PROSECUTING CHILD ABUSE HOMICIDES IN IOWA: A PROPOSAL FOR CHANGE

TABLE OF CONTENTS

I. INTRODUCTION

On September 25, 1987, Lisa Jennings gave her eight-month-old son, Devrick, medication to fight a fever and an ear infection.[1] She then laid him down for a nap in a bedroom.[2] Shortly thereafter, Devrick started to cry.[3] Dexter Hughes, the infant's father and Lisa's boyfriend, agreed to check on Devrick and managed to quiet him.[4] Moments later, however, Devrick again started to cry.[5] Hughes returned to the bedroom and after a couple of minutes called for Lisa.[6] When Lisa entered the room, she saw Devrick lying unresponsively on the floor in a fetal position.[7] Hughes then attempted to revive Devrick, who later died at a hospital.[8]

Devrick was a victim of "shaken baby syndrome,"[9] caused by intentional, violent shaking.[10] In connection with the boy's death, Hughes was charged with,

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1. State v. Hughes, 457 N.W.2d 25, 26 (Iowa Ct. App. 1990).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. For a technical discussion of shaken baby syndrome, see Randell Alexander et al., *Serial Abuse in Children Who Are Shaken*, 144 AM. J. OF DISEASES OF CHILDREN 58 (1990); *see also* Derek A. Bruce & Robert A. Zimmer, *Shaken Impact Syndrome*, 18 PEDIATRIC ANNALS 482 (1989) (reporting results of investigations of 26 SIDS cases, 18 of which were later found to be attributable to asphyxiation, smothering, hypothermia, and shaken baby syndrome); Millard Bass et al., *Death-Scene Investigation in Sudden Infant Death*, 315 NEW ENG. J. MED. 100 (1986)

and convicted of, felonious child endangerment and first-degree felony murder.[11] Although Hughes maintained that Devrick's death was accidental and unforeseeable, the state offered medical evidence that established his injuries were intentionally caused and that his death was a foreseeable consequence.[12] The doctor who performed the infant's autopsy described the force necessary to inflict the injuries as "such a significant shaking that [Devrick's] head [was] being . . . bounced from [his] chest and then all the way back to hit against [his] back," causing the boy's brain to oscillate after his skull became stationary.[13]

Devrick's death represents just one of the six estimated child abuse related deaths in Iowa each year and one of over 1400 nationally.[14] Unfortunately, these numbers are on the rise.[15] The increased number of reported child abuse homicides is due, in part, to the particularly horrific circumstances surrounding these deaths, which have lead to an increased public and medical awareness of the actual causes of infant death.[16] In some cases, causes of deaths that at one time might have been labeled as unknown or accidental are now being correctly identified as intentional homicides.[17]

(describing the clinical picture of shaken baby synrome, the ability to diagnose through radiology, and the results of emergency resuscitation); Barbara Eagan et al., *The Abuse of Infants by Manual Shaking: Medical, Social and Legal Issues*, 72 J. FLA. MED. ASS'N. 503 (1985) (comparing variances in the management of Whiplash Shaken Infant Syndrome (WSIS) and discussing the need for uniform evaluation procedures for WSIS).

10. State v. Hughes, 457 N.W.2d 25, 27 (Iowa Ct. App. 1990). He "suffered a severely-swollen brain, swelling about the eyes, bilateral subdural bleeding from the brain, subarachnoid bleeding, and subdural hematomas over the entire spinal cord, all of which were acute rather than chronic." *Id.*

11. *Id.* at 26. See *infra* text accompanying note 38 for the definition of felony murder in Iowa.

12. State v. Hughes, 457N.W.2d at 27. Hughes asserted that Devrick's death was the consequence of a previously unknown physical condition, which culminated in a seizure and became unintentionally aggravated by his concerned attempt to revive the baby. *Id.*

13. *Id.*

14. BETH A. PAYNE, NATIONAL CENTER FOR PROSECUTION OF CHILD ABUSE, PROSECUTION OF CHILD ABUSE DEATHS 1 (1992) (citing DEBORAH DARO & KAREN MCCURDY, CURRENT TRENDS IN CHILD ABUSE REPORTING AND FATALITIES: NCPCA 1991 ANNUAL FIFTY STATE SURVEY (1992)).

15. The increase in child abuse related deaths is directly linked to the increase in child abuse itself. In 1986 alone, an estimated one and a half million children were known victims of maltreatment in the United States. *See* NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, STUDY OF NATIONAL INCIDENCE AND PREVALENCE OF CHILD ABUSE AND NEGLECT: 1988, 3-2 (1988). Of this number, 358,300 children were physically abused, 211,100 emotionally abused, and 155,900 sexually abused. *Id.* at 3-8. The number of countable abuse and neglect cases in 1986 represents a 64% increase from studies conducted in 1980. *Id.* at 3-2.

16. *See* BETH A. PAYNE, NATIONAL CENTER FOR PROSECUTION OF CHILD ABUSE, PROSECUTION OF CHILD ABUSE DEATHS: STATUTORY REFORMS 1 (1991).

17. *See id.*; *see also* Bass et al., *supra* note 9, at 100 (suggesting many sudden deaths of infants have an identifiable cause, making the high rates of SIDS (4.2 per 1000 live births) occurring in the low socio-economic population treated at Kings County Hospital in New York City questionable). For example, in *State v. Jurgens*, 424 N.W.2d 546 (Minn. Ct. App. 1988), the State successfully prosecuted a parent for second-degree murder more than twenty years after the death of her adopted son. *Id.* at 556. At the time of the boy's death in 1965, the autopsy report listed the mode of death as "deferred." *Id.* at 549. In 1986, however, the mode of death was changed to

Although states have come a long way in prosecuting homicides resulting from child abuse[18] —especially regarding public awareness and medical diagnosis—not enough attention has been given to the homicide laws under which convictions must be sought. In many cases, efforts to obtain convictions and maximum punishments for child abuse homicides are hindered because prosecutors are required to pursue convictions under pre-existing homicide statutes,[19] which are not designed to take into consideration the unique circumstances surrounding child abuse homicides.[20]

For example, most first-degree murder statutes, including Iowa's, have traditionally required a showing of willfulness, deliberation, and premeditation.[21] As illustrated by the circumstances surrounding Devrick Hughes's death in *State v. Hughes*,[22] however, it is often very difficult—if not impossible—to obtain direct, subjective evidence of a caretaker's intent to injure or kill a child. It can also be difficult to obtain a conviction for second-degree murder, which traditionally requires a showing of killing with malice aforethought.[23] Rather than believe that an accused acted out of hatred or ill will, it is much easier for courts to conclude that the death resulted from understandable, uncontrollable frustration of dealing with a crying infant.[24] Others have even concluded evidence of a

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"homicide" after a different coroner examined the autopsy report and concluded that the boy had been a victim of battered child syndrome. *Id.*

18. One of the first successfully prosecuted child abuse cases was brought in the 1870s, under a statute designed to prohibit cruelty to animals. *See* Mason P. Thomas, Jr., *Child Abuse and Neglect, Part I: Historical Overview, Legal Matrix and Social Perspectives*, 50 N.C. L. REV. 293, 308 (1972). Eventually, states adopted legislation designed specifically to protect the welfare of children. *Id.* at 341. But because parents were given broad discretion as to how they could raise and punish their children, courts were initially hesitant to convict parents for abusing their children. *Id.* at 339-40; *see, e.g.*, State v. Jones, 95 N.C. 588 (1886) (holding questions surrounding alleged child abuse were domestic, rather than legal, concerns).

19. Generally, first-degree murder convictions required an intent to kill, including premeditation and deliberation, or a showing the death occurred in the course of one of five stated felonies—rape, robbery, kidnapping, arson or burglary. 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 7.7 (1986). It is often very difficult to convict a parent in a child homicide case of first-degree murder when findings of willfulness, deliberation, and premeditation are required. *See infra* notes 150-153 and accompanying text; H.D. Warren, Annotation, *Criminal Liability for Excessive or Improper Punishment Inflicted on Child by Parent, Teacher, or One In Loco Parentis*, 89 A.L.R.2d 396 (1963).

20. Gathering direct evidence of the circumstances surrounding child abuse is problematic because these crimes almost always take place in the home, the victims are often too young to defend themselves or explain how the injuries occurred, and family members often act in concert to conceal evidence or hamper investigations. *See* State v. Tanner, 675 P.2d 539, 551 (Utah 1983), *superseded by statute as stated in* State v. Walker, 743 P.2d 191 (Utah 1987). As a result, most convictions are made from circumstantial evidence and reasonable inferences. *Id.*

21. *See* 2 LAFAVE & SCOTT, *supra* note 19, § 7.7.

