
died.\textsuperscript{91} Noren was convicted of second-degree murder; he appealed, arguing that there was insufficient evidence to prove beyond a reasonable doubt that the victim’s death was a natural and probable consequence of the felonious robbery.\textsuperscript{92}

The court of appeals rejected the defendant’s claim and for the first time defined “natural and probable” under the felony-murder statute.\textsuperscript{93} The court applied a proximate cause test to determine whether a death was the natural consequence of a felony.\textsuperscript{94} Specifically, the court required that, in order to be a natural consequence of the robbery, “the defendant’s conduct . . . [must be] a substantial factor in causing the death.”\textsuperscript{95}

In addition the court defined “probable” by declaring that the term referred to the “foreseeability of death.”\textsuperscript{96} The court then assigned the level of foreseeability necessary for criminal liability to attach under the felony-murder statute.\textsuperscript{97} First, the court listed the various levels of foreseeability necessary for liability under a variety of civil and criminal situations.\textsuperscript{98} Next, the court reiterated the policy reasons for the inclusion of the “natural and probable consequence” language in the statute.\textsuperscript{99} Stat-
ing that the phrase was "intended to limit felony-murder liability to situations where the defendant's conduct creates some measure of foreseeable risk of death," the court attached a requirement that the level of foreseeability needed for felony murder should be the same as that required for depraved mind murder; that is, the acts causing death must be inherently dangerous to life. The court supported its adoption of the "inherently dangerous standard" by stating that most other jurisdictions followed this test as well.

Finally, the court concluded its analysis of the felony-murder statute by tracing the inherently dangerous test, to Judge Stephen's decision in Regina v. Serné. In adopting the inherently dangerous test, the court stated that it was persuaded that Wisconsin's felony-murder statute originated from Serné and therefore the state should also adopt the reasoning of the case.

The last case focusing on the felony-murder doctrine in Wisconsin is the most important because it gave ammunition to critics of the doctrine during the 1988 revision of the homicide statutes. In 1983, concurrent with early meetings of the Special Committee, the Wisconsin Supreme

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100. Id. (citing Model Penal Code § 201.2 cmt. 4C at 37 (Tentative Draft No. 9 1959)). See supra note 35 and accompanying text. It is interesting that the Wisconsin Court of Appeals looked to the Model Penal Code for justification of its new foreseeability test, since the Code's recommendations on felony-murder are one of its least implemented provisions. See supra note 37 and accompanying text.

101. Noren, 125 Wis. 2d at 208, 371 N.W.2d at 384. "We apply this test to felony-murder because it requires a high degree of foreseeability, thereby implicitly requiring greater culpability than lesser grades of homicide." Id.


103. 16 Cox Crim. Cases 311 (Central Crim. Ct. 1887); see supra note 27 and accompanying text.

104. Noren, 125 Wis. 2d at 209, 371 N.W.2d at 384. The court provides no basis for this claim other than most other courts that adopted the inherently dangerous test relied on Serné for their justification. The influence of Judge Stephen's reasoning in Serné is remarkable. The English case was decided in 1887, decades after the first codification of the felony-murder rule in Wisconsin. See supra notes 38-43 and accompanying text. Additionally, eight years prior to Serné, the Wisconsin Supreme Court had already required that an act constituting a felony under the early felony-murder statutes must in itself be dangerous to life. Pliemling v. State, 46 Wis. 516, 521, 1 N.W. 278, 281 (1879); see supra notes 44-47. Thus, the court's claim that Wisconsin's felony-murder statute originated from Serné is dubious at best. A more accurate statement may be that Wisconsin's felony-murder doctrine developed during a period of hostility to the harsh operation of the doctrine at common law similar to that under which Serné originated. Therefore, any future reliance by Wisconsin courts on this claim must be questioned.
Court in *State v. Gordon* severely limited the usefulness of felony murder as a second-degree murder offense.

In *Gordon* the defendant had been convicted of kidnapping, robbery, burglary, and second-degree murder (felony murder). The trial court found that kidnapping was the underlying offense for the felony-murder conviction and sentenced Gordon to fifteen years for the kidnapping and fifteen years for the felony murder. Gordon appealed arguing that her separate convictions and sentencing for the felony murder and the lesser-included offense of kidnapping violated her constitutional rights against double jeopardy. The supreme court, similar to its ruling in *Carlson*, agreed, vacated the kidnapping conviction, and remanded for resentencing.

The court held that when the state legislature revised the felony-murder statute in 1977 and included it under second-degree murder, the legislature "did not expressly authorize punishment for both the underlying felony and felony murder." Since the legislature did not show a clear intent to allow cumulative sentencing for the felony murder and the underlying felony, Gordon’s sentence for kidnapping violated double jeopardy.

The upshot of *Gordon* was that defendants who were committing a Class B felony at the time they caused the death of someone could only be convicted of and be sentenced for either the underlying felony or the second-degree murder (felony murder). Since the cumulative effects of felony-murder sentencing were no longer possible, the benefit to the state during plea negotiations was also gone. The court gutted one of the lingering uses for the felony-murder statute on the basis that there was no clear way to establish the legislature’s intent because there were

105. 111 Wis. 2d 133, 330 N.W.2d 564 (1983).
106. *Id.* at 134, 330 N.W.2d at 564.
107. *Id.* at 134-35, 330 N.W.2d at 564.
108. *Id.* at 135, 330 N.W.2d at 564.
109. *Id.* at 136, 330 N.W.2d at 565.
110. *Id.* The court based its decision on the United States Supreme Court ruling in Missouri v. Hunter, 459 U.S. 359 (1983), which held that the Double Jeopardy Clause (in cases of cumulative sentences imposed in a single trial) prevents the court from sentencing a defendant for a greater term than the legislature intended. *Gordon*, 111 Wis. 2d at 137, 330 N.W.2d at 565.
112. In the case of a Class C or D felony, cumulative sentencing could still be allowed under *Gordon*. *Id.* at 142, 330 N.W.2d at 568.
113. See supra note 55.
no records of why felony murder had been attached to second-degree murder in the 1977 revision.114

These four cases provide the background that the Wisconsin Judicial Council's Special Committee on Homicide and Lesser-Included Offenses was confronting when it began its revision of the criminal code in 1982. The past legislative and judicial development of the felony-murder doctrine provided a starting point for the Special Committee and led to the eventual adoption of the current felony-murder statute in 1988.

C. A History of the 1988 Revision of Section 940.03

When the Wisconsin Judicial Council appointed its Special Committee in 1982, the members of the committee agreed early on that the main task before them was to clarify the homicide statutes that were left in a confused state after the 1956 revisions.115 Thus, for the next two years the Special Committee met regularly and arduously went about this difficult task. While they simply meant to clarify the statutes and not make changes to the substantive criminal law in Wisconsin, it became readily apparent that this committee, like those before it, would attempt to repeal the felony-murder statute.116

At the outset several members of the committee stated their belief that the felony-murder statute was no longer necessary.117 They argued that any murder committed in the course of a felony could be charged under one of the other proposed felony statutes.118 It also was apparent

114. See supra notes 60-61 and accompanying text.
115. Summary of Proceedings for Judicial Council Homicide and Lesser Included Offenses Committee 1-15 (Sept. 10, 1982) (unpublished, on file in HOMICIDE REVISION, supra note 6); see also Dickey et al., supra note 6, at 1328.
116. See supra note 9; see, e.g., Draft O: Tentative Revision of Homicide Statutes 1 (Nov. 5, 1982) (unpublished, on file in HOMICIDE REVISION, supra note 6).
117. Summary of Proceedings for Judicial Council Homicide and Lesser Included Offenses Committee 24 (Nov. 11, 1982) (unpublished, on file in HOMICIDE REVISION, supra note 6); see Dickey et al., supra note 6, at 1367.
118. Summary of Proceedings for Judicial Council Homicide and Lesser Included Offenses Committee 25 (Nov. 11, 1982) (unpublished, on file in HOMICIDE REVISION, supra note 6). The summary states:

The committee continued to try to imagine crimes which might not be first or second degree murder but which would be covered by felony murder. Mr. Malmstadt gave the example of a person who pours gasoline on the floor of the apartment above that of his intended victims and then lights a match to it. The committee members agreed that this would constitute first degree murder. Mr. Becker gave the example of an armed robber who is backing out the door with his gun trained on the customers in the store when another customer coming through the door bumps his arm causing the gun to discharge. Prof. Dickey thought this could be second degree murder because pointing a loaded gun at people in that situation evinces a depraved mind. Mr. Becker
to the Special Committee, however, that it would be politically unpopular to repeal the statute, and therefore it might be expedient to come up with an alternative statute to the currently existing one.\textsuperscript{119}

Accordingly, throughout the remaining meetings the Special Committee would contend with the felony-murder issue on two levels. First, the members agreed to recommend to the Judicial Council that the legislature repeal the last vestiges of felony murder in Wisconsin\textsuperscript{120}, but second, if this was politically impossible, the Special Committee would devise a new felony-murder statute more consistent with the overall approach of the revised homicide statutes.\textsuperscript{121}

One of the first ideas the Special Committee discussed was whether to include felony murder as a subsection of first-degree murder, but to limit it to killings occurring in the course of a specific and limited number of felonies.\textsuperscript{122} While the idea to include felony murder as a class of first-degree homicide was later dropped out of political necessity, the limitation of the statute's applicability to specific underlying felonies became an integral part of the eventual statute.

