In 1980, the Michigan Supreme Court abolished a confused and tangled crime known as “felony murder.” At its most expansive, felony murder meant that if a death occurred while somebody was committing a felony, the felon was guilty of murder, regardless of his motive or role in causing the death. Scholars dispute the origins of the felony murder doctrine, and each state had its own version of the crime. By the end of the twentieth century, many jurists regarded it as a harsh, unfair, out-of-date vestige of the common law, which many states reformed or abolished.

Ironically, felony murder arose as part of the effort to liberalize criminal law in the United States. Old English law punished all felonies with death. The American colonies and states tried to mitigate this system. Pennsylvania’s 1776 constitution, the most liberal and democratic of the new fundamental laws, stated, “The penal laws as heretofore used shall be reformed by the Legislature of this state, as soon as may be, and punishments made in some cases less sanguinary, and in general more proportionate to the crimes.”

The Pennsylvania legislature adopted a statute in the 1790s to define degrees of murder, and the Michigan legislature copied this statute verbatim in 1837. It read, “All murder which shall be perpetrated by means of poison, or lying in wait, or other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery, or burglary, shall be murder of the first degree.” Michigan having abolished capital punishment (except for treason), the statute imposed life imprisonment for first-degree murders. The legislature later added larceny, extortion, and kidnapping to the list of “enumerated” felonies. The statute defined all other murders as second-degree, and empowered judges to sentence the murderer to any term of years in prison.

However, the legislature never defined “murder.” The term evolved over centuries in the common law of England and the American states. The most serious crime in American law, murder exceeded mere killing. Indeed, the biblical commandment often translated as “thou shalt not kill” should really read “thou shalt not murder.” Murder involved more than the mere killing of a human being, or “homicide,” for some homicide is excusable or even praiseworthy. Societies award medals and erect monuments to soldiers who take many lives in war. They also permit killing in self-defense or the defense of others (see Pond). Nor does all criminal homicide rise to the level of murder. Killing done negligently or in the heat of passion became known as “manslaughter” (see the Maber and Beardsley cases). The common law defined murder as criminal homicide plus “malice.” As the Michigan Supreme Court put it in an 1858 case, “Murder is where a person of sound memory and discretion unlawfully kills any reasonable creature in being, in the peace of the state, with malice prepense or aforethought, either express or implied.” It defined malice as “the intention to kill, the intention to do great bodily harm, or the wanton and willful disregard of the likelihood that the natural tendency of one’s behavior is to cause death or serious bodily harm.”

Historians long sought the origins of the felony murder rule among the murky bogs of legal history. Most often, commentators claimed that it was an English common-law rule that colonial and early state jurisdictions adopted. But the most thorough inquiry into it reveals not a single felony murder case in pre-Revolutionary England, nor in any American colony. The doctrine seems to have originated in nineteenth-century America, and was a legislative
murder this way. But some Michigan courts did not require limited its application to inherently dangerous felonies; Michigan judges began to elaborate rules were “limited in scope and applied fairly.” Judges interpreted felony murder statutes and rules narrowly and limited their application, most often to felonies that were inherently dangerous—a felony aggravator statute. Michigan judges began to elaborate a common-law doctrine of felony murder, beyond the 1837 statute’s requirements, in the late nineteenth century. Some courts limited its application to inherently dangerous felonies; Michigan was among the first states to try to contain common-law felony murder this way. But some Michigan courts did not require

Far from being an oppressive and arbitrary rule, most felony murder rules were “limited in scope and applied fairly,” Judges interpreted felony murder statutes and rules narrowly and limited their application, most often to felonies that were inherently dangerous—arson, for example, but not larceny. Michigan did not really have a felony murder statute. The 1837 statute, which elevated murders committed in the commission of enumerated felonies to first-degree murder, was more accurately a “felony aggravator statute.” Michigan judges began to elaborate a common-law doctrine of felony murder, beyond the 1837 statute’s requirements, in the late nineteenth century. Some courts limited its application to inherently dangerous felonies; Michigan was among the first states to try to contain common-law felony murder this way. But some Michigan courts did not require

