

# Police Killings as Felony Murder

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*The widely applauded conviction of officer Derek Chauvin for the murder of George Floyd employed the widely criticized felony murder rule. Should we use felony murder as a tool to check discriminatory and violent policing? The authors object that felony murder—although perhaps the only murder charge available for this killing under Minnesota law—understates Chauvin’s culpability and thereby inadequately denounced his crime. They show that further opportunities to prosecute police for felony murder are quite limited. Further, a substantial minority of states impose felony murder liability for any death proximately caused by a felony, even if the actual killer was a police officer, not an “agent” of the felony. In these “proximate cause” jurisdictions, felony murder is far more often used to prosecute the (often Black) targets of police violence, than to prosecute culpable police.*

*Previous scholarship on prosecution of felons for killings by police criticized such proximate cause rules as departures from the “agency” rules required by precedent. But today’s proximate cause felony murder rules were enacted legislatively during the War on Crime and are thus immune to this traditional argument. The authors instead offer a racial justice critique of proximate cause felony murder rules as discriminatory in effect, and as unjustly shifting blame for reckless policing onto its victims. Noting racially disparate patterns of charging felony murder, and particularly in cases where police have killed, the authors call on legislatures to reimpose “agency” limits on felony murder as a prophylactic against discrimination. Finally, the authors widen this racial justice critique to encompass felony murder as a whole, urging legislatures to abolish felony murder wherever racially disparate patterns of charging can be demonstrated.*

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### I. MURDER, WITH AN ASTERISK?

On May 25, 2020 Officer Derek Chauvin of the Minneapolis Police Department was called to a convenience store to investigate a suspected counterfeit 20 dollar bill.<sup>1</sup> Chauvin, who is white, wrestled an unarmed and non-resisting Black suspect, George Floyd, to the ground and for nine minutes, captured on videotape, kneeled on Floyd's neck.<sup>2</sup> While Floyd begged for breath, the officer stared with contempt and defiance at witnesses begging him to release Floyd. Finally, Floyd would beg for his dead mother and utter the all too familiar, "I can't breathe," before dying.<sup>3</sup>

Three weeks later, police officers Devin Brosnan and Garrett Rolfe were summoned to an Atlanta-area Wendy's because Rayshard Brooks, another Black man, had fallen asleep in his car.<sup>4</sup> After determining that Brooks's blood alcohol exceeded the legal limit, the officers decided to arrest him.<sup>5</sup> Despite Brooks's pleas that he could walk a short way to his sister's home, the officers moved to handcuff him.<sup>6</sup> The resulting struggle sent Brooks and Brosnan to the ground. Brosnan reported that Brooks then took

<sup>1</sup> *George Floyd: What happened in the final moments of his life*, BBC NEWS (May 30, 2020), <https://www.bbc.com/news/world-us-canada-52861726> [<https://perma.cc/4S9U-87G6>].

<sup>2</sup> Catherine Thorbecke, *Derek Chauvin had his knee on George Floyd's neck for nearly 9 minutes, complaint says*, ABC NEWS (May 29, 2020), <https://abcnews.go.com/US/derek-chauvin-knee-george-floyds-neck-minutes-complaint/story?id=70961042> [<https://perma.cc/DSG6-PRW2>]; *State v. Chauvin*, Sentencing Order, 27-CR-20-12646 (Minn. Ct. App. 2021).

<sup>3</sup> Esme Murphy, *I Can't Breathe!: Video Of Fatal Arrest Shows Minneapolis Officer Kneeling On George Floyd's Neck For Several Minutes*, WCCO-TV (May 26, 2020), <https://minnesota.cbslocal.com/2020/05/26/george-floyd-man-dies-after-being-arrested-by-minneapolis-police-fbi-called-to-investigate/> [<https://perma.cc/M2HW-LNBZ>].

<sup>4</sup> Malachy Browne, Christina Kelso & Barbara Marcolini, *How Rayshard Brooks Was Fatally Shot by the Atlanta Police*, N.Y. TIMES (June 14, 2020), <https://www.nytimes.com/2020/06/14/us/videos-rayshard-brooks-shooting-atlanta-police.html> [<https://perma.cc/7M7L-4L3W>].

<sup>5</sup> Aimee Ortiz, *What to Know About the Death of Rayshard Brooks*, N.Y. TIMES (May 6, 2021), <https://www.nytimes.com/article/rayshard-brooks-what-we-know.html> [<https://perma.cc/HZL9-BZ7K>].

<sup>6</sup> *Id.*

his taser and tased him. Rolfe drew his taser and fired it at Brooks, hitting him.<sup>7</sup> Brooks ran, turning and firing Brosnan's taser over Rolfe's head. Rolfe fired his gun, hitting Brooks twice and killing him. A third shot hit an occupied vehicle.<sup>8</sup>

Searing videos of these killings ignited waves of protest unseen in generations.<sup>9</sup> At the forefront of the racial justice issues raised in their wake were calls for less violent and less discriminatory policing and demands that police who unjustifiably kill be prosecuted with all tools available.<sup>10</sup> Facing enormous public scrutiny, prosecutors charged the police officers involved in these high-profile killings with a slew of crimes, including, most seriously, felony murder.<sup>11</sup>

The felony murder charges sent legal observers puzzling through the intricacies of the felony murder law and the "merger doctrine" that would preclude such charges in most states.<sup>12</sup> For criminal law reformers and social justice advocates, these felony murder charges forced a reckoning. On the one hand lay the long-standing academic disdain for felony murder liability, stretched to its furthest limits in these cases.<sup>13</sup> On the other lay the imperative to prosecute killer cops who for so long have seemed above the law.<sup>14</sup>

<sup>7</sup> *Id.*

<sup>8</sup> Richard Fausset & Shaila Dewan, *Police Decisions Are Scrutinized After Rayshard Brooks's Fatal Encounter*, N.Y. TIMES (June 19, 2020), <https://www.nytimes.com/2020/06/18/us/rayshard-brooks-police-tactics.html> [<https://perma.cc/WY3K-KRHL>].

<sup>9</sup> *How George Floyd Died, and What Happened Next*, N.Y. TIMES (November 1, 2021), <https://www.nytimes.com/article/george-floyd.html?> [<https://perma.cc/K26N-T4DY>].

<sup>10</sup> *Id.*

<sup>11</sup> *4 Minnesota police officers fired after death of unarmed black man*, BBC NEWS (May 27, 2020), <https://www.bbc.com/news/world-us-canada-52806572> [<https://perma.cc/7QCU-TUB2>]; Fausset & Dewan, *supra* note 8. On another notorious racist killing of 2020 resulting in felony murder charges, see Ekow N. Yankah, *Abmaud Arbery, Reckless Racism, and Hate Crimes*, 53 ARIZ. ST. L.J. 681 (2021).

<sup>12</sup> Kyron Huigens, *Minn. Should Consider Another Charge in the George Floyd Case*, LAW360 (August 2, 2020), <https://www.law360.com/articles/1291283/minn-should-consider-another-charge-in-george-floyd-case> [<https://perma.cc/W5D8-3UK6>]. For explication and analysis of the merger doctrine, see Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 518-551 (2011).

<sup>13</sup> Aya Gruber, *Equal Protection Under the Carceral State*, 112 NW. U. L. REV. 1337 (2018); Aya Gruber, *Murder, Minority Victims, and Mercy*, 85 U. COLO. L. REV. 129 (2014); Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965, 966 (2008) (surveying academic indictments of felony murder) [hereinafter Binder, *The Culpability of Felony Murder*]; Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 60 (2004) (same) [hereinafter Binder, *Origins of American Felony Murder*]; Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 446 (1985); Hava Dayan, *Assaultive Femicide and the American Felony-Murder Rule*, 21 BERKELEY J. CRIM. L. 1 (2016).

<sup>14</sup> Kate Levine, *Discipline and Policing*, 68 DUKE L.J. 839 (2019) (noting the protections afforded police defendants but cautioning against a carceral solution to policing harms); Kate Levine, *Police Prosecutions and Punitive Instincts*, 98 WASH. U. L. REV. 997 (2021); Aziz Z. Huq & Richard H. McAdams, *Litigating the Blue Wall of Silence: How to Challenge the Police Privilege to Delay Investigation*, 2016 U. CHI. LEGAL F. 213 (2016); James S. Liebman & Peter Clarke, *Minority Practice, Majority's Burden: The Death Penalty Today*, 9 OHIO ST. J. CRIM. L. 255, 280-291 (2011) (discussing incentives to use felony murder to secure otherwise unavailable sentences, including capital sentences).

Thus, scholars and activists struggled to reconcile their decarceral commitments with their insistence on police accountability.<sup>15</sup>

But the public was generally unmoved by such scruples. Outraged by news reports of violent officers remaining unpunished and unrestrained,<sup>16</sup> the public would accept no less than prosecutors' best efforts to convict offending officers of murder.<sup>17</sup> Accustomed to seeing prosecutors deploy enormous advantages against unpopular suspects on behalf of privileged victims, they demanded no less for Floyd and Brooks. If a felony murder rule was the shortest path to punishment, most did not care exactly what violent police were punished for.<sup>18</sup> Thus, when Chauvin was finally convicted and sentenced in June 2021 to twenty-two and a half years, many Americans, and particularly Black Americans, felt vindication.<sup>19</sup> That this penalty was imposed for the morally ambiguous offense of an inadvertently fatal assault was hardly noticed.<sup>20</sup> To be sure, Chauvin was also convicted of third degree murder for "causing . . . death . . . by means of an act eminently dangerous to others and evincing a depraved mind, without regard for human life,"<sup>21</sup> but that conviction added nothing to his penalty, because—paradoxically—it was considered the lesser charge.

Moreover, this depraved mind murder conviction will very likely be overturned on appeal.<sup>22</sup> Chauvin's trial was only the second time a police

<sup>15</sup> AYA GRUBER, *THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION* 46-50, 199-204 (2020) (abolitionist critique of progressive criminalization strategies; Kate Levine, *The Progressive Love Affair With the Carceral State*, 120 MICH. L. REV. 1225, 1232-1240 (critiquing progressive proposals to prosecute police and hate crimes); Aya Gruber, *WHEN THEORY MET PRACTICE: DISTRIBUTIONAL ANALYSIS IN CRITICAL CRIMINAL LAW THEORIZING*, 83 FORDHAM L. REV. 3 211, 3215-3228 (conflict between punishing crimes against minority and female victims and racial justice critique of carceral state).

<sup>16</sup> John Eligon, Tim Arango, Shaila Dewan & Nicholas Bogel-Burrough, *Derek Chauvin Verdict Brings a Rare Rebuke of Police Misconduct*, N.Y. TIMES (April 20, 2021), <https://www.nytimes.com/2021/04/20/us/george-floyd-chauvin-verdict.html> [<https://perma.cc/YA9S-BK6H>]; Lorita Copeland Daniels & Rosa Castillo Krewson, *How Black Lives Matter Demands Accountability of Twitter – and When It Works*, WASH. POST (July 29, 2021), <https://www.washingtonpost.com/politics/2021/07/29/how-black-lives-matter-demands-accountability-twitter-when-it-works/> [<https://perma.cc/3XR7-HJFM>].

<sup>17</sup> Emma Tucker, Mark Morales & Priya Krishnakumar, *Why It's Rare for Police Officers to be Convicted of Murder*, CNN (April 21, 2021), <https://www.cnn.com/2021/04/20/us/police-convicted-murder-rare-chauvin/index.html> [<https://perma.cc/G7XY-V8GT>]; Levine, *Police Prosecutions and Punitive Instincts*, *supra* note 14; Huq & McAdams, *supra* note 14.

<sup>18</sup> Gideon Yaffe, *The Lucky Legal Accident that Led to Derek Chauvin's Conviction*, THE HILL (May 1, 2021), <https://thehill.com/opinion/criminal-justice/551322-the-lucky-legal-accident-that-led-to-derek-chauvins-conviction/> [<https://perma.cc/P7ZS-R8V3>].

<sup>19</sup> Joshua Jamerson & Arian Campo-Flores, *Black Americans Greet Derek Chauvin's Conviction with Relief, Caution*, WALL ST. J. (April 20, 2021), <https://www.wsj.com/articles/black-americans-greet-derek-chauvin-conviction-with-relief-caution-11618963514> [<https://perma.cc/WY5U-ARYA>].

<sup>20</sup> Yaffe, *supra* note 18 (noting that Minnesota's felony murder law is unusual in requiring no felony other than the act causing death).

<sup>21</sup> MINN. STAT. § 609.195 (2020).

<sup>22</sup> Matt Cannon, *Derek Chauvin has a shot at appeal success. Here's why*, NEWSWEEK (Jan. 22, 2022), <https://www.newsweek.com/derek-chauvin-appeal-success-why-1632485> [<https://perma.cc/3XR7-HJFM>].

officer had been convicted of murder in Minnesota.<sup>23</sup> The first was the 2018 conviction of Officer Mohamed Noor for third degree (i.e. depraved indifference) murder.<sup>24</sup> In an inversion of the typical racial script, the Somali-American Noor, shot and killed the white Australian Justine Damond, while responding to her call to report a possible assault.<sup>25</sup> Many racial justice advocates were troubled that a Black police officer's killing of a white victim elicited the conviction that has proved so elusive when white officers have killed Black victims.<sup>26</sup> Yet three months after Chauvin's conviction, Noor's conviction for third-degree murder was overturned by the Minnesota Supreme Court.<sup>27</sup> The Court held this offense could not be charged where an offender's actions endangered one person rather than a number of people.<sup>28</sup> We regard this interpretation of depraved indifference as profoundly mistaken: *selective* indifference to the welfare of Black suspects *increases* the depravity of many police killings. Depraved indifference seemed to precisely describe Chauvin's attitude toward the person dying beneath him. Yet the Noor decision meant that in retrospect, the felony murder charge was the only way to convict Chauvin of murder in Minnesota, short of finding that he killed intentionally.<sup>29</sup>

The charges against Rolfe followed a circuitous path, passing through two elected county prosecutors to a state-appointed special prosecutor, who recently dropped them, finding the killing a justified use of force against an armed, resisting, felony arrestee.<sup>30</sup> This deflating result recalls that prosecutorial discretion and the law of justified force remain greater obstacles to prosecuting police than the burden of proving culpability; while the label of "felon" will be more often fastened to the *victims* of police violence than the perpetrators.

Yet the successful felony murder prosecution of Chauvin poses a genuine dilemma: should we celebrate deployment of prosecutorial privilege to

perma.cc/ZD9Y-LU3W]; Appellant's Brief, *Minnesota v. Chauvin*, No. A21-1228 (Minn. Ct. App. Sept. 23, 2021).

<sup>23</sup> Emily Haavik, *Derek Chauvin Found Guilty of Murder, Manslaughter in Death of George Floyd*, KARE11 (April 20, 2021) <https://www.kare11.com/article/news/local/george-floyd/derek-chauvin-guilty-murder-manslaughter-george-floyd-death/89-aa32108a-288e-4c62-af7d-e42d98589c7e> [<https://perma.cc/LW4M-Q86G>].

<sup>24</sup> *Id.*

<sup>25</sup> *Justine Damond: U.S. Policeman Guilty of Australian's Murder*, BBC NEWS (May 1, 2019), <https://www.bbc.com/news/world-us-canada-48113953> [<https://perma.cc/9JWT-WZUR>]; Jon Collins & Riham Feshir, *Did Race Color the Noor Verdict? Questions Linger for Some*, MPR NEWS (May 10, 2019), <https://www.mprnews.org/story/2019/05/10/police-trial-shooting-justine-damond-ruszczyk-australia-race-color-verdict> [<https://perma.cc/98P5-WMEW>].

<sup>26</sup> Collins & Feshir, *supra* note 25.

<sup>27</sup> Noor remains convicted of second-degree manslaughter. Jon Collins, Brian Bakst & Peter Cox, *MIN Supreme Court Tosses 3d-Degree Murder Conviction of Ex-Cop Noor*, MPR NEWS (September 15, 2021), <https://sahanjournal.com/policing-justice/mn-supreme-court-tosses-3rd-degree-murder-conviction-of-excop-noor/> [<https://perma.cc/PX64-SUMV>].

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> See Part III *infra*.

ease conviction of homicidal police? Or does this shortcut mark such convictions with an asterisk, signifying only the power of the state to punish whoever it pleases? We share the hunger to use potent prosecutorial tools to control racist police violence. Yet punishing police officers for felony murder in emblematic cases poses profound dangers.<sup>31</sup> Even those who accept punishment as a legitimate response to crime should hesitate. Criminal law influences not only by threatening punishment, but also by expressing collective judgments. In a democracy, it speaks for us. What do we express in calling such killings felony murders? Does such a conviction aptly name and denounce these wrongs?

At its best, felony murder condemns and punishes an inadvertent killing, because the risk of death was imposed in furtherance of a second grave wrong.<sup>32</sup> This account exposes two problems with these cases. First, these killings were not—and police killings typically are not—inadvertent. Punishing them as felony murder understates this culpability regarding death and thereby undeservedly exculpates the killer. Next, what is the second wrong here? Is it racial subordination? Or arrogantly prioritizing police authority or safety over the lives of civilians? If these are the motives we want to denounce, we will need the underlying felony to reflect this wrong: perhaps a hate crime or a civil rights violation, not an assault.

Moreover, another message expressed by a felony murder conviction should trouble us. This is the sentiment that felony murder liability is summary justice meted out only to those beyond the circle of our mutual concern. Unfortunately, this became a common way of thinking about punishment during the “War on Crime,”<sup>33</sup> as rising penal severity expanded prosecutorial discretion,<sup>34</sup> enabling “pretextual prosecution” of those suspected of hard-to-prove major crimes.<sup>35</sup> Lengthy recidivist sentences aimed

<sup>31</sup> Kate Levine, *Police Prosecutions and Punitive Instincts*, 98 WASH. U. L. REV. 997, 1009-1033 (2021); Gruber, *Murder, Minority Victims, and Mercy*, *supra* note 13, at 134-36; Gruber, *When Theory Met Practice*, *supra* note 15, at 3215-3217.

<sup>32</sup> See Binder, *The Culpability of Felony Murder*, *supra* note 13, at 991-1000, 1032-1046 (proposing that negligent killing deserves more severe condemnation when an apparent risk is imposed to further an independent wrongful purpose); Binder, *Making the Best of Felony Murder*, *supra* note 12 at 433-437 (same); and Section II.B *infra*.

<sup>33</sup> ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 1-2 (2017) [Hereinafter HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME]; See also ELIZABETH HINTON, AMERICA ON FIRE: THE UNTOLD HISTORY OF POLICE VIOLENCE AND BLACK REBELLION SINCE THE 1960'S (2021) [Hereinafter HINTON, AMERICA ON FIRE]; MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012).

<sup>34</sup> William J. Stuntz, *The Uneasy Relationship between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 236-243, 251-274 (2011); see also JOHN PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM (2017).

<sup>35</sup> William J. Stuntz and Dan Richman, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COL. L. REV. 583 (2005); STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE *supra* note 34, 269-274.

at “incapacitation” further disconnected penalties from crimes.<sup>36</sup> Prosecutors increasingly used heightened penalties to coercively recruit informants to inculpate others, including the innocent.<sup>37</sup> Criminal justice increasingly seemed a vicious and cynical team sport. In this context, felony murder, with its disconnect between conduct and label, its disproportion between culpability and penalty, and its unfairly broad complicity, seemed emblematic rather than anomalous. Like a “Three Strikes” recidivist sentence, a felony murder conviction seemed a condemnation of the person rather than the offense.<sup>38</sup> Disproportion seemed its very point. Indeed, the appeal of felony murder liability for brutal police may inhere in its very arbitrariness. After police have long enjoyed undue power and impunity, arbitrary punishment may feel like poetic justice.

But before we declare “war” on police violence, we should reflect on the history of this metaphor and the discrimination inherent in a regime punishing dangerous dispositions and associations. Drawing on the research of Elizabeth Hinton, we will recall the War on Crime as a reaction against Black protest, that racialized the political issue of “crime.”<sup>39</sup> The discriminatory use of felony murder liability is particularly apparent in cases of police violence. In a substantial minority of states, prosecutors can and do use felony murder rules to prosecute *arrestees rather than police* for killings committed by police.<sup>40</sup> Thus, felony murder charges have often shifted blame for unreasonably violent law enforcement onto its targets.

In a majority of felony murder states, such charges would be precluded by an “agency rule,” confining felony murder liability to killings by parties to the felony.<sup>41</sup> But when Floyd and Brooks were killed, 15 states, representing 47% the American population, applied a broader “proximate cause” rule, imposing liability for all deaths foreseeable as a result of the felony, even if directly caused by police.<sup>42</sup> Thus, many felony murder rules, including Geor-

<sup>36</sup> Guyora Binder & Ben Notterman, *Penal Incapacitation: A Situationist Critique*, 54 AM. CRIM. L. REV. 1, 1-2, 5-11 (2017); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 681-683 (2005).

<sup>37</sup> Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE L. REV. 107, 1009-1012(2006); Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 645-646, 651-660, 663-677 (2004); Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 6-21 (2003).

<sup>38</sup> For a critique of punishing character rather than conduct, see generally Ekow N. Yankah, *Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment*, 25 CARDOZO L. REV. 1019 (2004)(character theory encourages modern caste formation, reinforcing group subordination).

<sup>39</sup> HINTON, AMERICA ON FIRE, *supra* note 33.

<sup>40</sup> See Parts III & IV *infra*.

<sup>41</sup> See text accompanying footnotes 177, 235-264 *infra*.

<sup>42</sup> Until 2021, these included Texas, Florida, New York, Illinois, Ohio, Georgia, New Jersey, Arizona, Indiana, Missouri, Wisconsin, Colorado, Alabama, Oklahoma, and Alaska, however Illinois and Colorado adopted agency rules in 2021. See text and accompanying footnotes 118-120, 274-307 *infra*. For state populations, see <https://www.census.gov/library/stories/2021/08/more-than-half-of-united-states-counties-were-smaller-in-2020-than-in->

gia's (but not Minnesota's), absolve culpable police officers of less visible racist killings by shifting blame onto their victims. Since Floyd's death, two more states adopted agency limitations as racial justice reforms,<sup>43</sup> but felony murder still extends to all proximately caused deaths in 13 states.

Prosecuting felons for police killings under this standard normalizes unreasonably violent and dangerous policing, almost requiring felons to expect it.<sup>44</sup> This proximate cause standard has been criticized for its vulnerability to hindsight bias—ex ante rare events tend to look inevitable after they occur.<sup>45</sup> But in a context of race discrimination, this inflation of danger is even more disturbing. It is sadly “foreseeable” that police kill Black civilians at 2.5 times the rate at which they kill whites.<sup>46</sup> Under a foreseeability test, Black felons may therefore be punished for attracting even unreasonable police violence. If prosecutors and juries already overattribute danger to putative felons, perhaps they will see a violent police response as particularly predictable when the suspect is Black.<sup>47</sup> Holding Black felons responsible to anticipate not just an excessive, but also a discriminatory response, is particularly ugly.

2010.html#:~:text=California%20was%20the%20most%20populous,half%20of%20the%20U.S.%20population [https://perma.cc/J2DF-SN4R].

<sup>43</sup> See text accompanying notes 118–120 *infra*.

<sup>44</sup> See text and accompanying notes 357–411 *infra*.

<sup>45</sup> Martin Lijtmaer, Comment, *The Felony Murder Rule in Illinois: The Injustice of the Proximate Cause Theory Explored via Research in Cognitive Psychology*, 98 J. CRIM. L. & CRIMINOLOGY 621, 621–624 (2008); Donald A. Dripps, Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame, 56 VAND. L. REV. 1383, 1385 (2003); Binder, *Origins of American Felony Murder*, *supra* note 13, at 462–463.

<sup>46</sup> See Wesley Lowery, *Aren't more white people than black people killed by police? Yes, but no.*, WASH. POST (JULY 11, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/07/11/arent-more-white-people-than-black-people-killed-by-police-yes-but-no/> [https://perma.cc/QG3X-V4T7]. There remains a debate about whether the police are more likely to use lethal violence in identical situations. Compare Roland G. Fryer Jr., *An Empirical Analysis of Racial Differences in Police Use of Force*, 127 J. POL. ECON. 1210 (2017) (observing racial disparity in police nonlethal force in one city, but none in fatal shootings when controlling for situational factors such as being stopped) and Steven Durlauf & James Heckman, *An Empirical Analysis of Police Use of Force: A comment* 128 J. POL. ECON. 3998 (2020) (failure to observe effect of race on situational factors predicting shootings, such as being stopped, renders absence of observed racial disparity in shootings uninformative); see also, Joshua Correll, Bernadette Park, Charles M. Judd, Bernd Wittenbrink, Melody S. Sadler, & Tracie Keese, *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCH. 1006, 1015 (2007). Others point out that racism in both policing and larger social structures can lead to disproportionate violence by generating situations where lethal force seems “necessary.” Michael Siegel, *Racial Disparities in Fatal Police Shootings: An Empirical Analysis Informed by Critical Race Theory*, 100 B.U. L. REV. 1069, 1077–1085 (2020) (correlating racial disparities in probability of being fatally shot by police with level of residential segregation and other indices of structural racism); MAPPING POLICE VIOLENCE <https://mappingpoliceviolence.org> [https://perma.cc/6XZP-MH4V] (last updated Mar. 31, 2022).

<sup>47</sup> Police often treat Black neighborhoods as more threatening in disproportion to any evidence. Brad W. Smith & Malcolm D. Holmes, *Police Use of Excessive Force in Minority Communities: A Test of the Minority Threat, Place, and Community Accountability Hypotheses*, 61 SOC. PROBS. 83, 86–87 (2014).



“Agency” limits confined felony murder to deaths directly caused by felons throughout the nineteenth century.<sup>48</sup> After World War II, some courts fashioned broader proximate cause rules—unconfined by agency limits—as weapons in an imagined war against criminals. Eventually, courts in almost all states invoked precedent to reestablish agency limits. But soon most states enacted new codes in the face of rising crime and calls for increasing penal severity.<sup>49</sup> Broader proximate cause felony murder rules were written or read into many of these new codes. So, while an agency limit remains the majority rule, neither courts nor scholars have supported it with any normative rationale. One contribution of this essay is to do so: an agency rule prevents discriminatory prosecutorial decisions that shift blame onto the victims of discriminatory police violence. Such blame-shifting exacerbates police violence by intimidating, discrediting, and silencing surviving witnesses. Three recent cases aptly illustrate how proximate cause felony murder rules provide camouflage in the War on Crime.

In 2012, John Givens, Leland Dudley and David Strong, all unarmed Black men, burglarized an electronics store in Chicago, and loaded up the store’s van with loot. When police surrounded the store, the three attempted escape by backing the van through a garage door. One officer was grazed by the van. Officers fired 77 shots into the van, killing Strong. Dudley took five bullets, and lost 40% of his skull, suffering brain damage. Givens was shot eight times. Both were convicted of felony murder, even though two members of the Independent Police Review Authority found the shootings unjustified (both members were fired for their candor). In 2021, Illinois adopted an agency rule as part of a broad criminal justice reform bill. Givens has been pardoned by the Governor and a jury awarded Strong’s family one million dollars.<sup>50</sup>

In 2018, Columbus police set up stings to catch aspiring robbers advertising merchandise on social media. A police decoy would meet the seller, accompanied by a concealed SWAT officer. When the suspected robber showed a weapon, the sniper would shoot him. After police shot and killed Julius Tate, a Black 16 year old, prosecutors charged his 16 year old sweetheart, Masonique Saunders, also Black, with felony murder. She helped set up the meeting but was not present at the scene.<sup>51</sup> Tate was the second sus-

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<sup>48</sup> Binder, *Origins of American Felony Murder*, *supra* note 13, at 96. *See also* Norval Morris, *The Felon’s Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50 (1956).

<sup>49</sup> Part IV *infra*.

<sup>50</sup> Maya Dukmasova, *Chicago May Pay \$1M to Estate of Man Killed in Burglary Try*, US NEWS (October 2, 2021, 1:01 a.m.), <https://www.usnews.com/news/best-states/illinois/articles/2021-10-02/chicago-may-pay-1m-to-estate-of-man-killed-in-burglary-try> [<https://perma.cc/U47H-5XTY>].

<sup>51</sup> Adora Namigadde, *After Columbus Police Killed Teen, Officers Arrest Other Teen For His Murder*, WOSU, <https://news.wosu.org/news/2018-12-14/after-columbus-police-killed-teen-officers-arrest-other-teen-for-his-murder> [<https://perma.cc/W947-UCLZ>]; Melissa Gira Grant, *Police Killed Her Boyfriend, Then charged her with his murder*, NEW REPUBLIC (August 6, 2019), <https://newrepublic.com/article/154674/masonique-saunders-columbus-ohio-police-felony-murder-laws> [<https://perma.cc/F8BC-RQZH>].

pect shot in this operation within a week. After much protest, prosecutors allowed Saunders to plead to manslaughter. The killer won a medal.

In 2020, 15-year-old Latino, Stavian Rodriguez, and 17-year-old Caucasian, Wyatt Cheatham, attempted to rob a gas station in Oklahoma City.<sup>52</sup> During the robbery, the hapless Rodriguez returned to the scene, was locked inside the store by the clerk and surrounded by police.<sup>53</sup> Moments after police joked that he was probably calling his Mom, Rodriguez set down his gun and attempted to surrender. He was shot 13 times by 5 officers and killed.<sup>54</sup> Cheatham, 17, not even on the scene, was charged with felony murder, while prosecutors resisted mounting public pressure to prosecute the actual killers.<sup>55</sup>

In each case, police unnecessarily used deadly force, and prosecutors charged absent or unarmed defendants with murder. These cases display a disturbing symmetry between disproportionate police violence and disproportionate prosecution. Indeed, the more unreasonable police violence becomes, the more capacious felony murder liability must become to shift blame onto victims. The resulting murder charges presume police violence is deserved by its victims. Thus, the availability of such felony murder liability creates perverse incentives for both police and prosecutors.<sup>56</sup> Moreover, the targets of these prosecutions are disproportionately people of color. The War on Crime was not only an escalation of policing and punishment, but specifically a racialized escalation,<sup>57</sup> with racial disparity at every stage in the process.<sup>58</sup> Black people are not only disproportionately victimized by police violence, but also disproportionately punished for felony murder,<sup>59</sup> and disproportionately charged with felony murder when they attract police violence.<sup>60</sup>

<sup>52</sup> Nolan Clay, *Five Oklahoma City Officers Charged with First-Degree Manslaughter in Fatal Shooting of Teen Who Dropped Gun*, USA TODAY (Mar. 10, 2021), <https://www.usatoday.com/story/news/nation/2021/03/10/stavian-rodriguez-shooting-5-oklahoma-city-police-officers-charged/6945418002/> [<https://perma.cc/5HCT-D7YD>].