Accordingly, the early discussions quickly laid down a predicate that the new statute would activate only if a death was caused in the commission or attempted commission of a set number of felonies.\textsuperscript{123} The initial list was to include all Class B felonies.\textsuperscript{124} In addition, felony murder

\textsuperscript{119} Id. at 25-26.

\textsuperscript{120} Three members of the Special Committee, Professor Remington, Judge Barron, and Senator Hanaway, specifically mentioned the difficulty they perceived in getting the Wisconsin Legislature to abolish felony murder. Id.

\textsuperscript{121} Minutes of the Meeting of the Judicial Council 3 (Dec. 17, 1982) (unpublished, on file in \textsc{Homicide Revision}, supra note 6).

\textsuperscript{122} See Memorandum from Jim Fullin, Executive Secretary and Reporter, Wisconsin Judicial Council, to Homicide and Lesser Included Offenses Committee 11-12 (Nov. 5, 1982) (unpublished, on file in \textsc{Homicide Revision}, supra note 6). \textit{Compare} Draft O, supra note 113 ("This draft repeals Wisconsin's "felony murder" statute.") \textit{with} Draft R: Tentative Revision of Homicide Statutes 5 (Dec. 10, 1982) (unpublished, on file in \textsc{Homicide Revision}, supra note 6) ("Whoever causes the death of another human being while violating or attempting to violate [enumerated felonies] is guilty of a class A Felony.").

\textsuperscript{123} Summary of Proceedings for Judicial Council Homicide and Lesser Included Offenses Committee 26 (Nov. 11, 1982) (unpublished, on file in \textsc{Homicide Revision}, supra note 6). The Special Committee noted that the Model Penal Code referred to robbery, rape or deviate sexual intercourse by force or threat, arson, burglary, kidnapping, or felonious escape as serious felonies. Id.

\textsuperscript{124} Id. at 12.
would now be classified as a Class A felony,\textsuperscript{125} thereby increasing the maximum penalty for felony murder from ten years to life imprisonment.\textsuperscript{126} To minimize changes to the present statute, there was some discussion over whether to include the requirement that the death be a natural and probable consequence of the crime, but the Special Committee decided that this approach was really an alternative to a specific felonies limitation and it quickly dropped the idea.\textsuperscript{127} One member of the Special Committee offered that if the statute was going to enumerate specific felonies to limit the harsh effects of the felony-murder rule, there should be no corresponding limitation placed on how the death was caused.\textsuperscript{128}

This approach seems to have been accepted by the Special Committee as a whole:

Prof. Remington stated that the intent of the committee is to include any homicide caused in the commission or an attempt to commit any of [the] enumerated offenses. There may be disputation about when a felony begins and ends, but there need not be any litigation over whether the homicide was foreseeable when the criminal enterprise was undertaken. . . . If we’re going to have to litigate foreseeability or causal connection, we might as well

\textsuperscript{125} Summary of Proceedings for Judicial Council Homicide and Lesser Included Offenses Committee 26 (Nov. 11, 1982) (unpublished, on file in \textit{HOMICIDE REVISION}, \textit{supra} note 6).

\textsuperscript{126} Minutes of Meeting of the Judicial Council 3 (Dec. 17, 1982) (unpublished, on file in \textit{HOMICIDE REVISION}, \textit{supra} note 6).

\textsuperscript{127} Summary of Proceedings for Judicial Council Homicide and Lesser Included Offenses Committee 11-12 (Nov. 5, 1982) (unpublished, on file in \textit{HOMICIDE REVISION}, \textit{supra} note 6).

\textsuperscript{128} University of Wisconsin Law Professor Frank Remington, who was a member of the original 1956 revision committee, believed that the 'natural and probable consequences' rule was developed as an alternative to the specified felonies approach:

Jurisdictions which restrict the underlying felony to a few heinous offenses do not need the natural and probable consequences doctrine, too. . . . Even when the victim dies of a heart attack from fright rather than from wounds inflicted by the weapon, the courts have sustained felony murder convictions. And there is no reason why they shouldn’t. After all, the purpose of felony murder is to deter armed burglary and armed robbery. Why litigate the foreseeability of the death? Whether the [clerk] dies because you shoot him or because he has a heart attack when you draw your gun, you’ve had it. There is fair warning in the statute that if you cause death while embarked on these crimes you’ll get life imprisonment whether or not you intend to kill. If that seems too hard and inflexible, Wisconsin could go back to the penalty enhancement approach, giving the judge some discretion about the length of the penalty. But the states that have gone the hard-line route have had the least trouble in terms of litigation and appeals on foreseeability.

not have the statute at all. He hoped it was clear that if the de-
fendant causes the death while committing or attempting to com-
mit a Class B felony, no further inquiry into culpability is 
required. Even if the defendant is completely without negligence 
in running over someone while making off with the proceeds of 
an armed robbery, he would be liable. The committee agreed that 
this was its intent. However, it was unlikely to be reflected in the 
statutory note because the bill will call for the abolition of felony 
murder; and only if this is unacceptable to the legislature will fel-
ony murder be restored through amendment (amendments do not 
usually carry Judicial Council Notes).129

It is therefore apparent that if the felony-murder statute could not be 
repealed, the alternative statute would limit the troublesome aspects of 
the doctrine by only affixing liability under a specific set of underlying 
felonies. The exact causal nature between the death and the defendant 
was not intended to be limited beyond the usual "substantial factor" 
test.130

In June 1983, the proposed homicide bill was completed and sent to 
the Judicial Council for approval with the express intention to repeal 
felony murder set forth; however, the "alternative" felony-murder stat-
ute was "kept somewhat under wraps until such time as the proposed 
repeal might meet significant political resistance."131 Members of the 
Special Committee presented the bill to various members of the criminal 
bar132 and it was one of these constituencies—the Wisconsin District At-
torneys Association (WDAA)—that would first raise resistance to the 
proposed repeal of felony murder.133 At their 1985 Winter Conference,

129. Summary of Proceedings Homicide and Lesser Included Offenses Committee 8-9 
This opinion may not have been unanimous, however. At least one member of the Special 
Committee was leery about expanding the potential causal liability under the felony-murder 
statute:

Regarding felony murder, [Mr. Croak] said, some states have a rule that if the police 
kill one of two escaping bank robbers, the other one can be charged with felony murder 
in his death. [Mr. Croak] certainly wouldn't advocate such a rule for Wisconsin.

Summary of Proceedings Homicide and Lesser Included Offenses Committee 6 (Sept. 10, 
1982) (unpublished, on file in HOMICIDE REVISION, supra note 6).

130. Summary of Proceedings Homicide and Lesser Included Offenses Committee 9 

131. Dickey et al., supra note 6, at 1369.

132. Presentation by David J. Becker to Wisconsin District Attorneys Association Sum-
mer Conference 1 (June 30, 1983) (unpublished, on file in HOMICIDE REVISION, supra note 6).

