COLLATERAL AND INDEPENDENT FELONIOUS DESIGN: A CALL TO ADOPT A TEMPERED MERGER LIMITATION FOR PREDICATE FELONIES OF ASSAULT UNDER A MINNESOTA FELONY MURDER DOCTRINE CURRENTLY "TOO PRODUCTIVE OF INJUSTICE"

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I. INTRODUCTION: A LONG-OVERDUE CALL TO REVISIT MINNESOTA'S SUPERFICIAL AND DATED FELONY MURDER MERGER ANALYSIS WITH RESPECT TO ASSAULTS AS PREDICATE FELONIES

A troubled five-year romance between Janice Misquadace and John Kochevar ended abruptly on June 20, 1974.[1] That night, the couple had spent several hours together at a tavern drinking "3.2 beer."[2] They then went to a second tavern before capping the evening off by sharing a six pack of beer in the car in front of their home.[3] "While in the car, they 'were sort of arguing back and forth' about a '[f]amily mix-up.'"[4] Ms. Misquadace pleaded with Mr. Kochevar to "go back to the tavern for some more beer," but he

1. Kochevar v. State, 281 N.W.2d 680, 682–83 (Minn. 1979).
2. *Id.* at 683.
3. *Id.*
4. *Id.*

convinced her that they should enter the house.[5] They were still arguing as they came through the door.[6]

According to Mr. Kochevar, Ms. Misquadace immediately got a .22 long rifle from the front room of the house and confronted him.[7] She warned him the gun was loaded.[8] He went to the same room for a gun of his own, a .410 shotgun.[9] He was able to wrestle the .22 rifle away from Ms. Misquadace.[10] He discovered it was actually unloaded, and he loaded it.[11] He then discharged the gun "to scare her."[12] As the shot rang out, she went to the floor, "playing possum."[13] She remained there while Mr. Kochevar reloaded the .22 rifle and set it by the telephone on the kitchen table, telling Ms. Misquadace to not touch the rifle because it was loaded.[14] He testified about what happened next: "[t]hen when I went to sit down there and was going to light a cigarette, she said now you are really going to get it, and she came up and charged and grabbed the .22."[15]

Mr. Kochevar said he grabbed the gun at the same time.[16] He testified, "[w]e were scuffling around there, and that is when it went off and she got shot."[17] He "did not think" he hit Janice with the butt of the .410 shotgun before the .22 rifle went off, and he denied threatening "I'm going to shoot you."[18] He admitted only that "she got shot."[19]

Mr. Kochevar pled guilty to third-degree murder under the felony murder doctrine in effect at that time, [20] as the witness

5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. At the time this case was adjudicated, felony murder was codified under the third-degree murder statute. *See* MINN. STAT. § 609.195 (1971) ("Whoever, without intent to effect the death of any person, causes the death of another by either of the following means, is guilty of murder in the third degree and may be sentenced to imprisonment for not more than 25 years . . . (2) Commits or attempts to commit a

testimonies and other evidence would have supported a conviction at trial.[21] The trial court accepted the guilty plea after a lengthy exchange between the parties.[22]

On appeal, the Minnesota Supreme Court noted that at the time, the defense attorney agreed that the facts were sufficient to support a plea of guilty under the felony murder doctrine because "the entire incident between the first shot and the death [was] *res gestae*,[23] all one behavioral incident."[24] The Supreme Court of Minnesota upheld the conviction because Mr. Kochevar's testimony provided a factual basis for the plea under the felony murder doctrine.[25] The trial court agreed with the application of the felony murder doctrine to this fact scenario, "particularly that part of the statute which reads 'commits or attempts to commit a felony upon or affecting the person whose death was caused.'"[26] Mr. Kochevar's guilty plea was entered cleanly and pursuant to the felony murder doctrine with the predicate crime of assault.[27]

The factual scenario underlying *Kochevar* provides a classic test to the merger limitation of the felony murder doctrine with assault as a predicate felony.[28] Unfortunately, it is a test that Minnesota appellate courts have failed to address in any meaningful way for nearly a century.[29] The *Kochevar* court devoted less than half a page

felony upon or affecting the person whose death was caused or another, except rape or sodomy with force or violence within the meaning of section 609.185."). *Compare id. with id.* § 609.19, subdiv. 2(1) (2016) (employing language identical in substance, but lifting the requirement that the predicate felony be "upon or affecting the person whose death was caused or another," and adding the predicate crime of drive-by-shooting to criminal sexual conduct with force as an excluded predicate felony under the second-degree unintentional murder statute).

21. *Kochevar*, 281 N.W.2d at 684. The prosecutor claimed that additional evidence would have shown that the victim was lying on the floor with the barrel of the .22 rifle two-to-three feet from the point at which the bullet entered her head. *Id.*

22. *See id.* at 683–84.

23. *Res gestae* translates to "things done" such as events that are contemporaneous or run at the same time. *See Res Gestae*, BLACK'S LAW DICTIONARY (10th ed. 2014)

24. *Kochevar*, 281 N.W.2d at 684.

25. *Id.* at 686.

26. *Id.* at 685 (quoting MINN. STAT. § 609.195).

27. *Id.*

28. *See infra* Section II for background discussion of the felony murder doctrine and the merger limitation.

29. *See, e.g.*, State v. Carson, 219 N.W.2d 88, 89 (1974) (declining to adopt the

of analysis to the merger issue, simply concluding "[t]he felony murder doctrine is properly applied when the underlying felony is aggravated assault."[30] Rather than articulating its reasoning for allowing assault to continue serving as a predicate felony in Minnesota, the *Kochevar* court rested on a string citation to earlier cases that dismissed the merger limitation with similarly superficial analysis.[31]

The Supreme Court of Minnesota has a long history of predicating the felony murder doctrine on assault.[32] In *State v. Carson*, without even mentioning the merger limitation by name, the court concluded that there was sufficient evidence that the defendant "willfully and knowingly, without intent to kill, killed the victim while committing the felony of aggravated assault on him."[33] When it comes to the merger limitation with assault as the predicate felony, the court has a history of adopting this conclusion without any significant legal reasoning.[34]

Even in the wake of the reclassification of murder in the 1981 Minnesota legislative session, the Minnesota Supreme Court declined to reconsider the merger limitation in a series of nearly contemporaneous cases. In *State v. Loebach*, the Minnesota Supreme Court held that adoption of merger to prevent "the use of aggravated assault as an underlying felony, is an argument which has been made countless times by other defendants and rejected each time by this court."[35] It provided no further substantive analysis of the merger

merger limitation to the felony murder doctrine with aggravated assault as the predicate felony when appellant stabbed the victim with a steak knife); State v. Morris, 187 N.W.2d 276, 277 (1971); State v. Nelson, 181 N.W. 850, 853 (1921) (providing no further reasoning for the premise that assault can stand as a predicate felony other than to note that it is a felony); State v. Rubio-Segura, No. A11-2246, 2012 WL 5381843, at *3 (Minn. Ct. App. Nov. 5, 2012) (accepting that first-degree assault resulting in death can trigger the second-degree felony murder doctrine in an analysis so routine that the case did not warrant publication).

30. 281 N.W.2d at 686.

31. *Id.* (citing *Carson*, 219 N.W.2d at 88); State v. Smith, 203 N.W.2d 349, 349 (Minn. 1972); *Morris*, 187 N.W.2d at 276 (all devoid of any substantive merger analysis).

32. *See Nelson*, 181 N.W.2d at 853 (articulating a bright line rule, dating back to at least 1921, that assault may serve as a predicate felony under the felony murder doctrine).

33. 219 N.W.2d at 89.

34. *See, e.g., Morris*, 187 N.W.2d 276; *Nelson*, 292 N.W.2d 850; *Kochevar*, 281 N.W.2d 680.

35. 310 N.W.2d 58, 65 (Minn. 1981).

limitation.[36] In *State v. Jackson*, the court avoided any legal analysis by simply ruling that "the arguments urging adoption of the so-called 'merger doctrine' are more appropriately addressed to the legislature."[37] In *State v. Cromey*, the court merely reasoned, "[w]e recently rejected an identical argument in *State v. Jackson* . . . ."[38] In *State v. Abbott*, the court held, "[w]e expressly declined to adopt such a doctrine in *State v. Jackson* . . . ."[39] In *State v. Marshall*, the court cited its holdings in *Cromey* and *Jackson*, noting "[w]e expressly declined to adopt the doctrine in two controlling cases . . . ."[40]

The Court of Appeals of Minnesota was founded in 1983 as an intermediate appellate court.[41] This court has been tentative in addressing the merger limitation, citing its role as an error-correcting court and reasoning that it is "not in [a] position to overturn established supreme court precedent."[42]

Substantive discussion of the merger limitation is scant in any published Minnesota cases in the wake of this series of decisions from the late 1970s through the mid-1980s. Whatever their justifications for declining to revisit the merger limitation in any meaningful way since then, reassessment by Minnesota appellate courts is long overdue. After decades of inaction and legislative deference, it is time for Minnesota appellate courts to adopt the merger limitation and hold that assaults can no longer serve as viable predicate felonies for application of the second-degree felony murder doctrine.

36. *See generally id.*

37. 346 N.W.2d 634, 636 (Minn. 1984). Contemporary courts in nearby jurisdictions have recognized the importance of thoughtful judicial action in the realm of a merger limitation to the felony murder doctrine and have overcome inactivity formerly justified by deference to the legislature. *See, e.g.*, State v. Heemstra, 721 N.W.2d 549, 558 (Iowa 2006) ("[W]e should not defer to the legislature for a signal for us to adopt a legal principle that is the responsibility of the court and within the power of the court to apply, based on legal precedent, common sense, and fairness.").

38. 348 N.W.2d 759, 760 (Minn. 1984).

39. 356 N.W.2d 677, 679 (Minn. 1984).

40. 358 N.W.2d 65, 66 (Minn. 1984).

41. MINN. JUD. BRANCH, COURT OF APPEALS 1 (2017), http://www.mncourts.gov/Documents/0/Public/Court_Information_Office/Informational%20Brochures/QF-_Court_of_Appeals.pdf [https://perma.cc/K4A9-3ELW].

42. State v. Grigsby, 806 N.W.2d 101, 114 (Minn. Ct. App. 2011) (citing State v. Ward, 580 N.W.2d 67, 74 (Minn. Ct. App. 1998)).

Section II outlines the ideological and mechanical operations of the felony murder doctrine in general.[43] It enumerates some of the limitations to the purview of the doctrine in Minnesota and elsewhere.[44] This section specifically explores the merger limitation as it exists in contemporary jurisprudence in jurisdictions where, unlike in Minnesota, it is employed by courts.[45] Section II underscores how the merger limitation bars use of assault as a predicate felony.[46]

Section III begins with an analysis of precedent cases involving the first-degree child abuse murder statute.[47] It highlights the manner in which Minnesota courts are applying a de facto felony murder analysis when construing this statute. It further argues that this statutory application is informed by traditional common law merger principles and tracks with the various tests employed to determine whether a prospective predicate felony is in fact an integral part of the homicide. Section III defines and applies each of these merger tests to both child abuse murder and felony murder predicated on assault. The analysis demonstrates how, on the whole, Minnesota's application of the child abuse murder statute is sound insofar as it passes the various merger tests—even if merger nomenclature is not directly employed—while felony assaults fail as predicates under nearly every test.

Section IV analyzes the relationship between the rejection of the merger limitation and the mens rea required for predicate assaults.[48] It juxtaposes merger with general and specific intent assault liability, comparing Minnesota to another jurisdiction that also declines to recognize the merger limitation. In Minnesota, assault is only a general intent crime,[49] while sister jurisdictions require specific intent. So, in at least one other jurisdiction that rejects the merger limitation with assault as a predicate felony, the common law provides an additional protection against an overly expansive felony

43. *See infra* Section II.
44. *Id.*
45. *Id.*
46. *Id.*
47. *See infra* Section III.
48. *See infra* Section IV.
49. State v. Fleck, 810 N.W.2d 303, 309 (Minn. 2012) (concluding that "assault-harm is a general-intent crime").

murder doctrine by requiring the heightened specific intent *mens rea* for the predicate assault felony.[50]

Section V highlights the fact that merger is currently recognized, in at least some form, in the vast majority of U.S. state jurisdictions.[51] Courts in these states generally employ sound legal reasoning in support of the merger limitation. At minimum, merger generally bars assaults from serving as predicate felonies. This section applauds the reasoning in hallmark merger opinions and acknowledges the growing trend to adopt the merger limitation continuing in cases as recent as March of 2017. If this trend continues, which it likely will, Minnesota jurisprudence left unchecked will become even more antiquated relative to other jurisdictions. Minnesota's current analytical framework steadfastly rejects the merger limitation without meaningful discussion. This section advocates that Minnesota join the sound and growing majority of jurisdictions that have adopted the merger limitation to the felony murder doctrine to preclude assaults from serving as predicate felonies.

II. BACKGROUND: FELONY MURDER, MERGER, AND THEIR APPLICATION IN MINNESOTA COMMON LAW

The traditional pathway to obtain a conviction for second-degree murder in Minnesota is to prove death of a human being and intent to effectuate that death without premeditation.[52] Minnesota's traditional intent requirement reflects the common law concept of constructive malice, or mens rea, the required guilty mind.[53] Under traditional murder prosecutions, to prove intent to kill, the state must prove deliberation in the killing of another.[54]

50. *See, e.g.*, OHIO REV. CODE ANN. § 2903.11 (West 2017); State v. Goad, No. 08CA25, 2009 WL 321193, at *2 (Ohio Ct. App. Feb. 5, 2009); State v. Heemstra, 721 N.W.2d 549, 555 (Iowa 2006); State v. Norman, 453 N.E.2d 1257, 1260 (Ohio Ct. App. 1982).

