

FELONY MURDER

An On-Ramp
for Extreme Sentencing

 **THE
SENTENCING
PROJECT**
RESEARCH AND ADVOCACY FOR REFORM

 **FAIR AND JUST
PROSECUTION**

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The report incorporates research assistance and legal consultation provided by Latham & Watkins LLP, Faegre Drinker Biddle & Reath LLP, Berkeley Law's International Human Rights Law Clinic, Drexel Kline School of Law's Andy and Gwen Stern Community Lawyering Clinic, Monica Reid at the National Association of Criminal Defense Lawyers and several state affiliates, Kevin Muhitch, Elissa Jude He, and Liz Komar.

Sections of this report benefited from the generous feedback, editing, and comments of the following individuals: Jobi Cates, Kate Chatfield, Kate Epstein, Monica Fuhrmann, Caitlin Glass, Jennifer Hansen, Lauren Katz, Miriam A. Krinsky, Youngjae Lee, Colby Lenz, Rachel López, Olevia Mae, Rosemary Nidiry, Jinwoo Park, Astha Sharma Pokharel, Amanda J. Powell, Richard Schmechel, Katerina Semyonova, Michael Serota, Kimberly A. Thomas, and David Weiss.

The Sentencing Project gratefully acknowledges Arnold Ventures for their generous support of our research to end extreme sentences.

Published March 2022
Updated May 2024

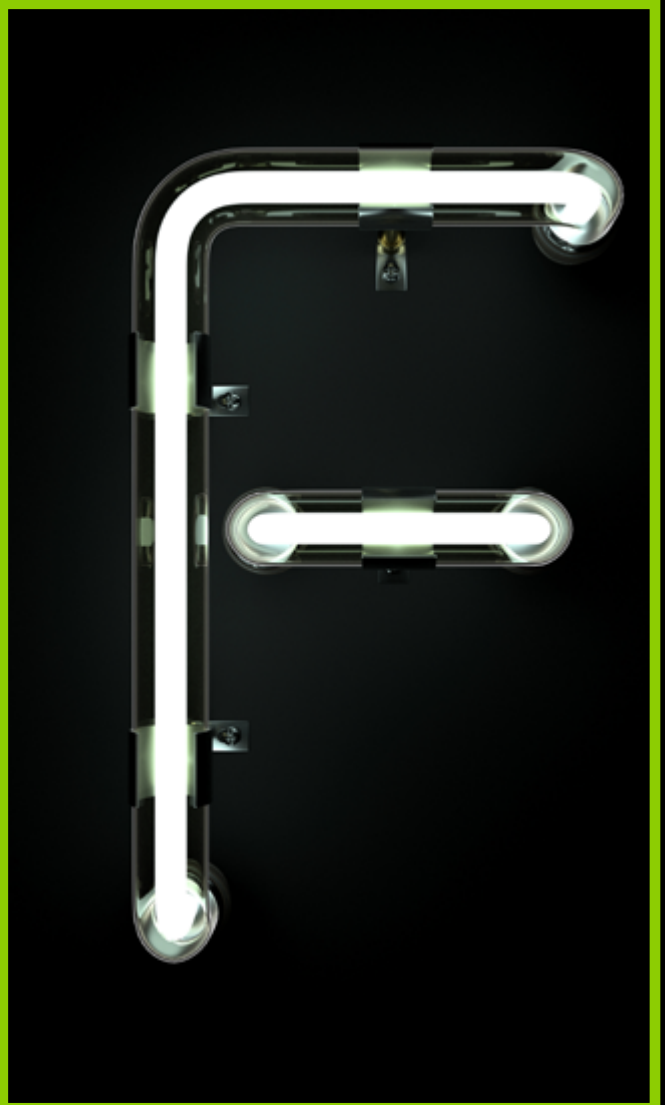


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FELONY MURDER: An On-Ramp for Extreme Sentencing

In San Joaquin County, California in 2010, 19-year-old Emmanuel Mendoza helped lure a robbery victim to a location where a masked accomplice waited with a firearm. When a struggle with the victim over the firearm ensued, Mendoza's accomplice fired a fatal shot. Although Mendoza did not have a weapon and the killing had not been planned, he was convicted of felony murder with special circumstances, and automatically sentenced to life without parole (LWOP).¹ In prison, he ended his gang affiliation and mentored others to do the same, earned a GED and associate degree, embraced his faith, and has been an active father to his three children. "I understand that at the end of the day someone lost their life," Mendoza says. "Our plan that night wasn't to kill anyone. I can't take it back. But I also feel that it was a huge injustice to not be given an attempt at freedom."²

EXECUTIVE SUMMARY

Murder typically refers to an intentional killing. But "felony murder" laws hold people like Mendoza liable for murder if they participated in a felony, such as a robbery, that resulted in someone's death. These laws impose sentences associated with murder on people who *neither intended* to kill nor *anticipated* a death, and even on those who *did not participate* in the killing. As such, they violate the principle of proportional sentencing, which is supposed to punish crimes based on their severity. These excessively punitive outcomes violate widely shared perceptions of justice. With one in seven people in U.S. prisons serving a life sentence, ending mass incarceration requires bold action to reduce extreme prison terms such as those prescribed for felony murder.³ These laws run counter to public safety, fiscal responsibility, and justice.

Although other countries have largely rejected the felony murder doctrine,⁴ 48 states, the District of Columbia, and the federal government still use these laws. The only two states that do not have felony murder laws are Hawaii and Kentucky. Seven other states require some proof of intentionality regarding the killing to consider it murder,⁵ though the use of a gun—or mere knowledge of a co-defendant's gun use—satisfies this requirement in some jurisdictions.⁶ In any case, all felony murder laws use the underlying felony to either a) treat as murder a killing that would not have otherwise been considered murder, or b) increase the gradation of murder, such as from second to first degree.

This report evaluates the legal and empirical foundation, and failings, of the felony murder rule, profiles impacted individuals, and highlights recent reform efforts in 10 jurisdictions. Key findings include:

1. Felony murder laws widen the net of extreme sentencing and are counterproductive to public safety.

- For felony murder convictions for adults, 11 states and the federal system mandate LWOP sentences, 11 states mandate LWOP in some cases, and 17 states and Washington, DC make LWOP a sentencing option. Five states permit or require a virtual life sentence of 50 years or longer for some or all felony murder convictions.⁷
- In Pennsylvania and Michigan, one quarter of people serving LWOP were convicted of felony murder—over 1,000 people in each state.⁸
- Felony murder laws have not significantly reduced felonies nor lowered the number of felonies that become deadly.
- The extreme prison sentences associated with felony murder laws add upward pressure on the entire sentencing structure.
- Felony murder laws spend taxpayer dollars on incarcerating people who no longer pose a danger to the community and divert resources away from effective investments that promote public safety.

2. Felony murder laws have particularly adverse impacts on people of color, young people, and women.

- In Pennsylvania in 2020, 80% of imprisoned individuals with a felony murder conviction were people of color and 70% were African American.⁹
- Felony murder laws ignore the cognitive vulnerabilities of youth and emerging adults by assuming that they recognize the remote consequences of their own actions—and those

of others in their group. In Pennsylvania, nearly three-quarters of people serving LWOP for felony murder in 2019 were age 25 or younger at the time of their offense, as were over half of Minnesotans charged with aiding and abetting felony murder in recent years.¹⁰

- An exploratory survey in California found that 72% of women but only 55% of men serving a life sentence for felony murder were not the perpetrators of the homicide.¹¹ The California Coalition for Women Prisoners reports that the majority of their members convicted of felony murder were accomplices navigating intimate partner violence at the time of the offense and were criminalized for acts of survival.¹²

3. Existing reforms must be expanded to achieve justice.

- Since 1980, Michigan has required a minimum culpable mental state of *wanton disregard for life* for felony murder convictions. Despite this reform, the number of Michiganders imprisoned for felony murder is comparable to that of Pennsylvania, where no such requirement exists.
- Reforms in Colorado, Illinois, and Massachusetts have not been applied retroactively to provide relief to people sentenced under the old law.

The Sentencing Project and Fair and Just Prosecution recommend that all U.S. jurisdictions repeal felony murder statutes. In the interim, reforms to felony murder laws should at a minimum include: eliminating death and LWOP as sentencing options; protecting minors and emerging adults from the felony murder rule; ending accomplice liability; creating meaningful intent requirements for the killing itself; narrowing predicate offenses that can trigger a felony murder charge; and tackling racial disparities in enforcement. Prosecutors can be leaders in these reform efforts. The model policy memo included in Appendix 1 sets forth recommended changes prosecutors can put in place to address these concerns and achieve just results.

I. INTRODUCTION

When a person's commission, or attempted commission, of a felony *unintentionally* results in someone's death, the felony murder doctrine allows them to be punished as if they had committed an *intentional* homicide. Similarly, when a person participates in a felony in which their partner in the offense intentionally kills, without their prior knowledge or consent, the felony murder law allows them to also be punished for murder. As this section will show, felony murder laws vastly expand the imposition of extreme sentences; have particularly adverse impacts on people of color, young people, and women; and are counterproductive to public safety.



MARIE SCOTT

Marie Scott is an incarcerated writer, peer facilitator, legal aid assistant, and advocate for children with incarcerated parents. After being sentenced to LWOP at age 19 in Philadelphia County, Scott, now 67, has transformed her life through education and mentorship. In 1974, Scott was convicted of felony murder for acting as a lookout in a gas station robbery, during which her co-defendant killed a station attendant. A survivor of childhood abuse, Scott developed a substance use disorder at a young age. During the time of the robbery, she was under the influence of pills given to her by her co-defendant, which impaired her ability to make rational decisions. She had no prior knowledge that her co-defendant would kill the attendant.¹³

In her 47 years of incarceration, Scott has completed paralegal training, earned her associate degree in sociology, and authored a bill calling on state agencies to study the needs of children with incarcerated parents. She is a petitioner in a case challenging Pennsylvania's mandatory LWOP sentences for felony murder, for which The Sentencing Project has submitted an amicus brief.¹⁴

Currently, Scott is the editor of COPING, a newsletter for children with incarcerated parents, and a peer facilitator for people in drug and alcohol treatment. Her years of advocacy and education have helped her to grow and reflect on her life. On her personal transformation, Scott notes, "I started studying myself and why I came to prison. It was that time in my life that I began facing and taking responsibility for what I had actually done to come to prison."¹⁵ Scott says her motivation to fight for justice comes from her daughter, nicknamed Hope, and Scott's own hope of breaking the cycle of intergenerational incarceration. Given her passion for cooking, Scott dreams of one day owning a food truck.

A. Scope of the Problem

Only two states, Hawaii and Kentucky, do not have felony murder laws. Seven other states require some proof of a culpable mental state vis-à-vis the killing specifically—not merely the underlying felony—to charge an individual with murder.¹⁶ But some courts have deemed the use of a firearm, or awareness of a co-defendant’s planned use, as meeting this standard. Forty-two states and the District of Columbia, then, have strict liability felony murder laws—they do not require any evidence of intentionality towards the killing.¹⁷

Although national data on the number of people imprisoned with felony murder convictions have not been compiled, this information is known for a handful of jurisdictions. Specifically:

- **Pennsylvania** is one of 11 states that mandate an LWOP sentence for *all* adults convicted under its felony murder rule. In 2019, 1,166 Pennsylvanians were serving LWOP for felony murder—accounting for nearly one-quarter of the state’s LWOP population.¹⁸
- **Michigan** courts have required evidence of a culpable mental state relating to a killing to establish felony murder since 1980.¹⁹ But, as discussed in Section III, the state’s broad interpretation of this requirement and mandatory LWOP sentencing has resulted in over 1,000 Michiganders serving LWOP for felony murder convictions in 2019—over one-quarter of the state’s LWOP population.²⁰ In 2019 alone, the state convicted 35 people of felony murder.²¹
- Approximately half of **California’s** LWOP population was convicted of felony murder.²² California is among 11 states that mandate LWOP for certain felony murder convictions.²³
- In **Minnesota**, one-third of individuals incarcerated for murder in 2021 were convicted under the felony murder doctrine.²⁴ Like

