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# CRIMINAL LAW—THE UNCERTAIN STATUS OF THE FELONY-MURDER RULE IN MASSACHUSETTS AFTER *Commonwealth v. Matchett*, 386 Mass. 492, 436 N.E.2d 400 (1982)

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CRIMINAL LAW—THE UNCERTAIN STATUS OF THE FELONY-MURDER RULE IN MASSACHUSETTS AFTER *COMMONWEALTH V. MATCHETT*, 386 Mass. 492, 436 N.E.2d 400 (1982).

I. INTRODUCTION

Massachusetts cases have frequently stated that a homicide that occurs during the commission or attempted commission of a felony constitutes murder.<sup>1</sup> The Supreme Judicial Court of Massachusetts has declared that “the common law felony-murder doctrine is . . . part of our criminal law” and that to prove a charge of murder under that rule, the prosecution need only “establish that the defendant . . . committed a homicide while engaged in the commission of a felony.”<sup>2</sup> Despite the seemingly forthright nature of these statements, however, the supreme judicial court, on June 14, 1982, reversed a second degree murder conviction because it might have been based on the felony-murder rule.<sup>3</sup> The court’s holding in *Commonwealth v. Matchett*<sup>4</sup> represents a fundamental change in the treatment of felony-murder cases in Massachusetts, a change which virtually abrogates the felony-murder rule or at least drastically restricts the scope of its application.

In a case of first impression on the issue of the applicability of

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1. See, e.g., *Commonwealth v. Walden*, 380 Mass. 724, 729 n.2, 405 N.E.2d 939, 944 n.2 (1980); *Commonwealth v. LePage*, 352 Mass. 403, 420, 226 N.E.2d 200, 211 (1967); *Commonwealth v. Gricus*, 317 Mass. 403, 411-12, 58 N.E.2d 241, 246 (1944); *Commonwealth v. Madeiros*, 255 Mass. 304, 315, 151 N.E. 297, 299-300 (1926); *Commonwealth v. Chance*, 174 Mass. 245, 253, 54 N.E. 551, 555 (1899); *Commonwealth v. Pemberton*, 118 Mass. 36, 43 (1875). See also *Commonwealth v. Devlin*, 335 Mass. 555, 567, 141 N.E.2d 269, 275 (1957); *Commonwealth v. Venuti*, 315 Mass. 255, 258, 52 N.E.2d 392, 394 (1943).

2. *Commonwealth v. Balliro*, 349 Mass. 505, 512, 209 N.E.2d 308, 312 (1965).

3. *Commonwealth v. Matchett*, 386 Mass. 492, 511, 436 N.E.2d 400, 412 (1982). At one point during jury instructions, the judge charged the jury in the following manner: “If you find . . . that the defendant was engaged in an attempted extortion, and that as a matter of probable consequence of the commission of that extortion, [the decedent] was killed, then you would find the defendant . . . guilty of murder in the second degree.” *Id.* at 502 n.11, 436 N.E.2d at 407 n.11. This charge was in error because it did not require enough of the jury. Under the *Matchett* holding, to find a defendant guilty of murder in the context of a homicide occurring during an extortion, the jury must not only find an extortion and a resultant death, but also that the means used by the defendant in the commission of the extortion demonstrate a conscious disregard of the risk to human life. *Id.* at 508, 436 N.E.2d at 410.

4. 386 Mass. 492, 436 N.E.2d 400 (1982).

the felony-murder rule to the crime of extortion,<sup>5</sup> the supreme judicial court held, in *Matchett*, that the felony-murder rule can be invoked in that context only when the jury finds that the extortion involved "circumstances demonstrating the defendant's conscious disregard of the risk to human life."<sup>6</sup> After *Matchett*, the finding of an extortion no longer proves malice in the related killing; rather, it raises the issue of the existence of malice. On that issue, the jury may consider whether the means used in the commission of the felony demonstrate a conscious disregard of the risk to human life.<sup>7</sup> If the jury so finds, then, presumably, the felony-murder rule may be invoked and the defendant found guilty of murder.

Having determined, however, the existence of a conscious disregard of the risk to human life and thereby having determined the issue of malice, the jury need not then, as the court suggests, invoke the felony-murder rule. Because the felony-murder rule is used solely to achieve a finding of malice,<sup>8</sup> once malice has been found by other means, the felony-murder rule has no function in the calculus of proof of the crime of murder. In the same opinion in which the court claimed to articulate a use for the felony-murder rule in the context of extortion when the jury finds a conscious disregard of the risk to human life, the court in fact obviated any need for the felony-murder rule at all.

Moreover, the implications of the holding in *Matchett* are not confined to the statutory crime of extortion. In *Commonwealth v. Moran*,<sup>9</sup> the court extended its holding in *Matchett* to the crime of unarmed robbery<sup>10</sup> and, possibly, beyond.<sup>11</sup> In *Moran*, the court enunciated "the *Matchett* principle" as a rule of law that applies not only to extortion and unarmed robbery, but to any felony, statutory or common law, that can be committed without danger to human life.<sup>12</sup> The court justified its action on the ground that criminal liability for murder is not warranted absent a culpable mental state with respect to the underlying homicide.<sup>13</sup>

Because it is possible for all felonies traditionally associated with the felony-murder rule to be committed without danger to

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5. *Id.* at 504, 436 N.E.2d at 408.

6. *Id.* at 508, 436 N.E.2d at 410.

7. *Id.* at 511, 436 N.E.2d at 412.

8. *See infra* text accompanying note 56.

9. 387 Mass. 644, 442 N.E.2d 399 (1982).

10. *Id.* at 650, 442 N.E.2d at 403.

11. *See id.* at 650-51, 442 N.E.2d at 403.

12. *See id.*

13. *Id.* at 651, 442 N.E.2d at 403.

human life, a strict application of the *Matchett* principle will forbid the invocation of the felony-murder rule in the trial of any homicide occurring during the commission of a felony unless the jury first find that the circumstances of the commission of the felony demonstrate the defendant's conscious disregard of the risk to human life. Failure to so instruct the jury appears to be reversible error. Yet, the use of the felony-murder rule after an express finding, on the issue of malice, of a conscious disregard of the risk of human life appears to be superfluous. While there remains in the law of homicide in the Commonwealth the form and appearance of the felony-murder rule, the *Matchett* principle eviscerates that rule. As a result, the status of the law is unclear. This casenote will analyze and clarify the *Matchett* principle and recommend that the court abrogate the felony-murder rule openly. This step would bring clarity to the law and, at the same time, return the issue of malice to its historical status as a question of fact for the jury, not a question of law.<sup>14</sup>

## II. FACTS

In a poker game in the fall of 1977, David Colvin lost approximately \$1500 to Arthur Samson.<sup>15</sup> On February 12, 1979, Samson hired Brian Matchett to help collect the debt.<sup>16</sup> The next day, Samson and Matchett went to Colvin's home together, with Samson entering first and Matchett following shortly thereafter.<sup>17</sup> Within minutes, the heavily-armed<sup>18</sup> Matchett shot Colvin twice and left him lying on the floor.<sup>19</sup> Defendant<sup>20</sup> was charged with a number of crimes, the most serious being murder.<sup>21</sup> At trial, the judge in-

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14. See *infra* note 148 and accompanying text.