133. Letter (including resolution) from John E. Fryatt, President, Wisconsin District At-
torneys Association, to James Fullin, Wisconsin Judicial Council 1-3 (Feb. 5, 1985) (unpub-
lished, on file in HOMICIDE REVISION, supra note 6).
the WDAA proposed that felony murder be retained, however, it would accept the "alternative" version of the statute that the Special Committee had kept under wraps with the addition of several more underlying felonies.\textsuperscript{134} Wisconsin Attorney General Bronson La Follette concurred with the WDAA and supported its proposed amendments.\textsuperscript{135}

Professor Remington feared that the WDAA proposal could lead to a "Christmas Tree" effect with additional underlying felonies added to the statute until it was unworkable.\textsuperscript{136} He again stated his preference "to limit the statute to the clearly dangerous situations and, as to those, make clear that there is liability if death is caused (no matter how it occurs)."\textsuperscript{137}

The Judicial Council accepted the WDAA amendments for the most part,\textsuperscript{138} and the bill was presented to the Wisconsin Senate.\textsuperscript{139} The "1985 Senate Bill 279 included felony murder in substantially the form approved by the Judicial Council committee as its "fall-back" position."\textsuperscript{140} Thus, the bill revised felony murder "by limiting it to homicides caused in the commission or attempt to commit arson, armed burglary, armed robbery, first-degree sexual assault or second-degree sexual assault by use or threat of force or violence."\textsuperscript{141} The penalty was increased from a Class B to a Class A felony.\textsuperscript{142} The Senate's Committee on Judiciary and Consumer Affairs, however, recommended an amendment that would repeal the felony-murder statute rather than changing it to the alternative version.\textsuperscript{143} The amendment was passed by the Senate and the bill

\textsuperscript{134} Id. at 1-2; see Dickey et al., supra note 6, at 1369.
\textsuperscript{135} Letter from Bronson La Follette, Wisconsin Attorney General, to Judicial Council 1-2 (Feb. 7, 1985) (on file in HOMICIDE REVISION, supra note 6).
\textsuperscript{136} Letter from Frank Remington, University of Wisconsin Law School Professor of Law, to David Becker, Wisconsin Assistant Attorney General, 1 (Feb. 12, 1985) (on file in HOMICIDE REVISION, supra note 6).
\textsuperscript{137} Id. at 2.
\textsuperscript{138} Minutes of the Meeting of the Judicial Council 4-9 (Apr. 19, 1985) (unpublished, on file in HOMICIDE REVISION, supra note 6).
\textsuperscript{139} Dickey et al., supra note 6, at 1369.
\textsuperscript{140} Id.
\textsuperscript{141} Summary of Judicial Council Homicide Bill (LRB-1519/2) (unpublished, on file in HOMICIDE REVISION, supra note 6).
\textsuperscript{142} Id. at 6.
\textsuperscript{143} Dickey et al., supra note 6, at 1369. As noted by Dickey, this action drew considerable criticism from a Milwaukee Journal editorial:

Wisconsin needs a stronger felony murder statute to adequately punish those who kill while committing, or attempting to commit, certain crimes. Such slayings ought to be treated as first-degree murder, and the offenders should be punished with life imprisonment.
was sent to the Assembly, but it never reached a floor vote and thus died at the end of the legislative session.144

When passage of the bill was attempted again during the 1987 floor session it was apparent that a major roadblock in passing the homicide revisions was the reluctance on the part of many senators to the harsh penalty prescribed by the felony-murder statute.145 Therefore, the Judicial Council proposed that instead of making felony murder a Class A felony it should attach "a penalty of up to twenty years in excess of the maximum prescribed for the underlying felony."146 The deadlock over felony murder dissipated. The entire homicide revision was attached to a budget review bill and passed at the end of the 1987-88 legislative session.147 Its effective date was January 1, 1989.148

The above discussion presents a cogent example of how historically difficult any attempt to repeal the felony-murder doctrine in Wisconsin has been. While the Special Committee originally wanted to abolish felony murder, the end result of the committee's hard work was instead an entirely new felony-murder statute. This new statute severed the historical continuity under which the felony-murder doctrine had developed in Wisconsin. In the past, the main restriction on the operation of the felony-murder doctrine had been the necessity that the death be a natural and probable consequence of the felony. This restriction was dropped under the new statute and replaced with the specific enumerated felonies proviso. The Special Committee's attempt to clarify the homicide statutes in Wisconsin actually unearthed a new problem, one that will be discussed in Part III.

III. Attaching Vicarious Liability to Accomplices Under the Felony-Murder Doctrine

As can be seen by the discussion in Part II, the felony-murder doctrine has proved to be one of the more contentious remnants of the common law. 

So that society may properly express its revulsion at killing in the commission of crime, and so that offenders may be properly punished, Wisconsin lawmakers should enact an appropriately strong felony murder statute.


144. Dickey et al., supra note 6, at 1369-70.

145. Id. at 1370.

146. Id.

147. Id.

Criticism of the rule constitutes a lexicon of everything that scholars and jurists can find wrong with a legal doctrine: it has been described as "astonishing" and "monstrous" an unsupportable "legal fiction," "an unsightly wart on the skin of the criminal law," and as an "anachronistic remnant" that "has no logical or practical basis for existence in modern law."149

While the doctrine as a whole has been criticized, a corollary of the rule has proved even more troublesome. This problem appears when someone other than the defendant causes a death during the commission of a felony. Under common law, defendants could be found guilty of felony murder no matter if they, the accomplice, or the victim caused a death during the defendant's commission or attempted commission of the underlying felony.150 As will be discussed below, some states have attempted to limit the applicability of the doctrine in a number of ways, particularly with respect to deaths caused by someone other than the accused.

Wisconsin had little difficulty with this troublesome corollary because the past felony-murder statutes and the interpretations handed down by the Wisconsin courts had sufficiently narrowed the focus of the doctrine to exclude the necessity of attaching vicarious liability to actors other than the defendant. Therefore, no appellate or supreme court cases in the past discussed the above situation. The 1988 revision of the felony-murder statute changed this.

In their attempt to clarify or repeal the felony-murder statute in Wisconsin, the members of the Special Committee left open a serious breach in the application of the felony-murder rule. As three of the members of the Special Committee stated:

The problem with the connection between the felony and the death has surfaced in two typical situations which may still arise under Wisconsin's revision. One involves the death of an accomplice or co-conspirator. If Smith and Jones commit an armed robbery and Jones is killed by the robbery victim, is Smith guilty of felony murder for the death of her accomplice? ... Under the prior Wisconsin statute, felony murder liability was limited to foreseeable results, which were in turn limited to deaths caused by an act in and of itself dangerous to life. Whether the same standard will be applied under the revised statute is an open question.151

149. Roth & Sundby, supra note 25, at 446 (citations omitted).
150. Fletcher, supra note 15, at 413.
151. Dickey et al., supra note 6, at 1371-72 (footnotes omitted).
The problem arises because of the vague language of the statute. Specifically, the statute provides:

940.03 Felony Murder  
Whoever causes the death of another human being while committing or attempting to commit a crime specified in s. 940.225 (1) or (2)(a), 943.02, 943.10 (2) or 943.32 (2) may be imprisoned for not more than 20 years in excess of the maximum period of imprisonment provided by law for that crime or attempt.\(^{152}\)

A strict construction of the language of the statute seemingly opens up prosecution for felony murder to anyone who causes the death of someone during the attempt or commission of five specific felonies. Thus, if a defendant and an accomplice commit an armed robbery and in the process the victim or a police officer kills the accomplice, the defendant is criminally liable for the death of the accomplice.

This breach provided a new opportunity for prosecutors to extend criminal liability to accomplices in felonies in which someone other than the principal defendant caused a death. It is no surprise then that prosecutors were quick to test the limits of this extended liability.\(^{153}\) The next section will detail the two prevailing methods courts have used in addressing this troublesome corollary.

### A. The Agency Theory and the Proximate Causation Test

Many jurisdictions have confronted the issue of causation between the defendant and a death committed by someone resisting the defendant's felonious act in one of two ways: the "agency theory" or the "proximate cause theory."\(^{154}\) While both limit the potential acts for which the defendant is liable, each arrives at this result in vastly different ways.

The agency theory in its most basic form operates in the following manner: "for a defendant to be held guilty of murder, it is necessary that

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153. See discussion of Oimen, Rivera, and State v. Chambers, 183 Wis. 2d 316, 515 N.W.2d 531 (Ct. App. 1994), infra part III.C.
the act of killing be that of the defendant, and for the act to be his, it is necessary that it be committed by him or by someone acting in concert with him."\textsuperscript{155} It is obvious from this definition that a jurisdiction that follows the agency theory would preclude criminal liability of the defendant for a death caused by someone resisting the felony.

