I. INTRODUCTION: THE FELONY-MURDER RULE IN GENERAL

The felony-murder rule, which operates to hold a defendant responsible for any death that occurs during her commission or furtherance of a felony, evolved from the common law of England. The rule has been incorporated in some form or another into the criminal homicide statutes of most states, and has generated a great deal of controversy and commentary. The operation of the rule is complex, and defenses to its application are numerous. A substantial difference distinguishes felony-murder from "non-felony" murder (hereinafter "substantive murder"). A key element of substantive murder is the defendant's mental state: she must have intended to kill the victim. Felony-murder does not share this requirement; whether the defendant intended to kill the victim is irrele-

1. "A widely accepted and quite plausible explanation of the origin of the [felony-murder] doctrine is that at early common law many crimes, including practically all, if not all, felonies were punishable by death so that it was of no particular moment whether the condemned was hanged for the initial felony or for the death accidentally resulting from the felony." Commonwealth v. Redline, 391 Pa. 486, 494, 137 A.2d 472, 476 (1958). As early as 1536, it was held that if a person was killed accidentally by one of the members of a band engaged in a felonious act, all could be found guilty of murder. Mansell & Herbert's Case, 2 Dyer 128b (1536).

2. See, e.g., 18 PA. CONS. STAT. ANN. § 2502(b) (Purdon 1983); ILL. ANN. STAT. ch. 38 § 9-1 (Smith-Hurd 1979); WIS. STAT. ANN. § 940.02(2) (West 1982); FLA. STAT. ANN. § 782.04(3) (West 1976 & Supp. 1987); N.Y. PENAL LAW § 125.25 (McKinney 1987).


4. See supra note 3.

5. In contrast, substantive murder requires the prosecution to prove "premeditated intent to cause the death of another person," WASH. REV. CODE § 9A.32.030(1)(a) (1987), or show "circumstances, manifesting an extreme indifference to human life," id. § 9A.32.030(1)(b), or prove "intent to cause the death of another person but without premeditation," id. § 9A.32.050(1)(a).
viant. Instead, the felony-murder rule allows the requisite malice for murder to be inferred from the malicious intent that must be present to prove the underlying felony. In effect, the rule operates to hold a defendant accountable for any homicide that occurs during the commission of a felony. For example, if a defendant commits armed robbery, and during the course of the robbery, a police officer's stray bullet kills a bystander, the defendant can be charged with felony-murder of the bystander.

The felony-murder rule provides a strategic advantage for prosecutors because the elements of felony-murder are less difficult to prove than are the elements of substantive murder. For example, the underlying felony in a felony-murder charge can require either specific intent or general intent. When the

6. "The theoretical basis for felony-murder is that general malice (not intent to kill) may be inferred from the malicious felonious intent which must be present to prove the underlying felony. Where malice is present and homicide results, felony-murder may be shown. Intent to kill is not the sine qua non of felony-murder, either historically or in this statutory scheme." State v. Wanrow, 91 Wash. 2d 301, 306, 588 P.2d 1320, 1322 (1978). Thus, the court in Wanrow stated:

"[I]n order to prove second degree felony-murder in this case the State must prove: (1) that petitioner committed an assault in the second degree under RCW 9.11.020(4) [repealed by WASH. REV. CODE § 9A.36.021] (willful assault on another with a weapon likely to produce harm), and (2) that the homicide was perpetrated while petitioner was engaged in the commission of the assault. No intent to kill need be shown.

Id.

7. See, e.g., LAFAVE & SCOTT, supra note 3, § 7.5 n.2. Discussing the common law background of the felony-murder rule, the court in Redline stated:

In certain circumstances the malice essential to murder need be neither prenese nor express. For instance, at common law an accidental or unintentional homicide committed in the perpetration of or attempt to perpetrate a felony is murder, the malice necessary to make the killing murder being constructively imputed by the malice incident to the perpetration of the initial felony. Thus, "if one intends to do another felony, and undesignedly kills a man, this is also murder": IV Blackstone Commentaries, 200-201. This type of felonious homicide, known as felony-murder, became firmly imbedded in the common law.

391 Pa. at 494, 137 A.2d at 475.

8. E.g., Commonwealth v. Almeida, 362 Pa. 596, 68 A.2d 595 (1949) (As defendant fled after committing armed robbery, a policeman's bullet, intended for defendant, hit and killed an off duty patrolman. Defendant was convicted of first-degree felony-murder.).


10. General and specific intent can be viewed in terms of intent to engage in certain conduct (general) and intent to cause a certain result (specific). Substantive (intent-to-kill) murder thus requires specific intent, because an essential element of murder is that the defendant proximately cause the death of another. In comparison, burglary requires that the burglar intentionally engage in the conduct of breaking and
felony requires general intent, all that must be proved is that the act was intended, not that the result was intended. Intent to kill the victim need not be proved. Hence, a conviction can often be obtained under a felony-murder charge when evidence of the defendant's mental state might be insufficient to convict for substantive murder. Because the prosecutor does not have to prove intent, a defendant who commits a felony can even be held responsible for the death of an accomplice caused by the victim.\(^{11}\)

Because it is no defense to a felony-murder charge that the defendant did not intend to kill the victim, there is a potential disparity between culpability and punishment.\(^{12}\) As a result, some courts have chosen to interpret the rule as the circumstances of the case dictate.\(^{13}\) In fact, the potential disparity entering; once the act is committed, it is no defense that the result was unintended. \textit{LaFave \& Scott, supra} note 3, \S 3.5(a).

Specific intent crimes can also be distinguished from general intent crimes by examining the statutory language. Compare, for instance, the language of \textit{WASH. REV. CODE} \S 9A.32.050(1)(a) (1987), "With intent to cause the death of another person," with that of \S 9A.36.021(1)(a), "Intentionally assaults another and thereby inflicts substantial bodily harm." Under \S 9A.32.050(1)(a), the focus is on the defendant's mental state as to the result, whereas under \S 9A.36.021(a), the focus is on the defendant's mental state as to the commission of the act.

11. \textit{E.g.}, Taylor v. Superior Court, 3 Cal. 3d 578, 477 P.2d 131, 91 Cal. Rptr. 275 (1970) (Owner of a store shot and killed a robber while the defendant waited outside in the getaway car. The California Supreme Court held that probable cause existed to charge the defendant with first degree (felony) murder for the death of the robber.). \textit{See also} People v. Stamp, 2 Cal. App. 3d 203, 82 Cal. Rptr. 598 (1969) (defendants found guilty of first degree (felony) murder for death caused by heart attack 15-20 minutes after the completion of armed robbery); People v. Cabaltero, 31 Cal. App. 2d 52, 87 P.2d 364 (1939) (defendants found guilty of first degree felonymurder when one member of the group shot and killed another for disobeying orders); People v. Hickman, 12 Ill. App. 3d 412, 297 N.E. 2d 582 (1973) (defendants found guilty of felony-murder for death of police officer caused by fellow officer); People v. Harrison, 176 Cal. App. 2d 330, 1 Cal. Rptr. 414 (1959) (defendants found guilty of first degree (felony) murder for death of store owner caused by employee during gun battle initiated by defendants); Commonwealth v. Thomas, 382 Pa. 639, 117 A.2d 204 (1955) (defendant found guilty of first degree felony-murder for the killing of an accomplice by the victim of their robbery); Commonwealth v. Almeida, 362 Pa. 596, 68 A.2d 595 (1949) (defendant found guilty of first degree felony-murder for the killing of a bystander by a police officer's bullet intended for defendant).

12. For example, when the homicide was caused by another person, a defendant convicted of felony-murder presumably did not possess the requisite intent to kill for substantive murder, yet under Washington law she would be punished as if she had intentionally killed another.

13. \textit{E.g.}, People v. Washington, 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965) (supreme court reversed defendant's first degree felony-murder conviction, stating that the killing of defendant's accomplice, committed by the robbery victim, was intended to thwart the felony, not further it, and thus could not support a felony-murder charge).
between culpability and punishment that can result from applying the felony-murder rule has led England, where the rule originated,\textsuperscript{14} to abolish it altogether,\textsuperscript{15} and has led many other jurisdictions to limit the rule's application.\textsuperscript{16}

Limitations on the felony-murder rule vary from state to state. One limitation on the rule's application, however, has been adopted by virtually every state except Washington:\textsuperscript{17} the underlying felony supporting the felony-murder charge must be a separate felony from the act that proximately causes death. Thus, if A assaults B, and B dies as a result, A cannot be charged with felony-murder even though a death resulted from the commission of a felony (assault). In some states, the felony-murder statute excludes felonious acts that are themselves the cause of death by limiting the scope of the statute to the felonies enumerated therein.\textsuperscript{18} In other states, courts

\textsuperscript{14} See supra note 1 and accompanying text.
\textsuperscript{15} Homicide Act, 5 & 6 Eliz. 2, ch. 11, § 1 (1957):
Where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offense.

\textsuperscript{16} One such limitation is to restrict the second degree felony-murder rule's application to inherently dangerous felonies, such as armed robbery. E.g., People v. Ford, 60 Cal. 2d 772, 795, 388 P.2d 892, 907, 36 Cal. Rptr. 620, 635 (1964). Another restriction is to disallow the application of the second degree felony-murder rule when assault is the underlying felony. See LAFAVE & SCOTT, supra note 3, § 7.5; State v. Thompson, 88 Wash. 2d 13, 21, 558 P.2d 202, 207 (1977) (Utter, J., dissenting).

\textsuperscript{17} For a discussion of the adoption and operation of this restriction under each state's particular criminal code, see Annotation, Application of Felony-Murder Doctrine Where the Felony Relied Upon is an Includible Offense with the Homicide, 40 A.L.R. 3d 1341 (1971 & Supp. 1986).

\textsuperscript{18} E.g., Fla. Stat. Ann. § 782.04 (West Supp. 1987), which reads in part as follows:

Murder (1)(a) The unlawful killing of a human being: . . . 2. When perpetrated by a person engaged in the perpetration of, or in the attempt to perpetrate, any: (a) Trafficking offense prohibited by § 893.135(1), (b) Arson, (c) Sexual Battery, (d) Robbery, (e) Burglary, (f) Kidnapping, (g) Escape, (h) Aggravated child abuse, (i) Aircraft piracy, or (j) Unlawful throwing, placing, or discharging of a destructive device or bomb; or 3. Which resulted from the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user, is murder in the first degree and constitutes a capital felony, punishable as provided in § 775.082.