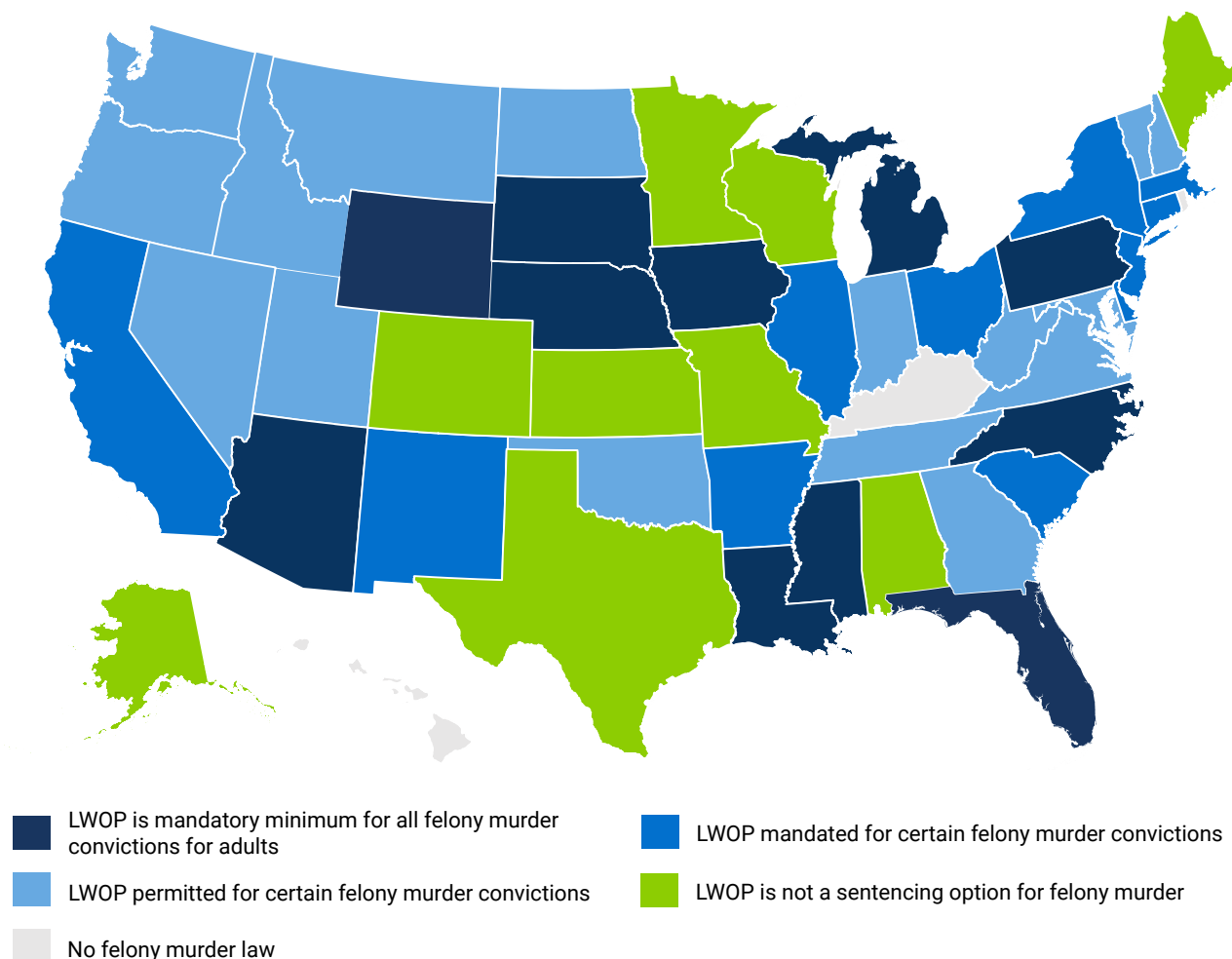
California, Minnesota mandates LWOP for certain felony murder convictions.

- **Missouri** admitted 28 people to its prisons with a felony murder conviction in 2020, reaching a total of 159 people imprisoned for this offense.²⁵
- Among the 185 people **Washington, DC** sentenced to 24-plus years in prison between 2010 and 2019, 30 were sentenced for a felony murder conviction; this included three LWOP sentences.²⁶ It is unclear in how many of these cases prosecutors pursued this charge, instead of intentional murder, because they lacked evidence to prove the culpable mental state requirement. The District is one of 17 jurisdictions that make LWOP a sentencing option for certain felony murder convictions.

Because fighting a felony murder charge at trial can seem impossible, people are incentivized to accept plea deals for other crimes carrying still-lengthy sentences out of proportion to their actual offense.

The number of people impacted by the felony murder rule is not limited to those convicted under the law. In two separate cases from the 1970s—*Maine vs. Anderson* and *State vs. Corbitt*—courts stated that the purpose of the felony murder rule was to provide prosecutors with “flexibility and efficiency” in obtaining plea deals.²⁷ Prosecutors still use felony murder charges to incentivize plea deals to lesser offenses: a felony murder conviction carries a heavier sentence and its absent or weak mental state (*mens rea*) requirement helps the government to secure a murder conviction at trial.²⁸ Because fighting a felony murder charge at trial can seem impossible, people are incentivized to accept plea deals for other crimes carrying still-lengthy sentences out of proportion to their actual offense. Many young people accept plea deals to avoid transfer to the adult criminal legal system.²⁹

FIGURE 1. Sentencing Laws for Felony Murder, 2022



Note: Delaware, Massachusetts, Michigan, New Hampshire, New Mexico, North Dakota, and Vermont have *mens rea* requirements related to the killing in a felony murder charge. In California, felony murder convictions are limited to those who killed and accomplices who acted with reckless indifference to human life and were major participants in the killing. Arkansas's felony murder law requires "extreme indifference to the value of human life" but the courts have described this as a requirement not of the defendant's mental state, but of the circumstances that they set in motion. These states permit or require a virtual life sentence of 50 years or longer for some or all felony murder convictions: Alabama, Alaska, Kansas, and Texas. Life sentences in Tennessee require 60 years of imprisonment before release consideration See also Appendix 2.

B. Racial Bias

While national figures are unavailable, data from several jurisdictions reveal that people of color—especially Black people—are disproportionately represented among those with felony murder convictions. In Pennsylvania, four of every five imprisoned individuals with a felony murder conviction were people of color in 2020, and 70% were African American.³⁰ In Cook County, Illinois, eight out of 10 people sentenced under the felony

murder rule between 2010 and 2020 were Black.³¹ In Ramsey and Hennepin Counties, Minnesota, where St. Paul and Minneapolis are located, respectively, people of color accounted for 80% of second-degree felony murder convictions between 2012 and 2018.³² Statewide, just over half (54%) of those with felony murder convictions in Minnesota were Black and 10% were American Indian or Alaskan Native in 2021.³³ In Missouri, felony murder is among the top 20 offenses for which Black individuals were imprisoned in 2020, but not so for the non-Black population.³⁴

Deeply concerning racial disparities in prosecutors' use of discretion—in decisions about which homicides to prosecute as felony murder and how many people to charge as co-defendants—directly disadvantages people of color.

Bias and inequities that exist both within and beyond the criminal legal system drive these racial disparities. Deeply concerning racial disparities in prosecutors' use of discretion—in decisions about which homicides to prosecute as felony murder and how many people to charge as co-defendants—directly disadvantages people of color.³⁵ An analysis of felony murder convictions in Ramsey and Hennepin Counties identified “racially inequitable charging practices”: for white defendants, felony murder convictions often represented an opportunity to plead down from more serious charges, whereas for defendants of color, felony murder convictions often represented the most serious charge.³⁶ In California, prosecutors have been more likely to bring murder charges under the “special circumstances” law—which includes felony murder and imposes a mandatory minimum sentence of LWOP—against people of color or in cases involving white victims.³⁷ Tragically, the fact that Black Americans have been 3.5 times as likely as white Americans to be killed by the police exacerbates racial injustice in states where people can face felony murder charges when police kill their co-defendants.³⁸

Structural racism also drives the over-representation of people of color among felony murder convictions in that African Americans are more likely to live in concentrated urban poverty, producing higher rates of violent crime among people who live there.³⁹ Fully eliminating these disparities requires a host of strategies, including equalizing access to quality public schools, steady employment, high-quality medical care, stable housing, and political representation.

C. Impact on Women

In the small number of states for which data are available, felony murder convictions fuel LWOP sentences among women. In Michigan, 57 of the 203 women serving LWOP were convicted of felony murder.⁴⁰ In Pennsylvania, 40 of the 201 women serving LWOP were convicted of felony murder.⁴¹

Because felony murder laws impose identical sentences on individuals regardless of their role in the crime, they can produce especially unjust punishments for women whose criminalized acts are coerced by intimate partners.

Because felony murder laws impose identical sentences on individuals regardless of their role in the crime, they can produce especially unjust punishments for women whose criminalized acts are coerced by intimate partners. According to the California Coalition for Women Prisoners, the majority of their members convicted of felony murder were accomplices navigating intimate partner violence at the time of the offense and were criminalized for acts of survival.⁴² An exploratory survey of 82 women serving a life sentence for felony murder in California in 2018 found that 72% were not the actual perpetrators of the homicide.⁴³ In contrast, among their 411 male counterparts who were surveyed, only 55% had not committed the killing.

D. Criminologically Unsound

The extreme lengthy sentences associated with felony murder laws do not align with evidence on

how to promote public safety. Lengthy sentences keep people imprisoned long after they pose a public safety risk, do little to deter future crimes, and divert resources from more effective investments in public safety.

Extreme sentences imprison people who have aged out of their crime-prone years. The age-crime curve is a longstanding and well-tested concept in criminology, depicting the proportions of individuals in various age groups who are engaged in criminalized activity. Arrest trends between 1980 and 2010 reveal that for a range of offenses, including robbery and murder, criminal offending peaked around the late teenage years and began a gradual decline in the early 20s.⁴⁴ Because people generally age out of crime, those who have been imprisoned for violent crimes and have served lengthy sentences are among the least likely to recidivate when released from prison.⁴⁵ Indeed, studies of recidivism rates among those who have served extreme sentences for serious crimes, including in California,⁴⁶ Michigan,⁴⁷ and Maryland,⁴⁸ reveal that they have been imprisoned long past the point at which they pose an above-average public safety risk.⁴⁹ And yet in Pennsylvania, for example, 58% of those imprisoned with felony murder convictions have already served over 20 years and 28% have already served over 30 years.⁵⁰

Long sentences also fail to effectively deter crime. As Daniel Nagin, professor at Carnegie Mellon University and a leading national expert on deterrence has written: “Increases in already long prison sentences, say from 20 years to life, do not have material deterrent effects on crime.”⁵¹ Long sentences do little to discourage crime because most people do not expect to be apprehended for a crime, are not familiar with relevant legal penalties, or commit crime with their judgment compromised by substance use or mental health problems.⁵² And as Berkeley Law professor Jonathan Simon has noted, many violent acts are responsive to situational factors and circumstances, necessitating a broader approach to crime prevention.⁵³

FELONY MURDER AND DETERRENCE

“The primary justification offered for the contemporary felony-murder rule is deterrence,” writes Iowa College of Law professor James Tomkovic.⁵⁴ However, research suggests these laws are ineffective. For example, a study of felony murder rates from 1976 to 1987 found that executions for felony murder, and their televised coverage, had no significant impact on felony murder rates.⁵⁵ In a working paper, University of Chicago Law School professor Anup Malani found that the felony murder rule did not significantly reduce the number of deaths during a felony, based on a regression analysis of state-level homicide and arrest data between 1970 and 1998.⁵⁶ A legal studies thesis from UC Berkeley on felony murder laws nationwide during this period also found no significant and consistent correlation between these laws and rates of crime or crime-related deaths.⁵⁷

Some researchers even suggest that the felony murder rule “distorts marginal deterrence incentives”: while it is impossible to deter an unintentional act, immediately after an accidental death does occur, people who may face a felony murder charge may have greater incentive to kill witnesses in order to avoid detection.⁵⁸ Likewise, SUNY law professor and leading expert on felony murder Guyora Binder concludes that, “by eroding the law’s moral authority and obscuring its commands, underserved punishment [under the felony murder rule] may therefore provoke more crime than it deters.”⁵⁹ The extent to which felony murder rules promote crime is unclear—but it is clear, as Arizona State University law professor Michael Serota explains, that available evidence does not support the policy justifications typically offered in support of felony murder laws.⁶⁰

Finally, any public safety gains from extreme sentences come at a high financial cost. The high cost of imprisoning people into old age should be evaluated alongside more effective investments in public safety, such as creating universal access to effective treatment for substance use disorders and mental health care, and reducing economic and political barriers to economic stability and prosperity. Increasingly, organizations advocating on behalf of crime survivors are recommending tackling the root causes of crime to prevent future victimization.⁶¹

After reviewing international trends, this report examines four forms of injustice resulting from felony murder laws:

1. Erasing the distinction between unintentional and intentional homicides.
2. Imposing extreme sentences on young people with diminished culpability.
3. Imposing extreme sentences on accomplices who did not intend to cause a homicide.
4. Bringing murder charges based on less serious felonies and for killings committed by third parties.

II. INTERNATIONAL AND COMPARATIVE LAW

International and foreign laws and practices can help to shape U.S. laws. A global perspective on the “evolving standards of decency that mark the progress of a maturing society” has at times informed understandings of the Eighth Amendment of the U.S. Constitution, which bars cruel and unusual punishment⁶² and calls for proportionality in sentencing.⁶³ Global trends reveal that U.S. felony murder laws are anomalous and that the extreme sentences that they often impose are cruel and unusual.

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Foreign jurisdictions increasingly recognize felony murder laws as violating the fundamental principles of justice and of proportionality.⁶⁴ The United Kingdom, where the felony murder rule originated and subsequently spread to other Commonwealth countries and the United States, abolished felony murder starting as early as 1957.⁶⁵ Other countries followed suit in the 1960s, including the Republic of Ireland, Antigua and Barbuda, Barbados, and Tuvalu.⁶⁶ In 1990, the Canadian Supreme Court also eliminated felony murder, underscoring “the principle of fundamental justice that subjective foresight of death is required before a conviction for murder can be sustained,” which, in the Court’s opinion, is necessary to “maintain a proportionality between the stigma and punishment attached to a murder conviction and the moral blameworthiness of the offender.”⁶⁷ Under these circumstances, extreme

sentences for felony murder are especially suspect under international human rights law. The European Court of Human Rights (ECtHR) has reasoned that LWOP sentences for felony murder require closer scrutiny because they are more likely to be grossly disproportionate due to the lessened culpability in such cases.⁶⁸

LWOP sentences are exceedingly rare in most parts of the world. Only four countries in Latin America, and 10 in Europe, allow LWOP, and most of them use it sparingly.⁶⁹ Of the 193 United Nations member states, 155 ban LWOP sentences. For example, in addition to having no felony murder laws, Germany does not sentence its residents to LWOP or death, and for all but 0.01% of prison sentences the maximum sentence length is 15 years.⁷⁰ Germany's crime rates are at their lowest level in 30 years, and only 4% of people re-offended with crimes "serious enough to be given an unsuspended prison sentence" within a three-year period after either being released from prison or given a non-custodial sanction.⁷¹ Many other countries view extreme sentences as cruel and unusual, even in cases of intentional murder.⁷² If the U.S. were to follow global norms, it would—at the very least—conclude that LWOP sentences for felony murder violate the protections of the Eighth Amendment.