The agency theory as stated above, or variations of it, has become the most widely accepted methodology of limiting liability in felony-murder statutes.\textsuperscript{156} States are increasingly turning to the agency theory either by statutory construction or judicial rulings and have thereby removed the open-ended strict liability of the felony-murder rule that occurred at common law. This is increasingly apparent as states revise their respective homicide statutes.\textsuperscript{157}

While the agency theory has gained prominence in recent years, many states still limit felony-murder liability by using a theory of proximate causation.\textsuperscript{158} There are many derivations of this theory in place,\textsuperscript{159} but briefly stated the theory "holds that if the homicide is the product of an unexpected chain of events, unrelated to some life-endangering aspect of the underlying felonious conduct, there is no liability. Deaths that are reasonably foreseeable results of the underlying conduct, on the other hand, qualify as felony murders."\textsuperscript{160} Thus, there could be situations in which the defendant's actions were so dangerous in the course of committing a felony that a death would likely be the result. This could also include the situation in which a death was caused by the intended victim of the crime, where liability would attach to the defendant for the victim's actions.

In order to analyze Wisconsin's felony-murder statute in the context of these two limiting theories it is necessary to see how other states have addressed this troublesome issue. A comparison of the approaches of all jurisdictions in the United States is beyond the scope of this Comment, however, and the next section will therefore survey nine states that have similar statutory language to Wisconsin's felony-murder statute.

\textsuperscript{155} Barbre, \textit{supra} note 154, at 242.
\textsuperscript{156} State v. Branson, 487 N.W.2d 880, 882 (Minn. 1992).
\textsuperscript{157} \textit{See} id. The Minnesota Supreme Court in \textit{Branson} was analyzing Minnesota's felony-murder statute, Minn. Stat. § 609.19(2) (1990), for the first time since its statute was revised in 1981. \textit{See infra} notes 163-68 and accompanying text.
\textsuperscript{158} Barbre, \textit{supra} note 154, at 252-61; Crump & Crump, \textit{supra} note 154, at 383-91.
\textsuperscript{159} \textit{See} Crump & Crump, \textit{supra} note 154, at 383-84.
\textsuperscript{160} \textit{Id}.
B. Survey of Felony-Murder Statutes in Other States

A brief survey of the various state statutes delineating the felony-murder rule shows that very few include specific statutory language similar to the Wisconsin felony-murder statute. Of the nine states\(^1\) that do use the general phrase "cause the death" within their statutes, only Minnesota and Georgia use language that is nearly identical in form to Wisconsin's statute. Of these two, Minnesota Statute Section 609.19 is more similar in its construction and language to that of Wisconsin Statute Section 940.03.\(^2\) All of the remaining states have clarified, in their statutory language, the intention of the legislature in applying liability to the defendant for a death caused by another person.

Neither Minnesota nor Georgia has adopted the agency theory as a rule of law in the application of the felony-murder doctrine; however, both states have construed their statute to garner the same result as the agency theory. In *State v. Branson*,\(^3\) the Minnesota Supreme Court recently faced a factual situation in which a defendant was convicted of felony murder after a bystander was killed in exchange of gunfire between members of two rival gangs.\(^4\) The defendant was an alleged participant in the shooting exchange but did not fire the fatal shot.\(^5\)

The supreme court reversed the jury's conviction, holding that the Minnesota felony-murder statute, which had been revised in 1981, did not evince a new legislative intent to expand liability to persons other than those who directly committed the killing.\(^6\) Before the 1981 revision, the Minnesota law required that the "person killed be the object of the predicate felony."\(^7\)

However, the court did not formally adopt the agency theory in *Branson*, stating "[i]t has long been the law that only a person . . . who caused the death of another person while committing or attempting to

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162. Minn. Stat. § 609.19 (1990). The statute reads:
Whoever does . . . the following is guilty of murder in the second degree and may be sentenced to imprisonment for not more than 40 years: . . . (2) Causes the death of a human being, without intent to effect the death of any person, while committing or attempting to commit a felony offense other than criminal sexual conduct in the first or second degree with force or violence.

Id.
164. *Id.* at 880-81.
165. *Id.* at 881.
166. *Id.* at 885.
167. *Id.* at 884.
commit a felony could be charged with felony murder. The amendatory provisions of 1981 did not change the law in this regard.\textsuperscript{168} Therefore, basing its decision outside the agency theory-proximate cause debate and relying on the felony-murder doctrine's history in Minnesota—the court nonetheless found that a defendant could not be guilty of a death caused by a person other than the defendant or accomplice to the felony. In practical terms, the court's result is the same as that which an implementation of the agency theory would have provided.

Georgia has dealt with the felony-murder issue in a different way. The Georgia statute provides that "[a] person also commits the offense of murder when, in the commission of a felony, he causes the death of another human being irrespective of malice."\textsuperscript{169}

The Georgia Supreme Court also refused to hold a person liable for a death caused by a person who was not the defendant or an accomplice to the felony. In \textit{State v. Crane},\textsuperscript{170} a would-be burglar was shot and killed by the intended victim of the crime, and the deceased burglar's accomplices were charged with felony murder.\textsuperscript{171} The court actually favored an interpretation of Georgia's felony-murder statute to include deaths "indirectly caused by one of the parties, as in the present case where the parties caused the intended victim of the burglary to shoot and kill one of their number."\textsuperscript{172} However, citing Georgia rules of statutory interpretation (which demanded in cases of dual construction of statutory language that the statute must be construed against the state),\textsuperscript{173} the court stated it was the responsibility of the Georgia Legislature to choose whether it wanted the felony-murder doctrine to extend to the fact situation presented before it.\textsuperscript{174} Therefore, the Georgia Supreme Court, similar to its counterpart in Minnesota, adopted the agency theory result without expressly adopting the agency theory as a rule of law.

All of the remaining states surveyed have constructed their statutes with less ambiguous language than Minnesota, Georgia, or Wisconsin. In so doing, they have eliminated the confusion garnered in the states previously discussed.

\begin{itemize}
  \item 168. \textit{Id.} at 885.
  \item 170. 279 S.E.2d 695 (Ga. 1981).
  \item 171. \textit{Id.} at 696; accord \textit{Hill v. State}, 295 S.E.2d 518, 521 (Ga. 1982) (where a bystander was killed by a police officer in pursuit of defendant).
  \item 172. \textit{Crane}, 279 S.E.2d at 696.
  \item 173. \textit{Id.}
  \item 174. \textit{Id.} at 697.
\end{itemize}
Alaska and New Jersey use similar language in their felony-murder statutes. They both state that a defendant is guilty of murder if, while the defendant is engaging in or attempting to commit an enumerated felony, "any person causes the death of a person other than one of the participants."\footnote{175} 

In \textit{State v. Martin},\footnote{176} the New Jersey Supreme Court, in modifying the proximate cause theory held that "a defendant should be exculpated only 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."\footnote{177} Thus, "in a robbery of a store in which 'the shopkeeper fires at the robber but instead kills an innocent bystander,' the death would not [be] too remote for the defendant to be guilty of felony murder."\footnote{178} As stated in \textit{Martin},\footnote{179} the court's adoption of this proximate cause test came only after the New Jersey Legislature changed its statute on felony murder in response to the New Jersey Supreme Court's decision in \textit{State v. Canola}.\footnote{180} In \textit{Canola} the court had adopted the agency theory, thus limiting the felony-murder rule to deaths caused by the defendant or an accomplice.\footnote{181} Accordingly, in order for the New Jersey Supreme Court to adopt the proximate cause rule, the legislature had to specifically alter the statute to its present language. Prior to this point no liability would be attached under the agency theory.

