

# Assaultive Femicide and the American Felony-Murder Rule

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*This article examines the American legal criminal doctrine that is commonly applied in cases of a particular sub-type of femicide: assaultive femicide, women who are battered to death. The most relevant criminal doctrine applicable to these circumstances is the felony-murder rule, applied in most U.S. jurisdictions. As will be shown, the doctrine's most problematic modification relates to one of its sub-doctrines, the principle of merger, which was stretched and extended to include lesser non-homicidal offenses such as assault. This gross doctrinal extension has in fact created a criminal anomaly whereby blameworthy murderers of women are exonerated and technically exempted from murder convictions. Given that most U.S. jurisdictions apply the felony-murder doctrine in some form, the article will analyze and scrutinize the felony-murder doctrine with regard to its particular applicability to circumstances of assaultive femicide. In addition, the article will propose statutory amendments to Sections 210.2(b) and 210.6 of the U.S. Model Penal Code. The proposed statutory amendments to the U.S. Model Penal Code are applicable, mutatis mutandis, to most American jurisdictions and may constitute a prototype for future legislative state reforms.*

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## I. INTRODUCTION

This article examines the American legal criminal doctrine that is commonly applied in cases of a particular sub-type of femicide: assaultive femicide, women who are battered to death. The most relevant criminal doctrine applicable to these circumstances is the felony-murder rule. Generally speaking, according to this rule, the felon's intent in committing the felony is attached to the killing and transformed into the malice aforethought required for murder.<sup>1</sup> The felony-murder rule thus aggravates an unintended killing to murder on the basis of committing or attempting to commit a felony.<sup>2</sup> Under the general notion of the American felony-murder rule, the prosecution is relieved of the burden of proving that the defendant intentionally or knowingly caused the death of an individual. Rather, the culpable mental state for a homicide conviction is supplied by the state of mind accompanying the underlying felony.<sup>3</sup> As will be shown, the doctrine's most problematic modification

<sup>1</sup> George P. Fletcher, *Reflections on Felony-Murder*, 12 SW. U. L. REV. 413, 413 (1980).

<sup>2</sup> Guyora Binder, *Making the Best of Felony Murder*, 91 B. U. L. REV. 403, 413 (2011).

<sup>3</sup> Russell R. Barton, *Application of the Merger Doctrine to the Felony Murder Rule in Texas: The Merger Muddle*, 42 BAYLOR L. REV. 535, 535 (1990).

relates to one of its sub-doctrines, the principle of merger. The principle of merger is premised on the fact that manslaughter and other homicidal acts are a lesser-included offense within murder.<sup>4</sup> Lamentably, the merger principle was stretched and extended to include lesser non-homicidal offenses, such as assault. In the realm of domestic violence, this gross doctrinal extension has in fact created a criminal anomaly whereby blameworthy murderers of women are exonerated and technically exempted from murder convictions. Such legal construction has dire and unjust consequences for women in general and for battered women in particular, since international statistics show that assaultive male intimate partners eventually kill significant shares of battered women.<sup>5</sup>

The three landmark cases with regard to the principle of merger in cases of assaultive homicide can be traced to decisions of the California Supreme Court in the late 1960s. Curiously enough, all three decisions related to defendants who had killed their wives. The legal application of the merger principle in these cases resulted in the defendants' acquittal on murder charges.<sup>6</sup> The first legal precedent was the 1969 case of *People v. Ireland*.<sup>7</sup> In that case, the defendant shot and killed his wife. The California Supreme Court struck down the defendant's conviction of second-degree felony murder for killing his wife on the ground that a "felony murder instruction cannot properly be given when it is based upon a felony which is an integral part of the homicide and when the evidence produced by the prosecution to prove an offense was in fact included within the offense charged."<sup>8</sup> In the second landmark case, *People v. Wilson*,<sup>9</sup> the defendant broke into the apartment of his estranged wife, armed with a shotgun. There, he killed

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<sup>4</sup> WAYNE R. LAFAYE & AUSTIN WAKEMAN SCOTT, HANDBOOK ON CRIMINAL LAW 558-59 (1972).

<sup>5</sup> There are statistical data which show that about half of the women murdered by their partners were, prior to their murder, victims of sustained and routine domestic violence. See generally DONALD ALEXANDER DOWN, MORE THAN VICTIMS: BATTERED WOMEN, THE SYNDROME SOCIETY, AND THE LAW 53 (1984); see also Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2116, 2173 (1996).

<sup>6</sup> If these defendants had committed crimes less serious than and separate from homicide, the crimes could have served as predicate felonies and the defendants would have been convicted of felony murder.

<sup>7</sup> *People v. Ireland*, 450 P.2d 580, 589-90 (Cal. 1969).

<sup>8</sup> *Id.* at 590.

<sup>9</sup> *People v. Wilson*, 462 P.2d 22, 29 (Cal. 1969).

his wife and one of the three men present, and wounded another one. In reversing the defendant's double felony conviction, the Supreme Court rendered the lower court's conviction as improper, stating "the felony murder instruction was based on an underlying felony which was a necessary ingredient of the homicide"<sup>10</sup> Similarly, in *People v. Sears*,<sup>11</sup> the California Supreme Court struck down the felony-murder conviction of a defendant who broke into a dwelling for the purpose of killing his estranged wife, and ended up accidentally killing her daughter. While the lower court maintained that burglary with the intent to assault was a predicate felony for killing the daughter, the Supreme Court rendered that under the merger principle, prosecution for felony-murder is erroneous. The Supreme Court further stated that "to apply the felony-murder rule to such a situation would extend the doctrine 'beyond any rational function that it is designed to serve'. As pointed out in Wilson, that doctrine can serve its purpose only when applied to a felony independent of the homicide."<sup>12</sup>

In line with the judicial extended interpretation of the principle of merger as illustrated in these landmark cases, assaultive femicide cases will probably be prima facie excluded from being covered by the felony-murder doctrine. Such probable exclusion should be lamented, since assaultive femicide is by many times a fatal result of domestic violence. Indeed, empirical data indicates that battering of women by their husbands, ex-husbands or boyfriends is the largest single cause of injury to women in the United States,<sup>13</sup> and that such battering may result in a greater likelihood of the women being killed while being assaulted.<sup>14</sup> It is therefore of extreme importance to try and eradicate

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<sup>10</sup> *Id.* at 26 ("In our recent decision of *People v. Ireland* (1969) 70 Cal.2d 522 [75 Cal.Rptr. 188, 450 P.2d 580], we held an identical instruction to be improper on the ground that it went beyond any 'rational function' that the felony-murder rule was intended to serve. To allow such use of the felony murder rule would effectively preclude the jury from considering the issue of malice aforethought in all cases wherein homicide has been committed as a result of a felonious assault—a category which includes the great majority of all homicides. This kind of bootstrapping finds support neither in logic nor in law. We therefore hold that a second degree felony murder instruction may not properly be given when it is based upon a felony which is an integral part of the homicide and which the evidence produced by the prosecution shows to be an offense included in fact within the offense charged." (footnote omitted)).

<sup>11</sup> *People v. Sears*, 465 P.2d 847 (Cal. 1970).

<sup>12</sup> *Id.* at 852.

<sup>13</sup> CATHERINE A. MACKINNON, *SEX EQUALITY* 715 (2001).

<sup>14</sup> CYNTHIA K. GILLESPIE, *JUSTICIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE AND THE LAW* 59-60, 148-49 (1989); John Q. La Fond, *The Case of Liberalizing the Use*

femicide by advancing an explicit legislative and statutory inclusion of the offense of aggravated assault in circumstances of domestic violence, within the felony-murder rule. Such legislative amendment will be proposed within the legal framework of the U.S. Model Penal Code because of the code's enormous influence and leading role in shaping the state criminal codes. The article proposes direct amendments to Section 210.2(b) of the U.S. Model Penal Code, and indirect amendments to Section 210.6 (that addresses aggravating circumstances for death penalty upon first-degree felony-murder convictions). The proposed statutory amendments to the U.S. Model Penal Code are applicable, *mutatis mutandis*, to most American jurisdictions and may constitute a prototype for future legislative state reforms.

## II. A CRIMINOLOGICAL PERSPECTIVE ON ASSAULTIVE FEMICIDE

Apart from the military and police arenas that are inherently dangerous, the most dangerous and violent arena in the United States is the home.<sup>15</sup> Stated more precisely, the home is the most dangerous place for women.<sup>16</sup> Indeed, the U.S. Department of Justice estimates that between 90%–95% of domestic violence victims are women<sup>17</sup>: “Many women in the United States live under siege in their homes, with aggression, including battering and rape, recurrent and pervasive from male intimates. The criminological significance of these findings is that, in the vast majority of cases, domestic violence is for all intents and purposes equivalent to violence against women.<sup>18</sup> This phenomenon is by no means marginal. According to reports by the U.S. Justice Department, some four million women suffer from serious or life-

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*of Deadly Force in Self Defense*, 6 U. OF PUGET SOUND L. REV. 276, 277 (1982).

<sup>15</sup> RICHARD GELLES & MURRAY STRAUS, VIOLENCE IN THE AMERICAN FAMILY, IN CRIME AND THE FAMILY 88 (Alan Jay Lincoln & Murray Straus eds., 1985).

<sup>16</sup> R. Emerson Dobash & Russell P. Dobash, *Wives: The Appropriate Victims of Marital Violence*, 2 VICTIMOLOGY 426,, 437 (1978).

<sup>17</sup> Siegel, *supra* note 5, at 2172.

<sup>18</sup> Violence against women has broader criminological aspects than mere domestic violence, as female victimology is also a characteristic of crimes committed outside the home environment, for example sexual crimes. In the context of domestic violence, victims of assault and murder – are almost entirely – women. Likewise, patterns relating to the murder of women display empirical proximity to the family arena: women who are murdered are primarily murdered within the framework of “their family,” i.e., by their partners. For further discussion regarding the murder of women, see Hava Dayan & Emanuel Gross, *Uxoricide Under the Auspices of the Model Penal Code: A Legislative Proposal to Amend Section 210.3(b) of the Model Penal Code*, 15 GEO. J. GENDER & L. 411 (2014).

threatening violence every year in the U.S. alone.<sup>19</sup> The empirical findings regarding the extent and characteristics of violence against women are not particularized and do not depend on any specific class, ethnicity or religion, and in addition to the high frequency of violence against women, the data show that it cuts across all strata and groups in American society.<sup>20</sup>

This violence has five unique characteristics. First and foremost, domestic violence is not gender-symmetrical. In most cases of domestic violence, as well as domestic murders, the perpetrators are men and the typical victims are women<sup>21</sup> Secondly, their past or present partners direct the vast majority of incidents of such violence against woman, and in the United States, three-quarters of all attacks against women are committed by persons who are in or have been in an intimate relationship with these women.<sup>22</sup> Third, the findings relating to attacks on intimate partners show that most of these attacks are likely to include rape and repeated sexual offenses.<sup>23</sup> Fourth, assaults against women in the context of domestic violence are characterized by severe physical injury, which is more hazardous than that caused in the course of attacks committed by strangers in other circumstances. The U.S. Department of Justice has shown that the injuries suffered by women assaulted by their partners are more serious than those suffered by women assaulted by strangers, and estimates the severity of about one-third of the attacks against women within the home as equivalent to the severity of violence accompanying traditional notions of violent crime, that of robbery, felony rape and serious assaults.<sup>24</sup> It also estimates that the vast majority of domestic violence defined as “common assaults” (i.e., attacks which

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<sup>19</sup> L.A. GOODMAN, NO SAFE HAVEN: MALE VIOLENCE AGAINST WOMEN AT HOME, AT WORK, AND IN THE COMMUNITY 44 (1994).

<sup>20</sup> The high rate of domestic violence directed against women is similar across different strata and different ethnic groups (albeit the specific expressions and typical responses vary slightly across origin and status). MACKINNON, *supra* note 13, at 717.

<sup>21</sup> For example, notwithstanding the absence of a systematic collection of precise data, in the context of female perpetrators (the number of women in America who committed murder, those among them who killed their partners, those among them who alleged domestic violence and those among them who alleged homicide in self-defense), the accepted estimate is that each year about 500 women kill their intimate partners. Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*. 140 U. PA. L. REV. 379, 397 (1991).

<sup>22</sup> Siegel, *supra* note 5, at 2172; ANGELA BROWNE, WHEN BATTERED WOMEN KILL 9-10 (1987).

<sup>23</sup> MACKINNON, *supra* note 13, at 869; Siegel, *supra* note 5, at 2173.

