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Merger and Felony Murder

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1. Introduction

Felony murder has been controversial among American commentators for years.¹ They see American criminal law as uncivilized, relative to other English-speaking nations, and urge the United States to follow the example of Great Britain, which abolished felony murder by legislation,² and Canada, which found it unconstitutional.³ The central objection American criminal law scholars level at the doctrine is that it is a form of strict liability, and they see strict liability for serious crimes as morally unacceptable.⁴ What makes matters worse, from their point of view, is that no one has a clear view of the purpose of the felony murder doctrine.⁵ This makes it difficult to resolve borderline cases, as there are no underlying principles to guide their determination. The result is that the felony murder rule ends up being intolerably ad hoc.

Nevertheless, there seems little chance the felony murder rule will be abolished in the United States any time soon. It is a much favored tool of American prosecutors, and is available in the vast majority of American jurisdictions.⁶ Despite their grave misgivings about the doctrine, then, it might behoove criminal law scholars to consider ways of improving the rule and its application, rather than treating current practice as an all-or-nothing.

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proposition. What follows is a suggestion toward such incremental improvement.

It is the contention of this chapter that the greatest source of inconsistency in the application of the felony murder rule lies in the tests used to identify which felonies can serve as predicate felonies. There are two requirements that are commonly imposed in American jurisdictions. The first is that the felony must be ‘inherently dangerous’, a requirement that has mostly been articulated in jurisdictions where the basis for the felony murder rule is common law, rather than statutory. In these jurisdictions, a felony like fraud or theft will not support a charge of felony murder, even if it gives rise to death, because, considered in the abstract, fraud is not a dangerous act. In states where the felony murder rule is statutory, the same principle has been adhered to in the legislatively specified list of acceptable predicate felonies, which is restricted to acts that would count as inherently dangerous in their common law cousins.

The second is the requirement that the predicate felony not merge with the homicide. The doctrine of merger restricts acceptable predicate felonies by treating certain felonies as inseparable from the homicides to which they give rise. The paradigm case is the killing that takes place in the course of an assault. The doctrine of merger says that the assault ‘merges’ with the homicide, with the result that prosecutors cannot avoid proving the mens rea for murder by tying the murder charge to the assault charge. Armed robbery, by contrast, will usually support a charge of felony murder, since the predicate felony is sufficiently distinct from the homicide.

My focus in what follows will be on the merger doctrine. It is here that the felony murder rule encounters its greatest source of confusion, with results that sometimes border on incoherence. In particular, the rule often has the effect of making it easier for prosecutors to prosecute defendants who have committed less severe crimes, as compared with those who have committed more serious ones. The person who assaults his victim with a deadly weapon can only be convicted if prosecutors can prove he intended to kill or had one of the other acceptable mental states for murder, such as knowledge or reckless indifference. The person who burglarizes a home in order to steal the television set, and accidentally kills the homeowner who happens upon him in fright, by contrast, can be convicted of murder on the basis of the burglary and the death of the victim alone. Worse, the parent who intentionally beats his child, causing the child’s death, cannot be convicted of murder unless prosecutors can show that he intended to kill or at least knew he

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7 People v Phillips, 414 P. 2d 353 (1966). A minority of jurisdictions, however, apply a more liberal version of the ‘inherently dangerous’ test. Such jurisdictions require that the felony be dangerous ‘in the particular’ rather than in the abstract. For example, in State v Goodsell, 553 P. 2d 279 (Kan. 1977), the court said that one should consider ‘both the nature of the offense in the abstract and the circumstances of its commission in determining whether a particular felony was inherently dangerous to human life’.
probably would. But the parent who is guilty of neglecting his child by failing to feed her, thus causing death, can often be convicted of murder without the prosecutor’s having to prove the mens rea for murder. The result is that defendants will be acquitted of murder in a number of more serious cases, where they would often have been convicted had they committed a less serious crime that could serve as the predicate felony for a felony murder prosecution.

Not only do such results seem ad hoc, but it is hard even to imagine what a rationale for a doctrine with such wildly inconsistent outcomes could look like. 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. The felony murder rule thus appears to make prosecution in the absence of mens rea possible in a middle tier of cases. What could the rationale for such a rule be? 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. If, on the other hand, one were to argue that strict liability for murder should be acceptable in such cases because murders in this category are less serious, imposing the inherently dangerous rule would make little sense. In many jurisdictions, moreover, it is not the case that felony murder is punishable less severely than intentional murder. Thus distinguishing such cases at the level of mens rea is a curious thing to do.

Over the years, courts in various jurisdictions have proposed a number of quite different tests for solving the merger problem. There seems to be general agreement that assault and assault-type felonies should merge with the homicide, while felonies like armed robbery should not. But there are a host of grey area cases, such as burglary, felony child abuse, kidnapping, poisoning, and arson, where results are highly variable, both across jurisdictions and within a single jurisdiction. There are also a number of related doctrines, such as misdemeanor-manslaughter, where courts have been uncertain whether merger should apply. Adding to the overall inconsistency is the fact that some jurisdictions have eliminated the merger doctrine all together.

In what follows, I shall argue that courts fail to perceive the only possible rationale for the merger rule that makes any sense of the doctrine. In particular, they often take a functionalist view of merger—relating it to the general deterrence aims of the criminal law. I shall argue, by contrast, that the reason for having a merger doctrine is not functional but structural: if we are to have a form of liability in which we punish a person for killing in the process of committing a felony, the defendant must have done two things—performed a separate felony and killed. Once we understand what is required in philosophical terms for this to be the case, the doctrine will no longer seem so mysterious and the range of its application will be
substantially clearer. The approach to merger I shall develop will not eliminate all the objections to the felony murder rule. In particular, it will do nothing to cure the basic objection of those who think it immoral to punish for serious offenses in the absence of mens rea, and it fails to address sources of inconsistency other than merger. But if I am correct that the merger doctrine currently provides the greatest source of inconsistency in the application of the felony murder rule, straightening out mergers should improve felony murder substantially. Moreover, once we understand the underlying logic of the merger doctrine, we will see that the problem of merger bears important affinities to other criminal law problems, such as double jeopardy, common law merger, and the voluntary act requirement. The merger doctrine itself will thus appear to descend from a set of more general principles relating to divisions among criminal acts.

2. Prevailing Approaches to Merger

The doctrine of merger is often traced to the California case of People v Ireland. In that case, the defendant drew a gun and shot his wife, killing her. The jury was instructed that it could find the defendant guilty of second degree felony murder if it determined that the homicide occurred during the commission of an assault with a deadly weapon. The California Supreme Court struck down the conviction, on the ground that this approach allowed for a kind of ‘bootstrapping’: it allowed prosecutors to convert what would ordinarily be a straightforward murder case, involving only one crime, into a felony murder case, by separating off an assault and treating the killing as the result of the assault. Instead, the court maintained 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 show to be an offense included in fact within the offense charged.

