

Racially Disparate and Disproportionate Punishment of Felony Murder: Evidence from New York

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ABSTRACT: America's peculiar institution of felony murder liability has long been criticized as cruel and pointless, particularly as applied to defendants who did not kill. This study of felony murder arrest and disposition in New York reports large racial disparities, particularly for those convicted who did not kill. It is one of the first to examine the behavior punished, revealing that half of those convicted were charged as accomplices, not alleged to have killed. Many of those alleged to have caused death appeared to do so inadvertently. And almost thirty percent of all people convicted of felony murder were teens with diminished culpability. Thus, arguably, disproportionate punishment is the norm. The study also reports substantial racial disparities in arrests and convictions for felony murder, and that these were substantially higher among those convicted as accomplices. Finally, the study reveals hundreds of arrests of almost exclusively Black and Latinx people for the fictitious crime of attempted felony murder. In New York, it seems, the worst of felony murder is reserved for defendants of color.

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INTRODUCTION

Felony murder laws impose murder liability for participation in certain felonies that result in death.¹ They have long been criticized as imposing undeserved punishment on people who may have neither killed, intended to kill, or even risked another's death recklessly.² Indeed, the U.S. Supreme Court has barred capital punishment for such defendants.³ Yet felony murder is still punished severely: American homicide sentences are among the longest in the world,⁴ and penalties for felony murder are typically life-maximum sentences, and often life without parole.⁵ People convicted of felony murder serve such sentences for some unlikely deaths.⁶ But the most controversial felony murder prosecutions—featured by journalists and activists—are of individuals who did not kill at all, most commonly because the victim was killed by a co-

1. *Felony Murder Rule*, CORNELL L. SCH., LEGAL INFO. INST., https://www.law.cornell.edu/wex/felony_murder_rule [<https://perma.cc/WKS3-Q8NK>]; see, e.g., N.Y. PENAL LAW § 125.25(3) (McKinney 2020).

2. FOURTH REPORT OF HER MAJESTY'S COMMISSIONERS ON CRIMINAL LAW, at xxviii (London 1839); SECOND REPORT OF HER MAJESTY'S COMMISSIONERS FOR REVISING AND CONSOLIDATING THE CRIMINAL LAW 18 (London 1846); CRIM. CODE B. COMM'N, REPORT OF THE ROYAL COMMISSION APPOINTED TO CONSIDER THE LAW RELATING TO INDICTABLE OFFENCES 23–24 (London 1879) (describing the purpose of proposed reform of “constructive malice” as conforming to requirement of recklessness); BILL TO ESTABLISH CODE OF INDICTABLE OFFENSES AS AMENDED IN COMMITTEE 59–60 (1879) (UK) (identifying Art. 175, “Further Definition of Murder,” to require voluntary infliction of life-threatening injury, administration of “stupefying” drug, or obstructing airways); R. v. Serné, (1887) 16 Cox's Crim. L. Cas. 311 (Cent. Crim. Ct.) 313 (Eng.); O.W. HOLMES, JR., THE COMMON LAW 57–58 (Boston, Little, Brown & Co. 1881); “*Constructive Murder*,” 67 L.J. 450, 450 (1929); MODEL PENAL CODE § 210.2 cmt. 6 at 36–37 (AM. L. INST., Official Draft and Revised Commentaries, Part II 1980); Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 695–97 (1994); H.L. Packer, *Criminal Code Revision*, 23 U. TORONTO L.J. 1, 3–4 (1973); Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 490–91 (1985); Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1499 n.2 (1974).

3. *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (limiting capital punishment to offenses including actual killing or intent to kill); *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (expanding death eligibility to major participants acting with reckless indifference to human life).

4. LILA KAZEMIAN, COUNCIL ON CRIM. JUST., LONG SENTENCES: AN INTERNATIONAL PERSPECTIVE 13 (2022).

5. NAZGOL GHANDNOOSH, EMMA STAMMEN & CONNIE BUDACI, FELONY MURDER: AN ON-RAMP FOR EXTREME SENTENCING 10 (2024), <https://www.sentencingproject.org/app/uploads/2024/05/Felony-Murder-An-On-Ramp-for-Extreme-Sentencing.pdf> [<https://perma.cc/4BX4-Q26B>].

6. *People v. Ingram*, 492 N.E.2d 1220, 1220–21 (N.Y. 1986) (homeowner's heart attack after capturing burglar); *People v. Matos*, 634 N.E.2d 157, 157–58 (N.Y. 1994) (pursuing officer falls off roof); *A Shot Is Fired, a Cop Dies-But Is It Murder?*, CHI. TRIB. (Aug. 8, 2021, 11:59 PM), <https://www.chicagotribune.com/1987/10/30/a-shot-is-fired-a-cop-dies-but-is-it-murder> [<https://perma.cc/VPA3-3VU8>] (officer shoots partner while tackling marijuana suspect); *State v. Colenburg*, 773 S.W.2d 184, 185 (Mo. Ct. App. 1989) (unsupervised toddler darts into path of previously stolen car).

defendant.⁷ Sometimes, even the defendant's connection to the underlying felony is doubtful.⁸ And often such vicarious blame is imposed on teens,⁹ now recognized by the Supreme Court as less culpable than adults.¹⁰

Consternation about felony murder liability for individuals who did not kill is also reflected in survey data. Empirical criminologists have long studied popular views of deserved punishment, finding more consensus on “ordinal desert”—which offenses should be punished more and less severely—than “cardinal desert”—what punishment any particular offense deserves.¹¹ As part of a wider study of empirical desert, Paul Robinson and John Darley examined popular intuitions about punishment for various felony murder scenarios.¹² Their subjects assigned accomplices in fatal felonies far less punishment than

7. See, e.g., Sarah Stillman, *Sentenced to Life for an Accident Miles Away*, NEW YORKER (Dec. 11, 2023), <https://www.newyorker.com/magazine/2023/12/18/felony-murder-laws> (on file with the *Iowa Law Review*); Abbie VanSickle, *If He Didn't Kill Anyone, Why Is It Murder?*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/2018/06/27/us/california-felony-murder.html> (on file with the *Iowa Law Review*); Alison Flowers & Sarah Macaraeg, *Charged with Murder, but They Didn't Kill Anyone—Police Did*, CHI. READER (Aug. 18, 2016), <https://chicagoreader.com/news-politics/charged-with-murder-but-they-didnt-kill-anyone-police-did> [<https://perma.cc/TJU2-T7VE>]; Harrison Keegan, *How You Can Be Convicted of Murder in Missouri Without Killing Anyone*, SPRINGFIELD NEWS-LEADER (Feb. 7, 2019, 9:41 PM), <https://www.news-leader.com/story/news/crime/2019/01/09/missouri-felony-murder-springfield-crime-police-shooting/2450511002> [<https://perma.cc/5H HG-53U2>]; Luke Nozicka, *KC Area Teens Didn't Pull the Trigger but Are Charged with Murder. Is That Justice?*, KAN. CITY STAR (Sept. 22, 2019, 5:00 AM), <https://www.kansascity.com/news/local/crime/article234988842.html> (on file with the *Iowa Law Review*); Jesse Paul, *Colorado Poised to Revisit Murder Law That Can Send People to Prison for Life — Even When They Didn't Kill Anyone*, COLO. SUN (Jan. 6, 2020, 5:10 AM), <https://coloradosun.com/2020/01/06/colorado-felony-murder-law-change-2019> [<https://perma.cc/GHL7-GVER>]; Katie Rose Quandt, *Curtis Brooks Didn't Kill Anyone. So Why Is He Labeled a Murderer for Life?*, APPEAL (Sept. 18, 2018), <https://theappeal.org/curtis-brooks-felony-murder-life-sentence> [<https://perma.cc/9329-LPZE>]; Vinny Vella, *Fanta Bility Was Killed by Police. So Why Were Two Teens Charged?*, PHILA. INQUIRER (Nov. 21, 2021, 5:00 AM), <https://www.inquirer.com/news/fanta-bility-death-transferred-intent-first-degree-murder-20211121.html> (on file with the *Iowa Law Review*); Alexandra Kukulka & Sam Roe, *Who Killed Johnny? A Chicago Officer Shot a Teen in the Back, but the Boy's Accomplice Went to Prison*, USA TODAY (Oct. 28, 2021, 10:12 AM), <https://www.usatoday.com/story/news/nation/2021/10/28/chicago-shooting-controversy-felony-murder-charges/8566769002> [<https://perma.cc/LHC5-2CR2>]; Adam Liptak, *Serving Life for Providing Car to Killers*, N.Y. TIMES (Dec. 4, 2007), <https://www.nytimes.com/2007/12/04/us/04felony.html> (on file with the *Iowa Law Review*).

8. Liptak, *supra* note 7; *Auman v. People*, 109 P.3d 647, 652–53 (Colo. 2005) (en banc).

9. Samantha Michaels, *Police Killed His Friend and Blamed Him. He Got 65 Years in Prison. He Was 15.*, MOTHER JONES (Mar. 21, 2023), <https://www.motherjones.com/criminal-justice/2023/03/police-killed-his-friend-and-blamed-him-he-got-65-years-he-was-15> [<https://perma.cc/5R4 G-62E6>]; VanSickle, *supra* note 7; Vella, *supra* note 7.

10. *Graham v. Florida*, 560 U.S. 48, 72 (2010); *Miller v. Alabama*, 567 U.S. 460, 471–73 (2012).

11. PAUL H. ROBINSON, *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH?* 135–74 (2008); Alice Ristroph, *Desert, Democracy, & Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1303–04 (2006). See generally THORSTEN SELLIN & MARVIN E. WOLFGANG, *THE MEASUREMENT OF DELINQUENCY* (1964) (studying how delinquency and culpability are measured in the law); Peter H. Rossi, Emily Waite, Christine E. Bose & Richard E. Berk, *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 AM. SOC. REV. 224, 224 (1974).

12. PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* 1 (1995).

people who actually killed—only about one-third as much prison time.¹³ Ian Farrell recently surveyed Colorado residents' views of similar felony murder scenarios drawn from Colorado cases.¹⁴ His subjects assigned accomplices about one-fourth as much prison time as the principals in two robbery scenarios¹⁵ and even less in a burglary scenario where the accomplice was not physically present.¹⁶

Based on such evidence, this study treats the imposition of felony murder liability on accomplices who did not kill as controversial and presumptively undeserved. We proceed to investigate how often such presumptively undeserved liability has been imposed and, just as importantly, on whom. Our data is from New York State, where a felony murder reform bill is under legislative consideration.¹⁷

Although any undeserved penalty is one too many, if excessive punishment is frequent, it can also contribute to the increasingly recognized systemic problems of mass incarceration and racial disparity. The United States is uniquely punitive, imprisoning people at higher rates than other societies¹⁸ and with longer sentences.¹⁹ Moreover, highly disproportionate shares of these frequent and severe punishments are suffered by Black Americans,²⁰ further damaging the life prospects of individuals, families, and communities²¹ already diminished by the enduring effects of legally enforced deprivations imposed on previous generations.²² Indeed, some historians attribute mass incarceration

13. *Id.* at 169–81.

14. Ian P. Farrell, *Moral Judgments and Knowledge About Felony Murder in Colorado: An Empirical Study 1* (Sept. 25, 2023) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4562486 (on file with the *Iowa Law Review*).

15. *Id.* at 3–5, 9.

16. *Id.* at 9.

17. Assemb. B. 2899, 2023–2024 Leg., Reg. Sess. (N.Y. 2023); S.B. 6865, 2023–2024 Leg., Reg. Sess. (N.Y. 2023).

18. See JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, *CRIMINAL LAW: CASES AND MATERIALS* 19–20 (2021); ASHLEY NELLIS, SENT'G PROJECT, *MASS INCARCERATION TRENDS* 3–4 (2024), <https://www.sentencingproject.org/app/uploads/2024/05/Mass-Incarceration-Trend-s.pdf> [<https://perma.cc/2XGQ-C67W>].

19. KAZEMIAN, *supra* note 4, at 13.

20. NELLIS, *supra* note 18, at 6 (showing Black men face an imprisonment rate six times as high as white men, while Latinx men face an imprisonment rate 2.5 times as high); Marc Mauer, *The Endurance of Racial Disparity in the Criminal Justice System*, in *POLICING THE BLACK MAN* 31, 37–40 (Angela J. Davis ed., 2017).

21. See BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* 83–167 (2006) (describing post-prison inequalities in employment, family outcomes, and other areas of life for Black Americans).

22. See generally RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017) (exploring how government policies systemically created segregation in American cities); Susan M. Wachter & Isaac F. Megbolugbe, *Racial and Ethnic Disparities in Homeownership*, 3 HOUS. POL'Y DEBATE 333 (2010) (providing a model for understanding racial disparities in homeownership); Lukas Althoff & Hugo Reichardt, *Jim Crow and Black Economic Progress After Slavery*, 139 Q.J. ECON. 2279 (2024) (analyzing the effects of racial oppression on Black families' economic outcomes and calculating the particular economic effects of Jim Crow laws).

primarily to a racially-motivated “War on Crime.”²³ This context of concern about the severity, scale, and demographic distribution of punishment has inspired recent felony murder reforms passed in California, Illinois, Colorado, and Minnesota.²⁴ All these reforms targeted punishment of defendants who do not kill,²⁵ with California and Minnesota eliminating felony murder liability for individuals who do not kill or recklessly risk death.²⁶

To assess such systemic effects, it is important to know the scope and impact of felony murder liability. Very long prison sentences, like those imposed for felony murder, have an outsized influence on the scale and distribution of punishment. Nationwide, one-seventh of the imprisoned population at any

23. KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 11, 96–97 (1997); ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 64–95 (2016); ELIZABETH HINTON, AMERICA ON FIRE: THE UNTOLD STORY OF POLICE VIOLENCE AND BLACK REBELLION SINCE THE 1960s, at 8–25 (2021); Matthew D. Lassiter, *II. Liberal War on Crime, 1964-1966*, POLICING & SOC. JUST. HISTORYLAB, DET. UNDER FIRE (2021), <https://policing.umhistorylabs.lsa.umich.edu/s/detroitunderfire/page/1964-1966> [<https://perma.cc/6ZXU-GZ3B>]. See generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (describing racial disparities at all stages of the criminal justice process and interpreting the disparities as retaliation against civil rights advocacy).

24. S.B. 1437, 2017–2018 Leg., Reg. Sess. (Cal. 2018); Safe-T Act, H.B. 3653, 101st Gen. Assemb., Reg. Sess. (Ill. 2021); S.B. 21-124, 2021 Leg., Reg. Sess. (Colo. 2021); H.F. 1406, 93d Leg., Reg. Sess. (Minn. 2023). For racial justice advocacy, see *Hearing on S.B. 21-124 Before the S. Judiciary Comm.*, 2021 Leg., Reg. Sess. at 5:06:48 PM (Colo. 2021), <https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/%2020210318/41/11143> (on file with the *Iowa Law Review*) (statement of Philip Cherner for Sam Cary Bar Assoc.); LINDSAY TURNER, TASK FORCE ON AIDING AND ABETTING FELONY MURDER: REPORT TO THE MINNESOTA LEGISLATURE 4–6 (2022), <https://www.lrl.mn.gov/docs/2022/mandated/220160/report.pdf> [<https://perma.cc/NMG8-H46Z>] (highlighting racial disparities); Rita Ocegüera, *Sweeping Criminal Justice Package Would Curtail Felony Murder Prosecutions in Illinois*, INJUST. WATCH (Jan. 12, 2021), <https://www.injusticewatch.org/criminal-courts/bail-and-pretrial/2021/criminal-justice-reform-felony-murder-prosecutions-illinois> [<https://perma.cc/HS7Q-79PD>] (describing felony murder reform sponsored by the legislature’s Black Caucus and highlighting controversial prosecution of five Black teens); and Kevin Rector, *How 600-Plus California Inmates Got More Than 11,000 Years Cut off Their Prison Sentences*, L.A. TIMES (Aug. 3, 2023, 3:00 AM), <https://www.latimes.com/california/story/2023-08-03/california-criminal-justice-reform-reduced-prison-terms-felony-murder> (on file with the *Iowa Law Review*) (“A major criticism of the state’s former felony murder law was that it was disproportionately applied to defendants of color.”).

25. Colorado and Illinois both barred felony murder liability for killings by persons not party to the felony. 720 ILL. COMP. STAT. 5/9-1(a)(3) (2023) (adding “he or she or another participant causes the death”); COLO. REV. STAT. § 18-3-103(1)(b) (2024) (reducing felony murder to second degree and adding “by any participant”). Colorado also expanded a defense for non-trigger accomplices. *Id.* § 18-3-103(1.5).

26. CAL. PENAL CODE §§ 188(a)(3) & 189(e) (West Supp. 2024); Minn. H.F. 1406 (“A person may not be held criminally liable for a violation of section 609.19, subdivision 2, clause (1) [felony murder], committed by another unless the person was a major participant in the underlying felony and acted with extreme indifference to human life.”); Deena Winter, *Minnesota Lawmakers Changed Felony Murder Laws, Which Could Mean the Release of Prisoners*, MINN. REFORMER (Nov. 15, 2023, 8:15 AM), <https://minnesotareformer.com/2023/11/15/minnesota-lawmakers-changed-felony-murder-laws-which-could-mean-the-release-of-prisoners> [<https://perma.cc/P8UN-Q25A>].

given time are serving life terms.²⁷ Although increasing attention has rightly focused on misdemeanor arrests and incarceration both pre- and post-trial in jails,²⁸ severe sentences matter too. Indeed, John Pfaff has argued that we cannot reduce mass incarceration without reforming our penalties for violent crime.²⁹ And if our goal is to reduce mass incarceration, past sentences matter more than future ones: It would take decades before a prospective reform of felony murder liability could have as much impact on the incarcerated population as the same reform imposed retroactively. People serving life sentences are not water under the bridge: They are under water, and they need rescue. This underscores the importance of retroactive application of reforms like the proposed New York bill.³⁰

So how many people have been convicted of felony murder, with what demographics, and how many have actually killed anyone? While preparing the New York bill, legislators contacted the authors, seeking such information about felony murder in New York State. We had to confess that very little is known about the scale and scope of felony murder. Indeed, Sarah Stillman of Yale's Investigative Journalism Lab recently reported in the *New Yorker*:

Remarkably, no one knows how many people in the United States have been imprisoned for the crime. So in 2022, . . . [we filed] public-records requests to state corrections departments and other agencies across the country; to our surprise, most told us that they weren't keeping track. "The records do not exist," an official at the Virginia Department of Corrections wrote, in a typical response. In most states, a felony-murder conviction gets lumped in with other types of murder, clouding the data. It was as if the extent of felony murder in America were hidden by design.³¹

Despite such obstacles, we set out to answer the legislators' questions, using a combination of freedom of information requests and research in legal and journalistic databases. We received data on arrests for felony murder in New

27. ASHLEY NELLIS, SENT'G PROJECT, NO END IN SIGHT: AMERICA'S ENDURING RELIANCE ON LIFE IMPRISONMENT 4 (2021), <https://www.sentencingproject.org/app/uploads/2022/08/No-End-in-Sight-Americas-Enduring-Reliance-on-Life-Imprisonment.pdf> [<https://perma.cc/GF93-TMN6>].

28. *See generally* ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018) (exploring the mechanisms and consequences of America's massive misdemeanor system); ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING (2019) (explaining how courts handle misdemeanors and arguing that the process is no longer adjudicative); AMY BACH, ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT (2010) (highlighting the deficiencies in how state legal systems function day-to-day).

29. *See generally* JOHN PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM (2017). *Cf.* JEFFREY BELLIN, MASS INCARCERATION NATION (2022) (arguing that both felony and misdemeanor prosecutions, and both prosecutor and police decisions contributed to mass incarceration).

30. Assemb. B. 2899, 2023–2024 Leg., Reg. Sess. (N.Y. 2023); S.B. 6865, 2023–2024 Leg., Reg. Sess. (N.Y. 2023); S.B. 1437, 2017–2018 Leg., Reg. Sess. (Cal. 2018); Minn. H.F. 1406.

31. Stillman, *supra* note 7.

York State and on the resulting dispositions, including anonymized demographic data. We also acquired public data on second-degree murder convictions in New York State over a twelve-year period—identifying convicted individuals, but not whether their convictions were for felony murder.³² Using these datasets, along with legal and journalistic sources, we were able to identify most felony murder convictions and determine whether prosecutors alleged that the convicted defendant killed the victim.³³ We found that *half* of these identified defendants were convicted without proof that they personally killed anyone. Taking felony murder liability for those who do not kill as presumptively undeserved, disproportionate punishment for felony murder is quite common in New York.³⁴

Who is arrested for and convicted of felony murder in New York? Recent studies of the demography of felony murder prosecution in Cook County, Illinois,³⁵ Minnesota,³⁶ Colorado,³⁷ Pennsylvania,³⁸ St. Louis,³⁹ and Jackson Counties in Missouri,³⁹ and California,⁴⁰ have all found substantial racial

32. See *infra* Section II.A.

33. See *infra* Sections II.B–C.

34. See *infra* Sections II.B–C.

35. Kat Albrecht, *Data Transparency & the Disparate Impact of the Felony Murder Rule*, DUKE CTR. FOR FIREARMS L. (Aug. 11, 2020), <https://firearmslaw.duke.edu/2020/08/data-transparency-the-disparate-impact-of-the-felony-murder-rule> [<https://perma.cc/XQ3U-NEG4>]; see Guyora Binder & Ekow N. Yankah, *Police Killings as Felony Murder*, 17 HARV. L. & POL'Y REV. 157, 207 (2022) (when compared to county population figures, Black people were over twenty-five times more likely than white people to be arrested for and convicted of felony murder).

36. Greg Egan, *Deadly Force: How George Floyd's Killing Exposes Racial Inequities in Minnesota's Felony-Murder Doctrine Among the Disenfranchised, the Powerful, and the Police*, INEQUALITY INQUIRY 1, 3 n.5, 5–6 (Mar. 8, 2021), <https://lawandinequality.org/wp-content/uploads/2021/03/Deadly-Force-Egan-1.pdf> [<https://perma.cc/J62Z-KK5Y>] (reporting that over a six-year period people of color were twelve times as likely as white people to be convicted of felony murder in Hennepin and Ramsey counties); TURNER, *supra* note 24, at 6 (noting that 54% of incarcerated felony murder convicts in 2021 were Black, 10% Indigenous, and 25% white); cf. *QuickFacts Minnesota*, U.S. CENSUS BUREAU (2024), <https://www.census.gov/quickfacts/fact/table/MN/RHI225223> [<https://perma.cc/6EJF-8DCZ>] (showing 2023 U.S. census population estimates for Minnesota are 7.9% Black, 1.4% Indigenous, 82.3% white, and 6.5% Latinx).

37. See Binder & Yankah, *supra* note 35, at 208.

38. ANDREA LINDSAY & CLARA RAWLINGS, *LIFE WITHOUT PAROLE FOR SECOND DEGREE MURDER IN PENNSYLVANIA: AN OBJECTIVE ASSESSMENT OF RACE* 1, 3 (2021), https://www.plsephilly.org/wp-content/uploads/2021/04/PLSE_SecondDegreeMurder_and_Race_Apr2021.pdf [<https://perma.cc/5SWY-DBVA>] (reporting that 69.9% of felony murder inmates in Pennsylvania, but only 12% of the state population, were Black, and that Black Pennsylvanians were eighteen times more likely than whites to be serving such sentences).

39. Thomas Birmingham, *How Missouri's 'Felony Murder' Law Traps People for Defending Themselves*, APPEAL (July 10, 2023), <https://theappeal.org/missouri-felony-murder-law-traps-people-self-defense> [<https://perma.cc/8DLF-2P7M>] (reporting that since 2010, 100% of felony murder convicts in the City of St. Louis were Black, although population was 45% Black; 93% of felony murder convicts in St. Louis County since 2010 were Black, although county population was 25% Black; 72% of Jackson County (containing Kansas City) felony murder convicts were Black, although population was 25% Black).

40. DANIEL TRAUTFIELD, *SPECIAL CIRCUMSTANCES CONVICTION PROJECT, LIFE WITHOUT PAROLE AND FELONY MURDER SENTENCING IN CALIFORNIA* 8 (2023) (finding 42.7% of convicts sentenced

disparities. Our investigation found that felony murder arrests and convictions were similarly skewed in New York, particularly for Black people: Black New Yorkers were roughly twenty times more likely than white New Yorkers to be arrested for, and to be convicted of, felony murder, and Latinx New Yorkers were arrested and convicted of felony murder at about five to six times the rate of white people.⁴¹ Moreover, these racial disparities were greater than those for other felony convictions and at least 3.5 times greater than disparities for each of the predicate felonies for felony murder. So too were the disparities greater for felony murder than for other forms of second-degree murder.

Felony murder liability was also imposed disparately on young people. Almost a third of those arrested and about a fourth of those convicted of felony murder were teenagers, and teens were about three times as likely as adults to be convicted of felony murder. Among teens, the proportion of defendants convicted without killing was lower than among adults—about 40%—but still substantial.⁴²

We also found linkage between racial disparity and disproportionate punishment, as represented by murder liability without actual killing. Although previous work on this question has been limited, four recent studies have reported suggestive data.

