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# Assaulative Felony Murder: Homicide with Intent to Cause Serious Injury

David Crump

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**ASSAULTIVE FELONY MURDER: HOMICIDE WITH  
INTENT TO CAUSE SERIOUS INJURY**

**David Crump\***

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INTRODUCTION

In the law of felony murder, the doctrine of merger provides that lesser homicides cannot serve as predicates to elevate homicidal crimes to murder.<sup>1</sup> The reason is simple. If felonies such as manslaughter or negligent homicide could be the basis of a murder conviction, these lesser homicides would disappear. Manslaughter and negligent homicide are felonies themselves; they result in death; and therefore, if they qualified as predicate felonies, every manslaughter and negligent homicide would become, instead, a murder.<sup>2</sup> This would effectively destroy the system of crime-grading created by the legislature.

Some jurisdictions, in bursts of thoroughness, have

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1. See *infra* notes 27–30 and accompanying text.

2. *Id.*

extended the doctrine of merger to assaultive crimes.<sup>3</sup> Some have even extended it to burglaries that are based on intent to commit assault.<sup>4</sup> Other jurisdictions have avoided these results by declining to extend the doctrine of merger to assaultive crimes or to assaultive burglaries.<sup>5</sup> Still others apply merger to assaults but retain the felony murder rule in cases in which they can identify an “independent felonious purpose” in addition to the intent to assault.<sup>6</sup>

This Article begins with an example of an assaultive homicide. It then sets out the well-known arguments for and against the felony murder doctrine, against which the possibility of assaultive felony murder should be evaluated. The third section contains a brief introduction to the doctrine of merger. In the fourth section, this Article analyzes the reasoning of jurisdictions that apply merger to prevent assaults from becoming the basis of felony murder. The fifth section then looks at jurisdictions that avoid merger of assaultive crimes, including those that rely on the doctrine of independent felonious purpose. The final section sets out the author’s conclusions, which include the proposition that application of merger to assaultive crimes is unjustified if the felony murder doctrine itself is properly defined in the particular jurisdiction. Briefly put, the argument, “I only meant to maim the victim, but I guess I went a little too far and killed him,” should not excuse the crime of murder.

#### I. AN EXAMPLE TO WORK WITH

In *Commonwealth v. Kilburn*,<sup>7</sup> the Massachusetts Supreme Court considered a typical situation involving an assaultive homicide. An unknown gunman shot and killed the victim after bursting into the victim’s apartment. Another individual was visiting the victim and became the only witness to the homicide. The assailant first brandished his firearm and pushed the victim back. He then saw the witness and stopped in confusion. “After a short interlude during which the gunman ordered both men about the apartment, the gunman shot the victim in the back of the

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3. See *infra* Part IV of this Article.

4. See *infra* notes 45–48 and accompanying text.

5. See *infra* Part V.A of this article.

6. See *infra* Part V.B of this article.

7. 780 N.E.2d 1237 (2003).

head.”<sup>8</sup> Kilburn, the defendant before the court, was not present at the scene, but was later linked to a conspiracy to punish or discipline the victim. In fact, Kilburn confessed to this latter crime, but denied that he had anything to do with any homicide or murder. According to Kilburn, the gunman “had just gone there to ‘do’” the victim.<sup>9</sup> The jury convicted Kilburn of murder, under instructions that included the felony murder rule.

Kilburn’s argument, as might be expected, was that the inclusion of the felony murder instruction was reversible error because the underlying felony was an assault. Therefore, he argued, it merged into the homicide, so application of the felony murder rule was impermissible.<sup>10</sup> The court’s convoluted analysis is discussed later in this Article,<sup>11</sup> because understanding the analysis requires the understanding of further felony murder doctrines. The situation is set out here as an example.

A too-quick conclusion about this situation is likely to precipitate two kinds of mistakes. The first mistake is to think that the felony murder rule was not even needed in *Commonwealth v. Kilburn* because the facts were clear enough to support a murder conviction without it. That reasoning omits the proof standard and the effect that Kilburn’s description of his instructions to the gunman, and his exculpatory theory, could have had. All elements of Kilburn’s guilt were required to be proved beyond a reasonable doubt.<sup>12</sup> Some evidence of Kilburn’s *mens rea* would not have been sufficient. A preponderance would not have been sufficient. Even strong evidence of Kilburn’s complicity in the crime would not have been sufficient. There was no further direct evidence of Kilburn’s participation, and it probably would have been impossible to get more.<sup>13</sup> Kilburn’s statement about the event readily could have been considered as creating a reasonable doubt about his guilt for murder, given the confusing nature of vicarious liability

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8. *Id.* at 1240.

