Fordham Urban Law Journal

Volume 51
Number 3 *Racially Structured Legal Mechanisms and Their Effects on the Criminal, Housing, and Education Systems*

Article 2

2024

Race, Racial Bias, and Imputed Liability Murder

Perry Moriearty

Kat Albrecht

Caitlin Glass

RACE, RACIAL BIAS, AND IMPUTED LIABILITY MURDER

Perry Moriearty,[*] *Kat Albrecht*[**] *& Caitlin Glass*[***]

Even within the sordid annals of American crime and punishment, the doctrines of felony murder and accomplice liability murder stand out. Because they allow states to impose their harshest punishments on defendants who never intended, anticipated, or even caused death, legal scholars have long questioned their legitimacy. What surprisingly few scholars have addressed, however, is who bears the brunt.

This Article is one of the first to explore the racialized impact of the two most controversial and ubiquitous forms of what we call "imputed liability murder." An analysis of ten years of murder prosecutions in the state of Minnesota reveals that imputed liability murder is anything but a fringe subtype of homicide: an astounding 70% of those charged with murder during this period were charged with felony murder, accomplice liability murder, or both. The study also shows that nearly 60% of these defendants were Black, a level of racial disproportionality that is not just intrinsically extreme; it is comparatively greater than levels of disproportionality for other types of murder. The question is, why? The answer lies in part in the structural and social psychological dynamics of imputed liability murder prosecutions themselves, we claim. By reducing prosecutors' burden to prove the most salient legal indicia of a defendant's culpability — mens rea, actus reus, or both — and allowing prosecutors to cast a wide and

---

[*] Associate Professor, University of Minnesota Law School. We thank University of Minnesota Law School students Christian Purnell and Dahlia Wilson and Boston University School of Law students Joel Paulson and Lauren Batchelder for their excellent and invaluable research assistance. We are also grateful for feedback we received during faculty workshops at the University of Minnesota and the Northwestern Pritzker School of Law Review symposium in October 2023. Special thanks to Joanne Scheer, founder of the Felony Murder Elimination Project–California, Toni Cater and Linda Martinson, founders of Felony Murder Law Reform (Minnesota), and members of the Minnesota Task Force on Aiding and Abetting Felony Murder.

[**] Assistant Professor, Criminal Justice and Criminology, Andrew Young School of Policy Studies, Georgia State University, Judicial Innovation Fellow, Georgetown Law School.

[***] Visiting Lecturer and Clinical Instructor, Boston University School of Law.

undifferentiated net around almost any homicide, the felony murder and accomplice liability murder doctrines invite prosecutors to base normative charging decisions on subjective, extra-legal proxies, like "dangerousness" and "group criminality." Multiple studies have shown that decision-makers are more likely to attribute these proxies to Black defendants and, in turn, treat them more punitively. Compounding these dynamics is the racial stereotypicality of the crimes themselves. A separate body of research indicates that felony murder and accomplice liability murder have become so cognitively synonymous with Black defendants that simply shoring up the doctrines' structural laxity may not be enough to mitigate their disproportionate enforcement.

As states across the country grapple with reforming their felony murder and accomplice liability murder laws, this Article contributes to the ongoing debate about the legitimacy of both doctrines. It also raises critical questions about the racialized enforcement of not just these doctrines but of any doctrine that invites the State to impute criminal liability.

INTRODUCTION

Frida was 16 years old when she, 18-year-old Jade, Frida's 23-year-old boyfriend, and a 23-year-old friend went to an apartment building in North Minneapolis to rob a man that Jade had met on a bus.[1] "In my 16-year-old head, I'm thinking it's just going to be a robbery. No one's going to get hurt," Frida says, looking back on the events of November 25, 2008.[2] Frida and Jade were sitting outside in a car when Frida's boyfriend and his friend emerged, announcing that they had "slammed" the victim.[3] Frida was stunned.[4] Minneapolis police arrested Frida and Jade the following day, but it took them another two weeks to find their co-defendants.[5]

Frida was charged with aiding and abetting second-degree intentional murder. Three weeks later, she was indicted for aiding and abetting first-

1. "Frida" and "Jade" are pseudonyms. This description of Frida's experience is taken from public records. *See* State v. Donnerson, No. 27-CR-08-62283 (Minn. 2009), https://publicaccess.courts.state.mn.us/CaseSearch (type "Donnerson" in the "Last Name" textbox; then type "Jamiccia" in the "First Name" textbox; then select "Find"; then select "Case Number: 27-CR-08-62283). It also comes from a 2009 episode of *The First 48* television program, *see The First 48: Live Bait/Drama at the Classic* (A&E Network television broadcast Mar. 5, 2009) [hereinafter *The First 48*], and interviews conducted by members of the Minnesota Task Force on Aiding and Abetting Felony Murder in October 2021 (on file with the Task Force) [hereinafter Task Force Interviews]. *See also* LINDSAY TURNER, TASK FORCE ON AIDING & ABETTING FELONY MURDER: REPORT TO THE MINNESOTA LEGISLATURE 35 (2022), https://www.wilder.org/sites/default/files/imports/AAFM-LegislativeReport_ACCESSIBLE_2-22.pdf [https://perma.cc/5XJN-9HME].

2. *See* TURNER, *supra* note 1, at 35; Task Force Interviews, *supra* note 1.

3. *See The First 48*, *supra* note 1.

4. *See* TURNER, *supra* note 1, at 35.

5. *See The First 48*, *supra* note 1.

degree felony murder.[6] Certified as an adult and facing a mandatory life sentence, "[t]he only way out was to take a plea," she recalls.[7] The first offer was for 35 years and a plea to aiding and abetting second-degree murder.[8] "I [just] started bawling," Frida says.[9] She rejected it.[10] Then came an offer for 25 years and finally ten years in exchange for her testimony against her boyfriend.[11] Frida did the math. "I'll get out when I'm in my 20s, I can still make something of myself," she recalls thinking.[12] She took the deal.[13] Her co-defendants eventually entered pleas to the same offense.[14] Jade was sentenced to 15 years, and the men were sentenced to 25 and 36 years.[15] Though she did not intend, anticipate, cause, or actively participate in the homicide itself, 16-year-old Frida entered a Minnesota women's prison in 2009 as a convicted murderer.

Frida's story is tragically familiar. Though courts and commentators have long maintained that criminal liability should be limited to those who are "blameworthy in mind,"[16] the "felony murder doctrine" allows the State to hold people like Frida liable for murder simply because they had some nexus to an underlying felony that resulted in death.[17] In all but ten states, their mental state or "mens rea" is irrelevant.[18] Felony murder has been abolished

---

6. *See* Warrant, *Donnerson*, No. 27-CR-08-62283 (Dec. 16, 2008).

7. *See* TURNER, *supra* note 1, at 35; Task Force Interviews, *supra* note 1.

8. *See* TURNER, *supra* note 1, at 35.

9. *See* TURNER, *supra* note 1, at 35.

10. See TURNER, *supra* note 1, at 35.

11. See TURNER, *supra* note 1, at 35.

12. See TURNER, *supra* note 1, at 35.

13. *See* TURNER, *supra* note 1, at 35.

14. *See* State v. Donnerson, No. 27-CR-08-62283 (Minn. 2009); State v. Walker, No. 27-CR-08-62285 (Minn. 2008), https://publicaccess.courts.state.mn.us/CaseSearch (follow same instructions from *supra* note 1 with appropriate case number); State v. Marshall, No. 27-CR-08.62284 (Minn. 2008), https://publicaccess.courts.state.mn.us/CaseSearch (same). Note all sentences are designated in months, and under state practice defendants serve 2/3 of sentences.

15. *Id.*

16. *See, e.g.*, Elonis v. United States, 575 U.S. 723, 734 (2015) (the "central thought" of the criminal law is that a defendant must be "blameworthy in mind" to be guilty) (citing Morissette v. United States, 342 U.S. 246, 252 (1952)).

17. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 503, 522 (5th ed. 2009) ("The felony-murder rule facially applies whether a felon kills the victim intentionally, recklessly, negligently, or accidentally and unforeseeably."); MODEL PENAL CODE § 210.2 cmt. 6 (AM. L. INST. 1980) ("The classic formulation of the felony-murder doctrine declares that one is guilty of murder if a death results from conduct during the commission or attempted commission of any felony.").

18. Ten states, including Minnesota, require some mens rea related to the killing for the highest degree of felony murder. *See infra* Section I.A.

in every other common law country.[19] Yet, in the U.S., 48 states, the District of Columbia, and the federal government still have it in some form,[20] and 21 of them permit the death penalty for those who are convicted.[21] The "accomplice liability" doctrine eschews yet another criminal legal norm: it allows the State to hold a defendant criminally liable not for their own conduct, but for the conduct of another person.[22] In practical terms, this means that a defendant who was nowhere near a homicide can be charged with murder.[23]

Because the felony murder and accomplice liability murder doctrines permit the State to impute to defendants what are arguably the most salient measures of criminal liability — mens rea and actus reus[24] — this Article refers to them as "imputed liability murder" doctrines.[25] Even among the most widely maligned elements of American crime and punishment, these doctrines stand out. Courts and legal scholars have called the felony murder doctrine everything from "injudicious and unprincipled"[26] to "monstrous,"[27]

---

19. Guyora Binder & Ekow N. Yankah, *Police Killings as Felony Murder*, 17 HARV. L. & POL'Y REV. 157, 206 (2022) ("[F]elony murder became another American exception in the post-war period, as analogous doctrines were abandoned in other common law systems.").

20. *See* NAZGOL GHANDNOOSH ET AL., FELONY MURDER — AN ON-RAMP FOR EXTREME SENTENCING, SENTENCING PROJECT 24 (2022), https://www.sentencingproject.org/app/uploads/2023/10/Felony-Murder-An-On-Ramp-for-Extreme-Sentencing.pdf [https://perma.cc/4N47-WN7T].

21. These states are Alabama, Arizona, Arkansas, California, Delaware, Florida, Georgia, Idaho, Indiana, Louisiana, Mississippi, Montana, Nebraska, Nevada, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Wyoming. *See id.* at 15.

22. *See* DRESSLER, *supra* note 17, at 451.

23. *See, e.g.*, MINN. STAT. ANN. § 609.19, subdiv. 2(1) (whoever "causes the death of a human being without intent to effect the death of any person, while committing or attempting to commit a felony offense" is guilty of unintentional murder in the second degree).

24. *See* WAYNE R. LAFAVE, MODERN CRIMINAL LAW: CASES, COMMENTS AND QUESTIONS 10–12 (6th ed. 2017) (describing the basic premises of criminal law including the general requirement that, for conduct to be criminal, three elements must be present: a physical act (actus reus), "some sort of bad state of mind" that concurs with the act (mens rea), and a resulting injury to the public).

25. For purposes of this Article, "imputed liability murder" includes all forms of accomplice liability murder, felony murder, and aiding and abetting felony murder, which is a combination of both doctrines. Our terminology draws from Paul Robinson's 1984 *Yale Law Journal* article delineating the various types of "imputed criminal liability," which are rules that "imputed a required element of [a criminal] offense." Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 619 (1984) (discussing the broader rationales for offenses such as felony murder, accessory liability, strict liability, voluntary intoxication, status offenses, and liability for omissions).

26. People v. Aaron, 299 N.W.2d 304, 334 (Mich. 1980) (Ryan, J., concurring in part and dissenting in part).

27. Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 446 (1985) (citing 3 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 57, 65 (1883)).

and its moral rectitude has been the subject of numerous publications.[28] Though less controversial, accomplice liability too has garnered criticism for conferring guilt by association — something that scholars have called a fundamental "deviat[ion] from the normal rules of criminal liability."[29]

What has received far less attention from legal scholars, however, are the people who bear the brunt of these doctrines. This Article begins to fill this critical gap. A descriptive analysis of all first- and second-degree murder charges and convictions in the state of Minnesota between 2010 and 2019 reveals that far from fringe subtypes of homicide, felony murder, accomplice liability murder, or both were charged in over 70% of murder cases.[30] It also reveals that, like Frida and her three co-defendants, 57% of those charged with imputed liability murder were Black — in a state where Black people make up just 7.6% of the population.[31] Finally, the study shows that Black defendants were significantly more likely to be charged with imputed liability murder than they were with what we call "direct liability murder."[32]

The question is, why? The answer lies in part in the structural and social psychological dynamics of imputed liability murder prosecutions themselves, we argue. A substantial body of empirical, theoretical, sociological, and psychological research suggests that imputed liability murder prosecutions are especially susceptible to the influence of racial bias. By definition, the felony murder and accomplice liability murder doctrines substantially reduce the State's burden of proof. When prosecutors pursue a conviction for direct liability murder, they must prove that the defendant both committed an act that caused death *and* acted with some form of intent or

---

28. *See infra* Section I.A.

29. Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 92 (1985) [hereinafter Dressler, *Reassessing*]. The broad category of "accomplice liability" includes multiple doctrines that differ in scope and application, like "aiding and abetting," "joint venture," and "conspiracy." While this Article does not focus on the law of conspiracy or liability of conspirators, the arguments here apply with equal if not greater force to conspiracy offenses. *See id.* at 93 (arguing that the "degree of an accomplice's crime and punishment should depend on the presence or absence of a causal connection between the secondary party's assistance and the ultimate injury"); *id.* at 91 n.1 (noting that these arguments apply to conspirators as well as accomplices).

30. *See infra* Section II.D.

31. *See infra* Section II.D.

32. As used in this article, "direct liability murder" includes first-degree premeditated murder, which requires that the State prove that a defendant "cause[d] the death of a human being with premeditation and . . . intent," MINN. STAT. § 609.185(a)(1) (West 1963), and second-degree intentional murder, which requires the State to prove that a defendant "cause[d] the death of a human being with intent . . . but without premeditation." MINN. STAT. § 609.19, subdiv. 1(1).

knowledge.[33] When they charge felony murder in most jurisdictions, however, prosecutors are relieved of the burden of having to prove an intent to kill.[34] The accomplice liability murder doctrine, in turn, relieves them of having to prove an act that caused death.[35] When the doctrines are used in combination, as they were in Frida's case, the State's burden can become almost negligible. Because imputed liability murder charges are constrained by fewer legal elements, prosecutors need less evidence to pursue and sustain them. The net effect is that charging decisions in imputed liability murder cases are inherently more normative, more subjective, and more likely to be influenced by extra-legal factors.

Imputed liability murder doctrines also allow prosecutors to cast a wide net around almost any homicide. Frida's case is illustrative. While there was probable cause to charge Frida's boyfriend with direct liability murder, since he shot the victim, charging the other three co-defendants with murder would have been impossible without imputed liability murder doctrines.[36] The accomplice liability doctrine enabled prosecutors to impute the "act" of murder to the male co-defendant, who witnessed the shooting, and to Frida and Jade, who sat in the car, simply by alleging that they intended to aid the shooter.[37] The felony murder doctrine, in turn, allowed prosecutors to impute an "intent to kill" to all four defendants based solely on their participation in the underlying robbery. In combination, the doctrines allowed prosecutors to charge the entire group with murder based not on their subjective mental states or individual roles in the homicide, but on their mere association with one another.

These structural dynamics have significant cognitive implications. When prosecutors are invited to make normative assessments of a defendant's culpability with less law and fewer facts, studies on criminal legal decision-making show that they are more likely to base decisions on highly subjective,

---

33. *See, e.g.*, MINN. STAT. § 609.185(a)(1) (establishing that whoever "causes the death of a human being with premeditation and with intent to effect the death" is guilty of first-degree murder).

34. *See, e.g.*, FLA. STAT. § 782.04(4) ("The unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony . . . is murder in murder in the third degree.").

35. *See, e.g.*, MINN. STAT. § 609.05, subdiv. 1 ("A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime.").

36. *See* Maryland v. Pringle, 540 U.S. 366, 371 (2003) (citing Ybarra v. Illinois, 444 U.S. 85, 91 (1979)) (internal citations omitted) (noting that "[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt . . . and that the belief of guilt must be particularized with respect to the person to be searched or seized.") (quoting Ybarra v. Illinois, 444 U.S. 85, 91 (1979) and Brinegar v. United States, 338 U.S. 160, 175 (1949) (internal citations omitted)).

37. MINN. STAT. § 609.05, subdiv. 1.

extra-legal proxies.[38] Social psychologists have repeatedly shown that these proxies often include pernicious racial stereotypes linking Black defendants with "criminality" and "dangerousness,"[39] which, in turn, increases the likelihood that prosecutors will — consciously and unconsciously — treat Black defendants more punitively.[40]

The doctrines' net-widening effect may also trigger an additional form of racial bias. A recent study of implicit racial bias in the use of the accomplice liability and felony murder doctrines found that participants automatically perceive White[41] men as "individuals" and Black and Hispanic/Latino men as "group members."[42] They concluded that these biases may lead decision-makers to "indifferently impute guilt" to Black and Hispanic/Latinx defendants.[43]

---

38. *See, e.g.*, Celesta A. Albonetti, *Prosecutorial Discretion: The Effects of Uncertainty*, 21 L. & SOC'Y REV. 291, 311 (1987); Mark Chaffin et al., *Same-Sex and Race-Based Disparities in Statutory Rape Arrests*, 31 J. INTERPERSONAL VIOLENCE 26, 30 (2016) (explaining that when decision-makers are "liberate[d] to use greater subjectivity in decision making," it increases "the likelihood that extrajudicial factors will influence outcomes").

39. *See, e.g.*, Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876, 889 (2004) (finding that study participants who were primed with crime-related images were more visually attendant to Black faces compared to participants who were not primed, indicating a pre-existing association between the categories of crime and Blackness).

40. *See, e.g.*, Robert J. Smith et al., *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 881 (2015) (describing studies finding that "implicit negative stereotyping of [B]lack Americans contributes to racial disparities in police stops"); Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 L. & HUM. BEHAV. 483, 483 (2004) (finding that, when primed with words that represent stereotypically Black associations, like "Harlem" and "dreadlocks," both police officers and probation officers evaluated juvenile suspects as more culpable and deserving of punishment).

41. A "White" person is defined by the U.S. Census as "[a] person having origins in any of the original peoples of Europe, the Middle East, or North Africa." *About the Topic of Race*, U.S. CENSUS BUREAU (Mar. 1, 2022), https://www.census.gov/topics/population/race/about.html [https://perma.cc/64D8-ZQ39]. In this Article, "White" is capitalized as a socially constructed category. *See* LaToya Baldwin Clark, *Stealing Education*, 68 UCLA L. REV. 566, 568–69 n.1 (2021) ("Choosing to not capitalize White while capitalizing other racial and ethnic identifiers would implicitly affirm Whiteness as the standard and the norm.").

42. *See* G. Ben Cohen et al., *Racial Bias, Accomplice Liability, and the Felony Murder Rule: A National Empirical Study*, __ DENVER L. REV. __ (forthcoming).

43. *Id*. As discussed below, this Article argues that racial biases may influence the prosecution of imputed liability offenses. These racial biases primarily draw from false and insidious stereotypes about Black, Indigenous, and Hispanic/Latinx people. However, this Article in some instances uses the general term "Brown" in recognition of how people are often racialized in ways that do not reflect how they identify. For example, a prosecutor or juror may consciously or subconsciously associate a South Asian or Southeast Asian person with those same negative stereotypes, even if those people do not identify as Black, Indigenous, or Latinx.

Finally, it is not just the structural dynamics of imputed liability murder doctrines that exacerbate racial bias — it is also the racial stereotypicality of the crimes themselves. Research on race-crime congruency has repeatedly shown that Black people are disproportionately associated with the crimes of robbery and murder,[44] which can affect the degree to which the crimes are attributed to Black defendants.[45] This suggests that felony murder and accomplice liability murder may have become so cognitively and normatively associated with Black defendants that simply mitigating their structural laxity may not be enough to reduce their racially disproportionate enforcement.

This Article contributes to at least three primary bodies of research and scholarship. First, it builds upon decades of empirical,[46] sociological,[47] and social psychological[48] studies of the effects of racial bias in criminal legal decision-making. It also adds to burgeoning bodies of empirical, theoretical, and doctrinal scholarship on the role of mens rea in the administration of the criminal law.[49] Finally, it contributes to the ongoing debate about the efficacy, fairness, and continued legitimacy of two of this country's most controversial criminal law doctrines.[50]

---

44. *See, e.g.*, Cynthia Willis Esqueda, *European American Students' Perceptions of Crimes Committed by Five Racial Groups*, 27 J. APPLIED SOC. PSYCH. 1406 (1997).

45. *See, e.g.*, Randall A. Gordon et al., *Majority Group Perceptions of Criminal Behavior: The Accuracy of Race-Related Crime Stereotypes*, 26 J. APPLIED SOC. PSYCH. 148, 157 (1996).

46. *See, e.g.*, David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983) (presenting one of the most sophisticated multivariate analyses of race and capital punishment ever produced).

47. *See, e.g.*, Cassia Spohn et al., *The Impact of the Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges*, 25 CRIMINOLOGY 175 (1987).

48. *See, e.g.*, Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCH. 1006, 1006–09 (2007); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 350 (2007); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795 (2012); JENNIFER L. EBERHARDT, BIASED: UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO (2020) (examining the pervasive unconscious racial bias in America and how it can be addressed).

49. *See, e.g.*, Michael Serota, *Strict Liability Abolition*, 98 N.Y.U. L. REV. 112, 179 (2023) [hereinafter Serota, *Strict Liability Abolition*] (calling for an "across-the-board imposition of culpable mental state requirements"); Michael Serota, *Proportional Mens Rea and the Future of Criminal Code Reform*, 52 WAKE FOREST L. REV. 1201 (2017) (analyzing mens rea in the context of the Model Penal Code); Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 464 (1992) (analyzing the "flaws" in the "conventional hierarchy of mental states" including mens rea).