A Pennsylvania study of the incarcerated population serving sentences for felony murder there examined cases where two or more co-defendants were convicted of the same felony murder. It found that 81% of the inmates serving such sentences were Black, compared to 70% for felony murder overall.⁴³

A recent experimental study by Ben Cohen, Justin Levinson, and Koichi Hioki suggests that implicit bias may contribute to racial disparities observed in such cases. The authors reported that subjects more readily attributed complicity in crime to Black than to white suspects in otherwise identical scenarios.⁴⁴ In short, they argued that racial minorities may be particularly vulnerable to guilt by association. Such implicit bias could contribute to racial disparities in felony murder liability for accomplices who did not kill, as well as racial disparities for felony murder liability overall.

A study recently commissioned by the Minnesota State Legislature reviewed accomplice liability in felony murder there and found substantial racial disparities in the populations charged and convicted under this theory of

to life without parole on the basis of using felony murder as an aggravating “special circumstance” were Black in a state with 5% Black population).

41. In conformity with *Iowa Law Review* conventions, we use the term “Latinx” throughout this Article. New York’s Division of Criminal Justice Statistics, the Department of Corrections and Community Supervision, and the U.S. Census Bureau use the term “Hispanic.” Accordingly, where the data we rely on refers to a “Hispanic” population, we have substituted “Latinx.”

42. See *infra* Section II.B.

43. LINDSAY & RAWLINGS, *supra* note 38, at 12.

44. G. Ben Cohen, Justin D. Levinson & Koichi Hioki, *Racial Bias, Accomplice Liability, and the Felony Murder Rule: A National Empirical Study*, 101 DENV. L. REV. 65, 98 (2024).

liability compared to Minnesota's population.⁴⁵ Most pertinently, another study of the Minnesota data conducted by Perry Moriearty, Kat Albrecht, and Caitlin Glass, contemporaneous with our New York research, has examined the disparate racial impact of the doctrines of accomplice liability and felony murder liability in Minnesota.⁴⁶ Where we have focused primarily on the distribution of felony murder liability, the Moriearty group has focused more on patterns of charging. But when examining the charging of one form of felony murder in Minnesota, the Moriearty group finds patterns similar to those we find for all felony murder convictions in New York. In their data, the alleged accomplices outnumber the alleged principals, and the racial disparities among these alleged accomplices are greater than those among the alleged principals.⁴⁷

These convergent findings strengthen the hypothesis that accomplice liability for felony murder is a vector of racial disparity in the criminal justice system as well as a source of disproportionality. Our study supports and helps connect these other contributions. We compared racial disparities in New York felony murder cases where felony murder liability was imposed on the basis of killing to those where felony murder liability was imposed on those who did not kill.⁴⁸ As reported below, we found that the Black/white racial disparity in the felony murder conviction of accomplices who did not kill—*thirty-four to one*—was nearly triple the Black/white racial disparity in the conviction of individuals who actually killed. The Latinx/white racial disparity (twelve to

45. TURNER, *supra* note 24, at 6, 15. Those convicted as accomplices were 62% Black, 8% Latinx, 6% American Indian, and 20% white. *Id.* at 6. This report did not compare figures for conviction as a participant to figures for conviction as a principal. *Id.* However, it reported an overall inmate population of felony murder convicts as 54% Black, 25% white, and 10% Indigenous. *Id.*

46. Perry Moriearty, Kat Albrecht & Caitlin Glass, *Race, Racial Bias, and Imputed Liability Murder*, 51 *FORDHAM URB. L.J.* 675, 708–09 (2024).

47. *Id.* at 719–20. The authors examined seventy-four charges of first-degree felony murder, including forty-three cases where the defendant was charged as an accomplice. This offense was defined in an unusual way in Minnesota during the period studied. The relationship between the proof required by perpetrators and that required for principals is different than that found in New York and other states. In most states, felony murder does not require intent to kill for either perpetrators or accomplices. This is true for second-degree felony murder in Minnesota as well. But for most of the predicate felonies covered by first-degree felony murder in Minnesota before 2024, liability required intent to kill for principals but mere foreseeability for accomplices in the predicate felony. See MINN. STAT. ANN. §§ 609.05(2), 609.185(a)(3) (West 2018 & Supp. 2024); 10 MINN. PRAC. SERIES, CRIM. JURY INSTRUCTION GUIDES § 4.01: LIABILITY FOR CRIME OF ANOTHER, Westlaw (database updated Nov. 2024); 10 MINN. PRAC. SERIES, CRIM. JURY INSTRUCTION GUIDES § 7.04: FELONY MURDER IN THE FIRST DEGREE, Westlaw (database updated Nov. 2024). Thus, charging perpetrators with felony murder rather than conventional murder would give prosecutors no lighter burden of proof than conventional murder. Thus, we might expect a higher percentage of alleged accomplices among those charged with this crime than we would for felony murder as defined in other jurisdictions. It would be interesting to see if the pattern is similar for the 104 defendants charged with second-degree felony murder, which more closely resembles felony murder in other states. The authors found that twenty-nine of the forty-three defendants charged as accomplices to first-degree felony murder were Black, whereas sixteen of the thirty-one charged as perpetrators were Black.

48. We use the term “principal” to describe someone who is convicted on a theory that they actually killed someone, and the term “accomplice” to describe someone who is convicted without proof that they actually killed someone.

one) in the felony murder conviction of accomplices who did not kill was more than quadruple the Latinx/white disparity among those convicted of killing. *More than half of Black people convicted of felony murder and more than 60% of Latinx people convicted of felony murder did not kill*, compared to less than 30% of white people convicted of felony murder. Put differently, *only 7% of New Yorkers convicted of felony murder without killing were white*. Accomplice liability for felony murder—widely regarded as unfair—is rarely imposed on white New Yorkers. When we looked at teens convicted without killing, these racial disparities were similar. Only two of twenty-four teens convicted of felony murder without killing were white. Moreover, more than a quarter of the people convicted of actually killing had killed inadvertently, and more than half of those people were Black and a third were Latinx. In our data, *the effects of the presumptively disproportionate punishment of accomplices for felony murder fall almost exclusively on Black and Latinx defendants*.

Finally, we discovered one more mysterious racial disparity. Over two hundred defendants were arrested for “attempted felony murder” even though there is *no such crime* under New York law.⁴⁹ Almost 70% of these arrestees were ultimately convicted of a crime, but only 2% of those people were white. Of fifty teens arrested for the fictitious crime of attempted felony murder, *none* were white. Here too, an unjust effect of New York’s felony murder laws falls almost exclusively on Black and Latinx defendants. In their civil rights era litigation campaign against capital punishment, lawyers for the NAACP Legal Defense Fund (“NAACP LDF”) argued that capital punishment was accepted only because it was so rarely applied against whites.⁵⁰ Our data, in combination with other recent studies, supports a similar critique of felony murder liability.⁵¹

Our Article proceeds in three parts. Part I reviews the origin, criticism, and reform of felony murder laws, generally and in New York, and outlines the reform currently under legislative consideration. Part II describes our research and results, with discussions of our data on arrests, convictions, and sentences. Part III returns to the problem of reform, describes the proposed New York statute in more detail, and considers how its proposed resentencing might best be implemented.

49. *People v. Burress*, 505 N.Y.S.2d 272, 273 (App. Div. 1986) (mem.); *People v. Campbell*, 532 N.E.2d 86, 88–89 (N.Y. 1988) (finding that attempted assault “is a legal impossibility” because it adds an intent element that is “not required for the higher crime”).

50. MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* 124–36 (1973).

51. For the articulation of a similar critique, see Binder & Yankah, *supra* note 35, at 201–21.

I. THE LAW OF FELONY MURDER, NATIONALLY AND IN NEW YORK

A. A BRIEF HISTORY OF FELONY MURDER LAW AND ITS REFORM

1. English Sources of Doctrine and Reform

Felony murder's origins are more modern and more American than is commonly recognized, but American reformers paid attention to English developments. Because a constructive murder rule appears in William Blackstone's treatise,⁵² American lawyers have often viewed it as long-established common law precedent.⁵³ Yet before the nineteenth century, the common law was not conceptualized as a system of precedent,⁵⁴ so Blackstone's pronouncement was a report of learned opinion rather than decided cases. Well-known sixteenth-century decisions had imposed accomplice liability for intentional collaborators in deadly assaults and had also treated a criminal purpose as barring any defense of provocation for intentional killing.⁵⁵ Although proposed by Edward Coke,⁵⁶ an unlawful act murder rule was explicitly rejected in the 1663 *Stanley's Case*.⁵⁷ Constructive murder liability based on participation in the commission or attempt of a *felony* was only first proposed by an English court in 1701 as dictum,⁵⁸ and in William Hawkins's 1716 treatise.⁵⁹ Based on reports of London trials, this constructive murder rule does not seem to have been applied in England until the last decades of the eighteenth century, and then only rarely.⁶⁰ Nevertheless, courts had applied a constructive murder rule in some reported cases by the mid-nineteenth century.⁶¹ Thus, felony murder, or constructive murder as it came to be called in England, became

52. 4 WILLIAM BLACKSTONE, COMMENTARIES 191–92, 201 (London, A. Strahan & W. Woodfall 1795).

53. See sources collected at Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 60–62 nn.1–13 (2004).

54. NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT 17–18, 32–33 (2008); NEIL DUXBURY, THE INTRICACIES OF DICTA AND DISSENT 15, 21 (2021).

55. Lord Dacres' Case (1541) 72 Eng. Rep. 458 (KB). *Lord Dacres' Case*, commonly reported as decided in 1535, was actually decided in 1541. Henry VIII, June 1541, 21–30, in 16 LETTERS AND PAPERS, FOREIGN AND DOMESTIC, HENRY VIII, 1540–1541, at 444, 448–49 (James Gairdner & R.H. Brodie eds., London 1898), <https://www.british-history.ac.uk/letters-papers-hen8/vol16/p444-465> [<https://perma.cc/2W47-G82T>] (confirming that crime and trial occurred in 1541); Mansell & Herbert's Case (1558) 73 Eng. Rep. 279 (KB).

56. EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 56 (London, W. Clarke & Sons 1817) (1644).

57. *Sir Charles Stanley's Case* (1663) 84 Eng. Rep. 1094 (KB). Coke's view was also famously mocked by Hobbes. See THOMAS HOBBS, A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND (1681), reprinted in 6 THE ENGLISH WORKS OF THOMAS HOBBS OF MALMESBURY 3, 87 (Sir William Molesworth ed., 2d ed. 1966).

58. *R. v. Plummer* (1701) 84 Eng. Rep. 1103, 1106–07 (KB).

59. 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 86 (n.p. 1716).

60. Binder, *supra* note 53, at 96–98.

61. *R. v. Smithies* (1832) 172 Eng. Rep. 999, 999 (KB); *R. v. Holland* (1841) 174 Eng. Rep. 313, 314 (KB).

English law too late to be incorporated into American law, and there is no evidence of its application in colonial America.⁶²

The doctrine proposed in eighteenth-century England, if applied, would have made a difference *only* for accomplices in the felony. It would not have lowered the mental culpability required for principals, who were deemed “malicious” if they used a conventional weapon and lacked an “excuse” of self-defense, provocation, or insanity.⁶³ Charging instruments for murder in eighteenth-century England described the wound and the weapon and said nothing about an accompanying intention.⁶⁴ In other words, the “malice” required for murder was a characteristic of conduct, not a mental state. The idea that every offense required a culpable mental state was a nineteenth-century innovation promoted by Jeremy Bentham and the utilitarian reformers who staffed the English Criminal Law Commission, charged with digesting and possibly codifying the law.⁶⁵ They reconceptualized the traditional requirement of a fatal injury inflicted with a weapon as an evidentiary presumption of intent to inflict serious injury.⁶⁶

To these utilitarian reformers, imposing murder liability for any fatal felony was another such evidentiary presumption, but a foolish one: The commission of a felony did not imply intent to kill, as the chances of any particular felony leading to death were quite low. As good utilitarians, the Criminal Law Commissioners saw felony murder liability as imposing useless suffering unless it produced a greater benefit in deterring crime. Early utilitarians believed certain and swift punishment would deter more effectively than severe but uncertain punishment,⁶⁷ as modern criminology has repeatedly confirmed.⁶⁸ From this perspective, felony murder established an inefficient punishment lottery, conditioning very severe punishment on the unlikely event of death during a felony. The Commission’s 1834 report found such a doctrine “totally

62. Binder, *supra* note 53, at 107–13.

63. Guyora Binder, *The Meaning of Killing*, in MODERN HISTORIES OF CRIME AND PUNISHMENT 88, 89 (Markus D. Dubber & Lindsay Farmer eds., 2007).

64. *Id.* at 93.

65. See generally Guyora Binder, *Foundations of the Legislative Panopticon: Bentham’s Principles of Morals and Legislation*, in FOUNDATIONAL TEXTS IN MODERN CRIMINAL LAW 79 (Markus D. Dubber ed., 2014) (explaining Bentham’s influence on the law); Lindsay Farmer, *Reconstructing the English Codification Debate: The Criminal Law Commissioners, 1833–45*, 18 LAW & HIST. REV. (2000) (discussing the Criminal Law Commissioners’ attempted codification and reform of English criminal law).

66. Guyora Binder, *Homicide*, in THE OXFORD HANDBOOK OF CRIMINAL LAW 702, 708–10 (Markus D. Dubber & Tatjana Hörnle eds., 2014).

67. JEREMY BENTHAM, THE THEORY OF LEGISLATION 326 (Charles K. Ogden ed., Richard Hildreth trans., London, Morrison and Gibb Ltd. 2d ed. 1950) (1802) (“[T]he more certain punishment is, the less severe it need be.”).

68. Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143, 181–89 (2003); Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 243–44 (2013); NAT’L INST. OF JUST., U.S. DEP’T. OF JUST., FIVE THINGS ABOUT DETERRENCE (2016), <https://www.ojp.gov/pdffiles1/nij/247350.pdf> [<https://penna.cc/HA7P-A2TY>]; Jeffrey Grogger, *Certainty vs. Severity of Punishment*, 29 ECON. INQUIRY 297, 308 (1991).

incongruous with the general principles of our jurisprudence,”⁶⁹ and the 1836 report reasoned that:

If the punishment for stealing from the person be too light, let it be increased, and let the increase fall alike on all the offenders. Surely the worst mode of increasing the punishment of an offence is to provide that, besides the ordinary punishment, every offender shall run an exceedingly small risk of being hanged.⁷⁰

Thomas Macaulay made similarly phrased arguments in drafting what would become the Indian Penal Code.⁷¹ In 1874, James F. Stephen, then the leading English authority on criminal law, testified to Parliament that a rule punishing accidental death in the course of felonies as murder would be “barbarous and monstrous.”⁷² The draft code he prepared Parliament in 1879 instead would have conditioned murder on an act likely to cause death committed for an unlawful purpose.⁷³ In instructing a jury from the bench in the influential 1887 case of *Regina v. Serné*, he similarly limited liability to an individual causing death by means of an “act known to be dangerous to life, and likely in itself to cause death”⁷⁴—essentially conditioning liability on recklessness, and limiting accomplice liability to individuals who participated in the reckless act. As we shall see, Stephen’s position would influence American reformers. England abolished constructive murder—what Americans call felony murder—in the Homicide Act of 1957.⁷⁵

2. American Origins and Reforms

It appears the earliest American felony murder rules were legislative.⁷⁶ American state legislatures codified criminal law throughout the nineteenth

69. FIRST REPORT FROM HIS MAJESTY’S COMMISSIONERS ON CRIMINAL LAW 29 (London 1834).

70. SECOND REPORT OF HER MAJESTY’S COMMISSIONERS FOR REVISING AND CONSOLIDATING CRIMINAL LAW, *supra* note 2, at 18.

71. Binder, *supra* note 53, at 129–30.

72. *Id.* at 103 (quoting FRANCIS WHARTON, A TREATISE ON THE LAW OF HOMICIDE IN THE UNITED STATES: TO WHICH IS APPENDED A SERIES OF CASES 40 (Phila., Kay & Brother 1875)).

73. 3 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 80–81 (London, MacMillan & Co. 1883).

74. *R. v. Serné* (1887) 16 Cox’s Crim. L. Cas. 311 (Cent. Crim. Ct.) 311 (Eng.).

75. Homicide Act of 1957, 5 & 6 Eliz. 2 c.11 (Eng.).

76. Arguably, they first appeared in territorial legislation: a criminal code for the federal Northwest Territory in 1788. While defining murder simply as malicious killing, provisions on robbery and burglary declared these crimes would be “deemed wilful murder” if participants killed victims or resisters. Act of Sept. 6, 1788, *reprinted in* 1 THE LAWS OF THE NORTHWEST TERRITORIES, 1788–1800, at 13, 14–16 (Theodore Calvin Pease ed., 1925) (defining murder, burglary, and robbery). These provisions also stated that all participants in robbery and burglary would be “deemed principals” in any “consequent” crimes. *Id.* at 15–16. An arson provision imposed capital punishment for fatal arson but did not use the term “murder,” and a 1799 law widened such punishment to all arson, regardless of result. Act of Dec. 19, 1799, *reprinted in* 1 THE LAWS OF THE NORTHWEST TERRITORIES, 1788–1800, *supra*, at 505, 505. Although the authority of the 1788 Code was initially doubted as repugnant to Section 5 of the Northwest Ordinance, it was reenacted by the territorial legislature in 1799. *See* 1 THE LAWS OF THE NORTHWEST TERRITORIES,

century, often in conjunction with mandating the construction of penitentiaries. One influential template for homicide offenses was Pennsylvania's 1794 homicide reform statute, dividing murder into degrees and grading murder as first degree (and therefore capitally punishable) if committed in the course of the felonies of robbery, burglary, arson, or rape.⁷⁷ Most American states adopted similar grading schemes by the end of the nineteenth century.⁷⁸ Courts read most of these grading or "felony aggravator"⁷⁹ statutes as imposing felony murder liability for all killings during these enumerated felonies.⁸⁰ However, nineteen states imposed felony murder explicitly by statute during the nineteenth century,⁸¹ including some of the states with multiple grades of murder.⁸²

Some states with felony murder statutes—including New York for a time—did not limit felony murder to enumerated felonies. Where non-enumerated felonies could serve as predicates, questions arose as to which ones. Some courts held that felony assault, like lesser forms of homicide, was not sufficiently distinct from the element of causation of death to serve as a predicate felony.⁸³ This came to be called a merger doctrine. Overall, reported felony murder decisions were few in antebellum America but became more common late in the century.⁸⁴ Through most of the nineteenth century, killing was generally understood to require direct causation, by means of a weapon, poison, or fire.⁸⁵

In the late nineteenth century, American jurists followed the contemporaneous English debate on constructive murder. The 1875 edition of Francis Wharton's treatise on homicide law quoted Macaulay's earlier criticisms and reported the parliamentary testimony of Stephen and other judges opposing the doctrine.⁸⁶ Wharton added, "[T]here is reported no

1788-1800, *supra*, at xx-xxii; Act of Oct. 28, 1799, *reprinted in* 1 THE LAWS OF THE NORTHWEST TERRITORIES, 1788-1800, *supra*, at 337, 338. Among states, Georgia passed felony murder laws in 1811 and 1817, the first of which did not go into effect. GUYORA BINDER, FELONY MURDER 129 (2012); Act of Dec. 14, 1811, § 28, 1811 Laws of Ga. 26, 32-34; Act of Dec. 20, 1817, § 9, 1817 Laws of Ga. 92, 96-97; *cf.* Binder, *supra* note 53, at 120-21 (mistakenly deeming a later Illinois statute the first state felony murder statute).

77. Act of Apr. 22, 1794, ch. MDCCLXVII, 1794 Statutes at Large of Pa. 174, 175.

78. Binder, *supra* note 53, at 120.

79. *Id.* at 141.

80. *Id.* at 160-61 (showing fourteen of twenty-two felony aggravator statutes were without explicit felony murder provisions); *see, e.g.*, Commonwealth v. Flanagan, 7 Watts & Serg. 415, 415 (Pa. 1844).

81. Binder, *supra* note 53, at 161. Of these nineteen states, one—only Nebraska—repealed it in favor of a felony aggravator statute (and adopted felony murder by judicial decision). *See id.* at 157. Thus, all nineteen had felony murder rules by the turn of the century.

82. *Id.* at 120. An 1890 federal decision conditioned murder on fatal violence in the course of such violent crimes as robbery but without announcing a felony murder rule. United States v. Boyd, 45 F. 851, 859-61 (C.C.W.D. Ark. 1890), *rev'd on other grounds*, 142 U.S. 450, 458 (1892).

83. People v. Rector, 19 Wend. 569, 591-93 (N.Y. Sup. Ct. 1838); State v. Shock, 68 Mo. 552, 553-54 (1878).

84. Binder, *supra* note 53, at 134.

85. *Id.* at 192-97.

86. WHARTON, *supra* note 72, at 43-45.

modern conviction of common law murder, in a case in which there was no evidence of malicious intent . . . and in which the felonious intent proved was simply an intent to commit a collateral felony.”⁸⁷ U.S. Supreme Court Justice Oliver Wendell Holmes, Jr. expressed similar skepticism about the deterrent value of felony murder:

The fact that the shooting is felonious does not make it any more likely to kill people. If the object of the rule is to prevent such accidents, it should make accidental killing with firearms murder, not accidental killing in the effort to steal; while, if its object is to prevent stealing, it would do better to hang one thief in every thousand by lot.⁸⁸

Felony murder liability became broader in application during the twentieth century. Early in the century, some courts, invoking the tort doctrine of proximate cause, expanded causal responsibility to include deaths mediated by the risky responses of victims, such as headlong flight, wrestling over a gun, or firing at felons.⁸⁹ Such expansive definitions of proximate cause spread after World War II as courts likened people accused of felony murder to military aggressors.⁹⁰ Such metaphors justified holding defendants causally responsible for the acts of persons resisting the felony, such as an Illinois felony murder case in which one officer shot another after unarmed burglars had fled.⁹¹ The expansion of causation was sometimes reflected in liability for unlikely consequences, such as a well-known California felony murder case in which a robbery victim suffered a fatal heart attack.⁹²

Yet this expansion was also resisted by academic criticism, drawing on the utilitarian tradition. In their influential 1937 article, *A Rationale of the Law of Homicide: I*, Herbert Wechsler and Jerome Michael used Stephen’s analysis of English murder as their organizing scheme,⁹³ accepted his critique of felony murder,⁹⁴ and proposed similar solutions (a requirement that death be caused during the felony by means of a manifestly dangerous act).⁹⁵ Although the *Rationale* may be considered the blueprint for the Model Penal Code Wechsler later drafted as Chief Reporter, the utilitarian program of that code is more explicit in his 1952 article, *The Challenge of a Model Penal Code*, in which

87. *Id.* at 39.

88. HOLMES, *supra* note 2, at 58.

89. Binder & Yankah, *supra* note 35, at 190.

90. *See id.* at 188–93 (discussing Commonwealth v. Almeida, 68 A.2d 595, 598–99 (Pa. 1949)).

91. People v. Hickman, 297 N.E.2d 582, 583 (Ill. App. Ct. 1973).

92. People v. Stamp, 2 Cal. App. 3d 203, 208 (Ct. App. 1969). More recent cases have imposed murder liability for deaths from a single punch (predicated on aggravated assault), alcohol overdose (supplying alcohol to minors), collision with an unsupervised toddler (auto-theft), and voluntary drug injection (drug possession). Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 405–06 (2011).

93. Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide: I*, 37 COLUM. L. REV. 701, 702–03 (1937).

94. *Id.* at 713–17.

95. *Id.* at 714.

he invoked the precedents of Stephen's code (the basis for codes enacted in Canada, Australia, and New Zealand) and Macaulay's Indian code.⁹⁶ Here, Wechsler professed preventive aims: "[T]he object is control of harmful conduct in the future."⁹⁷ This aim required conditioning every crime on culpability:

The significance of conduct for preventive purposes cannot be made to rest upon its tendencies alone. Unless the actor is or ought to be aware of those aspects of his behavior or of the environment that give his conduct an offensive quality, the threat of sanctions cannot operate as a deterrent and the conduct does not show the individual to be a larger menace than another man. Criminal liability ought not, therefore, to depend merely upon external factors; it should also take account of the actor's state of mind.⁹⁸

He added that strict liability should be avoided for any significantly punished offense, including homicide,⁹⁹ and the Model Penal Code ultimately required proof of a culpable mental state for every objective element for any offense leading to incarceration.¹⁰⁰ Wechsler further disapproved reliance on negligence,¹⁰¹ and the Code would provide recklessness as the default mental state for any objective element for which culpability was undefined.¹⁰²

The Model Penal Code ultimately defined homicide as causing death with a culpable mental state of at least negligence¹⁰³ and murder as including homicide committed "recklessly under circumstances manifesting extreme indifference to the value of human life" where "[s]uch recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after" robbery, rape, arson, burglary, kidnapping or escape.¹⁰⁴ The Code defines "recklessly" as "consciously disregards a substantial and unjustifiable risk that the . . . element . . . will result

96. Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1131 (1952).