<sup>24</sup> Siegel, *supra* note 5, at 2173.

prima facie are not serious) include serious physical injuries similar to those associated with severe attacks and robberies.<sup>25</sup> Similarly, the American Medical Association's Council on Scientific Affairs reported that attacks on women in circumstances of domestic violence are generally more severe and violent than attacks committed in other circumstances. While approximately half of the attacks committed by strangers end in significant injury, over eighty percent of the attacks against intimate partners result in significant injury, and are characterized by a high rate of serious injury, including damage to internal organs and loss of consciousness.<sup>26</sup> The fifth characteristic of these attacks is that they constitute a pattern of continuous and escalating assaults that become increasingly severe<sup>27</sup> over time and result in a greater likelihood of the women being killed.<sup>28</sup> Taken together, these criminological characteristics lead to the conclusion that, in circumstances of domestic violence, the equivalent criminal offense is, at the very least, aggravated assault. While in many cases these assaults fall just short of homicide, in a significant portion the aggravated assault eventually leads to homicide.

The U.S. Model Penal Code (MPC) deals separately with each of the behaviors, ranging from simple assault to the infliction of serious and permanent injury. Offense grading is based on the gravity of harm intended or caused and on the dangerousness of the means used, and the criminal penalty ranges from petty misdemeanor to second-degree felony.<sup>29</sup> Aggravated assault is a felony of second or third degree as defined in Sections 211.1(2)(a) and 211.1(2)(b) of the MPC. Section 211.1(2) of the Code states that an aggravated assault may be committed in either of two ways: attempting or causing serious bodily injury in a manner that manifests recklessness and indifference to the value of life,<sup>30</sup> or a knowledgeable or purposeful commission or attempt to

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> GILLESPIE, *supra* note 14, at 148-49; La Fond, *supra* note 14, at 276-77.

<sup>28</sup> For the opposite opinion, stating that "the fact that a battered woman has been assaulted on many occasions in the past but has not been killed might suggest that she is unlikely to be killed by her partner in the future", see FIONA LEVERICK, *KILLING IN SELF-DEFENCE* 91 (2006).

<sup>29</sup> MODEL PENAL CODE § 210-211 (Am. Law Inst., Official Draft and Revised Comments 1980).

<sup>30</sup> The requirement of knowledge or the similar mens rea required for felony-murder rule: recklessness under circumstances manifesting extreme indifference to the value of human life. MODEL PENAL CODE § 211.1(2)(a).

commit bodily injury (not necessarily of a serious type) by the mere usage of a deadly weapon.<sup>31</sup> In other words, a person who batters a woman could be convicted for a felony of aggravated assault if he caused serious bodily injury unarmed, or if he caused any bodily injury<sup>32</sup> while using a deadly weapon.<sup>33</sup>

The MPC distinguishes between bodily injury and serious bodily injury. The definition of bodily injury states that it “means physical pain, illness or any impairment of physical condition.”<sup>34</sup> In contrast, the definition of serious bodily injury includes either a risk to the victim’s life or bodily injury of a serious permanent nature: “serious bodily injury means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.”<sup>35</sup> The MPC’s definition of bodily injury is restricted to cases involving either the fact or prospect of physical injury or physical endangerment: “bodily injury means physical pain, illness or any impairment of physical condition.”<sup>36</sup> Thus, according to the MPC, mere offensive contact without physical injury,<sup>37</sup> or wrongs based solely upon insult or emotional trauma, are excluded.<sup>38</sup>

While the approach of the MPC towards injury is restricted to physical injuries, its approach towards deadly weapons is broad-minded. According to the drafters’ commentaries, the section dealing with assault with a deadly weapon “extends liability to negligent infliction of injury with a deadly weapon, despite the general policy of confining penal sanctions to behavior of a higher degree of culpability.”<sup>39</sup> This approach

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<sup>31</sup> MODEL PENAL CODE § 211.1(2)(b).

<sup>32</sup> Bodily injury could mean any physical pain, illness or any impairment of physical condition. MODEL PENAL CODE § 210.0(2).

<sup>33</sup> In the case of serious bodily injury, the perpetrator will be prosecuted for an offense that is graded as second degree felony. In the case of non-serious bodily injury committed by a deadly weapon, the perpetrator will be prosecuted for an offense that is graded as third degree felony. MODEL PENAL CODE § 211.1(2).

<sup>34</sup> See MODEL PENAL CODE § 210.0(2).

<sup>35</sup> See MODEL PENAL CODE § 210.0(3).

<sup>36</sup> MODEL PENAL CODE § 210.0(2).

<sup>37</sup> According to the drafters, other forms of offensive but not physically endangering behavior can be treated by other provisions in the Code. MODEL PENAL CODE § 211.

<sup>38</sup> For example, emotional fear is addressed in Section 211.1(c), defined as “attempts by physical menace to put another in fear of imminent serious bodily injury,” which is a simple assault graded as a misdemeanor.

<sup>39</sup> MODEL PENAL CODE AND COMMENTARIES, pt. II, vol. I commentary at 191 (1980). The drafters also state that “this extension is justified on the ground that any use of an



towards deadly weapons is broad in four main respects. First, it includes not only weapons as such but also all instruments, materials and devices.<sup>40</sup> Second, it refers not to the nature of the instrument but to the manner in which it was applied.<sup>41</sup> Third, it defines a weapon or instrument as ‘deadly’ not only if it is capable of producing death but also if it is capable of producing serious bodily injury.<sup>42</sup> Fourth, it does not require a high degree of culpability and extends liability for such injury even to cases of mere negligent infliction of injury.<sup>43</sup> Hence, the MPC’s approach towards assault with a weapon should have accommodated, in principle, various cases of assaultive femicide, including those perpetrated by the usage of a non-lethal instrument (as long as it was used in a manner capable of causing serious bodily injury).

Assaults against women typically include elements defined by the MPC as constituting aggravated assault. In conjunction with the MPC’s definitions of ‘bodily injury’ and ‘serious bodily injury’ in Section 210.0(3),<sup>44</sup> violence against women could thus be a felony of aggravated assault in three possible ways:

- (1) If it includes an element of serious bodily injury that substantially risked the victim’s life (as in the definition of ‘serious bodily injury’ in Section 210.0(3)).
- (2) If it included a serious permanent injury [as in the definition of ‘serious bodily injury’ in Section 210.0(3)].

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instrument or substance known for its capability of causing death should be accompanied by special care and restraint.” The definition of “deadly weapon” in Section 210.0(4) is: “any firearm, or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury.”

<sup>40</sup> According to the MPC drafters, “this definition is designed to take account of the ingenuity of those who desire to hurt their fellows without encompassing every use of an ordinary object that could cause death or serious injury.” MODEL PENAL CODE § 210.0(4).

<sup>41</sup> The drafters state that the expanded definition “reaches to certain instruments that become deadly weapons only because of the manner of their use”, and give an example of the manner in which a car can be used. *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> According to the MPC drafters, “‘serious bodily injury’ means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.” MODEL PENAL CODE § 210.0(3).

(3) If it included any bodily injury that was afflicted with a deadly weapon [as in the definition of aggravated assault with a deadly weapon in Section 211.1(b)].

Since the MPC does not distinguish between inchoate assault offenses and complete offenses,<sup>45</sup> the drafters stretched the offense of aggravated assault to include the mere attempt to cause serious bodily injury. The Code's grading of the offense of aggravated assault as a felony is consistent with that of most U.S. jurisdictions<sup>46</sup> and with the American federal criminal law.<sup>47</sup> Hence, the empirically-based criminological

<sup>45</sup> MODEL PENAL CODE § 211.1.

<sup>46</sup> A large majority of U.S. jurisdictions (41 jurisdictions) grade the offense of aggravated assault as a felony, *see* Alabama, ALA. CODE § 13A-6-20, § 13A-6-20; Alaska, ALASKA STAT. § 11.41.200; Arizona, ARIZ. REV. STAT. §13-1204; Arkansas, ARK. CODE ANN. § 5-13-204, § 5-26-306; Colorado, COLO. REV. STAT. § 18-3-202; Connecticut, CONN. GEN. STAT. § 53a-59, § 53a-70a; Delaware, DEL CODE § 613; Florida, FLA. STAT. §784.021; Georgia, O.C.G.A. TITLE 16, § 16-5-21; Hawaii, HAW. REV. STAT. § 707-710; Idaho, IDAHO CODE § 18-905, § 18-906, § 18-111; Indiana, IND. CODE § 35-42-2-1.5; Kansas, KAN. STAT. ANN. §21-3410; Kentucky, KY. REV. STAT. ANN. §508.010, §508.020; Maine, ME. REV. STAT. ANN - §208, § 4, 1252; Maryland, MARYLAND CRIM. LAW § 3-202, § 3-203; Massachusetts, MASS. GEN. LAWS. c.265 § 13A; Minnesota, MINN. STAT. § 609.02; § 609.221; Mississippi, MISS. CODE ANN. § 97-3-7; Missouri, MO. REV. STAT. § 565.050. 1, § 565.072, § 565.073; Montana, MONT. CODE ANN § 5-202; Nebraska, NEB. STAT. REV. ANN § 28-308, § 28-309; Nevada, NEV. REV. STAT. § 200.481; New Hampshire, NH. REV. STAT. ANN. § 631:1; § 631:2; New Jersey, N.J. REV. STAT. § 2C:12-1; New York, N.Y. PENAL. LAW § 120.10; § 120.04-a; § 120.11; § 120.12; North Dakota, N.D. § 12.1-17-01 N.D. § 12.1-17-01; Ohio, OHIO REV. CODE. ANN. R.C. § 2903.12; Oklahoma, OKLA. STAT. §21-646, § 21650, §21-650.2, § 21-647, § 21-5, §219; Oregon, OR REV. STAT. § 163.185; Pennsylvania, PA. CONS. STAT. § 2702; Rhode Island, R.I. Gen. Laws § 11-5-2, § 11-5-2.1; South Carolina, S.C. CODE ANN. § 16-3-600; South Dakota, S.D. CODIFIED L §22-18-1.1; Tennessee, TENN. CODE ANN. § 39-13-102; Texas, TEX PENAL CODE ANN. . § 22.02; Utah, UTAH CODE ANN. § 76-5-103; Vermont, VT. STAT. ANN. § 1024; Washington, WASH. REV. CODE § 9A.36.011, § 9A.36.021, § 9A.36.021; Wisconsin, WIS. STAT. STAT § 940.19; Wyoming, WYO. STAT. ANN. § 6-2-502. Seven jurisdictions grade such assault as a felony depending on its particular circumstances, *see* California, CAL. PENAL CODE § 242, § 243; Illinois CRIMINAL CODE, 720 ILCS 5/12-3.2; Iowa, IOWA CODE § 708.1, §708.2; New Mexico, NM STAT. ANN. § 30-3-4, § 30-3-3; North Carolina, N.C. GEN. STAT. § 14-32; § 14-33; Virginia, VA CODE ANN.§ 18.2-57; West Virginia, W. VA. CODE § 61-2-9. Only two jurisdictions, Michigan and Louisiana, grade aggravated assaults as misdemeanors, *see* Louisiana, LA. STAT. ANN. §2, §37; Michigan, MICH. COMP. LAWS § 750.81a.

<sup>47</sup> *See* 18 U.S.C. § 113(a)(7)-(8), (b)(1) (2013); 18 U.S.C. § 1365(h)(3)-(4).: “(a) (7) Assault resulting in substantial bodily injury to a spouse or intimate partner, a dating partner, or an individual who has not attained the age of 16 years, by a fine under this title or imprisonment for not more than 5 years, or both. (8) Assault of a spouse, intimate partner, or dating partner by strangling, suffocating, or attempting to

nature of physical violence against women as including serious bodily injury and risk of death is in line with the legal tendency in the United States to grade such an offense as felonious aggravated assault. Assaults against women should thus be classified as felonious offenses that are inherently dangerous to human life in general and to women in particular. This socio-legal conclusion appears to provide the two crucial elements necessary for the application of the felony-murder doctrine in cases of assaultive femicide: the commission of a felony dangerous to human life, and the resulting killing. Lamentably, with the exception of several U.S. jurisdictions, the vast majority (including the U.S. Model Penal Code) exclude such an offense from the felony-murder rule.<sup>48</sup> The legal exclusion of aggravated assault from the list of predicate felonies for felony-murder creates a perplexing anomaly with regard to assaultive femicide: It exonerates blameworthy killers whose convictions are therefore downgraded at most to voluntary or involuntary manslaughter. This legal anomaly will be further elaborated below in the context of the discussion about the historical origins and legal principles of the felony-murder doctrine in the United States.