50. *See, e.g.*, GUYORA BINDER, FELONY MURDER 7 (2012) (arguing that because "[f]elony murder liability is not going away . . . we should try to make felony murder law better"); Roth

Part I of the Article describes the origins, controversy surrounding, and current status of both the felony murder and accomplice liability murder doctrines in the United States. Part II presents an empirical analysis of the racial demographics of murder charges and convictions in the state of Minnesota between 2010 to 2019, revealing that imputed liability murder was charged prolifically and especially against Black defendants, who were far more likely to be charged with imputed liability murder than direct liability murder.

Part III then considers why racial disparities in felony murder and accomplice liability murder prosecutions are so intrinsically and comparatively extreme. It begins with an overview of the research on the sources of racial disproportionality in criminal legal outcomes before taking an in-depth look at studies on the role of racial bias. It then turns to the existing theoretical work on the nature of prosecutorial decision-making. It argues that because the felony murder and accomplice liability murder doctrines reduce prosecutors' burden to prove the most salient legal indicia of culpability while simultaneously inviting them to cast a wide net around almost any homicide, prosecutors are more likely to base normative charging decisions on subjective, deindividualized, extra-legal proxies. It concludes that these structural dynamics, along with the racial stereotypicality of the crimes of felony murder and accomplice liability murder themselves, increase the likelihood that multiple forms of racial bias will affect individual charging decisions.

Finally, Part IV explores the normative implications of these analyses. The U.S. criminal legal system is in the midst of a deep reckoning as scholars, policymakers and activists across the political spectrum question the efficacy and equity of American conceptions of criminal law and punishment.[51] This Article contributes to this broader dialogue. Not only

---

& Sundby, *supra* note 27, at 446 (noting that "[c]riticism of the rule constitutes a lexicon of everything that scholars and jurists can find wrong with the legal doctrine"); Cohen et al., *supra* note 42 (presenting an empirical study on the role of implicit racial bias in cases involving accomplice liability and felony murder and arguing for the abandonment of the felony-murder doctrine in group liability situations).

51. *See, e.g.*, Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1783 (2020) (arguing that "the only way to stop the violence of policing is to make the cops obsolete" (quoting Rachel Herzing, Address to the Critical Prison Studies Caucus of the American Studies Association: Keyword Police (Nov. 8, 2014)); Aya Gruber, *Policing and "Bluelining"*, 58 HOUS. L. REV. 867, 933 (2021) (explaining that "abolitionist ideology . . . is currently experiencing a renaissance in progressive scholarly circles."); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1616 (2019) (arguing for an "abolitionist conception of justice . . . where punishment is abandoned in favor of accountability and repair"); Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597, 1597, 1604–05 (2017) (arguing that "[m]aking criminal law democratic" requires an "abolitionist approach that will dismantle the

does it add to the growing body of research demonstrating that the imputed liability murder doctrines are significant sources of racial disparities in homicide convictions and sentences, but our analyses begin to explore how the doctrines themselves may amplify racial bias. Amid a slew of recent efforts by state courts and legislatures to limit the scope of their felony murder and accomplice liability murder laws and calls within the academy for comprehensive mens rea reform across the criminal spectrum, this Article raises questions about whether these incremental changes will actually mitigate the racialized enforcement of these doctrines or simply further their entrenchment.

I. IMPUTED LIABILITY MURDER

The doctrines of felony murder and accomplice liability murder are among the most controversial in American criminal law. They "each sit at the fulcrum of the criminal legal system's false promise of individualized moral culpability," Ben Cohen, Justin Levinson, and Koichi Hioki recently observed, and "[t]heir bold, even reckless combination is a quintessential example of the system's delivery of overly punitive, generalized class of collective punishment."[52] Yet, both doctrines remain firmly ensconced in the U.S. criminal law. This Part traces the evolution, criticisms, and current state of the felony murder and accomplice liability murder doctrines in the United States.

A. The Felony Murder Doctrine

1. Imputed Thoughts and Moral Exceptionalism

The concept of mens rea is deeply entrenched in the criminal law.[53] As the U.S. Supreme Court observed more than a half-century ago, "[t]he contention that an injury can amount to a crime only when inflicted by intention . . . is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."[54] Because, in most circumstances, the State cannot convict a person of a crime without proof beyond a reasonable doubt that the person engaged in a prohibited act with

---

criminal law's anti-democratic aspects entirely and reconstitute the criminal justice system without them").

52. Cohen et al., *supra* note 42, at 8–9.

53. *See* Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815, 829–30 (1980) (tracing the so-called guilty mind requirement to the 13th century).

54. Morissette v. United States, 342 U.S. 246, 250 (1952).

a culpable state of mind,[55] "the criminal law's requirement of mens rea is the central distinguishing characteristic of the institution."[56]

Typically, criminal codes use a tiered hierarchy of mental statutes to relegate culpability. At the top is *intent* or *purpose*, which requires proof that it was the defendant's "conscious object" to commit the prohibited act.[57] One rung down is *knowledge*, which requires proof that the defendant was "aware" that they were committing a prohibited act;[58] then *recklessness*, which means that the defendant was aware of, but consciously disregarded, the risk that they were committing the act;[59] and finally, *negligence*, which generally means that the defendant was not aware of the risk of wrongdoing when a reasonable person would have been.[60] In the context of homicide, a death caused with "negligence" is considered the least serious and therefore the least deserving of severe punishment,[61] while a death caused with *premeditation* or *deliberation*, which are heightened forms of intent, is considered the most serious and the most deserving of severe punishment.[62]

The felony murder doctrine is a stark exception to these basic principles and practices. Though its origins remain the subject of debate among scholars,[63] the doctrine is often traced to the English common law and Blackstone, which states, "if one intends to do another felony, and undesignedly kills a man, this is also murder."[64]

---

55. *See, e.g.*, MODEL PENAL CODE § 2.02 (AM. L. INST. 1985) (requiring purpose, knowledge, recklessness, or negligence).

56. Claire Finkelstein, *The Inefficiency of Mens Rea*, 88 CALIF. L. REV. 895, 896 (2000).

57. *See* MODEL PENAL CODE § 2.02(2)(a).

58. *See id.* at § 2.02(2)(b).

59. *See id.* at § 2.02(2)(c).

60. *See id.* at § 2.02(2)(d).

61. *See, e.g.*, MINN. STAT. § 609.205 ("A person who causes the death of another by any of the following means is guilty of manslaughter in the second degree and may be sentenced to imprisonment for not more than ten years or to payment of a fine of not more than $20,000, or both: (1) by the person's culpable negligence whereby the person creates an unreasonable risk, and consciously takes chances of causing death or great bodily harm to another.").

62. *See, e.g.*, MINN. STAT. § 609.185(a) ("Whoever does any of the following is guilty of murder in the first degree and shall be sentenced to imprisonment for life: (1) causes the death of a human being with premeditation and with intent to effect the death of the person or of another.").

63. *See* Roth & Sundby, *supra* note 27, at 449–50, 492 (stating the "origins of the felony-murder rule are disputed" and that the doctrine arose from "obscure historical origins"); George P. Fletcher, *Reflections on Felony Murder*, 12 SW. U. L. REV. 413, 421 (1981) (describing the "historical roots" of felony murder as "tenuous and ill defined").

64. DRESSLER, *supra* note 17, at 521 n.105 (citing 4 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 200–01 (Oxford Clarendon Press 1765)). However, Guyora Binder has claimed that "the draconian doctrine of strict liability for all deaths resulting from all felonies was never enacted into English law or received into American law." Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 63 (2004).

Felony murder first emerged in the United States during the early 19th century,[65] and by the end of the 19th century, all but seven states and the federal government had adopted the felony murder doctrine in some form.[66] Initially, only a limited number of violent acts could serve as predicate felonies, but the list soon expanded to include many relatively minor offenses.[67] However, as the doctrine took hold in American criminal law, it became increasingly controversial abroad. In 1957, the English Parliament abolished felony murder altogether,[68] and every other common law country has now abolished it.[69]

Over the last century, scholars, courts, and advocates have roundly criticized the felony murder doctrine as morally indefensible, constitutionally suspect, penologically unsound, and discriminatory.[70] The most prominent and perhaps obvious criticism of the doctrine is that it offends basic notions of culpability by imposing murder liability without a requisite showing of mens rea.[71] In its starkest form, felony murder holds defendants liable for first-degree murder based solely on their participation

---

65. Binder, *The Origins of American Felony Murder*, *supra* note 64, at 123.

66. Binder, *The Origins of American Felony Murder*, *supra* note 64, at 123.

67. *See* SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 521 (10th ed. 2017) (noting that "legislatures have enacted a long list of statutory felonies, many of them nonviolent").

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

69. *See, e.g.*, Criminal Justice Act 1964 (Act No. 5/1964) (Ir.); R. v. Martineau, [1990] S.C.R. 633 (Can.); Penal Code §§ 299–300 (India).

70. While Professor Guyora Binder has provided the most extensive accounts of the evolution, criticisms, and current state of the felony murder doctrine in the United States, *see, e.g.*, BINDER, FELONY MURDER, *supra* note 50; Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965, 981 (2008) (explaining that "criminal law theorists have almost unanimously condemned felony murder as a form of strict liability, imposing undeserved punishment for causing death without culpability"); Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 422–28, 434 (2011) (noting that studies have not supported the conclusion that felony murder is a deterrent), numerous scholars and advocates have analyzed the doctrine. *See, e.g.*, Roth & Sundby, *supra* note 27, at 446 (observing that "few legal doctrines have been as maligned and yet have shown as great a resiliency as the felony murder rule"); GHANDNOOSH ET AL., *supra* note 20, at 2 (examining the "legal and empirical foundation, and failings, of the felony murder rule"); Norman J. Finkel, *Capital Felony-Murder, Objective Indicia, and Community Sentiment*, 32 ARIZ. L. REV. 819, 819 (1990) (calling felony murder a "curious doctrine" (citing Tison v. Arizona, 481 U.S. 137, 159, *reh'g denied*, 482 U.S. 921 (1987) (Brennan, J., dissenting))); Isabel Grant & A. Wayne MacKay, *Constructive Murder and the Charter: In Search of Principle*, 25 ALBERTA L. REV. 129, 133, 156–57 (1987) (calling the doctrine "abhorrent").

71. *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, 1435–38, 1441 (1994) ("[T]he major complaint about the felony-murder rule is that it violates generally accepted principles of culpability.").

in an underlying felony.[72] Laws in 45 states and the District of Columbia currently allow this.[73] In doing so, felony murder laws "lump disparate categories of people together," Rachel Barkow has noted, even though they have acted with materially different levels of mens rea.[74] This violates the fundamental notion that "lesser culpability yields lesser liability."[75]

The doctrine has also been criticized for subjecting defendants to disproportionate punishments. Because it allows states to impose their harshest punishments on those who neither intended nor anticipated death, the felony murder doctrine has been the subject of numerous constitutional challenges. The Supreme Court first addressed the constitutionality of imposing the death penalty on those who did not kill or intend to kill in 1978 when it reversed the mandatory death sentence of a woman who had acted as a getaway driver during a robbery because it precluded the sentencer from "giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense."[76] Four years later in *Enmund v. Florida*, the Court clarified that the Eighth and Fourteenth Amendments prohibited states from executing accomplices to felony murder unless they themselves "killed or attempted to kill," or "intended or contemplated that life would be taken."[77] The Court explained that "[i]t is fundamental that 'causing harm intentionally must be punished more severely than causing the same harm unintentionally.'"[78] But just five years after that, in *Tison v. Arizona*, the Court walked back its holding in *Enmund*, setting the threshold for the execution of accomplices to felony murder at

---

72. *Id.* at 1436. According to the Sentencing Project, 42 states and the District of Columbia have strict liability felony murder laws. GHANDNOOSH ET AL., *supra* note 20, at 4.

73. D.C. CRIM. CODE REFORM COMM'N, APPENDIX J: RESEARCH ON OTHER JURISDICTIONS' RELEVANT CRIMINAL CODE PROVISIONS 368 n.22 (2021), https://ccrc.dc.gov/sites/default/files/dc/sites/ccrc/publication/attachments/Appendix-J-Research-on-Other-Jurisdictions-Relevant-Criminal-Code-Provisions.pdf [https://perma.cc/VRE4-VQET] (finding that "a majority of jurisdictions treat felony murder as a form of first degree murder" while only, Maine, Alaska, Kentucky, Hawaii, and Pennsylvania "treat felony murder as a lower grade of murder as compared to intentionally or knowingly causing the death of another").

74. *See* RACHEL BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 25–27 (2019); *see also* Serota, *Strict Liability Abolition*, *supra* note 49, at 115 ("Strict liability felony murder statutes punish getaway drivers, lookouts, and general encouragers of offenses like intentional murderers.").

75. MODEL PENAL CODE § 210.2, cmt. 6 ("Lesser culpability yields lesser liability, and a person who inadvertently kills another under circumstances not amounting to negligence is guilty of no crime at all. The felony murder rule contradicts this scheme.").

76. Lockett v. Ohio, 438 U.S. 586, 605 (1978).

77. Enmund v. Florida, 458 U.S. 782, 801 (1982).

78. *Id.* at 798 (quoting H. L. A. HART, *Punishment and the Elimination of Responsibility*, *in* PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 158, 162 (1968)) (holding that the Eighth Amendment does not permit the death penalty for individuals who did not themselves kill, attempt to kill, or intend to kill).

"reckless indifference to human life" for those who had a "major participation in the felony."[79] A majority of U.S. courts have read *Enmund* and *Tison* to permit executions of those who cause death inadvertently — an interpretation that has been described as "overly mechanical" but one which persists.[80]

Proponents of the felony murder doctrine have argued that it deters crime.[81] However, studies attempting to isolate the deterrent effect of the felony murder doctrine have found that its adoption does not correlate with a decrease in either felonies or felony murder.[82] These findings are consistent with studies on the deterrent effect of incarceration more generally.[83] Instead, most studies suggest that compliance with the law is motivated by faith in the fairness and legitimacy of law rather than fear of sanctions[84] and that "proof of guilt" is paramount.[85]

Finally, courts and commentators have more recently begun to focus on the felony murder doctrine's particular impacts on young people, survivors of gender-based violence, and Black and Brown people. Because of their recency, these studies have less prominence than the other aforementioned bodies of scholarship. Multiple studies have shown that youth and emerging adults are disproportionately charged with group-based offenses such as

---

79. *See, e.g.*, *id.*; Tison v. Arizona, 481 U.S. 137, 158–59 (1987) (Brennan, J., dissenting) (excoriating the doctrine as "a living fossil from a legal era in which all felonies were punishable by death").

80. Guyora Binder et al., *Capital Punishment of Unintentional Felony Murder*, 92 NOTRE DAME L. REV. 1141, 1142 (2017).

81. According to Justice Oliver Wendell Holmes, the law should place the punishment on the individual committing the felony as a risk of engaging in such conduct, even when the death is accidental. OLIVER WENDELL HOLMES, THE COMMON LAW 59 (1881).

82. Daniel Ganz, The American Felony Murder Rule: Purpose and Effect (2012) (M.A. honors thesis, University of California Berkeley) (on file with the Fordham Urban Law Journal) (finding no decrease in felony rates for states that adopted the felony murder rule); Anup Malani, Does the Felony-Murder Rule Deter Crime? Evidence from FBI Crime Data (unpublished working paper, 2007) (on file with the Fordham Urban Law Journal) (finding that the felony murder rule does not substantially affect either the overall felony or felony murder rate); *see also* Ian P. Farrell, Moral Judgments and Knowledge about Felony Murder in Colorado: An Empirical Study, SSRN (Sept. 5, 2023) (manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4562486 [https://perma.cc/9QSQ-VARS] (analyzing poll results showing that only a small fraction of respondents were aware of felony murder liability and thus could be deterred by it); Roth & Sundby, *supra* note 27, at 452 ("[T]he felony-murder rule can have no deterrent effect if the felon either does not know how the rules works or does not believe a killing will actually result.").

83. Damon Petrich et al., *Custodial Sanctions and Reoffending: A Meta-Analytic Review*, 50 CRIME & JUST. 353, 353 (2021).

84. TOM TYLER, WHY PEOPLE OBEY THE LAW 57–58, 165–166 (1990); RANDOLPH ROTH, AMERICAN HOMICIDE 9–20, 297–300 (2009); GARY LAFREE, LOSING LEGITIMACY: STREET CRIME AND THE DECLINE OF SOCIAL INSTITUTIONS IN AMERICA 79–81 (1998).

85. Binder & Yankah, *supra* note 19, at 174.

felony murder.[86] Indeed, data from Minnesota and Pennsylvania show that most people convicted of felony murder are under the age of 25,[87] and in some states, the average age of someone with a felony murder conviction is just 18.[88] The doctrine's disproportionate impact on young people has been explained in part by neurodevelopmental evidence demonstrating that they are especially vulnerable to impulsivity and peer pressure and are less likely than older adults to understand the possible consequences of their actions.[89] Youth are also more likely to seek belonging or protection in a group, research shows, especially if they have been exposed to trauma, do not have safety in their homes, or are deprived of resources.[90] "Felony murder laws ignore the cognitive vulnerabilities of youth and emerging adults by assuming that they recognize the remote consequences of their own actions," as well as "those of others in their group," a report from The Sentencing Project recently observed.[91]

There is also evidence that felony murder laws disproportionately criminalize survivors of domestic violence, trafficking, and gender-based violence. Survivors of abuse may be exposed to felony murder charges if they are present during their abusive partner's violence, or in some cases, coerced into participating in criminal conduct.[92] The gendered impact of

---

86. *See, e.g.*, Beth Caldwell, *The Twice Diminished Culpability of Juvenile Accomplices to Felony Murder*, 11 U.C. IRVINE L. REV. 905, 907 (2021) (noting that "an estimated twenty to twenty-six percent of all juveniles prosecuted for murder are charged under felony murder theories"); FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE 152 (1998) (reporting that felony murder theories underly one in five of all juvenile homicides).

87. GHANDNOOSH ET AL., *supra* note 20, at 13.

88. DANIEL TRAUTFIELD, UCLA CTR. FOR STUDY OF WOMEN: STREISAND CTR., SPECIAL CIRCUMSTANCES CONVICTION PROJECT, LIFE WITHOUT PAROLE AND FELONY MURDER SENTENCING IN CALIFORNIA 9 (2023), https://csw.ucla.edu/wp-content/uploads/2023/07/SCCP_Life_Without_Parole_Sentencing.pdf [https://perma.cc/9CLQ-PN74] (stating that in California "[t]he most common age at offense for individuals convicted through felony murder and sentenced to [life without parole] is 18").

89. Stuti Kokkalera et al., *Too Young for the Crime, Yet Old Enough to Do Life: A Critical Review of How State Felony Murder Laws Apply to Juvenile Defendants*, 4 J. CRIM. JUST. & L. 90, 95 (2021).

90. Dawn Delfin McDaniel, *Risk and Protective Factors Associated with Gang Affiliation Among High-Risk Youth: A Public Health Approach*, 18 INJ. PREVENTION 253, 255 (2012).

91. GHANDNOOSH ET AL., *supra* note 20, at 2.

92. Author Caitlin Glass is grateful to Tammy Cooper Garvin, Colby Lenz, and Christina Martinez for sharing insights on this subject during a conversation in Spring of 2023. *See also* Savanna Jones, *Ending Extreme Sentencing Is a Women's Rights Issue*, 23 GEO. J. GENDER & L. 1, 3–4 (2022) (noting that women may be coerced to participate in felony-murder offense due to intimate partner violence and that women may engage in felony conduct to defend themselves from abuse); GHANDNOOSH ET AL., *supra* note 20, at 6 (citing research from the California Coalition for Women Prisoners, showing that "the majority of their members convicted of felony murder were accomplices navigating intimate partner violence at the time of the offense and were criminalized for acts of survival"); Melissa E. Dichter & Sue Osthoff, *Women's Experiences of Abuse as a Risk Factor for Incarceration: A Research Update*,

felony murder also intersects with its racialized impact, discussed in Parts II and III, *infra*, since research shows that Black and Brown survivors of domestic violence are "routinely objectified, overlooked, [have] experienced overt mistreatment, and had their voices minimized by providers within the very systems that were supposed to assist them."[93] Many survivors report that their ability to leave an abusive situation is impacted "by other forms of violence and abandonment, such as police violence, inadequate social services or lack of resources, other gender-based attacks, and/or lack of community or family support."[94] By preventing survivors from leaving abusive situations, these dynamics enhance the risk of exposure to felony murder charges.

2. Rapid Proliferation and Unparalleled Punishment

Although every other common law country has abolished felony murder,[95] the doctrine endures in the United States. Today, 48 states and the federal government still use the doctrine in some form; only Kentucky and Hawaii have abolished it fully.[96]

In 40 states, felony murder convictions carry the harshest available punishment.[97] Twenty-one states allow for a person to be executed for a felony murder conviction if the person was found to be a "major participant" in the felony who acted with a mens rea of "reckless indifference" — far less than the deliberate premeditation generally required for a capital or first-degree murder conviction.[98] In a number of states, felony murder

---

NAT'L ONLINE RES. CTR. ON VIOLENCE AGAINST WOMEN (July 2015), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_IncarcerationUpdate.pdf [https://perma.cc/MQH3-522B] (describing paths from abuse to incarceration, including use of violence in response to abuse or against an abusive partner).

93. *See* Bernadine Y. Waller et al., *Caught in the Crossroad: An Intersectional Examination of African American Women Intimate Partner Violence Survivors' Help Seeking*, 23 TRAUMA VIOLENCE ABUSE 1235, 1244 (2022); *see also* ALISA BIERRIA & COLBY LENZ, SURVIVED & PUNISHED, DEFENDING SELF-DEFENSE: A CALL TO ACTION BY SURVIVED & PUNISHED 25 (Mar. 2022), https://survivedandpunished.org/wp-content/uploads/2022/03/DSD-Report-Mar-21-final.pdf. [https://perma.cc/QHQ7-NGMK].

94. BIERRIA & LENZ, *supra* note 93, at 11.

95. *See, e.g.*, Homicide Act 1957, 5 & 6 Eliz. 2. c. 11 § 1 (Eng. & Wales); Criminal Justice Act 1964 (Act. No. 4/1964) (Ir.); R. v. Martineau [1990] S.C.R. 633 (Can.); Central Government Act, 2023, §§ 299–300 (India).