22. State v. Hughes, 457 N.W.2d 25, 26 (Iowa Ct. App. 1990).

23. *See* LAFAVE & SCOTT, *supra* note 19, § 7.7.

24. *See* State v. Taylor, 452 N.W.2d 605, 606-07 (Iowa 1990) (rejecting the district court's findings that the accused in a shaken baby syndrome case did not act with malice aforethought and a fixed purpose to harm, but rather it was an immature, frustrated reaction).

pattern of abuse and torture can be reasonably construed as an attempt to keep the child alive for further abuse and not evidence of an intent to kill at all.[25]

Many state legislatures began dealing with this issue by amending their felony-murder statutes to permit felony child abuse to act as the underlying felony that triggers a felony-murder charge.[26] Some legislatures and courts, however, view the scope of the felony-murder doctrine more narrowly and limit the underlying felonies to only those that are independent from the homicide itself.[27] Rather than allow aggravated assault, battery, or felonious child abuse—arguably the same crimes[28]—to act as an underlying felony, the trend in these states is to adopt novel "homicide-by-abuse" laws to facilitate prosecution of child abuse homicides.[29] These laws incorporate the elements of felonious child abuse in order to make acts likely to cause serious injury or death to a child first-degree murder.[30]

In 1985, the Iowa Legislature amended its felony-murder statute to include felonious child endangerment as an underlying felony.[31] Consequently, certain acts of child abuse that result in the death of a child may constitute the basis for first-degree felony murder convictions, carrying with them mandatory life sentences in prison.[32] This result may please society. Such a result, however, arguably abuses the limited purpose of the felony-murder rule and violates the defendant's right to due process.

This Note addresses the current dilemma of convicting offenders of child abuse homicide under the existing Iowa first-degree felony-murder statute in light of the merger and independent felony doctrines. Part II of the Note examines the current law of Iowa[33] while Part III discusses and compares Iowa's laws with other states.[34] Finally, Part IV of the Note concludes by suggesting that the Iowa Legislature adopt some form of homicide-by-abuse law, a solution that will continue to offer maximum penalties for convicted offenders without further jeopardizing the integrity of the felony-murder statute.[35]

II. BACKGROUND AND IOWA LAW

Few would argue that the senseless killing of a child does not deserve the most severe punishment permitted by law. In Iowa, two methods are currently used to convict an accused of first-degree murder, which imposes a mandatory

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25. Midgett v. State, 729 S.W.2d 410, 411 (Ark. 1987) (finding accused did not intend to kill the child in a battered child syndrome case, but intended the child to live so that further physical abuse could be administered).

26. *See infra* text accompanying note 155.

27. *See infra* notes 70-71 and accompanying text.

28. *See infra* text accompanying note 147.

29. *See* PAYNE, *supra* note 16, at 1; *see infra* notes 175-77 and accompanying text.

30. *See infra* notes 173-75 and accompanying text.

31. *See* IOWA CODE §§ 707.2(2), 702.11 (1993).

32. *See infra* notes 36-39 and accompanying text.

33. *See infra* notes 36-122 and accompanying text.

34. *See infra* notes 123-94 and accompanying text.

35. *See infra* notes 195-96 and accompanying text.

life sentence, in a child abuse homicide case.[36] Under the Iowa criminal code, a defendant is guilty of first-degree murder if the state can prove the child was murdered "willfully, deliberately and with premeditation."[37] A person also commits first-degree felony murder by participating in felonious child endangerment that results in the death of the child.[38]

Of the two methods, it is less difficult for the State to obtain a first-degree felony-murder conviction. In a felony-murder prosecution, the State must only establish the deceased child was a victim of felonious child endangerment and was murdered by the accused.[39] Therefore, the State is not required to prove the

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36. *See* IOWA CODE § 902.1 (1993).

37. *Id.* § 707.2(1).

38. *Id.* §§ 707.2(2), 702.11. Other forcible felonies, which may act as underlying felonies in felony-murder convictions, include "assault, murder, sexual abuse, kidnapping, robbery, arson in the first degree, or burglary in the first degree." *Id.* § 702.11. The Iowa Supreme Court has also held that "willful injury" may be an underlying felony sufficient to convict a person of first-degree felony murder. State v. Beeman, 315 N.W.2d 770, 776 (Iowa 1982); *see infra* text accompanying notes 82-84.

39. IOWA CODE § 707.2(2) (1993). A parent or caretaker commits child endangerment if he or she:

> a. Knowingly acts in a manner that creates a substantial risk to a child or minor's physical, mental or emotional health or safety.
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> b. By an intentional act or series of intentional acts, uses unreasonable force, torture or cruelty that results in physical injury, or that is intended to cause serious injury.
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> c. By an intentional act or series of intentional acts, evidences unreasonable force, torture or cruelty which causes substantial mental or emotional harm to a child or minor.
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> d. Willfully deprives a child or minor of necessary food, clothing, shelter, health care or supervision appropriate to the child or minor's age, when the person is reasonably able to make the necessary provisions and which deprivation substantially harms the child or minor's physical, mental or emotional health. For purposes of this paragraph, the failure to provide specific medical treatment shall not for that reason alone be considered willful deprivation of health care if the person can show that such treatment would conflict with the tenets and practice of a recognized religious denomination of which the person is an adherent or member. This exception does not in any manner restrict the right of an interested party to petition the court on behalf of the best interest of the child or minor.
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> e. Knowingly permits the continuing physical or sexual abuse of a child or minor. However, it is an affirmative defense to this subsection if the person had a reasonable apprehension that any action to stop the continuing abuse would result in substantial bodily harm to the person or the child or minor.
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> f. Abandons the child or minor to fend for the child or minor's self, knowing that the child or minor is unable to do so.

IOWA CODE § 726.6 (1993). "Serious injury" is defined as any "disabling mental illness, or bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." *Id.* § 702.18. "Child" is defined as "any person under the age of fourteen years." *Id.* § 702.5.

It is a class "C" felony, which carries a maximum penalty of ten years imprisonment, for a person to commit child endangerment that causes a serious injury to a child or minor. *Id.* §§

child was killed willfully, deliberately, and with premeditation,[40] or that the accused intended or knowingly caused the child's death[41] to satisfy a felony-murder conviction.

Technically, the Iowa Code permits the State to prosecute a child abuse homicide as first- or second-degree murder,[42] voluntary manslaughter,[43] or involuntary manslaughter.[44] Most defendants today will be prosecuted under the felony-murder statute because doctors diagnose shaken and battered child syndromes as intentionally caused.

A. *Involuntary or Voluntary Manslaughter*

As evidenced by the doctors' testimony in *State v. Hughes*,[45] the physical injuries a child sustains from felonious abuse are not likely caused accidentally or

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726.6(2), 902.9. It is an aggravated misdemeanor, which carries a maximum penalty of two years imprisonment, to commit child endangerment that does not result in serious injury to a child or minor. *Id.* §§ 726.6(3), 903.1(2).

40. *Cf.* State v. Ragland, 420 N.W.2d 791, 794 (Iowa 1988) (holding the defendant was required to prove both malice aforethought and intent to cause serious injury). Unlike the rule at common law, it is not enough to prove that a victim was merely killed during the commission of the designated felony; it must be established that the victim was murdered. *See id.* at 794 (citing State v. Nowlin, 244 N.W.2d 596, 604-05 (Iowa 1976)); State v. Brant, 295 N.W.2d 434, 436-37 (Iowa 1980); State v. Galloway, 275 N.W.2d 736, 738 (Iowa 1979) (en banc); State v. Conner, 241 N.W.2d 447, 463 (Iowa 1976), *cert. denied*, 444 U.S. 851 (1979). *But see* State v. Hughes, 457 N.W.2d 25, 28 (Iowa Ct. App. 1990) (stating "[u]nder Iowa law, an individual is guilty of felony murder if the individual kills another while participating in a forcible felony"). Murder is a killing committed with malice aforethought, either express or implied. IOWA CODE § 707.1 (1993). "Malice is that condition of mind which prompts one to do a wrongful act intentionally without legal justification or excuse." 4 JOHN J. YEAGER & RONALD L. CARLSON, IOWA PRACTICE, CRIMINAL LAW AND PROCEDURE § 135, at 34 (Supp. 1995).

41. *Cf.* State v. Nowlin, 244 N.W.2d at 604-05 (holding the state was required to prove all of the elements of first-degree murder under the felony-murder statute).