15. *Matchett*, 386 Mass. at 493, 436 N.E.2d at 402.

16. *Id.* at 493-94, 436 N.E.2d at 402.

17. *Id.* at 495, 436 N.E.2d at 403.

18. Defendant was carrying on his person a .38 caliber revolver, a .25 caliber pistol, a large knife, and a pair of handcuffs; in addition, a sawed-off shotgun, a sword cane, and a large German shepherd dog were available in his car. *Id.* at 500, 509, 436 N.E.2d at 406, 411. There was evidence that the .38 caliber revolver was loaded, at least in part, with hollow point bullets. Brief for Appellant at 14, *Commonwealth v. Matchett*, 386 Mass. 492, 436 N.E.2d 400 (1982); Brief for Appellee at 12, *Commonwealth v. Matchett*, 386 Mass. 492, 436 N.E.2d 400 (1982).

19. *Matchett*, 386 Mass. at 496-97, 436 N.E.2d at 403-04. The victim died two days later. *Id.* at 497, 436 N.E.2d at 404. At trial, defendant admitted shooting the victim, but claimed he did so in self-defense. *Id.* at 496, 436 N.E.2d at 404.

20. Samson and Matchett were codefendants at trial. Samson was, however, acquitted of all charges. *Id.* at 493 n.2, 436 N.E.2d at 402 n.2. The word "defendant" will be used herein to signify Matchett alone.

21. *Id.* at 493, 436 N.E.2d at 402. The other charges were for weapons violations. *Id.*

structed the jury that it could return a verdict of guilty of murder in the first degree based upon a finding of deliberately premeditated malice aforethought or upon the application of the felony-murder rule, with the underlying felony being an armed assault in a dwelling house with the intent to commit a felony; alternately, the jury could return a verdict of guilty of murder in the second degree based upon a finding of express malice aforethought or upon the application of the felony-murder rule, with the underlying felony being statutory extortion.<sup>22</sup> The jury returned a verdict of guilty of murder in the second degree<sup>23</sup> and defendant was sentenced to life imprisonment<sup>24</sup> with the possibility of parole after fifteen years.<sup>25</sup> From this conviction, defendant appealed,<sup>26</sup> asserting, *inter alia*, that the trial judge erred in instructing the jury that it could return a verdict of murder in the second degree under the felony-murder rule because the common law felony-murder rule is inapplicable to the statutory crime of extortion.<sup>27</sup>

In a six-to-one decision, the supreme judicial court held that because statutory extortion can be committed in a way not inherently dangerous to human life, a defendant cannot be convicted of murder through the application of the felony-murder rule to that crime unless the jury were to find that the extortion "involved circumstances demonstrating the defendant's conscious disregard of the

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22. *Id.* at 497-98, 436 N.E.2d at 404. A crime punishable by death or imprisonment in the state prison is a felony; all other crimes are misdemeanors. MASS. GEN. LAWS ANN. ch. 274, § 1 (West 1970). Armed assault in a dwelling house carries a possible punishment of life imprisonment. MASS. GEN. LAWS ANN. ch. 265, § 18A (West 1970). Extortion by threat carries a possible punishment of 15 years' imprisonment. *Id.* ch. 265, § 25. A felony-murder conviction based upon a felony punishable by death or life imprisonment is deemed first degree murder, *id.* ch. 265, § 1; all other felony-murders are second degree murders, *id.*

23. *Matchett*, 386 Mass. at 493, 436 N.E.2d at 402. Defendant was also convicted of unlawfully carrying the sawed-off shotgun and the two handguns, *id.*, in violation of MASS. GEN. LAWS ANN. ch. 269, § 10 (West 1970), which makes it a crime, *inter alia*, to carry firearms on the person or in a vehicle without a license.

24. *Matchett*, 386 Mass. at 493, 436 N.E.2d at 402.

25. Brief for Appellee at 27, *Commonwealth v. Matchett*, 386 Mass. 492, 436 N.E.2d 400 (1982). Defendant was also sentenced to concurrent terms of three to five years for carrying the handguns without a license and five to seven years for possession of the sawed-off shotgun. *Matchett*, 386 Mass. at 493, 436 N.E.2d at 402.

26. *Matchett*, 386 Mass. at 493, 436 N.E.2d at 402. Defendant also appealed the convictions on the weapons charges. *Id.* Those convictions, with which this casenote is not concerned, were affirmed by the supreme judicial court. *Id.* at 511, 436 N.E.2d at 412.

27. *Id.* at 493, 498-99, 436 N.E.2d at 402, 405. See *infra* notes 98-111 and accompanying text.

risk to human life.”<sup>28</sup> To understand fully the implications of that holding, it is necessary to consider briefly the common law and statutory development of the law of murder in England and the United States, particularly with reference to the concept of malice aforethought.

### III. A BRIEF SURVEY OF THE HISTORICAL DEVELOPMENT OF THE LAW OF MURDER

#### A. *In General*

Murder is “homicide committed with malice aforethought.”<sup>29</sup> Because homicide is “the killing of a human being by another human being,”<sup>30</sup> murder is the killing, with malice aforethought, of one human being by another.<sup>31</sup>

“Malice aforethought,” the *mens rea* of murder, is a legal term of art, the meaning of which cannot be derived from its constituent elements.<sup>32</sup> To be guilty of murder, a defendant must have acted with malice,<sup>33</sup> but this does not necessarily refer to any feeling of animosity or hostility.<sup>34</sup> Early in the history of the English common law of murder, the judges understood “malice” to require an intent to kill.<sup>35</sup> Over the course of time, however, the common law evolved as the judges sought to deem as murder conduct that resulted in homicide, but that occurred in a context lacking an intent to kill.<sup>36</sup> At first, this requirement was met by finding an “implied intent” to kill;<sup>37</sup> later, it became apparent that an actual intent to kill is not always required for murder.<sup>38</sup>

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28. *Matchett*, 386 Mass. at 508, 436 N.E.2d at 410.

29. R. PERKINS & R. BOYCE, *CRIMINAL LAW* 57 (3d ed. 1982) (footnote omitted) [hereinafter cited as PERKINS & BOYCE]. See also *Commonwealth v. Gricus*, 317 Mass. 403, 411-12, 58 N.E.2d 241, 246 (1944).

30. PERKINS & BOYCE, *supra* note 29, at 46 (footnote omitted).

31. W. LAFAYE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* 528 (1972) [hereinafter cited as LAFAYE & SCOTT] (murder is the unlawful killing of another living human being with malice aforethought).

32. See *Commonwealth v. Starling*, 382 Mass. 423, 428-29, 416 N.E.2d 929, 932-33 (1981). See also PERKINS & BOYCE, *supra* note 29, at 57, 73.