Ireland was quickly extended to more far-reaching situations. In People v Wilson, the defendant broke into his estranged wife’s apartment with a shotgun, where he fatally shot a man he encountered in the living room. He then proceeded to the bathroom where he killed his wife. His conviction for felony murder for both killings was reversed under Ireland. The argument was that the predicate felony of burglary was established solely in virtue of the fact that the defendant entered the apartment with intent to commit an assault with a deadly weapon, a felony that would normally merge with the homicide. The court held that this use of the felony murder rule involved the same kind of bootstrapping condemned in Ireland.

8 70 Cal. 2d 522 (1969).  9 Id. at 539.  10 1 Cal. 3d 431 (1969).
and that the deterrent purpose of the felony murder rule is only relevant in application to a felony that is independent of the homicide. And in People v Sears,\textsuperscript{11} the defendant broke into a dwelling for the purpose of killing his estranged wife, and ended up accidentally killing her daughter when the latter intervened. The lower court thought the burglary with intent to assault the wife could serve as the predicate felony for killing the daughter. The California Supreme Court, however, thought it anomalous ‘to place the person who intends to attack one person and in the course of the assault kills another inadvertently or in the heat of battle in a worse position than the person who from the outset intended to attack both persons and killed one or both’.\textsuperscript{12} Accordingly, the court once again applied the merger doctrine, rendering prosecution for felony murder unavailable.

The Sears court was of course correct that the results of applying the merger doctrine in that case would have been anomalous. Why should a person who kills accidentally find himself in a worse position than one who kills intentionally? Yet the anomalousness of the doctrine is not avoided by taking the Sears approach to burglary. For it will still be possible to construct side-by-side cases whose differential treatment seems ad hoc in this same way. Consider, for example, the varying approach to felony child abuse. The best known case in this area is People v Smith,\textsuperscript{13} in which a child of two underwent severe beatings and other physical abuses from which she died later that day. The California Supreme Court applied the Ireland rule, saying that merger should apply where the purpose of the child abuse is the ‘very assault that resulted in death’.\textsuperscript{14} Furthermore, following a post-Ireland case involving armed robbery,\textsuperscript{15} the court said that the defendant must have had an ‘independent felonious purpose’ in committing the predicate felony. The court pointed out that to refuse merger would allow the prosecution to bootstrap this case into murder ‘merely because the victim was a child rather than an adult’. The court distinguished, however, cases of passive child abuse like People v Shockley, where the child’s death followed from malnutrition and dehydration. Here the court found that the felony was ‘independent’ and ‘not related to the assault causing the murder’.\textsuperscript{16} Thus the court was able to preserve the symmetry of the adult assault cases and the child abuse cases, but only at the cost of distinguishing direct child abuse from passive dehydration and nutrition.

It would of course be possible to avoid the asymmetry between active and passive child abuse by revising the rule in cases like Shockley to hold that the passive abuse in that case merges with the homicide. That would make for consistent results between adult assault cases (like Ireland) and child abuse cases, as well as between the burglary cases (like Wilson and Sears) and the assault cases. But an asymmetry would now exist between the

\textsuperscript{11} 2 Cal. 3d 180 (1970).\textsuperscript{12} Id. at 188.\textsuperscript{13} 678 P. 2d 886 (1984).\textsuperscript{14} Id. at 890.\textsuperscript{15} People v Burton, 6 Cal. 3d 375 (1971).\textsuperscript{16} 79 Cal. App. 3d 669 (1978).
Shockley-type case and other cases where merger does not normally apply, such as kidnapping\(^{17}\) or poisoning food, drink or medicine.\(^{18}\) Normally, kidnapping is both inherently dangerous and independent of any resulting homicide, so that felony murder is available. But one might question the logic of making it harder to prosecute a parent who deliberately fails to feed or otherwise care for her child than the non-violent kidnapper who has no intent of harming the child but nevertheless causes an accidental death. Perhaps more anomalous is the comparison between the parent who assaults his child, with the result that the child dies, and the parent who poisons his child, with the same result. The former would now be harder to convict than the latter, because in the first case the predicate felony of assault would merge with the homicide, whereas in the second case the predicate felony of poisoning would not.

The reasoning of the Smith case is typical, in that courts tend to take a fairly result-oriented approach to merger. Even Ireland cited a largely pragmatic rationale for the doctrine, saying that its application to this case would ‘extend[] the operation of that rule “beyond any rational function that it is designed to serve”’, and that it 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’.\(^{19}\) But distinguishing the felonies that merge from those that do not in pragmatic terms obscures any hope one might have of rationalizing the merger doctrine. The question is whether the doctrine has an analytical core that would rationalize the various cases. Few courts have conducted any kind of search for a theoretical core of this sort. Among the few that have, several approaches have been proposed to resolve hard cases. The most prevalent of these is one already mentioned, namely that the predicate felony must be based on an ‘independent felonious purpose’ from the killing.\(^{20}\) At first glance, the test may seem promising. Assault merges with the homicide, for example, because the purpose of assault is to harm the victim, and it is this intent that produces the victim’s death. On the other hand, where the defendant’s purpose is armed robbery, the death is entirely beside the point of the defendant’s activity. Arguably, moreover, the test can also capture the distinction between active and passive child abuse. In active child abuse, where the predicate felony normally merges, the defendant’s felonious purpose is to harm the child, and the death is the culmination of that purpose. But where the defendant passively fails to feed the child, or takes insufficient care against environmental or other hazards, the defendant’s purpose is ancillary to the resulting homicide.

\(^{17}\) People v Kelso, 64 Cal. App. 3d 538, 542 (1976).
\(^{18}\) People v Mattison, 4 Cal. 3d 177 (1971).
\(^{19}\) Ireland, 70 Cal. 2d. at 539.
\(^{20}\) People v Burton, 6 Cal. 3d 375 (1971).
The independent felonious purpose test, however, is not as successful as it might seem. First, notice that the distinction between active and passive child abuse does not in fact receive much support from that test. After all, passive child abuse can be entirely purposeful. Moreover, the test even runs into difficulty as restricted to active child abuse. Courts have sometimes denied merger in these cases on the ground that the parent’s purpose was to discipline the child, not to abuse him or her. But presumably that is very often the case in child abuse cases, and it would be exceedingly odd to make it easier to prosecute the same acts of child abuse when the parents have a punitive, rather than a sadistic, purpose. The independent felonious purpose test is not even entirely compelling as applied to assault. A defendant who intends to harm his victim by beating him up very likely does not have the purpose of inflicting sufficient harm on him to kill him. And if this is so, then how can this test maintain that the felonious purpose in this case—which involves wounding—is not independent of the homicide, where the intention normally required for murder is an intent to kill (or knowledge of or extreme indifference to the possibility of killing)? From the defendant’s standpoint, the killing is once again entirely ‘beside the point’, just as the death of the victim is beside the point of armed robbery.

A second test that has appeared in some of the cases is called the ‘same act doctrine’, according to which 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. This is the best of the established tests for merger.

