

NOTE

PARADOX IN PRACTICE: A RECKONING OF THE
COMMON LAW’S ANTIQUATED, PREJUDICED FELONY
MURDER RULE

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“I am what time, circumstance, history, have made of me, certainly,
but I am, also, much more than that. So are we all.”

-James Baldwin¹

I. INTRODUCTION

In February 2015, a group of five young friends burglarized two homes in Millbrook, Alabama.² A shootout broke out allegedly between police officers and A’Donte Washington, one of the five

1. JAMES BALDWIN, *NOTES OF NATIVE SON* xii (1984).

2. See Portia Allen-Kyle, *The Lakeith Smith Case Demonstrates the System’s Brokenness*, ACLU (Apr. 12, 2018), <https://www.aclu.org/blog/smart-justice/lakeith-smith-case-demonstrates-systems-brokenness> [https://perma.cc/ATS8-75R8]; *Fact Check: Lakeith Smith was Sentenced to 65 Years in Prison for Murder, Burglary and Theft After his Friend was Killed by Police Officer During Break-in* REUTERS (July 2, 2020), <https://www.reuters.com/article/uk-factcheck-lakeith-smith-65-years/fact-check-lakeith-smith-was-sentenced-to-65-years-in-prison-for-murder-burglary-and-theft-after-his-friend-was-killed-by-police-officer-during-break-in-idUSKBN243246> [https://perma.cc/DL62-URYE] [hereinafter *Fact Check: Lakeith Smith*]; Krista Johnson, *Accomplice Law Case of Lakeith Smith, Sentenced to 55 Years, Gains Renewed Interest*, MONTGOMERY ADVISER (June 11, 2020), <https://www.montgomeryadvertiser.com/story/news/crime/2020/06/11/alabama-case-lakeith-smith-inmate-sentenced-55-years-gains-renewed-interest/5344257002/> [https://perma.cc/2K9C-PCK8].

friends.³ Washington's death resulted from an officer's fatal shot.⁴ Alabama prosecuted the remaining members for Washington's death, three of whom accepted plea deals for a felony murder conviction.⁵ They received sentences between seventeen to twenty-eight years in prison.⁶ Three years later, the remaining friend, Lakeith Smith, was tried as an adult and convicted of felony murder, burglary, and theft.⁷ Smith was only fifteen years old at the time of the burglary⁸ and the judge sentenced him to sixty-five years in prison.⁹

Lakeith Smith, like many other defendants, was charged under the doctrine of felony murder.¹⁰ There are generally two elements that constitute a crime in common law jurisdictions:¹¹ *actus reus* (the act) and *mens rea* (the thought).¹² *Actus reus* is a voluntary act or omission that causes the social harm.¹³ Just as important, a defendant's *mens rea* describes their mental state or

3. See Allen-Kyle; Johnson; and *Fact Check: Lakeith Smith*, *supra* note 2.

4. See Allen-Kyle; Johnson; and *Fact Check: Lakeith Smith*, *supra* note 2.

5. See Allen-Kyle; Johnson; and *Fact Check: Lakeith Smith*, *supra* note 2.

6. See Allen-Kyle; Johnson; and *Fact Check: Lakeith Smith*, *supra* note 2; Kirsten Fiscus, *Montgomery Teen Indicted on Robbery, Kidnapping Charges*, MONTGOMERY ADVISER (Oct. 3, 2018), <https://www.montgomeryadvertiser.com/story/news/crime/2018/10/03/teen-previously-convicted-murder-indicted-robbery-and-kidnapping-charges/1509082002/> [https://perma.cc/5BNA-KZA6].

7. See Allen-Kyle; Johnson; and *Fact Check: Lakeith Smith*, *supra* note 2.

8. See Fiscus, *supra* note 6; Allen-Kyle; Johnson; and *Fact Check: Lakeith Smith*, *supra* note 2.

9. A judge reduced Lakeith Smith's sentence to 55 years after the Criminal Court of Criminal Appeals ruled that Smith's 10-year theft sentence could not run consecutively with his 15-year first-degree burglary sentence. See *Fact Check: Lakeith Smith*, *supra* note 2.

10. See *supra* notes 2-9 discussing the Alabama case against Lakeith Smith.

11. Common law jurisdictions are considered "place[s] where the legal system derives fundamentally from the English common-law system" (i.e. Australia, the US, Canada). And "in the absence of a controlling statute, the court exercised common-law jurisdiction over those claims." See *Common Law Jurisdiction*, BLACK'S LAW DICTIONARY (11th ed. 2019). For the purposes of this note, the referenced common law jurisdictions are the United States, Canada, and the United Kingdom. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 165, 82-83 (8th ed. 2018); CANADA DEPARTMENT OF JUSTICE, GOVERNMENT RESPONSE TO THE FIFTEENTH REPORT OF THE STANDING COMMITTEE ON JUSTICE AND HUMAN RIGHTS, CORPORATE MENS REA, REPORT (Nov. 2002); Serious Crime Act 2015, c. 9, § 45 (Eng.).

12. See KENT ROACH, CRIMINAL LAW 10 (7th ed. 2017). See also DRESSLER, *supra* note 11, at 81-82.

13. See ROACH, *supra* note 12, at 10. See also DRESSLER, *supra* note 11, at 83.

intention at the time of the crime.¹⁴ *Mens rea* reflects their moral blameworthiness¹⁵ and is assigned one of four categories: purpose, knowledge, recklessness, and negligence.¹⁶ Common law jurisdictions require the government to prove both the *actus reus* and *mens rea* elements to convict a defendant of a crime.¹⁷ Some crimes, such as homicide, require one additional element, causation (or the connection) between the act and the resulting harm.¹⁸

Some statutory offenses—called strict liability crimes—however, do not require any *mens rea*.¹⁹ Felony murder is a strict liability theory which finds a person guilty of murder if a death results from the commission, attempted commission, or flight from a felony.²⁰ In its broadest form, felony murder holds the accused accountable under just these circumstances, however many jurisdictions introduced components that “limit” its application.²¹ These include: *causation* and the *foreseeability* of death,²² that the act causing death be *in furtherance* of the felony, including the doctrine of merger,²³ and that the underlying felony be *inherently*

14. See ROACH, *supra* note 12, at 10. See DRESSLER, *supra* note 11, at 112-13.

15. See DRESSLER, *supra* note 11, at 114.

16. See CRIMINAL LAW 5 (Thomas Morawetz ed., 2000).

17. See DRESSLER, *supra* note 11, at 112-13.

18. See DRESSLER, *supra* note 11, at 170-71; ROACH, *supra* note 12, at 93-94.

19. See CRIMINAL LAW, *supra* note 16, at 406. A strict-liability crime is “[a]n offense for which the action alone is enough to warrant a conviction, with no need to prove a mental state.” *Crime*, BLACK’S LAW DICTIONARY (11th ed. 2019).

20. See George P. Fletcher, *Reflections on Felony-Murder*, 12 Sw. U. L. REV. 413 (1981); DRESSLER, *supra* note 11, at 488.

21. See Fletcher, *supra* note 20, at 413; DRESSLER, *supra* note 11, at 492-97.

22. In deciphering causation, courts have concluded that “there must be a causal – actual and proximate – relationship between the felony and homicide.” DRESSLER, *supra* note 11, at 497. Some courts utilize a “proximate cause” test in order to determine whether “the act im-poses a foreseeable danger of death.” GUYORA BINDER, *FELONY MURDER* 13 (Stanford Law Books, 8th ed. 2012). For more on causation, see CRIMINAL LAW, *supra* note 16, at 51-52; ROACH, *supra* note 12, at 93-94.

23. Felony murder expert Guyoya Binder describes this as a “linkage requirement that the act causing death be in furtherance of the felony.” BINDER, *FELONY MURDER*, *supra* note 22, at 14. The “merger doctrine” holds that the underlying felony murder be “independent” or “collateral” to the homicide. For example, in jurisdictions that recognize the merger doctrine, if the underlying felony is negligent homicide, it merges with the homicide and the felony murder doctrine does not apply. See DRESSLER, *supra* note 11, at 493-95.

violent.²⁴ Despite these “limitations,” felony murder’s application is extremely vast.²⁵

Typically, common law jurisdictions, such as the United States, the United Kingdom, and Canada, attach a high culpability standard of *mens rea* to its murder statutes.²⁶ *Mens rea* for first-degree murder in the United States, for example, often requires that the act was premeditated or done with malice aforethought.²⁷ England also requires malice aforethought or premeditation to prove first-degree murder.²⁸ Canada requires planning and deliberation to prove first-degree murder.²⁹ Felony murder stands apart from these typical statutes by not requiring the prosecution to prove culpable *mens rea*. While causation typically must be present—meaning the felony must cause the death³⁰—culpability results regardless of the accused or accomplice acting negligently, recklessly, or accidentally.³¹

This logic fundamentally ignores one of the most important aspects of modern criminal law: culpable *mens rea*, or “a guilty mind.”³² In the United States, for an act to constitute a crime, the necessity of *mens rea* is not a “provincial or transient notion.”³³ Rather, it is a universal and consistent element of mature law systems that recognizes independent human will.³⁴ Ignoring *mens*

24. The original doctrine designated *any* underlying felony was applicable for the rule, while many jurisdictions now indicate the underlying felony must be one that is inherently violent. Two tests courts utilize for this determination are the nature of the crime in the abstract (looking at the language of the statute in it of itself) or in the way it was executed in the particular circumstance. See DRESSLER, *supra* note 11, at 492-93.

25. See *id.* at 488.

26. For brevity, this note will only cite a few murder statutes and common law definitions in the jurisdictions of the United States, the United Kingdom, and Canada. “Murder is the unlawful killing of a human being with malice aforethought.” 18 U.S.C. § 1111. Murder; “Murder is first-degree murder when it is planned and deliberate.” R.S.C., 1985, c C-46 (Can.); “the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder. . . .” Homicide Act 1957, 5 & 6 Eliz. 2, ch. 11 § 1 (Eng.).

27. See, DRESSLER, *supra* note 11, at 481.

28. See Homicide Act 1957, 5 & 6 Eliz. 2, c. 11 § 1 (Eng.).

29. See R.S.C., 1985, c C-46.

30. See DRESSLER, *supra* note 11, at 498.

31. See *id.*

32. See MODEL PENAL CODE § 210.2, cmt. 30 (AM. L. INST. 1980); DRESSLER, *supra* note 11, at 113.

33. See *Morissette v. United States*, 342 U.S. 246, 250 (1952).

34. See *id.*

rea to obtain a murder conviction is intrinsically paradoxical to the bedrock principles of US criminal law.

The doctrine of felony murder applies harsh and disproportionate sentences such as life without parole or capital punishment as a form of strict liability.³⁵ While all other common law jurisdictions worldwide abolished the doctrine, it uniquely survives—and actually flourishes—in the United States.³⁶ These other jurisdictions, including the United Kingdom and Canada, abolished it due to severe issues in the proportionality between crime and punishment.³⁷ They also emphasized the importance of *mens rea* in their criminal law systems.³⁸ The United States recognized these issues in other contexts both legally and diplomatically. This is evidenced by its decision to end capital sentencing for non-murder crimes³⁹ and its repeated denunciation of non-murder executions in countries such as Iran and North Korea where the practice still exists.⁴⁰ Yet, curiously, the felony murder rule continues to exist and perpetuate unjust justice throughout the US criminal justice system.⁴¹ In the Smith case, without access to the felony murder rule, prosecutors would have been unable to charge any of the four defendants with murder.⁴² Instead, their charges could have amounted to burglary or theft, which carry sentences between ten to twenty years.⁴³ Without the

35. See Guyora Binder, *The Origins of American Felony Murder Rules*, 57 *Stan. L. Rev.* 59 (2004).

36. See Tayler Green, *When You Didn't Pull the Trigger, Can it Still be Called Murder?*, *THE CRIME REPORT* (July 15, 2020), <https://thecrimereport.org/2020/07/15/when-you-didnt-pull-the-trigger-can-it-still-be-called-murder/> [https://perma.cc/MFD6-R6ZP] (last visited Sept. 18, 2020).

37. See Abbie VanSickle, *If He Didn't Kill Anyone, Why Is It Murder?*, *N.Y. TIMES* (June 27, 2018), <https://www.nytimes.com/2018/06/27/us/california-felony-murder.html> [https://perma.cc/UQG4-KXEA].

38. See *id.* For a discussion on the importance of *mens rea* in UK criminal law and how the United Kingdom abolished felony murder, see *infra* notes 75-98

39. See *Coker v. Georgia*, 433 U.S. 584 (1977); *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

40. The United States repeatedly condemns countries such as Iran and North Korea for harsh capital sentencing for non-murder crimes as human rights abuses. For examples, see *infra* Part III.A.3.

41. See *infra* Part III.B. (detailing the injustices perpetrated by the felony murder rule in the US).

42. See *supra* notes 2-9.

43. See *id.*; ALA. PRESUMPTIVE AND VOLUNTARY SENT'G STANDARDS (ALA. SENT'G COMM'N 2016) <https://sentencingcommission.alacourt.gov/media/1065/2016-presumptive-manual.pdf> [https://perma.cc/YT7W-BKTW].

doctrine of felony murder, Lakeith Smith would not have been convicted of murder nor sentenced to what amounts to a lifetime in prison.⁴⁴

This Note analyzes the legislative and judicial history of felony murder in three common law jurisdictions and advocates for three distinct ways that the United States can abolish it entirely. Part II describes the common law consensus to abolish the doctrine of felony murder outside of the United States by recounting its evolution in the United Kingdom and Canada.⁴⁵ In so doing, it details how these jurisdictions dealt with the lack of proportionality between crime and punishment and the nonexistence of *mens rea*.⁴⁶ Part III discusses the United States' legal rationale of proportionality rooted in the Eighth Amendment ban against cruel and unusual punishment.⁴⁷ It argues how US logic behind condemnations of select countries' capital punishment for non-murder crimes⁴⁸ is inconsistent with its practice of felony murder and therefore delegitimizes these denunciations as empty threats.⁴⁹ Last, it details the disparate impact of felony murder on Black people across the United States.⁵⁰ Part IV reflects on the paths to abolition deployed by the United Kingdom and Canada and describes two ways the United States can abolish felony murder by federal action. Similar to the UK model, the US legislature can outright abolish the felony murder doctrine.⁵¹ Or, mirroring Canada's approach, it can implement congressional legislation to elevate civil liberties in the penal system.⁵² This could pave a foundation for the US Supreme Court to abolish felony murder

44. See *supra* notes 2-9; ALA. PRESUMPTIVE AND VOLUNTARY SET'G STNADARDS *supra* note 43.

45. See *infra* Parts II.A. and II.B.

46. See Homicide Act 1957, 5 & 6 Eliz. 2, c. 11 § 1 (Eng.). See *R. v. Vaillancourt*, [1987] 2 S.C.R. 636 (Can.).

47. See *Coker*, 433 U.S. at 592 (SCOTUS held that the death penalty for rape of an adult was "grossly disproportionate" finding it to be "excessive punishment). See *Kennedy*, 554 U.S. at 412 (SCOTUS held the death penalty for child rape as disproportional and thus unconstitutional, finding that capital punishment "should not be introduced into the justice system where death has not occurred.").

48. See *supra* note 38.

49. See *infra* Part III.

50. For numerous examples of the felony murder rule's disparate racial impact on people of color, see *id.*

51. See *infra* Part II.A.

52. See *infra* Part II.B.

similarly to the Canadian Supreme Court.⁵³ Part IV demonstrates the ability and trends of individual US states abolishing felony murder, and advocates for three ways each state should abolish the doctrine through their courts, legislature, or a combination of both.⁵⁴ Finally, it calls for more open source reporting and tracking of felony murder generally and as it relates to race.⁵⁵ This would allow the United States to reckon with the racial injustice felony murder perpetrates against people of color, and predominantly Black people.

The proportionality issue is prevalent within the felony murder doctrine because it essentially allows a conviction and sentence for murder when the offender commits another, lesser felony.⁵⁶ Therefore, there is no sound legal justification to execute people or sentence them to life without parole without the requisite *mens rea* necessary to convict under a typical murder statute. As a legal practice in itself, with the high probability to result in extreme punishment, and accounting for its harsh implications on communities of color, the US stance to preserve felony murder is duplicitous and the practice should be abolished.

II. THE GLOBAL RISE AND FALL OF FELONY MURDER

The United Kingdom is considered the birthplace of the strict liability theory of felony murder, which permits a murder charge when a death results from a crime.⁵⁷ Many countries that inherited the English common law system likewise inherited felony murder

53. See *infra* Part III.A.1. (detailing SCOTUS' implementation of the proportionality principle in US criminal law).

54. For examples on numerous US states abolishing or limiting felony murder, see *infra* Part IV.C.

55. See *infra* Part IV.D.

56. See *supra* notes 20-31.

57. See James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces that Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429 (1994) citing *Lord Dacres' Case*, 72 Eng. Rep. 458 (K.B. 1535); *Mansell and Herbert's Case*, 73 Eng. Rep. 279 (K.B. 1558); EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND*, 56 (1644). Considering that felony murder is an intrinsic descendant of English common law, its disputed earliest use in the US is not pertinent for the purposes of this note. See GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW*, 291 (2000) (describing felony murder's earliest presence in the US as a descendant of English common law). *But see* Binder, *The Origins of American Felony Murder Rules*, *supra* note 35 (indicating that the first use of felony murder in court occurred in the United States).

in their criminal law, but have since abolished it.⁵⁸ Their abolition of felony murder was based in logic that a defendant's crime was not proportional to their murder conviction or sentence.⁵⁹ Two examples to illustrate this dissonance in this Note include the United Kingdom and Canada.⁶⁰

The rule receives mixed criticism from global scholars, public officials, and the general public; criticism fluctuates between arguments of lack of proportionality and arguments addressing the need for deterrence.⁶¹ Opponents of the rule find it inconsistent with principles of criminal law, characterizing it as “abhorren[t],”⁶² “barbar[ic],”⁶³ and “injudicious”⁶⁴ in nature. They assert that it is a “modern monstrosity”⁶⁵ that erodes the relationship between criminal liability and moral culpability.⁶⁶ Conversely, some proponents argue that the doctrine protects innocent citizens or bystanders and police officers.⁶⁷ They argue that its abolition would otherwise cause criminals to take more risks and act more violently.⁶⁸ They assert that the rule deters exceptionally dangerous methods of crime, condemns inherently “wicked” behavior, and allows a form of revenge on behalf of the victim.⁶⁹ In weighing these critiques, the United Kingdom and Canada ultimately decided the costs far outweighed the benefits and abolished the rule.