33. LAFAYE & SCOTT, *supra* note 31, at 534.

34. PERKINS & BOYCE, *supra* note 29, at 58. See also LAFAYE & SCOTT, *supra* note 31, at 528-29.

35. PERKINS & BOYCE, *supra* note 29, at 59. See also LAFAYE & SCOTT, *supra* note 31, at 529.

36. See LAFAYE & SCOTT, *supra* note 31, at 529.

37. PERKINS & BOYCE, *supra* note 29, at 59.

38. *Id.* An intent to inflict great bodily injury may constitute “malice aforethought,” *id.*, as would an unintentional killing during the commission of a felony,

With the evolution of the English common law, moreover, the "aforethought" component came to be less and less important. A "well-laid plan" was no longer required to be proven in a prosecution for murder;<sup>39</sup> it was enough that the fatal conduct not be the result of afterthought.<sup>40</sup>

As a result, it has been suggested that "malice aforethought" is a misleading expression whose function in the law of homicide would be better served by the phrase "man-endangering-state-of-mind," which may be taken to mean "every attitude of mind which includes (1) an intent to kill, or (2) an intent to inflict great bodily injury, or (3) an intent to do an act in wanton and wilful disregard of an unreasonable human risk . . . , or (4) an intent to perpetrate a dangerous felony."<sup>41</sup> "Malice aforethought" identifies any of these four states of mind when it exists in the absence of justification, excuse, or mitigation.<sup>42</sup>

In the common law of England, there were no degrees of murder.<sup>43</sup> The gradation of murder was a legislative development,<sup>44</sup> occurring in response to then-current ideas of crime and punishment. Under the English common law, murder was punishable by death.<sup>45</sup> Because murder can occur in a wide variety of ways, however, the degree of culpability of each defendant varies from case to case. Recognizing that different degrees of culpability warrant different punishments, the Pennsylvania legislature, in 1794, passed a statute which divided murder into two degrees, the greater of which retained the punishment of death and the lesser, the punishment of life imprisonment.<sup>46</sup> The "Pennsylvania pattern" is typical of murder statutes in the United States. It provides that:

[A]ll *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

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LAFAYE & SCOTT, *supra* note 31, at 529. *See also* Commonwealth v. Drum, 58 Pa. 9, 15 (1868).

39. PERKINS & BOYCE, *supra* note 29, at 58.

40. *Id.* Professors Perkins and Boyce suggest that a definition of murder as "homicide committed with malice" would serve the law of homicide well. *Id.* at 57-58.

41. *Id.* at 73. *See also* LAFAYE & SCOTT, *supra* note 31, at 528. These types of murder exist today in most jurisdictions. *Id.*

42. PERKINS & BOYCE, *supra* note 29, at 73-75. *See also* LAFAYE & SCOTT, *supra* note 31, at 534.

43. LAFAYE & SCOTT, *supra* note 31, at 562.

44. *Id.*

45. *See infra* note 59 and accompanying text.

46. PERKINS & BOYCE, *supra* note 29, at 127.

of, or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of *murder* shall be deemed murder of the second degree.<sup>47</sup>

Because this type of statute concerns itself only with murder, that crime is the starting point in interpreting such a statute. But the statute itself does not define the crime; for definition, resort must be made to the common law.<sup>48</sup> The statute merely provides a formula for categorizing common law murders<sup>49</sup> as either first degree murder or second degree murder. Once those murders which constitute first degree murder are specified, the remainder<sup>50</sup> constitute second degree murder.

### B. *The Common Law Felony-Murder Rule*

At common law, a homicide is murder "if it falls within the scope of the felony-murder rule."<sup>51</sup> At the early English common law, the felony-murder rule was quite literal: homicides were within its scope if they occurred during the commission or attempted commission of a felony.<sup>52</sup> As to causation, however, the phrase "during the commission of" requires more than mere coincidence of time and place; to invoke the felony-murder rule, it must be that *but for* the commission of the felony, the death would not have occurred.<sup>53</sup>

In application, the felony-murder rule does not obviate the requirement that the prosecutor prove malice to secure a murder conviction.<sup>54</sup> Rather, the intent to commit the underlying felony serves

47. *Id.* (quoting *Commonwealth v. Drum*, 58 Pa. 9, 16 (1868)) (emphasis added). The wording is that of the March 31, 1860 Act.

48. LAFAYE & SCOTT, *supra* note 31, at 530, 568 & n.56. See also PERKINS & BOYCE, *supra* note 29, at 128-29.

49. See *supra* text accompanying notes 29-31, 41-42.

50. Generally, these include intent-to-kill murder which is not deliberate and premeditated, intent-to-inflict-great-bodily-injury murder, murder occurring as the result of an act in wanton and willful disregard of an unreasonable human risk, and felony-murder for which the underlying felony is not listed. LAFAYE & SCOTT, *supra* note 31, at 568.

51. PERKINS & BOYCE, *supra* note 29, at 61 (footnote omitted).

52. *Id.* at 61-62. "[I]f one intends to do another a felony, and undesignedly kills a man, this is . . . murder." *Id.* at 62 (quoting 4 W. BLACKSTONE, COMMENTARIES \*200-01). See also LAFAYE & SCOTT, *supra* note 31, at 545.

The felony-murder rule is of dubious origin and history. For a brief analysis of this doctrine, see *People v. Aaron*, 409 Mich. 672, 689-707, 299 N.W.2d 304, 307-16 (1980), and the opinion of Justice Ryan at 409 Mich. at 739-43, 299 N.W.2d at 332-33 (Ryan, J., concurring in part, dissenting in part).

53. PERKINS & BOYCE, *supra* note 29, at 67. See also LAFAYE & SCOTT, *supra* note 31, at 545-46, 555-57.

54. PERKINS & BOYCE, *supra* note 29, at 71. See also *Aaron*, 409 Mich. at 716-17, 299 N.W.2d at 321.

to show malice aforethought.<sup>55</sup> The subtlety of this concept is explained in this way:

[T]he *mens rea* or "malice" necessary for the felony is . . . different from the *mens rea* or "malice aforethought" required for murder; but for certain killings the law will allow the latter to be conclusively proved from the former. This is not to identify them at all—it is merely to say that in certain cases proof of the particular state of mind required for murder will be established by the *mens rea* of certain felonies; it will be malice "implied" rather than "express." The difference is significant for it preserves the felony-murder rules [sic] as a *mens rea*-imposing mechanism.<sup>56</sup>

In this way, the rule establishes felony-murder as a fourth category of murder by providing a "separate definition of malice"<sup>57</sup> in addition to an intent (1) to kill, (2) to inflict great bodily injury, and (3) to act in wanton and willful disregard of an unreasonable human risk.<sup>58</sup>

The practical result of the application of the felony-murder rule, recognizing that the intent to commit the underlying felony establishes the *mens rea* of murder, is clearly seen in the context of the early common law. When the felony-murder rule was first conceived, all felonies were punishable by death.<sup>59</sup> A prisoner who had successfully committed a felony forfeited his life upon conviction. A prisoner whose attempt had failed, however, was guilty merely of a misdemeanor<sup>60</sup> and did not, therefore, face a death sentence. The felony-murder rule was designed to be used when an attempt to commit a felony both failed and incidentally caused a homicide.<sup>61</sup> A homicide committed under such circumstances was deemed murder<sup>62</sup> and the defendant was sentenced to death.<sup>63</sup> It may seem, then, that the intended effect of the felony-murder rule at common

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55. *Aaron*, 409 Mich. at 717, 299 N.W.2d at 321. See also LAFAYE & SCOTT, *supra* note 31, at 534. "The felony-murder doctrine ascribes malice aforethought to the felon who kills in the perpetration of an inherently dangerous felony." *People v. Washington*, 62 Cal.2d 777, 780, 402 P.2d 130, 133, 44 Cal. Rptr. 442, 445 (1965) (citations omitted).

56. Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50, 60-61 (1956).

57. *Aaron*, 409 Mich. at 716-17, 299 N.W.2d at 321.

58. See *supra* text accompanying note 33.

59. PERKINS & BOYCE, *supra* note 29, at 70. "The judgment against a felon is, that he be hanged." *Id.* n.78 (quoting 3 INST. \*47). See also LAFAYE & SCOTT, *supra* note 31, at 546 n.4.

60. PERKINS & BOYCE, *supra* note 29, at 70.

61. See *id.*

62. See *supra* notes 54-57 and accompanying text.

63. See *supra* text accompanying note 45.

law was to deter, by raising the specter of a death sentence should life be lost, would-be felons from attempting to commit any felony and, most particularly, to discourage attempts at those felonies which, by their nature, carry some risk of the loss of life. Because no one attempts a felony with the intent to fail, however, the felony-murder rule could not have *raised* the specter of a death sentence, since a would-be felon necessarily courted that very punishment from the moment he embarked, intent on success, on a felonious course of action. The felony-murder rule, then, actually served to remove, through execution, the criminal element of English society. The punishment for felony-murder complemented the common law punishment for felony: the latter led to the execution of felons; the former, to the execution of those whose attempt at committing a felony caused the death of another.<sup>64</sup>

As the common law developed in both England and the United States, the scope of the felony-murder rule was narrowed by judges who viewed the doctrine as harsh and anachronistic. The reach of the felony-murder rule was progressively restricted to the point that the rule could have been restated as: "Homicide resulting from any felony committed in a dangerous way is murder."<sup>65</sup> In one English case,<sup>66</sup> the trial court instructed the jury:

[I]nstead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life, and likely in itself to cause death done for the purpose of committing a felony which caused death, should be murder.<sup>67</sup>

A similar result, the rejection of the idea that any and all felonies serve equally well to invoke the felony-murder rule, obtained in American case law.<sup>68</sup> In an early case demonstrating judicial concern over the scope of the felony-murder rule, the Court of Appeals of Kentucky presented a hypothetical felony-murder problem:

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54. What of those successful felons who faced the gallows as a result of being convicted of a felony? Those whose malefactions did not result in homicide were, of course, unaffected by the felony-murder rule; those whose conduct did result in homicide, however, *did* fall under the felony-murder rule. Those latter prisoners, in facing a possible second death sentence for murder, were no worse off than they were upon conviction of the underlying felony, however: a man can be hanged to death only once.

65. PERKINS & BOYCE, *supra* note 29, at 63 (footnote omitted).

66. Regina v. Serné, 16 Cox Crim. Cas. 311, 313 (Central Crim. Ct. 1887).

67. *Id.*, quoted in Commonwealth v. Matchett, 386 Mass. 492, 506, 436 N.E.2d 400, 409 (1982).

68. PERKINS & BOYCE, *supra* note 29, at 64-65.

Under our statute, the removal of a cornerstone is . . . a felony. If, in attempting this offense, death were to result to one conspirator by his fellow accidentally dropping the stone upon him, no Christian court would hesitate to apply this limitation [that the rule be applied only to criminal acts whose natural tendency is to produce death].<sup>69</sup>

In the United States, the felony-murder rule is, in many jurisdictions, restricted in its application to those felonies which are considered to be inherently dangerous.<sup>70</sup> Those most often categorized as such are burglary, arson, rape, and robbery.<sup>71</sup> Both common experience<sup>72</sup> and the case reports<sup>73</sup> reflect that the commission of these crimes poses a grave risk to human life. At least one authority has concluded that, under the felony-murder rule as it is generally formulated in the United States, "[h]omicide is murder if the death results from the perpetration or attempted perpetration of an inherently dangerous felony."<sup>74</sup> There is, however, disagreement over the meaning of "inherently dangerous."<sup>75</sup> One approach, the "manner of commission" test, examines the facts of the particular

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69. *Powers v. Commonwealth*, 110 Ky. 386, 416, 61 S.W. 735, 742 (1901).

70. PERKINS & BOYCE, *supra* note 29, at 64-65. *See also* LAFAYE & SCOTT, *supra* note 31, at 547. This statement comprehends its own converse; i.e., some jurisdictions do not so restrict the reach of the felony-murder rule.

71. PERKINS & BOYCE, *supra* note 29, at 63. Some courts have limited the class of underlying felonies to those crimes which were felonies at common law; e.g., burglary, arson, rape, robbery, sodomy, mayhem, and larceny. LAFAYE & SCOTT, *supra* note 31, at 547.

72. PERKINS & BOYCE, *supra* note 29, at 63.

73. *See, e.g.*, *Commonwealth v. Walden*, 380 Mass. 724, 405 N.E.2d 939 (1980) (breaking and entering a dwelling house in the daytime with intent to commit larceny and to put a person therein in fear); *Commonwealth v. Cameron*, 385 Mass. 660, 433 N.E.2d 878 (1982) (arson); *Commonwealth v. Gricus*, 317 Mass. 403, 58 N.E.2d 241 (1944) (death resulting from a beating occurring in the commission of rape); *Commonwealth v. Venuti*, 315 Mass. 255, 52 N.E.2d 392 (1943) (robbery); *Commonwealth v. LePage*, 352 Mass. 403, 226 N.E.2d 200 (1967) (armed assault with intent to rob in a dwelling house).