97. *Id.* at 1105.

98. *Id.* at 1108.

99. *Id.* at 1109–10.

100. MODEL PENAL CODE §§ 2.02(1), 2.05 (AM. L. INST. 1985).

101. Wechsler, *supra* note 96, at 1107–09.

102. MODEL PENAL CODE § 2.02(3) (AM. L. INST. 1985).

103. *Id.* § 210.1.

104. *Id.* § 210.2(1)(b). Although this awkward compromise appeared to absolve prosecutors of proving recklessness for participants in the enumerated felonies, other provisions of the Code provided that presumptions of offense elements are permissive, authorizing but not requiring the jury to find the element beyond a reasonable doubt. *See id.* §§ 1.12(1), 1.12(5), 1.13(9). Moreover, the Code's causation provision would require a finding that a death caused recklessly be within the risk foreseen by the accused. *Id.* § 2.03(3). According to the commentaries "[t]his presumption has the effect of abandoning the strict liability aspects of the traditional felony-murder doctrine but at the same time recognizing the probative significance of the concurrence of homicide and a violent felony." MODEL PENAL CODE § 210 introductory note, at 2 (AM. L. INST., Official Draft and Revised Commentaries, Part II 1980). The presumption might have better achieved this purpose if confined to the "indifference" element distinguishing extreme indifference murder from reckless manslaughter.

from his conduct.”¹⁰⁵ The official commentary on this provision concludes that felony murder suffers from “essential illogic”¹⁰⁶:

Murder is invariably punished as a heinous offense Sanctions of such gravity demand justification, and their imposition must be premised on the confluence of conduct and culpability. . . . The felony-murder rule contradicts this scheme. It bases conviction of murder not on any proven culpability with respect to homicide but on liability for another crime. The underlying felony carries its own penalty and the additional punishment for murder is therefore gratuitous¹⁰⁷

The commentary proceeds to conclude that “principled argument in favor of the felony-murder doctrine is hard to find”¹⁰⁸ and refutes the Code’s own presumption of recklessness with statistics from Philadelphia, which showed mortality of six per thousand for robbery, four per thousand for rape, and just one death in 27,669 burglaries while reporting very similar statistics from two other jurisdictions in different decades.¹⁰⁹ Since the probability of apprehension and conviction for these deaths is lower still, this data evokes the punishment lottery arguments of the Commissioners, Macaulay, and Holmes. And indeed, the only currently extant study of the deterrent effect of felony murder laws found none.¹¹⁰

Although the Model Penal Code project inspired most states to substantially revise their penal codes,¹¹¹ only a small minority of states adopted its reform of felony murder, and indeed Ohio and Alaska added felony murder laws.¹¹² Today, only Kentucky and Hawaii define murder liability without regard to commission of a felony.¹¹³ An additional seven states—Arkansas, Massachusetts, Michigan, New Hampshire, New Mexico, North Dakota, and Vermont—condition murder in the course of certain felonies on recklessness, as proposed in the Code.¹¹⁴ California and Minnesota require recklessness towards death

105. MODEL PENAL CODE § 2.02(2)(c) (AM. L. INST. 1985).

106. MODEL PENAL CODE § 210.2 cmt. 6 at 36 (AM. L. INST., Official Draft and Revised Commentaries, Part II 1980).

107. *Id.*

108. *Id.* at 37.

109. *Id.* at 38.

110. Anup Malani, *Does the Felony Murder Rule Deter? Evidence from FBI Statistics* 25 (Univ. of Chi. L. Sch., Working Paper No. 30181494Q, 2002) (on file with the *Iowa Law Review*).

111. WAYNE R. LAFAVE & JENS DAVID OHLIN, CRIMINAL LAW 5–6 (7th ed. 2023) (listing thirty-seven states adopting revised codes “largely stimulated by the labors of the American Law Institute,” including thirty-six after circulation of its draft codes, as well as Wisconsin, contemporaneous with its deliberations); Herbert Wechsler, MODEL PENAL CODE foreword, at xi (AM. L. INST., Official Draft and Revised Commentaries, Part II 1980) (describing that there are over thirty states to that point).

112. Guyora Binder, *Felony Murder and Mens Rea Default Rules: A Study in Statutory Interpretation*, 4 BUFF. CRIM. L. REV. 399, 400–01, 421–23 (2000); Binder & Yankah, *supra* note 35, at 197–201.

113. HAW. REV. STAT. § 707-701 (2014); KY. REV. STAT. ANN. § 507.020 (LexisNexis 2014).

114. *People v. Aaron*, 299 N.W.2d 304, 321 (Mich. 1980); *State v. Doucette*, 470 A.2d 676, 682 (Vt. 1983); *State v. Ortega*, 817 P.2d 1196, 1205 (N.M. 1991), *abrogated by State v. Frazier*,

for liability as an accomplice in the felony, but not for the principal.¹¹⁵ Massachusetts, California, and Minnesota adopted these limits quite recently.¹¹⁶

As the Model Penal Code Commentary remarked in 1980,¹¹⁷ and as remains true,¹¹⁸ felony murder is subject to several limitations in most states.

First, some states condition felony murder on lesser mental states. Five states make negligence or foreseeability of death an offense element. Delaware does so explicitly.¹¹⁹ Alabama, Texas, and Pennsylvania all have statutory provisions borrowed from the Model Penal Code, defining homicide as causing death intentionally, knowingly, recklessly, or negligently.¹²⁰ Maine requires by statute that death must be “a reasonably foreseeable consequence of such commission, attempt or flight.”¹²¹ Eight states and the federal system condition felony murder on “malice,” and courts sometimes invoke this as a source of a requirement that felony be committed dangerously.¹²²

Second, most states condition the element of causation on the objective foreseeability of death, thereby indirectly conditioning felony murder on negligence.¹²³ The effectiveness of this requirement depends on courts instructing juries that death must be foreseeable to each participant charged, not just the principal. Many have authority limiting complicity to deaths foreseeable as a result of and in furtherance of the felony,¹²⁴ but it is fair to wonder how vigilantly this requirement is enforced. In a minority of states,

164 P.3d 1, 6 (N.M. 2007) (eliminating double punishment of predicate felony and felony murder, but retaining requirement of recklessness); *Commonwealth v. Brown*, 81 N.E.3d 1173, 1196–97 (Mass. 2017) (Gants, C.J., concurring); N.H. REV. STAT. ANN. §§ 630:1-b, 626:7(2) (LexisNexis 2015); ARK. CODE ANN. §§ 5-10-101 to -103 (2023); N.D. CENT. CODE §§ 12.1-02-02(1), -02(2), -02(3), 12.1-16-01(1)(c) (2021); N.D. Crim. Jury Instructions K-6.03; Murder (While Committing a Crime) (2013).

115. CAL. PENAL CODE §§ 188(a)–(b), 189(a)–(b), (c) (West Supp. 2024); H.F. 1406, 93d Leg., Reg. Sess. (Minn. 2023).

116. S.B. 1437, 2017–2018 Leg., Reg. Sess. (Cal. 2018); Minn. H.F. 1406; *Brown*, 81 N.E.3d at 1196.

117. MODEL PENAL CODE § 210.2 cmt. 6 at 36, 40–42 (AM. L. INST., Official Draft and Revised Commentaries, Part II 1980).

118. See generally Binder, *supra* note 92 (indicating that most jurisdictions limit the felony murder doctrine by conditioning the offense through several culpability requirements and standards).

119. DEL. CODE ANN. tit. 11, § 635 (2015).

120. 18 PA. STAT. AND CONS. STAT. ANN. § 302(a) (West 2015); *id.* §§ 2501–2502; *Commonwealth v. Hassine*, 490 A.2d 438, 453 n.13, 454 (Pa. Super. Ct. 1985) (approving instruction on negligence); ALA. CODE §§ 13A-6-1 to -2 (LexisNexis 2015 & Supp. 2023) (stating that felony murder requires an act clearly dangerous to life); *id.* § 13A-6-2 note (Felony-Murder Doctrine) (requiring of negligence); TEX. PENAL CODE ANN. § 19.01 (West 2019); *id.* § 6.02; *Kuykendall v. State*, 609 S.W.2d 791, 796 n.6 (Tex. Crim. App. 1980); *Rodriguez v. State*, 953 S.W.2d 342, 354 (Tex. App. 1997).

121. ME. REV. STAT. ANN. tit. 17-A, § 202 (West 2006).

122. See *supra* notes 111–14 and accompanying text (identifying California, Idaho, Iowa, Mississippi, Nevada, Rhode Island, South Carolina, and Virginia).

123. Binder, *supra* note 92, at 484–87 (identifying authority for a requirement of foreseeability for causation in thirty conventional felony murder states, as well as recklessness states of Massachusetts and North Dakota).

124. *Id.* at 499–500 nn.603–05 (discussing jurisdictions with authority limiting complicity to deaths in furtherance of and foreseeable as a result of the felony).

the statute defines all participants in the felony as collectively liable for the death rather than liable as accomplices in the principal's offense.¹²⁵ Several of these states afford participants who did not kill an affirmative defense, conditioned on not being armed or having reason to foresee death.¹²⁶ It is hard to know how often such defenses are offered or whether their availability affects charging and plea bargaining.

Third, a majority of felony murder states have adopted an "agency" rule limiting liability to deaths directly caused by participants in the felony. As noted above, this limitation was observed throughout the nineteenth century, but by the middle of the twentieth century, a number of states had expanded "proximate" causation to embrace killings by law enforcement or victims in response to the felony. After the appearance of a highly influential article criticizing these decisions, most were overturned so that by 1970, almost every state had adopted an agency rule.¹²⁷ But then, in the more punitive environment of the War on Crime, about a third of these states abandoned it.¹²⁸ In 2021, two of these, Illinois and Colorado adopted agency rules.¹²⁹ Today, of the states without a requirement of recklessness, thirteen states continue to apply the broader "proximate cause" rule.¹³⁰ A number of states have a rule limiting felony murder liability to the deaths of non-participants.¹³¹

A fourth limitation on felony murder consists of a restriction to predicate felonies that might be thought dangerous. The most common approach is to exhaustively enumerate predicate felonies.¹³² The four felonies employed in

125. *See id.* at 510–17 (discussing Alabama, Alaska, Arizona, Colorado, Connecticut, Florida, Maine, Missouri, Montana, New Jersey, New York, North Dakota, Ohio, and Oklahoma).

126. COLO. REV. STAT. § 18-3-103 (2024); CONN. GEN. STAT. § 53a-16b (2023); N.J. STAT. ANN. § 2C:1-13 (West 2015); N.Y. PENAL LAW § 125.25.3(b)–(d) (McKinney 2020); N.D. CENT. CODE § 12.1-16-01(1)(c)(2)–(4) (2021); OR. REV. STAT. § 163.115(3)(b)–(d) (2023); WASH. REV. CODE § 9A.32.030(1)(c)(ii)–(iv) (2023).

127. *See generally* Norval Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50 (1956). On the impact of Morris's arguments, see Binder & Yankah, *supra* note 35, at 193–96.

128. Binder & Yankah, *supra* note 35, at 196–201.

129. S.B. 21-124, 2021 Leg., Reg. Sess. (Colo. 2021); COLO. REV. STAT. § 18-3-103; Safe-T Act, H.B. 3653, 101st Gen. Assemb., Reg. Sess. (Ill. 2021); 720 ILL. COMP. STAT. ANN. 5/9-1(a)(3) (West 2022).

130. ALASKA STAT. § 11.41.110 note II (2023) (stating felony murder requires causal nexus); ARIZ. REV. STAT. ANN. § 13-1105 (2020); FLA. STAT. § 782.04(2) (2023); N.J. STAT. ANN. § 2C:11-3 (West 2015 & Supp. 2024); MO. REV. STAT. § 565.021 (2016); *Kinchion v. State*, 81 P.3d 681, 684 (Okla. Crim. App. 2003) (punishing defendant for killing of accomplice by victim); *State v. Dixon*, No. 18582, 2002 WL 191582, at *2–7 (Ohio Ct. App. Feb. 8, 2002); *State v. Jackson*, 697 S.E.2d 757, 759 (Ga. 2010); *People v. Hernandez*, 624 N.E.2d 661, 663–65 (N.Y. 1993); *Witherspoon v. State*, 33 So. 3d 625, 628, 630 (Ala. Crim. App. 2009); *Sheckles v. State*, 684 N.E.2d 201, 205 (Ind. Ct. App. 1997); *Dowden v. State*, 758 S.W.2d 264, 272–73 (Tex. Crim. App. 1988) (en banc); *State v. Oimen*, 516 N.W.2d 399, 408 (Wis. 1994).

131. *E.g.*, N.Y. PENAL LAW § 125.25(3); WASH. REV. CODE § 9A.32.050(1)(b); N.J. STAT. ANN. § 2C:11-3(a)(3).

132. Jurisdictions not requiring recklessness that exhaustively enumerates predicate felonies include twenty-two states and the federal and D.C. systems: 18 U.S.C. § 1111 (2018); ALASKA STAT. § 11.41.110 (2023); ARIZ. REV. STAT. ANN. § 13-1105 (2020); CAL. PENAL CODE §§ 189(a), 190.2(17)

the original Pennsylvania statute—robbery, arson, rape, and burglary—are invariably included, even though—as the statistics cited above show—burglary alone is rarely lethal.¹³³ Many states add kidnapping and escape, and some add felony child abuse or drug distribution offenses.¹³⁴ A substantial minority impose liability for non-enumerated offenses¹³⁵ but often restrict these to felonies committed in a way deemed dangerous to life.¹³⁶ Among states imposing felony murder liability for non-enumerated felonies, many have imposed a “merger” doctrine to bar assault offenses as predicate felonies.¹³⁷

As noted, punishment for felony murder is harsh. Although death is not available without additional findings, we can sort true felony murder jurisdictions (those not requiring recklessness) into five roughly equal groups by severity of sentence. At the high end, we have a group, including the federal system, that mandates life without parole for felony murder.¹³⁸ Second, we have a group that permits life without parole.¹³⁹ We find New York in the third tier:

(West 2014 & Supp. 2024); COLO. REV. STAT. § 18-3-103(b) (2024); CONN. GEN. STAT. § 53a-54c (2023); D.C. CODE § 22-2101 (2001); IDAHO CODE § 18-4003(d) (2016); IND. CODE ANN. § 35-42-1-1 (2) (West 2024); IOWA CODE §§ 702.11, 707.2 (2024); KAN. STAT. ANN. §§ 21-3401, -3436 (2007); LA. STAT. ANN. § 14:30(1) (2016); ME. REV. STAT. ANN. tit. 17-A, § 202(1) (2006); NEB. REV. STAT. § 28-303(1) (2016); N.J. STAT. ANN. § 2C:11-3(a)(3); N.Y. PENAL LAW § 25.25(3); OHIO REV. CODE ANN. § 2903.02 (West 2020); OR. REV. STAT. § 163.115(b) (2023); 18 PA. STAT. AND CONS. STAT. ANN. § 2502 (West 2015); S.D. CODIFIED LAWS § 22-16-4(2) (2017); TENN. CODE ANN. § 39-13-202(a)(2) (2018 & Supp. 2023); UTAH CODE ANN. § 76-5-203(1)(a) (LexisNexis Supp. 2024); W. VA. CODE ANN. § 61-2-1 (LexisNexis 2020); WIS. STAT. ANN. § 940.03 (West 2023 & Supp. 2023); WYO. STAT. ANN. § 6-2-101(a) (2023).

133. Binder, *supra* note 92, at 451.

134. *Id.* at 452.

135. *Id.* at 466–67 (listing eighteen jurisdictions other than Massachusetts, which now requires recklessness, and California, which no longer punishes second degree felony murder based on non-enumerated felonies); *see* CAL. PENAL CODE § 188(a)(3).

136. Binder, *supra* note 92, at 472–78 (summarizing and criticizing case law in Georgia, Maryland, Oklahoma, Rhode Island, South Carolina, and Virginia). Alabama, Texas, Delaware, Illinois, Montana, and North Carolina do so by statute. ALA. CODE § 13A-6-2(3) (LexisNexis 2015 & Supp. 2023); DEL. CODE ANN. tit. 11, §§ 635(2), 636(a)(2) (2015); 720 ILL. COMP. STAT. ANN. 5/2-8 (West 2022); MONT. CODE ANN. §§ 45-2-101(24), -5-102(1)(b) (2023); N.C. GEN. STAT. § 14-17(a) (2023); TEX. PENAL CODE ANN. § 19.02(b)(3) (West 2019 & Supp. 2023).

137. *State v. Jones*, 155 A.3d 492, 500 (Md. 2017); *State v. Heemstra*, 721 N.W.2d 549, 558 (Iowa 2006); *Barnett v. State*, 783 So. 2d 927, 930 (Ala. Crim. App. 2000); *People v. Morgan*, 758 N.E.2d 813, 838 (Ill. 2001); *State v. Jones*, 538 S.E.2d 917, 926 n.3 (N.C. 2000); *Massie v. State*, 553 P.2d 186, 191 (Okla. Crim. App. 1976); *Tarter v. State*, 359 P.2d 596, 602 (Okla. Crim. App. 1961); *see also* KAN. STAT. ANN. § 21-3436 (2007) (although aggravated assault of another victim is an enumerated felony, assault of the victim killed cannot serve as a predicate felony).

138. FLA. STAT. §§ 775.082, 782.04 (2023) (showing the two sentencing options are the death penalty or life without parole); IOWA CODE § 902.1(1) (2024); LA. STAT. ANN. § 14:30.1(B) (2016); MISS. CODE ANN. § 97-3-21(2) (2020); NEB. REV. STAT. § 28-303 (2016); N.C. GEN. STAT. §§ 14-17(a), 15A-2000(a)(1) (2023); 18 PA. STAT. AND CONS. STAT. ANN. §§ 1102(b), 2502(b) (West 2015); S.D. CODIFIED LAWS § 22-6-1 (2017 & Supp. 2024); WYO. STAT. ANN. § 6-2-101 (2023); 18 U.S.C. § 1111(b).

139. CAL. PENAL CODE §§ 189, 190.2 (West 2014 & Supp. 2024); GA. CODE ANN. § 16-5-1(e)(1) (2014); MD. CODE ANN., CRIM. LAW § 2-201(b)(1) (LexisNexis 2021); NEV. REV. STAT. § 200.030(4) (2023); OKLA. STAT. ANN. tit. 21, § 701.9 (West 2015 & Supp. 2024); TENN. CODE ANN. § 39-13-202(c)(1) (2018 & Supp. 2023); W. VA. CODE ANN. § 61-2-2 (LexisNexis 2020).

those mandating life with parole for felony murder convictions.¹⁴⁰ A fourth group permits life maximum sentences.¹⁴¹ A fifth group at the low end of the spectrum imposes only terms of years.¹⁴²

Having recounted the development of felony murder law more broadly, we can now tell the story of felony murder in New York.

B. NEW YORK FELONY MURDER LAW YESTERDAY, TODAY, AND TOMORROW

1. New York Felony Murder Law Before the 1965 Penal Law

Post-revolutionary New York adopted a statute simply imposing punishment for “wilful murder” without much further definition.¹⁴³ New York adopted its first comprehensive criminal code in 1829, which defined murder as follows:

[K]illing, unless it be manslaughter or excusable or justifiable homicide . . . shall be murder in the following cases: 1. When perpetrated from a premeditated design to effect the death of the person killed, or of any human being: 2. When perpetrated by any act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual: 3. When perpetrated *without any design to effect death*, by a person engaged in the commission of *any felony*.¹⁴⁴

New York’s legislators apparently assumed that the common law had, as Coke proposed, punished unintended killings in the course of all unlawful acts as murder.¹⁴⁵ Accordingly, they thought they were narrowing the rule in requiring any felony. Since the attempt of a felony was also a felony, this language embraced killing in the course of attempts.¹⁴⁶ An 1838 case, *People v. Rector*,

140. ALA. CODE § 13A-5-6 (LexisNexis 2015 & Supp. 2023); IDAHO CODE §§ 18-4003(d), -4004 (2016); KAN. STAT. ANN. § 21-6620(b)(1) (Supp. 2021); N.Y. PENAL LAW § 70.00 (McKinney 2009 & Supp. 2024); OR. REV. STAT. § 163.115(5) (2023); 11 R.I. GEN. LAWS § 11-23-2 (2002).

141. CONN. GEN. STAT. § 53a-35a (2023); MO. REV. STAT. §§ 557.021, 565.021 (2016); MONT. CODE ANN. § 45-5-102; N.J. STAT. ANN. § 2C:11-3(b)(1) (West 2015 & Supp. 2024); TEX. PENAL CODE ANN. §§ 19.02(b)-(c), 12.32(a) (West 2019); UTAH CODE ANN. § 76-3-207.7 (LexisNexis 2017); VA. CODE ANN. §§ 18.2-10, -32 (2021); WASH. REV. CODE §§ 9A.32.030, .040 (2023).

142. ALASKA STAT. § 12.55.125 (2023); COLO. REV. STAT. §§ 18-1.3-306, -3-103 (2024); D.C. CODE § 22-2104 (2001 & Supp. 2001); 730 ILL. COMP. STAT. ANN. 5/5-4.5-20 (West 2022); IND. CODE ANN. § 35-50-2-3(a) (West 2023); ME. REV. STAT. ANN. tit. 17-A, § 1603 (West Supp. 2024); MINN. STAT. ANN. § 609.19 (West 2018); WIS. STAT. ANN. § 940.03 (West 2023 & Supp. 2023).

143. Act of Feb. 14, 1787, ch. 22, 1787 N.Y. Laws 391, 392.

144. An Act Concerning Crimes and Punishments; Proceedings in Criminal Cases; and Prison Discipline, N.Y. Revised Statutes, part IV, ch. 1, tit. I, § 5 (1829) (emphasis added); Act of Dec. 18, 1828, ch. 20, § 4, 1828 N.Y. Laws 19, 19 (codifying “An Act Concerning Crimes and Punishments; Proceedings in Criminal Cases; and Prison Discipline” as part of the Revised Statutes of New York); see also Peter J. McQuillan, *Felony Murder and the Misdemeanor of Attempted Escape: A Legislative Error in Search of Correction*, 15 FORDHAM URB. L.J. 821, 829-30 (1987) (describing the 1829 N.Y. Revised Statutes).

145. McQuillan, *supra* note 144, at 829-30; *People v. Enoch*, 13 Wend. 159, 165 (N.Y. 1834).

146. McQuillan, *supra* note 144, at 832.

adopted a merger limitation on predicate felonies.¹⁴⁷ Mid-century cases struggled with the scope of complicity in felony murder and generally required participation in violence or intent to use force.¹⁴⁸ Late nineteenth-century cases expanded the scope of causation and included one heart attack case.¹⁴⁹

Legislative definitions of felony murder fluctuated in the later nineteenth century but retained their basic scope. In 1860, New York followed Pennsylvania by dividing murder into degrees restricting capital (i.e., first degree) felony murder to killing in the course of “arson, rape, robbery, or burglary.”¹⁵⁰ But it eliminated all enumerated predicate felonies except arson in 1862, and it then made killing during any felony first-degree murder in 1873—essentially returning felony murder to its original shape.¹⁵¹ An 1881 code left this definition of felony murder the same.¹⁵² Predicate felonies yielding felony murder convictions under this statute included not only the usual ones but also larceny¹⁵³ and unlawful entry by a tramp.¹⁵⁴ It was established only in the 1895 case, *People v. Wilson*, that defendants were liable for deaths caused by their accomplices, without proof that the defendant aided or encouraged the act causing death.¹⁵⁵

A 1930 case, *People v. Udwin*,¹⁵⁶ tested the scope of the offense. During an attempted prison escape, escapees held some guards at gunpoint, with shots fired by other guards; one escapee was fatally shot.¹⁵⁷ In affirming convictions of participants, the majority found sufficient evidence that the fatal shot was fired from a gun held by one escapee, perhaps while struggling over the gun with an officer.¹⁵⁸ The majority thereby permitted defendants to be held liable

147. *People v. Rector*, 19 Wend. 569, 592–93 (N.Y. Sup. Ct. 1838).

148. See generally *People v. Van Steenburgh*, 1 Parker’s Crim. Rep. 39 (N.Y. Ct. Oyer & Terminer 1845) (involving shots fired at mounted policemen during a riot); *Ruloff v. People*, 18 N.Y. 179 (1858) (concerning the alleged murder of a woman and child).

149. *Cox v. People*, 80 N.Y. 500, 516 (1880).

150. Act of Apr. 14, 1860, ch. 410, § 2, 1860 N.Y. Laws 712, 712–13 (discussed by McQuillan, *supra* note 144, at 834).

151. Act of Apr. 12, 1862, ch. 197, sec. 6, § 5, 1862 N.Y. Laws 368, 369 (discussed by McQuillan, *supra* note 144, at 836–38); Act of May 29, 1873, ch. 644, sec. 1, § 5, 1873 N.Y. Laws 1014, 1014–15 (discussed by McQuillan, *supra* note 144, at 838).

152. Act of July 28, 1881, ch. 676, § 183, 1881 N.Y. Laws 1, 44.

153. *People v. Willett*, 6 N.E. 301, 302–03 (N.Y. 1886).