51. *See infra* Section V.

52. MINN. STAT. § 609.19, subdiv. 1(1) (2017). The added element of premeditation elevates second-degree intentional murder to first-degree murder under Minnesota's modern statutory scheme. *Id.* § 609.185(a)(1) (2017).

53. *See, e.g.*, Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 453–55 (1985) (outlining the doctrine of constructive malice of criminal intent for murder under a traditional common law theory).

54. *See, e.g.*, Douglas Van Zanten, *Felony Murder, the Merger Limitation, and Legislative Intent in* State v. Heemstra: *Deciphering the Proper Role of the Iowa Supreme*

In addition to providing for intentional murder, Minnesota also codifies the felony murder doctrine. Here, second-degree murder liability can be imposed without proving intent to kill if a death occurs "while [the defendant is] committing or attempting to commit a felony offense."[55] Most states have similar provisions,[56] which find justification in legal theory. Under the constructive malice theory, intent to cause the death may be imputed by the mental state required for the commission of the underlying, or predicate, felony.[57] At the time the felony murder doctrine was created, most felonies were punishable by death.[58] As a result, the doctrine was relatively uncontroversial, as it was irrelevant whether the actor was put to death for the death they caused or for the commission of the predicate felony.[59] Initially, "[t]he felony murder rule thus partly operated on an unarticulated rationale that one who does bad acts cannot complain about being punished for their consequences, no matter how unexpected."[60] From these expansive origins, the doctrine has necessarily evolved to become more limited in scope.[61]

While most contemporary state jurisdictions apply the felony murder doctrine, they now recognize limitations on its purview.[62] Minnesota applies several of these limitations fairly well, substantially preserving the integrity of the felony murder doctrine. The concept of *res gestea* is one of the limitations Minnesota applies to the felony murder doctrine.[63] *Res gestea* requires that the killing and the felony must be part of "one continuous transaction."[64] In other words, the

Court in Interpreting Iowa's Felony-Murder Statute, 93 IOWA L. REV. 1565, 1568 (2008).

55. MINN. STAT. § 609.19, subdiv. 2(1) (2017).

56. Van Zanten, *supra* note 54, at 1570.

57. Roth & Sundby, *supra* note 53, at 455–56.

58. *See, e.g.*, 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT JR., SUBSTANTIVE CRIM. L. § 14.5 n.5 (3d ed. 1986); David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL'Y 359, 360 n.7 (1985).

59. Van Zanten, *supra* note 54, at 1569.

60. Roth & Sundby, *supra* note 53, at 458.

61. *See, e.g.*, *id.* at 446 ("Most states have attempted to limit the rule's potential harshness either by limiting the scope of its operation or by providing affirmative defenses.").

62. *See, e.g.*, Van Zanten, *supra* note 54, at 1568.

63. *See* State v. Russell, 503 N.W.2d 110, 113 (Minn. 1993) ("Under the *res gestea* theory, the felony murder rule is applied if the 'felony and the killing are parts of one continuous transaction.'" (citing Bellcourt v. State, 390 N.W.2d 269, 274 (Minn. 1986))); *Res Gestea*, *supra* note 23 (defining *res gestea* as Latin for "things done").

64. *Russell*, 503 N.W.2d at 113 (citing *Bellcourt*, 390 N.W.2d at 274; State v. Fox,

evidence must show that the defendant formed the intent to commit the underlying felony before or during the act resulting in death.[65] "[T]he state must prove that 'the "fatal wound" was inflicted during the same "chain of events" [in which the underlying felony took place] so that the requisite time, distance, and causal relationship between the felony and the killing are established.'"[66] In this way, Minnesota courts employ the *res gestea* limitation effectively, which narrows the application of the felony murder doctrine.

Minnesota courts also limit the felony murder doctrine by requiring that the predicate felony be inherently dangerous to human life. In *State v. Anderson*, the Minnesota Supreme Court held that illegal firearm possession and possession of a stolen firearm cannot serve as predicate felonies for unintentional second-degree felony murder.[67] This holding finds its ideological roots in case law decided prior to the 1981 overhaul of Minnesota's laws governing homicide.[68] Prior to *Anderson*, the Minnesota Supreme Court recognized the need to "isolate for special treatment those felonies that involve special danger to human life."[69] The *Anderson* court examined the danger posed by the predicate felony in the abstract and the danger posed by the predicate felony as committed.[70] In doing so, it distinguished ordinary felonious conduct from felonious conduct that poses a significant risk to human life, and it limited the application of the felony murder doctrine to the latter.

Other limitations are recognized in sister jurisdictions. For example, some jurisdictions require a showing that the conduct causing death "was done in furtherance of the design to commit the [predicate] felony."[71] Other jurisdictions require a showing that the predicate felony was a proximate cause of the murder.[72] Some courts

868 N.W.2d 206, 223 (Minn. 2015)).

65. *Id.*

66. State v. McBride, 666 N.W.2d 351, 365 (Minn. 2003) (quoting State v. Russell, 503 N.W.2d 110, 113 (Minn. 1993)).

67. 666 N.W.2d 696, 701 (Minn. 2003).

68. *Id.* at 699–701.

69. State v. Nunn, 297 N.W.2d 752, 753 (Minn. 1980).

70. 666 N.W.2d at 700.

71. Commonwealth v. Redline, 137 A.2d 472, 476 (Pa. 1958).

72. Comer v. State, 977 A.2d 334, 338 (Del. 2009) (holding that there is a "requirement of a causal connection between the felony and the murder" (quoting Weick v. State, 420 A.2d 159, 162 (De. 1980))); *see also* State v. Harding, 528 S.W.3d 362, 369 (Mo. Ct. App. 2017) (holding that possession of a firearm was a "foreseeably proximate cause" of the victim's death and further articulating the rule

employ the *res gestea*[73] standard in assessing foreseeability by holding that "a death is foreseeable if the underlying felony and killing were part of a continuous transaction, closely connected in time, place, and causal relation."[74] In yet other jurisdictions, courts apply the common law tort principle of agency in limiting the scope of the felony murder doctrine requiring that the felon, the accomplice, or someone otherwise associated with the felon in the unlawful enterprise, actually carries out the killing.[75] These limitations, present in various combinations in most jurisdictions that adopt the felony murder doctrine, safeguard against its overly-expansive application.

Merger, recognized in many states, represents another limitation on the scope of the felony murder doctrine. Minnesota does not recognize this limitation.[76] Merger, where applied, requires that the defendant display "a collateral and independent felonious design that [i]s separate from the resulting homicide."[77] In other words, "[t]he underlying felony must be an independent crime and not merely the killing itself."[78] Courts employ various tests to determine whether a predicate felony will merge with the homicide, thereby precluding the application of the felony murder doctrine.[79] And while jurisdictions vary regarding which predicate crimes merge,[80] courts applying the limitation recognize merger as a

that "a defendant may be responsible for any deaths that are the natural and proximate result of the crime unless there is an intervening cause of that death").

73. *See generally Fox*, 868 N.W.2d at 223; *Anderson*, 666 N.W.2d at 701 (Minn. 2003); *McBride*, 666 N.W.2d at 365; *Russell*, 503 N.W.2d at 113; *Bellcourt*, 390 N.W.2d at 274.

74. *Harding*, 528 S.W.3d at 369 (internal quotations omitted).

75. *See Weick*, 420 A.2d at 162 (Del. 1980) ("The purpose of the [common law] rule was to clothe the actions of the accused and his co-felons, if any, with an implied-in-law malice, thus enabling the courts to find the felon guilty of common-law murder when a killing was committed by one of the felons in perpetration of the felony."); *Comer*, 977 A.2d at 338 (citing Commonwealth v. Campbell, 89 Mass. 541 (Mass. 1863)).

76. State v. Loebach, 310 N.W.2d 58, 65 (Minn. 1981).

77. People v. Hansen, 885 P.2d 1022, 1029 (Cal. 1994).

78. Sarun Chun, 203 P.3d at 434–35; *Hansen*, 885 P.2d at 1028 (explaining how a potential predicate offense that was "an integral part of" the homicide could not be the basis for felony murder liability (citing People v. Ireland, 450 P.2d 580 (Cal. 1969))).

79. *See infra* Section III(B).

80. *See, e.g.*, State v. Spruiell, 798 S.E.2d 802, 810–11 (N.C. Ct. App. 2017) (declining to apply North Carolina's "very limited 'merger doctrine'" to the

"shorthand explanation" for why they should decline to apply the felony murder doctrine when the predicate felony is an assault.[81]

The underlying rationale to this analytical approach is "because a homicide generally results from the commission of an assault, [and] every felonious assault ending in death automatically would be elevated to murder."[82] Treating felonious assault as a predicate offense would "usurp most of the law of homicide, reliev[ing] the prosecution in the great majority of homicide cases of the burden of having to prove malice in order to obtain a murder conviction."[83] The California Supreme Court highlights this rationale in the seminal case *People v. Ireland*.[84]

The *Ireland* court began its analysis with the premise that the second-degree felony murder instruction allows the jury to hold the defendant liable for murder without proving malice.[85] The court held that using assault with the use of a deadly weapon as the predicate felony "extends the operation of the rule 'beyond any rational function that it was designed to serve.'"[86] The court reasoned that a homicide committed as a result of felonious assault embraces "the great majority of all homicides" and represents the type of "bootstrapping" that "finds support neither in logic nor in law."[87] The court concluded that felony murder is not proper when it is premised on a felony that is an integral part of the homicide.[88] This is the essence of the merger limitation to the felony murder doctrine.

predicate felonies of discharging a weapon into an occupied property or automobile and felonious child abuse).

81. *See, e.g.*, *Hansen*, 885 P.2d at 1028; State v. O'Blasney, 297 N.W.2d 797, 799 (S.D. 1980) (noting in its presentation of a general overview of the felony murder doctrine that "the merger rule has been most frequently adopted where the underlying felony was one of assault").

82. *Hansen*, 885 P.2d at 1028.

83. *Id.*

84. 450 P.2d 580 (Cal. 1969); *see infra* Section V.A.1.

85. *Ireland*, 450 P.2d at 589 ("The felony murder rule operates (1) to posit the existence of malice aforethought in homicides which are the direct causal result of the perpetration or attempted perpetration of all felonies inherently dangerous to human life, and (2) to posit the existence of malice aforethought and to classify the offense as murder.").

86. *Id.* at 590 (citing People v. Washington, 402 P.2d 130, 134 (Cal. 1965)).

87. *Id.*

88. *Id.*

Minnesota courts have applied the felony murder doctrine throughout their contemporary jurisprudence.[89] Their application of the doctrine recognizes limitations to its scope, such as *res gestea* and the requirement that predicate offenses be dangerous to human life.[90] However, Minnesota has long neglected the merger limitation to the felony murder doctrine, exposing defendants to murder liability absent malice, even when the underlying felony is an integral part of the homicide.[91] Notwithstanding the sound policy underlying the merger limitation employed in other jurisdictions, current Minnesota law makes assaults viable predicate felonies under the felony murder doctrine.[92]

III. WHY MINNESOTA APPELLATE COURTS SHOULD APPLY THE DE FACTO MERGER LIMITATION USED IN CHILD ABUSE MURDER CASES TO FELONY MURDER CASES WITH ASSAULTS AS PREDICATE FELONIES.

Minnesota's analytical approach to second-degree felony murder cases should mirror its approach to first-degree child abuse murder cases.[93] Unlike the quasi-predicate felony of child abuse in Minnesota, which necessarily entails an additional independent felonious design and would withstand a merger challenge under most tests posed,[94] felony murder predicated on assault does not require proof of additional elements to set the killing apart from an

89. *See supra* notes 28–41 and accompanying text.

90. *See supra* notes 53–60 and accompanying text.

91. *See supra* notes 28–41 and accompanying text.

92. *See* State v. Loebach, 310 N.W.2d 58, 65 (1981).

93. *Compare* MINN. STAT. § 609.185(a)(5) (2016) ("Whoever does any of the following is guilty of murder in the first degree and shall be sentenced to imprisonment for life . . . [:] causes the death of a minor while committing child abuse, when the perpetrator has engaged in a past pattern of child abuse upon a child and the death occurs under circumstances manifesting an extreme indifference to human life . . . .") *with id.* § 609.19 subdiv. 2(1) ("Whoever does either of the following is guilty of unintentional murder in the second degree and may be sentenced to imprisonment for not more than 40 years . . . [:] causes the death of a human being, without intent to effect the death of any person, while committing or attempting to commit a felony offense . . . .").

94. This is certainly not universally true across all jurisdictions. *See, e.g.*, People v. Smith, 678 P.2d 886 (Cal. 1984) (holding that the Court could "conceive no independent purpose" for "child abuse of the assaultive variety"). *See* People v. Hansen, 885 P.2d 1022 (Cal. 1994); Russell R. Barton, *Application of the Merger Doctrine to the Felony Murder Rule in Texas: The Merger Muddle*, 42 BAYLOR L. REV. 535 (1990); Hava Dayan, *Assaultive Femicide and the American Felony-Murder Rule,* 21 BERKELEY J. CRIM. L. 1, 31 (2016).

accidental death.[95] On its face, the Minnesota first-degree murder statute allows courts to sidestep a pure common law felony murder analysis with child abuse as the quasi-predicate felony.[96] However, in applying the statute, Minnesota courts have faithfully required the additional level of culpability intrinsic of the merger limitation to the felony murder doctrine.[97] Sound Minnesota jurisprudence in first-degree child abuse murder cases illustrates how the merger limitation should be applied.