42. For the definition of first-degree murder, see *supra* text accompanying notes 32-36. Second-degree murder is defined as a "murder which is not murder in the first degree." IOWA CODE § 707.3 (1993). A second-degree murder conviction carries a maximum sentence of 50 years imprisonment. *Id.*

43. It is voluntary manslaughter to cause:

> [t]he death of another person, under circumstances which would otherwise be murder, if the person causing the death acts solely as the result of sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a person and there is not an interval between the provocation and the killing in which a person of ordinary reason and temperament would regain control and suppress the impulse to kill.

Id. § 707.4. Voluntary manslaughter is a class "C" felony and carries a maximum sentence of ten years imprisonment. *Id.* §§ 707.4, 902.9(3). Because voluntary manslaughter is an included offense of first- or second-degree murder, a person may not be convicted of both voluntary manslaughter and first-degree murder, or voluntary manslaughter and second-degree murder. *See id.* §§ 701.9, 707.4.

44. It is involuntary manslaughter to cause, unintentionally, "the death of another person by the commission of a public offense." *Id.* § 707.5(1). "A public offense is that which is prohibited by statute and is punishable by fine or imprisonment." *Id.* § 701.2.

45. State v. Hughes, 457 N.W.2d 25, 27-28 (Iowa Ct. App. 1990).

unintentionally.[46] Therefore, an instruction on involuntary manslaughter would not be warranted in a child-homicide trial.[47] Furthermore, as a result of the Iowa Supreme Court's decision in *State v. Taylor*,[48] an instruction on voluntary manslaughter is not warranted, as a matter of law, in cases in which the deceased child died as a direct result of physical abuse.[49]

In *Taylor*, the defendant, Anthony Taylor, was charged with second-degree murder[50] for the death of his fiancee's eight-month-old son.[51] The district court found the infant died from shaken infant syndrome while in Taylor's care.[52] Taylor, however, was not convicted of second-degree murder. According to the district court's finding of facts, the "'reprehensible conduct of the defendant . . . was the result of frustration, an immature reaction, not a fixed purpose . . . designed to do some physical harm to [the child].'"[53] The court convicted him of voluntary manslaughter after failing to find the requisite malice aforethought to sustain a second-degree murder conviction.[54]

Taylor appealed the conviction, claiming, among other things, that his due process rights had been violated because the district court allegedly failed to adequately establish all the elements of voluntary manslaughter.[55] He asserted that "an eight-month-old child is incapable" of provoking a person to kill the child in a manner necessary to satisfy a voluntary manslaughter conviction.[56] Because the element of provocation was not sufficiently established, Taylor argued involuntary manslaughter was the highest charge for which he could be convicted.[57]

The Iowa Supreme Court agreed with Taylor and found an infant could not have provoked a reasonable person in a manner consistent with a voluntary manslaughter conviction.[58] The court, however, disagreed with the district court's finding of facts and found adequate evidence to conclude Taylor killed

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46. *See supra* note 17 and accompanying text.

47. *See, e.g.*, State v. Jurgens, 424 N.W.2d 546, 554 (Minn. Ct. App. 1988); Schultz v. State, 749 P.2d 559, 561 (Okla. Crim. App. 1988).

48. State v. Taylor, 452 N.W.2d 605 (Iowa 1990).

49. *Id.* at 606-07; *see* People v. Crews, 231 N.E.2d 451, 453 (Ill. 1967); Robertson v. State, 453 N.E.2d 280, 283-84 (Ind. 1983); State v. Vega, 253 S.E.2d 94, 98 (N.C. Ct. App. 1978), *cert. denied*, 444 U.S. 968 (1979).

50. It is not clear from the facts why Taylor was not charged with first-degree felony murder.

51. State v. Taylor, 452 N.W.2d at 605.

52. *Id.*

53. *Id.* at 606 (quoting the district court).

54. *Id.* at 607.

55. *Id.* at 606.

56. *Id.*

57. *Id.*

58. *Id.* Although the victim in *Taylor* was an infant, the holding would likely extend to children in their early teens. *See* 4 YEAGER & CARLSON, *supra* note 40, § 146, at 48 (Supp. 1995).

the infant with malice aforethought.[59] Therefore, according to the majority, Taylor should have been convicted of second-degree murder.[60]

B. *Second-Degree Murder and First-Degree Premeditated Murder*

The State could pursue a second-degree murder conviction in a child abuse homicide, but there is little incentive to do so. A closer inspection of Iowa's homicide laws reveals that—for all practical purposes—there is little distinction between first- and second-degree murder. Because a killing committed with malice aforethought during the commission of a designated felony (such as felonious child endangerment) elevates the crime from what would otherwise be second-degree murder to first-degree murder,[61] the State has no reason to limit the conviction to second-degree murder.[62] Furthermore, the fact that first-degree premeditated murder is more difficult to establish than felony murder all but ensures the State will prosecute child abuse homicides under the felony-murder statute, as it did in *State v. Hughes*.[63]

C. *First-Degree Felony Murder*

Felony-murder statutes were designed to deter killings during the commission of felonies by holding criminals strictly liable when their felonious actions resulted in death.[64] By substituting the mens rea requirement of the underlying felony for that of the homicide, the doctrine is used to elevate the punishment of the underlying felony to that of the homicide.

Use of the felony-murder doctrine has been criticized in Iowa[65] and in other jurisdictions[66] because it is often applied beyond its intended purpose. As a result, some jurisdictions have restricted its use in an attempt to protect the rights

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59. State v. Taylor, 452 N.W.2d 605, 607 (Iowa 1990).

60. *Id.* The court affirmed the district court's holding. *Id.* Because Taylor was convicted of a lesser crime than he should have been, the court found the district court's error nonprejudicial and, thus, irreversible. *Id.* at 606-07.

The dissent agreed there was "no evidence of adequate provocation to support Taylor's conviction of voluntary manslaughter." *Id.* at 609 (Andreasen, J., dissenting). It accepted, however, the district court's finding that the state had insufficiently proven that Taylor had killed the infant with malice aforethought. *Id.* (Andreasen, J., dissenting). The dissent recommended the case be remanded to consider whether there was sufficient evidence to find Taylor guilty of involuntary manslaughter. *Id.* at 610 (Andreasen, J., dissenting).

61. *See* State v. Nowlin, 244 N.W.2d 596, 604-05 (Iowa 1976).

62. *See infra* note 93 and accompanying text.

63. State v. Hughes, 457 N.W.2d 25, 26 (Iowa Ct. App. 1990).

64. *See infra* note 139-141 and accompanying text.

65. *See* State v. Phams, 342 N.W.2d 792, 799-800 (Iowa 1983) (Carter, J., dissenting); *see also* 4 YEAGER & CARLSON, *supra* note 40, § 139, at 44-46 (Supp. 1995).

66. *See* Robert L. Simpson, 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). The United States borrowed the felony-murder doctrine from England. *See* 2 LAFAVE & SCOTT, *supra* note 21, § 7.7, at 642. Although most states continue to use a limited form of the felony-murder doctrine, Hawaii and Kentucky have abolished it. *Id.*

of the accused.[67] Defendants frequently argue that applying the felony-murder rule to elevate a crime to first-degree murder violates their rights to due process when the acts constituting the underlying felony are so closely related to or integrated in the death that they merge into the acts constituting the homicide.[68]

Such arguments are premised on the merger and independent felony doctrines.[69] Under these doctrines, a felony-murder instruction should be limited to only those underlying felonies that are independent of the homicide (i.e. arson, burglary, kidnapping, and robbery).[70] The underlying felonies of assault or homicide, for example, should not be permitted to be used as predicate felonies because the necessary intent required in the underlying felony is so closely related to the killing that the intent to commit the felony merges with the intent to commit the murder.[71] In these cases, the State should be required to prove the accused murdered the victim willfully, deliberately, and with premeditation, rather than merely proving the elements of the underlying felony and the lower mens rea requirement of second-degree murder (malice aforethought), which may be inferred or implied in Iowa.[72]

Although the Iowa Supreme Court has previously entertained the independent felony theory as a limitation on the felony-murder doctrine, its more recent decisions indicate an unwillingness to continue the application of the theory.

1. State v. Beeman[73]

In *State v. Beeman*, the Iowa Supreme Court rejected the merger doctrine and independent felony theory when the predicate felony was felonious assault.[74] In *Beeman*, the defendant, William Beeman, was charged with first-degree mur-

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67. Some states have limited their felony-murder statutes by specifically enumerating only those felonies that may suffice as predicate felonies, requiring proximate cause, requiring the death to occur during the commission of the felony, and requiring the underlying felony be independent of the homicide. *Id.* § 7.5, at 622-23.