The problem with the same act doctrine, however, is that it is unattended by any accompanying theory of the crucial underlying concept of an ‘act’. The result is that the cases articulating the same act doctrine do not give it a terribly consistent formulation. Thus in Garrett v State,21 the defendant pulled a gun on a clerk in a store in order to scare the latter during an altercation. The gun accidentally discharged, and the clerk was killed. The Texas Court of Criminal Appeals held that the crime of aggravated assault—based on the act of brandishing a weapon—could not supply the predicate felony for felony murder, as the aggravated assault and the act which caused the homicide were one and the same.22 But in Murphy v State,23 the court rejected the same act doctrine, under circumstances one would have thought equally suited to the theory. In that case, the defendant set a dwelling on fire in order to collect on the insurance, with the unintended result that someone inside the house was killed. The defendant argued, under Garrett, that the act—starting a fire—was the ‘exact same act alleged to have been clearly dangerous to human life’, and which caused

22 Id. at 545–6.
the death of the victim. The court, however, said that the act of arson and the resulting homicide were ‘not one and the same’, but it offered no basis for its holding. If *brandishing a gun* is identical to the killing in *Garrett*, then it seems probable that *starting a fire* is identical to the killing in *Murphy*. But until we have a clearer conception of the meaning of ‘act’, and we have a clearer conception of how to distinguish acts from one another, we will not be able to make sense of a test like the same act test.

Consider once again the scenario described in *Garrett*, where the defendant went into a store and held up the clerk, but let us assume this time that the defendant did this in order to demand the money from the cash register, rather than as part of an altercation. On the basis of the act of brandishing a gun, let us imagine the defendant is charged with armed robbery, rather than aggravated assault. If, as before, the gun goes off, will we be prepared to say that the predicate felony of armed robbery merges with the homicide? That would fly in the face of the standard approach to merger, as armed robbery is always the classic example of a crime that does not merge. But here the robbery charge would be based on the same underlying act used to establish aggravated assault in the actual case. And clearly aggravated assault merges with the homicide if anything does. Thus the ‘same act’ test requires an important piece of clarification: is it the underlying act itself that is used to test for merger, or something like a paradigm act normally used as the basis for charging a crime of a certain sort?

A third approach (not quite a ‘test’) is to appeal as much as possible to legislative judgment. There are two forms this approach takes—the first is found in common law jurisdictions, and the second in jurisdictions where felony murder is established by statute. In the former, where the *mens rea* for murder is established by statute and the felony murder provision is common law, the argument would run like this. The legislature has established an intent requirement for various crimes, and these legislative judgments would be obscured if courts failed to apply the merger doctrine in various instances. This is supposed to supply the rationale for treating assault as merging with the felony: since every murder, or nearly every murder, contains an assault within it, the legislature’s specified *mens rea* for murder would be entirely subverted if assault did not merge, and no meaning could be established for that segment of the relevant penal code establishing an intent or knowledge requirement for murder. On

24 *Id*. at 119.
25 *Id*.
26 California provides the best example of such a scheme, where the murder provision requires a *mens rea* of ‘malice aforethought’ and no mention is made of convicting for murder in the absence of *mens rea*, as would be the case in a felony murder prosecution.
this rationale, it is acceptable to treat predicate felonies such as armed robbery or kidnapping as sufficiently separate from the resulting homicide, because there will still be murder cases left to give effect to any intent requirement if homicides resulting from these crimes are prosecuted without intent.27

This worry about legislative deference, however, seems to be selective and unjustified. Notice that if murder requires intent to kill, knowledge of killing, or extreme indifference to the prospect of killing, then any time a murder conviction is won on felony murder grounds the statutory provision for murder will have been obviated. If the legislature did not specifically exempt certain kinds of murder from its mental state requirements, the legislature’s express provisions have been ignored. On the other hand, once one accepts that the legislatively established murder provision can be ignored to the extent of allowing any felony murder prosecution, there is no reason to object to any particular prosecution that ignores the established mens rea for murder. Thus it is hard to see how the worry about legislative deference would allow some felony murder prosecutions and eliminate others.

The second appeal to legislative deference appears in jurisdictions where the felony murder rule is established by statute, rather than common law. Here the argument is to treat the statutory list of predicate felonies as preempting the question of merger, and simply assume that any predicate felony on the list does not merge with the homicide, no matter what the underlying facts. In People v Miller, for example, the New York Court of Appeals took this approach to the predicate felony of burglary.28 The facts were roughly the same as those of the Sears case. The court rejected the California approach, arguing that the fact that the New York Legislature had included burglary on the list of predicate felonies meant that burglary did not merge. This, it said, reflected a legislative judgement that persons within domiciles are in greater peril from those entering the domicile with criminal intent, than persons on the street who are being subjected to the same criminal intent.29 The New York Legislature, however, had not specifically addressed the question of merger, and there is no particular reason to suppose that they had attended to the difference

27 A good example of this type of approach is People v Watters, where the court applied this doctrine to the misdemeanor–manslaughter doctrine, the misdemeanor version of the felony murder rule, 212 Cal. Rpt. 71 (1985). The court held that the Ireland rule simply has no room to operate, id., in the misdemeanor-manslaughter situation, on the grounds that manslaughter itself is killing without malice, and the mental state for that crime is adequately established by whatever mental state is required for the misdemeanor. Thus if recklessness was required to prove child endangerment, that mental state must be adequate to establish the manslaughter charge as well. In other words, there is no worry about obviating a legislative decision to require intent.
29 Id. at 86.
between a defendant who breaks into the victim’s dwelling in order to
attack him and a defendant who attacks his victim on the latter’s front
steps.

Now the Miller court may have been right to think that attacks in
dwellings pose a special danger that out-of-doors attacks do not. But pre-
sumably there would have been a more straightforward way for the legis-
lature to increase the deterrent pressure on such defendants, which is to
augment the penalties for indoor homicides over and above those for other
kinds of homicides. And meanwhile, it would have made more sense for the
court to read the New York statute as including burglary among the pre-
dicate felonies except in those instances in which the burglary merges with
the resulting homicide, and then search for a test that will tell us when this
is so. In other words, whether a predicate felony merges with the homicide
should depend on the act in virtue of which the defendant satisfies the
predicate offense definition. The better test is act-by-act rather than felony-
by-felony. For this reason, statutory jurisdictions should not be in a sub-
stantially different position from common law jurisdictions where the
question of merger is concerned.

Finally, in view of the difficulties with the various approaches to the
merger doctrine, several jurisdictions have decided to proceed without
any merger doctrine whatsoever. One problem with such jurisdiction
however, is that any unintentional killing can be prosecuted as felony
murder if the killing occurred in the course of a purposeful assault.30
Moreover, what would be the result if the defendant has a valid provoca-
tion defense that would reduce his conviction from murder to man-
slaughter? Since prosecutors can take any intentional killing and prosecute
it on the basis of felony murder instead of purpose or knowledge, they
could eliminate any opportunity for defendants to claim provocation.
Moreover, the absence of merger would affect even the ordinary kind
of manslaughter case, the kind predicated on a mens rea of recklessness.
A large number of these cases would get bumped up to murder, as long as
these reckless killings involved brandishing a weapon or other form of
assault.

Thus none of the prevailing approaches to merger appears to provide a
principled basis for the doctrine, and eliminating the doctrine altogether
does not appear to constitute an improvement. Let us therefore wipe the
slate clean and see whether we can provide an alternative account of the
logic behind the doctrine of merger.