96. KY. REV. STAT. ANN. § 507.020 (1984); HAW. REV. STAT. § 707-701 (1972).

97. GHANDNOOSH ET AL., *supra* note 20, at 15.

98. The "major participant" and "reckless indifference" requirements for a death-by-execution sentence for felony murder were collectively established by the U.S. Supreme Court in *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987). Notably, Texas's felony murder law appears to impose the death penalty for intentionally taking a life during a felony, but through Texas's "Law of Parties," liability also extends to co-conspirators who lacked intent. *Summary of State Death Penalty Statutes*, DEATH PENALTY

convictions impose mandatory life or life-without-parole sentences. Twenty-four states and the federal government mandate a life-without-parole sentence for at least some felony murder convictions.[99] Ten of these states do so without requiring any mens rea at all related to the killing, meaning that a person who participates in a felony where a death occurs may be automatically sentenced to death in prison even if they did not kill anyone, intend to kill anyone, or foresee the possibility that a death could occur.[100]

INFO. CTR. (2023), https://deathpenaltyinfo.org/facts-and-research/crimes-punishable-by-death/summary-of-state-death-penalty-statutes [https://perma.cc/GU5B-SSR4]; *Texas House Advances Bill to Limit 'Law of Parties' in Capital Cases*, DEATH PENALTY INFO. CTR. (Apr. 21, 2023), https://deathpenaltyinfo.org/news/texas-house-advances-bill-to-limit-law-of-parties-in-capital-case [https://perma.cc/5HKK-6CH9].

99. ARIZ. REV. STAT. ANN. § 13-1105 (2009) (mandatory minimum LWOP for strict liability felony murder); ARK. CODE ANN. § 5-10-101 (West 2024) (mandatory minimum LWOP for capital felony murder, requiring a finding of "extreme indifference to the value of human life"); CAL. PENAL CODE §§ 189, 190.2 (mandatory minimum LWOP where special circumstances is applied, requiring a finding that defendant was a "major participant" who acted with "reckless indifference"); CONN. GEN. STAT. ANN. §§ 53a-54d, 53a-35a(2) (West 2015) (mandating LWOP for certain murders); DEL. CODE. ANN. tit. 11, §§ 636 (West 2013) (mandating LWOP but requiring finding of recklessness); FLA. STAT. ANN. § 782.04(1) (West 2023); FLA. STAT. ANN. § 775.082(1)(a) (West 2019) (mandating LWOP for strict liability felony murder); IDAHO CODE ANN. §§ 18-4003(d), 18-4004, 19-2515(9)(g) (West 2024) (mandating LWOP only where the death penalty is sought but not imposed and where the jury finds an aggravating circumstance); 730 ILL. COMP. STAT. § 5-8-1(a)(1)(c) (West 2024) (mandating LWOP where aggravating circumstances are found); IOWA CODE ANN. § 902.1 (West 2015) (mandatory minimum LWOP for strict liability felony murder); LA. STAT. ANN. § 14:30(C) (2011) (mandatory minimum LWOP for strict liability felony murder, but recognized as unconstitutional in State v. Comeaux, 239 So.3d 920 (3d Cir. 2018)); MASS. GEN. LAWS ANN. ch. 265, §§ 1–2 (West 2024) (mandatory LWOP for first degree murder); Commonwealth v. Brown, 81 N.E.3d 1173, 1191 (Mass. 2017) (Gants, C.J., concurring) (requiring a finding of malice for first degree felony murder); MICH. COMP. LAWS § 750.316(1)(b) (mandating LWOP for first degree murder); People v. Aaron, 299 N.W.2d 304, 326 (Mich. 1980) (requiring a finding of "wanton and willful disregard"); MISS. CODE. ANN. § 97-3-21 (West 2024) (mandatory minimum LWOP for strict liability felony murder); NEB. REV. STAT. ANN. § 28-105 (West 2019) (mandatory minimum LWOP for strict liability felony murder); N.H. REV. STAT. ANN. §§ 630:1-a–b (West 2018) (mandatory LWOP where it is found that the defendant acted knowingly); N.J. STAT. ANN. § 2C:11-3(a)(3), (b)(3) (West 2017) (mandatory LWOP where aggravating circumstances are found); N.M. STAT. ANN. §§ 30-2-1(A)(2), 31-18-14, 31-20A-5 (West 2024) (mandatory aggravating circumstances); N.Y. PENAL LAW § 125.25(5) (McKinney 2019) (mandating LWOP where there is a finding of intent to cause death and limiting to specified sexual felonies); N.C. GEN. STAT. ANN. § 14-17 (West 2023) (mandatory minimum LWOP for strict liability felony murder); OHIO REV. CODE ANN. § 2903.01(B) (West 2011) (mandatory LWOP for aggravated felony murder); 18 PA. STAT. AND CONS. STAT. ANN. § 1102 (West 2012) (mandatory minimum LWOP for strict liability felony murder); S.C. CODE ANN. §§ 16-3-10, 16-3-20(A) (2010) (mandatory minimum LWOP where aggravating circumstances are found); S.D. CODIFIED LAWS § 22-6-1 (2023) (mandatory minimum LWOP for strict liability felony murder); WYO. STAT. ANN. § 6-2-101 (West 2021) (mandatory minimum LWOP for strict liability felony murder).

100. These states are Arizona, Florida, Iowa, Louisiana, Mississippi, Nebraska, North Carolina, Pennsylvania, South Dakota, and Wyoming. *See supra* note 99.

Some state courts and legislatures have limited the scope of their felony murder laws. For example, in 2018 and 2023, respectively, the California and Minnesota legislatures narrowed the felony murder rule for accomplices. To convict an accomplice of felony murder in California, the prosecution must now show that the person was a "major participant" in the underlying felony and acted with "reckless indifference to human life" as to the killing.[101] In Minnesota, only those accomplices who acted "with the intent to cause the death of a human being" may now be convicted of first-degree felony murder, and only those who were "major participants" and acted with "extreme indifference to human life" may be convicted of second-degree felony murder.[102]

In 2017, the Massachusetts Supreme Judicial Court held that first-degree felony murder convictions require proof of malice — *i.e.*, intent to kill, intent to cause grievous bodily harm, or intent to do an act that a reasonable person would have known created a plain and strong likelihood of death.[103] In 2021, the Colorado legislature reduced the applicable sentence for felony murder from mandatory life without parole to 16 to 48 years in prison.[104] Eight states' felony murder laws include an affirmative defense requiring a showing that the defendant did not kill anyone or have any reasonable ground to believe that death or serious injury could occur.[105]

These reforms have mitigated but not eliminated concerns about the felony murder doctrine's imposition of disproportionate punishment. For example, the changes in Massachusetts and Colorado were not retroactive, leaving hundreds of people serving life-without-parole sentences that they would not have received if convicted today.[106] The third prong of

---

101. Cal. S.B. No. 1437, Reg. Sess. 2017–18 (Cal. 2018). A "major participant" is not explicitly defined under California law. *See* People v. Estrada, 904 P.2d 1197, 1201 (1995); People v. Proby, 60 Cal. 4th 922, 933 (1998). However, the California Penal Code requires a mental state for felony murder of "reckless indifference to human life." CAL. PENAL CODE § 190.2(d) (2023) (enacted to bring California law into conformity with the Supreme Court's decision in *Tison v. Arizona*, 481 U.S. 137 (1987)).

102. 2023 Minn. Sess. L. Serv. ch. 52, § 23 (S.F. 2909) (2023).

103. *Brown*, 81 N.E.3d at 1196 (Gants, C.J., concurring).

104. COLO. REV. STAT. § 18-3-102 (2021); S.B. 21-124, 73rd Gen. Assemb., 2021 Reg. Sess. (Colo. 2021).

105. *See* ARK. CODE ANN. § 5-10-101 (West 2024) (Arkansas); COLO. REV. STAT. ANN. § 18-3-103 (West 2021) (Colorado); CONN. GEN. STAT. § 53a-54c (West 2015) (Connecticut); N.J. STAT. ANN. § 2C:11-3(a)(3) (West 2017) (New Jersey); N.Y. PENAL LAW § 125.25(3) (McKinney 2019) (New York); N.D. CENT. CODE ANN. §§ 12.1-16-01(1)(c), 12.1-32-01(1) (West 2019) (North Dakota); OR. REV. STAT. ANN. §§ 163.115(1)(b), (3), (5) (West 2020); OR. REV. STAT. ANN. 163.107(2)(b) (West 2019) (Oregon); WASH. REV. CODE ANN. § 9A.32.030 (1)(c) (West 2015); WASH. REV. CODE ANN. § 9A.20.021(1)(a) (West 2015); WASH. REV. CODE ANN. § 9.94A.540(1)(a) (West 2014) (Washington).

106. *See* Sellers v. People, No. 22SC738, 2023 WL 3479427, at *1 (Colo. May 15, 2023) (granting cert. to determine "[w]hether a life without the possibility of parole sentence for

Massachusetts's malice requirement — intent to do an act that a reasonable person would have known created a plain and strong likelihood of death — also leaves significant room to convict someone of felony murder based solely on their participation in the felony alone, which appears to defeat the purpose of the limiting requirement.[107]

B. The Accomplice Liability Murder Doctrine

1. Imputed Acts and Derivative Guilt

The broad category of "complicity" in criminal law generally refers to the circumstances under which a person who does not personally commit a proscribed harm may nonetheless be held criminally liable for the conduct of another person.[108] Under the umbrella of complicity are two related doctrines. "Accomplice liability" holds a person criminally liable for the conduct of another person if they "assist" that person in committing an offense.[109] A majority of jurisdictions also hold a person who has *conspired* with another criminally liable for the conduct of a co-conspirator who commits a crime in furtherance of their agreement.[110] This Article's focus is accomplice liability.

Accomplice liability is derivative, meaning that an accomplice cannot be guilty of an independent offense of "aiding and abetting."[111] Instead, an accomplice's liability is derived from the primary party or "principal," and the principal's acts become their acts.[112] Most states provide that an

---

felony murder is categorically unconstitutional following the Colorado General Assembly's reclassification of that offense"); Brief of Appellant, Commonwealth v. Shepherd, No. SJC-12405 (Mass. Dec. 27, 2022) (arguing that non-retroactivity of Massachusetts's new felony murder rule violates the Equal Protection Clause of the 14th Amendment).

107. Brief of B.U. Ctr. for Antiracist Rsch., Mass. Assoc. of Crim. Defense Laws., Felony Murder Elimination Project, Nat'l Council for Incarcerated & Formerly Incarcerated Women & Girls, Professor Kat Albrecht & the Sent'g Project as Amici Curiae in Support of Appellant, Commonwealth v. Fisher (Mass. 2023) (No. SJC-13340), https://www.ma-appellatecourts.org/pdf/SJC-13340/SJC-13340_08_Amicus_Boston_University_Brief.pdf. [https://perma.cc/NT55-K689] (arguing that Massachusetts's malice requirement still allows disproportionate punishments for felony murder).

108. *See* DRESSLER, *supra* note 17, at 465.

109. *See, e.g.*, MINN. STAT. § 609.05, subdiv. 1 (2023) (providing that "[a] person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime").

110. *See, e.g.*, MINN. STAT. § 609.175, subdiv. 2 (2023) ("Whoever conspires with another to commit a crime and in furtherance of the conspiracy one or more of the parties does some overt act in furtherance of such conspiracy may be sentenced as follows.").

111. *See generally* Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CALIF. L. REV. 323 (1985).

112. *See* DRESSLER, *supra* note 17, at 450.

accomplice may be convicted of any offense committed by the principal if that offense is the result of the accomplice's intentional assistance.[113]

In its earliest incarnations, accomplice liability was complex and often inconsistent. Jurisdictions distinguished between principals, who were either of the "first degree" or of the "second degree," and "accessories," who were either "before the fact or after the fact."[114] Although the categories were often confusing, accessories were generally treated more leniently than the principal or accomplice at the scene.[115] Professor Joshua Dressler describes these distinctions as "morally counter-intuitive" and "probably empirically indefensible,"[116] and they were largely abandoned in both the United States and abroad. Today, in the overwhelming majority of cases, all parties to crime are held equally liable.

Accomplice liability has generated almost as much scholarly criticism as the felony murder doctrine. Professor Dressler has famously called accomplice liability "a disgrace" because "[i]t treats the accomplice in terms of guilt and potential punishment as if she were the perpetrator, even when her culpability may be less than that of the perpetrator . . . and/or her involvement to the crime is tangential."[117] Sherif Girgis also notes that while "[c]onvicting an accomplice naturally requires inquiry into mens rea and actus reus, . . . the actus reus bar is set remarkably low" because "[i]t is cleared by any words or behavior that count as *aiding* the principal," no matter how minor.[118] Finally, like felony murder, commentators have begun to criticize the racially disparate application of the accomplice liability doctrine. From the Scottsboro boys to the Central Park Five, "[g]roup

---

113. *See, e.g.*, MINN. STAT. § 609.05, subdiv. 2 (2023) ("A person liable under subdivision 1 is also liable for any other crime committed in pursuance of the intended crime if reasonably foreseeable by the person as a probable consequence of committing or attempting to commit the crime intended." (referencing § 609.05, subdiv. 1)).

114. Dressler, *Reassessing*, *supra* note 29, at 94–95; WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 496 (1st ed. 1974).

115. Dressler, *Reassessing*, *supra* note 29, at 95–96.

116. Dressler, *Reassessing*, *supra* note 29, at 96 & n.22 (explaining, for example, that "if an accessory before the fact convinces a weak-willed perpetrator to commit a crime, it is plausible that the accessory is more blameworthy than the primary party").

117. Joshua Dressler, *Reforming Complicity Law: Trivial Assistance as a Lesser Offense?*, 5 OHIO ST. J. CRIM. L. 427, 428 (2007); *see also* Michael Heyman, *Losing All Sense of Just Proportion: The Peculiar Law of Accomplice Liability*, 87 ST. JOHN'S L. REV. 129, 129 (2013) ("[C]omplicity law seems to violate the fundamental precept of personal wrongdoing as a predicate for punishment. And, though it need not, in practice it has with terrible frequency."); G.R. Sullivan, *Doing Without Complicity*, 2012 J. COMMONWEALTH CRIM. L. 199, 199 (complicity law gives rise to "complexity, uncertainty, excessive litigation and, on occasion, injustice").

118. Sherif Girgis, *The Mens Rea of Accomplice Liability: Supporting Intentions*, 123 YALE L.J. 460, 465 (2013).

liability has long had sordid racist overtones," Cohen, Levinson, and Hioki write.[119]

2. Reasonable Foreseeability and Expansive Liability

In the majority of states, accomplice liability allows the State to hold anyone liable who "aids, abets, counsels, commands, induces or procures" a crime committed by another person as if they were the principal.[120] It also allows the State to punish that person as if they were the principal.[121]

Because accomplice liability is contingent on a defendant's assistance to the principal in a crime rather than on their performance of the criminal act themselves, state laws traditionally required prosecutors to prove that the defendant "intended" or had the "purpose" to assist the commission of the crime and for the crime to be committed.[122] However, the requisite mens rea for accomplice liability expanded over time, and approximately 20 states now utilize what is known as the "Natural and Probable Consequences Doctrine," which holds accomplices liable for any "natural and probable consequences of the intended crime."[123] Wayne LaFave and Austin Scott have called this doctrine "inconsistent with more fundamental principles of our system of criminal law" because "[i]t would permit liability to be predicated upon negligence even when the crime involved requires a different state of mind."[124]

An even more controversial approach to accomplice liability is the so-called *Pinkerton* Doctrine, established in the 1946 Supreme Court case *Pinkerton v. United States*, under which accomplices can be convicted of any substantive offenses that are "within the scope" or are "reasonably foresee[able]" as a "necessary or natural consequence" of the group conspiracy.[125] Scholars argue that "*Pinkerton* liability can have an even broader reach than felony murder liability," because it holds accomplices

---

119. Cohen et al., *supra* note 42, at 4 (citing Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933 (2004) (discussing Korematsu v. United States, 323 U.S. 214 (1944))).

120. *See, e.g.*, 18 U.S.C. § 2(a) (1998); *see also* MINN. STAT. § 609.05, subdiv. 1 (2023).

121. *See* DRESSLER, *supra* note 17, at 450.

122. *See* DRESSLER, *supra* note 17, at 449 ("The *mens rea* of accomplice liability is usually described in terms of 'intention.'"); MODEL PENAL CODE §§ 2.06(3)–(4) (AM. L. INST. 1985) (articulating a two-pronged test for the mens rea of accomplice liability: (1) The defendant must have "the purpose of promoting or facilitating the commission of the offense," and (2) with respect to result elements of a crime, the defendant must have acted "with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense").

123. John F. Decker, *The Mental State Requirement for Accomplice Liability in American Criminal Law*, 60 S.C. L. REV. 237, 242 (2008).

124. LAFAVE & SCOTT, *supra* note 114, at 516.

125. 328 U.S. 640, 647–48 (1946).

criminally liable for a principal's crimes "whether or not the defendant had personal knowledge of such offenses or was personally involved in their commission."[126] The federal government and at minimum the 14 states that follow the *Pinkerton* doctrine impose blanket liability on accomplices for all foreseeable offenses committed by their co-conspirators,[127] while other states impose accomplice liability for an offense only where the accomplice shared the principal's intent to commit that offense.[128]

II. RACE AND IMPUTED LIABILITY MURDER IN MINNESOTA

Until recently, just a handful of empirical studies explored the racialized enforcement of imputed liability murder. Focusing almost exclusively on felony murder, they all reached the same conclusion: that even within a criminal legal system rife with racial disparities, the degree to which Black and Brown people are charged with, convicted of, and sentenced to death for felony murder is extreme.[129] Notwithstanding these findings and the extraordinary volume of commentary and criticism on the felony murder and accomplice liability murder doctrines more generally, however, legal scholars have only recently begun to explore the doctrines' racialized impact.[130] This Article adds to this rapidly expanding body of research through a descriptive analysis of all first- and second-degree murder charges and convictions in the state of Minnesota over a ten-year period, from 2010 to 2019. While our initial objective was to develop a general understanding of whether racism plays a role in the prosecution of felony murder in Minnesota, especially robust findings on the racial demographics of accomplice liability murder charges and convictions led to an expansion of its scope. [131] Notably, this study is one of the first to compare levels of racial

126. Cynthia V. Ward, *Criminal Justice Reform and the Centrality of Intent*, 68 VILL. L. REV. 51, 79 (2023).

127. *See, e.g.*, *Pinkerton*, 328 U.S. at 645–48; Bruce A. Antkowiak, *The* Pinkerton *Problem*, 115 PENN. ST. L. REV. 607, 615 n.35 (2011) (identifying the following states as following *Pinkerton*: Arkansas, California, Colorado, Connecticut, Kansas, Florida, Georgia, Nebraska, New Jersey, Maryland, Rhode Island, Texas, Virginia, and Washington, D.C.).

128. *See, e.g.*, MINN. STAT. § 609.05, subdiv. 1 ("A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime.").

129. *See infra* Section II.A.1.

130. *See infra* Section II.A.1.

131. Racial demographic data regarding imputed liability murder charges and convictions provides a starting point for evaluating racism in the prosecution of imputed liability murder offenses. As defined by Karen and Barbara Fields "[t]he term *race* stands for the conception or the doctrine that nature produced humankind in distinct groups, each defined by inborn traits that its members share and that differentiate them from the members of other distinct groups of the same kind but of unequal rank." KAREN E. FIELDS & BARBARA J. FIELDS, RACECRAFT: THE SOUL OF INEQUALITY IN AMERICAN LIFE 16 (2012). Racism, on the other

disproportionately in imputed liability murder prosecutions with levels in direct liability murder prosecutions.

This Part begins with an overview of the existing data and analysis on the racial demographics of felony murder and accomplice liability murder before turning to contextual background information on the racial demographics of Minnesota and its homicide laws. It then describes the process through which data was obtained, cleaned, and validated. Finally, it provides the results of an analysis of this data and a discussion of those results.

A. A Historical Dearth of Data

1. Race and Felony Murder

Data on the racial demographics felony murder charges and convictions has been notoriously hard to obtain because state-level conviction data rarely differentiates between direct liability and imputed liability homicide.[132] Nonetheless, studies have consistently found that felony murder sentences disproportionately affect Black people. This work is rooted in studies of the death penalty, which have long revealed that Black defendants are more likely to be sentenced to death than similarly situated White defendants.[133]

One of the earliest studies was a 1962 analysis of murder convictions in Pennsylvania which found that execution rates were highest among Black defendants convicted of felony murder.[134] Subsequent studies also found that defendants convicted of felony murder were far more likely to be executed if their victim was White. A 1981 study of Florida death row inmates, for example, found that 31% of those arrested for killing White victims were sentenced to death, compared to just 1% of those arrested for

---

hand, "refers to the theory and the practice of applying a social, civic, or legal double standard based on ancestry, and to the ideology surrounding such a double standard." *Id*. at 17. In other words, racism "is an action and a rationale for action, or both at once." *Id*.

132. *See generally* Kat Albrecht & Kaitlyn Filip, *Public Records Aren't Public: Systemic Barriers to Measuring Court Functioning & Equity*, 113 J. CRIM. L. & CRIMINOLOGY 1 (2023) (arguing that, as constitutionally-protected public records, criminal record data should be far more accessible).

133. *See* Kat Albrecht, *Data Transparency & The Disparate Impact of the Felony Murder Rule*, DUKE CTR. FOR FIREARMS L. (Aug. 11, 2020) [hereinafter Albrecht, *Data Transparency*], https://firearmslaw.duke.edu/2020/08/data-transparency-the-disparate-impact-of-the-felonymurder-rule/ [https://perma.cc/XA6V-HCYW] (explaining that "[a] majority of [the] work [on race and felony murder] is grounded in the most severe punishment: the death penalty").