A. Contemporary Application of Minnesota's First-Degree Child Abuse Murder

In *State v. Peltier*, the Supreme Court of Minnesota affirmed a step-mother's conviction for killing a child entrusted to her care.[98] The case was prosecuted under the first-degree child abuse murder statute.[99] The *Peltier* court articulated the elements required for a conviction under that statute, including that the defendant "causes

95. Petition for Review at 1, People v. Brainagkul, 2000 WL 34231514 (Cal. Mar. 16, 2000) (No. S086769) Stating:

> The majority decision in *Hansen* rested on the premise that the Ireland-merger doctrine is limited to homicides resulting from pure assaults, or felonies that do not require additional elements apart from assault. This is so because 'the great majority of all homicides' do not result from felonies requiring elements apart from an assault . . . .

96. *See id.* (outlining first-degree murder liability on the face of the statute without addressing malice, imputed mens rea, or any of the hallmarks of felony murder liability); *supra* note 93 (providing the text of the Minnesota statute). Several other jurisdictions explicitly recognize child endangerment or similar crimes as predicate felonies triggering the felony murder doctrine. Hava Dayan, *Assaultive Femicide and the American Felony-Murder Rule,* 21 BERKELEY J. CRIM. L. 1, 31 (2016). Ohio does so under pure common law analysis, which provides context for Minnesota's statutory application. *See* State v. Dawson, 91 N.E.3d 140 (Ohio Ct. App. 2017).

97. *See, e.g.*, State v. Peltier, 874 N.W.2d 792 (Minn. 2016) (applying a form of the "integral part" test); State v. Johnson, 773 N.W.2d 81, 86 (Minn. 2009) (requiring proof of a pattern of abuse in order to elevate culpability); State v. Kelbel, 648 N.W.2d 690, 702 (Minn. 2002) (holding that a finding of more than one incident of abuse constitutes a discrete additional element); State v. Hokanson, 821 N.W.2d 340, 353–354 (Minn. 2012) (requiring, in addition to a pattern of abuse, "an intentional act of unreasonable force that is excessive under the circumstances").

98. 874 N.W.2d at 806.

99. *Id.* at 796–97; *see also* MINN. STAT. § 609.185(a)(5) (2014) (defining first-degree murder to include causing the death of a minor while committing child abuse).

the death of a minor while committing child abuse, when the perpetrator has engaged in a past pattern of child abuse upon a child and the death occurs under circumstances manifesting extreme indifference to human life."[100]

The operative predicate felony applied under the quasi-felony murder statute in *Peltier* was malicious punishment of a child.[101] In applying the statutory definition of "child abuse," the court concluded that malicious punishment of a child triggers the first-degree child abuse murder statute.[102] The elements of malicious punishment of a child include: (1) defendant is a legal guardian or caretaker of the child; (2) who commits an intentional act or series of acts towards the child; (3) that evidences either "unreasonable force" or "cruel discipline;" (4) that is "excessive under the circumstances."[103] The *Peltier* court noted that the jury was instructed on malicious punishment of a child as a felony-level offense.[104] Malicious punishment of a child is elevated to a felony if the defendant has prior convictions or if the victim is under the age of four and suffers "bodily harm to the head, eyes, neck, or otherwise suffers multiple bruises to the body," "substantial bodily harm," or "great bodily harm."[105]

100. *Peltier*, 847 N.W.2d at 797 (quoting MINN. STAT. § 609.185(a)(5)).

101. *Id.* at 798.

102. *Id.* at 797. The court applied Minnesota Statutes Section 609.185(d), which enumerates twelve quasi-predicate felonies applicable under first-degree child abuse murder, including malicious punishment of a child. *Id.* at 798.

103. MINN. STAT. § 609.377, subdiv. 1 (2014).

104. The court emphasized felony-level liability even though an underlying felony is not technically required under the statutory definition of child abuse for purposes of the first-degree child abuse murder statute. *Peltier*, 847 N.W.2d at 799; *see also* MINN. STAT. § 609.377, subdiv. 2 (including gross misdemeanor liability in the scope of the required "child abuse" under Minnesota Statutes section 609.185(d)). The court's implicit judicially-imposed requirement that the quasi-predicate offense be a felony-level offense provides further evidence that Minnesota courts have been faithful to the theoretical common law principles of felony murder in applying the first-degree child abuse murder statute. *Peltier*, 847 N.W.2d at 799.

105. MINN. STAT. § 609.377, subdivs. 3–6 (2014). In *Peltier*, the victim's age, coupled with bodily harm, was the operative statutory provision that enhanced the malicious punishment of a child to a felony. 847 N.W.2d at 799. While Ms. Peltier was prosecuted under the theory that the child was under the age of four, the court also devoted substantial analysis to the excessive nature of the child abuse. *Id.* at 800–01 (noting overwhelming evidence of physical abuse when the step-mother threw the child into a corner, hit him in the face and buttocks, bit him on the head and face, choked him, and slapped him on the mouth and the side of the head—causing a broken arm, spiral fracture, and black eye). In light of the excessive

The *Peltier* court emphasized the importance of the elements of "an intentional act" and "unreasonable force or cruel discipline that is excessive under the circumstances" by holding that the trial court's jury instruction failing to embrace these two elements was plainly erroneous.[106] Of particular importance for purposes of this analysis is the latter element: it was not enough in Minnesota to impose homicidal liability simply because a death resulted from the quasi-predicate felony.[107] The actual felonious act must encompass more than just the killing; it has to entail unreasonable force or cruel and excessive discipline as an additional element.[108]

Under Minnesota Statutes section 609.185(a)(5), a person is guilty of murder in the first degree when the person "causes the death of a minor while committing child abuse, when the perpetrator has engaged in a past pattern of child abuse upon a child[109] and the death occurs under circumstances manifesting an extreme indifference to human life."[110] This past pattern is independent of the death and fits squarely within the theoretical framework of the common law felony murder merger limitation. By contrast, assaults under Minnesota felony murder law involve no additional act beyond that necessary for the killing.[111] Minnesota

abuse and serious injuries sustained prior to death, Ms. Peltier could have just as easily been prosecuted under the alternative theories provided in Minnesota's felony malicious punishment statute, triggering first-degree child abuse murder. *See generally* MINN. STAT. §§ 609.377, subdivs. 4–6; 609.185(a)(5).

106. *See Peltier*, 847 N.W.2d at 799–800.

107. *See generally id.*

108. *See* Marcia J. Simon, *An Inappropriate and Unnecessary Expansion of Felony Murder in Maryland*, 65 MD. L. REV. 992, 999 (2006) (articulating the merger limitation as a requirement that the felonious act be independent of the homicide).

109. MINN. STAT. § 609.185(a)(5) (2016). In applying the past pattern of child abuse upon a child element, the *Peltier* Court concluded that "[t]aken together, this evidence overwhelmingly demonstrates that Peltier engaged in a pattern of malicious punishment of Eric prior to his death." 847 N.W.2d at 801.

110. *See* MINN. STAT. § 609.185(a)(5) (2016); *id.* § 609.377; *see also Peltier*, 874 N.W.2d at 799–800 (applying the extra-statutory requirement that the jury instruction include the elements for the crime of malicious punishment of a child enumerated in Minnesota Statutes section 609.377 to accurately apply Minnesota Statue section 609.185(a)(5) (2016)).

111. *See* MINN. STAT. § 609.223, subdiv. 1 (2016) (requiring only "substantial bodily harm"); *id.* § 609.221, subdiv. 1 (requiring only "great bodily harm"). While first- and third-degree assaults should merge with homicide under the felony-murder doctrine, second-degree assault arguably passes the merger test and may remain a viable predicate felony because of the additional element of a "dangerous weapon." *id.* § 609.222 subdiv. 1–2. *See* Commonwealth v. Kilburn, 780 N.E.2d 1237,

courts should explicitly adopt the merger limitation to preclude use of assaults as predicate felonies triggering homicidal liability under the felony murder doctrine.

B. Application of Merger Tests

The various merger tests further illustrate why Minnesota appellate courts' constructive application of the merger limitation in first-degree child abuse murder cases is sound. The tests also show that refusing to employ the same analytical standards in cases involving predicate assaults is untenable.

1. Lesser Included Offense Test

The "lesser included offense test" excludes the application of predicate felonies that do not have additional elements to homicide offenses of lesser degree than felony murder.[112] The Minnesota voluntary manslaughter statute states that a person "who causes the death of another . . . by the person's culpable negligence whereby the person creates an unreasonable risk, and consciously takes chances of causing death or great bodily harm to another" is guilty of voluntary manslaughter.[113] In Minnesota, the necessary elements for malicious punishment of a child include: (1) that the offender is a parent, legal guardian, or caretaker; (2) who engaged in an "intentional act" or "series of intentional acts;" and (3) used "unreasonable force" or "cruel discipline" that was "excessive under the circumstances."[114] None of these factors from the malicious punishment statute are included in the voluntary manslaughter statute, so a Minnesota felony murder predicated on malicious punishment of a child would pass the "lesser included offense test." Minnesota first- and third-degree assaults, however, would not pass the test because these statutes do not include elements already incorporated into the involuntary manslaughter statute.[115]

1241 (Mass. 2003) (holding that a fear assault brandishing a pistol may be a viable predicate felony if the assault did not actually cause the injury resulting in death).

112. Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 520 (2011).

113. MINN. STAT. § 609.205, subdiv. 1 (2016).

114. *See id.* § 609.377, subdivs. 3–6 (applied in *Peltier*, 874 N.W.2d at 798).

115. *Compare id.* § 609.221, subdiv. (listing elements of first-degree "great bodily harm" assault) *and id.* § 609.223, subdiv. 1 (listing the elements of third degree "substantial bodily harm" assault) *with id.* § 609.205, subdiv. 1 (listing elements of

Therefore, unlike child abuse, assault should not serve as a predicate felony pursuant to the lesser included offense test.

2. Independent Act Test

The "independent act test" requires that the predicate felony entail some additional act beyond what is required to carry out the killing.[116] First-degree child abuse murder requires the additional acts embraced by the "past pattern of abuse."[117] By contrast, first- and third-degree assaults require only the "great" or "substantial" bodily harm already inherent in the killing itself.[118] Under the independent act test, even second-degree assault would be precluded, at least in scenarios where the weapon is actually used to cause the death.[119] In those cases, the weapon only represents the means by which the substantial bodily harm occurs, and the assault does not necessarily entail an independent act beyond that required for the killing. For example, under Minnesota's second-degree assault statute, an assailant could stab the victim with a knife, constituting substantial bodily harm.[120] If that act of stabbing results in death, then there is no additional act. As such, under the independent act test, merger would preclude nearly all felony assaults from triggering the felony murder doctrine.[121]

involuntary manslaughter).

116. Binder, *supra* note 112, at 520.

117. MINN. STAT. § 609.185(a)(5) (2016); *see also Peltier*, 847 N.W.2d at 801 (analyzing how additional past acts of abuse demonstrate a pattern of past malicious punishment); State v. Johnson, 773 N.W.2d 81, 87 (Minn. 2009) (noting evidence of "at least two distinct acts of abuse: (1) that Johnson sat on [Johnson's infant child] breaking his ribs; and (2) that Johnson squeezed [Johnson's infant child] inappropriately when feeding him"); State v. Sanchez-Diaz, 683 N.W.2d 824, 832 (Minn. 2004) (applying the "past pattern of abuse" statutory requirement in a de facto application of the independent act test, concluding that the state must specify "a minimum number of incidents in order to find a pattern" (internal quotations omitted)); State v. Kelbel, 648 N.W.2d 690, 702 (Minn. 2002) (holding that the State must present sufficient evidence of enough underlying past acts to constitute a pattern of "more than one incident").

118. MINN. STAT. § 609.221, subdiv. 1; *id.* § 609.223, subdiv. 1.

119. *id.* § 609.222.

120. *See* Scott v. State, 390 N.W.2d 889, 892 (Minn. Ct. App. 1986) (sustaining a second-degree assault conviction when evidence was sufficient to conclude that a knife caused the puncture wound).

121. *See* MINN. STAT. § 609.221, subdiv. 1 (2016); *id.* § 609.223, subdiv. 1. Second-degree assault may survive a merger challenge only if the act of using a dangerous weapon was construed as independent of the harm caused by it. *See id.* § 609.222,

While most Minnesota felony assaults would merge under the independent act test, there is a potential exception. Ironically, it applies to one of the least violent types of assault: two prior potential misdemeanor-level domestic violence-related offenses elevate a subsequent misdemeanor assault to a felony.[122] The prior domestic violence convictions or adjudications—each separate antecedent crimes representing separate actus reus conduct—constitute additional acts not included in the subsequent transaction that

subdiv. 2 (delineating "assaults another with a dangerous weapon" as a separate statutory element from "inflicts substantial bodily harm"). The ability to pose a theoretical argument favoring Minnesota's second-degree felony assault as a viable predicate felony does not mean it would represent sound public policy. Courts in other jurisdictions have addressed this precise concern in their discussion of an assailant who fires a gun intending only to scare the victim, juxtaposing felony murder liability in this situation with voluntary manslaughter as applied under more heinous circumstances. (*See, e.g.*, People v. Sarun Chun, 203 P.3d 425, 439 (Cal. 2009) ("It simply cannot be the law that a defendant who shot the victim with the intent to kill or injure, but can show he or she acted in unreasonable self-defense, may be convicted of only voluntary manslaughter, whereas a defendant who shot only to scare the victim is precluded from raising that partial defense and is strictly liable as a murderer.")).

