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Shaken Baby Syndrome as Felony Murder in North Carolina

DERICK R. VOLLRATH

INTRODUCTION

In May of 2010, Durham Regional Hospital began a program designed to educate new parents about Shaken Baby Syndrome. As part of this program, staff members instruct new parents on the dangers of shaking a baby and suggest alternative ways parents can attempt to calm a seemingly inconsolable child and relieve their own incidental stress. The instruction focuses on what research suggests is the primary reason that parents shake their children: parents’ immense frustration with a period of inconsolable crying that most children experience between two weeks and six months after the child’s birth.

The New York City Administration for Children’s Services and the New York City Department of Health and Mental Hygiene also seek to educate new parents on the dangers of Shaken Baby Syndrome. Literature indicative of their joint awareness campaign implores parents: “No matter how angry or frustrated you feel when your baby or toddler

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1 Derick Vollrath is an associate at the Raleigh law firm of Tharrington Smith, LLP.
2 DRH Program Takes on Shaken Baby Syndrome, HERALD-SUN (Durham, N.C.), May 12, 2009, at C4 (“Durham Regional Hospital is providing a shaken baby syndrome prevention program called ‘The Period of PURPLE Crying’ for patients who deliver at Durham Regional.”).
3 Id. The article states: The program includes education from Durham Regional postpartum nurses who have been trained on Shaken Baby Syndrome, as well as a video and a booklet that parents can share with other caregivers of their baby. The program describes the hazards of shaking and gives [parents] alternatives to use when they feel they need a break from a crying baby.
4 Id.
5 PERIOD OF PURPLE CRYING, http://www.purplecrying.info/sections/index.php?sct=5&sctp=s20&loc=mbr3p6 (last visited Jan. 26, 2012) (observing that nearly all children cry more during this period, that most cases of Shaken Baby Syndrome involve children of this age, and inferring a causal relationship between the two).

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cries—and no matter how much he or she cries—never shake your baby or toddler. Shaking can cause bleeding in the brain that can injure or even kill a child.\textsuperscript{5}

These awareness campaigns have a clear implication. They suggest that a significant proportion of Shaken Baby Syndrome cases are perpetrated by individuals who are either unaware that shaking a baby can kill or who are so profoundly frustrated by their circumstances that they fail to perceive the consequences of their actions at the time they shake the child.

While public health agencies set out to educate parents on the dangers of shaking babies, District Attorneys’ offices around the nation prosecute those who do shake their children.\textsuperscript{6} In North Carolina, a caregiver who shakes a baby to death can be tried for, and convicted of, first-degree murder.\textsuperscript{7}

Some shaken baby cases truly involve premeditated acts outside those contemplated by the myriad Shaken Baby Syndrome awareness campaigns.\textsuperscript{8} Others, however, involve no intent to kill or spring from the heat of passion that would ordinarily bring a homicide squarely within the definition of manslaughter.\textsuperscript{9} North Carolina law, however, allows all shaken baby cases to be charged as capital crimes.\textsuperscript{10}

The wisdom of this approach is debatable. Intent to kill, premeditation, and at the very least, perception of a risk of death are ordinarily predicates of a murder conviction.\textsuperscript{11} However, children present special

\textsuperscript{5} Id. at 2 (warning that “[a] crying baby is not ‘bad’ or ‘spoiled’” and “[i]t is a crime to shake a baby”).


\textsuperscript{7} See, e.g., id. But see State v. Barrow, 718 S.E.2d 673 (2011) (upholding a jury’s conviction of a defendant for second degree murder in a shaken baby syndrome case in which the same jury acquitted the defendant of first-degree murder on the felony murder theory discussed infra).

\textsuperscript{8} See, e.g., State v. Anderson, 513 S.E.2d 296, 301 (N.C. 1999) (“In September 1996, defendant was tried capitally and found guilty of first-degree murder on the basis of malice, premeditation and deliberation; on the basis of torture; and under the felony murder rule.”).

\textsuperscript{9} See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 544 (4th ed. 2006) (observing that “[m]anslaughter is an unlawful killing that does not involve malice aforethought” and that “an intentional killing committed in ‘sudden heat of passion’ as the result of ‘adequate provocation’ is voluntary manslaughter”).

\textsuperscript{10} See infra Part I.

\textsuperscript{11} DRESSLER, supra note 9, at 543–44 (observing that “[t]he common law definition of ‘murder’ is ‘the killing of a human being by another human being with malice aforethought’ and further observing that “a person who kills another acts with ‘malice’ if she
cases. They are vulnerable members of society, ordinarily unable to protect themselves.12 Moreover, where parents or other caretakers shake their children to death in violation of their respective duties, there exists a layer of moral opprobrium that the typical murder case lacks. Both deterrent and retributive rationales support punishing shaken baby cases more harshly than other homicides committed with a similar mens rea.

But these considerations do not animate the law that enables North Carolina prosecutors to bring first-degree murder charges in shaken baby cases. The North Carolina General Assembly has not determined that homicides involving infants deserve classification as a higher degree of murder or that only particularly severe punishment can adequately deter those who would otherwise kill a child.13 Instead, prosecutors’ authority to bring first-degree murder charges in shaken baby cases derives from the idiosyncratic interpretation of North Carolina’s felony murder rule.14

This Article argues that the North Carolina criminal law’s treatment of Shaken Baby Syndrome should be reformed. Rather than leaving in place a legal regime that allows the state to prosecute all Shaken Baby Syndrome deaths to prosecution as first-degree murder, the law should distinguish between accidental and purposeful killings. If the state wishes to punish Shaken Baby Syndrome cases with special severity, the General Assembly should make this policy choice explicit.

In making this argument, this Article proceeds in three parts. First, this Article examines how and why North Carolina subjects all Shaken Baby Syndrome deaths to prosecution as first-degree murder.15 Part I examines the two rules that, when combined, achieve this result: North Carolina’s felony murder rule,16 and the State’s codification of the crime possesses . . . (1) the intention to kill a human being; (2) the intention to inflict grievous bodily injury on another; [or] (3) an extremely reckless disregard for the value of human life”).