III. FELONY MURDER'S FOUR FORMS OF INJUSTICE

A. Erasing the Distinction Between Unintentional and Intentional Homicides

By converting certain unintentional killings into murders, felony murder laws violate the principle of proportional sentencing. "Proportionality has been a requirement of every mainstream normative theory of punishment since the Enlightenment" writes the National Research Council, noting that the United States has been neglecting the principle since the rise of mass incarceration.⁷³ The U.S. Supreme Court's application of the Eighth Amendment requires that "punishment for crime should be graduated and proportioned to [the] offense."⁷⁴ Proportional sentencing is relevant when distinguishing between homicides, based on factors such as whether the act was provoked or done in self-defense and whether it was done with intent—the focus of this section.

Proportional sentencing plays a role in "reinforcing norms, clarifying values, or reassuring the public,"⁷⁵ and is supported by public opinion about criminal penalties. Research conducted when U.S. crime rates were near their peak levels, in the early 1990s, by Paul Robinson and the late John Darley, professors of law at the University of Pennsylvania and of psychology at Princeton University, respectively, revealed that while survey respondents supported giving people who unintentionally killed during a felony a greater sentence than just for the felony, they did not support a punishment as severe as that imposed for murder.⁷⁶ The American Law Institute notes that proportionality is "ubiquitous" in legislative statements on the purposes of criminal sentencing.⁷⁷ The Institute recommends a "proportionality constraint" for sentencing, suggesting that legislatures and courts "render sentences in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders."⁷⁸ This principle is intended to ensure the fairness and efficacy of criminal penalties, and to help end mass incarceration by leveling down some penalties.

TABLE 1. Homicide Sentencing Laws in Several States Considering Reforms, 2022

	Pennsylvania	Michigan**	Washington, DC	California**
Sentence for first-degree murder	LWOP or death*	LWOP	LWOP	25 years to life, LWOP, or death*
Sentence for felony murder	LWOP	LWOP	30 years to LWOP	25 years to life, LWOP, or death*

* Pennsylvania and California have issued moratoriums on the death penalty.

** In California, felony murder convictions are limited to those who killed and accomplices who acted with reckless indifference to human life and were major participants in the killing. In Michigan, felony murder convictions now require, at minimum, proof of wanton disregard for life.

The felony murder rule equates many unintentional killings with intentional, premeditated ones, obviating the need to prove intentionality for a murder conviction.⁷⁹ “The rationale of the [felony murder] doctrine,” according to Wayne LaFave, emeritus law professor at the College of Law at the University of Illinois, “is that one who commits a felony is a bad person with a bad state of mind, and he has caused a bad result, so that we should not worry too much about the fact that the fatal result he accomplished was quite different and a good deal worse than the bad result he intended.”⁸⁰ Pennsylvania is among a handful of states that classify felony murder convictions as second-degree murder.⁸¹ But this carries the same sentence as for first-degree murder: life without parole.

Without meaningful assessments of intentionality to consider a killing murder, nearly all states blur the line between negligent and reckless killings and those committed purposely. Even some efforts to require a mental state (*mens rea*) requirement have maintained the underlying injustice of felony murder, as discussed below.

“The rationale of the [felony murder] doctrine is that one who commits a felony is a bad person with a bad state of mind, and he has caused a bad result, so that we should not worry too much about the fact that the fatal result he accomplished was quite different and a good deal worse than the bad result he intended.”

- Wayne LaFave

1. Two Approaches to Establishing a Culpable Mental State: Michigan and California

Michigan has treated felony murder as first-degree murder and mandated an LWOP sentence for it since the 19th century.⁸² In 1980, the Michigan Supreme Court decided in *People v. Aaron* that going forward, only individuals who demonstrated a culpable mental state with respect to the killing could be convicted of felony murder. The Court listed three levels of culpable mental states as equal under the law: “the intention to kill, the intention to do great bodily harm,

or the wanton and willful disregard of the likelihood that the natural tendency of defendant's behavior is to cause death or great bodily harm" (emphasis added).⁸³ Kahla Crino, currently the Appellate Chief in the Ingham County Prosecutor's Office, explained that this change brought about more fairness in the state's felony murder law. But prosecutors have found this third prong to be relatively easy to establish. Indeed, Michigan's justices foresaw that the change would not significantly alter case outcomes, writing: "From a practical standpoint, the abolition of the category of malice arising from the intent to commit the underlying felony should have little effect on the result of the majority of cases. In many cases where felony murder has been applied, the use of the doctrine was unnecessary because the other types of malice could have been inferred from the evidence."⁸⁴

The mental state standard for second-degree murder in Michigan is that a person has "consciously created a very high degree of risk of death to another with knowledge of its probable consequences."⁸⁵ However, the felony murder law allows prosecutors to convert such killings, which permit sentences of a discrete number of years in prison and the possibility of parole, into first-degree murder, which still mandates LWOP.⁸⁶ Crino illustrated this with an example of an armed robbery case: "If we assume that the getaway driver knew that guns would be involved, that the plan was to use those guns to facilitate a robbery, and that knowing that, they agreed to do it, then there would be no legal constraints" to pursue a felony murder charge against the driver.⁸⁷ As she acknowledged, "felony murder is alive and well in Michigan."⁸⁸ Yet she did acknowledge that treating people the same regardless of their level of intent "doesn't necessarily mean that that's the most just result."⁸⁹

The American Law Institute's 1980 Model Penal Code similarly recommends elevating a killing to murder if it was "committed recklessly under circumstances manifesting extreme indifference to the value of human life."⁹⁰ Although the Code rejects an unqualified felony murder doctrine for "its essential illogic," it offers "a concession" to facilitate proving recklessness.⁹¹ The Code offers that participation in

certain felonies can serve as a presumption—albeit a rebuttable one—that a killing was done recklessly, and can therefore qualify as murder. As criminologists Franklin Zimring and Gordon Hawkins have pointed out, this proposed presumption "rests on no more secure a basis than the discarded [felony murder] rule."⁹² The authors of the Code acknowledged the reform would likely cause little change.⁹³ Michigan's experience suggests that the Code's language would not end the injustice of felony murder.

In contrast, California's Supreme Court revised the standard for felony murder for accomplices in 2015, to state that they must be guilty of being a major participant with reckless indifference to human life, and has ruled that knowing participation in a crime when a co-defendant is armed is insufficient.⁹⁴ Additionally, California appellate courts have ruled that reckless indifference to human life means that the person's recklessness must be displayed in the killing itself, not in the underlying felony. In other words, a court or jury must assess a person's "individual responsibility for the loss of life, not just his or her vicarious responsibility for the underlying crime."⁹⁵

“DEPRAVED HEART MURDER”

U.S. criminal laws typically treat negligent and reckless killings as manslaughter, a less serious crime than murder, which is generally done purposely or knowingly. Felony murder laws are not the only way that certain accidental, negligent, and reckless killings are treated as murder. The legal concept of “depraved heart murder” can also convert an unintentional killing into murder. “Depraved heart murder” often requires a demonstration of *extreme indifference to human life* through conduct that “carries with it a very high risk of death”—unlike the predicate felonies for a felony murder charge which overwhelmingly do not result in someone’s death.⁹⁶ While felony murder is often classified as first-degree murder, “depraved heart” murder is generally considered second-degree murder and carries a lesser sentence.⁹⁷ Courts can make unjust classifications when distinguishing between a reckless killing that would be manslaughter and an extremely reckless killing that would be “depraved heart” murder.⁹⁸

2. Related Reforms

U.S. jurisdictions are a long way from treating unintentional killings committed during felonies differently from intentional murder. However, two recent reform efforts relating to felony murder are worth noting:

- The Supreme Judicial Court of **Massachusetts** prospectively narrowed the state’s felony murder law in 2017 by requiring evidence of malice regarding the killing itself—either intent to kill or to cause grievous bodily harm, or an intent “to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would result.”⁹⁹ But as in Michigan, this reform is not retroactive and may prove to be a weak restriction given that juries can infer malice from factors such as the use of a dangerous weapon.¹⁰⁰
- **DC’s** Revised Criminal Code Act, which is pending as of this writing, would reclassify felony murder from first-degree murder, which currently carries a sentence of 30 years to life without parole, to second-degree murder, which would carry a maximum sentence of 24 years.¹⁰¹ It is based on the recommendations of the Criminal Code Reform Commission. Fair and Just Prosecution

and The Sentencing Project support this reform and have encouraged DC to go further and limit maximum sentences to 20 years.¹⁰² Under its “second look” provision, the bill would also enable people convicted under old law to become eligible for resentencing after 15 years of imprisonment.

B. Imposing Extreme Sentences on Young People with Diminished Culpability

The application of the felony murder rule against youth and emerging adults results in lengthy sentences that fail to account for the significant differences in neurobiology, psychology, and maturity between young people and adults. These laws assume that all people should recognize the remote consequences of their own actions and those of others in their group, and they often sweep young people into adult penal systems. Research across several fields suggests that the “cognitive vulnerabilities” of young people make them particularly at risk of felony murder charges.¹⁰³

Young people up to age 25 often act impulsively, viewing the negative consequences of their actions as accidental, whereas adults can more easily foresee the impact of their conduct.¹⁰⁴ Due to their

susceptibility to peer pressure, adolescents are also more likely to engage in group crimes than adults, which increases their risk of being charged with felony murder.¹⁰⁵ Legislators and prosecutors have yet to align felony murder laws with these facts. Consequently, Human Rights Watch estimated that in 2008, a quarter of the 2,484 people nationwide serving LWOP sentences for crimes committed under age 18 had been convicted of felony murder.¹⁰⁶ In Pennsylvania, 73% of people serving LWOP for felony murder in 2019 were age 25 or younger at the time of their offense.¹⁰⁷ In Minnesota, 57% of those charged with aiding and abetting felony murder between 2010 and 2019 had been in this age group.¹⁰⁸

Recent reforms in criminal law increasingly reflect scientific understanding of adolescent development. Over the last two decades, the U.S. Supreme Court has affirmed the scientific evidence linking maturity with brain development by abolishing the death penalty for minors (*Roper v. Simmons*, 2005), barring juvenile-life-without-parole (JLWOP) sentences for non-homicide crimes (*Graham v. Florida*, 2010), and ending all mandatory JLWOP sentences including for homicides (*Miller v. Alabama*, 2012).¹⁰⁹ Since 2012, 32 states and the District of Columbia have updated their laws for people who commit murder under age 18, with many states banning JLWOP for all minors.¹¹⁰

Given that adolescent brain development continues into the mid-20s, when people are still learning to control their impulses, resist peer pressure, and understand the consequences of their actions,¹¹¹ states including Washington, California, Oregon, and New Jersey have enabled some individuals between ages 18 and 25 to be held in youth rather than adult correctional facilities.¹¹² Texas has operated a “Youthful Offender Program” since 1997 that includes people up to age 20.¹¹³ In 2018, California expanded eligibility for specialized youth parole hearings to people under the age of 26 at the time of their offense.¹¹⁴ Washington, DC’s Second Look Amendment Act, which became law in 2021, allows people who committed crimes under the age of 25 to petition for resentencing after 15 years of incarceration.¹¹⁵ In 2021, Washington State’s

Supreme Court overturned the automatic LWOP sentences of two individuals for murders committed at ages 19 and 20, ruling that judges must consider a defendant’s youthfulness in sentencing.¹¹⁶ All of these advances underscore the need to revisit felony murder laws, especially as applied to young people.