134. Marvin Wolfgang et al., *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. CRIM. L. & CRIMINOLOGY 301, 308 (1962) (finding a 94% execution rate for Black defendants convicted of felony murder).

killing Black victims.[135] Eight years later, an analysis by Richard Rosen cited to the racially disparate imposition of capital punishment in felony murder cases as a basis for abolishing the doctrine or invoking a narrowing requirement to significantly limit its application.[136]

Contemporary studies have made similar findings. A 2020 study in Pennsylvania found that 80% of those incarcerated for felony murder convictions were people of color, and 70% were Black.[137] In Cook County, Illinois, Author Kat Albrecht found that over 80% of the people sentenced under the felony murder doctrine between 2010 and 2020 were Black.[138] The study also found that felony murder charges were either dismissed or pleaded down in 90.5% of cases, a percentage over four times higher than for other murder charges, suggesting that the felony murder doctrine may play an outsized role in plea bargaining.[139] In California, data filed on the public record in evidentiary hearings held under the California Racial Justice Act demonstrated that felony murder "special circumstance"[140] enhancements are more likely when a victim is White.[141] These findings are consistent with other research demonstrating that specific subtypes of felony

135. Hans Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456, 460 (1981); *see also* Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103, 1117–18 (1990) (citing WILLIAM BOWERS ET AL., LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864–1982 230–31 (1984)) (discussing data indicating that 93% of those sentenced to death in Florida for felony murder, 93% of those sentenced in Georgia, and 85% of those sentenced in Texas had white victims).

136. Rosen, *supra* note 135, at 1168–70.

137. Andrea Lindsay, *Life Without Parole for Second-Degree Murder in Pennsylvania: An Objective Assessment of Sentencing*, PHILA. LAWS. FOR SOC. EQUITY, at 11 (2021), https://www.plsephilly.org/wp-content/uploads/2021/01/PLSE-Second-Degree-Murder-Audit-Jan-19-2021.pdf [https://perma.cc/QHQ7-NGMK].

138. Albrecht, *Data Transparency*, *supra* note 133; Kat Albrecht, *The Stickiness of Felony Murder: The Morality of a Murder Charge*, 92 MISS. L.J. 481, 513 (2023) [hereinafter Albrecht, *Stickiness*].

139. Albrecht, *Stickiness*, *supra* note 138, at 504. *See generally* Albrecht, *Data Transparency*, *supra* note 133.

140. California Penal Code § 190.2 delineates the "special circumstances" under which a defendant who is found guilty of first-degree murder must be sentenced to death or life in prison without the possibility of parole. A murder that is "committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit" any one of twelve designated felonies constitutes a "special circumstance" murder. CAL. PENAL CODE § 190.2(a)(17).

141. *See* Exhibit A, *Analysis of Racial Differences in Life Without the Opportunity of Parole Charges in San Francisco County* 9 (2023), California v. Fantasy Decuir, No. 17011544 (on file with author).

murder special circumstance charges, like robbery and burglary, disproportionately affect Black and Hispanic/Latinx defendants.[142]

Notably, two recent studies of felony murder in Minnesota have also found extreme racial disparities in both charges and convictions. A study of second-degree felony murder cases between 2012 and 2018 in Ramsey and Hennepin Counties found that 80% of those convicted were people of color.[143] Author Greg Egan also found that White defendants convicted of second-degree felony murder were more likely to have pleaded down to the charge, while Black defendants convicted of second-degree felony murder were more likely to have been convicted of the most severe offense with which they were charged.[144] Using criminal complaints, Egan then compared the respective facts and outcomes of individual felony murder cases — including comparisons of co-defendants of different races within the same case — and found that "White defendants are frequently punished [more] leniently, while defendants of color receive harsher treatment even when the facts support opposite outcomes."[145] The study illustrates that when it comes to felony murder, prosecutors both charge more defendants of color in situations where White people would not be charged, and bring more serious charges for less serious conduct in cases involving defendants of color.

A 2022 report by the Minnesota Task Force on Aiding and Abetting Felony Murder featured detailed data on the intersection of felony murder and accomplice liability in Minnesota.[146] The report found that Black people and young people in Minnesota are disproportionately affected when the felony murder and accomplice liability murder doctrines are used in combination.[147]

Importantly, legal scholars and national advocacy organizations are now beginning to invoke this universe of data to make normative arguments about the intersection of race and felony murder. Over the last year alone, three articles and one national report have focused in whole or in part on the racialized enforcement of the felony murder doctrine.[148]

---

142. 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, 1442 (2019).

143. Greg Egan, *George Floyd's Legacy: Reforming, Relating, and Rethinking Through Chauvin's Conviction and Appeal Under a Felony-Murder Doctrine Long-Weaponized Against People of Color*, 39 MINN. J.L. & INEQ. 543, 547 (2021).

144. *Id*. at 548.

145. *Id.* at 548–51.

146. *See generally* TURNER, *supra* note 1.

147. TURNER, *supra* note 1, at 12–13.

148. *See*, *e.g.*, Cohen et al., *supra* note 42, at 1 (invoking the results of an original empirical study on race, group liability and felony murder, along with historical data, to argue that

2. Race and Accomplice Liability Murder

Theoretical and empirical analysis of the racial demographics of accomplice liability murder in the United States has been sparse.[149] One of the few studies on race and accomplice liability was conducted over the last year by Ben Cohen, Justin Levinson, and Koichi Hioki. Described in more detail in Section III.C, *infra*, this study involved a simulation in which mock jurors read fact patterns about felony murder cases involving defendants with Black-sounding names, White-sounding names, or Hispanic/Latinx-sounding names and were asked to evaluate the defendants' levels of criminal responsibility and mental states.[150] The authors found that participants demonstrated anti-Black and anti-Latino implicit bias in assigning accomplice liability and general anti-Latino sentiment in assigning culpability.[151]

This research aligns with other international social-scientific and legal analyses criticizing forms of group punishment, like gang enhancements, which disproportionately impact young Black and Brown people.[152] Much of this analysis comes from the United Kingdom, where the doctrine of "joint enterprise" has come under increased scrutiny. Like accomplice liability, joint enterprise allows prosecutors to charge multiple people with the same offense if they shared a "common purpose,"[153] even "where a suspect was not in the proximity of the offence committed."[154] Over the last decade,

---

felony murder and accomplice liability murder "function symbiotically and specifically to heighten racialized punishment"); Binder & Yankah, *supra* note 19, at 225 (arguing that the "strikingly disparate patterns of felony murder charging and conviction recently documented in metropolitan Chicago and Minneapolis, and in Pennsylvania and Colorado, suggest that felony murder is a crime prosecutors have seen little need to punish when committed by whites"); GHANDNOOSH ET AL., *supra* note 20, at 2 (publishing data showing that "felony murder laws have particularly adverse impacts on people of color, young people, and women"); Serota, *Strict Liability Abolition*, *supra* note 49, at 176 (arguing that strict liability felony murder rules expands "the scope of unchecked discretion" and contributes to racial disparities).

149. *See generally* Audrey Rogers, *Accomplice Liability for Unintentional Crimes: Remaining Within the Constraints of Intent*, 31 LOY. L.A. L. REV. 1351, 1351–52 (1998).

150. Cohen et al., *supra* note 42, at 39–41.

151. Cohen et al., *supra* note 42, at 43.

152. Avanindar Singh & Sajid Khan, *A Public Defender Definition of Progressive Prosecution*, 16 STAN. J. C.R. & C.L. 475, 479 (2021).

153. *Secondary Liability: Charging Decisions on Principals and Accessories*, CROWN PROSECUTION SERV. (2018), https://www.cps.gov.uk/legal-guidance/secondary-liability-charging-decisions-principals-and-accessories [https://perma.cc/2KBJ-5WC5].

154. PATRICK WILLIAMS & BECKY CLARKE, CTR. FOR CRIME & JUST. STUD., DANGEROUS ASSOCIATIONS: JOINT ENTERPRISE, GANGS AND RACISM 7 (2016), https://www.crimeandjustice.org.uk/sites/crimeandjustice.org.uk/files/Dangerous%20associations%20Joint%20Enterprise%20gangs%20and%20racism.pdf [https://perma.cc/TKB4-JNQ6].

researchers have documented the "(re)emergence of collective punishment" in the United Kingdom, which coincides with an increased focus on "the perceived problem of the UK gang."[155] Though a lack of official data has hindered research efforts, studies have shown that a disproportionate number of those serving sentences for joint enterprise offenses are Black and Minority Ethnic (BAME) men.[156] A 2015 survey in England and Wales, for example, found that 53% of the 241 incarcerated men who self-identified as "joint enterprise prisoners" were BAME, compared with just 26% of the total prison population and 14% of the general population were BAME.[157] Other studies have demonstrated that "the gang construct is racialised to Black and Brown men" in the United Kingdom and is "significantly more likely to be cited in the prosecution of BAME [joint enterprise] defendants."[158]

B. Race, Homicide, and Incarceration in Minnesota

1. Shifting Demographics

Though Minnesota is a racially homogenous state, its racial demographics are changing rapidly.[159] In 1970, more than 95% of the state population was White and mostly of northern European ancestry.[160] Today, 77.6% of Minnesota's five-million residents identify as White,[161] 7.6% of residents identify as Black or African American, 6.0% identify as Hispanic or Latino, 5.5% identify as Asian, and 1.4% identify as American Indian, Native American or Alaskan Native.[162] Minnesota has large Mexican, Somali, and

155. *Id*. at 5.

156. Susie Hulley et al., *Making Sense of Joint Enterprise for Murder: Legal Legitimacy or Instrumental Acquiescence*, 59 BRIT. J. CRIMINOLOGY 1328, 1328 (2019).

157. WILLIAMS & CLARKE, *supra* note 154, at 12–13, 22 n.1; Hulley et al., *supra* note 156, at 1331.

158. WILLIAMS & CLARKE, *supra* note 154, at 10, 20.

159. Steve Karnowski, *Minnesota Grows a Bit Older, Less White, More Metropolitan*, ASSOCIATED PRESS (Aug. 12, 2021, 6:42 PM), https://apnews.com/article/minnesota-census-2020-628f268881c30f24395138e45bb6b709 [https://perma.cc/Z6BB-3TTC].

160. Susan E. Martin, *Interests and Politics in Sentencing Reform: The Development of Sentencing Guidelines in Minnesota and Pennsylvania*, 29 VILL. L. REV. 21, 28–29 n.22 (1984).

161. *U.S. Census Bureau Quick Facts: Minnesota*, U.S. CENSUS BUREAU (July 1, 2023), https://www.census.gov/quickfacts/MN [https://perma.cc/A4NS-5NSU].

162. *Id*.

Laotian and Hmong communities,[163] which were shaped by sharp increases in immigration during the 1990s and 2000s.[164]

2. Homicide and Sentencing

Minnesota's substantive murder offenses are set forth in the state Criminal Code.[165] While sentences for first-degree murder are mandated by the legislature and included in the Code, sentences for all other criminal offenses are established by the Minnesota Sentencing Guidelines Commission MSGC. In 1980, Minnesota became the first U.S. jurisdiction to adopt legally binding sentencing guidelines promulgated by an appointed commission.[166] Though the state formally abolished parole release, it allows incarcerated persons to reduce their pronounced prison terms by up to one-third.[167] When people are released from prison, they serve a "supervised release term," which resembles traditional parole and is subject to revocation for violation of release conditions.[168]

Minnesota's sentencing guidelines are based on two factors: the severity of the current offense and the individual's criminal history.[169] The recommendations are contained in a two-dimensional grid.[170]

Minnesota has three levels of murder: first-degree murder, second-degree murder, and third-degree murder. First-degree murder in Minnesota is defined as "caus[ing] the death of a human being" under one of the following seven circumstances:

> (1) with premeditation;
>
> (2) while committing or attempting to commit criminal sexual conduct in the first or second degree with force or violence;
>
> (3) while committing or attempting to commit burglary, aggravated robbery, kidnapping, arson, a drive-by shooting, tampering with a witness,

---

163. *Immigration and Language: Key Facts*, MINN. STATE DEMOGRAPHIC CTR., https://mn.gov/admin/demography/data-by-topic/immigration-language/ [https://perma.cc/B566-JRWX] (referring to the American Community Survey Data collected by the U.S. Census Bureau in 2018) (last visited Aug. 14, 2023).

164. *See Population Trends: Foreign Born Population by Birthplace: Minnesota, 1850–2022*, MINN. COMPASS, https://www.mncompass.org/chart/k264/population-trends#1-10779-g [https://perma.cc/C3LW-7QEN] (last visited Aug. 14, 2023).

165. MINN. STAT. ANN. § 609.

166. Richard S. Frase, *What Explains Persistent Racial Disproportionality in Minnesota's Prison and Jail Populations?*, 38 CRIME & JUST. 201, 208 (2009); MINN. STAT. § 244.09 (establishing 11-member Minnesota Sentencing Guidelines Commission).

167. Frase, *supra* note 166, at 208.

168. Frase, *supra* note 166, at 208.

169. MINN. SENT'G GUIDELINES & COMMENT. § 4A (MINN. SENT'G COMM'N 2023).

170. *Id.*

> escape from custody, or the unlawful sale of a controlled substance, and the defendant acted with the intent to cause the death of the victim or another;
>
> (4) if the victim was a peace officer, prosecuting attorney, judge, or corrections officer engaged in the performance of official duties and the defendant acted with the intent to cause the death of the victim or another;
>
> (5) if the victim was a minor killed during the course of child abuse, the defendant had engaged in a past pattern of child abuse upon a child, and the death occurred under circumstances manifesting an extreme indifference to human life;
>
> (6) while committing domestic abuse, if the defendant had engaged in a past pattern of domestic abuse, and the death occurs under circumstances manifesting an extreme indifference to human life; or
>
> (7) while committing, conspiring to commit, or attempting to commit a felony crime to further terrorism and the death occurs under circumstances manifesting an extreme indifference to human life.[171]

All of these offenses are deemed "heinous acts" under Minnesota law.[172] Minnesota law mandates a sentence of life in prison without the possibility of release ("LWOR") for convictions of (1), (2), (4), and (7),[173] and life in prison with the possibility of release after 30 years ("Life") for convictions under (3), (5), and (6).[174] The offenses listed under (2), (3), (5), (6), and (7) are generally considered "first-degree felony murder" offenses, though just the first — causing death while committing criminal sexual conduct — lacks any mens rea.

Second-degree murder in Minnesota is divided into two categories: intentional and unintentional. Second-degree intentional murder is defined as "caus[ing] the death of a human being with intent to effect the death of that person or another, but without premeditation,"[175] while second-degree unintentional murder is defined as "caus[ing] the death of a human being, without intent to effect the death of any person, while committing or attempting to commit a felony offense other than criminal sexual conduct in the first or second degree with force or violence or a drive-by shooting."[176] Both types of offenses carry sentences of imprisonment for not more than 40 years,[177] though the Minnesota Sentencing Guidelines provide ranges of 21.74 to 40 years for second-degree intentional murder and 10.6 to 24 years

171. MINN. STAT. ANN. § 609.185 (West 2023).
172. MINN. STAT. ANN. § 609.106, subdiv. 1 (West 2023).
173. *Id.* at subdiv. 2.
174. MINN. STAT. ANN. § 609.185(a) (West 2023).
175. MINN. STAT. ANN. § 609.19, subdiv. 1(1) (West 2023).
176. *Id.* at subdiv. 2(1).
177. *Id.* at subdivs. 1, 2.

for second-degree unintentional murder.[178] Second-degree unintentional murder in Minnesota is considered "second-degree felony murder," and unlike first-degree felony murder, it requires no proof of malice.

Third-degree murder in Minnesota is defined as causing death "by perpetrating an act eminently dangerous to others and evincing a depraved mind, without regard for human life" or while engaging in the distribution of a controlled substance and punishable by imprisonment of up to 25 years.[179] However, the Minnesota Supreme Court has limited liability under this statute to situations in which a defendant's actions are directed toward multiple people rather than a "particular person."[180]

Minnesota's accomplice liability law is set forth in a single statute, which provides that: "[a] person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime."[181] However, Minnesota is one of the states that has adopted the *Pinkerton* Doctrine and, therefore, extends liability to an accomplice "for any other crime committed in pursuance of the intended crime if reasonably foreseeable by the person as a probable consequence of committing or attempting to commit the crime intended."[182] Minnesota law also allows accomplices to be charged with and convicted of the crime of the principal even though "the person who directly committed it has not been convicted, or has been convicted of some other degree of the crime or of some other crime based on the same act, or if the person is a juvenile who has not been found delinquent for the act."[183]

As discussed in Section I.B, *supra*, Minnesota amended its accomplice liability law in 2023 by limiting first-degree felony murder liability to accomplices who acted "with the intent to cause the death of a human being" and second-degree felony murder liability to accomplices who were "major participant[s]" and acted with "extreme indifference to human life."[184]

---

178. MINN. SENT'G GUIDELINES & COMMENT. § 4A (MINN. SENT'G COMM'N 2023).

179. MINN. STAT. ANN. § 609.195(a) (West 2023).

180. State v. Noor, 964 N.W.2d 424, 438 (Minn. Ct. App. 2021) (holding that "the mental state necessary for depraved-mind murder, Minn. Stat. § 609.195(a), is a generalized indifference to human life and — based on our precedent — cannot exist when the defendant's conduct is directed with particularity at the person who is killed").

181. MINN. STAT. ANN. § 609.05, subdiv. 1 (West 2023).

182. *Id*. at subdiv. 2.

183. *Id*. at subdiv. 4.

184. 2023 Minn. Sess. Law Serv. ch. 52, art. 4, § 3 (West).

3. Race and Incarceration

Minnesota has one of the lowest incarceration rates in the country,[185] but it has an especially high number of people under correctional control. At the beginning of 2021, about 93,000 people in the state were under community supervision — the sixth-highest rate in the nation, according to the Bureau of Justice statistics.[186]

Minnesota also has some of the worst correctional disparities in the country. Though Black Minnesotans make up 7.6% of Minnesota's population, they comprise nearly 36% of the state's prison population.[187] Black/White racial disparities in prison populations are twice the national average,[188] and Black Minnesotans are incarcerated at nearly ten times the rate of White Minnesotans.[189] Racial disparities among those on community supervision programs are also significant. Black Minnesotans make up 19% of those on probation and 26% of those on supervised release.[190]

Scholars have attributed disparities in sentencing and incarceration to a variety of causal factors, including the weight that the State's sentencing guidelines place on criminal history scores.[191] In 2020, the Chair of the Minnesota Sentencing Guidelines Commission addressed the continued disproportionate representation of Black and Indigenous defendants in the Minnesota criminal legal system in blunt terms: "Though I would not expect the proportions to be exactly equal across the three populations, if there were

---

185. As of 2021, there were 8,003 adults incarcerated in Minnesota correctional facilities. This is the fifth lowest in the nation, according to the Bureau of Justice Statistics. *See* E. ANN CARSON, U.S. DEP'T. OF JUST., BUREAU OF JUST. STAT., PRISONERS IN 2021 — STATISTICAL TABLES 8, tbls.11 & 15 (Dec. 2022), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/p21st.pdf [https://perma.cc/MUZ4-G9QK] [hereinafter PRISONERS IN 2021].

186. DANIELLE KAEBLE, PROBATION & PAROLE IN THE UNITED STATES, 2021 19 (Feb. 2023).

187. *Quick Facts: Minnesota*, U.S. CENSUS BUREAU (July 1, 2023), https://www.census.gov/quickfacts/MN [https://perma.cc/D5V3-JPLE]; PRISONERS IN 2021, *supra* note 185, at 47.

188. Frase, *supra* note 166, at 205.

189. ASHLEY NELLIS, THE SENT'G PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITIES IN STATE PRISONS 10 (2021), https://www.sentencingproject.org/app/uploads/2022/08/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf [https://perma.cc/TNT5-3GME].

190. MINN. DEP'T OF CORR., MINN. STATEWIDE PROB. & SUPERVISED RELEASE OUTCOMES 7 (2021), https://mn.gov/doc/assets/2021%20Minnesota%20Statewide%20Probation%20and%20Supervised%20Release%20Outcomes%202017%20Cohort_tcm1089-519633.pdf?sourcePage=/doc/data-publications/research/publications/index.jsp%3Fnull [https://perma.cc/F9SV-AP6P#:~:text=https%3A//perma.cc/F9SV%2DAP6P].

191. Frase, *supra* note 166, at 265.

no bias in the system, I would expect the numbers to be similar. The fact that they are so disproportionate tells us that insidious forces are at work."[192]

Though statewide data on the front end of Minnesota's criminal legal system is more elusive, the Minneapolis Police Department has long been under fire for racially disparate policing practices. In 1993, the Minnesota Supreme Court Task Force on Racial Bias in the Judicial System found that people of color in Hennepin County (which includes Minneapolis) were arrested at vastly disproportionate rates.[193] Nearly 30 years later, a report on policing in Minneapolis by the Minnesota Advisory Committee to the United States Commission on Civil Rights reached similar conclusions, citing a recent study that found that, while the Minneapolis population is 19% Black, 54% of the 16,443 traffic stops made during the 2019–2020 period were of Black motorists.[194] The study also showed that even though 78% of the vehicles searched during these stops belonged to Black motorists and 12% to White motorists, 41% of those arrested for contraband were White, and only 26% were Black. [195] "This suggests a staggering abuse of officer 'probable cause,' a lack of training, and a callous disregard of the negative effects of such stops," the Committee concluded.[196]

Minnesota has also experienced several high-profile police killings of civilians over the last decade.[197] By far, the most widely publicized was the May 25, 2020 murder of George Floyd by Minneapolis Police Officer Derek Chauvin, which sparked an international uprising and reckoning on race and

---

192. Kelly Lyn Mitchell, *Taking Steps to Address Racial Disparities in Sentencing*, 33 FED. SENT'G REP. 1, 1 (2020).

193. MINN. ADVISORY COMM. TO THE U.S. COMM'N ON C.R., CIVIL RIGHTS AND POLICING PRACTICES IN MINNESOTA 5 (2018), https://www.usccr.gov/files/pubs/2018/03-22-MN-Civil-Rights.pdf [https://perma.cc/37DZ-U7CQ].