74. PERKINS & BOYCE, *supra* note 29, at 70. Professors LaFave and Scott note, tellingly, that some cases proclaim the scope of the felony-murder rule to be very general, while in fact the cases usually involve an underlying felony that is inherently dangerous. LAFAYE & SCOTT, *supra* note 31, at 546. They note further that a limitation on the felony-murder rule should be worded in terms of inherently dangerous felonies, *id.* at 547, rather than by naming specific felonies, since not all common law felonies (e.g., larceny) are dangerous, *see id.* In their view, those felonies which are not dangerous should be punished as manslaughter rather than murder if the homicide occurs in an "extraordinary, unforeseeable" manner, *id.* n.12; further, there are statutory felonies, as opposed to common law felonies (e.g., abortion and kidnapping), that should be punished as murder if they are committed in such a way that death is a foreseeable result, *id.*

75. LAFAYE & SCOTT, *supra* note 31, at 547.

case, including the circumstances surrounding the commission of the felony and the defendant's conduct, to see whether there existed a foreseeable danger to human life; the other approach, the "inherently dangerous" test, examines the particular felony in the abstract, rather than with reference to the way in which it was committed.<sup>76</sup>

C. *Overview of the Massachusetts Law of Murder Prior to Commonwealth v. Matchett*

Murder, within the Commonwealth of Massachusetts, remains the same as at common law: "[t]he killing of a human being, with malice aforethought."<sup>77</sup> "Malice aforethought" names the mental states which transform homicide into murder.<sup>78</sup> As a requirement for murder, malice aforethought is satisfied by the mental element that accompanies homicide committed with (1) an intent to kill,<sup>79</sup> (2) an intent to inflict great bodily injury,<sup>80</sup> (3) an intent to do an act in wanton and willful disregard of an unreasonable human risk,<sup>81</sup> and (4) an intent to perpetrate a dangerous felony.<sup>82</sup> Moreover, the malice aforethought element of murder does not require the foreseeability of the occurrence of death or great bodily injury.<sup>83</sup> It includes all unlawful and unjustifiable motives<sup>84</sup> and is "implied from any deliberate or cruel act against another."<sup>85</sup>

Murder is classified, according to its gravity, as murder in the first degree or murder in the second degree.<sup>86</sup> The Massachusetts

76. *Id.* See also Note, *Criminal Law—Felony-Murder Rule in Missouri—The Underlying Felony Need Not Be Inherently Dangerous*, 41 MO. L. REV. 595, 599 n.23 (1976); Annot., 50 A.L.R.3d 397 (1973).

77. MASS. GEN. LAWS ANN. ch. 277, § 39 (West 1972). See, e.g., *Commonwealth v. Campbell*, 378 Mass. 680, 686, 393 N.E.2d 820, 825 (1979); *Commonwealth v. McGuirk*, 376 Mass. 338, 344, 380 N.E.2d 662, 666 (1978), *cert. denied*, 439 U.S. 1120 (1979); *Commonwealth v. Hicks*, 356 Mass. 442, 444, 252 N.E.2d 880, 881 (1969); *Commonwealth v. McCauley*, 355 Mass. 554, 559, 246 N.E.2d 425, 427 (1969); *Commonwealth v. Madeiros*, 255 Mass. 304, 315, 151 N.E. 297, 299-300 (1926); *Commonwealth v. Desmarteau*, 82 Mass. (16 Gray) 1, 9 (1860). See *supra* note 31 and accompanying text.

78. *Campbell*, 378 Mass. at 686, 393 N.E.2d at 825.

79. *Id.*

80. *Id.*

81. See *Commonwealth v. Chance*, 174 Mass. 245, 252, 54 N.E. 551, 554 (1899), *quoted in* *Commonwealth v. Swift*, 382 Mass. 78, 83, 413 N.E.2d 717, 720 (1980). See also LAFAYE & SCOTT, *supra* note 31, at 541-44.

82. *Commonwealth v. Walden*, 380 Mass. 724, 728 n.2, 405 N.E.2d 939, 944 n.2 (1980). See *supra* text accompanying note 41.

83. *Commonwealth v. Starling*, 382 Mass. 423, 428, 416 N.E.2d 929, 932 (1981).

84. *Commonwealth v. Boyajian*, 344 Mass. 44, 48-49, 181 N.E.2d 577, 580 (1962).

85. *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 304 (1850).

86. MASS. GEN. LAWS ANN. ch. 265, § 1 (West 1970). See also *Commonwealth v.*

murder statute<sup>87</sup> follows, roughly, the "Pennsylvania pattern":<sup>88</sup> Murder in the first degree is murder committed (1) with deliberately premeditated malice aforethought, (2) with extreme atrocity or cruelty, (3) in the commission of a crime punishable with death or imprisonment for life,<sup>89</sup> or (4) in the attempted commission of a crime punishable with death or imprisonment for life;<sup>90</sup> all other killing with malice aforethought constitutes murder in the second degree.<sup>91</sup>

Although the Massachusetts murder statute does not codify the common law felony-murder rule, that rule is, nevertheless, applicable within the Commonwealth.<sup>92</sup> In a prosecution for felony-murder, the intent to commit the underlying felony has been held to supply the element of malice aforethought,<sup>93</sup> so that a murder conviction could be based upon a showing that the defendant committed the homicide while engaged in the commission of a felony.<sup>94</sup> Because the statute speaks only in terms of "murder," it cannot be invoked until a murder has been established.<sup>95</sup> Once this has been done through the application of the felony-murder rule, however, the statute provides that those felony-murders based on an underlying felony punishable with death or life imprisonment are first degree murders,<sup>96</sup> while all other felony-murders are second degree murders.<sup>97</sup>

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DiStasio, 298 Mass. 562, 564, 11 N.E.2d 799, 801 (1937). *See supra* text accompanying notes 46-47.

87. MASS. GEN. LAWS ANN. ch. 265, § 1 (West 1970).

88. *See supra* notes 47-50 and accompanying text.

89. All offenses so punishable are included within the scope of MASS. GEN. LAWS ANN. ch. 265, § 1 (West 1970). *Commonwealth v. Pemberton*, 118 Mass. 36, 42 (1875).

90. MASS. GEN. LAWS ANN. ch. 265, § 1 (West 1970).

91. *Id.* The degree of murder is a question of fact to be decided by the jury. *Id.*

92. *See supra* text accompanying notes 1-2. "[W]hen a defendant by some act done in the commission or attempted commission of some . . . felony causes the death of a human being, the killing is with malice aforethought and is murder." *Commonwealth v. Madeiros*, 255 Mass. 304, 315, 151 N.E. 297, 299-300 (1926).

93. *Madeiras*, 255 Mass. at 315, 151 N.E. at 299-300. *See supra* notes 54-57 and accompanying text.

94. *Commonwealth v. Balliro*, 349 Mass. 505, 512, 209 N.E.2d 308, 312 (1965).

95. The only function of the Massachusetts murder statute is to categorize a murder as murder in the first degree or murder in the second degree. *See supra* notes 87-91, 46-50 and accompanying text.

96. MASS. GEN. LAWS ANN. ch. 265, § 1 (West 1970).

97. *Id.*

IV. MODIFICATION OF THE FELONY-MURDER RULE IN MASSACHUSETTS IN LIGHT OF *MATCHETT* AND "THE *MATCHETT* PRINCIPLE"

A. *Holding*

In *Commonwealth v. Matchett*,<sup>98</sup> the Supreme Judicial Court of Massachusetts faced the issue of the applicability of the common law felony-murder rule to a homicide occurring during the attempted commission of the statutory crime of extortion.<sup>99</sup> The court quickly dismissed as mere dicta those prior statements found in the case reports to the effect that the common law felony-murder rule<sup>100</sup> could be applied as a talisman<sup>101</sup> to any and all felonies.<sup>102</sup> Stating that "[a] rule of law assumed, but not decided, is not binding on this court,"<sup>103</sup> the court made clear its intention to be free of any false notions of precedent as it undertook the task of shaping the common law of felony-murder.<sup>104</sup>

Motivated by the desire to uphold what it considered to be a fundamental principle of criminal justice, that "criminal liability for causing a particular result is not justified in the absence of some

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98. 386 Mass. 492, 436 N.E.2d 400 (1982).

