The Doctrine of Merger in Felony-Murder and Misdemeanor-Manslaughter

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gree comparable to the federal income "operational" test since it is the operation which determines whether the charity is in fact a "guise." Finally, the federal income "unrelated business" test is at least a partial counterpart to the property "use" test. Only that part of a charity which is deemed "unrelated business" is subject to income tax, the remainder retaining its exemption. Likewise, only that segment of the property not used for the charitable purpose will be taxed, the remainder again retaining its exemption.

THE DOCTRINE OF MERGER IN FELONY-MURDER AND MISDEMEANOR-MANSLAUGHTER

Early common law grouped homicide cases as (1) justifiable, (2) excusable, and (3) felonious. In other words, all homicide which was not justifiable nor excusable was felonious. Every felonious killing, without further refinement into murder or manslaughter, was punishable by death; while on the other hand, benefit of clergy attached even if it was a killing of the most atrocious nature.

However, during the period from 1496 to 1547, a series of statutes excluded from benefit of clergy certain of the more serious forms of felonious homicide, referring to them as murder committed with malice aforethought. Felonious homicide was then divided into two main categories: that which was committed with malice aforethought, and that which was not. The former was called murder and punishable by death, the latter became manslaughter and was punishable by branding and imprisonment not to exceed one year. Express malice was defined by Blackstone as "malice . . . when one, with a sedate deliberate mind and formed design, doth kill another: which formed design is evidenced by external circumstances discovering that inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm." Malice afore-

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1 2 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 483-84 (1895).
2 3 HOLDSWORTH, A HISTORY OF ENGLISH LAW 314 (3d ed. 1927).
3 2 POLLOCK & MAITLAND, op. cit. supra note 1, at 450-60.
4 3 STEPHEN, HISTORY OF CRIMINAL LAW OF ENGLAND 44 (1883).
5 See Perkins, A Re-Examination of Malice Aforethought, 43 YALE L.J. 537, 543 (1934). This work is an excellent and extensive study of malice aforethought. According to the author, aforethought (prepense) was used in the sense of a design meditated upon for a substantial period of time in advance.
6 Id. at 544.
7 4 BLACKSTONE, COMMENTARIES *199. The words "express" or "implied" do not add to the meaning of malice; they are not two separate kinds of malice, but merely signify the manner in which the only kind known to the law may be shown to exist.
thought is a "subjective condition of the mind" and may "be inferred from acts committed." All homicide was presumed to have been committed with malice aforethought unless the proof offered by the state or by the defendant tended to reduce the offense to manslaughter or show that the defendant's act was justified or excusable. This presumption was rebuttable, yet it put upon the defendant the burden of coming forward with the evidence. If the defendant failed to rebut the presumption (the unrebutted evidence of the commission of the homicide was also presumptive evidence of its commission with malice aforethought), the jury could find him guilty of murder in the first or second degree.

The common-law view found malice aforethought—whether "express" or "implied"—to be present whenever there was an intent to kill or to inflict grievous bodily harm devoid of justification, excuse, or some special circumstance of mitigation. This occurred whether or not the intent was focused on the actual victim or upon some other. In connection with this approach, it was obvious that certain felonies were so frequently attended with death or grievous bodily harm that the felon was charged with the state of mind evidenced by his wanton act, regardless of the possible absence of an actual intent to cause death or harm. With regard to homicide resulting from such felonies, it was unnecessary to show in a specific case a plain and strong likelihood that death or grievous bodily harm would result. This type of homicide was regarded, as was homicide done with actual intent to kill, as "murder with malice aforethought"—the malice here being constructive rather than express. This type of homicide is called felony-murder.

As previously mentioned, the felony concerned with constructive malice had to be dangerous; in addition, the homicide must have been done in furtherance of the felony. Most common-law felonies, with the exception of larceny, were directed either toward death or grievous bodily harm, or involved a substantial risk of this nature. Even if the felony itself did not involve any element of risk to human life, the criminal could employ a dangerous force to complete the crime or deter others from interfering. Whether the felony was in-

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9 Stevens v. State, 42 Tex. Crim. 154, 173, 59 S.W. 545, 549 (1900).
11 State v. Pasour, 183 N.C. 793, 111 S.E. 779 (1922).
13 This rule was established early in the common law. See 3 Coxe, Institutes 51 (6th ed. 1680). Thus if A intentionally shoots at B and misses him, but instead kills C undesignedly, he is guilty of murder at common law. Actual intent to kill could be inferred from these facts. However, if intent to kill was not inferred the defendant could still be found guilty of murder, upon a finding of an intent to inflict grievous bodily harm.
14 See 4 Blackstone, Commentaries *205-19.
herently dangerous or the method used was dangerous, any killing perpetrated therein was murder.\(^{15}\)

In addition, homicide resulting from resistance to a lawful arrest was considered as murder with malice aforethought.\(^{16}\) This was rationalized by stating that one who was resisting a proper, lawful arrest acted without justification, excuse or provocation, and therefore, the resistor's use of a deadly force constituted malice aforethought.\(^{17}\) Also, resistance to lawful arrest almost always involves an element of risk of death or grievous bodily harm.

All cases of malice aforethought therefore involved substantial risk to human life, including intent to kill, intent to inflict grievous bodily harm, or an intent to commit an act under such circumstances that there was an obvious likelihood that death or harm would result.\(^{18}\) The latter classification concerns felony-murder and resistance to lawful arrest.