194. MINN. ADVISORY COMM. TO THE U.S. COMM'N ON C.R., CIVIL RIGHTS IMPLICATIONS OF POLICING (REVISITED) 15 (2022), https://www.usccr.gov/files/2022-12/mn-policing-report-11.2022.pdf [https://perma.cc/AH8Y-SUPM].

195. *Id.* at 16.

196. *Id.*

197. These include the 2015 shooting of Jamar Clark by a Minneapolis police officer in North Minneapolis, Press Release, Off. of Pub. Aff., U.S. Dep't of Just. Federal Officials Decline Prosecution in the Death of Jamar Clark, (June 1, 2016); the 2016 shooting of motorist Philando Castile by a St. Anthony police officer during a traffic stop in a community adjacent to St. Paul, Sharon LaFraniere & Mitch Smith, *Philando Castile Was Pulled Over 49 Times in 13 Years, Often for Minor Infractions*, N.Y. TIMES (July 16, 2016), https://www.nytimes.com/2016/07/17/us/before-philando-castiles-fatal-encounter-a-costly-trail-of-minor-traffic-stops.html; and the 2018 shooting of Justine Damond by a Minneapolis police officer in South Minneapolis, Joey Jackson, *Mohamed Noor's Sentence Raises Uncomfortable Questions About Race*, CNN (Apr. 20, 2021), https://www.cnn.com/2019/05/03/opinions/mohamed-noor-conviction-justine-ruszczyk-death-raises-questions-jackson/index.html [https://perma.cc/ESP3-RCD6].

police brutality.[198] Floyd's murder also prompted both state and federal investigations of the Minneapolis Police Department, culminating in a 2023 report by the U.S. Department of Justice. This report found that "a significant portion" of the nineteen Minneapolis police shootings between January 2016 and August 2022 "were unconstitutional uses of deadly force," during which officers sometimes shot civilians "without first determining whether there was an immediate threat of harm to the officers or others."[199]

C. Data and Methods

The data analyzed in this study consists of two datasets provided by the Minnesota Sentencing Guidelines Commission in 2021.[200] The first set includes more than 50 variables related to all first-degree murder convictions entered between 2001 and 2019, and the second set includes the same information for all second-degree murder convictions entered during the same period.[201] Among the variables captured by the data are the date and county of the offense(s), the race, age, and gender of the defendants, and the charge(s), plea(s), conviction(s), and sentence(s) entered.[202] The data sets were refined to include only those convictions entered between 2010 and 2019, yielding 616 total cases for analysis.[203] Of this subset, 110 were entered as first-degree murder convictions, and 506 constituted second-degree murder convictions.[204] There was some overlap in the two data sets; specifically, some defendants with both first-degree murder charges and

198. *See generally* Muhammed Ah-Hashimi, *The Brazen Daylight Police Murder of George Floyd and the Racist Origin of American Policing*, 20 FOURTH WORLD J. 34 (2021) (discussing the racial legacy of policing in context); Jeremy Pressman & Elannah Devin, *Profile: The Diffusion of Global Protests After George Floyd's Murder*, SOC. MOVEMENT STUD. 1 (2023) (examining how protests unfolded across the globe after the murder of George Floyd); Angela Onwuachi-Willig, *The Trauma of Awakening to Racism: Did the Tragic Killing of George Floyd Result in Cultural Trauma for Whites?*, 58 HOUS. L. REV. 817 (2021) (discussing the broader cultural implications of George Floyd's murder).

199. U.S. DEP'T OF JUST. C.R. DIV. & U.S. ATT'Y'S OFF. DIST. OF MINN. CIV. DIV., INVESTIGATION OF THE CITY OF MINNEAPOLIS AND THE MINNEAPOLIS POLICE DEPARTMENT 11 (2023).

200. MINN. SENT'G GUIDELINES COMM'N, COMPLETED 1ST DEGREE MURDER, 609.185: SENTENCED 2001–2019 (April 2021) (on file with author) [hereinafter First-Degree Spreadsheet 2001–19]; MINN. SENT'G GUIDELINES COMM., COMPLETED 2ND DEGREE MURDER, 609.19: SENTENCED 2001–2019 (April 2021) (on file with author) [hereinafter Second-Degree Spreadsheet 2001–19].

201. First-Degree Spreadsheet 2001–19, *supra* note 200; Second-Degree Spreadsheet 2001–19, *supra* note 200.

202. First-Degree Spreadsheet 2001–19, *supra* note 200; Second-Degree Spreadsheet 2001–19, *supra* note 200.

203. First-Degree Spreadsheet 2001–19, *supra* note 200; Second-Degree Spreadsheet 2001–19, *supra* note 200.

204. First-Degree Spreadsheet 2001–19, *supra* note 200; Second-Degree Spreadsheet 2001–19, *supra* note 200.

second-degree murder convictions were included in the second data set. These cases were identified and accounted for.

To ensure the accuracy of the data, the authors undertook substantial efforts to clean and confirm the data relied upon in this Article. With the help of a trained legal research assistant, the authors manually reviewed the universe of charges for all 616 first- and second-degree murder convictions cross-referenced these charges with publicly available data through the Minnesota Judicial Branch's records database,[205] identified the universe of murder subtypes charged and listed as convictions, placed these charges in a hierarchy, and classified whether or not a defendant was also charged as an accomplice. Because the Minnesota Sentencing Guidelines Commission's data did not include information on whether a defendant was convicted under a theory of accomplice liability, it was necessary to perform a detailed review of charges and convictions in every eligible case. Of the 616 cases, 30 were found to have insufficient charging information which left 586 cases for study. Finally, the authors merged the data from the remaining cases across both data sets into a single spreadsheet for analysis.[206]

Set forth below is the hierarchy of possible murder charges into which each murder subtype was placed. This allowed researchers to classify "top" charges and lesser charges. Using a conceptual combination of punishment severity and mens rea requirements, the definitions and hierarchical order of murder subtype charges relevant to this data are plotted in Figure 1 (below).

205. *Access Case Records, Minnesota District (Trial) Court Case Search*, MINN. JUD. BRANCH, https://www.mncourts.gov/access-case-records.aspx (last visited Jan. 31, 2024).

206. COMBINED 1ST AND 2ND DEGREE MURDER CONVICTIONS: 2010–2019 (2023) (on file with authors).

***Figure 1*: Hierarchy of Murder Charges**

	Murder Subtype	Definition	Sentence
Most Severe	First-Degree Premeditated Murder	Causing death with intent & premeditation	Mandatory LWOR
	First-Degree Felony Murder (all 4 subtypes)	Causing death with intent while committing enumerated felony	Mandatory Life
	Second-Degree Intentional Murder	Causing death with intent	21.75 to 40 years
	Second-Degree Intentional Murder & Second-Degree Felony Murder	Causing death with intent + causing death while committing felony	10.6 to 40 years
Least Severe	Second-Degree Felony Murder	Causing death while committing felony	10.6 to 24 years

D. Results

The primary objective of this study was to assess the racial demographics of imputed liability murder charges and convictions in Minnesota. Our analysis was necessarily limited by a lack of state-wide data on crime commission rates, arrest rates, case declinations, and other relevant charging variables.[207] As a result, findings are probative of levels of racial

207. For a discussion of how a lack of prosecutorial data transparency impedes efforts to identify and mitigate sources of racism, see Caitlin Glass, Kat Albrecht & Perry Moriearty, *Prosecutorial Data Transparency and Data Justice*, ___NW. UNIV. L. REV. __ (forthcoming 2024); *see also* Daniel P. Mears et al., *Offending and Racial and Ethnic Disparities in Criminal Justice: A Conceptual Framework for Guiding Theory and Research and Informing Policy*, 32 J. CONTEMP. CRIM. JUST. 78, 86 (2016) (noting that "few, if any, jurisdictions conduct self-report crime surveys on a regular basis and so know little about the actual prevalence of offending among racial and ethnic groups, much less whether the rates of offending differ after adjusting for age, sex, and exposure to criminogenic conditions"); Robin Olsen et al., *Collecting and Using Data for Prosecutorial Decisionmaking*, URB. INST. (Sept. 2018) (finding significant variation in the amount and types of prosecutorial data collection).

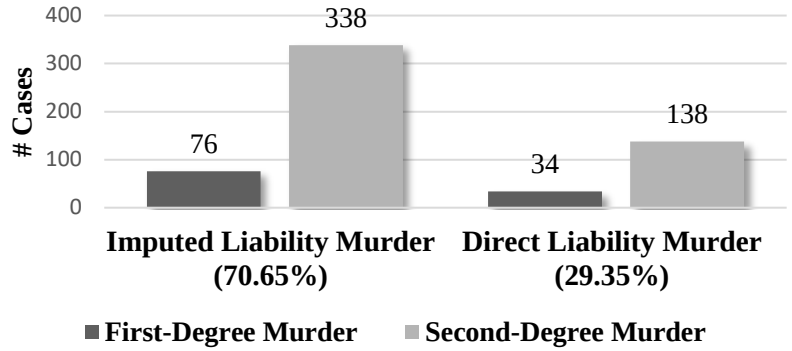
disproportionality in charging and conviction, but cannot, without additional data and more refined analysis, pinpoint the causes of racial disparities.[208]

1. Charging Imputed Liability Murder

Figure 2 (below) depicts the breakdown of imputed liability versus direct liability murder charges in both data sets. "Imputed liability murder" cases were defined as any case in which a defendant was charged with a form of felony murder, accomplice liability murder, or both. "Direct liability murder" cases were defined as any case in which a defendant was charged with first-degree premeditated murder or second-degree intentional murder, charged alone or together.

Notably, 414 of the 586 individuals for whom there was adequate charging information during the ten-year period, or 70.7%, were charged with some type of imputed liability murder. Results further indicate that 352, or 60.1%, of these defendants were charged with some type of felony murder, and 194, or 33.1%, were charged as accomplices. Of the defendants in this study, 214, or 36.5%, were charged with both imputed liability and direct liability murder offenses.

Figure 2:
Imputed Liability vs. Direct Liability Charges
First- and Second-Degree Murder Convictions
(2010-19)



208. *See generally* Mears et al., *supra* note 207, at 78, 87–88 (defining "disparity" as "any disproportionality attributable to overt or covert, or intended or unintended, discrimination against minorities").

2. Race and Imputed Liability Murder

Figure 3 provides a demographic snapshot of murder charge subtypes by race.[209] Of the 616 murder convictions recorded in Minnesota between 2010 and 2019, 315, or 51.1%, of the defendants were Black, 190, or 30.8%, were White, 45, or 7.3%, were Hispanic/Latinx, 46, or 7.5%, were American Indian, and 20, or 3.3%, were Asian. White defendants represented a greater percentage of first-degree murder convictions than second-degree murder convictions, while rates were roughly equivalent for all other racial groups. Notably, after controlling for their relative share of the state population, Black defendants were 17 times more likely to be convicted of murder during this period than White defendants. They were 11.8 times more likely to be convicted of first-degree murder, and 18.5 times more likely to be convicted of second-degree murder.

The data also provided information about the age and gender demographics of those charged with murder during the period. Of the defendants, 90.9% were identified as male, while 9.1% were identified as female.[210] A vast majority of those charged were adults at the time of conviction (93.3%). However, Black defendants were significantly younger on average (av. 27.5) than their White counterparts (av. 33.3).

209. All racial, ethnic, and gender definitions and designations were provided by the Minnesota Sentencing Guidelines Commission.

210. The gender classifications and designations used by the Minnesota Sentencing Guidelines Commission were limited to "male" and "female."

***Figure 3*: Demographics of First- and Second-Degree Murder Charges (2010-2019)**

	All Charges		**First-Degree Murder**		**Second-Degree Murder**	
Race	N	%	N	%	N	%
Black	315	51.1	52	47.3	263	52.0
White	190	30.8	45	40.9	145	28.7
Hispanic	45	7.3	5	4.6	40	7.9
Am. Ind.	46	7.5	4	3.6	42	8.3
Asian	20	3.3	4	3.6	16	3.2
Sex						
Male	560	90.9	101	91.8	459	90.7
Female	56	9.1	9	8.2	47	9.3
Age Status						
Juvenile	41	6.7	5	4.6	36	7.1
Adult	575	93.3	105	95.5	470	92.9
Av. Age						
Black	315	27.5	52	27.9	263	27.5
White	189	33.3	45	33.0	145	33.4

Figure 4 plots a comparison of the racial demographics of the defendants charged with imputed liability murder, direct liability murder, or both. Racial patterns varied significantly by type of murder offense. Black defendants were overrepresented in charges for both direct liability and imputed liability murder relative to their percentage of the general population, but disproportionality was substantially higher for imputed liability murder charges. While 39.3% of those charged with direct liability murder offenses were Black, a staggering 57.4% of the individuals charged with imputed liability murder and 54.9% of charges with both direct liability and imputed liability murder offenses were Black.

This difference of ~18–19% fell in the opposite direction for White defendants. White defendants comprised 42.9% of those charged with direct liability murder, and 37.7% of those charged with both direct liability and imputed liability murder, but only made up 23.5% of those charged with imputed liability murder.

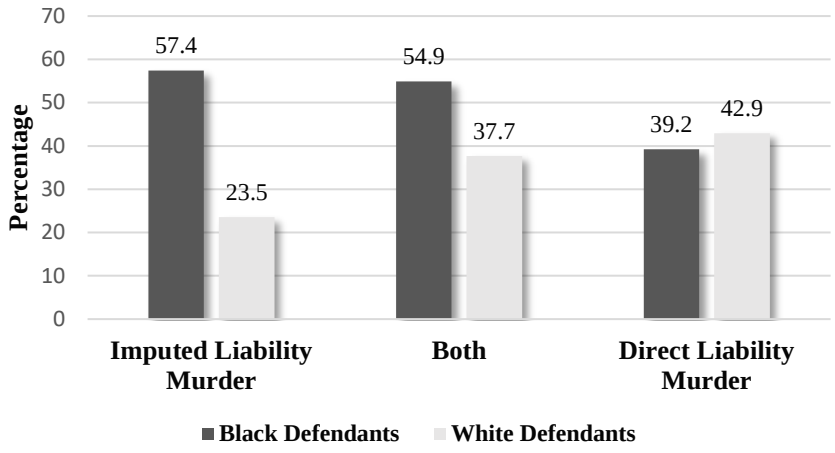
Relative to their percentage of the state population, Black defendants were 9.4 times more likely than White defendants to be charged with direct liability murder, but 25 times more likely to be charged with imputed liability murder. This is preliminary evidence that the doctrines of imputed liability murder and direct liability murder function differently for Black and White defendants.

Figure 4: **Racial Demographics of Imputed Liability Murder vs. Direct Liability Murder Charges (2010-2019)**

	Imputed Liability Murder Only		Direct Liability Murder Only		Both	
Race	N	%	N	%	N	%
Black	166	57.4	64	39.3	67	54.9
White	68	23.5	70	42.9	46	37.7
Hispanic	26	9.0	13	8.0	3	2.5
Am. Ind.	20	6.9	16	9.8	6	4.9
Asian	9	3.1	9	5.5	2	1.6

Figure 5 visualizes these differences.

***Figure 5*:**
Racial Demographics of
Imputed Liability vs. Direct Liability Murder Charges
(2010-19)



All first- and second-degree murder charges were then placed within the hierarchy of murder charges set forth in Figure 1. Though 175 of the 586 defendants had a top charge of first-degree premeditated murder, less than half were ultimately convicted of the offense. Similarly, of the 75 defendants charged with some form of first-degree felony murder, just 25, or a third, were convicted of the charge, while 50, or two-thirds, were convicted of some form of second-degree murder. Conversely, 171 or 73.7%, of the defendants charged with second-degree intentional murder were ultimately convicted of the offense, along with 100% of the 104 defendants charged with second-degree felony murder. These findings support the argument that prosecutors charge defendants with first-degree premeditated murder and first-degree felony murder as leverage to induce pleas to lesser offenses.

***Figure 6*: First- and Second-Degree Murder Charge to Conviction Matrix (2010-19)**

		Top Charge			
		First-Degree Premeditated Murder (n=175)	First-Degree Felony Murder (n=75)	Second-Degree Intentional Murder (n=232)	Second-Degree Felony Murder (n=104)
Top Conviction	First-Degree Premeditated Murder (n=69)	69	0	0	0
	First-Degree Felony Murder (n=40)	15	25	0	0
	Second-Degree Intentional Murder (n=284)	78	35	171	0
	Second-Degree Felony Murder (n=193)	13	15	61	104

Notably, of the 106 defendants who were charged with first-degree premeditated murder but convicted of a lesser offense, 49 (46.2%) were Black, while 45 (42.5%) were White. However, of the 50 defendants who were charged with first-degree felony murder but convicted of a lesser offense, 30 (60%) were Black, while just 11 (22%) were White. Similarly, of the 61 defendants charged with second-degree intentional murder but convicted of second-degree felony murder, 35 (57.4%) were Black, while only 20 (32.8%) were White. These findings suggest that prosecutors are more likely to use first-degree felony murder and second-degree intentional murder charges as bargaining leverage in cases involving Black defendants.

3. Race and Accomplice Liability Murder

Following a rigorous manual review of all eligible cases, a more nuanced review of charging types was then conducted to determine whether defendants were charged as accomplices. Accomplice liability murder charges were then plotted by race. Of the 586 cases with sufficient information for analysis, 194 (33.1%) were classified as accomplice liability murder cases, while 392 (66.9%) were not. As Figures 7a and 7b demonstrate, Black defendants were significantly overrepresented among those with accomplice liability murder charges, but less so among those without such charges. Of the 194 cases, 120 (61.9%) of the defendants were Black, 38 (19.7%) were White, and 36 (18.6%) were a combination of other races/ethnicities. Of the remaining 392 cases, however, 177 (45.2%) of the defendants were Black, 146 (37.2%) were White, and 59 (15.1%) were a combination of other races/ethnicities. Relative to their percentage of the state population, Black defendants were 12.4 times more likely than White defendants to be charged with non-accomplice liability forms of murder, but 32.6 times more likely than White defendants to be charged with accomplice liability murder.

Racial Demographics of Accomplice Liability Murder Charges in Minnesota (2010-19)

Figure 7a:
Accomplice Liability Murder Charges by Race (2010-19) (n=194 Defendants)

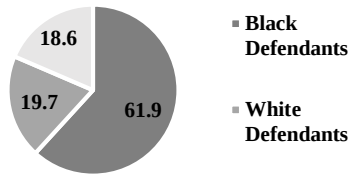
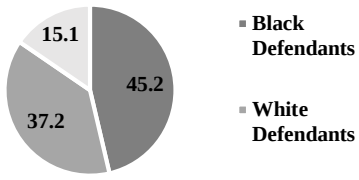


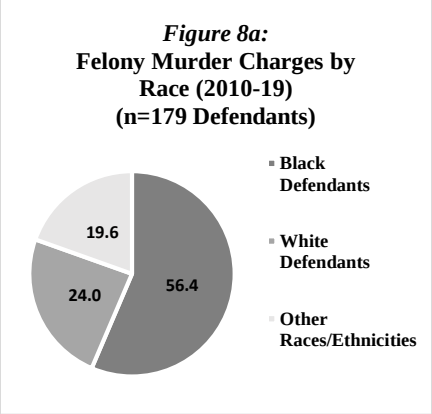
Figure 7b:
All Other Murder Charges by Race (2010-19) (n=392 Defendants)

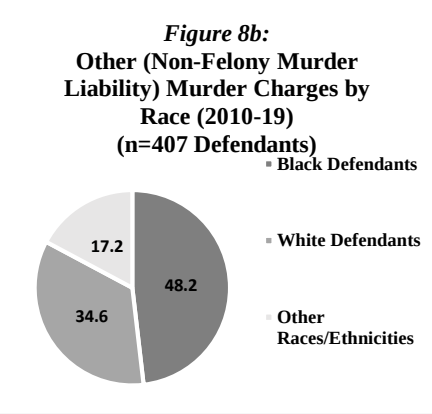


4. Race and Felony Murder

A comparable analysis was then completed on felony murder cases. Of the 586 cases with complete enough information for analysis, 179 (30.5%) had top charges of first- or second-degree felony murder, and 407 (69.5%) did not. As Figures 8a and 8b demonstrate, Black defendants were significantly overrepresented among those with felony murder charges. Of the 179 cases, 101 (56.4%) of the defendants were Black, 42 (24.0%) were White, and 35 (19.6%) were a combination of other races/ethnicities. In the remaining 407 cases, 196 (48.2%) of the defendants were Black, 141 (34.6%) were White, and 70 (17.2%) were a combination of other races/ethnicities.

Relative to their percentage of the state population, Black defendants were 14 times more likely than White defendants to be charged with non-felony murder offenses, but nearly 24 times more likely than White defendants to be charged with felony murder.





5. Race and Imputed Liability Murder Subtypes

Finally, the racial demographics of specific imputed liability murder subtypes were analyzed. Within the category of first-degree felony murder were five subtypes: (a) the "criminal sexual conduct" subtype;[211] (b) the "robbery" subtype;[212] (c) the "domestic violence" subtype;[213] (d) the "child

211. MINN. STAT. ANN. § 609.185(a)(2) (West 2023).
212. *Id.* at § (a)(3).
213. *Id.* at § (a)(5).

abuse" subtype;[214] and (e) the "terrorism" subtype. [215] Just one White defendant was charged with felony murder in the criminal sexual conduct subtype. Nine defendants were charged with (non-accomplice) first-degree felony murder in the robbery subtype category; of these, seven, or 77.8%, were Black, and none were White. Eleven defendants were charged with (non-accomplice) first-degree felony murder in the domestic violence category; of these, six or 54.6%, were Black, two or 18.2%, were White, and three were other races. Ten defendants were charged with (non-accomplice) first-degree felony murder in the child abuse subtype category; of these, three or 30.0%, were Black, and six or 60.0%, were White. No defendants were charged under the terrorism category.