Cf. N.Y. Penal Law § 125.25 (McKinney 1975 & Supp. 1987), which limits the underlying felony capable of supporting a second degree felony-murder charge to the following: Robbery, Burglary, Kidnapping, Arson, Rape in the first degree, Sodomy in the first degree, Sexual Abuse in the first degree, Aggravated sexual abuse, Escape in the first degree, or Escape in the second degree.
apply what is known as the "merger doctrine" to exclude felonious acts such as assault from supporting a felony-murder charge. Under the merger doctrine, the assault and the resultant homicide merge into one inseparable offense—manslaughter.

The merger doctrine evolved from judicial efforts to diminish the disparity between culpability and punishment that accompanies the felony-murder rule's application when assault is the underlying felony in a felony-murder charge. Courts adopting the merger doctrine have reasoned that the deterrent effect of the felony-murder rule is illusory; that the theoretical basis for the rule is illogical; and that allowing every assault that resulted in death to be punishable as felony-murder would do violence to the implicit meaning of criminal homicide statutes that distinguish between murder and manslaughter.

A general policy behind the felony-murder rule is to deter persons from committing dangerous felonies, but that deterrence is illusory. Essentially, the rule states that if persons are going to commit felonies, they had better do so carefully because they will be held strictly liable for any deaths that might result. The rule does not deter persons from committing crimes per se; rather, it deters them from committing crimes in a certain manner. For example, a person determined to commit a robbery might be deterred from using a dangerous weapon to facilitate the crime because of the increased probability that someone might be killed during the course of the robbery. The deterrent effect of the rule in such a situa-


20. See, e.g., supra note 11 and accompanying text; see also People v. Ireland, 70 Cal. 2d 522, 539, 450 P.2d 580, 590, 75 Cal. Rptr. 188, 198 (1969); People v. Wilson, 1 Cal. 3d 431, 462 P.2d 22, 44 Cal. Rptr. 494 (1969); State v. Branch, 244 Or. 97, 415 P.2d 766 (1966); State v. Essman, 98 Ariz. 228, 403 P.2d 540 (1965); People v. Luscomb, 292 N.Y. 390, 55 N.E.2d 469 (1944); People v. Lazar, 271 N.Y. 27, 2 N.E.2d 32 (1936); People v. Moran, 246 N.Y. 100, 158 N.E. 35 (1927).

21. "The purpose of the felony-murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit. . . . Where a person enters a building with an intent to assault his victim with a deadly weapon, he is not deterred by the felony-murder rule." Wilson, 1 Cal. 3d at 440, 462 P.2d at 28, 44 Cal. Rptr. at 500. (citation omitted). See generally Comment, Merger and the California Felony-Murder Rule, 20 UCLA L. REV. 250 (1972).

22. Cf. LaFAVE & SCOTT, supra note 3, § 7.5 n.2:

[If] the purpose of the felony-murder doctrine is to hold felons accountable for unintended deaths caused by their dangerous conduct, then it would seem to
tion is based on an assumption that the person (1) makes a
decision to commit robbery, (2) is knowledgeable of the felony-
murder rule, (3) considers the risk of increased punishment via
the rule if a death results from armed robbery, and (4) makes
a decision to commit unarmed, as opposed to armed, robbery
based on the risk of increased punishment.

This deterrent effect, however, is particularly negligible
when applied to the commission of second degree assault. Presumably, most second degree assaults are the result of barroom
brawls, the culmination of heated arguments, or (unjustified)
acts of self-defense. The assailant might not even consider
whether to assault, much less consider the rule and its opera-
tion, or the possibility of death occurring.23 As one commenta-
tor noted, "Holding a felon strictly liable for the resulting
homicide will hardly encourage him to assault more care-
fully."24 The effect of applying the rule in this instance is to
heap additional punishment on the defendant because of the
result of the act, not the act itself.25

Furthermore, application of the felony-murder rule when
assault is the underlying basis for a felony-murder charge is
illogical.26 The rule operates on the premise that an act sepa-
make little difference whether the felony committed was dangerous by its
very nature or merely dangerous as committed in the particular case. If the
armed robber is to be held guilty of felony-murder because of a death
occurring from the accidental firing of his gun, it seems no more harsh to
apply the felony-murder doctrine to the thief whose fraudulent scheme
includes inducing the victim to forgo a life-prolonging operation.

For that matter, it would be "no more harsh" to hold a mail thief guilty of felony-
murder when a person starves to death because he did not receive his welfare check.

23. See supra note 21.
24. Note, Felony-Murder Rule: An Assault Resulting in Homicide May Be Used to
Invoke the Felony-Murder Rule, 13 GONZ. L. REV. 268, 272 (1977) (footnote omitted)
[hereinafter Note, Felony-Murder Rule].
25. The only purpose served by adding punishment to an already punishable act
because that act caused a particular result is retribution. For example, assume the
defendant's act caused an unintentional death, and this act constituted the commission
of second degree manslaughter. Under WASH. REV. CODE § 9.94A.310 (1987), Table 1—
Sentencing Grid, the minimum punishment for a first-offender convicted of second
degree manslaughter is 12 months imprisonment. Under Washington law, because a
death resulted during the commission of a felony (assault), the defendant can be
charged with second degree felony-murder, as will be discussed below. Under
§ 9.94A.310, the minimum punishment for a first-offender convicted of second degree
felony-murder is approximately 12 years.
26. As the California Supreme Court stated:
We have concluded that the 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. . . ." To allow such
rate from the underlying felony caused a death, and that the requisite intent for substantive murder can be inferred from the intent to commit the felony. When the underlying felony is assault, however, there is no separate act that caused the death; there is only one act and one result.\(^\text{27}\)

Finally, gradations in homicide statutes are based on varying degrees of culpability.\(^\text{28}\) Without a felony-murder rule, the

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use of the felony murder rule would effectively preclude the jury from considering the issue of malice aforesought in all cases wherein homicide has been committed as a result of a felonious assault—a category which includes the great majority of all homicides. This kind of bootstrapping finds support neither in logic nor in law.

_Ireland_, 70 Cal. 2d at 539, 450 P.2d at 590, 75 Cal. Rptr. at 198 (citations omitted). "The unity of act and intent that exists when the felony-murder rule is utilized is a fictitious one, at best, for it is a combination of the intent to do one act (the felony) with the commission of another act (homicide)." Note, _The California Supreme Court Assaults The Felony-Murder Rule_, 22 STAN. L. REV. 1059, 1059 n.3 (1970). As (then) Chief Justice Cardozo observed, holding that the same felony that causes the death can support a felony-murder charge constitutes "a futile attempt to split into unrelated parts an indivisible transaction." _Moran_, 246 N.Y. at 104, 158 N.E. at 36. _See also_, State v. Thompson, 88 Wash. 2d 13, 22, 558 P.2d 202, 208 (1977) (Utter, J., dissenting).

**27.** WASH. REV. CODE § 9A.36.021 (1987) defines second degree assault as follows: (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree: (a) Intentionally assaults another and thereby inflicts substantial bodily harm; or . . . . (c) Assaults another with a deadly weapon; or (d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or (e) With intent to commit a felony, assaults another. (2) Assault in the second degree is a class B felony.

Under this definition of assault, every intentional homicide necessarily involves the commission of a second degree assault on the victim. The only possible exception to this rule would be where a person owed a legal duty to another and purposefully failed to act, with the intention that death would subsequently result (i.e., where a nurse withholds a patient's medication in order to cause the patient's death). Apart from this narrow exception, all homicides—first and second degree substantive murder, first, second, and third degree manslaughter, and vehicular homicide—must result from the commission of some type of assault. _See infra_ note 104. Technically, under Washington law, all homicides are punishable as felony-murder. It seems illogical, however, to conclude that the legislature defined and set punishments for six different crimes of homicide and yet intended that all homicides be punishable as felony-murder. _See infra_ text accompanying notes 77-82. For a more detailed explanation of legislative intent, _see infra_ text accompanying notes 66-100.

**28.** For example, first degree substantive murder under WASH. REV. CODE § 9A.32.030(1)(a) (1987) requires premeditation and intent to cause the death of another; second degree substantive murder under § 9A.32.050(1)(a) requires intent to cause the death of another; manslaughter in the first degree under § 9A.32.060(1)(a) requires recklessness in causing the death of another; second degree manslaughter under § 9A.09.070 requires criminal negligence in causing the death of another. Section 9A.08.010(1) defines kinds of culpability—(a) Intent, (b) Knowledge, (c) Recklessness, (d) Criminal negligence. Section 9A.08.010(3) states:

Culpability as Determinant of Grade of Offense. When the grade or degree of an offense depends on whether the offense is committed
non-intentional killing of another would warrant a charge of manslaughter. Where the facts support equally a charge of manslaughter or second degree felony-murder, a question arises: Why should a felony-murder defendant receive the same sentence for committing a non-intentional killing as a defendant found to have committed an intentional killing? In response to this question, courts have found it unlawful to convict a defendant of a specific intent crime (murder) when the only mental state proven was the general intent to assault.29

Washington's criminal homicide statutes contain first and second degree felony-murder provisions.30 Second degree felony-murder requires neither intent to kill, nor intent to commit a felony separate from the act that caused the homicide.31 Although Washington's criminal code states that criminal pun-

intentionally, knowingly, recklessly, or with criminal negligence, its grade or degree shall be the lowest for which the determinative kind of culpability is established with respect to any material element of the offense.

29. See, e.g., supra notes 19-20. Felony-murder charges often arise in imperfect self-defense cases—the defendant uses force in self-defense, a death occurs, and the degree of force used is subsequently held to have been excessive or unjustified. E.g., Thompson, 88 Wash. 2d at 18-20, 558 P.2d at 205, 206 (Utter, J., dissenting); Wanrow, 91 Wash. 2d at 224-226, 559 P.2d at 551. Where the use of force is charged as second degree assault under WASH. REV. CODE § 9A.36.021 (1987), the defendant, by definition, lacked intent to kill.

30. First degree felony-murder is governed by WASH. REV. CODE § 9A.32.030(1)(c) (1987). The statute provides in part that a person is guilty of first degree murder if [h]e commits or attempts to commit the crime of either (1) robbery, in the first or second degree, (2) rape in the first or second degree, (3) burglary in the first degree, (4) arson in the first degree, or (5) kidnapping, in the first or second degree, and, in the course of and in furtherance of such crime or in immediate flight therefrom, he, or another participant, causes the death of a person other than one of the participants. . . .