As previously noted, after the latter part of the fourteenth century all homicide committed with "malice aforethought" constituted murder; all others, with the exception of excusable or justifiable homicide, were manslaughter. Manslaughter at common law was defined by Hale as the "voluntary killing of another without malice express or implied, and differs not in substance of the fact from murder, but only differs in [several] . . . circumstances."\(^{19}\) The rule governing homicide committed in the course of an unlawful act has been definitely modified since Coke first declared that "if the act be unlawful, it is murder."\(^{20}\) Foster, admittedly contrary to Coke, stated that accidental homicide caused by unlawful acts was murder if the unlawful acts were felonies; killings attendant upon unlawful acts other than felonies were manslaughter.\(^{21}\) Felonious homicide which was not murder was known as homicide by chance-medley, and later as manslaughter.\(^{22}\) Foster restricted his unlawful acts, felonies or otherwise, to *malum in se* offenses.\(^{23}\)

A more recent definition is that common-law involuntary manslaughter is death resulting unintentionally from an unlawful act not

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\(^{15}\) See State v. Cooper, 13 N.J.L. 361 (Ct. Err. & App. 1833). The court stated here that death resulting from a felony is murder and added "especially if death were a probable consequence of the act." *Id.* at 370.

\(^{16}\) See Floyd v. State, 82 Ala. 16, 2 So. 683 (1886).

\(^{17}\) See White v. State, 70 Miss. 253, 11 So. 632 (1892).

\(^{18}\) Regina v. Porter, 12 Cox Crim. Cas. 444 (1873).

\(^{19}\) 1 Hale, *Pleas of the Crown* 466 (1800). Of the four circumstances enumerated by Hale, only one has significance here. "1. In the degree of the offense, murder being aggravated with malice presumed or implied, but manslaughter not, and therefore in manslaughter there can be no accessories before." *Ibid.* For examples of manslaughter at common law, see *id.* at 475 (1800).


\(^{21}\) Foster, *Crown Law* 258 (1762).


\(^{23}\) See note 21 *supra.*
amounting to a felony or from a lawful act negligently performed; the former is presently known as misdemeanor-manslaughter and the latter as negligent manslaughter. Constructive intent from the commission of a misdemeanor was utilized in this area as it was in murder.

The New York Statutory Classification of Homicide

In 1829, the Revised Statutes, containing the first codification of the law of homicide in New York, divided homicide into murder, manslaughter, excusable homicide, and justifiable homicide. The common-law terminology of "malice" and "aforethought" were replaced by "design" and "premeditated."

Murder was defined in one section containing three subdivisions. Manslaughter was divided into four degrees. The main distinction between murder and manslaughter was intent to kill which was present in the former and absent in the latter.

The failure of the Revised Statutes to provide a separate category with a more lenient penalty for unpremeditated-intentional killings caused the legislature in 1860 to divide murder into two degrees. In this statute, the qualified felonies under the felony-murder provision were specifically stated as the commission or attempt to commit arson, rape, robbery, or burglary, and constituted murder in the first degree. This statute, however, was short-lived; it was repealed in 1862. The Act of 1862 reinstated the original language of 1829, i.e., "premeditated design to effect the death." The two divisions of murder continued. At this point, all felony-murder, which had been murder in the first degree, was classified as murder in the second degree, with the exception of arson. Second degree murder, however.

24 WHARTON, HOMICIDE § 6 (2d ed. 1875).
25 See, e.g., N.Y. PEN. LAW § 1052(3).
26 N.Y. REV. STAT. (1829) Pt. IV, ch. 1, tit. 1, tit. 2; Art. 1.
27 N.Y. REV. STAT. (1829) Pt. IV, ch. 1, tit. 1; Art. 1, § 5.
28 N.Y. REV. STAT. (1829) Pt. IV, ch. 1, tit. 2; Art. 1, §§ 6-19.
29 N.Y. REV. STAT. (1829) Pt. IV, ch. 1, tit. 2; Art. 1, § 4.
30 N.Y. REV. STAT. (1829) Pt. IV, ch. 1, tit. 2; Art. 1, § 2.
31 N.Y. REV. STAT. (1829) Pt. IV, ch. 1, tit. 2; Art. 1, §§ 6, 10, 12. The phrase used was "without design to effect death." The sole exceptions were § 7 (aiding suicide), § 8 (wilful killing of an unborn quick child) and, perhaps, § 11 (using excessive or unnecessary force in self-defense).
32 Laws of New York, 1860, ch. 410, at 712: "All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or the attempt to perpetrate any arson, rape, robbery, or burglary, or in any attempt to escape from imprisonment, shall be deemed murder of the first degree, and all other kinds of murder shall be deemed murder in the second degree. . . ." No test was laid down for determining what acts constituted murder in the second degree.
33 Laws of New York, 1862, ch. 197, at 308-69.
with the exception of felony-murder, remained a negative, unclear
 provision.

The desire of the legislature to narrow the field of capital homi-
cides—defeated in 1860 and again in 1862—was brought to fruition
in 1873 with the first affirmative definition of second degree murder.
In this statute of 1873, felony-murder reappeared as murder in the
first degree in the following form: "[W]hen perpetrated without
any design to effect death by a person engaged in the commission of
any felony." 34

The legislature, in 1881, enacted the final statutory change in the
definition of murder. 35 With the exception of a slight change in the
phrasing of murder in the second degree, the provisions of the Act
of 1873 were merely re-enacted. These intentional homicide provi-
sions were retained in the Penal Law 36 and remain to the present day.