(Statutory), not a judicial (common-law), creation. Caselaw discloses no common-law felony murder convictions until very late in the nineteenth century, and very few even then. Thomas Jefferson proposed to preclude felony murder in his 1779 “bill for proportioning crimes and punishments.” “Where persons meaning to commit a trespass only, or larceny, or other unlawful deed, and doing an act from which involuntary homicide hath ensued, have heretofore been adjudged guilty of manslaughter or of murder, by transferring their unlawful intention to an act, much more penal than they could have in probable contemplation; no such case shall hereafter be deemed manslaughter unless manslaughter was intended, or murder, unless murder was intended.” This defined the essential idea of felony-murder: transferring the intent to commit any felony into the intent to commit murder. However, far from following Jefferson’s late eighteenth-century advice to prevent felony murder, American states extended the principle in the early nineteenth century. Illinois enacted the first felony murder statute in 1827. Half of the states had enacted one by the time of the Civil War.6

Felony murder also acquired the reputation of being a particularly harsh rule. Commentators claimed that it led to the execution of defendants who inadvertently and indirectly caused the death of someone during the commission of a felony. For example, if, during a bank robbery, a bank customer accidentally killed another customer or a police officer while trying to prevent the robbery, the bank robber was held responsible for the killing. He would be punished, not for robbery, but for first-degree murder.

But among such hard cases, few states adopted the felony murder principle to its full extent—calling it murder if any death occurred while somebody was committing a felony, regardless of his motive or role in causing the death. Most convictions resulted from the shooting of robbery victims. In the nineteenth century, courts “almost always conditioned murder liability on causing death with fault,” and almost never in cases of accidental death. Far from being an oppressive and arbitrary rule, most felony murder rules were “limited in scope and applied fairly,” Judges interpreted felony murder statutes and rules narrowly and limited their application, most often to felonies that were inherently dangerous—arson, for example, but not larceny.7

By the 1970s, the legal academic world attacked the felony murder rule, and the Michigan Court of Appeals was at loggerheads over it. New Hampshire abolished felony murder by statute in 1974; the Kentucky and Hawaii legislatures followed by the end of the decade. The Iowa Supreme Court abolished it in 1979.8 The Michigan Court of Appeals decided in 1976 that the state had neither a statutory nor a common-law felony murder rule. In a killing during a robbery, the prosecution must prove malice to the jury as a matter of fact; the judge could not instruct the jury that intent to commit robbery was a sufficient substitute for proof of malice in the killing. But the following year, a different panel of the Court of Appeals held that Michigan did have a felony murder rule to the extent that commission of an enumerated felony would turn manslaughter into murder.9 The Supreme Court had to step in and settle the matter.

The Court consolidated three cases from the Court of Appeals (People v Aaron, People v Thompson, and People v Wright). Robert G. Thompson was convicted of felony murder for a killing that took place during an armed robbery. The judge instructed the jury that “the evil intent to commit the robbery carries over to make that crime murder in the first degree.” The Court of Appeals reversed the conviction, ruling that the prosecution had to prove to the jury malicious intent to kill. Similarly, the Court of Appeals reversed the conviction of Daniel J. Wright, who was found guilty of first-degree murder for two deaths that occurred as a result of the arson he committed. The State brought these appeals. Stephen Aaron was also convicted of first-degree murder for a homicide that arose out of an armed robbery. In his case, the Court of Appeals upheld the conviction, but the Supreme Court overturned the decision and instructed the trial court to resentence Aaron for a second-degree murder conviction. The trial court imposed the same sentence (life imprisonment), and Aaron appealed again.10 The Supreme Court took up the issue of the status of felony murder in Michigan.

The Court unanimously ended felony murder. With considerable understatement, Justice Fitzgerald observed in his majority opinion, “Felony murder has never been a static, well-defined rule at common law.” He noted its obscure origins, which he located in England, which had abolished it in 1957 by statute. He also described the ways in which American jurisdictions had limited, and some recently abolished, the rule. These “modifications and restrictions…reflect dissatisfaction with the harshness and injustice of the rule…. To the extent that these modifications reduce the scope and significance of the common-law doctrine, they also call into question the continued existence of the doctrine itself.” Above all, felony murder “completely ignores the concept of determination of guilt on the basis of individual misconduct.” It was possible that “an accidental killing occurring during the perpetration of a
and thereby make clear that the common law does not become
the common law. As Justice Levin said, “the Court acted in the ex-
in a period of rising crime rates. The murder rate in the United

Fitzgerald’s opinion for “eliminat[ing] a harsh and outdated view
of criminal responsibility.” Some cases contained language that suggested
a common-law rule, but never in a way that established a clear
precedent. Due to the confusion among appellate courts on the
issue, the Supreme Court exercised its power under Article III,
section 7 of the State Constitution to abrogate the common law.