<sup>53</sup> *Id.*

<sup>54</sup> Michael Levenson, *Five Oklahoma Officers Charged in Shooting Death of 15-Year-Old Boy*, N.Y. TIMES (Mar. 10, 2021), <https://www.nytimes.com/2021/03/10/us/oklahoma-city-police-stavian-rodriguez.html> [<https://perma.cc/7JE6-YTEE>].

<sup>55</sup> *Murder Charge Dropped Against Teen Accomplice in Robbery that Resulted in OCPD Shooting of Stavian Rodriguez*, KOCO (Apr. 19, 2021), <https://www.koco.com/article/murder-charge-dropped-against-teen-accomplice-in-robbery-that-resulted-in-ocpd-shooting-of-stavian-rodriguez/36164450> [<https://perma.cc/8BWL-HBP5>]. The killers were ultimately charged with manslaughter.

<sup>56</sup> Section V.D *infra*.

<sup>57</sup> HINTON, AMERICA ON FIRE, *supra* note 33, at 1-45; HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME, *supra* note 33 at 1-62, 134-179.

<sup>58</sup> Guyora Binder & Robert Weisberg, *What is Criminal Law About?*, 114 MICH. L. REV. 1173, 1201 (2016).

<sup>59</sup> See Section V.B *infra*.

<sup>60</sup> See Section V.C *infra*.

The prospect of race discrimination has often motivated prophylactic restrictions on law enforcement.<sup>61</sup> Vagrancy offenses were deemed unconstitutionally vague, because the discretion these crimes afforded police was a playground for prejudice.<sup>62</sup> Juries, lawyers, and exclusionary rules likewise serve as checks against discrimination.<sup>63</sup> We present felony murder as a similar site for discrimination and offer agency rules as a necessary prophylactic—the example of Illinois should be followed in other states that lack agency rules.

But while agency rules are necessary prophylactics, they may not be sufficient. Discrimination risk inheres not just in the attribution of police killings to felons but also in the more common attribution of felony murder to co-felons. In turn, our racial justice critique of proximate cause rules can also indict felony murder more broadly, wherever data reveals grossly disparate patterns of charging. One aim in reflecting on felony murder liability for police violence is to refresh the familiar critique of felony murder. That felony murder liability is often undeserved is a reason to narrow it. But that it has been imposed selectively by race is a reason—maybe our best reason—to abolish it altogether.

Our discussion proceeds as follows. Part Two explains the varieties of felony murder liability, and their application to both felons who cause death and accomplices who do not. It explains traditional criticisms and defenses of felony murder and reports on recent reform efforts. Part Three examines how and when felony murder can apply to police, in cases where police kill, and considers whether such liability can properly label and denounce their culpability. Next, it examines the implications of merger limitations, which properly preclude felony murder prosecutions of police predicated on assault in the great majority of states. Finally, it notes the rarity of laws punishing civil rights violations as felonies and proposes proliferating these, but not necessarily as predicates for felony murder. Part Four shows how felony murder can apply to suspected felons in cases where police kill. It discusses agency limitations, which preclude holding felons liable for police killings in most states, and the elimination of such agency limits in a substantial minority of states. It shows, moreover, that the postwar cases extending felon liability to such killings relied on a conception of law enforcement as warfare that should be seen as an early example of War on Crime rhetoric. Part Four

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<sup>61</sup> Michael Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 48-49 (2000).

<sup>62</sup> *Papachristou v. City of Jacksonville*, 405 U.S. 156, 158-159, 162, 170-171 (potential for race discrimination in enforcing vagrancy laws, illustrated by facts of case) (1972); Guyora Binder & Brenner M. Fissell, *A Political Interpretation of Vagueness Doctrine*, 2019 U. ILL. L. REV. 1527, 1529, 1541-42 (discussing *Papachristou*) (2019); RISA GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960'S* (2016) 247-248, 298-332.

<sup>63</sup> *Norris v. Alabama* 294 U.S. 587 (1935); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Powell v. Alabama* 287 U.S. 45 (1932); *Mapp v. Ohio* 367 U.S. 643 (1961); *Brown v. Mississippi* 297 U.S. 278 (1936).

also explicates Dean Norval Morris's influential doctrinal defense of agency limitations, showing how it was obsoleted by new tough-on-crime codes that left agency rules without a rationale. Part Five proposes racial justice as that rationale, recalling the centrality of racial subordination and systematic police violence in the War on Crime, and identifying felony murder prosecution of victims of police violence as a tactic in that war. Further, it justifies an agency limitation as a prophylactic against the discriminatory abuse of felony murder. Lastly, it proposes depraved indifference as a better test for assessing the culpability of both police and felons for death in cases where police kill. We conclude in Part Six, extending our racial justice critique from proximate cause variants of felony murder, to all felony murder. Returning to the problem of prosecuting police killings, we voice *two* concerns about using felony murder to prosecute police: it understates their culpability *and* legitimates a tool of racial subordination.

## II. THE FELONY MURDER PROBLEM

Let us first introduce felony murder liability and provide background on when, how and why felony murder liability can apply to police and felons, in cases where police kill.

### A. *Felony Murder Defined*

By “felony murder,” we refer to any murder offense conditioned on killing in the commission or attempt of a felony but with less culpability than otherwise required for murder. Since almost all states punish some reckless killings as murder, the term is best applied to killings conditioned on negligence towards death or strict liability. By this measure, 41 states, the federal system, and the District of Columbia have felony murder rules.<sup>64</sup>

Felony murder rules have a second distinctive feature: they can impose murder liability not only on those who killed in the course of a felony, but also on their accomplices in the felony, even if they had no intention to aid or encourage a killing. About a third of felony murder statutes impose liabil-

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<sup>64</sup> The exceptions: Hawaii requires intent to kill for all murder. HAW. REV. STAT. § 707–701 (2022); Arkansas, Kentucky, Massachusetts, Michigan, New Hampshire, New Mexico, North Dakota, and Vermont, require at least recklessness with respect to death for murder in the course of a felony, although Arkansas defines such murder as “causes the death of any person . . . under circumstances manifesting extreme indifference to human life.” ARK. CODE ANN. §5-10-101 (2022); KY. REV. STAT. Ann. §507.020 (West 2022); Commonwealth v. Brown, 81 N.E.3d 1173, 1194 (Mass. 2017) (Gants, J., concurring); People v. Aaron, 299 N.W.2d 304, 326–327 (Mich. 1980); N.H. REV. STAT. ANN. §630:1-b, §626:7(2); State v. Ortega, 817 P.2d 1196, 1208 (N.M. 1991); N.D. CENT. CODE. 12.1-02-02, 12.1-16-01(1)(C) (2021); N.D. CRIMINAL INSTRUCTION K-6.03 (2019); State v. Doucette, 470 A.2d 676, 682–683 (Vt. 1983).

ity on any participant in a felony that causes death.<sup>65</sup> In these collective liability states, each felon's liability depends on the causal attribution of the death to the felony. Typically, such causation requires that the death be foreseeable as a consequence of the felony; sometimes it also requires that the act causing death "further" the felony. This furthering requirement appears to exclude killings by those resisting the crime, such as crime victims and the police, but in some jurisdictions it is not so applied.<sup>66</sup>

In the remaining jurisdictions, the murder liability of co-felons depends on their complicity in the killing. Yet courts in these complicity states have conditioned complicity in the killing on criteria similar to those governing causation in the collective liability states. Almost all confine complicity to killings foreseeable as a result of the felony and most also require that the killings be in furtherance of the felony.<sup>67</sup> Both types of rules extend liability for the killing to accomplices in the felony who did not kill, or intentionally aid or encourage killing. By contrast, accomplice liability is usually limited to those crimes the accomplice intentionally aided or encouraged.<sup>68</sup>

### B. *Historical Origins*

Felony murder is less ancient than is sometimes supposed.<sup>69</sup> The distinction between murder and manslaughter dates only from the sixteenth century in English law and was not originally defined by distinct culpable mental states. To be sure, murder required "malice," but malice was a normative conclusion about the absence of certain excusing and mitigating circumstances rather than a particular mental state. Both murder and manslaughter required (1) "killing"—fatal injury directly inflicted with a weapon—and (2) the absence of such "excuses" as self-defense, insanity or "accident" (as when the weapon was not intentionally aimed at a person). If the killing was provoked or arose from mutual combat, it lacked "malice" and was graded as manslaughter. During the sixteenth century, a limited doctrine of accessorial liability was adopted, holding conspirators who agreed together to use deadly force to overcome resistance to a crime (not necessarily a felony) responsible for such uses of deadly force.<sup>70</sup>

A doctrine that all participants in an unintentionally fatal felony would be liable for murder was proposed as dictum by Justice Holt in the early eighteenth century English decision of *R. v. Plummer*.<sup>71</sup> Holt's idea was then endorsed in several eighteenth century treatises, including Blackstone's.<sup>72</sup> Yet

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<sup>65</sup> Binder, *supra* note 12, at 510–517 (discussing Alabama, Alaska, Arizona, Colorado, Connecticut, Florida, Maine, Missouri, Montana, NJ, NY, Ohio, Oklahoma, Oregon and Washington).

<sup>66</sup> See *People v. Hernandez* 82 N.Y.2d 309, 313 (1993).

<sup>67</sup> *Id.* at 501–510.

<sup>68</sup> GUYORA BINDER, *FELONY MURDER* 217 (2012).

<sup>69</sup> See Binder, *Origins of American Felony Murder Rules*, *supra* note 13, at 60–66.

<sup>70</sup> *Id.* at 73–70.

<sup>71</sup> *Id.* at 88–89.

<sup>72</sup> *Id.* at 89–97.

it does not appear to have been actually applied in England before the American Revolution, and was not regularly applied there until well into the nineteenth century. Nevertheless, it was legislatively codified in many American states—notably Georgia, Illinois, New York and California—beginning in the second decade of the nineteenth century.<sup>73</sup> In many other states—notably Pennsylvania, Virginia and Massachusetts—statutes instead aggravated murder to the first degree if committed in the course of certain felonies. Over the course of the nineteenth century, courts read these grading statutes as imposing first degree murder liability for unintended killing in the course of these felonies.<sup>74</sup>

During the nineteenth century, felony murder liability was largely confined to a short list of predicate felonies, usually including robbery, arson, rape or burglary. A slow expansion of the meaning of killing to embrace indirect causation eventually expanded the scope of felony murder during the late nineteenth century. But almost all cases of remote causation dated from the century's last decade. Only one case, in 1900, involved an intervening actor: train robbers used the victim as a shield, forcing him into the path of gunfire.<sup>75</sup> Beginning in the 1930's felony murder liability in some states encompassed killings by police or others resisting the felony, on the theory that the felony had "proximately caused" such resistance. This doctrine will be examined and criticized in detail in Part IV below.

### C. *The Normative Problem*

The normative questions posed by felony murder are whether it conditions liability on sufficient culpability to satisfy desert, and if not, whether it is defensible on consequentialist grounds.

Felony murder rules are often described as imposing strict liability for any death, which seems to imply that felony murder liability cannot be deserved. But whether that is so depends on what we mean by strict liability. If strict liability means liability without moral fault, strict liability for the very serious crime of murder would obviously be unfair. Liability without moral fault is sometimes referred to as "*substantive* strict liability."<sup>76</sup> By contrast, the American Law Institute's 1962 Model Penal Code offers what has been called a "*formal*"<sup>77</sup> conception of strict liability. It conditions criminal liability on proof of a mental state corresponding to each element. Under the Code, one must purposely, knowingly, recklessly or negligently perform any forbidden act or cause any forbidden harm to be guilty of any jailable offense.<sup>78</sup>

<sup>73</sup> *Id.* at 161–186.

<sup>74</sup> *Id.* at 141–161.

<sup>75</sup> *Id.* at 194–195 (discussing *Keaton v. State*, 57 S.W. 1125 (Tex. Crim. App. 1900)).

<sup>76</sup> Kenneth Simons has helpfully distinguished between "substantive" and "formal" senses of strict liability. Ken Simons, *When is Strict Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1085–1093 (1997).

<sup>77</sup> *Id.*

<sup>78</sup> MODEL PENAL CODE § 2.02(1), 2.05 (Am. L. Inst. 1962).

The Code's scheme has had great influence among legal scholars<sup>79</sup> and considerable influence on the law.<sup>80</sup>

Yet it is easy to think of examples of offenses involving moral fault without satisfying this formal requirement of correspondence between act and mental state. Consider causing death with intent to torture.<sup>81</sup> Here is a terrible crime comprising a very bad mental state and a very bad result, yet the two do not correspond. Next consider a crime defined as causing death by means of torture: here we require a bad act and a bad result but no mental state at all. These crimes obviously involve fault and are substantively culpable. We may say that an intent to torture *implies* some culpable awareness of a risk of death. The second crime requires no mental state, but because the forbidden conduct of torture is very dangerous to life, it seems culpable "*per se*."<sup>82</sup> Thus we can see how a sufficiently malign and dangerous felony *could* supply enough moral fault to merit murder liability, without requiring any mental state corresponding to death. But that does not mean that every felony murder crime does.

One illuminating example of conduct culpable *per se* is use of a deadly weapon. In fact, for much of the history of the common law, weapons mattered much more than mental states in proving murder. The forbidden act was "killing," not causing death. Killing connoted an attack with a weapon or some other obviously apt means like strangulation or poison. Once it was established, a culpable attitude of malice was presumed, and the burden would fall to the defendant to show the deadly means were used unintentionally.<sup>83</sup> Mental states only became important as the conduct required for murder expanded to include causing death remotely by any means, as occurred in both English and American law during the nineteenth century.<sup>84</sup> As our later discussion of felony murder causation standards will reveal, standards of causal responsibility for death can matter just as much as mental states in aligning criminal liability with moral fault.

Today, felony murder often involves formal strict liability, but rarely involves substantive strict liability. Only five of 41 felony murder statutes explicitly condition the offense on negligence toward or foreseeability of death.<sup>85</sup> Eight states and the federal system condition felony murder on "malice," although whether this requires any culpability beyond the intent to

<sup>79</sup> See, e.g., Paul Robinson & Jane Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681 (1983).

<sup>80</sup> WAYNE LAFAVE, CRIMINAL LAW §1.1(b) (2017); Darryl Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L. J. 285, 294 (2012).

<sup>81</sup> See, e.g., IDAHO STAT. § 18-4001 (2022).

<sup>82</sup> Mark Kelman, *Strict Liability, an Unorthodox View*, in 4 ENCYC. CRIME & JUST. 1512, 1512-1518 (Sanford Kadish, ed. 1983) (discussing "*per se*" culpable conduct).

<sup>83</sup> GUYORA BINDER, THE OXFORD INTRODUCTIONS TO U.S. LAW: CRIMINAL LAW (2016) 195-196.

<sup>84</sup> *Id.* at 187-207; Binder, *Origins of American Felony Murder Rules*, *supra* note 13, at 192-197.

<sup>85</sup> JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, CRIMINAL LAW: CASES AND MATERIALS 443 (9th ed. 2021).

commit the felony is often unclear.<sup>86</sup> Still, we might view dangerous predicate felonies like robbery and arson as inherently manifesting some culpability towards death. Both also involve non-corresponding culpability toward another wrong: theft, in the case of robbery, and destruction of property in the case of arson.

If certain felonies pose a reasonably apparent danger to life, their commission would be *per se* negligent. Among our 41 felony murder states, 22 exhaustively enumerate the felonies that can serve as predicates to felony murder liability. Most often, the felonies enumerated are robbery, burglary, rape, arson, escape, and kidnapping. Courts and commentators often view these predicates as especially dangerous, and some codes refer to them as such.<sup>87</sup> The remaining 19 felony murder states predicate at least some felony murders on non-enumerated felonies. In at least 14 of these states, the felony must be dangerous or involve the use of a deadly weapon.<sup>88</sup> Predicate felonies, on this view, are analogous to drunk driving: actions we understand are dangerous and that can easily go fatally wrong.

Culpability can also inhere in criteria of causal responsibility. Thus, conditioning causal responsibility for death on its foreseeability makes causation *per se* negligent toward that result.<sup>89</sup> Of 41 felony murder states, 29 have clearly required foreseeability for causation, while only three have clearly rejected it.<sup>90</sup> Conditioning accomplice liability on foreseeability of death can extend this negligence requirement to accomplices.<sup>91</sup> Thus, most felony murder rules can be seen as *per se* negligence rules with respect to death.

In addition to this negligence, most felony murder rules require non-corresponding culpability towards another harm through two principles. First, most states impose causation limitations by requiring that the act causing death further the predicate felony. Thus, if a plane coincidentally and fatally crashes while smuggling drugs, the lack of a relationship between the crime and death disables a felony murder conviction.<sup>92</sup>

Second, most states restrict predicate felonies to those other than homicide or assault. If a state could predicate felony murder on a lesser homicide like manslaughter, that offense would effectively be eliminated. Similarly, if a state was able to prosecute any fatal assault as felony murder, it would effectively erase any other grade of homicide. Every killing, whether reckless, provoked, or the freakish result of a punch could be punished as murder. This limitation on felony murder, often called a "merger" limit, is achieved in two ways. Some state codes exhaustively enumerate predicate felonies and

<sup>86</sup> *Id.*

<sup>87</sup> But how much danger is required for negligence? About 1% of robberies and arsons are fatal, but fatal burglaries are far rarer. *Id.*

<sup>88</sup> *Id.* at 444.

<sup>89</sup> *State v. Martin*, 573 A.2d 1359, 1375 (N.J. 1990); MODEL PENAL CODE § 2.06 cmt. at 312 (AM. L. INST, Official Draft and Revised Comments 1980).

<sup>90</sup> KAPLAN, WEISBERG & BINDER, *supra* note 85, at 446.

<sup>91</sup> Although if courts require only foreseeability of a foreseeably dangerous act, however, we don't even have negligence. See BINDER, *supra* note 68, at 213-225.

<sup>92</sup> *King v. Commonwealth*, 368 S.E.2d 704, 707-09 (Va. Ct. App. 1988).



simply leave out assault and lesser forms of homicide. Other codes allow courts to decide which felonies can support felony murder. In such states, courts often impose a merger limit as judicial doctrine.

Of 22 states exhaustively enumerating predicate felonies, none conditions felony murder on the manslaughter of the victim. Only four enumerate felony assault as a predicate felony. One uses drive-by shooting and 10 use felony child abuse as predicates. Merger doctrines exclude lesser homicide felonies and assault felonies in many of the remaining 19 jurisdictions with non-enumerated felonies, but five have rejected the merger doctrine.<sup>93</sup> As will be explained in part III, merger doctrines and related limits on predicate felonies prevent felony murder prosecution of police for unreasonable killings in most states.

So substantively, felony murder generally does not impose strict liability. It almost always requires *some* moral fault. But that does not mean felony murder requires *enough* fault to warrant condemnation and punishment as murder. Accordingly, felony murder liability has faced vigorous criticism from its inception.<sup>94</sup> In 1846 the English Law Commissioners wrote:

If the punishment for stealing from the person be too light, let it be increased, and let the increase fall alike on all the offenders! Surely the worst mode of increasing the punishment of an offence is to provide that, besides the ordinary punishment, every offender shall run an exceedingly small risk of being hanged.<sup>95</sup>

James Stephen regarded felony murder liability as “cruel . . . and indeed monstrous.”<sup>96</sup> In the U.S., the Model Penal Code rejected felony murder, commenting that “principled argument in favor of the felony-murder doctrine is hard to find.”<sup>97</sup> Sanford Kadish condemned felony murder liability as

<sup>93</sup> *State v. Jackson*, 346 N.W.2d 634, 636 (Minn. 1984); *Baker v. State* 225 S.E.2d 269, 272 (Ga. 1976); *State v. Burkhardt*, 103 P.3d 1037, 1045-46 (Mont. 2004); *Lawson v. Texas*, 64 S.W.2d 396, 396-97 (Tex. Crim. App. 2001); *Johnson v. State*, 4 S.W.3d 254, 258 (Tex. Crim. App. 1997); *State v. Williams*, 24 S.W.3d 101, 117 (Mo. Ct. App. 2000).

<sup>94</sup> Several scholars—including one of this essay’s two authors—have challenged this consensus, proposing retributive rationales for sufficiently limited felony murder rules. See David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL’Y 359 (1985); Kevin Cole, *Killings During Crime: Toward a Discriminating Theory of Strict Liability*, 28 AM. CRIM. L. REV. 73 (1990); Kenneth W. Simons, *Is Strict Liability in the Grading of Offences Consistent with Retributive Desert?*, 32 OXFORD J. LEGAL STUD. 445, 450-458 (2012); Ken Simons, *When is Strict Liability Just?* 87 J. CRIM. L. & CRIMINOLOGY 1075, 1077, 1103, 1111-1125 (1997); Guyora Binder, *The Culpability of Felony Murder*, *supra* note 13 at 966-972; Binder, *Making the Best*, *supra* note 12 at 433-437. These arguments generally observe that in other contexts, criminal law increases liability based on non-corresponding harm, or non-corresponding culpability.

<sup>95</sup> COMM’RS ON CRIM. L., SECOND REPORT 17 (1846). “Constructive murder” is the term used for felony murder in England.

<sup>96</sup> 3 JAMES FITZJAMES STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 75 (1883).

<sup>97</sup> MODEL PENAL CODE § 210.2 cmt. 6 at 36 (AM. L. INST, Official Draft and Revised Comments 1980).

“rationally indefensible.”<sup>98</sup> Nelson Roth and Scott Sundby argued that felony murder violates the constitution, by either punishing severely without culpability, or presuming culpability without proof.<sup>99</sup> Among former common law jurisdictions, England, Ireland, Canada and India have abolished felony murder.<sup>100</sup> However, two Australian states have limited felony murder rules, and two punish negligent unlawful act murder.<sup>101</sup>

Assuming that murder liability for inadvertent killing during a felony is undeserved, can it nevertheless be defended on consequentialist grounds, as a crime control measure? Might felony murder rules deter the commission of the underlying *predicate felonies*? Not likely, as empirical studies show that while raising the certainty of punishment marginally increases deterrence, raising the severity of punishment generally does not.<sup>102</sup> As the Law Commissioners argued, attaching punishment to an infrequent consequence of a felony establishes a punishment lottery, which should have no deterrent effect.

Nor can felony murder liability easily be justified as a deterrent to *kill-ing* by those engaged in the felony. While one might argue that absolving the prosecution of proving culpability increases the certainty of punishment, this argument proves too much. Relieving prosecutors of proving *any* offense element increases the probability of punishing the guilty—and the probability of punishing the innocent. If, as many social scientists believe, most compliance is motivated by trust in the fairness and legitimacy of law rather than fear of sanctions,<sup>103</sup> proof of guilt is an important contributor to crime control. If felony murder is just a thumb prosecutors can selectively press on the scales of justice, who will most often be punished without proof of guilt? Indeed, in a criminal justice system affording prosecutors unreviewed discretion, within a society rife with race discrimination, a doctrine permitting punishment without proof might so corrode legitimacy as to counsel against its use at all.

<sup>98</sup> Sanford H. Kadish, *Foreword: Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 695–697 (1994).

<sup>99</sup> Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 448–449 (1984).

<sup>100</sup> Homicide Act 1957 (UK); Criminal Justice Act 1964 (Ir.); R. v. Martineau [1990] S.C.R. 633 (Can.); Penal Code §§ 299–300 (India).

<sup>101</sup> New South Wales Criminal Code of 1900, section 18(1) classifying as murder the causing death in any crime punishable by imprisonment for at least 25 years is unquestionably a felony murder rule, although the predicate felonies are very few. Also punishing murder in the course of certain felonies without culpability towards death is South Australia Criminal Law Consolidation Act 1935 § 12A (intentional violence in the course of any crime punishable by ten years). Harder to classify, but certainly harsh in conditioning murder on objectivity foreseeability of death in the course of any crime are Tasmanian Criminal Code § 157(c), and Western Australia Criminal Code § 279(1)(c).

<sup>102</sup> Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143, 181–189 (2003)

<sup>103</sup> TOM R. TYLER, WHY PEOPLE OBEY THE LAW 57–68, 165–166 (1990); RANDOLPH ROTH, AMERICAN HOMICIDE 9–20, 297–300 (2009); GARY LAFREE, LOSING LEGITIMACY: STREET CRIME AND THE DECLINE OF SOCIAL INSTITUTIONS IN AMERICA (1998) 79–81.

If deterrence cannot justify felony murder liability, it seems we cannot avoid the question of deserved punishment. So can felony murder liability *ever* be defended as deserved? Perhaps some felonies are so dangerous that they are *per se* reckless to human life. But these will be few: even robbery and arson cause death only about 1% of the time.<sup>104</sup> Nor can we morally equate an intention to commit another wrong with an intention to kill. Among crimes against persons, the Supreme Court permits capital punishment only for murder on the view that homicide is categorically worse.<sup>105</sup>

But what if we combine culpability towards death with culpability towards another grave wrong? Take Harry Goldvarg, a Chicago butcher, who in 1930 paid two men to burn his butcher shop so that he could recover insurance. What could possibly go wrong? The resulting fire and explosion killed two children who, as Goldvarg knew, lived with their parents behind the adjoining drygoods store.<sup>106</sup> Similarly, in 1973, Charlie Ware and Darius Slater robbed a motel clerk at gunpoint. What could possibly go wrong? Ware's thumb slipped off the pistol's hammer, it fired, killing the clerk.<sup>107</sup> These killings are grossly negligent in so far as the actors did not consider obvious risks. While it might be assumed that these offenders must have adverted to these risks, some offenders delude themselves that they have more control over events than they do.<sup>108</sup> Sometimes we hold people responsible not just for harm they do expect but also for harm they should expect.<sup>109</sup> To be sure, jurors may find recklessness in these cases, and requiring them to do so reduces the risk that biases, whether racial prejudice or hindsight bias, will induce them to overattribute negligence. Nevertheless, assuming negligence merits blame, killing negligently in furtherance of a felony combines two kinds of culpability, corresponding to two different harms. Together, these may merit more punishment than negligent killing alone.

This rationale fits some features of felony murder doctrine: it often requires that we condition felony murder liability on both foreseeability of death and a felonious purpose independent of injury to a person. This rationale also aligns with some evidence of popular intuitions about the punishment deserved for actual killers in the course of felonies. Paul Robinson and John Darley found mock jurors willing to impose sentences of over 20 years for negligent homicide committed in the perpetration of a robbery, while imposing sentences of only a year or two for negligent homicide outside of that context. Yet subjects supported *much* less severe sentences years for accomplices in a fatal robbery who did not personally kill, and *almost no pun-*

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<sup>104</sup> BINDER, *supra* note 68, at 190–191 (also noting that even assault with intent to grievously injure is fatal only 3% of the time, and that a study of drive by shooting found it fatal only 5% of the time).

<sup>105</sup> Kennedy v. Louisiana, 554 U.S. 407, 421, 447(2008).

<sup>106</sup> People v. Goldvarg, 178 N.E. 892, 894 (Ill. 1931).

<sup>107</sup> Slater v. State, 316 So.2d 539, 542-43 (Fl. 1975).

<sup>108</sup> Jack Katz, *The Motivation of the Persistent Robber*, 14 CRIME & JUST. 277, 295-300 (1990); Binder, Culpability of Felony Murder, *supra* note 13 1038-3.

<sup>109</sup> Kyron Huigens, *Virtue and Inculpation*, 108 HARV. L. REV. 1423, 1423–25, 1472–1476 (1995).

ishment, when the victim was a co-felon and the shooter was a resisting victim.<sup>110</sup>

Of course, readers may agree that a negligently fatal robbery, arson, or rape is substantively culpable and a grave crime, and still feel that “murder” mislabels it. In addition, criminal liability is not only a question of labels. Our judgments about deserved blame are traduced by the unusually severe punishments our system attaches to such labels, as measured by international standards.<sup>111</sup> Further attenuating the link between criminal conviction and deserved blame is the prevalence of plea bargaining in this context of penal severity. Offense definitions may little matter in this context, and unproven convictions may communicate little about what offenders actually did.<sup>112</sup> Nevertheless, the cases considered here, killings by police and killings during crime, are not run of the mill. They attract public attention and affect our sense of civic status and security. It matters to us how the legal system evaluates these actions, in our name.

One reason to carefully measure the normative considerations in favor of felony murder liability is to assess dilemmas like those posed by felony murder prosecutions of police. Understanding the normative valence of a felony murder conviction illuminates its expressive implications. Can such a conviction ever express what is wrong with unjustified police killing? A second reason is to prioritize incremental reforms. What limits on felony murder are most important to its opponents? What limits can its supporters accept? That felony murder liability is defensible—if at all—as deserved rather than expedient has implications for its scope. If we persuade ourselves that felony murder liability can control crime by punishing excessively, or without proof of guilt, we will be tempted to expand it indefinitely. But if we believe it can only be justified when applied to conduct proven obviously dangerous to life and malignly motivated, felony murder may be narrower and less liable to abuse. Proving that a particular death is that exceptional case will be more difficult. Further, if only desert can justify felony murder liability, penalties must also be proportional to culpability. The less felony murder charges grant prosecutors unchecked power, the less politically invested they may be in its preservation. In this way, reforms that confine felony murder liability to its most justifiable applications may also advance the goal of ultimately abolishing it.

Public interest in reforming felony murder law has grown in recent years, with publicity focusing especially on murder convictions of those who did not personally kill. Thus, the focus of the reform movement has been on liability for killings by accomplices, or by law enforcement, or others re-

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<sup>110</sup> PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY & BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* 169–181 (1995).

<sup>111</sup> Amanda Petteruti & Jason Fenster, *JUST. POL’Y INST., FINDING DIRECTION: EXPANDING CRIMINAL JUSTICE OPTIONS BY CONSIDERING POLICIES OF OTHER NATIONS* 21–24 (2011) (US imposes incarceration for many more crimes, and for much longer sentences than Canada, Australia, UK, Germany, and Finland).