30 But arguably this would not lead to objectionable results across the board, since it would
merely result in homicide convictions for defendants who intend to inflict grievous bodily
injury, with the result that the victim dies. In the wake of the 1957 Homicide Act in Britain, this
became the established rule. And thus the absence of merger would arguably introduce into
American jurisdictions the British interpretation of malice aforethought.
3. The Redescriptive Test

Before considering what role the merger rule ought to play, let us re-examine the purpose of the doctrine itself. One of the most common rationales offered for felony murder is the advantage it affords the state in meeting its deterrence goals. The deterrence argument has been widely criticized, on the ground that the homicide in felony murder prosecutions is unintentional, and that it is not possible to deter unintentional acts.\(^{31}\) This criticism, however, misses its mark. The deterrence argument in favor of the felony murder rule is quite legitimate: One way to further deter burglary, robbery, rape, etc., is to add punishment for the unintended homicides that result from these acts to the punishment for the acts themselves. The problem is not so much that there are no deterrence benefits to punishing felony murder, but that achieving these benefits in this way is arbitrary. For if the legislature wanted to increase penalties for the underlying predicate felony, it could always do so directly, and with greater precision, by simply increasing the penalties for those felonies. A better deterrence argument sometimes offered is that the felony murder rule encourages those committing property and other non-violent offenses to commit their crimes carefully, in order to maximize the chances that no lives are accidentally lost. But this rationale suffers from the same defect as the previous one, just in more sophisticated guise. For if we wish to increase penalties for non-violent felonies that are not committed carefully, it would be better to do so directly, rather than focusing exclusively on the subset of sloppily committed felonies that actually result in death. Thus although the felony murder rule does indeed enhance deterrence, it does so in a highly ad hoc fashion, one that a rational legislature would presumably want to eschew.

A better explanation for the felony murder rule looks to the moral foundations of the doctrine. As Jim Gordley has so eloquently documented in exploring the history of transferred intent doctrines, canon law had traditionally regarded a person as responsible for all the bad effects of his intentional wrongdoing.\(^{32}\) The philosopher Elizabeth Anscombe explains this doctrine as the rule that ‘a man is responsible for the bad consequences of his bad actions, but gets no credit for the good ones; and contrariwise is not responsible for the bad consequences of good actions’.\(^{33}\) Any other view, she thinks, is not compatible with the Christian (and anti-consequentialist)

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\(^{31}\) See Roth and Sundby, above n. 4.


teaching that some actions are, in their nature, wrong, and may not be performed for any reason having to do with the balance of consequences. She points out that if a person were to receive ‘credit’ for the good consequences of his bad actions, a bad act could be rendered permissible by assessing the balance of its consequences. And this is what she takes a non-consequentialist Christian ethics to be denying. On the other hand, a person who performs a bad action has nothing to shield him from the bad consequences he brings about. Unlike the person whose act is good, he can offer no justification for his behavior, and thus he is responsible for whatever occurs as a result of what he does.

The doctrine of felony murder is a descendant of this Catholic doctrine, albeit one that presents a sharply limited version of the rule. It does not hold a defendant who commits an illegal act responsible for any inadvertent harm that occurs as a result of his wrongdoing, but instead restricts the reach of the doctrine to cases where the bad consequence is someone’s death. It also limits the reach of the doctrine by restricting the relevant acts to illegal acts that are felonies (and in some jurisdictions to those that are inherently dangerous). Despite these alterations of the original deontological doctrine, the felony murder rule is of a piece with this non-consequentialist teaching, and cannot be explained in functionalist terms.

Let us now turn to the topic of merger. At base, the felony murder doctrine says that when the defendant does one forbidden thing (meeting certain specifications), and in the course of so doing he does another forbidden thing (meeting certain other specifications) it is not necessary for him to have had any awareness of the latter for him to be guilty of a crime for having done it. That is, the second activity need not have involved a second intentional wrong for the defendant to be responsible for it as a separate offense. At a minimum, this suggests something rather fundamental about the structure of felony murder: there must have been two separate things the defendant did. The further specifications, of course, are that the first thing must be a felony (and the right kind of felony, whatever we require) and the second thing must be a killing. From the above formulation, we can infer the central idea behind the doctrine of merger: a potential predicate felony merges with the homicide when the defendant’s performing that activity just is his killing of the victim. In other words, it is an analytically necessary part of felony murder that there be, at a minimum, two separate things the defendant is doing: one that counts as a felony that is not a killing, and another that is a killing. Merger takes place when instead of two activities, we have only one.

Now it might be tempting to think that any time there is a predicate felony like ‘armed robbery’, ‘burglary’, or ‘child abuse’, there must be a second act or activity which is separate from the act which is the killing. For on the face of it, the acts required to commit a burglary are different from the acts involved in killing. But the problem is that it is often possible that the same
act or course of conduct gives rise to more than one criminal charge. And it would seem to follow that where we have two separate chargeable crimes—such as burglary and murder—we still know nothing about whether the defendant was in fact engaged in more than one activity. For if the offense definition for burglary requires that the defendant ‘enter a building’, it is possible that the defendant actually killed by, or in, performing that very act. Alternatively, the defendant might have satisfied the actus reus called for in the offense definition for burglary first, and then performed some second act that produced the victim’s death. We thus require a test that will look past the charges to the underlying behavior of the defendant, and figure out whether, in committing several crimes, the defendant in fact was doing only one thing or was doing more than one thing.

Let us begin by interpreting the merger doctrine as requiring that the defendant perform two separate acts. We will then need to know what precisely is meant by the notion of an act. The standard philosophical account of this question says that if Harold fires a gun, for example, then firing the gun is an act just in case there is some description of it under which Harold did it intentionally. And Harold can be said to have done something intentionally just in case there was something he wanted in doing it and he believed that doing that thing would conduce to give him what he wanted. Since Harold fired the gun in order to warn Frank that he meant business, there was something he wanted in firing the gun and he believed that firing it would help him secure it. The event of Harold’s firing the gun is thus intentional under a description like ‘Harold’s issuing a warning’, and the event which is Harold’s firing the gun is an act in its own right.

Suppose, then, we understand the requirement that there be a predicate felony and a killing as meaning that there must have been a separate act, in the above sense, for each. The question in each case of merger would be whether the killing was attributable to a person as a separate act, or whether it was simply another way of talking about an act he had already performed. The answer to this question is discovered by applying what I shall call the ‘redescriptive’ test: if the act in virtue of which the defendant satisfies the offense definition for the predicate felony can itself be redescribed in terms of the resulting death, we have only one act under two different descriptions. If, on the other hand, the act cannot be redescribed in terms of the victim’s death, but the defendant did in fact cause the victim’s death by performing some act, then the act whereby the defendant satisfies the predicate felony and the act whereby he caused the victim’s death are separate. In the first case, the predicate felony should merge with the homicide, and felony murder would be unavailable. In the second case, as long as the second act causing death was performed in the same course of conduct or criminal transaction as the non-homicidal felony, the two acts do not merge and the first can supply the predicate for the second, homicidal act.
Merger and Felony Murder

This test would produce fairly intuitive results for a range of cases. In general, burglary would tend to provide a basis for a felony murder charge, since most killings do not take place merely by the defendant entering or remaining in a building. But assault, in general, would not, as a killing that takes place in the course of an assault is usually straightforwardly caused by that assault, and thus the assault and the killing are one and the same act under different descriptions. Similarly, armed robbery would tend not to merge, whereas felony child abuse (as it is assaultive in nature) usually will. Other crimes, such as arson, can presumably go either way, but if the killing takes place as a direct result of the setting of the fire, in all likelihood the arson and the homicide will merge, and felony murder should not be available.