Under the Revised Statutes, a system of four gradations was
superimposed upon the general categories of common-law man-
slaughter. An attempt was made to divide each common-law category
into its component parts and to distribute the segments among the
appropriate degrees of manslaughter.

The system of degrees adopted by the Revisers necessitated meta-
physical inquiry into the relative culpability in each type of man-
slaughter. The "unlawful act" category, which would constitute
murder at common law, was resolved into: (1) homicide in the course
of felonies, becoming murder; 37 (2) homicide in the course of mis-
demeanors, becoming manslaughter in the first degree; 38 (3) homi-
cide in the course of private wrongs, becoming manslaughter in the
third degree. 39

Homicides committed in the heat of passion were classified as:
(1) murder when an intent to kill existed; 40 (2) manslaughter in
the second degree when committed "in a cruel and unusual manner"
but without an intent to kill; 41 (3) manslaughter in the third degree

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34 Laws of New York, 1873, ch. 664, at 1014: "Such killing, unless it be
manslaughter or excusable or justifiable homicide, as hereinafter provided, shall
be murder in the first degree, in the following cases: [The first and second
situations covered premeditated and depraved mind murder.] . . . . Third,
when perpetrated without any design to effect death by a person engaged in
the commission of any felony. Such killing, unless it be murder in the first
degree, or manslaughter, or excusable or justifiable homicide, as hereinafter
provided, shall be murder in the second degree when perpetrated intentionally
but without deliberation and premeditation." (Emphasis added.) The above
section concerning felony-murder was stated in the same manner in 1876.
Laws of New York, 1876, ch. 333, at 317.
36 N.Y. PEN. LAW § 1044.
37 See note 27, supra. See also text accompanying note 15 supra.
38 N.Y. REV. STAT. (1829) Pt. IV, ch. 1, tit. 2; Art. 1, § 6.
39 N.Y. REV. STAT. (1829) Pt. IV, ch. 1, tit. 2; Art. 1, § 13.
40 See note 31 supra.
41 N.Y. REV. STAT. (1829) Pt. IV, ch. 1, tit. 2; Art. 1, § 10.
when committed with a dangerous weapon but without an intent to kill.\textsuperscript{42} Homicide committed in the course of an unlawful performance of a lawful act, \textit{i.e.}, in the course of a negligent act, became manslaughter in the fourth degree.\textsuperscript{43}

The number of degrees of manslaughter was reduced from four to two with the enactment of the Penal Code in 1881 but the content of the four degrees was retained within the two. Manslaughter in the first and second degree retained its separate identity but was classified as manslaughter in the first degree. The homicide previously grouped as manslaughter in the third and fourth degree was termed manslaughter in the second degree. This scheme has been continued down to the present time.\textsuperscript{44}

With respect to the statutory derivation of misdemeanor-manslaughter, the Revised Statutes in 1829 stated:

The killing of a human being, without a design to effect death, by the act, procurement or culpable negligence of any other, while such is engaged, 1. In the perpetration of any crime or misdemeanor not amounting to felony: or, 2. In an attempt to perpetrate any such crime or misdemeanor, in cases where such killing would be murder at common law, shall be deemed manslaughter in the first degree.\textsuperscript{45}

It would appear that the intention of the Revisers was to insure that death-causing unlawful acts which were not felonies would not constitute murder. The desire to further limit qualifying misdemeanors was displayed when the Penal Code in 1881 \textsuperscript{46} expressed the same terminology as used presently, namely:

Such homicide is manslaughter in the first degree, when committed without a design to effect death: 1. By a person engaged in committing or attempting to commit, a misdemeanor, affecting the person or property, either of the person killed, or of another. . . \textsuperscript{47}

If the felony-murder provision in first degree murder had continued as set forth in the Laws of 1860, with specifically enumerated qualifying felonies, there would be no debatable issue in this area. The felonious homicide would simply qualify under the statute or it would not. This is the situation in the majority of American jurisdictions.\textsuperscript{48} However, since New York and five similar jurisdictions \textsuperscript{49} 

\begin{itemize}
\item \textsuperscript{42} N.Y. REV. STAT. (1829) Pt. IV, ch. 1, tit. 2; Art. 1, § 12.
\item \textsuperscript{43} N.Y. REV. STAT. (1829) Pt. IV, ch. 1, tit. 2; Art. 1, § 19.
\item \textsuperscript{44} N.Y. PEN. LAW §§ 1050, 1052.
\item \textsuperscript{45} N.Y. REV. STAT. (1829) Pt. IV, ch. 1, tit. 2; Art. 1, § 6.
\item \textsuperscript{46} 3 LAWS of New York, 1881, ch. 676, § 189(1).
\item \textsuperscript{47} N.Y. PEN. LAW § 1050(1).
\item \textsuperscript{48} See survey, note 49 \textit{infra}.
\item \textsuperscript{49} A survey of the United States revealed that five states have felony-murder statutes similar to New York. Homicide perpetrated by a person engaged in the commission of, or in an attempt to commit any felony is murder in the highest degree. \textit{KAN. GEN. STAT. ANN.} § 21-401 (1949); \textit{N.M. STAT.}}
The District of Columbia and Hawaii have similar statutes, but the Hawaiian law refers to homicides committed in the perpetration of a felony which is punishable by life imprisonment, not subject to parole. D.C. CODE ANN. § 22-2401 (1951) and HAWAII REV. LAWS § 291-3 (Supp. 1957). Wisconsin makes such killing in the commission of any felony murder in the third degree. Wis. STAT. ANN. § 940.01 (1958). In Minnesota, certain enumerated felonies (rape, assault to commit rape, indecent assault and sodomy) when combined with homicide are murder in the second degree. MINN. STAT. ANN. § 619.08 (Supp. 1959).