13. North Carolina has made explicit policy choices to categorize some murders as more severe than others. See N.C. GEN. STAT. § 14-17 (2011) (categorizing a murder as first-degree where that murder was “perpetrated by means of a nuclear, biological, or chemical weapon of mass destruction[,] . . . poison, lying in wait, imprisonment, starvation, [or] torture”). In addition, North Carolina allows for enhanced sentencing with the presence of aggravating factors including the victim’s very young age. Id. § 15A-1340.16(d)(11); see also State v. Barrow, 718 S.E.2d 673, 676 (N.C. App. 2011) (noting that defendant was indicted on aggravating factors because the victim was five months old and because defendant “took advantage of a position of trust to commit the offense”).

14. See infra Part I.

15. See infra Part I.

16. See infra Part I.A.
of felonious child abuse. Second, this Article digs deeper into the felony murder doctrine, arguing that North Carolina’s felony murder rule is indefensible in the Shaken Baby Syndrome context. Finally, this Article’s conclusion suggests reform of the way the North Carolina criminal law treats Shaken Baby Syndrome cases. This Part argues for legislative and judicial reform that would limit North Carolina’s felony murder rule in child abuse cases. If the State wishes killing children to be punished more severely than killing an adult, the General Assembly should make that policy choice explicit. In the absence of such reforms, prosecutors should take it upon themselves to exercise sound discretion. Prosecutors should bring first-degree murder charges only in those Shaken Baby Syndrome cases that involve a defendant who acted with the premeditated design to kill or with knowledge that death would result from his actions.

I. NORTH CAROLINA LAW ALLOWS ALL SHAKEN BABY SYNDROME DEATHS TO BE PROSECUTED AS FIRST-DEGREE MURDER

All Shaken Baby Syndrome deaths in North Carolina can be prosecuted as first-degree murder. This holds even if the defendant did not act with the purpose to kill and if the defendant did not perceive the possibility that a child might die as a result of the shaking. This deviation from the ordinary predicates of a murder conviction in Shaken Baby Syndrome cases results not from the North Carolina General Assembly’s explicit policy choice that Shaken Baby Syndrome cases present particularly troubling facts, but rather from the idiosyncratic interpretation of North Carolina’s felony murder rule and the North Carolina statute defining the crime of felony child abuse. This Part discusses each of these rules in turn.

17. See infra Part I.B.
18. See infra Part III.
19. Id.
20. Id.
21. Not all Shaken Baby Syndrome deaths are in fact prosecuted as first-degree murder, however. Some cases are prosecuted as manslaughter. See, e.g., State v. Evans, 345 S.E.2d 193 (N.C. Ct. App. 1986) (concerning the appeal of a case in which defendant pled to manslaughter for shaking a baby to death).
A. North Carolina’s Felony Murder Rule

North Carolina’s felony murder rule appears in the section of the North Carolina General Statutes that defines first-degree murder. After defining first-degree murder as “[a] murder which shall be perpetrated by means of a nuclear, biological, or chemical weapon of mass destruction[,] . . . poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing,” the statute goes on to set forth the felony murder rule. In so doing, the statute further defines first-degree murder as one that is “committed in the perpetration or attempted perpetration of any arson, rape, or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon.” The requirements for finding a person guilty of first-degree murder under North Carolina’s felony murder rule in a Shaken Baby Syndrome case therefore become clear. As a Shaken Baby Syndrome case clearly does not fall under the rubric of any of the enumerated felonies, the prosecution must proceed under the catchall “other felony committed or attempted with the use of a deadly weapon” language. Thus, in order for felony murder to apply, the prosecution must prove that the defendant: (1) killed another, (2) in the perpetration or attempted perpetration of (3) a felony committed or attempted with the use of a deadly weapon.

1. The “Use of a Deadly Weapon” Requirement

At first blush, it would appear that North Carolina’s felony murder rule contains language that would limit the rule’s application to Shaken Baby Syndrome cases. Requiring that a would-be felony murderer commit the underlying felony with a deadly weapon seems to remove Shaken Baby syndrome from the reach of the felony murder rule. However, North Carolina courts have held that, in certain contexts, an individual’s hands can qualify as deadly weapons.

In State v. Jacobs, for example, the North Carolina Court of Appeals held that a defendant’s fists qualified as “deadly weapons” within

23. Id.
24. Id.
25. That is, Shaken Baby Syndrome deaths do not necessarily involve arson, rape, a sex offense, robbery, kidnapping, or burglary. See id.
the meaning of the North Carolina statute prohibiting assault with a deadly weapon. In so holding, the court observed that an item's status as a deadly weapon must be evaluated in light of “the manner in which [it was] used and the relative size and condition of the parties.” Such an item is a deadly weapon if, given these circumstances, the item “is likely to produce death or great bodily harm.”

Under such a standard, it is not surprising that the North Carolina Supreme Court has held that an adult’s hands can constitute deadly weapons in Shaken Baby Syndrome cases. In State v. Pierce, the North Carolina Supreme Court observed, “When a strong or mature person makes an attack by hands alone upon a small child, the jury may infer that the hands were used as deadly weapons.” The Pierce court upheld a jury's determination that a defendant’s hands were deadly weapons under North Carolina’s felony murder rule where the defendant was a 150-pound adult male and the defendant used his hands to shake a two-and-a-half-year-old child to death.

That said, juries do not always find that a defendant used his hands as deadly weapons in Shaken Baby Syndrome cases. In State v. Barrow, for example, the trial court instructed the jury in a Shaken Baby Syndrome case that it could convict the defendant of felony murder, second-degree murder, or manslaughter. The jury acquitted the defendant of felony murder but convicted him of second-degree murder. On appeal, the defendant argued that no evidence in the record would support such a verdict: either defendant committed felony murder or no murder at all. The Court of Appeals rejected this argument, observing, “[T]he State’s evidence would have permitted the jury to find that defendant did