154. *People v. Deacons*, 16 N.E. 676, 679 (N.Y. 1888).

155. *People v. Wilson*, 40 N.E. 392, 393–94 (N.Y. 1895); see also *People v. Giro*, 90 N.E. 432, 434 (N.Y. 1910) (“A shot fired by either under the circumstances disclosed by the evidence was the act of both, whether their minds met in the act of shooting or not, provided they met in the act of committing the burglary.”); *People v. Friedman*, 98 N.E. 471, 473 (1912) (“An express agreement by intending robbers not to kill in carrying out a plan of robbery would not save any of the conspirators from responsibility for a homicide by one of them in committing or attempting to commit the robbery, if such killing was the natural and probable result of the robbery or attempt to rob in such a contingency as actually occurred in this case.”). For an earlier case suggesting the contrary, see *People v. Van Steenburgh*, 1 Parker’s Crim. Rep. 39, 39 (N.Y. Ct. Oyer & Terminer 1845).

156. See generally *People v. Udwin*, 172 N.E. 489 (N.Y. 1930).

157. *Id.* at 491.

158. *Id.* at 491–93.

for the death of an accomplice but stopped short of holding that defendants could be held liable for deaths directly caused by non-participants resisting the felony, which implied the defendants would not be liable for a fatal shooting by guards, however justifiable. In 1960, New York joined a wave of decisions explicitly adopting agency rules. Its 1960 decision in *People v. Wood* dismissed a felony murder charge for the fatal shootings of a bystander and an accomplice by a third party resisting the felony, citing recent cases in other states, declaiming that the common law felony murder rule had been “barbaric,” and concluding that the legislature must have intended to restrict liability to killings by participants in the felony.¹⁵⁹

2. Drafting New York Penal Law § 125.25(3)

In 1961, the legislature appointed a Temporary Commission on Revision of the Penal Law and Criminal Code, which announced plans for a thorough revision of the homicide chapter, along the lines proposed in the Model Penal Code (promulgated in 1962).¹⁶⁰ A 1963 draft required that one of the participants cause death by “an act inherently dangerous to human life.”¹⁶¹ In this way, the Commission sought to capture the Model Penal Code’s requirement of recklessness and its aim of allowing the jury to presume culpability from behavioral indicators such as the use of a deadly weapon. Yet it failed to individualize culpability so that accomplices of the principal could be convicted with both less harmful conduct *and* less culpability. The Commission responded to this problem the next year, not by requiring proof of recklessness for non-trigger accomplices too, but by offering an affirmative defense, burdening accomplices to prove they did not commit, aid, or encourage the act causing death, were unarmed, and could not reasonably foresee an act dangerous to life.¹⁶² This favoring of principals over accomplices no doubt weakened the provision’s appeal. In any case, the provision ultimately adopted resolved the disparity by eliminating the requirement of an act inherently dangerous to human life, thereby reducing the required culpability for actual killers as well.¹⁶³

Insight into the reform process is provided by a remarkable interview with the Commission’s Executive Director Richard Denzer, the Chief of Appeals at

159. *People v. Wood*, 167 N.E.2d 736, 738 (N.Y. 1960).

160. STATE OF N.Y. TEMP. COMM’N ON REVISION OF THE PENAL L. & CRIM. CODE, INTERIM REPORT, Leg. 185-41, Reg. Sess., at 15 (1962); STATE OF N.Y. TEMP. COMM’N ON REVISION OF THE PENAL L. & CRIM. CODE, INTERIM REPORT, Leg. 186-8, Reg. Sess., at 38-39 (1963); Herman Schwartz, *Criminal Law Revision Through a Legislative Commission: The New York Experience*, 18 BUFF. L. REV. 213, 213 (1969) (interviewing Richard Bartlett).

161. Proposed N.Y. Penal Law, S.B. 3918, 1964 Leg., Reg. Sess., § 130.25(3) (N.Y. 1964); McQuillan, *supra* note 144, at 843.

162. McQuillan, *supra* note 144, at 844-45 n.145; Proposed N.Y. Penal Law, S.B. 3918. McQuillan was a member of the Commission. See Schwartz, *supra* note 160, at 219.

163. McQuillan, *supra* note 144, at 845-46 n.146 (citing Act of July 20, 1965, ch. 1030, 1965 N.Y. Laws 2343, 2387-88).

the Manhattan District Attorney's office.¹⁶⁴ Denzer's interlocutors were Herman Schwartz, a University at Buffalo law professor, and Jerome Skolnick, a Berkeley criminologist. Although Wechsler had served on the Commission, Denzer denied that the Commission's product had been greatly influenced by the Model Penal Code and professed that its influence was confined to the section on general principles of liability.¹⁶⁵ Asked why, Denzer characterized the Model Penal Code as too academic, citing the Code's treatment of felony murder:

Altogether too much emphasis is placed on the word "reckless." For example, felony murder is brought in through the back door of the Model Penal Code by means of a rebuttable presumption of recklessness. . . . [T]here is no provision for felony murder as such. There is only a presumption that a killing in the course of the commission of an independent felony is reckless. Perhaps, that's all right as regards the actual killer, but what about the non-killer? How can you presume recklessness on the part of a non-killer when he isn't even the person who committed the homicidal act? . . . The jury can't make a determination of this realistically. It is too theoretical.¹⁶⁶

Although Denzer implied that the Model Penal Code unfairly presumed the recklessness of accomplices, the Commission did *not* propose burdening the prosecution to prove such recklessness even for accomplices. The requirement of "extreme indifference to human life" was eliminated in the draft ultimately adopted.¹⁶⁷ The burdensome defense for accomplices was retained.

Denzer implied that the key decision-makers were his staff rather than the Commission. A majority of these were prosecutors from his own office:

[T]here is no substitute for knowing the crimes and courts in a live context; the ivory tower approach is too-often unworkable. . . . Lest we be accused of having hired too many prosecutors, it should be understood that prosecutors were hired because they had the experience that was thought necessary. Defense lawyers do not appear in court nearly as often as prosecutors.¹⁶⁸

164. Wolfgang Saxon, *Richard G. Denzer, Ex-Prosecutor and New York Judge, Dies at 80*, N.Y. TIMES (Jan. 17, 1992), <https://www.nytimes.com/1992/01/17/obituaries/richard-g-denzer-ex-prosecutor-and-new-york-judge-dies-at-80.html> (on file with the *Iowa Law Review*); Herman Schwartz & Jerome Skolnick, *Drafting a New Penal Law for New York: An Interview with Richard Denzer*, 18 BUFF. L. REV. 251, 251 (1969) (interviewing Richard Denzer).

165. See Schwartz & Skolnick, *supra* note 164, at 252–53. In fact, the special part's ordering of offenses into ladders of greater and lesser included offenses was drawn from the Model Penal Code.

166. *Id.* at 253 (emphasis omitted) (footnote omitted).

167. Act of July 20, 1965, ch. 1030, 1965 N.Y. Laws 2343, 2387–88. Denzer admitted that apart from Wechsler, the Commission was almost entirely staffed by prosecutors. See Schwartz & Skolnick, *supra* note 164, at 257.

168. See Schwartz & Skolnick, *supra* note 164, at 257.

He added that bar, judicial, and civil rights organizations were not consulted in the drafting because he and his staff were too busy.¹⁶⁹

Returning to the felony murder provisions later in the interview, Skolnick asked if the Commission had considered abolishing felony murder. Denzer explained:

Some members of the Commission thought that the felony murder rule was too harsh in that one who does not pull the trigger may be deemed guilty of murder. [T]hey pointed out that a lookout in a robbery situation or other defendant of lesser culpability, who didn't think anyone would be killed, is made guilty of the same crime as the robbery accomplice who, with intent, kills someone. . . . Actually, felony murder is looked upon as a rule of deterrence more than anything else. However, . . . the consensus was that when a person commits a serious crime—particularly where firearms are involved—and a homicide is one of the results, then he should suffer the consequences. . . . Practically every jurisdiction in this country accepts the felony murder doctrine. It certainly would have been drastic for us to eliminate it completely.¹⁷⁰

Schwartz interjected that England had abolished felony murder and Denzer replied: “Yes, and most of the arguments against it are from England.”¹⁷¹ Skolnick pressed, with obvious skepticism: Could felony murder really have been retained in the belief that it deterred? Denzer responded:

In terms of culpability, felony murder deserves treatment equivalent to that of murder. This is particularly true if the rule comes into play only upon the perpetration of the more violent and dangerous crimes. Something is bound to happen, for instance, in the classical armed robbery situation. When it does, even out of panic, or during escape, a severe penalty is merited.¹⁷²

Skolnick responded with the classic reformist argument that both deterrence and retribution should then be directed at the intended crime of robbery rather than the unintended result, and implied that popular unfamiliarity with the rule precluded any deterrent influence:

Skolnick: Why aren't the penalties for the simple armed robbery greater? Who deserves the greater penalty—a man who is part of an

169. *Id.* at 258–59. Commission Chair Richard Bartlett offered a slightly different account: Prosecutors were engaged because academics and defense attorneys would not have been willing to work for the commission full-time. Schwartz, *supra* note 160, at 219. The public was not consulted until late in the process to avoid political pressure, and the ACLU declined to offer timely comments. *Id.* at 226–28. Minority advocacy groups were not consulted, but prosecutors and police were. *Id.* at 227, 229.

170. Schwartz & Skolnick, *supra* note 164, at 260.

171. *Id.*

172. *Id.* at 261.

accident during a robbery or a man who goes out and intends to commit a murder?

Denzer: Now you're raising a philosophical problem, that is, how much of a part should result play in determining the punishment for a crime. Under the Model Penal Code, result means virtually nothing, and the determination of punishment is made largely on culpability. . . . But we tried to be realistic in terms of what the community was ready to accept. Therefore, we . . . permitted the result to play its part.

Skolnick: What do you mean by "community"? Not the man on the street who has never heard of the felony murder rule?

Denzer: The Legislature of New York. They would never, at least in these times, have enacted a penal law without the felony murder rule.¹⁷³

Undaunted, the interviewers continued to press Denzer until he admitted that the punitive attitudes he attributed to the Commission, legislature, and public were in fact his own. Asked if he would still have recommended a felony murder in the teeth of legislative disagreement, he replied, "Yes. The culpability involved is still sufficient."¹⁷⁴

In sum, the New York felony murder rule was drafted by and for prosecutors, in the teeth of recommendations from the American Law Institute and dissent within the Commission and without input from judges, defense attorneys, and civil rights groups.

3. Applying NYPL § 125.25(3)

The resulting provision, New York Penal Law ("NYPL") section 125.25(3), conditions felony murder on participating in burglary, robbery, arson, kidnapping, escape, rape, and other aggravated sexual assaults, in which a participant causes the death of a non-participant in the course and in furtherance of the felony.¹⁷⁵

173. *Id.* (footnote omitted).

174. *Id.*

175. In pertinent part, as applicable prior to September 2024, NYPL section 125.25 provides:

A person is guilty of murder in the second degree when . . .

3. Acting either alone or with one or more other persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, criminal sexual act in the first degree, sexual abuse in the first degree, aggravated sexual abuse, escape in the first degree, or escape in the second degree, and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

On its face this language—requiring causation by a participant in furtherance of the crime—appears to continue in force the agency limitation of *Wood*.¹⁷⁶ On the other hand, it conditions liability on participation in the felony, not on complicity in the act causing death. The statute provides an affirmative defense for participants who did not kill; did not aid or encourage the killing; were not armed; had no reason to believe another participant was armed; and had no reason to expect another participant would seriously injure anyone.¹⁷⁷ Second-degree murder is a Class A-I Felony, punishable by an indeterminate sentence (i.e., subject to release on parole after completion of the minimum term), with a required minimum sentence of between fifteen and twenty-five years and a required maximum term of life.¹⁷⁸

Since adoption of the Penal Law, key New York cases on felony murder have concerned causation, sentencing, and attempts. A 1974 case established a test for the causation of death required for extreme indifference murder. In *People v. Kibbe*, assailants left a victim in a helpless state by a highway at night, where he was fatally struck by another vehicle.¹⁷⁹ The New York Court of Appeals¹⁸⁰ ruled the defendants' acts:

[A] sufficiently direct cause of death so as to warrant the imposition of a criminal penalty therefor . . . if it can be said beyond a reasonable doubt, as indeed it can be here said, that the ultimate harm is something which should have been foreseen as being reasonably related to the acts of the accused.¹⁸¹

With this foreseeability standard, the court required proximate *rather than* direct causation. This became the causation test for all homicide cases, including felony murder.

(b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury

Murder in the second degree is a class A–I felony.

N.Y. PENAL LAW § 125.25(3) (McKinney 2020). Effective September 1, 2024, acts formerly punished as criminal sexual act in the first degree were consolidated into the offense of rape in the first degree. Accordingly, criminal sexual act has been excised from section 125.25(3) as applied after that date, but the law is otherwise unchanged. See S.B. 8008, 247th Leg., 2023–2024 Sess. (N.Y. 2024) (amending section 125.25 and other sections).

176. See N.Y. PENAL LAW § 125.25; *People v. Wood*, 167 N.E.2d 736, 739 (N.Y. 1960), abrogated by *People v. Hernandez*, 624 N.E.2d 661 (N.Y. 1993).

177. N.Y. PENAL LAW § 125.25.

178. *Id.*; *id.* § 70.00(3)(a)(i).

179. *People v. Kibbe*, 321 N.E.2d 773, 774–76 (N.Y. 1974).

180. New York's highest appellate court.

181. *Kibbe*, 321 N.E.2d at 776.

In the felony murder context, even this requirement of foreseeability was honored in the breach. In *People v. Ingram*, a burglar was captured at gunpoint, bound by a homeowner, and then arrested.¹⁸² When the homeowner had a fatal heart attack, Ingram was found guilty of felony murder. Although his jury was not instructed on the requirement that such a death be foreseeable, no defense exception preserved the error.¹⁸³

A 1991 decision of a trial court cited both *Ingram* and *Kibbe* in justifying a felony murder conviction in another improbable case. In the 1991 case of *People v. Matos*, a New York Appellate Division¹⁸⁴ decision upheld the felony murder conviction of a robber who fled across rooftops at night when a pursuing officer fell down an airshaft to his death.¹⁸⁵ The New York Court of Appeals affirmed this decision, also citing *Kibbe* and finding sufficient foreseeability.¹⁸⁶ The court also cited two other important cases: *People v. Gladman* and *People v. Hernandez*. The 1976 case of *People v. Gladman* held that the scope of the felony continued during flight from the crime to a place of temporary safety¹⁸⁷ so that a death caused by such flight, or in furtherance of it, would count as felony murder.¹⁸⁸ The court cited another causation decision relying on *Kibbe*, *People v. Hernandez*,¹⁸⁹ upholding the conviction of a robber for the death of a police officer at the hands of a fellow officer during a shootout with the defendant.¹⁹⁰ With the *Matos* decision, the court abandoned the agency rule previously adopted in *Woods* and seemingly required by the language of NYPL section 125.25(3) in favor of a rule requiring only proximate cause. Today, New York State remains one of only thirteen felony murder states without an agency rule.¹⁹¹ However, its felony murder provision excludes liability for the deaths of accomplices.¹⁹²

Other cases established that felony murder, as a crime that does not require an intent to kill, cannot be attempted.¹⁹³ The practical effect of this holding is

182. *People v. Ingram*, 492 N.E.2d 1220, 1220 (N.Y. 1986).

183. *Id.* at 1221.

184. An intermediate appellate court.

185. *People v. Matos*, 571 N.E.2d 93, 93 (N.Y. 1991).

186. *People v. Matos*, 634 N.E.2d 157, 158 (N.Y. 1994).

187. *People v. Gladman*, 359 N.E.2d 420, 424 (N.Y. 1976).

188. *Id.*

189. *See generally* *People v. Hernandez*, 624 N.E.2d 661 (N.Y. 1993).

190. *Matos*, 634 N.E.2d at 158 (discussing *Hernandez*, 624 N.E.2d at 661).

191. *Binder & Yankah*, *supra* note 35, at 164.

192. N.Y. PENAL LAW § 125.25(3) (McKinney 2020).

193. *People v. Brown*, 249 N.Y.S.2d 922, 922 (App. Div. 1964) (“An attempt to commit manslaughter is apparently a contradiction because the specific crime of manslaughter involves no intent and, accordingly, an intention to commit a crime whose distinguishing element is lack of intent is logically repugnant.”).

[T]here is no such crime as ‘attempted’ felony murder, because an attempt requires an intent to commit a specific crime. One cannot attempt to commit an act which one does not intend to commit (*People v. Falu*, 37 A.D.2d 1025; *People v. Brown*, 21 A.D.2d 738). Felony murder is not an intentional crime; it . . . make[s] felons strictly

that defendants cannot be indicted for this crime or convicted of it at trial; yet they can choose to plead to it under indictments for offenses of higher grade, including felony murder, and some do. They are then sentenced and punished for an impossible crime.¹⁹⁴ Moreover, as we will see, dozens of New Yorkers are arrested for this fictitious crime every year.

Finally, NYPL section 70.25 requires that sentences for two offenses must run concurrently if one offense is an element of another. The case of *People v. Parks* establishes that the commission or attempt of a felony is an element of the felony murder form of second-degree murder. Accordingly, both must be sentenced concurrently.¹⁹⁵

Three controversial cases illustrate the risk of excessive law enforcement discretion that New York's expansive felony murder rule invites.

Two highly publicized cases led to recent exonerations based on false confessions. Both involved white victims likely to engage public sympathy: an elderly female victim attacked in her suburban home and a tourist from Utah defending his mother from multiple robbers in a Manhattan subway stop. In the first case, police pressured Renay Lynch, a tenant of the victim, to turn informant. When Lynch could not get an acquaintance to implicate himself in the killing, police talked her into claiming she was present as he robbed and murdered the victim.¹⁹⁶ In the second case, Johnny Hincapie was one of

responsible for all consequences of their felonies, whatever their intentions or the intentions of their confederates. Accordingly, an indictment charging attempted felony murder charges no crime and is jurisdictionally defective. Jurisdictional defects in indictments are not waived by a plea of guilty. Thus, the two convictions and sentences for 'attempted' felony murder should be reversed and the counts therefor[e] dismissed. We have considered *People v. Foster* (19 N.Y.2d 150). In our view, it is distinguishable. There, there was a plea of guilty to a lesser included crime of the higher crime charged in the indictment. Here, the guilty plea was to the counts as charged in the indictment.

People v. Hassin, 48 A.D.2d 705, 705 (N.Y. App. Div. 1975); *see also* *People v. Falu*, 325 N.Y.S.2d 798, 798 (App. Div. 1971) (finding no error in failing to instruct on attempted involuntary manslaughter); *People v. Zimmerman*, 360 N.Y.S.2d 127, 127 (App. Div. 1974) (holding charge and conviction for attempted involuntary manslaughter invalid); *People v. Jackson*, 370 N.Y.S.2d 739, 739 (App. Div. 1975) (overturning jury conviction for attempted involuntary manslaughter as lesser included offense of intentional murder); *People v. Hendrix*, 391 N.Y.S.2d 186, 186 (App. Div. 1977), *aff'd*, 376 N.E.2d 192 (N.Y. 1978); *People v. Burrell*, 505 N.Y.S.2d 272, 272 (App. Div. 1986) (finding no attempted involuntary manslaughter); *People v. Campbell*, 532 N.E.2d 86, 88 (N.Y. 1988) (finding no attempted second degree assault because of element of unintended injury); *People v. Martinez*, 611 N.E.2d 277, 277 (N.Y. 1993) (attempted involuntary manslaughter conviction invalid, and jurisdictional claim is not waived by failure to object to charge at trial, but reaffirming authority of *Foster's* holding that "we will allow a defendant to plead to a nonexistent crime in satisfaction of an indictment charging a crime with a heavier penalty").

194. *People v. Mayo*, 908 N.Y.S.2d 353, 353 (App. Div. 2010) ("While the defendant pleaded guilty to attempted felony murder, a 'nonexistent' . . . or 'logically and legally impossible' . . . crime, the plea was permissible since it was 'in satisfaction of an indictment charging a crime with a heavier penalty'" (citing *Foster*, 19 N.Y.2d at 152 and *Martinez*, 611 N.E.2d at 810)).

195. *People v. Parks*, 734 N.E.2d 741, 742-43 (N.Y. 2000).

196. Kim DeGeorge & Nate Benson, *Judge Vacates Woman's Conviction in 1995 Amherst Murder Case*, WGRZ (Jan. 6, 2024, 10:07 AM), <https://www.wgrz.com/article/news/crime/woman-exonerated-in-1995-amherst-murder/71-c9a5fc94-620c-4c6d-940b-50a173fb3e8b> [<https://perma.cc>

many Latinx teens taking the subway from Queens that night to go dancing. Police arrested him and told him he'd been implicated by another participant but that he'd be released if he confessed to a minor role—and so he did.¹⁹⁷ Believing they were saving themselves by implicating others, both Lynch and Hincapie assumed they were confessing to only minor wrongdoing that police would gratefully overlook.¹⁹⁸ Yet both were convicted of murder and spent decades in prison before exoneration.¹⁹⁹ Paradoxically, felony murder's vast disproportion between perceived wrong and actual penalty enables police to extract false confessions to this crime.

Finally, in 2019, Christopher Ransom, a Black man who had reportedly struggled with mental illness, robbed two Queens phone stores using toy guns.²⁰⁰ According to police, Jagger Freeman, also Black, had helped plan these robberies.²⁰¹ Freeman, unarmed, watched the second robbery from across the street. Police converged on the store in response to an alarm. As Ransom tried to run from the store, police fired forty-two shots, striking Ransom seven times, wounding Sergeant Matthew Gorman and killing Detective Brian Simonsen.²⁰² By virtue of the *Hernandez* case, Ransom and Freeman were both potentially liable for causing Simonsen's death indirectly. Ransom pled to manslaughter

/7RNF-5V95]; Innocence Staff, *Renay Lynch Is Exonerated After Nearly 26 Years of Wrongful Conviction in Buffalo, New York*, INNOCENCE PROJECT (Jan. 5, 2024), <https://innocenceproject.org/renay-lynch-is-exonerated-after-nearly-26-years-of-wrongful-conviction-in-buffalo-new-york> [<https://perma.cc/8WFG-CTAP>].

197. Bill Hughes, *The Murder That Changed New York City*, CITY LIMITS (Oct. 26, 2010), <https://citylimits.org/2010/10/26/the-murder-that-changed-new-york-city> [<https://perma.cc/63DS-HF2C>]; Benjamin Weiser, *Man Exonerated in 1990 Subway Killing of Tourist to Get \$18 Million*, N.Y. TIMES (Dec. 2, 2022), <https://www.nytimes.com/2022/12/02/nyregion/johnny-hincapie-exonerated-killing.html> (on file with the *Iowa Law Review*); *Johnny Hincapie*, NAT'L REGISTRY EXONERATIONS (Sept. 10, 2023), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5094> [<https://perma.cc/N9WZ-7F94>].

198. Weiser, *supra* note 197.

199. *Id.*

200. Sarah Maslin Nir, *2-Man Team Planned Robbery That Led to Detective's Death. It Was Their Second in a Week, Police Say*, N.Y. TIMES (Feb. 17, 2019, 11:30 PM), <https://www.nytimes.com/2019/02/17/nyregion/jagger-freeman-christopher-ransom-nypd.html> (on file with the *Iowa Law Review*); Reuven Blau, *Man Charged in Detective's Death Says He Wanted to Commit 'Suicide by Cop'*, CITY (Apr. 6, 2020, 4:57 PM), <https://www.thecity.nyc/2019/04/05/man-charged-in-detective-s-death-says-he-wanted-to-commit-suicide-by-cop> [<https://perma.cc/844T-AMDE>]; Ali Watkins & Ali Winston, *A Model Detective. A Small-Time Thief. How 2 Lives Collided in a Deadly Robbery in Queens.*, N.Y. TIMES (Feb. 18, 2019), <https://www.nytimes.com/2019/02/18/nyregion/nypd-brian-simonsen-christopher-ransom.html> (on file with the *Iowa Law Review*).

201. Georgett Roberts, M'Niyah Lynn & Mark Lungariello, *Jagger Freeman Sentenced in NYC Cop Brian Simonsen's Death*, N.Y. POST (July 7, 2022, 5:29 PM), <https://nypost.com/2022/07/07/jagger-freeman-sentenced-in-nyc-cop-brian-simonsen-s-death> (on file with the *Iowa Law Review*). Freeman's attorney denied this. Jacob Kaye, *Queens Man Sentenced to 30 Years for Murder of Detective Shot by Fellow Officers*, QUEENS DAILY EAGLE (July 7, 2022), <https://queenseagle.com/all/2022/7/7/queens-man-sentenced-to-30-years-for-murder-of-detective-shot-by-fellow-officers> [<https://perma.cc/U82L-DJF6>].

202. Kaye, *supra* note 201.

and other crimes and was sentenced to thirty-three years.²⁰³ Freeman reportedly turned down a plea offer of a ten-year sentence for robbery and was convicted at trial of felony murder and sentenced to thirty years to life.²⁰⁴ Freeman's case is described in the preamble of the proposed reform bill.