Most American jurisdictions reserve their severest punishments for homicides perpetrated in the commission of specified felonies. Lesser felonies constitute murder in the second or third degree or manslaughter. The "most popular" felonies are arson, rape, robbery and burglary. ALA. CODE tit. 14, § 314 (1940); ALASKA COMP. LAWS ANN. § 65-4-1 (Supp. 1958); IND. ANN. STAT. tit. 0-3401 (1956); Mich. STAT. ANN. § 28.548 (1954); MISS. CODE ANN. § 2215 (1942); NEB. REV. STAT. § 28-401 (1956); NEV. REV. CODE ANN. § 2901.01 (Baldwin 1959); OREG. REV. STAT. § 163.010 (Supp. 1957); R.I. GEN. LAWS ANN. § 11-23-1 (1956); UTAH CODE ANN. § 76-30-3 (1953); VT. STAT. ANN. tit. 13, § 2301 (1958); W.VA. CODE ANN. § 18-30 (1950); W. VA. CODE ANN. § 5916 (1955); WYO. COMP. STAT. ANN. § 6-54 (1957).


Kentucky, Maine, South Carolina and Texas make no specific reference to felony-murder, but it appears to be included within the meaning of "willful murder" and common-law homicide. KY. REV. STAT. ANN. § 433.010 (1955); ME. REV. STAT. ANN. ch. 130, § 1 (1954); S.C. CODE § 16-51 (1952); TEX. PEN. CODE art. 1256 (1948).

Georgia and Illinois mention no specific felony-murder statute, but case law has included the "popular" felonies within their homicide statutes. GA. CODE ANN. § 26-1002 (1953) and ILL. ANN. STAT. ch. 38, § 358 (Smith-Hurd 1934).

In Delaware, murder in the first degree covers only homicides which occur in the commission of, or in attempt to commit, crimes punishable with death (rape, kidnapping and treason). DEL. CODE ANN. tit. 11, § 571 (Supp. 1958). Massachusetts includes crimes punishable with death or life imprisonment. MASS. ANN. LAWS ch. 265, § 1 (1956).

The punishment for felony-murder in the majority of American jurisdictions is death or life imprisonment, with the exceptions of Wisconsin, Minnesota, Texas and Illinois. Wis. STAT. ANN. § 940.03 (1958) (Maximum sentence cannot exceed fifteen years over that provided by law for the felony.); MINN. STAT. ANN. § 619.08 (1959) (punishment not less than fifteen years nor more than forty years, except felonies of rape, assault, indecent assault, sodomy, where the maximum punishment is life imprisonment); TEX. PEN.
do not specify the applicable felonies, problems of interpretation often arise.

The felony-murder area, however, is subject to much less interpretation than is necessary in misdemeanor-manslaughter. This is readily understandable when one contemplates the Penal Law and the number and diversity of our misdemeanors. The problem of determining which misdemeanors "affect the person, or property of the person killed, or of another," as opposed to those that "affect society in general," which misdemeanors merge and which do not, which misdemeanors are *malum in se* and which are *malum prohibitum*, is huge. Other states circumvent this problem by following the common law or by enacting general "unlawful act" misdemeanor-manslaughter provisions.60

Code art. 1257 (1948) (Minimum punishment is two years, maximum is life imprisonment or death.) Ill. Ann. Stat. ch. 38, § 360 (Smith-Hurd 1934) (punishment no less than fourteen years to life imprisonment or death).


The remaining states do not appear to have any specific statute covering misdemeanor-manslaughter, but the majority of them do cover this area with case law.
Necessity for Distinguishing Between Murder and Felony-Murder and Manslaughter and Misdemeanor-Manslaughter

As previously shown, at common law, homicide resulting from an assault committed with intent to inflict serious bodily harm was classified as murder. Consequently there was no confusion between degrees of murder if the same act were punishable as felony-murder as well. But with the advent of the codified degrees of homicide it became necessary to devise methods of preserving the distinctions between those degrees. For example, in 1860 murder was divided into two categories: murder in the first degree and murder in the second degree. If assault were allowed to constitute one of the underlying felonies for an indictment for felony-murder, the distinction between the two degrees would be obliterated.

In order to properly preserve the distinction between the degrees of murder and between murder and manslaughter, it has been held that the crime of assault merged with the homicide, thus preventing a felony-murder indictment with assault alone as its foundation. Chief Judge Cardozo described the necessity for this holding by stating that “[e]very homicide . . . would occur in the commission of a felony, with the result that intent to kill and deliberation and premeditation would never be essential.” The Chief Judge went on to state that “the felony that eliminates the quality of the intent must be one that is independent of the homicide and of the assault merged therein, as, e.g., robbery or larceny or burglary or rape.”

The necessity of proper allocation of crimes is equally important in the field of manslaughter. A homicide is defined by New York Penal Law, Section 1050(1), as manslaughter in the first degree.
“when committed without a design to effect death . . . by a person engaged in committing, or attempting to commit, a misdemeanor, affecting the person or property, either of the person killed, or of another. . . .” If all assaults which amounted to a misdemeanor and which resulted in death were punishable under the above-mentioned statute, then section 1052(2) would become superfluous. This section declares manslaughter to be in the second degree “when committed without a design to effect death . . . in the heat of passion, but not by a dangerous weapon or by the use of means either cruel or unusual. . . .” The courts have applied the same reasoning here as in felony-murder; assault being a constituent and inseparable part of the act of killing, cannot at the same time be held to be an independent misdemeanor sufficient to support a misdemeanor-manslaughter charge.