68. *See infra* text accompanying notes 101-08.

69. As one commentator noted:

> The merger doctrine operates to bar application of the felony-murder rule whenever the underlying felony "directly results in or is an integral element of the homicide." Conversely, to support a felony-murder conviction, the elements of the underlying felony must be independent from those of the homicide so that the felony is not a constituent part of the homicide.

Robert M. Elliot, Comment, *The Merger Doctrine as a Limitation on the Felony-Murder Rule: A Balance of Criminal Law Principles*, 13 WAKE FOREST L. REV. 369, 377 (1977).

70. *See id.* at 381 n.55.

71. *See infra* text accompanying note 90.

72. *See* 4 YEAGER & CARLSON, *supra* note 40, §§ 135-36, at 36-39 (Supp. 1995).

73. State v. Beeman, 315 N.W.2d 770 (Iowa 1982).

74. *Id.* at 776-77. The underlying felony charged was willful injury, which is not specifically listed as a forcible felony. *Id.* at 776; *see* IOWA CODE § 702.11 (1993). Willful injury is defined as "an act which is intended to cause and does cause serious injury to another." IOWA CODE § 708.4 (1993). The court held that willful injury was felonious assault and would support a felony-murder conviction. State v. Beeman, 315 N.W.2d at 777.

der for slaying Michiel Winkel.[75] The victim had been kicked in the head, choked, and, after being moved to another location, stabbed in the chest seventeen times.[76] The victim's nude body was found concealed behind a log, and the autopsy revealed Beeman had sexual intercourse with the victim either before or after killing her.[77] The trial court instructed the jury on three possible theories of guilt:[78] premeditated murder,[79] felony murder, based on the underlying felony of sexual abuse;[80] and felony murder, based on the underlying felony of willful injury.[81]

On appeal, Beeman argued the merger doctrine should have precluded the use of felonious assault as the felony underlying a felony-murder instruction.[82] Addressing Beeman's argument, the court recognized its previous discussion of the merger doctrine in *State v. Hinkle*:[83]

> Other jurisdictions confronted with a properly-presented "felony merger" issue have demonstrated a reluctance to allow the State to bootstrap a higher degree of murder solely on the basis of felonious assault—thus inevitably reading out the element of malice aforethought or premeditation. Among courts considering the doctrine it has gained widespread acceptance.[84]

The court, nonetheless, "decline[d] to adopt an independent felony rule for felony murder based upon felonious assault."[85] According to the court, the legislature intentionally included felonious assault as a forcible felony in an amendment to the Iowa Code as a result of the merger discussion in *Hinkle*.[86] Moreover, because willful injury was so closely related to felonious assault, it would also suffice as a predicate felony.[87] Thus, the court held "the merger doctrine discussed in *Hinkle* does not apply to such assaults."[88]

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75. *Id.* at 772.
76. *Id.*
77. *Id.*
78. *Id.* at 775.
79. IOWA CODE § 707.2(1) (1993).
80. *Id.* §§ 702.11, 707.2(2).
81. *Id.* §§ 707.2(2), 708.4.
82. State v. Beeman, 315 N.W.2d 770, 776 (Iowa 1982). The defendant also asserted the trial court erred in giving a felony-murder instruction based on sexual abuse as the underlying felony. *Id.* at 775. The court held, however, the defendant waived any error because he had not properly objected to the instruction. *Id.* at 775-76 (citing IOWA R. CRIM. P. §§ 18(7)(f), 196)).
83. State v. Hinkle, 229 N.W.2d 744, 749-50 (Iowa 1975) (distinguishing applicability of merger doctrine in cases of assault with burglary).
84. State v. Beeman, 315 N.W.2d at 776-77 (quoting State v. Hinkle, 229 N.W.2d at 750) (citations ommitted).
85. *Id.* at 776 n.9.
86. *Id.* at 777.
87. *Id.*

> The forcible felonies are listed in § 702.11. These include felonious assault. . . . Some courts have held that the felony must be an independent felony, if malice is to be implied from it, and felonious assaults are not independent in this sense. However, an examination of §§ 708.3, 708.4, and 708.5, does not compel the

In a footnote, the court stated the stabbing assault by Beeman, following the transfer of the victim to another location, "arguably 'merged' into the homicide."[89] The court found no error, however, in the trial court's felony-murder instruction.[90] According to the court, if the stabbing had not killed the victim, the kick to the victim's head would have seriously injured her.[91] This blow to the head "could be viewed as a felonious assault independent of the homicide."[92]

The holding in *Beeman* has been criticized by the very source upon which the decision was based for extending the felony-murder doctrine beyond its intended limits:

> Some states have used a concept of the "independent felony" to avoid the *Beeman* result. In those states, assault is not considered to be an independent felony, but a stage in the homicide itself. The original draft of the criminal code made it clear that the felony which would be required to satisfy the first degree murder section would be a felony other than a homicide or assault. Unless some similar rule is adopted in Iowa, it would seem that there will seldom be any justification for second degree murder convictions except in those rare cases where malice can be implied from willful and wanton negligence not associated with the commission of forcible felonies.[93]

The *Beeman* decision nevertheless remains the authority cited in all of the Iowa Supreme Court's subsequent decisions addressing similar merger issues.[94]

> conclusion that murders resulting from these assaults are not intended to be included in the first degree murder category. Prior law is altered somewhat by this section in that the felonies listed in former § 609.2 are not identical with those listed in the definition of "forcible felony." There is no offense called mayhem, § 708.4 including what was formerly that crime. . . . The result is that more murder will be first degree murder than was formerly the case.

Id. at 776 (quoting 4 YEAGER & CARLSON, *supra* note 40, § 139, at 42-43).

88. *Id.* at 777. The court further noted that mayhem, which was the previous basis for felony-murder, was now covered under willful injury. *Id.* Note that the reason behind specifically enumerating only those felonies that will suffice a felony-murder charge is to prevent the felony-murder doctrine from being extended, as evidenced here, beyond its limited scope. *See generally* 2 LAFAVE & SCOTT, *supra* note 19, § 7.7.

89. State v. Beeman, 315 N.W.2d 770, 776 n.9 (Iowa 1982).

90. *Id.* at 777.

91. *Id.* at 776 n.9.

92. *Id.*

93. 4 YEAGER & CARLSON, *supra* note 40, § 139, at 43 (citations omitted). The holding in *Beeman* was also criticized by the dissent in State v. Phams, 342 N.W.2d 792, 799 (Iowa 1983) (Carter, J., dissenting). According to the dissenting justice, "[A] majority of jurisdictions have refused to construe felony murder statutes so as to permit the type of bootstrapping which flows from predicating felony murder convictions on felonious assaults." *Id.* (Carter, J., dissenting).

94. *See* State v. Ragland 420 N.W.2d 791, 793 (Iowa 1988) (holding, under the 1981 Iowa Code, merger doctrine and independent felony rule inapplicable in felony-murder cases when willful injury acts as underlying felony); *cf.* Heaton v. State, 420 N.W.2d 429, 430-31 (Iowa 1988) (holding terrorism as the underlying felony did not violate due process when used as the basis for felony-murder conviction), *cert. denied*, Heaton v. Hix, 500 U.S. 956 (1991); State v. Mayberry, 411 N.W.2d 677, 682-83 (Iowa 1987) (holding underlying felony of sexual abuse sufficient to

2. State v. Ragland[95]

In *State v. Ragland*, a more recent case interpreting the 1981 Iowa Criminal Code, the court revisited the merger issue and reaffirmed *Beeman*.[96] In *Ragland*, Jeffrey Ragland was charged with first-degree murder as a result of his involvement in the death of Timothy Sieff.[97] Ragland, along with a few companions, confronted the victim and his friends in a grocery store parking lot and challenged them to a fight.[98] After the victim and his friends refused to fight, one of Ragland's companions killed the victim by striking him with a tire iron.[99] Ragland later grabbed the tire iron and chased two of the victim's friends through the grocery store.[100] The first-degree murder charge was based on the alternative theories of premeditated murder and felony murder.[101] As in *Beeman*, the underlying felony in the case was willful injury.[102]

Ragland challenged, among other things, the application of the felony-murder doctrine.[103] He argued that because "the felonious assault and the fatal act were one and the same," the assault merged with and was included in the homicide.[104] Thus, "he argue[d] what would have been second-degree murder or less should not be elevated to first degree murder" without proving the more stringent mens rea requirement of first-degree premeditated murder.[105] To hold otherwise, Ragland asserted, would violate his due process rights.[106]

In addressing Ragland's claims, the court stated:

> The legislature has the right to prescribe those acts which are murder and to further define acts which constitute first-degree murder. In enacting [the felony-murder statute], the legislature did not relieve the State of proving any element of murder nor did it create any presumptions which shifted the burden of proof from the State to the defendant.[107]

Because all statutorily defined elements must be proved to sustain a conviction, the court agreed it would be a violation of due process if the State only

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support felony-murder instruction); State v. Phams, 342 N.W.2d at 799 (Carter, J., dissenting) (recognizing willful injury felony provided basis for felony-murder conviction).