4. Reforming NYPL § 125.25(3)

A comprehensive reform bill is now under consideration in New York.²⁰⁵ This bill would revise New York's felony murder provision (NYPL section 125.25(3)) to:

- Condition murder liability on either killing recklessly during a predicate felony or, where not the principal, participating in a predicate felony with the intent to cause death;
- Reduce the grade of the offense from a Class A-I Felony punishable by a minimum sentence of fifteen years to life, to a Class B Violent Felony, punishable with an indeterminate sentence of at least five years and a maximum of no more than twenty-five years; and
- Apply retroactively, offering resentencing to two classes of prisoners: (1) those convicted of second-degree murder after being charged with felony murder, and (2) those who pled to some other offense after being charged with felony murder on the basis of alleged conduct no longer punishable under the reform law.²⁰⁶

Should such a reform be adopted? And should such reforms be considered elsewhere? Our next Part informs these questions by examining the performance

203. Press Release, Melinda Katz, Dist. Att'y's, Queens Dist. Att'y's Off., Brooklyn Man Sentenced to 33 Years in Prison After Pleading Guilty to Aggravated Manslaughter in 2019 Death of Detective Brian Simonsen (Nov. 17, 2021), <https://queensda.org/brooklyn-man-sentenced-to-33-years-in-prison-after-pleading-guilty-to-aggravated-manslaughter-in-2019-death-of-detective-brian-simonsen> [<https://perma.cc/RCM2-DF4P>].

204. Andrea Grymes, *Jagger Freeman Sentenced to 30 Years to Life in Friendly Fire Death of NYPD Det. Brian Simonsen*, CBS NEWS (July 7, 2022, 6:37 PM), <https://www.cbsnews.com/newyork/news/sentencing-day-for-jagger-freeman-in-friendly-fire-death-of-nypd-det-brian-simonsen> [<https://perma.cc/6QSW-H53N>]; Roberts et al., *supra* note 201. The sentence, widely reported as thirty years to life, includes a sentence of fifteen to life for the murder charge. The aggregate minimum sentence is reported by the Department of Corrections and Community Supervision as twenty-seven years, ten months, and eight days, presumably reflecting the availability of good time credit for the consecutive sentence for the second robbery. *Freeman, Jagger*, N.Y. DEP'T CORR. & CMTY. SUPERVISION, <https://nysdoccslookup.doccs.ny.gov> [<https://perma.cc/V4NV-MRJS>] (putting 22B3118 in the "Department ID Number" box and clicking "Search").

205. Assemb. B. 2899, 2023–2024 Leg., Reg. Sess. (N.Y. 2023); *Assembly Bill A2899*, N.Y. ST. S., <https://www.nysenate.gov/legislation/bills/2023/A2899> [<https://perma.cc/C99W-NMK8>] (showing bill introduced Feb. 1, 2023, by Assembly Member Carroll and referred to Codes Committee, Feb. 1, 2023, and Jan. 3, 2024; co-sponsored by members Forrest, Simon, Epstein, and Levenberg); S.B. 6865, 2023–2024 Leg., Reg. Sess. (N.Y. 2023); *Senate Bill S6865*, N.Y. ST. S., <https://www.nysenate.gov/legislation/bills/2023/S6865> [<https://perma.cc/7A67-T8N4>] (showing bill introduced May 11, 2023, by Senator Julia Salazar; referred to Senate Codes Committee May 11, 2023, and Jan. 3, 2024).

206. Assemb. B. 2899, 2023–2024 Leg., Reg. Sess. (N.Y. 2023).

of New York's current felony murder law in achieving proportionately and fairly distributed punishment.

II. DATA ON FELONY MURDER IN NEW YORK

This Part presents the data gathered on individuals in New York State who have been arrested for and/or convicted of felony murder. This data reveals substantial racial disparities in arrests and convictions for felony murder, disparities that increased when we examined convictions based on accomplice liability compared to convictions for individuals who actually committed the homicidal act. This disparity is consistent with other data that tracks arrests, convictions, and prison sentences across New York. Yet, this is the first study in New York to analyze the racial disparities in conviction for felony murder, and the first study nationwide to analyze the racial disparities based on theory of liability used to convict someone of felony murder.

We were able to gather this data through a combination of records requests to relevant criminal systems agencies and a lengthy process of researching and coding the cases behind the data. As far as we are aware, no institution in New York State maintains a list of all the individuals in the state convicted of felony murder, including their names and whether they are convicted as the principal or on an accomplice liability theory that they participated in the underlying predicate felony.

The difficulty in obtaining such data is not exclusive to New York State. In 2022, Sarah Stillman, a reporter for the *New Yorker* and professor at the Yale Investigative Reporting Lab, undertook a count of people in the United States who have been convicted of felony murder. After filing numerous public records requests, the team learned that most agencies did not keep track of such convictions.²⁰⁷ In most states, as in New York, felony murder is counted with other forms of murder, making it difficult to isolate and track.²⁰⁸ Ultimately, the Yale–*New Yorker* team was able to gather robust data (with identifiers and racial demographics) from only eleven states as of the time the article went to print in 2023.²⁰⁹

This lack of transparency is not unique to felony murder convictions. A recent report from Measures for Justice, an organization dedicated to bringing “transparency and accountability”²¹⁰ to the criminal legal system, found that “with few exceptions, the mechanisms for criminal justice data collection and release in New York State are broken.”²¹¹ Researchers who were interviewed for the report described a “black box” system where they struggled to understand

207. Stillman, *supra* note 7.

208. *Id.*

209. *Id.*

210. MEASURES FOR JUST., <https://measuresforjustice.org> [<https://perma.cc/6FP6-HXQQ>].

211. MEASURES FOR JUST., A LOOK INSIDE THE BLACK BOX OF NEW YORK STATE'S CRIMINAL JUSTICE DATA 1 (2022), https://measuresforjustice.org/wp-content/uploads/2023/01/New_York_Data_Landscape_Report.pdf [<https://perma.cc/W7CQ-FACR>].

even what data was being collected and could be shared with them.²¹² Another problem the report captured was significant variance across jurisdictions in the way that data are defined and recorded, with New York City often touted as having more sophisticated data-gathering systems, better tracked and coded data, and more easily accessible records than other parts of the state.²¹³ Certain types of data pose particular challenges: race classification in arrest statistics is often based on officer perceptions; race classification in other datasets may be self-reported, and the two datasets may not match.²¹⁴ The long amount of time and sometimes great cost associated with criminal records requests can also impede access to information.²¹⁵

Our experience with gathering felony murder data in New York reflects these difficulties. We discovered that the New York State Division for Criminal Justice Services (“DCJS”) had relatively robust data on individuals arrested for and convicted of felony murder under NYPL section 125.25(3). However, DCJS was not able to provide identifying information (names or dates of birth) for these individuals.²¹⁶ Nor did DCJS track whether an individual was convicted on a theory that they were the principal or on an accomplice liability theory. Because the individuals were not identified, we had no way, without additional data, to track this information ourselves.

The New York State Department of Corrections and Community Supervision (“DOCCS”) was able to provide names and dates of birth that would allow us to research the theory of liability under which someone was convicted. However, DOCCS does not track under what subsection of the second-degree murder statute someone is convicted. Therefore, we had to cross-reference the DOCCS and DCJS data in order to compile an identified list of felony murder convictions.

This cross-referencing revealed discrepancies across agencies in coding for race and in recording the final sentence. In some instances, we were confident that a case from DCJS matched an individual from DOCCS dataset based on age at the time of the offense, date of sentence/admission into DOCCS custody, jurisdiction where they were sentenced, and sentence length. However, in a few such cases, the DCJS and DOCCS datasets listed different races for the individual who we were fairly confident was the same person (e.g., someone listed as white in DCJS dataset and Latinx in DOCCS records). This discrepancy likely reflects differences in how race is coded: by officer report for arrest/conviction data in DCJS and by individual self-report for DOCCS data. We also noted discrepancies in sentence length across some

212. *Id.* at 5–6.

213. *Id.* at 7, 16.

214. *Id.* at 8.

215. *Id.* at 9–11; *see also* Christina Koningsor, *Police Secrecy Exceptionalism*, 123 COLUM. L. REV. 615, 619 (2023) (detailing the infrastructure of secrecy in police record-keeping systems).

216. This is per DCJS policy, according to Deputy Commissioner Bates. E-mail from Leigh Bates, Deputy Comm’r, N.Y. State Div. of Crim. Just. Servs., to Guyora Binder & Alexandra Harrington (Jan. 23, 2023, 12:54 PM) (on file with the *Iowa Law Review*).

matched cases as DCJS did not always count consecutive sentences on non-felony murder charges, nor subsequent, post-incarceration consecutive sentences for, e.g., assault or weapons possession. Ultimately, we were able to compile an identified and coded dataset that approaches the total number of felony murder convictions from 2008 to 2019, but not a full dataset of all the actual convictions in this time frame.

A. METHODOLOGY

In late Fall of 2022, the Authors made data requests under New York's Freedom of Information Law ("FOIL") to DCJS and DOCCS. These requests aimed to identify, from the period 2008 to the present, how many people in New York were arrested for felony murder, how many of those people were convicted of felony murder, what were the demographics of this population, what were the sentences in cases with convictions, and—among those convicted of felony murder—how many were convicted as the principal versus an accomplice or participant in the underlying felony.

DCJS maintains criminal system data, including data on arrests and dispositions, for all sixty-two counties in New York.²¹⁷ Some data is available on their website, but not data for arrests/convictions for murder in the second degree or for felony murder.²¹⁸ The Authors corresponded with the FOIL Office at DCJS to explain what data we were interested in gathering. After guidance from a Deputy Commissioner at DCJS, we submitted a FOIL request seeking "[a] case level dataset on dispositions of arrests for second degree murder under PL 125.25(3) between 2008 and 2021."²¹⁹

On January 19, 2023, the DCJS Records Access Officer provided "a case-level file of all PL 125.25(03) arrests that reached final disposition between 2008 and 2021."²²⁰ This dataset included individuals under eighteen as those individuals are "handled as adult[s]" when charged with an A-1 Felony.²²¹ However, the dataset did not include the names of the individuals in the dataset or whether they were charged as being the principal or an accomplice in the underlying felony, as DCJS is unable to provide that information.²²² Moreover, the dataset did not include individuals who were arrested for murder in the first degree, for aggravated murder, for murder in the second degree

217. *Criminal Justice Statistics*, N.Y. ST. DIV. CRIM. JUST. SERVS., <https://www.criminaljustice.ny.gov/crimnet/ojsa/stats.htm> [<https://perma.cc/GF43-M8QD>].

218. *Id.*

219. Data request was submitted to DCJS. E-mail from Alexandra Harrington to FOIL Officer, N.Y. State Div. of Crim. Just. Servs. (Dec. 26, 2022, 9:56 AM) (on file with the *Iowa Law Review*).

220. DCJS response to FOIL request. E-mail from Brian Garvey, Recs. Access Officer, N.Y. State Div. of Crim. Just. Servs., to Alexandra Harrington (Jan. 19, 2023, 12:09 PM) (on file with the *Iowa Law Review*).

221. *Id.*

222. See E-mail from Guyora Binder to Leigh Bates, Deputy Comm'r, N.Y. State Div. of Crim. Just. Servs. (Jan. 19, 2023, 6:19 PM) (on file with the *Iowa Law Review*); E-mail from Guyora Binder to Leigh Bates, Deputy Comm'r, N.Y. State Div. of Crim. Just. Servs. (Jan. 22, 2023, 10:45 AM) (on file with the *Iowa Law Review*); E-mail from Leigh Bates to Guyora Binder, *supra* note 216.

under a subsection of NYPL section 125.25 other than section 125.25(3), or for a lesser offense, and who were subsequently convicted of felony murder.²²³ In other words, it did not capture the entire population of individuals convicted of felony murder during this time period.

A second FOIL request to DCJS aimed primarily at determining the racial distribution of convictions for predicate felonies for felony murder. We also included a request for data on all convictions for felony murder regardless of the original arrest offense. In April 2024, we sent a follow-up request for all convictions for all of the felonies enumerated in NYPL section 125.25(3) as predicate felonies for felony murder and for “all convictions for attempted or completed second-degree murder under [NY]PL 125.25 (3).”²²⁴ In June 2024, we received a response. Like the first DCJS dataset, this dataset was anonymized. It presented a further complication in that, unlike the first dataset—and although the wording of the two requests was identical—it excluded individuals who were under eighteen at the time of the crime. This exclusion meant that a sizeable portion of the felony murder convictions were likely missing.²²⁵ Moreover, as we had discovered with the first dataset, it included a number of convictions for felony murder where the individual was also convicted of intentional murder or depraved indifference murder, i.e., where the felony murder doctrine did not make a difference to the outcome in that case.²²⁶ For these reasons and because of the timing of the request, we report on the aggregate numbers here but focus our analysis on the identified dataset of cases that we have confirmed as felony murder without another conviction under a different theory of liability.

In order to analyze the data from the DCJS dataset and attempt to determine whether someone convicted of felony murder was convicted as the principal or an accomplice in the underlying felony, we submitted a second FOIL request to DOCCS. DOCCS oversees the population of incarcerated individuals in New York State and maintains data on the individuals in its custody, including their date of birth, race, county of conviction, crimes of conviction, and

223. See E-mail from Alexandra Harrington to FOIL Officer, *supra* note 219 (showing the data request included dispositions for arrests for felony murder and, therefore, did not include dispositions for felony murder where the original arrest was under another charge); see also N.Y. PENAL LAW § 125.25 (McKinney 2020) (defining murder in the second degree).

224. Data request submitted to Division of Criminal Justice Services. Email from Alexandra Harrington to Brian Garvey, Recs. Access Officer, N.Y. State Div. of Crim. Just. Servs. (Apr. 28, 2024, 12:35 PM) (on file with the *Iowa Law Review*).

225. There were thirty-two completed felony murder convictions for individuals under age eighteen in the first DCJS dataset. Guyora Binder & Alexandra Harrington, DCJS Combined Dataset (Aug. 1, 2024) (unpublished dataset) (on file with the *Iowa Law Review*) [hereinafter DCJS Dataset]. This represents about 15% of the total felony murder convictions in that set.

226. This complication in the data is why it was necessary with the first dataset for us to individually review each conviction to confirm that there was not an additional murder conviction under another theory of murder liability.

sentence.²²⁷ On March 8, 2023, we submitted a FOIL request for all individuals who entered DOCCS custody between 2008 and the present and who were convicted of murder in the second degree.²²⁸ Unfortunately, correspondence with the FOIL Office revealed that DOCCS does not maintain data on which subsection of the Penal Law individuals are convicted under; therefore, DOCCS could not share data on who was convicted of felony murder.²²⁹ On April 27, 2023, DOCCS transmitted a list of all individuals convicted of murder in the second degree who had entered DOCCS custody since 2008.²³⁰

With the assistance of student researchers, we began to analyze and code the data received. This analysis revealed substantial disparities across race and age in the impact of felony murder law in New York State.²³¹

B. DCJS DATASET

1. Arrests for Felony Murder

The DCJS dataset included 1,232 individuals arrested for completed or attempted felony murder under NYPL section 125.25(3) whose cases were disposed of between 2008 and 2021.²³² Noting that dispositions significantly diminished during the COVID-19 pandemic years of 2020 and 2021, and in order to exclude any outliers from these years, researchers counted dispositions only between 2008 and 2019. This left 1,144 arrests for felony murder. Of the 1,144 cases, 928 involved charges for completed felony murder. Another 216 cases involved charges of attempted felony murder, despite the fact that attempted felony murder is not a legally recognized charge under New York law.²³³ We focused on the 928 completed felony murder arrests and on convictions for completed felony murder, but we report separately an analysis of the attempted felony murder cases.

227. See, e.g., N.Y. DEP'T OF CORR. & CMTY. SERVS., INCARCERATED PROFILE REPORT – SEPTEMBER 2024, at 1–3 (2024), <https://doocs.ny.gov/system/files/documents/2024/09/incarcerated-profile-report-september-2024.pdf> [<https://perma.cc/QEZ9-KFMQ>].

228. E-mail from Alexandra Harrington to N.Y. Dep't of Corr. & Cmty. Servs. (Mar. 8, 2023, 10:24 AM) (on file with the *Iowa Law Review*).

229. Letter from Nadene Shultis, FOIL Unit, N.Y. Dep't of Corr. & Cmty. Servs., to Alexandra Harrington (Apr. 27, 2023) (on file with the *Iowa Law Review*).

230. *Id.*; Guyora Binder & Alexandra Harrington, DOCCS Dataset (Aug. 1, 2024) (unpublished dataset) (on file with the *Iowa Law Review*) [hereinafter DOCCS Dataset].

231. For purposes of assessing racial disparities, we compared Black, Latinx, and white defendants. DCJS data also included “Asian” and “Other-Unknown” racial categories. DCJS Dataset, *supra* note 225. There were thirty-six of these individuals in the entire DCJS dataset (2.9%). *Id.* DOCCS also counted “Native American,” “Asian,” and “Other.” DOCCS Dataset, *supra* note 230. There were ninety-six individuals in these categories, or 4.3% of the DOCCS dataset. *Id.*

232. DCJS Dataset, *supra* note 225.

233. See *People v. Burress*, 505 N.Y.S.2d 272, 273 (App. Div. 1986); see also *People v. Campbell*, 532 N.E.2d 86, 87–89 (N.Y. 1988) (holding that attempt to commit assault in the second degree is a legal impossibility because there cannot be intent to cause an unintended injury and explaining that “there can be no attempt to commit a crime which makes the causing of a certain result criminal even though wholly unintended”).

Analysis of the 928 arrests for completed felony murder during this time period revealed substantial disparities in the likelihood of arrest by race. Black people were 19.6 times as likely to be arrested for and charged with felony murder than were white people, and Latinx people were 5.9 times as likely to be arrested for felony murder as white people.²³⁴ During the relevant time period, Black people made up about 15% of the state's population, Latinx people made up about 17%, and white people made up 59% of New York's population.²³⁵ Comparatively, 62.7% of the 928 felony murder arrestees were Black, 22.0% were Latinx, and 12.5% were white.²³⁶ Put differently, 84.7% of individuals arrested in New York State for felony murder from 2008 to 2019 were Black or Latinx, despite those populations making up only 32.8% of the state population.

Table 1

Felony Murder ("FM") Arrestees vs. New York State ("NYS") Population		
	FM Arrestees	NYS Population
Black	62.7%	15.1%
Latinx	22.0%	17.7%
White	12.5%	59.0%

We also compared the racial disparities in arrests for felony murder with overall arrests for felonies and for violent felonies in New York State. DCJS has publicly available data on adult arrests by race from 2016 to the present.²³⁷ We examined statewide arrests by race for felonies and for violent felonies in 2016 and compared those numbers to the arrests for felony murder.²³⁸

234. See *infra* Table 3.

235. See *infra* Table 1. We used the 2010 census counts as an average of the state population for the relevant time period. Because the annual reported population counts are merely an estimate based on the decennial count, and because we would otherwise use an average of the 2008 to 2019 census years, we decided that the most straightforward method would be to use the 2010 census data for the entire time period. See *About*, U.S. CENSUS BUREAU (May 6, 2024), <https://www.census.gov/programs-surveys/popest/about.html> [<https://perma.cc/25TN-5NPP>] (explaining the method of calculating annual population counts by estimated based on reported births, deaths, and migration). We ran the numbers using both 2010 data and average census data from 2008 to 2019, and the slight differences in population counts did not result in significant differences in likelihood calculations.

236. See *infra* Table 1.

237. See *Adult Arrest Demographics by County and Region: 2023*, N.Y. ST. DIV. CRIM. JUST. SERVS., <https://www.criminaljustice.ny.gov/crimnet/ojsa/adult-arrest-demographics/2023/index.html> [<https://perma.cc/T9B2-RYJP>].

238. We examined the publicly available DCJS data from both 2016 and 2019 to see if there were noticeable differences in arrests by race between those two years. We found that the proportion of felony arrests and violent felony arrests by race were largely the same in both years, even though overall felony arrests decreased by 16.6% between 2016 and 2019 and overall

Although Black people were overrepresented in each arrest category compared to their representation in the statewide population, the overrepresentation was greatest for felony murder arrests.²³⁹ The opposite was true for white people. The Black/white and the Latinx/white racial disparities in likelihood of arrest increased from felony arrests to violent felony arrests and from violent felony arrests to felony murder arrests.²⁴⁰ Black people were about six times as likely as white people to be arrested for a felony, about ten times as likely to be arrested for a violent felony, and about nineteen times as likely to be arrested for felony murder.²⁴¹ Latinx people were almost three times as likely as white people to be arrested for a felony, about four times as likely to be arrested for a violent felony, and about five times as likely to be arrested for felony murder.²⁴²

Table 2

Felony Murder (“FM”) Arrestees (2008 to 2019) vs. Arrestees for All Felonies (“F”) and Violent Felonies (“VF”) (2016)				
	All F Arrestees	VF Arrestees	FM Arrestees	NYS Population
	2016	2016	2008 to 2019	2010 Census
Black	44%	51%	63%	15%
Latinx	24%	26%	22%	18%
White	26%	19%	13%	59%

violent felony arrests decreased by 15.7% in that time period. The racial makeup across analogous categories (felony arrests or violent felony arrests) did not change more than 1.3% in that time period. In 2016, the first year for which public data was available, there were 150,610 arrests for felonies across New York State. DIV. OF CRIM. JUST. SERVS., N.Y. STATE, ADULT ARREST DATA SOURCE NOTES 2 (2018), <https://www.criminaljustice.ny.gov/crimnet/ojsa/adult-arrest-demographics/2016/NewYorkState.pdf> [<https://perma.cc/Y5Q2-ZCNY>]. Among these arrests, 66,799, or 44.4%, were Black; 36,802, or 24.4%, were Latinx; and 39,582, or 26.3%, were white. *Id.* That year there were 40,384 arrests for violent felonies. Among those violent felony arrests, 20,412, or 50.5%, were Black; 10,605, or 26.2%, were Latinx; and 7,588, or 18.8%, were white. *Id.* In 2019, the most recent year for which we counted felony murder data, there were 125,663 arrests for felonies in New York, and 34,019 arrests for violent felonies. DIV. OF CRIM. JUST. SERVS., N.Y. STATE, ADULT ARREST DATA SOURCE NOTES 2 (2020), <https://www.criminaljustice.ny.gov/crimnet/ojsa/adult-arrest-demographics/2019/NYS.pdf> [<https://perma.cc/79Y3-D6PB>]. Among the felony arrests, 56,012, or 44.6%, were Black; 30,785, or 24.5%, were Latinx, and 32,870, or 26.2%, were white. *Id.* Among the violent felony arrests, 17,252, or 50.7%, were Black; 9,189, or 27.0%, were Latinx; and 5,937, or 17.5%, were white. *Id.*

239. See *infra* Table 2.

240. See *infra* Table 3.

241. See *infra* Table 3.

242. See *infra* Table 3.

Table 3

Likelihood of Arrest for Felony Murder by Race (2008 to 2019) vs. Likelihood of Arrest for All Felonies and Violent Felonies (2016)						
	All Felony Arrests		Violent Felony Arrests		Felony Murder Arrests	
	#	Likelihood	#	Likelihood	#	Likelihood
Black	66,799	2.2827%	20,412	0.6975%	582	0.0199%
Latinx	36,802	1.0700%	10,605	0.3083%	204	0.0059%
White	39,582	0.3460%	7,588	0.0663%	116	0.0010%
All Races	150,610	0.7768%	40,384	0.2083%	928	0.0048%
		X/W Ratio		X/W Ratio		X/W Ratio
Black		6.6		10.5		19.6
Latinx		3.1		4.6		5.9

Among our felony murder arrest dataset, the racial disparities in arrest likelihood by race increased when we examined the population of individuals who were between fifteen and nineteen years old when they allegedly committed the crime for which they were arrested.²⁴³ The younger age group was overrepresented amongst the population of felony murder arrestees: Almost a third of completed felony murder arrestees (27.9%) were ages fifteen to nineteen, while only 7% of the state population was aged fifteen to nineteen during the relevant time period. The difference in Black vs. white youths' representation in the felony murder arrestee population (almost 69% Black and 9% white) compared to the statewide population (18% Black and 53% white) was particularly stark.²⁴⁴ Among fifteen to nineteen-year-olds, Black youths were 23.7 times as likely to be arrested for felony murder as white youths, and Latinx youths were 5.8 times as likely to be arrested.²⁴⁵ The arrest likelihood ratio for Black youths, as compared to white youths, was about 20% greater than for people of all ages, while the likelihood ratios for Latinx youths were about the same for people of all ages.²⁴⁶

243. There was one fourteen-year-old among the arrests for completed felony murder. Because we were only able to get census data for fifteen to nineteen-year-olds, we excluded the fourteen-year-old from our counts.