Ironically, the first definite recognition of the felony murder rule
came during its abolition. “We believe that it is no longer accept-
able to equate the intent to commit a felony with the intent to kill,”
Fitzgerald wrote. Prosecutors would have to prove malicious in-
tent to kill, beyond a reasonable doubt, to the jury. The new rule
would apply to all current and future prosecutions.

Fitzgerald and other commentators earnestly asserted that the
abolition of felony murder should have little practical effect. While
courts could not translate intent to commit a felony into malicious
intent to commit murder, they could consider the felonious intent
as a factor in establishing intent to kill. This would be particularly
likely in cases of the dangerous felonies enumerated in the Michi-
gan murder statute. But the new rule would prevent courts from
treating accidental killings, committed without malice, as mur-
ders. As one review noted, “Aaron barely aids defendants at all.”
Justice Ryan’s concurring opinion reinforced the point that the
Court was simply clarifying the confusion that had arisen in lower
courts. “It is sufficient to state only that if felony murder existed in
Michigan, by virtue of today’s decision it no longer does.” He
noted that, “Today we simply declare that the offense popularly
known as felony murder, which, properly understood, has nothing
to do with malice and is not a species of common law murder,
shall no longer exist in Michigan, if indeed it ever did.”

In retrospect, there was a lot less to Aaron than met the eyes of
both supporters and critics, Justice Levin later commented Justice
Fitzgerald’s opinion for “eliminating a harsh and outdated view
of criminal responsibility.” The decision did eliminate opportu-
nities for illogical applications, if not outright miscarriages of jus-
tice. As one commentator noted, “To consider a killing without
malice to be more blameworthy than a killing with malice merely
because the former was committed during the course of a felony
is irrational.” But such cases were rare, and reformers reinforced
this point by repeated claims that the abolition of the rule would
make no serious difference. But critics saw the decision as another
irresponsible exercise of liberal judicial activism, coddling felons
in a period of rising crime rates. The murder rate in the United
States doubled between 1963 and 1970, years in which the United
States Supreme Court imposed significant liberalization of crimi-
nal procedure in the states.

Observers also debated the Court’s exercise of its power to alter
the common law. As Justice Levin said, “the Court acted in the ex-
ercise of its constitutional authority to declare the common law,
and thereby make clear that the common law does not become
mortified when embodied in the statute.” Others noted that it was
unusual for the Court to use its constitutional common-law power
to alter the criminal law, which was mostly codified by statute. De-
cisions like Placek, which altered civil common law, were more ac-
ceptable. Some complained that the Court was usurping legisla-
tive authority. But Aaron really restored Michigan law to the
legislature’s original 1837 statute. That act was not a felony murder
act at all—there is no way to read the statute as doing anything but
elevating murders committed during certain felonies to first-degree
murder; never did it turn blemishes committed during felonies into
murders. Insofar as felony murder had insinuated its way into
Michigan law, it did so through incoherent lower-court opinions. If
anything, Aaron deferred to the original intent of the Michigan leg-
islature and put an end to the Victorian-era judicial activism that
had fabricated a common law of felony murder.

FOOTNOTES
2. Pa Const 1776, XXXVIII.
4. People v Potter, 5 Mich 1, 8 (1858).
8. Id. at 120, 141, 150, 160.
12. People v Aaron, supra at 687–689.
13. Id. at 689, 698, 707–09.
15. People v Aaron, supra at 729–731; Cohn, The demise of the felony murder doctrine in Michigan, 28 Wayne L R 237 (1981).
16. People v Aaron, supra at 744, 746.
18. Cohn, The demise of the felony murder doctrine, supra at 234.
19. Presentation of the Portrait of the Honorable John W. Fitzgerald, supra.
20. People v Aaron, supra at 722; Cutlip, Criminal law, supra at 438.