Application of the Doctrine of Merger

In order to merge with a homicide, the underlying felony must be an integral part of the homicide; so that upon an indictment for the homicide the accused may be convicted of the felony. In Buel v. People, the defendant allegedly strangled his victim while committing the crime of rape. The defendant contended that the felony merged with the homicide since violence was an essential element of the crime. The court reasoned that:

If a person unintentionally kills another, while committing a minor felony which is not an ingredient of the killing, the two felonies being so distinct that they cannot be included in the same indictment, they are not merged, and the accused may be convicted of [felony-murder]. . . .

In short, the felony, rape, does not merge with the homicide because rape is not an ingredient of the homicide. When on trial for the homicide, one cannot be convicted of rape.

The defendant in People v. Hüter was accused of killing an officer while resisting arrest. The court held that the offense was assault in the second degree, and that therefore the act merged with the homicide. Here there was one act which caused the homicide. The court followed Buel and stated:

In order . . . to constitute murder in the first degree by the unintentional killing of another while engaged in the commission of a felony, we think that

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57 18 Hun 487 (3d Dep't 1879), aff'd, 78 N.Y. 492 (1879).
58 Id. at 493-94.
59 184 N.Y. 237, 77 N.E. 6 (1906).
60 Assault in the second degree, then § 218(5) of the Penal Code of New York, now § 242(5) of the Penal Law, was defined as assault "to prevent or resist the execution of any lawful process or mandate of any court or officer, or the lawful apprehension or detention of himself, or of any other person. . . ." Ibid.
while the violence may constitute a part of the homicide yet the other elements constituting the felony in which he is engaged must be so distinct from that of the homicide as not to be an ingredient of the homicide, indictable therewith or convictable thereunder.61

Where the accused in the course of assaulting one person, assaults and kills a second person, the first assault does not merge with the subsequent homicide.62 For example, A is in a room and is being assaulted by X when B walks into the room. X continues his assault on A and assaults and kills B. The two assaults are separate and distinct. X killed B "while in the commission of" a felonious assault on A; therefore he is guilty of felony-murder.63 Similarly, an attempt to commit a distinct felony, including an attempted assault, cannot be held to merge with the homicide.64

In summary, to be an integral part of the homicide and therefore merge into it, the underlying felony or misdemeanor must be an assault which is the fatal assault. An assault with intent to kill which results in the death of the person assaulted is an insufficient basis for a charge of felony-murder.65 Assault with intent to prevent lawful arrest, as stated previously with reference to the Hüter case, merges, but a homicide committed in escaping from arrest for a felony could result in a felony-murder charge since the underlying felony, the escape, is distinct from the assault causing the homicide.66

All assaults involve some degree of bodily harm but any law or principle of law which would permit every act of killing to be classified as murder would be barbarous and unreasonable. Homicide is the product of a fatal assault; without the assault there would be no homicide. It is for this reason that it has been almost universally held that the specific crime of assault merges with the homicide.

There have been many attempts made to broaden the use of the doctrine of merger to include other crimes, such as rape, robbery, and burglary, but the courts have vehemently opposed such an expansion. The defense in the Buel case contended that force and violence constituted the crime of rape, and therefore, the forceful

61 People v. Hüter, 184 N.Y. 237, 244, 77 N.E. 6, 8 (1906).
63 Compare People v. Moran, 246 N.Y. 100, 158 N.E. 35 (1927), in which the court found that the first assault had ended and the second (fatal) assault was merged in the homicide. Therefore, neither could be the basis of a felony-murder charge. See also Ladner v. United States, 358 U.S. 169 (1958), wherein the Court held that a single discharge of a shotgun, although affecting more than one federal officer (the discharge wounded two officers) constituted a single violation of the statute involved (18 U.S.C. § 111 (1958)).
64 N.Y. PEN. LAW § 1044(2).
65 Foster v. People, 50 N.Y. 598, 604, 609 (1872).
67 78 N.Y. 492, 497 (1879).
assault should merge with the homicide. The court emphatically rejected this assertion. “While force and violence constitute an important element of the crime of rape,” the court explained, “they do not constitute the entire body of that offense. The unlawful or carnal knowledge is the essence of [rape]. . . .”

Robbery and burglary will not merge with the homicide because there are two elements in both of these crimes, assault and larceny, the presence of the latter preventing merger. An attempt to escape from a state prison or from arrest for a felony does not merge. A recent attempt to apply the doctrine of merger to kidnapping was made in People v. La Marca. In a prosecution for kidnapping and murder, the New York Court of Appeals rejected the contention that the seizure, detention and depositing of the kidnapped infant in a wooded area was but a felonious assault which merged in the homicide. The court based this ruling on the reasoning that force and violence do not constitute the entire body of the crime of kidnapping.

While force and violence may constitute an important element of the crime of kidnapping a child under the age of sixteen years (Penal Law, § 1250, subd. 2), as they constitute an important element of the crimes of rape and robbery, they do not constitute the entire body of that offense. A taking or detaining of the infant with intent to keep or conceal it from the person having the lawful care or control of it, or to extort or obtain money or reward for the return or disposition of the child is the essence of that crime.

Judge Sobel, in a dictum statement in People v. Conforti, declared that the use of force or fear to collect a debt owed by the deceased to one of the defendants may constitute the offense of extortion or attempted extortion. The judge added that the defendants might be indicted for felony-murder or manslaughter in the second degree.