9. *Id.*

10. *Id.*

11. See *infra* Part V.B of this Article.

12. See generally DAVID CRUMP ET AL, CRIMINAL LAW: CASES, STATUTES, AND LAWYERING STRATEGIES Ch. 4 (3d ed. 2014).

13. Under the circumstances, this kind of evidence would have to have come from Kilburn or from his co-felon, who was unknown.

instructions.<sup>14</sup> From the standpoint of achieving justice in such a case, the assistant district attorney trying the case was correct to request, and the trial judge to give, a felony murder instruction.

The second mistake would be to consider the felony murder rule to be unneeded in this or any situation because lesser crimes are always sufficient to achieve justice. On the contrary, a felony crime that results in death is not merely the underlying felony crime alone.<sup>15</sup> It has been suggested that every jurisdiction should create a plethora of crimes such as robbery causing death, sexual assault causing death, and so forth, instead of a felony murder doctrine.<sup>16</sup> That might be a solution, but it confuses the issue. Felony murders look like serious crimes, and they are.<sup>17</sup> It also might be suggested that felony murders can be covered by depraved-heart statutes, which cover unintentional murders.<sup>18</sup> But many jurisdictions have considered and rejected the depraved-heart formulation for murder because it is a vague dragnet,<sup>19</sup> and it is doubtful that it is preferable to a well-constructed felony murder rule.<sup>20</sup>

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14. The instructions would be confusing to the jury. The reason is that felony murder instructions are often long, much longer than those for other homicidal crimes, and they often contain additional requirements whose meaning and relevance would not be obvious to a lay person.

15. For example, in my home jurisdiction, aggravated assault is a second-degree felony, whereas murder is a first-degree felony. See Tex. Penal Code §§ 22.02 (aggravated assault), 19.02 (murder).

16. See David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL'Y 359, 363 (1985).

17. Cf. DAVID CRUMP, *supra* note 12, at 131–32 (reporting on crime in which bullet fired only for the purpose of destruction of property ricocheted and killed a toddler in her home and bystander said, “Maybe this was an accident, but it feels like murder.”). See also David Crump, *supra* note 16, at 363–64; see also *infra* note 19 (reporting Bureau of Justice statistics poll in which Americans ranked some unintended crimes as more serious than some with intentional malice).

18. See David Crump, *Murder, Pennsylvania Style: Comparing Traditional American Homicide Law to the Statutes of Model Penal Code Jurisdictions*, 109 W.VA. L.REV. 257, 305–12 (analyzing depraved heart murder).

19. The depraved heart formula is vague because it does not describe the mental state of the crime, other than to say that it is the product of a depraved (or abandoned and malignant) heart, and thus it relies upon a metaphor instead of a definition. Metaphors are undesirable as a means of defining crime, precisely because they are deliberately imprecise.

20. See *id.*

## II. THE MERITS AND DEMERITS OF FELONY MURDER

The morality of the felony murder rule has been debated extensively.

Detractors argue that the doctrine cannot achieve any deterrence because felons will not know about it, and that unintentional homicides cannot be deterred anyway.<sup>21</sup> Furthermore, abolitionists argue that the doctrine divorces guilt from blameworthiness.<sup>22</sup>

Supporters of the rule, on the other hand, see felony murder as an aspect of proportional crime grading. This argument is based on the ground that a robbery, assault, or other felony that causes death is not merely the underlying felony, but a more serious crime.<sup>23</sup> Supporters also debunk the opponents' deterrence arguments: felons may not be able to quote the statute, but they know that they have done something more serious if they kill. Additionally, the detractors' argument proves too much because it would result in the abolition of all unintended homicidal crimes as well as all negligence doctrine itself.<sup>24</sup> Furthermore, the felony murder rule reaffirms the sanctity of human life. Other arguments on both sides have been well-developed elsewhere.<sup>25</sup>

And there is another issue related to these arguments, because there are good and bad formulations of the felony murder rule. Bad formulations, such as the confusing law of California, operate independently of the dangerousness of the defendant's actions. A dangerous felony is enough, even if the death of a victim is an unforeseeable accident.<sup>26</sup> But there are better formulations, such as the Texas felony murder statute, which requires the defendant to have engaged in an "act clearly dangerous to human life."<sup>27</sup> This better

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21. See David Crump, *Reconsidering the Felony Murder Rule in Light of Modern Criticisms: Doesn't the Conclusion Depend on the Particular Rule at Issue?*, 32 HARV. J.L. & PUB. POL'Y 1155, 1158–61 (2009).