28. Id. at 430.
29. Id.
30. Id. (quoting State v. Sturdivant, 283 S.E.2d 719, 725 (N.C. 1981)). In Jacobs, the court held that a defendant’s fists were deadly weapons in a case in which the defendant, “a thirty-nine year old male who weighed two hundred ten pounds, hit the victim, a sixty year old woman, in the head and stomach.” Id. The victim suffered brain hemorrhaging as a result of her injuries and became unable to care for herself. Id.
32. Id. at 589 (citing State v. Eliot, 475 S.E.2d 202, 213 (N.C. 1996); State v. Lang, 308 S.E.2d 317, 325 (N.C. 1983)).
33. Id.
35. Id. at 678.
36. Id. at 677.
37. Id. at 674.
not use a deadly weapon but still killed [the victim] with malice . . .” 38
The Court of Appeals observed that while the law permitted the jury to find that a defendant used his hands as a deadly weapon, the law did not require it to do so. 39

2. The Necessary Mens Rea

North Carolina’s felony murder statute makes no mention of a specific mental state with which a defendant must act to sustain a conviction for felony murder. 40 In State v. Jones, 41 however, the North Carolina Supreme Court held that to convict a defendant under the felony murder rule, the State must prove that the defendant committed the underlying felony with some level of intent. 42 The court held that a defendant must have been “purposely resolved” to commit the “conduct that comprises the [underlying] criminal offense.” 43

Jones concerned a defendant who, while driving under the influence of alcohol, struck an occupied vehicle. 44 The collision resulted in the deaths of two teenagers and serious injury to three others. 45 One passenger escaped with only minor injuries. 46 At trial, the jury convicted Jones of four crimes: (1) first-degree murder under the felony murder rule; (2) assault with a deadly weapon inflicting serious injury (AWDWISI); (3) assault with a deadly weapon (AWDW); and (4) driving while impaired (DWI). 47

The judge allowed Jones’s conviction of AWDWISI against one of the impacted vehicles’ passengers to serve as the predicate felony for the murder of another of the impacted vehicle’s passengers. 48 Importantly, the trial court instructed the jury that felony murder did not require the state to prove that the defendant acted with any mental state other than that required by the underlying felony. 49 With respect to the underlying

38. Id.
39. Id.
40. N.C. GEN. STAT. § 14-17 (2011) (including no such requirement).
42. Id. at 924.
43. Id.
44. Id. at 921.
45. Id.
46. Id.
47. Id.
48. Id. at 922 (“In the instant case, defendant was charged with first-degree murder under the felony murder rule based on the underlying felony of AWDWISI.”).
49. Id. at 921.
AWDWISI charge, the judge instructed the jury that the defendant “may be convicted . . . provided there is either an actual intent to inflict injury or culpable or criminal negligence from which such intent may be implied.”

The North Carolina Supreme Court held that these instructions were incomplete and that mere negligence as to the act constituting the underlying felony could not sustain a conviction under the felony murder rule. In reaching this conclusion, the court considered the way North Carolina has treated first-degree murder throughout the state's history. The court concluded that a first-degree murder conviction requires "that the defendant had 'actual intent' to commit the act that forms the basis of a first-degree murder charge."

Importantly, the court held that the intent requirement applies only to the conduct that comprises the underlying felony. The defendant need not act with any particular mental state with respect to the attendant circumstances or the results of the crime that felony murder requires. Specifically, a defendant need not know that his conduct is a felony, and needs to act neither with the purpose of causing a death, nor with the knowledge that a death would result from his intended conduct.

50. Id. at 923.
51. Id. at 923–24. Explaining this holding, the court stated:
   Whether ‘general intent,’ ‘specific intent,’ or ‘malice’ crimes, all of the enumerated offenses [in North Carolina's felony murder rule] require a level of intent greater than culpable negligence on the part of the accused. In short, the accused must be purposely resolved to commit the underlying crime in order to be held accountable for unlawful killings that occur during the crime's commission.
   Id. at 924.
52. Id. (observing that all forms of first-degree murder recognized in North Carolina require an actual intent to commit the action resulting in the first-degree murder charge). The court observed that to be convicted of killing by torture, the defendant must have intended to torture; and to be convicted of killing someone by firing a gun into a building the defendant thought was occupied, the state must prove that the defendant intentionally fired into the building. Id.
53. Id.
54. Id.
55. Id.
56. Id. ("This is not to imply that an accused must intend to break the law . . . .").
57. Id. ("[T]he actual intent to kill may be present or absent . . . .").
B. Felony Child Abuse in North Carolina

North Carolina law outlines many different ways in which a parent or other caregiver can commit felony child abuse. Caregivers commit felony child abuse if they permit or encourage their children to participate in prostitution,\(^58\) commit or allow the commission of any sexual act upon their children,\(^59\) or—either through willful act or grossly negligent omission—manifest a reckless disregard for human life resulting in serious injury to the child.\(^60\)

Most importantly for the discussion of Shaken Baby Syndrome deaths, however, North Carolina law defines as felony child abuse instances in which (1) a parent or caretaker of (2) a child fewer than sixteen years of age (3) either (a) intentionally inflicts serious physical injury upon the child or (b) intentionally commits an assault upon the child which results in serious physical injury to the child.\(^61\) The latter alternative of the third prong is particularly relevant. It allows the state to convict a caregiver of felony child abuse even if a caregiver intended only to assault the child. The statute does not require the caretaker to intend that the assault result in serious physical injury to the child.\(^62\)

Establishing intent to commit an assault is not difficult under North Carolina law. North Carolina has not codified the elements of criminal assault, and the crime therefore continues to be governed by common law.\(^63\) The common law defines an assault as “an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another.” Further, the show of force “must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm.”\(^64\)

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59. Id. § 14-318.4(a)(2).
60. Id. §§ 14-318.4(a)(4)–(5).
61. See id. § 14-318.4(a) (codifying the laws prohibiting felony child abuse).
62. See, e.g., State v. Williams, 646 S.E.2d 613, 617 (N.C. Ct. App. 2007) (“[T]he element of intent is sufficiently established if a defendant intentionally inflicts injury that proves to be serious on a child of less than sixteen years of age in his care. He need not specifically intend the injury to be serious.” (internal quotation marks omitted) (citing State v. Campbell, 340 S.E.2d 474, 476 (N.C. 1986])); see also State v. Capps, No. COA09-1011, 2010 N.C. App. LEXIS 587, at *13–16 (N.C. Ct. App. Apr. 6, 2010) (drawing on Williams and Campbell to reach the same conclusion).
64. Crouse, 610 S.E.2d at 458 (citation omitted) (internal quotation marks omitted).
65. Id.
This formulation is misleading, however, because the common law establishes a low threshold for the nature of the feared “physical injury” or “bodily harm” that an assault must entail. The North Carolina Supreme Court has observed that under the state’s criminal law, every battery necessarily contains an assault, and that a battery occurs whenever “any force is applied, directly or indirectly, to the person of another.” 66 A slap is sufficient to constitute battery, 67 as is an unwanted poke. 68

Shaken Baby Syndrome cases therefore almost uniformly present situations in which an assault has occurred. If the necessary attendant circumstances exist, 69 and the assault results in serious physical or bodily injury, 70 a defendant will be guilty of felonious child abuse.