There is, however, a problem with the reductive test we must now address, namely that the test appears to be over-inclusive. For according to the standard action theoretic account, an action can always be redescribed in terms of its consequences. If Harry moves his finger, with the consequence that the trigger of the gun he is holding moves, we can redescribe Harry’s act of moving his finger as ‘pulling the trigger’. And if a further consequence of his action (of moving his finger) is that the gun he is holding fires, we can once again redescribe his action (of moving his finger) as ‘firing a gun’. The standard account (as most clearly articulated by the philosopher Donald Davidson) says that the same is true for all the consequences of a person’s action. If one of the consequences of Harry’s moving his finger is that Frank dies, we can redescribe Harry’s action as killing Frank. The redescription holds whether or not he intended to kill Frank or even knew that by moving his finger, he would cause Frank’s death. Since something is an action just in case there is some description under which it was someone’s doing something intentionally, then as long as Harry moved his finger intentionally, and as long as his so moving caused Frank’s death, killing Frank is an action Harry performed, under one of its many descriptions.

The problem, then, is that it looks as though by this test, every predicate felony will merge with its resulting homicide, since the defendant must have caused the victim’s death, and so will have produced the death as a consequence, if felony murder is even a possibility. Felony murder, therefore, will never be available, and it looks as though the reductive test will have eliminated the felony murder doctrine altogether. Consider, for example, the reductive test as applied to the predicate felony of robbery. In the Model Penal Code, robbery is defined, among other things, as ‘threaten[ing] another with . . . serious bodily injury’ in the course of committing a theft.

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34 Donald Davidson, Essays on Actions and Events (Oxford: Oxford University Press, 1980).
35 As long, that is, as there is some description under which the defendant’s action was intentional. This will hold whenever we have conduct we would ordinarily call voluntary, meaning that the defendant is not having an epileptic seizure or experiencing some other condition that produces the movement uncontrollably.
36 MPC § 222.1(1)(b).
Suppose I hold up a liquor store. I point a gun at a cashier, and demand she hand over all the money in the cash register, threatening to shoot her if she does not comply. Just at that moment my gun accidentally discharges, and the cashier is killed. It would appear that my act of threatening the clerk had as one of its consequences that the gun discharged and the clerk was killed. Thus threatening the clerk with a gun can be redescribed as ‘killing’ and the predicate felony would merge with the homicide. As long as there is causation between the defendant’s felonious act and the homicide, the redescription should hold and it looks as though under this test the offense would merge. But a killing during an armed robbery is the classic case of felony murder.

The over-expansive result of the descriptive test lies not with the formal structure of the test itself, but with the standard action-theoretic approach to redescription. In particular, orthodox action theory maintains that an act can be redescribed in terms of all of its consequences. But there seems reason to suspect that sometimes an act cannot be described in terms of its consequences. Consider the following case. A stabs B, with the result that B is seriously wounded and must be rushed to the hospital. While in the hospital, C, a malicious interloper, disguises himself as a surgeon and intentionally operates badly on B, with the result that B dies. B’s dying is among the consequences of A’s stabbing B. But did A kill B? I do not think he did. That is, in this case it does not seem right to redescribe A’s act of stabbing as killing, in the same way that we might describe that action as ‘wounding’, ‘causing pain’, etc. Why does the redescription from consequence to act in this case not carry over? One response is suggested by the criminal lawyer’s standard approach to such cases, which is to say that C’s act ‘breaks the chain of causation’ between A’s act and B’s death. In general, lawyers say, the free, voluntary acts of another human being break the chain of causation. A is responsible for his own acts alone. He is not responsible for the voluntary acts of other people.

It is true that if A did not cause B’s death, A could not have killed B, so that we could readily explain this case if the lawyers are right that intervening voluntary acts break the chain of causation. But I do not think the lawyers are right. For surely B’s death is among the consequences of A’s act. And what is a consequence of an act but an event or state that is caused by it? Indeed, to see that there is causation here, one has only to note that A’s act was a necessary (but not sufficient) condition of B’s death. And necessary conditions are always causes in some sense, even though there are cases in which it appears that something can be a cause of something else without its

37 Of course, whether this is so might depend on exactly why the gun discharged. If it discharged because of some intentional movement of mine, however unintentional the gun’s firing, then it is easy to see that the threatening of the clerk caused the gun to discharge which in turn caused the death of the clerk. If, on the other hand, the gun discharged as the result of a twitch or epileptic seizure on my part, then arguably it was not my commission of the felony that caused the victim’s death, as the twitch functions as an intervening cause.
being a necessary condition for it (as in cases of overdetermination). So I doubt we should abandon the idea that A’s stabbing is a cause of B’s death, even though there is an intervening voluntary act that separates A’s act from B’s death. The lawyers are right that something is going on in this case that vitiates the connection between redescription and consequence. But we must perhaps restrict ourselves to saying that in some cases, a person’s causal connection to an event does not suffice to establish a relation of agency between him and it. That is, there are cases in which A stabbed B, causing his death, but in which A did not kill B, since A’s act cannot be redescribed in terms of B’s death.

Philosophers might at this point attempt to elucidate the situation by drawing a distinction between A’s being a cause of B’s death and A’s being the cause of B’s death. In the former case, A is only one among many causal factors that leads to B’s death, whereas in the latter case, A’s participation is singled out as having a more significant role than most other factors that contributed to the result. But the distinction between a cause and the cause is not any more fundamental than the distinction between ‘causing a death’ and ‘killing’. Indeed, the latter is more comprehensive and hence arguably more salient, given that something’s being a cause, rather than the cause, is only one of the ways that ‘causing’ a death might fail to be a killing. So we are still left with the observation that not every causing of death counts as a killing, most notably in those cases where there is an intervening voluntary act of another human being.

It is important to see that not every intervening voluntary act ‘breaks the redcriptive chain’. For suppose now that A stabs B, once again with the result that B is rushed to the hospital. This time, however, C performs a perfectly reasonable operation on B, which unfortunately causes (or is a cause of) B’s death. (B has a complication due to the surgery which is not in any way C’s fault.) In this case, it seems sensible to say that the redescription goes through: A’s act of stabbing B is killing B, in view of the fact that someone’s performing a high risk operation on B was a consequence of A’s stabbing B that could reasonably have been expected. Thus stabbing B can be killing B, despite the fact that the stabbing was not sufficient, taken by itself, to cause B’s death. There are, of course, grey area cases in between the two stabbing cases we considered. What if C’s intervention is negligent, rather than either intentional or wholly accidental? Is A’s act sufficiently implicated in B’s death to say that A killed B in this case? Criminal lawyers are divided. Without resolving these in-between cases, however, the point remains that in some instances the intervening cause seems too insignificant for the redescription to succeed. In such a case, it would appear that the fact that A caused B’s death is not a sufficient basis for thinking that A killed B.