Second degree felony-murder, the primary topic of this Comment, is governed by WASH. REV. CODE § 9A.032.050(1)(b) (1987), which provides in part that a person is guilty of second degree murder if "[h]e commits or attempts to commit any felony other than those enumerated in [WASH. REV. CODE § 9A.32.030(1)(c)], and, in the course of and in furtherance of such crime or in immediate flight therefrom, he, or another participant, causes the death of a person other than one of the participants. . . ." Prior to 1976, WASH. REV. CODE § 9.48.030 governed first degree felony-murder, and § 9A.48.040 governed second degree felony-murder. Both first and second degree felony-murder are Class A felonies. WASH. REV. CODE § 9A.32.030(2)-.050(2) (1987). Class A felonies committed before July 1, 1984, are punishable by imprisonment for a maximum term fixed by the court of not less than 20 years, or by a fine imposed by the court of not more than $50,000, or by both. WASH. REV. CODE § 9A.20.020(1)(a) (1987). Class A felonies committed after July 1, 1984, are punishable by a maximum sentence of life imprisonment, or a fine of $50,000, or by both. WASH. REV. CODE § 9A.20.021(1)(a) (1987). Regarding first degree felony-murder, WASH. REV. CODE § 9A.32.040 (1987) mandates a sentence of life imprisonment.

ishment is to be commensurate with culpability, the penalty for second degree felony-murder is potentially more severe than the penalty for intentional murder.

This Comment will discuss the effect of applying Washington's felony-murder statute where assault is the underlying felony. The case law interpreting section 9A.32.050(1)(b) of the Revised Code of Washington [hereinafter section (1)(b)] and the legislative intent behind that statute will be discussed, as will the effects of allowing assault to support a section (1)(b) charge. The thesis of this Comment is that interpretation of Washington's criminal code as a whole leads to the conclusion that the legislature never intended assault to be capable of supporting a section (1)(b) charge. It is recommended that the Washington Supreme Court reconsider its position regarding section (1)(b) in light of recent statutory enactments and the court's opinions in other areas. Additionally, the legislature is urged to clarify section (1)(b) by amending the statute.

II. WASHINGTON CASE LAW

The Washington Supreme Court has repeatedly held that

[w]hen the grade or degree of an offense depends on whether the offense is committed intentionally, knowingly, recklessly, or with criminal negligence, its grade or degree shall be the lowest for which the determinative kind of culpability is established with respect to any material element of the offense. The Sentencing Reform Act of 1981 states that the purpose of the Act is, in part, to “[e]nsure that punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history” and to make the sentence for the commission of a felony “commensurate with the punishment imposed on others committing similar offenses.” Wash. Rev. Code § 9.94A.010 (1987). It is clear from the language of these statutes that the legislative policy underlying the sentencing provisions of the criminal code is that the punishment for an offense be commensurate with the defendant's degree of culpability.

33. Both second degree felony-murder and second degree substantive murder are Class A felonies. Under Wash. Rev. Code § 9.94A.310 (1987), Table 1—Sentencing Grid, the minimum sentence for a first-offender would be approximately 12 years (123-164 months). Table 1 also requires additional time to be added to the sentence if the offender was armed with a deadly weapon; in the case of second degree assault, the additional time is 12 months. Under Table 1, a person who intentionally committed murder by strangling another person would receive a minimum sentence of approximately 12 years. On the other hand, a person who shot another person, allegedly in self-defense, causing the assailant's death, would receive a minimum sentence of approximately 13 years, assuming the shooting was held to be unjustified.

34. Washington is virtually the only state in which an assault can support a second degree felony-murder charge. Washington's position regarding the merger doctrine was noted in Thompson, 88 Wash. 2d at 17, 558 P.2d at 205 (citation omitted):

In Harris, we held that, where the precedent felony in a felony murder is an
an assault that causes death does not merge into the crime of manslaughter but instead can support a section (1)(b) charge. The court's reasoning in various cases can be summarized as follows:

(1) The language of section (1)(b) allows any felony other than those enumerated in section 9A.32.030(1)(c)\textsuperscript{35} to support a felony-murder charge. Because assault is not one of the felonies enumerated in section 9A.32.030(1)(c),\textsuperscript{36} it must fall within the scope of section (1)(b);

(2) there is no express language in the criminal code authorizing the merger doctrine or precluding the court's interpretation of section (1)(b);

(3) the legislature must agree with the court's interpretation of section (1)(b)\textsuperscript{37} because it has not taken steps to modify the statute; and

(4) the court is powerless to allow the merger doctrine under Washington law without express legislative authorization.\textsuperscript{38}

Although the criminal code does not expressly state that the crime of assault cannot merge into the crime of manslaughter, the Washington Supreme Court has ruled in a series

\textsuperscript{35} See supra note 30.
\textsuperscript{36} See supra note 30.
\textsuperscript{37} See supra note 30.
\textsuperscript{38} "While it may be that the felony murder statute is harsh, and does relieve the prosecution from the burden of proving intent to commit murder, it is the law of this state." Thompson, 88 Wash. 2d at 17, 558 P.2d at 205.
of opinions that the merger doctrine does not apply to section (1)(b).

The first case to so hold was State v. Harris. In Harris, the defendant had been convicted of second degree felony-murder, the underlying felony being second degree assault. On appeal, the defendant urged the court to adopt the New York (merger) rule. Under then-existing New York law, the unjustified killing of a person by one engaged in the commission of a felony constituted first degree murder. Hence, the New York Court of Appeals has held that the "precedent felony must constitute an independent crime not included within the resulting homicide." Otherwise, under then-existing New York law, every second degree assault that resulted in a death would have been punishable as first degree murder.

The Harris court declined to adopt the New York merger rule, distinguishing New York's statutory scheme from that of Washington. The court reasoned that Washington's legislature had limited the first degree felony-murder rule to specific enumerated felonies, effectively eliminating the need to adopt the New York merger rule.

State v. Mosley followed Harris. The Washington Supreme Court granted the petition to review the case and

40. Id. at 931, 421 P.2d at 663.
43. Harris, 69 Wash. 2d at 931, 421 P.2d at 662.
44. Id. at 933, 421 P.2d at 665. See supra note 30.
45. However,

[i]the dissenters in Harris pointed out that the use of the rule approved by the majority would effectively convert into second-degree murder any crime properly viewed as manslaughter, because manslaughter itself is a felony, and that prevention of precisely such a result was the purpose of the New York court in adopting the felony-murder merger rule.

Thompson, 88 Wash. 2d at 24, 558 P.2d at 209 (Utter, J., dissenting). Furthermore,

[w]hile the legislature may have avoided the New York merger problem—that of a homicide resulting from assault being held murder in the first-degree—the legislature did not respond to Washington's problem. In Washington, the problem is that of automatically converting into second-degree murder a homicide which should properly be viewed as manslaughter.

Note, Felony-Murder Rule, supra note 24, at 274.

46. 84 Wash. 2d 608, 528 P.2d 986 (1974). The defendant struck the victim in the face with his fist, causing the victim to fall backwards and hit his head against a wall. As a result of hitting the wall, and a previous history of head injuries, the victim suffered a skull fracture and died two weeks later. The defendant was charged with and convicted of second degree felony-murder, based on Harris.

47. Meanwhile, the legislature was working on revising the penal code. According
the *Harris* ruling that assault and the resulting homicide do not merge into one crime.\(^\text{48}\) Unfortunately, Mr. Mosley fled the jurisdiction before the court reached a decision, and the issue was thus left undecided until *State v. Thompson*.\(^\text{49}\)

In that case, Linda Marie Thompson was charged with second degree felony-murder under former section 9.48.040(2) of the Revised Code of Washington, which is now section (1)(b), after shooting her intoxicated and physically abusive husband.\(^\text{50}\) Despite a vigorous dissent by four justices,\(^\text{51}\) the majority in *Thompson* affirmed the *Harris* rule. Writing for the majority, Justice Dolliver stated that “[w]hile it may be that the felony murder statute is harsh, and does relieve the prosecution from the burden of proving intent to commit murder, it is the law of this state.”\(^\text{52}\) The court found the lack of express language authorizing the merger doctrine in the criminal statute, coupled with the absence of statutory amendment since *Harris*, conclusive of the legislature’s intent to disallow the merger doctrine.\(^\text{53}\)

One year later, the court decided *State v. Wanrow*.\(^\text{54}\) Defendant Yvonne Wanrow, a five foot four inch partially handicapped woman, had shot a six foot two inch intoxicated man named Wesler after he forcibly entered the home where she was staying.\(^\text{55}\) Wanrow was convicted of second degree

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\(^{48}\) *Mosley*, 84 Wash. 2d at 608-09, 528 P.2d at 986.


\(^{50}\) Mrs. Thompson, who had been physically abused throughout the day by her intoxicated husband, alleged that she killed him in self-defense. For a detailed description of the facts leading to the shooting, see *Thompson*, 88 Wash. 2d at 18-20, 558 P.2d at 206 (Utter, J., dissenting) (“The facts of this case illustrate the injustice of the [felony-murder] rule.”).

\(^{51}\) *Id.* at 18, 558 P.2d at 205 (Utter, J., dissenting, and Horowitz, Hunter, and Rossellini, JJ., concurring in the dissenting opinion).

\(^{52}\) *Id.* at 17, 558 P.2d at 205.

\(^{53}\) *Id.*

\(^{54}\) 91 Wash. 2d 301, 588 P.2d 1320 (1978).

\(^{55}\) Wanrow was confronted unexpectedly by Wesler, a man she knew had previously been committed to Eastern State Hospital for the Mentally Ill, and whom she suspected had slashed the window screen on the bedroom window two days earlier in an attempt to gain entry. Wanrow’s son had complained to her that Wesler had attempted to drag him into a house on the previous afternoon. Wesler had also
murder under former section 9.48.040(2), now section (1)(b). Her conviction was reversed and the case remanded, based on erroneous jury instructions.56 Prior to retrial, Wanrow petitioned the court to dismiss the second degree felony-murder charge urging the court to adopt the merger doctrine.57

The court, however, reaffirmed its view that the merger doctrine does not apply when assault is the underlying felony supporting a second degree felony-murder charge.58 Although the court emphasized again that the legislative intent to disallow the merger doctrine was clear from the lack of express authorization, the court addressed the arguments made in favor of the merger doctrine as well.59 First, the court stated that if the merger doctrine was allowed when second degree assault was the underlying felony in a felony-murder charge, the homicide that resulted would be manslaughter,60 which at the time was defined as “[a]ny homicide other than murder in the first degree, or murder in the second degree, and not being excusable or justifiable.”61 According to the court, allowing the merger doctrine would create “a new category of manslaughter, i.e., where the death results from a felonious assault, contrary to this court’s construction of the manslaughter statute in State v. Sill.”62

The court thought that to adopt the merger doctrine would require overturning Sill, which the court declined to do. The dissent in Wanrow argued that the definition of man-

allegedly molested the seven-year old daughter of Wanrow’s friend, giving the girl a venereal disease. These facts were made known to the police on the day before the homicide, but the police said they could do nothing until the following Monday. Wanrow, 88 Wash. 2d at 224-26, 559 P.2d at 550-51.