The remaining states all have specific language that on their face ascribe to either the agency theory or proximate cause theory. In Connecticut a defendant is guilty of felony murder if, while committing or attempting to commit a specified felony, "and, in the course of and in furtherance of such crime or flight therefrom, he, or another participant, if any, causes the death of a person other than one of the participants."\footnote{182} The Connecticut Supreme Court held that the limiting language of "in furtherance of" imposes a proximate cause requirement "beyond that of mere causation in fact."\footnote{183} In addition, the court stated, "[i]t is not enough, however, that the defendant committed a robbery

\footnotesize{\begin{itemize}
\item \footnote{176} \textit{State v. Martin}, 573 A.2d 1359 (N.J. 1990).
\item \footnote{177} \textit{Id.} at 1375.
\item \footnote{178} \textit{Martin}, 573 A.2d at 1375 (quoting \textit{New Jersey Senate Judiciary Comm., Statement to Senate Committee Substitute, No. 1537, § 14 (1981)}).
\item \footnote{179} \textit{Id.} at 1371.
\item \footnote{180} 374 A.2d 20 (N.J. 1977).
\item \footnote{181} \textit{Id.} at 25.
\item \footnote{183} \textit{State v. Young}, 469 A.2d 1189, 1193 (Conn. 1983).
\end{itemize}}
and caused the death of the victim unless the death was a part of the robbery and directly involved in it." 184 Furthermore, liability would not extend outside those murders committed by the defendant or accomplices. 185

Similarly, the legislature in Maine enacted legislation which states that one is liable if "the person or another participant in fact causes the death of a human being, and the death is a reasonably foreseeable consequence." 186 Thus, in both Connecticut and Maine the statute itself delineates that only defendants and their accomplices can cause the death in question if felony-murder liability is to affix.

For comparison, Arkansas and Colorado prescribe use of the proximate cause theory. Arkansas's statute reads "[a] person commits manslaughter if . . . . Another person who is resisting such offense or flight causes the death of any person." 187 Colorado provides criminal liability if "the death of a person, other than one of the participants, is caused by anyone." 188 Once again the statutes specify which theory is in effect.

Finally, Arizona's statute states a person is liable under the felony-murder doctrine if "such person [the defendant] or another person causes the death of any person." 189 The Arizona Supreme Court has held that for liability to be established "the death [must] result from an action taken to facilitate the accomplishment of one or more of the felonies enumerated in [the felony-murder statute]." 190 The court has additionally concluded that the statute requires that "but/for causation" is a necessary element before a jury can convict. 191

A comparison of the various felony-murder statutes above reveals that when ambiguity in the statute's required casual relationship occurs, most states have held the defendant is not liable for a death caused by someone other than the defendant or his or her accomplices. Only in states in which the statutory language is more specific as to its intent does one find a willingness on the part of the various courts to adopt a stricter form of felony-murder liability.

While the states above have reached divergent views on how to best implement the felony-murder rule it is important to note that the histori-

185. Young, 469 A.2d at 1193.
188. COLO. REV. STAT. § 18-3-102(1)(b) (1990).
cal development of felony murder in each state carried great weight in each court's eventual dispensation. Accordingly, the next section discusses the three recent Wisconsin cases interpreting Section 940.03 and highlights the manner in which Wisconsin has broken from the historical development of the felony-murder doctrine in the state. In all three cases, the Wisconsin courts rejected the national trend to limit the sweeping breadth of the felony-murder doctrine in situations when someone other than the defendant caused a death in the commission of a crime. In doing so, the courts provided prosecutors with an extremely wide net under which they could charge individuals with felony murder.

C. State v. Chambers, State v. Oimen, and State v. Rivera

The first case released by a Wisconsin court interpreting the breadth of criminal liability under Section 940.03 was State v. Chambers. In Chambers, the court of appeals determined that a defendant could "be held liable for felony-murder, party to a crime, where a defendant participates with an accomplice in a relevant underlying felony within [Section 940.03] and the accomplice kills a pursuing police officer during the commission of the felony." The court was faced with a novel situation in Chambers. The defendant, Lavelle Chambers, and his friend, Eddie Brooks, were driving in the City of Milwaukee intending to commit a robbery. As they drove past the North Avenue Smoke Shop, they noticed two men pushing a safe away from the shop. Chambers and Brooks stopped the car; "accosted" the two men; learned that the men had just broken into the shop and were stealing the safe; and finally, ran into the shop and "stole various items—guns, money, and food stamps." While in the shop, they heard on a police scanner that the police had been dispatched to the break-in. They left the shop, noticed a squad car located near the shop, and ran. They split up after a short distance and Chambers hid under a porch. The police later found Chambers and arrested him. At that point, Chambers learned that Brooks had shot and killed a pursuing police officer. Chambers

192. 183 Wis. 2d 316, 515 N.W.2d 531 (Ct. App. 1994).
193. Id. at 325, 515 N.W.2d at 535.
194. Id. at 318-19, 515 N.W.2d at 532.
195. Id.
196. Id. at 319, 515 N.W.2d at 532.
197. Id.
198. Id.
199. Id.
200. Id.
was charged and convicted of felony murder, party to a crime, and possession of a firearm by a felon.

Chambers argued on appeal that there was insufficient evidence to convict him of felony murder, party to a crime, because after he and Brooks left the shop, "they went in separate directions and had no further contact or communications." The court of appeals concluded that:

the general principles governing party to a crime liability under § 939.05 . . . when applied to the language of the felony murder statute, are most reasonably construed as holding all participants in the underlying felony liable for any death that results from the acts of their co-conspirators during the commission of such felony.

The court stated that it was adopting the reasoning of Prophet v. United States, a case from the District of Columbia Court of Appeals that declared there was "[n]o distinction . . . between principals and aiders and abettors for purposes of felony murder liability." The Wisconsin Court of Appeals thereby concluded that under Section 940.03 only the defendant's intent to commit the underlying felony need be proved in order to convict the defendant of a death caused by an accomplice. The court stated that there was no requirement that the defendant, when

201. The supreme court in Oimen declared that it was improper to charge a defendant with felony murder, as a party to a crime. See infra notes 231-33 and accompanying text.

202. Id.

203. Id. at 320, 515 N.W.2d at 533.

204. Id. at 322-23, 515 N.W.2d at 534.


206. Chambers, 183 Wis. 2d at 322-23, 515 N.W.2d at 534 (quoting Prophet, 602 A.2d at 1095). Prophet was discussing the proper jury instructions a trial court submits in cases of accomplice liability for felony murder. Prophet, 602 A.2d at 1094. The D.C. trial court gave the standard felony-murder instruction:

"Any killing, even committed . . . without the specific intent to kill, and even if accidental is murder in the first degree if committed in the perpetration or the attempt to perpetrate the offense of robbery.

Now, if two or more persons acting together [are] perpetrating, or attempting to perpetrate the offense of robbery, and one of them in the course of the felony and in furtherance of the common purpose to commit the felony, kills a human being, both the person who commits the killing, and the person or persons who aided and abetted the felony are guilty of murder in the first degree.

Id. (quoting D.C. CRIMINAL JURY INSTRUCTIONS 4.22 (3d ed. 1978). The D.C. court concluded that it could not require a "natural and probable consequence" scheme for felony murder, as urged by the defendant, because prior D.C. case law had previously declared that such a connection was unnecessary. Id. at 1095.

207. Id.
engaged in one of the felonies enumerated under Section 940.03, in-
tended to kill "or directly cause the death of a third party." 208

The court of appeals decision in Chambers was quickly followed by
two companion cases issued by the Wisconsin Supreme Court on June 7,
1994. These two cases, State v. Oimen and State v. Rivera, definitively
laid to rest most remaining questions surrounding the statutory construc-
tion of Section 940.03.

The supreme court decision in Oimen derived from a homicide com-
mitted in Monona, Wisconsin, only one day after Section 940.03 became
effective on January 1, 1989. Thus, the resulting prosecution was the first
to test the potentially sweeping language of the new statute.