Figure 9a plots all (non-accomplice) first-degree felony murder subtypes identified in the data, quantifying what percentage of charges within that category are assigned to Black defendants, White defendants, or defendants of some other race/ethnicity.

Figure 9a. Distribution of First-Degree Felony Murder Charges by Race (Non-Aiding and Abetting)

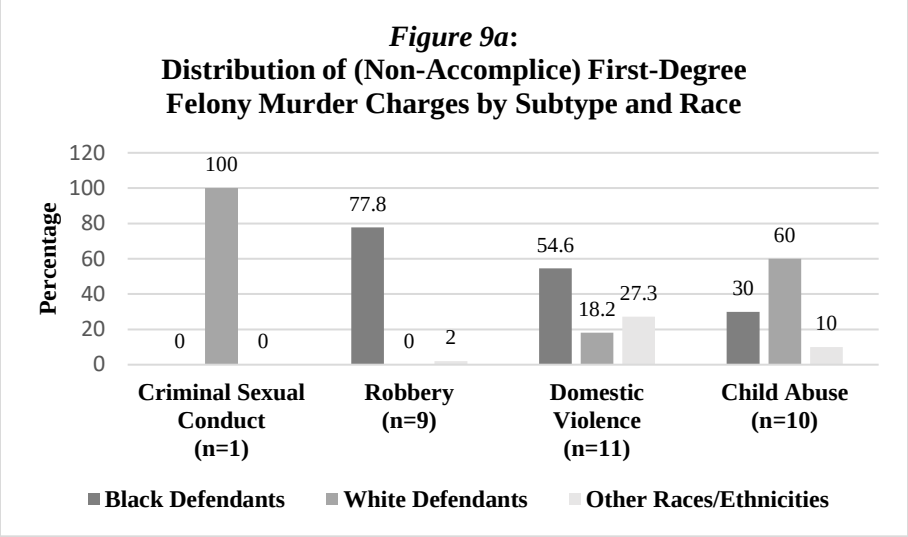
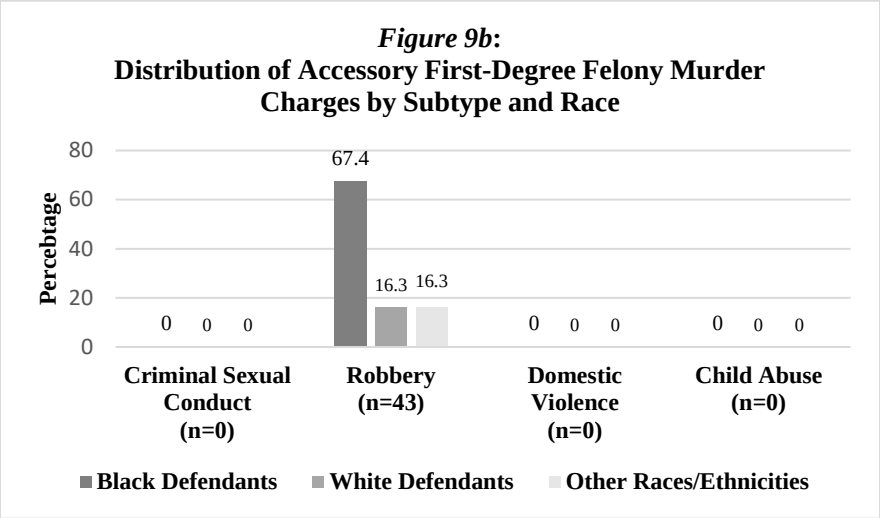


Figure 9b plots the same first-degree felony murder subtypes with accessory charges. Forty-three defendants were charged as accomplices to first-degree felony murder in the robbery subtype category; of these, 29 or

214. *Id.* at § (a)(6).
215. *Id.* at § (a)(7).

67.4%, were Black, seven or 16.3%, were White, and seven were other races. It is especially notable that every single accomplice liability charge is within the robbery subtype. That is, between 2010 and 2019, the state of Minnesota did not charge a defendant as an accomplice to any subtype of first-degree felony murder but the robbery subtype, where Black defendants are vastly overrepresented.

Figure 9b. Distribution of Aiding and Abetting First-Degree Felony Murder Charges



E. Discussion

Backed by careful manual and substantive case review, this descriptive analysis yields several important findings about the racial demographics of those charged with and convicted of felony murder and accomplice liability murder in Minnesota. The theoretical implications of these findings are explored in greater depth in Part III, *infra*, and the substantive findings are discussed below.

Before making meaning of these results, however, it is important to address how the process of data construction in this study might inform future empirical work on felony murder and accomplice liability murder. The data received from the Minnesota Sentencing Guidelines Commission was remarkably complete. It provided information about both the demographics of those charged with and convicted of murder during the relevant period and about the subtypes of the charges and convictions

themselves.[216] This data is substantially more detailed than what is available in other jurisdictions.[217] But even with this comprehensive data, there was still significant manual case inspection and contextual legal expertise needed to add information about top charges and accomplice liability. And perhaps most critically, the Sentencing Guidelines Commission does not have access to what is arguably the most informative data of all: prosecutorial data on who was *not* charged with imputed liability murder and why. As discussed in more detail in Part III.B, *infra*, because this data is notoriously elusive, [218] pinpointing the causes of racial disparities in criminal case outcomes has proven especially difficult.[219]

The substantive findings from this analysis of murder convictions in Minnesota between 2010 and 2019 are equal parts sobering and revealing. Three particular areas stand out: (1) the prevalence of imputed liability murder charges; (2) the racial demographics of imputed liability murder charges versus direct liability murder charges; and (3) the levels of racial disproportionality for specific murder subtypes.

A deceptively simple but deeply important conclusion of this analysis concerns the percentage of all murder charges that were imputed liability murder charges. Imputed liability murder was not treated as a murder subtype reserved for only a narrow set of circumstances and small set of defendants; instead, prosecutors charged some form of imputed liability murder in the vast majority (over 70%) of murder cases in Minnesota during the ten-year period. This belies any notion that imputed liability murder is a more refined or targeted alternative to direct liability murder.

---

216. First-Degree Spreadsheet 2001–19, *supra* note 200; Second-Degree Spreadsheet 2001–19, *supra* note 200.

217. For a discussion on lack of access to data and the burdens of data production for defense counsel when making claims of racial bias or disparity, see generally Kat Albrecht & Kaitlyn Filip, *The Burden of Data: Court Practices Tilting the Scales*, 22 CONTEXTS 70–71 (2023).

218. *See* Shima Baradaran Baughman & Megan S. Wright, *Prosecutors and Mass Incarceration*, 94 S. CAL. L. REV. 1123, 1124–32 (2022) (lamenting the lack of up-to-date empirical research on prosecutorial decisions); Trace C. Vardsveen & Tom R. Tyler, *Elevating Trust in Prosecutors: Enhancing Legitimacy by Increasing Transparency Using a Process-Tracing Approach*, 50 FORDHAM URB. L.J. 1153, 1160, 1163 (characterizing prosecutors as "a relatively inaccessible group of legal authorities" and noting that studies of prosecutorial decision-making are generally limited by what data is publicly available).

219. A forthcoming article from the Authors discusses the lack of prosecutorial data collection as a racial justice issue. *See* Caitlin Glass, Kat Albrecht & Perry Moriearty, *Prosecutorial Data Transparency and Data Justice*, ___ NW. UNIV. L. REV.___(forthcoming 2024); *see also* Joseph J. Avery, *An Uneasy Dance with Data: Racial Bias in Criminal Law*, 93 S. CAL. L. REV. POSTSCRIPT 28, 32–33 (2019) (noting that "without robust data collection, we have no way of knowing when similarly-situated defendants are being treated dissimilarly" and that "there is still a ways to go before prosecutorial data is properly organized and digitized").

Second, the findings revealed that imputed liability murder charges are heavily racialized. Though just 7.6% of Minnesota's population, Black defendants constituted nearly 60% of those charged with imputed liability murder. Black defendants were also overrepresented within the population of those charged with direct liability murder, at 39%, but the degree of overrepresentation was considerably lower. Relative to their percentage of the population of all murder defendants during the period (51%), Black defendants were overrepresented in imputed liability and underrepresented in direct liability murder charges. Patterns fell in the opposite direction for White defendants, who were 77.6% of the state population, 31% of the population of all murder defendants, 43% of direct liability murder charges, and 24% of imputed liability murder charges.

These results can be viewed in two ways: as percentages of overrepresentation of a particular population or as aggregate impact on individuals. Focusing on the raw numbers of people affected becomes especially critical when it comes to crimes and doctrines that are, in and of themselves, highly controversial. Partnered with the sheer number of individuals who were affected by imputed liability murder in Minnesota during the period — more than 414 individuals, 233 or 56.3%, of whom were Black — the data tell a story of a category of crime that in both raw numbers and percentages has become associated with Blackness.

Finally, the results reveal the importance of considering nuances within charge subtypes. For both first-degree and second-degree murder, Black defendants were substantially overrepresented in accessory classifications and specifically in the first-degree felony murder robbery subtypes. Over 60% of those charged with accessory liability murder during the period were Black; over 77% of those charged with first-degree felony murder (robbery) were Black; and 65.7% of those charged as accessories to first-degree felony murder (robbery) were Black. This suggests that Black defendants are disproportionately impacted by the charging of group crimes. It is also notable that the type of felony murder where every single accessory liability case exists is the robbery murder subtype — the canonical and most highly racialized subtype of felony murder.[220] Overall, the results reveal patterns of racial disproportionality in imputed liability murder prosecutions in Minnesota between 2010 and 2019 that substantially disadvantage Black defendants.

220. *See infra* Section III.C.

III. IMPUTED LIABILITY MURDER AND THE AMPLIFICATION OF RACIAL BIAS

Like previous studies on the racial demographics of felony murder and accomplice liability murder, our analysis of ten years of murder prosecutions in Minnesota points to a seminal conclusion: the degree to which Black defendants are charged with and convicted of imputed liability murder is not just extreme in its own right, it is far more extreme than it is in direct liability murder prosecutions. The question is why. This Part begins with a brief overview of the extant research on the sources of racial disproportionality in the criminal legal system, before taking an in-depth look at one of these sources: racial bias in decision-making in individual cases. Subpart B then turns to the nature of prosecutorial decision-making. It makes the case that, because the felony murder and accomplice liability murder doctrines reduce prosecutors' burden to prove the most salient legal indicia of culpability, while simultaneously inviting them to cast a wide net around almost any homicide, imputed liability murder prosecutions are more normative, more subjective, and more likely to be influenced by extra-legal factors than direct liability murder prosecutions. Finally, Subpart C argues that these structural dynamics, along with the racial stereotypicality of the crimes of felony murder and accomplice liability murder themselves, increase the likelihood that multiple forms of racial bias will affect individual charging decisions.

A. Deconstructing Disproportionality

Over the past several decades, hundreds of studies have documented racial and ethnic disparities at multiple stages of criminal legal processing in jurisdictions across the country.[221] What causes these disparities, however,

221. *See, e.g.*, Cassia Spohn, *Race, Crime, and Punishment in the Twentieth and Twenty-First Centuries*, 44 CRIME & JUST. 49, 52 (2015) (documenting racial disparities in multiple areas of criminal processing and punishment); Lynn Langton & Matthew Durose, U.S. DEPT. OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., SPECIAL REPORT: POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS, 2011 1 (2016) (finding that Black motorists were more likely than White or Latinx motorists to have been the target of a traffic stop in the previous year); Robert Brame et al., *Demographic Patterns of Cumulative Arrest Prevalence by Ages 18 and 23*, 60 CRIME & DELINQ. 471, 477 (2014) (finding that police differentially arrest people of different races for the same offenses); David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 306 (2001) (finding that Black and Latinx defendants receive substantially longer sentences than White defendants and are also more likely to be incarcerated); Max Schanzenbach, *Racial and Sex Disparities in Prison Sentences: The Effect of District-Level Judicial Demographics*, 34 J. LEGAL STUD. 57, 72–73 (2005) (finding that Black defendants in federal criminal cases receive sentences that are 2.9 months higher than White defendants, a difference that represents 6% of the average sentence of 48.2 months); Darrel Steffensmeier & Stephen Demuth, *Ethnicity and Judges' Sentencing Decisions: Hispanic-Black-White Comparisons*, 39 CRIMINOLOGY 145, 160 (2001) (finding that White defendants in

has long been the subject of debate. Though scholars differ in the weight they assign to each source, they generally agree that differential involvement, disparate impact, and differential treatment all play a role.

1. Differential Involvement and Differential Treatment

Criminologists have advanced three main explanations for the presence of racial disparities in criminal legal outcomes. The first is that these disparities reflect differential racial involvement in the commission of criminal offenses, which is a product of multiple forms of profound social, economic, educational, and structural inequity.[222] This perspective is often grounded in a seminal 1983 study by Alfred Blumstein, which concluded that up to 80% of the documented disparities in incarceration rates could be attributed to differential rates of offending and arrest.[223] While some subsequent studies confirmed Blumstein's conclusions,[224] his findings have also been challenged by a number of prominent criminologists, who argue that arrest rates are an inappropriate proxy for crime commission rates,[225] the percentage of disparity unexplained by arrest disparities is substantially

---

Pennsylvania are less likely to be incarcerated than Black and Latinx defendants, and also receive shorter sentences).

222. *See, e.g.*, NAT'L ACADS. OF SCIS., REDUCING RACIAL INEQUALITY IN CRIME AND JUSTICE: SCIENCE, PRACTICE, AND POLICY 1–3 (2023) (discussing research on the relationship between racial segregation and early exposure to criminalization); Lisa Stolzenberg et al., *Race and Cumulative Discrimination in the Prosecution of Criminal Defendants*, 3 RACE & JUST. 275, 276 (2013) (noting that "[w]ithin this framework, the legal system is rooted in the logic that criminal laws shape society and regulate human conduct").

223. Using arrest rates for 12 separate violent, property, and drug offenses, Blumstein calculated the portion of the racial disproportionality in prison populations that could be attributed to differential involvement in crime. Alfred Blumstein, *On the Racial Disproportionality of United States' Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259, 1264, 1267 (1982) (arguing that if there were no discrimination in the criminal system, "one would expect to find the racial distribution of prisoners who were sentenced for any particular crime type to be the same as the racial distribution of persons arrested for that crime").

224. *See, e.g.*, Patrick A. Langan, *Racism on Trial: New Evidence to Explain the Racial Composition of Prisons in the United States*, 76 J. CRIM. L. & CRIMINOLOGY 666, 671–73 (1985) (concluding from prison admissions and victimization data on five different offense types that just 20.5 percent of the racial disparity in prison admissions was unexplained by the (perceived) race of the defendant); Spohn, *Race, Crime, and Punishment*, *supra* note 221, at 53 (claiming that "most scholars would contend that [Blumstein's] conclusion is still valid today").

225. *See, e.g.*, Michael Tonry & Matthew Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, *in* 37 CRIME & JUST.: A REVIEW OF RESEARCH 1, 18 (2008) (arguing that, because the proportions of Black defendants arrested for violent offenses has declined at the same time the proportions of Black defendants imprisoned have increased or remained stagnant, arrest rates are not accurate measures of criminal involvement).

larger than 20%,[226] and results vary significantly by jurisdiction.[227] It should be noted that while studies like Blumstein's (that is, those that attribute disparities in incarceration primarily to racial differences in criminal involvement) are often wielded in an effort to disprove the existence of racism in the criminal legal system, they simply do not. On the contrary, these studies arguably align with a structural analysis that attributes racism in the criminal legal system to disinvestment in communities of color and overinvestment in carceral institutions.[228]

The disproportionate incarceration of Black and Brown people is also attributed to the implementation of policies that have racially disparate effects. Michael Tonry and Michelle Alexander, for example, have attributed the sharp increases in racial disproportionality in incarceration in the 1980s and 1990s to policies and practices associated with the Wars on Crime and Drugs, arguing that their architects knew or should have known that these policies would disproportionately harm young Black males.[229] "The fact that more than half of the young black men in many large American cities are currently under the control of the criminal justice system (or

---

226. *See, e.g.*, *id.* at 17–18 (replicating Blumstein's approach at the national level using arrest and prison population data for 2004 and finding that "unexplained disparities" were 38.4% for violent crimes, 38.3% for property crimes, and 57.4% for drug offenses).

227. *See, e.g.*, Darnell Hawkins & Kenneth A. Hardy, *Black-White Imprisonment Rates: A State-by-State Analysis*, 16 SOC. JUST. 75, 79 (1987) (finding through state-by-state analysis that the percentage of racial disproportionality in imprisonment that could be explained by arrest ranged widely and that, in nine states, arrest accounted for 40% or less of the disproportionality in imprisonment and in six states, arrest accounted for more than 80% of the variation); Robert D. Crutchfield et al., *Analytical and Aggregation Biases in Analyses of Imprisonment: Reconciling Discrepancies in Studies of Racial Disparity*, 31 J. RES. CRIME & DELINQ. 166, 170 (1994) (examining each state using Blumstein's approach and finding that, while the 80% estimate was correct as an average, it masked gross differences across the states). Even Blumstein later emphasized that his results did not preclude the existence of racial discrimination in the criminal legal system. Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 750 (1993) (stressing that his earlier findings simply implied that, "the bulk of the racial disproportionality in prison is attributable to differential involvement in arrest, and probably in crime, in those most serious offenses that tend to lead to imprisonment").

228. *See, e.g.*, Rachel Foran et al., *Abolitionist Principles for Prosecutor Organizing: Origins and Next Steps*, 16 STAN. J. C.R. & C.L. 496, 496 (2021) (describing how the "severe investment in policing, surveillance, militarization, and incarceration over the last several decades reflects what Ruth Wilson Gilmore calls 'organized abandonment': deliberate disinvestment in poor communities of color"); Ruth Wilson Gilmore, *What Is to Be Done?*, 63 AM. Q. 245, 257 (2011) (discussing the concept of "organized abandonment").

229. MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA 82, 104 (1995) (attributing racial disparities in the criminal justice system in part to a "calculated effort foreordained to increase [the] percentage" of Black people in prison); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 197 (2010) [hereinafter THE NEW JIM CROW] (noting that "African Americans are not significantly more likely to use or sell prohibited drugs than whites, but they are made criminals at drastically higher rates for precisely the same conduct").

saddled with criminal records) is not — as many argue — just a symptom of poverty or poor choices, but rather evidence of a new racial caste system at work," Alexander argues.[230] While often perceived as natural and rational, decisions about what conduct to punish may themselves be informed by stereotypes and structural inequities.[231] Thus, the supposedly race-neutral enforcement of laws can still contribute to racial disparities where those laws are constructed to target a particular identity or behavior specific to social circumstances, such as poverty.[232]

The final explanation is that racial disparities in criminal legal outcomes are the product of racially biased decision-making at an individual level. Over the last several decades, researchers have conducted hundreds of empirical studies in an effort to isolate evidence of differential treatment at specific decision points. Though these studies vary in theoretical and methodological sophistication,[233] many have found evidence of direct and indirect race effects on criminal legal outcomes.[234] These race effects have

---

230. ALEXANDER, THE NEW JIM CROW, *supra* note 229, at 16.

231. *See Policy Statement 202117: Advancing Public Health Interventions to Address the Harms of the Carceral System*, AM. PUB. HEALTH ASS'N (Oct. 26, 2021), https://www.apha.org/Policies-and-Advocacy/Public-Health-Policy-Statements/Policy-Database/2022/01/07/Advancing-Public-Health-Interventions-to-Address-the-Harms-of-the-Carceral-System [https://perma.cc/98QV-L2JK] (discussing federal, state and local policies through which "certain activities and identities are socially constructed as criminal and that legal ramifications are broadened"); ANDREA J. RITCHIE & BETH E. RICHIE, THE CRISIS OF CRIMINALIZATION: A CALL FOR A COMPREHENSIVE PHILANTHROPIC RESPONSE (2017), https://bcrw.barnard.edu/wp-content/nfs/reports/NFS9-Challenging-Criminalization-Funding-Perspectives.pdf [https://perma.cc/Y4UG-TQ8K] ("While framed as neutral, decisions about what kinds of conduct to punish, how, and how much are very much a choice, guided by existing structures of economic and social inequality based on race, gender, sexuality, disability, and poverty, among others.").

232. *See, e.g.*, NAZGOL GHANDNOOSH, SENTENCING PROJ., ONE IN FIVE: RACIAL DISPARITY IN IMPRISONMENT — CAUSES AND REMEDIES 8–12 (Dec. 2023) (discussing how "[m]yriad criminal legal policies that appear to be race neutral combine with broader socioeconomic patterns to create a disparate racial impact").

233. For a detailed discussion of the "five waves" of research on racial disparities in sentencing, see Spohn, *Race, Crime, and Punishment*, *supra* note 221, at 72–79.