1. The Supreme Court has Restricted, but Not Ended, JLWOP for Felony Murder

The U.S. Supreme Court has begun to recognize the harms of JLWOP. Ruling in favor of individualized rather than mandatory JLWOP, the Court held in *Miller v. Alabama* (2012) that youth matters in felony murder sentencing. In *Jackson v. Hobbs* (2012), a companion case to *Miller*, the Supreme Court held that the sentencing of 14-year-old Kuntrell Jackson to mandatory JLWOP—for participating in a robbery during which a co-defendant killed a store clerk—violated the Eighth Amendment. The Court noted that Jackson neither killed nor intended to kill, and that his age may have influenced his risk assessment and willingness to participate in the robbery. However, the Court has yet to use this reasoning to categorically ban JLWOP sentences for felony murder, as some states have done, or to exempt young people from these laws, as recommended by many experts.¹¹⁷

In *Graham vs. Florida* (2010) the Supreme Court established that youth defendants who did not kill or intend to kill have a “twice diminished moral culpability” (due to their age and their not having killed) and are therefore less deserving of extreme punishment.¹¹⁸ Public opinion on this issue aligns with this perspective, according to sources such as a 2009 Michigan survey showing reluctance to prosecute youth who did not kill for felony murder as adults.¹¹⁹ Justice Steven Breyer referenced this reasoning in his concurring opinion in *Miller*, joined by Justice Sonia Sotomayor, arguing that youth with homicide convictions who did not kill or intend to kill should not receive discretionary JLWOP sentences. The felony murder law’s transfer of intent from the underlying felony to the killing is inappropriate for a minor, he wrote, because “the ability to consider the full consequences of a course of action and to

adjust one's conduct accordingly is precisely what we know juveniles lack capacity to do effectively."¹²⁰ But for now, the Supreme Court has not banned the imposition of JLWOP sentences for felony murder.¹²¹

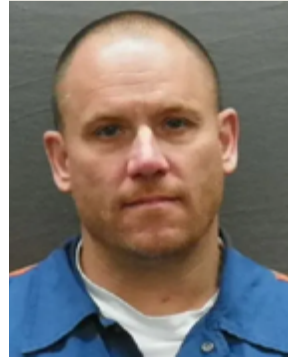
2. Related Reforms

Several jurisdictions have enacted or proposed reforms to felony murder laws as they apply to young people:

- In 2013, **North Carolina** lawmakers eliminated JLWOP sentences for felony murder and granted resentencing hearings for people convicted of felony murder as minors.¹²² **Florida** also passed legislation in 2014 automatically entitling minors convicted of felony murder to review for sentences longer than 15 years.¹²³
- In 2020, the **Oregon** Court of Appeals ruled that for minors convicted of felony murder, mandatory sentences of life with the possibility of parole after 25 years were unconstitutional, applying this decision retroactively.¹²⁴
- The Childhood Offenders Rehabilitation and Safety Act (H.R. 2908), introduced by Rep. Karen Bass in 2021, would eliminate the application of the felony murder rule to minors at the **federal** level.¹²⁵

Although these reforms have been restricted to people under the age of 18 at the time of their crime, criminologists Rolf Loeber and David Farrington have recommended that the minimum age at which young people can be referred to adult court be raised to 21 or 24.¹²⁶ Emerging adults experience continued psychosocial development, and have many of the same cognitive vulnerabilities as minors that diminish their culpability. Based on these similarities, emerging adults should be included in measures that seek to end or restrict the application of the felony murder rule to young people.

C. The Disproportionate Punishment of Accomplices



JAMIE MEADE

Jamie Meade was 19 years old when he was sentenced to life without parole after being convicted of aiding and abetting a felony murder in Michigan in 1993. Under the influence of marijuana and alcohol,

Meade and his co-defendant planned to rob an acquaintance, but his co-defendant's gun accidentally discharged and killed the victim. Meade was aware that his co-defendant had a weapon. He has since served 28 years behind bars, while his co-defendant was convicted of lesser offenses, including assault and weapons charges, and served 10 years.¹²⁷

During his incarceration, Meade earned a Bachelor of Arts from Adams State University. He is currently pursuing an MBA from the same institution, as well as a Master of Divinity from the Chicago Theological Seminary. Should he complete the degree, he will be the first incarcerated person to be registered by the United Church of Christ Michigan Covenant Association to become an ordained minister.

Many people, including the judge who sentenced Meade, the now-retired Third Circuit Court of Michigan Judge Sharon Tevis Finch, support his release. In her support letter for Meade to the Michigan Parole Board, Judge Finch noted, "If I were sentencing today, had discretion, and was not bound by the mandatory sentence, I probably would have sentenced him to no more than his co-defendant ... and Mr. Meade would have walked out of prison 15 years ago."¹²⁸

Once someone is found guilty of being an accomplice to the underlying felony, they can also be found guilty of felony murder, and very often, be subject to the same punishment as the person who killed, regardless of their level of intent or involvement in the killing. Neither public opinion nor experts support this overcriminalization. Robinson and Darley's polling in the 1990s found that in a hypothetical case of a negligent killing that occurred in the course of a robbery, the American public supported making the accomplice's sentence one-third that of the person who killed.¹²⁹ Mock juror experiments, which simulate trial conditions to study juror decision-making, also demonstrate strong public support for lesser sentences for individuals captured under accomplice liability.¹³⁰ Some crime survivors and their advocates have also echoed these views. According to Bobbi Holtberg, executive director of the Minnesota Alliance on Crime (MAC), a coalition of victim/survivor service organizations, most of MAC's member organizations support repealing Minnesota's aiding and abetting felony murder doctrine, and applying this reform retroactively. She reported that victims' loved ones were unhappy with the harsh punishment applied to those who aided and abetted their loss, and that they had a "strong preference" for holding "principal actors principally accountable."¹³¹

Accomplice liability has also been widely critiqued in scholarship for holding all parties equally culpable, regardless of their level of participation or intent to assist in the convicting offense.¹³² This approach contrasts sharply with third-party liability in tort cases, where courts undergo a strict analysis to determine the level of connection between the defendant's actions and the harm caused and the foreseeability of that harm before assigning liability.¹³³ Compared to tort law, felony murder laws can more readily hold people responsible for the acts of others, when the standard for assessing fault should in fact be higher, given the more significant consequences. Scholars are also skeptical of the punishment structures attached to most types of accomplice liability statutes, which apply blanket liability to an individual for meeting the definition of "accomplice" rather than assigning proportionate punishment based on the degree of

participation or of harm caused.¹³⁴ Evidence also suggests that these features of accomplice liability perpetuate the use of guilt by association, which has been linked to reinforcing biases and fostering disparate treatment against communities of color.¹³⁵ Finally, as discussed earlier, accomplice liability for felony murder laws has resulted in especially unjust sentences for women and youth.¹³⁶

1. Deeply Concerning Use of the Death Penalty for Felony Murder Accomplices

Today, approximately half of U.S. states allow death sentences for unintentional killings under felony murder laws.¹³⁷ The Supreme Court, in *Enmund v. Florida* (1982), acknowledged the disproportionality of capital punishment statutes for accomplices, finding that the death penalty violated the Eighth and Fourteenth Amendments unless the defendant killed, attempted to kill, or intended that a killing take place.¹³⁸ On this point the Court noted that "American criminal law has long considered a defendant's intention—and therefore his moral guilt—to be critical to 'the degree of [his] criminal culpability,'" and concluded that it was unconstitutional to assign punishment that did not match the culpability of the accused.¹³⁹ However, the Court loosened these restrictions in *Tison v. Arizona* (1987), allowing the death penalty to apply in broader circumstances where an individual acted as a major participant in the underlying felony and demonstrated reckless indifference to human life.¹⁴⁰ Since 1985, 11 people have been executed for participating in a felony during which a co-defendant committed homicide.¹⁴¹ The ongoing ability to use the death penalty in these circumstances underscores the dire need for change.

2. Related Reforms

Some states allow individuals to raise an affirmative defense against a felony murder charge.¹⁴² Typically to successfully assert such a claim, the accused must demonstrate that they (1) did not commit the killing; (2) were not armed with a dangerous weapon; (3) reasonably believed that no other participant was armed; and (4) reasonably believed that no other

participant intended to engage in conduct likely to result in death or serious bodily harm.¹⁴³ This helps to limit the circumstances that can result in a conviction for felony murder. However, under this system, charges are still brought and the onus falls to the accused to prove this defense. Broader recent reforms include:

- **California** passed SB 1437 in 2018, dramatically redefining felony murder for accomplices. Now, to be convicted as an accomplice to felony murder an individual must have either intended to kill or been both a “major participant” in the underlying felony and acted with “reckless indifference to human life” in the killing.¹⁴⁴ The law provides a process for those convicted under the old definition of felony murder to apply to be resentenced. If the prosecutor cannot prove that what they did meets the definition of murder under today’s law, a successful applicant is resentenced to the underlying felony. SB 775, passed in October 2021, extends relief to individuals who pleaded guilty to manslaughter to avoid a felony murder conviction under the old definition.¹⁴⁵ California has also introduced SB 300 to require that if someone did not kill, the prosecutor must prove that the accomplice had the intent to kill in order to obtain an LWOP or death sentence.¹⁴⁶
- **Colorado** lawmakers removed two of the conditions required for a successful affirmative defense claim for felony murder charges in 2021, allowing more individuals to meet the requirements for this defense.¹⁴⁷ The reform also reclassified felony murder from first to second degree murder, reducing the mandatory sentence from life without parole to a sentence of 16 to 48 years for all participants, allowing judges the discretion to determine appropriate punishment. However, this did not apply retroactively. Signing the bill into law, Governor Jared Polis explained: “The person who did the murder should do the most time.”¹⁴⁸ In 2018, Polis’s predecessor, John Hickenlooper, commuted Curtis Brooks’s mandatory JLWOP sentence for a felony murder conviction at age 15.¹⁴⁹ Brooks had been in a group that robbed and killed someone, but he did not kill and did not intend for the killing to occur.¹⁵⁰
- **DC’s** Revised Criminal Code Act would eliminate accomplice liability felony murder for those who did not intend to kill, a reform which Fair and Just Prosecution supported in testimony before the Commission.¹⁵¹

D. The Most Egregious Felony Murder Laws

JONATHAN MILLER

In 1998, fifteen-year-old Jonathan Miller was convicted in Georgia of felony murder, aggravated assault, and aggravated battery for the death of thirteen-year-old Josh Belluardo.¹⁵² Miller was initially charged with aggravated battery, after hitting Belluardo in the back of the head and striking and kicking him on the ground, which put him in a coma. Upon Belluardo's death, Miller was indicted for first-degree murder, tried as an adult, and sentenced to automatic life in prison with the possibility of parole after 14 years. During trial, Miller's defense argued that Miller had no intent to kill Belluardo, attempting to lower the charges to involuntary manslaughter, which carries a sentence of 1-10 years in prison. A medical examiner also testified that the punch that resulted in Belluardo's death had a 1-in-2,300 chance of rupturing the blood vessel that caused his brain to bleed.¹⁵³ After his sentencing, Miller told reporters, "I'm not a murderer ... I don't see myself as a murderer ... I'm a good kid, but I just made a few mistakes in my life."¹⁵⁴ In 2002, Miller's lawyers appealed to the Georgia Supreme Court to reverse the conviction and order a retrial. Although the Court rejected their argument, in his concurring opinion Justice Robert Benham stated: "I cannot help but believe that as we treat more and more children as adults and impose harsher and harsher punishment, the day will soon come when we look back on these cases as representing a regrettable era in our criminal justice system."¹⁵⁵

While the felony murder rule is widely criticized for unduly expanding murder liability, some people offer principled support for the broader rule, such as law professor Guyora Binder.¹⁵⁶ Yet there are iterations and applications of the law that are so far-reaching that even those legal thinkers consider them overreach. These instances include statutes that allow felonies such as burglary, drug distribution, and assault to serve as the basis for felony murder convictions.

1. Murder Charges Based on Burglary, Drugs, and Assault

Felony murder laws exaggerate the risk of homicide related to felonies in general, and thus the extent to which a person participating in those felonies should have anticipated that death would occur. For example, a study of Chicago in the early 1980s found that approximately 0.6% of *reported* robberies resulted in homicide.¹⁵⁷ The California Supreme Court has held that a "garden-variety armed robbery"—one involving the use of a gun—does not involve a grave risk of death.¹⁵⁸ Yet the problem with describing a crime like robbery as "inherently dangerous" pales in comparison to describing crimes such as burglary and drug distribution in this way. While robbery typically involves taking something directly from someone by threatening or using force, burglary typically involves entering a building without permission to commit a felony. Binder points out that the mortality rate for reported burglaries is less than 0.02%.¹⁵⁹ Treating burglary as inherently dangerous is especially problematic, he argues, in cases that lack aggravating factors that create foreseeable danger, such as using a weapon or knowingly burglarizing a dwelling that is inhabited. Binder recommends that the 25 states and the federal system that included burglary as a basis for felony murder charges in 2012 repeal this part of their statutes.¹⁶⁰

Binder recommends similar changes to the laws of the 12 jurisdictions that included drug offenses as a predicate felony for felony murder at that time.¹⁶¹ Death is not a foreseeable consequence of sharing or

selling drugs because drug use overwhelmingly does not result in death.¹⁶² Binder recommends that drug offenses not be considered predicate felonies for felony murder charges because “drug offenses do not inherently involve violence, coercion, or destruction, and because their dangers are so variable and context specific.”¹⁶³

Basing a felony murder conviction on crimes such as aggravated assault poses another problem: doing so inappropriately allows all crimes of assault that inadvertently result in death to be treated as intentional murder. Since many intentional murders begin with an assault, allowing this crime to serve as the underlying felony for felony murder would make it unnecessary for prosecutors to ever prove that a killing was intentional. Many states prevent this outcome through a “merger doctrine,” which excludes felonies that are integrated into the act of killing from serving as the basis for felony murder charges, or by requiring that predicate felonies have an independent purpose from the killing. States that allow felony murder charges based on aggravated assault include Georgia, Minnesota, Montana, Ohio, Washington, and Wisconsin, which enumerate aggravated assault as a predicate felony, and Delaware, Missouri, and Texas, which do not enumerate predicate felonies and have rejected merger rules.¹⁶⁴

In rare instances, prosecutors in states that lack the merger doctrine have used their expansive felony murder laws to bring elevated murder charges against officers for unjustified killings.¹⁶⁵ For example, Minnesota police officer Derek Chauvin was convicted of second-degree murder for killing George Floyd, in what was considered an unintentional killing that occurred amidst an assault.¹⁶⁶ As Greg Egan, a Ramsey County, Minnesota, public defender and adjunct law professor at Mitchell Hamline School of Law, has acknowledged: “I’ve called at the very least for a merger limitation and yes, as much as I hate to say it, that limitation would’ve prevented the top count against Derek Chauvin if Minnesota, like many other states, had adopted a merger limitation.”¹⁶⁷ But officers can still be held accountable for unjustified

killings if these states were to narrow or eliminate the felony murder rule. In Minnesota, for example, Chauvin would remain liable for aggravated assault and the two other charges brought against him: third-degree murder for a “depraved mind” killing and second-degree manslaughter—though both of these would carry a lesser sentence than the 22 1/2 years that he received. As Ekow Yankah, law professor at Benjamin N. Cardozo School of Law, has explained, “we have to be very conscious of the bargain we’re making” by retaining overly broad felony murder rules for their rare application to police officers who kill unjustly.¹⁶⁸

2. Convicting Others for Killings Committed by Police, Victims, or Bystanders

TEVIN LOUIS

In 2012, 19-year-old Tevin Louis was charged with felony murder. The deceased was his friend, Marquise Sampson. The person who pulled the trigger was Officer Antonio Dicarolo.