The defendant, James Oimen, and two others, David Hall and Shawn
McGinnis, attempted to burglarize the home of Tom Stoker during the
late-night hours of January 2, 1989. 209 Oimen remained in the pickup
truck while Hall and McGinnis cut the telephone cords to the house. 210
Next, the two went to the back porch, with Hall carrying a broken pool
cue butt, a small billy club, and a pocket knife; McGinnis carried a BB
gun. 211 Meanwhile, Stoker had been attempting to call his daughter
when the phone went dead. 212 He placed a hunting rifle on his bed and
went to investigate, at which time he saw Hall and McGinnis—masked
and armed on his porch. 213 McGinnis pointed the BB gun at Stoker and
yelled, "We want your money, you bookie. " 214 Stoker ran to his bed-
room and grabbed and loaded his gun. 215

McGinnis broke open the door and Hall entered. 216 Seeing Stoker
return with a rifle, Hall fled, but Stoker fired the rifle and killed McGin-
nis. 217 Oimen, who was still waiting in the pickup truck outside, drove
off. 218

Oimen was later arrested, charged, and convicted of attempted
armed robbery, armed burglary, and felony murder, all as a party to a
crime. 219 In a two to one, unpublished decision, the court of appeals

208. Id.
209. Oimen, 184 Wis. 2d at 429, 516 N.W.2d at 402.
210. Id. at 429, 516 N.W.2d at 402.
211. Id.
212. Id.
213. Id. at 430, 516 N.W.2d at 402.
214. Id.
215. Id.
216. Id.
217. Id.
218. Id.
219. Id. at 431-33, 516 N.W.2d at 402-03.
affirmed Oimen's judgment of conviction on all counts.\textsuperscript{220} The Wisconsin Supreme Court accepted review of the case in order to clarify the language of Section 940.03.\textsuperscript{221}

In a unanimous decision, the court concluded a defendant could "be charged with felony murder for the death of a co-felon when the killing was committed by the victim of the underlying felony."\textsuperscript{222} The court concluded that the "plain meaning" of Section 940.03 prescribed the proof of only two elements before criminal liability would attach: (1) that a defendant cause a death, and (2) that a defendant cause the death while committing or attempting to commit one of the five enumerated felonies.\textsuperscript{223}

Further, the court concluded that Wisconsin criminal law prescribed a consistent meaning to the definition of "causation," that is, that an "actor causes death if his or her conduct is a 'substantial factor' in bring about that result."\textsuperscript{224} Thus, the court stated that if a defendant's actions were a substantial factor in causing a death, it was irrelevant as to whose death was the result.\textsuperscript{225}

The court also stated that the legislative history of Section 940.03 supported the court's construction of the causation language.\textsuperscript{226} After tracing the history of the Special Committee's deliberations in a similar manner to that set forth in Part III above, the court acknowledged that while a majority of states had adopted the agency theory of felony-murder liability, the language and legislative history of Section 940.03 did not evince an intent by the Wisconsin Legislature to "impose liability only when there is an 'agency' relationship."\textsuperscript{227}

The court stated that any harshness that resulted from the operation of the felony-murder statute should be mitigated at sentencing; thus, the sentencing court could take into consideration the fact that the person killed was not an "innocent bystander" but was a participant in the underlying felony.\textsuperscript{228}

\begin{footnotes}
\item[220] Id. at 427, 516 N.W.2d at 401.
\item[221] Id.
\item[222] Id. at 428, 516 N.W.2d at 401.
\item[223] Id. at 435, 516 N.W.2d at 404.
\item[224] Id.
\item[225] Id. The court did acknowledge that other states specifically limit felony-murder liability by the express language of their respective felony-murder statutes. Id. at 436 n.7, 516 N.W.2d at 404 n.7; see also supra notes 175-91 and accompanying text.
\item[226] Id. at 437, 516 N.W.2d at 405.
\item[227] Id. at 443-44, 516 N.W.2d at 407-08.
\item[228] Id. at 444-45, 445 n.16, 516 N.W.2d at 408, 408 n.16.
\end{footnotes}
Finally, the court also concluded that the language "while committing or attempting to commit" in Section 940.03 encompassed actions committed while in immediate flight from a felony. Thus, if an action that resulted in a death was sufficiently temporal to the attempted commission or commission of the underlying felony, felony-murder liability could be extended to all those who intended to commit the underlying felony.

In one final aside, the court also noted that it was improper to charge a defendant with felony murder, party to a crime. "A person convicted of a felony as a party to a crime becomes principal to a murder occurring as a result of that felony." Accordingly, the court determined that to charge an individual with felony-murder, party to a crime, was both "redundant and unnecessary."

In *State v. Rivera*, Oimen's companion case, the supreme court faced a slightly different issue. On September 5, 1989, Elvin Rivera and three accomplices went to the apartment of Robert and Julie Mayle. They went to the apartment with the intention of stealing marijuana that they believed the Mayles possessed. Rivera approached Brian Fruth, a friend of the Mayles, as he left the apartment. Rivera placed a gun to Fruth's side, said, "Don't move or I'll kill you," and entered the apartment with Fruth and one of Rivera's associates.

The Mayles, who were in their bedroom, heard their dogs snarling, and Robert Mayle went to investigate. He saw Rivera in the kitchen with a gun pointed at Fruth's head; he yelled for his wife to get her gun, and ran back into the bedroom with Rivera following. Once inside the bedroom Robert Mayle attempted to grab the gun from his wife and it discharged. Rivera heard the shot and attempted to flee the apart-

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229. *Id.* at 447-48, 516 N.W.2d at 409-10. As the court noted, *id.* at 448 n.18, 516 N.W.2d at 409 n.18, its conclusion regarding liability for deaths caused in the immediate flight or escape from the underlying felony has been adopted by a majority of states.

230. This issue was not raised in *Chambers* where the defendant was held liable for the killing of a police officer by the defendant's escaping accomplice to the underlying robbery.

231. *Id.* at 449, 516 N.W.2d at 410.

232. *Id.*

233. *Id.*

234. *Rivera*, 184 Wis. 2d at 487, 516 N.W.2d at 391.

235. *Id.*

236. *Id.* at 487-88, 516 N.W.2d at 392.

237. *Id.* at 488, 516 N.W.2d at 392.

238. *Id.*

239. *Id.*

240. *Id.*
ment but Mayle fired several shots at Rivera and one shot struck and killed Fruth. 241

Rivera was arrested, charged, and convicted before a bench trial for felony murder. 242 Rivera appealed his conviction and the supreme court accepted certification of his appeal from the court of appeals. 243 The court, in a succinct opinion, stated that the outcome of the case was dictated by its conclusion in Oimen. 244 Thus, it concluded that Rivera was criminally liable for Fruth's death because Rivera's conduct in the attempted armed robbery was a substantial factor in causing Fruth's death. 245

While the decision in Rivera did not break significant new ground on the issue of felony murder in Wisconsin beyond that already discussed in Oimen, it further expanded the scope of prosecutorial discretion in deciding whether to charge a defendant with felony murder. In the wake of Chambers, Oimen, and Rivera the scope of felony-murder situations in Wisconsin now includes accomplice liability when: (1) another accomplice separated from the principle and escaping from the scene of a robbery kills a pursuing police officer; (2) an intended victim kills one of the accomplices during an attempted robbery; and (3) an intended victim kills an innocent bystander while defending against an attempted robbery. All three cases make a clear break with the historical development of the felony-murder doctrine in Wisconsin. They also give Wisconsin one of the more sweeping felony-murder statutes in the United States. 246 This is an ironic result for a statute that has at its genesis a committee that originally recommended the abolishment of the felony-murder doctrine. Thus, perhaps it is now time to again re-evaluate whether the felony-murder doctrine and the widened scope of Section 940.03, has a place in Wisconsin's criminal code.

241. Id.
242. Id.
243. Id. at 487, 516 N.W.2d at 391.
244. Id.
245. Id.

246. This, of course, refers only to the establishment of criminal liability. Because § 940.03 acts only as a penalty enhancer to the underlying felony, Wisconsin avoids the harshness that might have resulted if the Special Committee's "fall-back" plan of making felony murder a Class A felony, had been adopted.
IV. Justifications For and Against the Abolition of Felony Murder in Wisconsin

Parts II and III of this Comment laid out a historical background for the origination and development of the felony-murder doctrine in Wisconsin and other jurisdictions. While the history of a doctrine is necessary for a complete understanding of how and why a legal theory developed, it fails to answer a more important question: Is the felony-murder doctrine a necessary part of the modern criminal code of Wisconsin? This question, after all, remains at the heart of nearly all of the criticism that the doctrine has engendered in the last half-century. Accordingly, Part IV of this Comment will highlight the contemporary justifications for the continuation of felony murder as a viable component of the substantive criminal law. Next, this Comment will address the major criticism of the doctrine. In conclusion, this Comment suggests that in the wake of Oimen and Rivera the legislature should once again re-evaluate whether the doctrine has a place in Wisconsin's criminal law.