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68 Ibid. (Emphasis added.)
69 People v. Hüter, 184 N.Y. 237, 77 N.E. 6 (1906); Cox v. People, 80 N.Y. 500 (1880).
70 See Cox v. People, supra note 69.
73 N.Y. PEN. LAW § 1250.
75 72 N.Y.S.2d 458 (Kings County Ct. 1947).
76 N.Y. PEN. LAW § 850.
77 N.Y. PEN. LAW § 857.
The doctrine of merger will not apply to reduce a possible indictment for murder in the first degree to a lesser degree merely because the killing was accidental. In *People v. Udwin*, the victim, a prisoner attempting to escape from a state prison, was accidentally killed by a misdirected bullet discharged from a pistol held by a fellow-conspirator. The court stated that "there may be no intent to kill, but the violence having been perpetrated while engaged in the robbery, burglary, or attempt to escape imprisonment, it is murder in the first degree." 

The doctrine of merger has also been applied to misdemeanor-manslaughter. The leading case is *People v. Grieco*, where the defendant, while intoxicated, drove past a red light and through a safety zone, killing one pedestrian and injuring a second. He was indicted for misdemeanor-manslaughter on the theory that the misdemeanors of reckless driving and operation of a motor vehicle while intoxicated were within the meaning of section 1050(1) which defines misdemeanor-manslaughter. The Court of Appeals held that the two misdemeanors did not come within the meaning of section 1050(1). The court reasoned that immediately prior to the accident the defendant was not "affecting the person or property, either of the person killed, or of another..." His reckless and drunken operation of the automobile was not "affecting" anyone in particular until the moment of impact with the deceased. Prior to that it was merely "affecting society in general."

A moment before the collision the defendant's conduct constituted a crime, a misdemeanor against society, against law and order, and against the People of the State. The commission of the misdemeanor in which he was engaged was not one affecting the person or property of deceased or of another. He had not seen the deceased and did not know that she was present. The fact that his automobile struck her could not instantly change his conduct so as to make it an act affecting the person of the deceased and thereby make him liable for the crime of manslaughter in the first degree.

The court explained that if Grieco could have been convicted of misdemeanor-manslaughter here, "every driver of an automobile, who, while committing one of the offenses defined as a misdemeanor

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80 *People v. Udwin*, *supra* note 78, at 262, 172 N.E. at 491.
82 N.Y. VEHICLE & TRAFFIC LAW § 58, now N.Y. VEHICLE & TRAFFIC LAW § 1190.
83 N.Y. VEHICLE & TRAFFIC LAW § 70(5), now N.Y. VEHICLE & TRAFFIC LAW § 1192.
84 N.Y. PEN. LAW § 1050(1).
85 *People v. Grieco*, 266 N.Y. 48, 51-52, 193 N.E. 634, 635 (1934).
in the act [Vehicle and Traffic Law], accidentally causes the death of a person will be guilty of... manslaughter in the first degree no matter how thoughtless or unintentional the act.” 86 Although the court held the misdemeanors without section 1050(1), it nevertheless went on to discuss the doctrine of merger and concluded that the misdemeanors merged.

The recent case of People v. Nicoll 87 provides an interesting comparison with the Grieco case. The defendant had caused the death of another by shooting at his car during a chase on a highway. The Appellate Division held, inter alia, that the misdemeanor of wilfully discharging a fire-arm in public merged with the resulting homicide—not that it was without the ambit of section 1050(1), but that it merged. The court stated that:

The wilful discharge of the firearm, constituting a violation of section 1906, was the very act which produced the death. It was simply the means by which the assault was committed—the assault under a different name. As was stated in People v. Hätter . . ., “the gist of the offense is the assault”, which merges in the homicide. . . . 88

The Nicoll case, however, invites a new criticism. What is the difference between drunken and reckless driving down a street and the wilfull discharge of a firearm in public? They both appear to “affect society in general” rather than a particular person, before the homicide actually occurs. Why then did not the court follow the Grieco rule and simply state that the misdemeanor did not come within section 1050(1) ? 89

86 Id. at 52, 193 N.E. at 635. N.Y. PEN. LAW § 1053a, passed in 1936, has eliminated this problem by separately classifying all unintentional vehicular homicide.

87 3 App. Div. 2d 64, 158 N.Y.S.2d 279 (4th Dep’t 1956).

88 Id. at 72-73, 158 N.Y.S.2d at 289.

In addition to merger, the factors of causation and duration are significant in felony-murder. The homicide must be in pursuance of the unlawful act and not merely coincident with it. There must be some causal relation between the homicide and the underlying felony in order for it to be regarded as felony-murder, especially when there are two defendants of unequal culpability. Thus, the Court of Appeals, in a per curiam decision, reversed a felony-murder conviction with regard to one co-conspirator in *People v. Elling* upon a showing that the defendant E shot S for a reason personal to E and unrelated to the robbery. Thus, defendant B, who participated in the robbery but attempted to prevent the murder, was released from the felony-murder charge. Causality cannot be replaced by contemporaneity. It is imperative to establish that death ensued in consequence of the felony.