<sup>112</sup> We are indebted to Frank Rudy Cooper for pressing this point.

sisting the felony.<sup>113</sup> As concern about mass incarceration has focused attention on severe sentences, felony murder sentencing has come under scrutiny. Felony murder is graded as first degree murder or is punishable with Life Without Parole in many states.<sup>114</sup>

Several states have recently implemented reforms. Massachusetts abandoned felony murder in the 2017 case of *Commonwealth v. Timothy Brown*.<sup>115</sup> California's SB 1437 eliminated accomplice liability for felony murder in 2018.<sup>116</sup> Maryland courts adopted a merger rule in the 2017 case of *State v. Tyshon Jones*.<sup>117</sup> In 2021, Colorado adopted SB 124-2021, reducing felony murder penalties from life to a term of years, broadening an affirmative defense for unarmed accomplices of the killer, and adopting an agency rule.<sup>118</sup> Also in 2021, Illinois—which originated the practice of punishing felons for killings by non-parties—adopted an agency rule as part of a massive criminal justice reform bill, HB 3653, also known as the Safe-T Act.<sup>119</sup> Since passage of this bill, the Illinois governor has begun reviewing

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<sup>113</sup> Adam Liptak, *Serving Life for Providing Car to Killers*, N.Y. TIMES (Dec. 4 2007), <https://www.nytimes.com/2007/12/04/us/04felony.html> [https://perma.cc/4VYY-6RYD]; Abbie Van Sickle, *If he didn't Kill Anyone, Why Is It Murder?*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/2018/06/27/us/california-felony-murder.html> [https://perma.cc/M8UV-9QMA]; Beth Schwartzapfel, *D'Angelo Burgess Fleed from Police. Does That Make Him a Killer?*, MARSHALL PROJECT (May 30, 2019), <https://www.themarshallproject.org/2019/05/30/d-angelo-burgess-fleed-from-police-does-that-make-him-a-killer> [https://perma.cc/2JUM-HJXG]; Katie Rose Quandt, *Curtis Brooks didn't Kill Anyone. So why is He labeled a Murderer for Life?*, THE APPEAL (Sept. 18, 2018), <https://theappeal.org/curtis-brooks-felony-murder-life-sentence/> [https://perma.cc/TR68-F3Q3]; Alison Flowers & Sarah Macaraeg, *Charged with Murder, But They Didn't Kill Anyone—Police Did*, CHI. READER (August 18, 2016), <https://chicagoreader.com/news-politics/charged-with-murder-but-they-didnt-kill-anyone-police-did/> [https://perma.cc/JQN5-MQ7Q]; Criminal, *76th and Yates, Criminal #150*, THIS IS CRIMINAL (Oct. 23, 2020), <https://thisiscriminal.com/episode-150-76th-and-yates-10-23-2020/> [https://perma.cc/KZ2Q-M784]; *PBS NewsHour: Convicted of Murder, But Police Pulled the Trigger* (PBS television broadcast September 14, 2019).

<sup>114</sup> NAZGOL GHANDNOOSH, EMMA STAMMEN & CONNIE BUDACI, FELONY MURDER: AN ON-RAMP FOR EXTREME SENTENCING (2022), <https://www.sentencingproject.org/publications/felony-murder-an-on-ramp-for-extreme-sentencing/> [https://perma.cc/ZT7B-KRHJ]; See ARIZ. REV. STAT. §§ 13-1105, 13-751 to 13-752 (LexisNexis); IOWA CODE §§ 707.2, 902.1 (LexisNexis); LA. REV. STAT. ANN. § 14:30.1 (LexisNexis); MISS. CODE ANN. §§ 97-3-19(1)(c), 97-3-21(1); NEB. REV. STAT. ANN. §§ 28-303, 29-2520 to 29-2524 (LexisNexis); N.C. GEN. STAT. § 14-17(a); 18 PA. CONS. STAT. ANN. §§ 2502(b), 1102(a)(1) (LexisNexis); S.D. CODIFIED LAWS §§ 22-16-4(2), 22-16-12, 22-16-1(1) (LexisNexis); 18 U.S.C.S. § 1111(a)-(b) (LexisNexis)(states mandating life without parole for adults convicted of felony murder).

<sup>115</sup> 81 N.E.3d 1173, 1190 (Mass. 2017).

<sup>116</sup> CAL. PENAL CODE §§ 188–189 (2021).

<sup>117</sup> *State v. Jones*, 155 A.3d 492, 508 (Md. 2017).

<sup>118</sup> Pat Poblette and Marianne Goodland, *Gov. Jared Polis signs felony murder, drug importation bills*, COLO. POL. (JULY 27, 2022), [https://www.coloradopolitics.com/legislature/gov-jared-polis-signs-felony-murder-drug-importation-bills/article\\_d42540c4-a6bd-11eb-95c4-374184ebf102.html](https://www.coloradopolitics.com/legislature/gov-jared-polis-signs-felony-murder-drug-importation-bills/article_d42540c4-a6bd-11eb-95c4-374184ebf102.html) [https://perma.cc/58HM-3JYH].

<sup>119</sup> 02 Feb FAQ: Final Felony Murder Language in House Bill 3653, Senate Amendment 2 As passed, January 2021, RESTORE JUST. ILL. (Feb. 2, 2021), <https://restorejusticeillinois.org/faq-final-felony-murder-language-in-hb3653sa2-as-passed-january-2021/> [https://perma.cc/EL49-E4DG].

cases of those previously convicted of felony murder for police killings, and issuing pardons.<sup>120</sup>

Ultimately, clarity on the normative meaning of felony murder may not settle the tension between abolitionist and reformist impulses. But in delineating the justificatory limits of the doctrine, we can both shape the most acceptable felony murder rule and highlight what remains morally unsatisfying, even where felony murder convictions are most justifiable. In seeing how felony murder fails to adequately condemn, and sometimes exonerates, racist policing, we expose its less acknowledged shortcomings and perhaps illuminate a path to doctrinal abolition.

### III. FELONY MURDER PROSECUTION OF POLICE

Clarity about the normative implications of felony murder highlights its appeal as a tool to punish police killings such as those committed by Derek Chauvin and Garrett Rolfe. But on closer inspection the doctrine's potential for denouncing or deterring brutal policing is quite limited.

Chauvin was charged with, and ultimately convicted of, three homicide offenses under Minnesota law: third degree murder, defined as “caus[ing] the death of another by perpetrating an act eminently dangerous to others and evincing a depraved mind, without regard for human life,” and punishable up to 25 years;<sup>121</sup> second degree murder, defined as “caus[ing] the death of a human being . . . while committing or attempting to commit a felony,” and punishable up to 40 years;<sup>122</sup> and second degree manslaughter, defined as causing death negligently. The predicate felony for Chauvin's felony murder charge was assault in the third degree, requiring “assault[ing] another and inflict[ing] substantial bodily harm.”<sup>123</sup>

The third degree murder charge was initially dismissed by the trial judge, who read the statute as requiring that a depraved indifference murder endanger multiple victims.<sup>124</sup> It was restored after the Minnesota Court of Appeals upheld the third degree murder conviction in the *State v. Noor*.<sup>125</sup> As noted earlier, however, the Court of Appeals decision, and Noor's third degree murder conviction, were later overturned by the Minnesota Supreme

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<sup>120</sup> Maya Dukmasova, *supra* note 50.

<sup>121</sup> MINN. STAT. § 609.195 (2020).

<sup>122</sup> MINN. STAT. § 609.190 (2020).

<sup>123</sup> MINN. STAT. § 609.223 (2020).

<sup>124</sup> Dakin Andone, Omar Jimenez, Brad Parks & Kay Jones, *Judge drops third-degree murder charge against former officer Derek Chauvin in George Floyd's death, but second-degree murder charge remains*, CNN (Oct. 22, 2020, 6:08 PM) [<https://perma.cc/9H7Q-WX5Y>].

<sup>125</sup> *State v. Noor*, 955 N.W.2d 644 (Minn. App. 2021). Brad Parks, Aaron Cooper & Eric Levenson, *Judge reinstates third-degree murder charge against Derek Chauvin in George Floyd's death*, CNN (Mar. 11, 2021 0:41 PM), <https://www.cnn.com/2021/03/11/us/derek-chauvin-george-floyd-charges/index.html> [<https://perma.cc/ZMW7-HCGP>].

Court.<sup>126</sup> This very likely implies that Chauvin's third degree murder conviction is no longer valid.

One effect of this decision is that Chauvin will be punished and condemned much more severely than Noor. The reversal of Noor's third degree murder conviction leaves him liable only for second degree manslaughter, which requires causing death by "culpable negligence" by "consciously" creating a risk of death or great bodily harm.<sup>127</sup> Noor's sentence was reduced from 12.5 to 4.75 years.<sup>128</sup> Obviously, some disparity may be appropriate: unlike Chauvin, Noor was responding to a call about a violent crime, he saw his partner draw his gun and his fatal mistake was a momentary impulse, not a choice defiantly maintained for nine minutes.

In overturning Noor's depraved indifference murder conviction, the Minnesota Supreme Court pointed to extensive Minnesota precedent restricting that crime to deaths resulting from acts endangering more than one person.<sup>129</sup> The state urged the court to overrule this precedent on the basis of a structural interpretation of the code: restricting depraved indifference murder to reckless acts endangering multiple victims left a gap, as the code had no other offense encompassing killing with reckless indifference toward an individual. The court responded that such conduct is encompassed by second degree murder—felony murder—when predicated on assault.<sup>130</sup>

However, this crime—the very crime Chauvin was convicted of—does *not* require proof of recklessness towards death.<sup>131</sup> Moreover, because Minnesota lacks a merger limitation, its felony murder rule does not require any aggravating motive for imposing such risk. As noted above, the selective imposition of a risk of death on a single victim can be *more* depraved if the principle of selection is an illegitimate one such as racial identity, political dissent, or resistance to subordination. The *Noor* decision may accord with precedent, but that precedent is not compelled by the statutory language, and it does leave a gap in the law. The court filled this gap with a broader felony murder offense uncabined by a merger limitation. The result left prosecutors free to charge fatal assaults as manslaughters or murders without requiring any difference in proof.

Minnesota is not unique in lacking murder liability for killing with depraved indifference directed at an individual. Seven states appear not to per-

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<sup>126</sup> Paulina Villegas, *Court overturns third-degree murder conviction against ex-Minneapolis officer*, WASH. POST (Sept. 15, 2021, 9:31 PM); *State v. Noor* A19-1089 (Sept. 15, 2021), <https://www.mncourts.gov/mncourtsgov/media/Appellate/SupremeCourt/StandardOpinions/OPA191089-091521.pdf> [<https://perma.cc/NF26-R83H>]; *State v. Noor*, 964 N.W.2d 424, 440 (Minn. 2021).

<sup>127</sup> MINN. STAT. § 609.205 (2021).

<sup>128</sup> Jon Collin & Matt Sepic, *Ex-cop Noor set for June release after resentencing in Ruszczyk killing*, MPR NEWS (October 21, 2021, 4:00 AM), [<https://perma.cc/X97Y-6H5E>].

<sup>129</sup> *Noor*, 964 N.W.2d, at 431-433.

<sup>130</sup> *Id.* at 440.

<sup>131</sup> MINN. STAT. § 609.19(2)(1) (2020).

mit murder based on recklessness (outside the context of a felony).<sup>132</sup> Four states join Minnesota in conditioning murder offenses on recklessness only if directed toward multiple potential victims,<sup>133</sup> although one also punishes killing with recklessness towards an individual as murder.<sup>134</sup> Thus, in 39 states, murder would potentially be available for any reckless and unjustified police killing. Felony murder is unnecessary as a prosecutorial tool for punishing most unjustified police violence in those states.

As it happened, Chauvin was, and Noor was not, charged with second degree (felony) murder. Although convicted of both second and third degree murder, Chauvin was sentenced only for the higher charge, receiving 22 ½ years in prison.<sup>135</sup> Two of the factors used to justify increasing Chauvin's sentence above a 15-year guideline recommendation for second degree murder sentence were his "abuse of a position of trust and authority,"<sup>136</sup> and his "particular cruelty" toward the victim.<sup>137</sup> In finding abuse of authority, the judge pointed out Chauvin's reckless indifference to human life in these terms:

Defendant . . . held a handcuffed George Floyd . . . for an inordinate length of time (more than nine minutes and forty seconds), [in] a position that Defendant knew from his training and experience carried with it a danger of positional asphyxia. The prolonged use of this technique was particularly egregious in that George Floyd made it clear he was unable to breathe and expressed the view that he was dying as a result of the officers' restraint . . . . In addition, the other officers involved in the restraint . . . twice inquired during the restraint if they should roll Floyd onto his side, i.e., into a "recovery position" and [one] later also informed Defendant that he believed Floyd had passed out. Thus, not only was the

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<sup>132</sup> HAW. REV. STAT. § 707-701.5; 720 ILL. COMP. STAT. 5/9-2 (2022); IND. CODE § 35-42-1-1 (2022) (second degree murder requires malice express or implied, not otherwise defined); LA. STAT. ANN. § 14:30 (2022); MONT. CODE ANN. § 45-5-102 (2022); NEB. REV. STAT. § 28-304; OHIO REV. CODE ANN. § 2903.02 (West 2022); Of these, Hawaii does not punish felony murder either. An eighth state, Iowa, does not condition murder on recklessness, but does condition second degree murder on "general intent," rendering any fatal assault punishable as murder. IOWA CRIMINAL JURY INSTRUCTIONS § 700.7 (malice is unlawful purpose or intent to injure), *State v. Lee*, 494 N.W.2d 706, 707 (Iowa 2003) (intent to inflict physical harm); IOWA CODE § 707.1, 707.3. *State v. Caldwell*, 385 N.W.2d 553, 556 (Iowa 1986); IOWA CRIMINAL JURY INSTRUCTIONS § 700.14 (general intent).

<sup>133</sup> See *Howard v. State*, 85 So.3d 1054, 1062 (Alabama 2011); *Ex Parte Williams*, 838 So.2d 1028, 1031 (Ala. 2002); *Gholston v. State* 494, So.2d 876, 883 (Ala. Crim. App. 1986); *State v. Pettus*, 89 Wash. App. 688 (Wash. Ct. App. 1998); COLO. REV. STAT. 18-3-102(1)(d) (2016); *People v. Zekany*, 833 P.2d 774, 778 (Colo. App. 1996). *But see Candelaria v. People*, 148 P.3d 178, 182 (Colo. 2006) (one victim can be targeted if perpetrator is indifferent to identity); *State v. Candelaria*, 434 P.3d 297, 303-307 (N.M. 2018); N.M. STAT. ANN. § 30-2-1(A)(3) (2022).

<sup>134</sup> N.M. STAT. ANN. § 30-2-1(B) (2022).

<sup>135</sup> The other homicide offenses were viewed as lesser included offenses. *State v. Chauvin*, No. 27-CR-20-12646, 2021 WL 2621001, at \*7 (Minn. Dist. Ct. June 25, 2021).

<sup>136</sup> *Id.* at \*3.

<sup>137</sup> *Id.* at \*9.



danger of asphyxia theoretical, it was communicated to the Defendant as actually occurring with George Floyd.<sup>138</sup>

The court's finding of abuse of authority also relied on such facts as his violation of his training, his failure to render aid, and his using force far in excess of what was necessary to maintain custody.<sup>139</sup> The judge's finding of cruelty detailed further culpability:

b. It was particularly cruel to kill George Floyd slowly by preventing his ability to breathe when Mr. Floyd had already indicated he was having trouble breathing. c. The slow death of George Floyd, occurring over approximately six minutes of his positional asphyxia was particularly cruel in that Mr. Floyd was begging for his life and was obviously terrified by the knowledge he was likely to die but during which the defendant objectively remained indifferent to Mr. Floyd's pleas. . . . the prolonged nature of the asphyxiation was by itself particularly cruel.<sup>140</sup>

These official statements, measured, grave but painfully graphic and patiently detailed, from an exponent of the legal system, do describe and denounce Chauvin's actions in appropriate terms. They contributed to making the trial, conviction and sentencing the moving and cathartic event that it was.

Nevertheless. As discretionary sentencing factors, these facts did not have to be charged, proven beyond a reasonable doubt, or found by a jury.<sup>141</sup> They were not integral elements of the offense of conviction. To be sure, the jury necessarily found Chauvin's conduct "dangerous" and "depraved" in convicting him of third degree murder, but the felony murder charge for which he was actually sentenced did not require this. The jury had to find that Chauvin's use of force was not justified to find him guilty of assault but did not have to additionally find that he abused his office. Under Minnesota's statute, Chauvin could have been convicted of exactly the same charge if he had thrown a punch in response to a suspect's curse and the suspect had improbably suffered a fatal head injury.

Minnesota is unusual (although not unique) in permitting felonious assault as a predicate for felony murder.<sup>142</sup> It neither enumerates predicate felonies, nor limits predicate felonies by means of a merger rule. Rather than two

<sup>138</sup> *State v. Chauvin*, No. 27-CR-20-12646, slip op. at 2 (Minn. Dist. Ct. May 11, 2021), <https://mncourts.gov/mncourtsgov/media/High-Profile-Cases/27-CR-20-12646/Order05112021.pdf> [<https://perma.cc/H3JR-RP2S>].

<sup>139</sup> *Id.* at 1-3.

<sup>140</sup> *Id.* at 4.

<sup>141</sup> See *U.S. v. Booker*, 543 U.S. 220, 251-52 (2005).

<sup>142</sup> See *State v. Morris*, 290 Minn. 523, 524-525 (Minn. 1971); *State v. Smith*, 203 N.W.2d 348, 350-351 (Minn. 1972); *State v. Carson*, 219 N.W.2d 88, 88 (Minn. 1974); *Kochevar v. State*, 281 N.W.2d 680, 686 (Minn. 1979); *State v. Loebach*, 310 N.W.2d 58, 65 (Minn. 1981); *State v. Abbott*, 356 N.W.2d 677, 680 (Minn. 1984); *State v. Jackson*, 346 N.W.2d 634, 636 (Minn. 1984); *State v. French*, 402 N.W.2d 805, 808 (Minn. Ct. App. 1987); *State v. Gorman*, 532 N.W.2d 229, 233-34 (Minn. 1995).

dimensions of culpability (towards physical harm and an independent felonious purpose), felony murder predicated on assault has only one. The reader might assume that at least the culpability towards physical harm required for felony assault must be very high, since that crime requires inflicting substantial physical injury. Surely the intent to inflict such injury would imply consciously imposing a risk of death. Yet in Minnesota, third degree assault does not require intent—or, for that matter *any* culpable mental state—with respect to the injury. In the case of *State v. Gorman*, for example, defendant was convicted of felony murder for a single, fatal blow with a fist.<sup>143</sup> Thus, while Chauvin’s presumptively invalid third degree murder conviction implied that he acted with both reckless indifference to human life and a depraved motive, Chauvin’s legally valid felony murder conviction required no finding of any culpability beyond the bare foreseeability of death. Such a charge gives the jury no responsibility—and no real opportunity—to judge the defendant’s moral guilt. At the close of his summation, prosecutor Jerry Blackwell famously concluded that while the defense had argued that “Mr. Floyd died because his heart was too big. . . the truth of the matter is that the reason George Floyd is dead is because Mr. Chauvin’s heart is too small.”<sup>144</sup> Yet, the felony murder charge neither required nor permitted any such finding.

The abuse of public authority found by the judge at Chauvin’s sentencing represents culpability toward a secondary harm. While the jury did not learn this, Chauvin had earlier used the same tactic, kneeling for 17 minutes on the neck of a bleeding 14-year-old, who also complained that he could not breathe, while his mother protested.<sup>145</sup> Chauvin’s misuse of public authority to inflict unnecessary pain, fear, and risk bespeaks an attitude of contempt for the governed, and disregard of public responsibilities, as well as indifference to human life. Does Minnesota have an official misconduct or civil rights felony that could have better served as a predicate felony? No. It has an official misconduct offense of unlawfully injuring another in his person or rights, but it is only a misdemeanor.<sup>146</sup> Conceivably an assailant’s animus or selective disregard toward a particular group could add culpability toward a secondary harm. So does Minnesota have a hate crime felony? Minnesota imposes a sentence enhancement for some hate-motivated crimes

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<sup>143</sup> See *State v. Gorman*, 532 N.W.2d 229, 231 (Minn. 1995). See also Binder, *supra* note 12, at 489–90; *State v. Mosley*, 414 N.W.2d 461, 465 (Minn. Ct. App. 1987) (no such intent required for third degree assault).

<sup>144</sup> *Jurors Have The Case In Chauvin Trial; Prosecutors Ended With Call For Common Sense*, NPR NEWS (Apr. 19, 2021, 5:40 PM), <https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/04/19/988802717/watch-live-prosecutors-offer-rebuttal-to-chauvin-defense-closing-arguments> [<https://perma.cc/A276-NH56>].

<sup>145</sup> Ray Sanchez & Omar Jimenez, What we know about the 2017 encounter that led to Derek Chauvin’s second indictment, CNN (May 7, 2020, 3:44 PM), <https://www.cnn.com/2021/05/07/us/derek-chauvin-indictment-2017-incident/index.html> [<https://perma.cc/79LT-9J94>].

<sup>146</sup> MINN. STAT. 609.43 (2021).

but imposes felony liability only for a second hate-motivated assault conviction.<sup>147</sup>

In Minnesota, if reckless killers cannot be charged with depraved indifference murder as a result of endangering a single victim, felony murder predicated on assault is the only unintentional murder charge available to Minnesota prosecutors in such a case. This puts critics of felony murder and critics of police violence in the dilemma with which we began. The felony murder law which enabled Chauvin's murder conviction—lacking any merger limitation—is one of the broadest and least defensible.

Officer Garrett Rolfe was charged with “felony murder,”<sup>148</sup> defined as “in the commission of a felony, caus[ing] the death of another human being irrespective of malice.”<sup>149</sup> Like Minnesota, Georgia lacks a merger limitation, so that assault can serve as a predicate felony there. Apart from murder, the felonies originally charged in the Rolfe case were of two kinds: willful and intentional violation of oath by a public officer (by shooting Brooks twice in the back, and failing to render medical aid),<sup>150</sup> and aggravated assault with a deadly weapon (committed against Brooks and bystanders in the parking lot).<sup>151</sup> The felony murder charges were predicated only on the aggravated assault offenses.<sup>152</sup>

On these facts, a high degree of culpability towards death—recklessness—was implicit in the weapon Rolfe used. But the offense definition treats as a deadly weapon any weapon actually causing a serious injury, without requiring any culpability towards that result. As a result, in Georgia, as in Minnesota, an assailant can be convicted of felony murder for a single fatal blow with a bare hand.<sup>153</sup> Thus, the felony murder charge predicated on assault would not have required proof of the culpability towards death Rolfe demonstrated and does not require culpability towards any secondary harm. When we turn to the official misconduct felony, that could have supported additional felony murder counts, we find that its elements do not inherently entail culpability towards death. However, the offense does entail an abuse of

<sup>147</sup> MINN. STAT. 609.2231 (2021); MINN. STAT. 609.2233 (2021).

<sup>148</sup> Case No. 20CP192494 State of Georgia vs Garrett Rolfe Complaint Room Case Summary (Filed 6/18/2020); Criminal Warrant for arrest of Garrett David Rolfe, Superior Court of Fulton County, Georgia, issued by Judge Rebecca Rieder, 6/17-2020 2:52 p.m.

<sup>149</sup> GA. CODE ANN. § 16-5-1(c) (2022); Complaint Room Case Summary *supra*; Zachary Hansen & Christian Boone, *Former Atlanta Cop Charged with Felony Murder in Rayshard Brooks' Death*, ATLANTA J. CONST. (June 17, 2020), <https://www.ajc.com/news/crime-law/breaking-atlanta-cop-charged-with-felony-murder-other-charges-rayshard-brooks-death/h0j3W9OZvMgtSf3eE1i2hM/> [<https://perma.cc/34NA-MGNT>].

<sup>150</sup> GA. CODE ANN. § 16-10-1(2022); Complaint Room Case Summary, *supra* note 148; Hansen & Boone, *supra* note 149.

<sup>151</sup> GA. CODE ANN. § 16-5-21(2) (2022) (defining a deadly weapon as “any object, device, or instrument, which when used offensively against a person is likely to, or actually does result in serious bodily injury”); Nicole Chavez, *What We Know About the Charges Against the Officers Involved in Rayshard Brooks' Death*, CNN (June 17, 2020, 9:20 PM), <https://www.cnn.com/2020/06/17/us/rayshard-brooks-officers-charges/index.html> [[perma.cc/DE3E-4RPL](https://perma.cc/DE3E-4RPL)].

<sup>152</sup> Criminal Warrant *supra* note 148.

<sup>153</sup> *Miller v. State*, 571 S.E.2d 788, 793, 798 (Ga. 2002).

public trust. This provides culpability towards a secondary wrong and in that respect partially justifies the severe condemnation of a murder conviction. Georgia has now passed a bill imposing modest hate crime penalty enhancements, but did so only in the wake of the Ahmaud Arbery and Brooks killings.<sup>154</sup>

Could this case have been resolved by charging depraved indifference murder requiring recklessness as an offense element? Unlike Minnesota, Georgia has a depraved indifference murder offense that can apply to endangerment of an individual.<sup>155</sup> So why wasn't Rolfe originally charged with that form of murder? A possible reason is that Georgia's depraved indifference murder offense has an exception for provoked killings.<sup>156</sup> Brooks' alleged taser attack on Rolfe could have provided such provocation, even though we do not agree that it justified Rolfe's killing of Brooks. Given this difficulty, the felony murder charge might have eased the prosecution's path to conviction and avoided some risk of juror confusion. One option absent in Georgia is a manslaughter felony conditioned on recklessness or negligence toward death and not predicated on another offense.<sup>157</sup> Thus, in cases of unintended killing, prosecutors in Georgia face a dilemma. Murder is their only charging option involving any significant punishment. The legislature has helped prosecutors, not by enacting an involuntary manslaughter offense, but by rejecting a merger limitation on felony murder. Again, because Georgia's felony murder law is one of the broadest and least defensible,<sup>158</sup> the felony murder prosecution of Garrett Rolfe posed a dilemma for progressives bent on reforming both policing and felony murder law.

Yet the prosecution was ultimately dropped on other grounds. Paul Howard, Fulton County District Attorney, who approved the charges, was defeated in a primary election.<sup>159</sup> His successor, Fani Willis, successfully moved to recuse her office, on the ground that Howard had improperly used footage of the killing in his election campaign.<sup>160</sup> As a result in July 2021, the State Attorney General appointed a Special Prosecutor, not answerable to

<sup>154</sup> Angela Barajas, Dianne Gallagher & Erica Henry, *Georgia Governor Signs Hate Crime Bill Spurred by Outrage over Ahmaud Arbery's Killing*, CNN (June 26, 2020, 3:07 PM), <https://www.cnn.com/2020/06/26/us/georgia-hate-crime-bill/index.html> [<https://perma.cc/9BZQ-HYFY>].

<sup>155</sup> GA. CODE ANN. § 16-5-1(b) (2022).

<sup>156</sup> *Id.*

<sup>157</sup> GA. CODE ANN. § 16-5-3 (2022) (involuntary manslaughter punished as misdemeanor, unless committed during another misdemeanor).

<sup>158</sup> GA. CODE ANN. § 16-5-1(c) (2022).

<sup>159</sup> Christian Boone, *Fani Willis Unseat 6-term Fulton DA Paul Howard*, *Atlanta Journal Constitution*, Aug. 12, 2020, <https://www.ajc.com/news/crime/early-results-show-fulton-da-challenger-in-the-lead/X23G6PDMIFBVHJKYH6UVTQM54/> [<https://perma.cc/SJ6E-C6P3>].

<sup>160</sup> Christopher Buchanan, *Judge Allows Fulton DA Recusal from Case Against Atlanta Officer in Rayshard Brooks Shooting*, 11ALIVE, June 5, 2021, <https://www.11alive.com/article/news/crime/judge-allows-fulton-da-recusal-rayshard-brooks-shooting/85-f2f5e56a-e3a1-468c-9abd-61c77a8361c7> [<https://perma.cc/98S5-HNX6>].

Atlanta voters.<sup>161</sup> On August 23, 2022, Special Prosecutor Peter Skandalikis announced his decision to drop all charges against Rolfe and Brosnan.<sup>162</sup> Danny Porter, a former Gwinnett County prosecutor, consulted as an expert, reasoned that after Brooks tased Brosnan, police “could have arrested Brooks on charges of aggravated assault of an officer, felony resistance to arrest and several other charges,” and concluded that “Rolfe acted within accordance with Georgia law” and “the use of deadly force was reasonable.”<sup>163</sup> Skandalikis added that Brooks, although fleeing, was in an “offensive position” by virtue of possessing the taser, and that “a Taser in the hands of an untrained person can also be deadly.”<sup>164</sup> Although acknowledging that the Taser’s two shots had already been spent by the time Rolfe fired, Skandalikis concluded that “it was reasonable to assume that Mr. Rolfe might not have counted” the shots.<sup>165</sup> Georgia NAACP President Gerald Griggs issued a statement arguing that Brooks was not a threat when shot and a grand jury would have been a more impartial decisionmaker.<sup>166</sup> Our own view is that there is probable cause to think Rolfe had alternatives to killing the fleeing Brooks and that his claim of justification should at the very least have been evaluated by a grand jury.

We have seen that both Minnesota and Georgia can prosecute police for felony murder, predicated on aggravated assault, because they (1) do not exhaustively enumerate felonies *and* (2) lack a merger rule. In addition, Georgia has a felony of official misconduct that can provide a predicate for felony murder. Six other states enumerate some form of aggravated assault as a predicate felony. Aggravated assault, where the victim of the assault is killed, can serve as a predicate felony in Montana, Ohio, Washington and Wisconsin.<sup>167</sup> In Washington, the victim cannot be a co-felon.<sup>168</sup> In Louisi-

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<sup>161</sup> Statement from Executive Director Peter J. Skandalikis, Prosecuting Attorneys’ Council of Georgia, July 21, 2021, <https://pacga.org/2021/07/21/statement-from-executive-director-peter-j-skandalikis/> [<https://perma.cc/MJ5H-6CRP>].

<sup>162</sup> WBS-TV Atlanta, *No Charges for Atlanta Officers in Shooting Death of Rayshard Brooks*, <https://www.wsbtv.com/news/local/charges-dropped-against-atlanta-officers-rayshard-brooks-shooting-death/KPGYC5RJORA2TACW2PY3MSY2ZU/> [<https://perma.cc/8EKP-FDCA>].

<sup>163</sup> *Id.*

<sup>164</sup> Richard Fausset, *Charges to be Dropped Against Officers in Fatal Shooting of Rayshard Brooks*, N.Y. TIMES, Aug. 23, 2022 <https://www.nytimes.com/2022/08/23/us/rayshard-brooks-officers-no-charges.html> [<https://perma.cc/E3X9-K9GP>].

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*; Jozsef Papp, *Georgia NAACP demands case be presented to grand jury*, ATLANTA JOURNAL-CONSTITUTION, August 23, 2022, <https://www.ajc.com/news/crime/georgia-naacp-demands-rayshard-brooks-case-be-presented-to-grand-jury/HJM7CYJ44JDL3EOQP4UF4HIJHU/> [<https://perma.cc/P6MA-TXD6>].

<sup>167</sup> MONT. CODE ANN. 45-5-102(1)(b) (2021) (“assault with a weapon” and “aggravated assault”); OHIO REV. CODE ANN. 2903.02(B), 2903.11(D)(1)(a) (2022) (“felonious assault”); State v. Owens, 166 N.E.3d 1142, 1146 (Ohio 2020) *cert. denied*, 141 S. Ct. 2577 (2021) (rejects merger doctrine); WASH. REV. CODE 9A.32.050 (1)(b) (2022) (“including assault”); WIS. STAT. 940.03, 940.19 (2022) (“battery”). For purposes of this discussion, we do not distinguish between offenses labelled “assault” and those labelled “battery,” on the assumption that any homicide will satisfy the definition of either.