C. Putting the Two Together

In light of the North Carolina courts’ interpretation of North Carolina’s felony murder rule and the state’s definition of felony child abuse, any homicide resulting from Shaken Baby Syndrome can be prosecuted as first-degree felony murder. To convict a person of felony murder with child abuse serving as the predicate felony, the state needs to prove that (1) the defendant committed or attempted to commit felonious child abuse, (2) the defendant killed the child in the course of committing or attempting to commit felonious child abuse, (3) the defendant’s actions proximately caused the child’s death, and (4) the act of felony child abuse was committed with a deadly weapon. 71 To convict a defendant of felony child abuse, the state must prove that (1) the defendant was pro-

67. Id. at 520 (finding sufficient evidence of an assault on a female victim when the defendant hit her on the neck and slapped her when she screamed).
69. That is, the victim is under the age of sixteen and the defendant is the victim’s caregiver. N.C. GEN. STAT. § 14-318.4(a) (2011) (codifying these attendant circumstances as elements of the offense).
70. If the assault results in serious physical injury, defendant will be guilty of a class E felony. Id. If the assault results in serious bodily injury or protracted or permanent loss or impairment of any mental or emotional function of the child, the defendant will be guilty of a class C felony. Id. § 14-318.4(a3). A serious physical injury is one that causes “great pain and suffering” including serious mental injury. Id. § 14-318.4(d)(2). A serious bodily injury is one that causes substantial risk of death, causes permanent injuries, or results in prolonged hospitalization. Id. § 14-318.4(d)(1).
viding care to the child; (2) the child was under sixteen years of age; (3) the defendant (a) intentionally assaulted the child, (b) the child suffered serious injury, and (c) the assault proximately caused the injury.72

A typical Shaken Baby Syndrome homicide meets these requirements. It is assumed within the definition of a Shaken Baby Syndrome case that a parent or other caretaker has shaken a small child. Even if a caregiver shook the child out of sheer passionate frustration or without understanding the potential consequences of his or her actions, the caregiver will have intended to undertake the act of shaking the child. In cases involving a large defendant and an infant child, the jury may infer that the defendant used his or her hands as deadly weapons. A serious injury necessarily precedes the victim’s eventual death. All elements of a felony murder conviction present themselves in a Shaken Baby Syndrome case.

Of importance to North Carolina’s treatment of Shaken Baby Syndrome homicides is that North Carolina’s “merger doctrine” appears not to apply to felonious child abuse. The merger doctrine limits the felony murder rule in most jurisdictions.73 In jurisdictions that recognize the merger doctrine, the felony murder rule only applies if the predicate felony is collateral to or independent of the homicide.74 The underlying felony must have been undertaken “with a collateral and independent felonious design separate from the intent to inflict the injury that caused the death.”75 To adopt a contrary rule would render every felonious death a first-degree murder and destroy the crimes of manslaughter and negligent homicide.76

North Carolina’s Supreme Court appears to have adopted the merger doctrine only reluctantly and in a limited capacity. In a footnote to

72. See id. § 239.55 (2005).
73. See State v. King, 340 S.E.2d 71, 73–74 (N.C. 1986) (observing that North Carolina has never adopted the merger doctrine and declining to do so in that case). For an example of the merger doctrine in action, see Edge v. State, 414 S.E.2d 463, 464 (Ga. 1992). In Edge, the state of Georgia applied a modified version of the merger doctrine to limit liability for felony murder where the underlying felony formed an integral part of the conduct that resulted in the death and where circumstances would otherwise warrant a mitigation of the homicide to mere manslaughter. Id.
74. DRESSLER, supra note 9, at 563.
75. Id. at 565 (quoting People v. Hansen, 885 P.2d 1022, 1029 (Cal. 1994)) (internal quotation marks omitted).
76. Id. at 564 (“[A] felony murder rule without some form of independent-felony limitation would effectively destroy the distinctions set up by legislatures between first- and second-degree murder and manslaughter.”).
its opinion in *State v. Jones*, the North Carolina Supreme Court suggested in dicta that while North Carolina has rejected the merger doctrine where an assault on one victim causes the death of another, “cases involving a single assault victim who dies of his injuries have never been similarly constrained.” The court continues, declaring that “in such cases, the assault on the victim cannot be used as an underlying felony for purposes of the felony murder rule.” In so stating, the court adopted the prevailing rationale that to allow an assault or other felony perpetrated against one victim to serve as a predicate for a felony murder charge for the death of the same victim would effectively undo the General Assembly’s codification of lesser homicides.

However, other language in the *Jones* opinion and subsequent holdings by the North Carolina Supreme Court and Court of Appeals reveals that the court did not adopt the merger doctrine wholesale. In *Jones*, the court stated that a defendant would be subject to a felony murder conviction where he fired a weapon into an occupied building (a felony in North Carolina) and that action resulted in a death. The court so stated even though this rule converts a classic second-degree murder perpetrated in wanton and reckless disregard for human life into a first-degree felony murder based on conduct inextricably bound up in the commission of the second-degree murder. It is difficult to see how the two felonies (the murder and the discharging of a firearm into an occupied building) were perpetrated with the independent felonious design that the merger doctrine typically requires.