In *People v. Marendi* the court instructed the jury that the felony of carrying a dangerous weapon merged with the ensuing homicide. An analysis of the decision, however, would seem to

On the other hand, the following misdemeanors have been declared to merge with the homicide: *People v. Grieco*, 266 N.Y. 48, 193 N.E. 634 (1934) (N.Y. VEHICLE & TRAFFIC LAW §§ 1190—reckless driving, and N.Y. VEHICLE & TRAFFIC LAW § 70(5), now N.Y. VEHICLE & TRAFFIC LAW § 1192—driving while intoxicated); *People v. Marendi*, 218 N.Y. 600, 107 N.E. 1058 (1915) (N.Y. PEN. LAW § 1897(4)—carrying a dangerous weapon); *People v. Nicoll*, 3 App. Div. 2d 64, 158 N.Y.S.2d 279 (4th Dep't 1956) (N.Y. PEN. LAW § 1906—wilful discharge of a fire-arm in public).

The N.Y. Law Revision Commission in 1937 listed the following misdemeanors in the Penal Law which under the *Grieco* case might be deemed within the scope of § 1050(1): § 405 (unlawfully entering building); § 483-c (tattooing child under sixteen); § 580 (definition and punishment of conspiracy); § 1030 (hazing prohibited); § 1299 (petit larceny a misdemeanor); § 1425 (malicious injury to, and destruction of, property); § 1433 (injury to property, how punished); § 1710 (prize-fighting and sparring); § 2034 (forcible entry and detainer); § 2035 (returning to take possession of lands after being removed by legal process); § 2036 (unlawful intrusion on real property); § 2070 (preventing performance of religious act). The Commission went on to enumerate seventy misdemeanors of the Penal Law which in all likelihood would not be the basis of a misdemeanor-manslaughter charge, e.g., § 483 (endangering life or health of a child). 1937 N.Y. LAW REVISION COMMISSION REP. 748-50, n.703.

* See *People v. Luscomb*, 292 N.Y. 390, 55 N.E.2d 469 (1944); *People v. Elling*, 289 N.Y. 419, 46 N.E.2d 501 (1943) (per curiam); *People v. Marendi*, 213 N.Y. 600, 107 N.E. 1058 (1915); *Buel v. People*, 78 N.Y. 492 (1879).

* Buel v. People, 78 N.Y. 492, 497 (1879).

* People v. Marendi, 213 N.Y. 600, 107 N.E. 1058 (1915).

* Id. at 606, 107 N.E. 1059-60. See N.Y. PEN. LAW § 1897(4). The offense is a felony when committed by second offenders.
indicate that the court was referring to the lack of *causality* between the felony and the homicide rather than the felony merging with the homicide. So too, in the *Grieco* case, the court, after an analysis of the merger doctrine as applied to felony-murder, emphatically stated that their conclusion was that the misdemeanors merged. This, in the face of the court's extended primary holding that subject misdemeanors were not within the misdemeanor-manslaughter statute, appears unnecessary, if not contradictory. Can the misdemeanors be without the statute—not affect the person or property of the deceased, or of another—yet still be held to merge? It would seem that the antithesis would be more logical and proper. Only when the offense is deemed within the statute—that is, affecting a particular person or his property before the homicide occurs—that the question of whether the misdemeanor merges arises. So, perhaps the *Grieco* court too was referring to causality rather than merger. This analysis would preserve the traditional concept of merger and prevent an extension which would include all misdemeanors which only affected "society in general."

The New York decisions, in defining the "duration" factor in felony-murder, have declared that the felony must be so related to the homicide as to justify a jury in finding that the homicide was committed in the actual course of the felony. A burglar, who at the time of the homicide had abandoned the loot and was in flight, was not indictable under the felony-murder provision because the felony had ended prior to the homicide.

**People v. Nelson**

A case which drew considerable criticism in the field of misdemeanor-manslaughter was *People v. Nelson*. The defendant was convicted of manslaughter in the first degree (misdemeanor-manslaughter) and manslaughter in the second degree (culpable negligence manslaughter) for failing to provide adequate fire protection

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95 People v. Grieco, 266 N.Y. 48, 54, 193 N.E. 634, 639 (1934).

96 N.Y. PEN. LAW § 1044(2): "[B]y a person engaged in the commission of, or in an attempt to commit a felony...


98 People v. Hütter, 184 N.Y. 237, 77 N.E. 6 (1905). In other jurisdictions, the requirement that the homicide be in consequence of the felony, is necessary. State v. Glover, 330 Mo. 709, 50 S.W.2d 1049 (1932); Pleimling v. State, 46 Wis. 516, 1 N.W. 278 (1879) (death resulting from fire during the felony of rape was not felony-murder; the fire was not the consequence of the rape).

in his multiple dwelling, a misdemeanor under the Multiple Dwelling Law. The defendant had not been personally notified of the violation. The Court of Appeals upheld his conviction of misdemeanor-manslaughter, stating that this "constituted a continuing misdemeanor 'affecting the person . . . killed.'" The court rejected any application of the merger doctrine, holding that the situation before them was dissimilar to a continuing assault resulting in death.

The criticism of the situation mainly involved the conviction of manslaughter in the first degree for a malum prohibitum misdemeanor. Under the doctrine of constructive intent, which supplies the foundation for felony-murder and misdemeanor-manslaughter, one who undesignedly causes the death of another during the intentional commission of an unlawful act, will be deemed in law to have intended such death. Malum prohibitum acts have been made misdemeanors by statute regardless of the lack of wrongful intention. It would appear to follow that the absence of intent which can be transferred to the homicide would preclude the finding of the mens rea necessary for a conviction.