Are there other cases where causing death is not a killing, other than those involving intervening voluntary acts of other agents? Another example would be a standard case of wayward causation: A shoots at B and misses,
but the bullet takes an unlikely trajectory into a herd of wild boar, who in turn stampede B and kill him. Did A kill B? Possibly, although arguably not, despite the fact that A’s act was a necessary condition for B’s death. Once again, we might say that although A caused B’s death, we cannot redescribe A’s contribution to the situation as killing B, given the unlikely and unanticipated way in which this result came about. Further, there are cases of attenuated causation. Thus, for example, conceiving a child will eventually result in the child’s death (hopefully when the child is a very old adult), but it surely is not killing him or her. Similarly, firing an employee may cause his children to starve. But it is not itself starving the children. Finally, although more controversially, there are cases of overdetermination, such as the three defendants and the classic hiker in the desert example. The first defendant poisons the water in the hiker’s canteen; the second replaces the (poisoned) water with sand; the third puts a hole in the bottom of the canteen so that the contents drain out. It seems fair to say that each defendant ‘caused’ the hiker’s death, namely that although each defendant ‘killed’ the hiker, none can be treated as having caused his death. 38

Is there anything general we can say about when a person’s act can be redescribed in terms of one of its consequences and when it cannot? This is not an easy task, and it is unlikely to be a matter that can be settled on the present occasion. There is, however, a common characteristic with the cases where redescription fails: these all appear to be cases involving some unusual intervention occurred, namely some occurrence that does not seem to come along in the ordinary course of events. 39 The intentional wrongful conduct of an interloper belongs in this category (even if it is wrongdoing that is to be expected), for A is surely absolved of responsibility for killing B in the case in which C maliciously performs a wrongful operation, even if A thought such officious intermeddling likely. The intentional, wrongful acts of another are like a freak occurrence, in that the original defendant is entitled to assume they will not occur. The same can be said for the herd of wild boar and cases of attenuated causation: there is no reason to suppose that shooting in the direction of a potential victim will result in stampede that will kill someone, or that firing an employee will result in his children starving. And, holding the specific causal chain fixed by which death occurred, there is no reason to suppose that putting a hole in someone’s canteen will result in his dying at the hands of a person who poisons the water or replaces it with sand, and the same can be said from the standpoint of each defendant. So we might say that the unexpected or normatively

38 This is perhaps controversial. I can imagine someone arguing just the opposite, namely that although each hiker contributed causally to the result, none can be treated as the killer in this case.

39 The proposal is not perfect, since the couple that conceives a child should surely not be thought to have killed the child in doing so. But arguably the act of conceiving a child could not be killing that child, since surely it is not possible to kill someone who does not yet exist. So this is perhaps a special case.
deviant nature of the relation between act and consequence in these cases is what ultimately breaks the redemptive chain.\footnote{40}

Once we allow for the possibility that some causal consequences fail to generate redescriptions, the redemptive test for merger fares better. Where I assault someone by punching him in the nose, my act of punching can be redescribed as ‘killing’, and merger will apply. But arguably, where I threaten the clerk with death if she does not hand over the money, it is only in an attenuated sense that my threat causes the death of the clerk. It is true that but for the threat, the clerk would not have died. But death results from my threatening the clerk via a fairly circuitous trajectory, similar to the shooting that causes the herd of wild boar to stampede. If this is correct, then the act of threatening cannot be redescribed in terms of the death and it can therefore serve as the predicate felony for the homicide. Let us consider how the revised test handles several other difficult cases.

Suppose a defendant kidnap a child from her backyard, and, after some elapse of time, he has a car accident with the child in the car and she dies. Does the kidnapping provide the predicate felony for the homicide? Or should the kidnapping and the homicide be thought to merge? Unlawfully removing a person from her home does not carry death with it as among the ordinary consequences of the act. Indeed, being killed in a car accident is still, fortunately, a relatively rare event. Once again, the relation between the defendant’s act of driving the victim away from her home and the defendant’s killing of the victim is attenuated—at least as attenuated as the relationship between threatening the clerk and the clerk’s death. Thus there is a basis for thinking that the kidnapping does not merge and felony murder should be available.

Moreover, in the kidnapping case there is a further point to notice. The removal of the victim from her home has already occurred once the defendant kills the victim. There is thus an independent reason to think that the act whereby the defendant commits the predicate felony of kidnapping is not the same act whereby he kills the victim, since those two acts are significantly separated in time and place. The ‘redemptive break’ in this case is created by the defendant’s own later voluntary act; his later self is like the officious intermeddler in the hospital who performs the wrongful operation relative to his earlier self! Notice that the causation requirement for felony murder is satisfied in such a case, even though the act whereby the defendant commits the predicate felony is not itself the cause of the victim’s death. While the defendant cannot be prosecuted for felony murder if he

\footnote{40}{The above account squares with the treatment offered by Hart and Honoré in their \textit{Causation in the Law} for when an intervening cause breaks the chain of causation. Hart and Honoré suggest that the causal chain is broken when the intervening act is either the wrongful act of another competent agent or the intervening factor is an abnormal event or ‘coincidence’; \textit{Causation in the Law} (2nd ed., Oxford: Oxford University Press, 1989), 68 ff. For the reasons I have offered above, however, it seems to me more helpful to speak of redescription than of causation.}
did not cause the victim’s death, he need not have caused it by committing the felonious act itself. Indeed, notice that the defendant would be liable for the victim’s death if the car accident occurred while he was trying to return the victim to her home, having had a change of heart. It is thus sufficient for liability that the act that caused the victim’s death occurred in the course of the commission of the predicate felony. It need not be the case that the act that is the basis for finding the defendant guilty of the predicate felony is itself the cause of the death.

What about the more difficult, in-between cases with which we began? Consider the felony child abuse cases. If an adult uses extreme physical force against a child, with the result that the child dies, there is every reason to think that the re-descriptive test succeeds: The act of violence whereby the adult harms the child is also an act of killing. The predicate felony of abuse thus merges with the homicide. Notice that it should make no difference on this account what the adult’s purpose was in attacking the child. If the adult engages in a physical assault of a child for the purpose of disciplining a child, the act is causally no different from an assault undertaken for a different purpose. Since re-description travels along causal lines, the defendant’s purposes are not relevant to settling the question of merger. Moreover, the exceptions to re-description based on causation, namely unusual events, coincidences, and voluntary intervening acts, do not themselves vary depending on the defendant’s purposes. So it makes sense to reject the ‘purpose test’ we considered above. Furthermore, the same must be said of the child abuse cases where the parent allows the child to starve or freeze to death: in such cases, the failure to feed a child produces the consequence that the child dies. And since it is a natural consequence of failing to feed a child (however unintentional) that the child will die, the re-description from ‘failing to feed’ to ‘killing’ cannot be blocked by unusual or coincidental circumstances and the child abuse will merge with the homicide.