122. *See* MINN. STAT. § 609.224, subdiv. 4 (2016) (providing that whoever commits what would otherwise constitute a misdemeanor level assault "against the same victim within ten years of the first of any combination of two or more previous qualified domestic violence-related offense convictions or adjudications of delinquency is guilty of a felony"). It should be noted that other provisions of this same statute punish assault not resulting in significant bodily harm as misdemeanors and gross misdemeanors. *See id.* § 609.224 subdivs. 1–2. Absent the antecedent domestic violence-related conduct, misdemeanor assault does not, by definition, trigger the felony murder rule because it is not a felony. *id.* § 609.19, subdiv. 2(1).

Instead, misdemeanor assaultive conduct charged under Minnesota Statute section 609.224, subdivision 1 potentially triggers the misdemeanor manslaughter rule when death results. *id.* § 609.20(2). Relative to second-degree felony murder, misdemeanor manslaughter entails low liability. *Compare id.* § 609.20 (providing for a maximum sentence of fifteen years imprisonment) *with id.* § 609.19 (2017) (providing for a maximum sentence of forty years imprisonment).

Even so, its application is guarded by the additional statutory requirements that the misdemeanor or gross misdemeanor offense be committed "with such force and violence that the death of or great bodily harm to any person was reasonably foreseeable." *id.* § 609.20 (2016). The Minnesota legislature recognizes the need for this additional layer of protection against the overzealous application of the misdemeanor manslaughter doctrine. Yet even when the stakes are far higher, as in the case of second-degree murder, Minnesota courts provide no such protection. Instead, courts allow any felony assault to trigger homicidal liability, even if the assault is a felony only by virtue of antecedent conduct.

ultimately leads to the unintended death.[123] This represents a narrow exception. For the most part, Minnesota felony assaultive crimes would not pass the independent act test and should merge, precluding them from serving as predicate felonies under the second-degree unintentional murder statute.[124] Allowing what would, but for the antecedent offenses, be a misdemeanor or gross misdemeanor level assaults to trigger second-degree felony murder liability would implicate serious public policy concerns. Consequently, even though they pass the independent act test, assaults made felonious only by virtue of prior convictions should not be used to predicate felony murder liability in Minnesota or elsewhere.

Even Minnesota's fourth-degree assault on a peace officer statute, a relatively obscure intermediate felony assault provision, fails the independent act test.[125] Under most circumstances, fourth-degree assault is either not a felony or requires only "demonstrable bodily harm" to become a felony.[126] The latter requirement makes the actus reus and causation requirements akin to those of first- and third-degree felony assaults and would consequently be barred by the independent act test.[127] Even if a felony is charged based on the narrow statutory avenue of the assailant throwing bodily fluids or feces at a peace officer without demonstrable bodily harm, the offense would merge under the independent act test because the throwing of the feces or bodily fluids would constitute the assaultive act.[128] Thus, fourth-degree assault on a peace officer with feces or bodily fluids should also be precluded as a predicate felony pursuant to the independent act test.

123. *See* MINN. STAT. § 609.224, subdiv. 4(a)–(b) (showing how two independent domestic assaults may raise a subsequent one to felony-level assault).

124. *Id.*

125. *See id.* § 609.2231 (2016).

126. *Id.*

127. *See id.* §§ 609.221 subdiv. 1, 609.223 subdiv. 1; State v. Peltier, 874 N.W.2d 792, 798 (Minn. 2016).

128. However, felony assault of a peace officer in the fourth-degree by throwing feces or bodily fluids would not merge under the lesser included test because use of feces or bodily fluids represents an additional element. *See* MINN. STAT. § 609.2231. Absent contraction of deadly disease, punishable under different statutory provisions, death from such a prospective predicate offense is highly improbable, which limits the practical application of felony fourth-degree assault on a peace officer as a predicate felony, even under the lesser included test.

3. Independent Interest Test

The "independent interest test" requires that the predicate felony endanger "some interest other than the life or health of the victim."[129] Minnesota's first-degree child abuse murder statute recognizes the duty of care towards children as a hallmark and widely-recognized independent interest.[130] Child abuse poses a risk to the health and safety of the child and threatens the deeply-held social norms acknowledging the dependency of children on adults. Thus, safe and healthy rearing of a child represents an independent interest.[131] In a Minnesota State Senate hearing before the Committee of Crime Prevention, a witness advocating for inclusion of malicious punishment of a child as a quasi-predicate felony testified that malicious punishment of a child is "very much a family crime," implicating these independent family-rearing interests.[132] In contrast, assault statutes in Minnesota do not represent any parallel independent interest.[133] The interests articulated in the assault statutes deal only with the prevention of "great bodily harm" and "substantial bodily harm," which can lead to death.[134] Unlike the diverse interests surrounding the first-degree child abuse murder statute, no further interests beyond protecting the life and health of

129. Binder, *supra* note 112, at 520.

130. *See generally* Dayan, supra note 96, at 31.

131. James A. Mercy & Francie Zimmerman, *A Better Start: Child Maltreatment Prevention as a Public Health Priority*, ZERO TO THREE 4, 4–9 (2010), https://vetoviolence.cdc.gov/apps/phl/docs/A_Better_Start.pdf [https://perma.cc/Z8EQ-YQSR] (discussing why child safety should be considered a public health priority).

132. *Domestic Abuse Provisions: Hearing on SF0551 Before the Minn. Sen. Comm. on Crime Prevention*, 1999 Leg., 81st Sess. (Minn. 1999) (statement of Susan Gaertner, Ramsey County Attorney), https://www.revisor.mn.gov/bills/bill.php?view=chrono&f=SF551&y=1999&ssn=0&b=senate#actions [https://perma.cc/k3EQ-P74P] (audio recorded testimony on file with the Minnesota Legislative Library). The committee was convened to discuss amendments to the provision of Minnesota's murder statute for deaths resulting from a pattern of domestic abuse. The debate encompassed similar policy concerns to those articulated in the context of the parallel provision of Minnesota's first-degree child abuse murder statute. In Minnesota, as elsewhere, the two statutory sub-provisions are rooted in common logic and implicate parallel social values. Dayan, *supra* note 96, at 32 (equating child abuse murder to "assaultive femicide" and calling for legislative adoption of parallel provisions in California).

133. *See* MINN. STAT. § 609.221, subdiv. 1 (2016) (defining assault in the first degree); *id.* § 609.223, subdiv. 1 (defining assault in the third degree).

134. *id.* § 609.221, subdiv. 1 (including the language "great bodily harm"); *id.* § 609.223, subdiv. 1 (including the language "substantial bodily harm").

the victim appear on the face of Minnesota's first- and third-degree felony assault statutes[135] or the jurisprudence interpreting them.[136] As such, the independent interest test should preclude first- and third-degree assaults from being predicate felonies. Second-degree assault would likely also merge under the independent interest test, although discouraging the use of guns and other dangerous weapons arguably represents a social interest independent of the life and health of the victim.[137] First-degree child abuse murder passes the independent interest test and constitutes a viable quasi-predicate felony. Meanwhile, assaults—with the possible exception of second-degree assault with a dangerous weapon—do not pass the independent interest merger test and should be excluded as predicate felonies under the felony murder doctrine.

4. Independent Culpability Test

The "independent culpability test" requires that "the fatal felony combine[ ] two culpable mental states: indifference to the risk of death, and an independent felonious purpose."[138] Under this merger test, felony murder could never be predicated on strict liability offenses.[139] For liability to attach under this theory, there

135. *id.* §§ 609.221, subdiv. 1, 609.223, subdiv. 1.

136. *See, e.g.*, State v. Dorn, 887 N.W.2d 826, 833 (Minn. 2016) (assessing the "great bodily harm" endured when the assailant pushed her victim into a large bonfire).

137. *See* Commonwealth v. Kilburn, 780 N.E.2d 1237, 1241 (Mass. 2003) (conceding that second-degree assault with a dangerous weapon, unlike first- and third-degree felony assaults, may represent an acceptable predicate felony); *see also* Donna Halvorsen, *Legislature OKs bill to Fight Crime, Curb Guns*, STAR TRIB., May 16, 1993, at 1B (proclaiming a Minnesota legislative policy for "curb[ing] drive-by shooting, random gunfire, accidental shootings of children and proliferation of guns in schools and on city streets").

138. Binder, *supra* note 112, at 522. A recent line of California cases provides a discussion of the distinction between whether a given intent is a "purpose" or merely a "motive." *See* People v. Sarun Chun, 203 P.3d 429, 442 (Cal. 2009); People v. Randle, 111 P.3d 987, 1005 (Cal. 2005); People v. Robertson, 95 P.3d 872, 888 (Cal. 2004).

139. Minnesota also violates this principle. *See* State v. Smoot, 737 N.W.2d 849, 853–54 (Minn. Ct. App. 2007) (holding that the predicate felony does not require any specific mens rea element and expressly endorsing felony DWI, a strict liability crime, as an acceptable predicate felony). *Smoot* represents a dangerous and unwarranted expansion of the felony murder doctrine and should be overruled or superseded by statute. It also contravenes recent common law in sister jurisdictions holding that a predicate felony with a mens rea of at least "recklessly" or something

must be an act "aimed at a wrongful end,"[140] as well as demonstrable "indifference to the risk of death."[141] The acts may be the same, but two distinct mental states must be present.[142]

As a threshold matter, first-degree child abuse murder with malicious punishment as a quasi-predicate felony elevates mens rea on the face of the statute by requiring "an intentional act."[143] Minnesota case law holds that an independent felonious purpose can be manifested in the form of intentional and forceful biting, throwing, slapping, hitting, and choking of a child.[144] Meanwhile, "extreme indifference to the value of human life" is a statutorily enumerated element of first-degree child abuse murder.[145] This satisfies on its face the "indifference to the risk of death" prong. Minnesota's quasi-felony murder with child abuse as the predicate felony encompasses the culpable state of indifference towards the risk of death while applying a quasi-predicate felony with purposeful mens rea.

Under all germane Minnesota statutes, felony assaults require a wrongful end in the form of the injurious conduct and elevated mens rea for that conduct.[146] Assault does not fall short as a predicate felony under the felonious purpose mens rea prong of the independent culpability test. However, all levels of assault can be committed in a way that does not involve indifference to the risk of death.[147] In fact, a person can commit an assault with the intent merely to injure or cause fear of bodily harm, taking care to avoid

more than "criminal negligence" is required in order to avoid violating constitutional rights. *See, e.g.*, State v. Dawson, No. 15 MA 0118, 2017 WL 2264768, at *3 (Ohio Ct. App. 2017); State v. Jones, 538 S.E.2d 917, 922–23 (N.C. 2000).

140. In other words, the predicate felony must implicate a mens rea element greater than strict liability. *See* Binder, *supra* note 112, at 522.

141. *Id.*

142. *Id.*

143. State v. Peltier, 874 N.W.2d 792, 799–801 (Minn. 2016) (applying MINN. STAT. § 609.377).

144. *See id.* at 800.

145. MINN. STAT. § 609.185(a)(5) (2016) (requiring "circumstances manifesting an extreme indifference to the value of human life").

146. *id.* § 609.221; *id.* § 609.222; *id.* § 609.223; *id.* § 609.2231; *id.* § 609.224, subdiv. 4. *See infra* Section IV for discussion of requisite mens rea for assault under Minnesota law.

147. MINN. STAT. § 609.221 (2017) (first-degree assault); *id.* § 609.222 (second-degree assault); *id.* § 609.223 (third-degree assault); *id.* § 609.2231 (fourth-degree assault); *id.* § 609.224, subdiv. 4 (fifth-degree assault).

causing death.[148] Consequently, assault as a predicate felony fails under the "indifference to a risk of death" prong.[149] Unlike Minnesota's malicious punishment of a child, which would pass the independent culpability test, all levels of Minnesota felony assault fail the independent culpability test, and they should therefore be precluded under a merger limitation of the felony murder doctrine.

5. Independent Felonious Purpose Test

The "independent felonious purpose test" requires that the predicate felony be based on a felonious purpose that is independent from the killing.[150] For example, when the predicate felony is arson, intending to burn down a dwelling represents a separate purpose from the death of the resident inside.[151] Thus, like most predicate felonies, arson passes the independent felonious purpose test, and an arson conviction would not be precluded by the independent felonious purpose formulation of the merger limitation.

Similar to arson and other viable hallmark predicate felonies—and unlike assaults—Minnesota's first-degree child abuse murder entails an independent felonious purpose: namely, the actor's design in carrying out a pattern of abuse over the course of a significant period of time prior to the death.[152] The individual acts with the purpose of punishing, silencing, or otherwise abusing the

148. The deterrence theory of punishment in encouraging assailants to carry out their crimes in a "careful" way is, in fact, among the public policy interest academics cite in support of the felony murder doctrine in general. *See, e.g.*, Simon, *supra* note 110, at 1009–10 (explaining this position but arguing that if a twenty-five-year statutory maximum penalty for first-degree assault in Maryland does not deter careless assaults that may lead to death, the thirty-year statutory maximum penalty for second-degree felony murder is unlikely to provide additional incentive). Punishment under Minnesota's respective statutes conforms better to the policy aim of discouraging "careless" assaults. First degree assault in Minnesota caries a statutory maximum penalty of twenty years. MINN. STAT. § 609.221, subdiv. 1 (2017). But when unintended death results from an assault, second-degree felony murder liability does not just add five years; it doubles the statutory maximum penalty. *id.* § 609.19, subdiv. 2.

149. *See* Binder, *supra* note 112, at 522–23.