244. See *infra* Table 4.

245. See *infra* Table 5.

246. See *infra* Table 5.

Table 4

Felony Murder ("FM") Arrestees (Ages 15 to 19) vs. New York State ("NYS") Population (Ages 15 to 19)		
	FM Arrestees	NYS Population
Black	68.3%	18.0%
Latinx	19.7%	21.3%
White	8.5%	53.0%

Table 5

Likelihood of Completed Felony Murder ("FM") Arrest 15 to 19 vs. Likelihood of Completed Felony Murder ("FM") Arrest All Ages				
	All Ages		Ages 15 to 19	
	# of FM Arrests	Likelihood	# of FM Arrests	Likelihood
Black	582	0.020%	177	0.072%
Latinx	204	0.006%	51	0.017%
White	116	0.001%	22	0.003%
All Races	928	0.005%	259	0.019%
		X/W Ratio		X/W Ratio
Black		19.6		23.7
Latinx		5.9		5.8

2. Overall Convictions and Convictions for Felony Murder

We calculated how many of the individuals charged with felony murder were ultimately convicted of some crime, as well as how many were ultimately convicted of completed felony murder between 2008 and 2019. Among the 928 arrestees for completed felony murder, 88% of them were convicted and sentenced for some crime or convicted and sentenced on another case. The crimes of conviction ranged in seriousness from murder in the first degree to criminal possession of a weapon in the fourth degree. Among the 817 convictions, 66.5% were secured by a plea. Of those plea dispositions, 80.7% were pleas to a charge lesser than murder. This is significant because, even where arrest for felony murder does not lead to conviction for felony murder, arrest for such a serious offense can offer leverage to prosecutors in securing

plea agreements and can put pressure on defendants facing long prison terms to plead to lesser charges.

From the set of 817 convictions (both misdemeanors and felonies), we more closely examined the 782 felony convictions.²⁴⁷ These felony conviction numbers revealed racial disparities in the likelihood of conviction for Black people and Latinx people as compared to white people. Of the 782 people convicted of felonies, 62.3% were Black, 22.6% were Latinx, and 12.7% were white.²⁴⁸ Black people arrested for felony murder were about nineteen times as likely as white people arrested for felony murder to be convicted of a felony, and Latinx people were almost six times as likely as white people to be convicted.²⁴⁹

Teens made up almost a third of the felony conviction subset (28.7%). For Black teens, the likelihood of conviction was even greater than for Black people of all ages; Black teens were almost twenty-five times as likely to be convicted of a felony as white teens.²⁵⁰ For Latinx teens, the likelihood was slightly less than for Latinx people of all ages.²⁵¹

These disparities in convictions are consistent with, but far greater than, disparities the New York Civil Liberties Union (“NYCLU”) discovered in statewide felony convictions from 2002 to 2019.²⁵² According to NYCLU’s analysis, “Black people were convicted . . . at a rate roughly five times greater than white people.”²⁵³ For Latinx people, the conviction rate was more than

247. Note that not all of the remaining convictions are misdemeanors; only thirteen of the remaining thirty-five cases are clearly identified as misdemeanor convictions. The rest are covered by another case, and the class of conviction is not indicated.

248. See *infra* Table 6. Non-convictions include acquittals, cases dismissed or declined to prosecute, and “other favorable outcomes.”

249. See *infra* Table 7.

250. See *infra* Table 7.

251. See *infra* Table 7. For the purposes of calculating conviction likelihood, we used the state population as the denominator. In other words, we examined the likelihood of conviction as a Black person in New York State rather than as a Black person arrested for felony murder. One reason for this is to account for the disparities baked into each step of the criminal legal process. Studies have documented the over-policing of Black neighborhoods, which results in more frequent arrests of Black people and more over-charging by prosecutors of Black people compared to white people. See generally Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479 (2016) (identifying social forces that make Black people vulnerable to increased police contact); JOHANNA MILLER & SIMON MCCORMACK, N.Y.C.L. UNION, SHATTERED: THE CONTINUING, DAMAGING, AND DISPARATE LEGACY OF BROKEN WINDOWS POLICING IN NEW YORK CITY (2018), https://www.nyclu.org/sites/default/files/field_documents/nyclu_20180919_shattered_web.pdf [<https://perma.cc/5REL-WPAT>] (documenting the impacts of over-policing in certain majority-minority New York City neighborhoods); ELIZABETH HINTON, LESHAE HENDERSON & CINDY REED, AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM (2018), <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf> [<https://perma.cc/LQ52-9ASL>] (highlighting the ways in which bias against Black people operates across the criminal legal system).

252. Simon McCormack & Jesse Barber, *A Racial Disparity Across New York That Is Truly Jarring*, N.Y.C.L. UNION (Nov. 29, 2022), <https://www.nyclu.org/en/news/racial-disparity-across-new-york-truly-jarring> [<https://perma.cc/G6DU-D8WD>].

253. *Id.*

double that of white people.²⁵⁴ The disparity between Black people and white people in our dataset convicted after arrest for felony murder was more than four times as great as the racial disparity reported by NYCLU for all felony convictions statewide. The disparity between Latinx people and white people in likelihood of felony conviction after arrest for felony murder was almost three times as great as the disparity for felony convictions reported by NYCLU.²⁵⁵ For teens convicted of felonies after arrest for felony murder, the Black/white racial disparity was more than five times as great than that for all ages in the NYCLU database.²⁵⁶

Table 6

All Felony (“F”) Convictions vs. Felony (“F”) Convictions After Felony Murder (“FM”) Arrest			
	All Convictions (NYCLU)	F Convictions After FM Arrest (All Ages)	F Convictions After FM Arrest (Ages 15 to 19)
Black	40.6%	62.3%	70.2%
Latinx	22.1%	22.6%	19.1%
White	35.0%	12.7%	8.4%

²⁵⁴ *Id.*

²⁵⁵ *See infra* Table 7.

²⁵⁶ *See infra* Table 7.

Table 7

Felony Conviction Likelihood (NYCLU Dataset) vs. Felony Conviction Likelihood After Arrest for Felony Murder (DCJS Dataset)						
	All Ages (NYCLU)		All Ages (DCJS)		15 to 19 (DCJS)	
	#	Likelihood	#	Likelihood	#	Likelihood
Black	12,806	0.4376%	487	0.0166%	158	0.0639%
Latinx	6,967	0.2026%	177	0.0051%	43	0.0147%
White	11,046	0.0965%	99	0.0009%	19	0.0026%
All Races	31,574	0.1629%	782	0.0040%	225	0.0164%
		X/W Ratio		X/W Ratio		X/W Ratio
Black		4.5		19.2		24.5
Latinx		2.1		5.9		5.6

Within the subset of individuals convicted of a crime after arrest for felony murder, we examined the population that was convicted of felony murder. We have two different sources of data for this count. One is the original DCJS data, which reflects convictions for completed felony murder after arrest for felony murder (209 convictions), including individuals under age eighteen. The second data source is the new DCJS data, which reflects convictions for completed felony murder (288 convictions), regardless of the crime of arrest, but which does not include juveniles. Our data reflected similar racial disparities in the felony murder conviction subset as in the overall conviction after felony murder arrest subset. Because it contains data on teens as well as adults, we focus on the first DCJS dataset of convictions after arrest for felony murder.²⁵⁷ About 22% of the arrestees in the original DCJS dataset were convicted of completed felony murder in this time period. A little less than a third of those convictions (30.6%) were secured through a plea. Of these 209 individuals convicted of felony murder, 135 (64.6%) were Black, 45 (21.5%) were Latinx, and 25 (12.0%) were white.²⁵⁸

The fifteen to nineteen-year-old cohort made up almost 29% of the completed felony murder convictions after arrest for felony murder. Black teens are overrepresented in the felony murder conviction population (68.3%) compared to the overall felony murder arrest (62.7%) and conviction

257. Of the 288 convictions in the second DCJS dataset, 175 (60.8%) were Black, 62 (21.5%) were Latinx, and 37 (12.9%) were white. Guyora Binder & Alexandra Harrington, Second DCJS Combined Dataset (Aug. 1, 2024) (unpublished dataset) (on file with the *Iowa Law Review*) [hereinafter Second DCJS Dataset].

258. See *infra* Table 8.

populations (64.6%).²⁵⁹ Conversely, white teens and Latinx teens are slightly underrepresented in the felony murder conviction cohort compared to the arrestee or overall felony murder convictions cohorts.

Although racial disparities among this fifteen to nineteen age group were very high, they were not noticeably higher than the disparities for adults. Overall, Black people were about twenty-one times more likely than white people to be convicted of felony murder after arrest for felony murder, and Black teens were about twenty times as likely as white teens to be convicted of felony murder after arrest for felony murder.²⁶⁰ The Latinx/white likelihood ratios were 6:1 for people of all ages and 4.6:1 for teens.²⁶¹

Table 8

Felony Murder ("FM") Arrests vs. Felony Murder ("FM") Convictions				
	FM Arrests (All Ages)	FM Arrests (Ages 15 to 19)	FM Convictions (All Ages)	FM Convictions (Ages 15 to 19)
Black	62.7%	68.3%	64.6%	68.3%
Latinx	22.0%	19.7%	21.5%	18.3%
White	12.5%	8.5%	12.0%	10.0%

Table 9

Felony Murder Conviction Likelihood After Arrest for Felony Murder				
	All Ages		15 to 19	
	#	Likelihood	#	Likelihood
Black	135	0.0046%	41	0.0166%
Latinx	45	0.0013%	11	0.0038%
White	25	0.0002%	6	0.0008%
All Races	209	0.0011%	60	0.0044%
		X/W Ratio		X/W Ratio
Black		21.1		20.1
Latinx		6.0		4.6

259. See *infra* Table 8.

260. See *infra* Table 9.

261. See *infra* Table 9.

3. Comparing Convictions for Predicate Felonies and Convictions for Felony Murder

In the second dataset from DCJS, we were able to obtain data on convictions from 2008 to 2009 for all the felonies that are predicates for a felony murder conviction pursuant to NYPL section 125.25(3). This data allowed comparison of the racial composition and the conviction likelihoods for felony murder and the various felonies upon which a felony murder conviction could be predicated. For this comparison, we used the second dataset of felony murder convictions from DCJS rather than the first dataset.²⁶²

Such comparison revealed that Black people made up a far greater proportion of the convictions for felony murder (60.8%) than they did for any other predicate felony (about 27% to 41%).²⁶³ Conversely, white people were underrepresented in the felony murder cohort (about 13%) compared to their representation in the predicate felony cohorts (from about 30% for kidnapping to about 50% for arson).²⁶⁴ The difference between Latinx people's representation in the felony murder cohort and the predicate felonies cohorts was less unidirectional. Their representation in the felony murder group (21.5%) was comparable to their representation in the robbery/burglary groups, while their representation in the sex offenses (26.9%) and kidnapping (25.5%) cohorts was greater than their representation in the felony murder cohort.²⁶⁵

The conviction likelihood ratios reflected these same racial disparities.²⁶⁶ Black people and Latinx people had a greater likelihood of conviction than did white people across each offense category.²⁶⁷ The Black/white disparity for felony murder, however, far exceeded that for any predicate felony. Black/white conviction likelihood ratios ranged from about 2.5:1 to 5:1 in the predicate felony cohorts, while the likelihood ratio was about 19:1 for the felony murder cohort, almost four times the disparity of even the most racially disparate predicate felony cohort (5.1:1 for kidnapping).²⁶⁸ The Latinx/white

262. The second dataset includes everyone convicted of felony murder from 2008 to 2019, regardless of the crime of arrest. It excludes individuals who were under age eighteen at the time of the crime. Because the predicate felony convictions also exclude juveniles, the numbers can be compared across comparable populations. See Second DCJS Dataset, *supra* note 257.

263. See *infra* Table 10.

264. See *infra* Table 10.

265. See *infra* Table 10.

266. Because of the difficulty in visually presenting both the raw numbers of convictions and the conviction likelihood ratios in one table, we included only the conviction likelihood numbers in Table 11. There were 275 convictions for kidnapping in the relevant time period. Of those, 108 were Black, 70 were Latinx, and 83 were white. There were 66,606 convictions for robbery and burglary, of which 27,445 were Black, 14,409 were Latinx, and 21,803 were white. There were 5504 convictions for sex offenses, including rape in the first degree, criminal sexual act in the first degree, sexual abuse in the first degree, and aggravated sexual abuse. Among those convictions, 1,481 were Black, 1,481 were Latinx, and 2,305 were white. There were 2,231 convictions for arson from 2008 to 2019. Of those, 680 were Black, 294 were Latinx, and 1,114 were white. Finally, there were 148 convictions for escape: 61 Black, 15 Latinx, and 65 white.

267. See *infra* Table 11.

268. See *infra* Table 11.

disparity in felony murder conviction likelihood (5.6:1) was double that of the most racially disparate predicate felony ratio (2.8:1 for kidnapping).²⁶⁹ In sum, felony murder liability is vastly more racially disparate than liability for any predicate felony.

Table 10

Predicate Felony Convictions vs. Felony Murder Convictions						
	Sex Offenses	Kidnapping	Robbery / Burglary	Arson	Escape	FM
Black	26.9%	39.3%	41.2%	30.5%	41.2%	60.8%
Latinx	26.9%	25.5%	21.6%	13.2%	10.1%	21.5%
White	41.9%	30.2%	32.7%	49.9%	43.9%	12.9%

Table 11

Conviction Likelihood Predicate Felonies vs. Conviction Likelihood Felony Murder ("FM")						
	FM	Kidnapping	Robbery / Burglary	Sex Offenses	Escape	Arson
Black	0.0060%	0.0037%	0.9379%	0.0506%	0.0021%	0.0232%
Latinx	0.0018%	0.0020%	0.4189%	0.0431%	0.0004%	0.0085%
White	0.0003%	0.0007%	0.1906%	0.0201%	0.0006%	0.0097%
All Races	0.0015%	0.0014%	0.3435%	0.0284%	0.0008%	0.0115%
X/W Ratio						
Black	18.5	5.1	4.9	2.5	3.7	2.4
Latinx	5.6	2.8	2.2	2.1	0.8	0.9

4. Disposition Outcome and Sentence Length

Finally, we analyzed the disposition outcome and sentence length for the population arrested for felony murder and convicted of felony murder as compared to the population arrested for felony murder and convicted of any crime. We did not find substantial differences between the racial composition of felony murder arrestees overall and arrestees who were convicted and sentenced to prison time or between the racial composition of arrestees who were convicted and sentenced to something less than prison and those who were sentenced to prison time.

²⁶⁹ See *infra* Table 11.

Among the 817 individuals who were convicted of some crime, 770, or 94.2%, were sentenced to prison time. The racial composition of the cohort sentenced to prison time and the cohort that received jail time, probation, time served, or a conditional discharge was similar.²⁷⁰ The racial disparities in these groups were also almost the same—about 19:1 Black/white and about 6:1 Latinx/white.²⁷¹

Table 12

All Convictions After Felony Murder (“FM”) Arrest vs. Convictions Resulting in a Prison Sentence and Non-Prison Sentence				
	FM Arrestees	Convictions After FM Arrest	Convictions with Prison Sentence	Convictions with Non-Prison Sentence
Black	62.7%	64.6%	62.3%	61.7%
Latinx	22.0%	21.5%	22.6%	23.4%
White	12.5%	12.0%	12.6%	12.8%

Table 13

Likelihood of Conviction After Arrest for Felony Murder vs. Likelihood of Conviction with Prison Sentence and Non-Prison Sentence						
	All Convictions After Arrest for Felony Murder		Convictions with Prison Sentence		Convictions with Non-Prison Sentence	
	#	Likelihood	#	Likelihood	#	Likelihood
Black	509	0.0174%	480	0.0164%	29	0.0010%
Latinx	185	0.0054%	174	0.0051%	11	0.0003%
White	103	0.0009%	97	0.0008%	6	0.0001%
All Races	817	0.0042%	770	0.0040%	47	0.0002%
		X/W Ratio		X/W Ratio		X/W Ratio
Black		19.3		19.3		18.9
Latinx		6.0		6.0		6.1

We examined the average sentence length for convictions with a sentence to a prison term. However, there are significant limitations to analyzing sentence length. Most pertinently, the DCJS data only reports the sentence for the

270. See *infra* Table 12.

271. See *infra* Table 13.

reported crime of conviction, not the aggregate sentence. For example, no minimum prison term for an indeterminate life sentence exceeded three hundred months or twenty-five years, even though an aggregate sentence with consecutive counts will often exceed twenty-five years. Indeed, we know from our analysis of the identified and confirmed felony murder cases, described below in Section II.C,²⁷² that many aggregate sentences, including for convictions listed in the DCJS data, exceed twenty-five years. Thus, the DCJS data does not necessarily represent the full sentence that an individual received. Moreover, the new DCJS dataset reflected a number of “unknown” or blank minimum prison sentences, unlike the original dataset, which made it almost impossible to analyze sentence length using the data from that cohort.

Analysis of the limited data available from the original DCJS dataset reflected little difference in average sentence length across race. This was true if we calculated average sentence length by assigning a fixed number to a life sentence in order to account for differences in the minimum sentence imposed.²⁷³ It was also true if we calculated the actual life expectancy of each defendant based on their age at the time of disposition in order to account for differences in the meaning of a life sentence depending on the age of the defendant.²⁷⁴ White people had determinate sentences a year longer on average

272. See *infra* Section II.C.

273. The average age at the time of the crime of the individuals who were convicted of a crime after arrest for felony murder was about twenty-five and a half years old. The median was twenty-two years old. The most recent CDC statistics (2020) reflect a life expectancy for New Yorkers of 79.0 years. *New York*, NAT'L CTR. FOR HEALTH STAT., CTRS. FOR DISEASE CONTROL & PREVENTION (May 23, 2024), <https://www.cdc.gov/nchs/pressroom/states/newyork/ny.htm> [https://perma.cc/L6F9-VEFX]. However, recent studies suggest that incarceration takes years off the average life expectancy. See, e.g., Sebastian Daza, Alberto Palloni & Jerrett Jones, *The Consequences of Incarceration for Mortality in the United States*, 57 *DEMOGRAPHY* 577, 595 (2020) (finding mortality excesses in the incarcerated population compared to the general population that “translate[d] into losses of life expectancy at age 45 of about 4–5 years”). We used fifty years as a rough estimate of the average life sentence as a fixed number.

274. We used this second method mindful of the fact that almost a third of our dataset was aged fifteen to nineteen and thus would spend, on average, a longer time in prison on a life sentence than would an older adult.

Note that we could not calculate the average actual time served, as that data is not readily available. Someone serving a fifteen-year-to-life sentence might get out at fifteen years or might serve the full life sentence. That decision is left to the discretion of the parole board. N.Y. COMP. CODES R. & REGS. tit. 9, § 8002 (2019). The vast majority of people serving indeterminate life sentences are not released at their initial parole hearing. DOCCS annual reports on parole board decision-making from 2015 to 2019 reflect a 22–38% approval rate at an initial parole hearing for A-1 violent offenses like murder in the second degree. CORR. & CMTY. SUPERVISION, N.Y. STATE, BOARD OF PAROLE LEGISLATIVE REPORT 2019, at 6 (2019), https://doccs.ny.gov/system/files/documents/2022/02/2019-parole-board-legislative-report_o.pdf [https://perma.cc/U735-SYRK]. However, these reports do not document the average length of time past minimum eligibility that most parole-eligible people serve before being granted release.

To calculate the estimated length of a life sentence based on age, we used data on life expectancy for New Yorkers from the Institute for Health Metrics and Evaluation. *U.S. Health Map*, INST. FOR HEALTH METRICS & EVALUATION (2024), <https://vizhub.healthdata.org/subnational/usa> [https://perma.cc/HY8Z-349U]. We calculated the life expectancy for each defendant based on age at the time of disposition and converted any life sentences into a numerical value

than other races, but had indeterminate life sentences that were roughly the same, and had non-life indeterminate sentences that were on average 2.5 to 3.5 years shorter than other races (Table 14). For felony murder convictions, there was less than a year's worth of variation across the average sentences by race using a fixed-life-sentence calculation (Table 14). However, the felony murder sentences for Black people using the life expectancy model were about two years longer on average than the sentences for white people (Table 15). This likely reflects the larger proportion of Black youths compared to white youths in the cohort convicted of felony murder.

Table 14

Average Prison Sentence for All Convictions After Arrest for Felony Murder Based on Fixed Life Sentence				
	All Convictions	Determinate Sentences	Non-Life Indeterminate Sentences	Indeterminate Life Sentences
Black	22.3 years	13.8 years	6.5 years	36.4 years
Latinx	21.8 years	13.7 years	5.4 years	36.2 years
White	24.9 years	14.7 years	2.9 years	36.8 years
All Races	22.5 years	13.9 years	5.9 years	36.4 years

Table 15

Average Prison Sentence for All Convictions vs. Felony Murder Convictions Using Fixed Life ("FL") and Estimated Life by Age ("EL") Methods of Calculation				
	All Convictions		Felony Murder Convictions	
	FL	EL	FL	EL
Black	22.3 years	22.5 years	35.5 years	36.3 years
Latinx	21.8 years	21.4 years	36.1 years	35.7 years
White	24.9 years	23.7 years	35.7 years	34.5 years
All Races	22.5 years	22.4 years	35.7 years	35.9 years

5. Attempted Felony Murder in DCJS Dataset

We also analyzed the subset of individuals in the DCJS dataset who were arrested for attempted felony murder and whose case was disposed of between 2008 and 2019. During this time period, 216 people were arrested for

based on that life expectancy minus the age at the time of disposition. We then took the averages of the many indeterminate sentences.

attempted felony murder, which is a legal fiction in New York.²⁷⁵ The vast majority of these arrests were within New York City: Only 13 of 216 arrests for attempted felony murder were outside of New York City.

Table 16

Attempted Felony Murder Arrest Distribution by County				
	All Races	Black	Latinx	White
Bronx	72	39	31	2
New York	45	28	14	2
Kings	42	33	7	1
Queens	40	20	12	1
Richmond	4	4	0	0
Erie	3	3	0	0
Albany	2	2	0	0
Oneida	2	2	0	0
Rensselaer	2	2	0	0
Dutchess	1	0	1	0
Nassau	1	0	1	0
Orange	1	0	1	0
Rockland	1	1	0	0
Total	216	134	67	6

The group of attempted felony murder arrestees was more than 60% Black and less than 3% white.²⁷⁶ Black people were eighty-seven times as likely to be arrested for attempted felony murder as were white people, and Latinx people were thirty-seven times as likely to be arrested for this crime as white people.²⁷⁷ Young people ages fifteen to nineteen made up almost a quarter of the arrests for attempted felony murder (23.6%). Although there were only fifteen such arrests, and therefore a small sample size, none of the youths arrested for the fictitious crime of attempted felony murder were white.²⁷⁸ Because there were no white teens arrested for attempted felony murder, Black teens and Latinx teens were infinitely more likely than white teens to be arrested for that offense.

275. See *supra* note 233 and accompanying text; *infra* Table 16.

276. See *infra* Table 17.

277. See *infra* Table 18.

278. See *infra* Table 17.

Table 17

Arrests for Attempted Felony Murder		
	All Ages	15 to 19
Black	62.0%	60.8%
Latinx	31.0%	37.3%
White	2.8%	0.0%

Table 18

Likelihood of Arrest for Attempted Felony Murder				
	All Ages		Ages 15 to 19	
	#	Likelihood	#	Likelihood
Black	134	0.0046%	31	0.0125%
Latinx	67	0.0019%	19	0.0065%
White	6	0.0001%	0	0.0000%
All Races	216	0.0011%	51	0.0037%
		X/W Ratio		X/W Ratio
Black		87.3		–
Latinx		37.1		–

Of the group arrested for attempted felony murder, 69.4% were convicted of some offense, but none were convicted of completed felony murder or attempted felony murder. This is notable because a legally invalid charge ultimately resulted in conviction for almost 70% of people arrested for this charge.

The racial disparities within the group who were convicted after arrest for attempted felony murder are also notable. Of this group, almost half were Black, about a fifth were Latinx, and less than 2% were white. Put differently, more than three-quarters of the Black people arrested for attempted felony murder were convicted of some offense; almost two-thirds of Latinx people arrested for attempted felony murder were convicted of some offense; and only half the white people arrested for attempted felony murder were convicted of some offense. Black people were 133 times as likely as white people to be both arrested for attempted felony and then convicted of a crime. For Latinx people, the likelihood was more than forty-five times that for white people.²⁷⁹

The population of teens ultimately convicted of a crime after arrest for attempted felony murder also reflected substantial racial disparity. More than

279. See *infra* Table 19.

a quarter (25.3%) of the 150 convictions were for individuals aged fifteen to nineteen. Black teens made up almost two-thirds of this group, and Latinx teens made up about a third. There were no white teens who were ultimately convicted of a crime after being arrested for attempted felony murder. As with arrests for attempted felony murder, Black and Latinx teens were infinitely more likely than white teens to be convicted of a crime after arrest for attempted felony murder.²⁸⁰

Table 19

Likelihood of Conviction After Arrest for Attempted Felony Murder				
	All Ages		Ages 15 to 19	
	#	Likelihood	#	Likelihood
Black	102	0.0035%	24	0.0097%
Latinx	41	0.0012%	13	0.0044%
White	3	0.0000%	0	0.0000%
All Races	150	0.0008%	38	0.0028%
		X/W Ratio		X/W Ratio
Black		132.9		–
Latinx		45.5		–

C. IDENTIFIED DATASET OF FELONY MURDER CONVICTIONS
FROM DCJS AND DOCCS

1. Identifying and Confirming Felony Murder Convictions

As noted above, the DCJS datasets did not include identifying information and, therefore, did not allow for case research to determine whether an individual was convicted of intentional murder or depraved indifference murder in addition to felony murder. Nor did they allow us to determine whether someone was convicted under a theory that they were the accomplice or the principal. The DOCCS dataset we received listed 2,255 convictions for murder in the second degree between 2008 and 2023.²⁸¹ Because these individuals were identified by name, we could conduct the necessary research, but we needed to determine first which cases were felony murder as opposed to other forms of second-degree murder. To do so, we removed from the DOCCS dataset duplicates where the same individual was listed more than once, either for multiple counts of second-degree murder in the same case or for multiple, separate convictions for second-degree murder of different victims. This left

^{280.} See *infra* Table 19.