58. See VanSickle, *supra* note 37.

59. For example, Ireland got rid of the rule through the passage of the Criminal Justice Act of 1964. Criminal Justice Act, 1964 (Act No. 5/1964) (Ir.). The Australian Capital Territory also abolished the rule through the Crimes Act of 1958, but it still exists in principle in the state of Victoria. *Crimes Act 1958* (pt) I (Austl.).

60. See *id.*

61. See *infra* notes 61-69, 237, 244 (detailing various criticisms of felony murder).

62. See Isabel Grant & A. Wayne MacKay, *Constructive Murder and the Charter: In Search of Principle*, 2 ROBERTA L. REV. 129, 157 (1987).

63. See *People v. Burroughs*, 678 P.2d 894, 897 (Cal. 1984).

64. See *People v. Aaron*, 409 Mich. 672, 686 (1980).

65. See David Lanham, *Felony Murder-Ancient and Modern*, 7 CRIM. L.J. 90, 90-1 (1983).

66. See *People v. Patterson*, 778 P.2d 549, 554 (Cal. 1989)(citing *People v. Washington*, 402 P.2d 130, 134 (Cal. 1965)).

67. See *id.*

68. See *id.*

69. See Paul Weiler, *The Supreme Court of Canada and the Doctrines of Mens Rea*, 49 CAN. B. REV. 280, 336 (1971).

A. *Felony Murder's Confusing Nature: Uncertainty of Its Scope in the United Kingdom*

Until the United Kingdom abolished felony murder in 1957, judges were often uncertain of how to appropriately apply the rule.⁷⁰ This uncertainty prompted concern from many critics, especially considering the high sentencing stakes of a felony murder conviction, such as the death penalty.⁷¹ Many believed that the doctrine only applied to deaths resulting from *inherently* violent underlying felonies toward a person (i.e. rape), rather than *any* felony (i.e. burglary).⁷² *R v. Beard*, a 1920 case where a rape resulted in the victim's death, inferred that violent felonies were those that further the act of killing.⁷³ Later decisions—*R v. Jarmain*,⁷⁴ decided in the same year, and *R v. Stone*,⁷⁵ in 1937—supplemented *Beard* by finding that an entirely accidental killing during a felony of violence in itself constituted murder.⁷⁶ *Jarmain* and *Stone* deciphered whether the underlying circumstances in robbery and rape constituted those crimes as inherently violent felonies.⁷⁷ Thus, felony murder's actual scope was still uncertain as courts adopted different interpretations of what constituted an "inherently" violent felony.

English criminal law requires proof of a defendant's *mens rea* to establish their moral blameworthiness when convicting them of a crime.⁷⁸ Yet, *Jarmain* focused on the risk of the defendant's actions by engaging in a felony altogether.⁷⁹ It ignored the significance of the defendant's *mens rea* in respect to the actual killing.⁸⁰ *R v. Grant*, a larceny case resulting in the victim's death, affirmed that non-inherently violent felonies are classified as

70. See Graham Hughes, *The English Homicide Act of 1957: The Capital Punishment Issue, and Various Reforms in the Law of Murder and Manslaughter*, 49 J. CRIM. L. CRIMINOLOGY 522, 522-23 (1958-1959).

71. See *id.*

72. See *id.*

73. See REPORT OF THE ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-53 ¶ 83-6 (UK) (hereinafter "R.C.C.P.") (citing *R v. Beard* [1920] 14 Crim. App. 110, 159).

74. See *R v. Jarmain* [1945] 31 Crim. App. 39.

75. See *R v. Stone* [1937] 3 All ER 920.

76. See R.C.C.P., *supra* note 73, ¶ 83-84 (citing *Jarmain*, 31 Crim. App. 39 and *Stone*, 3 All ER 920).

77. See *Jarmain* [1945] at 46-47; *Stone* [1937] at 921.

78. See *Chisholm v. Doulton* [1889] 16 Cox CC 675, 679.

79. See generally *Jarmain* [1945].

80. See *id.*

inherently violent when a defendant demonstrates a “preconceived intention” to use violence during the course of that felony.⁸¹ Here, the defendant’s *mens rea* in their intention (or lack thereof) to cause death was immaterial to a charge of murder.⁸² Therefore, offenses other than robbery and rape (i.e. *Jarmain*⁸³ and *Stone*⁸⁴ respectively) could be used as felony murder’s underlying circumstance.⁸⁵ While its possible application to extensive underlying felonies was largely theoretical, the rule was nevertheless utilized to “secure [] conviction[s]” when the prosecution was otherwise unable to prove *mens rea* beyond a reasonable doubt.⁸⁶

The Homicide Act of 1957 abolished felony murder in the United Kingdom after years of debate and recommendations by the legislature.⁸⁷ First, in 1948, the House of Lords vetoed the outright abolition of the death penalty introduced by the House of Commons.⁸⁸ Shortly after, a Royal Commission assembled and produced a report in 1953 that examined whether British common law should limit or modify capital punishment for murder statutes.⁸⁹ It detailed many criticisms of felony murder as “harsh and severe.”⁹⁰ The report acknowledged discrepancies in its

81. See *R v. Grant*, [1954] 38 Crim. App. 107, 110.

82. See *id.*

83. See generally *Jarmain* [1945].

84. See generally *Stone* [1973].

85. See R.C.C.P., *supra* note 73, ¶ 100.

86. See *Hughes*, *supra* note 70, at 522.

87. See generally Homicide Act 1957, 5 & 6 Eliz. 2, c. 11(Eng.) and R.C.C.P., *supra* note 73, for a discussion on the debate of felony murder’s abolition in the United Kingdom.

88. See *Hughes*, *supra* note 70, at 521 (citing Criminal Justice Act, 1948, 11 & 12 Geo. 6, ch. 58 (“Criminal Justice Act”)). The United Kingdom’s parliamentary system is made up of two Houses: the House of Commons and the House of Lords. Their respective roles revolve around legislation, governmental scrutiny, and debate of issues. See *The Two-House System*, UK PARLIAMENT, <https://www.parliament.uk/about/how/role/system/> [<https://perma.cc/S62U-QGTJ>] (last visited Apr. 10, 2021).

89. See *Hughes*, *supra* note 70, at 522.

90. See *id.* These include the 1839 Fourth Report of the Commissioners on the Criminal Law, the 1866 Report of the Royal Commission on Capital Punishment, and the 1883 book *History of the Criminal Law* written by Judge Sir James Fitzjames Stephens. *But see* R.C.C.P., *supra* note 73, ¶ 96. The 1839 Fourth Report of the Commissioners on the Criminal Law fundamentally outweighed its severity by its deterrence qualities, finding “justifi[cation] by one of the main principles of penal laws, namely, the prevention of crimes of violence attended with danger to the person.” Before the expansive interpretations Lord Chief Justice Goddard expresses, the court trends toward a limiting application of the rule between 1862-1911. See R.C.C.P., *supra* note 73, ¶ 80 (discussing R.

application⁹¹ and reasserted that *mens rea* is a fundamental principle and necessary ingredient of English law used over the last four centuries.⁹² In the same year, the House of Commons experienced a change in leadership who held opposing views on the death penalty.⁹³ The debate on whether felony murder was appropriate was alive, with a House of Commons minority member arguing that the UK government had no right to utilize a method of punishment of such “irrevocable doom.”⁹⁴ In 1956, he introduced a private bill intending to abolish the death penalty once again, though opposing majority members ultimately vetoed it.⁹⁵ In that same year, the House of Commons failed to pass a motion for the retention of the death penalty.⁹⁶ One year later, in 1957, the Houses reached a compromise: without abolishing capital punishment explicitly, the resulting Homicide Act of 1957 alternatively abolished felony murder.⁹⁷ Among other reforms, this abolition partially addressed the harsh nature and lack of evidential deterrence of capital punishment.⁹⁸ The Homicide Act rejected the felony murder rule by requiring *mens rea* as an element of any murder:

§ I 1) Where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence.⁹⁹

The decade-long debate in the UK legislature regarding the lack of *mens rea* in felony murder and the probability of a resulting

v. Horsey [1862] 176 ER 129; R. v. Serné [1887] 16 Cox Crim. Cas. 311; R. v. Whitmarsh [1898] 62 J.P. 711; R. v. Bottomley [1903] 115 L.T. 88; R. v. Lumley [1911] 22 Cox 635).

91. See R.C.C.P., *supra* note 73, ¶ 100. The report also acknowledged the lack of a Supreme Court definition of a felony involving violence, indicating further confusion in the courts of felony murder’s scope.

92. See *id.*, ¶ 75, 94.

93. See Hughes, *supra* note 70, at 522.

94. See 1 July 1953, HC Deb (1953), col. 410 (UK) <https://www.theyworkforyou.com/debates/?id=1953-07-01a.407.0> [<https://perma.cc/DFA6-AH6H>].

95. See Hughes, *supra* note 70, at 522.

96. See *id.* at 521-22.

97. See Homicide Act 1957, 5 & 6 Eliz. 2, c. 11 (Eng.).

98. See R.C.C.P., *supra* note 73, ¶ 80, 94.

99. See Homicide Act 1957, 5 & 6 Eliz. 2, c. 11 (Eng.).

death sentence exhibits the controversial nature of the rule.¹⁰⁰ *Mens rea* is a bedrock principle in the United Kingdom in determining culpability and subsequent convictions by the state.¹⁰¹ This disproportionality of crime to punishment based in absent *mens rea* caused the abolition of felony murder in England. It died in the place it was born.

B. The Canadian Charter and Constructive Murder: A Supreme Court Segue

Canada incorporated the felony murder rule in its criminal code, as evidenced by the 1955 definition of constructive murder.¹⁰² It provided that a crime is murder when a death ensues during the commission or attempted commission of certain, specified felonies if the defendant uses or has a weapon with them.¹⁰³ This applied whether or not the defendant intended or knew that death is likely.¹⁰⁴ Less than thirty-five years later, Canada passed the Charter of Rights and Freedoms as part of the Constitution Act of 1982.¹⁰⁵ It states that “[e]veryone has the right to life, liberty and security of the person” and that they should apply in accordance with the principles of fundamental justice.¹⁰⁶ Critics of the Charter believed it could only accomplish procedural fairness.¹⁰⁷ Yet, in its application, it led to substantive changes in criminal law.¹⁰⁸ The Charter provided Canada with a legal foundation to frame the constructive murder provision as

100. See Hughes, *supra* note 70. See VanSickle, *supra* note 37.

101. See OLIVER WENDELL HOLMES JR., *THE COMMON LAW* 75-77 (1963); Chisholm v. Doulton [1889] 22 QBD 736 (U.K.).

102. Constructive murder is the term for Canada’s version of felony murder. See Revised Criminal Code, S.C. 1955, § 202 (d) (Can.).

103. See *id.* See also J. Li. J. Edwards, *Constructive Murder in Canadian and English Law*, 3 CRIM L.Q. 481, 505 (1961).

104. See Edwards, *supra* note 103.

105. See Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.) [hereinafter Canadian Charter]. Canada’s 1982 Constitution Act changed its original Constitution, instituted with many acts of British Parliament, of 1867. For more, see *Constitution Act, 1982*, THE CANADIAN ENCYCLOPEDIA, <https://www.thecanadianencyclopedia.ca/en/article/constitution-act-1982> [https://perma.cc/5VGU-HR7G] (last visited Dec. 19, 2020).

106. See Canadian Charter, *supra* note 105, § 7.

107. See Kent Roach, *Canada’s Experience with Constitutionalism and Criminal Justice*, 25 SAclJ 656, 677 (2013).

108. See *id.*

promoting “fundamental injustice.”¹⁰⁹ It permitted Canadian courts to analyze and decipher whether constructive murder violated the principles of fundamental justice,¹¹⁰ the presumption of innocence,¹¹¹ and constituted cruel and unusual punishment when combined with the respective penalty.¹¹²

Canada based its decision to abolish constructive murder on concepts of proportionality and moral blameworthiness to achieve justice.¹¹³ In a highly determinative case, *R. v. Vaillancourt*¹¹⁴ dealt with constructive murder’s constitutionality under Canada’s new Charter.¹¹⁵ The defendant, convicted under the doctrine, participated in an armed robbery where his accomplice fatally shot someone.¹¹⁶ Ultimately, *Vaillancourt* held that due to the special stigma that results from a murder conviction, a defendant’s *mens rea* must reflect the “particular nature of that crime” to uphold the principles of fundamental justice.¹¹⁷ A defendant’s mental state is the distinguishing element between murder and manslaughter.¹¹⁸ Therefore, because murder is society’s most severe crime, some “special mental element” of their *mens rea* must be present to achieve this conviction.¹¹⁹ Canada classifies culpable homicide as murder when the accused “means” to cause a death.¹²⁰ It reduces the charge to manslaughter when the accused commits a homicide in the heat of passion.¹²¹ Accordingly, *Vaillancourt* concluded that there cannot be a murder conviction without minimally objective foresight under the principles of fundamental justice.¹²² Thus, it effectively abolished constructive murder across Canada.¹²³ Descriptions of a special mental element, mental state, and

109. See Grant & MacKay, *supra* note 62, at 157 (emphasis added).

110. See Canadian Charter, *supra* note 105, § 7.

111. See *id.* § 11(d).

112. See *id.* § 12.

113. See Bruce P. Archibald, *Crime and Punishment: The Constitutional Requirements for Sentencing Reform in Canada*, 22 R.J.T. 307 (1988).

114. See generally *Vaillancourt*, [1987] 2 SCR 636.

115. See *id.*

116. See *id.* at 636.

117. See *id.*

118. See *id.*

119. See *id.*

120. See Criminal Code, R.S.C., 1985, c C-46 (Can.), <https://laws-lois.justice.gc.ca/eng/acts/C-46/page-52.html#docCont> [<https://perma.cc/5HTP-3Q4M>].

121. See *id.*

122. See *Vaillancourt*, [1987] at 654.

123. See *id.*

objective foreseeability refer to the defendant's *mens rea* during the course of a killing to distinguish murder from another crime.¹²⁴ Without it, the justice system is left with a paradoxical exertion of itself.

*R. v. Martineau*¹²⁵ confirmed this decision three years later, but the scope of the court's analysis and conclusions extends beyond those of *Vaillancourt*.¹²⁶ Canada convicted the *Martineau* defendant as an accomplice to an armed robbery that resulted in the deaths of two people.¹²⁷ The court held that free and democratic societies that recognize an individual's free will should only employ a murder conviction—and its subsequent stigma and punishment—for those who intentionally choose to cause death or bodily harm knowing death is likely to occur.¹²⁸ The subjective foresight of death is the *only* way to maintain the proportionality between a murder conviction's stigma and punishment to the defendant's moral blameworthiness.¹²⁹ Additionally, the requirement of proportionality between stigma and punishment is not solely based on *mens rea* alone, but correlates to the combination of both the *physical* and mental elements of a murder.¹³⁰ This conclusion broadened the argument against constructive murder beyond *mens rea* by extending it to the *actus reus* portion of crime, which was also not necessary to prove for a constructive murder conviction.¹³¹ *Martineau* necessitates proof of *mens rea* and *actus reus* in a murder statute, essentially eliminating the prospect of secondary statutes accomplishing the same stigma and punishment of a murder conviction.¹³²

124. See *supra* notes 114-124 (discussing the necessity of a "special mental element," a defendant's "mental state," and "objective foreseeability" in order to distinguish a murder conviction in *Vaillancourt*).

125. See generally *R. v. Martineau*, [1990] 2 S.C.R. 633.

126. See generally *Vaillancourt*, [1987]; *Martineau*, [1990].

127. See generally *Martineau*, [1990].

128. See *id.* at 634. (emphasis added).

129. See *id.*; Roach, *Canada's Experience with Constitutionalism and Criminal Justice*, *supra* note 107.

130. See generally *Martineau* [1990] (emphasis added).

131. See *id.*

132. See *id.*

III. ISSUES WITH FELONY MURDER IN THE UNITED STATES

A. *Unjust Justice: Eliminating Disproportionality Issues in Crime and Punishment*

Felony murder's application in the United States is far broader than that of the United Kingdom and Canada.¹³³ It often includes instances where a third party or law enforcement kills an accomplice—such as in the Lakeith Smith case.¹³⁴ Consequently, its continued use undergoes extensive criticism in the United States.¹³⁵ On the state level, California's Supreme Court described it as "highly artificial."¹³⁶ In a dissent to an opinion upholding accomplice felony murder, US Supreme Court Justice William J. Brennan called it a "living fossil."¹³⁷ The proportionality argument used to abolish felony murder in the United Kingdom and Canada also applies to the United States.¹³⁸ Accordingly, this section details US caselaw that exemplifies the proportionality principle within US criminal law, which is almost solely based in its interpretation of the Eighth Amendment ban on cruel and unusual punishment.¹³⁹ It also describes the inconsistencies of the United States upholding proportionality in its diplomacy, but disregarding it within its own borders.¹⁴⁰ Independently from the United Kingdom and Canada, there is a legitimate concern that the endurance of deeply ingrained racial biases within the US legal system disproportionately impacts the outcomes of felony murder cases.¹⁴¹ This section therefore details the overarching racial imbalance of felony murder against Black people and the impact of felony murder on prosecutorial discretion.¹⁴² It describes

133. Compare Guyora Binder, *Making the Best of Felony Murder*, 91 *BUFF. UNIV. L. REV.* 403, 404 (2011), with Hughes, *supra* note 70.

134. See Binder, *Making the Best of Felony Murder*, *supra* note 133, at 404; see also Hughes, *supra* note 70; see also *supra* notes 2-9 discussing the Lakeith Smith case.

135. See Vaillancourt, [1987]; Martineau, [1990]. See also cases cited *infra* notes 242, 245, and 390-91.

136. *People v. Phillips*, 414 P.2d 353, 359-61 (1966).