Another close case was that in which the defendant breaks into a dwelling with the purpose of assaulting someone inside. Should the burglary be thought to supply the predicate felony for the homicide? The question is whether the relevant act identified in that prohibition—‘entering a dwelling with intent to commit a crime therein’—can be reasonably re-described as killing. While courts have been murky on this point and the matter has remained subject to much doubt, the re-descriptive test would appear to be unambiguous: entering a dwelling, even when the purpose is to bring about a later killing, cannot itself be re-described as killing. Why not? Once again, the defendant’s own later voluntary act (of attacking, assaulting, or killing) breaks the re-descriptive chain from entering a dwelling to the victim’s death. The defendant did not cause himself to kill the victim by entering the dwelling. It would follow that the burglary in this case can supply the
predicate felony for the homicide and felony murder applies. Notice once again that the defendant’s purpose in entering the dwelling is irrelevant. And this has the benefit of rationalizing the cases that deal with this type of fact pattern, since it seemed arbitrary to distinguish the defendant who breaks into a house in order to assault someone from the defendant who breaks into the house to steal some jewelry and ends up killing someone in the process.\footnote{The exception to this might be a case in which the very opening of the window engaged in as the first step of entering the victim’s dwelling somehow triggers the victim’s death, because, say, it trips a spring gun which malfunctions and kills the victim. But if the tripping of the spring gun was a highly unusual event that intervened between the defendant’s act and the victim’s death, the redescriptive chain is once again broken and the predicate felony would not merge.}

Notice, further, that once we have the redescriptive test in place, we can entirely dispense with the inherently dangerous requirement, as well as with a series of rather byzantine requirements that courts also sometimes impose for making sure there is an adequate causal connection between the predicate felony and the killing. There should be no objection to allowing lesser felonies to serve as the predicate if those felonies satisfy the other requirements for felony murder prosecutions. The felonies we should exclude from the class of predicate felonies are those where the predicate felony is so closely linked to the victim’s death that we cannot identify the defendant as engaging in two separate wrongful acts. This has nothing to do with the dangerousness of the predicate felony. Indeed, if anything, the dangerous felonies will be the ones that more directly give rise to the victim’s death, and so more easily support merger. Thus the imposition of an inherently dangerous requirement tends to get matters backwards. Moreover, it need not be the case that the predicate felony is the cause of the killing—even in the loose sense of cause that lawyers employ when they articulate the notion of ‘proximate cause’. For it should be sufficient if the killing takes places roughly ‘in the course’ of the commission of the predicate felony, given that a defendant’s own later act breaks the chain of causation in any event.

Before closing this section, we must address two features of the proposed redescriptive test that will undoubtedly strike some as peculiar. First, a certain paradigmatic case for felony murder will now be a case in which the felony merges with the homicide. For example, suppose the defendant engages in a crime like arson with the result that he causes the death of an occupant of the structure he burns. In many jurisdictions, both common law and statutory, the arson would supply the predicate felony for the homicide and the offense would not merge. This would be the result, for example, under the purpose-based test, assuming that the defendant’s purpose is the destruction of property and not the loss of human life. Thus in the Murphy
case we considered earlier, there would be reason to think that the court was wrong to reject the argument for merger taken from Garrett. Under a newly clarified ‘same act’ test, the arson in this case would merge with the homicide and could not serve as the predicate felony for a felony murder prosecution.

Or consider a California case, People v Billa,42 where the defendant participated in a scheme with two co-conspirators to defraud an insurance company by burning a truck. In the course of setting the fire, one of the co-conspirators was fatally burned. The court rejected the defendant’s argument that the arson should merge with the homicide, citing Burton and the independent felonious purpose test: ‘the merger rule is limited in application to situations in which the purpose of inflicting violent injury is the single purpose or single course of conduct in which the perpetrator engages’.43 Under the redescriptive analysis, however, the defendant’s argument in Billa would have been correct: the act of setting the truck on fire is easily describable as killing under these circumstances, given that there was nothing freakish about the causal route from setting the fire to the burning and subsequent death of the victim. The redescriptive test will thus usually produce the result that arson merges with the homicide, even though arson is not an ‘assaultive’ offense.

This may seem a counterintuitive result, particularly in cases like Murphy and Billa where the motive for the offense is economic. But setting a building or a truck on fire is a highly dangerous activity, one that may very well lead to a loss of human life in the ordinary course of events. And this is so regardless of the defendant’s specific purpose in setting the fire. Thus it seems reasonable to think that in most cases arson will be analyzable in the same way that assault is, and that the predicate felony will merge with the homicide. And once again this shows the tension between the usual inherently dangerous requirement for predicate felonies and the merger rule: since the felonies most likely to merge are felonies involving dangerous activities (such as assault and arson), we will end up eliminating felony murder altogether if we maintain both requirements at once. As we have found a basis for making sense of the merger doctrine, and the inherently dangerous rule continues to seem ad hoc, we should eliminate the inherently dangerous rule in favor of the revised merger rule I have presented.

A second counterintuitive feature of the re-descriptive test is also worth emphasizing. Unlike the approach of most courts to merger, the re-descriptive test will produce different results for a given predicate felony depending on the act in virtue of which the defendant satisfies the offense definition. In

43 Id. at 834.
nearly all cases of assault, the predicate felony will merge, because the assaul
tive act in virtue of which the defendant satisfies the offense definition is 
the same act that quite naturally gives rise to the victim’s death. But crimes 
like arson, burglary, poisoning, kidnapping, and child abuse may vary, 
depending on the underlying facts. Thus a defendant who is found to commit 
burglary because he remains in a building for the purpose of committing an 
assault, where the assault results in the victim’s death, will probably not be 
chargeable with felony murder, since the act in virtue of which he commits 
burglary is the same as the act in virtue of which he causes the death of the 
victim. But a person who actually hoists a window open and enters from the 
street for the purpose of committing an assault will probably be chargeable 
with felony murder, since his act—entering a building with intent to commit a 
crime—is itself separate from the later act in virtue of which the defendant 
causes the death of the victim. The difference may seem a fine one, but it is not 
arbitrary: the defendant in the first case satisfies the offense definition for 
burglary by killing the victim, whereas the defendant in the second case must 
do something else in order to be guilty of the burglary, other than kill the 
victim.

Finally, there is an important objection to this account we should consider, which we might call the ‘double assault’ case. Suppose the defendant 
punches the victim in the nose, and after a brief interval, he does so again. The victim unexpectedly dies from the second blow. Could we 
say that the first assault is the predicate felony for the killing, and thus 
bootstrap the assault into murder without having to prove that the defendant 
intended to kill the victim? All the requirements seem to be present: there 
are two separate acts, and the defendant’s later voluntary act breaks 
the redressive chain. However, if this is so, will it not be the case that nearly 
all assault cases resulting in homicide can be treated as cases of felony-
murder? How often, after all, does the defendant actually kill the victim 
with a single act?