22. See *id.*

23. See *id.* at 1161–65.

24. See *id.*

25. See *id.* at 1158–65; see also David Crump et al., *supra* note 16, at 361–76 (stating justifications of the rule at greater length).

26. See David Crump, *supra* note 21, at 1170–75 (critiquing the California felony murder doctrine as arbitrary and less connected to blameworthiness than better formulations).

27. TEX. PENAL CODE ANN. § 19.02(b)(3) (statute containing this definition as covering one of three types of murder).

formulation avoids divorcing the defendant's guilt from the defendant's blameworthiness, because the defendant must have engaged in a clearly dangerous act.<sup>28</sup> And thus, the better formulation answers the most important argument of the critics of the felony murder rule.

These preliminaries, however, are addressed in other articles, and they will not be further discussed here. However, they provide context for the purpose of this Article, which is to consider the propriety of basing felony murder on felony assault. The Article will assume that the jurisdiction in question has a felony murder rule, as most jurisdictions do, and it will assume that the rule is, or can be, formulated as the better felony murder doctrines are. In these circumstances, how should the jurisdiction treat homicides that include a felony assault? In other words, how should they handle felony murder arguments like those in *Commonwealth v. Kilburn*, described above?

### III. THE MERGER DOCTRINE

The rationale for the merger doctrine is straightforward. It prevents the conversion of lesser homicidal crimes into murder and preserves the grading of homicidal offenses. Without it, felonies that result in death, such as manslaughter or negligent homicide, would automatically become murder, contrary to the legislative intent underlying these lesser crimes.<sup>29</sup>

Sometimes, as in California, the doctrine is a common law inference from the legislature's grading of homicidal offenses.<sup>30</sup> The inference makes sense because otherwise the lesser homicides would be made meaningless. In some cases, the doctrine is expressed in the statute that creates the state's felony murder rule. For example, Missouri recognizes murder when the defendant's actions satisfy the specified dangerousness criteria and also include a causative felony, which must be "other than . . . manslaughter."<sup>31</sup>

The merger doctrine is well established. Without it, one court long ago explained, the felony murder rule would

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28. See David Crump, *supra* note 21, at 1165–70 (analyzing this better formulation).

29. See *infra* notes 27–30 and accompanying text.

30. See *People v. Ireland*, 450 P.2d 580 (1969).

31. See *State v. Gheen*, 41 S.W.3d 598, 604–05 (Mo. App. 2001) (citing statute).

“convert many cases of unintentional killing, which would be manslaughter only under other provisions of the statute, into murder.”<sup>32</sup> Likewise, according to another court, “to hold otherwise would eliminate [lesser killings] as a separate form of homicide, since, in that event, every [lesser killing] would also be a felony murder.”<sup>33</sup>

In one state, it was at first unclear even that the crime of negligent homicide was not a predicate for felony murder. The controlling legislation, outlined above, disqualified only manslaughter as a predicate for felony murder.<sup>34</sup> This anomaly arose from legislative oversight. When the legislature first passed the felony murder statute, criminally negligent homicide was a misdemeanor.<sup>35</sup> It therefore could not have served as the basis for felony murder. Later, the legislature redefined criminally negligent homicide as a felony and increased the maximum sentence,<sup>36</sup> but it failed to amend the felony murder statute accordingly.

The court thus faced a situation in which the rationale for doctrine of merger applied, but the words of the statute literally excluded the doctrine. In *Lawson v. State*,<sup>37</sup> the court reasoned, in accordance with the longstanding purpose of the merger doctrine, that “felony murder . . . will not lie when with the underlying felony is manslaughter [which was eliminated by the controlling statute] or a lesser included offense of manslaughter.” This holding carried out the function of the merger doctrine: to avoid the destruction of the legislatively crafted hierarchy of homicidal crimes.

#### IV. MERGER OF ASSAULTIVE CRIMES

Some jurisdictions have extended the merger doctrine beyond lesser homicidal crimes and have applied it to assaultive offenses.<sup>38</sup> By its terms, the felony murder rule

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32. *State v. Shock*, 68 Mo. 552, 562–63 (1878).

33. *Edge v. State*, 414 S.E.2d 463, 465 (Ga. 1992).