### III. THE ORIGINS OF THE FELONY-MURDER RULE

It is commonly believed that the felony-murder doctrine is rooted in British common law.<sup>49</sup> The early English conception of criminal homicide derived from the principle that all people who cause

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strangle or suffocate, by a fine under this title, imprisonment for not more than 10 years, or both. (b) Definitions.— In this section—(1) the term “*substantial bodily injury*” means bodily injury which involves—(A) a *temporary but substantial disfigurement*; or (B) a *temporary* but substantial loss or impairment of the function of any bodily member, organ, or mental faculty.” See also definitions of bodily injury in Sections 1365 (3) and 1365(4), that for the definition of serious bodily injury do not require a permanent disfigurement or impairment, and can include risk of death and extreme physical pain. U.S. Code, Title 18, Part I, chapter 51, Section 1365: (3) the term “serious bodily injury” means bodily injury which involves (A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty; and (4) the term “bodily injury” means (A) a cut, abrasion, bruise, burn, or disfigurement; (B) physical pain; (C) illness; (D) impairment of the function of a bodily member, organ, or mental faculty; or (E) any other injury to the body, no matter how temporary.”

<sup>48</sup> Several recent legislative amendments include such an offense only in so far as the assault is committed against children. The legislative arrangement according to which assault of a child is a predicate felony murder will be elaborated below.

<sup>49</sup> Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 57, 60 (2004).

death, whether intentionally or accidentally, are liable for murder,<sup>50</sup> and from the principle that an actor is responsible for the unintended harm resulting from an unlawful act, which has its roots in early Christian ethics.<sup>51</sup> The doctrine originated in the seventeenth century and rendered the legal excuse of “accidental killing” unavailable to those whose hands were soiled by an accidental killing that occurred in the course of an unlawful act.<sup>52</sup> It was this principle of a “killing with soiled hands,” which was the conceptual foundation for what would become over time the formal test of criminal liability for felony murder.<sup>53</sup>

According to the felony-murder rule, the felon’s intent in committing the felony is attached to the killing and transformed into the malice aforethought required for common law murder.<sup>54</sup> A defendant could thus be liable for murder if the killing was connected with an attempted or committed dangerous felony, or while attempting to flee the crime scene. The doctrine seems to be based on the notion that the mere fatal (though accidental) outcome of the felony inherently taints the defendant, whether or not the homicide is culpable.<sup>55</sup> An additional line of thought underlying the doctrine stressed that because the felonious act precedes the deadly outcome, the wrongdoer’s threshold of liability is lower because his own preliminary wrongdoing lowered the threshold of liability for the resulting death.<sup>56</sup>

Throughout case law, several modifications were developed with regard to the felony-murder rule in an effort to limit its scope and adjust its application to notions of moral culpability and fair punishment. These modifications included limitation of the felony-murder rule to inherently

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<sup>50</sup> See Leonard Birdsong, *Felony Murder: A Historical Perspective By Which To Understand Today’s Modern Felony Murder Rule Statutes*, 23 T. MARSHALL L. REV. 1, 4 (2006).

<sup>51</sup> *Id.*

<sup>52</sup> The legal excuse of “per infortunium,” see Birdsong, *supra* note 50, at 5.

<sup>53</sup> See *id.* For an analysis of the initial use of the felony-murder rule in case law, see *id.* at 6-7.

<sup>54</sup> See Fletcher, *supra* note 1, at 413.

<sup>55</sup> According to Fletcher, the notion of “tainting” dates back to 13<sup>th</sup> century England, whereby the assumption was that if one person caused the death of another, the killing itself upset the natural order and some response was necessary to expiate the killing and thus to expunge the taint. Fletcher argues that this medieval notion of tainting still haunts the way courts think about criminal homicide, and felons are therefore forced to answer for a human death for no reason other than that they or their accomplice caused it, just because the tainting occurred regardless of fault or blame. See Fletcher, *supra* note 1, at 426-27.

<sup>56</sup> *Id.*

dangerous felonies,<sup>57</sup> the requirement of proximate causation between the committed or attempted felony and the occurrence of the victim's death,<sup>58</sup> and the principle of merger, which excludes lesser offenses of homicide (mainly the offense of assault) considered to be already included within the legal elements of the offense of homicide<sup>59</sup>

The most substantial legal criticism leveled against the felony-murder rule relates to the assertion that the doctrine divorces criminal liability from blameworthiness.<sup>60</sup> Indeed a common criticism specifically refers to the creation of a de jure "heavy handed

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<sup>57</sup> The limitation of the doctrine to dangerous felonies is rooted in the 19<sup>th</sup> century judicial decision given by Sir James Stephen that implicitly pointed to the notion of human life sanctity while limiting the application of the felony-murder rule in England to: "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. *See* Anne C. Adlerstein, *Felony Murder in the New Criminal Codes*, 4 AMER. J. CRIM. L. 4 249, 252 (1975), referring to the case of *Regina v. Serne*, 16 Cox Crim. Cas. 311 (Central Crim. Ct. 1887); *see also* David Crump & Susan Waite Crump, *Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL'Y 359, 391-93 (1985).

<sup>58</sup> The basic definition of felony-murder implies a causal relationship between the underlying crime and the homicide. This assumption calls for judicial determination of legal questions pertaining to, inter alia, the duration of the felonious act and its proper legal connection to the resulting killing. The common law concept maintains that the act which caused the death must occur "in" or "during" the commission of the felony, and extends the concept to include attempted perpetration of felony and flight or attempted flight after the commission or attempted commission of a felony. Limitation of causation relates to the requirement of a proximate causation between the killing and the felonious act. Therefore, causation doctrines such as "but-for causation," foreseeability and intervening agency are sometimes used to limit felony-murder. *See* CRUMP & CRUMP, *supra* note 57, at 383. For further reading on the limitation of causation applied in the felony-murder rule, *see* CRUMP & CRUMP, *supra* note 57, at 383-90.

<sup>59</sup> The limitation that refers to the principle of merger disallows use of the felony-murder rule in manslaughter or criminally negligent homicide as underlying felonies, *see* LAFAVE & SCOTT, *supra* note 4, at 558-59. Some argue that the purpose of this exclusion is to avoid "bootstrapping" which would allow prosecutors to convert what would ordinarily be a straightforward murder case, involving only one crime, into a felony-murder case, by separating an assault and treating the killing resulting from the assault, as murder, *see* Fletcher, *supra* note 1, at 415-16. Scholars argue that the underlying rationale of this exclusion is to prevent its inappropriate use, because such homicide is an integral part of the said homicide and thus a lesser included offense within murder, *see* CRUMP & CRUMP, *supra* note 57, at 377.

<sup>60</sup> David Crump, *Reconsidering the Felony Murder Rule in Light of Modern Criticisms: Doesn't the Conclusion Depend Upon the Particular Rule at Issue?*, 32 HARV. J.L. & PUB. POL'Y 1155, 1158 (2009).

approximation of malice in killing,”<sup>61</sup> which forms de facto a kind of strict liability for homicide.<sup>62</sup> Such strict liability creates an intrinsic injustice, which disregards the basic legal criminal requirement of mens rea, the question of the felon’s moral culpability and individual accountability, and the proportional punishment with regard to the most grievous criminal allegation and its correlated harsh sanctions.<sup>63</sup> This legal criticism has been echoed in constitutional legal arguments, which state that prosecution for an accidental death squarely denies the equal protection from arbitrary legal procedures in no-fault cases.<sup>64</sup>

Proponents of the felony-murder doctrine underscore two positive outcomes of the doctrine. The first relates to the proper weight it gives to the actus reus and to the proper criminal grading of the actual crime committed.<sup>65</sup> According to this approach, a doctrine that includes the result of the defendant’s conduct as a relevant determinant of just punishment and of fair criminal labeling is considered morally and socially desirable.<sup>66</sup> The second positive outcome pertains to its influence on societal norms and values in reaffirming and reinforcing the notion of the sanctity of human life. According to this view, the felony-murder rule serves this purpose by distinguishing between and upgrading crimes that cause human death.<sup>67</sup> The most notable argument set forth in favor of the felony-murder doctrine relates to the notion of social deterrence,<sup>68</sup> yet it is still unclear whether the rule deters criminals from committing felonies or influences them to be more careful when carrying them out.<sup>69</sup> In this respect, common criticism leveled against

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<sup>61</sup> See Fletcher, *supra* note 1, at 415.

<sup>62</sup> See Birdsong, *supra* note 50, at 2.

<sup>63</sup> See Fletcher, *supra* note 1, at 428.

<sup>64</sup> Fletcher for example, raises the possibility of equal protection and Sixth Amendment problems with respect to the felony-murder doctrine. For this critique see, e.g., Fletcher, *supra* note 1, at 425.

<sup>65</sup> CRUMP & CRUMP, *supra* note 57, at 366-67.

<sup>66</sup> See *id.*

<sup>67</sup> See *id.*

<sup>68</sup> However, FBI crime data used to model the effect of the felony-murder rule suggest that the rule is correlated with higher rates of felonies. This correlation seriously undermines the deterrence logic of such a doctrine. However, Ganz notes that the correlation between higher felony rates and application of the felony-murder rule doctrine may be linked to the fact that states with higher rates of crime would be more likely to adopt the rule. Daniel Ganz, *The American Felony Murder Rule: Purpose and Effect 6* (Unpublished Legal Studies Honors Thesis, UC Berkeley) (on file with author).

<sup>69</sup> According to Ganz, “One would presume that if a legislature wanted to merely decrease the prevalence of felonies, they would pass laws that prescribe more strict

the doctrine is that it does not serve positive or intended purposes and might not advance utilitarian concepts such as deterrence.<sup>70</sup>

Only several jurisdictions in the Western world currently rely on the felony-murder doctrine, and no evidence of the rule has been found in French or German law.<sup>71</sup> England itself, the conceptual cradle of the doctrine, abolished the felony-murder rule and all forms of constructive or fictitious malice,<sup>72</sup> and in fact never incorporated the rule in legislation.<sup>73</sup> Still, this doctrine is commonly practiced and legislatively recognized in all U.S. jurisdictions.<sup>74</sup>

#### IV. THE UNITED STATES FELONY-MURDER RULE

Most states reformed their homicide laws during the nineteenth century, adopting more detailed statutes that included provisions addressing homicide committed in the course of a crime.<sup>75</sup> By the mid-19<sup>th</sup> century, most U.S. jurisdictions had a felony-murder rule statute,<sup>76</sup> however uniform legislation was still lacking. Each jurisdiction had its particular version, yet by and large all versions were limited in scope and no strict liability for every death committed in the course of all felonies was applied.<sup>77</sup> The most popular legislative reform to homicide in post-independence U.S. jurisdictions divided murder into degrees.<sup>78</sup> This constituted a major departure from the criminal common law, but as far as the felony-murder rule was concerned, most U.S. jurisdictions

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punishments for the felony itself, rather than pass a law that elevates the punishment for something that may or may not happen during the felony.” *Id.* at 7.

<sup>70</sup> See *id.* at 3-9.

<sup>71</sup> For a description of the French and German laws of homicide, see GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 321-40 (1978).

<sup>72</sup> See English Homicide Act of 1957, 5 & 6 Eliz 2 c. 11, § 1, which provided that a person who “kills another in the course or furtherance of some other offence” shall not be guilty of murder unless his act was done “with the same malice aforethought as is required for a killing to amount to murder when not done in the course or furtherance of another offense.”

<sup>73</sup> Birdsong, *supra* note 50, at 14.

<sup>74</sup> FLETCHER, *supra* note 71, at 283-84.

<sup>75</sup> Binder, *supra* note 49, at 119.

<sup>76</sup> By the end of the 18th century, more than 80% of U.S. jurisdictions had legislated the felony-murder rule in some form. *Id.* at 132.

<sup>77</sup> *Id.* at 66.

<sup>78</sup> This new approach originated with Pennsylvania’s 1794 reform statute that restricted capital punishment to first degree murder, and by the end of the 19th century two-thirds of the states had followed suit. *Id.* at 119-20.

still classify all felony murder as murder of the first degree.<sup>79</sup>

There are three main versions to the U.S. felony-murder doctrine: the enumerating version, the version that requires an additional mens rea and the traditional common law version.<sup>80</sup> The enumerating version is the most common among U.S. jurisdictions.<sup>81</sup> The mere enumeration of certain felonies as premising a first-degree murder conviction when an accidental killing occurred during their commission created a legal presumption that these felonies were inherently dangerous enough to trigger the felony-murder rule. This classification simply enumerated the felonies that are legally conclusive on the issue of malice, thus limiting the scope of the common law felony-murder rule. It was widely adopted by numerous U.S. jurisdictions. The most

<sup>79</sup> Adlerstein, *supra* note 57, at 258.

<sup>80</sup> Fletcher, *supra* note 1, at 418; Adlerstein, *supra* note 57, at 257-67.