After the two teenagers robbed a gyro shop, Officer Dicarolo and his partner chased Sampson for a quarter mile before Dicarolo shot him in the shoulder, chest, and back. While Dicarolo claimed that Sampson pulled out his gun, the body camera footage of the shooting was obscured: it only showed Sampson holding his waistband, not a gun.¹⁶⁹ Louis was convicted of first-degree murder for his friend's death as well as robbery. He was found guilty of each, and sentenced to 52 years in prison. Appealing his case, Louis acknowledged: "I'm not perfect. But I don't deserve this."¹⁷⁰

Dicarolo, an officer with over 20 misconduct complaints on his record since 2000, including for improper use of a weapon,¹⁷¹ was praised for his actions. Then-Chicago Mayor Rahm Emanuel gave him a 2013 Superintendent's Award for Valor. According to an investigation from the *Chicago Reader*, Louis's case was one of at least 10 in Cook County between 2011 and 2016 in which killings by Chicago police and Cook County sheriff's officers resulted in felony murder charges for residents. If Illinois's 2021 reform narrowing the scope of the felony murder law were to be applied retroactively, Louis might have a chance at resentencing. Louis's case echoes similar cases across the country that shift blame from police to civilians, including in Alabama, Arizona, Ohio, and Oklahoma.¹⁷²

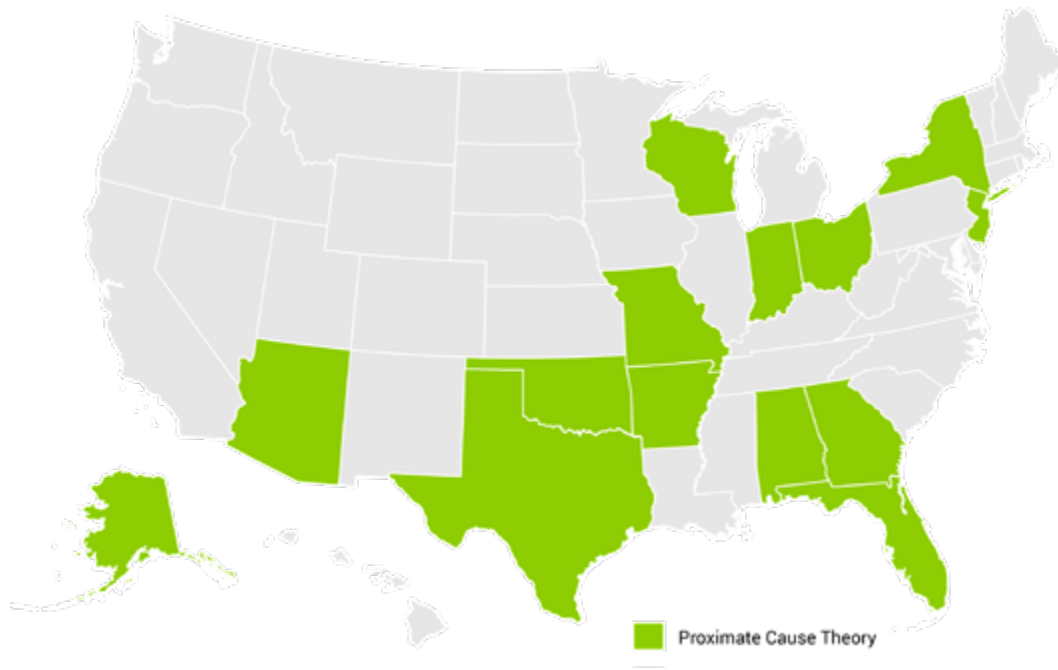
Tevin Louis's case is an example of another type of felony murder over-reach: reliance on the proximate cause rather than the agency theory of responsibility for death. This allows the members of a group engaged in a felony, such as the robbery Louis participated in, to be convicted of murder when someone *outside* of their group, such as a police officer or victim, kills. These statutes enable prosecutors to shift blame for excessive police use of force to members of the victim's group—disproportionately against Black Americans.¹⁷³ Referencing some of the most egregious instances and applications of the felony murder doctrine, law professor Guyora Binder has written: "If the felony murder doctrine is designed to produce results like these, it should indeed be abolished."¹⁷⁴

"If the felony murder doctrine is designed to produce results like these, it should indeed be abolished."

- Guyora Binder

A majority of states rely on the agency rule for felony murder, holding people responsible for killings committed by co-defendants in the underlying felony (those who acted as "agents" of the person carrying out the felony).¹⁷⁵ But in states with only a proximate cause rule, people engaged in a felony can be convicted of felony murder for a killing committed by third parties if it can be characterized as a foreseeable result of their action.¹⁷⁶

FIGURE 2. Where People Can Face Felony Murder Charges for Killings by Police, Victims, or Bystanders



Sources: G. Binder (personal communication, October 21, 2021); *Jefferson v. State*, 276 S.W.3d 214, 223 (Ark. 2008).

Overall, 14 states with felony murder laws have rejected agency rules and require only proximate causation, including such populous states as Texas, Florida, New York, Ohio, and Georgia.¹⁷⁷ In these states, Binder notes, “We see a continuing pattern of prosecutors using such felony murder laws to shift blame from police to suspects, often Black suspects, for police violence.”¹⁷⁸ An investigation in Illinois—where the law has changed but not retroactively—found that a police officer was the shooter in more than half of the 38 cases where people remain imprisoned for a killing committed by someone outside of their group, a conviction no longer permitted under current law.¹⁷⁹

The DC Criminal Code Reform Commission notes that only in a handful of states is it impossible to make the death of a person who participated in the underlying felony, like Marquise Sampson, into a felony murder charge.¹⁸⁰ The Rhode Island Supreme Court, for example, has held that if the defendant’s actions “foreseeably produced” the fatal injury, they

can be convicted of felony murder even if the victim was an accomplice.¹⁸¹

3. Related Reforms

- **Illinois** and **Colorado**’s legislatures amended their laws in 2021 to prevent people engaged in a felony from being held criminally culpable for deaths caused by people outside of their group, though neither reform was applied retroactively.¹⁸² Illinois’s reform was motivated by the high-profile “Lake County Five” case in which prosecutors in Lake County initially charged five Black teenagers with murder as adults when a friend in their group was shot and killed by an elderly white homeowner for allegedly trying to steal a car from his driveway.¹⁸³

IV. RECOMMENDATIONS

A. Ending the Injustice of Felony Murder Laws

The Sentencing Project and Fair and Just Prosecution recommend that lawmakers repeal felony murder statutes and punish these crimes as their constituent parts—often a felony and an unintentional killing. In the absence of this broad overhaul, several more specific reforms are needed to narrow the felony murder rule, advance public safety, and address a troubling cause of mass incarceration and racial disparities in the criminal legal system. The reforms included below should apply not only to people who will face prosecution in the future, but also **retroactively** to those already convicted. Many, but not all, of these changes will require state and federal legislative action, although some can be put in place immediately by elected prosecutors and/or courts and other justice system leaders, on their own accord. Elected prosecutors can lead the way in advancing these reforms by implementing the model policy included in Appendix 1.

1. Jurisdictions should **eliminate the most extreme sentences—death and LWOP—for felony murder, and ensure that felony murder** convictions result in less harsh punishment than intentional murders.
2. Jurisdictions should **eliminate application of the felony murder law to predicate offenses that have an extremely low risk of death**, including **robbery, burglary, and drug law violations**. **Assault** should not serve as a predicate felony, to avoid extending murder liability to unintentional killings. Also, killings by people who were **not involved in the commission of the felony**, such as by a police officer or victim, should not subject the individuals committing the offense to felony murder charges.¹⁸⁴
3. Prosecutors should **address charging and plea practices that exacerbate racial and ethnic disparities**, such as expansive charging of

accomplices and unjustifiably unfavorable plea offers to people of color. Prosecutors can also play a role in eliminating racial disparities by supporting policies that build prosperity and stability in communities of color, such as by expanding access to health care (including mental health care and effective drug treatment), reducing the broad scale and negative impact of low-level criminal convictions, and addressing underemployment, low wages, and affordable housing.

4. Jurisdictions should **repeal the felony murder rule for accomplices** as well as for **youth and emerging adults**. Accomplices have a lower level of culpability and young people have a weaker grasp of the potential consequences of their criminal activity, making their felony murder convictions doubly unjust. At a minimum, jurisdictions should narrow accomplice liability to major participants in the underlying felony who acted with reckless indifference to human life in the killing. In addition, prosecutors and courts should consider evidence that accomplices are not acting under coercive control, as seen in cases involving people who are threatened with intimate partner violence, sexual violence, and human trafficking.
5. Jurisdictions should **institute meaningful intent requirements** for a killing to be considered felony murder, assessing the defendant's mental state with respect to the killing itself, not to the underlying felony offense. Terms such as extreme recklessness or wanton disregard for life should be statutorily defined and applied in such a way as to substantially narrow felony murder convictions such as by requiring more than the use of a dangerous weapon, or knowledge that a co-defendant was armed. At a bare minimum, all jurisdictions should allow for an affirmative defense to felony murder for those who did not commit the killing; were not armed with a dangerous weapon; and believed that no other participant intended to engage in conduct likely to result in death or serious bodily harm.

6. Jurisdictions should allow judicial review of sentences for people who **pled to lesser crimes** because they were threatened with murder sentences under overly expansive felony murder laws.

B. Addressing Past and Future Sentencing Excesses: A Broad Vision for Change

Fair and Just Prosecution and The Sentencing Project view ending the injustice of felony murder laws as part of a broader effort to end mass incarceration and better invest in strategies proven to promote public safety. Two key elements of this effort include limiting the imposition of extreme sentences on the front end and reconsidering previously imposed lengthy sentences, including through opportunities for second chances after years of imprisonment.

The Sentencing Project, in coalition with other organizations, recommends limiting maximum prison terms to 20 years, except in unusual circumstances.¹⁸⁵ Achieving this goal requires reforming front-end sentencing laws and practices. At the federal level, President Biden and Attorney General Merrick Garland support the abolition of mandatory minimum sentences, a reform endorsed by the American Bar Association and the NAACP Legal Defense and Educational Fund.¹⁸⁶ In January of 2022, New York District Attorney Alvin Bragg enacted a policy to prohibit life-without-parole-sentences, and cap determinate sentences at 20 years.¹⁸⁷

Over 60 reform-minded elected prosecutors and law enforcement leaders working with Fair and Just Prosecution have called for second look legislation, and several prosecutors' offices have launched sentence review units charged with looking back and remedying past unjust sentences. In 2021, over 40 elected prosecutors joined in a statement issued by Fair and Just Prosecution calling for office policies whereby no prosecutor is permitted to seek a lengthy sentence above a certain number of years (for example 15 or 20 years) absent permission from a supervisor or the elected prosecutor.¹⁸⁸ The joint statement also notes:¹⁸⁹

Changing presumptions in this way and making clear that these sentences should be reserved for the unusual and extraordinary case can have a significant impact moving forward by aligning the U.S. with the starting point around sentence length in place in other countries, and also move us away from the ramp up of mass incarceration seen over past decades.

The Sentencing Project and Fair and Just Prosecution also recommend instituting a second-look and automatic sentence review process within a maximum of 10 years of imprisonment, with a rebuttable presumption of resentencing.¹⁹⁰ Over 60 reform-minded elected prosecutors and law enforcement leaders working with Fair and Just Prosecution have called for second look legislation, and several prosecutors offices have launched sentence review units charged with looking back and remedying past unjust sentences.¹⁹¹ Victim advocacy and service organizations in jurisdictions including Washington, DC, and New York have also supported these reforms.¹⁹²

V. Appendices

Appendix 1. Model Felony Murder Policy for Prosecutors' Offices

This model policy for a prosecutor's office presumes a jurisdiction in which felony murder lacks any additional *mens rea* requirement. However, an office within a jurisdiction with a *mens rea* requirement would also benefit from implementing many of these guidelines. For example, even within jurisdictions with a *mens rea* requirement, chief prosecutors should consider implementing policies restricting the use of mere possession of a firearm to prove malice. In addition to implementing the below guidelines, prosecutors' offices should audit past charging and plea practices to identify racial and ethnic disparities, as well as collect racial and other demographic data prospectively to monitor and correct disparities in charging and sentencing practices. Likewise, offices should seek or consent to sentence modifications for defendants who received sentences inconsistent with these guidelines. Ultimately, chief prosecutors committed to reform should seek legislative reform to abolish felony murder laws or, at the very least, introduce a *mens rea* requirement for felony murder of at least reckless indifference.