<sup>168</sup> WASH. REV. CODE ANN. 9A.32.050 (1)(b) (2022).

ana, a narrow form of assault entailing recklessness, drive-by-shooting, is an enumerated predicate felony.<sup>169</sup> In Illinois, felony murder can be predicated on assault, but not if the victim was the intended target.<sup>170</sup> Three other states, Texas, Missouri and Delaware, impose felony murder predicated on non-enumerated felonies and have rejected a merger rule.<sup>171</sup> Thus, in only seven other states could an officer face felony murder liability for an unjustified fatal assault of a civilian.

In only one state other than Georgia is it possible to punish killing in the course of an official misconduct, civil rights violation or hate crime felony as murder. Illinois has an official misconduct felony, which includes performance by an official of any act he is forbidden by law to perform.<sup>172</sup> If such a felony is performed, while contemplating that violence might be necessary to carry out the offense, it qualifies as a “forcible felony” that can be a predicate for felony murder.<sup>173</sup>

This summary returns us to our question. Should other states change their laws to enable felony murder prosecution of police who kill unreasonably, as in Delaware, Georgia, Illinois, Minnesota, Missouri, Montana, Ohio, Texas, Washington, and Wisconsin? Recall that the merger doctrine serves an important purpose: requiring an additional dimension of culpability for felony murder beyond negligently risking death and doing so for a gravely wrong purpose independent of that danger. If we are going to have felony murder, it should be bounded by a merger rule. Making it easier to prosecute police is not a sufficient reason to predicate felony murder on felonious assault.

On the other hand, predicating felony murder on a felony of civil rights violation or misuse of public authority would add an independent wrongful purpose to the negligent imposition of risk. This would comply with the merger doctrine and so it is a better way to expand felony murder liability to encompass unreasonable police violence. States lacking a civil rights or official misconduct felony arguably should add one whether or not they designate it as a predicate for felony murder. Adding such a felony is of value in denouncing and deterring police violence regardless of whether it can be used as a predicate for felony murder. Finally, a hate crime is another kind of felony that could add a felonious purpose independent of physical harm. Yet proving a discriminatory purpose for a particular act of police violence is also notoriously difficult.<sup>174</sup> Many instances of police violence may reflect what

<sup>169</sup> LA. STAT. ANN. 14:30.1(2) (2022).

<sup>170</sup> 720 ILL. COMP. STAT. 5/2-8 (2022); 720 ILL. COMP. STAT. 5/9-1 (2022); *People v. Morgan*, 758 N.E.2d 813, 838 (Ill. 2001); *People v. Boyd*, 825 N.E.2d 364, 369–70 (Ill. App. Ct. 2005).

<sup>171</sup> *Lawson v. Texas*, 64 S.W.3d 396, 396–97 (Tex. Crim. App. 2001); *Johnson v. State*, 4 S.W.3d 254, 258 (Tex. Crim. App. 1999); *State v. Williams*, 24 S.W.3d 101, 117 (Mo. Ct. App. 2000); DEL. CODE ANN. tit. 11, §§635,636 (2022); see also *Binder*, *supra* note 12, at 540 (explaining this statute as removing a requirement of causing death “in furtherance of the felony” to invalidate decisions basing a merger doctrine on this language).

<sup>172</sup> 720 ILL. COMP. STAT. 5/33-3 (official misconduct).

<sup>173</sup> See *People v. Belk*, 784 N.E.2d 825, 831 (Ill. 2003).

<sup>174</sup> *Avlana Eisenberg*, *Expressive Enforcement*, 61 U.C.L.A. L. REV. 858, 891–93 (2014).

one of the authors has called reckless racism.<sup>175</sup> Nationally, hate crime charges and enhancements are little used by prosecutors, when other charges are available, as they almost always are. Not only hard to prove, bias allegations rarely affect penalties, and may provoke juror pushback.<sup>176</sup>

But supposing a state had a civil rights or hate crime felony, there would still be an objection to charging police with felony murder. Indeed, Georgia could have charged Garrett Rolfe with murder predicated on official misconduct felony, but there would still have been something unsatisfying about this charge. It would have understated the highly culpable attitude toward the risk of death Rolfe displayed. The killings of Floyd and Brooks were not merely careless. They were at least reckless toward the lives of their victims, a morally significant fact that felony murder liability does not reflect. Punishing Chauvin and trying Rolfe for felony murder might have been the best among bad alternatives, but charges of depraved indifference would have better characterized their culpability. Fortunately, such charges will be available to prosecute unjustified police killings in most states.

#### IV. FELONY MURDER PROSECUTION OF FELONS FOR KILLINGS BY POLICE

Thus far, we have examined the possibilities of using felony murder laws to punish unreasonable police killings. Here, we turn to another use of felony murder liability in cases of police violence: prosecuting not the police who kill, but the suspects they target or pursue. In many cases, the dead victims are co-felons. And sometimes the felons who survive to be charged are also injured victims.

Jurisdictions divide on permitting such prosecutions. A majority preclude felony murder liability for the actions of police in opposition to the felony, by imposing an “agency rule”—limiting felony murder liability to deaths directly caused by a participant in the felony.<sup>177</sup> But a substantial mi-

<sup>175</sup> Yankah, *supra* note 11, at 683.

<sup>176</sup> Eisenberg, *supra* note 174, 883–95. Thus, the expressive deficiency of Chauvin’s felony murder conviction explored here fits into a larger pattern of prosecutorial incentives and choices, in a context where penalties are high and multiple overlapping charges are often available.

<sup>177</sup> *People v. Washington*, 402 P.2d 130, 134–35 (Cal. 1965); *State v. Young*, 469 A.2d 1189, 1193 (Conn. 1983) (favorably citing New York agency rule decision of *People v. Wood*, 137 A.2d 472 (NY 1958) discussed *infra* at note 245); *Comer v. State*, 977 A.2d 334, 337 (Del. 2009); *State v. Pina*, 233 P.3d 71, 78 (Idaho 2010); *State v. Sophophone*, 19 P.3d 70, 77 (Kan. 2001); *State v. Bryant*, 78 P.3d 462, 466 (Kan. 2003); *State v. Small*, 100 So.3d 797, 806 (La. 2012) *Campbell v. State*, 444 A.2d 1034, 1042 (Md. 1982); *State v. Branson*, 487 N.W.2d 880, 885 (Minn. 1992); *State v. Rust*, 250 N.W.2d 867, 875 (Neb. 1977); *Sheriff v. Hicks*, 506 P. 2d 766, 768 (Nev. 1973); *State v. Bonner*, 411 S.E.2d 598, 603–04 (N.C. 598); *State v. Williams*, 185 N.C. App. 318, 332 (2007); *Commonwealth ex rel. Smith & Myers*, 261 A.2d 550, 559–60 (Pa. 1970); *State v. Severs*, 759 S.W.2d 935, 938 (Tenn. Crim. App.1988); *State v. Hansen*, 734 P.2d 421, 427 (Utah 1986); *Wooden v. Commonwealth*, 284 S.E.2d 811, 816 (Va. 1981); *State v. Bauer*, 329 P.3d 67, 73 (Wash. 2014) (“no Washington case upholding . . . liability, where the accuse did not actively participate in the immediate physical impetus of

nority instead punish felons for any deaths “proximately caused” by the felony—including those caused by police or others in resisting the felony.

Although in force in most states, agency rules have heretofore lacked a principled rationale. The most influential argument in their favor, offered by Dean Norval Morris in 1956, invoked precedent, and the general disrepute of felony murder liability itself.<sup>178</sup> Probably Morris and many of his readers presumed that the Model Penal Code would soon rationalize homicide law and consign the anachronism of felony murder to the dustbin of history. His arguments were initially effective and proximate cause standards almost disappeared. Yet they ultimately proved helpless to prevent a legislatively led expansion of felony murder liability during the War on Crime. Proximate cause standards were based on an expansive modern conception of causation championed by the Model Penal Code itself. The new codes inspired by the Model Penal Code were passed during the War on Crime, not by liberal reformers, but by legislators eager to show they were tough on crime. Most new codes retained felony murder. New proximate cause standards drew authority from these new codes in many states.

#### A. “Chain Reaction”: Proximate Cause as a Defensive Weapon

The restriction of felony murder liability to killings in furtherance of the felony is found in the earliest formulation of the rule. In *Rex v. Plummer*,<sup>179</sup> one smuggler shot another, while in flight from royal officers. Justice Holt supported extending murder liability to accomplices in any “deliberate” and “malicious” predicate felony “tend[ing] to the hurt of another either immediately or by necessary consequence,” provided that “the killing must be in pursuance of that unlawful act, and not collateral to it.”<sup>180</sup> However, since there was no proof that the shooting had anything to do with the smuggling crime, the accomplices of the shooter could not be guilty of murder.

A review of reported felony murder cases in nineteenth century America disclosed none where liability was imposed for a death directly caused by an intervening actor (such as a police officer), not party to the

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harm.”); *Davis v. Fox*, 735 S.E.2d 259, 265 (W. Va. 2012). For statutes appearing to require causation of death by a participant, see CONN. GEN. STAT. ANN. § 53a-54c; IOWA CODE ANN. § 707.2; LA. STAT. ANN. 14:30.1(A)(2); ME. REV. STAT. T. 17-A § 202 I.1; MINNESOTA STATUTES 609.19 Subd. 2 (1); MISS. CODE ANN. § 97-3-19 I.(1)(c); MONT. CODE ANN. 45-5-102 I.(1)(b); NEB. REV. STAT. ANN. § 28-303; O.R.S. § 163.115(b); R.I. GEN. LAWS. ANN. § 11-23-1; S.D. CODIFIED LAWS § 22-16-4; TENN. CODE ANN. § 39-13-202 I(a)(2); UTAH CODE ANN. § 76-5-203 (2)(d); WASH. REV. CODE ANN. 9A.32.030(1)(c); WYO. STAT. ANN. § 6-2-101(I)(a). For a jury instruction requiring causation by a participant, see SJC1 §2-3 (South Carolina).

<sup>178</sup> Norval Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50, 60-68 (1956).

<sup>179</sup> 84 Eng. Rep 1103, (K.B. 1701).

<sup>180</sup> *Id.* at 1105-07.



felony.<sup>181</sup> In the 1863 Massachusetts case of *Commonwealth v. Campbell*,<sup>182</sup> the defendant was a participant in a riot, during which a bystander was fatally shot, possibly by a soldier attempting to disperse the crowd.<sup>183</sup> The court held that “[n]o person can be held guilty of homicide unless the act is either actually or constructively his, and it cannot be his act in either sense unless committed by his own hand or by someone acting in concert with him or in furtherance of a common object or purpose.”<sup>184</sup> The 1888 Illinois case of *Butler v. People*,<sup>185</sup> repeated this language in overturning manslaughter convictions for defendants who resisted arrest for a minor disturbance, and whose arresting officer fatally shot their uninvolved brother.<sup>186</sup> The court added that “[w]here the criminal liability arises from the act of another, it must appear that the act was done in furtherance of the common design . . . ; otherwise a person might be convicted of a crime to the commission of which he never assisted, which could not be done upon any principle of justice.”<sup>187</sup> This pattern continued in the early twentieth century: a 1905 Kentucky case, *Commonwealth v. Moore*,<sup>188</sup> reasoned that “[i]n order that one may be guilty of homicide, the act must be done by him actually or constructively, and that cannot be, unless the crime be committed by his own hand, or by the hands of someone acting in concert with him, or in furtherance of a common object or purpose.”<sup>189</sup> These courts presumed the principle prevailing in nineteenth century criminal law, that one actor could not be the cause of another’s action.<sup>190</sup>

Yet by the early twentieth century, several lines of cases had eroded this principle. Some cases imposed causal responsibility on assailants for the dangerous flight,<sup>191</sup> or even suicide,<sup>192</sup> of victims. Others imposed liability for death mediated by another’s neglect or unwise treatment of an injury.<sup>193</sup> Some imposed causal responsibility on arsonists when firefighters or inhabi-

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<sup>181</sup> Binder, *Origins of American Felony Murder*, *supra* note 13, at 193–96. The nearest exception occurred in 1900: the shield case of *Keaton v. State*, forcing the victim into gunfire. 57 S.W. 1125, 1129 (Tex. Crim. App. 1900).

<sup>182</sup> 7 Allen 541, 542 (Mass. 1863).

<sup>183</sup> *Id.* at 542.

<sup>184</sup> *Id.* at 544.

<sup>185</sup> 18. N.E. 338, 339–40 (Ill. 1888).

<sup>186</sup> *Id.* at 339–40. It is true that the court also quoted an English treatise to the effect that “If the unlawful act be a felony, it will be murder in all, although the death happened collaterally” *Id.* at 339.

<sup>187</sup> *Id.* at 645.

<sup>188</sup> 88 S.W. 1085 (Ky. 1905).

<sup>189</sup> *Id.* at 1086 (Ky. 1905); *accord*, *State v. Majors*, 237 S.W. 486, 488 (Mo. 1922); *State v. Oxendine*, 122 S.E. 568, 570 (N.C. 1924).

<sup>190</sup> BINDER, *supra* note 83, at 210–11; Paul Ryu, *Causation in Criminal Law*, 106 U. PA. L. REV. 773, 782 (1958).

<sup>191</sup> *Rex v. Valade*, 26 Can. Crim. Cas. Ann. 233 (K.B. 1915); *Regina v. Halliday*, 61 L.T.R. (n.s.) 701, 702 (Crown Cas. Res. 1889); *Letner v. State*, 299 S.W. 1049, 1052 (Tenn. 1927).

<sup>192</sup> *People v. Lewis*, 570 P. 470, 470 (Cal. 1899); *Stephenson v. State*, 179 N.E. 633, 650 (Ind. 1932).

<sup>193</sup> *Queen v. McIntyre*, 2 Cox C.C. 279, 279 (1847).

tants entered a blaze, even if imprudently.<sup>194</sup> Several decisions brushed aside as irrelevant, robbers' doubtful claims that their guns were discharged by struggling victims.<sup>195</sup> In one, the 1925 case of *People v. Krauser*, the Illinois Supreme Court distinguished *Butler*:

The shooting of Souders was a consequence naturally to be expected from the plaintiff in error's acts. He made an assault with a deadly weapon, and Souders was justified in resisting the attack. . . . It is not material whether it was in the hand of the plaintiff in error or Souders. The plaintiff in error had the intent to commit murder if resisted.<sup>196</sup>

Additional cases upheld liability where felons had coerced victims to serve as shields and so exposed them to anticipated gunfire.<sup>197</sup> While a voluntary act could supersede the felony as a cause of death, a coerced act was neither voluntary nor independent of the felony.

By the middle third of the twentieth century, then, courts had identified several ways that felons might become causally responsible for the destructive act of a non-felon. It became plausible to see defensive force against a felony, and even force used in arresting felons, as coerced by the felony. In the 1935 case of *People v. Payne*,<sup>198</sup> The Illinois Supreme Court upheld a murder conviction for the fatal shooting of a robbery victim in an exchange of gunfire between a robber and the victim's brother, where the source of the fatal bullet was uncertain.<sup>199</sup> Citing *Krauser*, the court held "[i]t reasonably might be anticipated that an attempted robbery would meet with resistance, during which the victim might be shot either by himself or someone else in attempting to prevent the robbery, and those attempting to perpetrate the robbery would be guilty of murder."<sup>200</sup> In the 1952 Texas case, of *Miers v. State*,<sup>201</sup> a defendant appealed his conviction on the basis of the trial court's refusal to instruct the jury to acquit him if his robbery victim had accidentally shot himself.<sup>202</sup> The Texas Court of Criminal Appeals upheld the felony murder conviction, reasoning that the defendant caused the victim's act by menacing him.<sup>203</sup>

<sup>194</sup> *State v. Glover*, 50 S.W.2d 1049, 1056 (Mo. 1932); *State v. Leopold*, 147 A. 118, 121 (Conn. 1929).

<sup>195</sup> *People v. Manriquez*, 206 P. 63, 63 (Cal. 1922); *Commonwealth v. Lessner*, 118 A. 24, 25–26 (Pa. 1922); *People v. Krauser*, 146 N.E. 593, 601 (Ill. 1925).

<sup>196</sup> *Krauser*, 146 N.E. at 601.

<sup>197</sup> *Keaton v. State*, 57 S.W. 1125, 1129 (Tex. Crim. App. 1900) (defendant "would be responsible for the reasonable, natural, and probable result of his act, to wit, placing deceased in a place of danger, where he would probably lose his life"); *Taylor v. State*, 55 S.W. 961, 965 (Tex. Crim. App. 1900); *Wilson v. State*, 68 S.W.2d 100, 102 (Ark. 1934).

<sup>198</sup> 194 N.E. 539 (Ill. 1935).

<sup>199</sup> *Id.* at 543–44.

<sup>200</sup> *Id.* at 543.

<sup>201</sup> 251 S.W.2d 404, Tex. Crim. App. 1952).

<sup>202</sup> *Id.* at 407–08.

<sup>203</sup> *Id.* at 407–408 (citing *Taylor v. State*, 55 S.W. 961, 964 (Tex. Crim. App. 1900)).

This expansion of liability was not motivated merely by abstract theoretical debates about the reach of proximate cause. Rather, deaths caused by victims and police were recast as defensive responses compelled by enemy outsiders. Most influential were a pair of postwar Pennsylvania cases likening felonies to sedition and aggression, and portraying police as soldiers, immunized by duty. In the 1947 case of *Commonwealth v. Moyer*,<sup>204</sup> where the defense alleged that one robbery victim shot another while exchanging gunfire with the robbers, the Pennsylvania Supreme Court upheld an instruction that “[a]ll of the participants in an attempted robbery are guilty of murder in the first degree if someone is killed in the course of” that crime.<sup>205</sup> It invoked the recent war:

It is the right and duty of both individuals and nations to meet criminal aggression with effective countermeasures. Every robber or burglar knows when he attempts to commit his crime that he is inviting dangerous resistance. . . . For Earl Shank, the proprietor of a gas station . . . being attacked by armed robbers, to return the fire of these robbers with a pistol which he had at hand was as proper and as inevitable as it was for the American forces at Pearl Harbor on the morning of December 7, 1941, to return the fire of the Japanese invaders. The Japanese felonious invasion of the Hawaiian Islands on that date was in law and morals the proximate cause of all the resultant fatalities. The Moyer-Byron felonious invasion of the Shank gas station on July 13, 1946, was likewise the proximate cause of the resultant fatality.<sup>206</sup>

The *Moyer* court next cited the Haymarket Riot, or “Anarchists’ Case”, convicting organizers of a labor demonstration for killing a police officer when a bomb was thrown by an unidentified person, never linked to the defendants.<sup>207</sup> The explosion was followed by police gunfire killing several members of the crowd.<sup>208</sup> Finally, the *Moyer* court cited a Civil War case finding that “the proximate cause of the fire [set by the Union army] which destroyed plaintiff’s property was the rebel invasion.”<sup>209</sup>

*Moyer* was followed in 1949 by *Commonwealth v. Almeida*,<sup>210</sup> in which an off-duty police officer was killed in a super-market parking lot in front of his family, during an exchange of fire between police and robbers fleeing the store after a hold-up.<sup>211</sup> Almeida contended that another officer had fired the

<sup>204</sup> 53 A.2d 736, 740, (Pa. 1947).

<sup>205</sup> *Id.* at 741–43 (citing *Keaton v. State*, 57 S.W. 1125, 1129 (Tex. Crim. App. 1900); *Taylor v. State*, 55 S.W. 961, 964 (Tex. Crim. App. 1900); and *People v. Manriquez*, 206 P. 63 (Cal. 1922)).

<sup>206</sup> *Id.* at 741–42.

<sup>207</sup> *Id.* at 743 (citing *Spies v. People*, 12 N.E. 865, 911 (Ill. 1887)).

<sup>208</sup> JAMES GREEN, *DEATH IN THE HAYMARKET* 174–91 (2007).

<sup>209</sup> *Moyer*, *supra* note 206 at 195 (citing *Aetna Insurance Co. v. Boon* 95 U.S. 117 (1877)).

<sup>210</sup> 68 A.2d 595 (Pa. 1949), *overruled* by *Commonwealth ex rel. Smith v. Myers*, 261 A.2d 550 (1970).

<sup>211</sup> *Id.* at 598–99.

fatal shot, but the Court upheld instructions that the defendants would be liable for shots fired in resisting the robbery.<sup>212</sup> The court reprised much of its argument in the Moyer case, reasoning that “he whose felonious act is the *proximate cause* of another’s death is *criminally* responsible for that death.”<sup>213</sup> Again, the court favorably invoked the Anarchists’ Case.<sup>214</sup> The court asserted the involuntariness of police use of force: “The policemen cannot be charged with any wrongdoing because their participation in the exchange of bullets with the bandits was both in justifiable self-defense and in the performance of their duty.”<sup>215</sup>

It is not surprising to see repeated references to *causal chains* in an opinion affirming proximate causation—but one of these revealingly involved a novel nuclear metaphor: “a knave who feloniously and maliciously starts ‘a *chain reaction*’ of acts dangerous to life must be held responsible for the natural fatal results . . . .”<sup>216</sup> This trope of Hiroshima as both compelled and justified by Pearl Harbor was common in postwar America. Historian Paul Boyer recounts:

A *Chicago Tribune* cartoon of August 8 [1945] pictured a long fuse running from Pearl Harbor to Hiroshima over which flies debris and various body fragments including a severed head murmuring “So sorry.” . . . William L. Laurence struck the same note in *Dawn Over Zero* (1946) as he described his feelings while flying toward Nagasaki: “Does one feel any pity or compassion for the poor devils about to die? Not when one thinks of Pearl Harbor and of the Death March on Bataan.”<sup>217</sup>

Yet America’s unprecedented use of nuclear weapons late in the war was, like the court’s unprecedented extension of felony murder, novel and of questionable legitimacy.<sup>218</sup> While the Pennsylvania Supreme Court would

<sup>212</sup> *Id.* at 597.

<sup>213</sup> *Id.* at 599–600.

<sup>214</sup> *Id.* at 602.

<sup>215</sup> *Id.* at 607.

<sup>216</sup> *Id.* at 614 (emphasis added). The term “chain reaction” was not in general use until after World War II. A Corpus of Historical American English search conducted on 3/12/2021, <https://www.english-corpora.org/coha/>, documented no uses of this term in popular writing before 1945, seven in 1945 (all referencing a nuclear chain reaction), 59 in 1946 (of which 57 referenced a nuclear chain reaction); seven of 23 references from 1947 through 1949 were metaphoric. The concept of a nuclear “chain reaction” was developed by Leo Szilard and included in a 1934 patent application granted in 1936. Improvements in or relating to the transmutation of chemical elements, U.K. Patent No. GB630726A (filed June 28, 1934, (issued Mar. 30, 1936) (UK)).

<sup>217</sup> PAUL BOYER, *BY THE BOMB’S EARLY LIGHT* 185 (1994).

<sup>218</sup> Opinion polls in 1945 revealed Americans overwhelmingly supported use of the bomb immediately thereafter, although a small minority thought it should have first been demonstrated in an unpopulated area. *Id.* at 183–84. Influential considerations were the belief that use had saved American lives and that aerial bombardment of population centers had become routine during the war. *Id.* at 185–86, 189. By 1949, the cold war context induced most Americans to oppose an American pledge to avoid first use. *Id.* at 336. *See also* MARGOT HENRIKSEN, *DR. STRANGELOVE’S AMERICA: SOCIETY AND CULTURE IN THE ATOMIC AGE* 8 (1997) (dependence of American security on nuclear weapons consolidated approval of them).

abandon proximate cause in 1958, a dissent would continue to defend it in authoritarian terms: “The brutal crime wave . . . sweeping and appalling our country can be halted only if the courts stop coddling . . . and freeing murderers, communists and criminals on technicalities made of straw.”<sup>219</sup>

Several other states adopted the proximate cause standard of *Almeida* and *Moyer*. In the 1952 case *People v. Podolski*, the Michigan Supreme Court upheld defendant’s first-degree felony murder conviction for his participation in a bank robbery in which one police officer was fatally shot by another.<sup>220</sup> The court quoted *Moyer* on the need to “return the fire of the Japanese invaders.”<sup>221</sup> In a 1955 Florida case, the defendant and an accomplice fled a robbery by taking hostages and firing at police.<sup>222</sup> The defendant’s accomplice was killed by police, and an officer was killed by an unknown shooter. Citing *Almeida*, the court held that the source of the shot was immaterial as “the proximate cause of the killing was the malicious criminal action of the felons.”<sup>223</sup> In the 1963 Oklahoma case *Johnson v. State*,<sup>224</sup> the shot killing a police officer during a burglary might have come from his partner.<sup>225</sup> The jury was told to convict the burglar if he “set in motion a chain of events which were or should have been within his contemplation.”<sup>226</sup> The Oklahoma Court of Criminal Appeals affirmed, citing *Podolski*.<sup>227</sup> An influential student comment defended Pennsylvania’s new “proximate cause” test and rejected the traditional test limiting liability to acts in furtherance of a common plan, as a misapplication of “agency” principles, that improperly dignified criminal conspiracies as fiduciary relationships.<sup>228</sup> This gave the traditional “agency rule” its modern name.<sup>229</sup>

### B. *The Triumph of Morris’s Doctrinal Defense of Agency*

The proximate cause test was poorly received among academics. Norval Morris’s 1956 article, *The Felon’s Responsibility for the Lethal Acts of Others* became the authoritative critique. Morris identified the proximate cause test

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For Szilard’s droll reflections on the legality of the nuclear weapons he helped develop, see generally L. Szilard, *My Trial as a War Criminal*, 17 U. CHI. L. REV. 79 (1949). For a later inconclusive view, see 1996 I.C.J. 11 (deciding by a vote of 7-7 with the President breaking the tie, that use of nuclear weapons would be contrary to humanitarian law, but might be justifiable in self-defense).

<sup>219</sup> Commonwealth v. Redline, 137 A.2d 472, 483 (Pa. 1958) (Bell, J., dissenting).

<sup>220</sup> 52 N.W.2d 201, 205 (Mich. 1952).

<sup>221</sup> *Id.* at 204.

<sup>222</sup> Hornbeck v. State, 77 So.2d 876, 877–78 (Fla. 1955).

<sup>223</sup> *Id.* at 878 (quoting Commonwealth v. Almeida, 68 A.2d 595, 614 (Pa. 1949)).

<sup>224</sup> 386 P.2d 336 (Okla. Crim. App. 1963).

<sup>225</sup> *Id.* at 338–39.

<sup>226</sup> *Id.* at 339.

<sup>227</sup> *Id.* at 340 (citing *People v. Podolski*, 52 N.W.2d 201, 205 (Mich. 1952)).

<sup>228</sup> Frederick C. Moesel Jr., *A Survey of Felony Murder*, 28 TEMP. L. Q. 453 (1955) (cited 31 times [https://scholar.google.com/scholar?hl=en&as\\_sdt=0%2C33&q=Frederick+c+Moesel+jr&coq=Frederick+C.+Moesel](https://scholar.google.com/scholar?hl=en&as_sdt=0%2C33&q=Frederick+c+Moesel+jr&coq=Frederick+C.+Moesel) [<https://perma.cc/5BDG-T79C>] retrieved Aug. 27, 2022).

<sup>229</sup> Moesel, *supra* note 228 at 461.

as a novel extension of felony murder liability. Morris reasoned that a felony murder rule defines the *mens rea* of murder, and so should not affect causation, an *actus reus* concept. He interpreted American statutory felony murder rules as incorporating common law doctrine and denied the Pennsylvania court's claim that "any person committing any common law felony . . . is from time immemorial responsible for the natural and reasonably foreseeable results of his felony."<sup>230</sup> An absence of older precedents imposing liability for defensive killings implied that such liability was not incorporated by reference in statutes punishing murder generally, or felony murder in particular. Morris proceeded to distinguish the twentieth century cases expanding causation, arguing that, properly understood, the shield cases and dangerous flight cases were cases where the death was directly caused by the defendant.<sup>231</sup>

Absent statutory compulsion or long-settled precedent, judicial application of a proximate cause standard was discretionary, and so could only be justified by policy considerations.<sup>232</sup> "Deterrence," he reasoned, "must be the main purpose; it is the purpose expressed by the majority in *Almeida* and *Thomas*."<sup>233</sup> Morris then considered the deterrent value of such liability and invoked the punishment lottery argument against felony murder liability, quoting the classic reasoning by the English Criminal Law Commission.<sup>234</sup> The only reform of felony murder that could be justified by policy was to abolish it.

Morris's arguments had an immediate impact. In the 1958 case of *Commonwealth v. Redline*,<sup>235</sup> the Pennsylvania Supreme Court overturned a felon's murder conviction, for the killing of a co-felon by a police officer, thereby overruling *Thomas* and repudiating the reasoning of *Almeida*.<sup>236</sup> The Court acknowledged that these cases had "provoked a large amount of critical law review comment" and singled out Morris's piece as "a particularly well-considered and cogent criticism."<sup>237</sup> It reasoned that it was not the place of the judiciary to expand the scope of criminal liability, invoked *Campbell*, *Butler* and *Moore*, and distinguishing the same cases that Morris had,<sup>238</sup> argued that *Almeida* and *Thomas* had deviated from precedent.<sup>239</sup> While overruling only *Thomas*'s imposition of felony murder liability for non-party killings of co-felons, the court threatened to overrule *Almeida*, a shoe it proceeded to drop in the 1970 case of *Commonwealth ex rel Smith* &

<sup>230</sup> Morris, *supra* note 178 at 60–61 (1956) (quoting *Commonwealth v. Thomas*, 117 A.2d 204, 207 (Pa. 1955) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES §§ 192–93, 200–01), and calling this claim "false").

<sup>231</sup> *Id.* at 62–64.

<sup>232</sup> *Id.* at 63–64.

<sup>233</sup> *Id.* at 67.

<sup>234</sup> *Id.* at 68; Comm'rs on Crim. L., Second Report 17 (1846).

<sup>235</sup> 137 A.2d 472, (Pa. 1958).

<sup>236</sup> *Id.* at 482–83.

<sup>237</sup> *Id.* at 473 n.1.

<sup>238</sup> *Id.* at 499–501.

<sup>239</sup> *Id.* at 482–82.