A. Modern Justifications for the Felony-Murder Doctrine

As other commentators have noted, the academic literature on felony murder is "voluminous." Nearly all of this commentary is derogatory to the doctrine, yet felony murder remains a part of nearly every jurisdiction in the United States. While most of the recent literature continues to be critical of felony murder, in the past decade several writers have posited modern justifications for the continuation of this much maligned common-law doctrine. These justifications attempt to provide a reasoned argument for supporters of the felony-murder doctrine beyond the popular belief that it would be politically impossible to remove felony murder from criminal codes.

247. Tort Law, supra note 25, at 1918 n.1.
250. See Roth & Sundby, supra note 25, at 450.
251. See Crump & Crump, supra note 154, at 360. When discussing why the felony-murder doctrine is retained in most jurisdictions, albeit under many limited constraints, the authors state: "A cynic might attribute this phenomenon to misinformation, public hysteria, electoral politics, or stodginess, but the number of courts and legislatures that have considered the question and retained the doctrine prompts the speculation that public officials may know something that scholars do not." Id. (citation omitted).
One of the principal arguments many supporters of felony murder propagate is that felony-murder statutes provide a deterrent effect.\textsuperscript{252} This deterrence has two components. The first is to deter felonious actors from causing a death in the commission of the felony.\textsuperscript{253} The second is to provide a deterrence to the underlying felony itself by holding the felonious actor responsible for any death that occurs in the commission of that felony.\textsuperscript{254} This deterrence argument has come under much criticism,\textsuperscript{255} particularly when discussing the vicarious liability of codefendants for the actions of the principal.\textsuperscript{256} One set of commentators noted:

The illogic of the felony-murder rule as a means of deterring killing is apparent when applied to accidental killings occurring during the commission of a felony. Quite simply, how does one deter an unintended act? A similar deterrence problem arises when the felony-murder rule is used to convict the defendant for murder when a third party, such as the victim or a policeman, committed the killing. The defendant has no control over the acts of the third party and thus the rule cannot deter this sort of killing.

\begin{enumerate}
\item[252.] FLETCHER, supra note 15, at 297-98; Cole, supra note 206, at 78-96; Crump & Crump, supra note 154, at 369-71; see also People v. Washington, 402 P.2d 130, 135-36 (Cal. 1965) (Burke, J., dissenting) (criticizing the reversal of a felony-murder conviction by stating, that "[o]bviously this advance judicial absolution removes one of the most meaningful deterrents to the commission of armed felonies." Id. at 136).
\item[253.] Roth & Sundby, supra note 25, at 450.
\item[254.] Id. at 451. While this justification does have some adherents, it is, by and large, a minority view. Id. at 451 n.28 (citing Note, The Merger Doctrine as a Limitation on the Felony-Murder Rule: A Balance of Criminal Law Principles, 13 WAKE FOREST L. REV. 369, 374 (1977)).
\item[255.] Oliver Wendall Holmes, Jr. provided an early formation of this criticism: "If the object of the [felony-murder] rule is to prevent [accidental killings], it should make accidental killing with firearms murder, not accidental killing in the effort to steal; while, if its object is to prevent stealing, it would do better to hang one thief in every thousand by lot." HOLMES, supra note 17, at 58. This statement by Holmes is often quoted. E.g., 2 LAFAVE & SCOTT, supra note 16, at 232-33; Ludwig, supra note 16, at 62.
\item[256.] Enmund v. Florida, 458 U.S. 782, 798-99 (1982). The Supreme Court in Enmund held that it was inconsistent with the U.S. Constitution's Eighth and Fourteenth Amendment guarantees against cruel and unusual punishment to impose the death penalty on a defendant convicted of felony murder when he did not "kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." Id. at 797. The Court stated:

We are quite unconvinced, however, that the threat that the death penalty will be imposed for murder will measurably deter one who does not kill and has no intention or purpose that life will be taken. Instead, it seems likely that "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation," for if a person does not intend that life be taken or contemplate that lethal force will be employed by others, the possibility that the death penalty will be imposed for vicarious felony murder will not "enter into the cold calculus that precedes the decision to act."

\textit{Id.} at 778-79 (quoting Fisher v. United States, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting), and Gregg v. Georgia, 428 U.S. 153, 186 (1976)).
\end{enumerate}
Moreover, any potential deterrence effect on unintentional killings is further reduced because few felons either will know that the felony-murder rule imposes strict liability for resulting deaths or will believe that harm will result from commission of the felony.\(^{257}\)

In the face of such criticism, deterrence remains as one of the "most often recognized" policy rationales used by courts for the continuation of the felony-murder doctrine.\(^{258}\)

Another justification for the modern acceptance of the felony-murder rule is that it "squares with societal perceptions of proportionality—of 'just deserts.'"\(^{259}\) Under this scheme, felony-murder statutes are justified because they reflect a judgment by society\(^{260}\) that "an intentionally


The argument against deterrence often proceeds on the additional assumption that felony murder is addressed only to accidental killings and cannot result in their deterrence. By facilitating proof and simplifying the concept of liability, however, felony murder may deter intentional killings as well. The robber who kills intentionally, but who might claim under oath to have acted accidentally, is thus told that he will be deprived on the benefit of this claim. By institutionalizing this effect and consistently condemning robbery-homicides as qualitatively more blameworthy than robberies, the law leads the robber who kills intentionally to expect this treatment for himself... The proposition that accidental killings cannot be deterred is inconsistent with the widespread belief that the penalizing of negligence, and even the imposition of strict liability, may have deterrent consequences.

\(^{258}\) Crump & Crump, supra note 154, at 370 (citing People v. Burton, 491 P.2d 793, 801 (Cal. 1971), and People v. Miller, 297 N.E.2d 85, 87-88 (N.Y. 1973)).

\(^{259}\) Id.

\(^{260}\) There are differing opinions on what constitutes societal views. The U.S. Supreme Court in Enmund v. Florida, 458 U.S. 782 (1982), and Tison v. Arizona, 481 U.S. 137 (1987), was divided over what was the best expression of societal views in the case of capital punishment for felony murders. It viewed legislative enactments and jury sentencing decisions. Compare Enmund, 458 U.S. at 789-97 with Enmund, 458 U.S. at 818-24 (O'Connor, J., dissenting); compare also Tison, 481 U.S. at 146-48.

Crump and Crump reviewed a 1983 U.S. Justice Department report that surveyed public attitudes on the seriousness of certain "legal events." Crump & Crump, supra note 154, at 363-64 (citing Bureau of Justice Statistics of the U. S. Dep't. of Justice, Report to the Nation on Crime and Justice: The Data 4-5 (1983)). The survey respondents classified "offenses" that were ostensibly felony-murders as more serious than some "intentional killings." Id. at 364 n.18-21.

Finally, Finkel and Duff concluded from the results of their controlled experiment that "mock jurors and mock justices overwhelmingly and consistently reject the accessorial liability theory [for felony-murders]." Norman J. Finkel & Kevin B. Duff, Felony-Murder and Community Sentiment: Testing the Supreme Court's Assertions, 15 L. & Hum. Behav. 405, 427 (1991). "It is also clear from [the experiment's results] that a majority of the subjects nullify the conclusive presumption of the felony-murder rule when we sum across defendants and cases." Id.
committed robbery that causes the death of a human being is qualitatively more serious than an identical robbery that does not.\textsuperscript{261} To some, this classification system is a necessary extension of the deterrence objective.\textsuperscript{262} Because felony murder is a greater crime in society's view than just the underlying felony, the punishment must also be greater to reflect society's indignation and to provide greater deterrence to this crime.\textsuperscript{263} It also reinforces the "reverence [society has] for human life" by condemning crimes that cause human death.\textsuperscript{264}

This justification is also closely tied to the societal goal of retribution. Under this basis, felons exhibit "evil minds" when they attempt or commit the underlying felony and, therefore, any death that results deserves greater punishment because of the greater harm caused.\textsuperscript{265} This justification, according to some commentators, is a remnant of a "harm-oriented" approach of the early common law, rather than the contemporary "act-oriented" approach that focuses on the defendant's culpability for the underlying act.\textsuperscript{266}

While these are not the only justifications that supporters of the felony-murder rule posit in defense of the doctrine, they remain the most prominent.\textsuperscript{267} As stated above, the academic support for felony murder is dwarfed in comparison to the reproach that commentators have draped on the doctrine. Hence, the next section will discuss the major criticism of the doctrine that these commentators have produced in favor of their call for the elimination of the felony-murder rule.