Dealing with the double assault case will force us to accept a slight 
modification of the redressive test, for it does not seem acceptable to say 
that a first assault out of two can serve as the predicate felony for a homi-
cide. Where there are two acts of the defendant’s of the same type, followed 
in quick succession by one another, we should regard the defendant as 
engaged in a single activity and treat the merger requirement for felony 
murder as not met. That is, in the double assault case, if the blows are in 
sufficiently quick succession, it makes sense to think of the defendant as 
engaged in one activity (viz., attacking the victim), and to treat these as one 
act for purposes of the redressive test. Then we can say that it was the 
defendant’s attack that killed the victim, that the attack can be redescribed 
as killing, and the test for merger is met.
4. Other Applications of the Redescriptive Test

The problem of merger may seem an obscure one in the jurisprudence of criminal law. But once the problem is understood as a question about whether the defendant has performed one act or two, it can be easily shown to belong to a family of problems that turn on this same question. And just as the action-theoretic foundation of the doctrine of merger has been obscured by judicial decisions on the topic of felony murder, so the action theoretic foundations of these corresponding problems in the criminal law have also been missed.

In the area of double jeopardy doctrine, for example, courts have repeatedly focused on the criminal charges to which defendants are subject in deciding whether the defendant is subject to multiple prosecutions for the ‘same offense’. And the prevailing test, as established in Blockburger, is whether each of two offenses with which the defendant has been charged contains an element that the other offense does not contain. If so, the offenses are thought to pass double jeopardy scrutiny and otherwise not. But this conception of double jeopardy law has led to an odd result, namely that what is supposed to be a constitutional protection against state infringement on personal liberty is in fact itself subject to, and determined by, the very state law it is supposed to protect individuals against. For whether a person can be punished twice for the same conduct depends after Blockburger entirely on the definition the state chooses to use in criminalizing the conduct. A state is thus free to prosecute a defendant multiple times for the same conduct, as long as it invents crimes with non-overlapping elements to define the relevant offenses. As I have argued elsewhere, whether a prosecution violates the double jeopardy provision should depend instead on whether the defendant is being prosecuted twice for the same underlying act or set of acts.\(^\text{44}\) The redescriptive test will tell us when two acts are the same and when they are different in this context as well.

Indeed, consider the relation between our problem of merger and a typical problem of double jeopardy that arises in the felony murder context. Courts have long been uncertain whether a defendant may be punished both for the predicate felony and for the murder in a case in which a defendant is convicted of felony murder. May a defendant, for example, be punished separately for armed robbery and for murder if the defendant kills in the course of committing a robbery? The more common answer is that this would violate the Double Jeopardy Clause, on the ground that the elements of the predicate felony are contained within the crime of felony murder, and that the Blockburger requirement that each offense contain an element the other does not contain is not satisfied. But courts

have not been consistent about this approach. Some, for example, say that the predicate felony can be punished separately if it appears that the legislature intended that result. They thus allow successive punishment for robbery and felony murder based on robbery. Insofar as the question of merger in felony murder and the question of double jeopardy should both turn on an analysis of the underlying acts the defendant committed, however, these problems will admit of a common solution: any case where the predicate felony is distinct from the act that caused the victim’s death is both a case in which felony murder can be prosecuted and a case in which punishment for both the predicate felony and the murder would not be duplicative. For the question in the double jeopardy area should be whether the defendant is being punished more than once for the same set of criminally prohibited acts, not whether the legislature has happened to slice up the definition of the offenses for those acts in a sufficiently fine-grained way that the same acts make the defendant guilty of different offenses.

The reductive test should also help solve a family of problems that have arisen under the common law doctrine of what is also called ‘merger’. May a defendant be tried and punished both for a conspiracy to commit a crime and for the crime itself? For an attempt to commit a crime and the crime itself? For soliciting an offense and for the offense itself? For attempting an offense and for soliciting or conspiring to commit it? That there should be a common law doctrine of merger makes perfect sense if our analysis is act rather than offense-based. A defendant should not be punished for two offenses if the defendant’s commission of those offenses depends entirely upon the defendant’s performance of the same act or set of acts. The results of the reductive test would be consistent with our intuitions. Conspiracy usually requires the defendant to have done something over and above the thing he must have done in order to be guilty of the substantive offense itself, so a prosecution for conspiracy can coexist with a prosecution for the substantive offense. But this is not so where attempt is concerned, and usually not where solicitation is concerned either. On an act-based analysis, however, double jeopardy and merger should produce the same results.

A more far-flung application of the reductive test is found in relation to the thorny problem of whether contrived involuntariness should count for purposes of establishing the involuntary act defense. The question is whether a person who arranges, for example, that he kill his wife under hypnotic suggestion can be thought of as having killed her at all, given that he does so in a state that would normally be exonerating as involuntary. As I have argued elsewhere, the problem requires us to decide whether the

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act of going to the hypnotist can itself be redescribed as *killing*, since a man cannot be prosecuted for a death if he did not himself perform the killing (or arrange for the killing to be performed by another voluntary agent). If the hypnotic state is a sufficiently unusual intervening event, the redescription will not go through and the man does not kill his wife when he goes to a hypnotist. But if the intervening event is sufficiently ordinary, the redescription will work and the man kills his wife in going to the hypnotist.\(^{47}\)

It is difficult to know in these obscure cases how precisely the redescriptive test is to be applied. Is the person, like *Decina*, who drives knowing he is subject to epileptic seizures guilty of manslaughter, when he has an epileptic seizure behind the wheel and kills several children?\(^{48}\) That would depend on whether his driving, knowing he is subject to epileptic seizures, is itself redescribable as ‘killing the children’. And that will depend on whether the intervening event of his seizure is sufficiently unusual that it breaks the ‘redescriptive chain’ from driving to killing. Does sleepwalking Mrs. Cogdon kill her daughter ‘voluntarily’ when she brings an axe down on her head in the middle of the night?\(^{49}\) That depends on whether the act of going to sleep, knowing she is subject to sleepwalking, can itself be redescribed as killing her daughter. The redescriptive test at least provides a clear framework for answering the foregoing questions. Unlike in the cases we have been considering in connection with merger and felony murder, however, it is particularly difficult to determine whether the redescription holds where voluntariness is concerned. In this regard, however, the difficulty applying the redescriptive test matches the underlying difficulty of the legal question, and so the lack of clear results is not surprising. What is needed in all of these doctrines is a clearer understanding of the notion of an act and the role that acts play in judgments of criminal responsibility. While the analysis I have provided here will not solve all of the problems associated with the various doctrines related to the notion of an act, it should at least go some distance towards improving our understanding of how an act-based analysis can function in the criminal law.

\(^{47}\) It may seem curious to suggest that a man can kill his wife at time \(t_1\), when at \(t_1\) the wife is still alive. Do we not have to wait until the time at which the wife is really dead to say that her husband *killed* her? And does it not follow from that that the man in question cannot have killed his wife at \(t_1\)? The answer is that it does not follow—from the fact that we may not know at \(t_1\) that a man has killed his wife, it does not follow that he has not killed her at that time, despite the fact that she is still alive. At some later time, \(t_2\), we can look back at \(t_1\) and say, ‘that is the moment at which he killed her’, despite the fact that we did not know at that time that that is what he had done. For a more thorough discussion of the difficulties here, see Judith Thomson, ‘The Time of a Killing’ (1971) 68 Journal of Philosophy 115.

\(^{48}\) See *People v Decina*, 138 N.E. 2d 798 (1956).

\(^{49}\) See Finkelstein, above n. 46, at 143.