95. State v. Ragland, 420 N.W.2d 791 (Iowa 1988).

96. *Id.* at 793.

97. *Id.*

98. *Id.* at 792.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 792-93.

103. *Id.* at 793.

104. *Id.* The court found nothing in the Iowa Code to suggest that the crime of willful injury was not intended to act as a predicate felony. *Id.*

105. *Id.*

106. *Id.* According to *Ragland*, the State was required to prove more than the intent to commit the underlying felony; it should have had to prove "both malice and an intentionally and knowingly caused death." *Id.*

107. *Id.* at 794.

established the intent to commit the predicate felony and not the fact that the victim was murdered.[108] The court further recognized the "evidence establishing the intent required for [a willful injury] crime will often be the same as that proving the malice aforethought required for murder"[109] although "malice aforethought and intent to cause serious injury are distinct elements and the presence of one does not necessarily prove the presence of the other."[110] In light of this scrutiny, the court concluded the State had sufficiently established both elements, and therefore had not violated Ragland's right to due process.[111]

The Iowa Supreme Court has yet to rule whether the merger and independent-felony doctrines will preclude the use of felonious child endangerment as an underlying felony in a felony-murder conviction. The Iowa Court of Appeals, however, has addressed the issue, albeit in a rather limited and troubling manner.

3. State v. Hughes[112]

In *State v. Hughes*, the defendant, Dexter Hughes, raised the independent felony doctrine and invited the court to overrule the holding in *State v. Beeman*.[113] The court of appeals refused to respond to Hughes's argument, noting the Iowa Supreme Court had already rejected the issue.[114] Consequently, the court held felonious child endangerment may act as a predicate felony to sustain a felony-murder conviction.[115]

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108. *Id.* at 793. The court noted that intentionally and knowingly causing death is not an element of felony murder. *Id.* (citing State v. Nowlin, 244 N.W.2d 596, 604 (Iowa 1976); People v. Benson, 480 N.Y.S.2d 811, 814 (N.Y. Sup. Ct. 1984); State v. Wanrow, 588 P.2d 1320, 1323-25 (Wash. 1978)).

109. *Id.* at 794. The court stressed it is not enough for the State to show the victim had been killed during the commission of the underlying felony. *Id.* Without proof that the killing occurred with malice aforethought, "there can be no finding of murder." *Id.* The State was not required to show the defendant killed with malice aforethought; it was only required to prove the defendant's companion, who actually killed the victim, acted with malice and that both parties intentionally committed a willful injury. *Id.* at 793-94.

110. *Id.* at 794.

111. *Id.* Ragland also challenged the felony-murder rule as violating the Equal Protection Clause. *Id.* In his opinion, it was unfair that "two felons, neither of whom intended to kill another, may receive vastly disproportionate punishment based on the fortuity that unintended death occurred in one case but not the other." *Id.* The court found it within the legislature's discretion to define and classify which crimes pose "a substantial risk of serious injury or death . . . [to] provide a basis for the felony-murder rule." *Id.* Therefore, as long as the criminal classification "'is a reasonable one, operates equally on all within the class, and bears a logical relationship to the purpose to be accomplished,'" it would withstand an equal protection claim. *Id.* (quoting State v. Robbins, 257 N.W.2d 63, 67 (Iowa 1977)). Holding the felony-murder statute met this standard, the court found no basis in the defendant's equal protection claim. *Id.*

112. State v. Hughes, 457 N.W.2d 25 (Iowa Ct. App. 1990).

113. *Id.* at 28; *see supra* text accompanying notes 1-15.

114. State v. Hughes, 457 N.W.2d at 28.

115. *Id.* at 29 (citing State v. Ragland, 420 N.W.2d 791, 793 (Iowa 1988)). According to the court, it was inappropriate for the court of appeals to address the issue further. *Id.* at 28. If

The decision in *Hughes*, however, is troubling. The court stated, "[u]nder Iowa law, an individual is guilty of felony murder if the individual kills another while participating in a forcible felony. Felonious child endangerment constitutes a forcible felony. As such, felonious child endangerment may constitute the basis for a felony murder charge."[116]

By merely requiring proof that the victim was killed and not murdered, the decision conflicts directly with the supreme court's holding in *State v. Ragland*,[117] which the court of appeals cited as authority.[118] In *Ragland*, the Iowa Supreme Court made it clear that the current criminal code requires the State to prove the elements of the underlying forcible felony (in this case felonious child endangerment) and a murder had been committed while participating in the felony.[119] To establish murder, the court was required to find that Hughes killed with malice aforethought.[120] Absent such a finding, a felony-murder conviction would violate Hughes's right to due process because not all the requisite elements would have been established.[121]

In addition to setting bad precedent, the decision in *Hughes* exemplifies the confusion surrounding the requirements of the felony-murder statute. Furthermore, the Iowa Supreme Court's holdings in *Beeman* and its progeny illustrate how the felony-murder doctrine has been abused in order to secure a more severe punishment than the criminal code provides.[122] The dilemma about securing first-degree murder convictions in child abuse homicides is not unique to Iowa. Other jurisdictions addressing the problem, however, have dealt with it in a different manner.[123]

III. CHILD HOMICIDE LAWS OF OTHER STATES

A. *First-Degree Felony Murder*

Citing the merger and independent felony doctrines, other jurisdictions have refused to uphold a first-degree felony-murder conviction for homicides caused by child abuse. For example, in *State v. Lucas*[124] the Kansas Supreme Court held felony child abuse could not be a predicate offense for a felony-mur-

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supreme court precedent was to be overturned, it was for the supreme court to do and not the court of appeals. *Id.* (citing State v. Eichler, 83 N.W.2d 576, 578 (Iowa 1957)).

116. *Id.* at 28-29 (citations omitted).

117. *Id.*

118. *Id.* at 28.

119. *See* State v. Ragland, 420 N.W.2d at 794.

120. *See id.*

121. *Id.*

122. As critics note, "[t]he jumble of instructions required in some felony murder prosecutions, the purpose of which is to clarify the law for the jurors, often must have the opposite result." 4 YEAGER & CARLSON, *supra* note 40, § 139, at 45. "It does seem that the felony murder rule has gotten out of hand, and it is not only in this one instance exemplified by Beeman." *Id.*; *see* State v. Phams, 342 N.W.2d 792, 799 (Iowa 1983) (Carter, J., dissenting).

123. *See infra* text accompanying notes 124-94.

124. State v. Lucas, 759 P.2d 90 (1988), *aff'd on reh'g*, 767 P.2d 1308 (Kan. 1989), *superseded by statute as stated in* State v. Colwell, 790 P.2d 430 (1990).

der conviction.[125] The court concluded the limited purpose of its felony-murder doctrine would be undermined if it held otherwise.[126]

In *Lucas*, the live-in boyfriend of Jean Woodside, Robert Lucas, was charged with and convicted of child abuse and felony murder in connection with the death of Ms. Woodside's eighteen-month-old daughter, Shaina.[127] On the night of Shaina's death her mother was attending night school while Lucas stayed home to care for Shaina and her three-year-old sister, Shannon, which he did at least four times a week.[128] Lucas testified he had placed the girls in the tub for a bath and then went to the living room to watch television.[129] When he returned to check on the girls, Lucas claimed he found Shaina floating face down in the water.[130] He then telephoned the girls' mother and dialed 911.[131] Shaina was later pronounced dead at the hospital.[132]

In what the court called "a real life horror story of abuse inflicted by [Lucas],"[133] Shaina suffered "severe multiple blows to [her] head" sometime near the time of her death.[134] She also had "patterned burns on her buttocks, three burns resembling cigarette burns on other parts of her body, severe fresh lacerations to her nipples, and numerous bruised areas on many different parts of her body."[135] An investigation further revealed that Lucas had previously beaten Shaina severely with a heavy leather belt, forced her to swallow Tabasco sauce, placed her down on a hot stove burner, pinched and bit her, broke her arm, and had covered her mouth and nose with his hands until she passed out.[136] These injuries occurred as a result of what Lucas labeled as "accidents" or attempts to "discipline" the infant girl.[137]

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125. *Id.* at 98-99. At the time of the action, Kansas law defined first-degree murder as a killing committed "maliciously, willfully, deliberately and with premeditation or committed in the perpetration or attempt to perpetrate any felony." KAN. STAT. ANN. § 21-3401 (1988). Child abuse was defined as "willfully torturing, cruelly beating or inflicting cruel and inhuman corporal punishment upon any child under the age of 18 years old." *Id.* § 21-3609.