<sup>81</sup> The vast majority of the U.S. jurisdictions, more specifically 42 jurisdictions, currently apply this version of the felony-murder rule: Alabama, ALA. CODE § 13A-6-2 (1975); Alaska, ALASKA STAT. §§ 11.41, 11.41.110 (1999); Arizona, ARIZ. REV. STAT. § 13-1105 (2009); Arkansas, ARK. CODE ANN. § 5-10-101 (2013); California, CAL. PENAL CODE § 189 (2012); Colorado, COLO. REV. STAT. § 18-3-102 (2000); Connecticut, CONN. GEN. STAT. § 53a-54c (2015); Florida, FLA. STAT. ANN. § 782.04 (2015); Idaho, IDAHO CODE § 18-4003 (2002); Illinois, 720 ILL. COMP. STAT. § 5/2-8 (1996); Indiana, IND. CODE § 35-42-1-1 (2014); Iowa, IOWA CODE §§ 707.2; 702.11 (2013); Kansas, KAN. STAT. ANN. § 21-3401 (2011); LOUISIANA, LA. STAT. ANN. §§ 14:30, 14:30.1 (2015); Maine, ME. REV. STAT. ANN. tit. 17-A, §202 (1991); Maryland, MD. CODE ANN. CRIM. LAW § 2-201 (2013); Massachusetts, MASS. GEN. LAWS ch. 265, § 1 (2016); Michigan, MICH. COMP. LAWS §§ 750.316, 750.319, 750.320, 750.327, 750.328 (2014); Minnesota, MINN. STAT. §§ 609.185, 609.19 (2014); Mississippi, MISS. CODE ANN. § 97-3-27 (1994); Montana, MONT. CODE ANN. § 45-5-102 (2013); Nebraska, NEB. REV. STAT. § 28-303 (2002); Nevada, NEV. REV. STAT. § 200.030 (2013); New Hampshire, N.H. REV. STAT. ANN. §§ 630:1, 630:1-b (2011); New Jersey, N.J. REV. STAT. § 2C:11-3 (2007); New York, N.Y. PENAL LAW § 125.25 (2006); North Carolina, N.C. GEN. STAT. § 14-17 (2013); North Dakota, N.D. CENT. CODE § 12.1-16-01 (1992); Ohio, OHIO REV. CODE ANN. § 2903.02 (1975); Oklahoma, OKLA. STAT. § 701.7 (2012); Oregon, OR. REV. STAT. § 163.115 (2015); Rhode Island, R.I. GEN. LAWS §11-23-1 (2008); South Carolina, S.C. CODE ANN. §§ 16-3-10, 16-3-20 (1976); South Dakota, S.D. CODIFIED LAWS §§ 22-16-4; 22-16-41 (2005); Tennessee, TENN. CODE ANN. § 39-13-202 (2014); Utah, UTAH CODE ANN. § 76-5-203 (2009); Vermont, VT. STAT. ANN. § 2301 (1947); Virginia, VA. CODE ANN. § 18.2-32 (1998); Washington, WASH. REV. CODE § 9A.32.030(1)(c) (1990); West Virginia, W. VA. CODE § 61-2-1 (1991); Wisconsin, WIS. STAT. § 940.03 (2015); Wyoming, WYO. STAT. ANN. § 6-2-101 (2013).

Four of the above jurisdictions: Illinois, Massachusetts, Ohio and Iowa enumerate the felonies by way of categorization: Illinois and Iowa enumerate by way of categorizing “forcible felonies,” Massachusetts by categorizing “death or life imprisonment felonies” and Ohio enumerates by the categorization of “any violent offense.”\



common enumerated felonies in these jurisdictions are burglary, robbery, rape, arson and kidnapping.<sup>82</sup> Some jurisdictions, such as Illinois, limit this enumeration to felonies considered inherently dangerous to human life.<sup>83</sup>

Some jurisdictions retained the traditional common law version of the felony-murder rule that accords criminal liability to death ensuing from any felonious act.<sup>84</sup> This is the strictest version of the felony-murder rule and only a few U.S. jurisdictions recognize any felony as sufficient to classify a related killing as murder.<sup>85</sup> According to this version, the felony-murder rule is triggered upon the commission of any felonious act, with no requirement to prove subjective malice or mens rea related to the killing itself. This version of legal liability as part of the felony-murder rule is the closest to strict liability, as there is no legislative requirement to prove the defendant's actual intent to kill.<sup>86</sup>

The least common version of the felony-murder rule is the version that that requires an additional mens rea for a felony-murder conviction.<sup>87</sup> This requirement is currently reflected in the MPC's

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<sup>82</sup> See Adlerstein, *supra* note 57, at 270-74 (tables containing enumerated felonies by enumerating jurisdictions).

<sup>83</sup> See 38 ILL. COMP. STAT. ANN. 9-1(a)(3) (1976). According to Birdsong, in 1827 Illinois became the first state to pass the first true felony-murder law, which states that an "involuntary killing. . .in the commission of an unlawful act which in its consequences, *naturally tends to destroy the life of a human being*, or is committed in the prosecution of a felonious intent. . .shall be deemed and adjudged to be murder." This Illinois rule does not apply to all felonies, but rather to those felonies which are inherently dangerous to human life. Birdsong, *supra* note 50, at 18-19.

<sup>84</sup> Six jurisdictions retain the traditional extended version of the felony-murder rule applied to any felonious act: Delaware, Georgia, Missouri, New Mexico, Pennsylvania and Texas. See Delaware, Del. Code Ann. §§ 635, 636(a) (2013); Georgia, Ga. Code Ann. § 16-5-1 (2014); Missouri, Mo. Rev. Stat. § 565.021.1(2) (2016); New Mexico, N.M. Stat. Ann. § 30-2-1 (1994); Pennsylvania, Pa. Cons. Stat. § 2501 (1973); Texas, Tex. Penal Code Ann. § 19.02 (1994).

<sup>85</sup> Adlerstein, *supra* note 57, at 265-67. New York's 1829 felony-murder statute was the strictest felony-murder rule, specifying that "killing 'without any design to effect death, by a person engaged in the commission of any felony'" could result in a felony-murder conviction. Birdsong, *supra* note 50, at 19.

<sup>86</sup> According to this version of felony-murder, the intent to commit a felonious act (any felonious act, even if not inherently dangerous), suffices to receive a murder conviction if death occurred while committing or attempting to commit any felony.

<sup>87</sup> Additional to either the enumerating version or the traditional common law version. Only four jurisdictions add an additional requirement of mens rea to the felonious act requirement for the felony-murder rule application: Arkansas, Delaware, Louisiana and New Hampshire. See Arkansas, ARK. CODE ANN. § 5-10-102 (2013); Delaware, DEL. CODE § 635(2) (2004), § 636 (a)(2) (2013); Louisiana, LA. STAT. ANN. §14:30 (2009);

felony-murder approach. The jurisdictions that add the mens rea requirement to the enumerated felonies (Arkansas, Louisiana, Delaware and New Hampshire), limit the application of the felony-murder doctrine by a statutory requirement that the killing be committed with some sort of malice aforethought.<sup>88</sup>

As noted, the enumerating version of the felony-murder rule is the most common among U.S. jurisdictions and U.S. Federal Criminal Code applies this version.<sup>89</sup> Most U.S. felony-murder rules predicate murder liability only on felonies dangerous to life, and only on killings in which an intentional act clearly dangerous to human life was performed in the course of a dangerous felony.<sup>90</sup> Consequently, strict liability is not applied to all deaths occurring in the course of felonies, and murder liability is almost always conditioned on causing death with fault.<sup>91</sup> In its various forms, the felony-murder rule remains in force in all but three U.S. jurisdictions that have completely abolished it either statutorily (Hawaii and Kentucky)<sup>92</sup> or by judicial decision (Michigan).<sup>93</sup>

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New Hampshire, NH. REV. STAT. ANN. § 630:1, 630:1-b (2010).

<sup>88</sup> Such as the requirement of recklessness, indifference towards the value of life and knowledge or malice aforethought. For example, Arkansas that requires “universal malice manifesting extreme indifference to the value of human life generally”; Delaware requiring “criminal negligence”; Louisiana that requires “specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of”; and New Hampshire requiring “knowledge” for capital and first degree murder and “extreme indifference to the value of human life” for second degree murder. Similarly, U.S. federal codification of the felony-murder doctrine requires “malice aforethought” as an element of the offense of murder, felony-murder included. Henry S. Noyes, *Felony Murder Doctrine Through the Federal Looking Glass*, 69 INDIANA L.J. 533, 537-40 (1994).

<sup>89</sup> Conjunct with a requirement of “malice aforethought” that must be proved in order to grade the felony-murder as a murder in the first degree. 18 U.S.C § 1111 (2003) (“(a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.”)

<sup>90</sup> Binder, *supra* note 49, at 72.

<sup>91</sup> *Id.* at 66, 68.

<sup>92</sup> Adlerstein, *supra* note 57, at 250. Hawaii and Kentucky have abolished the felony-murder rule. 37 HAW. REV. STAT. § 701-04 (1972); KY. REV. STAT. ANN. § 507.020 (1974). In the relevant commentaries explaining the reason for its abolition, Hawaii

## V. THE MODEL PENAL CODE FELONY-MURDER RULE

The point of departure of the U.S. Model Penal Code's articulation of the felony-murder rule is most likely anchored in the drafters' criticism of the doctrine as a whole. Their main argument was that this common law doctrine imposes liability for murder based on the culpability required for the underlying felony, without requiring separate proof of culpability with regard to the death. Consequently, conviction of murder is not based on any proven culpability with respect to homicide, but on liability for another crime.

The drafters maintain that the criminal law should limit liability to homicide cases whereby death is based on personal blameworthiness,<sup>94</sup> and Section 210.1(1) to the Code states that, "a person is guilty of criminal homicide if he (sic) purposely, knowingly, recklessly or negligently causes the death of another human being."<sup>95</sup> The Code's general notion of culpability insisted on an element of culpability as a requisite for any valid criminal conviction, and maintained that without a subjective and actual mens rea (of at least extreme negligence coupled with indifference), felony-murder should not "provide any basis for imputing to the defendant actual culpability for the homicide."<sup>96</sup> In an effort to reconcile the felony-murder doctrine with the U.S. Model Penal Code's basic premise of mens rea, the drafters require personal culpability that is greater than recklessness, for a murder criminal liability. In doing so, they limited the criminal liability arising from the felony-murder to the actor's subjective and actual extreme recklessness, coupled with an indifference towards the value of life.<sup>97</sup> Section 210.2(1)(b) of the Code further states that "such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight

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drafters argue that: "if the murder penalty is to be used to reinforce the deterrent effect of penalties imposed for certain felonies (by converting an accidental, negligent, or reckless killing into a murder), it would be more effective, and hardly more fortuitous, to select a certain ratio of convicted felons for the murder penalty by lot. In recognition of the trend toward, and the substantial body of criticism supporting, the abolition of the felony-murder rule, and because of the extremely questionable results which the rule has worked in other jurisdictions, the Code has eliminated from our law the felony-murder rule." HAW. REV. STAT. part II Criminal Homicide, Commentary on 707-701.

<sup>93</sup> See Birdsong, *supra* note 50, at 20.

<sup>94</sup> See MODEL PENAL CODE AND COMMENTARIES 5, 30-32 [What does this refer to?].

<sup>95</sup> See Birdsong, *supra* note 50, at 4.

<sup>96</sup> MODEL PENAL CODE § 210.1 cmt. 1.

<sup>97</sup> MODEL PENAL CODE § 210.2 cmt. 6, at 29-30.

after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.” The Code maintains that such mens rea is only a rebuttable presumption that may be rebutted by the defendant himself.<sup>98</sup>

The felony-murder doctrine was not only limited by the elaborate and distinctive mens rea requirement. It was also limited by the Code drafters’ statutory enumeration of the particular felonies whereby such prosecution could be applied. Thus, the Code’s felony-murder doctrine is in fact a combination of the enumerating felonies approach and the mens rea approach, because the mens rea requirement of extreme recklessness and indifference to human life may be presumed from the commission of certain enumerated felonies.<sup>99</sup> The predicated felonies are enumerated in Section 210.2.(1)(b) of the Code and include the following felonies: “robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.”<sup>100</sup> Oddly, the Code drafters do not comment on their particular choice or on the rationale underlying their decision to include these offenses rather than others. Perhaps they regarded these felonies as inherently dangerous to human life, and as possibly manifesting the extreme indifference to the value of human life required for felony-

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<sup>98</sup> According to MODEL PENAL CODE § 1.12(5): “When the Code establishes a presumption with respect to any fact which is an element of an offense, it has the following consequences: (a) when there is evidence of the facts which give rise to the presumption, the issue of the existence of the presumed fact must be submitted to the jury, unless the Court is satisfied that the evidence as a whole clearly negatives the presumed fact; and (b) when the issue of the existence of the presumed fact is submitted to the jury, the Court shall charge that while the presumed fact must, on all the evidence, be proved beyond a reasonable doubt, the law declares that the jury may regard the facts giving rise to the presumption as sufficient evidence of the presumed fact.” According to the Code drafters, the jury may regard the facts giving rise to the presumption as sufficient evidence of the required culpability unless the court determines that the evidence as a whole clearly negates the conclusion of the required mens rea. *Id.* at cmt. 6.