150. People v. Hansen, 885 P.2d 1022, 1029 (Cal. 1994); Dayan, *supra* note 96, at 25.

151. Russell R. Barton, *Application of the Merger Doctrine to the Felony Murder Rule in Texas: The Merger Muddle*, 42 BAYLOR L. REV. 535, 547 (1990).

152. State v. Peltier, 874 N.W.2d 792, 801 (Minn. 2016).

child.[153] Minnesota assaults involve no comparable independent purpose. The intent with assault is merely to cause physical harm to the victim.[154] In the case of felony murder, that harm leads to death. This may—and usually does—occur in an isolated occasion and does not require a pattern of prior abuse falling short of death.[155] When the assault results in death, it cannot be characterized as happening with any independent or reoccurring purpose. Minnesota's first-degree child abuse murder passes the independent felonious purpose test, but assaults do not.

6. Homicide Test

Some legal scholars and state jurisdictions still apply the "homicide test."[156] This test is simple: another lesser offense included under the homicide statute merges with murder, barring application of the felony murder doctrine.[157] For example, manslaughter cannot be a viable predicate felony under this test. This is what prevents, at least in theory, felony murder from subsuming other lesser unlawful killings.[158] Any other holding in the realm of predicate felonies involving a lesser degree of murder would "usurp most of the law of homicide."[159] Furthermore, "the merger rule applied to assaults is supported by the policy of preserving some meaningful domain in which the Legislature's careful graduation of homicide offenses can be implemented."[160] The homicide test avoids the kind of "bootstrapping" that "finds support neither in logic nor in law."[161] Under this test, neither assault nor first-degree child abuse murder merges because neither child abuse nor assault is a lesser included offense under the homicide statutes.[162]

153. *Id.* at 798 (citing MINN. STAT. § 609.377 (2016)).

154. MINN. STAT. § 609.224 (2016).

155. Binder, *supra* note 112, at 453–54 ("[A]ssaults with intent to injure result in death only about three percent of the time.").

156. *Id.* at 524; *see, e.g.*, Cotton v. Commonwealth, 546 S.E.2d 241, 244 (Va. Ct. App. 2001).

157. *Cotton*, 546 S.E.2d at 244.

158. Barton, *supra* note 151, at 538.

159. People v. Hansen, 885 P.2d 1022, 1028 (Cal. 1994).

160. *Id.*

161. People v. Ireland, 450 P.2d 580, 590 (Cal. 1969); Dayan, *supra* note 96, at 23.

162. Binder, *supra* note 112, at 439 ("A lesser included offense test excludes predicate felonies unless they have statutory offense elements not included in

C. Conclusions Drawn from Juxtaposing Minnesota Child Abuse Murder with Felony Murder Predicated on Assault

Child abuse embodies "a particularly aggravated form of assault."[163] It stands apart from ordinary assault because of the additional factors the quasi-predicate felony is comprised of in Minnesota.[164] These factors are rooted in public policy and social norms that justify harshly punishing "indifference to the physical and emotional vulnerability of a youthful victim" and a "willful violation of a duty of care toward[s] a child."[165] Under common law felony murder schemes, child abuse is an acceptable predicate felony—both theoretically and morally—passing muster under the merger limitation because the additional elements and social harm aggravate the offender's culpability.[166] Commission of the predicate felony of child abuse demonstrates further "bad values,"[167] and, when unintended death results, punishing this offense as a homicide under the felony murder doctrine squares with the policy objective of "upholding the sanctity and vulnerability of children."[168]

The additional elements required to survive the merger limitation are present for quasi-felony murder predicated on child abuse, but they are lacking for killings predicated on felony assaults.[169] Thus, social norms and public policy concerns support imputing homicidal liability under the quasi-felony murder doctrine with predicate child abuse felonies, but they do not support imputing homicidal liability with ordinary assaults as predicate felonies.

Minnesota's first-degree murder statutory scheme incorporates child abuse murder on its face.[170] In interpreting that statute,

homicide offenses punished less severely than felony murder.").

163. Binder, s*upra* note 112, at 524.

164. *See* MINN. STAT. § 609.185(a) (2017).

165. Binder, *supra* note 112, at 524.

166. *Id.*; *see* Dayan, *supra* note 96, at 32 (noting the courts' willingness to hold that an antisocial motive can implicate part of the malice required for a murder conviction). Minnesota law requires "circumstances manifesting extreme indifference to the value of human life." MINN. STAT. § 609.185(a)(5) (2016). But not all jurisdictions require that level of mens rea. *See, e.g.*, GA. CODE ANN. §16-5(d) (West 2014) (imposing "cruelty to children" murder "irrespective of malice").

167. Binder, *supra* note 112, at 524.

168. Dayan, *supra* note 96, at 32.

169. *Compare* MINN. STAT. § 609.185(a)(5) *with id.* § 609.185(a)(7).

170. *See id.* § 609.185(a)(5).

Minnesota appellate courts apply felony murder common law principles.[171] This jurisprudence serves as a useful benchmark to measure the theoretical, moral, and policy-oriented viability of potential predicate felonies under Minnesota's second-degree felony murder statute. Many tests exist to evaluate whether a proposed predicate felony merges under common law principles.[172] Minnesota's first-degree child abuse murder statute embodies sound law because child abuse predicate felonies would pass all merger tests. Assaults under Minnesota's statutory scheme, meanwhile, pass virtually none. Thus, because Minnesota does not recognize the merger limitation, yet faithfully adheres to its common law tenets in applying its highest-level murder statute, assaults should not be viable predicate felonies under Minnesota's second-degree unintentional murder statute. The statutes do not pass theoretical or moral muster or comport with rudimentary public policy norms.

IV. SPECIFIC INTENT: MINNESOTA'S LOW MENS REA REQUIREMENT FOR ASSAULTS COMPARED TO ASSAULTIVE MENS REA REQUIREMENTS IN OTHER JURISDICTIONS THAT REJECT THE MERGER LIMITATION TO THE FELONY MURDER DOCTRINE

Minnesota is among a small minority of jurisdictions that expressly declines to adopt the merger limitation to the felony murder doctrine.[173] Minnesota law also holds that felony assault is a general intent crime, which represents a lower composite threshold of proof relative to jurisdictions in which felony assault is a specific intent crime.[174] Most other jurisdictions where assaults are general intent crimes recognize the merger limitation.[175] Those jurisdictions, like Minnesota, that decline to adopt merger limitations and generally require two layers of mens rea: intent to engage in the underlying conduct and knowing that it will likely

171. *See e.g.*, State v. Peltier, 874 N.W.2d 792 (Minn. 2016).

172. Binder, *supra* note 112, at 527 (citing Foster v. People, 50 N.Y. 598, 602–03 (1872)).

173. *Id.* at 549 (noting that as of 2011, only seven states unambiguously reject the merger limitation).

174. *See id.* at 531.

175. *See e.g.*, State v. Heemstra, 721 N.W.2d 549, 555 (justifying enactment of the merger limitation by noting that where assault is a general intent crime and malice may be inferred from the commission of an assault, application of the old rule "creates an ever expanding felony murder rule").

cause serious physical harm.[176] When applying the felony murder doctrine in these sister jurisdictions with assault as the predicate felony, the dual layer of mens rea for specific intent assault protects against an overly-broad application of the felony murder doctrine. The heightened mens rea requirement at least somewhat balances the absence of the merger limitation in these jurisdictions when the predicate felony is assault.[177]

Such temperance is not present under Minnesota common law, where assault requires mens rea only for intent to engage in the physical conduct underlying the assault.[178] No proof of culpability with respect to the result element is required.[179] Minnesota's general intent assault overextends the felony murder doctrine in the absence of a merger limitation. This combination makes felony murder convictions predicated on assault too accessible to prosecutors and sets Minnesota apart from even the small minority of conservative jurisdictions that also decline to adopt the merger limitation to the felony murder doctrine.[180]

Like Minnesota, Ohio does not recognize the merger limitation.[181] Ohio courts have reasoned that "the intent to kill is conclusively presumed as long as the state proves the required intent

176. State v. Goad, No. 08CA25, 2009 WL 321193, at *2 (Ohio Ct. App. Feb. 5, 2009). *See, e.g.*, OHIO REV. CODE ANN. § 2903.11 (West 2017); State v. Norman, 453 N.E.2d 1257, 1260 (Ohio Ct. App. 1982); *see also* State v. Heemstra, 721 N.W.2d 549, 555 (Iowa 2006) (justifying enactment of the merger limitation by noting that where assault is a general intent crime and malice may be inferred from the commission of an assault, application of the old rule "create[s] an ever-expanding felony murder rule" (citation omitted)).

177. Simon, *supra* note 108, at 1012 ("[T]he modern understanding of criminal law emphasizes individual culpability and proportional punishment. Even those who have argued for the felony murder doctrine acknowledge that proportionality is a critical consideration and that the merger doctrine supports the objective of proportional punishment.").

178. State v. Dorn, 887 N.W.2d 826, 831 (Minn. 2016) ("[T]he *mens rea* element of assault . . . requires only the general intent to do the act that results in bodily harm.").

179. *Id.* (providing that felony assault does not require "that the defendant 'meant to or knew that [they] would violate the law or cause a particular result.'" (citation omitted)).

180. *Compare id.* (requiring no intent to cause, or knowledge of the probability of causing, serious physical harm) *with Goad*, 2009 WL 321193, at *2 (requiring knowledge of the probability of causing serious physical harm).

181. State v. Mays, No. 24168, 2012 WL 689953, at *3 (Ohio Ct. App. Mar. 2, 2012).

to commit the underlying felony."[182] It is not required that the predicate felony be independent of the killing or done with malice.[183] A felonious assault may stand as a predicate felony even if it is an integral part of the homicide.[184] Ohio courts use legislative intent to justify declining to adopt the merger limitation, holding that the Ohio "General Assembly rejected the independent felony/merger doctrine."[185] As such, assault can stand as a predicate felony for application of the felony murder doctrine in Ohio. However, obtaining a conviction for the predicate assault offense in Ohio requires a heightened burden of proof.[186]

In *State v. Norman*, the Court of Appeals of Ohio recognized that the Ohio assault statute requires specific intent.[187] In addition to proving intent to engage in the underlying conduct, subsequent Ohio courts applied the statutory term "knowingly" to require "awareness that his conduct would probably cause serious physical harm to another."[188] Under this standard, it was insufficient for the State to prove the defendant intended to strike the alleged victim in the nose. The state must also establish that the defendant knew his conduct was likely to cause serious bodily harm—in this case, a broken nose requiring corrective surgery.[189] For felonious assault, Ohio law requires intent with respect to the conduct and intent with respect to the result.[190] The dual layers of mens rea inherent of a specific intent crime guards against the overbroad application of the felony murder doctrine predicated on assault. This safeguard provides balance even in a jurisdiction that declines to recognize the merger limitation.

182. *See, e.g.*, *id.* at *2 (quoting State v. Walters, No. 06AP-693, 2007 WL 3026956, at *14 (Ohio Ct. App. Oct. 18, 2007)).

183. *Id.* at *3.

184. *Id.*

185. *Id.*

186. *See* OHIO REV. CODE ANN. § 2903.11 (West 2017).

187. 453 N.E.2d 1257, 1259–60 (Ohio Ct. App. 1982) (citing OHIO REV. CODE § 2903.11 (1980)).

188. State v. Goad, No. 08CA25, 2009 WL 321193, at *2 (Ohio Ct. App. Feb. 5, 2009) (holding that although the defendant "did not intend the consequences of his actions . . . [he] acted with the awareness that his conduct could have resulted in serious physical harm"). Even if mens rea with respect to the result element is not purposeful, this represents a heightened mental state for the dual layer of culpability.

189. *Id.*

190. *See, e.g.*, *id.*; State v. Norman, 453 N.E.2d 1257, 1259–60 (Ohio Ct. App. 1982).

In contrast to Ohio, assault is only a general intent crime in Minnesota.[191] In *State v. Dorn*, the defendant "shoved" the victim in the chest "to get him out of her personal space because he was 'in [her] face,' 'saying a bunch of stuff,' 'calling [her] a drug dealer,' and 'standing close' to her."[192] They were about five feet apart, standing next to a large bonfire that had burned down to embers.[193] The victim, who had been drinking, lost his balance, and after the second push, he fell into the burning embers.[194] He sustained significant burn injuries.[195]

The defendant in *Dorn* asserted that her conviction of first-degree assault should be vacated because she did not intend to harm the victim.[196] She argued that "intent to do *some* amount of harm" is required under the statute.[197] But the Supreme Court of Minnesota held that the State need not prove that she intended or knew that she would cause a particular result.[198] The *Dorn* court unambiguously characterized assault as a "general-intent crime."[199] Only "the general intent to do the act that results in bodily harm" was required.[200] Accordingly, whether she intended the result was irrelevant—the State needed only to prove that she intended "to do the prohibited physical act of committing a battery."[201] Since the defendant did not contend that her act of pushing the victim was unintentional or involuntary, the court held that her conduct satisfied the mens rea element of general intent required for assault-harm, regardless of whether she understood such conduct would result in bodily harm.[202]

191. *Compare* OHIO REV. CODE ANN. § 2903.11 (West 2017) (requiring the mens rea "knowingly"), *with* MINN. STAT. § 609.221, subdiv. 1 (2017) (listing no mens rea requirement).

192. State v. Dorn, 887 N.W.2d 826, 829 (Minn. 2016).

193. *Id.*

194. *Id.* at 828–29.

195. *Id.* at 829.

196. *Id.* at 828.

197. *Id.* at 830.

198. *Id.* at 831 ("This distinction is important because in proving the mens rea element of general-intent crimes, the State need not show that the defendant 'meant to or knew that [they] would violate the law or cause a particular result.'" (citing State v. Fleck, 810 N.W.2d 303, 308 (Minn. 2012))).