137. *Tison v. Arizona*, 481 U.S. 137, 159 (1987).

138. See *supra* Section II and accompanying text.

139. See Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 *YALE L.J.*, 3094, 3098 (2015).

140. See discussion *infra* Sections III.A.1, III.A.3.

141. See discussion *infra* Section III.B.

142. See discussion *infra* Section III.B.

contemporary instances of felony murder, including its use in cases of excessive force by law enforcement and civilians.¹⁴³

1. Expanding the Proportionality Principle Under the Eighth Amendment

Proportionality is a critical factor in deciphering punishment in US law, especially when sentencing a person to death or life without parole.¹⁴⁴ In 1910, in *Weems v. United States*,¹⁴⁵ the Supreme Court considered the constitutionality of a fifteen year sentence imposed by the Philippine government (then a US colony) on a US Coast Guard official.¹⁴⁶ The Philippines convicted him of falsifying a public document.¹⁴⁷ The Court interpreted the Eighth Amendment to mean that a crime's punishment would be graduate and proportional to a defendant's offense to uphold the principles of justice.¹⁴⁸ While the Supreme Court's interpretation of the Eighth Amendment does not designate capital punishment as cruel and unusual altogether, it currently requires a proportionality analysis in its application.¹⁴⁹ Over the past five decades, the United States Supreme Court ("SCOTUS") applied the principle of proportionality in cases involving low-level offenders, juvenile delinquents, and people with limited mental capacities.¹⁵⁰

On numerous occasions, the US Supreme Court ruled on the proportionality of punishment for low-level offenders. In *Solem v. Helm*,¹⁵¹ SCOTUS granted habeas corpus relief for a defendant

143. See *infra* notes 258-275.

144. See Youngjae Lee, *Why Proportionality Matters*, 160 UNIV. PA. L. REV. 1835, 1836, 1840-41 (2012). For a discussion on the proportionality of sentencing in the US criminal justice system more broadly, see generally Gregory S. Schneider, *Sentencing Proportionality in the States* (Dec. 12, 2011) (unpublished note) (on file with University of Arizona Law Review), Arizona L. R.), <http://www.arizonalawreview.org/pdf/54-1/54arizlrev241.pdf> [<https://perma.cc/V8EC-7A6Q>].

145. *Weems v. United States*, 217 U.S. 349 (1910).

146. See *id.*

147. See *id.* at 357.

148. See *id.* at 367.

149. See *id.*; see also *Bucklew v. Precythe*, 139 S. Ct. 1112, 1119-20 (2019) (finding that "[t]he Eighth Amendment forbids 'cruel and unusual' methods of capital punishment but does not guarantee a prisoner a painless death."). SCOTUS briefly suspended the death penalty for four years in 1972 after striking it down altogether, but then reinstated it in 1976. See generally *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976).

150. See *infra* notes 151-174.

151. *Solem v. Helm*, 463 U.S. 277 (1983).

sentenced to life in prison without the possibility of parole for obtaining one hundred dollars under false pretenses.¹⁵² The Court took into account his prior, non-violent felonies at sentencing.¹⁵³ SCOTUS held that the sentence of life without parole was significantly disproportionate to the defendant's low level crime and, thus, unconstitutional because society viewed it as a less severe offense.¹⁵⁴ SCOTUS then limited *Solem* with its later decision, *Harmelin v. Michigan*,¹⁵⁵ which upheld the constitutionality of a life without parole sentence for a drug possession conviction.¹⁵⁶ Writing for the Court, Justice Scalia determined that a life sentence alone is not inherently disproportionate unless it is both cruel *as well as* unusual.¹⁵⁷ SCOTUS refused to classify this method of punishment for a drug crime as unusual.¹⁵⁸ This idea of proportionality seeks a balance between an offense's gravity and its perspective punishment, and thus, limits the availability of the "second most severe penalty" in the criminal justice system.¹⁵⁹

Nearly twenty years later, SCOTUS established important guidelines in sentencing juveniles. In *Graham v. Florida*,¹⁶⁰ the court considered the constitutionality of a life without parole sentence for violating the probation of a nonhomicide crime committed as a juvenile.¹⁶¹ SCOTUS determined the sentence was unconstitutional based on the Eighth Amendment's central concept of proportionality.¹⁶² It referred to tools historically used by the court—i.e. weighing the proportionality of crime to sentence, restricting extreme sentences that are grossly disproportionate, and considering the gravity and nature of the offense as well as the characteristics of the offender—to make this

152. *See id.* at 280.

153. *See id.*

154. *See id.* at 292-93, 303.

155. *Harmelin v. Michigan*, 501 U.S. 957 (1991).

156. *See id.* at 996.

157. *See id.* at 967.

158. *See id.* at 994-96.

159. *See id.* at 960.

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

161. *See id.* The crime perpetrated by the defendant was burglary. A juvenile is considered "[s]omeone who has not reached the age (usu. 18) at which one should be treated as an adult by the criminal-justice system." *Juvenile*, BLACK'S LAW DICTIONARY (11th ed. 2019).

162. *See Graham*, 560 U.S. at 959.

determination.¹⁶³ SCOTUS expanded this juvenile protection two years later in *Miller v. Alabama*,¹⁶⁴ where a fourteen-year-old homicide defendant received a mandatory sentence of life in prison without the possibility of parole.¹⁶⁵ SCOTUS ruled that the *mandate* of this sentence for juvenile homicide offenders also violated the proportionality principle of the Eighth Amendment.¹⁶⁶ These holdings focused on the juvenile offenders as an entire class of people—children—prosecuted in the criminal justice system.¹⁶⁷ The court asserted that the blanket severity of life in prison is cruel and unusual.¹⁶⁸

The Supreme Court previously barred death sentences for insane¹⁶⁹ and “mentally retarded”¹⁷⁰ defendants, as well as those with severe mental illness who do not have a “rational understanding” of their execution.¹⁷¹ Recently, *Madison v. Alabama*¹⁷² considered the constitutionality a defendant’s death sentence for an individual who suffered from multiple strokes, dementia, disorientation, and memory loss.¹⁷³ *Madison* found that the Eighth Amendment may *permit* a person’s execution if they cannot *remember* committing a crime, and it may *prohibit* the

163. *See id.* at 959-61.

164. *Miller v. Alabama*, 567 U.S. 460 (2012).

165. *See id.* at 465.

166. *See id.* at 489.

167. *See* cases cited *supra* notes 155-164.

168. The Supreme Court abolished the death penalty for juvenile offenders in 2005. The Court’s analysis took into account the national consensus against and the majority of state’s rejection of juvenile capital punishment. It also highlighted the “stark reality” that the US was the sole country in the world that officially used capital punishment against juveniles. *See Roper v. Simmons*, 543 U.S. 551, 564-68, 575 (2005).

169. *See generally* *Ford v. Wainwright*, 477 U.S. 399 (1986). In *Ford* a prisoner on death row manifested changes in behavior indicating his insanity while in prison and challenged the constitutionality of his sentence. *Id.* In its ruling, SCOTUS solidified the centuries old norm barring the death penalty for insane defendants and expanded it to death row prisoners who become insane while in prison after their sentencing. *Id.*

170. *See Atkins v. Virginia*, 536 U.S. 304, 321 (2002). The use of the term “mentally r*tarded” reflects the language of the court and not the preferred language of the author. In *Atkins* a forensic psychologist deemed the defendant as “mentally retarded,” but the jury convicted him of abduction, armed robbery, and capital murder. SCOTUS’ ruling – barring capital punishment for those it considered mentally r*tarded – was consistent with the position of state legislatures. *Id.*

171. *See generally* *Panetti v. Quarterman*, 551 U.S. 930 (2007) (ruling on the constitutionality of a death row defendant with extensive mental illness that only allowed him the basic awareness of his execution).

172. *Madison v. Alabama*, 139 S. Ct. 718 (2019).

173. *See id.* at 723.

execution of a person that suffers from *dementia*.¹⁷⁴ SCOTUS' focus on these various mental standards speaks to its acceptance of the proportionality principle generally and its recognition of the mental state of a defendant.

2. Cruel and Unusual: SCOTUS Abolishes The Death Penalty for Non-Murder Crimes

The abolition of capital punishment for non-murder crimes did not fully materialize in the United States until 2008.¹⁷⁵ More than forty years prior, the Supreme Court considered in *Coker v. Georgia*¹⁷⁶ the constitutionality of a death sentence for a defendant convicted of raping an adult, among other crimes.¹⁷⁷ SCOTUS concluded that a death sentence for a rape conviction of an adult was grossly disproportionate and therefore excessive punishment under the Eighth Amendment.¹⁷⁸ SCOTUS took guidance from historical and contemporary legal trends around the United States in its decision;¹⁷⁹ it found that the majority of states did not institute capital sentences for rape in the prior fifty years and that many legislatures rejected it altogether.¹⁸⁰ SCOTUS also identified a disagreement with the practice through the analysis of jury trends, which showed that juries did not impose a death sentence for rape in a vast majority of cases.¹⁸¹

174. *See id.* at 726-27.

175. The roots of non-murder death sentences date to the country's birth, mostly within states with a strong history of slavery. *See* Michael S. Brazaol, *The Death Penalty in America: Riding the Trojan Horse of the Civil War*, 4 *THE MODERN AMERICAN* 27 (2008) (citing MATTHEW B. ROBINSON, *DEATH NATION: THE EXPERTS EXPLAIN AMERICAN CAPITAL PUNISHMENT* 178-83 (2008)).

176. *Coker v. Georgia*, 433 U.S. 584 (1977).

177. *See id.* at 586.

178. *See id.* at 592.

179. *See id.* at 593, 597. In 1972, the Court in *Furman v. Georgia* narrowed the criteria of which the death penalty could be applied for rape cases (because it effectively banned the death penalty for four years). *Furman v. Georgia*, 408 U.S. 238 (1972); *see The History of the Death Penalty: A Timeline*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/stories/history-of-the-death-penalty-timeline> [<https://perma.cc/5RUN-JKXV>] (last visited Sept. 28, 2020). It is important to note that the court also stresses that Georgia, subsequent the ruling in *Furman*, was the only jurisdiction left that "authorizes a sentence of death when the rape victim is an adult woman, and only two other jurisdictions provide capital punishment when the victim is a child." *Furman*, 408 U.S. at 596.

180. *See supra* *The History of the Death Penalty*, note 175.

181. *See id.* at 597.

In 2008, *Kennedy v. Louisiana*¹⁸² deciphered whether non-murder capital sentences were constitutional in the context of a defendant who raped a juvenile.¹⁸³ *Kennedy* completely outlawed capital punishment for non-murder crimes against individuals by ruling the death penalty disproportionate and unconstitutional “where death ha[d] not occurred.”¹⁸⁴ This logic focused on the resulting death, mirroring the reasoning of the Canadian court when it decided *Martineau*.¹⁸⁵ *Kennedy* extended the determination of proportionality based on the combination of physical and mental elements of a murder, rather than just a defendant’s *mens rea* while committing the crime.¹⁸⁶ It limited its application to crimes against *individuals* rather than the *State* such as “treason, espionage, terrorism, and drug kingpin activity.”¹⁸⁷ While the facts of the *Kennedy* case specifically involved the rape of a child, SCOTUS concluded that states cannot impose a death sentence if a crime against another person, rather than the State, does not result in death, regardless if the victim is an adult or juvenile.¹⁸⁸ SCOTUS also took into account the national consensus against using the death penalty in instances of child rape.¹⁸⁹ It concluded that in consideration of the ban on cruel and unusual punishment, the State should limit its punishing power “within the limits of civilized standards.”¹⁹⁰ These two cases legitimize and solidify the United States’ implementation of the proportionality principle in capital punishment for crimes that did not result in someone’s death.¹⁹¹

182. See *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

183. See *id.* at 412-13.

184. See *id.* at 440.

185. See *id.*; see also *Martineau* [1990] 2 S.C.R. at 637.

186. See *Kennedy*, 554 U.S. at 437.

187. *Id.* at 437. Accordingly, there are several state capital offenses for other crimes against the state such as drug trafficking, espionage, aircraft hijacking etc. *Death Penalty for Offenses Other Than Murder*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/crimes-punishable-by-death/death-penalty-for-offenses-other-than-murder> [https://perma.cc/2WJB-DK9J] (last visited Sept. 28, 2020). However, the US government has not used the death penalty in these situations of non-murder crimes against the state and no one is currently on death row for these types of crimes. *Id.*

188. *Kennedy*, 554 U.S. at 437.

189. *Id.* at 434.

190. *Id.* at 435.

191. See generally *Coker*, 433 U.S. 584; see generally *Kennedy*, 554 U.S. 407.

It is important to note that US states historically used non-murder capital punishment predominantly in circumstances of crimes among free Black people, slave insubordination, and even *attempted* rape by a Black person of a white person.¹⁹² To paraphrase Justice Thurgood Marshall, perhaps one of the most stunningly consistent and blatant instances of the death penalty's disparate impact on Black people in the United States is that of the execution for rape.¹⁹³ Between 1930-1972, 405 of the 455 executions for rape that took place were of Black defendants, accounting for 89.1 percent of all rape executions.¹⁹⁴ The elements of a rape statute in most common law jurisdictions are the *actus reus*, the act of rape, and *mens rea*, the defendant's state of mind concerning that rape.¹⁹⁵ The *actus reus* element in a felony murder statute, as explained above, does not necessarily refer to the act of killing by the defendant themselves.¹⁹⁶ Similarly, the *mens rea* element does not refer to the defendant's state of mind concerning the killing, but instead considers that of the underlying felony.¹⁹⁷ Yet, while rape is no longer punishable by death, capital felony murder remains. A rapist did not physically or mentally intend to kill but was previously executed for his actions.¹⁹⁸ A felony murder defendant does not have the state of mind and often does not commit the physical act of killing, but can still be executed.¹⁹⁹ In this way, the death penalty for rape as well as felony murder is disproportionate, highlighting the proportionality principle in terms of crime and punishment for both *mens rea* and *actus reus*.

192. See Brazao, *supra* note 175, at 27 (emphasis added).

193. See GILBERT KING, *DEVIL IN THE GROVE* 48, 50 (2012) (citing a 1949 memo written by Thurgood Marshall).

194. Brief for American Civil Liberties Union, et al. as Amici Curiae Supporting Petitioner, *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (No. 07-3343), 2008.

195. See DRESSLER, *supra* note 11, at 548, 561.

196. See *supra* notes 20-31 for a discussion of the elements of the felony murder doctrine.

197. See *supra* notes 20-31 for a discussion of the elements of the felony murder doctrine.

198. See discussion *supra* Section II.A.1.

199. See *supra* notes 20-31 (explaining of felony murder and its elements); see *infra* Section III.A.4 (discussing capital felony murder and its scope).

3. A Paradox in Practice: Capital Punishment in Non-Murder vs. Felony Murder Cases

The United States still employs the death penalty precipitously despite abolishing it for non-murder crimes. Worldwide, as of July 2018, 106 countries fully abolished the death penalty, 56 utilize it generally,²⁰⁰ and at least 35 employ it for crimes not resulting in death.²⁰¹ The United States repeatedly condemns countries such as Iran and North Korea for harsh capital sentencing of non-murder crimes.²⁰² It suggests that these executions violate due process and lack a deterring impact.²⁰³ Simultaneously, the United States sentences defendants to death for felony murder.²⁰⁴ In these cases, the intention to commit homicide and at times, the physical perpetration of killing, are not present.²⁰⁵ Therefore the basis for these condemnations by the United States—rooted in proportionality, human rights, and due process violations—continues to paradoxically take place via felony murder cases within US borders.²⁰⁶ The implications of

200. *Abolitionist and Retentionist Countries as of July 2018*, AMNESTY INT'L, <https://www.amnesty.org/download/Documents/ACT5066652017ENGLISH.pdf> [<https://perma.cc/2VY4-6CJ2>] (last visited Sept. 18, 2020).

201. *Death Penalty Database*, CORNELL UNIV. SCH. L., <https://deathpenaltyworldwide.org/database> [<https://perma.cc/88XA-36QK>] (last visited Sept. 18, 2021) [hereinafter *Death Penalty Database*]. While capital punishment for non-murder crimes “exists” as a formal rule in these countries, some such as Russia have adopted moratoriums on executions. Russia has subsequently not formally executed anyone since 1999 – not including extrajudicial killings.

202. *See infra* notes 208-27 for examples of these condemnations.

203. *See infra* notes 208-27 for examples of these suggestions.

204. *See infra* Section III.A.4 for examples of capital felony murder.

205. *See infra* Section III.A.4 for a detailed analysis of these instances of capital felony murder.

206. *See generally Kennedy*, 554 U.S. 407; *see infra* notes 131-97. For the purposes of this section it is important to highlight the differences between the following: 1) capital punishment – a “criminal penalty” of “killing the perpetrator” or sentencing them to “death for a serious crime,” versus 2) extrajudicial killing – defined as “killings ‘committed, condoned or acquiesced by governments.’” *Capital Punishment*, BLACK’S LAW DICTIONARY (11th ed. 2019); *The Right Not To Be Arbitrarily Killed by the State*, ICELANDIC HUMAN RIGHTS CTR., <http://www.humanrights.is/en/human-rights-education-project/comparative-analysis-of-selected-case-law-achpr-iachr-echr-hrc/the-right-to-life/the-right-not-to-be-arbitrarily-killed-by-the-state> [<https://perma.cc/WC3D-J3ZU>] (last visited Sept. 18, 2020) (In describing the death penalty, this source uses the term justified due to the exceptions mentioned within Article 2 of the ECHR and do not reflect the opinions or use of the term justified killing by the author); *see* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, https://www.echr.coe.int/Documents/Convention_Eng.pdf [

contradictory rhetoric by the US as it condemns selected rival countries for categorical injustices while similar actions still take place within its borders further deter worldwide progress in human rights.²⁰⁷

The history of tension and political rivalry between the United States and the Islamic Republic of Iran is complex and long-established.²⁰⁸ As part of this tenuous relationship, the United States frequently condemns Iran's use of capital punishment for non-murder crimes. Under the Obama administration, officials labeled executions of political defendants Mohammad Reza Ali Zamani and Arash Rahmanipour as unjust.²⁰⁹ The Iranian government convicted them of "trying to topple" the regime and sentenced them to death by hanging.²¹⁰ The Obama White House "condemn[ed] in the strongest terms the Government of Iran's apparent plans to move forward"²¹¹ with the planned execution of

A975] (last visited Nov. 16, 2020). This section specifically addresses issues around capital punishment, not extrajudicial killings. Finally, there is of course a difference in capital punishment as it applies to cases resulting in death (the felony murder rule) versus those not resulting in death (non-murder capital punishment). The commonality between the two is that they both lack the proportionality principle in their justification. *See Death Penalty Database, supra* note 201.