<sup>99</sup> Fletcher argues that the Code’s approach seems to have abolished the felony-murder rule, when in fact it abolished it as a rule of substantive law and reformulated it as a rule of evidence. Fletcher, *supra* note 1, at 428-29.

<sup>100</sup> MODEL PENAL CODE § 210.2(1)(b) (stating that homicide is murder when “it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping, or felonious escape.”).

murder conviction.<sup>101</sup> In the absence of such comments we do not really know, for example, why they included the offense of rape as a predicate felony while excluding the offense of aggravated assault from the very same list.<sup>102</sup>

### A. The U.S. Model Penal Code Felony-Murder Rule and Femicide

With respect to femicide, the U.S. Model Penal Code's approach seems problematic for two main reasons. The first pertains to the peculiar mens rea requirements by which conviction may be difficult to achieve, particularly in cases of an intimate relationship whereby a basic assumption of love and care could easily rebut the legal requirement to manifest, in the felonious circumstances, an extreme indifference to the value of life. It may be difficult to argue convincingly that the Code's doctrinal approach emphasizing the mens rea requirement should be abandoned or altered, in light of the fact that recent U.S. Supreme Court decisions seem to side with the main thrust of the Code's criminal approach requiring personal and subjective mens rea for each element of an alleged crime.<sup>103</sup> The deliberate exclusion of assault from the Code's

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<sup>101</sup> Or perhaps as merely presumptive of the culpability required for homicide. See Fletcher, *supra* note 1, at 414; see also CRUMP & CRUMP, *supra* note 57, at 391.

<sup>102</sup> A curious case would be the inclusion of the crime of rape in spite of the merger doctrine. Rape is considered by all enumerating jurisdictions to be a predicate to felony-murder in spite of the primarily physical elements of assault. The Code's drafters explain such exclusion of the offense of rape from the merger doctrine in that it is an offense that includes an additional element of "extreme indignity of forced sexual intimacy." See MODEL PENAL CODE § 210.6 cmt. 3. However, perhaps the legislators' willingness to include the crime of rape within the felony-murder doctrine hints to a covert underlying patriarchal approach towards sex and women, coupled with covert leniency towards women's physical battery. Such possible patriarchal approach is reflected also in the fact that the MPC exempts marital rape from criminal liability (for the definition of rape and related offenses. See MODEL PENAL CODE § 213.1 – 213.5.

<sup>103</sup> Roth and Sundby mention the Supreme Court's decision in the case of *United States v. Bailey*, 444 U.S. 394 (1980), whereby Justice Rehnquist noted that "'strict liability' crimes are exceptions to the general rule that criminal liability requires an 'evil meaning mind,'" and went on to quote the U.S. Model Penal Code proposition that "clear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime." For further reading on recent U.S. Supreme Court decisions recognizing substantive limits on legislature's powers to dispose of mens rea elements, see Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 485-90 (1985). In fact, Roth and Sundby argue that the Supreme Court's judicial reliance on the U.S. Model Penal Code's requirement of mens rea has been understood by legal scholars as "establishing a constitutional

list of enumerated predicate felonies creates a seriously lacking legal structure for the criminal treatment of femicide and for the proper conviction of its perpetrators, since such killing will not be prosecuted under the MPC's felony-murder rule. Consequently, it seems we can assume that the U.S. Model Penal Code's approach with regard to femicide as a result of assault would be that such cases, along with other cases of assaultive homicide, should not be prosecuted for murder, rather for some version of negligent homicide.<sup>104</sup> Hence, the MPC's deliberate exclusion of assault from the enumerated felonies creates a lenient approach towards the murderer's criminal liability in cases of assaultive femicide. Such killers will, at worst, be convicted of negligent homicide with its more lenient sentence. A criminal code that exonerates perpetrators of assaultive femicide communicates a problematic public message of leniency and tolerance towards lethal violence with the possible result of the victim's killing. Furthermore, such an approach is grossly inadequate from a legal perspective since it creates an anomalous criminal situation that classifies death resulting from the conduct of an arsonist or a robber as murder, while exonerating femicide perpetrators from the corresponding culpability and the criminal liability for the murder they committed.

#### VI. ASSAULTIVE FEMICIDE AND THE PRINCIPLE OF MERGER IN THE FELONY-MURDER RULE

One limitation that developed within the felony-murder rule seems to have had critical and dire consequences for femicide: the principle of merger. This principle was formulated in order to determine which felonies could serve as predicate felonies. It originally disallowed the use of manslaughter or criminally negligent homicide as predicate felonies according the felony-murder rule<sup>105</sup> because "it would subvert any effort to grade homicide if every felonious homicide aggravated itself to murder."<sup>106</sup> Thus, the basic thrust of the merger principle is that the felony, which aggravates the homicide into a murder conviction

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doctrine of mens rea against which legislation must be tested." See Roth and Sundby's reference to Erlinder's comment in C. Peter Erlinder, *Mens Rea, Due Process and the Supreme Court: Toward a Constitutional Doctrine of Substantive Criminal Law*, 9 AM. J. CRIM. L. 163, 188 (1981).

<sup>104</sup> See MODEL PENAL CODE § 210.2 cmt. 6.

<sup>105</sup> LaFave, *supra* note 4, at 558-59.

<sup>106</sup> Binder, *supra* note 2, at 519.

must be distinct from the resulting killing.<sup>107</sup> Accordingly, the vast majority of U.S. jurisdictions excludes assault from felony-murder convictions, and requires an additional actual intent to kill in order to convict a defendant who intended to cause serious injury for murder.<sup>108</sup>

The principle of merger limits the inclusion of some predicate felonies by treating certain felonies as inseparable from the homicides to which they give rise. This limitation seems reasonable because its main purpose is to prevent the ‘bootstrapping’ of a lesser-included offense within murder.<sup>109</sup> A murder conviction based on such ‘bootstrapping’ might contravene the legal statutes and requirements of manslaughter or involuntary manslaughter, and disrupt the grading schemes typically found in U.S. homicide statutes.<sup>110</sup> According to Binder, the oft-stated purpose of the merger rule is to maintain the coherence and integrity of a scheme for grading homicide offenses, and it is for this reason the merger limitation requires that a predicate felony have some feature that appropriately aggravates a homicide and relevantly distinguishes it from homicides graded below murder.<sup>111</sup>

Scholars believe that the American roots of the merger principle are ingrained in nineteenth century case of *State v. Schock*.<sup>112</sup> In this

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<sup>107</sup> In referring to Hawkins’ 1716 treatise, Binder argues that the merger problem was recognized as soon as felony-murder rules were first proposed. *Id.* at 525 (citing William Hawkins, *A Treatise of the Pleas of the Crown* 74 (1976)). He maintains that, in an effort to resolve the merger problem that arises in murder convictions regarding quarrels and arguments that consequently turn violent, Hawkins required that the predicate felony aim at an additional wrong transcending danger to the victim (arguing that “such killing will be adjudged murder, which happens in the execution of an unlawful action, principally intended for some other purpose, and not to do a personal injury to him in particular who happens to be slain”). *Id.* at 526.

<sup>108</sup> Henry F. Leonning, *Assault With Intent To Murder – Necessity For Actual Intent To Cause Death – Wimbush v. State*, 21 MD. L. REV. 254, 255 (1961). In other words, in addition to the requirement of malice (which refers to the intent to commit the mere act of assault, e.g. knifing, shooting and punching, and not to the intent to achieve the specific result of death) “an actual intent to take life is necessary to establish the offense of ‘assault with intent to murder’. It is this intent which the law seeks to punish and prevent, and which distinguishes the offense from a simple assault.” *Id.* Only a few US judicial decisions seem to be willing to consider the character and degree of harm inflicted by the assault as the aggravation necessary to raise a simple assault to assault with intent to murder, *see id.* at 256-58.

<sup>109</sup> CRUMP & CRUMP, *supra* note 57, at 377

<sup>110</sup> *See* Binder, *supra* note 2, at 520.

<sup>111</sup> *Id.* at 519, 521.

<sup>112</sup> *State v. Schock*, 68 Mo. 552 (1878). *See* Douglas Van Zanten, *Felony Murder, the Merger Limitation, and Legislative Intent in State v. Heemstra: Deciphering the Proper*

case, the Missouri Supreme Court reversed a felony-murder conviction on the grounds that the defendant's acts of personal violence against the deceased were necessary and constituent elements of the homicide itself, and therefore merged with the alleged homicide.<sup>113</sup> Most U.S. jurisdictions avoid the merger problem by limiting predicate felonies and enumerating them statutorily.<sup>114</sup> By explicitly including particular offenses within the statutory provision, legislators provide clear instructions for judges and juries alike, and prevent in advance any possible judicial interpretation that would exclude the predicate offense on the grounds of the merger principle.<sup>115</sup>

The central controversy in the legal discourse about the merger principle concerns predicating felony murder on assault of the deceased: while some courts preclude felony murder liability predicated on assault, other courts permit such charges.<sup>116</sup> According to Binder, American judicial decisions that permit felony murder predicated on assault typically rely on statutory language and structure.<sup>117</sup> However, since most U.S. jurisdictions follow the merger principle, this statutory language and structure excludes assault as a predicate felony-murder offense. This exclusion is based on the argument that assault is a lesser-included offense within murder, and indeed the paradigm case of the principle of merger is a killing that takes place in the course of an assault.<sup>118</sup> The doctrine of merger would argue that, contrary to other predicate felonies, in cases involving assault leading to death the prosecutors cannot avoid proving mens rea for murder by merely linking the charges of assault and murder. With respect to other felonies, such as robbery or arson, the respective mens rea of the felony and the murder

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*Role of the Iowa Supreme Court in Interpreting Iowa's Felony Murder Statute*, 93 IOWA L. REV. 1565, 1573 (2008).

<sup>113</sup> *State v. Schock*, 68 Mo. at 561-62.

<sup>114</sup> See Binder, *supra* note 2, at 526, 533.

<sup>115</sup> In general, the judicial problem of the interpretation of the merger principle in U.S. jurisdictions is mostly relevant to those jurisdictions that either have a categorical felony murder rule (like the category of felonies "dangerous to human life" in Alabama, or the category of "forcible felonies" in Iowa), or have a common law felony-murder rule that encompasses all felonies as such, because they transfer the role of defining the limits of the merger doctrine to the judiciary. *Id.* at 526.

<sup>116</sup> *Id.* at 533 (arguing that courts in Texas, Missouri, and Massachusetts precluded felony-murder liability predicated on felonious assault while courts in Minnesota, Illinois, Georgia and Iowa permitted such charges).

<sup>117</sup> *Id.* at 534.

<sup>118</sup> See CLAIRE FINKELSTEIN, MERGER AND FELONY MURDER, DEFINING CRIMES: ESSAYS ON THE SPECIAL PART OF THE CRIMINAL LAW 218-20 (2005).



are sufficiently distinct and that the felony and murder do not merge into one and the same crime. According to the merger principle, if felonious assault could constitute the predicate felony for felony murder, the predicate felony would be the very act, which caused the homicide.<sup>119</sup>

In line with the merger principle, and in order to maintain the grading schemes typically found in American homicide statutes, most U.S. courts decided that the underlying felony which serves as the basis for a felony murder conviction must be “independent of the homicide and the assault merged therein.”<sup>120</sup> According to Finkelstein, it is here that the felony-murder rule encounters its greatest source of confusion, with results that sometimes border on the incoherent.<sup>121</sup> She argues that, in line with the principle of merger, it would be easier to convict by way of felony murder defendants of lesser crimes which appear distinct enough from homicide, while defendants who committed more serious crimes would be acquitted of such a murder charge just because the crime they committed seemed to include elements of homicide. As Finkelstein notes:

felony murder cannot be charged unless the predicate felony is sufficiently serious, under the inherently dangerous rule. But if the predicate felony is in the class of assault like offenses, the merger doctrine will make felony murder unavailable again . . . If the rationale were that such cases are particularly serious and so call for putting a thumb on the prosecution’s side of the scale, it would not make sense to exempt crimes like assault from the list of predicate felonies.<sup>122</sup>

#### **A. The Offense of Aggravated Assault as a Predicate to Felony Murder**

According to the merger principle doctrine, there are two prevalent arguments for the exclusion of the offense of assault from predicated felony murder. The first relates to the mens rea of the assaultive homicide offense and asserts that the predicate felony must be based on an “independent felonious purpose” from the killing.<sup>123</sup> It also

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<sup>119</sup> U.S. courts have contended that if the felony murder doctrine would be strictly followed, every felonious assault resulting in death would be murder, and any lesser offense (such as voluntary manslaughter, involuntary manslaughter, and criminally-negligent homicide) would effectively be eliminated. Barton, *supra* note 3, at 538.