Summary and Conclusion

When on trial for felony-murder or misdemeanor-manslaughter, the theory is that the defendant may be separately convicted of both the lesser crime and the homicide, i.e., convicted of either the underlying offense or the homicide and acquitted of the other, or acquitted of both the charges. Although assault, resulting in death, cannot be the felony or the misdemeanor constituting felony-murder or misdemeanor-manslaughter, the defendant could theoretically be found guilty of an assault after being acquitted on the homicide. In illustration, if A was indicted for manslaughter in the second degree for

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99 N.Y. MULT. DWELL. LAW §§ 187, 188, 189, 304.
100 Notification is necessary for conviction according to the Multiple Dwelling Law. N.Y. MULT. DWELL. LAW § 326.
103 See 3 FORTNIGHTLY L.J. 257-58 (1934) ; 23 MICH. L. REV. 176 (1924).
104 Briefly put, the theory is that the intent to commit the underlying felony or misdemeanor is sufficient ground to regard any homicide occurring in pursuance thereof as punishable by the severe penalty usually reserved for homicides done with a specific criminal intent toward the victim. See text following note 13 supra.
106 See WHARTON, HOMICIDE (3d ed. 1907). "But while homicide perpetrated in the commission of some unlawful act is manslaughter, though the death of the person killed was not intended, yet the unlawful act must be willful, and not a mere misadventure." Id. § 213. Contra, People v. Diamond, 95 Misc. 114, 160 N.Y. Supp. 603 (Kings County Ct. 1916). The court declared: "It
the killing of B, in the heat of passion, while engaged in a fist-fight with B, in theory A could be acquitted of the homicide, by a reasonable doubt being entertained by the jury whether or not the fight caused B's death, and yet be convicted of assault in the third degree. The reasoning behind this circumstance is the heart of the doctrine of merger itself. Assault merges with the homicide because it is a necessary ingredient of the homicide, and for this reason, when one is on trial for murder and manslaughter, he is also on trial for assault.

In New York and similar jurisdictions all felonies with the exception of assault have been held not to merge with the homicide; in other jurisdictions those felonies which are specifically enumerated will not merge, and seemingly all other felonies will merge with the homicide or not be included within the statutes pertaining to murder in the first degree. Unfortunately, however, no such talismanic formula may be drafted for misdemeanor-manslaughter. Several jurisdictions follow New York but most states follow the common law and allow "unlawful acts" to constitute misdemeanor-manslaughter. Just what "unlawful acts" will satisfy the various provisions is a study within itself.

With regard to misdemeanor-manslaughter, the courts attempt to preserve the traditional concept of merger although there is some confusion as to this in the misdemeanor-manslaughter area. This confusion can be avoided if the courts first determine whether the misdemeanors "affect the person or property of the deceased, or of another," as distinguished from "affecting society in general," and if the misdemeanors qualify, only then apply the merger doctrine. A possible answer to the confusion of determining which felonies and misdemeanors merge to prevent felony-murder charges may be found in the employment of the term "efficient cause." Using this concept, the courts determine if the underlying offense was "the efficient cause" of the homicide or merely contributed collaterally to the homicide. Thus, in a fatal assault, it is the act of the assault itself which produces the homicide. So also in the area of neglect, if it is the act of neglect itself which causes the homicide, then the neglect should merge within the homicide. For example, if a parent fails to provide food for its child for an extended period of time, and the child dies of starvation, the parental neglect and the homicide should merge.

It seems to me that under our statute there are no exceptions, but that any one would be guilty of manslaughter who, while engaged in the commission of a misdemeanor, brings about the death of another, irrespective of the fact that it was malum prohibitum or malum in se." Id. at 120, 160 N.Y. Supp. at 607.

107 N.Y. PEN. LAW § 1052(2).
108 N.Y. PEN. LAW § 244.
109 In a very early case, People v. McDonald, 49 Hun 67, 1 N.Y. Supp. 703 (Sup. Ct. Gen. Term, 5th Dep't 1888), a mother was indicted for misdemeanor-manslaughter based on a violation of the predecessor of N.Y. PEN. CODE § 482 (failure to provide for a child). She was convicted of the misdemeanor only;
More and more misdemeanors are being created yearly, the bulk of which are *mala prohibita*. As the greatest number of misdemeanors qualify under misdemeanor-manslaughter, fewer manage to avoid the more severe punishment for manslaughter in the first degree by coming within manslaughter in the second degree, culpable negligence-manslaughter. Cases of accidents and misfortunes or omissions, devoid of criminal intent, rise to the level of misdemeanor-manslaughter when the legislature so deems. This imposes greater sanctions on crimes which require a lesser degree of culpability than offenses within a lesser degree of manslaughter. Misdemeanor-manslaughter could be established with proof of ordinary negligence, where culpable negligence must be shown to convict for manslaughter in the second degree.

To make the situation more harmonious with the concept of having the punishment befit the crime, either legislative revision to specifically enumerate the qualifying misdemeanors or judicial reshaping to limit the offenses to those *mala in se* appears necessary. Knowledge and intent should be two important determinants in any consideration of this kind. Perhaps Mr. Justice Van Voorhis' statement in his dissent in *People v. Nelson* would serve as a good guide:

Death caused by a person "engaged in committing a misdemeanor" was designed to mean by a person *consciously* engaged in committing the misdemeanor.110

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**Proposed Section 735 of the Internal Revenue Code: An Implication Contrary to Established Principles of Gratuitous Assignment of Income?**

A revision of Section 735 of the Internal Revenue Code in the recently proposed "Trust and Partnership Income Tax Revision Bill of 1960"1 was intended to clarify the treatment of distributed part-