99. *Id.* at 498-99, 436 N.E.2d at 405. Other issues raised on appeal were (1) the sufficiency of the evidence of an (attempted) extortion, the finding of which was a condition precedent to the use of the felony-murder rule; (2) the sufficiency of the judge's instruction regarding the necessity, on the issue of the existence of extortion, of finding that a threat was uttered; (3) the constitutionality of the felony-murder rule per se; and (4) the denial by the trial court of defendant's motion to suppress evidence seized during a warrantless inventory search of defendant's car. *Id.* at 493, 498-99 & n.8, 436 N.E.2d at 402, 404-05 & n.8. None of these issues is within the scope of this casenote. Because the decision rested on other grounds, the third issue, the constitutionality of the felony-murder rule, was not addressed by the court. *Id.* at 508 n.17, 436 N.E.2d at 410 n.17.

100. For the purpose of this discussion, "common law felony-murder rule" means the rule of law which deems as murder a homicide occurring during the commission or attempted commission of a felony.

101. *Matchett*, 386 Mass. at 504-05, 436 N.E.2d at 408. "This court has never automatically applied the felony-murder rule without viewing the facts of the case." *Id.* at 504, 436 N.E.2d at 408 (footnote omitted).

102. *Id.* at 504 n.13, 436 N.E.2d at 408 n.13.

103. *Id.* (citation omitted). *But cf.* *Commonwealth v. Madeiros*, 255 Mass. 304, 315, 151 N.E. 297, 299-300 (1926) (jury correctly charged that when a defendant, by some act done in the commission or attempted commission of a felony, causes the death of a human being, the killing is with malice aforethought and is murder).

104. "We do not view the instant case as a departure from the Commonwealth's common law felony-murder rule because this court has never held that the felony-murder rule was applicable to the statutory felony of extortion." *Matchett*, 386 Mass. at 505 n.14, 436 N.E.2d at 408 n.14.

culpable mental state in respect to that result,'"<sup>105</sup> and noting that the felony-murder rule is a rule of "constructive malice" in that it substitutes the intent to commit the underlying felony for the malice aforethought that is an element of murder,<sup>106</sup> the court summarily rejected the automatic application of the felony-murder rule to any and all felonies.<sup>107</sup> In doing so, the court declared

"For this theory to be tenable the nature of the felony must be such that an intent to commit that crime exhibits a *conscious disregard for human life*, hardness of heart, cruelty, recklessness of consequences and a mind regardless of social duty. Where, however, the acts which constitute felonious conduct do not possess a sufficient danger to human life to justify the application of the doctrine of common-law felony murder, the doctrine is inapplicable because there is a failure to establish the requisite state of mind from the forming of the intention to commit the felony."<sup>108</sup>

This statement foreshadowed the court's holding that, when a death results from the commission or attempted commission of the statutory felony of extortion, a conviction of felony-murder in the second degree<sup>109</sup> is not warranted unless "the jury find that the extortion involved circumstances demonstrating the defendant's *conscious disregard of the risk to human life*. The crime of extortion may be committed in a way not inherently dangerous to human life. . . . We conclude, therefore, that the judge's charge<sup>110</sup> was in error."<sup>111</sup>

Because the trial judge did not require the jury to find a conscious disregard of the risk to human life before applying the felony-murder rule, his charge constituted fundamental error, requiring a

105. *Id.* at 506-07, 436 N.E.2d at 409 (quoting Gegan, *Criminal Homicide in the Revised New York Penal Law*, 12 N.Y.L.F. 565, 586 (1966)).

106. *Matchett*, 386 Mass. at 502, 436 N.E.2d at 407. *See supra* notes 54-56 and accompanying text.

107. *Matchett*, 386 Mass. at 507-08, 436 N.E.2d at 410.

108. *Id.* at 507, 436 N.E.2d at 410 (quoting *Commonwealth v. Bowden*, 456 Pa. 278, 287, 309 A.2d 714, 719 (1973) (Nix, J., concurring)) (emphasis added).

109. Because the jury returned a verdict of guilty of second degree murder, the court found no need to discuss the applicability of the felony-murder rule to a first degree murder charge based on the underlying felony of armed assault in a dwelling house with intent to commit a felony. *Matchett*, 386 Mass. at 501 n.11, 436 N.E.2d at 407 n.11. *See MASS. GEN. LAWS ANN.* ch. 265, § 18A (West 1970).

110. As to murder in the second degree based upon the application of the felony-murder rule to the underlying felony of statutory extortion, the judge charged, "If you find . . . that the defendant was engaged in an attempted extortion, and that as a matter of probable consequence of the commission of that extortion, [the decedent] was killed, then you would find the defendant . . . guilty of murder in the second degree." *Matchett*, 386 Mass. at 502 n.11, 436 N.E.2d at 407 n.11.

111. *Id.* at 508, 436 N.E.2d at 410 (emphasis added) (citation omitted).

reversal of judgment and a new trial.<sup>112</sup> A reversal is required under such circumstances despite the possibility that the verdict of guilty of murder in the second degree might not have been based on the felony-murder rule at all. The judge instructed the jury both as to first degree murder and second degree murder. With reference to the latter, the jury was authorized to return a verdict of guilty based on either a finding of express malice aforethought or on the application of the felony-murder rule to the underlying felony of extortion, a crime neither punishable by a death sentence nor by life imprisonment.<sup>113</sup> The jury returned a general verdict of guilty of second degree murder.<sup>114</sup> From this verdict, it is impossible to tell whether the jury found that defendant acted with express malice aforethought or that he committed or attempted to commit statutory extortion and, in doing so, caused the victim's death. Because the jury instruction concerning felony-murder was deficient, the latter of those two grounds was insufficient to support a finding of guilt. Under the command of the Supreme Court in *Yates v. United States*,<sup>115</sup> a verdict must be reversed when it is supportable on one ground, but not on another, and it is not possible to discern the ground upon which the jury relied in reaching a verdict of guilty.<sup>116</sup> Therefore, despite the possibility that the jury found express malice aforethought, the verdict was reversed and the case remanded to the superior court for a new trial.<sup>117</sup>

B. *"Conscious Disregard of the Risk to Human Life"*

The most remarkable aspect of *Matchett* is the wording of the holding. In formulating a new standard under which the felony-murder rule may be invoked in the prosecution of homicides occurring during the perpetration or attempted perpetration of statutory extortion, the court held that the jury must "find that the extortion

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112. *Id.* at 508, 511, 436 N.E.2d at 410, 412.

113. *Matchett*, 386 Mass. at 498, 436 N.E.2d at 404. *See supra* note 22 and accompanying text. The jury was also authorized to return a verdict of guilty of murder in the first degree based on either a finding of deliberately premeditated malice aforethought or on the application of the felony-murder rule to the underlying felony of armed assault in a dwelling house with the intent to commit a felony, a crime punishable by imprisonment for life. *Matchett*, 386 Mass. at 497, 436 N.E.2d at 404. *See supra* note 22 and accompanying text.