207. *See infra* Section III.A.3 (discussing US condemnation of international non-murder capital punishment). *But see infra* Part IV.B. (illustrating the use of the felony murder doctrine in the US).

208. *See US-Iran relations: A brief history*, BBC NEWS (Jan. 6, 2020), <https://www.bbc.com/news/world-middle-east-24316661> [<https://perma.cc/FMN2-VSR5>]; *U.S. Relations With Iran, 1953 - 2020*, COUNCIL ON FOREIGN RELATIONS, <https://www.cfr.org/timeline/us-relations-iran-1953-2020> [<https://perma.cc/MR3M-N9PT>] (last visited Sept. 28, 2020).

209. *See* Golnaz Esfandiari, *Iran Hangs Two Sentenced In Postelection Trials*, RADIO FREE EUROPE (Jan. 28, 2010), https://www.rferl.org/a/Iran_Executes_Two_Over_Election_Unrest/1941862.html [<https://perma.cc/4J9A-T8DR>]; Spencer Magloff, *White House Condemns Iran Executions*, CBS NEWS (Jan. 28, 2010), <https://www.cbsnews.com/news/white-house-condemns-iran-executions/> [<https://perma.cc/3L3H-44GA>]; *Iranian Election Protesters Executed*, WALL ST. J. (Jan. 28, 2010), <https://www.wsj.com/articles/SB10001424052748704878904575030483299887178> [<https://perma.cc/7AAC-FEYZ>].

210. *Iranian Election Protesters Executed*, WALL ST. J. (Jan. 28, 2010), <https://www.wsj.com/articles/SB10001424052748704878904575030483299887178> [<https://perma.cc/ZFM3-T62W>].

211. *See Statement by the Press Secretary on the Case of Ms. Sakineh Mohammadi Ashtiani*, The White House (Nov. 2, 2010), <https://obamawhitehouse.archives.gov/the-press-office/2010/11/02/statement-press-secretary-case-ms-sakineh-mohammadi-ashtiani> [<https://perma.cc/ZZ34-N9SW>]; *see also U.S. Condemns Iran's Planned Execution of Woman*, REUTERS (Nov. 2, 2010), <https://www.reuters.com/article/us-iran-execution-n>

Sakineh Mohammadi Ashtiani for adultery by stoning.²¹² The statement also cited a lack of due process in her case.²¹³

This trend continued under the Trump Administration. In 2017, Iran convicted and sentenced to death fifteen-year-olds Mehdi Sohrabifar and Amin Sedaghat and reportedly executed them in 2019.²¹⁴ The US State Department responded that although the US was “appalled” by the executions, they reflected “Iran’s egregious overall human rights record.”²¹⁵ In June 2020, Iran’s Supreme Court upheld the death sentences of three protesters—Amir-Hossein Moradi, Saeed Tamjidi, and Mohammad Rajabi—prompting a strong condemnation from the US State Department with a call for Iran to respect human rights.²¹⁶ The administration also retroactively condemned a 1980 execution of Albert Danielpour – a Jewish Iranian convicted of spying for and aiding the stabilization of the Israeli government.²¹⁷ These

usa/u-s-condemns-irans-planned-execution-of-woman-idUSTRE6A16D220101102
[https://perma.cc/P6AQ-PEB8].

212. Jim Sciutto, *Death by Stoning: Sakineh Mohammadi-Ashtiani Faces Brutal Death, Sparking International Outrage*, ABC NEWS (July 9, 2010), <https://abcnews.go.com/WN/sakineh-mohammadi-ashtiani-faces-brutal-death-stoning-iran/story?id=11129429> [https://perma.cc/B3Y3-HA95]; Saeed Kamali Dehghan, *Sakineh Mohammadi Ashtiani could be hanged in Iran*, THE GUARDIAN (Dec. 26, 2011), <https://www.theguardian.com/world/2011/dec/26/sakineh-mohammadi-ashtiani-hang-iran> [https://perma.cc/YS87-ZZUN].

213. See sources cited *supra* note 211.

214. See *‘Execution’ of Iranian Teenage Boys cNdemned*, BBC NEWS (May 2, 2019), <https://www.bbc.com/news/world-middle-east-48133641> [https://perma.cc/23FL-7LSV]; *Iran: Two 17-year-old Boys Flogged and Secretly Executed in Abhorrent Violation of International Law*, AMNESTY INT’L (Apr. 29, 2019), <https://www.amnesty.org/en/latest/news/2019/04/iran-two-17-year-old-boys-flogged-and-secretly-executed-in-abhorrent-violation-of-international-law/> [https://perma.cc/L3AU-9TSP].

215. See Morgan Ortagus, U.S. Dep’t of State, *Unconscionable Reports of Secret Executions of Minors in Iran* (May 1, 2019), <https://www.state.gov/unconscionable-reports-of-secret-executions-of-minors-in-iran/> [https://perma.cc/H46U-TVE3].

216. See *US Condemns Iran’s Death Sentence For Three November Protesters*, RADIO FARDA (June 26, 2020), <https://en.radiofarda.com/a/us-condemns-iran-s-death-sentence-for-three-november-protesters/30692119.html> [https://perma.cc/MJ37-DZJ3]; Ned Price (@statedeptspox), TWITTER (June 25, 2020, 5:05 PM), <https://twitter.com/statedeptspox/status/1276260317069221888?s=20> [https://perma.cc/356D-PTEK].

217. See Benjamin Weinthal, *US Condemns Islamic Republic for Execution of Iranian Jew in 1980*, JERUSALEM POST (June 7, 2020), <https://www.jpost.com/middle-east/us-condemns-islamic-republic-for-execution-of-iranian-jew-in-1980-630662> [https://perma.cc/7GSE-CBQ9]; Ned Price (@statedeptspox) TWITTER (June 7, 2020, 7:05

condemnations by the US government align with federal caselaw where SCOTUS prohibited the use of capital punishment for all non-murder crimes, including rape.²¹⁸

In a similar fashion, the historical rapport between the United States and the Democratic People's Republic of Korea ("North Korea") is contentious.²¹⁹ Across various administrations, the US consistently denounces North Korea for its human rights abuses—including non-murder capital punishment—and occasionally imposes sanctions and soft power threats.²²⁰ US Secretary of State John Kerry labeled the 2015 "executions" of the North Korean defense minister as "grotesque, grisly, [and] horrendous," and that the government displays one of the most "reckless disregard for human rights" in the world.²²¹ In December 2018, the US State Department produced a report detailing executions of defectors, foreign media listeners, and government critics,²²² and initiated an executive order sanctioning the regime.²²³ It followed with broad sanctions on individuals who "perpetrate the regime's brutal state-sponsored censorship activities, human rights violations and abuses, and other abuses that suppress and control the

AM), <https://twitter.com/statedeptspox/status/1269586321208741890> [https://perma.cc/J8YU-V8TP].

218. See generally *Kennedy*, 554 U.S. 407.

219. See *U.S.-North Korea Relations*, CTR. FOR STRATEGIC & INT'L STUD., <https://www.csis.org/programs/korea-chair/us-north-korea-relations> [https://perma.cc/PJC7-6LJ3] (last visited Sept. 18, 2020); see also EMMA CHANLETT-AVERY & MARK E. MANYIN, CONG. RSCH. SERV., IF10246, U.S.-NORTH KOREA RELATIONS (2020).

220. See Press Release, U.S. Dep't. of Treasury, Treasury Sanctions North Korean Officials and Entities in Response to the Regime's Serious Human Rights Abuses and Censorship (Dec. 10, 2018), <https://home.treasury.gov/news/press-releases/sm568> [https://perma.cc/L5GB-NCN5] (detailing the United States' stance and intentions to impose sanctions on North Korea for human rights abuses) [Press Release on North Korean Sanctions]. See *infra* notes 221-227 for examples directly related to capital punishment for non-murder crimes.

221. See Jaime Fuller, *John Kerry on Execution in North Korea: 'Grotesque, Grisly, Horrendous,'* NEW YORKER (May 18, 2015), <https://nymag.com/intelligencer/2015/05/john-kerry-discusses-north-korea.html> [https://perma.cc/K3VH-XBSE]. See also Black Law's Dictionary defines an execution in the context of criminal law as "[t]he carrying out of a death sentence." *Execution*, BLACK'S LAW DICTIONARY (11th ed. 2019). Considering this definition and the high probability based on new reporting that the defense minister was likely not formally charged and convicted by a court, this was probably an extrajudicial killing rather than an instance of capital punishment.

222. See Press Release on North Korean Sanctions, *supra* note 220.

223. Exec. Order No. 13687, 80 Fed. Reg. 817, "Imposing Additional Sanctions With Respect to North Korea" (Jan. 2, 2015).

population.”²²⁴ The designation of the individuals under the Treasury Department’s Office of Foreign Assets Control also furthered a 2015 Executive Order sanctioning the regime on account of its “human rights abuses” for the first time.²²⁵ Overall, the United States concluded that the North Korean government displays a “reckless disregard for human rights,”²²⁶ and vowed to consistently condemn North Korea’s “flagrant and egregious” abuses against human rights and “fundamental freedoms.”²²⁷

The United States’ condemnations of Iran and North Korea reflect its disapproval in the lack of proportionality between crime and punishment, which it claims amount to human rights and due process violations. Yet, the United States continues to practice disproportionate punishment within its own criminal justice system via the felony murder rule.²²⁸ It therefore violates its own standards of the proportionality principle.²²⁹ The international community does not overlook discrepancies in US rhetoric versus practice. It only hinders enforcement of human rights and criminal justice reform worldwide by damaging the credibility of condemnations and example-setting.²³⁰ For example, North Korea released a human rights report titled “News Analysis on Poor Human Rights Records in U.S.,” which underscored many fundamental human rights issues throughout the United States.²³¹

224. See Press Release on North Korean Sanctions, *supra* note 220.

225. Exec. Order No. 13687, 80 Fed. Reg. 817, “Imposing Additional Sanctions With Respect to North Korea” (Jan. 2, 2015).

226. See Press Release on North Korean Sanctions, *supra* note 220.

227. See *id.*

228. See *infra* Section III.A.4 (discussing capital felony murder); *infra* Part III.B.1 (discussing felony murder’s impact on communities of color).

229. See *infra* Part III.A.1-2 for a discussion of the United States Supreme Court implementing the proportionality principle.

230. See Belkis Wille & Ida Sawyer, *The US Commits the Same Abuses it Condemns Abroad*, HUMAN RIGHTS WATCH (June 29, 2020), <https://www.hrw.org/news/2020/06/29/us-commits-same-abuses-it-condemns-abroad#> [<https://perma.cc/2VN3-TGKT>].

231. Adam Taylor, *North Korea Releases List of U.S. ‘Human Rights Abuses’: ‘The U.S. is a Living Hell,’* WASH. POST (May 2, 2014), <https://www.washingtonpost.com/news/worldviews/wp/2014/05/02/north-korea-releases-list-of-u-s-human-rights-abuses-the-u-s-is-a-living-hell/> [<https://perma.cc/84JX-W3PY>] (citing *News Analysis on Poor Human Rights Records in U.S.*, KOREAN CENT. NEWS AGENCY (June 30, 2014), <http://www.kcna.co.jp/item/2014/201404/news30/2014-0430-23ee.html> [<https://web.archive.org/web/20140521171129/http://www.kcna.co.jp/item/2014/201404/news30/2014-0430-23ee.html>]).

Similarly, Iran published a 2018 report criticizing the human rights record of the United States.²³² The report highlighted the hypocrisy of US policy that condemns select countries that it considers to be political foes, including Iran, for “violating human rights” while it commits similar atrocities at home. Not only are these hypocritical politics perpetrated by the United States paradoxical in practice, but the empty rhetoric curtails the ability to achieve actual reform in human rights, due process, and proportionality of punishment.

4. Limiting the Scope of Capital Felony Murder

According to unpublished 1989 FBI data, felony murders and probable felony murders accounted for roughly one-fifth of the total criminal homicides investigated.²³³ While capital punishment for a felony murder conviction still flourishes within the United States, the Supreme Court partially limited its scope in *Enmund v. Florida*.²³⁴ *Enmund* considered whether the death penalty is constitutionally valid for a defendant “who neither took life, attempted to take life, nor intended to take life.”²³⁵ The defendant waited in a parked car while his co-defendants robbed and killed two victims.²³⁶ *Enmund* concluded that a defendant’s actual participation in a robbery that results in death should limit their criminal culpability.²³⁷ Thus, their personal responsibility in the crime and “moral guilt” should tailor their punishment.²³⁸ It concluded that a death sentence to avenge a killing that a defendant did not intend to commit does not constitute

232. *Iran Publishes Human Rights Report on US*, ISLAMIC REPUBLIC NEWS AGENCY (June 13, 2018), <https://en.irna.ir/news/82942228/Iran-publishes-human-rights-report-on-US> [<https://perma.cc/AE5K-VSW2>]; Jason Lemon, *Iran Publishes 47-Page Report Criticizing U.S. Human Rights Record*, NEWSWEEK (June 13, 2018), <https://www.newsweek.com/iran-report-criticizing-us-human-rights-record-974851> [<https://perma.cc/5V6G-NZSZ>].

233. See Ruth D. Peterson & William C. Bailey, *Felony Murder and Capital Punishment: An Examination of the Deterrence Question*, 29 CRIMINOLOGY 367, 370 (1991). See also Phyllis L. Crocker, *Crossing the Line: Rape-Murder and the Death Penalty*, 26 OHIO N. UNIV. L. REV. 689 (2000) (stating that felony murder was the most prevalent type of murder conviction for defendants on death row).

234. See generally *Enmund v. Florida*, 458 U.S. 782 (1982).

235. *Id.* at 787.

236. See *id.* at 784.

237. *Id.* at 782.

238. See *id.* at 800.

retribution.²³⁹ The Court recognized that most of the legislature had previously come to the same conclusion.²⁴⁰ The death penalty would also likely not deter people who do not intend to kill, so neither deterrence nor retribution can be a sufficient justification for the death penalty in these circumstances.²⁴¹

Five years later, the Supreme Court upheld the overall availability of capital felony murder in *Tison v. Arizona*.²⁴² The defendants in *Tison* assisted in an armed robbery and abduction after helping their father escape from prison, resulting in four deaths perpetrated by their co-defendants.²⁴³ *Tison* held that a defendant's major participation in a felony in combination with reckless indifference to human life satisfies the *Enmund* culpability requirement to impose capital felony murder.²⁴⁴ Thus, a defendant who demonstrates reckless indifference (a culpability standard significantly lower than the *mens rea* of intent required for a typical murder conviction) and has major participation in the felony (but does not necessarily commit the *actus reus* of themself physically killing as required by typical murder) can be sentenced to death.²⁴⁵

The use of the death penalty in US felony murder cases is persistent across many states. Numerous studies historically demonstrate the vast majority of felony murders were, at one point, death possible (90 percent),²⁴⁶ the most common death row

239. *See id.* at 801.

240. *See id.*

241. *See id.* at 783. For a discussion on retributivist versus utilitarian views on the felony murder doctrine, *see* ROACH, *supra* note 12, at 47-48.

242. *See Tison v. Arizona*, 481 U.S. 137, 137-38 (1987). Scholars and experts of felony murder utilize the term "capital felony murder" to refer to instances of capital sentences for felony murder convictions. *See* Guyora Binder, Brenner Fissell & Robert Weisberg, *Capital Punishment of Unintentional Felony Murder*, 92 NOTRE DAME L. REV. 1141, 1151-52 (2017); BINDER, FELONY MURDER, *supra* note 22, at 35.

243. *See Tison*, 481 U.S. at 137.

244. *See id.* at 158.

245. *See Tison*, 481 U.S. at 159 (Brennan, J., dissenting) (recognizing that it is illogical to continue to use the felony murder rule while the US previously outlawed mandatory executions for all felonies); *see Enmund*, 458 U.S. at 825; *see also* DRESSLER, *supra* note 11, at 215. It is important to note that, upon analysis, the precedent in this case may not necessarily classify a bright line rule because finding a defendant's participation in a crime to be "major" is partially subjective. *Id.*

246. *See* Leigh B. Bienen, et al., *The Reimposition of Capital Punishment in New Jersey: Felony Murder Cases*, 54 ALB. L. REV. 709, 752 (1990).

conviction,²⁴⁷ or represented the majority of defendants on death row (80 percent) despite only accounting for a minority of homicides (17-27 percent).²⁴⁸ At times, the threat of disproportionate capital punishment unnaturally forces a plea deal in exchange for a noncapital charge.²⁴⁹ Even though capital sentences are numerically infrequent considering the grand scheme of the sentencing system, just one disproportionate capital sentence is too many.²⁵⁰ Several studies found no evidence of deterrence by capital felony murder generally nor through cases of specific underlying felonies.²⁵¹ While capital punishment is statistically seen as a “limited” practice,²⁵² its extreme prevalence in felony murder cases exemplifies its importance in the context of the proportionality principle in punishment under this doctrine. Its frequency is a widespread problem that is a matter of life and death.²⁵³ The commonality of this result demonstrates that the use of capital felony murder therefore always results in unjust justice.

247. See Crocker, *supra* note 233, at 695; see William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 26 *CRIME & DELINQUENCY* 563 (1980).