\textsuperscript{261} Crump & Crump, \textit{supra} note 154, at 363.
\textsuperscript{262} Cole, \textit{supra} note 249, at 87. Cole postulated:
Just as a consequentialist punishment strategy might distinguish between premeditated and unpremeditated murders, a consequentialist punishment strategy also justifies distinguishing between felony murders and simple murders. That is because we can plausibly predict that potential felony murderers, viewed as a class, will require more punishment to deter them from crime than will potential simple murderers.

\textit{Id.}

\textsuperscript{263} \textit{Id.}

\textsuperscript{264} Crump & Crump, \textit{supra} note 154, at 368. "Condemnation itself is a multifaceted idea. It embodies the notion of reinforcement of societal norms and values as a guide to the conduct of upright persons, as opposed to less upright ones who presumably require the separate prod of 'deterrence.'" \textit{Id.} at 367.

\textsuperscript{265} Roth & Sundby, \textit{supra} note 25, at 457-58.

\textsuperscript{266} Fletcher, \textit{supra} note 15, at 284-85; Roth & Sundby, \textit{supra} note 25, at 458 n.68.

\textsuperscript{267} Authors Crump and Crump gave several other justifications for the modern application of the felony-murder rule beyond those already discussed: "Clear and Unambiguous Definition of Offenses and Sentence Consequences," "Optimal Allocation of Criminal Justice Resources," and "Minimization of the Utility of Perjury." Crump & Crump, \textit{supra} note 154, at 371-76.
B. The Major Criticism of the Modern Felony-Murder Rule

The predominant criticism of the felony-murder doctrine today remains the troubling concept of holding a person criminally liable for a result without requiring a corresponding level of mental culpability for the result. According to critics of the felony-murder doctrine, it is askew with modern conceptions of proportionality—that someone should be severely punished for the unintended results of their actions.

The United States Supreme Court stated that "[i]t is fundamental that 'causing harm intentionally must be punished more severely than causing the same harm unintentionally.' The felony-murder rule violates this principle most dramatically in states, unlike Wisconsin, that categorize felony murder as first-degree murder. In such a classification, the mental culpability for an unintended or accidental death is raised to the same level as that as a calculated, premeditated homicide. Critics contend that felony murder is no more than a "living fossil" of a criminal justice system that did not distinguish criminal behavior on the basis of mental culpability.

The above brief discussion in no way addresses the range of the modern criticisms of felony murder, but it does provide a platform from

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268. People v. Aaron, 299 N.W.2d 304, 316-17 (Mich. 1980). The Michigan Supreme Court stated:

"If one had to choose the most basic principle of the criminal law in general... it would be that criminal liability for causing a particular result is not justified in the absence of some culpable mental state in respect to that result...."

The most fundamental characteristic of the felony-murder rule violates this basic principle in that it punishes all homicides, committed in the perpetration or attempted perpetration of proscribed felonies whether intentional, unintentional or accidental, without the necessity of proving the relation between the homicide and the perpetrator's state of mind.

Id. (quoting Gegan, Criminal Homicide in the Revised New York Penal Law, 12 N.Y. L. Forum 565, 586 (1966)).

269. 2 LAFAVE & SCOTT, supra note 16, at 232. "Yet it is a general principle of criminal law that one is not ordinarily criminally liable for bad results which differ greatly from intended results." Id. Fletcher states: "Punishment must be proportional to wrongdoing. When the felony-murder rule converts an accidental death into first-degree murder, then punishment is rendered disproportionate to the wrong for which the offender is personally responsible.” Fletcher, supra note 15, at 428.


271. Aaron, 299 N.W.2d at 317.

272. Id.


274. See supra notes 15-22 and accompanying text.
which one can analyze the continued need for the felony-murder statute in Wisconsin. Accordingly, the next section places Wisconsin Statutes Section 940.03 under just such a critical examination.

C. Is It Time to Re-Evaluate Felony Murder in Wisconsin Again?

As chronicled above, the call for the elimination of the felony-murder doctrine in Wisconsin is not a new concept. In the past forty years, three recommendations to repeal the statute have failed. On their face, such efforts would have appeared to have the great weight of academic and judicial backing for their success. Yet each time, bowing to perceived public pressure, the Wisconsin Legislature enacted a more restricted construction of felony murder instead of abolishing this antiquated common-law doctrine. In the wake of Oimen and Rivera, however, the doctrine has been granted a broader scope of potential liability than at any other time in modern Wisconsin history.

Accordingly, it is time once again for the legislature to consider whether the felony-murder doctrine has a place in the Wisconsin substantive criminal code. The Special Committee was nearly uniform in its original recommendation to repeal the felony-murder statute. In its attempt to clarify the Wisconsin Homicide Code, the Special Committee realized that there was no longer a need for the doctrine because nearly every conceivable type of homicide would be chargeable under another provision of the new homicide code. While there may exist some situations that could slip through the cracks of the current scheme, these situations are most likely to violate the proportionality principle so fundamental to the modern ideals of criminal law.

While one must acknowledge that the scheme under Section 940.03 does not violate the proportionality principle as egregiously as do statutes in other jurisdictions that make felony murder a capital offense or equal to premeditated homicide—the scheme remains an awkward anomaly under the overall concepts of the Wisconsin Criminal Code. The Wisconsin Legislature acknowledged the need for proportionality when it rebuffed the Special Committee's back-up recommendation to

275. See supra notes 53-61, 115-48 and accompanying text.
276. Id.
277. See supra note 143.
278. See supra note 120 and accompanying text.
280. See supra notes 24, 259-64 and accompanying text.
make Section 940.03 a Class A felony. The penalty for this proposed version of the felony-murder statute was considered too harsh when compared to the entire punishment scheme.

As in many other jurisdictions, the Wisconsin Legislature has chosen to mitigate the harsh effects of the original common-law felony-murder rule. For the majority of the history of the doctrine in Wisconsin this mitigation was accomplished in one manner: The causal connection between the underlying felony and the death had to be sufficiently close so that one could impute the intent from the felony to the death. The Special Committee broke from this tradition and instead limited the operation of the felony-murder rule to a specified set of felonies. None of these restraints resolves the underlying problem of the rule. "Such patchwork attempts to mitigate the rule's harshness, however, have been legitimately criticized because they do not resolve [the rule's] essential illogic. Limiting the scope of the rule's operation, for instance, merely increases the probability that defendants convicted under the rule are guilty of some form of homicide."

The political pressure to retain felony murder most likely surrounds fears that without such a statute felons who kill will not be held responsible for their actions. But as can be seen, it is only in the most bizarre or tenuous situations that a felon will not be prosecutable under other provisions of the homicide code. In these bizarre situations the public most often rejects the operation of the felony-murder rule anyway.

For these reasons, the continued validity of the felony-murder statute in Wisconsin must be questioned. If the only reason to retain Section 940.03 is such unfounded political fears, it is logical that the doctrine no longer has a legitimate place in Wisconsin law.

281. See supra note 145 and accompanying text.
282. Id.
283. Roth & Sundby, supra note 25, at 446-47 (quoting MODEL PENAL CODE § 210.2 commentary at 36 (Official Draft 1980)).
284. See supra note 143.
285. Id.
286. See Finkel & Duff, supra note 260, at 427.
287. The Michigan Supreme Court concluded, when it abolished the felony-murder doctrine in 1980, that:

Whatever reasons can be gleaned from the dubious origin of the felony-murder rule to explain its existence, those reasons no longer exist today. Indeed, most states, including our own, have recognized the harshness and inequity of the rule as is evidenced by the numerous restrictions placed on it. The felony-murder doctrine is unnecessary and in many cases unjust in that it violates the basic premise of individual moral culpability upon which our criminal law is based.

People v. Aaron, 299 N.W.2d 304, 328 (Mich. 1980).
V. CONCLUSION

This Comment has attempted to discuss many of the issues surrounding Wisconsin's revised felony-murder statute. While attempting to clarify the homicide code in 1988, the Judicial Council's Special Committee on Homicide and Lesser-Included Offenses actually laid the groundwork to alter how the felony-murder doctrine operated in the state. The Wisconsin Supreme Court completed this change with its decisions in Oimen and Rivera. One can now view a clear break with the historical development of the doctrine in Wisconsin. This break with history should reinvigorate the doctrine's critics to ask the legislature once more: Why does felony murder have a place in the modern Wisconsin criminal code?

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