114. *Matchett*, 386 Mass. at 493, 436 N.E.2d at 402.

115. 354 U.S. 298 (1957).

116. *Id.* at 311-12.

117. *Matchett*, 386 Mass. at 511, 436 N.E.2d at 412. Defendant was also convicted of firearms violations; those convictions were affirmed. *Id.* at 493, 436 N.E.2d at 402. *See supra* note 23.

involved circumstances demonstrating the defendant's *conscious disregard of the risk to human life*."<sup>118</sup> That phrase is based on the concurring opinion of a 1973 Pennsylvania case.<sup>119</sup> In the context of that concurring opinion, the state of mind described exhibits not only a conscious disregard of the risk to human life, but also "hardness of heart, cruelty, recklessness of consequences and a mind regardless of social duty."<sup>120</sup> This is the common description of a "depraved heart," which is one of the states of mind that constitute malice aforethought.<sup>121</sup>

The Model Penal Code sheds light on the meaning of "a conscious disregard of the risk to human life." The Code defines as murder a criminal homicide committed "recklessly under circumstances manifesting extreme indifference to the value of human life";<sup>122</sup> criminal homicide committed with ordinary recklessness is simply manslaughter.<sup>123</sup> Recklessness presupposes an awareness and conscious disregard of a substantial homicidal risk.<sup>124</sup> To determine whether the defendant's recklessness is sufficient to support a conviction of murder rather than manslaughter, the key, under the Model Penal Code, is whether the circumstances of the crime indicate that the defendant, in consciously disregarding the risk to human life, acted with "extreme indifference to the value of human life."<sup>125</sup> If so, the defendant is guilty of murder; if not, he is guilty only of manslaughter. Again, in context, the phrase upon which the *Matchett* court drew<sup>126</sup> indicates extreme indifference to the value of human life and, hence, murder.<sup>127</sup>

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118. *Matchett*, 386 Mass. at 508, 436 N.E.2d at 410 (emphasis added).

119. *Commonwealth v. Bowden*, 456 Pa. 278, 287, 309 A.2d 714, 719 (1973) (Nix, J., concurring).

120. *Bowden*, 456 Pa. at 287, 309 A.2d at 719 (Nix, J., concurring). See *supra* text accompanying note 108. See also MODEL PENAL CODE § 210.2 comment 1 (Official Draft and Revised Comments 1962).

121. See LAFAYE & SCOTT, *supra* note 31, at 542.

122. MODEL PENAL CODE § 210.2(1)(b) (1962).

123. *Id.* § 210.3(1)(a).

124. *Id.* § 210.2 comment 4.

125. *Id.*

126. See *supra* text accompanying notes 119-21.

127. The Model Penal Code departs from the traditional felony-murder rule. Under the Code, criminal homicide is presumed to be committed recklessly under circumstances manifesting extreme indifference to the value of human life if the actor is engaged in, or is an accomplice in, the commission of, or an attempt to commit, or flight after committing or attempting to commit, robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping, or felonious escape; i.e., criminal homicide occurring under such circumstances constitutes murder. MODEL PENAL CODE § 210.2(1)(b). Even with this presumption, the prosecution has the burden of persuasion

The court forced the conclusion that “a conscious disregard of the risk to human life” refers to malice when it wrote that “the means utilized to effect the extortion could be considered by the jury on the issue of malice, i.e., whether these means and the methods used by the defendant demonstrated a conscious disregard of the risk to human life.”<sup>128</sup> This statement is important for two reasons. First, on its face, it allows a jury to find malice by finding a conscious disregard of the risk to human life; i.e., the jury can infer malice from the means used by the defendant in committing the extortion by finding that those means demonstrate a conscious disregard of the risk to human life. This the jury could not do unless “conscious disregard of the risk to human life” represents a state of mind that coincides, at least to some degree, with the state of mind known as “malice aforethought.” Second, if it is possible to infer a state of mind less culpable than malice from means that demonstrate a conscious disregard of the risk to human life, then the invocation of the felony-murder rule under those circumstances would violate the spirit of the *Matchett* holding because doing so would cause a finding of criminal liability for murder despite the absence of a culpable mental state with respect to the underlying homicide.<sup>129</sup> Therefore, the phrase “conscious disregard of the risk to human life” must represent a state of mind that is not merely coincidental to some degree with the state of mind known as “malice aforethought,” but a state

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beyond a reasonable doubt that the defendant acted recklessly and with extreme indifference to the value of human life. The jury may regard the facts giving rise to the presumption as sufficient evidence of the required culpability unless the court determines that the evidence as a whole clearly negatives that conclusion. The presumption may, of course, be rebutted by the defendant or may simply not be followed by the jury; if so, the defendant may be liable for manslaughter or negligent homicide. If the presumption is not rebutted and if the jury finds, with or without its aid, that the requisite extreme indifference in fact existed beyond a reasonable doubt, then the appropriate conviction is for murder.

128. *Matchett*, 386 Mass. at 511, 436 N.E.2d at 412. To prepare the jury for that task, a judge might recite the following instruction:

If you find that the defendant committed or attempted to commit the statutory crime of extortion, and, as a consequence of having done so, the decedent was killed, then you must decide whether that killing was murder. Murder is “the killing, with malice aforethought, of one human being by another.” On the issue of malice aforethought, you may consider the means utilized to effect the extortion; that is to say, whether the means and methods used by the defendant demonstrate a conscious disregard of the risk to human life. If you find that the means and methods used by the defendant to effect the extortion do in fact demonstrate a conscious disregard of the risk to human life, you will have found that the defendant acted with malice aforethought and you will, therefore, return a verdict of guilty of murder in the second degree.

129. See *supra* text accompanying note 105.

of mind that is in fact synonymous with "malice aforethought." This conclusion demonstrates, again, the redundant nature of the holding in *Matchett*. *Matchett* requires that before the felony-murder rule may be applied, the jury first find that the defendant acted in conscious disregard of the risk to human life.<sup>130</sup> Making such a finding, however, is tantamount to finding that the defendant acted with malice. Once the jury has found malice aforethought, there is no need to invoke the felony-murder rule, since that rule is a "*mens rea*-imposing mechanism"<sup>131</sup> and malice is the *mens rea* of murder.<sup>132</sup> Having shown a homicide accompanied by "conscious disregard of the risk to human life," the prosecutor has made out a case of murder; he need not then ask the jury to return a verdict of guilty through the application of the felony-murder rule.

### C. *The Matchett Principle Extended to Crimes Other Than Extortion*

At best, the holding in *Matchett* is obscure; at worst, it is self-contradictory and represents a redundancy in the law of homicide. If the holding were to be restricted to homicides occurring during the commission of the statutory felony of extortion, its effect would be more academic than practical because it is not to be expected that extortion will often lead to homicide.