Further, the North Carolina Supreme Court has distinguished cases in which a series of assaults culminate in a death. In *State v. Caroll*, for example, the defendant attacked his victim with a machete and then strangled her to death. The court held that the attack with the machete and the act of strangulation constituted two separate assaults and that

77. *See supra* Part I.A.2 and accompanying text.
79. *Id.*
80. *Id.*
81. *Id.* at 925.
84. *Id.* at 903–04.
the machete attack could serve as the underlying felony for a felony murder charge based upon the death by strangulation.85

Although North Carolina’s adoption of the merger doctrine has been muddled and piecemeal, it appears clear that the rule does not preclude felony child abuse from undergirding a felony murder conviction. In the same Jones opinion in which the court articulated North Carolina’s merger doctrine, the court observed that felony child abuse could support a felony murder conviction.86 Further, in the 2003 case, State v. Stokes,87 the court affirmed a defendants’ conviction for felony murder in a case in which felony child abuse was offered as the predicate felony.88 While Stokes did not explicitly confront the issue of whether felony child abuse can serve as the predicate felony for a felony murder charge, the court expressed no reservations on this score.89

North Carolina’s version of the felony murder rule and the state’s codification of felony child abuse operate to elevate every fatal case of Shaken Baby Syndrome to the status of a first-degree murder. While North Carolina’s felony murder rule limits felony murder to crimes involving the use of a deadly weapon, North Carolina’s courts consistently hold that a jury can find a defendant’s hands to be deadly weapons where the defendants are much larger than their victims. While North Carolina’s felony murder rule requires that a defendant intentionally commit the underlying felony, the slightest battery more than satisfies this requirement in felony child abuse cases. North Carolina’s version of the merger doctrine does not prohibit felony child abuse from underlying a felony murder charge.

This treatment does not result from the North Carolina General Assembly’s explicit policy choice to punish Shaken Baby Syndrome cases particularly harshly. Rather, it results from a series of idiosyncratic interpretations of North Carolina’s felony murder rule.

85 Id. at 906. This result is questionable in light of North Carolina’s requirement that the death occur during the course of the felony underlying a felony murder conviction.

86 Jones, 538 S.E.2d at 925 (“Specific crimes that have qualified as an underlying felony . . . include . . . felonious child abuse.” (citing State v. Pierce, 488 S.E.2d 576 (N.C. 1997))).


88 Id. at 56; see also State v. Carrilo, 562 S.E.2d 47 (N.C. Ct. App. 2002) (affirming a conviction for felony murder with child abuse serving as the underlying felony).

89 See Stokes, 581 S.E.2d at 56.
II. THE FELONY MURDER DOCTRINE: NATIONAL BACKGROUND

The national debate surrounding the felony murder doctrine may further illustrate the peculiarities and shortcomings of North Carolina's version of the rule, especially as it applies to Shaken Baby Syndrome cases. The felony murder rule is a controversial doctrine with no shortage of detractors. Those who disfavor the rule argue that it fails to correlate the grade of an offense with a defendant's culpability and achieves no deterrent purpose. Supporters of the doctrine argue that this is not always true and that the felony murder rule has valid expressive value. This Part describes the leading objections to and arguments in support of the felony murder rule. It then argues that North Carolina's felony murder rule, as applied to Shaken Baby Syndrome cases, would not satisfy even those who defend the felony murder doctrine.

A. Against the Felony Murder Rule

The vast majority of criminal law scholars disfavor the felony murder rule. These scholars evaluate the felony murder rule in light of the traditional aims of the criminal justice system: retribution for and deterrence of socially undesirable and morally wrong actions.

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91. See infra Part II.A.

92. See id.

93. See infra Part II.B.

94. See, e.g., Binder, Culpability, supra note 90, at 966 (“Most criminal law scholars have assumed there is nothing to say on behalf of the felony murder doctrine, no way to rationalize its rules to the lawyers who will apply it, and no reforms worth urging on courts and legislatures short of its utter abolition.”).

95. See Crump, supra note 90, at 1160 (observing that opponents of the felony murder rule argue that the felony murder rule fails to capture the moral blameworthiness of criminal defendants and that “classic arguments [against the felony murder rule] also assert that the felony murder rule cannot advance other goals of the criminal law, including those founded on utilitarian concepts such as deterrence”).
1. Failure to Correlate with a Defendant’s Culpability

Most modern criticism of the felony murder rule revolves around retributive rationales. Professor James Tomkovicz, for example, observes that modern sensibilities demand that criminal liability correlate to an individual defendant’s culpability or “mental fault.” Where the felony murder rule allows the state to convict a defendant for an accidental killing, the law is “disloyal to the principle that some level of mental fault is required for each essential element” of a crime.

2. Lack of Deterrent Value

Other critiques of the felony murder doctrine focus on the rule’s deterrent value. In her influential student note, Jeanne Hall Seibold argues that the felony murder rule cannot possibly achieve deterrent ends because accidental and negligent actions cannot be deterred. Working from the additional premise that felony murder covers primarily accidental and negligent killings, Seibold concludes that the felony murder rule has no deterrent value. Justice Oliver Wendell Holmes, Jr. also offered this criticism of the felony murder doctrine. Additionally, Holmes argued that felons will not be deterred from accidentally killing in furtherance of a homicide because felons are unlikely to know the ni-

96. See James J. Tomkovicz, The Endurance of the Felony-Murder Rule: A Study of the Forces that Shape Our Criminal Law, 51 WASH. & LEE L. REV. 1429, 1441 (1994) (“[T]he major complaint about the felony-murder rule is that it violates generally accepted principles of culpability.”).

97. Id. at 1437 (“The third aspect of modern scholarly thought that is implicit in some of the foregoing is the demand for liability proportionate to culpability.”).

98. Id. at 1439.


100. See Seibold, supra note 99, at 151 (citing Jerome Hall, Negligent Behavior Should be Excluded From Penal Liability, 63 COLUM. L. REV. 632, 642 (1963)).