234. *See, e.g.*, David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 STETSON L. REV. 133, 195 (1986) (finding through highly sophisticated multivariate analysis that Black defendants convicted of murdering White victims had a significantly greater likelihood than other defendants of being sentenced to death in Georgia); Stolzenberg et al., *supra* note 222, at 275 (finding "a substantive cumulative racial discriminatory effect" for Black defendants through multivariate and meta-analyses of eight criminal legal decision points); Besiki L. Kutateladze et al., *Cumulative Disadvantage: Examining Racial and Ethnic Disparity in Prosecution and Sentencing*, 52 CRIMINOLOGY 514, 514 (2014) (finding strong evidence of racial and ethnic disparity in pretrial detention, plea offers, and use of incarceration through analysis of a large sample of felony and misdemeanor cases in New York City).

been attributed in part to individual decision-makers' unconscious reliance on racial stereotypes,[235] which are forms of "implicit race biases."[236]

2. The Role of Racial Bias

Deep-seated narratives falsely associating Blackness, violence, and criminality endure as a legacy of slavery and convict leasing, and are further reinforced through persistent racial inequity in the criminal legal system.[237] These narratives produce cognitive biases that can impact decision-making. Over the last two decades, social psychologists have developed indirect ways to measure racial meanings by taking advantage of the automaticity of racial bias through what are called reaction-time studies. Researchers trigger automatic cognitive processes through subliminal exposure to external stimuli, a technique known as "priming," which activates a subject's racial schema without triggering conscious awareness of either the prime or its impact.[238] Subjects are then asked to perform a task. When the prime and the task are consistent with the subject's schema, the subject's response time is faster; when they are inconsistent, it is slower. The time differentials observed are viewed as measurements of an individual's "implicit bias."[239]

A substantial body of research has demonstrated that the activation of "Black-as-criminal" stereotypes results in cognitive bias and negative evaluations and treatment of Black people.[240] In a well-known study of the influence of stereotypic associations on visual processing, for example, Jennifer Eberhardt, Philip Goff, Valerie Purdie, and Paul Davies showed that, when participants were subliminally primed with a Black male face (versus a White male face or no face), they observed the image of a weapon

---

235. *See, e.g.*, Sara Steen et al., *Images of Danger and Culpability: Racial Stereotyping, Case Processing, and Criminal Sentencing*, 43 CRIMINOLOGY 435, 463 (2005) (arguing that "because they lack complete information about individual cases, decision makers form causal attributions for offending and assess dangerousness and culpability by referencing stereotypes"); Jessica Saunders & Greg Midgette, *A Test for Implicit Bias in Discretionary Criminal Justice Decisions*, 47 L. & HUM. BEHAV. 217, 219 (2023) (noting that multiple studies have found universal stereotypes linking Black people with violence, hostility, and danger).

236. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 959–60 (2006).

237. *See, e.g.*, KHALIL JIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 4 (2010).

238. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1505 n.72 (2005) (citations omitted).

239. *Id.* at 1510 ("Tasks in the schema-consistent arrangement should be easier, and so it is for most of us. How much easier . . . provides a measure of implicit bias.").

240. *See, e.g.*, Eberhardt et al., *supra* note 39; Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCH. 526 (2014).

emerging from visual static more quickly.[241] Notably, the same study also showed that priming works in reverse. When participants were primed with images of weapons, they detected Black male faces more readily than White male faces.[242] Researchers concluded that there is an implicit association between Blackness and perceptions of violence.[243] "The overriding theme in this work is that implicit negative stereotypes of black Americans as hostile, violent, and prone to criminality create a lens through which criminal justice actors automatically perpetuate inequality," Robert Smith and Justin Levinson concluded.[244]

Just as aversive stereotypes can contribute to the negative treatment of Black defendants, so can positive stereotypes contribute to the favorable treatment of White defendants, which may also contribute to racial disparities in the criminal legal system.[245] Implicit favoritism — sometimes called "in-group favoritism" — manifests through "attribution error," which involves "systematically discounting the important social, historical, and situational determinants of behavior (in this case, criminal behavior) and correspondingly exaggerating the causal role of dispositional or individual characteristics."[246] The concept of attribution error helps explain how biases shape our understanding of others' behavior — as connected to social context, on the one hand, or as a reflection of individual moral failure and culpability, on the other.[247]

Implicit racial bias has been studied at each stage of the criminal legal process, and evidence of its impact on behavior has been identified in police

241. *See* Eberhardt et al., *supra* note 39, at 876.

242. *See* Eberhardt et al., *supra* note 39, at 876.

243. *See* Eberhardt et al., *supra* note 39, at 876.

244. Smith et al., *supra* note 40, at 874.

245. Smith et al., *supra* note 40, at 873. Thank you to Professor Robert Chang for raising the issue of in-group favoritism during conversations about racism and felony murder.

246. Lynch & Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 MICH. ST. L. REV. 573, 590 (2011); *see also* Smith et al., *supra* note 40, at 899 (discussing social science research showing that "empathy is experienced more for in-group members than out-group members").

247. *See also* Smith et al., *supra* note 40, at 902.

officers,[248] public defenders,[249] judges,[250] and probation officers.[251] As discussed in more depth below, while empirical research on demographic disparities at the prosecution stage is relatively limited, it, too, has documented race effects on decision-making that cannot be explained by race neutral factors.[252]

B. Charging Imputed Liability Murder

Though limited in quantity, the existing theoretical and empirical work on the nature of prosecutorial decision-making suggests that prosecutors' decisions are generally guided by formal evaluations of objective "legal" factors, like the nature of the offense and the relevant evidence, and informal evaluations of subjective "extra-legal" factors, which include the race and ethnicity of the defendant. By reducing the legal elements that prosecutors must prove while allowing them to charge a wide range of defendants with murder, we claim that charging decisions in imputed liability murder cases are necessarily less dependent on the law and the evidence, and more apt to be driven by extra-legal factors, than their direct liability murder counterparts.

---

248. PHILLIP ATIBA GOFF ET AL., CTR. FOR POLICING EQUITY, THE SCIENCE OF JUSTICE RACE, ARRESTS, AND POLICE USE OF FORCE 4 (July 2016) (analyses of 12 law enforcement departments from geographically and demographically diverse locations revealed racial disparities in police use of force persist even when controlling for racial distribution of local arrest rates); Graham & Lowery, *supra* note 40, at 486–87 (documenting the impact of written racial cues on police officers' and juvenile probation officers' judgments about the "culpability, expected recidivism, and deserved punishment" of hypothetical offenders).

249. *See generally* L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. 862 (2017).

250. Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 784 (2001) (reporting on a study of 167 federal magistrate judges, which revealed that they are susceptible to "heuristics" and biases when making decisions).

251. *See, e.g.*, George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554, 567 (1998) (finding that court officials routinely rely on perceived internal attributes of juvenile probationers rather than severity of crime or criminal history); Graham & Lowery, *supra* note 40, at 499 (explaining that disparities in sentencing may be attributable to implicit racial bias and stereotypes).

252. Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2, 7 (2013) (finding, after controlling for the arrest offense, criminal history, and other prior characteristics, a Black-White sentence-length gap of approximately 10%, which "can be explained by the prosecutor's initial charging decision–specifically, the decision to bring a charge carrying a 'mandatory minimum'" and "[a]fter controlling for pre-charge case characteristics, prosecutors in our sample were nearly twice as likely to bring such a charge against black defendants"). *See generally* Smith & Levinson, *supra* note 48 (discussing racial bias in prosecutors).

1. The Anatomy of Discretion

No state actor has more unfettered discretion than prosecutors.[253] They decide whether to charge a defendant,[254] what charges to bring,[255] whether to agree to a plea bargain,[256] and, in many states, what sentences to recommend.[257] Because 95% of criminal cases end in a plea bargain, these decisions often dictate the outcome of a case.[258]

Yet, formal guidance on prosecutorial decision-making is famously lacking. The American Bar Association cautions that "the primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict,"[259] but it does not define "justice," nor does it tell prosecutors what

---

253. ANGELA DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 5 (2007) (noting that prosecutors' "routine, everyday decisions . . . have greater impact and more serious consequences than those of any other criminal justice official," yet "they are totally discretionary and virtually unreviewable"); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 959 (2009) ("No government official has as much unreviewable power or discretion as the prosecutor."); Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1204 (2020) (noting that "[s]cholars view prosecutors as 'the most powerful officials in the criminal justice system,' and blame them for '[m]uch of what is wrong with American criminal justice'").

254. *See generally* Megan S. Wright et al., *Inside the Black Box of Prosecutor Discretion*, 55 U.C. DAVIS L. REV. 2133, 2206 (2022) (examining prosecutors' charging decisions); Samuel J. Levine, *The Potential Utility of Disciplinary Regulation as a Remedy for Abuses of Prosecutorial Discretion*, 12 DUKE J. CONST. L. & PUB. POL'Y 1, 4–5 (2017) (arguing that determining whether or not to bring charges is the most significant aspect of a prosecutor's discretion).

255. *See generally* Craig H. Solomon, *Prosecutorial Vindictiveness: Divergent Lower Court Applications of the Due Process Prohibition*, 50 GEO. WASH. L. REV. 324, 324 (1982) ("Prosecutors enjoy considerable discretion in deciding what charges, if any, to bring against a suspect."); Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071, 1090 (2017) ("[P]rosecutors have the latitude to charge a wide range of crimes and to seek a wide range of penalties as long as the prosecutor believes the charges and sought-after penalties are 'consistent with the nature of the defendant's conduct' or the likelihood of success at trial is high, without regard to the incarceration effect of the charges.").

256. *See generally* Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 425–26 (2008) (describing the significant leverage prosecutors have when making plea bargains); Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1472 (1993) (noting the "substantial power" prosecutors have "to overwhelm criminal defendants in the plea bargaining process").

257. *See* Geoffrey S. Corn & Adam M. Gershowitz, *Imputed Liability for Supervising Prosecutors: Applying the Military Doctrine of Command Responsibility to Reduce Prosecutorial Misconduct*, 14 BERKELEY J. CRIM. L. 395, 399 (2009) (noting that prosecutors hold significant sentencing power both in jurisdictions with determinate sentencing schemes and jurisdictions with indeterminate sentencing schemes).

258. Paul Hofer, *Has Booker Restored Balance? A Look at Data on Plea Bargaining and Sentencing*, 23 FED. SENT'G REP. 326, 327 (2011).

259. The ABA Standards for Criminal Justice add: "The line separating overcharging from the sound exercise of prosecutorial discretion is necessarily a subjective one, but the key consideration is the prosecutor's commitment to the interests of justice, fairly bringing those charges he or she believes are supported by the facts without 'piling on' charges in order to

factors to weigh in seeking it. Similarly, the National District Attorneys Association directs prosecutors to "only file those charges that are consistent with the interests of justice."[260] The NDAA goes on to list 17 factors that "may be considered" in determining whether to charge and 13 factors that "may be relevant" to selecting the precise charge, but it also notes that prosecutors are free to consider unenumerated factors.[261] Indeed, prosecutorial decision-making is so elusive that it is often called the "black box" of criminal justice.[262]

Scholars generally agree, however, that prosecutors' decisions are guided both by formal considerations of "legal" factors, like the strength of the evidence, the nature of the offense, and the defendant's role, and informal considerations of "extra-legal" factors, which can include the race, age, gender, and ethnicity of both the defendant and victim.[263] Two predominant theories have emerged to explain how these factors interact. The first posits that, because prosecutors must make decisions with limited information, they attempt to minimize uncertainty in case outcomes by "managing uncertainty" or engaging in "uncertainty avoidance."[264] As a result, prosecutors are more likely to charge cases where they either can ensure a guilty plea or have confidence that they will prevail at trial.[265]

Building on this framework, the "focal concerns" perspective claims that prosecutors base decisions on three primary considerations: the "blameworthiness" of the defendant; the "dangerousness" of the defendant;

---

unduly leverage an accused to forgo his or her right to trial." AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION 77 (1993) (Section 3-3.9 cmt. 4).

260. NAT'L DIST. ATT'YS ASS'N, NATIONAL PROSECUTION STANDARDS ¶ 4-2.4 (3d ed. 2009).

261. *Id.* ¶ 4-1.3 ("Screening: Factors to Consider"), ¶ 4-2.4 ("Charging: Factors to Consider"). The Standards include another twenty factors, and eleven sub-factors, to consider in negotiating a plea agreement. *Id.* ¶ 6-3.1.

262. *See, e.g.*, Wright et al., *supra* note 254, at 2136 (noting that legal commentators have characterized the lack of prosecutorial transparency as a "black box"); Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125 (2008) (characterizing the lack of prosecutorial transparency as a "Black Box"); Cassia Spohn, *Reflections on the Exercise of Prosecutorial Discretion 50 Years After Publication of The Challenge of Crime in a Free Society*, 17 CRIMINOLOGY & PUB. POL'Y 321, 324 (2018) (noting that "prosecutors' charging and plea bargaining decisions have not been subjected to anything approaching the level of scrutiny directed at judges' sentencing decisions," which "reflects the lack of transparency that characterizes most prosecutor's offices"); Ronald F. Wright et al., *The Many Faces of Prosecution*, 1 STAN. J. CRIM. L. & POL'Y 27, 45 (2014) (lamenting that "archival research [on prosecutors] must live with critical blind spots").

263. *See* BRUCE FREDERICK & DON STEMEN, THE ANATOMY OF DISCRETION: AN ANALYSIS OF PROSECUTORIAL DECISION MAKING — TECHNICAL REPORT iii (Dec. 2012), https://www.ncjrs.gov/ pdffiles1/nij/grants/240334.pdf [https://perma.cc/NH74-RUZ3].

264. Albonetti, *supra* note 38, at 291–313.

265. Albonetti, *supra* note 38, at 291–313.

and the likelihood of securing a conviction.[266] Prosecutors' decision-making begins with legal factors as benchmarks for decisions, theorists contend, but then incorporates attributions about defendants' character and relative risk.[267] When faced with uncertainty, the focal concerns theory hypothesizes that prosecutors employ a "perceptual shorthand," which may include cognitive schemas rooted in stereotypes and attributes about a defendant's relative blameworthiness and dangerousness.[268]

The existing empirical research generally supports the uncertainty management and "focal concerns" perspectives.[269] In their seminal study of charging decisions, plea offers, and sentence recommendations across thousands of cases in two demographically diverse jurisdictions, for example, Bruce Frederick and Don Stemen found that charging decisions were generally guided by two basic questions: "'Can I prove the case?' and 'Should I prove the case?'"[270] The first question turned largely on legal factors, they noted, like the objective "strength of the evidence," while the second was more likely to be influenced by extra-legal factors, including both the defendant's and victim's age, race, and gender.[271]

Viewed as a whole, this research suggests that prosecutors' charging decisions can be divided into two primary phases: a positive, formal phase that is driven by legal factors, and a normative, informal phase that is driven by extra-legal factors. Whether the State *can* charge a particular defendant with a particular crime is likely to be guided by an application of the relevant statutes to the universe of evidence in the State's possession. However, the rigor of even the "legal" phase of charging is necessarily limited by a standard of proof that is notoriously low. Prosecutors need "probable cause" to charge a defendant with a crime, which simply means that it is "more

---

266. Cassia Spohn et al., *Prosecutorial Justifications for Sexual Assault Case Rejection: Guarding the "Gateway to Justice,"* 48 SOC. PROBLEMS 201, 206 (2001); Darrell Steffensmeier & Stephen Demuth, *Ethnicity and Sentencing Outcomes in U.S. Federal Courts: Who is Punished More Harshly?*, 65 AM. SOC. REV. 705, 709 (2000); Darrell Steffensmeier et al., *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black and Male*, 36 CRIMINOLOGY 763, 766–71 (1998).

267. *See generally* Steffensmeier & Demuth, *supra* note 266.

268. Darnell Hawkins, *Causal Attribution and Punishment for Crime*, 2 DEVIANT BEHAV. 207, 222 (1981); Steffensmeier et al., *The Interaction of Race, Gender, and Age in Criminal Sentencing*, *supra* note 266, at 767–68.

269. *See, e.g.*, Spohn et al., *supra* note 266, at 206 (noting that empirical analysis of 1997 charging decisions in sexual assault cases in Miami, Florida and interviews with prosecutors revealed that charging decisions were guided by a set of "'focal concerns' that revolve around reducing uncertainty and securing convictions and that incorporate beliefs about real rapes and legitimate victims").

270. *See* FREDERICK & STEMEN, *supra* note 263, at 3.

271. *See* FREDERICK & STEMEN, *supra* note 263, at 276.

likely than not" that the defendant committed the crime.[272] In practical terms, both the legal inquiry and its attendant evaluation of the evidence can be both abbreviated and superficial.[273] The relative austerity of the legal inquiry therefore magnifies the importance of the normative, extra-legal phase of charging.

2. Imputed Liability Murder in Practice

By definition, imputed liability murder doctrines significantly reduce the State's burden of proof. When prosecutors pursue a conviction for direct liability murder, they must prove through direct or circumstantial evidence that the defendant both: (1) committed an act that caused death; and (2) acted with some form of intent or knowledge.[274] In most states, however, the felony murder doctrine relieves prosecutors of having to prove the second of these elements — an intent to kill[275] — while the accomplice liability murder doctrine relieves them of having to prove the first — an act that caused death.[276] Not having to prove a defendant's mens rea, actus reus, or both means that prosecutors can charge entire groups with imputed liability murder without ever conducting a granular investigation into what any one defendant thought or did.

In other words, imputed liability murder doctrines allow prosecutors to charge more people with murder with less evidence. With fewer legal and evidentiary constraints, the positive "legal" phase of imputed liability murder charging decisions is necessarily more truncated and austere than the legal phase of direct liability murder charging decisions. This magnifies the influence of the normative "extra-legal" phase.

Frida's case provides context. Within days of the November 25, 2008 shooting, Frida was brought into a Minneapolis Police precinct and she described exactly what had happened.[277] Jade had met the victim on a city

---

272. The probable cause standard is "inherently quite minimal." Daniel S. Medwed, *Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution*, 31 CARDOZO L. REV. 2187, 2188 (2010).

273. William Ortman, *Probable Cause Revisited*, 68 STAN. L. REV. 511, 561 (2016) (noting that "a prosecutor need not investigate a matter sufficiently to convince herself of a defendant's guilt before obtaining a formal charge, and thus, usually, a conviction").

274. *See, e.g.*, MINN. STAT. ANN. § 609.185(a)(1) (West 2023) (establishing that whoever "causes the death of a human being with premeditation and with intent to effect the death of the person or of another" is guilty of first-degree murder).

275. *See, e.g.*, FLA. STAT. § 782.04(4) (2023) ("The unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony . . . is murder in the third degree.").

276. *See, e.g.*, MINN. STAT. ANN. § 609.05, subdiv. 1 (West 2023) ("A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime.").

277. *See The First 48*, *supra* note 1, at 34:32–40:00.

bus that day, Frida explained, and the men had decided to lure him to an apartment building and rob him.[278] When the victim entered the building, Frida's boyfriend pointed a gun at him.[279] Frida and Jade ran from the building and were sitting in a car when Frida's boyfriend fired the shot.[280] Shaking as she recounted these events, Frida and Jade explained that the men had threatened her life if she said anything.[281]

When prosecutors received the case from the Minneapolis Police Department, they had a range of charging options. They could have charged 16-year-old Frida with some form of aggravated robbery, for example, and still exposed her to a sentence of up to 20 years in prison.[282] Instead, prosecutors elected to pursue murder charges. Minnesota law presented them with two direct liability murder options: first-degree premeditated murder and second-degree intentional murder. First-degree premeditated murder presented significant legal and evidentiary obstacles, however. It required the State to prove not only that Frida committed an act that caused the victim's death, but also that she acted with "intent" and "considered, planned, prepared for, or determined to commit the act before [she] committed it."[283] Even if there was evidence that Frida had somehow participated in the act of shooting, which she denied, the State still needed to obtain either direct or circumstantial evidence of her subjective mental state not only at the time of the shooting, but presumably before. This would require a more granular examination of Frida's mindset and conduct both during and around the events themselves. Absent a confession, the State could attempt to induce Frida to reveal conversations or acts of preparation, but this would not only require significant investigation and time, it would likely require the State to provide some incentive to cooperate. All of this would mean more time, more legal analysis, more fact investigation, and more uncertainty.

---

278. *See The First 48*, *supra* note 1, at 34:32–40:00.

279. *See The First 48*, *supra* note 1, at 34:32–40:00.

280. *See The First 48*, *supra* note 1, at 34:32–40:00.

281. *See The First 48*, *supra* note 1, at 34:32–40:00.

282. *See* MINN. STAT. ANN. § 609.245, subdiv. 1 (West 1994) ("Whoever, while committing a robbery, is armed with a dangerous weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a dangerous weapon, or inflicts bodily harm upon another, is guilty of aggravated robbery in the first degree and may be sentenced to imprisonment for not more than 20 years or to payment of a fine of not more than $35,000, or both.").

283. *See* MINN. STAT. ANN. § 609.185(a) (West 2023) ("Whoever does any of the following is guilty of murder in the first degree and shall be sentenced to imprisonment for life: (1) causes the death of a human being with premeditation and with intent to effect the death of the person or of another."); 10 Minn. Prac., *Jury Instruction Guides — Criminal*, § 7.01 (7th ed.).

Pursuing a direct liability conviction for second-degree intentional murder was also onerous. It required the State to prove both "intent" and an "act" that caused death.[284] Developing the requisite actus reus would be exceedingly difficult if witnesses supported Frida's claim that she left the building before the shooting.

But the State had two imputed liability murder doctrines at its disposal. Though there was no evidence that Frida fulfilled the actus reus for any form of direct liability murder, Minnesota's "aiding and abetting" statute allowed the State to get around this. Prosecutors could charge any of the four co-defendants with murder without even evaluating their individual roles in the shooting itself. Because Minnesota follows the "*Pinkerton* Doctrine," which imposes accessory liability for any crime "committed in pursuance of the intended crime" as long as it was "reasonably foreseeable,"[285] they simply needed probable cause that Frida had "aid[ed]" or "assist[ed]" the robbery.[286] Minnesota's is among the most expansive definitions in the country, commentators note, because it "holds an individual to the same culpability as a principal for a crime the commission of which the accomplice had no knowledge of or intent to assist in."[287] Prosecutors could charge all four defendants as aiders and abettors and worry about who did what later in the process.

Easier still, the State could couple an accomplice liability charge with a felony murder charge. If prosecutors used aggravated robbery as the underlying felony, they could charge Frida with aiding and abetting first-degree felony murder simply by showing that Frida's boyfriend "cause[d] the death" of the victim while "committing or attempting to commit . . . aggravated robbery," and that he "acted with the purpose of causing death."[288] All they needed was evidence that Frida's boyfriend wielded a gun during a robbery and shot the victim; whether he acted intentionally or recklessly was immaterial. More importantly, the State could charge all four defendants with first-degree murder without any direct

---

284. *See* MINN. STAT. ANN. § 609.19(1) (West 2015) ("Whoever does either of the following is guilty of murder in the second degree and may be sentenced to imprisonment for not more than 40 years: (1) causes the death of a human being with intent to effect the death of that person or another, but without premeditation.").