248. See Crocker, *supra* note 233, at 696.

249. See Binder, Fissell & Weisberg, *supra* note 242, at 1144.

250. See *id.*

251. See Peterson & Bailey, *supra* note 233, at 379-83, 388.

252. For a discussion on the death penalty’s “limited” use, see generally Binder, Fissell & Weisberg, *supra* note 242, at 1144; Nina Totenberg, *Why Has The Death Penalty Grown Increasingly Rare?*, NPR (Dec. 7, 2015), <https://www.npr.org/2015/12/07/457403638/why-has-the-death-penalty-grown-increasingly-rare> [<https://perma.cc/EG4K-SKGY>]; John Gramlich, *California is One of 11 States that Have the Death Penalty but Haven’t Used it in More than a Decade*, PEW RSCH. CTR. (Mar. 14, 2019), <https://www.pewresearch.org/fact-tank/2019/03/14/11-states-that-have-the-death-penalty-havent-used-it-in-more-than-a-decade/> [<https://perma.cc/97BF-U42U>].

253. See Binder, Fissell & Weisberg, *supra* note 242, at 1144. See generally Norman J. Finkel & Stefanie F. Smith, *Principals and Accessories in Capital Felony-Murder: The Proportionality Principle Reigns Supreme*, 27 *LAW & SOC’Y REV.* 129 (1993).

B. *Felony Murder's Historical, Disparate Impact Against People of Color*

1. The Historical Use of Prejudice in Felony Murder on Communities of Color

There is abundant, historical documentation of felony murder's egregious, racial impact.²⁵⁴ This impact is especially devastating for Black defendants in capital felony murder cases.²⁵⁵ It even persists in the disparate sentences for felony murder *against* Black victims.²⁵⁶ The disproportionate application of felony murder combined with the special circumstances of robbery and burglary to Black and Latinx defendants highlights the historical injustice in discretion.²⁵⁷

However, there is lesser, *recent* data of this specific correlation between race and felony murder, likely because the charge is not regularly tracked separately.²⁵⁸ This does not mean there is a curtailment of felony murder's racial, inconsistent

254. See Bienen, et al., *supra* note 246, at 752 (discussing Black defendants in New Jersey accounting for roughly three-fifths of all felony murder defendants at all processing stages through 1990); see also Catherine M. Grosso et al., *Death by Stereotype: Race, Ethnicity, and California's Failure to Implement Furman's Narrowing Requirement*, 66 U.C.L.A. L. REV. 1394, 1394 (2019).

255. See Crocker, *supra* note 233, at 695 (citing David C. Baldus, Charles Pulaski, & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983)); see also Barbara O'Brien, et al., *Untangling the Role of Race in Capital Charging and Sentencing in North Carolina, 1990-2009*, 94 N.C. L. REV. 1997 (2016) (finding that North Carolina "[W]hite victim" cases between 1990-2009, "face odds of receiving a death sentence that are 2.17 times higher than the odds faced by all other cases," and is especially prevalent in capital felony murder case where Black defendants in cases with a white victim are *most* likely to receive the death penalty). See Bienen, et al., *supra* note 246, at 734-35. See generally Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 13 (1985) (explicating more studies and analyses of racial impact of felony murder in a multitude of states).

256. In Florida and Georgia cases through 1977, there were only seven people sentenced to death for the killing of Black victims under felony murder circumstances. Contrarily, Black defendants in these jurisdictions were less likely to secure commutations for felony murders than white defendants. See Bowers & Pierce, *supra* note 247, at 605.

257. See Catherine M. Grosso et. al, *Death by Stereotype: Race, Ethnicity, and California's Failure to Implement Furman's Narrowing Requirement*, 66 UCLA L. REV. 1394, 1429 (2019) (detailing that Black felony murder defendants in New Jersey between 1978-2002 charged with underlying felonies of robbery or burglary accounted for 43 percent of the cases, compared to 24 percent Latinx and 26 percent white defendants).

258. After extensive research within numerous databases and across news sources, there is little to no recent accredited studies or data on felony murder.

impact—there are a multitude of current cases of defendants of color charged with felony murder and sentenced to death.²⁵⁹ For example, an open source reporting analysis of felony murder in Cook County, Illinois found that 7.8 percent of cases were of white defendants and 74.8 percent of cases and 81.3 percent of convictions were of Black defendants.²⁶⁰ Yet, Black individuals represent roughly 23.8 percent of the population and white individuals 65.4 percent.²⁶¹

Second-degree felony murder disparities in Ramsey and Hennepin, Minnesota between 2012 and 2018 reveal that 80.2 percent of convictions were of people of color compared to 19.8 percent of their white counterparts.²⁶² Minnesota’s overall population is 83.8 percent white, while its St. Paul/Minneapolis metro population is 77.1 percent white.²⁶³ Defendants of color faced significantly higher sentences, lower chances of charge reduction, and initially received second-degree felony murder charges more frequently, whereas their white counterparts accepted plea deals to lessen their initial charges.²⁶⁴

The Non-profit “End Felony Murder Now” estimates that in 2018, 39.8 percent and 27.4 percent of Californian felony murder defendants were Black and Mexican/Hispanic respectively, while

259. See Ashoka Mukpo, *When the State Kills Those Who Didn’t Kill*, ACLU (July 11, 2019), <https://www.aclu.org/issues/capital-punishment/when-state-kills-those-who-didnt-kill> [<https://perma.cc/U38B-TTR5>] (discussing various Black defendants sentenced to death for felony murder); see also *infra* notes 259-289 detailing various contemporary examples of felony murder’s impact on Black defendants.

260. See Kat Albrecht, *Data Transparency & The Disparate Impact of the Felony Murder Rule*, DUKE CTR. FOR FIREARMS L. (Aug. 11, 2020), <https://firearmslaw.duke.edu/2020/08/data-transparency-the-disparate-impact-of-the-felony-murder-rule/> [<https://perma.cc/6KRR-QENV>]. It is important to note that this research was completed based on what appears to be blunt percentage calculations, not accounting for outside variables usually utilized within complex research studies. While this does not discredit the ultimate outcome of racial disparities, the percentage takeaways might thus be over (or under) exaggerated without accounting for outside variables.

261. See *QuickFacts: Cook County, Illinois*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/cookcountyillinois/PST045219> [<https://perma.cc/Q8YP-6Y5Z>] (last visited Sept. 28, 2020).

262. Greg Egan, *Deadly Force: How George Floyd’s Killing Exposes Racial Inequities in Minnesota’s Felony-Murder Doctrine Among the Disenfranchised, the Powerful, and the Police*, 4 MINN. J. L. & INEQUALITY 1, 5 (2021).

263. See *id.*

264. See *id.* at 4, 6.

only 22.3 percent were white.²⁶⁵ This impact is longstanding. National FBI data on felony murder between 1980 and 2008 shows that while 44.1 percent of victims and 59.9 percent of prosecuted offenders were Black, 53.1 percent of victims and 38.4 percent of prosecuted offenders were white.²⁶⁶ The average national populations between 1980 and 2010 were 12.18 percent Black and 77.63 percent white.²⁶⁷ These statistics illustrate how extreme the disparities instituted by felony murder rule currently apply to Black people and people of color.

2. Felony Murder as a Tool of Historical Prosecutorial Discretion

Numerous state and national studies illustrate the higher likelihood of arrests, convictions, and longer sentences for defendants of color.²⁶⁸ Prosecutorial discretion produces more serious initial charges against Black and Latinx defendants,²⁶⁹ which often results in their “steeper charge reductions,” but ultimately exposes them to risks of longer or mandatory sentences and impacts their plea bargain negotiations.²⁷⁰ In tandem, these

265. See *Statistics*, END FELONY MURDER NOW (last visited Sept. 28, 2020) <https://www.endfmrnow.org/statistics> [https://perma.cc/87UT-SCLK]. Notes 290-291, 304-314 are not accredited legal sources, but represent data gathered by credible nonprofits and news sources.

266. See Alexia Cooper & Erica L. Smith, *Homicide Trends in the United States, 1980-2008*, U.S. DEP'T JUST.: BUREAU JUST. STATS. (Nov. 2011), <https://www.bjs.gov/content/pub/pdf/htus8008.pdf> [https://perma.cc/RK5F-2GBA].

267. See *A Look at the 1940 Census*, U.S. CENSUS BUREAU, https://www.census.gov/newsroom/cspan/1940census/CSPAN_1940slides.pdf [https://perma.cc/ALT6-TRGJ] (last visited Sept. 28, 2020).

268. See *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, SENTENCING PROJECT (Apr. 19, 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/> [https://perma.cc/6DDD-QX2A]; Anna-Leigh Firth, *Most Judges Believe the Criminal Justice System Suffers from Racism*, NAT'L JUD. COLL. (July 14, 2020), <https://www.judges.org/news-and-info/most-judges-believe-the-criminal-justice-system-suffers-from-racism/> [https://perma.cc/T76U-RUFY]; Radley Balko, *There's Overwhelming Evidence that the Criminal Justice System is Racist. Here's the Proof*, WASH. POST (June 10, 2020), <https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/> [https://perma.cc/2585-B9K3]. For a discussion on over one million cases studied in Massachusetts, see ELIZABETH TSAI BISHOP ET AL., CRIM. JUST. POL'Y PROGRAM, HARV. L. SCH., RACIAL DISPARITIES IN THE MASSACHUSETTS CRIMINAL SYSTEM (Sept. 2020), <http://cjpp.law.harvard.edu/assets/Massachusetts-Racial-Disparity-Report-FINAL.pdf> [https://perma.cc/8DP4-K4NN].

269. See *id.* at 62-63.

270. See *id.* at 63.

disparities raise important means in which racial injustice permeates throughout the criminal justice system.²⁷¹ One could argue that if defendants of color are more likely to receive higher initial charges and thus higher sentences, they are also more likely to receive felony murder charges because it accomplishes both of these results.²⁷²

It is evident across decades and leading to the present moment that the death penalty impacts Black people and people of color at an astonishingly high rate.²⁷³ From the beginning of colonial times through the height of slavery, within Jim Crow, and now during a “post” civil rights era: Black people have always been disproportionately executed in comparison to their white counterparts.²⁷⁴ While there is minimal recent felony murder data, the parallels between trends in capital punishment to the historical tendencies of felony murder suggest that the disparate racial patterns of the doctrine’s application still heavily pervade the justice system.

271. *See id.* (While this study only discusses the criminal justice system in Massachusetts, its conclusions are applicable to the overarching system throughout the United States which has historically and routinely reflected these findings).

272. History already demonstrates this notion, see *supra* notes 249-57.

273. *See generally* NGOZI NDULUE, *ENDURING JUSTICE: THE PERSISTENCE OF RACIAL DISCRIMINATION IN THE U.S. DEATH PENALTY*, DEATH PENALTY INFO. CTR. (ed. Robert Dunham) (Sept. 2020), <https://files.deathpenaltyinfo.org/documents/reports/r/Enduring-Injustice-Race-and-the-Death-Penalty-2020.pdf> [<https://perma.cc/ZL2S-KPHB>]. Additionally, more than forty-five percent of those on death row in 1980 were people of color. *See id.* For additional studies demonstrating that Black defendants with white victims have a much higher likelihood of receiving a death sentence, *SEE* FRANK R. BAUMGARTNER ET AL., #BLACKLIVESDON'TMATTER: RACE-OF-VICTIM EFFECTS IN US EXECUTIONS, 1976-2013, *POLITICS GROUPS AND IDENTITIES* (Jan. 29, 2015), <https://fbaum.unc.edu/articles/BlackLives-2015.pdf> [<https://perma.cc/8KE9-YBJJ>]; U.S. GEN. ACCT. OFF., GAO/GDD-90-57, *DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES* 6 (1990), <http://archive.gao.gov/t2pbat11/140845.pdf> [<https://perma.cc/E46Q-KGQK>].

274. *See id.* at 3 (discussing executions per capita in colonial times and the number of crimes other than murder punishable by death for Black versus white people including “small infractions” and “rape), 53 (discussing the death penalty during Jim Crow). The reference to a “post” civil rights era strictly describes the period of time after the civil rights movement in the 1950s-60s and does not, in any sense, insinuate a notion that the United States is currently experiencing a “post-civil rights era” in practice. Additionally, in 2019, forty-two percent of all death row inmates were Black, thirteen percent Latinx, and forty-two percent white – the latter made up roughly 60.4 percent of the US population. *See id.* at 35. Capital punishment is extremely prevalent in felony murder sentencing and was, at least at one point, “[t]he single most common type of murder represented on death row.” Crocker, *supra* note 233.

Felony murder is a prosecutorial tool that lowers the standard of proof for the prosecution.²⁷⁵ Though each jurisdiction typically lists its own number of enumerated underlying felonies, the most common type of felony resulting in homicide is robbery.²⁷⁶ According to FBI data between 1976-1987 robbery-related killings ranged between 1,605 and 2,162 during that period.²⁷⁷ While many jurisdictions consider robbery to be “violent” (along with commonly enumerated felonies designated as violent: rape, arson, or burglary), it is not inherently *assaultive* in nature.²⁷⁸ Yet, prosecutors continue to actively charge robbery defendants with felony murder.²⁷⁹

Prosecutorial discretion in up-charging felony murder is overt among race: studies show there is a direct relationship between the severity of a charge and a defendant’s race or ethnicity.²⁸⁰ There is also evidence shown in police reports that of the cases police characterized with no or only suspected felony murder circumstances, prosecutors were most likely to characterize those involving a Black defendant and white victim as felony murder.²⁸¹ Black Americans charged with the murder of white victims were the most severely prosecuted when compared to all other defendant-victim racial combinations.²⁸² The same is true for capital sentencing outcomes, which are more likely for Black

275. See Wes Dutcher-Walls, *Aggravated Disproportionality: The Merger Doctrine, Contemporaneous Felony Aggravators, and Intuitive Fairness*, 3 CRIM. L. PRAC. 5, 2 (2017) (citing Claire Finkelstein, *Merger and Felony Murder*, in DEFINING CRIMES: ESSAYS ON THE SPECIAL PART OF THE CRIMINAL LAW 219, 219 (R.A. Duff & Stuart Green eds., 2005)).

276. See Peterson & Bailey, *supra* note 233, at 380.

277. See *id.*

278. See generally Binder, *Making the Best of Felony Murder*, *supra* note 133.

279. For contemporary examples of prosecutors charging people accused of robbery and theft-related crimes with felony murder, see *supra* notes 2-6, and *infra* notes 287-289. See also George Joseph, *An Alabama Prosecutor Locked up 4 Black Teens for a Murder They Didn't Commit. Now He's Trying 2 More*, THE APPEAL (Oct. 4, 2018), <https://theappeal.org/alabama-prosecutor-locked-up-4-black-teens-for-a-murder-they-didnt-commit-now-hes-trying-2-more/> [<https://perma.cc/L7DG-GNQ5>].

280. See Christine Martin, *Influence of Race and Ethnicity on Charge Severity in Chicago Homicide Cases: An Investigation of Prosecutorial Discretion*, 4 RACE & JUST. 152, 169 (2014). This study included 672 Chicago defendants between 1994 and 1995.

281. See Radelet & Pierce, *supra* note 255. These reports were of 346 Florida felony murder cases in 1980.

282. See *id.* The study considered numerous variable controls and still came to the same conclusion.

defendants.²⁸³ Some studies find this “selective upgrading” to be a key reason behind the high proportion of Black defendants on death row for the killing of white victims.²⁸⁴ Others conclude that this is the result only *in part* because of the prosecutor’s higher likelihood to charge Black offender/white victim circumstances with felony murder.²⁸⁵ Regardless of the overall measure that the prosecutorial discretion results in charging Black defendants with felony murder, there are considerable instances where Black offender/white victim homicides filed as nonfelony killings later become felony murder charges by prosecutors.²⁸⁶

a. Felony Murder in the National and International Spotlight

Recent felony murder cases of note capture the attention of the national and international community.²⁸⁷ In 2005, Nathaniel Woods, a Black man, was sentenced to death after being convicted of a felony-murder that resulted from a shootout between his co-defendant and police during a drug bust.²⁸⁸ The Alabama Supreme Court denied Woods a stay, despite a slew of petitions advocating against it, and executed him in March 2020.²⁸⁹ Many other

283. See *supra* notes 262-64 (noting sentencing disparities between Black and white defendants in Michigan).

284. See Radelet & Pierce, *supra* note 255, at 592.

285. See Crocker, *supra* note 233, at 697.

286. See Bowers & Pierce, *supra* note 247, at 612 (emphasis added).

287. The fifty-five-year conviction of then fifteen-year-old Lakeith Smith is not considered an uncommon result of felony murder sentencing, but its outcome astonishes those learning about it across the United States and around the world. See Krista Johnson, *Accomplice Law Case of Lakeith Smith, Sentenced to 55 Years, Gains Renewed Interest*, MONTGOMERY ADVERTISER (June 11, 2020), <https://www.montgomeryadvertiser.com/story/news/crime/2020/06/11/alabama-case-lakeith-smith-inmate-sentenced-55-years-gains-renewed-interest/5344257002/> [<https://perma.cc/7FXA-7WK9>]; Jessica Lussenhop, *In the US, You Don't Have to Kill to Be a Murderer*, BBC (Apr. 19, 2018), <https://www.bbc.com/news/world-us-canada-43673331> [<https://perma.cc/WGK4-WGCK>].

288. See Elliott C. McLaughlin, Martin Savidge & Ray Sanchez, *Alabama Executes Inmate Nathaniel Woods*, CNN (Mar. 5, 2020), <https://www.cnn.com/2020/03/05/us/alabama-nathaniel-woods-execution/index.html> [<https://perma.cc/5XAS-DGHF>].

289. See *Petition: Nathaniel Woods is Innocent: Stop His Senseless Execution*, CHANGE.ORG, <https://www.change.org/p/it-s-not-too-late-to-save-nate-governorkayivey-savenate-readthefacts> [<https://perma.cc/2LS7-GN7V>] (last visited Sept. 28, 2020); *Petition: Stop the Execution of Nathaniel Woods in Alabama on March 5*, ACTION NETWORK, <https://actionnetwork.org/petitions/stop-the-execution-of-nathaniel-woods-in-alabama-on-march-5-2> [<https://perma.cc/2R6H-D243>] (last visited Sept. 28, 2020); *Nathaniel Woods Execution Reveals Disturbing Bias in Alabama*, EQUAL JUST. INITIATIVE (Mar.

examples include juveniles, such as charges resulting from a carjacking ending in the fatal shooting of their friend by a civilian.²⁹⁰ A then sixteen-year-old received a life sentence, and his co-conspirators received thirty-year sentences, after a police officer's fatality.²⁹¹ Many of these viral examples include Black defendants ranging from young adults recently charged²⁹² to those

5, 2020), <https://ejournal.org/news/nathaniel-woods-execution-reveals-disturbing-bias-in-alabama/> [<https://perma.cc/3KGG-XW7L>].