56. Id. at 240-41, 559 P.2d at 559.
57. Wanrow, 91 Wash. 2d at 302, 588 P.2d at 1320.
58. After Thompson, Justice Hicks replaced former Chief Justice Hale and concurred with the majority in Wanrow. Justice Hicks began his opinion, however, by stating: “Were I a member of the legislature, I would vote to adopt the merger rule, where assault is the precedent felony in a felony murder charge, for that seems the fairer rule to me.” Wanrow, 91 Wash. 2d at 313, 588 P.2d at 1326 (Hicks, J., concurring).
59. Id. at 305-06, 588 P.2d at 1322.
60. Id.
61. WASH. REV. CODE § 9.48.060 (repealed 1975). Manslaughter is currently defined as follows: Manslaughter in the first degree. (1) A person is guilty of manslaughter in the first degree when: (a) He recklessly causes the death of another person. Id. § 9A.32.060 (1987). Manslaughter in the second degree. (1) A person is guilty of manslaughter in the second degree when, with criminal negligence, he causes the death of another person. Id. § 9A.32.070 (1987).
62. Wanrow, 91 Wash. 2d at 306, 588 P.2d at 1322.
slaughter given in *Sill*, "was wholly dicta to the decision, since at issue was whether the defendant would be acquitted of the manslaughter charge—not whether he should have been found guilty of murder,"63 and that *Sill* need not be overturned to allow the merger doctrine.64 Under the revised penal code, the language limiting manslaughter to non-felonious acts resulting in homicide has been omitted,65 presumably eliminating the cause for concern cited by the majority in *Wanrow*.

III. LEGISLATIVE INTENT

Although the court thinks it must reject the merger doctrine in order to fulfill the legislative intent behind section (1)(b), none of its opinions66 discuss the statute's legislative history. And there is not much to discuss; section (1)(b) was included in a package of revisions to the criminal code and was enacted without change.67 Nowhere in the legislative history does the legislature state that it considered and rejected a pro-

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63. The court in *State v. Sill*, 47 Wash. 2d 647, 289 P.2d 720 (1955), construed manslaughter to be an unintentional killing "by one committing an unlawful, but not felonious, act." *Id.* at 651, 289 P.2d at 723 (citing *State v. Turpin*, 158 Wash. 103, 290 P. 824 (1930)).

64. *Wanrow*, 91 Wash. 2d at 315, 588 P.2d at 1327.

65. See supra note 61.


67. In 1975, Senators Francis, Woody, and Jones presented Senate Bill No. 2092, which contained the language of section (1)(b): a person is guilty of second degree felony-murder when "[h]e commits or attempts to commit any felony other than those enumerated in RCW § 9A.32.030(1)(c), and . . . causes the death of a person. . . ." S.B. 2092 effectively preserved the language of its predecessor, [former] WASH. REV. CODE § 9.48.040(2). The Senate Judiciary Committee had prepared a proposed revision to the statute. The Committee's proposed revision, however, was never voted on by the legislature. Justice Utter had the following to say about the events surrounding the enactment of what is now section (1)(b):

The RWCC (often referred to as "the Orange Code") was the product of 3 years' work by the Judiciary Committee of the Washington Legislative Council and a Citizen's Advisory Committee representing a broad cross section of individuals concerned with our criminal law. Passage of this code was delayed pending submission of an alternative set of bills prepared by the state prosecutor's association which was submitted to the legislature in 1973. This proposed code eliminated the language precluding application of the felony-murder rule to assault and manslaughter which had been part of the "Orange Code." The provision ultimately adopted and referred to by the majority here was thus introduced to the legislature by a group representing those persons vested with a constitutionally impermissible degree of discretion as a result of that same provision.

*Thompson*, 88 Wash. 2d at 26 n.5, 558 P.2d at 210 (Utter, J., dissenting).
posal to adopt the merger doctrine.\textsuperscript{68} In fact, nowhere has the legislature expressly stated its opinion on the matter.

The legislature has stated, however, that punishment is to be commensurate with culpability.\textsuperscript{69} Pursuant to this end, the legislature enacted a homicide scheme based on gradations in culpable mental states. For example, first degree murder requires either premeditated intent to cause the death of another\textsuperscript{70} or manifestation of an extreme indifference to human life;\textsuperscript{71} second degree murder requires intent to cause the death of another without premeditation;\textsuperscript{72} first degree manslaughter requires recklessness;\textsuperscript{73} vehicular homicide requires recklessness or disregard for the safety of others;\textsuperscript{74} and second degree manslaughter requires criminal negligence.\textsuperscript{75} The sentence for each type of homicide varies according to the degree of culpability.\textsuperscript{76}

Also included in the homicide scheme are first and second degree felony-murder,\textsuperscript{77} for which the only mental state

\begin{itemize}
  \item The court's conclusion that the legislature's omission of an express statement from the criminal code authorizing the merger doctrine is indicative of their hostility toward the doctrine fails to acknowledge the realities of the legislative process. As one commentator noted:

Legislatures are pragmatically-minded bodies, their members typically pressed by more business than they have time to handle, buffeted by competing outside interests, as practicing politicians never far from the thought of reelection and the bearing on reelection of the positions they take. They never sit to pass laws out of a planned design to create a single, comprehensive scheme of legal order. Only rarely and after unusual, sustained activity by interested groups do they adopt systematized patterns of law for broad sectors of community life, such as the Uniform Commercial Code. Normally they act for limited, or at least specialized ends. The legislative process is cumbersome; inertia of delay figure more easily in it than the pain of choosing policy; normally legislatures act only when outside interests exert effective pressure on them to do something.

J. Hurst, Dealing With Statutes 52 (1982). But see El Coba Co. Dormitories, Inc. v. Franklin County PUD, 82 Wash. 2d 858, 514 P.2d 524 (1973) (legislature is presumed to be familiar with its prior acts and past judicial interpretations of those acts).

69. See supra note 32.
71. Id. § 9A.32.030(1)(b).
72. Id. § 9A.32.050(1)(a).
73. Id. § 9A.32.060(1)(a).
74. Id. § 46.61.520(1).
75. Id. § 9A.32.070(1).
76. Thus, assuming the defendant had no prior convictions, the minimum sentence would be approximately 23 years for conviction of first degree murder; 12 years for conviction of second degree murder; 3 years for conviction of first degree manslaughter; 18 months for conviction of vehicular homicide; and 13 months for conviction of second degree manslaughter. Id. § 9.94A.310, Table 1—Sentencing Grid.
77. See supra note 30.
proven is the requisite mental state for the underlying felony. Generally, the punishment for felony-murder exceeds the punishment corresponding to the defendant's degree of culpability.\textsuperscript{78} Although the defendant intended to assault, she may not have intended to cause death, yet she is punished in every case as if she had so intended. Therefore, the operation of the felony-murder rule in general contradicts the legislature's intention that punishment be commensurate with culpability. This contradiction is arguably more palatable when the defendant willingly engaged in a felony separate from the act that caused the death. Where the felony underlying the felony-murder charge is the very act that caused the death, however, there is no justification for the potential disparity between the defendant's mental state as to the act, and the punishment given for felony-murder.\textsuperscript{79}

Under Washington's second degree felony-murder statute,\textsuperscript{80} if a defendant commits "any felony other than those enumerated in [section] 9A.32.030(1)(c) [of the Revised Code of Washington]" and a death results, the defendant can be charged with second degree felony-murder.\textsuperscript{81} According to the Washington Supreme Court, "there is no basis for assuming that [section (1)(b)] was not meant to apply where the underlying felony is assault."\textsuperscript{82}

If the purpose of the felony-murder rule is to decrease the risk of death occurring during the commission of felonies,\textsuperscript{83} that purpose logically requires that the felony committed be separable from the act that causes the death.\textsuperscript{84} Furthermore, when the very act that caused the death is the underlying felony supporting the felony-murder charge, punishment cannot be commensurate with culpability. Consider the following examples:

(1) Under section 9A.36.011(1) of the Revised Code of Washington, the commission of first degree assault requires

\textsuperscript{78} See generally supra notes 25 & 33.
\textsuperscript{79} Under Washington's criminal code, punishment is to be based on culpability. Before a defendant is punished for murder under either section (1)(a) or (1)(b) that defendant should be shown to be culpable of murder. A defendant who is shown only to have intended to defend herself, for example, is not culpable of, and should not be punished for, murder.
\textsuperscript{80} See supra note 30.
\textsuperscript{81} WASH. REV. CODE § 9A.32.050(1)(b) (1987).
\textsuperscript{82} Wanrow, 91 Wash. 2d at 308, 588 P.2d at 1323.
\textsuperscript{83} See supra notes 21-22 and accompanying text.
\textsuperscript{84} See supra notes 26-27 and accompanying text.
that the defendant have acted with "intent to inflict great bodily harm." Note that this statute focuses on the defendant's specific intention to cause a certain result. Under section 9A.36.021(1) of the Revised Code of Washington, the commission of second degree assault requires "circumstances not amounting to assault in the first degree." In other words, a charge of second degree assault presumes the defendant did not intend her act to cause great bodily harm—she either acted without considering the consequences of her actions, or misjudged the degree of harm that was likely to result from her actions. In either case, the defendant's mental state would be one of recklessness concerning the ultimate consequences of her actions.

The specific intention to cause an act, coupled with a reckless state of mind concerning the consequences, corresponds to

85. "Great bodily harm" means bodily injury that creates a probability of death, or that causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ. WASH. REV. CODE § 9A.04.110(4)(c) (1987).

86. Id. § 9A.36.021 (1987) (effective July 1, 1988), defines second degree assault as follows:

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree: (a) Intentionally assaults another and thereby inflicts substantial bodily harm; or . . . (c) Assaults another with a deadly weapon; or (d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or (e) With intent to commit a felony, assaults another. (2) Assault in the second degree is a class B felony. "Substantial bodily harm" means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.

Note that by definition, a defendant who commits second degree assault does not intend to kill the victim, because any injury caused must be temporary. Cf. id. § 9A.04.110(4)(c), quoted supra note 85.