285. MINN. STAT. ANN. § 609.05, subdiv. 2 (West 2023) expands upon subdivision one: "A person liable under subdivision 1 is also liable for any other crime committed in pursuance of the intended crime if reasonably foreseeable by the person as a probable consequence of committing or attempting to commit the crime intended."

286. MINN. STAT. ANN. § 609.05, subdiv. 1 (West 2023) provides that "[a] person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime."

287. Decker, *supra* note 123, at 243.

288. 10 STEPHEN E. FORESTELL, MINN. PRAC., JURY INSTRUCTION GUIDES — CRIMINAL § 7.04 (7th ed.) (Westlaw 2023).

or circumstantial evidence of their subjective mental states or whether they played any role in the shooting itself. This required far less time and fact investigation than bringing direct liability murder charges and was far more likely to yield a conviction.

Second-degree felony murder was a veritable slam dunk. The State would simply need to prove that one of the co-defendants "cause[d] the death" of the victim "without intent to cause the death of any person, while committing or attempting to commit a felony offense."[289] Like accessory liability, this required little to no legal analysis, additional investigation, or cooperation from the defendants — the State already had all of the evidence it needed from Frida's confession alone.

Ultimately, the State charged all four co-defendants as accomplices to second-degree intentional murder — a charge which carries a maximum sentence of 40 years in prison. Three weeks later, prosecutors indicted all of them as accomplices to first-degree felony murder, which carries a mandatory sentence of life in prison. Though seeking indictments for first-degree felony murder plainly added a layer of legal and evidentiary complexity, it also increased the amount of pressure the State could exert in plea negotiations.[290]

What role did extra-legal factors play in the State's decision? Without documentation of the basis for prosecutors' charging decisions, we can only theorize. However, there is reason to believe prosecutors were influenced by extra-legal factors. Because the legal phase of the State's charging decision was minimal, research suggests that prosecutors' evaluations of Frida's relative culpability were more likely to be based, at least in part, on subjective indicia of her relative "blameworthiness" and "dangerousness." Indeed, the bare fact that prosecutors charged the girls — who did not carry guns and sat in a car during the killing, with the same offenses as their older, male co-defendants, who did — indicates these evaluations were informed by factors other than the evidence itself.

---

289. *Id.* § 7.13.

290. The extent to which prosecutors use the threat of criminal liability and punishment as leverage during plea negotiations to secure outcomes deemed favorable is well-documented. Matthew L. Mizel et al., *Does Mens Rea Matter*?, 2023 WIS. L. REV. 287, 328 (2023); Irene Oritseweyinmi Joe, *Regulating Mass Prosecution*, 53 U.C. DAVIS L. REV. 1175, 1225 (2020); DAVIS, *supra* note 253, at 56–58; William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 520, 528 (2001); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2467, 2470–71 (2004); Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 12 (2010); Scott Hechinger, *How Mandatory Minimums Enable Police Misconduct*, N.Y. TIMES (Sept. 25, 2019), https://www.nytimes.com/2019/09/25/opinion/mandatory-minimum-sentencing.html [https://perma.cc/4NFU-9PQ4] (last visited Jan. 1, 2024, 4:29 PM).

C. Amplifying Bias

There is considerable evidence that the structural dynamics of imputed liability murder prosecutions make them especially susceptible to the influence of racial bias. Not only do the felony murder and accomplice liability murder doctrines invite decision-makers to rely more heavily on extra-legal factors, but research also suggests that they exacerbate the decision-making conditions that are likely to amplify racial bias. The racial stereotypicality of the crimes themselves only compounds this effect.

1. Reduced Burdens, Group Criminality, and Racial Stereotypes

Social psychologists have identified specific situational and ecological conditions that are likely to increase the influence of racial bias on decision-making. They include "disambiguation," which occurs when decisional criteria are uncertain,[291] "cognitive load," which may result when decisions are made quickly or superficially,[292] decisions that involve high levels of discretion or subjectivity,[293] and decisions that are depersonalized or dehumanized.[294] These conditions are likely to be particularly acute in imputed liability murder prosecutions.

By reducing the State's evidentiary burden, the felony murder and accomplice liability doctrines minimize both the granularity and rigor and increase the ambiguity, superficiality, and subjectivity of the State's charging decision. Invited to make normative assessments of a defendant's

---

291. *See, e.g.*, Katherine B. Spencer et al., *Implicit Bias and Policing*, 10 SOC. & PERSONALITY PSYCH. COMPASS 52 (2016) (explaining that implicit biases are most likely to influence judgment and behavior when a situation is ambiguous, because "individuals rely more . . . on prejudice and stereotypes when attempting to resolve uncertain circumstances").

292. *See, e.g.*, Daniel P. Mears et al., *Thinking Fast, Not Slow: How Cognitive Biases May Contribute to Racial Disparities in the Use of Force in Police-Citizen Encounters*, 53 J. CRIM. JUST. 12–24 (2017) (highlighting research demonstrating that when decision-makers "think fast," they are more likely to rely on cognitive shortcuts or heuristics); David A. Pizarro et al., *Ripple Effects in Memory: Judgments of Moral Blame Can Distort Memory for Events*, 34 MEMORY & COGNITION 550, 550 (2006) (observing that "lacking either the cognitive capacity or the motivation to think deeply about a problem often leads to an increased reliance on normatively irrelevant factors, such as the race or the attractiveness of an agent, as a heuristic for judgments across a variety of social domains, including judgments of criminal guilt"); Spencer et al., *supra* note 291, at 52 (explaining that "[w]hen cognitive resources are limited, humans are more likely to be influenced by mental shortcuts like stereotypes to process target information").

293. *See, e.g.*, Saunders & Midgette, *supra* note 235, at 219 ("Racial bias has been shown to affect decisions at many points along the progression of a criminal case, and decisions that have a large subjective component are the most likely to be affected." (internal citations omitted)).

294. *See* Saunders & Midgette, *supra* note 235, at 227 (finding that racial disparities in discretionary decisions by probation officers grew as supervision intensity and in-person contact decreased).

culpability with less law and fewer facts under conditions that allow racial biases to flourish, prosecutors are more likely to base their assessments of a defendant's blameworthiness and dangerousness on "Black-as-criminal" stereotypes.[295] This dynamic, in turn, increases the likelihood that prosecutors will treat Black defendants more punitively.[296]

The doctrines' net-widening effect may also trigger an additional form of racial bias. A recent empirical study by Ben Cohen, Justin Levinson and Koichi Hioki sought to test the hypothesis that the doctrines of felony murder and accomplice liability, working in concert, would amplify the effect of implicit racial bias. Grounding their analysis in the psychological concept of "entitativity," which they defined as "the degree to which a collection of persons are perceived as being bonded together into a coherent unit,"[297] they posited that racial groups with higher levels of entitativity would be perceived by decision-makers to be more "aligned [with one another] in their criminal goals" than those with lower levels of entitativity, and therefore "more likely to be morally culpable for one or more particular offenses."[298] Utilizing an original "Accomplice Liability Implicit Association Test,"[299] with a diverse group of over 500 jury-eligible participants, they found participants were significantly more likely to associate "White" with an individual ("Person") and "Black" and "Latino" with a group ("People").[300] They concluded that criminal legal decision-makers "may possess a psychological baseline whereby Black and Latino defendants are less likely to be viewed as individuals and more likely to be automatically perceived as group members," which leads "decision makers to indifferently impute guilt to Black and Latino defendants based upon mere association."[301] There is reason to believe that prosecutors' automatic "individuation" of White

295. *See, e.g.*, Eberhardt et al., *supra* note 39, at 880, 882, 889–91 (finding that study participants who were primed with crime-related images were more visually attendant to Black faces compared to participants who were not primed, indicating a pre-existing association between the categories of crime and Blackness).

296. *See, e.g.*, Smith et al., *supra* note 40, at 873–74; Graham & Lowery, *supra* note 40, at 483.

297. Cohen et al., *supra* note 42, at 37 (citing Brian Lickel et al., *Varieties of Groups and the Perception of Group Entitativity*, 78 J. PERSONALITY & SOC. PSYCH. 223 (2000)).

298. Cohen et al., *supra* note 42, at 38.

299. The Implicit Association Test or "IAT" is a game-like measure that measures bias by using reaction time differences between a task that seems consistent with some bias, and one that does not. *See* Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCH. 1464, 1464–66 (1998).

300. Cohen et al., *supra* note 42, at 43 ("Participants were significantly more likely to quickly group together Black and Latino names with words associated with groups, such as 'group, pack, crew, them, crowd, folks, bunch,' and white faces with individuality, such as 'individual, self, one, solo, single, somebody, character.'").

301. Cohen et al., *supra* note 42, at 48.

defendants and "de-individuation" of Black defendants influences charging decisions imputed culpability cases.[302]

2. Racial Stereotypicality and Race-Crime Congruency

Finally, the structural dynamics of imputed liability murder doctrines may not be the only driver of racial bias. Even though Minnesota's first-degree felony murder law requires a finding of "intent" — which should theoretically reduce the racially disproportionate impact of the law based on the logic set forth above — our data shows that Black defendants constituted 78% of first-degree felony-murder charges within the robbery subtype. [303] Black defendants also made up 60% of aiding and abetting first-degree premeditated murder charges, but just 42.4% of first-degree premeditated murder charges.[304] This suggests that it is not just the reduced burdens and net widening effects of the felony murder and accomplice liability murder doctrines that drive racially inequitable outcomes. It may be the racial stereotypicality of the crimes themselves.

There is considerable research on the racial construction of "crime." Dorothy Roberts writes:

> Not only is race used in identifying criminals, it is also used in defining crime. In other words, race does more than predict a person's propensity for committing neutrally-defined offenses. Race is built into the normative foundation of the criminal law. Race becomes part of society's determination of what conduct to define as criminal. Crime is actually constructed according to race.[305]

Building on Roberts' work, Kenneth Nunn argues that conduct can become criminalized due to its mere association with Black people.[306] Nunn juxtaposes historical examples of criminalized conduct by racially minoritized groups — "Chinese [people] and [o]pium," "Chicanos with

---

302. Smith et al., *supra* note 40, at 873 (describing studies showing that, "[o]nce activated, these implicit associations can color the real-world behavior of judges and jurors, prosecutors and police, commutation boards, and defense counsel as they make countless decisions across the spectrum of discretionary points in the criminal justice system"). These findings are consistent with an expansive body of research on the historical "dehumanization" of Black people. *See generally* DAVID LIVINGSTONE SMITH, LESS THAN HUMAN: WHY WE DEMEAN, ENSLAVE, AND EXTERMINATE OTHERS (2011).

303. *See supra* Section II.C.

304. *See supra* Section II.C.

305. Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 TUL. L. REV. 1945, 1954 (1993).

306. Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" Was a "War on Blacks,"* 6 J. GENDER RACE & JUST. 381, 413–17 (2002). Nunn uses 'African' and 'Black' interchangeably in his writings; we use Black here for consistency with the current manuscript.

marijuana," and "Black[] [people with crack] cocaine"—with the movement to decriminalize marijuana when use among White youth increased in the 1960s and 1970s.[307]

Empirical research on the "stereotypicality" of specific crimes supports Nunn and Roberts' claims. Studies have shown that Black people are disproportionately associated with armed robbery and murder, while White people are disproportionately associated with embezzlement and fraud.[308] Others have shown that these stereotypes can bias legal decisions.[309] Notably, the congruency between race and crime has been shown to affect the amount and type of information juries request,[310] and recall of the defendant and the case.[311]

There is reason to believe that "group" homicides have become stereotypically "Black crimes" in the minds of not just the public, but also in the minds of those whose job is to charge them. There is also reason to believe that the racial stereotypicality of imputed liability murder affects the extent to which prosecutors use felony murder and accomplice liability murder against Black defendants. This overuse, in turn, leads to normalized use, which creates a feedback loop of sorts. Because prosecutors automatically associate group murder with Black defendants, they disproportionately charge Black defendants with group murder, which further reinforces their racial stereotypes.

IV. REFORM, ENTRENCHMENT, AND ABOLITION

Recent reforms to felony murder and accomplice liability laws illustrate a growing recognition of their moral, constitutional, penological, and equitable infirmities.[312] But while these efforts will certainly bring relief to many, a reformist approach has risks.

In the last several years, states like California, Minnesota, and Massachusetts have begun to revisit aspects of their felony murder and

307. *Id.* at 413–16, 433.

308. *See* Esqueda, *supra* note 44, at 1408, 1410–11, 1414. *See generally* Jeanine Skorinko & Barbara Spellman, *Stereotypic Crimes: How Group-crime Associations Affect Memory and (Sometimes) Verdicts and Sentencing*, 7 VICTIMS & OFFENDERS 278 (2013).

309. *See* Gordon et al., *supra* note 45, at 148–49, 155.

310. *See* Christopher Jones & Martin Kaplan, *The Effects of Racially Stereotypical Crimes on Juror Decision-Making and Information-Processing Strategies*, 25 BASIC AND APPLIED SOC. PSYCH. 1, 7 (2003).

311. *See* Galen Bodenhausen & Meryl Lichtenstein, *Social Stereotypes and Information-Processing Strategies: The Impact of Task Complexity*, 52 J. OF PERSONALITY & SOC. PSYCH. 871, 871 (1987); JOSEPH FRANCIS BOETCHER, RACE STEREOTYPIC CRIMES AND JUROR DECISION MAKING: HISPANIC, BLACK, AND WHITE DEFENDANTS 22, 23, 25–26 (2009).

312. *See supra* Section I.A (citing scholarship addressing these infirmities).

accomplice liability murder doctrines.[313] Focused primarily on shoring the mens rea requirements in felony murder statutes and limiting the liability of accomplices,[314] these reforms align with growing bodies of empirical, theoretical, and doctrinal scholarship on the role of mens rea in the administration of the criminal law. Scholars like Michael Serota have argued that adding culpable mental state requirements to felony murder statutes "could minimize racially disparate enforcement by limiting the scope of unchecked discretion afforded to prosecutors."[315] Serota's perspective aligns with one of this Article's primary claims — that a low burden of proof and broad discretion amplify racial bias.[316] A recent study by Matthew Mizel, Michael Serota, Jonathan Cantor, and Joshua Russell-Fritch adds support to these claims. Examining the impact of a knowledge requirement on the administration of a federal felon-in-possession statute, the study concludes that mens rea can indeed constrain prosecutorial discretion, lower convictions, and reduce punishment.[317]

While in theory a mens rea element should mitigate the racialized impact of imputed liability doctrines, the data presented in this Article paints a more complicated picture. The data analysis discussed above shows that Minnesota's first-degree felony murder law, which *includes an intent element*, still has a stark racially disparate impact with respect to particular felony murder subtypes.[318] In other words, extreme levels of racial disproportionality seem to persist in felony murder and accomplice liability murder cases in Minnesota *despite* a mens rea requirement. Data from other states is consistent with these findings. The population incarcerated for felony murder in Michigan, for example, which has a malice requirement,[319] is on par with the population incarcerated for felony murder in Pennsylvania, which has a strict liability felony murder statute.[320] This suggests that the racialized construction of the doctrines themselves, and State practices normalizing their disproportionate use against Black defendants, may play a

313. *See supra* Section I.B.

314. *See supra* Section I.B.

315. *See, e.g.*, Serota, *Strict Liability Abolition*, *supra* note 49, at 176. *See generally* Benjamin Levin, *Mens Rea Reform and Its Discontents*, 109 J. CRIM. L. & CRIMINOLOGY 491 (2019); Serota, *Proportional Mens Rea and the Future of Criminal Code Reform*, *supra* note 49; Mizel et al., *supra* note 290; Simons, *supra* note 49.

316. See *supra* Sections III.B–C.

317. *See generally* Mizel et al., *supra* note 290.

318. *See supra* Section II.C, figs.9(a)–(b).

319. People v. Aaron, 409 Mich. 672, 728 (1980).

320. Notably, prosecutors in Michigan have reported that it is relatively easy to establish malice in felony murder cases. *See* GHANDNOOSH ET AL., *supra* note 20, at 2, 11; *see also Aaron*, 409 Mich. at 729 (noting abolition of constructive malice "should have little effect on the result of the majority of cases").

more critical role in driving disparities than previously thought. It also suggests that merely raising the State's burden of proof may not be enough to mitigate the racialized enforcement of these doctrines.

There is also a risk that reform at the margins of felony murder and accomplice liability murder doctrines could simply further entrench them without meaningfully addressing their racialized application and disproportionately severe punishments. In the capital punishment context, Justice Blackmun famously announced in 1994 that after two decades of attempting to "develop procedural and substantive rules" to improve the fairness of capital trials and sentencing, he would no longer "tinker with the machinery of death."[321] He observed that "the problems that were pursued down one hole with procedural rules and verbal formulas have come to the surface somewhere else, just as virulent and pernicious as they were in their original form."[322] Indeed, scholars have observed that reform and regulation of the death penalty may have impeded its abolition by supplying a veil of legitimacy and oversight to the practice.[323]

More broadly, a growing number of scholars and activists have argued that criminal legal system reform is generally "superficial and deceptive."[324] This perspective is informed by evidence that the criminal legal system is, in fact, working as it was intended to and is inherently and purposively stacked against the interests of people of color.[325] If our current systems cannot be

---

321. Callins v. Collins, 510 U.S. 1141, 1145 (1994).

322. *Id.* at 1144.

323. *See* Carol S. Steiker & Jordan M. Steiker, *Entrenchment and/or Destabilization – Reflections on (Another) Two Decades of Constitutional Regulation of Capital Punishment*, 30 LAW & INEQ. 211, 236–37 (2012) (noting that the "legal regulation of the death penalty likely contributed to its growth" in the short term, though also may have slowed the use of the death penalty in the long term); William W. Berry III, *American Procedural Exceptionalism: A Deterrent or a Catalyst for Death Penalty Abolition?*, 17 CORNELL J.L. & PUB. POL'Y. 481, 512 (2008) ("Although in many ways the waning of procedural exceptionalism has the potential to restrict and limit the use of capital punishment in the United States, it will at the same time ultimately inhibit the complete abolition of the death penalty in the United States"); Binder & Yankah, *supra* note 19, at 167.

324. *See* Alex Karakatsanis, *The Punishment Bureaucracy: How to Think About Criminal Justice Reform*, 128 YALE L.J. F. 848, 851 (2019); *see also* Amna Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L.J. 2497, 2518–27 (2023) (discussing critiques of reformism).

325. Akbar, *supra* note 324, at 2518–27, 2519 ("Reformism telegraphs to the public that the system, institution, or set of relations it seeks to tweak are here to stay; that the problem is not structural or symptomatic but stray."); Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1426 (2016) ("The Court has sanctioned racially unjust criminal justice practices, creating a system where racially unjust police conduct is both lawful and how the system is supposed to work."); Syrus Ware et al., *It Can't be Fixed Because It's Not Broken: Racism and Disability in the Prison Industrial Complex*, *in* DISABILITY INCARCERATED: IMPRISONMENT & DISABILITY IN THE U.S.

just, fair, or humane, incremental reforms will never be sufficient. "Reform . . . has a pacification effect," Paul Butler has argued. "It calms the natives even when they should not be calm. 'False consciousness' is the term some theorists have used to describe the tendency of liberal reforms to 'dupe[ ]those at the bottom of the social and economic hierarchy' with promises of 'equality, fairness, and neutrality.'"[326] While mens rea reforms might mitigate the harms of imputed liability doctrines, they likely will not meaningfully "unravel . . . the net of social control through criminalization,"[327] or alter the political, economic, and social order.[328]

Collectively, these critiques raise serious questions about the legitimacy and longevity of the felony murder and accomplice liability doctrines. Public support for felony murder and its extreme punishments appears to be waning,[329] in part because the public is beginning to understand that, even without felony murder laws, prosecutors can still bring charges, such as manslaughter, for an unintended death. Additional evidence of the doctrines' racialized enforcement only adds to these concerns.

CONCLUSION

The principles of culpability and proportionality are foundational to the criminal law. Yet, thousands of people in the United States are currently facing execution or life in prison for homicides that they did not intend, anticipate, or cause. They are disproportionately Black. Consistent with studies before it, our study of murder charges and convictions in Minnesota demonstrates that, even within a criminal legal system rife with racial inequity, the rates at which Black defendants are prosecuted for felony murder and accomplice liability murder are astoundingly high. Yet, the racialized impact of two of the most controversial forms of homicide in this country has largely evaded scholarly scrutiny. This Article begins to fill this critical void. Not only does it add to the growing body of research demonstrating that the felony murder and accomplice liability doctrines are

---

AND CAN. 163, 163–84 (Liat Ben-Moshe et al. eds., 2014) (quoting Angela Davis and arguing that criminal legal institutions are designed to reinforce logics of racism and ableism).

326. Butler, *supra* note 325, at 1467.

327. *See* Akbar, *supra* note 324, at 2529–30 (quoting RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 242 (2007)).

328. *See* Akbar, *supra* note 324, at 2527–31 (2023) (distinguishing "non-reformist reforms" as potentially transformative changes, unlike reformist reforms).

329. *See, e.g.*, SUSQUEHANNA POLLING AND RESEARCH, PENNSYLVANIA STATEWIDE OMNIBUS TELEPHONE POLL (Feb. 2023), https://famm.org/wp-content/uploads/Toplines-PAStatewide-Omnibus-FAMM-Feb2023.pdf [https://perma.cc/UYD2-B3VF] (showing that 79% of Pennsylvanians in 2023 supported changing the law requiring mandatory life-without-parole for felony murder in PA).

significant drivers of racial disparities in homicide charges and convictions, it pinpoints some of the ways that the doctrines may exacerbate racial disparities. In doing so, it raises significant questions about the continued legitimacy of not just these doctrines, but of any doctrine that invites decision-makers to impute culpability to people who otherwise lacked it. In the words of some of the felony murder doctrine's most prolific analysts: "That felony murder liability is often undeserved is a reason to narrow it. But that it has been imposed selectively by race is a reason — maybe our best reason — to abolish it altogether."[330] We agree.

330. Binder & Yankah, *supra* note 19, at 167.