<sup>120</sup> *People v. Moran*, 246 N.Y. 100, 102 (1927); Binder, *supra* note 2, at 519-30 (analyzing American case law of the principle of merger).

<sup>121</sup> FINKELSTEIN, *supra* note 120, at 219, 221.

<sup>122</sup> *Id.* at 220.

<sup>123</sup> *Id.* at 222.

contends that the offense of assault merges with the homicide because the purpose of assault is to harm the victim, and it is this intent that produced the victim's death. Hence, no distinctive mens rea can be established with respect to the assault. The second argument relates to the actus reus of the assaultive-homicide offense, which case law refers to as the "same act doctrine." According to this doctrine, the predicate felony merges with the homicide if it was "the same act" that was clearly dangerous to human life and which caused the death of the victim.<sup>124</sup> In line with this argument, there appears to be no distinctive actus reus with regard to the resulting killing, as the same assaultive act that perpetrated against the victim was the same act which caused the death.

In order to examine the rationale underlying the call for statutory inclusion of the offense of assault within the list of predicate felony murder, the arguments regarding the merging of the assault and the homicide's mens rea and actus reus should, at the very least, be critically reviewed. Even if the elements of physical assault may seem to be similar to the elements of homicide, they are nonetheless different: while in the case of intent to cause harm the assault would be considered the mere purpose, in the case of intent to cause death the physical assault would be the means to achieve the purpose, the intended death.<sup>125</sup> The intent to harm is thus sufficiently different from the intent to cause death because the defendant who intends to harm his victim by beating him or her does not necessarily have the intent to inflict sufficient harm to kill the victim.<sup>126</sup> The felonious intent in this case, which involves wounding, is thus independent of the homicide. Indeed, recent research about violence against women suggests that perpetrators have different intentions in battering or murdering women: while the purpose of battery is typically to establish or sustain control over the intimate partner, the purpose of her killing is not to control her, but to eliminate her mere existence.<sup>127</sup> This line of reasoning has in fact been supported by judicial

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<sup>124</sup> *Id.* at 224.

<sup>125</sup> For example, Leonning argues "an intent to shoot, knife, etc. is not the same as an intent to murder. Shooting at another is not always done with an actual intent to take life; there may only be an intent to wound or incapacitate." Henry F. Leonning, *Assault With Intent to Murder – Necessity For Actual Intent To Cause Death – Wimbush v. State*, 21 MD. L. REV. 254, 255 (1961).

<sup>126</sup> FINKELSTEIN, *supra* note 120, at 222.

<sup>127</sup> AARON BEN ZE'EV & RUHAMA GOUSSINSKY, IN THE NAME OF LOVE: ROMANTIC IDEOLOGY AND ITS VICTIMS 90 (2008).

decisions (albeit in non-femicide cases),<sup>128</sup> which maintain that an inherently dangerous felony that would otherwise be barred by the principle of merger with regard to assault, could nevertheless qualify as the predicate felony if the offender did not intend “to commit an injury which would cause death.”<sup>129</sup>

The legal presumption that assaultive homicide should be excluded from the felony-murder doctrine because the act of causing harm is the same act as causing death should, at the very least, be questioned. Some legal scholars argue “a felony resulting in death is not simply a more serious version of the underlying felony, but is a qualitatively different crime, comparable in seriousness to other murders.”<sup>130</sup> In other words, the nature of the criminal offense of assaultive femicide is legally distinct both qualitatively and inherently. Furthermore, even if it is not qualitatively different, the criminal principle of proportionality calls for a distinct and different crime gradation of an assault that results in death. Crump and Crump argue along the same lines that the most important substantial argument to be made in favor of felony-murder is that the doctrine serves the concern for proportionality in offense grading.<sup>131</sup> Hence, the inclusion of assaultive homicide within the felony-murder rule would serve the substantial socio-legal concern for proportionality in offense grading,<sup>132</sup> and would provide “a clear and unambiguous crime definition.”<sup>133</sup>

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<sup>128</sup> See, e.g., *People v. Robertson*, 95 P.3d 87 (Cal. 2004); *People v. Mattison* 481 P.2d 193 (Cal. 1971); see also MIGUEL A. MENDEZ, *THE CALIFORNIA SUPREME COURT AND THE FELONY MURDER RULE: A SISYPHEAN CHALLENGE?* 259-60 (5th ed. 2010).

<sup>129</sup> *People v. Mattison*, 481 P.2d 193, 198 (Cal. 1971).

<sup>130</sup> CRUMP & CRUMP, *supra* note 57, at 386.

<sup>131</sup> The argument favoring grading and proportionality as a matter of substantial criminal law is in accord with the recent development of the legal doctrine of “fair labeling.” This doctrine asserts that the distinctive and fair grading and labeling of offenses is not a mere procedural matter, but rather a substantial legal principle underlying criminal law and thus should be followed and applied meticulously. *Id.* at 396. See also ANDREW ASHWORTH, *THE ELASTICITY OF MENS REA, in CRIME, PROOF AND PUNISHMENT: ESSAYS IN MEMORY OF SIR RUPERT CROSS* 45 (C. Tapper ed. 1981); Glanville Williams, *Convictions and Fair Labeling*, 1 *CAMBRIDGE LAW JOURNAL* 85, 85 (1983).

<sup>132</sup> CRUMP & CRUMP, *supra* note 57, at 359 (noting the general argument favoring felony-murder for proportionality as a matter of legal rationality).

<sup>133</sup> Crump and Crump further argue that this is “an important (albeit certainly not the only) value in the criminal law. Ambiguity encourages discriminatory and inconsistent adjudication.” *Id.*; Crump, *supra* note 60, at 1163.

Only a few jurisdictions (Iowa<sup>134</sup>, Illinois<sup>135</sup>, Washington<sup>136</sup>, Montana<sup>137</sup> and Kansas<sup>138</sup>) currently include the offense of assault

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<sup>134</sup> In Iowa, the felony-murder statute (section 707.02) enables first degree murder convictions committed upon “forcible felonies.” IOWA CODE ANN. § 707.2 (West 2013) (“A person commits murder in the first degree when the person commits murder under any of the following circumstances: The person kills another person while participating in a forcible felony. . . .”). A reading of the respective list of ‘forcible felonies’ in Section 702.11 reveals that assault is listed as a forcible felony (together with murder, sexual abuse, kidnapping, robbery, first degree arson, and first degree burglary). IOWA CODE ANN. § 702.11 (West 2015) (“A ‘forcible felony’ is any felonious child endangerment, assault, murder, sexual abuse, kidnapping, robbery, arson in the first degree, or burglary in the first degree.”). The statutory language enabled the felony-murder conviction in the case of *Beeman*, where the merger limitation was explicitly denied based on the clear directive of the legislator. See Barton, *supra* note 3, at 535 (referring to *State v. Beeman*, 315 N.W.2d 770 (Iowa 1982)).

<sup>135</sup> 720 IND. CODE ANN. § 5/9-1 (West 2015) (“A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death: (1) he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or (2) he knows that such acts create a strong probability of death or great bodily harm to that individual or another; or (3) he is attempting or committing a forcible felony other than second degree murder.”).

<sup>136</sup> WASH. REV. CODE ANN. § 9A.32.050 (West 2003 (“(1) A person is guilty of murder in the second degree when: (a) With intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person; or (b) He or she commits or attempts to commit any felony, including assault, other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight there from, he or she, or another participant, causes the death of a person other than one of the participants. . . .”).

<sup>137</sup> MONT. CODE ANN. §45-5-102 (2015) (“(1) A person commits the offense of deliberate homicide if: (a) the person purposely or knowingly causes the death of another human being; (b) the person attempts to commit, commits, or is legally accountable for the attempt or commission of robbery, sexual intercourse without consent, arson, burglary, kidnapping, aggravated kidnapping, felonious escape, assault with a weapon, aggravated assault, or any other forcible felony and in the course of the forcible felony or flight thereafter, the person or any person legally accountable for the crime causes the death of another human being”). Binder refers, for example, to a 2004 Montana court decision, *State v. Burkhardt*, 103 P.3d 1037, 1046-47 (Mont. 2004), that rejected the merger doctrine and concluded that the crime of “deliberate homicide” includes causing death in the course of any “forcible felony.” See Binder, *supra* note 3, at 540-41.

<sup>138</sup> KAN. STAT. ANN. § 21-3401 (repealed 2011) (“Murder in the first degree is the killing of a human being committed: (a) Intentionally and with premeditation; or (b) in the commission of, attempt to commit, or flight from an inherently dangerous felony as defined in K.S.A. 21-3436 and amendments thereto. The definition of inherently dangerous felony includes aggravated assault and battery as defined in Statute 21-3436: “Inherently dangerous felony; definition . . . (b) Any of the following felonies shall be

within the list of predicate felony murder.<sup>139</sup> However, it seems that not all of these jurisdictions statutorily preclude the merger principle for felonious assault. Kansas, for example, explicitly and statutorily applies the merger principle to felonious assault and battery, and includes these offenses in the predicate list “only when such felony is so distinct from the homicide alleged . . . as to not be an ingredient of the homicide alleged.”<sup>140</sup> In the jurisdictions that include assault within the list of predicate felonies without limiting it by the principle of merger (Iowa, Illinois, Washington and Montana), assaultive femicide perpetrators could probably be prosecuted and convicted for felony murder.<sup>141</sup> The remaining U.S. jurisdictions, which still do not include assault as a predicate offense for felony murder, should strive for explicit statutory inclusion of such a felonious act.

The statutory inclusion of the offense of felony assault as a predicate for felony-murder could be supported by the common law’s approach which views “the intent to inflict serious bodily injury” as a sufficient intent for the malice aforethought required for a murder conviction.<sup>142</sup> British legal scholars assert that killings committed while

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deemed an inherently dangerous felony only when such felony is so distinct from the homicide alleged to be a violation of subsection (b) of K.S.A. 21-3401, and amendments thereto, as to not be an ingredient of the homicide alleged to be a violation of subsection (b) of K.S.A. 21-3401, and amendments thereto: . . . (4) *aggravated assault*, as defined in K.S.A. 21-3410, and amendments thereto . . . (6) *aggravated battery*, as defined in subsection (a)(1) of K.S.A. 21-3414, and amendments thereto”) (emphasis added).

<sup>139</sup> Two additional jurisdictions, Maryland and Idaho, include mayhem as a predicate to felony murder. MD. CODE ANN. CRIM. LAW § 2-201(a)(4)(vii) (West 2013); Idaho Code Ann. § 18-4003(d) (West). However this concept does not explicitly cater to assault and might cater to mutilation, disfigurement and crippling. For a distinction between the concepts of assault, battery and mayhem, see MODEL PENAL CODE §§ 211.1; 211.1 cmt. 1.

<sup>140</sup> KAN. STAT. ANN. § 21-3436 (repealed 2011) (“Inherently dangerous felony; definition . . . (b) Any of the following felonies shall be deemed an inherently dangerous felony *only when such felony is so distinct from the homicide alleged* to be a violation of subsection (b) of K.S.A. 21-3401, and amendments thereto, *as to not be an ingredient of the homicide alleged* to be a violation of subsection (b) of K.S.A. 21-3401, and amendments thereto”) (emphasis added).

<sup>141</sup> For examples of case law decisions enabling murder conviction upon assaultive homicide in such jurisdictions, see Binder, *supra* note 2, at 534-35.