199. *Id.* at 830.

200. *Id.* at 831.

201. *Id.* (quoting State v. Lindahl, 309 N.W.2d 763, 767 (Minn. 1981)).

202. *Id.*

Treating assault as a general-intent crime may lead to harsh and unfair results under the felony murder doctrine in a jurisdiction that fails to recognize the merger limitation. While other jurisdictions implicitly limit the scope of the felony murder doctrine by requiring dual layers of intent to commit the predicate assault, [203] Minnesota applies the felony murder doctrine freely to general intent predicate felony assaults.[204] Not only can Minnesota defendants stand convicted of felony murder without intending to cause a death, they can be convicted without any intent or knowledge that their actions would even cause harm.[205]

Had the victim in *Dorn* burned to death instead of merely sustaining serious burn injuries, the defendant could likely have been held liable for second-degree felony murder in Minnesota. It is sufficiently troubling that what would have been at most a misdemeanor level assault between two intoxicated strangers is elevated to a first-degree assault because of a consequence the defendant did not intend or know of. But Minnesota's general intent law, coupled with the absence of a merger limitation on the felony murder doctrine, means homicidal liability can easily attach to what in other contexts would be relatively minor criminal conduct. Allowing Minnesota courts to use general-intent assaults as predicate felonies stretches the felony murder doctrine too far. Even compared to minority jurisdictions that likewise refuse to adopt the merger limitation, Minnesota has become an outlier.[206] General-intent assault serving as a predicate felony has dangerous public policy implications, and it does not comport with even the most liberal applications of the felony murder doctrine. At the very least, jurisdictions that do not recognize merger should, like Ohio, require

203. *See* Beth Tomerlin, *Stretching Liability Too Far: Colorado's Felony Murder Statute in Light of Auman*, 83 DENV. U. L. REV. 639 (2005).

204. *See e.g.*, State v. Grigsby, 806 N.W.2d 101 (Minn. 2011); State v. Abbott, 356 N.W.2d 677 (Minn. 1984); State v. Cromey, 348 N.W.2d 759 (Minn. 1984); State v. Jackson, 346 N.W.2d 634 (Minn. 1984); State v. Marshall, 358 N.W.2d 65 (Minn. 1984); State v. Loebach, 310 N.W.2d 58 (Minn. 1981); Kochevar v. State, 281 N.W.2d 680 (Minn. 1979); State v. Carson, 219 N.W.2d 88 (Minn. 1974); State v. Morris, 187 N.W.2d 276 (Minn. 1971); State v. Nelson, 181 N.W. 850 (Minn. 1921); Bead v. State, No. A06-2136 2007 WL 4235525, at *1 (Minn. Ct. App. Dec. 4, 2007). Cases discussed at length. *See supra* Section I.

205. *See* Steven M. Klein, Minn. District Judges Ass'n, 10, *Murder in the First Degree—While Committing Certain Crimes*, MINN. PRAC. JURY INSTR. GUIDES, CRIMJIG 11.09 (6th ed. 2017).

206. *See* Tomerlin, *supra* note 203, at 649–54.

specific intent assault as a predicate felony.[207] Minnesota does not require specific intent assault,[208] and as a result, homicidal liability attaches to relatively minor predicate assaults.

V. MAJORITY RULES: A PERSUASIVE AUTHORITY ARGUMENT FOR MINNESOTA TO JOIN THE OVERWHELMING AND GROWING MAJORITY OF SISTER JURISDICTIONS IN ADOPTING THE MERGER LIMITATION TO THE FELONY MURDER DOCTRINE

Legislatures and appellate courts in the overwhelming majority of sister state jurisdictions have adopted the merger limitation to the felony murder doctrine to assaults as predicate felonies.[209] And while that powerful trend taken by itself may not represent adequate reason for Minnesota to follow suit, the sound legal analysis employed by courts in other jurisdictions—in many cases almost since the inception of the felony murder doctrine—represents a more compelling case for Minnesota to revisit the merger limitation on predicate assaults. Case law as recent as the last two years demonstrates a growing trend among jurisdictions that previously declined to adopt the merger limitation to reevaluate, even if they do so only in a limited context.[210] In these jurisdictions, felony murder convictions are still sustained when built on proper predicate felonies, but legal reasoning has developed to appropriately limit the purview of the felony murder doctrine.[211]

A. Deep-Rooted Precedent: How California, New York, and Illinois Have a Legally Sound History of Merger

California and New York have long been hailed as jurisdictions that appropriately apply the merger limitation to the felony murder

207. State v. Norman, 453 N.E.2d 1257, 1260 (Ohio Ct. App. 1982) (citing OHIO REV. CODE § 2903.11 (1980)).

208. *See* RONALD I. MESHBESHER & JAMES B. SHEEHY, MINNESOTA PRACTICE SERIES § 38:39 (2017–2018 ed.).

209. Binder, *supra* note 112, at 533–50 (tallying twenty-six of the forty-one total states that recognize the felony-murder doctrine as of 2006 that have either judicially or legislatively adopted the merger limitation as applied to assaults as predicate felonies). This majority has grown since the publication of Binder's exhaustive article. *See infra* Section V(B) (discussing decisions in 2017 by Maryland, North Carolina, and Iowa courts adopting or cementing the merger limitation and analyzing an Illinois case from 2010 reaching a similar conclusion).

210. *See infra* Section V.B.

211. *See infra* Section V.A.1–3.

doctrine.[212] Illinois also recognizes the merger limitation.[213] While these jurisdictions apply merger, they do so in a reserved way that guards against eviscerating the felony murder doctrine.[214] Minnesota could also adopt the merger limitation, precluding assaults from serving as predicate felonies while guarding against overbroad application of the merger limitation with respect to other predicate felonies.

1. California Merger

People v. Ireland[215] stands as a hallmark merger case relied upon by courts across the country for nearly half a century.[216] In that case, the defendant's wife had "entered into . . . a series of secret extramarital affairs."[217] Beginning to doubt her fidelity, the defendant made accusations, which resulted in "a number of violent physical encounters."[218] The defendant's relationship with his wife "continued in this turbulent and unhappy state for several years."[219] The defendant's wife then initiated a divorce proceeding, but the estranged couple continued to cohabitate.[220] She became involved with another man.[221] She promised the defendant she would end this relationship "in the interest of the family," but he hired a private detective to follow her.[222]

As this was transpiring, the defendant began suffering from headaches, nervousness, fatigue, and he began taking prescription medications.[223] Reluctantly, the defendant's wife agreed to meet with a conciliation counselor in a "last effort to save their marriage."[224] For his part, the defendant agreed to diminish the influence of his parents and seek some relief from his heavy teaching load.[225]

212. *See infra* Section V.A.1–2.
213. *See infra* Section V.A.3.
214. *See infra* Section V.A.1–3.
215. 450 P.2d 580 (Cal. 1969).
216. *See, e.g.*, People v. Lemon, No. B262406, 2017 WL 2665936, at *20 (Cal. Ct. App. June 21, 2017).
217. *Ireland*, 450 P.2d at 581.
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.* at 582.
225. *Id.*

On the evening tensions came to a head, the defendant awoke from a nap for dinner that his estranged wife had prepared.[226] He had taken his prescription medications and consumed several "coffee mugs of wine."[227] He testified that he had no recollection of what took place.[228] But at some point, he fired three shots at his wife.[229] The first shot went into the window; the second and third shots hit his wife in the eye and chest.[230] The defendant did not raise any issue of fact regarding his wife's conduct immediately preceding her death—she was reclining on a couch when he shot her.[231]

In analyzing these facts, the *Ireland* court outlined the theoretical operation of the felony murder doctrine, noting that the "rule operates (1) to posit the existence of malice aforethought in homicides which are the direct causal result of the perpetration or attempted perpetration of [a]ll felonies inherently dangerous to human life, and (2) to posit the existence of malice aforethought."[232] With this construct as the backdrop, the court concluded that "utilization of the felony murder rule in circumstances such as those before us extends the operation of that rule 'beyond any rational function that it is designed to serve.'"[233] As a remedy, the court explicitly adopted the merger limitation to the felony murder doctrine.[234] The court reasoned that because felonious assault homicides represent the "great majority of all homicides," stretching the felony murder doctrine to embrace these circumstances was improper because it "would effectively preclude the jury from considering the issue of malice aforethought." [235] The court characterized the proposition of felonious assault serving as a

226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.* at 582–83.
231. *Id.* at 584.
232. *Id.* at 589.
233. *Id.* at 590 (citing People v. Washington, 402 P.2d 130, 134 (Cal. 1965)).
234. *Id.* (holding that although the merger limitation as applied to the facts before it may not "come to assume the exact outlines and proportions of the so-called 'merger' doctrine . . . we believe that the reasoning underlying that doctrine is basically sound and should be applied to the extent that it is consistent with the laws and policies of this state").
235. *Id.*

predicate felony as "bootstrapping."[236] It held that this operation "finds support neither in logic nor in law."[237]

The Supreme Court of California refined the *Ireland* merger limitation in *People v. Sarun Chun*, holding that felonies that are inherently collateral to the resulting homicide do not merge.[238] The *Sarun Chun* court acknowledged the difficulty in assessing scenarios that turn on specific facts—namely, whether a defendant who shot at someone was trying merely to frighten, or was intending to injure or kill.[239] In the former scenario, merger would not apply under the traditional *Ireland* conceptualization because the intent to scare represented a collateral purpose.[240] By contrast, if the actor intended to injure, arguably more serious than intending merely to frighten, merger would apply, barring application of the felony murder doctrine and leaving the actor liable only of voluntary manslaughter.[241]

Notwithstanding its discomfort with categorical holdings on merger, the *Sarun Chun* court nevertheless found that a particular predicate felony must "either never or always merge."[242] To accommodate this mantra and avoid further "muddled"[243] analyses, the court expanded the protections of the *Ireland* merger limitation to hold that "when the underlying felony is assaultive in nature . . . the felony merges with the homicide and cannot be the basis of a felony murder instruction."[244] An assaultive felony is any felony that "involves a threat of immediate violent injury," which includes shooting into a building or car and child abuse or neglect.[245] The California appellate courts may later identify other assaultive

236. *Id.*
237. *Id.*
238. People v. Sarun Chun, 203 P.3d 425, 443 (Cal. 2009).
239. *Id.* at 442.
240. *Id.*
241. *Id.*; *see* State v. Branson, 487 N.W.2d 880, 882–85 (Minn. 1992) (discussing that this inequity in disproportionate culpability in the context of a public policy argument for Minnesota to include second-degree assault with a deadly weapon as a precluded predicate offense under the merger limitation, even though use of the deadly weapon arguably represents a collateral element).
242. *Sarun Chun*, 203 P.3d at 442.
243. *Id.* at 435.
244. *Id.* at 443.
245. *Id.*

felonies on an offense-by-offense basis under the expanded *Ireland* merger limitation.[246]

The *Ireland* court captured the essence of the merger limitation to the felony murder doctrine. Its reasoning mirrors that of landmark felony murder cases predating it,[247] and it represents solid legal authority that contemporary courts continue to rely on.[248] Together with its progeny, *Ireland* has helped relegate the felony murder doctrine to its appropriate limited sphere while maintaining a tempered merger limitation that keeps the felony murder doctrine intact. Felonious assaults are not proper predicate felonies in California; they should not be in Minnesota or in any other jurisdiction recognizing the felony murder doctrine.

2. New York Merger

In *People v. Moran*, a seminal 1927 case out of the Court of Appeals of New York, Judge Cardozo addressed felony-merger murder in the familiar context of a deadly assault with a firearm.[249] The defendant in that case was "riding in a motorcar" when two police officers pulled the driver over and stepped out of their vehicle.[250] The defendant "[a]t once" drew a revolver and shot at the officers, killing two of them.[251] He made a full confession "asserting with bravado that he wished to go to the electric chair."[252] Evidence was offered "to the effect that he was insane."[253]

The trial court judge refused to submit lesser degrees of homicide or manslaughter to the jury, giving the felony murder instruction and admonishing jurors "not to consider whether the defendant had fired with a deliberate and premeditated design to

246. *Id.* ("We do not have to decide at this point exactly what felonies are assaultive in nature, and hence may not form the basis of a felony murder instruction, and which are inherently collateral to the resulting homicide and do not merge.").

247. *See, e.g.*, People v. Phillips, 414 P.2d 353 (Cal. 1966); People v. Williams, 496 P.2d 647 (Cal. 1965); People v. Ford, 388 P.2d 892 (Cal. 1964); People v. Coefield, 236 P.2d 570 (Cal. 1951); People v. Valentine, 169 P.2d 1 (Cal. 1946).

248. *See, e.g.*, Gunter v. Malony, 291 F.3d 74 (1st Cir. 2002); People v. Sears, 465 P.2d 847 (Cal. 1970); State v. DeJournett, 868 S.W.2d 527 (Mo. Ct. App. 1993).

249. 158 N.E. 35, 36 (N.Y. 1927).

250. *Id.* at 35.

251. *Id.*

252. *Id.* at 36.