290. See *5 Teens Charged with Murder After Attempted Car Theft Led to Fatal Shooting of 14-year-Old*, FOX 32 CHICAGO (Aug. 14, 2019), <https://www.fox32chicago.com/news/5-teens-charged-with-murder-after-attempted-car-theft-led-to-fatal-shooting-of-14-year-old> [<https://perma.cc/H9P5-HU4C>]. The charges resulted in calls for Illinois to change its felony murder statute. *Id.*

291. See Lila Meadows, *Abolish Felony Murder in Maryland*, BALTIMORE SUN (June 7, 2019), <https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0610-felony-murder-20190607-story.html> [<https://perma.cc/Y9AZ-92J9>]; Mike Hellgren, *Teens Derrick Matthews, Eugene Genius Sentenced To 30 Years in Connection with Amy Caprio Case*, CBS LOCAL (Sept. 16, 2019), <https://baltimore.cbslocal.com/2019/09/16/derrick-matthews-eugene-genius-to-be-sentencing-amy-caprio-case/> [<https://perma.cc/3S4Y-Y7NN>]. See Mike Hellgren, *'I Didn't Want To Hurt Her': Dawnta Harris Sentenced to Life in Prison in Ofc. Amy Caprio's Death*, BALTIMORE SUN (Aug. 21, 2019), <https://baltimore.cbslocal.com/2019/08/21/dawnta-harris-sentencing-teen-convicted-amy-caprio-death-baltimore-county-police/> [<https://perma.cc/NUC4-5UAD>]; Bill Chappell, *Teen Gets Life Sentence for Killing Police Officer in Baltimore County*, NPR (Aug 21, 2019), <https://www.npr.org/2019/08/21/753177968/teen-gets-life-sentence-for-killing-police-officer-in-baltimore-county> [<https://perma.cc/Q6Z4-84DU>].

292. In April 2019, prosecutors brought felony murder charges against three Black defendants in Alabama after a fatal drug transaction. See Kirsten Fiscus, *Two More Charged with Murder After Drug Transaction Turned Deadly*, MONTGOMERY ADVERTISER (June 19, 2019), <https://www.montgomeryadvertiser.com/story/news/crime/2019/06/18/two-more-men-charged-murder-after-drug-transaction-turned-deadly/1493618001/> [<https://perma.cc/F5X9-UA9M>]; *Police: Fatal Shooting near Governor's Mansion Was Not Home Invasion*, WSFA 12 NEWS (June 18, 2019), <https://www.wsfa.com/2019/06/18/police-fatal-shooting-near-governors-mansion-was-not-home-invasion/> [<https://perma.cc/W4S2-PY93>]. An August 2020 shootout resulted in the death of a seventeen year old boy in Montgomery Alabama and two Black defendants – who reportedly did not shoot their friend – were charged with felony murder. See Krista Johnson, *Montgomery Police Arrest Two Suspects in Saturday Afternoon Shooting of 17-year-old*, MONTGOMERY ADVERTISER (Apr. 19, 2020), <https://www.montgomeryadvertiser.com/story/news/crime/2020/04/19/montgomery-police-arrest-rodrequis-managan-jacques-simmons-shooting-brian-daniels-woodland-drive/5161777002/> [<https://perma.cc/T774-WP2B>]; *2 Charged with Murder in Shooting of Montgomery Teen*, WSFA 12 NEWS (April 19, 2020), <https://www.wsfa.com/2020/04/19/charged-with-murder-shooting-montgomery-teen/> [<https://perma.cc/YDK7-6U9Z>]. In September 2016, prosecutors charged three young men with felony murder after their co-conspirator was fatally shot by a resident during an attempted home invasion. See *Three former Faulkner Athletes Charged in Man's Death*, ASSOCIATED PRESS (Sept. 21, 2016), <https://apnews.com/article/f5e715db433e4bb68e99405724d8c729>

serving prolonged felony murder sentences with renewed calls for reform.²⁹³ These high-profile cases represent what is likely a fraction of those actually charged with felony murder—an undiscoverable statistic due to lack of circumstantial reporting, awareness, and a uniform statutory classification across states.

b. A New Trend: Applying Felony Murder to Cases of Excessive Force

Following the tragic killing of George Floyd on May 25th, 2020, a recharged and revived national protest movement ignited across the country against police brutality.²⁹⁴ The Black Lives Matter (“BLM”) movement subsequently brought other recent killings of unarmed Black people to the forefront of the national conversation.²⁹⁵ A number of these cases are important in the

[<https://perma.cc/27TQ-PUVM>]; 3 *Former Faulkner Student Athletes Indicted on Murder Charge*, WSFA 12 NEWS (Sept. 20, 2016), <https://www.wsfa.com/story/33140960/3-former-faulkner-student-athletes-indicted-on-murder-charge/> [<https://perma.cc/JM97-7D3U>].

293. Changes to California’s felony murder law freed Niko Wilson in October 2018. See Abbie VanSickle, *California Law Says this Man Isn’t a Murderer. Prosecutors Disagree*, MARSHALL PROJECT (May 16, 2019), <https://www.themarshallproject.org/2019/05/16/california-law-says-this-man-isn-t-a-murderer-prosecutors-disagree> [<https://perma.cc/H3G5-BTTN>]. Wilson was sent back to jail in 2019 and held on no bond for violating probation of a seventeen-year-old marijuana charge; his case then returned to the national spotlight amidst COVID-19 concerns of overcrowded prisons in conjunction with his asthma complication. See Cleo Krejci, *Navajo County Case Highlights Debate over Treatment of Inmates During COVID-19*, ARIZ. REPUBLIC (June 25, 2020), <https://www.azcentral.com/story/news/local/arizona/2020/06/25/navajo-county-case-neko-wilson-highlights-debate-over-inmates-during-covid-19/3224732001/> [<https://perma.cc/TE56-5ZCU>]; Chris Gelardi, *Two of His Sons Are Incarcerated During Pandemic. A Third is Fighting to Get Them Out*, APPEAL (May 27, 2020), <https://theappeal.org/wilson-family-mass-incarceration-covid-19/> [<https://perma.cc/DB6M-ZE3N>].

294. See Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [<https://perma.cc/CHG3-WBJP>]; David Crary & Aaron Morrison, *Black Lives Matter Goes Mainstream After Floyd’s death*, ASSOCIATED PRESS (June 11, 2020), <https://apnews.com/article/347ceac3ea08978358c8c05a0d9ec37c> [<https://perma.cc/7N33-H9L9>].

295. See Li Cohen, *It’s Been over 3 Months Since George Floyd Was Killed by Police. Police Are Still Killing Black People at Disproportionate Rates*, CBS (Sept. 10, 2020), <https://www.cbsnews.com/news/george-floyd-killing-police-black-people-killed-164/> [<https://perma.cc/87QJ-3YSX>]; *Breonna Taylor: Timeline of Black Deaths Caused by Police*,

context of felony murder. Most predominant was the case arising from Floyd's killing and the charge and ultimate conviction of Derek Chauvin for second-degree felony murder, with assault as the underlying felony.²⁹⁶ States brought felony murder charges²⁹⁷ against a few other officers and individuals in 2019 and 2020 with underlying felonies including assault with a deadly weapon,²⁹⁸

BBC (Sept. 23, 2020), <https://www.bbc.com/news/world-us-canada-52905408> [https://perma.cc/Y2BV-E7H5].

296. For details of the all the charges against Chauvin, see Em Carpenter, *Derek Chauvin's Charges, Explained*, ORDINARY TIMES (June 5, 2020), <https://ordinary-times.com/2020/06/05/derek-chauvins-charges-explained/> [https://perma.cc/X9G9-7X57]; *George Floyd Death: New Charges for all Four Sacked Officers*, BBC (June 3, 2020), <https://www.bbc.com/news/world-us-canada-52915019> [https://perma.cc/HB2S-TQMV]. For details of all the charges jurors convicted Chauvin of, see Timothy Bella, *As Chauvin is Convicted on all Counts, what's Next for Him and the Other Police Officers Tied to George Floyd's Death?*, WASH. POST (Apr. 21, 2021, 2:16 PM), <https://www.washingtonpost.com/nation/2021/04/21/chauvin-trial-verdict/> [https://perma.cc/V66H-6G5R]; Ashley Southall & Johanna Barr, *Derek Chauvin Trial: Chauvin Found Guilty of Murdering George Floyd*, N.Y. TIMES (Apr. 20, 2021), <https://www.nytimes.com/live/2021/04/20/us/derek-chauvin-verdict-george-floyd> [https://perma.cc/AC5S-VBK3].

297. Prosecutors dropped then reinstated Officer James Burns' charges of felony murder in 2019 for the 2016 killing of Deravis Cane Rogers. See Sudin Thanawala, *Video Shows Encounter that Led to Charge for Atlanta Officer*, WASH. POST (Aug 18, 2020), https://www.washingtonpost.com/national/video-shows-encounter-that-led-to-charge-for-atlanta-officer/2020/08/18/67243bfa-e18e-11ea-82d8-5e55d47e90ca_story.html [https://perma.cc/GRY2-2T3J]; Katie Mettler, *Atlanta Grand Jury Issues Murder Indictment in Fatal Police Shooting of Unarmed Man*, WASH. POST (Sept. 1, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/09/01/in-rare-move-atlanta-grand-jury-indicts-fired-police-officer-on-murder-charge-in-fatal-shooting/> [https://perma.cc/FL83-SBK8].

298. After the mid-June killing of Rayshard Brooks, Fulton County prosecutors charged officer Garrett Rolfe with felony murder. See Aimee Ortiz, *What We Know About the Death of Rayshard Brooks*, N.Y. TIMES (Sept. 10, 2020), <https://www.nytimes.com/article/rayshard-brooks-what-we-know.html> [https://perma.cc/GMC3-PDS9]; Jacob Gershman, *The Controversial Legal Doctrine at the Heart of the Floyd, Brooks, Arbery Cases*, WALL ST. J. (July 9, 2020), <https://www.wsj.com/articles/the-controversial-legal-doctrine-at-the-heart-of-the-floyd-brooks-arbery-cases-11594295529> [https://perma.cc/A8JW-VH3P].

aggravated assault,²⁹⁹ malice murder, and false imprisonment.³⁰⁰ In October 2019, a jury acquitted former officer Robert Olsen of felony murder but found him guilty of aggravated assault for the killing of Anthony Hill.³⁰¹ The use of felony murder in these cases diverges from how it is typically used, which is to “up-charge” in cases lacking culpable *mens rea* for intentional killings,³⁰² whereas these cases still encompass circumstances of high culpability based on felonies that are mostly assaultive in nature.³⁰³

Initial investigations into the attempted siege of the US Capitol raised the possibility of prosecutors bringing felony murder charges.³⁰⁴ The ordeal resulted in five deaths: one Capitol Police

299. In mid-August, the Georgia Bureau of Investigation charged former state trooper Jacob Thompson with felony murder and aggravated assault for the killing of Julian Edward Roosevelt Lewis during a traffic stop earlier that month. See Allyson Waller, *Georgia Trooper Is Charged in Fatal Shooting of Black Driver*, N.Y. TIMES (Aug. 15, 2020), <https://www.nytimes.com/2020/08/15/us/georgia-state-trooper-charged-murder.html> [<https://perma.cc/6FCH-N4HW>]; Russ Bynum, *Georgia Trooper Charged with Murder in Traffic Stop Shooting*, AP NEWS (Aug. 14, 2020), <https://apnews.com/article/shootings-arrests-savannah-ahmaud-arbery-racial-injustice-a0150795ca1837b86458791f731f88f0> [<https://perma.cc/9H3N-PHBY>].

300. Ahmaud Arbery was the first of these felony murder cases after international pressure subsequent to George Floyd’s killing. In early May, a leaked video surfaced – taken by William Bryan who allegedly tried to block the victim’s escape – of Travis and Gregory McMichael. Prosecutors charged the offenders days later, but almost three months after the killing. Richard Fausset et al., *Ahmaud Arbery Shooting: A Timeline of the Case*, N.Y. TIMES (June 24, 2020), <https://www.nytimes.com/article/ahmaud-arbery-timeline.html> [<https://perma.cc/JD5K-CV7J>]; Christina Carrega, *Timeline: Events Leading up to the Arrests of 3 Men in the Murder of Ahmaud Arbery*, ABC NEWS (May 21, 2020), <https://abcnews.go.com/US/events-leading-arrest-men-murder-ahmaud-arbery/story?id=70576804> [<https://perma.cc/QB6Q-WZ7S>].

301. See Rick Rojas & Richard Fausset, *Former Georgia Officer Who Killed a Black Man Is Convicted, but Not of Murder*, N.Y. TIMES (Oct. 14, 2019), <https://www.nytimes.com/2019/10/14/us/robert-olsen-anthony-hill-shooting.html> [<https://perma.cc/F62K-AACM>]; see also Maria Cartaya et al., *Former Police Officer Found Not Guilty of Murder in Shooting Death of Unarmed Black Veteran*, CNN (Oct. 14, 2019), <https://www.cnn.com/2019/10/14/us/anthony-hill-robert-olsen-trial-not-guilty/index.html> [<https://perma.cc/J96W-CG6Z>].

302. All of the victims in the aforementioned cases were Black. See discussion *supra* notes 280-286 explicating each case.

303. See *supra* notes 294-301 for a discussion of these cases.

304. See Kristine Phillips & Kevin Johnson, *Capitol Police Officer’s Death Investigated as Homicide; Trump’s Legal Exposure Questioned*, USA TODAY (Jan. 8, 2021, 10:08 AM), <https://www.usatoday.com/story/news/politics/2021/01/08/capitol-riots-brian-sicknicks-death-being-investigated-homicide/6593630002/> [<https://perma.cc/4JVP-DPMZ>]; see also Jan Wolfe & Sarah N. Lynch, *Explainer: What Crimes Can the U.S. Capitol Rioters Be Charged With?*, REUTERS (Jan. 9, 2021, 1:16PM), <https://www.reuters.com/article/us-usa-trump-capitol-crimes/explainer-what-crimes->

officer beaten by the crowd while thin blue line flags flew nearby, and four rioters.³⁰⁵ Speculation around the charges commented that felony murder charges would be “aggressive” but “legally valid” in order to send a message and ultimately deter violent actions that can result in death.³⁰⁶ However, the federal felony murder statute’s list of underlying felonies does not include the most applicable felonies such as rioting or inciting riots,³⁰⁷ so these charges have not solidified.

IV. THE CASE FOR THE UNITED STATES TO ABOLISH FELONY MURDER

A. Global Outlook on Criminal Justice

The United States condemns other countries for perpetrating injustice and human rights abuses through non-murder capital punishment, highlighting that these executions violate due process and lack deterrence.³⁰⁸ Yet, similar gross disproportionality and injustice still exist under the United States’ use of the felony murder doctrine.³⁰⁹ The United States should end the inhumane practice of felony murder to discontinue this hypocrisy. More importantly, abolishing felony murder is a reformative step that would bolster credibility and enforcement of human rights concerns.

can-the-u-s-capitol-rioters-be-charged-with-idUSKBN29E0ND [https://perma.cc/LPJ3-L4HM].

305. Jack Healy, *These Are the 5 People Who Died in the Capitol Riot*, N.Y. TIMES (Jan. 11, 2021), <https://www.nytimes.com/2021/01/11/us/who-died-in-capitol-building-attack.html> [https://perma.cc/V9L5-8T65] (last updated Feb. 22, 2021); Peter Hermann & Steve Thompson, *D.C. Medical Examiner Releases Cause of Death for Four People Who Died During Capitol Riot*, WASH. POST (Apr. 7, 2021, 7:24PM), https://www.washingtonpost.com/local/public-safety/trump-riot-death-medical-examiner/2021/04/07/53806608-97cf-11eb-a6d0-13d207aad78_story.html [https://perma.cc/QZ7S-KWXX].

306. See Phillips & Johnson, *supra* note 304.

307. See 18 U.S.C. § 1111. See Elura Nanos, *Could the Capitol Rioters Really Be Charged with Felony Murder for Death of Ashli Babbitt?*, LAW AND CRIME (Jan. 7, 2021), <https://lawandcrime.com/legal-analysis/could-the-capitol-rioters-really-be-charged-with-felony-murder-for-death-of-ashli-babbitt/> [https://perma.cc/G3WT-78GN].

308. See *supra* Part III.A.3 (discussing US criticism of Iran and North Korean human rights standards).

309. See *supra* Part III.B (discussing the disparate impact of felony murder on people of color).

The United States actively chooses to utilize language such as “injustice” and “human rights abuses” to “strongly condemn” the Iranian and North Korean governments for their use of non-murder capital punishment.³¹⁰ It suggests that these executions violate due process and lack deterrent impact.³¹¹ In its two landmark decisions that outlaw the death penalty for non-murder crimes, the US Supreme Court cites the sentence as “grossly disproportionate” amounting to “cruel and unusual punishment.”³¹² The Court references the “national consensus” against its use.³¹³ Similar language in the United Kingdom and Canada—describing felony murder as “harsh and severe” and its use leading to “fundamental injustice” that denies a person “procedural fairness”—led to its outlaw within.³¹⁴ While the United States condemns countries such as Iran and North Korea for human rights abuses rooted in severe punishment and due process violations, similar practices still exist under the United States’ use of the felony murder doctrine. The implications of this contradictory rhetoric by the United States—condemning selected rival countries for human rights and capital punishment abuses while these actions still take place within its borders—further deter worldwide progress in human rights.³¹⁵

Instead, the United States should contribute to criminal justice reform by reckoning with its own history of disproportionate punishment. It should eliminate inconsistencies in its own paradoxical practice as compared to its international exhortation.³¹⁶ The United States cannot expect the international community to comply with its call for the human rights standards that it cannot meet itself.³¹⁷ When these empty condemnations do not reflect domestic practice, they become meritless and deter the

310. *See supra* notes 213-228 for examples of this language and other condemnations.