126. State v. Lucas, 759 P.2d at 98-99.

127. *Id.* at 92-93.

128. *Id.* at 92. The defendant was also charged with and convicted of physically abusing Shannon. *Id.* The evidence revealed the defendant had

> [pinched Shannon's nipples so fiercely she cried and could not be consoled;] . . . whipped her so severely . . . she had purple bruises from her lower back to her upper legs which remained visible for over a week; and . . . placed her in an unheated room in the wintertime without clothing, food, or drink for over five hours.

Id. at 101. Based on these facts, the court had "no hesitancy" affirming his conviction of child abuse with regard to Shannon. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 93.

137. *Id.*

On appeal, Lucas claimed the district court should have dismissed the felony-murder charge because "the child abuse charge merged into the felony murder and could not constitute the requisite collateral felony to support the felony murder charge."[138]

Recognizing that the Kansas felony-murder statute appeared on its face to allow any felony to act as an underlying felony, the court stated, "'The purpose of the statute is to deter those engaged in felonies from killing negligently or accidentally, and that doctrine should not be extended beyond its rational function which it was designed to serve.'"[139] To maintain this limited purpose, the court noted the felony-murder statute had been judicially narrowed in Kansas and in several other states[140] to apply only to those situations in which: "(1) the underlying felony is inherently dangerous to human life; and (2) the elements of the underlying felony are so distinct from the homicide as not to be an ingredient of the homicide."[141]

By definition, the court found child abuse to clearly be inherently dangerous to a child's life.[142] The dispositive issue of the case, therefore, was whether the doctrine of merger should apply to preclude the felony-murder charge based on the underlying felony of child abuse.[143] If the child abuse charge was found to be an ingredient of Shaina's death, the merger doctrine must preclude a felony-murder conviction.[144]

The court emphasized that the State made no claim that the pattern of abuse had caused or contributed—either directly or indirectly—to Shaina's death.[145] Rather, the charge was based solely on the injuries sustained to Shaina's head, which caused her to lose consciousness and drown.[146] Finding this to be an important distinction, the court stated:

> Had an adult been beaten on the head, lost consciousness as a result thereof, and drowned in a pool of water or been asphyxiated by his blood or vomit, we would have no hesitancy in holding that the aggravated battery (the

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138. *Id.*

139. *Id.* at 93 (quoting State v. Lashley, 664 P.2d 1358, 1369 (Kan. 1983)).

140. *See* 2 LAFAVE & SCOTT, *supra* note 19, § 7.7; Simpson, *supra* note 66, at 1351-55.

141. State v. Lucas, 759 P.2d 90, 93 (Kan. 1988) (citing State v. Lashley, 664 P.2d 1358 (Kan. 1958)), *aff'd on reh'g*, 767 P.2d 1308 (Kan. 1989), *superseded by statute as stated in* State v. Colwell, 790 P.2d 430 (Kan. 1990).

142. *Id.* In addressing the first prong, the court emphasized the "elements of the underlying felony should be viewed in the abstract and the circumstances of the commission of the felony should not be considered in making the determination." *Id.* (citing State v. Underwood, 615 P.2d 153 (Kan. 1980)). *But see* State v. Caffero, 255 Cal. Rptr. 22 (Cal. Ct. App. 1989). In *Caffero*, a felony-murder charge predicated on child abuse was dismissed based on a similar standard. *Id.* at 25. After viewing child abuse in the abstract, the court held child abuse was not inherently dangerous to human life. *Id.* The court reasoned although child abuse was arguably inherently dangerous to an infant's life, the same could not be said about a teenager's life. *Id.*

143. State v. Lucas, 759 P.2d at 93-94.

144. *Id.*

145. *Id.* at 96.

146. *Id.*

beating) was an integral part of the homicide and that it merged therewith and could not serve as the underlying felony.[147]

A different result, the court reasoned, could not "logically be reached by designating the beating as abuse of a child rather than aggravated battery."[148] Consequently, the court held "a single instance of assaultive conduct will not support the use of abuse of a child as the collateral felony for felony murder when that act is an integral part of the homicide."[149]

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147. *Id.* This argument drew a strong dissent. *Id.* at 104 (Herd, J., dissenting). According to the dissent, when the facts establish continuous child abuse, "the defendant has engaged in a course of conduct which no longer entitles him to judicial checks upon the statute." *Id.* (Herd, J., dissenting). The dissent also rejected the majority's position that acts of child abuse and aggravated battery on an adult are indistinguishable. *Id.* (Herd, J., dissenting). "The age of the victim and the continuing nature of the torture are the elements which distinguish child abuse from assault." *Id.* (Herd, J., dissenting). This argument appears to presume the adult to be middle-aged, in good health, and not a victim of continuous abuse, such as a battered spouse.

148. *Id.* The court noted that other courts—when faced with the horror of child homicide cases—have arrived at rather illogical justifications for not applying the merger doctrine in similar situations. *Id.* at 97 (citing People v. Jackson, 218 Cal. Rptr. 637 (Cal. Ct. App. 1985)). In *Jackson*, a father was convicted of felony murder for strangling, and then beating his infant son to death with a 36-inch long, 2-inch thick wooden dowel rod because the boy put his pants on backwards. People v. Jackson, 218 Cal. Rptr. at 639. The child abuse charge was based on the first blow, and the felony-murder charge was based on the subsequent lethal blows. *Id.* at 642.

The court considered the merger doctrine, but found it inapplicable because the father's conduct constituted "an independent, collateral purpose separate from the intent to inflict bodily harm. That purpose was to punish; to chastise; to bend the child's action into conformity with his father's idea of propriety, and to impress upon him the virtue of obedience." *Id.* at 641. This conclusion, the court stated, was "consistent with and well serves the public policy underlying the felony-murder rule, which is 'to deter those engaged in felonies from killing negligently or accidentally.'" *Id.* (quoting People v. Satchell, 489 P.2d 1361 (Cal. 1971)). Thus, the court concluded a first degree felony-murder charge was not meant to deter the first blow, but rather the subsequent blows. *Id.* at 642.

149. State v. Lucas, 759 P.2d 90, 98-99 (Kan. 1988), *aff'd on reh'g*, 767 P.2d 1308 (Kan. 1989), *suprseded by statute as stated in* State v. Colwell, 790 P.2d 430 (Kan. 1990). In support of this proposition, the court cited *People v. Benway*, 210 Cal. Rptr. 530 (Cal. Ct. App. 1985). In *Benway*, the court held the merger doctrine was applicable because the conduct surrounding a child abuse charge was found to be an integral part of the homicide. *Id.* at 534. The court stated: "when a person willfully causes or permits the infliction of unjustifiable pain *or* willfully causes or permits a child to be placed in a dangerous situation under circumstances likely to produce death, 'it is difficult to see how the assailant would be further deterred from killing negligently or accidentally in the course of that felony by application of the felony-murder rule.'" *Id.* (quoting People v. Smith, 678 P.2d 886 (Cal. 1984)). Accordingly, applying the felony-murder rule in the narrowest possible way, the child abuse felony necessarily merged with the homicide. *Id.* "[T]here is no independent felonious design when *any* form of felony child abuse is willfully committed under circumstances likely to produce great bodily harm or death." *Id.* at 535. The court noted it was obliged to reach such a conclusion in order to comply with the supreme court's directive to not extend the felony-murder rule beyond its designated purposes. *Id.* at 534. (citing People v. Smith, 678 P.2d at 886).