<sup>142</sup> See MODEL PENAL CODE § 210.2; see also Crump and Crump arguing that “since that is the case, assault-homicide closely resembles murder with traditional malice.” CRUMP & CRUMP, *supra* note 57, at 379 n.67. Crump and Crump further assert that such malice technically requires intent to inflict serious as opposed to mild injury, but in an assaultive transaction that actually results in homicide, “it is ordinarily so difficult to

intending to inflict serious injury (even if the perpetrator was unaware of a serious risk of causing death), should be graded as murder.<sup>143</sup> These scholars argue that murder is a fair label for killing while perpetrating a serious injury because, “to launch an attack of that severity against another person demonstrates a disregard for the vital interests of others deserving of the label ‘murderous’, even if it would not be right to regard the crime as one of first degree murder.”<sup>144</sup> The British approach that labels killings committed while intending to do serious injury, as murder is not commonly found in U.S. jurisdictions. Nonetheless, although most U.S. jurisdictions do not follow this approach, and still require establishing a distinct “intent to kill” for a first-degree murder conviction, recent legal scholars as well as some case law decisions seem to be contemplating the notion that the intent or malice requirement for first degree murder could be fulfilled by an intention on the part of the accused to do “great bodily harm,” as a replacement for the “intent to kill.”<sup>145</sup>

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distinguish these intentions that the assault-murder approach may be sensible in terms of proportionality, clear offense definition, and perjury discouragement.” *Id.*

<sup>143</sup> Albeit second degree murder if the proposed criminal legislation of the Law Commission for England and Wales will be enacted. According to the Commission’s legislative proposal, such killings will still be graded as either first or second degree murder, depending on the perpetrator’s awareness of the serious risk of causing death. The Commission’s proposal with regard to murder explicitly includes killings committed with the intent to do serious injury as the following wording suggests: “First degree murder: (a) intentional killings (b) killing with an intention to do serious injury in the awareness that there is a serious risk of causing death. Second degree murder: (a) killing with the intention to do serious injury (b) killing with the intention to cause injury or a fear or risk of injury, in the awareness that there is a serious risk of causing death. . .”. See Law Commission, ‘Murder, Manslaughter, and Infanticide’ (Law Com no 304, 2006) [3.50, 3.70]. According to the Consultation Paper of the Law Commission for England and Wales in 2006, killings with the intent to do serious injury while being aware of the serious risk of causing death will be graded as first degree murder. Killings with the intent to cause non-serious injury will be graded as second degree murder if they were committed with the awareness that such injury could cause death. See definition of second degree murder proposed by the Commission in *The Changing Face of the Law of Homicide*. JEREMY HORDER, *HOMICIDE LAW IN COMPARATIVE PERSPECTIVE* 19 (2007).

<sup>144</sup> See *id.* at 25. Horder further states that “there are sound moral reasons for thinking that killing with intent to do serious injury should be treated as a crime of murder, even if not as first degree murder. The nature of the harm intentionally done will in many cases mean that the defendant has made death a foreseeable consequence of his or her action. . . .”

<sup>145</sup> See David L. Thomas, *The Case of Intent: Should the Elements of Murder be Expanded in Virginia?*, 18 *COLONIAL LAWYER* 100, 101-02 (1989) (quoting court

The recent legal approach with respect to child abuse that results in the death of the child could provide a possible path to follow. Intentional felony injury to a child is an assaultive offense whereby the wording and rationale of the merger doctrine would require its preclusion from the list of predicate offenses for felony murder.<sup>146</sup> While some legal scholars assert that child assault can indeed be a predicate felony-murder offense because it does not totally merge with homicide (in the involvement of an additional and independent felonious purpose of neglect of the duty of care towards the child),<sup>147</sup> others maintain that child abuse is a likely candidate for applying the merger limitation because child abuse that results in death, like an assault that results in death, would not be considered independent of the killing, but rather merged with it.<sup>148</sup> Many jurisdictions have recently demonstrated, both statutorily and judicially, an explicit willingness to preclude child assault and child abuse from the merger principle and to include them within the list of predicate offenses of felony murder, despite legal approaches which maintain that these offenses should be precluded in line with the merger principle. Fourteen U.S. jurisdictions have recently included the offense of assault as a predicate offense to felony murder, when the victims are children,<sup>149</sup> and even the American Federal Law explicitly includes assault towards children within the list of predicate offenses for first-degree felony murder.<sup>150</sup> Such an exception was formulated, even

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decisions from Louisiana, Indiana and Virginia that seem to expand the intent requirement of first degree murder to include the intent to do serious bodily injury). See *id.* at 102 n.11 (Louisiana and Indiana), 103-07 (Virginia).

<sup>146</sup> Barton, *supra* note 3, at 543.

<sup>147</sup> The same line of reasoning could be attached to felonies such as rape and robbery, maintaining that in light of the merger principle they should be precluded from the felony-murder rule as they have independent felonious purposes in addition to the felonious act of assault (rape as assault + non-consensual intercourse, and robbery as assault + forced acquisition of money or property). Barry Bendetowies, *Felony Murder and Child Abuse: A Proposal for the New York Legislature*, 18 *FORDHAM URB. L.J.* 383, 399 (1990); see also Binder, *supra* note 2, at 550.

<sup>148</sup> Douglas Van Zenten, *Felony Murder, the Merger Limitation, and Legislative Intent in State v. Heemstra: Deciphering the Proper Role of the Iowa Supreme Court in Interpreting Iowa's Felony Murder Statute*, 93 *IOWA L. REV.* 1565, 1587-88 (2008); see also Binder, *supra* note 2, at 536 (arguing "most of the decisions permitting child abuse as a predicate felony also analogized it to assault").

<sup>149</sup> Currently, 14 jurisdictions explicitly include child assault or child abuse as a predicate felony to felony-murder: North Dakota, Oklahoma, Michigan, Louisiana, Nevada, Iowa, Wyoming, Arizona, Idaho, Oregon, Florida, Utah, Alaska and Tennessee.

<sup>150</sup> See 18 U.S.C. § 1111 (West 2003) ("(a) Murder is the unlawful killing of a human

though these assaultive-homicides do not include an additional “act” or an additional “mental state” usually required to preclude the merger principle.<sup>151</sup> The fact that courts and legislators alike demonstrate an increasing willingness to include felony child assault as a predicate felony for a felony-murder conviction could be at best understood in the context of the backdrop of underlying social norms and values that uphold the sanctity and vulnerability of children. The legal willingness to include a felonious assault within the list of predicate offenses for felony-murder based on the offense’s antisocial nature could serve as a model for the inclusion of assaultive femicide in the felony-murder rule. Legal willingness to regard an antisocial motive as implying part of the malice required for a murder conviction has already been expressed in case law,<sup>152</sup> and could be further applied to assaultive femicide.<sup>153</sup> Some of the same arguments in favor of the inclusion of child assault as an underlying felony for felony murder apply equally to assaultive femicide. The following quotation illustrates the argument for the inclusion of felony child assault within the felony murder rule. Simply replacing “child” and “children” with “woman” show the same logic can be applied to assaultive femicide:

Child abuse is most often committed in the privacy of the abuser’s home, where there are no witnesses other than the abuser himself. As a result, it is extremely difficult to prosecute

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being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree”) (emphasis added).

<sup>151</sup> See Barton, *supra* note 3, at 541-45; Van Zenten, *supra* note 150, at 1587-88.

<sup>152</sup> Levin mentions that in the case of *People v. Watson*, 637 P.2d 279, (Cal. 1981], the court indicated two similar tests for determining implied malice for second degree murder conviction: “1. When the defendant intended, with conscious disregard for life, to commit acts likely to kill; or 2. when the defendant, for a base, *antisocial motive* and with wanton disregard for human life, commits an act that has a high probability of causing death” (Italics added). Mark S. Levin, *People v. Watson: Drunk Driving Homicide - Murder or Enhanced Manslaughter*, 71 CAL. L. REV. 1298, 1303 (1983).

<sup>153</sup> For example, Bendetowies who supports the inclusion of such an offense within the list of predicate felony-murder offenses because the “felony murder rule satisfies society’s sense of outrage over the killing of a child. Our laws must severely punish those who violate the sanctity of a child’s life, in order to preserve the public’s trust in and need for justice.” Bendetowies, *supra* note 149, at 405.



child abuse cases, and even more difficult to obtain a murder conviction when death results. . . The felony murder rule will help to protect child(ren) from an abusive situation in which there is a great probability of serious injury or death.<sup>154</sup>

## VII. PROPOSED AMENDMENTS TO THE DOCTRINE OF FELONY-MURDER RULE IN CIRCUMSTANCES OF ASSAULTIVE FEMICIDE

In order to properly treat assaultive femicide perpetrators, it is critical to advance an explicit legislative and statutory inclusion of the offense of aggravated assault in circumstances of domestic violence. The proposed criminal inclusion of the offense of assault is explicitly limited to “aggravated assault,” and thereby prevents excessive expansion of the felony-murder doctrine to simple assaults. Explicit legislation will prevent arbitrary judicial interpretations that exonerate defendants,<sup>155</sup> in line with the current exclusion of the offense of assault from the felony-murder doctrine.

The proposed statutory amendment is based on the most commonly held version of the felony-murder rule in the United States: the enumerating version. As explained above, this version catalogs the felonies that are formally conclusive on the issue of malice required for a murder conviction. As the majority of state criminal codes in the United States have adopted the enumerating felony-murder version, the proposed legal arrangement is compatible with both the current felony-murder version in the MPC and with most U.S. jurisdictions. Such a legislative amendment prevents, *de jure*, any judicial exclusion of such an offense on the grounds of the merger principle, and enables proper prosecution of assaultive femicide perpetrators.

The proposed inclusion of the offense of aggravated assault within the MPC’s list creates a legal rebuttable presumption concerning the defendant’s criminal liability for the killing he committed in such

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<sup>154</sup> *Id.* at 404-06.

<sup>155</sup> In *State v. Beeman*, 315 N.W. 2d. 770 (Iowa 1982), the court rejected the defendant’s argument that the merger limitation should preclude his use of assault against his former girlfriend as a predicate felony, solely based on the applicable statute’s plain meaning and the legislature’s clear intent that assault may operate as a predicate felony. See Van Zanten, *supra* note 150. Iowa’s jurisprudence took a marked turn in 2006. In *State v. Heemstra*, 721 N.W.2d 549 (Iowa 2006), in spite of its explicit language (categorizing forcible felonies as predicate to felony murder), the Iowa Supreme Court overruled its decision regarding *Beeman*, and held that an assault causing the victim’s death cannot be a predicate for felony murder. The implications of such a judicial decision for assaultive femicide cases have yet to be seen.

circumstances. In line with the MPC drafters' approach, this presumption may be rebutted by the defendant.<sup>156</sup>

The proposed amendment adopts a gender-neutral terminology in relation to the gender identity of both the perpetrator and the victim. In addition, the proposed definitions pertain to domestic violence in general (not just to violence against women), so as to include potential male victims. In doing so, the proposed arrangement adjusts the legal harmony required for the proper conviction of assaultive femicide perpetrators who are, lamentably, still exonerated from a murder conviction on the grounds of the application of the merger principle in the context of assaultive offenses.

The proposal includes direct amendments to Section 210.2 of the Model Penal Code. In addition, for reasons of legal harmony, the proposal includes indirect amendments to Section 210.6 that address aggravating circumstances for death penalty upon first-degree felony-murder convictions. The wording of the proposed amendments to the MPC's felony-murder doctrine in circumstances of assaultive femicide is as follows.

#### **A. Proposed direct amendments to Section 210.2 of the Model Penal Code**

##### § 210.2 Murder.

(1) Except as provided in Section 210.3(1)(b), criminal homicide constitutes murder when:

- (a) it is committed purposely or knowingly; or
- (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping, felonious escape, *or aggravated assault perpetrated as part of a pattern of domestic violence*.

*For purposes of this section—*

*(1) The term "aggravated assault" has the same meaning as given that term in Section 211.1(2)157;*

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<sup>156</sup> See MODEL PENAL CODE § 1.12(5).

<sup>157</sup> MODEL PENAL CODE § 211.1(2) ("A person is guilty of aggravated assault if he: (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the

(2) The term “pattern” means assault engaged in on at least two occasions;

(3) The term “domestic violence” has the same meaning as given that term in Section 3.11 (4)<sup>158</sup>

### **B. Proposed Indirect Amendments to Section 210.6 of the Model Penal Code**

§ 210.6. Sentence of Death for Murder; Further Proceedings to Determine Sentence.

(1) Death Sentence Excluded. When a defendant is found guilty of murder, the Court shall impose sentence for a felony of the first degree if it is satisfied that: . . .

(3) Aggravating Circumstances:

. . . (e) The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping *or aggravated assault perpetrated as part of a pattern or practice of domestic violence.*

### **C. Explanations Accompanying the Proposed Statutory Amendments to Sections 210.2(b) and 210.6(3)(e) of the Model Penal Code**

The wording of the proposed legal arrangement adds the offense of ‘aggravated assault’ to the enumerated felonies of the present category, which lists and regulates predicate felony-murder in Section 210.2(2)(b) of the MPC. The expansion of this category is consistent, in particular, with the legal arrangements in the states of Washington and Iowa, which explicitly include assault within the list of predicate felony-

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value of human life; or (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon”).