Compare WASH. REV. CODE § 9A.36.021(1)(a) with § 9A.36.031(1)(c), which states that a person who, "[w]ith criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm" shall be guilty of third degree assault. Under § 9A.36.021(1)(a), while the defendant must specifically intend the act, her mental state as to the result is not considered. Section 9A.36.031(c), on the other hand, requires that the defendant specifically intend to inflict bodily harm. "[B]odily harm" means physical pain or injury, illness, or an impairment of physical condition. Id. § 9A.04.110(4)(a).

87. "A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation." Id. § 9A.08.010(c).
the definition of first degree manslaughter. At the same time, the commission of second degree assault that results in homicide fits within section (1)(b).

(2) Under section 9A.36.031(1)(c) of the Revised Code of Washington, a person commits third degree assault if she is criminally negligent in causing physical injury to another. Third degree assault is a class C felony. The commission of a criminally negligent act that causes the death of another person corresponds to the definition of second degree manslaughter. At the same time, the commission of the felony of third degree assault resulting in death fits within section (1)(b).

(3) Under section 46.61.522 of the Revised Code of Washington, a person is guilty of vehicular assault if she operates or drives any vehicle in a reckless manner or while under the influence of alcohol or drugs, and proximately causes serious bodily injury to another person. Vehicular assault is a class C felony. The operation of a vehicle in a reckless manner that is the proximate cause of injury to another resulting in death corresponds to the definition of vehicular homicide. At the same time, the commission of vehicular assault resulting in death fits within section (1)(b).

In each of the above examples, the defendant committed one act. The defendant had one mental state as to the commis-

88. "A person is guilty of manslaughter in the first degree when: (a) He recklessly causes the death of another person. . . ." Id. § 9A.32.060 (1)(a).

89. "A person is guilty of murder in the second degree when: . . . (b) He commits or attempts to commit any felony other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he . . . causes the death of a person. . . ." Id. § 9A.32.050(1)(b).

90. Id. § 9A.36.031(2).

91. See supra note 88.

92. See supra note 89.


94. Vehicular Assault—Penalty. (1) A person is guilty of vehicular assault if he operates or drives any vehicle: (a) In a reckless manner, and this conduct is the proximate cause of serious bodily injury to another; or (b) While under the influence of intoxicating liquor or any drug, as defined by [Wash. Rev. Code § ] 46.61.502, and this conduct is the proximate cause of serious bodily injury to another. (2) "Serious bodily injury" means bodily injury which involves a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body.


95. Vehicular homicide is a class B felony. WASH. REV. CODE § 46.61.520(2) (1987).

96. See supra note 89.
sion of that act. As the above examples illustrate, the act committed by the defendant can be punished as one of two crimes. The questions are, which crime, and why?

The legislature has stated that "[w]hen the grade or degree of an offense depends on whether the offense is committed intentionally, knowingly, recklessly, or with criminal negligence, its grade or degree shall be the lowest for which the determinative kind of culpability is established with respect to any material element of the offense." In each of the above examples, the same act by the defendant supports two crimes, though the defendant's mental state is identical for each crime. Because the punishment for second degree felony-murder is greater than that for manslaughter or vehicular homicide, second degree felony-murder is presumably not the crime that the legislature intended to be charged.

Yet according to the Washington Supreme Court, because the legislature did not expressly exclude from section (1)(b) felonious acts that are themselves the proximate cause of death, the legislature must intend these acts to be punishable as second degree felony-murder. This conclusion seems unlikely when one considers the other provisions of the criminal code enacted by the legislature.

For example, first and second degree manslaughter and vehicular homicide are each felonies. All three could be charged as second degree felony-murder under the court's interpretation of section (1)(b). Similarly, forgery, fraud, embezzlement, or any other felony that might possibly result in death could be punished as felony-murder under section (1)(b).

The Washington Supreme Court has stated that the statutory scheme is to be construed as a whole. If the legislature intended "any felony" to support a second degree felony-murder charge, then all felonious acts that result in death must be intended to support a felony-murder charge—assault, manslaughter, vehicular assault, etc. If, on the other hand, the legislature did not intend section (1)(b) to include "any felony," there is no logical reason for holding that the legislature

97. WASH. REV. CODE § 9A.08.010(3) (1987); see supra note 28.
intended assault, but not manslaughter, vehicular assault, etc., to fall under section (1)(b).

It seems clear from the express provision of the Sentencing Reform Act of 1981 that the legislature did not intend that every felonious act that results in death be punished as second degree felony-murder. Otherwise, the legislature would have eliminated the sentencing gradations between murder, manslaughter, and vehicular homicide. These gradations, which were in effect prior to Harris, Mosley, Thompson, and Wanrow, remain in effect under the 1981 Act.

The Washington Supreme Court views the legislature's failure to expressly authorize the merger doctrine as tantamount to a legislative endorsement of the court's holding that the crime of assault can support a section (1)(b) charge. The court relies on the legislature's failure to amend the statute subsequent to Harris as indicative of legislative intent. This reliance is misplaced because it fails to consider legislative intent as manifested in the statutory scheme as a whole.

Examination of the legislative history of section (1)(b), coupled with an examination of the criminal code as a whole, reveals no legislative inclination to reject the merger doctrine.

Accordingly, in order for the criminal homicide scheme to make sense, the words "any felony" contained in section (1)(b) must necessarily mean any felony other than the very act that causes death. In other words, implicit within the criminal homicide scheme is a legislative requirement that the act and the result merge into one inseparable offense, either substantive murder or manslaughter.

IV. THE EFFECT OF STATE V. WANROW: UNWARRANTED PROSECUTORIAL DISCRETION

The Washington Supreme Court's interpretation of section (1)(b) renders Washington law distinct from that of most other

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100. Thompson, 88 Wash. 2d at 17-18, 558 P.2d at 205; Wanrow, 91 Wash. 2d at 307-09, 588 P.2d at 1323-24. "The most convincing reason for rejecting the merger doctrine is that the authority to charge assault under the second degree felony-murder rule comes from the legislature and makes an exception only for the felonies listed in the first degree murder statute. Moreover, the legislature's failure to modify the felony-murder statute during its recent revision of the criminal code could be construed as approval of the court's holding in Harris and tacit rejection of the merger doctrine." Note, Felony-Murder Rule, supra note 24, at 274 (footnotes omitted).
jurisdictions. This distinction is hard-felt by the defendant and welcomed by the prosecutor because by holding that the crime of assault does not merge with a resultant homicide into the crime of manslaughter, the Washington Supreme Court has vested the prosecutor with an enormous amount of discretion.

Because it is virtually impossible to kill someone without also committing some form of assault, prosecutorial discretion

101. See supra note 34.
102. See supra text accompanying note 58.
103. Technically, neither the Washington Supreme Court nor the legislature could constitutionally vest discretion in the prosecution to charge under different statutes defendants who committed the same act, thereby subjecting them to different punishments. Thus, the Washington Supreme Court, in holding that the negligent homicide statute (now WASH. REV. CODE § 9A.32.070(1), quoted supra note 61) supersedes the manslaughter statute (id. § 9A.32.060(1)(a), quoted supra note 61) in all cases where it is applicable, stated:

This not only accords with the rules of statutory construction, but is the interpretation necessary to satisfy the requirements of the fourteenth amendment to the federal constitution requiring equal protection of the law for all persons. The principle of equality before the law is inconsistent with the existence of a power in a prosecuting attorney to elect, from person to person committing this offense, which degree of proof shall apply to his particular case.

State v. Collins, 55 Wash. 2d 469, 470, 348 P.2d 214, 215 (1960); see also State v. Kanistanaux, 68 Wash. 2d 652, 414 P.2d 784 (1966). Compare State v. Reid, in which the Washington Supreme Court held that a prosecutor may exercise discretion in deciding whether to proceed under one statute or another, provided the facts to be proven are not the same. 68 Wash. 2d 243, 247, 401 P.2d 988, 991 (1965).

This constitutional restriction on prosecutorial charging discretion has little practical effect. For instance, the Washington Supreme Court has held that when the facts equally support charges warranting different punishments, "no constitutional defect exists when the crimes which the prosecutor has discretion to charge have different elements." Wanrow, 91 Wash. 2d at 312, 588 P.2d at 1325. Should the fact that the elements of manslaughter are technically different than the elements of second degree felony-murder (based on second degree assault) justify punishing one defendant for manslaughter and one defendant for murder when both committed identical acts? Cf. State v. Zornes, 78 Wash. 2d 9, 23, 475 P.2d 109, 118 (1970): "There is no logical basis for drawing a distinction between an authorization contained in one statute, to charge for either a misdemeanor or a felony, and the same authorization contained in different statutes, if the prosecution under either statute is for the identical act."

Consider the situation where a person, surprised by an assailant, fears for her life and shoots the assailant, causing his death. The defendant claims she acted in self-defense. Her mental state reflected the desire to survive. She did not stop to think, "By shooting at X, I intend to cause substantial bodily harm"; nor did she think, "If I shoot at X, I am likely to kill him, but I don't care." She reacted to what she perceived was a life-threatening situation. The jury, unconvinced that the degree of force used was justified, concludes that the defendant is guilty of committing an unjustifiable homicide. See infra notes 109 & 126-27. The defendant's punishment for this act is then determined by whether the prosecutor charged manslaughter or second degree felony-murder. See infra notes 105-06 and accompanying text.
exists anytime a defendant is charged with causing a homicide.\textsuperscript{104} Thus, when the facts indicate that a non-premeditated intentional killing occurred, the prosecution has the option of charging the defendant with second degree (substantive) murder or second degree felony-murder.\textsuperscript{105} Additionally, when the

\textsuperscript{104} Except for the narrow exception involving omission of a legal duty (discussed \textit{supra} note 27), it is impossible to cause the death of another without committing a felonious assault under the following statutes:

\begin{itemize}
  \item Assault in the first degree
    \begin{enumerate}
      \item A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm: (a) Assails another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or (b) Administers to or causes to be taken by another, poison or any other destructive or noxious substance; or (c) Assails another and inflicts great bodily harm. (2) Assault in the first degree is a class A felony.
    \end{enumerate}


\item Assault in the second degree
  \begin{enumerate}
    \item A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree: (a) Intentionally assaults another and thereby inflicts substantial bodily harm; or . . . (c) Assails another with a deadly weapon; or (d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or (e) With intent to commit a felony, assaults another. (2) Assault in the second degree is a class B felony.
  \end{enumerate}

\textit{Id.} § 9A.36.021.

\item Assault in the third degree
  \begin{enumerate}
    \item A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree: (a) With intent to prevent or resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of himself or another person, assaults another; or (b) Assails a person employed as a transit operator or driver by a public or private transit company while that person is operating or is in control of a vehicle owned or operated by the transit company; or (c) With criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm; or (d) Assails a fire fighter or other employee of a fire department or fire protection district who was performing his or her official duties at the time of the assault. (2) Assault in the third degree is a class C felony.
  \end{enumerate}

\textit{Id.} § 9A.36.031.