101. See id. (observing that “[s]ince neither negligence nor accident can be deterred” the felony murder does not serve a deterrent purpose). This argument is wrongheaded, however: strict and negligent liability have definite deterrent effects.

eties of the felony murder rule and therefore the rule will not factor into a felon's decision-making process.103

3. Constitutionality and Fairness

Still other commentators take issue with the rule’s constitutionality and its implications for procedural fairness. They argue that under some formulations of the doctrine, the felony murder rule creates a presumption as to an element of a criminal offense and that this presumption violates the Constitution’s requirement that a state prove all elements of a crime beyond a reasonable doubt.104 Alternatively, avoiding a mens rea presumption by formulating the felony murder rule as truly a strict liability offense raises other Eighth Amendment and Due Process Clause concerns.105 Even if these moves do not run afoul of the Constitution, they amount to short cuts whereby prosecutors can achieve convictions without proving elements that homicide laws would otherwise require.106

B. In Support of the Felony Murder Rule

While most scholars reject the felony murder doctrine as failing either to correlate with a defendant’s culpability or to effectively deter homicides, the doctrine does have some supporters.107 Those who support the doctrine aver that the rule’s detractors argue against a straw man—a caricature of the rule that hasn’t existed for decades,108 if it ever existed

103. See id.; see also Crump, supra note 90, at 1160 (commenting on the criticism Holmes leveled along these lines).
105. Id. at 478–79 (citing Enmund v. Florida, 458 U.S. 782, 788–801 (1982), for the proposition that assigning heavy criminal liability for a crime that lacks a mens rea component might cross the threshold of constitutionality).
106. See, e.g., Seibold, supra note 99, at 157 (“Significant procedural advantages can be gained by predicking an indictment on felony-murder rather than, or in the alternative with, intentional murder.”).
107. See, e.g., David Crump & Susan Waite Crump, In Defense of the Felony Murder Doctrine, 8 HARV. J.L. & PUB. POL’Y 359 (1985) (defending the felony murder doctrine); Binder, Culpability, supra note 90, at 967 (attempting to provide “the long-missing principled defense of the felony murder doctrine”).
108. See Binder, Culpability, supra note 90, at 969 (arguing that one of the “two main reasons” that criminal law theorists dismiss the felony murder rule as irrational “is a distorted picture of felony murder liability as imposing strict liability for accidental death in the course of all felonies”). Professor David Crump alludes to this phenomenon in his argument that the validity of critiques of the felony murder rule depends on the particu-
at all. In fact, they argue, the felony murder rule is subject to several kinds of limitations and exceptions that ensure that the law captures only morally culpable offenders.

Professor David Crump is probably the foremost defender of the felony murder doctrine, at least in some incarnations. In his most recent article on the subject, Crump observes that the felony murder rule is a longstanding feature of state law, and consequently has evolved differently in each jurisdiction. As of 2006, for example, Missouri had opted for a broad interpretation of the rule, while Hawaii, Kansas, and Michigan have done away with the rule completely. Other states have limited the applicability of the felony murder rule in different ways. Crump argues that the validity of any criticism of the rule depends on the particular version of the rule in question. Some formulations of the felony murder rule achieve a just and reasonable result. Others do not.

Crump offers California’s felony murder doctrine as an example of a flawed version of the rule. California’s felony murder rule is primarily a judicial doctrine, born out of judicial interpretation of the concept of malice written into California’s murder statute. California’s felony murder rule is primarily limited by a requirement that the felony underlying a felony murder conviction be “inherently dangerous.” This test
does not look to the individual defendant's conduct in the course of committing the felony, but rather asks whether the felony itself is capable of being committed in a non-dangerous manner.117

This rule has proved better at testing the judicial imagination than the culpability of a defendant's conduct. California's courts have been able to hypothesize safe ways to commit the crimes of practicing medicine without a license under conditions creating a great risk of bodily harm, serious physical or mental illness, or death; false imprisonment by violence, menace, fraud, or deceit; possession of a sawed-off shotgun; extortion; and child endangerment or abuse.118 These felonies therefore cannot serve as predicates to a felony murder conviction. California courts have not thought of similarly safe ways to commit the crimes of manufacturing methamphetamine, kidnapping, arson of a motor vehicle, or grossly negligent discharge of a firearm.119 These felonies therefore can give rise to felony murder liability.

Crump argues that California's decisions as to what felonies can underlie a felony murder conviction are arbitrary.120 Further, the "inherent" dangerousness of a felony bears little necessary relationship to the defendant's actual conduct in the course of committing that felony. Consequently, California's felony murder rule does a poor job aligning punishment for a homicide with a defendant's culpability, and is therefore vulnerable to criticism on these grounds.121

Crump argues that while California's felony murder doctrine fails to correlate with a defendant's culpability, other versions of the rule do a better job. He offers Texas's felony murder statute as an example of a well-formulated felony murder rule. According to Texas's felony murder rule, defendants commit felony murder if they (1) commit or attempt to commit a felony other than manslaughter, and (2) in the course of and in furtherance of or in immediate flight from the commission of the offense, they (3) commit or attempt to commit an act clearly dangerous to human life that (4) causes the death of an individual.122 The requirement that a defendant commit or attempt an act clearly dangerous to human life ties Texas's felony murder rule to a defendant's individual

117. Id.
118. Id. at 1172 (quoting People v. Howard, 104 P.3d 107, 111–12 (Cal. 2005)).
119. Id. (quoting Howard, 104 P.3d at 111–12).
120. See id. ("[T]he list of felonies that the California court has found to be 'inherently dangerous' looks completely arbitrary when compared with the list of felonies that it has found not to be 'inherently dangerous' . . . .").
121. See id. at 1173 ("[T]he California rule gives the appearance of a disconnect between moral blameworthiness and crime definition.").
122. Id. at 1166 (quoting TEX. PENAL CODE § 19.02(b)(3) (2008)).
culpability. Crump argues that this rule is likely good enough, but observes that it can still be improved by adding language that would require a defendant to have intentionally committed the underlying felony and that the defendant intentionally commit an act that he knows to be clearly dangerous to human life.

Professor Guyora Binder also provides a defense of the felony murder rule. He argues that, subject to other appropriate limitations, felony murder liability is deserved where a defendant acts with “an additional malign purpose independent of injury to the victim killed.” Binder would go as far as to allow a conviction for felony murder even if a criminal defendant committed the underlying felony only negligently, so long as the state proved that the defendant acted with this additional malign purpose. Binder justifies this conclusion by observing that “the felon’s additional depraved purpose aggravates his culpability for causing a death carelessly.”