^{281.} DOCCS Dataset, *supra* note 230.

2,140 individuals. Removing individuals who entered custody from 2020 to 2023 left 1,845 individuals.²⁸² We further removed individuals who were convicted of murder in the first degree. That left 1,760 individuals, convicted between 2008 and 2019, whose most serious crime of conviction was murder in the second degree.

We endeavored to identify and confirm felony murder convictions in the DCJS dataset without additional convictions under another theory of murder liability. We also tried to determine which individuals identified in the DOCCS dataset were convicted of felony murder only rather than some other form of second-degree murder or multiple forms of second-degree murder. First, we ran an automated search of the two spreadsheets to see if, based on the county of conviction, age at time of offense, race, date of offense/conviction, and sentence length, we could come up with likely matches for the anonymous DCJS dataset among the DOCCS named dataset. Then, we used legal databases (LexisNexis and Westlaw) and journalistic sources to match as many of the DCJS cases as we could to a named individual from the DOCCS dataset. We were ultimately able to identify by name, with a reasonable degree of certainty, 183 of the 209 completed felony murder convictions from 2008 to 2019 in the DCJS dataset, or 87.6% of the dataset.

In order to determine which individuals in the other DOCCS dataset were convicted of subsection (3) of the second-degree murder statute (felony murder), we pulled a subset of the individuals who, according to DOCCS data, were convicted of both murder in the second degree, and one of the predicate felonies for felony murder (robbery, burglary, kidnapping, arson, rape in the first degree, criminal sexual act in the first degree, sexual abuse in the first degree, aggravated sexual abuse, escape in the first degree, or escape in the second degree). Our theory was that because proof of commission or attempt to commit one of these underlying felonies is required to secure a conviction for felony murder, most individuals convicted of felony murder will also be convicted of one of the predicate felonies. Hypothetically, the prosecution does not need to separately charge the underlying felony, but in our experience from review of numerous records of felony murder convictions, the prosecution will almost always charge the underlying predicate felony in addition to felony murder. Another possibility is that, in the case of a plea, a defendant will plead to felony murder without also pleading to the underlying predicate felony. However, we determined that using predicate felonies to sort through the almost two thousand murders in the second-degree convictions would be an efficient,

282. The first two digits in the Department Identification Number (“DIN”) reflect the date received into DOCCS custody (e.g., “08” reflects a 2008 entry date) and are an imperfect but mostly accurate measure of conviction date. DOCCS does not record date of conviction. Most individuals are transmitted to DOCCS custody within weeks or, in rarer cases, months of their conviction. For individuals convicted at the end of November or in December, this can mean that their disposition date is in one year and their DOCCS admission date is in the following year. Some individuals’ DOCCS admission date reflects a date of admission after a new trial, rather than the original date of admission. But for the vast majority of individuals, the DOCCS admission date (reflected in the first two digits of the DIN) is an accurate analog for the year of disposition.

if imperfect, way to identify felony murder convictions. There were 296 such cases in the DOCCS dataset with a predicate felony conviction in addition to the second-degree murder conviction.

We excluded from the resulting list of 296 cases any individuals who were already “matched” to a row in the DCJS dataset. We further excluded anyone who was also convicted of intentional murder in the second degree (and whose felony murder conviction was therefore not necessary to finding them guilty of murder). Finally, there were a couple of data entries where the case was disposed of before 2008, but the individual was received into DOCCS custody from 2008 to 2019 because of a retrial of an old case or because of a consecutive sentence in another state. We excluded these cases from the dataset as well.

Our review of the DOCCS dataset using this method allowed us to identify an additional fifty-nine individuals who were not in the DCJS dataset and who we could confirm were convicted of felony murder. We also identified an additional nine individuals who were probably convicted of felony murder but who we could not definitively conclude were convicted under NYPL section 125.25(3) using publicly available legal and journalistic resources. Thus, between the DCJS and DOCCS datasets, we identified and confirmed 242 convictions for felony murder without an additional conviction under another theory of murder.

Because the predicate felony sampling method could not guarantee identification of all felony murder cases in the DOCCS dataset, we also took a random sampling of a tenth (or 195 people) of the DOCCS dataset from the relevant time period. We used legal and journalistic sources to determine if any of those individuals could be confirmed as previously unidentified felony murder convictions without additional murder convictions. We found four additional felony murder cases (2.1% of our random sample) outside of the ones we had already identified in the DCJS dataset or in the DOCCS predicate felony cohort.²⁸³ We added those four cases to the 242 previously identified and confirmed cases for a total confirmed and identified dataset of 246 cases.²⁸⁴

^{283.} Of the 195 cases sampled, 36 were already identified in our DCJS-matched dataset or our DOCCS-confirmed felony murder dataset. There were seven cases where we could not definitively determine if it was a felony murder conviction (or only a felony murder conviction). Those seven cases did not have enough information available on Westlaw or through a journalistic and internet source search to determine whether the defendants were convicted of felony murder or not. In one of those seven cases, we thought it very probable the individual was convicted on the basis of felony murder, and we indeed found that individual’s case among those identified as felony murder convictions in the DCJS response to our second request. Because it was a cold case with many years between crime and arrest, we were able to definitively match that individual. Since we could definitively match that case, we counted it among the four confirmed felony murder cases identified from our random sample. (This means only six cases from the random sample remain without enough information to determine conclusively if they are felony murder convictions.)

^{284.} Our confirmed and identified dataset includes some cases where the conviction was later overturned on appeal. We decided to include these cases because we believe they still offer insight into situations where the felony murder rule makes a difference to the conviction. Moreover, some of the reversals were themselves overturned. And reversals were most often granted for issues like ineffective assistance of counsel or procedural violations rather than a finding that there was insufficient evidence to support a conviction for felony murder. These cases are a very small subset

That those four cases make up about 2% of our random sample suggests we might expect to find another thirty to forty or so additional cases not in our identified list.²⁸⁵ In other words, the dataset of 246 identified felony murder convictions (242 previously identified plus the 4 identified from the random sample) appears to be an almost complete dataset (about 90%) of felony murder convictions from 2008 to 2019 without an additional conviction for another theory of murder.

This is consistent with the data we received from the second DCJS request, which identified 288 total completed felony murder convictions from 2008 to 2019. That dataset did not, however, exclude cases where someone was also convicted of intentional murder or depraved indifference murder. Indeed, we identified—through a sampling of a little more than a quarter of new DCJS convictions not provided in the first dataset—at least eight cases where there was an additional conviction under another theory of murder liability. This suggests that the total felony murder conviction count of cases not involving additional convictions under a separate theory of murder liability is very close to what we had already identified. Both because of the timing of receipt of the second request and—more importantly—because the second request excluded juveniles, we decided not to include any new cases we were able to identify from that dataset in our identified and confirmed dataset. Juveniles make up a significant proportion of the felony murder conviction population; we feared data that excluded them would also obscure the extent of the disparities in conviction likelihood.

2. Analysis of Predicate Felonies

We undertook an analysis of the predicate felonies for the felony murder convictions among our 246 identified felony murder cases. In 181 cases,²⁸⁶ the individuals were convicted of a predicate felony as well as felony murder. In sixty-five cases, the defendant had not been convicted of a predicate felony in addition to felony murder. That meant that about 26% of the identified felony murder convictions were convictions for felony murder only, without a corresponding conviction for the underlying predicate felony.

Comparison of the predicate felony conviction group with the no predicate felony conviction group showed greater Black/white disparity and greater Latinx/white disparity in the predicate felony group. Black people were about twenty-two times as likely as white people to be convicted of felony murder with a predicate felony and fifteen times as likely as white people to be convicted

of the overall identified and confirmed felony murder cases. Including dispositions later overturned on appeal is also consistent with our inclusion of dispositions of relatively recent cases where appeals may yet be pending.

^{285.} We include an estimated range here because the complete DOCCS dataset we used for sampling lists a number of duplicate individuals, as described in *supra* Section II.C.1.

^{286.} All fifty-nine DOCCS cases involved a conviction for a predicate felony as well as for felony murder; this was the method we used to identify the felony murder cases among the DOCCS second-degree murder dataset.

of felony murder without a predicate felony.²⁸⁷ Latinx people were seven times as likely as white people to be convicted of felony murder with a predicate felony, and about three times as likely as white people to be convicted of felony murder without a predicate felony.²⁸⁸

These differences across the predicate felony and non-predicate felony conviction groups could be explained by variance in charging decisions left to prosecutorial discretion. The differences could also be explained by trends in negotiations and pleading, given that about two-thirds of the cases without predicate felony convictions were secured by plea compared to less than a third of the overall DCJS felony murder convictions secured by a plea.²⁸⁹

Table 20

Felony Murder (“FM”) Convictions with Predicate Felony (“PF”) Conviction vs. Felony Murder (“FM”) Convictions Without Predicate Felony (“PF”) Conviction		
	FM Convictions w/ PF Conviction	FM Convictions w/o PF Conviction
Black	62.4%	66.2%
Latinx	23.2%	16.9%
White	11.0%	16.9%

287. See *infra* Table 21.

288. See *infra* Table 21.

289. The DOCCS data does not contain information on whether a conviction was secured via plea or trial, so we could not calculate the plea rates for individuals convicted of felony murder and a predicate felony.

Table 21

Likelihood of Felony Murder Conviction with and Without Predicate Felony ("PF") Conviction				
	Felony Murder w/ PF		Felony Murder w/o PF	
	#	Likelihood	#	Likelihood
Black	113	0.0039%	43	0.0015%
Latinx	42	0.0012%	11	0.0003%
White	20	0.0002%	11	0.0001%
All Races	181	0.0009%	65	0.0003%
		X/W Ratio		X/W Ratio
Black		22.1		15.3
Latinx		7.0		3.3

Within the dataset of people convicted of felony murder and a predicate felony, robbery was by far the most common predicate felony, followed by burglary and kidnapping. By comparison, when looking at stand-alone convictions for the felonies that constitute predicate felonies for felony murder,²⁹⁰ robbery and burglary were also the felonies with by far the most convictions in the relevant time period. However, sex offenses were the next most common felony conviction in the relevant time period among the stand-alone convictions for predicate felonies. By contrast, within the dataset of identified convictions for felony murder, only three cases listed a sex offense as the predicate felony. There were no identified felony murder cases in which the predicate felony was escape.

According to DOCCS data, more than 66% of cases with a predicate felony conviction listed robbery as the second crime of conviction after felony murder, with burglary as the next most common crime, followed by kidnapping. The cases with a robbery as the predicate felony also had the greatest disparity in Black/white racial composition (72.5% Black compared to 7.5% white).²⁹¹

290. See *supra* Table 11.

291. See *infra* Table 22.

Table 22

Identified Felony Murder (“FM”) Convictions with Predicate Felonies (“PF”) by Predicate Felony (“PF”)						
	FM Convictions with PF	Robbery	Burglary	Kidnapping	Arson	Sex Offenses
Black	62.4%	72.5%	58.6%	33.3%	25.0%	0.0%
Latinx	23.2%	18.3%	31.0%	42.9%	0.0%	66.7%
White	11.0%	7.5%	10.3%	14.3%	50.0%	33.3%
% of FM Convictions with PF	100.0%	66.3%	16.0%	11.6%	4.4%	1.7%

3. Racial Disparities in Identified Felony Murder Dataset Compared to DCJS De-Identified Dataset and Second-Degree Murder Convictions Dataset

How does the racial composition and conviction likelihood by race for felony murder compare to those for other forms of second-degree murder? To estimate the racial composition for other forms of second-degree murder, we removed the 246 confirmed and identified felony murder cases from the 1,760 DOCCS second-degree murder cohort to get a new list of 1,521 people.²⁹² We compared the demographic data for this group of 1,521 individuals convicted of intentional or depraved indifference forms of second-degree murder to demographic data from our 246 identified felony murder convictions.

These comparisons revealed greater racial disparity in the felony murder conviction cohort than in the all-second-degree murder cohort and even greater disparities when compared to the non-felony-murder second-degree murder group. The racial composition of the all-second-degree murder and the non-felony-murder second-degree murder groups were similar to each other.²⁹³ However, the proportion of Black people in the felony murder cohort was 10% greater than in the second-degree murder cohorts, and the proportion of Latinx people and white people was about 4–5% less.²⁹⁴

The racial disparity between Black people and white people convicted of felony murder in our identified dataset was more than 1.5 times the racial

292. As noted, see *supra* note 283, we believe, based on our random sampling, that we have identified almost all of the felony murder cases in the DOCCS second-degree murder dataset, but that may leave some felony murder cases still counted among the non-felony-murder second-degree murder cohort. There were seven cases in our identified list that were not in the DOCCS dataset and could therefore not be removed from it. These were cases where the conviction was overturned on appeal.

293. See *infra* Table 23.

294. See *infra* Table 23.

disparity between Black people and white people convicted of non-felony-murder second-degree murder. Black people were 12.3 times as likely to be convicted of non-felony-murder second-degree murder as white people, and Latinx people were five times as likely as white people to be convicted.²⁹⁵ Comparatively, the Black/white conviction likelihood ratio for the confirmed and identified felony murder conviction dataset was 19.7:1.²⁹⁶ In other words, the Black/white disparity for felony murder convictions was 60% greater than the Black/white disparity for other forms of second-degree murder. The racial disparity between Latinx people and white people increased more modestly from a likelihood ratio of 5:1 for non-felony-murder second-degree murder to 5.7:1 in the felony murder dataset.²⁹⁷

Table 23

All Second-Degree Murder (“M2”) Convictions vs. Non-Felony-Murder Second-Degree Murder (“Non-FM M2”) Convictions vs. Felony Murder (“FM”) Convictions			
	All M2 Convictions	Non-FM M2 Convictions	ID-ed FM Convictions
Black	54.3%	53.4%	63.4%
Latinx	24.9%	25.4%	21.5%
White	16.6%	17.0%	12.6%

295. See *infra* Table 24.

296. See *infra* Table 24.

297. See *infra* Table 24.

Table 24

Conviction Likelihood (%) All Second-Degree Murder ("M2") vs. Non-Felony-Murder Second-Degree Murder ("Non-FM M2") vs. Felony Murder ("FM")						
	All M2		Non-FM M2		ID-ed FM	
	#	%	#	%	#	%
Black	956	0.0327%	812	0.0277%	156	0.0053%
Latinx	439	0.0128%	386	0.0112%	53	0.0015%
White	292	0.0026%	259	0.0023%	31	0.0003%
All Races	1760	0.0091%	1,521	0.0078%	246	0.0013%
		X/W Ratio		X/W Ratio		X/W Ratio
Black		12.8		12.3		19.7
Latinx		5.0		5.0		5.7

4. Analysis of Felony Murder Convictions Based on Theory of Liability

Our next task was to identify the subsets of people who were convicted of felony murder based on a theory that they were the principal and those who were convicted based on a theory that they were the accomplice and to examine their respective demographic compositions. This required extensive analysis beyond the raw numbers provided through the FOIL requests. Using Westlaw and news reports, we coded the 246 confirmed and identified felony murder cases based on whether a principal was identified in the course of prosecution and on the theory of liability under which the defendant was convicted.

If the defendant was the sole participant in the underlying felony and murder, the case was coded as "principal identified" and "principal theory of liability." If the defendant participated in the felony with co-defendants and the case records or journalistic sources clearly identified the defendant as the person who fired the fatal shot or otherwise fatally wounded or killed the victim, the case was coded as "principal identified" and "principal theory of liability." If the defendant participated in the felony with co-defendants and the case records or journalistic sources clearly identified one of the co-defendants as the "shooter" or person who killed the victim, then we coded the case as "principal identified" and "accomplice theory of liability." Where the defendant and co-defendant(s) both participated in the killing of the victim and where both (or all) people's actions were determined to have killed the victim, we coded as "principal identified" and "principal theory of liability."

Cases where neither the defendant nor co-defendant's actions were definitively identified as causing death, as well as cases where one person in a group did the killing, but the prosecution did not prove (because it does not need to under NYPL section 125.25(3)) which person was the principal, proved

more challenging to code. We decided to code both types of cases as “principal not identified” and “accomplice theory of liability.” Our reasoning was that, in these instances, the prosecution had not actually prosecuted the case on the theory that the defendant was the principal, and that the theory of liability was, therefore, accomplice liability for all participants charged.

A surprisingly large number of cases were prosecuted under the theory that they were complicit in the underlying felony but did not actually kill the victim. Half of the dataset of confirmed and identified felony murder cases from 2008 to 2019 were convicted on an accomplice theory of liability. We coded exactly 123 cases as accomplice liability cases and 123 cases as principal liability. In almost 20% of the cases (47 of 246 cases), the principal was not identified (i.e., the prosecution never identified or proved who delivered the fatal blow).²⁹⁸

i. Racial Disparities

We analyzed the racial composition of the groups convicted based on an accomplice theory of liability and on a theory that they were the principal. Black people made up a slightly larger proportion (1.6% larger) of the accomplice liability group than they did the principal liability subset, while Latinx people made up 10% more of the accomplice liability group than they did the principal group.²⁹⁹ White people were underrepresented in both groups but made up more than twice as much of the principal liability group as they did the accomplice liability subset.³⁰⁰

Black people were more than thirty-four times as likely as white people to be convicted as an accomplice.³⁰¹ Latinx people were about twelve times as likely as white people to be convicted as an accomplice.³⁰² Notably, the Black/white accomplice conviction likelihood ratio (34.3:1) was 2.5 times the principal conviction disparity (13.7:1), and the Latinx/white accomplice ratio (12.2:1) was four times as large as the ratio for principals (3:1).³⁰³ Black people had about the same likelihood of conviction as either accomplice or principal, while Latinx people’s likelihood of conviction as an accomplice was more than 1.5 times that as a principal.³⁰⁴ A reverse increase in likelihood was present for white people: they were almost 2.5 times as likely to be convicted as a principal than as an accomplice.³⁰⁵

Moreover, comparing the felony murder conviction likelihood ratios by theory of liability to non-felony-murder-second-degree murder demonstrates

298. Because no one was identified as the principal in these cases, we coded them as convictions under an accomplice liability theory.

299. See *infra* Table 25.

300. See *infra* Table 25.

301. See *infra* Table 26.

302. See *infra* Table 26.

303. See *infra* Table 26.

304. See *infra* Table 26.

305. See *infra* Table 26.

the outsize role that accomplice liability plays in felony murder's racial disparities. The Black/white conviction likelihood ratio for the identified felony murder cohort was already 1.6 times that for non-felony-murder second-degree murder.³⁰⁶ The disparity for the principal-liability felony murder cohort was only slightly greater (13.7:1 compared to 12.3:1) than the second-degree murder cohort.³⁰⁷ However, the disparity for the accomplice liability group (34.3:1) is nearly three times that for non-felony-murder second-degree murder (12.3:1).³⁰⁸ In other words, felony murder's accomplice liability doctrine accounts for almost all of the observed difference in racial disparity between convictions for felony murder and other forms of second-degree murder.

Table 25

Accomplice Liability and Principal Liability Subsets vs. All Identified FM Convictions ("ID-ed FM")						
	ID-ed FM		Accomplice		Principal	
	#	%	#	%	#	%
Black	156	63.4%	79	64.2%	77	62.6%
Latinx	53	21.5%	33	26.8%	20	16.3%
White	31	12.6%	9	7.3%	22	17.9%
All Races	246	100.0%	123	100.0%	123	100.0%

Table 26

Likelihood of Felony Murder Conviction by Theory of Liability vs. Non-Felony-Murder Second-Degree Murder ("Non-FM M2")								
	Accomplice		Principal		All ID-ed FM		Non-FM M2	
	#	%	#	%	#	%	#	%
Black	79	0.0027%	77	0.0026%	156	0.0053%	812	0.0277%
Latinx	33	0.0010%	20	0.0006%	53	0.0015%	386	0.0112%
White	9	0.0001%	22	0.0002%	31	0.0003%	259	0.0023%
All Races	123	0.0006%	123	0.0006%	246	0.0013%	1,521	0.0078%
		X/W Ratio		X/W Ratio		X/W Ratio		X/W Ratio
Black		34.3		13.7		19.7		12.3
Latinx		12.2		3.0		5.7		5.0

306. See *infra* Table 26.

307. See *infra* Table 26.

308. See *infra* Table 26.

ii. Gender Disparities

We analyzed the gender composition of the identified group of felony murder convictions based on theory of liability for conviction.³⁰⁹ Although there were far fewer women than men convicted of felony murder in this dataset, those few women were more likely to be convicted on an accomplice theory of liability than were their male counterparts.³¹⁰ There were ninety-four women, or 8.2%, in the dataset of felony murder arrestees from 2008 to 2019.³¹¹ In the identified convictions dataset, eleven or 4.5% of the felony murder convictions were women. Seven of these women, or 63.6%, were convicted under a theory of accomplice liability, and four, or 36.4%, were convicted as principals.³¹² Women were twice as likely to be convicted as an accomplice as they were a principal.³¹³

Comparatively, there were 235 men in the total felony murder conviction dataset, and 116 or 49.4% of the men were convicted on an accomplice theory of liability, while 119 or 50.6% were convicted as the principal.³¹⁴ Men were about equally likely to be convicted as an accomplice as they were to be convicted as a principal.³¹⁵ Men were almost twenty-three times as likely as women to be convicted of felony murder, about thirty-one times as likely as women to be convicted of felony murder as the principal, and about eighteen times as likely to be convicted as an accomplice.³¹⁶

309. The DCJS dataset included a column for “sex of arrestee.” See DCJS Dataset, *supra* note 225. The records do not indicate whether an individual was transgender or gender nonconforming, or how the sex of the arrestee was determined (e.g., self-report, identifying document, officer report). There was one case in the DCJS dataset where gender was not reported; that individual was not ultimately convicted of any crime. *Id.*

DOCCS records that we received do not reflect sex or gender. See DOCCS Dataset, *supra* note 230. There are only three prisons for women in New York State: Albion, Bedford Hills, and Taconic. We could identify people in female facilities based on their place of incarceration. We could also determine reported gender by reference to the underlying case briefs, appellate decisions, and news reporting. However, some people in female facilities identify as male or are gender nonconforming, and some people in male facilities identify as female or are gender nonconforming. See DEP’T OF CORR. & CMTY. SUPERVISION, DIRECTIVE 4021, INCARCERATED INDIVIDUAL RECEPTION/CLASSIFICATION 5–6 (2019), <https://doocs.ny.gov/Directives/4021.pdf> [<https://perma.cc/7A3D-6P8C>] (explaining the process for classification and placement of “transgender/intersex incarcerated individual[s]”). Some individuals’ gender identity may also have changed between the time of conviction/appeal and the present.

Therefore, it is possible that some transgender or gender-nonconforming individuals are counted in a gender category that they do not identify with.

310. This is consistent with results from a survey of incarcerated individuals in California, which found that 72% of women serving a life-without-parole sentence for felony murder in that state were convicted as accomplices, while only 55% of men serving a life-without-parole sentence for felony murder were convicted as accomplices. GHANDNOOSH ET AL., *supra* note 5, at 6.

311. DCJS Dataset, *supra* note 225.

312. See *infra* Table 27.

313. See *infra* Table 28.

314. See *infra* Table 27.

315. See *infra* Table 28.

316. See *infra* Table 28.

This data is particularly relevant to concerns about felony murder’s specific harm to female survivors of domestic violence. The sponsors of New York’s proposed felony murder reform note that many women convicted of felony murder may well be survivors of domestic violence, and the bill correspondingly carves out an exception to limitations on the defense of duress for survivors of domestic violence whose abuser was a participant in the underlying felony.³¹⁷ The theory is that the vast majority of incarcerated women have a history of domestic violence,³¹⁸ and women who are in abusive relationships are particularly susceptible to coercion—through implicit or explicit threats or through violence—to participate in a felony at the behest of their abuser.³¹⁹ Such women, advocates argue, who are often acting as accomplices under duress are unfairly punished by felony murder’s harsh sanctions.