- A. The following guidelines apply for the purposes of charging, plea offers, trial, and sentencing recommendations.
- B. Defendants shall **not** be either charged with felony murder or prosecuted under a felony murder theory of liability if at least one of these factors applies:
 1. The underlying felony offense involves a low risk of death. Such underlying offenses include, but are not limited to, robbery, burglary, drug law violations including sale, and assault without a deadly weapon.
 2. The defendant is 25 years of age or younger.
 3. The decedent's death is proximately caused by an individual who is not involved in the commission of the underlying felony, including instances in which the decedent's death is caused by a responding law enforcement officer.

4. The underlying felony is committed without reckless indifference to human life.
- C. In addition to the above requirements, accomplices to the underlying felony shall not be charged with felony murder or prosecuted under a felony murder theory of liability unless the state can prove all of these conditions beyond a reasonable doubt:
 1. The accomplice had the intent to kill.
 2. The accomplice was a major participant in the underlying felony and acted with reckless indifference to human life in the killing.
 3. The accomplice was not acting under coercive control, including but not limited to contexts of intimate partner violence, sexual violence, and trafficking.
 - D. For the purposes of this policy, neither the mere possession of a firearm nor the knowledge that a co-defendant was armed suffices to prove that the defendant acted with reckless indifference to human life.
 - E. All plea offers or sentence recommendations over 10 years in prison in cases wherein the defendant is either charged with felony murder or prosecuted under a felony murder theory of liability must receive executive approval by the chief prosecutor or a senior supervisor. In addition, plea offers and sentence recommendations in all cases in which the defendant is charged with felony murder or prosecuted under a felony murder theory of liability shall meet two conditions:
 1. The sentence to be recommended will not exceed 20 years if felony murder or homicide prosecuted under a felony murder theory of liability is the top count of the indictment.
 2. The disposition to be recommended will reflect principles of proportionality by being lower than comparable offers and recommendations for similarly situated defendants charged with malice murder.
 - F. Individuals previously sentenced to 20 years or over in prison on felony murder charges and based on a felony murder theory of liability should be reviewed by the office's Sentencing Review Unit.¹⁹³

APPENDIX 2. Sentencing Laws for Felony Murder, 2022

LWOP is mandatory minimum for all felony murder convictions for adults	LWOP mandated for certain felony murder convictions	LWOP permitted for certain felony murder convictions	LWOP is not a sentencing option for felony murder	No felony murder law
Arizona* Florida†† Iowa Louisiana Michigan** Mississippi Nebraska North Carolina Pennsylvania South Dakota Federal system Wyoming	Arkansas† California† Connecticut Delaware** Illinois Massachusetts** New Jersey New Mexico** New York Ohio South Carolina	District of Columbia Georgia Idaho Indiana Maryland Montana Nevada New Hampshire** North Dakota** Oklahoma Oregon Rhode Island Tennessee‡ Utah Vermont** Virginia Washington West Virginia	Alabama‡ Alaska‡ Colorado Kansas‡ Maine Minnesota Missouri Texas‡ Wisconsin	Hawaii Kentucky

* Life with parole is no longer a legal sentencing option for felony murder in Arizona since Arizona abolished parole for crimes committed after 1993. See A.R.S. 13-751(A)(3); A.R.S. 41-1604.09.

** These states have a *mens rea* requirement for all felony murder convictions.

† Arkansas's felony murder law requires extreme indifference to the value of human life but the courts have described this as a requirement not of the defendant's mental state, but of the circumstances that they set in motion. In California, felony murder convictions are limited to those who killed and accomplices who acted with reckless indifference to human life and were major participants in the killing.

‡ These states permit or require a virtual life sentence of 50 years or longer for some or all felony murder convictions. Life sentences in Tennessee require 60 years of imprisonment before release consideration.

†† Florida allows a lesser sentence when applying its proximate cause theory of the law, which is a broader use of the law than most states.

ENDNOTES

¹ *People v. Mendoza*, No. C089455 (Cal. Ct. App. Nov. 1, 2021).

² E. Mendoza (personal communication, March 1-2, 2022).

³ Nellis, A. (2021a). *No end in sight: America's enduring reliance on life imprisonment*. The Sentencing Project. <https://www.sentencingproject.org/publications/no-end-in-sight-americas-enduring-reliance-on-life-imprisonment/>; Fair and Just Prosecution. (2020). *Revisiting past extreme sentences: Sentencing review and second chances*. https://www.fairandjustprosecution.org/staging/wp-content/uploads/2020/02/FJP_Issue-Brief-SentencingReview.pdf

⁴ See Section II.

⁵ These states have a *mens rea* requirement for felony murder, the Latin term for guilty mind. Most felony murder laws can be characterized as strict liability, with no *mens rea* requirement for the killing. In contrast, most criminal laws require not only evidence of a criminal act, but also of a blameworthy mental state, typically ranging from negligent to purposeful. This report uses the terms intentionality and culpable mental state interchangeably with *mens rea*, which is also related to the concept of malice.

⁶ Jurisdictions with a *mens rea* requirement related to the killing in a felony murder charge are: Delaware (recklessness for first degree murder or criminal negligence for second), Massachusetts (intent to kill or inflict great bodily harm, or to commit a crime in circumstances that could reasonably have been known to create a strong likelihood of death), Michigan (at minimum, wanton and willful disregard of the likeliness of death or great bodily harm), New Hampshire (recklessness under circumstances manifesting extreme indifference to human life, which is presumed if the defendant causes death by the use of a deadly weapon while committing or attempting to commit a class A felony), New Mexico (intent to kill or knowledge of the strong probability of death or great bodily harm), North Dakota (at minimum, recklessness), and Vermont (intent to kill or inflict great bodily harm, or wanton disregard for human life). In addition, California has a *mens rea* requirement for accomplices, as described on pp. 24-25. Arkansas's felony murder law requires "extreme indifference to the value of human life" but the courts have described this as a requirement not of the defendant's mental state, but of the circumstances that they set in motion. 11 DE Code § 635(b) (2021); 11 DE Code § 635(a)(2) (2021); *State v. Glenn*, 107 A. 3d 651, 644-55 (N.H. 2014); *Commonwealth v. Brown*, 811 N.E. 3d 1173 (Mass. 2017); *People v. Aaron*, 299 N.W. 2d 304, 329 (Mich. 1980); N.H. Rev. State. Ann. § 630:1 (West 2021); *State v. Griffin*, 866 P.2d 1156, 1162 (N.M. 1993) & *State v. O'Kelly*, 84 P. 3d 88, 94-95 (N.M. 2003); N.D. Statutes 12,1-02-02, 12.1-16-01(1)(c); N.D. Crim. Instr. (2019) k-6.03; *State v. Baird*, 175 A. 3d 493, 496 (V.T. 2017); ARK. CODE ANN. § 5-10-102 & *Jefferson v. State*, 276 S.W.3d 214, 223 (Ark. 2008).

⁷ For details see Figure 1 and Appendix 2.

⁸ Lindsay, A. (2021). *Life without parole for second-de-*

gree murder in Pennsylvania. Philadelphia Lawyers for Social Equity. <https://www.plsephilly.org/wp-content/uploads/2021/01/PLSE-Second-Degree-Murder-Audit-Jan-19-2021.pdf>; Whitmer, G., & Washington, H. (2021). *Michigan Department of Corrections 2019 statistical report*. Michigan Department of Corrections. https://www.michigan.gov/documents/corrections/MDOC_2019_Statistical_Report_717026_7.pdf; Nellis (2021a), see note 3.

⁹ Lindsay (2021), see note 8.

¹⁰ Lindsay (2021), see note 8; Turner, L. (2022). Task force on aiding and abetting felony murder: *Report to the Minnesota Legislature*. Minnesota Department of Corrections. https://mn.gov/doc/assets/AAFM-LegislativeReport_2-1-22_tcm1089-517039.pdf

¹¹ C. Chapin (personal communication, December 3, 2021). See also Mallick, A., & Chatfield, K. (2018, August 8). California accomplices to a felony shouldn't be sentenced like the one who committed the murder. *Juvenile Justice Information Exchange*. <https://jjie.org/2018/08/08/accomplices-to-a-felony-shouldnt-be-sentenced-like-the-murderer-in-california/>

¹² C. Lenz (personal communication, November 30, 2021).

¹³ Petition for review in the nature of a complaint seeking declaratory judgment and injunctive relief on behalf of Marie Scott, Normita Jackson, Marsha Scaggs and Tyreem Rivers, July 8, 2020. 397 M.D. (2020). <https://ccrjustice.org/sites/default/files/attach/2020/07/Scott%20v.%20PBPP-as%20filed.pdf>

¹⁴ Amicus Curiae Supporting Petitioners Marie Scott, Normita Jackson, Marsha Scaggs and Tyreem Rivers, October 22, 2021. 397 M.D. (2020). (no. 16), 2021. <https://www.sentencingproject.org/publications/amicus-brief-in-support-of-ending-felony-murder-lwop-sentences-in-pennsylvania/>

¹⁵ See note 13, p. 12.

¹⁶ See note 6.

¹⁷ Some scholars argue that participation in certain felonies demonstrates some level of *mens rea*—negligence—towards the related death, though this alone would not qualify a killing as murder. See Simons, K. W. (1997). When is strict criminal liability just? *Journal of Criminal Law and Criminology*, 87(4), 1075-1081; Binder, G. (2012). *Felony murder*. Stanford University Press.

¹⁸ Lindsay (2021), see note 8; Nellis (2021a), see note 3.

¹⁹ *People v. Aaron*, see note 6.

²⁰ Whitmer & Washington (2021), see note 8; Nellis (2021a), see note 3.

²¹ Whitmer & Washington (2021), see note 8.

²² Committee on Revision of the Penal Code. (2021). *Annual report and recommendations: Committee on revision of the penal code*. California Law Revision Commission. http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2021.pdf. The findings of this report were based on a sample of 2,300 individuals who comprised half of the state's LWOP population. This sample likely overrepresents people convicted after the year 2000 based on

data availability. Trautfield, D. (personal communication, January 21, 2022).

²³ Special Circumstance Murder, CA Penal Code § 190.2 (1872).

²⁴ Turner (2022), see note 10.

²⁵ Parson, M. L., & Precythe, A. L. (2021). *Profile of the institutional and supervised offender population*. Missouri Department of Corrections. <https://doc.mo.gov/media/pdf/offender-profile-fy-20>

²⁶ Another person was sentenced to 70 years for felony murder. M. Bronshteyn (personal communication, September 13, 2021).

²⁷ *State v. Anderson*, 409 A.2d 1290 (Me. 1979); *State v. Corbitt*, 378 A.2d 235 (N.J. 1977); Ganz, D. (2012). *The American felony murder rule: purpose and effect* (Publication No. 21090905). [Legal Studies Honors Thesis, UC Berkeley] UC Berkeley Legal Studies. <https://studylib.net/doc/8912269/the-american-felony-murder-rule-purpose-and-effect>

²⁸ Albrecht, K. (2020). *Data transparency and the disparate impact of the felony murder rule*. Duke Center for Firearms Law. <https://firearmslaw.duke.edu/2020/08/data-transparency-the-disparate-impact-of-the-felony-murder-rule/>

²⁹ Grant, M. G. (2019, August 6). Police killed her boyfriend, then charged her with his murder. *The New Republic*. <https://newrepublic.com/article/154674/masonique-saunders-columbus-ohio-police-felony-murder-laws>

³⁰ Lindsay (2021), see note 8.

³¹ Albrecht (2020), see note 28.

³² Egan, G. (2021). Deadly force: How George Floyd's killing exposes racial inequities in Minnesota's felony-murder doctrine among the disenfranchised, the powerful, and the police. *Minnesota Journal of Law and Inequity*, 4(1), 1-23.

³³ Turner (2022), see note 10.

³⁴ Parson & Precythe (2021), see note 25.

³⁵ In addition, policies and decisions that disadvantage low-income people—such as underfunded indigent defense and money bail requirements—compound these racial disadvantages. See Ghandnoosh, N. (2015). *Black lives matter: Eliminating racial inequity in the criminal justice system*. The Sentencing Project. <https://www.sentencingproject.org/publications/black-lives-matter-eliminating-racial-inequity-in-the-criminal-justice-system/>

³⁶ Egan (2021), see note 32, p. 11.

³⁷ Committee on Revision of the Penal Code (2021), see note 22.

³⁸ GBD 2019 Police Violence US Subnational Collaborators. (2021). Fatal police violence by race and state in the USA, 1980-2019: A network mega-regression. *The Lancet*, 398(10307), 1239-1255.

³⁹ Peterson, R. D., & Krivo, L. J. (2010). *Divergent social worlds: Neighborhood crime and the racial-spatial divide*. Russell Sage Foundation.

⁴⁰ Nellis, A. (2021b). *In the extreme: Women serving life without parole and death sentences in the United States*.

The Sentencing Project. <https://www.sentencingproject.org/wp-content/uploads/2021/09/In-the-Extreme-Women-Serving-Life-without-Parole-and-Death-Sentences-in-the-United-States.pdf>

⁴¹ Nellis (2021b), see note 40.

⁴² Lenz (2021), see note 12.