C. North Carolina’s Felony Murder Rule in Light of These Argument

Those opposed to felony murder liability in general will find nothing favorable about North Carolina’s felony murder rule. As with other versions of the felony murder rule, North Carolina’s allows a defendant to be convicted of murder even if a defendant did not act with a premeditated intent to kill. In fact, North Carolina’s felony murder rule may attract greater derision on these grounds, as it converts a killing

123. See id. (“[T]his statute is a good law because it ties the crime of murder to relatively high degrees of individual blameworthiness.”).
124. See id. at 1169 (observing that “the statute . . . could be improved if it were amended to include additional language”). But see id. at 1170 (“Extra words in a jury charge cause confusion, of course, and in this instance it seems doubtful that the value of the extra words is worth it.”).
125. Binder suggests limitations different from those offered by Crump. Specifically, Binder argues that the rule should only apply where a defendant attempts felonies inherently involving violence or destruction. Binder, Culpability, supra note 90, at 967. Crump would likely object to this limitation based on the difficulty the California courts have had defining similar language. See Crump, supra note 90, at 1171–73.
126. Binder, Culpability, supra note 90, at 967.
127. Id.
128. Id.
129. See supra Part II.A.
130. See State v. Pierce, 488 S.E.2d 576, 589 (N.C. 1997) (“Felony murder . . . does not require the State to prove any specific intent on the part of the accused.”).
in the course of a felony into murder in the first-degree, even though a second-degree murder conviction is the usual outcome in other jurisdictions.

1. The North Carolina Felony Murder Rule Lacks an “Inherently Dangerous Act” Requirement

Even those who support felony murder liability in the abstract, however, may find North Carolina’s felony murder rule objectionable. As Professor Crump observes, a well constructed felony murder rule can hinge to a defendant’s moral culpability if the rule requires the state to prove that a defendant undertook a particularly dangerous act in the course of committing the underlying felony. This requirement limits liability to instances in which a defendant acted with a careless disregard for the potential consequences of his actions. North Carolina’s rule nearly imposes such a requirement by requiring that the state prove that a defendant committed the underlying felony with a deadly weapon.

If this deadly weapon requirement were given its colloquial meaning, it would go a long way towards restricting the felony murder rule to instances in which a defendant acted with true culpability. Engaging a deadly weapon dramatically raises the stakes of a felonious act. Additionally, the planning incumbent in bringing a deadly weapon to the scene of a felony implies at least some minimal degree of preparation, and therefore knowledge or intent, on the part of the defendant. Put another way, the defendant knowingly and intentionally brought the weapon to a scene of a felony, and either knew or should have known that this made the possibility of a death in the course of the felony much more likely. The reckless disregard for the safety of others manifest in employing a deadly weapon, as the term is colloquially understood, combined with a defendant’s malign purpose of using the deadly weapon to further the underlying felony, may give rise to a degree of moral culpability equivalent to premeditated murder.

131. N.C. GEN. STAT. § 14-17 (2011) (“A murder . . . which shall be committed in the perpetration or attempted perpetration of any . . . other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree . . . .”).

132. See DRESSLER, supra note 9, at 557 (observing that according to most modern murder statutes, “[i]f a death results from the commission of an unspecified felony, it is second-degree murder”).

133. See supra Part II.B.

134. See Crump, supra note 90, at 1166 (observing that a statute with such a requirement “is a good law because it ties the crime of murder to relatively high degrees of individual blameworthiness”).
Despite this limiting language, North Carolina courts have hampered the effectiveness that the language may have had through their application of the felony murder rule. North Carolina courts have held that whether an object is a deadly weapon depends not upon the object’s inherent purpose or design, but rather on the manner in which the defendant used the object and the circumstances surrounding its use.\(^\text{135}\) Consequently, North Carolina courts have held several everyday objects to be deadly weapons, including cars\(^\text{136}\) and belts.\(^\text{137}\) Moreover, in holding that hands can constitute deadly weapons for the purposes of the felony murder rule,\(^\text{138}\) North Carolina courts have held that a deadly weapon need not be an object independent from the defendant’s own body.

That said, the North Carolina Court of Appeals might have breathed new life into the deadly weapon requirement with its recent opinion in *State v. Barrow*.\(^\text{139}\) That case concerned a defendant accused of shaking his child in a manner that resulted in the child’s eventual death.\(^\text{140}\) At trial, the jury acquitted the defendant of first-degree felony murder and instead convicted the defendant of second-degree murder under a traditional malice theory.\(^\text{141}\) Upholding the verdict as supported by the evidence, a divided panel of the North Carolina Court of Appeals observed that the jury could have determined that the defendant shook the child to death with his hands, but that the defendant did not use his hands as deadly weapons when he did so.\(^\text{142}\)

In so holding, the Court of Appeals offered no guidance as to when—in the Shaken Baby Syndrome context—a jury should find that a defendant used his hands as a deadly weapon and when the jury should not.\(^\text{143}\) Perhaps more importantly, the court did not address why this

\(^{135}\) See supra Part I.A.1.

\(^{136}\) State v. Jones, 538 S.E.2d 917, 922 (N.C. 2000) (“It is well settled in North Carolina that an automobile can be a deadly weapon if it is driven in a reckless or dangerous manner.”).

\(^{137}\) See State v. Walden, 293 S.E.2d 780 (N.C. 1982) (allowing a belt to serve as a deadly weapon for a charge of assault with a deadly weapon).


\(^{139}\) State v. Barrow, 718 S.E.2d 673 (N.C. App. 2011).

\(^{140}\) Id. at 676.

\(^{141}\) Id. at 677.

\(^{142}\) Id. at 678.

\(^{143}\) See id. At least one Court of Appeals judge found the majority’s position untenable. Id. at 681 (Elmore, J., dissenting). Judge Elmore’s dissent has formed the basis of the defendant’s appeal to the North Carolina Supreme Court. The case is currently pending.
opaque analysis should form the line between a presumptive twelve-year prison term and exposure to the death penalty.144

However, the courts could provide content to this analysis that could meaningfully distinguish between defendants based upon their respective culpability. In keeping with Crump’s analysis above, the Appellate Division could hold that a defendant uses his hands—or any other everyday object—as deadly weapons if he intentionally uses them in such a manner that he actually knows is clearly dangerous to human life.