253. *Id.*

kill."[254] On appeal, Judge Cardozo held that this was improper,[255] explaining that "[t]he felony that eliminates the quality of the intent must be one that is independent of the homicide and of the assault merged therein."[256] *Moran* lays out the foundation of the merger limitation to the felony murder doctrine still applied in contemporary cases.[257]

3. Illinois Merger

Illinois appellate courts have long hailed the merger limitation as an integral part of their felony murder jurisprudence.[258] In 2010, the Supreme Court of Illinois decided *People v. Davison*, which cemented the vitality of the merger limitation in Illinois through language and reasoning that should be reassuring to those who fear abuse of the merger limitation.[259] Indeed, if Illinois jurisprudence leading up to *Davison* stands for the premise that merger will be applied liberally, *Davison* tempers the well-established merger limitation with reasoning moored to solid legal theory that is unlikely to be stretched so far as to erode sound public policy in Illinois.[260] As *Davison* and its progeny have proven can be true in Illinois, the merger limitation can likewise be applied in a measured way in Minnesota.

In *Davison*, the victim was beaten and stabbed to death by a group of four men, including the defendant.[261] The prosecutor

254. *Id.*

255. *Id.* at 37.

256. *Id.* at 36.

257. *See, e.g.*, State v. Jones, 155 A.3d 492, 500 (Md. 2017); People v. Davison, 923 N.E.2d 781 (Ill. 2010); State v. Heemstra, 721 N.W.2d 549 (Iowa 2006).

258. *See* People v. Davis, 821 N.E.2d 1154, 1172 (Ill. 2004); People v. Pelt, 800 N.E.2d 1193, 1199 (Ill. 2003); People v. Morgan, 758 N.E.2d 813, 844 (Ill. 2001).

259. 923 N.E.2d at 788 ("Therefore, this court has consistently recognized that the predicate felony underlying a charge of felony murder must have an independent felonious purpose . . . . Despite the State's invitation to abandon the latter consideration, we continue to adhere to these principles.").

260. There is ample evidence of a tempered merger limitation in other contemporaneous cases across several U.S. jurisdictions. *See, e.g.*, State v. Huynh, 92 P.3d 571, 573 (Kan. 2004) (acknowledging the place of the contemporary merger limitation but reserving its application to scenarios where the "deceased was not an intended victim of the lethal act"). The *Huynh* Court cited a seminal Kansas merger case from 1926, which articulated the tradition that "[the] same act cannot be made the basis, first, of some other felony . . . and then that felony used as an element of murder . . . ." *Id.* at 573 (citing State v. Fisher, 243 P. 291, 293 (Kan. 1926)).

261. 923 N.E.2d at 783–85.

originally predicated felony murder on aggravated battery but later amended the complaint to use "mob action" as the predicate offense.[262] The victim was stabbed twenty times in the neck, head, shoulders, arms, and upper torso following a chase that ended near the lobby of the Decatur Police Station.[263] The defendant and his associates really wanted to "go find Dude."[264] The defendant confessed in a videotaped statement and ultimately pled guilty after police recovered from his home a baseball bat and knife with the victim's blood on them.[265]

Mr. Davison argued that the crimes should have merged to bar the conviction "because the conduct constituting mob action arose from and was inherent in the act of murder itself and did not have an independent felonious purpose."[266] Although the Illinois state supreme court justices were not unanimous in endorsing this approach, the appeal did turn on the felonious purpose test.[267] In applying this test, the majority focused on the cumulative action of the defendant and his accomplices, reasoning that because there were as many as twenty separate stab wounds and because they were "inflicted by defendant and his three co-offenders, rather than any particular wounds inflicted by defendant alone," the superfluous violence and the fact that four assailants were acting together

262. *Id.* at 783.

263. *Id.*

264. *Id.* at 784 (quoting the trial testimony of a witness).

265. *Id.* at 783.

266. *Id.* at 785.

267. *See id.* at 787 ("Consequently, we conclude defendant acted with the felonious purpose to commit mob action."). In her special concurrence, Justice Rita Garman criticized the majority for declining either to expressly adopt or reject the "same-act doctrine." *Id.* at 789 (Garman, J., concurring); *see supra* Section III (detailing various merger tests, including the analytically-comparable "independent act test"). Justice Garman believed that the "arise from" and "inherent in" language employed by the *Davison* majority would have been more appropriately substituted with her "same evidence" analysis derived from the "same-act theory." People v. Davison, 923 N.E.2d 781, 789 (Ill. 2010) (Garman, J., concurring) (citing People v. Pelt, 800 N.E.2d 1193 (Ill. 2003); People v. Morgan, 758 N.E.2d 813 (Ill. 2001)); As an alternative to endorsing the "same-act doctrine," Justice Garman seemed she would also be satisfied if, in subsequent jurisprudence, her colleagues would simply pose a more direct inquiry into "whether the defendant acted for the purpose of committing an independent felony apart from the homicide." *Id.* at 791 (Garman, J., concurring). This also represents a perfectly acceptable, widely-employed, and time-honored test. Minnesota courts could proudly center their merger analysis on either test once they adopt the merger limitation.

represented an independent felonious purpose in committing the predicate felony of mob action.[268] Although not expressly stated in the majority opinion, the emphasis on the multiple actors suggests that the court believed the defendant could have perpetrated the killing on his own. But by acting in concert with others, as is required for the predicate crime of "mob action,"[269] the court believed the collective conduct represented a further felonious purpose collateral to the killing. [270]

The *Davison* court cited recent Illinois precedent. [271] In *People v. Morgan*, the court rejected felony murder charges predicated on aggravated battery and aggravated discharge of a firearm. [272] The court reasoned that those charges were "inherent in, and arose from, the fatal shootings."[273] The court explained, "it was arguable that the murders gave rise to the predicate felonies, rather than the predicate felonies resulting in the murders."[274] The *Davison* court also relied on *People v. Pelt*, where a father tried to throw his infant son on the bed to stop him from crying but threw him too far—into the dresser instead of onto the bed—causing his death.[275] In contrast to how Minnesota and other jurisdictions view the merger limitation, [276] the *Pelt* court decreed that child abuse merged with the killing.[277] The court reasoned, "the defendant's conduct was an act inherent in, and

268. *Davison*, 923 N.E.2d at 787.

269. 720 ILL. COMP. STAT. ANN. 25/1 (West 2010).

270. *See Davison*, 923 N.E.2d at 788.

271. *Id.* at 786 (citing People v. Morgan, 758 N.E.2d 813, 813 (Ill. 2001)).

272. 758 N.E. 2d at 813.

273. *Id.*

274. *Id.*

275. *Davison*, 923 N.E.2d at 786 (citing People v. Pelt, 800 N.E.2d 1193 (Ill. 2003)).

276. State v. Peltier, 874 N.W.2d 792 (Minn. 2016); State v. Hayes, 831 N.W.2d 546, 553–54 (Minn. 2013); State v. Hokanson, 821 N.W.2d 340, 354 (Minn. 2012); State v. Johnson, 773 N.W.2d 81, 86 (Minn. 2009); State v. Heemstra, 721 N.W.2d 549, 558 (Iowa 2006); State v. Kelbel, 648 N.W.2d 690, 703 (Minn. 2002) (applying principles to the statutorily-analogous domestic abuse statute); Faraga v. Mississippi, 514 So.2d 295, 302–04 (Miss. 1987). *See* Dayan, *supra* note 96, at 31 n.149 (listing the fourteen jurisdictions—Alaska, Arizona, Florida, Idaho, Iowa, Louisiana, Michigan, Nevada, North Dakota, Oklahoma, Oregon, Tennessee, Utah, and Wyoming—that have, as of 2016, explicitly endorsed child abuse as a predicate felony not barred under merger). *See supra* Section III for a detailed analysis of Minnesota first-degree child abuse murder with application of several merger tests.

277. *Pelt*, 800 N.E.2d at 1193.

arising from the child's murder."[278] It further explained, "[t]he act of throwing the infant forms the basis of the defendant's aggravated battery conviction, but it is also the same act underlying the killing."[279] The traditional merger limitation is firmly rooted in Illinois jurisprudence.

However, jurisprudence has room to evolve. *People v. Davis*, the immediate precursor of *Davison*, also dealt with mob action as the predicate felony.[280] In *Davis*, ten to twenty people fatally beat the victim to death after an argument over a stolen television.[281] The court held that the predicate felony involved conduct with a felonious purpose other than the conduct killing the victim and expressly held that mob action was a viable predicate felony.[282] The *Davison* court found *Davis* to be the most analogous recent precedent, and it relied upon *Davis* and other authority in its holding.[283]

The *Davison* court's guarded merger analysis would balance the academic and public policy concerns of those in Minnesota advocating for a merger limitation and those focused on preserving the integrity of the felony murder rule in general. A tempered merger limitation akin to the limitation articulated by Illinois appellate courts would not undermine the sanctity of Minnesota's largely sound felony murder doctrine. It would improve upon its jurisprudence by ensuring a balanced, workable analytical framework that produces fair results.

B. Recent Developments: A Growing Trend Towards Recognition of the Merger Limitation in Maryland, North Carolina, and Iowa

As more states have adopted the merger limitation in the past two years, they have added to a chorus of support for a majority that is trending towards sounder application of the felony murder doctrine.[284] Just last year, in a robust opinion, the Court of Appeals

278. *Id.*
279. *Id.*
280. *See* People v. Davis, 821 N.E.2d 1154 (Ill. 2004).
281. *Id.* at 1157.
282. *Id.* at 1163.
283. *See* People v. Davison, 923 N.E.2d 781, 787–88 (Ill. 2010).
284. *See, e.g.*, State v. Jones, 155 A.3d 492, 508 (Md. 2017) (adopting the merger limitation); State v. Spruiell, 798 S.E.2d 802, 811 (N.C. Ct. App. 2017) ("North Carolina courts have recognized a very limited 'merger doctrine' . . . ."); Nguyen v. State, 878 N.W.2d 744, 751 (Iowa 2016) (noting its prior adoption of the merger

of Maryland overturned long-standing precedent to adopt the merger limitation, precluding assault from serving as a viable predicate felony.[285] Also last year, North Carolina reaffirmed its limited merger limitation in an opinion that distinguishes assault from viable predicate felonies, demonstrating how courts can apply merger selectively while still upholding the sanctity of the felony murder doctrine.[286] Iowa, meanwhile, reaffirmed its commitment to the merger limitation in 2017, cementing its prohibition against assault as a predicate felony.[287] The majority favors a tempered merger limitation, and that majority is growing, as evidenced by opinions issued within the past two years.[288]

1. Merger in Maryland

In February of 2017, the Court of Appeals of Maryland exemplified the enlightened reasoning of a growing majority of state jurisdictions by embracing the merger limitation to the felony murder doctrine.[289] *State v. Jones* came more than a decade after *Roary v. State*,[290] a harshly-criticized[291] decision by the Supreme Court of Maryland rejecting the merger limitation. The *Jones* court finally embraced merger as the law of the land, holding expressly "that first-degree assault may not serve as a predicate for second-degree felony murder when that assault is not collateral to the lethal act."[292] The time is ripe for Minnesota appellate courts to do the same and hold that felony assaults are no longer viable predicate felonies.

In analyzing its decision to overturn *Roary,* the *Jones* court cited the history of the merger limitation, dating back to the nineteenth

limitation).

285. *Jones*, 155 A.3d at 508 (overruling Roary v. State, 867 A.2d 1095 (Md. 2005)) ("[T]oday we adopt the 'merger doctrine' and we hold that first-degree assault that results in the victim's death merges with the homicide and therefore cannot serve as an underlying felony for the purposes of the felony murder rule.").

286. *Spruiell*, 798 S.E.2d at 802.

287. *Nguyen*, 878 N.W.2d at 744.

288. *50 State Statutory Surveys—Felony Murder—0030 SURVEYS 9*, THOMSON REUTERS (2016) ("Today, almost all jurisdictions have statutory provisions for felony murder, although only a few have specific 'felony murder' statutes. Most often, felony murder is incorporated into the jurisdiction's murder statute.").

289. *Jones*, 155 A.3d at 492.

290. 867 A.2d 1095 (Md. 2005).

291. *See, e.g.*, Simon, *supra* note 108.