311. *See supra* notes 213-228 detailing these instances and the US response.

312. *Supra* notes 188-189 explicating the court’s decision in this case.

313. *See Coker*, 433 U.S. at 584.

314. *See supra* Section II.B (explicating Canada’s reasoning behind abolishing constructive murder).

315. *See supra* notes 213-28 (discussing U.S. condemnation of international non-murder capital punishment).

316. *See supra* Section III.A.3 (discussing US condemnation of international non-murder capital punishment).

317. *See Willie & Sawyer supra* note 232.

ability to enforce human rights worldwide.³¹⁸ Abolition of felony murder could contribute to the global call for criminal justice reform and strengthen the merit of human rights concerns and their overall enforcement.

B. Abolishing Felony Murder Through the Federal Government – A Congressional or Judicial Approach

The United States should abolish felony murder through its federal government. In addition to state statutes, felony murder is presently codified federally within 18 U.S.C. § 1111.³¹⁹ The appropriate solution is for the federal government to abolish it through federal means. Congress expanded the federal statute on multiple occasions by including additional underlying felonies as well as “if death results” provisions to the statute.³²⁰ Thus, the expansion of federal felony murder has led to confusion in its application.³²¹ Following the steps taken by the United Kingdom and Canada, the United States should abolish felony murder—by either the federal statute or the doctrine entirely—through its federal government.³²² In the present moment, the United States faces a widespread appeal to reform its criminal justice system.³²³

318. *See id.*

319. *See* 18 U.S.C. § 1111.

320. The federal statute originally applied to only offenses of “arson, rape, burglary, or robbery.” *See id.* The 1984 Comprehensive Crime Control Act expanded the statute’s reach to include felony offenses of “escape, murder, kidnapping, treason, espionage, [and] sabotage.” *See id.* *See also* Comprehensive Crime Control Act, Pub. L. No. 98-473, § 1004, 98 Stat. 1976, 2138 (1984); Nelson E. Roth & Scott E. Sundby, *Felony-Murder Doctrine Through the Federal Looking Glass*, 69 INDIANA L.J. (1994) (discussing various federal statutes that contain “if death results” provisions such as arson, bank robbery, aircraft piracy, drug robberies, and others).

321. *See* Henry S. Noyes, *Felony-Murder Doctrine Through the Federal Looking Glass*, 69 INDIANA L.J. 540-41 (1994)

322. *See supra* Part II (detailing the United Kingdom and Canada’s methodologies of abolishing felony murder).

323. Although calls for criminal justice reform are not new, the intensity of the Black Lives Matter movement during 2020 across the US and around the world has led to the call for change against injustice to be at the forefront of the national conversation. *See* Mark Berman & Tom Jackman, *After a Summer of Protest, Americans Voted for Policing and Criminal Justice Changes*, WASH. POST (Nov. 14, 2020, 8:00 AM), https://www.washingtonpost.com/national/criminal-justice-election/2020/11/13/20186380-25d6-11eb-8672-c281c7a2c96e_story.html [<https://perma.cc/K694-EK5R>]; Melissa Chan, *From Easing Drug Laws to Increasing Police Oversight, Criminal Justice Reform Won Big in the 2020 Election*, TIME (Nov. 5, 2020, 12:09PM), <https://time.com/5907794/2020-election-criminal-justice/>

In response to this call for action, the US federal government can take strides toward reform by abolishing felony murder in these two ways.

Emulating Canada's process, the US legislature should institute its own version of the Canadian Charter to strengthen protections of the people in its justice system.³²⁴ Through its Charter, Canada's legislature solidified a person's "right to life, liberty, and security" and "fundamental justice," which in turn provided a baseline to constructive murder's abolition.³²⁵ These rights mirror the founding "unalienable rights" introduced in the US Declaration of Independence and afforded by the US Constitution.³²⁶ They represent bedrock principles of US society.³²⁷ Like Canada, modern, rejuvenated US legislation could thus permit the US Supreme Court to nationally abolish felony murder.³²⁸ The US Supreme Court upheld the proportionality principle on numerous occasions by limiting harsh sentences of life without the possibility of parole and the death penalty.³²⁹ In its decisions to limit capital punishment for felony murder and outlaw capital punishment for all non-murder crimes, SCOTUS took into consideration the national consensus against this practice—looking at the trends of states and juries.³³⁰ The US version of the Canadian Charter should contain language reinvigorating a person's right to life, liberty, and security, while also upholding principles of fundamental justice. The implementation of a US Charter in conjunction with the restriction and abolition of felony

[<https://perma.cc/4PBS-F6BS>]; Jeffrey Toobin, *The Halted Progress of Criminal-Justice Reform*, NEW YORKER (July 12, 2020), <https://www.newyorker.com/magazine/2020/07/20/the-halted-progress-of-criminal-justice-reform> [<https://perma.cc/8LKQ-RQ68>]; *Protests Nationwide Demand Justice-System Overhauls*, CRIME REPORT (June 8, 2020), <https://thecrimereport.org/2020/06/08/protests-nationwide-demand-justice-system-overhauls/> [<https://perma.cc/5YFK-VTLX>].

324. See generally Canadian Charter, *supra* note 105.

325. See *id.*

326. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). U.S. CONST. amend. XIV.

327. See *id.*

328. See *supra* Section II.B (explicating Canada's reasoning behind abolishing constructive murder).

329. See *supra* notes Section II.B (outlining various SCOTUS decisions that limit capital and life without parole sentences).

330. See *id.*

murder in many states lays the groundwork for the US Supreme Court to abolish the doctrine completely.³³¹

Like the United Kingdom, the US federal legislature should abolish felony murder altogether.³³² Much of the United Kingdom's consideration of felony murder's abolition consisted of debate around the use of capital felony murder and its disproportionality to the crime committed.³³³ Vast, international movements demanding criminal justice reform in the United States and beyond call on the US federal government to address reformist agendas through the federal legislature and the executive branch.³³⁴ A June 2020 poll indicated 95 percent of Americans are in favor of reform.³³⁵ This national consensus should pressure the new leadership in both legislative and executive branches to take decisive action. Abolishing felony murder via federal means accomplishes paramount criminal justice reform.

Advocates of felony murder cite deterrence even though harsh punishment like the death penalty does not deter those without intention to kill.³³⁶ This leaves felony murder's remaining advocacy rooted in vengeance³³⁷ and the denunciation theory.³³⁸ Therefore, at the very minimum, the United States should abolish *capital* felony murder by federal means. A 2020 poll indicated that fewer than six in ten Americans favor the death penalty.³³⁹ As of April 2021, twenty-six states either abolished or imposed a

331. See *Coker*, 433 U.S. at 593.

332. See *supra* Section II.A (explicating the United Kingdom's reasoning behind abolishing felony murder).

333. See *supra* notes 87-97 (discussing the role of capital punishment in the United Kingdom and its abolition of felony murder).

334. See generally RAM SUBRAMANIAN ET AL., BRENNAN CTR. FOR JUST. NYU, A FEDERAL AGENDA FOR CRIMINAL JUSTICE REFORM (Dec. 9, 2020), https://www.brennancenter.org/sites/default/files/2021-01/FederalAgendaCriminalJustice_Final.pdf [<https://perma.cc/7DX2-BHGH>].

335. Colleen Long & Hannah Fingerhut, *AP-NORC Poll: Nearly All in US Back Criminal Justice Reform*, AP NEWS (June 23, 2020), <https://apnews.com/article/ffaa4bc564afcf4a90b02f455d8fdf03> [<https://perma.cc/Q5UT-6LCY>].

336. See *Enmund* 458 U.S. at 798-99.

337. See Weiler *supra* note 69, at 336.

338. See DRESSLER, *supra* note 11, at 20-21.

339. Jeffrey M. Jones, *U.S. Support for Death Penalty Holds Above Majority Level*, GALLUP (Nov. 19, 2020), <https://news.gallup.com/poll/325568/support-death-penalty-holds-above-majority-level.aspx> [<https://perma.cc/QK7A-EHBY>].

moratorium on executions.³⁴⁰ Before Trump's presidency, federal executions had not taken place since 2003.³⁴¹ To block the unjust executions of those who are least culpable, the federal government should minimally eliminate capital felony murder.

In 1977 and 1978 the Judiciary Committees in the Senate and House each proposed legislation that would allow broader defenses to federal felony murder defendants.³⁴² The basis for reform was "that the killing was not a reasonably foreseeable consequence of the defendant's act."³⁴³ The bill passed the Senate but did not survive in the House.³⁴⁴ This trend, coupled with federal felony murder's expansion in the 1980s,³⁴⁵ possibly indicates that the direction of federal law is thus unlikely to abolish the doctrine. However, with new leadership in the US House, Senate, and Presidency, alongside a recharged call for comprehensive justice reform, the US federal government should abolish felony murder by enacting legislation with similar language to the Judiciary Committees' bills.

C. Federalism in Practice – States Abolishing Felony Murder

The United Kingdom and Canada took federal action to abolish felony murder through their legislatures and courts.³⁴⁶ However, in consideration of the nature of US federalism in conjunction with the recent trends of many US states taking steps toward its abolition, each individual state should abolish felony murder. Thus far, four states abolished felony murder by their

340. *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> [<https://perma.cc/WGG5-73K7>] (last visited Apr. 11, 2021).

341. See Tom Jackman & Mark Berman, *Despite Recent Federal Flurry, Number of U.S. Executions is Lowest Since 1991*, WASH. POST (Dec. 16, 2020), <https://www.washingtonpost.com/nation/2020/12/16/us-executions-decline/> [<https://perma.cc/S6N2-QR3D>].

342. See S. 1437, 95th Cong. § 1601(c) (1978); H.R. 2311, 95th Cong. (1977).

343. S. 1437, 95th Cong., 2d Sess § 1601(c) (1978).

344. See *id.*

345. See Noyes, *supra* note 321, at 540-41.

346. See *supra* Part I (discussing the methods of the United Kingdom and Canada in abolishing felony murder).

legislature or courts³⁴⁷ and bills introduced in many other states propose severe limits to its application.³⁴⁸

Each state's Supreme Court should abolish felony murder altogether, or at least, limit its scope. Michigan is the only state to fully abolish felony murder through its Supreme Court in the 1980 case *People v. Aaron*.³⁴⁹ The lower court convicted the defendant under felony murder for a fatal armed robbery.³⁵⁰ *Aaron* deemed felony murder a doctrine that "completely ignores the concept of determination of guilt on the basis of individual misconduct" and abolished it.³⁵¹

In 2017, the Massachusetts Supreme Court essentially eliminated first-degree felony murder in a ruling that it determined in "the interests of justice."³⁵² The court upheld felony murder's general constitutionality, however, it recommended a reduction to second-degree murder.³⁵³ Further, the Court proposed narrowing felony murder's scope of liability, necessitating future trials to prove one of the prongs of malice, and is now limited to the statutory role as an aggravating element of murder.³⁵⁴ State Supreme Courts should therefore impose any of the following options: 1) abolishing felony murder altogether, or 2) institute either *or* a combination of a) reducing criminal liability to second (or even third) degree murder, and b) limiting its role as an aggravating element of murder.

Legislation is a much quicker way to abolish felony murder through the states, and they should take decisive action. Hawaii and Kentucky both outright abolished felony murder in the 1970s

347. Michigan, Hawaii, Kentucky, and Massachusetts all abolished felony murder through their state legislature or state Supreme Court. *See infra* notes 348-353.

348. Bills introduced in Ohio, Pennsylvania, California, and Maryland either seek to abolish or severely limit the scope of felony murder. *See infra* notes 354-370.

349. *See generally* *People v. Aaron*, 409 Mich. 672 (1980).

350. *See id.* at 708.

351. *See id.*

352. *See generally* *Commonwealth v. Brown*, 477 Mass. 805, 806 (2017); Patrick Johnson, *SJC Ruling Narrows Massachusetts Definition of Felony Murder*, MASS LIVE (Sept. 20, 2017),

https://www.masslive.com/news/2017/09/sjc_ruling_in_woburn_murder_co.html

[<https://perma.cc/8J4L-STXF>]; VanSickle, *supra* note 37.

353. *See generally* *Brown*, 477 Mass. at 824.

354. *See id.* at 807-08. In Massachusetts, felony murder is no longer considered an independent liability theory for murder. *See id.*

through their legislatures.³⁵⁵ These states recodified statutes to require specific *mens rea* culpability standards for murder.³⁵⁶ Ohio is thought to have effectively eliminated the felony murder doctrine through an involuntary manslaughter statute that encompassed what was previously felony murder.”³⁵⁷

There are also at least two states—Pennsylvania and Maryland—with ongoing efforts to abolish felony murder through their state legislatures. In February 2020, a Pennsylvania state senator recognized the “unjust results” of felony murder and introduced legislation to eliminate it through the criminal code.³⁵⁸ The current Pennsylvania statute automatically punishes felony murder convicts with life without parole.³⁵⁹ Two state representatives plan to introduce a new 2021 bill that incorporates language of intent in second-degree murder and allows for resentencing.³⁶⁰

In March 2020, Maryland’s state legislature introduced a crime bill that would alter first- and second-degree murder provisions to abolish felony murder and authorize courts to vacate

355. See Haw. Rev. Stat. §707-701 (2021) (stating “A person commits the offense of murder in the first degree if the person intentionally or knowingly causes the death”); Ky. Rev. Stat. § 507.020 (2021) (stating “(1) A person is guilty of murder when: (a) With intent to cause the death of another person, he causes the death of such person or of a third person . . . (b) Including, but not limited to, the operation of a motor vehicle under circumstances manifesting extreme indifference to human life, he wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person.”).

356. See *id.*

357. See KEVIN E. MCCARTHY, PRINCIPAL ANALYST, CONN. GEN. ASSEMBLY, OLR RESEARCH REPORT: FELONY MURDER (2008), <https://www.cga.ct.gov/2008/rpt/2008-r-0087.htm> [<https://perma.cc/93CG-DAAH>].

358. See S.1044, Gen. Assemb., Sess. Of 2020 (Pa. 2020); see Memorandum from State Senator Daylin Leach to All Senate Members on Eliminating the Felony Murder Doctrine (Jan. 8, 2020), <https://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=S&SPick=20190&cosponId=30847> [<https://perma.cc/H7EJ-QG3G>].

359. See An-li Herring, *Sentenced for Life, Prisoners Convicted of Felony-Murder Sue for Chance at Release*, WESA (July 8, 2020), <https://www.wesa.fm/post/sentenced-life-prisoners-convicted-felony-murder-sue-chance-release#stream/0> [<https://perma.cc/DUL6-RQWP>].

More than 1,100 people are currently serving sentences – Five people who served between 23-47 years in prison for felony murder filed a lawsuit challenging the statute in July 2020. See *id.*

360. Memorandum from Reps. Christopher M. Rabb & Dan L. Miller to All House Members on Reforming Felony Murder (Mar. 10, 2021) <https://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=H&SPick=20210&cosponId=35013> [<https://perma.cc/K62K-22SF>].

or resentence individuals convicted under the rule.³⁶¹ Various state legislatures are actively attempting to abolish or severely limit felony murder, and all US states should strive to follow suit. Importantly, these states should also ensure that the legislation is retroactive which will allow for the resentencing of individuals previously convicted under felony murder.

California almost entirely eliminated felony murder through a combination of its Supreme Court decisions and legislative actions. The California Supreme Court first limited the scope of second-degree felony murder in the 1989 case *People v. Patterson* by limiting the scope of what constituted an “inherently dangerous” felony.³⁶² The defendant in *Patterson* sold cocaine to a woman who consequently died of acute cocaine intoxication.³⁶³ In September 2018, then-Governor Jerry Brown signed a bipartisan bill that severely limited the scope of felony murder to people who are the actual killer or who possess the requisite *mens rea* of reckless indifference to human life as a major participant in the crime.³⁶⁴ These distinctions confront both the *mens rea* and *actus reus* issues presented by felony murder.³⁶⁵ The bill applies retroactively and allows resentences for those formerly convicted under the felony murder doctrine through a state-wide mandate. As a result, 800 inmates became eligible for relief.³⁶⁶ Employing a comprehensive judicial and legislative solution, states should seek to limit felony

361. See S. B0951, “Felony First-Degree Murder – Limitation and Resentencing Procedure” (Md. 2020).

362. See *People v. Patterson*, 49 Cal. 3d 615, 617 (1989); Sharon Pomeranz, *People v. Patterson: The Death of the Second Degree Felony Murder Rule in California*, 20 SW. U. L. REV. 123, 124-25 (1991).

363. See *Patterson*, 49 Cal. at 618-20.

364. See S. 1437, ch. 1015 (Cal. 2018) (“An act to amend Sections 188 and 189 of, and to add Section 1170.95 to, the Penal Code, relating to murder”); Jazmine Ulloa, *California Sets New Limits on Who Can Be Charged with Felony Murder*, LA TIMES (Sept. 30, 2018), <https://www.latimes.com/politics/la-pol-ca-felony-murder-signed-jerry-brown-20180930-story.html#:~:text=The%20new%20law%2C%20which%20goes,know%20a%20homicide%20took%20place> [<https://perma.cc/24HP-PQVB>]; Jordan Smith, *Landmark California Law Bars Prosecutors From Pursuing Murder Charges Against People Who Didn't Commit Murder*, INTERCEPT (Nov. 13, 2018), <https://theintercept.com/2018/11/23/california-felony-murder-rule/> [<https://perma.cc/R6NS-MMGN>].

365. See *supra* notes 10-17 discussing the different elements of a crime; see *supra* notes 18-28 discussing the elements of felony murder.

366. See *Adnan Khan Is First to Be Released From Prison Under New Law*, RESTORE JUST. (Aug. 17, 2019), <https://restorecal.org/npr-kqed-adnan-khan-is-first-to-be-released-from-prison-under-new-law/> [<https://perma.cc/B2JU-JUSJ>].

murder by introducing legislation that limits it or abolishes it entirely.

While some state courts were previously unwilling to do so, state supreme courts should abolish or limit felony murder anyway. For example, the criminal code of Illinois has one of the broadest interpretations of the felony murder doctrine in the country, but the US Supreme Court declined to hear an appeal of a 2012 felony murder conviction in November 2019.³⁶⁷ Nonetheless, lawyers and advocates for those convicted under felony murder in the state should not become complacent or be deterred from filing appeals. Actively challenging the doctrine of felony murder is the only way to abolish it through the courts.