2. North Carolina Fails to Require that a Defendant Act with an Independent Malign Intent

Further, even proponents of felony murder liability generally might object to North Carolina’s muddled application of the merger doctrine. As Professor Binder has observed, liability for felony murder is appropriate in instances in which a defendant’s malign intent to commit a felony aggravates a defendant’s culpability for causing a death (whether negligently or recklessly) in the course of committing that felony.145 Society condemns someone who negligently kills during the course of a rape more severely than it does someone who negligently kills while speeding down a highway in an effort to arrive at work on time.146 North Carolina’s merger doctrine—particularly as applied to child abuse cases—does not require that a defendant act with any additional malign purpose beyond causing the injury that results in a death.147

CONCLUSION

Society appears to send mixed messages concerning the blameworthiness of Shaken Baby Syndrome deaths. Hospitals, public health advocacy groups, and even some state agencies treat Shaken Baby Syndrome as a preventable phenomenon, arising not from malice but from ignor-

144. See id. at 678–79.
145. See Binder, Culpability, supra note 90, at 967 (articulating this justification for the felony murder doctrine).
146. See id. at 968. Binder suggests:
[F]elony murder liability rests on a simple and powerful idea: that the guilt incurred in attacking or endangering others depends on one’s reasons for doing so. Killing to prevent a rape is justifiable, while killing to avenge a rape is not. And yet killing to redress a verbal insult is worse, and killing to enable a rape worse still. Even when inflicting harm is wrong, a good motive can mitigate that wrong and a bad motive can aggravate it.

Id.
147. See supra Part I.C.
ance. They implore parents to never shake a baby and seek to help parents understand that a baby’s inconsolable shrieks and tears are normal, and that things will improve with time. These campaigns share a common assumption: a significant number of Shaken Baby Syndrome deaths are not the intended result of a caregiver’s premeditated design. Caregivers just lose it. They snap. They don’t know any better.

At the same time, North Carolina’s criminal law allows the state’s district attorneys to prosecute these caregivers for first-degree murder, the most serious criminal charge available.

This result is not indefensible. Small children are a particularly vulnerable population. The state may legitimately levy harsh punishments against those who kill children, even accidentally, in an effort to deter those killings as strongly as possible. Additionally, when a caregiver kills a child, he or she breaches profound duties that add a layer of moral culpability that is not found in other homicide cases.

However, compelling arguments can also be advanced against the North Carolina criminal law’s treatment of Shaken Baby Syndrome deaths. The law ordinarily distinguishes homicides based upon the mental state of the perpetrator. A deliberate, premeditated homicide has always been considered more inherently blameworthy than an accidental homicide, or a homicide intentionally committed in the sudden heat of passion. The fact that Shaken Baby Syndrome deaths involve a children does not mean that these distinctions should be discarded.

Ultimately, whether North Carolina’s criminal law punishes Shaken Baby Syndrome deaths appropriately is a normative question that could be argued either way. However, North Carolina’s treatment of Shaken Baby Syndrome deaths does not result from the evaluation of the competing considerations discussed above. Instead, North Carolina’s treatment of Shaken Baby Syndrome deaths results from peculiar features of the state’s felony murder rule and the statute codifying felony child abuse.

The state provides for no sanction more serious than a conviction for first-degree murder. North Carolina’s General Assembly should not allow the law to impose it based on a technicality and historical accident. The Assembly should amend North Carolina’s felony murder rule to preclude uniform liability for first-degree murder for Shaken Baby Syndrome deaths.

148. See supra notes 1–5 and accompanying text.
149. See id.
150. See supra notes 5–6 and accompanying text.
151. See supra notes 6–7 and accompanying text.
This Article has suggested ways in which the General Assembly could accomplish this aim. For example, the Assembly could amend the felony murder rule to require that a defendant commit an act that the defendant knows and perceives at the time to be dangerous to human life.\footnote{152}

The Assembly could provide a statutory definition of a “deadly weapon” in the felony murder context.\footnote{153} The amendment could, for example, define the term to exclude a person’s hands, or to exclude objects commonly used for a benign purpose and conveyed to the scene of a felony with that benign purpose. Such a definition would better approximate situations in which a defendant intended conduct that the defendant knew or should have known would lead to an increased risk of death.

Alternatively, either the General Assembly or the judiciary could define a “deadly weapon” to include only articles that the defendant intended to use in a manner he knew to be clearly dangerous to human life.

Further, either the General Assembly or the North Carolina courts should further the state’s adoption of the merger limitation on felony murder liability.\footnote{154} Adopting a requirement that a felony underlying a felony murder charge involve conduct independent of the act that resulted in the homicide would also go a long way towards ensuring that felony murder liability is justly applied. Such a limitation would preclude felony murder liability in classic Shaken Baby Syndrome cases.

Once classic Shaken Baby Syndrome deaths are removed from the ambit of felony murder, the General Assembly should consider how to treat such cases. The circumstances inherent in Shaken Baby Syndrome cases may demand harsher treatment of analogous homicides that do not involve children.\footnote{155} However, the appropriate treatment of Shaken Baby Syndrome cases presents a normative choice best left to the collective judgment of the North Carolinian people, as expressed through their representatives in the General Assembly.

In the absence of any legal reform along these lines, North Carolina’s prosecutors must exercise special vigilance and sound discretion.

\footnote{152. \textit{See supra} Part II.C.1.}
\footnote{153. \textit{See id.}}
\footnote{154. \textit{See supra} Part II.C.2.}
\footnote{155. This demand for a harsher punishment has already been addressed in North Carolina’s structured sentencing provisions, which lists as an aggravating factor that “the victim was very young, or very old, or mentally or physically infirm, or handicapped.” N.C. GEN. STAT. § 15A-1340.16(11)(d) (2011).}
They must recognize that were they to uniformly apply felony murder liability in all Shaken Baby Syndrome cases they would not necessarily act in accordance with the General Assembly’s considered policy choices. Prosecutors should therefore investigate the circumstances surrounding Shaken Baby Syndrome deaths thoroughly and bring only charges that serve the interests of justice in the particular case.