34. See TEX. PENAL CODE § 19.02(b)(3) (basing felony murder on a felony “other than manslaughter.”).

35. See TEX. PEN. CODE ANN. § 19.07 (West 1974), construed in *State v. Hall*, 829 S.W.2d 184, 185 (Tex. Crim. App. 1992) (describing criminally negligent homicide statute as originally enacted as “a class A misdemeanor.”).

36. TEX. PENAL CODE ANN. § 19.05 (West 2014) (substituting “state jail felony” for “Class A misdemeanor,” as penalty).

37. 64 S.W.3d 396, 397 (Tex. Crim. 2001) (quoting *Johnson v. State*, 4 S.W.3d 254, 258 (Tex. Crim. 1999)).

38. See *infra* Part V of this article.

can be based on assault only if it is a felonious assault. So-called simple assault cannot qualify, usually, because it is a misdemeanor. In fact, to be a felony an assault must be particularly serious. In jurisdictions following the Model Penal Code, for example, felony assault, which is called “aggravated” assault, requires the loss of, or protracted loss of use of, a bodily member or organ.<sup>39</sup> It is roughly analogous to what the common law called “mayhem.”<sup>40</sup> However, beating up an individual, even by causing bruises all over, is merely simple assault.

One state disallowing assaultive felony murder is California. In *People v. Ireland*,<sup>41</sup> the California Supreme Court treated assaultive homicide as analogous to other forms of murder. The crime of assault, it reasoned, was an “integral part of the homicide,”<sup>42</sup> just as manslaughter and negligent homicide would be. Therefore, treating assault that caused death as murder was “bootstrapping” that “finds no support in either logic or in law.”<sup>43</sup> Further, intentional assaults that caused death would become murder and assaultive homicide was “a category that included the great majority of all homicides.”<sup>44</sup>

The court carried this analysis further when, in *People v. Wilson*,<sup>45</sup> it decided a case that involved burglary with intent to commit assault, which caused the death of the victim. The assaultive burglary, said the court, could not provide a basis for felony murder. The assaultive element that was essential to the burglary predicate was a lesser included crime of murder, even if the burglary “technically” was not.<sup>46</sup> The higher crime overlapped the assault. To elevate the offense to murder would be “bootstrapping.”<sup>47</sup> For these reasons, the crime of murder was merged into the assaultive element in the burglary, and therefore into the burglary itself.<sup>48</sup>

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39. See MODEL PENAL CODE § 211.1(2) (1962).

40. See BLACK'S LAW DICTIONARY (10th ed. 2014).

41. 450 P.2d 580 (1969).

42. *Id.* at 590.

43. *Id.*

44. *Id.*

45. 462 P.2d 22 (Cal. 1969) (en banc), *overruled by* *People v. Farley*, 210 P.3d 361 (Cal. 2009).

46. *Id.* at 29.

47. *Id.* at 28–29.

48. *Id.* The merger doctrine was specifically mentioned later in *People v. Sears*, 465 P.2d 847, 850 (Cal. 1970), *superseded on other grounds by statute*,

Other jurisdictions have rejected this reasoning, holding that assaultive burglary is a proper predicate for felony murder<sup>49</sup> because burglary increases the intrusion and dangerousness of an assaultive encounter.<sup>50</sup>

The California Supreme Court's reasoning about assaultive felony murder reasoning is superficial. In the first place, assault is not analogous to homicidal crimes with respect to the merger doctrine. Homicidal crimes are different, because manslaughter and negligent homicide would cease to exist if they were proper predicates for felony murder. Because they result in death, these felony crimes would always be elevated to murder.<sup>51</sup> Assault, on the other hand, would not constitute murder if the crime did not result in death. The crime would not differ from other crimes that are proper predicates for felony murder, such as robbery or rape. The merger doctrine simply applies differently to homicidal and non-homicidal crimes.

More importantly, from a prudential (or policy) standpoint, the defensive theory of a person accused of assaultive homicide is outlandish, and the defensive reasoning itself shows why the crime should be murder if a felony assault results in death. In jurisdictions that follow the Model Penal Code, the felony version of assault is called aggravated assault.<sup>52</sup> This crime requires use of a deadly weapon such as a firearm to accomplish the assault or, alternatively, causing serious bodily injury. Serious bodily injury is defined so that only an extremely serious injury will suffice; the assault must cause the loss (or protracted loss of the use of) a bodily member or organ.<sup>53</sup> The victim must lose a hand, or an arm, or a leg, or the like. This is the kind of crime that qualifies as felony assault and that would be necessary for assaultive homicide.