292. *Jones*, 155 A.3d at 495.

century.[293] It noted that even the misguided *Roary* decision recognized that "our relatively strict adherence to the common law felony murder doctrine is not favored by a number of other States [sic]."[294] The court acknowledged that the instant facts raised "squarely the unintended and undesirable consequences of assault as a predicate for felony murder."[295] Limiting merger is necessary to ensure sound public policy and application of the felony murder doctrine to thoughtfully weigh culpability and appropriately deter socially-destructive criminal conduct.[296] The *Jones* court reasoned that assault should not serve as a predicate felony because it is "an integral element of the homicide."[297] Allowing assault to predicate felony murder "expands unwisely felony murder and elevates practically all shooting deaths in Maryland to second-degree felony murder, thereby effectively eliminating the crime of manslaughter."[298]

This reasoning by the Maryland court is rooted in a long history of cases it cites from sister jurisdictions.[299] Among them, the *Jones* court cites *Moran*, where Judge Cardozo reasoned that applying felony murder liability to a felonious assault that culminates in homicide "would mean that every homicide, not justifiable or excusable, would occur in the commission of a felony, with the result that intent to kill and deliberation that eliminates the quality of the intent must be one that is independent of the homicide and of the assault merged therein."[300]

In 2017, the Court of Appeals of Maryland finally recognized that assault serving as a predicate felony "is wrong."[301] It further acknowledged that it is "contrary to the trend around the

293. *Id.* at 500.
294. *Id.* (citing *Roary*, 867 A.2d at 1106).
295. *Id.* at 503.
296. *Id.* at 507–08.
297. *Id.* at 500.
298. *Id.* at 507.
299. *Id.* at 500 (citing Barnett v. State, 783 So.2d 927, 930 (Ala. Crim. App. 2000). *See, e.g.*, People v. Saran Chun, 203 P.3d. 425, 434–43 (Cal. 2009); People v. Ireland, 450 P.2d 580, 590–91 (Cal. 1969) (en banc); State v. Clark, 460 P.2d 586, 590 (Kan. 1969); State v. Essman, 403 P.2d 540, 545 (Ariz. 1965) (en banc); People v. Moran, 158 N.E. 35, 36 (N.Y. 1927); State v. Schock, 68 Mo. 552, 561–62 (Mo. 1878); State v. Hanes, 729 S.W.2d 612, 617 (Mo. Ct. App. 1987)).
300. *Jones*, 155 A.3d at 504 (citing *Moran*, 158 N.E. at 36–37).
301. *Id.* at 507.

country."[302] The court recognized that "[i]n order to maintain the integrity of the different levels of culpability of murder and manslaughter and to ameliorate its perceived harshness," Maryland had to adopt the merger limitation, so that assault may no longer serve as a viable predicate felony.[303] Minnesota appellate courts would be wise to join this solid and growing majority and look to the sound reasoning of courts in sister jurisdictions, such as the *Jones* court in Maryland.[304]

2. North Carolina's Limited Merger Doctrine

Perhaps no court has more succinctly or more simply stated the merger limitation and its rudimentary reasoning with respect to assault as a predicate felony than the Supreme Court of North Carolina in *State v. Jones*.[305] It proclaimed,

> [T]he assault on the victim cannot be used as an underlying felony for purposes of the felony murder rule. Otherwise, virtually all felonious assaults on a single victim that result in his or her death would be first-degree murders via felony murder, thereby negating lesser homicide charges such as second-degree murder and manslaughter. [306]

This was the starting point for one of the most recent state court appellate opinions in the country regarding the merger limitation on the felony murder doctrine; the crime of "discharging a weapon into occupied property" served as the predicate felony.[307]

In 2017, the Court of Appeals of North Carolina released an opinion addressing a killing that resulted from a drug deal facilitated through the rear window of a vehicle.[308] In *State v. Spruiell*, the deceased and his driver met the defendant in a car wash parking lot.[309] The defendant walked up to the rear passenger's side window of the vehicle to talk about "money and about drugs."[310] An

302. *Id.* ("We join the large majority of our sister states and conclude that the better and more legally sound approach is to adopt the 'merger rule.'").
303. *Id.*
304. *See id.*
305. 538 S.E.2d 917 (N.C. 2000).
306. *Id.* at 926 n.3.
307. State v. Spruiell, 798 S.E.2d 802, 804 (N.C. Ct. App. 2017).
308. *Id.*
309. *Id.*
310. *Id.*

argument ensued, and the defendant shot his revolver through the vehicle's open window from a range where the gun was "almost touching [the victim's] stomach."[311] The victim returned fire as the car sped to the hospital, where he later died.[312]

The trial court characterized the discharge of the firearm into the occupied vehicle as an "assaultive act" and held that because it was the "very same" act as that caused the victim's death, there was no viable predicate felony.[313] But the Court of Appeals also cited a line of cases involving shootings into occupied property, noting that the Supreme Court of North Carolina declined to endorse the merger limitation when the predicate felony was discharging a firearm into occupied property.[314] The court would not go so far as to adopt the "California 'merger doctrine.'"[315] But it did acknowledge that "North Carolina courts have recognized a very limited 'merger doctrine.'"[316] In that jurisdiction, a single assault on a single victim that causes that same victim's death merges with the killing.[317] Minnesota should adopt a tempered approach like that advanced by the North Carolina court. In doing so, it could keep the felony murder doctrine intact while making its application fairer and more theoretically sound.

3. Iowa Guarding Recent Precedent

In 2016, the Supreme Court of Iowa seized the opportunity to reaffirm its decade-old precedent and galvanize the place of the relatively new merger limitation.[318] In *State v. Nguyen*, the court held that merger remains good law when the act causing willful injury was the same as the act causing death.[319] This holding validates the court's 2006 decision in *State v. Heemstra*,[320] which adopted merger.

311. *Id.*
312. *Id.*
313. *Id.* at 806.
314. *Id.* at 807 (citing State v. Wall, 286 S.E.2d 68, 71 (N.C. 1982)).
315. *Id.* (citing State v. King, 340 S.E.2d 71, 74 (N.C. 1986)).
316. *Id.* at 811.
317. *Id.* at 807–09. *Compare* State v. Carroll, 573 S.E.2d 899, 906 (N.C. 2002) (discussing when "the assault was a separate offense from the murder") *with* State v. Jones, 538 S.E.2d 917, 926–27 (N.C. 2000) (discussing when the single assault caused the death and therefore could not be used as an underlying felony for the felony murder rule).
318. State v. Nguyen, 878 N.W.2d 744, 756 (Iowa 2016).
319. *Id.*
320. 721 N.W.2d 549, 558 (Iowa 2006).

The *Nguyen* holding weds Iowa to the growing majority of sound-minded jurisdictions where merger is now the law of the land.[321]

In *Heemstra*, the defendant and victim had been in a long-standing dispute over a parcel of farm land.[322] The victim had allegedly threatened and was swearing at the defendant.[323] In response, the defendant allegedly asked a deputy sheriff, "[w]hat happens if I beat the little son-of-a-bitch up?"[324] Tension culminated when the two were driving their pickup trucks down a county road near the victim's home.[325] The victim stopped in front of the defendant and blocked the road.[326] The victim got out of his truck.[327] So did the defendant.[328] The defendant described the victim as "hostile, contorted with rage."[329] The defendant felt threatened, so he retrieved a rifle from his truck "to neutralize [the] situation."[330] The victim shouted obscenities at the defendant, saying he did not "have the balls to pull the trigger."[331] According to the defendant, the victim lunged at him, so the defendant shot him.[332]

The mechanics of the Iowa merger limitation uphold the public policy aims underlying merger while appropriately limiting its scope. The Iowa homicide statute provided that if "[t]he person kills another person while participating in a forcible felony," she or he is guilty of felony murder.[333] "Willful injury" was classified as a forcible felony because it constituted "felonious assault."[334] It served as the predicate felony in *Heemstra*.[335] The court overturned long-standing precedent by adopting the merger limitation to the felony murder doctrine.[336] It reasoned, "[o]rdinarily in felony murder based on assault, the assault causing death is considered to be merged into the

321. Binder, *supra* note 112, at 549.
322. *Heemstra*, 721 N.W.2d at 551.
323. *Id.*
324. *Id.*
325. *Id.*
326. *Id.*
327. *Id.*
328. *Id.*
329. *Id.*
330. *Id.*
331. *Id.*
332. *Id.*
333. *Id.* at 552 (citing IOWA CODE § 707.2(2) (2004)).
334. *Id.* at 557 (citing IOWA CODE §§ 702.11, 708.4).
335. *Id.*
336. *Id.* at 558.

murder and cannot be used as an independent felony for felony murder purposes."[337] The court employed the same logic and metaphor as the *Ireland* court in California and wrote, "[o]therwise, all assaults that immediately precede a killing would bootstrap the killing into first-degree murder, and all distinctions between first-degree and second-degree murder would be eliminated."[338] But the *Heemstra* court, like courts around the country that adopted a narrow merger limitation, tempered its ruling.

> [I]n *some circumstances*, [assault still] may serve as a predicate for felony murder purposes. For example, if the defendant assaulted the victim twice, first without killing him and second with fatal results, the former could be considered as a predicate felony, but the second could not because it would be merged with the murder.[339]

In articulating its holding this way, the court both made an allowance for merger and guarded against abuse of this limitation. Minnesota should adopt a similarly tempered merger limitation to the felony murder doctrine.

VI. CONCLUSION: MINNESOTA APPELLATE COURTS SHOULD ADOPT THE MERGER LIMITATION TO PRECLUDE ASSAULTS AS PREDICATE FELONIES UNDER THE FELONY MURDER DOCTRINE

The felony murder doctrine occupies a time-honored place in Minnesota jurisprudence. It has long been—and remains—a useful tool in prosecuting homicides. But courts should be cautious of applying the doctrine too broadly. Minnesota courts, like their counterparts around the country,[340] have aptly applied several limitations to keep the doctrine from being stretched too far.[341] However, Minnesota refuses to acknowledge the merger limitation to the felony murder doctrine, even when dealing with assaults as predicate felonies.[342]

The time is ripe for Minnesota appellate courts to reconsider the propriety of the merger limitation, as Maryland and Iowa did as recently as 2017 and 2006, respectively.[343] Such an overhaul would

337. *Id.* at 556.
338. *Id.*; *see* People v. Ireland, 450 P.2d 580 (Cal. 1969).
339. *Heemstra*, 721 N.W.2d at 557.
340. *See* Van Zanten, *supra* note 54, at 1568; *see also supra* Section V.
341. *See supra* Section II.
342. *See* State v. Kochevar, 281 N.W.2d 680, 686 (Minn. 1979).
343. State v. Jones, 155 A.3d 492, 495 (Md. 2017); *Heemstra*, 721 N.W.2d at 558.

modernize Minnesota's felony murder jurisprudence and finally bring the state's common law into conformity with the merger law of a large and growing number of states.[344]

As evidenced by the theory underlying the child abuse provision of its first-degree murder statute,[345] Minnesota is already moving in the direction of other jurisdictions that adhere to the analytical tenets of the merger limitation. But to squarely address merger, Minnesota must analyze assaults as predicate felonies in connection with the second-degree unintentional murder statute as well. The requisite reasoning is already in place for the transition. Appellate court application of the first-degree child abuse murder statute is sound and the statute survives the various theoretical merger tests. On the other hand, assaults fail the merger tests; by parallel logic, they should not be viable predicate felonies under Minnesota's second-degree felony murder doctrine.

All assaults should be barred as predicate felonies in Minnesota, including second degree fear assaults with a dangerous weapon. As a practical matter, fear assaults cease to be fear assaults when they result in the victim's death. When there is no collateral or independent felonious design, merger should apply and prevent the application of the felony murder doctrine. Courts from merger jurisdictions, like Massachusetts, holding that a separate assault—antecedent to and not resulting in death—survives the merger test[346] are misguided. However, if Minnesota courts were to adopt an analytical framework, they would be well-advised to maintain a high threshold when concluding that a predicate assault is actually separate from the subsequent assault causing the death. Such a finding would, after all, be at odds with Minnesota's well-recognized limitation to the felony murder doctrine requiring that the killing and predicate felony be part of a continuous transaction.[347]

344. Binder, *supra* note 112, at 549.

345. MINN. STAT. § 609.185(a)(1)(5) (2016).

346. Commonwealth v. Scott, 37 N.E.3d 1054, 1058 (Mass. 2015) ("If an assault that is an element of an underlying felony is not separate and distinct from the assault that results in the death, then the assault is said to merge with the killing, in which case the underlying felony cannot serve as a predicate felony for purposes of the felony murder doctrine.").

347. *See* State v. Heden, 719 N.W.2d 689, 697 (Minn. 2006) ("[T]he state must prove . . . the requisite time, distance, and causal relationship between the felony and the killing."); State v. Darris, 648 N.W.2d 232, 236 (Minn. 2002) (requiring "that at the time of the act resulting in death appellant was involved in [the predicate felony]"). *See supra* Section II.

As it stands now, even among outliers, Minnesota represents an anomaly in terms of the ease that assaults can trigger felony murder liability. Other states, like Ohio, that refuse to recognize the merger limitation with assaults as predicate felonies at least provide a higher threshold of proof for the mens rea elements of the underlying assaults. [348] In Ohio, felonious assault is a specific intent crime.[349] Meanwhile, Minnesota requires only general intent.[350] The relative accessibility of predicate assaults makes it that much easier to stretch "an ever expanding felony murder rule" [351] in Minnesota as long as it continues to reject the merger limitation.

Under the felony murder doctrine, the conduct comprising the predicate felony must be "separate from the acts of personal violence which constitute a necessary part of the homicide itself."[352] This basic tenet conforms to the theoretical framework underlying the felony murder doctrine and homicide statutes more generally, and it represents sound public policy. It is the province of Minnesota appellate courts to finally revisit the merger limitation to the felony murder doctrine. By implementing a tempered merger limitation, Minnesota appellate courts could apply the sound legal principles adopted throughout the country while guarding against the erosion of the felony murder doctrine. As Minnesota's felony murder doctrine stands now, "[t]he anomalies created when assaultive conduct is used as the predicate for a second-degree felony murder theory . . . are too stark and potentially too productive of injustice . . . ."[353] The time has come for Minnesota to adopt a tempered merger limitation to the felony murder doctrine that

348. State v. Mays, No. 24168, 2012 WL 689953, at *2 (Ohio Ct. App. Mar. 2, 2012) ("The classic felony murder rule held that a death caused during the commission of any felony constitutes murder.").

349. State v. Norman, 453 N.E.2d 1257, 1260 (Ohio Ct. App. 1982) ("If you find that the State of Ohio failed to prove beyond a reasonable doubt that the defendant had the knowledge to commit the offense of felonious assault, then you must find the defendant not guilty.").

350. *See* MINN. STAT. § 609.19, subdiv. 2 (2016) ("Whoever does either of the following is guilty of unintentional murder in the second degree and may be sentenced to imprisonment for not more than 40 years . . . [:] causes the death of a human being, without intent to effect the death of any person, while committing or attempting to commit a felony . . . .").

351. *Heemstra*, 721 N.W.2d at 555.

352. Commonwealth v. Quigley, 462 N.E.2d 92, 95 (Mass. 1984).

353. People v. Sarun Chun, 203 P.3d 425, 439 (Cal. 2009) (citation omitted).

precludes assaults from serving as predicate felonies in the second-degree unintentional murder statute.