The court reached this holding by in effect overruling its earlier decision in *State v. Brown*.[150] The court in *Brown* rejected the defendant's claim that the merger doctrine should apply to a felony-murder charge when the underlying felony of child abuse was based on multiple, prior acts of abuse.[151] Having an opportunity to reconsider the issue in *Lucas*, the court queried:

> If an individual beats a child to death in July, what logical or legal basis is there to escalate the charge from manslaughter to first-degree felony murder based on the fact he had beaten the child several months previously? A wife-beater who ultimately batters his wife to death faces no first-degree felony murder charge simply because he may have injured his wife on previous occasions.[152]

Accordingly, the court held, "when a child dies from an act of assaultive conduct, evidence of prior acts of abuse cannot be used to escalate the charge into felony murder."[153]

If additional protection of children was needed, the court suggested the Kansas Legislature adopt legislation to address the concern.[154] Until that time, however, the felony-murder rule could not be used as a prosecutorial device to "bootstrap" one count of child abuse—based on multiple abusive acts—to a felony-murder charge.[155] Heeding the court's suggestion, the Kansas Legislature subsequently amended its felony-murder statute to include child abuse as an enumerated underlying felony.[156]

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150. State v. Brown, 696 P.2d 954 (Kan. 1985), *overruled on other grounds*, 759 P.2d 90, 91 (Kan. 1988). The defendant, Eileen Brown, was charged with first-degree felony murder of her infant son, Randell. *Id.* at 956. When released from the hospital after birth, Randell weighed five pounds and was in good health. *Id.* at 955. When pronounced dead two months later, he weighed only four pounds and three ounces. *Id.* An expert testified Randell should have weighed at least seven pounds and five ounces. *Id.* Moreover, Randell entered the hospital emaciated and with "bruises on his head, abdomen and buttocks." *Id.* The autopsy report also indicated the infant had a fractured left shoulder, abdominal bruises, and a skull fracture. *Id.* The mother admitted to police that she jerked, shook, and hit the child because he would not stop crying. *Id.* She further stated her actions were attributable to the tremendous pressure she felt from "living alone and trying to raise two children." *Id.*

151. *Id.* at 956. The court expressly passed on deciding whether "a single instance of assaultive conduct, as opposed to a series of incidents evidencing extensive and continuing abuse or neglect, would support a charge of felony murder." *Id.* at 957.

152. State v. Lucas, 759 P.2d at 99.

153. *Id.* The court noted, however, the prior acts could be used as a basis for additional charges of child abuse. *Id.* The case was thereby "remanded for further proceedings." *Id.* at 101.

154. *Id.* at 99; *see also* State v. Prouse, 767 P.2d 1308, 1316 (Kan. 1989) (Holmes, J., concurring) (suggesting that any exception to the merger doctrine allowing child abuse to be the underlying crime for felony murder should be carried out by the legislature).

155. State v. Lucas, 759 P.2d 90, 99 (Kan. 1988). This holding was affirmed by two subsequent Kansas Supreme Court decisions. *See* State v. Colwell, 790 P.2d 430, 433 (Kan. 1990); State v. Prouse, 767 P.2d at 1313.

156. *See* KAN. STAT. ANN. § 21-3401 (Supp. 1993). Like Kansas and Iowa, several other states have modified their felony-murder statutes to include physical child abuse as an underlying

Although the court suggested the Kansas Legislature adopt new legislation specifically enumerating child abuse as an underlying felony, such a suggestion seems inconsistent with the reasoning behind the court's holding. Specifically enumerating child abuse to suffice as an underlying felony does not resolve the merger issue. Considering the court found child abuse and battery to be—for all practical purposes—the same crime[157] and it stated the merger doctrine would preclude a felony-murder instruction in a case in which the underlying felony was aggravated assault or battery,[158] it does not follow then how enumerating child abuse as a underlying felony resolves the problem. Other courts, while finding the merger doctrine precluded a first-degree murder charge, have requested and received an adequate remedy from their state legislatures.

B. *Premeditated First-Degree Murder*

In *Midgett v. State*,[159] a case involving a first-degree murder statute similar to Iowa's, the Arkansas Supreme Court modified a murder conviction from first-degree to second-degree murder, finding insufficient evidence to justify the greater offense.[160] Eight-year-old Ronnie Midgett, Jr. had been brutally beaten over a substantial period of time by his father, who weighed 300 pounds and stood six feet, two inches tall.[161] According to Ronnie's little sister, the father, after drinking two to three quarts of whiskey, punched Ronnie in the stomach and the back four days before the boy's death.[162] Ronnie was also "very poorly nourished and underdeveloped"[163] and covered with signs of past physical

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felony. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1105 (1989); ARK. CODE ANN. § 5-10-102 (Michie 1993); FLA. STAT. chs. 782.04 (2), (3) (1992); ILL. REV. STAT. ch. 9 para. 1 (1989).

Some states also include sexual abuse or molestation of a child as an underlying felony for felony murder. *See, e.g.*, ALA. CODE § 13A-6-2(a)(5) (1987); ALASKA STAT. § 11.41.110 (1988); ARIZ. REV. STAT. ANN. § 13-1105 (1987); ARK. CODE ANN. § 5-10-102 (Michie 1989); CAL. PENAL CODE § 189 (West 1990); COLO. REV. STAT. § 18-3-102 (1988); DEL. CODE ANN. tit. 11, § 636 (1988); FLA. STAT. ch. 782.04(1) (1984); IND. CODE § 35-42-1-1 (1987); ME. REV. STAT. ANN. tit. 17-A, § 202 (West 1983); MD. CRIM. LAW CODE ANN., § 407 (1990); MICH. COMP. LAWS § 750.316 (1980); MINN. STAT. § 609.185 (1989); MISS. CODE ANN. § 97-3-19(2)(f) (1983); NEV. REV. STAT. § 200.030 (1989); N.Y. PENAL LAW § 125.5 (McKinney 1984); R.I. GEN. LAWS § 11-23-1 (1990); UTAH CODE ANN. § 76-5-203 (1990).

A few states, however, continue to define felony murder as a death caused in the perpetration of "any felony." *See, e.g.*, ALA. CODE § 13A-6-2 (1987); N.M. STAT. ANN. § 30-2-1 (Michie 1963). Other states require a showing the defendant intended to commit murder during the perpetration or attempted perpetration of a felony. *See, e.g.*, OR. REV. STAT. §§ 163.095, .115 (1989); UTAH CODE ANN. § 76-5-202 (1990).

157. *See supra* note 147 and accompanying text.

158. *See supra* note 148 and accompanying text.

159. Midgett v. State, 729 S.W.2d 410 (Ark. 1987).

160. *Id.* at 411. A first-degree murder conviction required the killing to be deliberate and with premeditation, and second-degree murder was defined as a death that resulted from an act committed "'with the purpose of causing serious physical injury.'" *Id.* (interpreting ARK. CODE ANN. § 41-1502(1)(b) (Michie 1976) (repealed 1977)).

161. *Id.*

162. *Id.*

163. *Id.*

abuse.[164] He had healed rib fractures in addition to bruises on his lips, chest plate, forehead, buttocks, palms of the hands, right temple, under the chin and left mandible, and near the spine.[165]

The court overturned the first-degree murder conviction, stating:

> The evidence in this case supports only the conclusion that the [father] intended not to kill his son but to further abuse him or that his intent, if it was to kill the child, was developed in a drunken, heated rage while disciplining the child. Neither of those supports a finding of premeditation or deliberation.
>
> . . . .
>
> Unless our law is changed to permit conviction of first-degree murder for something like child abuse or torture resulting in death, our duty is to give those accused of first degree murder the benefit of the requirement that they be shown by substantial evidence to have premeditated and deliberated the killing, no matter how heinous the facts may otherwise be.[166]

Despite the brutality of the crime, the court concluded the highest crime for which Midgett could be found guilty was second-degree murder.[167]

In so holding, the court overturned its previous ruling in *Burnett v. State*.[168] In *Burnett*, the court held "[p]remeditation, deliberation and intent may be inferred . . . from the evidence of [substantial] abuse."[169] After comparing its holding with those of similar cases in other jurisdictions,[170] the *Midgett* court, however, found it unacceptable that "[n]o explanation is given for the quantum leap from 'the facts,' horrible as they were, to the inferences of premeditation."[171] The court offered an alternative theory, stating, "in a case of child abuse of long duration the jury could well infer that the perpetrator comes not to expect death of the child from his action, but rather that the child will live so that the abuse may be administered again and again."[172] If Midgett truly premeditated Ronnie's

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164. *Id.*
165. *Id.*
166. *Id.* at 414.
167. *Id.*
168. Burnett v. State, 697 S.W.2d 95 (Ark. 1985), *overruled by* Midgett v. State, 729 S.W.2d 410, 414 (Ark. 1987).
169. *Id.* at 98.
170. *See, e.g.*, Morris v. State, N.E.2d 1022, 1024 (Ind. 1979) (holding premeditation may be inferred from the fact that the father caused a five-month-old baby's death by hitting the child and beating its head on the floor).
171. Midgett v. State, 729 S.W.2d 410, 412 (Ark. 1987); *see* Burnett v. State, 697 S.W.2d 95 (Ark. 1985).
172. *Id.* at 413.

death, the court reasoned, "he could have accomplished it in a previous beating."[173]

Soon after the decision in *Midgett*, the Arkansas Legislature responded by amending its criminal code to facilitate first-degree murder convictions in child abuse homicide cases.[174] In addition to its previous definition of first-degree murder, Arkansas made it first-degree murder to knowingly cause the death of a child fourteen years of age or younger, "under circumstances manifesting cruel and malicious indifference to the value of human life."[175]

The *Midgett* decision illustrates how difficult it is to establish premeditated first-degree murder in child homicide cases when the death of the child results from physical abuse by a parent or caretaker. The state legislature chose to resolve its problem by adopting a homicide-by-abuse law,[176] which maintains the rights of an accused while maximizing the sentence if the accused is found guilty.