*Myers*.<sup>240</sup> There, the court again cited *Morris*,<sup>241</sup> called felony murder “a hold-over from the days of our barbarian Anglo-Saxon ancestors,”<sup>242</sup> doubted that felony murder “has the deterrent effect its proponents assert,”<sup>243</sup> and concluded that “[w]ith so weak a foundation, it behooves us not to extend it further.”<sup>244</sup>

*Morris*’s arguments triumphed in eight other states. The 1960 New York decision in *People v. Wood*<sup>245</sup> dismissed a felony murder charge for the fatal shootings of a bystander and co-felon by a third party resisting the felony.<sup>246</sup> The court invoked *Campbell, Butler, Moore* and *Redline*,<sup>247</sup> reasoned that the common law felony murder rule had been “barbaric[ally]” broad, and concluded the legislature must have intended to restrict it to killings by parties to the felony.<sup>248</sup> The 1963 Michigan decision in *People v. Austin*,<sup>249</sup> adopted *Redline*’s reasoning<sup>250</sup> and rejected *Podolski*’s.<sup>251</sup>

In the 1965 case of *People v. Washington*,<sup>252</sup> the California Supreme Court reversed the felony murder conviction of a robber for the killing of his co-felon by a victim.<sup>253</sup> While the court below had relied on *Almeida*, the Supreme Court rejected felony murder for any victim killed by a non-party.<sup>254</sup> Citing *Morris*,<sup>255</sup> the court rejected deterrence of both the homicide and the predicate felony as justifications for punishing felons for defensive killings, concluding that felony murder was justifiable on the basis of neither utility nor desert: “Although it is the law in this state . . . it should not be extended beyond any rational function that it is designed to serve.”<sup>256</sup> However, the court offered prosecutors another path to murder liability for “defendants who initiate gun battles. . . if their victims resist and kill”: depraved indifference murder,<sup>257</sup> a path later taken in *Taylor v. Superior Court*.<sup>258</sup>

Also in 1965, the Massachusetts decision of *Commonwealth v. Balliro*<sup>259</sup> awarded a new trial to a burglar who was denied an instruction conditioning murder liability on the fatal shots having been fired by burglars rather than police. The court cited *Morris*, the *Campbell, Butler*, and *Moore* cases on

<sup>240</sup> 261 A.2d 550, 559–60 (Pa. 1970).

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 554 (quoting Addison Mueller, *Criminal Law and its Administration*, 34 N.Y.U. L. REV. 83, 98 (1959)).

<sup>243</sup> *Id.* at 554.

<sup>244</sup> *Id.*

<sup>245</sup> 167 N.E.2d 736 (N.Y. 1960).

<sup>246</sup> *Id.* at 738.

<sup>247</sup> *Id.* at 738–39.

<sup>248</sup> *Id.* at 738.

<sup>249</sup> 120 N.W.2d 766, (Mich. 1963).

<sup>250</sup> *Id.* at 769 (Mich. 1963) (Opinion of Dethmers, J.); *Id.* at 775 (Opinion of Kelly, J.).

<sup>251</sup> *Id.* at 775 (Opinion of Kelly, J.).

<sup>252</sup> 402 P.2d 130 (Cal. 1965) (en banc).

<sup>253</sup> *Id.* at 133–35.

<sup>254</sup> *Id.* at 132, 135.

<sup>255</sup> *Id.* at 134.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> 477 P.2d 131, 133–34 (Cal. 1970).

<sup>259</sup> 209 N.E.2d 308 (Mass. 1965).

which he relied, and the *Wood*, *Washington*, *Redline* and *Austin* cases that cited him.<sup>260</sup> In the 1970's similar reasoning was adopted and similar sources cited in Nevada,<sup>261</sup> Colorado,<sup>262</sup> and New Jersey.<sup>263</sup> Even in Illinois, an intermediate court decision cited *Redline* in reversing a conviction for the death of a co-felon shot by a robbery victim, although on the narrow grounds that the victim was a co-felon, shot justifiably.<sup>264</sup> By the early 1970's, Morris's arguments had triumphed everywhere and the proximate cause standard seemed in full rout.

### C. *The Codification of Proximate Cause During the War on Crime*

Yet like many progressive ideas that seemed intellectually inevitable in 1970, the extinction of the proximate cause standard—and indeed of felony murder itself—failed to materialize. American politics turned right and got tough on crime.<sup>265</sup> While it is tempting to describe this as a triumph of politics over principle, Morris's argument was not about principle. If, as Morris implied, predicate felonies supply insufficient culpability to justify murder liability, felony murder liability will be unjustified whether or not causation is direct. Morris did not argue as did others, that proximate cause rules too easily blamed felons for deaths that were *ex ante* improbable.<sup>266</sup> Nor did he argue, as Anthony Amsterdam and George Fletcher later would, that objective criteria of liability were preferable for civil libertarian reasons.<sup>267</sup> This lack of policy rationale left the agency rule vulnerable. In a society increasingly engineering complex systems, and using economic and epidemiological modeling in policy, confining causation to direct contact was bound to seem quaint.

Indeed, Morris probably expected his argument to have a limited shelf life. He could justifiably assume in 1956 that if a future Model Penal Code

<sup>260</sup> *Id.* at 313–15.

<sup>261</sup> *Sheriff, Clark County v. Hicks*, 506 P.2d 766, 768 (Nev. 1973).

<sup>262</sup> *Alvarez v. Dist. Ct.*, 525 P.2d 1131, 1133 (Col. 1974) (en banc) (during supermarket robbery, officer killed store employee who had disarmed a robber; court also cites Morris, *supra* note 221 and *Commonwealth ex rel. Smith v. Myers*, 261 A.2d 550 (1970)).

<sup>263</sup> *State v. Canola*, 374 A.2d 20, 26 (N.J. 1977) (citing Morris, *supra* note 221). The victim shot a co-felon during a store robbery and the court interpreted statutory language imposing liability for committing a felony from which death “ensues” as imposing liability for killings by a co-felon “with or through the criminal agency of another . . . in furtherance of the felony.” *Id.* at 22. And it rejected “the theory of proximate cause.” *Id.* Turning to “public policy implications of the proposed doctrine,” the court, citing the Model Penal Code, concluded that “modern progressive thought in criminal jurisprudence favors restriction rather than expansion of the felony murder rule.” *Id.* at 29. The court also cited *Smith*, 261 A.2d at 558. *Id.* at 24 n.4.

<sup>264</sup> *People v. Morris*, 274 N.E.2d 898, 901 (Ill. App. Ct. 1971).

<sup>265</sup> JONATHAN SIMON, *GOVERNING THROUGH CRIME* 33–74 (2007) (observing that over 30 gubernatorial candidates won office after promising to restore the death penalty).

<sup>266</sup> *Cf.* Frederick Ludwig, *Foreseeable Death in Felony Murder*, 18 U. PITT. L. REV. 5, 59, 62–63 (1956).

<sup>267</sup> GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 115–24 (1978); Anthony Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers and the Like*, 3 CRIM. L. BULL. 205, 205–207, 224–234 (1967).



had any influence, it would be to eliminate felony murder legislatively.<sup>268</sup> The proposed Code would indeed effectively abolish felony murder by requiring at least recklessness for murder.<sup>269</sup> But of the 36 new state codes passed after the drafting and circulation of the MPC's homicide provisions, only five states formerly imposing felony murder liability abandoned it,<sup>270</sup> and one state actually added felony murder.<sup>271</sup> More influential was the Model Penal Code's proximate cause approach to causation. In section 2.03, the Model Penal Code defined a cause as conduct creating necessary conditions for results foreseeably risked. This definition was adopted by 14 different codes.<sup>272</sup>

Most of the new codes were passed in the 1970's and interpreted by later appellate courts, by which time the War on Crime was well under way. In many cases, new codes were adopted by the same legislators that reenacted capital statutes in the wake of *Furman v. Georgia*.<sup>273</sup> In any case, by superseding prior codes, the new codes obsoleted Morris's argument from precedent. Courts were free to construe these new felony murder provisions as weapons in the War on Crime. And if they failed to, legislatures sometimes corrected them with further revisions. Thus, ironically the Model Penal Code only slightly reduced the prevalence of felony murder laws while

<sup>268</sup> Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1096, 1108–09 (1952).

<sup>269</sup> Model Penal Code § 210.2 (Am. L. Inst 1962).

<sup>270</sup> Hawaii and Kentucky required intent for all murders, while New Hampshire, Arkansas and North Dakota required recklessness for murder in the context of a felony. HAW. REV. STAT. §§ 707-701–707-701.5; KY. REV. STAT. ANN. § 507.020 (LexisNexis); N.H. REV. STAT. ANN. §§ 630:1-a–630:1-b (LexisNexis); ARK. CODE ANN. § 5-10-102; N.D. CENT. CODE § 12.1-16-01. WAYNE LAFAVE, CRIMINAL LAW 5–6 (5th ed. 2010) (listing 36 codes revised subsequent to MPC); see also Guyora Binder, *Felony Murder and Mens Rea Default Rules: A Study in Statutory Interpretation*, 4 BUFF. CRIM. L. REV. 399, 475–76 (2000), (noting that Ohio also conditioned felony murder on intent but had never previously had a felony murder rule, but subsequently adopted one in 1998).

<sup>271</sup> *Pfister v. State*, 425 P.3d 183, 185–86 (Alaska 2018) (explaining that Alaska first adopted felony murder as part of new code in 1980).

<sup>272</sup> MODEL PENAL CODE § 2.03 (AM. L. INST 1962). Of 13 states with MPC-influenced codes that lack agency limitations, six have MPC-style causation provisions. ALA. CODE § 13A-2-5 (2022); ARIZ. REV. STAT. ANN § 13-203 (2022); GA. CODE ANN. §§ 16-2-1, 16-2-2 (2022) (crime requires intent or negligence, conditions causal responsibility for harm on intent, negligence or “criminal scheme”); MO. REV STAT. § 565.003 (2022) (transfer of mental state); N.J. STAT. ANN. 2C:2–3 (West 2022); TEX. PENAL CODE ANN. 6.04 (West 2022). Additional states with causation provisions include: ARK. CODE ANN. § 5-2-205 (2022); DEL. CODE ANN. tit. 11 § 261 (2022); KY. REV. STAT. ANN. § 501.060 (West 2022); ME. REV. STAT. tit. 17-A, § 33 (2022); MONT. CODE ANN. § 45-2-201 (2022); N.D. CENT. CODE § 12.1-02-05 (2022); 18 PA. CONS. STAT. § 303 (2022); UTAH CODE ANN. § 76-2-105 (West 2022).

<sup>273</sup> Proximate cause states that passed a new code within four years of a new capital statute were Alabama, Colorado, Florida, Georgia, Indiana, Missouri, New Jersey, Ohio, and Texas. Ohio and Texas adopted their new capital statutes in their new codes (although Ohio's code had only a proximate cause felony manslaughter rule, see text accompanying nn. 290-293 *infra*). Leigh Bienen, *The Proportionality Review of Capital Cases by State High Courts After Gregg*, 87 J. CRIM. L. & CRIMINOLOGY 130, 166 (1996) (listing dates of post-Furman capital statutes); LAFAVE, *supra* note 270, at 5 (2010) (listing dates of new codes).

expanding the scope of causation of death, creating the conditions for a revival of proximate cause felony murder rules.

All Fifteen states that adopted proximate cause rules did so by either legislation or interpretation of new codes.

Seven did so legislatively. Five new codes explicitly permitted felony murder liability for killings by non-parties.<sup>274</sup> These included new codes recodifying felony murder in Arizona and Florida.<sup>275</sup> Alaska's new code adopted felony murder for the first time, extending it to deaths caused by "any person."<sup>276</sup> New codes in New Jersey and Colorado initially confined felony murder to killings in furtherance of the felony.<sup>277</sup> However, the New Jersey and Colorado legislatures swiftly added language explicitly including killings by non-parties, in response to court decisions recognizing agency rules.<sup>278</sup> Missouri and Oklahoma legislated proximate cause standards outside the context of codification. Missouri first adopted a proximate cause rule judicially in the precodification case of *State v. Moore*.<sup>279</sup> In 1984, Missouri codified this rule through a provision imposing second degree murder liability for attempting a felony in which "another person is killed as a result."<sup>280</sup> Oklahoma did not adopt a new code and long retained the proximate cause standard adopted judicially in *Johnson*. However, the 1993 decision of *State v. Jones* adopted an agency limit.<sup>281</sup> In 1996, the legislature responded by broadening liability to include "death . . . result[ing] from" a felony.<sup>282</sup>

The remaining eight states all adopted rules punishing felons for non-party killing on the basis of statutory interpretation of new codes. Code interpretation was central in two decisions adopting proximate cause standards in states where courts had earlier endorsed Morris's approach.

Illinois recodified criminal law in 1962. In 1974, the Illinois Supreme Court reasserted the vitality of *Payne's* proximate cause standard in *People v. Hickman*.<sup>283</sup> Police staking out a warehouse, observed three men break in. As

<sup>274</sup> ALASKA STAT. §11.41.110 (2022); ARIZ. REV. STAT. ANN. §13-1105 (2022); COLO. REV. STAT. §18-3-102 (2022); FLA. STAT. §782.04 (2022); N.J. STAT. ANN. §2C:11-3 (West 2022).

<sup>275</sup> ARIZ. REV. STAT. ANN. §13-1105 (2022); FLA. STAT. §782.04 (2022).

<sup>276</sup> ALASKA STAT. §11.41.110(a)(3) (2022).

<sup>277</sup> 1978 N.J. LAWS 540-41; COLO. REV. STAT. § 18-3-102 (1972).

<sup>278</sup> See *State v. Canola*, 374 A.2d 20, 22 (N.J. 1977) (attributing an agency rule based on statutory requirement that a "participant" cause death "in furtherance" of the felony); 1979 N.J. LAWS 684 (substituting "any person"); 1981 N.J. LAWS 1107; N.J. S. JUDICIARY COMM., STATEMENT TO SENATE COMMITTEE SUBSTITUTE, S. 199-1537, 2nd Sess., at § 14 (N.J. 1981); *Alvarez v. Dist. Ct.*, 525 P.2d 1131, 1133 (Col. 1974) (en banc) (adopting agency rule in Colorado); C.R.S.A. 18-3-102; see also H.B.1203, 50th Gen Ass., 1st Reg. Sess. (Colo. 1975) (adding "is caused by anyone").

<sup>279</sup> 580 S.W.2d 747, 752-53 (Mo. 1979) (en banc) (while the new code became effective in 1979, Moore was convicted for a 1975 killing; accord *State v. Baker*, 607 S.W.2d 153, 156-57 (Mo. 1980) (en banc).

<sup>280</sup> 1984 Mo. Laws 755.

<sup>281</sup> Accelerated Docket Order, *State v. Jones*, 859 P.2d 514, 515 (Okla. Crim. App. 1993).

<sup>282</sup> *State v. Kinchion*, 81 P.3d 681, 684 (Okla. Crim. App. 2003) (punishing felon for killing of co-felon by victim).

<sup>283</sup> 319 N.E.2d 511 (Ill. 1974)

they emerged, police arrested one, while two fled. One officer fired a warning shot. A second officer, on observing an armed man crouching, yelled “drop it.” When the armed man—one of the *seventeen* officers at the scene—failed to drop his weapon, the first officer killed him with a shotgun. The two at large burglars were later apprehended at another location, unarmed. In affirming their felony murder convictions, the Illinois Supreme Court invoked this provision of the new 1962 code: “a person who kills . . . commits murder if, in performing the acts which cause death . . . he is attempting or committing a forcible felony.”<sup>284</sup> The court argued that this provision’s drafting history showed that “kills” meant simply “performing the acts which cause death,” that the legislature intended that *Payne* would remain good law, and that felons could be held causally responsible for third party killings motivated by resistance to the felony.<sup>285</sup> The court added that burglary was classified as a forcible felony,<sup>286</sup> and treated it as a violent provocation to deadly force:

The commission of the burglary, coupled with the election by defendants to flee, set in motion the pursuit by armed police officers. The shot which killed Detective Loscheider was . . . fired in opposition to the escape of the fleeing burglars, and it was a direct and foreseeable consequence of defendants’ actions. The escape here . . . invited retaliation, opposition and pursuit. Those who commit forcible felonies know they may encounter resistance, both to their affirmative actions and to any subsequent escape.<sup>287</sup>

The felons here supposed to have foreseen police shooting each other after their flight did not initiate violence or show weapons.<sup>288</sup> Thus, *Hickman* held fleeing felons responsible to foresee and prevent even *unreasonable* police violence.

New York’s 1965 Penal Law replaced language punishing “killing” in the course of a felony with a provision punishing one who commits an enumerated felony and “in the course and in furtherance of” the felony he or another participant “causes death of a person other than one of the participants.”<sup>289</sup> By confining those who cause death to participants, confining victims to non-participants, and requiring that death be caused “in furtherance,” this language seemed to adopt an agency rule, and this is how the code was applied for decades.<sup>290</sup> In the 1993 case of *People v. Hernandez*,<sup>291</sup> however, the New York Court of Appeals held that the agency

<sup>284</sup> *Id.* (quoting 720 ILL. COMP. STAT. 5/9–1(a)(3) (1971)).

<sup>285</sup> *Id.* at 512–13.

<sup>286</sup> *Id.* at 513.

<sup>287</sup> *Id.* (discussing *People v. Allen*, 309 N.E.2d 544 (Ill. 1974)).

<sup>288</sup> The arrested felon, not convicted of murder, was armed.

<sup>289</sup> N.Y. PENAL LAW § 125.25(3) (McKinney 2022).

<sup>290</sup> *People v. Castro*, 529 N.Y.S.2d 554 (N.Y. App. Div. 1988), *abrogated by People v. Hernandez*, 624 N.E.2d 661, 663 (N.Y. 1993); *People v. Ramos*, 496 N.Y.S.2d 443, 443 (N.Y. App. Div. 1986), *abrogated by Hernandez*, 24 N.E.2d at 663.

<sup>291</sup> 624 N.E.2d 661 (N.Y. 1993).

rule adopted in *Wood* was extinguished by the new statute.<sup>292</sup> Thus, “causing death” included proximately causing death by provoking gunfire.<sup>293</sup> Hernandez, in flight from an attempted robbery of an undercover officer, threatened several officers with a gun. One fired at him, fatally striking another. The court invoked a 1974 causation decision under the new Penal Law, involving depraved indifference murder, holding a defendant liable for *indirectly, but foreseeably*, causing death.<sup>294</sup> The court reasoned that as the Penal Law defined all homicides using the same term, “causes the death,”<sup>295</sup> it could not have intended causation to have a narrower meaning for felony murder.

Courts similarly based proximate cause rules on new codes in six other states. Alabama relied on its Model Penal Code style causation provision in a 2009 case.<sup>296</sup> Ohio enacted felony murder only in 1998, in a provision using the phrase “caus[ing] the death of another as a proximate result” of attempting certain grave felonies.<sup>297</sup> Ohio courts had long interpreted a manslaughter provision with the same causation language as permitting indirect causation.<sup>298</sup> In a 1999 involuntary manslaughter case this causation test was used to hold a car thief liable for death caused by the unreasonably hazardous pursuit by a police officer *who was convicted of negligent homicide*.<sup>299</sup> A 2002 decision applied this proximate cause standard to the 1998 felony murder provision.<sup>300</sup> Georgia’s 1969 code provided that “A person . . . commits the crime of murder when in the commission of a felony he causes the death of another human being . . . .”<sup>301</sup> A 2010 decision held that “Georgia is a proximate cause state. . . [where] ‘cause’ is customarily interpreted in almost all legal contexts to mean ‘proximate cause’ . . . .”<sup>302</sup> A 1997 Indiana decision interpreted its 1977 code to require that a felon is responsible for any fatal act of a non-party “[w]here the accused reasonably should have foreseen that . . . the contemplated felony would . . . expose another to the danger of death at the hands of a nonparticipant” . . . .<sup>303</sup> The 1974 Texas code treats as a cause any act necessary to and creating a risk of the result.<sup>304</sup> In a pair of intentional murder cases, a court held escapees causally responsible for the

<sup>292</sup> *Id.* at 665.

<sup>293</sup> *Ibid.*

<sup>294</sup> *Id.* at 663(citing *People v. Kibbe*, 321 N.E.2d 773, 776 (N.Y. 1974)).

<sup>295</sup> N.Y. PENAL LAW § 125.25(3) (McKinney 2022).

<sup>296</sup> *Witherspoon v. State*, 33 So.3d 625, 628, 630 (2009).

<sup>297</sup> H.B. 5, 122 Gen Assemb. Reg. Sess. (Ohio 1998).

<sup>298</sup> *State v. Chambers*, 373 N.E.2d 393, 394–95 (Ohio Ct. App. 1977).

<sup>299</sup> *State v. Lovelace*, 738 N.E.2d 418, 424–28 (Ohio Ct. App. 1999) (holding car thief liable for motorist killed by police squad car running a stop sign at 65 mph in downtown Cincinnati; the officer was charged with negligent vehicular manslaughter).

<sup>300</sup> *State v. Dixon* 2002 WL 191582 at \*2–7 (Ohio Ct. App. 2002).

<sup>301</sup> GA. CODE ANN. § 26-1101(b) (1969).

<sup>302</sup> *State v. Jackson*, 697 S.E.2d 757, 759 (Ga. 2010).

<sup>303</sup> *Sheckles v. State*, 684 N.E.2d 201, 205 (Ind. Ct. App. 1997) (quoting 40 AM.JUR.2D *Homicide* § 39 (1968)).

<sup>304</sup> Tex. Penal Code Ann. 6.04 (West 2022).

shooting of one officer by another under this provision.<sup>305</sup> One presumed that this reasoning already applied to felony murder.<sup>306</sup> Finally, Wisconsin has used causation of death during a felony as the basis for a substantial sentence enhancement, since the adoption of a new code in 1955. In the 1994 case of *State v. Oimen*, the Wisconsin Supreme Court applied such an enhancement to an absent accomplice of a robber killed by the victim.<sup>307</sup>

In sum, after nearly disappearing, felony murder liability for killings by those opposing the felony returned in 15 states covering nearly half the nation's population, by legislative means, and primarily as a result of the widespread recodification of criminal law.

Long before Lyndon Johnson declared war on crime, postwar courts justified shifting blame for police violence onto felons, by portraying them as invading enemies. Initially rejected as an improper judicial innovation, proximate cause felony murder was later widely enacted legislatively, as part of a recodification of criminal law coinciding with a national resurgence of penal severity. And although advocated by liberal law professors in the 1960's, recodification was achieved by conservative legislators waging the War on Crime. Felony murder prosecutions of the targets of police violence were authorized by many of those new codes. Today, we can no longer criticize proximate cause felony murder rules as judicial innovations. Sadly, they have a majoritarian warrant. Critics will need to show majorities why these rules are *unjust*. Our next part provides that argument.

## V. A RACIAL JUSTICE CRITIQUE OF BLAMING FELONS FOR POLICE VIOLENCE

### A. *Race and Police Violence in the War on Crime*

We have seen that felony murder liability for proximately causing police violence was born of a metaphor portraying law enforcement as warfare. Within this metaphor, crime was both aggression and a fuse, inevitably triggering an explosive response. As a mechanical metaphor, the proximate cause standard at once blames felons for triggering deaths and effaces the intervening agency of police. As a war metaphor, it presents crimes and arrests not as individual cases, but as collective action, with each crime a battle in a larger war. Likening felonies to warfare provides a blanket justification for killing felons. This blame-shifting use of war metaphors preceded and anticipated the War on Crime, with roots in such internal conflicts as the

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<sup>305</sup> *Blansett v. State* 556 S.W.2d 322 (Tex. Crim. App. 1977), *abrogation recognized by Ex parte Davis*, 866 S.W.2d 234 (Tex. Crim. App. 1993).

<sup>306</sup> *Dowden v. State*, 758 S.W.2d 264, 272–73 (Tex. Crim. App. 1988) (en banc).

<sup>307</sup> *State v. Oimen*, 516 N.W.2d 399 (1994) (citing Walter Dickey, David Schultz & James L. Fullin, Jr., *The Importance of Clarity in the Law of Homicide: The Wisconsin Revision*, 1989 WISC. L. REV. 1323, 1329 (1989)).

Civil War and the World War I Red Scare.<sup>308</sup> However, the “War on Crime” announced by Lyndon Johnson in 1965<sup>309</sup> gave this metaphor new life, and a specifically racial significance.<sup>310</sup> This section reconstructs the expressive significance of the new proximate cause standards, in the larger context of a “War” on Black people that was much more than a metaphor.

It is important to locate this “War on Crime” among a larger set of war metaphors. In 1961, President Kennedy had declared a “total attack on delinquency.”<sup>311</sup> Only a year earlier, in his first State of the Union address, Johnson had announced the “War on Poverty,” as a remedy for racial injustice.<sup>312</sup> These metaphors evoked the continuous Cold War against communism while also justifying a potentially controversial federal role in local issues.<sup>313</sup> Indeed, historian Mary Dudziak has shown that national leaders saw civil rights enforcement “as a cold war imperative” to improve America’s

<sup>308</sup> These include not only the Haymarket Square Riot litigated in the *Spies* case, but also the wave of vigilante actions by the “Protective Leagues” during World War I, including the Bisbee Deportation of IWW members and the American Protective League’s mass arrests of suspected draft dodgers in New York, Chicago and other cities. See generally KATHERINE BENTON-COHEN, *BORDERLINE AMERICANS: RACIAL DIVISIONS AND LABOR WAR IN THE ARIZONA BORDERLANDS* (2009) 1-17, 198-238 (Bisbee deportation as racist violence, mobilizing a wartime accusation of disloyalty against immigrant labor) and JOHN HIGHAM, *PATTERNS OF AMERICAN NATIVISM, 1860-1925* (1983) 211-223 (describing American Protective League during WWI); East St. Louis, Tulsa, and Elaine, Arkansas were three of many sites of massacres in Black communities carried out by white mobs during and after World War I. See ALFRED BROPHY, *RECONSTRUCTING THE DREAMLAND: THE TULSA RACE RIOT OF 1921* (2002) xvii, 3-6 (describing deputizing of white rioters to suppress supposed Black uprising; while Black wartime service and wartime propaganda about defending democracy encouraged Black mobilization for reform); ELLIOTT RUDWICK, *RACE RIOT AT EAST ST. LOUIS, JULY 2, 1917* (1964) 7-15 (describing rhetoric of Black “colonization” of northern cities); GRIF STOCKLEY, BRIAN K. MITCHELL & GUY LANCASTER, *BLOOD IN THEIR EYES: THE ELAINE MASSACRE OF 1919* (2020) 21-31 (myth of Black uprising mobilizes white police, vigilantes and army troops to attack black labor, in massacre, culminating in blame-shifting prosecutions, including one overturned for testimony coerced by torture and mob intimidation in *Moore v. Dempsey*, 261 U.S. 86 (1923)).

<sup>309</sup> HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME*, *supra* note 33, at 1-2 (referencing Mar. 8, 1965 Statement of the President on Establishing the President’s Commission on Law Enforcement and the Administration of Justice), 49-86 (recounting and contextualizing war metaphors used to describe federal initiatives aimed at Black people between 1961 and 1965).

<sup>310</sup> Interpretations of the War on Crime as a program of racial supremacy include ALEXANDER, *supra* note 33, and PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* (2017).

<sup>311</sup> HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME*, *supra* note 33, at 3.

<sup>312</sup> Lyndon B. Johnson, State of the Union Address (Jan. 8, 1964).

<sup>313</sup> The term, apparently coined by Herbert Bayard Swope in 1946, was used publicly by Bernard Baruch in 1947: “we are today in the midst of a Cold War. Our enemies are to be found abroad and at home.” Larry G. Gerber, *The Baruch Plan and the Origins of the Cold War*, 6 *DIPLOMATIC HISTORY* 69, 92 (1982); Andrew Glass, *Bernard Baruch coins term ‘Cold War,’ April 16, 1947*, *POLITICO* (Apr. 16, 2010), <https://www.politico.com/story/2010/04/bernard-baruch-coins-term-cold-war-april-16-1947-035862> [<https://perma.cc/6TA3-T7BR>]. On permanent mobilization, see generally MARY DUDZIAK, *WAR TIME: AN IDEA, ITS HISTORY, AND ITS CONSEQUENCES* (2012).

image abroad.<sup>314</sup> Historian Elizabeth Hinton has shown that these leaders also saw Black urban poverty as a crime risk and as “social dynamite” set to explode.<sup>315</sup>

Hinton has emphasized the pivotal role of “Black rebellion”—referred to as “riots” in the press—from 1964 and 1972 in the construction of crime policy as warfare.<sup>316</sup> She describes a “cycle”<sup>317</sup> in which violent police harassment of Blacks provoked protest and collective defensive force, followed by further indiscriminate police violence. Although police-initiated, these “riots” provoked white consternation and were conflated with escalating levels of crime:

From the ashes of the Watts ‘riot’ in August 1965, a growing consensus of policymakers, federal administrators, law enforcement officials, and journalists came to understand crime as specific to black urban youth. They concluded that only intensified enforcement of the law in black urban neighborhoods, where contempt for authority seemed widespread, would quell the anarchy and chaos in the nation’s streets.<sup>318</sup>

According to President Johnson, “the riots as well as other criminal and juvenile delinquency problems in our cities—are closely connected” and were “aggravated by hoodlums and habitual lawbreakers.”<sup>319</sup> Thus, collective protest against discriminatory police violence was reinterpreted as crime, while any crime with a Black perpetrator was reinterpreted as a collective challenge to legal authority. In this way, the historic Black common grievance against police brutality was reinterpreted as a common motive for criminal offending and a rationale for discriminatory suspicion.

Police increasingly understood patrolling predominantly Black communities as their primary mission, conceptualized as the military occupation of hostile territory.<sup>320</sup> The contemporaneous Vietnam conflict became a double-edged metaphor for police presence in inner cities.<sup>321</sup> Bluntly put, the War on Crime came to signify a war on Black communities. This perception would later be reflected in statistical disparities in the treatment of Blacks

<sup>314</sup> See generally Mary Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988); see also MARY DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000).

<sup>315</sup> HINTON, *From the War on Poverty to the War on Crime*, *supra* note 33, at 29–32.

<sup>316</sup> HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME*, *supra* note 33, at 14, 63–95; see also HINTON, *AMERICA ON FIRE*, *supra* note 33, at 8–10, 21–25.

<sup>317</sup> See HINTON, *America on Fire*, *supra* note 33, at 19–45.

<sup>318</sup> HINTON, *From the War on Poverty* *supra* note 33, at 12; see also STEVE HERBERT, *POLICING SPACE: TERRITORIALITY AND THE LOS ANGELES POLICE DEPARTMENT 3-7, 79-122* (1996).

<sup>319</sup> See HINTON, *America on Fire*, *supra* note 33, at 4.

<sup>320</sup> HINTON, *America On Fire* *supra* note 33 at 44–49, 54–55, *From the War on Poverty*, *supra* note 33, 182–209.

<sup>321</sup> HINTON, *America on Fire*, *supra* note 33, at 97. In some cases, weapons and tactics were redirected from Vietnam to the War on Crime. *Id.* at 11, 34.

and whites at every stage of the criminal justice process during the War on Crime.<sup>322</sup>

Hinton has demonstrated the political centrality of “riots,” by documenting over 2,000 of these conflicts between 1964 and 1972.<sup>323</sup> Police officials routinely justified police violence by exaggerating the scale of Black violence.<sup>324</sup> In the Newark rebellion of 1967, for example, 24 of 26 fatalities were Black protestors.<sup>325</sup> Matthew Lassiter reports that in at least 21 of 35 fatal shootings by police during the 1967 Detroit rebellion, “eyewitness testimony . . . or forensic evidence contradicted the official accounts.”<sup>326</sup> “Riots” sometimes played a direct role in reshaping routine police law enforcement. Thus, the Detroit Police Department responded to criticism for violating its use of force policies during the “riot,” not by changing institutional behavior but by loosening those policies to encourage deadly force against fleeing suspects. As a result, “[t]he Detroit Police Department killed at least 108 people between 1971 and 1973 . . . [a]lmost all . . . young African American males, and the majority . . . unarmed.”<sup>327</sup> Twenty-two of these victims were killed by “STRESS,” a squad of robbery decoys, presaging the one that killed Julius Tate.<sup>328</sup> Riot suppression had become a routine mode of policing.