Given this background, the defensive theory carries a heavy dose of irony. The defendant must be saying, "I intended only to beat him so badly that I would maim him, or

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49. *E.g.*, *People v. Miller*, 297 N.E.2d 85 (N.Y. 1993).

50. *See id.* at 87–88.

51. This is the rationale underlying the merger principle. *See supra* notes 29–30 and accompanying text.

52. MODEL PENAL CODE § 211.1(2) (1962).

53. Or serious permanent disfigurement. MODEL PENAL CODE § 210.0(3) (1969).

in other words, I intended only mayhem.<sup>54</sup> Gee, I guess I must have gone too far, and now he's dead. But I didn't commit a murder." Or, if the deadly weapon provision is the basis of the felony, the argument becomes, "I intended only to fire a warning shot at him, but my warning shot must have been really accurate, because it went right into the victim's head." These sorts of excuses, aside from usually being perjurious, are not of the kind that should avoid the felony murder rule.

In fact, the common law recognized assaultive homicide intended to cause serious bodily injury as supplying the malice aforethought required for murder.<sup>55</sup> California's murder statute, derived from the common law definition, defines murder as the causing of death with malice aforethought.<sup>56</sup> Had the *Wilson* court faithfully applied the common law definition of malice aforethought in interpreting the statute, it would have concluded that felony assaultive homicide is murder.

Finally, some jurisdictions have not applied the merger doctrine to assaultive homicides. These jurisdictions' decisions could have been considered as persuasive authority. This Article will now turn to these decisions, and to the related notion of independent felonious purpose.

## V. ASSAULTIVE HOMICIDE AS FELONY MURDER

### A. *Felony Murder by the Definition of the Crime*

Jurisdictions that consider assaultive homicides to be felony murder generally use more straightforward reasoning. For example, in *State v. Gheen*,<sup>57</sup> the court followed the legislative definition of the crime, which provided that felony murder could be predicated on felonies "other than murder or manslaughter." Assault, of course, is not manslaughter, and thus the statutory definition made the crime murder. The legislature was capable of reasoning that a crime in which the defendant's argument is, "I intended only to beat him within

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54. See *supra* note 52 and accompanying text.

55. See DAVID CRUMP ET AL., *supra* note 12, at 74–75 (defining other types of malice).

56. Cf. *People v. Mejia*, 149 Cal. Rptr. 3d 815, 843, 859 (Cal. Ct. App. 2012) (deriving meaning of malice aforethought from common law). As for common law, see CRUMP, *supra* note 12, at 74–75.

57. 41 S.W.3d 598, 604–05 (Mo. Ct. App. 2001).

an inch of his life, but I went an inch too far,” is as much a murder as other kinds of murder.

Other jurisdictions have distinguished the merger reasoning in deciding that assaultive homicide is felony murder. In *Baker v. State*,<sup>58</sup> the defendant claimed to have aimed his firearm over the victim’s head, but instead he shot the victim to death. As in *Wilson*, the court considered the argument that assault is an integral part of a resulting homicide and therefore should not be a basis of felony murder.<sup>59</sup> But the legislative definition of assault, unlike homicidal crimes, would not be disturbed as manslaughter or negligent homicide would be, if assault were made the basis of felony murder.<sup>60</sup> The merger doctrine therefore would not apply.

Decisions following *Gheen* and *Baker* show that, contrary to the concerns of the California court, assaultive felony murder does not dispense with requirements of malice or destroy manslaughter as a separate crime. The jury must simply find whether, within the underlying assault, the kind of passion that qualifies for manslaughter was present to negate malice.<sup>61</sup> Likewise, a finding of merely reckless assault could presumably reduce the crime to involuntary manslaughter.

*B. Felony Murder by the Doctrine of Independent Felonious Purpose*

Some jurisdictions have avoided the merger of assaultive homicide, and considered it in limited circumstances to be a basis of felony murder, when they have found the crime to have arisen from an “independent felonious purpose.”<sup>62</sup> For example, one can imagine a burglar who intends to enter a building for the purpose of theft. Before he can enter the building to complete the burglary, he is confronted by a security guard. In an effort to escape, the would-be burglar assaults the security guard and causes his death,

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58. 225 S.E.2d 269 (Ga. 1976).

59. *Id.* at 271.