C. *Homicide by Abuse*

In addition to Arkansas, several other states have enacted similar homicide-by-abuse laws, making it first-degree murder to act in a manner likely to cause injury or death to a child and that causes death.[177] These laws are advantageous because they avoid the problems associated with prosecuting under more limited felony-murder statutes. In Louisiana, for example, it is first-degree murder to cause the death of a child by acting in a manner which is likely to "inflict great bodily harm to a child."[178] Similarly, in Oklahoma it is sufficient to show the child died as a result of "willful or malicious injuring, torturing, maiming or using of unreasonable force."[179]

Although the constitutionality of many of these new laws has yet to be seriously challenged, Oklahoma—the only state so far to rule on the constitutionality of its homicide-by-abuse law—has upheld its new law. In *Drew v.*

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173. *Id.* The majority's holding sparked a livid dissent. The dissenting judge stated: "Undoubtedly, the majority could accept it if the child were murdered with a bullet or a knife; but they cannot accept the fact . . . th[e] defendant beat and starved his own child to death. His course of conduct could not have been negligent or unintentional." *Id.* at 416 (Hickman, J., dissenting). In the dissent's opinion, it was unnecessary to labor "over the words 'premeditation and deliberation,'" as the majority did, because to do so ignored the severity of Midgett's actions. *Id.* at 416 (Hickman, J., dissenting).

174. ARK. CODE ANN. § 5-10-102 (Michie 1993).

175. *Id.*

176. *See* Payne, *supra* note 16, at 1.

177. *See* ALASKA STAT. § 11.41.100(a) (1989); ILL. ANN. STAT. ch. 720, para. 5/9-1(7) (Smith-Hurd Supp. 1995); LA. REV. STAT. ANN. § 30(5) (West 1989); MINN. STAT. § 609.185 (1987); NEV. REV. STAT. § 200.030 (1991); N.Y. PENAL LAW § 125.25(4) (McKinney 1987); OKLA. STAT. tit. 21, § 701.7 (C) (1983); OR. REV. STAT. § 163.115 (1993); TENN. CODE ANN. § 39-13-201 (1991); WASH. REV. CODE § 9A.32.055 (1988); W. VA. CODE §§ 61-8D-1, 2 (1992).

178. LA. REV. STAT. ANN. § 30(5) (West 1983).

179. OKLA. STAT. tit. 21, § 701.7(C) (1989). The statute also permits a first-degree murder conviction of a person who does not participate directly in the abuse, but "permits another to injure, torture, maim or use unreasonable force against a child." *Id.* § 843.

State,[180] the defendant, Karen Drew, was charged with and convicted of first-degree child murder[181] for the death of her fourteen-month-old daughter, Patricia.[182] Drew alleged that, while she was in the kitchen washing dishes, her daughter died as a result of injuries suffered from falling off a couch.[183] Patricia was diagnosed with a severe head injury, including a two-inch skull fracture and a blood clot in her brain,[184] and later underwent surgery during which "parts of her brain had to be amputated."[185] She died two days later as a direct result of her injuries.[186]

On appeal, Drew argued, among other things, that section 701.7(C) of the Oklahoma Criminal Code was "unconstitutional because it lacks a *mens rea* requirement."[187] Alternatively, Drew claimed that if section 701.7(C) contains a mens rea requirement for the homicide, it was "irrebuttably," and therefore unconstitutionally, "presumed from the *mens rea* required for the felony child abuse," as set forth in section 843 of the code.[188] Drew also asserted the independent-felony rule precluded felony child abuse to "serve as the underlying felony for a homicide conviction."[189]

In rejecting Drew's challenges, the court recognized that the mens rea element of the homicide statute is supplied by the child abuse statute.[190] The court stated, however, "[s]ection 843 clearly provides that only those acts which are committed in a willful or malicious manner fall within the purview of the statute."[191] Because the requirements of section 843 are statutorily defined elements of section 701.7(C), the court held "the adoption of the *mens rea* requirement of Section 843 does not alter the State's ultimate burden of proving each element of Section 701.7(C) beyond a reasonable doubt."[192] Therefore, the State need only establish—beyond a reasonable doubt—the mens rea elements of felony child abuse under section 843 to satisfy all the elements of the homicide under 701.7(C).[193] In addition, the court rejected Drew's independent felony claim, stating, "'[w]ith the enactment of § 701.7(C) the legislature has clearly

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180. Drew v. State, 771 P.2d 224 (Okla. Crim. App. 1989).

181. *Id.* at 226. "A person commits murder in the first degree when the death of a child results from the injuring, torturing, maiming or using of unreasonable force by said person upon the child pursuant to Section 843 of this title." OKLA. STAT. tit. 21, § 701.7(C) (1989). Section 843 prohibits any person from willfully or maliciously injuring, torturing, maiming, or using unreasonable force on a child younger than eighteen. *Id.* § 843.

182. Drew v. State, 771 P.2d at 226.

183. *Id.* at 227. Patricia's father, David Drew, was at work when the incident occurred. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 228.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

stated its intention that the use of unreasonable force upon a child, pursuant to . . . § 843 is to be punished as Murder in the First Degree.'"[194]

The *Drew* decision is significant because it demonstrates the willingness of at least one state's highest court to uphold the constitutionality of its first-degree homicide-by-abuse law. Because state legislatures have broad discretion in punishing acts as they deem appropriate, courts will not challenge the crimes as long as all the necessary elements are proved by the State.[195] Thus, the inadequacies and the abuses of the felony-murder rule can be avoided by adopting similar laws. The issues of merger and independent felony, which are problematic in felony murder charges, become moot with the adoption of first-degree homicide-by-abuse laws that expressly make the requirements of the felony child abuse part of the homicide.[196]

VI. CONCLUSION

As evidenced by *State v. Hughes*, the Iowa Legislature has chosen to prosecute child abuse homicides by the felony-murder rule, with felonious child endangerment constituting the underlying forcible felony.[197] Because of the merger and independent felony doctrines, however, at least one state supreme court has held the felony-murder rule should not apply to such prosecutions as it violates the defendant's right to due process.[198]

Iowa courts—and most importantly the Iowa Legislature—should reconsider the scope of the felony-murder rule as many other jurisdictions have done. Rather than continue to abuse the limited purpose behind the first-degree felony-murder statute in child abuse homicides, the legislature should adopt a homicide-by-abuse law. Adopting such a law would permit the felony-murder statute to be used in the limited manner for which it was originally intended. More importantly, it would send a clear message that, as a matter of public policy, Iowa will not tolerate the senseless killing of our children—a special class of people who need extra protection because they are often unable to protect themselves. By adopting a homicide-by-abuse law, state efforts to prosecute the offenders who violate a child's trust will not be hindered by laws inadequately designed to punish the offender.

Jerold P. McMillen

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194. *Id.* (quoting Schultz v. State, 749 P.2d 559, 561 (Okla. Crim. App. 1988)).

195. *Id.*

196. Generally, first-degree murder convictions require an intent to kill, including premeditation and deliberation, or a showing the death occurred in the course of one of five stated felonies—rape, robbery, kidnapping, arson or burglary. It is often very difficult to convict a parent in a child homicide case of first-degree murder when findings of willfulness, deliberation, and premeditation are required. *See supra* note 170 and accompanying text; *see also* Warren, *supra* note 19.

197. State v. Hughes, 457 N.W.2d 25, 29 (Iowa Ct. App. 1990).

198. State v. Prouse, 767 P.2d 1308, 1313 (Kan. 1989)("designating an aggravated battery against a child as child abuse does not avoid the merger doctrine and result in two independent felonies.").