Illinois, birthplace of the proximate cause doctrine, was another key battleground in the War on Crime. Between 1964 and 1972, Illinois endured 210 “riots.”<sup>329</sup> These unfolded in the typical cycle of racist policing, Black protest, and violent police response. The 1969 law enforcement killing of sleeping Black Panther leader Fred Hampton in Chicago was widely seen as retaliation for his calls for organized resistance to the police.<sup>330</sup> During the

<sup>322</sup> Binder & Weisberg, *supra* note 58, at 1201.

<sup>323</sup> HINTON, AMERICA ON FIRE, *supra* note 33, at 313–38. Hinton calls these incidents “rebellions” rather than “riots” to emphasize their character as politically motivated collective resistance to injustice, rather than irrational, chaotic or criminally motivated. *Id.* at 3–4. Matthew Lassiter critiques the term “riots” as disguising the primary police role in initiating and perpetrating violence. Matthew D. Lassiter, *Uprising and Occupation, 1967, DETROIT UNDER FIRE: POLICE VIOLENCE, CRIME POLITICS, AND THE STRUGGLE FOR JUSTICE IN THE CIVIL RIGHTS ERA*, U. MICH. POLICING & SOC. JUST. HIST. LABS (2020), <https://policing.umhistorylabs.lsa.umich.edu/s/detroitunderfire/page/1967> [<https://perma.cc/9JTG9-NFCJ>].

<sup>324</sup> HINTON, AMERICA ON FIRE, *supra* note 33, 94–120.

<sup>325</sup> Lassiter, *supra* note 323.

<sup>326</sup> *Id.* “2. Fatalities and Victims,” LABS, <https://policing.umhistorylabs.lsa.umich.edu/s/detroitunderfire/page/aftermath> [<https://perma.cc/Q3B8-UDCF>].

<sup>327</sup> Matthew D. Lassiter, *Stress and Radical Response*, UNDER FIRE: POLICE VIOLENCE, CRIME POLITICS, AND THE STRUGGLE FOR JUSTICE IN THE CIVIL RIGHTS ERA, U. MICH. POLICING & SOC. JUST. HIST. LABS (2020), <https://policing.umhistorylabs.lsa.umich.edu/s/detroitunderfire/page/1971-73> [<https://perma.cc/FKS2-6U3F>].

<sup>328</sup> *Id.* at 2. The Creation of STRESS: Remembering STRESS Victims, <https://policing.umhistorylabs.lsa.umich.edu/s/detroitunderfire/page/rememberingstressvictims> [<https://perma.cc/JVV8-7B75>]; HINTON, FROM THE WAR ON POVERTY, *supra* note 33 at 191–202.

<sup>329</sup> See generally HINTON, AMERICA ON FIRE, *supra* note 33, at 313–338 (2021).

<sup>330</sup> See Hans Bennett, *The Black Panthers and the Assassination of Fred Hampton*, 3 J. PAN AFR. STUDS. 215, 215–222 (2010).



next two decades, Chicago Police Commander John Burge and his subordinates tortured over a hundred Black suspects.<sup>331</sup>

Neither Burge's systematic use of torture nor his targeting of Black victims were isolated phenomena.<sup>332</sup> A 2006 study of policing in Chicago found the department widely perceived as "brutal, racist, and corrupt."<sup>333</sup> These patterns were again reflected in police shootings. One study tallied 523 civilians shot by Chicago police between 1974 and 1978, resulting in 132 killings. Although whites outnumbered Blacks 60.5% to 32.1% in the general population in 1970, 70% of those shot were Black and 20% white.<sup>334</sup> Thus Black Chicagoans were almost 7 times more likely to get shot by police than white ones. Chicago police reported killing 70 victims between 2010 and 2014 of which, 65% were Black.<sup>335</sup> Statewide, the *Washington Post* database identified 113 fatal police shootings in the state of Illinois between 2015 and January 2021.<sup>336</sup> Of these, 58% were Black, and 28% were white, although the 2020 state population was 14% Black and 77% white.<sup>337</sup> Thus, Black residents of Illinois were 11 times more likely to be killed by police than white residents.

These depressing statistics align with historical research on the origins of penal severity and militant policing. It seems racial animus has shaped not only the distribution of police violence but also background decisions to adopt violent policies and practices of policing in the first place. These practices threaten all and debase the vocation of police themselves. The reemergence of proximate cause felony murder during this period must be read against the background of these changes in policing.

### B. Race and Felony Murder

A promising strategy for critiquing felony murder connects American exceptionalism in criminal justice—reflected in such distinctive features as mass incarceration, penal severity, incapacitative sentencing, capital punish-

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<sup>331</sup> See *Survivors*, CHI. TORTURE JUST. MEM'LS, <https://chicagotorture.org/survivors/> [<https://perma.cc/R7RS-7YTE>]; Andrew S. Baer, *The Men Who Lived Underground: The Chicago Police Torture Cases and the Problem of Measuring Police Violence*, 44 J. OF URB. HIST. 262, 263 (March 2018).

<sup>332</sup> See Paul Bleakey, *A Thin-Slice of Institutionalised Police Brutality: A Tradition of Excessive Force in the Chicago Police Department*, 30 CRIM. L.F. 425,426, 429, 44 (Describing Richard Zuley, another serial torturer. One squad, "The Skullcap Crew," randomly assaulted Black civilians to spread fear. They attracted 128 brutality complaints, 87% by African Americans).

<sup>333</sup> WESLEY G. SGOGAN, *POLICE AND COMMUNITY IN CHICAGO: A TALE OF THREE CITIES* 11 (2009).

<sup>334</sup> William A. Geller & Kevin J. Karales, *Shootings of and by Chicago Police: Uncommon Crises—Part I, Shootings by Chicago Police*, 72 J. CRIM. L. & CRIMINOLOGY 1813, 1839, 1841 (1981).

<sup>335</sup> Andrew Schroedter, *Fatal Shootings By Chicago Police: Tops Among Biggest U.S. Cities*, BETTER GOV. ASS'N (July 26, 2015 5:02 AM), <https://www.bettergov.org/news/fatal-shootings-by-chicago-police-tops-among-biggest-us-cities/> [<https://perma.cc/58X8-ZKJ4>].

<sup>336</sup> *Fatal Force*, WASH. POST (Retrieved on Jan. 23, 2021), <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/> [<https://perma.cc/5BJG-FRGL>].

<sup>337</sup> *Id.*

ment and violent policing—to its “peculiar” history of racial subordination.<sup>338</sup> Significantly, felony murder became another American exception in the post-war period, as analogous doctrines were abandoned in other common law systems.<sup>339</sup> Its persistence in spite of academic argument and the American Law Institute’s proposed reform is usefully seen as one skirmish in the War on Crime. So, without dismissing familiar criticisms of felony murder as both disproportionate and inefficacious, we want to shift the focus of critique to felony murder as a vector of racial subordination. The persistence and expansion of felony murder in that period suggests that, like recidivist statutes,<sup>340</sup> felony murder became attractive less as a method of crime control than as a trope of “backlash.”<sup>341</sup> If so, disproportion along many dimensions was a feature, not a bug.

Consider the lay consensus that felony murder liability is disproportionate for co-felons who do not kill.<sup>342</sup> Felony murder seems least appealing as an expansive doctrine of accessorial liability for a killing by a co-felon. Academic and public calls for abolishing the felony murder rule often highlight defendants punished as murderers for relatively minor roles when their co-felon kills.<sup>343</sup> Moral outrage is easily mobilized on behalf of a young driver imprisoned for decades for idling in a car while a routine drug deal turned deadly.<sup>344</sup> Granting that under reasonably just economic and political cir-

<sup>338</sup> See generally C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1955); KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTEBELLUM SOUTH* (1956). On race and capital punishment in particular, see MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* 54–77, 124–36 (1973). On incapacitative sentencing, see generally Binder & Notterman, *supra* note 36. On the distinctive features of American criminal justice, see generally Binder & Weisberg, *supra* note 58; see also BINDER, *supra* note 83 at 40–49.

<sup>339</sup> Homicide Act 1957, 5 & 6 Eliz. 2, c. 11 (Eng.); Criminal Justice Act 1964 (Act No. 5/1964) (Ir.), <https://www.irishstatutebook.ie/eli/1964/act/5/enacted/en/html> [<https://perma.cc/83ZQ-88BZ>]; R. v. Martineau [1990] 2 SCR 633 (Can.).

<sup>340</sup> See generally FRANK ZIMRING, GORDON HAWKINS, & SAM KAMIN, *PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU’RE OUT IN CALIFORNIA* (2003).

<sup>341</sup> See Lawrence Glickman, *How White Backlash Controls American Progress*, *THE ATLANTIC* (May 22, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/white-backlash-nothing-new/611914/> [<https://perma.cc/J6HF-J8Z8>].

<sup>342</sup> See ROBINSON & DARLEY, *supra* note 110, at 172–173, 176–178. In the philosophical literature on punishment, disproportionate punishment is viewed as illegitimate regardless of the distributive principle dictated by the underlying theory of punishment. This idea of proportionate punishment is ancient. See, e.g., *Deuteronomy* 25:2 (English Standard Version) (“then if the guilty man deserves to be beaten, the judge shall cause him to lie down and be beaten in his presence with a number of stripes in proportion to his offense”). On some accounts it is the commitment to proportionality that distinguishes punishment and revenge. See Robert Nozick, *Philosophical Explanations* (1982) 366–368; JOHN GARDNER, *OFFENCES AND DEFENCES*, 213–25 (2007). Cf. WILLIAM IAN MILLER, *IN DEFENSE OF REVENGE*, IN *MEDIAEVAL CRIME AND SOCIAL CONTROL* (B.A. Hanawalt & D Wallace (1999) 70, 73–74 (criticizing such views).

<sup>343</sup> Adnan Khan, Video Essay, *I Didn’t Kill Anyone. Why Did I Just Serve 16 Years For Murder?* N. Y. TIMES (July 22, 2019), <https://www.nytimes.com/video/opinion/100000006616407/felony-murder-rule-adnan-khan.html> [<https://perma.cc/DT3X-4EL7>].

<sup>344</sup> Cf. *id.*

cumstances, it is wrong to aid an illegal transaction for pay,<sup>345</sup> that wrong pales in comparison to murder, as the lay public acknowledges. Such sentences punish offenders, not for killing, but for associating with killers—and so bespeak a view of crime as affiliation or identity rather than conduct. And to the extent that identity fused “Black” with “criminal” in the public mind, those who would bear this disproportionate punishment seemed to warrant no deep concern.<sup>346</sup> Indeed, officials expanding felony murder liability likely assumed their constituents wanted them to impose disproportionate punishment.

The limited statistical evidence available suggests felony murder prosecution has indeed been discriminatory. A recent study of felony murder charges in Minnesota’s Hennepin and Ramsey Counties (the Minneapolis metro area where Derek Chauvin was tried) reported that whites made up 77% of the population, but only 20% of the defendants convicted of felony murder. Thus, a person of color was 12 times more likely than a white person to be convicted of felony murder.<sup>347</sup>

A recent study examined felony murder charges since 2010 in Cook County, Illinois, which was 65% white and 24% Black according to 2019 census estimates.<sup>348</sup> During the period studied, 768 Black defendants and 80 white defendants had been charged with felony murder; and ultimately, 96 Blacks and 9 whites were sentenced for this crime.<sup>349</sup> Thus Black Cook County residents were 26 times more likely to be charged with felony murder and 29 times more likely to be convicted, than white residents. The attrition from charging to sentencing is also striking, suggesting that felony

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<sup>345</sup> Whether such lawbreaking is unjustified under conditions of deep and lasting unjust economic deprivation is a more contentious one embedded in a deep literature. For an overview see generally TOMMIE SHELBY, *DARK GHETTOS: INJUSTICE, DISSENT AND REFORM* (2018); Ekow N. Yankah, *Punishing Them All, How Criminal Justice Should Account for Mass Incarceration*, 97 RES PHILOSOPHICA 185 (2020); Richard Delgado, *Rotten Social Background: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation*, 3 L. & INEQ. 9 (1985); Jeffrey Howard, *Punishment, Socially Deprived Offenders, and Democratic Community*, 7 CRIM. L. & PHIL. 121 (2013); Stuart P Green, *Just Deserts in Unjust Societies: A Case-specific Approach*, in PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW, (R. A. Duff & Stuart P. Green eds., 2011); Jeffrie Murphy, *Marxism & Retribution*, 2 Philosophy and Public Affairs 217, 233-243 (1973).

<sup>346</sup> See Ekow N. Yankah, *Pretext and Justification: Republicanism, Policing, and Race*, 40 CARDOZO L. REV. 1543, 1560-1566 (2019); Yankah, *supra* note 38 at 1025-1033.

<sup>347</sup> Greg Egan, *Deadly Force: How George Floyd’s Killing Exposes Racial Inequities In Minnesota’s Felony Murder Doctrine*, 39 L. AND INEQ. 543, 547-548 (2021). For an early study from Dade County, Florida, see Steven D. Arkin, *Discrimination and Arbitrariness in Capital Punishment: An Analysis of Post-Furman Murder Cases in Dade County, Florida, 1973-1976*, 33 STAN. L. REV. 75, 86-89 (finding 61% of defendants charged with felony murder were Black). Dade’s population was about 15% Black. BUREAU OF THE CENSUS, 1970 CENSUS, SUPPLEMENTARY REPORT: RACE OF THE POPULATION BY COUNTY: 1970 AT 9 (1975).

<sup>348</sup> Schroedter, *supra* note 335.

<sup>349</sup> Kat Albrecht, *Data Transparency & The Disparate Impact of the Felony Murder Rule*, DUKE CENTER FOR FIREARMS LAW (August 11, 2020), <https://firearmslaw.duke.edu/2020/08/data-transparency-the-disparate-impact-of-the-felonymurder-rule/> [<https://perma.cc/JN4S-8D33>].

murder charges are viewed cynically by prosecutors, as bargaining chips, “upcharges” they add because they can.

Next, a 2020 survey of Pennsylvania’s inmate population found that 70% of those imprisoned for felony murder were Black,<sup>350</sup> although the Black population was only 12%.<sup>351</sup> Thus Blacks were 17 times more likely to be imprisoned for felony murder than other Pennsylvanians.

Finally, a review of Colorado felony murder charges and convictions from 2015-2019 presented to the legislature by the Colorado Criminal Defense Bar found that non-Hispanic whites comprised only 20% of those charged with, and 34% of those convicted of, felony murder, although that group is 68% of the state population. Blacks comprised 41% of those charged and 31% of those convicted, but only 4.6% of the population.<sup>352</sup> Thus it appeared that Blacks were 30 times more likely to be charged and 13 times more likely to be convicted of felony murder than whites.

In sum, not only can felony murder rules authorize disproportionate liability, they have been imposed on a racially disparate basis anywhere anyone has looked.

### C. *Proximate Cause: From Discriminatory Policing to Discriminatory Prosecution*

Having explored racial disparities in police violence and in felony murder charging, we now turn to the convergence of these vectors in prosecuting felons for police killings in the states that embraced broad proximate cause felony murder rules during what we have described as a racialized War on Crime. Data is limited, and of necessity, the case we make is anecdotal and qualitative rather than quantitative. But because we are concerned with meanings, the stories, and the people in them, matter.

<sup>350</sup> ANDREA LINDSAY, PHILA. LAWS. FOR SOC. EQUITY, LIFE WITHOUT PAROLE FOR SECOND-DEGREE MURDER IN PENNSYLVANIA, 23 (2021), <https://www.plsephilly.org/wp-content/uploads/2021/01/PLSE-Second-Degree-Murder-Audit-Jan-19-2021.pdf> [https://perma.cc/V2VE-2WXG].

<sup>351</sup> *Pennsylvania: 2020 Census*, U.S. CENSUS BUREAU (August 25, 2021), [https://www.census.gov/library/stories/state-by-state/pennsylvania-population-change-between-census-decade.html#:~:text=population%20\(up%207.4%25%20to%20331.4,or%20More%20Races%2010.2%25](https://www.census.gov/library/stories/state-by-state/pennsylvania-population-change-between-census-decade.html#:~:text=population%20(up%207.4%25%20to%20331.4,or%20More%20Races%2010.2%25) [https://perma.cc/QQ5P-362H].

<sup>352</sup> Colorado Criminal Defense Bar, *Felony Murder And Racial Disparities in Colorado* (briefing exhibit prepared by Hollis Whitson and Hannah Seigel Proff, based on data provided by the Colorado State Court Administrator’s Office and retrieved from the Colorado Department of Corrections at <https://www.doc.state.co.us/oss> (email from Hollis Whitson to Guyora Binder, 8/15/2022)). This data was reported in testimony of Philip Cherner of Sam Cary Bar Association, before Colorado Senate Judiciary Committee at 5:06:48 pm on 3/18/2021, available at <https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20210318/41/11143> and received by the Senate Judiciary Committee, per email from Rep. Mike Weissman to Guyora Binder, June 27, 2022). See *Quick Facts: Colorado*, U.S. CENSUS BUREAU (July 1, 2021), <https://www.census.gov/quickfacts/CO> [https://perma.cc/2CHV-SZWW]. This review counted only cases where felony murder was the only theory of murder charged.

The expansion of felony murder to embrace killings of felons, bystanders, and fellow officers by police, requires us to deny the testimony of our own eyes as to who is killing whom. Recall that, according to Robinson and Darley, killings of co-felons by those resisting the felony are those the lay public finds least punishable.<sup>353</sup> Perhaps the public finds only the dead felon at fault for having made himself liable to harm,<sup>354</sup> though it should be noted that recent cases show that the public sometimes finds the violence of those resisting felonies unjustified.<sup>355</sup> But even where there may be consensus that murder liability for the co-felon seems justified—where a felon has recklessly provoked a defensive killing—we will argue that a felony murder rule is not necessary for murder liability. In any case, the popularly perceived disproportion of felony murder in these cases seems reason enough for an agency limitation. As Robinson and Darley have argued, divergence between criteria of liability and popularly perceived desert erodes the legitimacy of criminal prohibitions on which compliance chiefly depends.<sup>356</sup>

Yet legislatures perversely added this most controversial form of felony murder during the racially inflected War on Crime. Felons were not just guilty of getting shot; they were guilty of getting shot while Black. A rule imposing flagrantly disproportionate punishment on the basis of participation in a felony, like a recidivist statute, expresses that such offenders do not deserve desert, and that their welfare is of little value. They are not recognized as partners in a social contract, sharing in its burdens and benefits,<sup>357</sup> or as included in a social welfare function, in which penal severity yields diminishing returns.<sup>358</sup> In this context, disproportionate punishment is an expression of disdain. That this disdain is expressed at the discretion of prosecutors is troubling. That their discretion can be influenced by police, in cases where police killed is more troubling still.

Proximate causation is troubling enough when imposing a tenuous link between a felon and a death no one seemed to cause: a homeowner suffers a heart attack after trapping a burglar, a police officer falls off a roof, a toddler runs into the path of a stolen car.<sup>359</sup> But proximate causation is problematic not only because it often punishes offenders disproportionately relative to their actual blameworthiness. It can also illicitly shift punishment, drawing our eyes from the truly blameworthy. Thus, in the circumstances of an unjustified police killing, the power of prosecutors to indict for felony murder enables them to shift blame from the appropriate person onto the shoulders

<sup>353</sup> ROBINSON & DARLEY, *supra* note 110, at 172-173, 176-178.

<sup>354</sup> See Christopher H. Wellman, *The Rights Forfeiture Theory of Punishment* 122 ETHICS 371 (2012).

<sup>355</sup> See, e.g., Clay, *supra* note 52.

<sup>356</sup> See Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. L. REV. 453, 457-58, 468-490 (1997).

<sup>357</sup> For the classic formulation of this Kantian account of retributive desert, see Herbert Morris, *Persons and Punishment*, 52 THE MONIST 475 (October 1968).

<sup>358</sup> For critique of incapacitation as violating the utility principle by excluding offenders from the social welfare calculus, see Binder & Notterman, *supra* note 36, at 3-4, 43-50.

<sup>359</sup> See Binder, *supra* note 12, at 405-407 (collecting several cases where death seemed too unlikely *ex ante* to impose blame).

of the defendant. This is unfair not only to the defendant unjustly blamed but to the victim left unvindicated. Indeed, in some cases, like that of John Givens, a felon blamed for an officer's unjustified killing of a co-felon is also a victim of police abuse. Shifting the appropriate legal blame spares the appropriate agent censure and punishment and obscures the wrongful nature of her actions.

In these scenarios, the defendant serves a lengthy sentence in place of a wrongdoer too privileged to punish. Here, a felon, who after all was engaged in wrongdoing, makes for a tempting defendant, a scapegoat on whom to heap blame. And all too often that defendant—poor, Black, shadowed by a record, inevitably spending most of his time with others similarly circumstanced—is ready-made in our social imagination to be blamed and banished.<sup>360</sup> This natural temptation makes the use of proximate cause to shift blame from the privileged to the pariah all too predictable. In this process, the truly culpable wrongdoer escapes not just punishment but even inspection.<sup>361</sup> Thus extended by proximate causation, felony murder liability has too often obscured and excused police violence, particularly against Black and Brown men.

We can best see this convergence of disproportion and discrimination in both policing and prosecution in Illinois. The dynamic is most visible there because of the long and successful struggle of activists and journalists to expose police violence and prosecutorial connivance<sup>362</sup> and to finally persuade legislators to impose an agency limit on felony murder.<sup>363</sup> Illinois is also a fitting place to survey because it was the birthplace of the proximate cause doctrine in the *Payne* and *Hickman* cases. Later decisions there would confirm that felony murder liability extended to the deaths of co-felons and the killing of a co-felon by police or a resisting victim.<sup>364</sup>

The interaction of this broad felony murder rule with racial profiling is well illustrated by the notorious 1989 Illinois case of *People v. Jenkins*.<sup>365</sup> Officers Hattenberger and Brunkella of the Chicago Police Department were dispatched as part of a “tactical squad” to suppress drug-dealing near a school. Hattenberger observed Allison Jenkins, a Black male immigrant from Belize, approach a vehicle and receive a bag of potato chips, which the police later claimed contained marijuana. Hattenberger confronted Jenkins

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<sup>360</sup> See *id.*; Yankah, *Good Guys and Bad Guys*, *supra* note 38 at 1025-1026; CYNTHIA LEE, *MURDER AND THE REASONABLE MAN* 5 (2003).

<sup>361</sup> See generally Ekow N. Yankah, *Legal Hypocrisy*, 32 *RATIO JURIS* 2 (2019) (exploring the expressive wrongs and potential harms of legal doctrines that obscure blameworthiness).

<sup>362</sup> See, e.g., Flowers & Macaraeg, *supra* note 112.

<sup>363</sup> See, e.g., Jobi Cates, *Testimony to the Illinois Senate Executive Committee: In Support of HB163, SA2, RESTORE JUST. ILL.* (Jan. 9, 2021 1 p.m.), <https://ilga.gov/senate/101CommitteeWrittenTestimony/SEXC//20210109%201300%20PM/HB163,%20SA2%20Proponent%20Jobi%20Cates%20Restore%20Justice%20Illinois.pdf> [<https://perma.cc/6DYV-Q6TE>].

<sup>364</sup> See *People v. Lowery*, 687 N.E.2d 973, 975-979 (1997) (holding that felons could be held liable for deaths of co-felons directly caused by a party to the felony); *People v. Graham*, 477 N. E.2d 1342, 1346-49(1985) (holding that felons could be held liable for deaths of co-felons directly caused by a party to the felony).

<sup>365</sup> 190 Ill. App.3d 115 (1989).

with a cocked .45.<sup>366</sup> According to Hattenberger, Jenkins ran and the officer “chambered a bullet,” and pursued.<sup>367</sup> According to Jenkins, he backed away until he collided with Brunkella. All witnesses agreed that Hattenberger, still waving the gun, tackled Jenkins.<sup>368</sup> All three men fell, and Hattenberger shot and killed Brunkella.<sup>369</sup> Hattenberger claimed that unnamed sources had told him that Jenkins carried a gun and that Jenkins had moved his hands to his middle.<sup>370</sup> He further claimed that Jenkins had elbowed him in the chest and that Jenkins’ later effort to shake himself free from Hattenberger’s grip caused Hattenberger to fall.<sup>371</sup> Jenkins denied striking Hattenberger, instead claiming that the gun discharged when Hattenberger struck him with it.<sup>372</sup> Jenkins was convicted of battery, a felony when committed against a police officer, and felony murder. Although the jury instructions (initially proposed by the prosecution) failed to require the jury to find that Jenkins foreseeably caused Brunkella’s death, this conviction was upheld on appeal.<sup>373</sup> The Seventh Circuit later ruled the instruction harmless error, as no juror could have reasonably doubted Jenkins’ guilt.<sup>374</sup> That Jenkins fled from a death threat proved he foresaw a danger of death.

Nevertheless, a *Chicago Tribune* story quoted Jenkins as saying he believed he might not have been convicted if there were more than one Black on the jury.<sup>375</sup> Nine other Black jurors were stricken, four by the prosecution, for such ostensibly race-neutral reasons as living in a high crime area, renting, having been falsely accused of crime, having not worked long at their current jobs, and being poorly dressed.<sup>376</sup> The lone Black juror, a young teacher, tearfully reported that she held out for acquittal for nine hours before giving in but “couldn’t do it [her]self.”<sup>377</sup> She said that the other jurors could not believe that police would use unnecessary force: “they were completely out of touch with reality, with the way things can be (in the city) and are.”<sup>378</sup> Jurors never learned that Hattenberger had previously shot *another*

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<sup>366</sup> Linnet Myers, *Suspect Faces Murder Charge in Cop’s Killing by Partner*, CHI. TRIB., October 8, 1986.

<sup>367</sup> *Jenkins*, 190 Ill. App.3d at 121.

<sup>368</sup> See Myers, *supra* note 366.

<sup>369</sup> *Jenkins*, 190 Ill. App.3d at 122.

<sup>370</sup> *Id.* at 121.

<sup>371</sup> *Id.* at 121–22.

<sup>372</sup> *Id.* at 123.

<sup>373</sup> *Id.*

<sup>374</sup> See *Jenkins v. Nelson*, 157 F.3d 485 (7th Cir. 1998). The case was upheld in a federal habeas, which concluded that the error in instructing the jury, although a violation of due process, was harmless: “Jenkins’ conduct was in the very heartland of this expanded concept of felony murder. But for Jenkins’ struggling, Officer Hattenberger’s gun would not have discharged. Additionally, it is foreseeable that struggling with an armed police officer could cause the officer’s gun to discharge, injuring anyone at the scene. . . . [A] properly instructed, rational jury would have found causation beyond a reasonable doubt.” *Id.* at 496; See also Linnet Myers, *A Shot is Fired, a Cop Dies, But is it Murder?* CHI. TRIB., Oct. 30, 1987; Jack Clark, *Who Killed Jay Brunkella?* CHI. READER, Jan. 25, 1988.

<sup>375</sup> Myers, *supra* note 374.

<sup>376</sup> See *Jenkins*, 190 Ill. App.3d at 141.

<sup>377</sup> Myers, *supra* note 374; Clark, *supra* note 374.

<sup>378</sup> Myers, *supra* note 376.

officer he bumped into with a cocked gun.<sup>379</sup> A second juror later became convinced Hattenberger had lied about the circumstances of the shooting after visiting the scene.<sup>380</sup> Even some police blamed Hattenberger and criticized the prosecution.<sup>381</sup> The case illustrates how easily self-serving police testimony can persuade white jurors—and judges—that a Black suspect caused police to use unreasonable force.

A 2016 *Chicago Reader* investigative report identified a pattern of felony murder prosecutions of the targets of particularly troubling uses of police force in Cook County.<sup>382</sup> The authors reported finding ten arrestees charged with felony murder for police killings during the preceding five years.<sup>383</sup> The cases also illustrate patterns of racial disparity in police shootings and in felony murder charges. These included the cases of John Givens and Leland Dudley, described above, convicted of the felony murder of their partner David Strong, after police shot all three unarmed Black men multiple times.<sup>384</sup> Officers offered the strange explanation that they fired volleys of bullets into the stationary vehicle because an officer might have been under it.<sup>385</sup>

Another disturbing case of fatal police violence was the killing of Marquise Sampson. Tevin Louis and Sampson, his best friend, were troubled Chicago teens navigating difficult childhoods pocked with foster care and poverty.<sup>386</sup> On a summer evening in 2012, the 19-year-olds allegedly robbed a local restaurant of \$1200 when Sampson crossed paths with police officer Dicarlo.<sup>387</sup> Sampson and Louis fled in separate directions and Dicarlo pursued Sampson. Although Dicarlo claimed Sampson pointed a gun at him, video footage did not show that.<sup>388</sup> Dicarlo shot Sampson three times, once in the back, killing him. Although Louis did not arrive on the scene until

<sup>379</sup> *Id.*

<sup>380</sup> *See id.*

<sup>381</sup> *See* Clark, *supra* note 374.

<sup>382</sup> Flowers & Macaraeg, *supra* note 113. The story recounted the 2006 case of Tristan Scaggs, a passenger in a stolen car at which police fired almost 70 bullets, with no return fire. Scaggs, who was shot by police while lying on the ground, was charged with felony murder for the killing of his two companions by police. All three shooting victims were Black. *See also* People v. Scaggs, 2021 Ill. App. 173017 (Ill. App. Ct. 2021).

<sup>383</sup> Flowers & Macaraeg, *supra* note 113.

<sup>384</sup> Givens was sentenced to 20 years and Dudley to 25. *See* Peter Hancock, *U.S. Supreme Court won't review Illinois 'Felony Murder' Law*, SO. ILLINOISAN (Nov. 25, 2019), [https://thesouthern.com/news/local/crime-and-courts/us-supreme-court-won-t-review-illinois-felony-murder-law/article\\_84b16866-d391-5996-91ec-3922cd31f554.html](https://thesouthern.com/news/local/crime-and-courts/us-supreme-court-won-t-review-illinois-felony-murder-law/article_84b16866-d391-5996-91ec-3922cd31f554.html) [<https://perma.cc/7GWT-GLPZ>].