⁴³ Chapin (2021), see note 11; Mallick & Chatfield (2018), see note 11. See also Bazelon, L. (2021, Feb 16). Anissa Jordan took part in a robbery. She went to prison for murder. *The Atlantic*. <https://www.theatlantic.com/politics/archive/2021/02/what-makes-a-murderer/617819/>

⁴⁴ In 2019, youth and emerging adults were far less likely to be arrested for all violent crimes than in the past. Loeber, R., & Farrington, D. (2014). Age-crime curve. Bruinsma & D. Weisburd (Eds.), *Encyclopedia of Criminology and Criminal Justice*. Springer, pp. 12-18; Office of Juvenile Justice and Delinquency Prevention Statistical Briefing Book. (2020). *Age specific arrest rate trends*. <https://www.ojjdp.gov/ojstatbb/crime/qa05301.asp?qaDate=2019&text=no>

⁴⁵ Nellis, A. (2021c). *A new lease on life*. The Sentencing Project. <https://www.sentencingproject.org/publications/a-new-lease-on-life/>; Alper, M., Durose, M., & Markman, J. (2018). *2018 update on prisoner recidivism: A 9-year follow-up period (2005-2014)*. Bureau of Justice Statistics. <https://www.bjs.gov/content/pub/pdf/18upr9yfup0514.pdf>; United States Sentencing Commission. (2019). *Recidivism among federal violent offenders*. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190124_Recidivism_Violence.pdf

⁴⁶ Weisberg, R., Mukamal, D. A., & Segall, J. D. (2011). *Life in limbo: An examination of parole release for prisoners serving life sentences with the possibility of parole in California*. Stanford Criminal Justice Center. http://law.stanford.edu/wp-content/uploads/sites/default/files/child-page/164096/doc/slspublic/SCJC_report_Parole_Release_for_Lifers.pdf; Prescott, J. J., Pyle, B., & Starr, S. B. (2020). Understanding violent-crime recidivism. *Notre Dame Law Review*, 95(4), 1643-1698.

⁴⁷ Levine, B., & Kettunen, E. (2014). *Paroling people who committed serious crimes: What is the actual risk?* Citizens Alliance on Prisons and Public Spending. https://www.prisonpolicy.org/scans/cappsmi/CAPPS_Paroling_people_who_committed_serious_crimes_11_23_14.pdf; see also Citizens Alliance on Prisons and Public Spending. (2009). *Denying parole at first eligibility: How much safety does it actually buy?* Citizens Alliance on Prisons and Public Spending. <https://static.prisonpolicy.org/scans/cappsmi/Recidivismstudy.pdf>

⁴⁸ Justice Policy Institute. (2018). *The Ungers, 5 years and counting*. <https://justicepolicy.org/research/reports-2018-the-ungers-5-years-and-counting-a-case-study-in-safely-reducing-long-prison-terms-and-saving-taxpayer-dollars/>

⁴⁹ Note that some studies suggest that people with felony murder convictions recidivate at a higher rate than those

with other murder convictions, in part because these individuals enter and leave prison at younger ages and because some have served far shorter sentences than is now common. Others find no difference in recidivism rates and conclude that all people with homicide convictions need rehabilitative and re-entry assistance. Khachatrian, N., Heide, K. M., & Hummel, E. V. (2018). Recidivism patterns among two types of juvenile homicide offenders: A 30 year follow up study. *International Journal of Offender Therapy and Comparative Criminology*, 62(2), 404-426, p. 420; Liem, M., Zahn, M. A., & Tichavsky, L. (2014). Criminal recidivism among homicide offenders. *Journal of Interpersonal Violence*, 29(14), 2630-2651; Liem, M. (2013). Homicide offender recidivism: A review of the literature. *Aggression and Violent Behavior*, 18(1), 19-25.

⁵⁰ Lindsay (2021), see note 8, p. 29.

⁵¹ Nagin, D. (2019, March 21). Guest post: Reduce prison populations by reducing life sentences. *Washington Post*. <https://www.washingtonpost.com/crime-law/2019/03/21/guest-post-reduce-prison-populations-by-reducing-life-sentences/>; Durlauf, S., & Nagin, D. (2011). Imprisonment and crime: Can both be reduced? *Criminology and Public Policy*, 10(1), 13-54.

⁵² Robinson, P., & Darley, J. (2004). Does criminal law deter? A behavioural science investigation. *Oxford Journal of Legal Studies*, 24(2), 173-205.

⁵³ Simon, J. (2011). *Drugs are not the (only) problem: Structural racism, mass imprisonment, and the overpunishment of violent crime*. The Aspen Institute, p. 145. <https://www.aspeninstitute.org/wp-content/uploads/files/content/docs/pubs/Race-Crime-Punishment.pdf>

⁵⁴ Tomkovicz, J. J. (1994). The endurance of the felony-murder rule: A study of the forces that shape our criminal law. *Washington and Lee Law Review*, 51(4), 1429-1480, p. 1448.

⁵⁵ Peterson, R. D., & Bailey, W. C. (1991). Felony murder and capital punishment: An examination of the deterrence question. *Criminology*, 29(3), 367-395.

⁵⁶ Malani, A. (2007). Does the felony-murder rule deter? Evidence from FBI crime data. (unpublished paper).

⁵⁷ Ganz (2012), see note 27.

⁵⁸ See Malani. (2007), see note 56, p. 1.

⁵⁹ Binder (2012), see note 17, p. 26.

⁶⁰ See Serota, M. (2021). *Strict liability abolition* [submitted for publication]. Sandra Day O'Connor College of Law, Arizona State University.

⁶¹ See Ghandnoosh, N. (2021). *A second look at injustice*. The Sentencing Project. <https://www.sentencingproject.org/publications/a-second-look-at-injustice/>

⁶² *Roper v. Simmons*, 543 U.S. 551, 575 (2005): "[A]t least from the time of the Court's decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'" See also *Atkins v. Virginia*, 536 U.S. 304,

316, n. 21 (2002): "[W]ithin the world community, the imposition of the death penalty for crimes committed by [intellectually disabled] offenders is overwhelmingly disapproved"; & *Trop v. Dulles*, 356 U.S. 86, 102 (1958): "The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime." For a comprehensive review of the citations of international and foreign sources in U.S. Supreme Court decisions, see Cleveland, S. H. (2006). Our international constitution. *Yale Journal of International Law*, 31(1), p. 2-3. For a comprehensive survey of state courts looking to international human rights law to inform their decision-making, see Davis, M. F., Iniguez-Lopez, D., Carter, R. L., & Thukral, J. (2014). *Human rights in state courts 2014*. The Opportunity Agenda & PHRGE; see also Davis, M. F., Kalb, J., & Kaufman, R. E. (2018). *Human rights advocacy in the United States*. West Academic Publishing.

⁶³ *Graham v. Florida*, 560 U.S. 48, 59 (2010).

⁶⁴ See *Enmund v. Florida*, 458 U.S. 782, 797, n. 22 (1982): "It is thus worth noting that the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of Commonwealth countries, and is unknown in continental Europe."

⁶⁵ Homicide Act of 1957, 5 & 6 Eliz.2 c.11, § 1 (Gr. Brit.); Criminal Justice Act of 1966, c. 20, § 8 (N. Ir.). In both of these contexts, the doctrine of felony murder is known as constructive malice. Although the constructive malice doctrine was abolished in the United Kingdom beginning in 1957, a doctrine much like it re-emerged in 1985, and was limited again in 2016. In 1985, the Privy Council of the United Kingdom adopted the parasitic accessory liability dimension of joint enterprise liability: when two defendants engage in a joint enterprise to commit offense A, it was sufficient for D2 to foresee the possibility that D1 might commit offense B, say murder, to be convicted of offense B. *Chan Wing-Siu v. The Queen* [1985] AC 168. This was overturned in 2016 by the UK Supreme Court in *R v. Jogee* [2016] UKSC 8. The Jogee court ruled that foresight of the possibility that D1 might commit offense B is not sufficient, but instead that D2 has to have intended to assist or encourage D1 in committing offense B. The Court did, however, say that foresight could be used as evidence of intent. This ruling is applicable to England, Wales, Northern Ireland, and many Commonwealth territories.

⁶⁶ The Republic of Ireland abolished felony murder in 1964. Criminal Justice Act 1964 (Act No. 5/1964), § 4 (Ir.), <http://www.irishstatutebook.ie/eli/1964/act/5/section/4/enacted/en/html#sec4>. Antigua and Barbuda, Barbados, and Tuvalu all passed provisions identical to § 1 of the United Kingdom's Homicide Act of 1957, which abolished felony murder in the United Kingdom. Offenses against the Person Act, 1982 (Cap. 300), § 10 (Ant. & Barb.); Offenses against the Person Act, 1994 (Act No. 18/1994), § 3 (Barb.); Penal Code, 1965 (Cap. 10.20), § 194 (Tuvalu). Additionally, several Commonwealth countries, including

India, Malaysia, Pakistan, Singapore, and Sri Lanka, have never recognized felony murder. See Indian Penal Code, 1860 (Act No. 45/1860) §§ 299-300; Malaysian Penal Code, 1936 (F.M.S. Cap. 45), §§ 299-300; Pakistan Penal Code, 1860 (Act No. 45/1860), §§ 299-300; Singapore Penal Code, 1871 (Ord. No. 4/1871) §§ 299-300; Sri Lanka Penal Code, 1883 (Ord. No. 2/1883), §§ 293-94.

⁶⁷ *R. v. Martineau*, (1990) Can. 2 S.C.R. 633, pp. 644-45.

⁶⁸ *Harkins v. United Kingdom*, (2012) 55 E.H.R.R. 19, pp. 603-605.

⁶⁹ See note 14.

⁷⁰ Fair and Just Prosecution. (2020). *Lessons learned from Germany: Avoiding unnecessary incarceration and limiting collateral consequences*. https://www.fairandjust-prosecution.org/staging/wp-content/uploads/2020/04/FJP_Brief_GermanIncarceration.pdf

⁷¹ Fair and Just Prosecution (2020), see note 70.

⁷² Van Zyl Smit, D., & Appleton, C. (2019). *Life imprisonment: A global human rights analysis*. Harvard University Press.

⁷³ Travis, J., Western, B., & Redburn, S. (2014). *The growth of incarceration in the United States: Exploring causes and consequences*. National Academies Press, p. 86. <https://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes>; LaFave, W. (2020) § 14.5 Felony Murder. *Substantive criminal law* (3rd ed., Vol. 2). Thomson West; Barkow, R. E. (2009). The court of life and death: The two tracks of constitutional sentencing law and the case for uniformity. *Michigan Law Review*, 107(7), 1145-1205.

⁷⁴ *Graham v. Florida*, 560 U.S. 48, 48 (2010) citing *Weems v. United States*, 217 U. S. 349, 367 (1910).

⁷⁵ Travis, J., Western, B., & Redburn, S. (2014) see note 73, p. 88.

⁷⁶ Robinson, P. H., & Darley, J. M. (1995). *Justice, liability, and blame*. Westview Press.

⁷⁷ American Law Institute. (2021). Model Penal Code: Sentencing, Article 1. Preliminary, § 102.2. Reporters' Note. Pre-Publication Draft, p. 79.

⁷⁸ American Law Institute (2021), see note 77, p. 16.

⁷⁹ Serota, M. (2017). Proportional *mens rea* and the future of criminal code reform. *Wake Forest Law Review*, 52(1202), 1201-1229. On due process violations caused by felony murder laws see Roth, N. E., & Sundby, S. E. (1985). The felony-murder rule: A doctrine at constitutional crossroads. *Cornell Law Review*, 70(3), 446-492; on the greater protections in civil law, see Gerber, R. J. (1999). The felony murder rule: Conundrum without principle. *Arizona State Law Journal*, 31(3), 763-786.

⁸⁰ LaFave (2020), see note 73, p. 643; See also the concept of tainting in Fletcher, G. P. (1981). Reflections on felony-murder. *Southwestern University Law Review*, 12(3), 413-430.

⁸¹ District of Columbia Criminal Code Reform Commission. (2021). Appendix J: Research on other jurisdictions

relevant criminal code provisions, p. 368. <https://ccrc.dc.gov/sites/default/files/dc/sites/ccrc/publication/attachments/Appendix-J-Research-on-Other-Jurisdictions-Relevant-Criminal-Code-Provisions.pdf>

⁸² Sidney, K. M. (1978). The Felony murder doctrine in Michigan. *Wayne Law Review*, 25(1), 69-82; Wanger, E. G. (2002). Michigan constitutional history: Michigan and capital punishment. Michigan Bar Journal. <https://www.michbar.org/file/barjournal/article/documents/pdf4article487.pdf>

⁸³ *People v. Aaron*, see note 6, p. 730.

⁸⁴ *People v. Aaron*, see note 6, p. 729.

⁸⁵ *People v. Aaron*, see note 6, p. 709, n. 87.

⁸⁶ *People v. Aaron*, see note 6, p. 709, n. 87.

⁸⁷ K. Crino (personal communication, September 23, 2021).

⁸⁸ Crino (2021), see note 87.

⁸⁹ Crino (2021), see note 87.

⁹⁰ American Law Institute (1980), see note 77, p. 21.

⁹¹ American Law Institute (1980), see note 77, pp. 30-36.

⁹² Zimring, F. E. & Hawkins G. (1987). Murder, the Model Code, and the multiple agendas of reform. *Rutgers Law Journal*, 19, 773-796, p. 777; see also Gordon, W. (1983). Strict legal liability, upper class criminality, and the model penal code. *Howard Law Journal*, 26(2), 781-798.

⁹³ "For the vast majority of cases it is probably true that homicide occurring during the commission or attempted commission of a felony is murder independent of the felony-murder rule." American Law Institute (1980). *Model Penal Code and Commentaries: Part II. Definition of specific crimes* (Vol. 1), § 210.2, p. 37; Roth, & Sundby (1985), see note 79, p. 491: "Requiring proof of culpability for the separate act of killing may not change the result in many cases. If a defendant undertakes a dangerous felony, he probably has exhibited the extreme recklessness or malice aforethought necessary for a conviction of murder"; See also Fletcher, G. P. (1981). Reflections on felony-murder. *Southwestern University Law Review*, 12(3), 413-430.