60. *Id.*

61. See *Malone v. State*, 232 S.E.2d 907, 908 (Ga. 1977); *Edge v. State*, 414 S.E.2d 463, 465 (Ga. 1992).

62. See, e.g., *People v. Davison*, 923 N.E.2d 781, 787 (Ill. 2010) (holding that felony of “mob action,” by which defendant and co-felons pursued victim and stabbed and hit him, had an “independent felonious purpose.”).

independently of the intended burglary. In this situation, many jurisdictions would consider the assault and the burglary to be independent and therefore uphold the characterization of the assaultive homicide as murder.<sup>63</sup>

At times, the independent felonious purpose doctrine has been stretched to lengths that make the reasoning seem less than credible. For example, in the previously discussed case of *Commonwealth v. Kilburn*,<sup>64</sup> the planner behind the crime sent a henchman to assault the victim. The on-scene actor then assaulted the victim at the door to the victim's location before proceeding inward to shoot the victim to death.<sup>65</sup> In this unappealing situation, the planner's story was that he wanted his hit man only to discipline the victim, not to kill him. The planner had sent the gunman only to "do" the victim.<sup>66</sup> The Massachusetts trial judge had instructed the jury on the felony murder rule, with assault as the predicate felony. The Massachusetts Supreme Court generally disapproved of felony assaultive murder, but it reasoned that there were two assaults in this case.<sup>67</sup> The court considered the initial assault of the defendant at the door to be separate from the homicidal assault. On this basis, the court pronounced that because of the "independent" felony exhibited in the assault at the door, the merger doctrine did not apply.<sup>68</sup> The court therefore refused to vacate the defendant's murder conviction.

As *Kilburn* demonstrates, the independent felonious purpose doctrine invites manipulation. The result seems justifiable, because affordance of the defendant's murder conviction would appear sensible to many observers, but the underlying reasoning is troubling. Calling the first assault "independent" sounds like judicial fudging, given that the objective of assaulting the homicide victim the second time and killing him was the defendant's ostensible purpose throughout. The crime was a unified series of events with a singular purpose, so it would be illogical to consider the assaults independently.

But given that the Massachusetts court had to respect an

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63. See *supra* text accompanying notes 45–46, 57.

64. 780 N.E.2d 1237 (Mass. 2003).

65. *Id.* at 1240.

66. *Id.*

67. *Id.* at 1240–41.

68. *Id.*

existing jurisprudence that merged the murder into the assault and usually prevented judgments of assaultive felony murder, and given the existence of the independent felonious purpose doctrine, the court may have done the best it could with a crime that it firmly believed deserved the label of murder. A more straightforward pathway to this outcome would be to consider assaultive felony murder as a crime. In fact, the application of the independent felonious purpose doctrine has amounted to judicial sleight of hand in other cases resulting in murder convictions as well.<sup>69</sup>

#### CONCLUSION

The felony murder rule should apply to assaults under the requisite conditions for felony murder, just as it would in cases involving rape or robbery. Felony assault is a serious, violent assault, as the Model Penal Code exemplifies, requiring either use of a deadly weapon or the loss of a bodily member or organ. The defendant's argument is singularly unappealing when he says, "I intended only to beat him within an inch of his life and maim him, but I guess I went too far," or, "I intended only to fire a warning shot, but by mistake, I shot him between the eyes." There is no good policy reason for avoiding the characterization of this circumstance as murder. In jurisdictions that recognize depraved-heart murder, less egregious combinations of *mens rea* and conduct are understandably called murder.

Furthermore, the rationale of the merger doctrine is inapplicable in these circumstances. The purpose of preventing crimes such as manslaughter and negligent homicide from supporting felony murder is that those crimes would disappear if they could be used in this manner. A manslaughter or negligent homicide results in death, by definition, and these two felonies would therefore always qualify as felony murder, inconsistently with the legislative intent to define these crimes as lesser than murder. This result would not follow in the usual case of felony assault, because that crime does not involve death.

The doctrine of independent felonious purpose provides a

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69. Cf. *People v. Davison*, 923 N.W.2d 781 (Ill. 2010) (finding independent felony of "mob action" where defendant and others assaulted the victim and killed him). The "mob action" felony, there, amounted to a group assault and was hardly "independent."

way for a court to escape the merger bar and characterize an assaultive homicide as murder. But independent felonious purpose invites manipulation, as the jurisprudence of Massachusetts indicates. Furthermore, it does not separate serious assaultive homicides that deserve to be called murder from less serious crimes that do not. The best approach, for straightforward application by courts and consistent results, would be for courts to do what some have done: to enable homicidal felony assault, in proper cases, to be defined as murder.