<sup>385</sup> Petition for Writ Certiorari, Givens v. Illinois, 2018 IL App (1st) 152031-U\* at P\*12, [https://www.supremecourt.gov/DocketPDF/18/18-9761/103313/20190618144715676\\_Givens%20cert%20Pet%20.pdf](https://www.supremecourt.gov/DocketPDF/18/18-9761/103313/20190618144715676_Givens%20cert%20Pet%20.pdf) [<https://perma.cc/62CM-CGTY>] at pp. 4-6

<sup>386</sup> Flowers & Macaraeg, *supra* note 113.

<sup>387</sup> *Id.*

<sup>388</sup> *Id.*; *see also* Amy Goodman, Alison Flowers, Sarah Macaraeg, *A Shocking Story of How a Chicago Cop Killed a Teen — Then Locked Up His Best Friend for the Murder*, DEMOCRACY NOW (August 22, 2016), [https://www.democracynow.org/2016/8/22/a\\_shocking\\_story\\_of\\_how\\_a](https://www.democracynow.org/2016/8/22/a_shocking_story_of_how_a) [<https://perma.cc/3KTM-WNWN>].



after Sampson had been shot, Louis was charged with the murder, while Dicarlo won a medal.<sup>389</sup>

Other cases included that of Timothy Jones, a Black man, charged with the death of motorist Jacqueline Reynolds, a Black woman,<sup>390</sup> whom a police vehicle killed while chasing Jones after he fled a home invasion burglary.<sup>391</sup> Similarly, Erik Martinez, Latino, a passenger in a car driven by Rafael Cruz, also Latino, was charged with Cruz's murder after Cruz was shot by an officer who had previously killed three other civilians. Martinez was accused of having provoked this shooting by firing at another car and so was charged with felony murder.<sup>392</sup> Martel Odom and Akeem Clarke, both Black, were charged with the felony murder of their accomplice, 17 year-old Cedric Chatman, in a carjacking. The unarmed Chatman (also Black) was fatally shot by police while fleeing. Odom and Clarke were blocks away.<sup>393</sup>

Devante Graham, then 17, and Emmanuel Johnson, then 15, both Black, were charged with the felony murder of their accomplice in robbery, when 16 year old Deonta Mackey, (also Black) was fatally shot by the robbery victim, an off-duty officer.<sup>394</sup> Finally, Breanna Patterson, a 20 year old Black woman, was charged with felony murder after police fatally shot her accomplice in robbery, Charles Smith, also Black.<sup>395</sup>

Of the ten felony murder defendants charged with killings actually committed by police, nine were Black, and none were white. Six of seven victims were Black. None were white. As a result of cases like these, activists

<sup>389</sup> Flowers & Macaraeg, *supra* note 113.

<sup>390</sup> Jacqueline Reynolds, HOMICIDE WATCH CHI., <http://chicago.homicidewatch.org/category/victims/jacqueline-reynolds/index.html> [https://perma.cc/8ATZ-RFNR]. Jones was sentenced to 22-28 years. Steve Schmadeke, *Man Given 28 Years in Prison for Chicago Police Chase that Turned Fatal*, CHI. TRIB. (May 1, 2015), <https://www.chicagotribune.com/news/breaking/ct-fatal-police-chase-sentencing-met-20150501-story.html> [https://perma.cc/CJ6R-MS5Y].

<sup>391</sup> See Flowers & Macaraeg, *supra* note 113. Criminal, *76th and Yates*, *supra* note 113.

<sup>392</sup> See Flowers & Macaraeg, *supra* note 113.

<sup>393</sup> See Emily Morris, *2 Men Charged with Carjacking, Murder After Fatal Police Shooting*, DNA INFO (Jan. 9, 2015), <https://www.dnainfo.com/chicago/20130109/south-shore-above-79th/2-men-charged-with-carjacking-murder-after-fatal-police-shooting/> [https://perma.cc/58VT-LFBJ]; Email from Sarah Macaraeg, to Guyora Binder (Sept. 13, 2021) (on file with author). Each eventually pled guilty to robbery and auto-theft and was sentenced to 10 years. See Jorden Owen, *Two Men Get 10 Years in Prison for Fatal Police Chase and Shooting*, CHI. SUN TIMES (Sept. 22, 2015), <https://chicago.suntimes.com/2015/9/22/18442502/two-men-get-10-years-in-prison-for-fatal-police-chase-and-shooting> [https://perma.cc/5MS9-NCZG].

<sup>394</sup> *Emmanuel Johnson*, HOMICIDE WATCH CHI., <http://chicago.homicidewatch.org/category/suspects/emmanuel-johnson/index.html> [https://perma.cc/484E-M4NF]. Graham was sentenced to 25 years. Rummuna Hussain, *Man Gets 25 Years for Deadly Robbery That Claimed Life of Cohort*, CHI. SUN TIMES (Apr. 26, 2016), <https://chicago.cbslocal.com/2016/04/27/armed-robbery-devante-graham-guilty-plea/> [https://perma.cc/DEP9-V9S5].

<sup>395</sup> See *Woman Charged in Connection with Fatal Police-Involved Shooting in Englewood*, ABC 7 CHICAGO (Feb. 2, 2016), <https://abc7chicago.com/englewood-police-standoff-73rd-and-paulina/1183467/> [https://perma.cc/4UJM-FRHP]; *Charles M Smith*, EB WIKI, <https://ebwiki.org/cases/charles-m-smith> [https://perma.cc/BH87-3PAZ]. Patterson ultimately received an 18-year sentence for robbery. See *INSIDE PRISON*, Breanna Patterson (last visited Sep. 3, 2022), [https://www.insideprison.com/state-inmate-search.asp?lnam=Patterson&fnam=Breanna&county=cook&st\\_abb=IL&cid=2026185172](https://www.insideprison.com/state-inmate-search.asp?lnam=Patterson&fnam=Breanna&county=cook&st_abb=IL&cid=2026185172) [https://perma.cc/J5RC-2EVK].

in Illinois framed felony murder reform as a racial justice issue, and in 2021 the Illinois legislature imposed an agency limit on felony murder as part of a comprehensive reform bill targeting police misconduct.<sup>396</sup> In Colorado, similarly, supporters framed a 2021 bill adopting an agency rule as a racial justice reform.<sup>397</sup>

But this pattern is not limited to Illinois and Colorado. Similar examples continue to proliferate across the country. Consider D'Angelo Burgess, pulled over for a routine traffic stop in Tulsa, Oklahoma.<sup>398</sup> Burgess panicked and fled from police, who pursued at over 100 mph.<sup>399</sup> Policing experts counsel against high-speed chases as among the most dangerous policing practices and indeed, such chases violated department policy.<sup>400</sup> One officer lost control of his car and struck and killed fellow officer Heath Meyer. Officer Meyer became the eighth person in just over a year killed in

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<sup>396</sup> Pivotal in this effort was the 2019 killing of 14 year old Ja'Quan Swopes, fatally shot by a suburban homeowner in Lake County when he and five other black teens attempted to steal the homeowner's car. The remaining five were initially charged with felony murder. See Jobi Cates, *Lake County Case Shows Why Illinois Should Abolish The Felony Murder Rule*, *Chicago Sun-Times*, CHI. SUN TIMES (August 15, 2019), <https://chicago.suntimes.com/2019/8/15/20807715/felony-murder-rule-illinois-gurnee-teens-lake-county-restore-justice-jobi-cates> [<https://perma.cc/NK2N-YHQJ>]; Frank S. Aberholden, *Community Meeting Focuses on Felony Murder Law Used to Charge 5 Teens in Botched Lake County Car Theft*, CHI. TRIB. (Sept. 5, 2019), <https://www.chicagotribune.com/suburbs/lake-county-news-sun/ct-lns-old-mill-creek-shooting-meeting-st-0904-20190905-zsdiwspypjfitbqvjalgpj3tm-story.html> [<https://perma.cc/2E4H-Q9D4>]. In legislative testimony in support of what would become the felony murder provision of HB 3653, abolishing Illinois' proximate cause rule, the group also referenced the Timothy Jones case. Cates, *supra* note 363. Proximate cause cases like these helped reframe felony murder reform as an issue of racial justice in Illinois.

<sup>397</sup> See Marianne Goodland, *Felony Murder Bill Wins Preliminary Approval in the House*, COLO. POL. (Apr. 23, 2021) ("We have a doctrine that is profoundly problematic' against people of color [sponsor Mike] Weissman added."); *Changes to Felony Murder: Hearing on SB21-124 Before the Senate Judiciary Committee*, 2021 Leg., 72nd Sess. (Co. 2021) (testimony of Curtis Brooks, Philip Cherner), <https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20210318/41/11143> [<https://perma.cc/CA4U-XCW7>].

<sup>398</sup> See Schwartzapfel, *supra* note 113.

<sup>399</sup> See *id.*

<sup>400</sup> See John P. Gross, *Unguided Missiles: Why the Supreme Court Should Prohibit Officers From Shooting at Moving Vehicles*, 164 PENN. L. REV. ONLINE 135, 137-141 (2016); Brief for The Association of Trial Lawyers of America as Amicus Curiae Supporting Respondents, *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) (No. 96-1337); Tim Grimmond, *Police Pursuits: Traveling a Collision Course*, POLICE CHIEF, July 1993, at 43, 47; Michael Avery, *Police Chases: More Deadly Than a Speeding Bullet?*, Trial, Dec. 1 (1997); M. Amanda Racines, Case Note, *Constitutional Law—To Chase or Not to Chase: What "Shocks the Conscience" in High-Speed Police Pursuits?*—*County of Sacramento v. Lewis*, 523 U.S. 833 (1998), 73 TEMP L. REV. 413, 438-439. In three notorious analogous cases, the Supreme Court has limited the Constitutional restrictions on police high-speed chases that lead to death or serious injury. In *Sacramento v. Lewis*, the Court held that police pursuit must "shock the conscience" for a due process violation to occur. 523 U.S. 833, 846-847 (1998). In *Scott v. Harris*, the Supreme Court ruled that an officer's attempt to terminate a high-speed chase by forcing a fleeing offender off the road did not constitute unreasonable force even if it put that driver's life and those of bystanders in jeopardy. 550 U.S. 372, 379-380, 385-386 (2007). And in *Plumbhoff v. Rickard*, 572 U.S. 765, 769, 775-778(2014), the court applied *Scott v. Harris*, to justify firing 15 shots into an immobilized car to end a chase. *Id.* at 777.

Oklahoma in a police chase, two of them, uninvolved drivers.<sup>401</sup> It was ultimately Burgess who was charged with felony murder.<sup>402</sup> Even if one believes Burgess shares blame for Meyer's death, the felony murder charge effaces the role of irresponsible police behavior. Only now, years later, has the State legislature began to consider regulating police chases.<sup>403</sup>

Or consider 15-year-old Lakeith Smith, who participated in two burglaries in Millbrook Alabama, along with four other Black teens, two of whom were armed. Police confronted and exchanged gunfire with the group, fatally shooting 16-year-old A'Donte Washington. Smith, who was unarmed, was convicted of felony murder along with other crimes, and received consecutive sentences totaling 65 years.<sup>404</sup>

Or 14-year-old Johnny Reed, charged with the felony murder along with two others, for the killing by Phoenix police of 19 year old Jacob Harris en route from a robbery. Police, following the group in six unmarked cars, disabled the vehicle and threw a flash grenade. Jacob Harris ran from the car. Police fired a volley of shots, striking him fatally in the back. Although police claimed that he fired shots, neither video nor ballistics evidence confirmed this. Harris was Black, as are two of those charged with his murder.<sup>405</sup>

Or the cases of Christopher Ransom, who held up a phone store in Queens with a toy gun, and the unarmed Jagger Freeman who served as a lookout. After police surrounded the store, Ransom emerged, along with

<sup>401</sup> A similar tragic story occurred last year when a police chase resulted in a crash between a police car and an Uber driver, Bismark Asare, killing Asare. See *Texas Uber Driver Killed in Crash with Police Involved in High-speed Chase*, WLVT 8 NEWS (Aug. 2, 2020), <https://www.wlvt.tv/2020/08/02/texas-uber-driver-killed-in-crash-with-police-involved-in-high-speed-chase/> [https://perma.cc/XNK7-WS6P]. The fleeing suspect was apprehended and charged with felony murder. See Brian White, *Texas Uber Driver Killed In Crash With Police-Involved in High-Speed Chase*, ATT'Y BRIAN WHITE PERS. INJ. LAWS. (August 18, 2020), <https://attorneybrianwhite.com/blog/texas-uber-driver-killed-in-crash-with-police-involved-in-high-speed-chase/> [https://perma.cc/TYV5-FQWP].

<sup>402</sup> See Corey Jones, *Fleeing Driver Convicted of Felony Murder in Death of OHP Lieutenant in Trooper Collision*, TULSA WORLD (Mar. 11, 2019), [https://madison.com/news/state-and-regional/fleeing-driver-convicted-of-felony-murder-in-death-of-ohp-lieutenant-in-trooper-collision/article\\_4e2f5f13-2ee6-5b3e-9069-c6a7d666777d.html](https://madison.com/news/state-and-regional/fleeing-driver-convicted-of-felony-murder-in-death-of-ohp-lieutenant-in-trooper-collision/article_4e2f5f13-2ee6-5b3e-9069-c6a7d666777d.html) [https://perma.cc/HB63-8BDY].

<sup>403</sup> See Melissa Scavelli, *Lawmaker Requests Study of Police Pursuit Policies*, J. REC. (July 13, 2021), <https://okcfox.com/news/local/lawmaker-requests-police-pursuit-study-to-create-safer-policy> [https://perma.cc/Q89Z-3NKE].

<sup>404</sup> See Jamiles Lartey, *Alabama Police Shot a Teen Dead, but His Friend Got 30 Years for the Murder*, THE GUARDIAN (Apr. 15, 2018), <https://www.theguardian.com/us-news/2018/apr/15/alabama-accomplice-law-lakeith-smith> [https://perma.cc/H4PN-DLZH]. The sentence was subsequently reduced to 55 years. See Krista Johnson, *Accomplice Law Case of Lakeith Smith, Sentenced To 55 Years, Gains Renewed Interest*, MONTGOMERY ADVERTISER (June 11, 2020), <https://www.montgomeryadvertiser.com/story/news/crime/2020/06/11/alabama-case-lakeith-smith-inmate-sentenced-55-years-gains-renewed-interest/5344257002/> [https://perma.cc/A2BV-NNRL].

<sup>405</sup> See Meg O'Connor, *Police Shot Jacob Harris—Then Charged His Friends with Murder*, PHX. NEW TIMES (June 28, 2019), <https://www.phoenixnewtimes.com/news/phoenix-cops-shot-jacob-harris-charged-friends-with-murder-11319507> [https://perma.cc/X4U7-XKYY]; Emily Wilder, *A Police Officer Killed Jacob Harris, But His Unarmed Friends Were Charged with His Murder*, BUZZFEED NEWS (August 24, 2021), <https://www.buzzfeednews.com/article/emilywilder/police-shooting-felony-murder-third-party> [https://perma.cc/QP8B-DJBP].

two detectives in plain clothes. They were met with a volley of 42 shots fired by seven officers. Ransom survived multiple gunshots, but one of the detectives did not. Ransom and Freeman, both Black were both charged with felony murder.<sup>406</sup> Freeman was recently convicted of felony murder.<sup>407</sup>

Lastly, consider the analogous story of the chronically mentally ill Glenn Broadnax, also Black, who tried to kill himself in traffic in Times Square.<sup>408</sup> When he attracted police attention, the police response to his behavior was to open fire in a crowded, world famous tourist destination, striking two innocent bystanders.<sup>409</sup> One, ironically a mental health expert trained to handle just such situations, observed that police missed every opportunity to deescalate the situation; the other, disabled by her injuries, has sued the NYPD.<sup>410</sup> Again, the police response avoided scrutiny when prosecutors convicted the mentally ill Broadnax of assault crimes.<sup>411</sup>

Too be sure, none of these stories is simple.<sup>412</sup> Many of those charged engaged in dangerous and reprehensible criminal behavior. But it is not only perfect people who deserve to survive police encounters. Policing is not just a matter of *if* the police become involved but *how* the police use force once they are involved. To be sure police proverbially make “split second life and death” decisions.<sup>413</sup> But occasions when deliberation is impossible are too

<sup>406</sup> See *Christopher Ransom Pleads Guilty in Friendly Fire Death of NYPD Detective Brian Simonsen*, EYEWITNESS NEWS (Oct 20, 2021), <https://abc7ny.com/christopher-ransom-brian-simonsen-jagger-freeman-t-mobile-store-robbery/11147156/> [<https://perma.cc/YT49-AYWT>].

<sup>407</sup> See Deshenia Andrews, *Queens Man convicted of Murder in NYPD Cops Friendly Fire Death*, N.Y. POST (June 13, 2022), <https://nypost.com/2022/06/13/man-convicted-of-murder-in-nypd-cops-friendly-fire-death/> [<https://perma.cc/K63K-XXXV>].

<sup>408</sup> See Ben Yakas, *Mentally Ill Man Charged With Assault Because Cops Shot Two Bystanders*, THE GOTHAMIST (December 5, 2013).

<sup>409</sup> See *id.*

<sup>410</sup> See Jon Campbell, *After NYPD Open Fire On an Unarmed, Mentally-Ill Man in Times Square, Who Gets the Blame?* THE VILLAGE VOICE (August 10, 2016), <https://www.villagevoice.com/2016/08/10/after-the-nypd-opened-fire-on-an-unarmed-mentally-ill-man-in-times-square-who-gets-the-blame/> [<https://perma.cc/ZAE8-7BNA>].

<sup>411</sup> Rebecca Rosenberg, *‘Deranged’ Times Square Man Sentenced to Two Years in Prison*, N.Y. POST (Mar. 11, 2015), <https://nypost.com/2015/03/11/deranged-times-square-man-sentenced-to-two-years-in-prison/> [<https://perma.cc/K9DA-EHC7>].

<sup>412</sup> While this article focuses on the way felony murder obscures unreasonable police behavior, a similar observation could be made in cases of questionable non-police uses of self-defense. See, e.g., *Robinson v. State*, 782 S.E.2d 657, 661-662 (Ga. 2016) (finding defendant guilty of felony murder of his accomplice in an attempted robbery of a business after the accomplice was shot in self-defense by the business owner and defendant failed to immediately inform police that wounded accomplice was in crashed and abandoned getaway vehicle); *People v. Lowery*, 687 N.E.2d 973, 977-979 (Ill. 1997) (finding defendant guilty of felony murder where the target of an attempted robbery wrestled the gun away from defendant and accidentally shot a bystander as defendant fled the scene of the robbery); *Layman v. State*, 42 N.E.3d 972, 979-981 (Ind. 2015) (reaffirming proximate cause standard, but nevertheless overturning felony murder convictions for two defendants who burglarized a home while unarmed and whose co-conspirator was shot and killed by the home’s occupant, providing insufficient evidence of foreseeability).

<sup>413</sup> The oft (and overused) incantation that deadly force by police is often dispensed with “split second” decisions is recognized in our Fourth Amendment jurisprudence, even in circumstances that seem to utterly belie such urgency. See, e.g., *Graham v. Connor*, 490 U.S. 386, 396-97 (1989). It is further reified in our policing norms. Seth W. Stoughton, *Policing Facts*,

often the product of avoidable choices. Police operations that create predictably explosive and fatal circumstances should be recognized as reckless. Indeed, the deaths that arise from these volatile setups are in some ways more blameworthy than rash police shootings in sudden circumstances. In reckless stings like the Saunders case, stakeouts like the Hickman case, needless chases like the Burgess case, or stopping cars with guns, as in the Givens case, police deliberately construct high noon confrontations and games of chicken.<sup>414</sup>

Indeed, a consistent criticism in high profile police killings has been the over-eagerness of police to charge into situations, thus forcing split-second decisions. Thus, the killing of Tamir Rice was stunning in part because of how quickly his life was forfeited. The video shows Officer Loehmann's car pull into the frame and Rice's body crumpling nearly instantaneously.<sup>415</sup> Loehmann's contention that he had to make an instantaneous decision ignores the obvious fact that it was his aggressive insertion into the situation before assessing it, that created this false dilemma.<sup>416</sup> Likewise, police killings cannot be justified by the urgency of the moment where police tactics themselves staged urgent life and death decisions. Zooming out from the moment of the shooting itself and inspecting the wisdom of tactics that narrow options into fatal pathways exposes many police killings as unnecessary.<sup>417</sup>

But where blame for those deaths can be shifted onto another criminal defendant, it is all too easy to avoid that inspection. Thus, the possibility of shifting all blame to a co-felon perversely incentivizes police violence. Given a choice between two culprits, one a member of the cohesive organization on which the prosecutor depends to prove every case, and the other chargeable with another crime, who will the prosecutor side with? It is not only the felons who find themselves outgunned in these confrontations.

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88 TUL. L. REV. 847, 865 (2014). But too little attention is paid to the unwise, negligent or reckless police decisions which force such "split second" decisions. See Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 228–232, 291–293 (2017); James J. Fyfe, *The Split-Second Syndrome and Other Determinants of Police Violence*, in CRITICAL ISSUES IN POLICING: CONTEMPORARY READINGS 466, 475–77 (Roger G. Dunham & Geoffrey P. Alpert eds., (2010)).

<sup>414</sup> Garrett & Stoughton, *A Tactical Fourth Amendment*, *supra* note 413 at 214–220, 228.

<sup>415</sup> *Id.* at 214; S. LAMAR SIMS, INVESTIGATION INTO THE OFFICER-INVOLVED SHOOTING OF TAMIR RICE WHICH OCCURRED AT CUDELL PARK, 1910 WEST BOULEVARD, CLEVELAND, OH, ON NOVEMBER 22, 2014 at 12 (Oct. 6, 2015) [hereinafter Sims Report], <http://prosecutor.cuyahogacounty.us/pdf/prosecutor/en-US/Tamir%20Rice%20Investigation/Sims-Review%20of%20Deadly%20Force-Tamir%20Rice.pdf> [<https://perma.cc/DCX9-ATCS>]; KIMBERLY A. CRAWFORD, REVIEW OF DEADLY FORCE INCIDENT: TAMIR RICE 2–3 [hereinafter Crawford Report], [http://prosecutor.cuyahogacounty.us/pdf\\_prosecutor/en-US/Tamir%20Rice%20Investigation/Crawford-Review%20of%20Deadly%20Force-Tamir%20Rice.pdf](http://prosecutor.cuyahogacounty.us/pdf_prosecutor/en-US/Tamir%20Rice%20Investigation/Crawford-Review%20of%20Deadly%20Force-Tamir%20Rice.pdf) [<https://perma.cc/9GRM-NLBC>].

<sup>416</sup> *Id.* at 215–216, 220, 260–261.

<sup>417</sup> See Garrett & Stoughton, *A Tactical Fourth Amendent* *supra* note 413, at 228–232, 291–293.

Of course, shoot-outs are dangerous for all and most police, one hopes, do not seek danger.<sup>418</sup> Thus, the most salient incentive for police will be the possibility of harm to themselves. But budgets must be justified, brass will stage theatrical operations, and when forced into danger, caution will push police to shoot first.<sup>419</sup> What is less clear is how to incentivize police to be solicitous of the lives of even felons they must arrest.<sup>420</sup> We cannot prove that rewarding killing with a collar as well as a medal actually adds to the carnage. But it expresses, through our legal doctrine, that the lives and futures of felons are forfeit.

Moreover, immunizing police from scrutiny permits them to engage in tactics that show Black life is considered cheap. After all, incentives are unnecessary where police already highly value the lives of civilians.<sup>421</sup> We are unlikely to see police set up explosive stings in wealthy, white neighborhoods.<sup>422</sup> But where the lives of the likely victims are not valued, being shielded from the consequences liberates the police to implement dangerous policing tactics.<sup>423</sup> Regardless of the legal regime, a sting that would be un-

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<sup>418</sup> The classic scholarship in the field was more focused on reducing danger to *officers* by avoiding circumstances calling for deadly force. See, e.g., POLICE ORGANIZATION AND TRAINING: INNOVATIONS IN RESEARCH AND PRACTICE 159 (M.R. Haberfeld et al. eds., 2012) (interviewing seminal policing practice scholar James Joseph Fyfe).

<sup>419</sup> This is probably exacerbated by the systematic lack of clear guidance in police departments as to the appropriate levels of force to use in a wide range of situations. See Garrett & Stoughton, *supra* note 413, at 280-285.

<sup>420</sup> For example, there remains a split in American jurisprudence as to whether the Fourth Amendment should restrict police force to the least violent methods available. Compare Griffith v. Coburn, 473 F.3d 650, 658 (6th Cir. 2007) (requiring officers to effectuate seizures using “the least intrusive means reasonably available” (quoting *St. John v. Hickey*, 411 F.3d 762, 774-75 (6th Cir. 2005) (internal quotation marks omitted)), with *Wilkinson v. Torres*, 610 F.3d 546, 551 (9th Cir. 2010) (holding availability of a less-intrusive alternative does not make use of deadly force unreasonable (citing *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994))). See also SAMUEL WALKER, THE NEW WORLD OF POLICE ACCOUNTABILITY 51 (1st ed. 2005) (describing minimum-force policies as the “prevailing standard”); *Police Use of Force*, U.S. DEP’T OF JUSTICE, NAT’L INST. OF JUST. (Apr. 13, 2015), <https://nij.ojp.gov/topics/law-enforcement/use-of-force> [<https://perma.cc/974J-5CSW>].

<sup>421</sup> See Siegel, *supra* note 45, at 1074-1081; Osagie Obasogie & Zach Newman, *Black Lives Matter and Respectability Politics in Local News Accounts of Officer-Involved Civilian Deaths: An Early Empirical Assessment*, 2016 WIS. L. REV. 541, 544; Osagie K. Obasogie & Zachary Newman, *Police Violence, Use of Force Policies, and Public Health*, 43 AM. J. L. AND MED. 279 (2017).

<sup>422</sup> Public conversation about the way police use force in executing arrests has spiked since the tragic shooting death of Breonna Taylor. The conversation surrounds not the fact that police returned fire when being fired upon but the justification in executing an explosive “no knock” warrant at all. It is interesting to note the widespread expert condemnation of the same tactics when Federal agents executed a similar warrant against Paul Manafort. See Brian Dolan, Note: *To Knock or Not to Knock? No-knock Warrants and Confrontational Policing*, 93 ST. JOHN’S L. REV. 201, 201-205 (2019); cf. Kenneth B. Nunn, *Race, Crime, and the Pool of Surplus Criminality: Or Why the “War on Drugs” Was a “War on Blacks”*, 6 J. GENDER RACE & JUST. 381, 382 (2002).

<sup>423</sup> While demographic data is difficult to accurately collect, experts observe the same striking racial disparities we see elsewhere in policing. See Radley Balko, Opinion, *Little Rock’s Dangerous and Illegal Drug War*, WASH. POST (Oct. 14, 2018), [https://www.washingtonpost.com/news/opinions/wp/2018/10/14/little-rocks-dangerous-and-illegal-drug-war/?utm\\_term=.41d32be5732c](https://www.washingtonpost.com/news/opinions/wp/2018/10/14/little-rocks-dangerous-and-illegal-drug-war/?utm_term=.41d32be5732c) [<https://perma.cc/ZU5C-7UPJ>]; AMERICAN CIVIL LIBERTIES UNION,

thinkably risky in a white neighborhood may be accepted as the cost of police business in a poorer minority neighborhood. But a doctrine that so readily shifts blame for police violence onto the companions of those killed invites police to shoot on location, wherever they expect felons to be found.

Lastly, we admit many proximate cause cases, including some explored here, are ambiguous. Even clearly condemnable cases of police violence often include suspects behaving unacceptably. Whatever happened the night Julius Ervin Tate, Jr.<sup>424</sup> or Marquise Sampson<sup>425</sup> were killed, both were engaged in reprehensible and dangerous criminal behavior. We do not minimize the wrong of robbery. But victims do not have to be blameless for police killings to be unjustified. For too long, standard political deflection of police accountability centered on smearing the victim of lethal police violence.<sup>426</sup> Michael Brown, killed in Ferguson, allegedly with his hands up, was publicly impeached with videos of him stealing a package of cigarillos.<sup>427</sup> Walter Scott, shot in the back by Officer Michael Slager, was indicted in the media as behind on child support payments.<sup>428</sup> This character assassination seems particularly virulent regarding victims of color who are afforded none of the media's generosity in examining the paths leading to their deaths.<sup>429</sup> To demand that Black victims of police violence embody virtue before deserving our regard is to deny them the equal consideration every citizen deserves. That someone was armed or spurred a police chase is significant but not decisive in determining whether lethal police violence was required.<sup>430</sup> Chicagoans, alongside the nation, were rightly incensed upon the release of

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<sup>424</sup> Melissa Gira Grant, *supra* note 51.

<sup>425</sup> Flowers & Macaraeg, *supra* note 113.

<sup>426</sup> See KATHERYN RUSSELL-BROWN, UNDERGROUND CODES: RACE, CRIME AND RELATED FIRES, 60-62 (2004); Cf. Gregory S. Parks & Danielle C. Heard, "Assassinate the Nigger Ape!": Obama, Implicit Imagery, and the Dire Consequences of Racist Jokes, 11 RUTGERS RACE & L. REV. 259, 278 (2010).

<sup>427</sup> Blanche Bong Cook, *Biased and Broken Bodies of Proof: White Heteropatriarchy, the Grand Jury Process, and Performance on Unarmed Black Flesh*, 85 UMKC L. REV. 567, 575-577; Transcript of Grand Jury, vol. 4 at 84-86, Ferguson Police Shooting, Sept. 10, 2014, available at <https://www.documentcloud.org/documents/1370517-grand-jury-volume-4.html> [<https://perma.cc/Z9QT-5J63>]; see also Katherine Goldwasser, *The Prosecution, the Grand Jury, and the Decision Not to Charge*, in FERGUSON'S FAULT LINES: THE RACE QUAKE THAT ROCKED A NATION 37, 44 (Kimberly Jade Norwood ed., ABA Publishing 2016), available at <http://www.americanbar.org/content/dam/aba/multimedia/cle/materials/2016/05/ce1605fss.authcheckdam.pdf> [<https://perma.cc/KG6Q-PLJC>].

<sup>428</sup> See *Walter Scott had Bench Warrant for His Arrest*, *Court Documents Show*, NBC NEWS (Apr. 10, 2015), <https://www.nbcnews.com/storyline/walter-scott-shooting/walter-scott-shooting-warrant-over-child-support-court-records-show-n339151> [<https://perma.cc/VM5U-43WV>].

<sup>429</sup> Cf. Agnes Constante, *Mainstream Media Fell Short in Atlanta Shooting Coverage*, *Activists Say*, CENTER FOR HEALTH JOURNALISM (Apr. 05, 2021), <https://centerforhealthjournalism.org/2021/04/02/mainstream-media-falls-short-atlanta-shooting-coverage-amid-rise-hate-crimes-against> [<https://perma.cc/7CSY-UUBJ>].