⁹⁴ *People v. Banks* (2015) 61 FCal.4th 788; *People v. Clark* (2016) 63 Cal.4th 522, 611 612.

⁹⁵ *In re Bennett* (2018) 26 Cal. App. 5th 1002.

⁹⁶ LaFave (2020), see note 73, p. 643.

⁹⁷ LaFave (2020), see note 73, n. 86.

⁹⁸ Crump, D. (2007). Murder, Pennsylvania style: Comparing traditional American homicide law to the statutes of Model Penal Code jurisdictions. *West Virginia Law Review*, 109(2), 257-356.

⁹⁹ *Commonwealth v. Brown*, 477 Mass. 805, 825 (2017) (Grants J., concurring).

¹⁰⁰ See *Commonwealth v. Concepcion*, 487 Mass. 77 (2021).

¹⁰¹ Revised Criminal Code Act of 2021 §22E-1101(g), B. 24-0416, 24th Council Period (D.C. 2021). <https://lims.dccouncil.us/Legislation/B24-0416>

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¹⁰³ Burton, A. (2017). A commonsense conclusion: Creating a juvenile carve out to the Massachusetts felony murder rule. *Harvard Civil Rights-Civil Liberties Law Review*, 52, 170-192.

¹⁰⁴ Beyer, M. (2000). Immaturity, culpability & competency in juveniles: A study of 17 cases. *Criminal Justice Magazine*, 15(2), 1-15.

¹⁰⁵ Burton (2017), see note 103.

¹⁰⁶ Human Rights Watch. (2008). *The rest of their lives: Life without parole for youth offenders in the United States in 2008*. <https://www.hrw.org/sites/default/files/reports/us1005execsum.pdf>

¹⁰⁷ Lindsay (2021), see note 8.

¹⁰⁸ Turner (2022), see note 10.

¹⁰⁹ *Roper v. Simmons*, 543 U.S. 551 (2005); *Miller v. Alabama*, 567 U.S. (2012); Hanan, M. E. (2019). Incapacitating errors: Sentencing and the science of change. *Denver Law Review*; Rovner, J. (2021). *Juvenile life without parole: An overview*. The Sentencing Project. <https://www.sentencingproject.org/publications/juvenile-life-without-parole/>

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¹¹¹ Center for Law, Brain & Behavior at Massachusetts General Hospital. (2022). *White paper on the science of late adolescence: A guide for judges, attorneys, and policy makers*. <https://clbb.mgh.harvard.edu/wp-content/uploads/CLBB-White-Paper-on-the-Science-of-Late-Adolescence-3.pdf>; Steinberg, L., Cauffman, E., & Monahan, K. (2015). *Psychosocial maturity and desistance from crime in a sample of serious juvenile offenders*. Office of Juvenile Justice and Delinquency Prevention. <https://www.courts.ca.gov/documents/BTB24-2M-5.pdf>

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¹³² Decker, J. F. (2008). The mental state requirement for accomplice liability in American criminal law. *South Carolina Law Review*, 60(2), 239-381.

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¹³⁶ Mallick & Chatfield (2018), see note 11.

¹³⁷ Mukpo, A. (2019). *When the state kills those who don't kill*. American Civil Liberties Union. <https://www.aclu.org/issues/capital-punishment/when-state-kills-those-who-didnt-kill>

¹³⁸ *Enmund v. Florida*, see note 64; & *Tison v. Arizona*, 481 U.S. 137 (1987).

¹³⁹ *Enmund v. Florida*, see note 64, p. 800.

¹⁴⁰ *Tison v. Arizona*, see note 138.

¹⁴¹ Death Penalty Information Center. (2021). *Executions overview: Executed but did not directly kill victim*. DPIC. <https://deathpenaltyinfo.org/executions/executions-overview/executed-but-did-not-directly-kill-victim>

¹⁴² Affirmative defense is a term describing various defenses a defendant may raise at trial, where if a set

of facts are proven to meet the requirements of that defense, it will negate the culpability of the offense and result in a finding of not guilty (for example, self-defense). LaFave (2020), see note 73.

¹⁴³ See, for example: Ark. Code Ann. § 5-10-102(b) (2017); Conn. Gen. Stat. § 53a-54c (2015); Me. Stat. tit. 17-A § 202 (2019); N.J. Stat. Ann. § 2C:11-3a(3); N.Y. Penal Law § 125.25(3); N.D. Cent. Code. § 12.1-16.01 (2019); Oregon Revised Statutes 163.115(3); *State v. Rice*, 683 P. 2d 199 (Wash. 1984).

¹⁴⁴ Cases involving the killing of a police officer are excluded from the reform. Accomplice liability for felony murder, S.B. 1437, 2017-2018 Reg. Sess. (Cal. 2018). https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1437; Ghandnoosh, N. (2019). *The next step: Ending excessive punishment for violent crimes*. The Sentencing Project. <https://www.sentencingproject.org/publications/the-next-step-ending-excessive-punishment-for-violent-crimes/>

¹⁴⁵ Felony murder: resentencing, S.B. 775, 2021-2022 Reg. Sess. (Cal. 2021). https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB775

¹⁴⁶ SB 300 would also give judges discretion to set aside a "special circumstances" finding, allowing for a sentence other than LWOP. Crimes: murder: punishment S.B. 300, 2021-2022 Reg. Sess. (Cal. 2021). https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB300; Felony Murder Elimination Project. (n.d.). SB 300 *Sentencing Reform Act*. <https://www.endfmrnow.org/sb-300>

¹⁴⁷ Lawmakers removed requirements that the defendant had no reasonable grounds to believe that another participant was armed with a deadly weapon, and that they attempted to disengage from the commission of the underlying felony or flight therefrom immediately after they became aware of the presence of the weapon or another participant's intent to engage in conduct that could likely result in death. Changes to Felony Murder, S.B. 21-124, 73rd Gen. Ass., 2021 Reg. Sess. (Co., 2021). https://leg.colorado.gov/sites/default/files/2021a_124_signed.pdf

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¹⁴⁹ President Donald Trump also commuted a felony murder sentence. Closson, T. (2021, January 26). He was convicted in a police officer's murder. Trump gave him clemency. *The New York Times*. <https://www.nytimes.com/2021/01/26/nyregion/jaime-davidson-clemency-syracuse.html>

¹⁵⁰ Schmelzer, E. (2019, July 2). Curtis Brooks, sentenced to die in prison at age 17, is free after 24 years behind bars. *The Denver Post*. <https://www.denverpost.com/2019/07/02/curtis-brooks-juvenile-free-after-24-years/>

¹⁵¹ Revised Criminal Code Act of 2021 §22E-1101(g), B. 24-0416, 24th Council Period (D.C. 2021). <https://lims>

dccouncil.us/Legislation/B24-0416; Krinsky, M. (2021), see note 102.

¹⁵² Drizin, S. A., & Keegan, A. M. (2004). Abolishing the use of the felony-murder when the defendant is a teenager. *Nova Law Review*, 28(3), 507-542.

¹⁵³ Quinn, C. (2010, Dec 13). 12 years ago, schoolmate's punch took a life. *The Atlanta Journal-Constitution*. <https://www.ajc.com/news/local/years-ago-schoolmate-punch-took-life/qi2pGLv5U3RjMJtu0APOWJ/>

¹⁵⁴ Drizin & Keegan (2004), see note 152.

¹⁵⁵ *Miller v. State*, 571 S.E.2d 788, 798-799 (Ga. 2002) (Benham J., concurring).

¹⁵⁶ Binder (2012), see note 17.

¹⁵⁷ Zimring, F. E., & Zuehl, J. (1986). Victim injury and death in urban robbery: A Chicago study. *Journal of Legal Studies*, 15(1), 1-40.

¹⁵⁸ *People v. Clark* (2016) 63 Cal.4th 522, 618, n. 74.

¹⁵⁹ Binder (2012), see note 17, p. 192.

¹⁶⁰ Binder (2012), see note 17, p. 255, n. 10: The states were Arizona, California, Colorado, Connecticut, Florida, Idaho, Indiana, Iowa, Illinois, Kansas, Maine, Mississippi, Montana, Nebraska, Nevada, New Jersey, New York, North Dakota, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, West Virginia, and Wyoming.

¹⁶¹ Binder (2012), see note 17, p. 255 n. 11: Arkansas, Arizona, The District of Columbia, Florida, Indiana, Kansas, Louisiana, Ohio, Oklahoma, Rhode Island, Utah, and West Virginia. See also drug-induced homicide laws. Beletsky, L. (2019). America's favorite antidote: Drug-induced homicide in the age of the overdose crisis. *Utah Law Review*, 2019(4), 833-890; Rambo, L. H. (1986). An unconstitutional fiction: The felony-murder rule as applied to the supply of drugs. *Georgia Law Review*, 20(671), 671-704; Phillips, K. S. (2020). From overdose to crime scene: The incompatibility of drug-induced homicide statutes with due process. *Duke Law Journal*, 70(659), 659-704; LaSalle, L. (2017) *An overdose death is not a murder: Why drug-induced homicide laws are counterproductive and inhumane*. Drug Policy Alliance. https://drugpolicy.org/sites/default/files/dpa_drug_induced_homicide_report_0.pdf

¹⁶² See Anthony, A. (2021, Feb 6). Meet Carl Hart: Parent, Columbia professor and heroin user. *The Guardian*. <https://www.theguardian.com/society/2021/feb/06/meet-carl-hart-parent-columbia-professor-and-heroin-user>

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¹⁶⁴ G. Binder (personal communication, October 21, 2021). Binder also notes that among states that do not enumerate all predicate felonies, Florida, Mississippi, and Washington State lack and should implement a foreseeable danger standard. Binder (2012), see note 17, p. 255.

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¹⁶⁸ Gershman, J. (2020, July 9). The controversial legal doctrine at the heart of the Floyd, Brooks, Arbery cases. *The Wall Street Journal*. <https://www.wsj.com/articles/the-controversial-legal-doctrine-at-the-heart-of-the-floyd-brooks-arbery-cases-11594295529>. See also University at Buffalo School of Law. (2021, April 19). George Floyd, policing, and race: A conversation about the trial of Derek Chauvin [Video]. Youtube. <https://www.youtube.com/watch?v=EJABaJpvLsQ>

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¹⁷² Sweetman, C. (2020, December 30). Alleged robbery accomplice charged with murdering Stavian Rodriguez, who was shot, killed by Oklahoma City police. *Oklahoma News 4*. <https://kfor.com/news/local/alleged-robbery-accomplice-charged-with-murdering-stavian-rodriguez-who-was-shot-killed-by-oklahoma-city-police/>; Wilder, E. (2021, August 24). A police officer killed Jacob Harris, but his unarmed friends were charged with his murder. *Buzzfeed News*. <https://www.buzzfeednews.com/article/emilywilder/police-shooting-felony-murder-third-party>; Grant (2019), see note 29; Quandt, K. R. (2018, September 18). A killer who didn't kill. *Slate*. <https://slate.com/news-and-politics/2018/09/felony-murder-rule-colorado-curtis-brooks.html>

¹⁷³ Binder (2020), see note 135.

¹⁷⁴ Binder (2012), see note 17, p. 5; see also Crump, D. (2009). Reconsidering the felony murder rule in light of modern criticisms: Doesn't the conclusion depend on the particular rule at issue? *Harvard Journal of Law and Public Policy*, 32(3), 1155-1185.

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¹⁷⁶ On the historical over-extension of the concept of foreseeability in Illinois, see Lijtmaer, M. (2008). The felony murder rule in Illinois: The injustice of the proximate cause theory explored via research in cognitive psychology. *Journal of Criminal Law and Criminology*, 98(2), 621-

652.

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¹⁸² SB21-124, 73rd General Assembly, 2021 Reg. Sess. (CO, 2021). <https://leg.colorado.gov/bills/sb21-124>; Restore Justice Illinois. (2021, Feb 2). *FAQ: Final felony murder language in HB3653, senate amendment 2 as passed, January 2021*. <https://restorejusticeillinois.org/faq-final-felony-murder-language-in-hb3653sa2-as-passed-january-2021/>

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¹⁸⁷ Bragg, A. (2022, January 3). *Achieving Fairness and Safety* [Memorandum]. District Attorney County of New

York.

¹⁸⁸ Fair and Just Prosecution. (2021). *Joint statement on sentencing second chances and addressing past extreme sentences*. <https://www.fairandjustprosecution.org/staging/wp-content/uploads/2021/04/FJP-Extreme-Sentences-and-Second-Chances-Joint-Statement.pdf>

¹⁸⁹ Fair and Just Prosecution (2021), see note 188.

¹⁹⁰ These groups include Network for Victim Recovery of DC, Common Justice, Crime Victims Treatment Center, New York State Coalition Against Sexual Assault, and Downstate Coalition for Crime Victims. See Ghandnoosh (2021), see note 61.

¹⁹¹ Fair and Justice Prosecution (2021), see note 188; For the People. (2021). *Prosecutor-initiated resentencing: California's opportunity to expand justice and repair harm*. <https://www.fortheppl.org/publications>

¹⁹² Ghandnoosh (2021), see note 61.

¹⁹³ Not all prosecutors' offices have the legal authority to engage in sentence review or seek sentence modification. However, prosecutor-initiated sentence review and sentencing review units are a growing and promising practice for addressing extreme sentences. Fair and Just Prosecution (2020), see note 3; For the People (2021), see note 191.



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