Advocates may also confront challenges through state legislatures or officials who actively seek to increase criminal liability despite calls for reform. For example, Florida State Senator Randolph Bracy proposed a July 2020 bill to the state legislature that would heighten the sentencing guidelines for future and retroactive felony murder convictions.³⁶⁸ It died in committee.³⁶⁹ In stark contrast, Florida Governor Ron DeSantis proposed an “anti-mob” bill in November 2020 that would expand the state’s “stand your ground” law, allowing people to use physical and sometimes lethal force against others who engage in looting, criminal mischief, and arson “that results in the interruption or impairment of a business operation.”³⁷⁰ There is perverse irony of

367. See Peter Hancock, *U.S. Supreme Court Won't Review Illinois 'Felony Murder' Law*, CAPITAL NEWS ILL. (Nov. 27, 2019), <https://www.illinoistimes.com/springfield/us-supreme-court-wont-review-illinois-felony-murder-law/Content?oid=11546904> [<https://perma.cc/Q73V-XTQQ>]; Robert McCopkin, *The Felony Murder Rule Has Roots Dating Back Centuries. This Week, It Was Applied to 5 Chicago Teens Charged in a Fatal Lake County Shooting*, CHI. TRIB. (Aug. 15, 2019), <https://www.chicagotribune.com/news/breaking/ct-cb-old-mill-creek-felony-murder-rule-20190815-bdfgucyrr5ftnlcvf67xrfppxu-story.html> [<https://perma.cc/C9F4-MGPF>].

368. See S.11-00222-20, 2020564 (Fla. 2020); Green, *supra* note 36.

369. See *id.*

370. See Ana Ceballos & David Ovalle, *DeSantis Pushes Expansion of Stand Your Ground Law as Part of 'Anti-Mob' Crackdown*, SUNSENTINEL (Nov. 10, 2020), <https://www.miamiherald.com/news/politics-government/state-politics/article247094007.html> [<https://perma.cc/DXU7-GAYC>]; Erik Ortiz, *'Stand Your Ground' in Florida Could Be Expanded Under DeSantis' 'Anti-Mob' Proposal*, NBC NEWS (Nov. 12, 2020), <https://www.nbcnews.com/news/us-news/stand-your-ground-florida-could-be-expanded-under-desantis-anti-n1247555> [<https://perma.cc/PA9X-UX7V>].

the law's expansion when juxtaposed with felony murder.³⁷¹ Despite these political attempts, state legislatures and officials should enact legislation that abolishes or severely limits felony murder.

In addition to overwhelming calls for blanket criminal justice reform, there are also numerous grassroots organizations in various states that indicate public support for abolishing felony murder. The California Coalition for Women Prisoners' project on felony murder alongside the non-profit End Felony Murder Now advocated for California's changes to its code that severely narrowed felony murder's application.³⁷² Projects on felony murder at the Maryland Alliance for Criminal Justice Reform, Restore Justice, and AZ Roots seek to educate the public and support bills that abolish felony murder.³⁷³ As previously discussed, a national consensus toward criminal justice reform, further indicated by the advocacy of a multitude of organizations, fundamentally obliges the states to abolish—or limit—felony murder by their legislatures or courts.

On appeal, state courts should interpret felony murder with principles of proportionality of punishment, fundamental justice, and the relationship between a person's *mens rea* and moral blameworthiness to the actual crime committed. In doing so, they will effectively abolish or severely limit felony murder's scope. State legislative or other officials should abolish felony murder completely by introducing legislation that recodifies statutes to strictly include specific *mens rea* culpability standards in first- and

371. This law would legalize lethal force as self-defense when a person *believes* they are in imminent danger of death for a gravely expansive number of crimes, whereas felony murder allows a murder conviction without the typical, necessary *mens rea* required to prove murder. See Ceballos & Ovalle, *supra* note 370; Ortiz, *supra* note 370. See also *supra* notes 18-28 (discussing the lack of *mens rea* in felony murder).

372. See *California Coalition for Women Prisoners*, WOMENPRISONERS.ORG, <https://womenprisoners.org/> [<https://perma.cc/9QNK-XE64>] (last visited Sept. 28, 2020) (hereinafter *California Coalition*); Smith, *supra* note 364.

373. See *Know More: Felony-Murder*, RESTORE JUST., <https://restorejustice.org/about-us/resources/know-more/know-more-felony-murder/> [<https://perma.cc/3TVN-UEDD>] (last visited Sept. 18, 2020); *Felony Murder Rule*, MD. ALL. FOR JUST. REFORM, <https://www.ma4jr.org/felony-murder-rule/> [<https://perma.cc/5JU4-MH5W>] (last visited Sept. 18, 2020); *ACLU of Arizona – in Our Shoes 6: Felony Murder Facts, Stats and Stories*, AZ ROOTS (Apr. 22, 2021), <https://azroots.info/event/aclu-of-arizona-in-our-shoes-6-felony-murder-facts-stats-and-stories/> [https://www.facebook.com/watch/live/?ref=watch_permalink&v=487023255754822].

second-degree murder charges. These legislative measures should eradicate the “commission of [an underlying felony]”³⁷⁴ and alike language to rid the code of the doctrine entirely. Minimally, the legislature should reduce felony murder’s scope by narrowing the enumeration of underlying felonies, what constitutes a violent felony, or reducing the culpability from first-degree to second-degree and subsequent levels of murder liability. Regardless if states abolish or limit felony murder, these legislative actions should all contain retroactive provisions that allow for the resentencing of individuals previously sentenced under the doctrine.

D. A Reckoning of Racial Injustice

The extreme disparate impact this rule has on people of color within the United States provides a compelling reason to abolish felony murder.³⁷⁵ This racial impact is apparent across historically and across state lines, through all phases of felony murder’s implementation.³⁷⁶ It is most notable in both the high likelihood of Black defendants facing capital trial and the proportion of those defendants ultimately receiving a death penalty sentence.³⁷⁷ However, the United States must first institute better methods of

374. For an example of this type of language, see Okla. R. Crim. App. 701.1(B), <http://okcca.net/ouji-cr/4-65/> [<https://perma.cc/TG8S-JXUQ>]; see generally *supra* notes 19-24 describing felony murder statutes.

375. See *supra* Part II.B. discussing the disparate impact of felony murder on people of color in the US. In addition to its grave racial impact, felony murder also disproportionately impacts women and youth. In 2005, an estimated “26 percent of juveniles serving life without parole were convicted of felony murder.” See Smith, *supra* note 364 (citing *United States: Thousands of Children Sentenced to Life Without Parole*, HUM. RIGHTS WATCH (Oct. 1, 2005), <https://www.hrw.org/news/2005/10/11/united-states-thousands-children-sentenced-life-without-parole> [<https://perma.cc/HX6X-75LD>]). “72 percent of women serving a life sentence in California did not kill anyone,” and the California Coalition for Women Prisoners finds that the majority of women imprisoned for felony murder were accomplices “navigating intimate partner violence, criminalized for survival acts.” See Smith, *supra* note 364; *California Coalition*, *supra* note 372. The effect of this rule once estimated that twenty percent of all first-degree murder convicts nationwide were imprisoned under felony murder. See Smith, *supra* note 364 (citing Anup Malani, *Does the Felony-Murder Rule Deter? Evidence from FBI Crime Data*, N. Y. TIMES (2002), <https://www.nytimes.com/packages/pdf/national/malani.pdf> [<https://perma.cc/9BZE-QQAR>]).

376. See *supra* Part II.B (discussing the disparate impact of felony murder on communities of color).

377. See *id.*

collecting data on felony murder in order to use contemporary statistics to underscore the racial element of the doctrine and abolish it altogether.

Very little recent, formal data on the correlation of felony murder and race exists.³⁷⁸ One way to correct this lack of data is through open source reporting on murder circumstance and race of offenders within individual counties or states.³⁷⁹ District attorney offices and police departments should implement open source reporting in order to conduct contemporary studies on the use of felony murder generally, in addition to its relationship with race and sentencing/conviction outcomes.³⁸⁰

Researchers and advocates should also utilize data aggregation resources—such as the Minnesota Sentencing Guidelines Commission that track specific statutes and biographical data—in order to more efficiently showcase felony murder’s detrimental impact on race.³⁸¹ Examples in Cook County, Illinois and Ramsey and Hennepin, Michigan demonstrate the grave racial disparities that exist via felony murder’s use on Black defendants today.³⁸² Considering the doctrine’s abundant, historical impact on race across state lines, open source reporting and aggregated research would allow for the study and exposure of felony murder’s current racial impact.³⁸³ Advocacy for its abolition without this applicable data will prove difficult to accomplish actual rectification.

One counterargument to felony murder’s eradication is to continue to use it to prosecute civilians and law enforcement personnel who kill or severely harm Black people and people of

378. After extensive searches conducted on numerous legal and academic databases, there is no indication that current data and statistics on felony murder have been procured. There are consequently no studies on the contemporary correlation between race and felony murder either.

379. For an example of open source reporting leading to valuable insight on the use of felony murder and its relationship with race see Albrecht, *supra* note 260.

380. *See id.*

381. *Data Requests*, MINN. SENT’G GUIDELINES COMM’N, <https://mn.gov/sentencing-guidelines/contact/data-requests.jsp> [<https://perma.cc/25FU-PT28>] (last visited Apr. 11, 2021).

382. *See id.*; Egan, *supra* note 262, at 5. Minnesota’s overall population is 83.8 percent white, while its St. Paul/Minneapolis metro population is 77.1 percent white. *See id.*

383. *See id.*; Albrecht, *supra* note 260.

color without justification.³⁸⁴ In the excessive force cases mentioned previously, many advocates called for high crime indictments of these individuals in order to seek justice.³⁸⁵ Moreover, advocates continue to demand accountability for police brutality and lethal societal racism that permeates US society.³⁸⁶ While these arguments may be valid, they do not consider the impact of the felony murder rule outside of these individual cases on Black communities and communities of color.³⁸⁷ Nor do they consider the ways it can, and historically has, been used against people who are far from morally culpable.³⁸⁸ This historical practice showcases the doctrine's ability to result in misuse against individuals or groups of people in the future. It is true that one way to seek individual justice for the victims of lethal racism is outright criminal accountability.³⁸⁹ Derek Chauvin's conviction showcases

384. *See supra* notes 283-92 discussing the use of felony murder statutes in excessive force cases resulting in the deaths of unarmed Black people. Another counterargument to abolishing felony murder is the possibility of its use to prosecute those engaged in the attempted siege on the capitol. Investigations are ongoing, but prosecutors already charged over to 600 individuals – none of which include charges of felony murder. *The Capitol Charges*, NPR (last accessed Sept. 18, 2021), <https://www.npr.org/2021/02/09/965472049/the-capitol-siege-the-arrested-and-their-stories#database> [<https://perma.cc/R7RC-6N8U>]; *Large Majority of the Public Views Prosecution of Capitol Rioters as 'Very Important'*, PEW RSCH. CTR. (Mar. 18, 2021), <https://www.pewresearch.org/politics/2021/03/18/large-majority-of-the-public-views-prosecution-of-capitol-rioters-as-very-important/> [<https://perma.cc/X5JZ-U2VP>]). Therefore, the United States criminal justice system is already ripe with ample (and arguably, an oversaturation of) criminal statutes that can hold perpetrators responsible for the direct actions they are morally culpable for. For a discussion on overcriminalization from a constitutional framework perspective, see *Overcriminalization*, HERITAGE FOUND., <https://www.heritage.org/crime-and-justice/heritage-explains/overcriminalization> [<https://perma.cc/UL5R-95C9>] (last visited Apr. 11, 2021). *See also* Eli Lehrer, *America Has too Many Criminal Laws*, HILL (Dec. 9, 2019, 1:00 PM), <https://thehill.com/opinion/criminal-justice/473659-america-has-too-many-criminal-laws> [<https://perma.cc/B7VW-B826>]).

385. *See id.*; *see also* Douglas Belkin et al., *Derek Chauvin and Three Other Ex-Officers Face New Charges in George Floyd's Killing*, WALL ST. J. (June 4, 2020), <https://www.wsj.com/articles/unrest-eases-as-protests-continue-despite-curfews-11591194391> [<https://perma.cc/7TEK-5753>].

386. *See* Belkin et al., *supra* note 385.

387. *See supra* Part II.B.

388. *See id.*

389. While rare, prosecutors have charged a handful of police officers for the killings of unarmed Black people across the US; while some of these instances resulting in charges are seemingly inadequate for the resulting life lost, the justice system does have the capacity to charge and convict these individuals, finding them culpable for these tragic deaths without the use of felony murder. *See Cases in Which Police Officers Were Charged in Shootings*, ASSOC. PRESS (Oct. 14, 2019),

one recent example of individual accountability.³⁹⁰ But this outcome stands as an anomaly.³⁹¹ Regardless, individual cases of criminal liability do not confront the root of the problem of policing and systemic racism or mass incarceration.³⁹² Once again, felony murder is used in these circumstances as a tool of prosecutorial discretion. The outcome of its use may provide for circumstantial justice, but this limited outcome must be weighed against its simultaneous use to inflict mass, unjust convictions against Black people and people of color.³⁹³ As a bright line standard that avoids misapplication and continued perpetuation of abuse, the United States should instead abolish the felony murder rule.

V. CONCLUSION

The logic of the continued use of the felony murder rule in the United States is paradoxical and unjust. Its continued use makes the proportionality principle of punishment unattainable. These conclusions are evident in the rationale to eliminate the doctrine in all common law countries other than the United States. The

<https://apnews.com/article/037b5bbf3a1d44f1bcf204a6c27a76bc> [<https://perma.cc/93MT-36MJ>] (indicating cases of charges brought against Police Officers for excessive force against unarmed Black people); *but see* Shaila Dewan, *Few Police Officers Who Cause Deaths Are Charged or Convicted*, N.Y. TIMES (Sept. 24, 2020), <https://www.nytimes.com/2020/09/24/us/police-killings-prosecution-charges.html> [<https://perma.cc/V9NL-4FWY>] (demonstrating the rarity of these charges against Police Officers actually coming to fruition).

390. *See* Bella, *supra* note 296.

391. *See* Philip M. Stinson, Sr. & Chloe A. Wentzlof, *On-Duty Shootings: Police Officers Charged with Murder or Manslaughter, 2005-2019*, BOWLING GREEN STATE UNIV. (2019) <https://www.bgsu.edu/content/dam/BGSU/health-and-human-services/document/Criminal-Justice-Program/policeintegritylostresearch/-9-On-Duty-Shootings-Police-Officers-Charged-with-Murder-or-Manslaughter.pdf> [<https://perma.cc/C645-K3HU>]; Mark Berman, *How Derek Chauvin Became the Rare Police Officer Convicted of Murder*, WASH. POST (Apr. 21, 2021), <https://www.washingtonpost.com/nation/2021/04/20/chauvin-police-officer/> [<https://perma.cc/EC8N-TKYU>].

392. For a discussion on how the Chauvin verdict is a necessary form of individual accountability, but should not be misinterpreted as an example of the type of radical change needed to confront the systemic issues of our criminal justice system, *see* Jerusalem Demsas, *Derek Chauvin's Conviction Shouldn't Obscure How Broken Our Criminal Justice System Is*, VOX (Apr. 21, 2021, 10:10 AM), <https://www.vox.com/2021/4/21/22395068/derek-chauvin-george-floyd-verdict-protests-change> [<https://perma.cc/M9RX-K5AX>].

393. *See supra* Part II.B (discussing the disparate impact of felony murder on communities of color).

Eighth Amendment of the US Constitution obliges proportionality between crime and punishment. Felony murder's ability to result in a capital or life sentence demonstrates that this disproportional punishment still exists by its means. Accordingly, the United States legislature can emulate that of the United Kingdom and outright abolish felony murder in its entirety. Or, it can pass legislation similar to the Canadian Charter that underscores the fundamental rights laid out in the US Constitution, paving the way for the US Supreme Court to abolish felony murder. The United States constantly condemns other nations that execute for crimes other than murder, citing human rights and due process abuses. Yet, these outcries represent empty rhetoric because practices such as felony murder still exist within US borders. Accordingly, these principles and rationales provide the core premise to abolish felony murder within the United States.

The felony murder doctrine also disproportionately impacts Black people and people of color from indictment to sentencing—commonly resulting in their capital sentences. The necessity to end felony murder extends beyond its illogical nature: but also to reckon with the grave injustice it inflicts on Black people and people of color. The racism effected by felony murder should impose its abolition as a matter of logical policy, a racial reckoning, and restoration of justice.

The present moment in US history calls for profound change in its criminal justice system. There is something exceptionally repugnant about trying and convicting people for murder, often resulting in punishments of life without parole or even the death penalty, when they did not intend to kill or actually kill in the first place. A conviction and punishment so severe for the crime of *existing at the wrong place at the wrong time*, albeit occasionally through a choice to do some other, far less heinous wrongdoing, is barbaric. It is reflective of an antiquated criminal justice system that exists to systematically oppress.

Taking stock of a national consensus that demands the restoration of justice, the US government should take steps to abolish felony murder outright through federal legislation. Alternatively, it can institute justice-oriented legislation to precipitate its future abolition by the Supreme Court. Minimally, the United States should outlaw *capital* felony murder by either of these means. Individual states, some of which already abolished

felony murder, can and should continue to do so. They can do this through their Supreme Courts by outright abolition, reducing the degree of criminal liability, or limiting felony murder as an aggravating element of murder. States could also abolish or limit felony murder's scope through their state legislatures and should ensure retroactive application for resentencing. Regardless of politicized efforts to undermine criminal justice reforms, attorneys and advocates should continue appealing felony murder cases while state representatives and grassroots organizations should push for its legislative abolition.

Finally, statistics and other data on felony murder should be better tracked with open-source reporting to take better account of its affects. Advocates and researchers should utilize these reporting methods and other resources to aggregate data to better demonstrate the abhorrent racial impact of felony murder. The United States' use of felony murder has a deep history of unjust justice and it is long overdue for a necessary rectification.