<sup>430</sup> See *Tennessee v. Garner*, 471 U.S. 1, 20 (1985) (holding that the use of deadly force to apprehend a fleeing felon is unconstitutional unless the felon poses a physical danger to arresting officer or to others).

video showing the killing of LaQuan McDonald by Officer Jason Van Dyke. Though McDonald was armed with a knife, the video showed him walking away from police officers when Van Dyke opened fire. A gun in the waistband does not always justify a shot in the back.

Indeed, the subjectivity of perceptions of danger is one reason to preclude murder liability for the crime of frightening police. That relativity came to public notice in the famous Fourth Amendment case of *Scott v. Harris*. Harris, hurrying home from work, led Georgia sheriff's deputies on a high-speed chase until Deputy Scott rammed his car, flipping it and leaving Harris quadriplegic.<sup>431</sup> Assessing the reasonableness of this "seizure," the Supreme Court sided with the police in an 8 to 1 decision.<sup>432</sup> In an unprecedented step, the Court released the dashboard video of the car chase.<sup>433</sup> The majority writer, Justice Scalia, was so confident that deadly force was reasonable that he mused that there could be no reasonable disagreement about the video footage.<sup>434</sup>

Such confidence naturally proved irresistible to academic inspection, leading Professors Kahan, Hoffman and Braman to survey wider assessments of the video. In the dashcam video, we see Harris's car weaving in and out of traffic on a commercial boulevard.<sup>435</sup> We don't see—but some viewers no doubt imagined—the view in his rearview mirror: multiple police cars, also driving dangerously, all chasing one terrified Black man. The court's decision, upholding summary judgment for Scott, deprived a jury of the opportunity to make that situationally dependent judgment of reasonableness from a diversity of perspectives. Though the Kahan, Hoffman and Braman survey found much agreement with the Court's decision it also found marked divergence of perspective across gender, ethnic and racial lines.<sup>436</sup>

Like Harris, Jenkins was denied an opportunity to face the judgment of a properly instructed, diverse jury. Instead, both cases now stand for the legal proposition that these Black men forced police to use deadly force against by them, by fleeing in mortal fear that police would kill them. In a society where police are socialized to identify Black people as dangerous, we cannot condition murder liability on getting shot at by police.

Yet proximate cause felony murder shifts blame for police violence onto its targets and can thereby obscure where the blame rightfully belongs. Police officers shooting indiscriminately, pursuing recklessly, or staging avoidable armed confrontations are all blameworthy, notwithstanding the felon's part

<sup>431</sup> See *Scott v. Harris*, 550 US 372, 374-75, 385(2007) (holding that officer used reasonable force in ramming the rear fender of speeding motorist's car, inflicting severe injury, and ending chase lasting six minutes at high-speeds and through busy streets).

<sup>432</sup> *Id.*

<sup>433</sup> Adam Liptak, *Supreme Court Enters the YouTube Age*, NEW YORK TIMES (Mar. 2, 2009), <https://www.nytimes.com/2009/03/03/us/03bar.html> [<https://perma.cc/YD6J-9P42>].

<sup>434</sup> See *id.*; *Scott v. Harris*, 550 US at 380, 385.

<sup>435</sup> See *Scott v. Harris (USSC 05-1631) Pursuit Video*, YOUTUBE (Sep. 2, 2008), <https://www.youtube.com/watch?v=QRVKSgRZ2GY> [<https://perma.cc/25Z5-E5LZ>].

<sup>436</sup> See Donald Braman, Dan Kahan & David Hoffman, *Whose Eyes are you Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 841-843, 860-863, 867, 879-880 (2009).



in the wrongdoing. Too often, felony murder prosecutions divert our attention from deadly policing and encourage us to assume that the guilty party has already been punished.

#### D. *Proximate Cause and Systemic Corruption*

While proximate cause felony murder enables police wrongdoing, it also invites prosecutors to become complicit in that wrongdoing. Police can expect felony arrestees to bear the blame for their violence, only insofar as prosecutors place it there. Obviously, prosecutorial discretion remains central to our criminal justice system, where well over 90% of convictions are achieved by guilty pleas. Prosecutors, in turn, rely on police to supply evidence and, if necessary, testimony.

Even without the additional weapon of proximate cause felony murder, prosecutors have little incentive to prosecute their working partners for unjustified use of force and face a heavy burden of proof in doing so.<sup>437</sup> The directly involved officers have incentives to lie about the circumstances and shift blame onto victims.<sup>438</sup> While officer-involved killings are not typically investigated by the perpetrators, they are usually investigated by the officer's colleagues and superiors.

Further, police suspects are afforded rights and advantages that are vastly more protective than the typical suspect.<sup>439</sup> Police culture incentivizes investigators of an officer-involved shooting to look the other way. Union representatives intervene early in these cases, arranging legal representation, often fostering collusion among police witnesses on statements.<sup>440</sup> And the prosecutors who evaluate these cases are typically from the office that regularly works with the force whose agent committed the killing.<sup>441</sup> All of this creates, obvious conflicts of interest.<sup>442</sup> Prosecutors investigating such cases report pressure from both supervisors and peers to prosecute perps, not police.<sup>443</sup>

Moreover, prosecutors often face pressure to establish that police killings were justified—for example by inducing a grand jury to issue a “no-bill” finding—in order to help the killer to defend a civil rights suit.<sup>444</sup> Criminal conviction of surviving victims of police brutality can discredit them in civil

<sup>437</sup> See PAUL CHEVIGNY, *EDGE OF THE KNIFE: POLICE VIOLENCE IN THE AMERICAS* 98–101 (1995).

<sup>438</sup> See Kevin Hogan, *Officer Involved Shooting Investigations Demystified: Slicing Through the Gordian Knot*, 13 DREXEL L. REV. 1, 15–23(2021).

<sup>439</sup> See Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745 (2016); Kate Levine, *Police Suspects*, 116 COLUM. L. REV. 1197 (2016) [hereinafter Levine, *Police Suspects*].

<sup>440</sup> See Levine, *Police Suspects*, *supra* note 439, at 1236–1237.

<sup>441</sup> See Hogan, *supra* note 438, at 15–18.

<sup>442</sup> See generally Somil Trivedi & Nicole Van Cleve, *To Serve and Protect Each Other: How Police Prosecutor Codependence Enables Police Misconduct*, 100 B.U. L. REV. 895, 899, 905–911(2020).

<sup>443</sup> See *id.* at 905–906, 908–911.

<sup>444</sup> See *id.* at 915–918; Jonathan Abel, *Cops and Pleas: Police Officers' Influence on Plea Bargaining*, 126 Yale L.J. 1730 (2017).

rights suits, and prosecutors are often expected to pursue weak charges against victims, relying on self-serving and dubious police testimony.<sup>445</sup> Winning a felony murder conviction of an arrestee can also win favor with police, by protecting the killer against a civil suit by that arrestee. But blame-shifting also protects the officer against suit by the estate of the deceased, by implying the killing was justified. A felony murder conviction can even preclude a surviving victim's civil rights suit altogether, under *Heck v. Humphrey*.<sup>446</sup> Further, a felony murder charge for a survivor of police brutality can be advantageous even without a conviction. Prosecutors can bargain the charge away in exchange for releasing their police allies from civil liability.<sup>447</sup>

We might hope that prosecutors in proximate cause states would only charge felons for those police killings they recklessly provoked with gunfire. But the incentives we have canvassed—like the cases we have described—show otherwise. Prosecutors predictably bring disproportionate charges against felons for unjustified killings by police, because doing so is in their interest.

Waging war on crime has proliferated a militarized and racialized police state on our streets and bound millions of our fellow citizens into a degraded status of unfreedom. Felony murder has been just one weapon in that war—police and prosecutors would have mistreated suspects without it. But expanding felony murder to encompass killings by non-parties condones abusive policing and invites corrupt prosecution. An agency rule supplies a prophylactic against the abuse of prosecutorial authority to punish friendless pariahs for the crimes of police.

But can we hope that legal reform might affect prosecutor and ultimately police behavior? Consider again the recent police shooting of Stavian Rodriguez, the 15-year-old Oklahoma teen, who joined 17-year-old Wyatt Cheatham in a gas station robbery.<sup>448</sup> Locked in the station by the store clerk and surrounded by mocking police, the hapless Rodriguez surrendered, pulling out his gun with his thumb and forefinger and dropping it to the ground.<sup>449</sup> A crowd of police proceeded to give him inconsistent commands and, when a seemingly confused Rodriguez moved his hand towards his waist, five police officers opened fire, striking him 13 times and killing him. Rodriguez's absent accomplice, Cheatham, was charged with his murder.<sup>450</sup>

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<sup>445</sup> See Seth Kreimer, *Release, Redress, and Police Misconduct*, 136 U. PA. L. REV. 851, 871–872 (1988) (describing widespread practice of aggressive prosecution of weak cases against potential civil rights claimants, to bolster the officer's defense); Tamara F. Lawson, *Powerless Against Police Brutality: A Felon's Story* 25 ST. THOMAS L. REV. 218 (2013).

<sup>446</sup> 512 U.S. 477 (1994).

<sup>447</sup> *Newton v. Rumery*, 480 U.S. 386, 389–98 (1987); Kreimer, *supra* note 445, at 852–53, 871–872, 903–910, 917–924.

<sup>448</sup> See Clay, *supra* note 52.

<sup>449</sup> See *id.*

<sup>450</sup> See *Murder Charge Dropped Against Teen Accomplice in Robbery that Resulted in OCPD Shooting of Stavian Rodriguez*, *supra* note 55.

*State v. Cheatham*<sup>451</sup> was poised to join our list of disproportionate felony murder convictions until derailed by a confluence of events. Protestors gathered outside Cheatham's prison, decrying the use of felony murder against him as disproportionate punishment for the absent co-defendant. At the same time, video of the police encounter was released, sparking outcry about whether the police were justified in opening fire.<sup>452</sup> Subsequent to both, the prosecution dropped the felony murder charges against Cheatham and, more remarkably, charged the five police officers with first degree manslaughter.<sup>453</sup>

A number of factors, including compelling video, perhaps contributed to these hopeful results. Yet one notable feature of this tragedy is the way charging Cheatham with the death of his co-felon initially shielded questionable and lethal police responses from further legal inspection. Once they could no longer pin Rodriguez's death on his co-felon, it seems prosecutors were compelled to ask if his death was in fact justifiable. Were prosecutors systematically foreclosed from the easy blame shifting offered by proximate cause felony murder, such inspection and public accountability of police violence might be more common.

### *E. Depraved Indifference*

Given the perverse incentives proximate cause felony murder creates, and the popular moral intuitions against it, why does this doctrine maintain a stubborn grip on a significant minority of jurisdictions? One reason, we have contended, is precisely its appeal to police and prosecutors as a way of shifting blame onto the victims of often racist police violence. Yet its applications need not always yield disproportionate results.

Recall that agency rules predicate felony murder on acts taken in furtherance of a dangerous felony. Thus, deaths directly caused by others resisting a felony fall outside of its ambit. In the examples we have surveyed, e.g., a police officer needlessly shooting a fleeing suspect, precluding murder liability for the felon seems the better result. But the armed robber who starts a gun battle with police, or with a cornered storekeeper or homeowner, resulting in a predictable death does seem blameworthy, even if the fatal bullet is fired by someone else. It is this insight that is marked when court opinions note that liability ought not turn on the arbitrary identity of the victim or the vagaries of forensic ballistics.

Yet such scenarios only counsel for felony murder liability at first blush. Even without felony murder, there will be independent grounds for murder liability in such cases. In the classic example, the robber who forces a hostage into the path of police gunfire does not need to be charged with felony murder. Rather, he can be charged with depraved indifference murder on the

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<sup>451</sup> We here refer to the hypothetical case the state ultimately declined to prosecute.

<sup>452</sup> See Levenson, *supra* note 53.

<sup>453</sup> See *Murder Charge Dropped Against Teen Accomplice in Robbery that Resulted in OCPD Shooting of Stavian Rodriguez*, *supra* note 55.

basis of his action. Similarly, as held in the California case of *People v. Taylor*, a felon who starts a gun battle, knowing others may well be killed, can be held liable for such a death, based on the depraved indifference to human life these actions manifest.<sup>454</sup>

Beneficially, such murder liability requires proof of recklessness, requiring that the robber recognize a substantial risk that one or more persons would be killed.<sup>455</sup> The robber's malign purpose for imposing a known risk of death supplies the additional measure of "depraved" or "extreme" indifference that often separates this form of unintended murder from "involuntary" (i.e. reckless) manslaughter. This long recognized independent basis of murder liability captures cases where death results from a felon's conscious choice to endanger others. It captures the sense that some atrocious crimes can be committed in ways so patently dangerous that the deaths they cause seem morally adjacent to murder.

We have seen that the great majority of states punish murder on the basis of such aggravated recklessness. Indeed, we propose adoption of such murder liability in the remaining jurisdictions, as a device for prosecuting unjustified police homicides. We acknowledge that a few states, like Minnesota, regrettably require that risk be recklessly imposed on more than one person, and we propose eliminating this requirement. Yet even in these states, it will generally be possible to use depraved indifference murder to prosecute offenders who initiate fatal gun-battles. So the few scenarios where expansive indirect causation is most appealing can be prosecuted outside the framework of felony murder, in the great majority of jurisdictions. In judging *both* unjustifiable police violence and conduct provoking justifiable police violence, depraved indifference murder better captures our intuitions about deserved blame than does felony murder. And, as we argue in the next Part, aligning blame with culpability is not just a theoretical concern. Getting the culpability right matters, not only to confine blame to the deserving but also to fulfill our responsibility to victims—by naming the wrong done them, to say their names.

Yet causal responsibility matters too. There are grounds for concern about indirect causal responsibility, even when we require a higher level of culpability towards death. Even if we abolish felony murder altogether and replace it with depraved indifference murder, police shootings will challenge the integrity of the criminal justice system. Prosecutors may still be motivated to shift blame for unjustified police shootings onto suspects. Deference to authority, hindsight bias, and racial bias may still induce jurors to overattribute culpability to suspects and underestimate the causal agency of police. If depraved indifference murder proves pliable in practice, further reforms—possibly including an agency limit—will be needed there too.

While depraved indifference murder may best capture our moral intuitions about blame for initiating fatal conflict, our criminal justice system too

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<sup>454</sup> See *Taylor v. Superior Court*, 477 P.2d 131, 135 (Cal. 1970).

<sup>455</sup> *Id.*

often weighs desert on a flawed scale. To be sure, in recategorizing certain types of antisocial conduct as depraved indifference murder rather than felony murder, we narrow liability and better align it with principles of desert. But the test of reform is practice rather than ideal normative theory. Our case against broad proximate cause felony murder standards rests on their demonstrable use as weapons in a discriminatory War on Crime. In the next Part, we propose a similarly grounded critique of felony murder generally. Reform is not just a matter of making technical changes in the law. It is a work of changing our community, by naming the injustice we correct.

Given our system's undue severity and pervasive inequality, any proposal to replace one standard of blame and punishment with another inevitably invites Abolitionist critique. The heart of that critique is that criminal law cannot solve the underlying social problems at which we aim it, and that every effort to align it with justice merely feeds its unjust power over poor and minority communities.<sup>456</sup> Yet that a criminal justice system is no substitute for the social infrastructure of a humane and democratic society does not mean it has no legitimate function in such a society. Even in a well-governed society, violent actions that harm others and deny their equal place as citizens require forceful repudiation. Other societies, although far from perfectly just, address this task with systems far smaller and more respectful of human dignity than ours. In short, there may be a long road reformers and abolitionists can travel together before they will need to part ways. So, too, this essay's two authors have walked a ways together, learned from our differences, and shared our conversation with you.

## VI. CONCLUDING REFLECTIONS: APPLYING A RACIAL JUSTICE CRITIQUE OF FELONY MURDER, EVEN WHERE IT HURTS

### *A. From Agency Limits to Felony Murder Abolition*

We have seen that felony murder has operated in many of our populous and apparently progressive states to obscure and excuse reckless and racially disparate police violence. But felony murder's race problem is larger in scope. The strikingly disparate patterns of felony murder charging and conviction recently documented in metropolitan Chicago and Minneapolis, and in Pennsylvania and Colorado, suggest that felony murder is a crime prosecutors have seen little need to punish when committed by whites. This suggests that the unexpected persistence of the academically despised felony murder in the late twentieth century recodification of criminal law reflected felony murder's appeal as a weapon in a racialized War on Crime. Felony murder liability—like recidivist sentencing—seemed attractive precisely because it

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<sup>456</sup> For some canonical expressions see ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003); MARIAME KABA, WE DO THIS TILL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE (2021); Allegra M. McLeod, *Envisioning Abolitionist Democracy*, HARV. L. REV. 1613–1649 (2019).

could inflict arbitrary and extreme punishment for criminality as an identity rather than an offense.

One reason why felony murder may be little used against white defendants is the availability in most states of other offenses—including involuntary manslaughter and depraved indifference murder—for unintended homicide. Those who commit felonies can also be punished for those crimes. So a strong argument for abolishing felony murder is that we seem to be able to do without it when the perpetrator belongs to a privileged majority. Detering and denouncing *crime* does not require felony murder, however useful it may be in selectively attributing and denouncing *criminality*. We have proposed that every felony murder rule incorporate an agency limit as a prophylactic against displacing blame for racist police violence onto its victims. By a like logic, we should see abolition of felony murder itself as a racial justice remedy, a prophylactic against the kind of discriminatory prosecution and selectively disproportionate punishment described here.

Abolition of felony murder is far off, as 41 states, the federal system, and D.C. retain felony murder rules conditioned on no more than negligence towards death. Thus, felony murder abolition is not a single reform, but many reforms in many places. Abolishing felony murder as a prophylactic against discrimination is less a policy conclusion than a framework for investigation and advocacy. At this stage, it requires gathering data and collecting stories about prosecution and adjudication in particular jurisdictions. It is a job for community advocates, journalists, scholars, and, public officials—including hopefully, some in law enforcement. That work may yield particular reforms smaller—or larger—than repealing felony murder.

As in other areas of criminal justice, the goal of abolition need not be inconsistent with the path of incremental reform.<sup>457</sup> Take the death penalty as an historical example. Believing that our nation would abandon capital punishment if forced to impose it even-handedly, abolitionists attacked its discretionary and discriminatory procedures, and temporarily achieved abolition.<sup>458</sup> Since the death penalty's almost immediate restoration, death penalty abolitionists have waged a procedural war of attrition against every execution, reducing the appeal of capital prosecution to prosecutors and thereby eroding support among the penalty's most effective advocates.<sup>459</sup> So

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<sup>457</sup> See Yankah, *supra* note 11, at 684; Levine, *The Progressive Love Affair With the Carceral State*, *supra* note 15 at 1227-1228; 1241-1245; Gruber, *The Feminist War on Crime*, *supra* note 15, at 46-50, 170, 199-204.

<sup>458</sup> See MICHAEL MELTSNER, CRUEL AND UNUSUAL 181-185 (1973).

<sup>459</sup> Brandon Garrett, *The Decline of the Virginia (And American) Death Penalty* 105 GEO. L.J. 661, 663-670, 674-679, 714-727 (2017) (explaining declining executions and death sentences in part based on expense of prosecuting a capital case, and effectiveness of state funded capital defense); R. Dieter, *Smart on Crime: Reconsidering the Death Penalty at a Time of Economic Crisis*, DEATH PENALTY INFORMATION CENTER (2009), <https://deathpenalty-info.org/facts-and-research/dpic-reports/in-depth/smart-on-crime-reconsidering-the-death-penalty-in-time-of-economic-crisis> [<https://perma.cc/UT2J-NCKA>] (estimating that death penalty costs taxpayers \$30 million per execution); James Liebman & P. Clarke, *Minority Practice, Majority's Burden: The Death Penalty Today*, 9 OHIO STATE J. CRIM. L. 255 (2012) (noting the overwhelming majority of county prosecutors now eschew capital prosecution as a drain

too, the incremental reform and restriction of felony murder may diminish its appeal to prosecutors and pave the path to its eventual abolition.<sup>460</sup>

To be clear, we make no claim that this path to felony murder abolition is Abolitionist in the largest sense. Abolition of felony murder liability is far from a radical goal, having won the support of such architects of modern penality as Bentham and Wechsler. And we have considered other reforms here to better enable prosecution of police violence. These include introducing depraved indifference murder in jurisdictions without it, expanding depraved indifference murder to include deaths resulting from reckless and depraved endangerment of individuals in jurisdictions like Minnesota, and enacting civil rights violation felonies. As we have acknowledged, these proposals to punish unduly violent police presuppose the persistence of the penal state. And one of our motivating principles is neutral regarding the penal state: the imperative to deprive police and reaffirm the equal civil status of all. However many or few offenses we continue to punish, however often and however severely, we must also prosecute and punish police who commit them.

Nevertheless, as things stand, we can expect that shortcuts to punishment will not be deployed primarily against police. We have seen that Minnesota and Georgia are outliers in giving prosecutors less room for maneuver in cases of unintended homicide, surely one factor in explaining the felony murder charges against Chauvin and the initial charges against Rolfe. No doubt another factor is wanting to assure success in high profile prosecutions by making prosecution easy, a goal that, we next argue, comes at an underappreciated cost.

### B. *Felony Murder, Mens Rea and the Cloaking of Racial Contempt*

Faced with the opportunity to convict police officers in high profile cases such as the killings of George Floyd and Rayshard Brooks, one might believe the prize of conviction worth these hidden costs. Whether proximate cause felony murder convictions shift blame in other sorts of cases does not erase its value in securing convictions of killer cops who might otherwise get away with their crimes. But even where felony murder is used to convict unjustifiable police killings we should hesitate to think a shortcut has won the day. Applying a felony murder rule deforms the meaning of the underlying

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on resources); *Joint Statement from Elected Prosecutors Pledging to Work Towards the Elimination of the Death Penalty*, FAIR AND JUST PROSECUTION (Mar. 2, 2022), <https://fairandjustprosecution.org/wp-content/uploads/2022/02/FJP-Death-Penalty-Joint-Statement-2022.pdf> [<https://perma.cc/YVQ2-CTAW>] (citing cost as well as justice concerns).

<sup>460</sup> Four District Attorneys and the Colorado District Attorneys' Council submitted testimony in support of Colorado's SB 21-124, imposing an agency limitation on felony murder, and reducing it from first to second degree murder. Senate Judiciary Committee hearing on SB21-124, Mar. 18, 2021, <https://leg.colorado.gov/content/0178a65bd99864d28725869c0075618d-hearing-summary> [<https://perma.cc/8A4U-49BJ>]; House Judiciary Committee hearing on SB21-124, Apr. 7, 2021, <https://leg.colorado.gov/content/2922d0e88230e14b872586b0007a7593-hearing-summary> [<https://perma.cc/5H9E-9KGQ>].

ing crime, leaving us unable to grapple with and condemn the *mens rea* of police who kill unjustifiably. Perhaps most importantly, in cases where our outrage centers on the history of police violence towards people of color, felony murder prosecution can render criminal law expressively silent and racist policing unaddressed.

Calling police killings felony murders is unsatisfying for reasons captured by the familiar criticisms of felony murder explored in Part II.<sup>461</sup> But those defects have special importance given the social salience of prosecuting police violence. Recall that felony murder imposes liability for murder for an unintended and even inadvertent killing during a dangerous felony.<sup>462</sup> The very point of such a rule is to elide the fact the defendant did not have the culpability otherwise required for murder, because the killer intended a different wrong. Whether we characterize felony murder liability as a “transfer” of intent from the felony to the killing, or as negligent homicide aggravated by a felonious motive, is immaterial. Either characterization implies that the killer’s culpability towards death alone did not suffice for murder liability. That may be justified where a felon kills inadvertently for some other bad end.<sup>463</sup> But it cannot be justified where there is no secondary goal. This is precisely why the “merger rule” carves out some potential cases of felony murder from prosecution; in those cases the crime is too similar to less serious homicide offenses.<sup>464</sup> A predicate felony of assault or battery contributes insufficient additional *mens rea* to an unintended killing.<sup>465</sup> In such a case, a felony murder charge allows the prosecution to avoid its obligation to prove beyond a reasonable doubt that the defendant’s killing was culpable enough to warrant condemnation as murder.<sup>466</sup>

This same deficiency can render felony murder convictions unsatisfying even when they lead to the conviction of rogue police. As we have seen, Judge Peter Cahill’s sentencing memorandum appropriately considered the great wrong Derek Chauvin did.<sup>467</sup> Cahill concluded that Chauvin knowingly imposed an enormous risk of death, explicitly rejecting Floyd’s pleas for his life, for the very purpose of degrading and terrorizing him.<sup>468</sup> At a more abstract level, the jury’s verdict of depraved indifference murder expressed this as well. But sadly, the jury’s verdict of felony murder predicated on assault—the only murder conviction likely to survive appeal—did not.

To watch Chauvin kneeling on George Floyd’s neck, impervious to Floyd’s begging for breath and the pleas by bystanders, is to watch someone kill with either intent or utter and cruel indifference. Recasting this as an unlawful assault with an unintended outcome likens this killing to an unlucky punch. Felony murder, by definition, does not require intentional or

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<sup>461</sup> See text accompanying nn. 76-111.

<sup>462</sup> See Binder, *The Culpability of Felony Murder*, *supra* note 13, at 966, 975-981.

<sup>463</sup> *Id.* at 1032-1046; Binder, *supra* note 12, at 433-437.

<sup>464</sup> See, e.g., *People v. Ireland*, 70 Cal. 2d 522, 538-540 (1969)

<sup>465</sup> *Id.*

<sup>466</sup> *Id.*

<sup>467</sup> See text accompanying nn. 135-140 *supra*.

<sup>468</sup> *Id.*



reckless killing and so cannot capture the wrong Chauvin inflicted—or for that matter, the recklessness of so many of the police killings we have described.<sup>469</sup> By restricting depraved indifference murder to diffuse risks in the *Noor* case, Minnesota has effectively decided that sadistically and fatally forcing an individual to beg for his life, is not sufficiently culpable to count as murder.<sup>470</sup> But by imposing felony murder with no merger rule, the same court has decided that an unlucky punch is more naturally described as murder. Must we then hope that when Minnesota someday adopts a merger limit or abolishes felony murder, it does so only prospectively? In this case, in this place, felony murder was the only possible murder charge, leaving what was most blameworthy in Chauvin’s conduct uncondemned.

Some might think this the quite ordinary trade-off at the heart of the felony murder doctrine. If the trade-off between giving prosecutors an easier road to punish rogue cops is a less bespoke measuring of their guilty mind, then so be it. After all, insisting on a conviction that centers Chauvin’s *mens rea* or another officer’s reckless and rash conduct may be much more difficult to prove; indeed, the challenge may leave prosecutors unable to secure a conviction. Would we be willing to risk the prosecution’s success, to insist on a more precise match between culpability and punishment?

But in these important cases of police violence such a trade-off does not merely lack nuance; it surrenders the very expressive heart of criminal punishment.<sup>471</sup> To be sure, any unjustified police violence is lamentable; injury or death by the very agency we have collectively organized for public safety is disturbing. But we ought not mince words: the most destabilizing images of police violence over the past months and years have been of police shootings of Black and Brown men.<sup>472</sup> These cases of police violence read as part of a historical lament; Tamir Rice, Eric Garner, Michael Brown, Philando Castile, George Floyd, Rayshard Brooks, Jacob Blake. . . The litany feels endless. The pain enflamed by these killings is due to the conviction that police find deadly violence too easy and life too cheap when aimed at Black people. Generations of Black complaints about policing, stretching back throughout the nation’s history, are being recognized by a broad cross-section of Americans.<sup>473</sup> Whether inspecting an individual officer’s actions or broader police

<sup>469</sup> See text accompanying note 64 *supra*

<sup>470</sup> Cannon, *supra* note 22.

<sup>471</sup> Jean Hampton, *Punishment, Feminism, and Political Identity: A Case Study in the Expressive Meaning of Law*, 11 CANADIAN J.L. & JURIS. 23 (1998); Joel Feinberg, *The Expressive Function of Punishment*, in *DOING AND DESERVING* (1970); R. A. DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* (2000).

<sup>472</sup> Alia Chughtai, *Know Their Names: Black People Killed by the Police in the US*, AL-JAZEERA, <https://interactive.aljazeera.com/aje/2020/know-their-names/index.html> [<https://perma.cc/X3JG-ABSR>]; Cheryl W. Thompson, *Fatal Police Shootings of Unarmed Black People Reveal Troubling Patterns*, NPR (Jan. 21, 2021), <https://www.npr.org/2021/01/25/956177021/fatal-police-shootings-of-unarmed-black-people-reveal-troubling-patterns> [<https://perma.cc/PVG8-YAUC>].

<sup>473</sup> See generally IBRAM X. KENDI, *STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA* 1 (2016); KHALIL GIBRAN MUHAMMAD, *THE*

tactics in minority neighborhoods, the nationwide swell of protest reflected a refusal to ignore the racism that drives so much police violence.

But this is precisely the cost of using felony murder to impose punishment on police violence. Casting police killings of minorities as unintentional, incidental killings, ignores the racism in case after case of lethal police violence. Prosecuting such killings, without inspection of the police officer's *mens rea*, hides away the precise feature nationwide protests have insisted we must face. By premising liability on an adjacent crime—the dangerous discharge of a weapon, for example—we are precluded not only from determining the critical *mens rea* as to the actual killing but also from inspecting the role of racism in that killing. The very central question of the current political conversation—would this officer have responded with similar violence were the now dead victim white?—becomes inaccessible and legally unimportant.

To be sure, proving that an officer's violence stemmed from racism is no small feat.<sup>474</sup> Some prosecutions may face the steep legal requirements to prove a Federal Civil Rights Violation. Other cases will be tried or sentenced under state hate crimes legislation. In other cases, the role race plays in determining reckless or irrational behavior may stretch our current hate crime regimes.<sup>475</sup> In many cases prosecutors are loathe to inject explosive questions of race into criminal cases. Despite these obstacles, we should do what we can to make racist violence more visible; to speak its name.

This may sound like an abstract diversion, of interest only to punishment theorists. It may seem a luxury to insist on not only the right punishment, but also the right justification for punishment. Yet the stakes here are not academic. If criminal law is legitimate at all, its purpose must be not to threaten but to persuade, protect and include. A political community's criminal laws should express the minimal standards of decent treatment it requires as a token of mutual respect. Such respect depends not only on how others treat us, but on what that treatment communicates. A central challenge of reforming policing has been the long-standing insistence from minority communities that racism in policing be directly addressed. Even successful prosecutions of unjustified police violence fail if they refuse to address its racism. Police violence is not only excessive. It has persisted because it is selectively excessive against our least privileged. If they leave what is understood unsaid, prosecutions of police can leave these targeted communities short-changed, deceived and unseen. Communities of color can hardly feel protected against racist violence by prosecutions that treat it as unintended.

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CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN AMERICA 1 (2011).

<sup>474</sup> Yankah, *supra* note 11, at 693-696.

<sup>475</sup> See *id.*