<sup>158</sup> The wording of the proposed MODEL PENAL CODE § 3.11(4) is: “Domestic violence” means - the occurrence of any of the following acts by a person, which is not an act of self-defense: (i) Causing or attempting to cause physical or mental harm to a family or household member. (ii) Placing a family or household member in fear of physical or mental harm. (iii) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force or duress. (iv) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed or molested. (v) Causing or allowing a child to see or hear violence directed against a person by a family or household member: or putting the child, or allowing the child to be put, at real risk of seeing or hearing that violence occurring”.

murder,<sup>159</sup> and the legal arrangements in the states of Montana and Illinois that explicitly include aggravated assault within the list of predicate felony murder.<sup>160</sup> The expansion of the list of predicate felonies to cater explicitly to homicide within circumstances of domestic violence is also consistent with the legislation in the states of Minnesota and Illinois that includes particular legal instructions for the prosecution of homicide in circumstances of domestic violence.<sup>161</sup>

Apart from the proposed amendment that includes the offense of aggravated assault within circumstances of domestic violence, the proposal contains three additions that provide statutory definitions of the particular terms required for the application of the proposed amended arrangement. The first, added as subsection 210.2(2)(b)(1) to the MPC,

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<sup>159</sup> See Iowa statute in IOWA CODE ANN. § 707.2 (2013) (“A person commits murder in the first degree when the person commits murder under any of the following circumstances . . . The person kills another person while participating in a forcible felony”). A reading of the respective list of forcible felonies in 702.11, reveals that assault is listed as a forcible felony (together with murder, sexual abuse, kidnapping, robbery, first degree arson and first degree burglary); IOWA CODE ANN. § 702.11 (West 2015) (“A “forcible felony” is any felonious child endangerment, assault, murder, sexual abuse, kidnapping, robbery, human trafficking, arson in the first degree, or burglary in the first degree”). See also Washington’s statute in WASH. REV. CODE § 9A.32.050 (1990) (“(1) A person is guilty of murder in the second degree when: (a) With intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person; or (b) He or she commits or attempts to commit any felony, including assault, other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight there from, he or she, or another participant, causes the death of a person other than one of the participants. . . .”).

<sup>160</sup> See Montana’s statute in MONT. CODE ANN. § 45-5-102 (2013) (“(1) A person commits the offense of deliberate homicide if: (a) the person purposely or knowingly causes the death of another human being; (b) the person attempts to commit, commits, or is legally accountable for the attempt or commission of robbery, sexual intercourse without consent, arson, burglary, kidnapping, aggravated kidnapping, felonious escape, assault with a weapon, aggravated assault, or any other forcible felony and in the course of the forcible felony or flight thereafter, the person or any person legally accountable for the crime causes the death of another human being”); see also Illinois’s statute in 720 ILL. COMP. STAT. 5/9-1 (West 2015) (“a) A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death: (1) he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or (2) he knows that such acts create a strong probability of death or great bodily harm to that individual or another; or (3) he is attempting or committing a forcible felony other than second degree murder”).

<sup>161</sup> See Minnesota’s statute in MINN. STAT. § 609.185, 609.19 (2014); see also Illinois’s statute in 720 ILL. COMP. STAT. § 5/9-1(b) (1996) (Aggravating Factors).

is designed to provide a legal clarification of the term “aggravated assault” and refers to the existing definition in Section 211.1(2) of the MPC.<sup>162</sup> By referring to the existing definition of aggravated assault in the Code, the amendment includes as predicate felonies both assaults that caused serious bodily injury and assaults that caused injury by means of a deadly weapon.<sup>163</sup> The second addition, added as subsection 210.2(2)(b) to the MPC, is designed to provide a legal clarification of the term “pattern” and follows the current definition of the term within the circumstances of domestic violence, as worded in the felony murder section of the U.S. Criminal Code,<sup>164</sup> and in the section that addresses felony murder in Minnesota Criminal Code.<sup>165</sup> The third addition, added as subsection 210.2(2)(b)(3) to the MPC, is designed to provide a legal clarification of the term ‘domestic violence,’ and refers to a proposed definition that will be added to subsection 311.(4) of the MPC as will be elaborated below.

Along with the extended approach that includes the offense of aggravated assault within the predicate felony murder, the proposed amendment is limited in relation to two main legal principles. As noted, the criminal inclusion of the offense of assault is explicitly limited to “aggravated assault,” and thereby prevents excessive expansion of the felony-murder doctrine to simple assaults. In addition, the proposed text restricts the application of the criminal offense of aggravated assault by introducing two cumulative preconditions: the aggravated assault must be committed in circumstances of domestic violence, and the inclusion of the offense is restricted to the precondition of a “pattern” of domestic

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<sup>162</sup> MODEL PENAL CODE § 211.1(2) (“ A person is guilty of aggravated assault if he: (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon”).

<sup>163</sup> According to the current wording of the definition of aggravated assault in Section 211.1(2) of the MODEL PENAL CODE, an assault with a deadly weapon will be graded as a felonious aggravated assault even if the injury was not serious, and even if the weapon used was not inherently deadly.

<sup>164</sup> 18 U.S.C. § 1111(b)(4) (2003) (“the term ‘pattern or practice of assault or torture’ means assault or torture engaged in on at least two occasions”).

<sup>165</sup> Minnesota’s legislation states, for example, that an assaultive homicide would be graded as a first degree murder if the perpetrator “causes the death of a human being while committing domestic abuse, when the perpetrator has engaged in a past pattern of domestic abuse upon the victim or upon another family or household member and the death occurs under circumstances manifesting an extreme indifference to human life”. MINN. STAT. § 609.185.

violence. Such a legal arrangement follows the approach reflected in the U.S. Criminal Code that restricts criminal liability for such assaults provided they are preconditioned on a prior pattern.<sup>166</sup> These two circumscribed yet cumulative requirements create a balanced legislative arrangement: on the one hand it includes in its consideration elements and characteristics of assaultive homicide within circumstances of domestic violence, and on the other hand it does not unduly expand the scope of the felony-murder doctrine to simple assaults or to aggravated assaults that are not preconditioned on a previous pattern of domestic violence.

In addition to the direct amendments proposed to Section 210.2 of the Model Penal Code, the proposal takes note of indirect amendments with regard to aggravating circumstances for a death penalty sentence within the felony-murder rule, as worded in Section 210.6 and necessary for legal harmony in regulating aggravating circumstances within the felony-murder doctrine. In this respect, the proposed amendment suggests amending subsection 210.6(3)(e) so as to include the offense of aggravated assault in circumstances of domestic violence within its list of aggravating circumstances for death penalty. As noted, the legislative arrangement of Illinois somewhat resembles the proposed indirect amendment of section 210.6(3)(e) of the Model Penal Code: Illinois enacted a section catering to murder in circumstances whereby there was a restraining order under a domestic violence statute, and included such circumstances as aggravating factors for death penalty upon first degree murder conviction.<sup>167</sup>

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<sup>166</sup> See 18 U.S.C. § 1111(a) (2003) (“Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree”).

<sup>167</sup> 720 ILL. COMP. STAT. 5/9-1(b) (“A defendant who at the time of the commission of the offense has attained the age of 18 or more and who has been found guilty of first degree murder may be sentenced to death if: . . . (19) the murdered individual was subject to an order of protection and the murder was committed by a person against whom the same order of protection was issued under the Illinois Domestic Violence Act of 1986”).

### VIII. CONCLUSION

This article demonstrated that the principle of merger as applied by almost all U.S. jurisdictions and the MPC, has created a criminal socio-legal anomaly. Blameworthy murderers of women are exonerated and technically exempted from conviction of murder committed by assaultive-homicide on the grounds of the preclusion of assaultive femicide from felony-murder. This article therefore proposed a legislative approach that explicitly includes felonious assault within the predicate felonies.

The exoneration of male intimate partners from a murder conviction on the grounds of the preclusion of assaultive femicide from felony-murder can be found in almost all U.S. jurisdictions.<sup>168</sup> This legal anomaly pertains equally to jurisdictions that enumerate predicate felonies (and preclude assault) and to jurisdictions that apply the felony-murder rule to all felonious acts while leaving statutory interpretation to the judicial authorities. To tackle this problem in jurisdictions that enumerate predicate felonies, it is necessary to persuade legislators in these jurisdictions by proposing to add the crime of aggravated assault to the list of predicate felonies. In jurisdictions that apply felony murder to all felonious acts without explicit enumeration,<sup>169</sup> there is a need to create an explicit statutory exception to the principle of merger in circumstances of assaultive femicide.

A legislative approach that explicitly includes felonious assault within the predicate felonies will prevent judicial application of the merger limitation to assaultive femicide. A resolute list of predicate felonies that includes felonious assault demonstrates that the legislative body in that jurisdiction has chosen to bar the merger limitation for assaultive homicide and to exclude this felony from the principle of merger. In Iowa, for example,<sup>170</sup> the explicit statutory inclusion of

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<sup>168</sup> As noted, currently, only Iowa, Washington, and Montana include forcible assault or aggravated assault as predicate felonies in statutory form, thus explicitly indicating that the merger principle does not apply to assaultive homicide.

<sup>169</sup> See, e.g., Alaska, ALASKA STAT. § 11.41.110 (1999); Arkansas, ARK. CODE ANN. § 5-10-102 (2013); Delaware, DEL. CODE ANN. tit. 11, §§ 635-636; Georgia, GA. CODE ANN. § 16-5-1 (2014); Minnesota, MINN. STAT. § 609.19 (2014); Missouri, MO. REV. STAT. § 565.021.1(2) (2016); New Mexico, N.M. STAT. ANN. § 30-2-1 (1994).

<sup>170</sup> In Iowa, the felony-murder statute enables first degree murder convictions for the commission of “forcible felonies”. See IOWA CODE ANN. § 707.2 (2013). The list of “forcible felonies” in 702.11 reveals that assault is listed as a forcible felony (together with murder, sexual abuse, kidnapping, robbery, human trafficking, first degree arson and first degree burglary).

assault within the list of predicate felonies has enabled murder conviction in cases of assaultive femicide that would have most likely been struck down by the merger principle, had it not been explicitly stated by the legislature.<sup>171</sup>

To prevent the exoneration of assaultive femicide perpetrators from the heinous crime that they committed, legislative arrangements such as the statutes enacted by the jurisdictions described above, which include felonious assault as a predicate for felony murder (Montana, Illinois, Iowa and Washington), should be adopted, explicitly stated and tailored to the particular phenomenon of lethal violence against women.<sup>172</sup>

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<sup>171</sup> For example, the felony-murder conviction in *Beeman*, where the merger limitation was explicitly denied based on the clear directive of the legislator. Van Zanten, *supra* note 150, at 1583. In the case of *Beeman*, the court rejected the defendant's argument that the merger limitation should preclude his use of assault against his former girlfriend as a predicate felony, based solely on the applicable statute's plain meaning and the legislature's clear intent that assault may be considered as a predicate felony. *See State v. Beeman*, 315 N.W.2d, 770, 776-77 (Iowa 1982). In spite of its explicit language, categorizing forcible felonies as predicate to felony murder, in 2006 the Iowa Supreme Court overruled *Beeman*, ruling in *State v. Heemstra*, 721 N.W.2d 549, 558 (Iowa 2006), that an assault causing the victim's death cannot be a predicate for felony-murder. Thus, in 2006 Iowa's jurisprudence took a marked turn and was willing to apply the merger principle in the case of a dispute that escalated into one side pointing a shotgun and committing an unintentional killing. The implications of such a judicial decision for assaultive femicide cases have yet to be seen.

<sup>172</sup> With respect to assaultive femicide within circumstances of domestic violence, it is worth mentioning jurisdictions that have legislated particular statutes catering to homicide in circumstances of domestic violence. For example, the Minnesota statute states that an assaultive homicide will be graded as a first degree murder if the perpetrator "causes the death of a human being while *committing domestic abuse*, when the perpetrator *has engaged in a past pattern of domestic abuse upon the victim* or upon another family or household member and the death occurs under circumstances manifesting an extreme indifference to human life." MINN. STAT. § 609.185 (emphasis added). In addition, Minnesota grades as second degree murder any unintentional assaultive homicide, if it was committed under domestic violence circumstances, while the perpetrator had been restrained under an order for protection. Minnesota's statute states that whoever "causes the death of a human being without intent to effect the death of any person, while intentionally inflicting or attempting to inflict bodily harm upon the victim, when the perpetrator is restrained under an order for protection and the victim is a person designated to receive protection under the order" is guilty of unintentional murder in the second degree and may be sentenced to imprisonment for not more than 40 years, and "[a]s used in this clause, 'order for protection' includes an order for protection issued under chapter 518B; a harassment restraining order issued under section 609.748; a court order setting conditions of pretrial release or conditions of a criminal sentence or juvenile court disposition; a restraining order issued in a



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marriage dissolution action; and any order issued by a court of another state or of the United States that is similar to any of these orders.” MINN. STAT. § 609.19. Illinois enacted a similar statute catering to murder in circumstances whereby there was a restraining order under a domestic violence statute, and included such circumstances within the aggravating factors for a death penalty sentence upon first degree murder conviction. *See* 720 ILL. COMP. STAT. 5/9-1(b)(19) (West 2015) (“A defendant who at the time of the commission of the offense has attained the age of 18 or more and who has been found guilty of first degree murder may be sentenced to death if: . . . the murdered individual was subject to an order of protection and the murder was committed by a person against whom the same order of protection was issued under the Illinois Domestic Violence Act of 1986”).