\item Vehicular assault
  \begin{enumerate}
    \item A person is guilty of vehicular assault if he operates or drives any vehicle: (a) In a reckless manner, and this conduct is the proximate cause of serious bodily injury to another; or (b) While under the influence of intoxicating liquor or any drug, as defined by [\textsc{Wash. Rev. Code} § ] 46.61.502, and this conduct is the proximate cause of serious bodily injury to another. (2) "Serious bodily injury" means bodily injury which involves a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body. (3) Vehicular assault is a class C felony.
  \end{enumerate}

\textit{Id.} § 46.61.522.

\textsuperscript{105} The dissent in \textit{Thompson} argued that this degree of prosecutorial discretion "is prohibited by the principles enunciated by this court in a number of cases."
commission of either second or third degree assault results in a homicide, the prosecutor has the option of charging manslaughter or second degree felony-murder. A continuum exists with manslaughter on one end and second degree (substantive) murder on the other end. In virtually every case involving homicide, the prosecutor can pick and choose from differing punishments and differing burdens of proof. This discretion is perhaps abused when the circumstances surround-

Thompson, 88 Wash. 2d at 25, 558 P.2d at 210 (Utter, J., dissenting) (footnote omitted). Justice Utter questioned the constitutionality of such discretion on the grounds that it denied defendants equal protection of the law as to the various charges that might be filed against them based on the same facts, and as to the different punishments that might be prescribed for the same act, and quoted the Washington Supreme Court as support for his position. Id. at 26, 558 P.2d at 210 (quoting State v. Collins, 55 Wash. 2d 469, 470, 348 P.2d 214, 215 (1960); Gardner v. Smith, 81 Wash. 2d 365, 366, 502 P.2d 333, 333 (1972)).

As to the various constitutional issues raised by the petitioners in Thompson and Wanrow, the Washington Supreme Court has held that the merger doctrine does not involve constitutional issues. Wanrow, 91 Wash. 2d at 309-13, 588 P.2d at 1324-28. Mrs. Thompson appealed her case to the United States Supreme Court, arguing that WASH. REV. CODE § 9.48.040(2) (replaced by WASH. REV. CODE § 9A.32.050(1)(b)) deprived her of due process and equal protection of the laws. Ms. Wanrow raised these same issues on her appeal to the Washington Supreme Court. Mrs. Thompson's appeal was dismissed "for the want of a substantial federal question." Thompson v. Washington, 434 U.S. 898 (1977). Consequently, the Washington Supreme Court held that the United States Supreme Court effectively approved of Washington's approach regarding the merger doctrine and rejected Ms. Wanrow's constitutional arguments. Wanrow, 91 Wash. 2d at 309-311, 588 P.2d at 1324-25.

106. Note that by charging manslaughter, as opposed to second degree felony-murder, a prosecutor would, in effect, implicitly be applying the merger doctrine, because the act causing the homicide would support a charge of second degree felony-murder.

Cf. State v. Dotts (unreported opinion; facts obtained from Safeco v. Dotts, 38 Wash. App. 382, 685 P.2d 632 (1984)). Dotts gave an open-handed, backhand slap to the face of McKee. The slap did not mark McKee's face and no other contact occurred. McKee lapsed into a coma later that day and died five days later without regaining consciousness. A Stevens County jury convicted Dotts of second degree manslaughter and second degree assault. Id. at 384, 685 P.2d at 633. Under section (1)(b), Dotts committed second degree felony-murder. After considering the operation of the felony-murder rule, and the facts of the case, however, the prosecutor in Dotts decided not to charge felony-murder. Rather, he charged first degree manslaughter and second degree assault. Telephone interview with Jerry Wetle, Stevens County prosecutor in State v. Dotts (Feb. 12, 1987).

107. [T]he prosecution could, by proving precisely the same facts, subject the defendant to substantially different penalties based upon varying proofs, depending upon his own judgment as to the appropriate charge. The broad discretion which results in this instance creates a possibility for unequal treatment under the law which cannot pass constitutional muster.

Thompson, 88 Wash. 2d at 27, 558 P.2d at 210-11 (Utter, J., dissenting). While the broad range of charging discretion available to prosecutors seems to implicate important constitutional issues, the majority of the Washington Supreme Court disagrees with Justice Utter in this regard. See supra note 103. The focus of this Comment is
ing the case strongly suggest that the defendant be charged with manslaughter,\textsuperscript{108} and yet the prosecutor charges second degree felony-murder.\textsuperscript{109}

Prosecutors are constantly forced to make decisions on how, and under what circumstances, to charge defendants. Given the many factors that can affect a charging decision, some discretion is certainly necessary. Generally, prosecutors are reasonable persons who exercise their powers in a responsible manner. No matter how reasonable prosecutors might be in general, however, the issue is too important in some instances to leave solely to their discretion.

Consider, for example, a situation in which it is not clear whether a killing charged to the defendant was committed intentionally or unintentionally. One solution would be to charge second degree substantive murder, and manslaughter in the alternative. Based on the evidence presented at trial, the jury would determine the defendant’s punishment according to her culpability. One solution employed by the prosecutor, however, is to charge second degree substantive murder, second degree felony-murder, and second degree assault.\textsuperscript{110} Thus, as long as the prosecutor proves that the death was caused “in

\textsuperscript{108} In a situation in which the same facts support a charge of manslaughter or second degree felony-murder, the prosecution might decide what offense to charge based on considerations such as pressure from the public and the media, a desire to rid society of certain offenders, or to promote suspect cooperation with law enforcement agencies. F. MILLER, PROSECUTION, THE DECISION TO CHARGE A SUSPECT WITH A CRIME 281-92 (1970).

\textsuperscript{109} An example of such a situation might involve a barroom brawl and a “thin-skulled” victim, or an individual who shoots another in self-defense but is held to have used excessive force. This type of situation may have existed in Thompson or \textit{Wanrow}. See supra notes 50 & 55.

\textsuperscript{110} Sometimes the facts of the case may make it unnecessary to charge felony-murder under section (1)(b). For example, according to information obtained from Ron Clark, Chief Criminal Deputy for the King County Prosecutor’s Office, second degree murder charges were filed against ten different individuals between January 1, 1987, and September 23, 1987. An examination of the pleadings in those cases revealed the following: Six of the defendants were charged with substantive murder under section (1)(a) and with felony-murder under section (1)(b) when the underlying felony charged was second degree assault. Four defendants were charged solely under section (1)(a): in one case, after admitting the killing to the police, the defendant pleaded guilty to first degree manslaughter under a plea bargain arrangement; in one case, the prosecutor planned to amend the complaint to include section (1)(b) and a charge of second degree assault (perhaps the defendant refused to plea bargain?); in one case, the prosecutor indicated that intent to kill was clear in light of the circumstances surrounding the killing; and in the final case, the defendant, who had an extensive
the course of and in furtherance of" the commission of an assault, the prosecutor will obtain a sentence for second degree murder under section (1)(b), even if the jury finds the defendant did not intend to kill the victim. Practically speaking, "there is no prosecutor with knowledge of the law who would undertake to prove the existence of such specific intent [as required in second degree substantive murder] when the absence of the mental element will make no legal difference to the disposition of the case."111

Accordingly, the petitioner in Wanrow argued that under Washington's statutory scheme, every time a homicide occurs, the prosecutor can charge felony-murder by alleging willful assault.112 By refusing to allow the merger doctrine, then, the court rendered meaningless the second degree substantive murder statute when intent to kill is an element of the offense. In response, the court stated:

[A]s long as clear cases of unpremeditated acts with a manifest intent to kill are conceivable, subsection (1) [now section (1)(a)] is not meaningless. Our conclusion that the merger doctrine is not necessary to make sense of the statutory scheme, and should therefore be rejected, was the reason this court declined to adopt the doctrine in State v. Harris...113

The court's attempt "to make sense of the statutory scheme" does not make complete sense. First, although the court may be theoretically correct, one must question why the legislature would create a criminal code that contained two types of second degree murder statutes if one of them, section

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juvenile record and was on parole for second degree robbery, stalked and killed the victim by firing two shots into his back.

Because of the limited number of cases examined, an accurate conclusion concerning prosecutorial charging practices is impossible. It does appear, however, that when there is a doubt about the ability to prove substantive murder, felony-murder is also charged. Furthermore, one reason why more second degree murder charges were not filed during the period in question might be that some defendants agreed to plead guilty to manslaughter when faced with the possibility of being charged with felony-murder.

111. Wanrow, 91 Wash. 2d at 314, 588 P.2d at 1327 (Utter, J., dissenting). For example, in Thompson, the prosecutor initially charged the defendant with second degree substantive murder and second degree felony-murder; later, an amended information was filed charging only felony-murder. Thompson, 88 Wash. 2d at 20, 558 P.2d at 206 (Utter, J., dissenting).

112. Wanrow, 91 Wash. 2d at 307, 588 P.2d at 1323.

113. Id. (emphasis added) (citing State v. Harris, 69 Wash. 2d 928, 421 P.2d 662 (1966), in which the court declined to adopt the merger doctrine).
(1)(a), was to have only theoretical applicability. Second, although "clear cases of unpremeditated acts with a manifest intent to kill are conceivable," prosecutors need only charge these acts under section (1)(a) when they cannot charge under section (1)(b). Given the workload most prosecutors labor under, it is hard to conceive of a prosecutor taking on the additional burden of proving intent under section (1)(a) when the defendant could be convicted with less work under section (1)(b). The only time a prosecutor must charge under section (1)(a) is in the limited case in which a party causes an intentional killing without committing assault; that is, through the intentional omission of a legal duty.

"A prosecutor's initial charging decision is not subject to judicial review except upon a showing of 'arbitrary action or governmental misconduct.' Assuming evidentiary sufficiency, and discounting jury nullification, the law provides essentially no external check on a determined prosecutor's ability to obtain a conviction." Thus, when the same or similar facts support a charge of manslaughter, felony-murder, or substantive murder, the prosecutor essentially decides what punishment the defendant deserves, and charges accordingly. As a result, the exercise of prosecutorial discretion can lead to inconsistent charges being filed and (arguably) disproportionate sentencing. In addition, there is the possibility that that discretion might be abused, contrary to recent legislative attempts to limit such abuse.

114. Examination of recent case files in which second degree murder was charged by the King County Prosecutor's Office reveal several cases where defendants were charged solely under section (1)(a). However, in these cases, intent to kill on the part of the defendants was clear. See supra note 110.