In the case of *Commonwealth v. Moran*,<sup>133</sup> decided five months after *Matchett*, however, the supreme judicial court extended the *Matchett* principle to the crime of unarmed robbery.<sup>134</sup> Moran and an accomplice robbed their victim after leaving a bar in which the three of them had been drinking together.<sup>135</sup> The intoxicated victim suffered blows to the head during the course of the robbery, was stuffed into the cab of his pickup truck, and asphyxiated after aspirating his own vomit.<sup>136</sup> While reaffirming that the felony-murder rule is "the law of this Commonwealth,"<sup>137</sup> the supreme judicial court held that because unarmed robbery is not inherently dangerous, the felony-murder rule is not applicable to that crime unless "the jury find from the circumstances of the felony that the defend-

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130. *Matchett*, 386 Mass. at 508, 436 N.E.2d at 410.

131. *See supra* text accompanying note 56.

132. *See supra* notes 29-31 and accompanying text.

133. 387 Mass. 644, 442 N.E.2d 399 (1982).

134. *Id.* at 651, 442 N.E.2d at 403.

135. *Id.* at 645, 442 N.E.2d at 400.

136. *Id.* at 645-46, 442 N.E.2d at 400.

137. *Id.* at 648, 442 N.E.2d at 402 (citations omitted).

ant consciously disregarded [the] risk to human life."<sup>138</sup>

Having, in *Moran*, extended the *Matchett* principle to unarmed robbery, it appears that the supreme judicial court will restrict the scope of the felony-murder rule whenever it can. Particularly vulnerable to the court's analysis will be those felonies which are not "inherently dangerous to human life"<sup>139</sup> and those which "can be committed without danger to human life."<sup>140</sup> While the *Moran* court did not state that an unarmed robbery accompanied by manual blows to the head, such as that which occurred in *Moran*, can be conceived of as being not inherently dangerous to human life, the court did state that unarmed robbery per se is not inherently dangerous and that the felony-murder rule may not be invoked in the prosecution of that crime unless the jury were to find from the circumstances that the defendant consciously disregarded the risk to human life.<sup>141</sup> If unarmed robbery per se is not inherently dangerous to human life, there is no reason not to believe that armed robbery accomplished by intimidation rather than by force can be committed without posing an inherent danger to life. Moreover, it is conceivable that the other felonies traditionally associated with the felony-murder rule, burglary, arson, and rape, can also be committed without danger to human life. In the trial of a homicide associated with any of these crimes, the *Matchett* principle would require that the jury first find that the defendant consciously disregarded the risk to human life in committing the underlying felony before the jury could apply the felony-murder rule.

That requirement effectively abrogates the felony-murder rule by subsuming what otherwise would be the felony-murder theory of a prosecution into a conventional murder theory under which the jury infers malice from the means used by the defendant in committing the underlying felony by finding that those means display a con-

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138. *Id.* at 651, 442 N.E.2d at 403. "The *Matchett* principle" was enunciated by the court in the following way:

The holding in *Matchett* was based on our recognition that extortion can be committed without danger to human life and on the principle that "criminal liability for causing a particular result is not justified in the absence of some culpable mental state in respect to that result. . . ."

Though *Matchett* involved only felony-murder based on extortion, its principle applies as well to felony-murder based on unarmed robbery. Unarmed robbery is not inherently dangerous to human life.

*Id.* at 650-51, 442 N.E.2d at 403 (citations omitted).

139. *See id.* at 651, 442 N.E.2d at 403; *Matchett*, 386 Mass. at 508, 436 N.E.2d at 410 (citation omitted).

140. *Moran*, 387 Mass. at 650, 442 N.E.2d at 403.

141. *Id.* at 651, 442 N.E.2d at 403.

scious disregard of the risk to human life. The felony-murder rule is abrogated because, under the requirements of *Matchett*, the role that it might have played in the prosecution, that of implying malice on the part of the defendant, is rendered unnecessary: Once malice has been established by a finding of a conscious disregard of the risk to human life, murder is proven; thereafter, there is no need to invoke the felony-murder rule. Yet, in establishing this requirement in *Matchett* and *Moran*, the court, at the same time, declared the felony-murder rule to be "the law of this Commonwealth."<sup>142</sup>

If it is the desire of the supreme judicial court to abrogate the felony-murder rule, the court should do so openly. With the advent of the *Matchett* principle, the felony-murder rule continues to exist in form but not in substance. The *Matchett* principle adds nothing other than confusion to the law of homicide. Other states have openly abrogated the felony-murder rule.<sup>143</sup> In its modern statutory analysis of the felony-murder rule, Hawaii declared that total abrogation, as opposed to judicial limitation of the scope of the felony-murder rule, is the wiser course:

Even in its limited formulation the felony-murder rule is still objectionable. It is not sound principle to convert an accidental, negligent, or reckless homicide into a murder simply because, without more, the killing was in furtherance of a criminal objective of some defined class. Engaging in certain penally-prohibited behavior may, of course, evidence a recklessness sufficient to establish manslaughter, or a practical certainty or intent, with respect to causing death, sufficient to establish murder, but such a finding is an independent determination which must rest on the facts of each case. . . . There appears to be no logical base for the felony-murder rule which presumes, either conclusively or subject to rebuttal, culpability sufficient to establish murder.<sup>144</sup>

## V. CONCLUSION

As a result of the holdings in *Commonwealth v. Matchett*<sup>145</sup> and *Commonwealth v. Moran*,<sup>146</sup> the felony-murder rule is, at present, in a state of de facto abrogation in Massachusetts. The de jure abroga-

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142. *Moran*, 387 Mass. at 648, 442 N.E.2d at 402 (citations omitted).

143. For a general discussion of the modern treatment of the felony-murder rule, see *People v. Aaron*, 409 Mich. 672, 699-707, 299 N.W.2d 304, 312-16 (1980).

144. HAWAII REV. STAT. § 707-701, commentary at 346-47 (1976) (footnotes and citation omitted).

145. 386 Mass. 492, 436 N.E.2d 400 (1982).

146. 387 Mass. 644, 442 N.E.2d 399 (1982).

tion of the rule, therefore, would not change the substance of the law, but would simply clarify the law's uncertain status. Since "a conscious disregard of the risk to human life" indicates, in the context of the opinion upon which the supreme judicial court drew, extreme indifference to the value of life, the prosecutor would be free, even after an express abrogation of the felony-murder rule, to prove malice aforethought, with respect to a homicide that is the result of the commission or attempted commission of a felony, by showing, from the circumstances of the felony, that the defendant acted in conscious disregard of the risk of that result. This would return to the jury its historical function of determining the existence of malice directly,<sup>147</sup> rather than indirectly through the application of the felony-murder rule.<sup>148</sup>

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147. PERKINS & BOYCE, *supra* note 29, at 73-74 (malice is a psychical fact to be determined by the jury).

148. One functional aspect of the felony-murder rule would survive the general abrogation of the rule: upon a finding that a murder occurred in the context of a felony, the degree of murder would be fixed by statute depending on the type of felony. Those murders occurring in the context of a felony punishable with death or imprisonment for life would constitute murder in the first degree; all other murders would be murder in the second degree. *See MASS. GEN. LAWS ANN.* ch. 265, § 1 (West 1970).