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Felony murder doctrine problematic for legal system

The U.S. Supreme Court recently heard arguments in a case involving the statutory construction of a federal criminal law. *Burrage v. U.S.*, No. 12-7515.

The law in question deals with a person convicted of selling illegal drugs. It includes a provision that adds an additional 20 years mandatory minimum imprisonment if the buyer experiences certain adverse effects.

Specifically, "if death or serious bodily injury results from" the drugs sold, then the defendant gets the additional 20-year mandatory minimum. The issue for the court was to determine the meaning of "results from."

Stripped to its essentials, the issue is one faced rarely by the U.S. Supreme Court but often by state courts: What is the scope of the "felony murder" doctrine? What connection must there be between commission of a felony and a resulting death before we are willing to call the death a murder?

The victim in the case had ingested a combination of marijuana, OxyContin and several prescription drugs. He topped this off with heroin purchased from the petitioner, Marcus Burrage. The victim died.

Medical experts at trial agreed that the heroin was a contributing factor in the victim's death. But in light of the other drugs he had ingested, they could not be sure if he would not have died "but for" the heroin. At the oral argument, Justice Elena Kagan summarized the issue nicely: "Using heroin made it more likely that he would die, but we can't say that using heroin killed him."

The trial judge had instructed the jury that it only needed to find that the heroin "contributed" to the death. The defense argued for the higher standards of either "but for" causation or foreseeability. The government countered that the heroin need only have been a "contributing factor" to the death.

The issue is important because

a finding that the death "results from" the drug transaction will essentially result in the kind of punishment reserved for someone who is guilty of murder. What should we have to conclude about the defendant's conduct to decide it was tantamount to an intentional killing?

David Edmonds' new book "Would You Kill the Fat Man?" (2014) discusses a variety of problems related to morals and ethics. One issue is the difficulty of determining what it means that a person has acted "intentionally." To illustrate this, Edmonds discusses a study conducted by the Yale experimental philosopher Jonathan Knobe.

The subjects of the study were asked to consider the following:

Case 1: A vice president of a company goes to the CEO and says, "We've got a new project. It's going to make a lot of money for our company, but it's also going to destroy 200,000 acres of rain forest."

The CEO says, "I realize the project's going to harm the environment. I don't care about that. All I care about is making as much money as possible. Start the project." The project starts and, as predicted, it makes money and destroys 200,000 acres of rain forest.

Case 2: A vice president of a company goes to the CEO and says, "We've got a new project. It's going to make a lot of money for our company and it will also save 200,000 acres of rain forest that would otherwise be destroyed."

The CEO says, "I realize the project is going to benefit the environment. I don't care about that. All I care about is making as much money as possible. Start the project." The project starts and, as predicted, it makes money and saves 200,000 acres of rain forest that would otherwise have been destroyed.

Knobe asked the subjects this question: "In each case, did the CEO intentionally affect the environment?"

How would you answer?

You could say neither did. Each

CRIMINAL PROCEDURE

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CEO only cared about money and did not care about the environment. On the other hand, you could say they both acted intentionally because each CEO voluntarily performed acts which he knew would affect the environment. But logically, of course, your answer must be the same for the CEO in each case.

Except the subjects did not see it this way. As to Case 1, 87 percent of them concluded that the CEO had intentionally harmed the environment, while only 20 percent concluded that the CEO in Case 2 had intentionally helped the environment. Numerous studies have produced similar results, i.e., when people feel an action is morally bad, they are more likely to call the results "intentional."

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Experimental philosophers have called this The Knobe Effect.

Joseph C. Mauro recently discussed the relation between felony murder and The Knobe Effect in his article "Intentional Killing Without Intending to Kill: Knobe's Theory as a Rational Limit on Felony Murder," 73 Louisiana Law Review 1011 (2013).

Mauro notes that experts disagree on what Knobe's results mean. Some contend that it simply shows that people lack an understanding of what a mental state such as "intentional" actually entails.

Others contend that the results suggest that we need a broader, more nuanced idea of mental state, i.e., the concept of "intent" should include not only a person's subjective mental state, but also the morality of his conduct and the outcomes he causes.

One of Mauro's suggestions to make felony murder fairer — that is, to insure that it punishes only "intentional" killings in the broad, Knobe-like sense — is to recognize felony murder only if the felony is included on a predetermined list of dangerous felonies and, additionally, that it is performed in a way that is clearly dangerous to human life.

As interesting as I find The Knobe Effect and the Mauro article, I am still not convinced that felony murder is a workable doctrine. As the *Burrage* case indicates, problems will always arise when there is no consideration explicitly given to how the defendant subjectively viewed the risk of death during his commission of the felony.

Without that consideration, courts get bogged down solely in the arcane issues of causation in *Burrage*. A judgment of murder should not be comprised simply of causation without consideration of the risk of death the defendant actually knew he faced.

Felony murder was invented in England and England eventually abolished it. The United States should follow England's lead. It is a doctrine that causes far more trouble than it is worth.