115. WASH. REV. CODE § 9A.32.050(1) (1987). A person is guilty of murder in the second degree when

(a) With intent to cause the death of another person but without premeditation, he causes the death of such person or a third person; or (b) He commits or attempts to commit any felony other than those enumerated in [WASH. REV. CODE § ] 9A.32.030(1)(c) and, in the course of and in furtherance of such crime or in immediate flight therefrom, he . . . causes the death of a person . . .

116. See supra note 27.


118. See supra note 103.

119. For example, a decision to charge a defendant with felony-murder as opposed to manslaughter that was based solely on race, sex, or other discriminatory criteria would constitute an abuse of prosecutorial discretion.
The degree of prosecutorial discretion that results from the Washington Supreme Court's rejection of the merger doctrine is at odds with the legislature's efforts to restrict prosecutorial discretion. Given the prosecutor's role in society and its accompanying responsibility, some degree of prosecutorial discretion is necessary. However, in the Sentencing Reform Act of 1981, the legislature expressed its intention to limit the exercise of prosecutorial discretion. The purpose of the Act is stated in section 9.94A.010 of the Revised Code of Washington, which reads in part as follows:

The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences, and to add a new chapter to Title 9 [of the Revised Code of Washington] designed to:

1. Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
2. Promote respect for the law by providing punishment which is just; [and],
3. Be commensurate with the punishment imposed on others committing similar offenses.

One commentator analyzing the Sentencing Reform Act devotes an entire chapter to the Act's efforts to limit prosecutorial discretion. The author states that "[t]he power to prosecute selectively . . . is potentially at odds with the requirement of equal treatment expressed in the Sentencing Reform Act's purpose that punishment '[b]e commensurate with the punishment imposed on others committing similar offenses.' " In other words, the punishment imposed upon conviction for second degree felony-murder is not commensurate with the punishment imposed upon conviction for manslaughter, even though the offense punished (unintentionally causing the death of another) is identical.

Additionally, allowing the prosecutor to charge defendant A with manslaughter and defendant B with second degree felony-murder when both committed the same act, causing the same result, will appear unjust to the public unless clearly

120. BOERNER, supra note 117, 12-1 through 12-56.
121. Id. at 12-17. For an in depth discussion of the purposes of the Sentencing Reform Act of 1981, see BOERNER, supra note 117, ch. 2.
articulated reasons for the variance in charges are given. Without some comprehensible public explanation, this exercise of prosecutorial discretion might undermine, rather than promote, respect for the law in the eyes of the public.

Because an express purpose of the Sentencing Reform Act is to limit prosecutorial discretion, it seems doubtful that the legislature endorses the court's interpretation of section (1)(b) and the degree of discretion it vests in the prosecutor. Rather, furtherance of the legislative policy articulated in the Sentencing Reform Act seems to require that the Washington Supreme Court change its position on the merger doctrine as a means of limiting the exercise of prosecutorial discretion.

As discussed, the exercise of prosecutorial discretion might result in a section (1)(b) charge being filed against a defendant who lacked the requisite intent to kill for substantive murder but who caused a death while committing an assault. In addition, the exercise of jury discretion might result in the defendant being sentenced for second degree substantive murder.

Although jury discretion is a factor in any jury trial, it takes on increased significance when a defendant is charged under section (1)(b) and assault is the underlying felony. Because lack of intent to kill is not a defense to a section (1)(b) charge, the only defense available to a defendant in such a situation is to argue against the assault charge.

Therefore, when a defendant is charged with second degree felony-murder based on the commission of an assault that resulted in death, the difference between acquittal and a sentence for second degree murder depends on whether the jury finds that the killing was justified, that is, legitimately

122. See supra notes 101-19 and accompanying text.

123. See supra note 6. When charging second degree felony-murder, all the prosecution must prove is that a homicide occurred, and that the defendant had assaulted the victim. Because every homicide necessarily involves a causal act amounting to assault, the only reasonable defense available to a defendant facing a second degree felony-murder charge is that of self-defense. The defendant cannot argue that the victim did not sustain "substantial bodily harm" because the victim is dead. Nor can the defendant argue that the assault was an accident, i.e., that the gun went off accidentally; accidental death by shooting implies assault with a deadly weapon (WASH. REV. CODE § 9A.36.021(1)(b)); assault while intending to commit a felony, e.g., robbery (id. § 9A.36.021(1)(d)); or at least criminal negligence in the handling of the weapon (id. § 9A.36.031(1)(c)).
committed in self-defense. The jury is precluded from considering the defendant's mental state toward the victim, but is not precluded from considering the fact that the defendant has killed another person. Accordingly, the jury might conclude that under the particular circumstances, commission of the assault was reasonable but that the taking of a life was not. Under such circumstances, a defendant does not have much hope of prevailing.

124. When the defendant claims the assault that caused the death was committed in self-defense, the jury will receive something similar to the following instruction:

   It is a defense that the homicide was justifiable as defined in this instruction. Homicide is justifiable when committed in the lawful defense of [the slayer] when the slayer has reasonable ground to believe that the person slain intends [to commit a felony] and there is imminent danger of such harm being accomplished.

   The slayer must employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the slayer at the time.


125. The California Supreme Court has recognized that "the giving of a second degree felony-murder instruction in a murder prosecution has the effect of relieving the jury of the necessity of finding one of the elements of the crime of murder... to wit, malice aforethought." Ireland, 70 Cal. 2d at 538, 450 P.2d at 589, 75 Cal. Rptr. at 197 (citations omitted). To remedy this problem, the court held that under California law,

   [A] second degree felony-murder instruction may not be given when it is based upon a felony which is an integral part of the homicide and which the evidence produced by the prosecution shows to be an offense included in fact within the offense charged.

Id. at 539, 450 P.2d at 590, 75 Cal. Rptr. at 198. The court noted that their holding was in accordance with the law of numerous other states. Id.

126. The instruction given a jury considering a second degree felony-murder charge when the underlying felony is assault will be similar to the following:

   A person commits the crime of murder in the second degree when he or she [commits] [or] [attempts to commit] (second or third degree, or vehicular assault) and he or she causes the death of a person [unless the killing is excusable] [or] [justifiable].


127. This set of circumstances may have existed in State v. Wanrow, 88 Wash. 2d 221, 559 P.2d 548 (1977). In Wanrow, the court held that jury instructions that effectively impose the same standard of reasonable force in self-defense for women as for men are prejudicial and constitute reversible error. Id. at 241, 559 P.2d at 559. When a woman is charged with second degree felony-murder, the jury may judge an assault allegedly committed in self-defense in a similar prejudicial manner. When a defendant is charged only under section (1)(b), the jury must either convict for felony-murder or acquit the defendant. The jury might conclude that the assault was justified but convict anyway by reasoning that anyone who kills another deserves to be punished. Technically, if the assault was justified, the defendant should be acquitted because there would no longer be a felony supporting the section (1)(b) charge.

128. In State v. Thompson, 88 Wash. 2d 13, 558 P.2d 202 (1977), the defendant had filed a waiver of jury trial, fearing jury prejudice based on her appearance, her history of drug and alcohol abuse, and the public interest generated by a recent rash of violent
On the other hand, if the prosecutor was limited to charging second degree substantive murder or manslaughter, a conclusion that the assault was justified, but that the resulting homicide nevertheless warrants punishing the defendant, would allow the jury to punish the defendant without convicting her of second degree murder. Although this situation still involves a questionable degree of jury discretion, it would ameliorate somewhat the harsh all-or-nothing consequences that result when second degree felony-murder is the sole charge that goes to the jury.

V. ADOPTION OF THE MERGER DOCTRINE?

Although the Washington Supreme Court declined to recognize the merger of one offense into another for purposes of section (1)(b), in State v. Johnson (I) the court did conclude that necessarily included offenses must merge into the primary offense.\(^\text{129}\)

In Johnson (I), the defendant had been convicted of first degree rape, first degree kidnapping, and first degree assault.\(^\text{130}\) In order to secure a conviction for first degree rape, the prosecution had to prove not only that the defendant committed the rape, but also that he committed the separate crime of kidnapping. Furthermore, in order to secure a conviction for first degree kidnapping, the prosecution had to prove the commission of first degree assault. Counsel for the defendant argued that the acts of kidnapping and assault were necessarily included in the offense of first degree rape, and that the defendant could not be charged with these acts as separate offenses.\(^\text{131}\) The court agreed:

\(^\text{129}\) 92 Wash. 2d 671, 600 P.2d 1249 (1979).
\(^\text{130}\) Id. at 672, 600 P.2d at 1250.
\(^\text{131}\) Id. at 674-76, 600 P.2d at 1251-52.
As we read the statutes, the legislature intended that conduct involved in the perpetration of a rape, and not having an independent purpose or effect, should be punished as an incident of the crime of rape and not additionally as a separate crime.

While it is not expressly set forth in the statute, this construction of the legislative intent is nowhere negated.\textsuperscript{132}

The court stated further that "as we construe the legislative intent, . . . those crimes [first degree assault and first degree kidnapping] became merged in the completed crime of first degree rape."\textsuperscript{133} Contained within this statement was a footnote that delimited the statement’s applicability to the felony-murder rule. The footnote stated that the \textit{Harris} court had found no clear expression of legislative intent to exclude

\textsuperscript{132} \textit{Id.} at 676, 600 P.2d at 1252 (emphasis added).

\textsuperscript{133} \textit{Id.} at 681, 600 P.2d at 1255 (emphasis added). In response to the court’s holding in \textit{Johnson (I)}, the prosecutors’ association submitted a bill to the legislature stating that necessarily included offenses do not merge with the underlying result into one crime. The bill was submitted a number of times between 1980 and 1983. Each time it was rejected by the legislature. Telephone interview with Mike Redmond, Washington Association of Prosecuting Attorneys, Olympia, Washington (Feb. 13, 1987).

The holding of \textit{Johnson (I)} was explained and limited in State v. Johnson (II), 96 Wash. 2d 926, 936, 639 P.2d 1332, 1337 (1982):

Since the same evidence (of the attendant assault and kidnapping) is required to convict of first degree rape, according to the intent of the legislature and our same evidence test, those crimes merged into the higher degree of the crime.

But \textit{Johnson (I)} is not determinative of the case before us, as proof of the separate act preceding the statutory rape was not necessary to proof of the statutory rape, and the legislature has not designated that the separate acts should merge.

The limitations imposed by \textit{Johnson (II)} were then explained in State v. Vladovic, 99 Wash. 2d 413, 420-21, 662 P.2d 853, 857 (1983). In discussing \textit{Johnson (I)} and (II), the court stated:

We reaffirm our holdings that the merger doctrine is a rule of statutory construction which only applies where the Legislature has clearly indicated that in order to prove a particular degree of crime (\textit{e.g.}, first degree rape) the State must prove not only that a defendant committed that crime (\textit{e.g.}, rape) but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes (\textit{e.g.}, assault or kidnapping).

Although the \textit{Vladovic} court was not addressing the question of an inherent assault merging into a resultant homicide, it appears that this is a type of situation in which the merger doctrine should apply. In order to prove \textit{any} type (or degree) of homicide—vehicular homicide, first or second degree manslaughter, or first or second degree murder—the prosecution must prove that the defendant committed an assault of some type which caused the victim’s death. Under the language quoted above, the assault should merge into the resultant homicide, because one cannot commit homicide without committing assault.
assault from the words "any other felony" and that the legislature had not seen fit to amend the statute to reflect a contrary intention.\textsuperscript{134} Furthermore, the court stated that cases decided under the second degree felony-murder statute "are distinguishable in that they involve not only different statutory language, but different issues as well."\textsuperscript{135}

Although the second degree felony-murder statute might involve different issues and different language than the statute at issue in *Johnson (I)*, there is no reason that that fact alone should stop the court from giving cognizance to the legislative intent implicit within the statute. The reason for not allowing the crimes of kidnapping and assault to be punishable as separate offenses was that they were necessarily included in the end result—first degree rape. But in the case of an assault-based felony-murder charge, the state does not seek to punish the defendant for the separate crime of assault.\textsuperscript{136} Instead, the state recognizes the assault as a felony separate from the resulting homicide for the purpose of supporting a section (1)(b) charge. Likewise, the state could recognize the homicide as manslaughter, and then charge felony-murder because a death resulted during the commission of a felony, namely, manslaughter.

The legislature could not have intended that criminal punishment be determined by such circuitous reasoning. In order to fulfill the legislative intent that punishment be assigned according to the defendant's culpability,\textsuperscript{137} the crime of assault must merge with a resultant homicide into the crime of man-

\textsuperscript{134} *Johnson (I)*, 92 Wash. 2d at 681 n.6, 600 P.2d at 1255.

\textsuperscript{135} *Id.* The issues differ in that in *Johnson (I)*, the defendant was concerned with being punished separately for two acts, kidnapping and rape, which under the statutory scheme constituted one offense, first degree rape. In contrast, the problem with section (1)(b) is not that a defendant might be punished separately for assault and manslaughter. Instead, the concern is that a defendant who commits manslaughter can be punished under section (1)(b) for murder because the commission of manslaughter necessarily requires the commission of assault. *Cf.* *supra* note 104 and accompanying text.

\textsuperscript{136} Under *Wash. Rev. Code* § 9.94A.310 (1987), Table 1—Sentencing Grid, assuming first-offender status, the minimum combined punishment for conviction for second degree assault (3 months) plus the minimum punishment for conviction for manslaughter (2 years, 7 months) equals nearly three years. In comparison, the minimum punishment for a first-offender convicted of second degree felony-murder is approximately 12 years. Most criminal defendants would gladly accept the combined punishment for assault and manslaughter as opposed to the single punishment for second degree felony-murder.

\textsuperscript{137} *See* *supra* note 32.
slaughter. "While it is not expressly set forth in the statute, this construction of the legislative intent is nowhere negated."\textsuperscript{138} Rather, the same implicit legislative intent that the court found within the first degree rape statute in Johnson \textit{(I)} exists within section (1)(b). Furthermore, recognition of this implicit intent leads to the same conclusion that was reached in Johnson \textit{(I)}:\textsuperscript{139} necessarily included offenses cannot be separated from the result solely for the purpose of increasing the amount of punishment. In other words, felonious acts that are themselves the cause of death cannot be separated from the resulting homicide solely to support a charge of felony-murder under section (1)(b).

VI. \textbf{Summary and Conclusion}

Ten years ago, the Washington Supreme Court concluded that the merger doctrine was not allowable under Washington law. At that time, the court acknowledged that with the possible\textsuperscript{140} exception of Maine, no other state shared Washington's position. During the past ten years, numerous defendants have been sentenced for second degree murder when in other jurisdictions, \textit{as well as under Washington law}, they could have been sentenced for manslaughter.\textsuperscript{141}

In the Sentencing Reform Act of 1981, the legislature specifically set punishments for felonious acts that are themselves the cause of death, thereby negating the conclusion that they are to be punishable under section (1)(b). The legislature must have intended that felonious acts that are themselves the cause of death be excluded from the second degree felony-murder statute. Otherwise, it would not have enacted separate provi-

\textsuperscript{138} Johnson \textit{(I)}, 92 Wash. 2d at 676, 600 P.2d at 1252. \textit{See also supra} note 132.

\textsuperscript{139} The holding of Johnson \textit{(I)}, subsequently explained and limited, is still applicable to situations in which a section (1)(b) charge is based on assault. \textit{See supra} note 133.

\textsuperscript{140} \textit{See supra} note 34.

\textsuperscript{141} \textit{See supra} text accompanying notes 88-92 for a discussion of the distinction between manslaughter and second degree felony-murder (or lack thereof) under Washington law. \textit{Cf.} Sullinger v. Oklahoma, 675 P.2d 472 (Okla. 1984). In Sullinger, the appellant struck a corrections officer who fell backwards, hitting his head on a three or four inch steel beam and a concrete sidewalk. Under Oklahoma law, the felony underlying a felony-murder charge must constitute an independent crime not included within the resulting homicide. Accordingly, appellant's conviction for second degree felony-murder was reversed and remanded. \textit{Id.} at 473. Sullinger was sentenced to ten years imprisonment upon conviction of second degree felony-murder. Under \textit{Wash. Rev. Code} § 9A.20.021(a) (1987), he could have been sentenced to life imprisonment.
sions for such felonies as first and second degree manslaughter and vehicular homicide. Furthermore, the Act embodies a legis-
listive determination to limit prosecutorial discretion. To this end, the Act left intact the court's holding in Johnson (I).

The court's refusal to allow the merger doctrine potentially results in punishment that is not commensurate with culpability.\textsuperscript{142} This result is contrary to the stated purpose of the Sentencing Reform Act and section 9A.08.010(3) of the Revised Code of Washington.\textsuperscript{143} In order to comport with this express legislative mandate, the language of section (1)(b) must be interpreted to include only those felonies separate from the act causing the death. Additionally, rules of statutory construction require that the court construe the statutory scheme as a whole, in the light most favorable to the defendant.\textsuperscript{144} Although the legislature has not expressly authorized the merger doctrine, the criminal homicide scheme evinces an implicit intention that felonious acts that are themselves the cause of death be excluded from section (1)(b). Only by allowing an assault and a resultant homicide to merge into the crime of manslaughter can the legislative gradations between manslaughter and murder be preserved.

Presently, the amount of prosecutorial charging discretion,\textsuperscript{145} minus the need to prove intent to kill,\textsuperscript{146} essentially vests the prosecutor with the power to judge and punish defendants accused of committing homicide. If the prosecutor seeks a potential sentence of life imprisonment, she should have to establish that the defendant intended to kill the victim.\textsuperscript{147} Every felonious homicide warrants a prison sentence, but non-intentional killing does not warrant potential life imprisonment. The effect of allowing the merger doctrine would be to charge the defendant with manslaughter, and if she is convicted, to punish her for manslaughter. Virtually every jurisdiction in the country has concluded that this is just punishment for the offense committed.\textsuperscript{148}

Since the court decided Wanrow, the following legislative and judicial events have taken place:

\textsuperscript{142} See supra note 25.
\textsuperscript{143} See supra note 32.
\textsuperscript{144} See supra note 98.
\textsuperscript{145} See supra notes 101-19 and accompanying text.
\textsuperscript{146} See supra note 6.
\textsuperscript{147} See supra notes 6, 12, & 115 and accompanying text.
\textsuperscript{148} See supra note 34.
(1) The language limiting manslaughter to non-felonious acts has been omitted from the manslaughter statutes.

(2) The legislature enacted the Sentencing Reform Act of 1981 with the stated purpose of limiting the exercise of prosecutorial discretion. Additionally, the Act sets specific punishments for various felonies. Without the merger doctrine, these legislatively determined punishments can be bypassed by charging second degree felony-murder.

(3) The court recognized in Johnson (I) that necessarily included offenses merge with the result into one crime. The court stated that the legislature implicitly intended that the necessarily included offenses not be separable from the result. After Johnson (I), the prosecutors' association repeatedly submitted a bill to the Senate that would have disallowed the included offenses to merge with the result. Each time the legislature rejected the bill.

These legislative and judicial events indicate that it is time for the Washington Supreme Court to reconsider adopting the merger doctrine. Adopting the merger doctrine where assault is the underlying felony supporting a felony-murder charge will not result in murderers running rampant in the streets. Defendants who commit murder will still be sentenced for murder. Defendants who have not committed murder as defined under section 9A.32.050(1)(a) of the Revised Code of Washington, however, will no longer be subject to punishment for second degree substantive murder. Adopting the merger doctrine will serve to limit the degree of prosecutorial discretion and will result in uniform charges being filed against defendants who commit identical acts. Prosecutorial discretion will, of course, still exist: if the defendant's act suggests that the killing was not unintentional, the prosecutor can charge second degree substantive murder, and manslaughter in the alternative.

At this point, the Washington Supreme Court seems entrenched in its stand against allowing the merger doctrine. It is hoped, however, that the court will reconsider its position.

149. See supra note 61.
150. The court in Wanrow was concerned that allowing the merger doctrine would create a new class of manslaughter and require that State v. Sill, 47 Wash. 2d 674, 289 P.2d 720 (1955), be overturned. See supra text accompanying note 62.
151. See supra text accompanying notes 101-19.
152. See supra note 133.
the next time it considers a case in which assault is the felony supporting a felony-murder charge. At the same time, it is urged that the legislature clarify its position by statutory amendment and thus bring Washington law into conformity with the law of other states.

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153. The statute could be amended easily by including language precluding the application of assault and manslaughter as was done by the Senate Judiciary Committee in the Orange Code. See, e.g., supra note 67. The legislative digests fail to reveal any indication that the legislature has examined section (1)(b) since its enactment in 1975. Cliff Pederson, Staff Coordinator for the Senate Judiciary Committee, stated that the Committee has taken no action regarding the statute during the five years that he has been with them, and was not aware of any action taken by the Committee between that time and the statute's enactment. Telephone interview with Cliff Pederson (Oct. 9, 1987).