Table 27

Accomplice Liability vs. Principal Liability by Gender						
	Accomplice		Principal		All ID-ed FM	
	#	Proportion	#	Proportion	#	Proportion
Male	116	49.4%	119	50.6%	235	100%
Female	7	63.6%	4	36.4%	11	100%

Table 28

Likelihood of Conviction as an Accomplice vs. as a Principal by Gender						
	Accomplice Liability		Principal Liability		All ID-ed FM	
	#	Likelihood	#	Likelihood	#	Likelihood
Male	116	0.0012%	119	0.0013%	235	0.0025%
Female	7	0.0001%	4	0.0000%	11	0.0001%
		M/F Ratio		M/F Ratio		M/F Ratio
		17.6		31.6		22.7

317. Assemb. B. 2899, 2023–2024 Leg., Reg. Sess. (N.Y. 2023).

318. See CORR. ASS’N OF N.Y., IT REMINDS US HOW WE GOT HERE: (RE)PRODUCING ABUSE, NEGLECT, AND TRAUMA IN NEW YORK’S PRISONS FOR WOMEN 4 (2020), https://static1.squarespace.com/static/62f1552c1dd65741c53bbc8/t/63f29998baca63f8dcce459/1676843422728/20_ItRemindsUs.pdf [<https://perma.cc/Z6EY-BVL4>] (citing studies that up to 95% of incarcerated women have histories of domestic violence and gender-based violence).

319. For example, California advocacy groups report that “many women charged with felony murder were survivors of intimate-partner violence, including women who were present with their abusive partners, often while facing threats, while a crime was being committed.” *The Felony Murder Reporting Project*, <https://felonymurderreporting.org> [<https://perma.cc/QVV5-PVHL>].

We examined the racial composition by gender for the cohorts convicted as accomplices and the cohorts convicted as principals. Both Black and Latinx men were overrepresented in the accomplice liability group compared to the principal liability group, while white men were underrepresented.³²⁰ Although Black men were about equally likely to be convicted as accomplices or principals, Latinx men were almost twice as likely to be convicted as accomplices than as principals, and white men were three times as likely to be convicted as principals.³²¹ The Black/white accomplice conviction likelihood ratio, already 34:1 in the overall felony murder conviction cohort, was even greater for men.³²² Black men were 44 times more likely than white men to be convicted as accomplices; i.e., the Black/white disparity was 25% greater for men than for the overall cohort.³²³ The Black/white disparities for men in the principal conviction groups (14.7:1) and for the overall cohort (13.7:1) were similar.³²⁴ The Black/white disparity for male accomplices was three times greater than that for male principals.³²⁵ The Latinx/white likelihood ratio for male accomplices was about 15:5, more than five times the likelihood ratio for male principals.³²⁶

For women, the Black/white racial disparities between the accomplice conviction cohort and the principal conviction cohort were the same: 7.5:1.³²⁷ There were no Latinx women convicted of felony murder as an accomplice.³²⁸

Table 29

Accomplice Liability vs. Principal Liability by Gender and Race				
	Male		Female	
	Accomplice	Principal	Accomplice	Principal
Black	65%	63%	57%	50%
Latinx	28%	16%	0%	25%
White	6%	18%	29%	25%

320. See *infra* Table 29.

321. See *infra* Table 29.

322. See *infra* Table 30.

323. See *infra* Table 30.

324. See *supra* Table 26; *infra* Table 30.

325. See *infra* Table 30.

326. See *infra* Table 30.

327. See *infra* Table 30.

328. See *infra* Tables 29–30.

Table 30

Likelihood of Conviction as an Accomplice vs. as a Principal by Gender and Race								
	Accomplice				Principal			
	Male		Female		Male		Female	
	#	Likelihood	#	Likelihood	#	Likelihood	#	Likelihood
Black	75	0.0055%	4	0.0003%	75	0.0055%	2	0.0001%
Latinx	33	0.0019%	0	0.0000%	19	0.0011%	1	0.0001%
White	7	0.0001%	2	0.0000%	21	0.0004%	1	0.0000%
All Races	116	0.0012%	7	0.0001%	119	0.0013%	4	0.0000%
		X/W Ratio		X/W Ratio		X/W Ratio		X/W Ratio
Black		44.1		7.5		14.7		7.5
Latinx		15.5		0.0		3.0		3.4

iii. Age Disparities

Age is an important facet of felony murder liability. Teens made up almost a quarter of the identified and confirmed felony murder cohort. Moreover, in the identified dataset, fifteen to nineteen-year-olds were about three times as likely as adults ages twenty and older to be convicted of felony murder.

How does age interact with race? We examined the racial disparities by age within our cohort of identified and confirmed felony murder convictions. First, we looked at the disparities between teens ages fifteen to nineteen and the rest of the adult felony murder conviction cohort ages twenty and older. The data showed slightly greater racial disparities between Black teens and white teens than in the adult cohort.³²⁹

Of the 246 identified cases across the DCJS and DOCCS datasets, about a quarter (61 or 24.8%) were ages fifteen to nineteen at the time of the offense.³³⁰ Of that group, two-thirds were Black, a fifth were Latinx, and less than a tenth were white.³³¹ The Black/white disparity in conviction likelihood for teens was 20.1:1 compared to a 19.4:1 disparity in conviction likelihood for adults over age twenty.³³² The Latinx/white disparity in conviction likelihood for teens (5:1) was slightly less than the disparity for adults (6.2:1).³³³ Teens of any race were

329. For these purposes, in Table 32, the adult cohort is counted as ages twenty and older while the teen cohort is ages fifteen to nineteen. This is to track the U.S. census data, which provides population statistics for those age groups, but which does not divide census counts by people under age eighteen and over eighteen years old. This count also excludes one fourteen-year-old who was convicted as the principal and who is Black. Because we don't have census data for fourteen to nineteen-year-olds, we excluded this conviction from the fifteen to nineteen cohort.

330. See DCJS Dataset, *supra* note 225; DOCCS Dataset, *supra* note 230.

331. See *infra* Table 31.

332. See *infra* Table 32.

333. See *infra* Table 32.

almost three times as likely as adults of the same race to be convicted of felony murder: Black teens were three times as likely as Black adults, Latinx teens were 2.3 times as likely as Latinx adults, and white teens were 2.8 times as likely as white adults to be convicted of felony murder.

Table 31³³⁴

Felony Murder Convictions for Adults vs. Teens		
	Ages 20+	Ages 15 to 19
Black	62.0%	67.2%
Latinx	22.3%	19.7%
White	13.6%	9.8%

Table 32

Likelihood of Felony Murder ("FM") Conviction for Adults vs. Teens				
	Ages 20+		Ages 15 to 19	
	#	Likelihood	#	Likelihood
Black	114	0.0055%	41	0.0166%
Latinx	41	0.0018%	12	0.0041%
White	25	0.0003%	6	0.0008%
All Races	184	0.0013%	61	0.0044%
		X/W Ratio		X/W Ratio
Black		19.4		20.1
Latinx		6.2		5.0

Second, we examined the theory of liability under which the teens were convicted. Of the teenage cohort, twenty-four, or 39.3%, were convicted on an accomplice theory of liability.³³⁵ This was less than the 53.8% of accomplice convictions among the adult ages twenty and over felony murder cohort. The other thirty-seven teens (60.7%) were convicted on the theory they were the principal.³³⁶ Comparatively, 46.3% of the adult cohort were convicted as the

334. The data for the cohort of adult de-identified felony murder convictions in Tables 31 and 32 comes from the second DCJS dataset of convictions from 2008 to 2019, which only included individuals ages eighteen and older. See Second DCJS Dataset, *supra* note 257. The data for the fifteen to nineteen-year-old cohort comes from the first DCJS dataset of convictions after arrest for felony murder. See DCJS Dataset, *supra* note 225.

335. See *infra* Table 33.

336. See *infra* Table 33.

principal.³³⁷ This was somewhat surprising given our hypothesis that most young people convicted of felony murder would likely be convicted as accomplices. The greater proportion of youths in the principal cohort may be a result of plea bargaining or juvenile offender adjudications that mean that young accomplices do not end up with felony murder convictions as often as older accomplices. Nonetheless, both the adult and teen groups reflected substantial racial disparities in conviction likelihoods.

Black teens made up a greater proportion of both the accomplice and principal liability cohorts than did Black adults.³³⁸ White teens made up a smaller proportion of the principal cohort than white adults but a slightly greater proportion of the accomplice cohort.³³⁹ The reverse was true for Latinx teens.³⁴⁰ Black teens in either cohort had a greater likelihood of conviction for felony murder than any other population.³⁴¹ The conviction likelihood under either theory of liability was greater for teens across all races than for adults of the same race.³⁴² The Black/white disparity in conviction likelihood was greater for teens convicted as principals (17.7:1) than for adults in that cohort (12.3:1), but the Black/white disparity in the accomplice cohort was greater for adults (37.7:1 compared to 25:1 for teens).³⁴³

Table 33

Number of Felony Murder Convictions for Adults vs. Teens by Theory of Liability				
	Accomplice		Principal	
	Ages 20+	Ages 15 to 19	Ages 20+	Ages 15 to 19
Black	62	17	52	24
Latinx	28	5	13	7
White	7	2	18	4
All Races	99	24	85	37

337. See *infra* Table 33.

338. See *infra* Tables 33–34.

339. See *infra* Tables 33–34.

340. See *infra* Tables 33–34.

341. See *infra* Table 35.

342. See *infra* Table 35.

343. See *infra* Table 35.

Table 34

Felony Murder Convictions for Adults vs. Teens by Theory of Liability				
	Accomplice		Principal	
	Ages 20+	Ages 15 to 19	Ages 20+	Ages 15 to 19
Black	62.6%	70.8%	61.2%	64.9%
Latinx	28.3%	20.8%	15.3%	18.9%
White	7.1%	8.3%	21.2%	10.8%

Table 35

Likelihood of Conviction for Felony Murder as Accomplice vs. Principal by Age				
	Accomplice		Principal	
	Ages 20+	Ages 15 to 19	Ages 20+	Ages 15 to 19
Black	0.0030%	0.0069%	0.0025%	0.0097%
Latinx	0.0012%	0.0017%	0.0006%	0.0024%
White	0.0001%	0.0003%	0.0002%	0.0005%
All Races	0.0007%	0.0017%	0.0006%	0.0027%
	X/W Ratio	X/W Ratio	X/W Ratio	X/W Ratio
Black	37.7	25.0	12.3	17.7
Latinx	15.2	6.2	2.7	4.4

5. Analysis of Felony Murder by Culpability for Inadvertent Killing

Finally, one oft-criticized feature of felony murder liability is that it requires little or no culpability towards death. Because we had identified most of the felony murder cases in the period observed, we were able to examine the underlying sequence of events and judge whether the defendant most directly responsible for the death likely expected the fatal outcome. In about a sixth of the cases (44 or 17.9%), the killing appeared inadvertent (e.g., a gun accidentally discharging, accidental asphyxiation from a mouth/nose obstruction, or a heart attack subsequent to a single punch).³⁴⁴

We also wanted to see how many of defendants accused of actually killing had killed inadvertently. We discovered that in 32 of the 44 cases of inadvertent

344. See *infra* Table 36.

killing in our dataset, the defendant had been convicted on a theory that they were the principal.³⁴⁵ More than a quarter (26%) of the 123 people who had been convicted of actually killing the victim had done so inadvertently.³⁴⁶ These numbers compound the number of cases where a defendant was convicted as an accomplice; together, cases that rely on an accomplice theory of liability and cases where the principal killed inadvertently make up about 63% of our dataset of identified felony murder cases.³⁴⁷

We also analyzed inadvertent killing by race. More than half of the people convicted for an inadvertent killing were Black, about a third were Latinx, and about a sixth were white.³⁴⁸ Black people were almost thirteen times as likely as white people to be convicted of felony murder based on an inadvertent killing, and Latinx people were almost six times as likely.³⁴⁹ The disparity in Latinx/white conviction likelihood was the same in the inadvertent killing group as in the overall felony murder convictions cohort, while the Black/white disparity for inadvertent killing was only about two-thirds as high as the disparity for felony murder overall.³⁵⁰

Table 36

Population Convicted of Felony Murder vs. Subset Convicted for Inadvertent Death						
	ID-ed FM		Inadvertent Deaths		Inadvertent Deaths Convicted as Principal	
	#	%	#	%	#	%
Black	156	63%	23	52%	18	56%
Latinx	53	22%	12	27%	6	19%
White	31	13%	7	16%	6	19%
All Races	246	100%	44	100%	32	100%

345. See *infra* Table 36.

346. See *supra* Table 25; *infra* Table 36.

347. See *supra* Table 25; *infra* Table 36.

348. See *infra* Table 36.

349. See *infra* Table 37.

350. See *infra* Table 37.

Table 37

Likelihood of Felony Murder (FM) Conviction vs. Likelihood of Inadvertent Killing Conviction				
	ID-ed FM		Inadvertent Killing	
	#	Likelihood	#	Likelihood
Black	156	0.0053%	23	0.0008%
Latinx	53	0.0015%	12	0.0003%
White	31	0.0003%	7	0.0001%
All Races	246	0.0013%	44	0.0002%
		X/W Ratio		X/W Ratio
Black		19.7		12.8
Latinx		5.7		5.7

III. NEW YORK'S POTENTIAL FELONY MURDER REFORM

Part of the impetus for gathering data about felony murder in New York is to support legislative reform efforts currently underway. This Part discusses the proposed reforms in New York and the ways in which the data on felony murder arrests and convictions in New York can help support advocacy for such reforms. This Part also addresses the proposed retroactive implementation of the new felony murder legislation and lessons from other states.

A. OVERVIEW OF PROPOSED REFORM

In 2023, Assembly Member Robert Carroll introduced legislation in New York State to reform the State's felony murder laws.³⁵¹ The proposed bill would amend NYPL section 125.25(3) to require that, in order to be convicted of felony murder, the defendant has directly caused the death of the victim or—if not the principal—that the defendant was an accomplice to the underlying felony and acted with intent to cause death.³⁵² The bill proposes to amend section 125.25(3) further by providing that “[a] defendant is not responsible for a death caused by a third party who was not a participant in the underlying felony.”³⁵³ The legislation would allow for the affirmative defense of duress if the defendant “has been or is a victim of domestic violence committed by one of the participants in the underlying felony.”³⁵⁴ The legislation also reduces felony murder from a Class A-1 Violent Felony offense, which carries a sentence

351. Assemb. B. 2899, 2023–2024 Leg., Reg. Sess. (N.Y. 2023); *Assembly Bill A2899*, *supra* note 205.

352. N.Y. Assemb. B. 2899, § 2.

353. *Id.*

354. *Id.* § 3.

of fifteen to twenty-five years to life, to a Class B Violent Felony offense, which carries a sentence of five to twenty-five years.³⁵⁵

The proposed legislation also has a retroactive component. The proposed law would allow individuals previously convicted under NYPL section 125.25(3) to petition the court “to have [their] murder conviction vacated and to be resentenced on any remaining counts.”³⁵⁶ In order to have their conviction vacated and a new sentence imposed, applicants must demonstrate that under the new law, “[they] could not be convicted of murder in the second degree . . . or would have been sentenced differently.”³⁵⁷ After an initial review of an application by the court, counsel would be appointed and have an opportunity to submit written pleadings, after which a hearing would be held to determine whether to vacate the murder conviction and resentence the applicant on any remaining counts.³⁵⁸ The prosecution would bear the burden at a hearing of proving the petitioner is ineligible for resentencing.³⁵⁹

Finally, and particularly relevant to this research project, the proposed law would require data collection and reporting on felony murder in New York State.³⁶⁰ The bill requires DOCCS to submit an annual report to the legislature’s judiciary committees on the number of incarcerated people convicted under NYPL section 125.25(3) over the past ten years.³⁶¹ This report must include the age, race, and gender breakdowns for those individuals; whether felony murder was the most serious charge against the defendant or a lower charge accepted after plea; the average sentence for these individuals, and the number of individuals serving life without parole; whether the person was an accomplice to, major participant in, or the perpetrator of the homicide; who the decedent was by category (victim, perpetrator, law enforcement, bystander); and whether the killing was perpetrated by a defendant/co-defendant, victim, law enforcement, or bystander.³⁶² This would mark a drastic change in the type of data DOCCS is currently mandated to record and report.

The law is intended to remedy a perceived lack of proportionality in current state law, which allows someone who did not intend to kill to be punished in the same way as someone who actually kills the victim. The law’s sponsor memo elaborates, “The current provisions of New York’s penal law pertaining to felony murder eliminate the distinction between intentional and unintentional homicide and are therefore not consistent with the principle of proportionality

355. *Id.* § 5; N.Y. PENAL LAW §§ 70.00, 70.02 (McKinney Supp. 2024).

356. N.Y. Assemb. B. 2899, § 4.

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.* § 6.

361. *Id.*

362. *Id.*

in charging and sentencing.”³⁶³ The memo explains that current law allows someone to be found guilty of murder even when they “did not actually commit a homicidal act.”³⁶⁴ This in turn, the sponsors highlight, facilitates imposition of lengthy sentences given the pressure to plead in the face of a murder charge.³⁶⁵

The bill’s justification also invokes evidence from other jurisdictions on the outsize role of felony murder in securing murder convictions and on the racial disparities in convictions for felony murder.³⁶⁶ The bill’s sponsors cite evidence from other states where as many as a fifth of the population incarcerated for murder are convicted under the felony murder doctrine.³⁶⁷ They further invoke the disproportionate impact of felony murder laws on non-white people, juveniles, and survivors of domestic violence.³⁶⁸ For example, the bill’s sponsors note that studies from Pennsylvania have found that 80% of people incarcerated for felony murder were people of color and that a similar study in California found that 68% of people convicted of felony murder are Black or Latinx.³⁶⁹ The data from our analysis lend support to these justifications.

B. IMPLICATIONS OF NEW YORK DATA FOR FELONY MURDER REFORM

The data we gathered on arrests and convictions for felony murder from 2008 to 2019 supports calls for reform in New York in multiple ways. First, it shows that racial disparities begin with arrests for felony murder. Black people and Latinx people are significantly more likely than white people to be arrested for felony murder, and Black and Latinx youths are even more vulnerable to arrest. Second, the data reveals racial disparities in the likelihood of conviction. Third, the data shows even greater racial disparities in conviction based on accomplice liability. This supports reform of the State’s felony murder law to require the highest level of culpability—intent to kill—before holding accomplices who do not kill liable for murder. Finally, the data we have gathered on felony murder convictions by gender supports reform to allow for affirmative defenses for victims of domestic violence who have been coerced into participation in the underlying felony.

With regard to arrest data, we found evidence that Black people and Latinx people are arrested for felony murder at substantially higher rates than their white counterparts.³⁷⁰ Almost 85% of the individuals arrested for felony murder in New York State from 2008 to 2012 were Black or Latinx.³⁷¹ Almost

363. Memorandum in Support of Legislation, Assemb. B. 2899, 2023–2024 Leg., Reg. Sess. (N.Y. 2023), https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A02899&term=2023&Memo=Y [<https://perma.cc/UL5Y-TPQX>].

364. *Id.*

365. *Id.*

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.*

370. *See supra* Tables 18–19.

371. *See* DCJS Dataset, *supra* note 225.

90% were non-white.³⁷² And almost a third of the arrestee population was fifteen to nineteen years old.³⁷³ Black people were almost twenty times as likely to be arrested for felony murder as white people, and Black teens aged fifteen to nineteen were almost twenty-four times as likely to be arrested for felony murder as white teens.³⁷⁴ Latinx people (including the teenage cohort) were almost six times as likely to be arrested as white people.³⁷⁵ Moreover, the racial disparities in arrest likelihood for felony murder were two to three times greater than those for felony arrests and 1.3 to 1.9 times greater than those for violent felony arrests.³⁷⁶

This large racial and age disparity is significant because studies have found that arrests, regardless of disposition, have serious and wide-ranging consequences, like loss of employment, loss of housing, and loss of child custody.³⁷⁷ Arrests for serious crimes and subsequent remand to jail also put pressure on arrested individuals to plead to a crime.³⁷⁸ This pressure is heightened in the case of teens who are more vulnerable to coercion to plead to something they did not do.³⁷⁹ Our evidence bears out this pressure to plead: The vast majority of people who are arrested for felony murder (88%) were ultimately convicted and sentenced for some crime.³⁸⁰ Of those convictions, more than two-thirds were the result of a plea, and more than 80% of those pleas were to a charge less than felony murder.³⁸¹ Therefore, racial disparities in arrest for felony murder can lead to down-system racial disparities in convictions and incarceration rates.

The data reveals notable disparities for Black people and Latinx people in the likelihood of conviction. Black people arrested for felony murder were almost twenty times as likely as white people to be convicted of any crime, and Latinx people were almost six times as likely. For Black teens, the disparity increased to a conviction likelihood ratio of almost twenty-five. These disparities

372. *Id.* Compare this to the population of arrestees for violent felony offenses in 2019. According to data from DCJS, Black people made up 50.7% of arrests for violent felony offenses, Latinx people, made up 27.0%, and white people made up 17.5% of the arrestees. *See* DIV. OF CRIM. JUST. SERVS., N.Y. STATE, ADULT ARREST DATA SOURCE NOTES 2 (2020), <https://www.criminaljustice.ny.gov/crimnet/ojsa/adult-arrest-demographics/2019/NYS.pdf> [<https://perma.cc/SA3Z-TNFS>].

373. *See* DCJS Dataset, *supra* note 225.

374. *Id.*

375. *Id.*

376. *Id.*

377. *See, e.g.*, Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 820–25 (2015) (detailing the numerous collateral consequences of arrests).

378. *See, e.g.*, Anna Roberts, *Convictions as Guilt*, 88 FORDHAM L. REV. 2501, 2511–22 (2020) (discussing the predominance of plea bargaining and the many reasons why a plea may be more desirable than taking a case to trial).

379. *See, e.g.*, Allison D. Redlich & Reveka V. Shteynberg, *To Plead or Not to Plead: A Comparison of Juvenile and Adult True and False Plea Decisions*, 40 LAW & HUM. BEHAV. 611, 612–13 (2016) (providing an overview of research studies that have found, inter alia, increased willingness to plead in teens as compared to adults).

380. *See* DCJS Dataset, *supra* note 225.

381. *Id.*

are at least three to four times greater than those that have been found for overall felony convictions statewide. This suggests that the effects of arrests and convictions for felony murder on the racial disparities in our criminal legal system are greater than for other types of crime. Indeed, data on convictions for all of the predicate felonies for felony murder reveals that the racial disparities for felony murder convictions are almost four times that of the next most racially disproportionate conviction type.

These disparities hold true even when comparing other forms of second-degree murder liability. Although Black people are disproportionately represented among the population of individuals convicted of second-degree murder, the disparity is even greater for felony murder than for other forms of second-degree murder. Black people make up about 63% of felony murder convictions, while they make up only about 53% of non-felony-murder second-degree murder convictions.³⁸² Put differently, the Black/white conviction likelihood disparity for felony murder was about 50% greater than for other types of second-degree murder. This suggests that the felony murder law is more susceptible to racial disparities in outcomes than other sections of NYPL section 125.25.

One of the key differences between felony murder and other forms of second-degree murder is the intent required to be found guilty: Intent to cause death is required for conviction under section 125.25(1) and section 125.25(5), and recklessness/depraved indifference to human life is required for conviction under section 125.25(2) and section 125.25(4).³⁸³ Yet, neither intent to cause death nor recklessness/depraved indifference to human life is required for conviction under section 125.25(3).³⁸⁴ Instead, all that is required is proof of commission or attempt to commit the underlying predicate felony.³⁸⁵ Therefore, changes in the statutory reform to require recklessness (for the principal) and intent to cause death (for the accomplice) bring the intent requirements more in line with other forms of second-degree murder. Our data suggests this alignment of punishment with culpability would also reduce the racial disparities in convictions for felony murder.³⁸⁶

The data also reveals how often accomplice liability theory is used to secure felony murder convictions, as well as the racially disparate impact of its use. Half of the felony murder convictions identified in our dataset were based on an accomplice theory of liability (either there was no proof who “struck the fatal blow” or a co-defendant was identified as the principal). This demonstrates how often felony murder law is used to secure convictions not against someone who has actually killed but rather against an accomplice who participated in

382. See *supra* Table 23.

383. N.Y. PENAL LAW § 125.25(1)–(2), (4)–(5) (McKinney 2020).

384. *Id.* § 125.25(3).

385. *Id.*

386. Though it is important to note that racial disparities, while lesser among other forms of second-degree murder, remain. Felony murder reform would not eliminate all racial disparity in second-degree murder convictions, but it would likely reduce one important source of disparity.

a felony with an ultimately fatal result. This, in turn, supports the justification for the New York felony murder reform: to make felony murder doctrine more consistent “with the principle of proportionality in charging and sentencing.”³⁸⁷ Under the proposed legislation, someone who did not actually kill and who did not intend to kill could not be convicted of felony murder.³⁸⁸

Moreover, revision of the requirements for conviction under NYPL section 125.25(3) would reduce the racial disparities between individuals convicted as accomplices and those convicted as actual principals. Our analysis revealed that the Black/white disparity in conviction likelihood for felony murder as an accomplice was almost triple the disparity in conviction likelihood as a principal.³⁸⁹ The Latinx/white disparity in conviction likelihood as an accomplice was more than four times the Latinx/white disparity in conviction likelihood as a principal.³⁹⁰ This suggests that the current law, which allows conviction regardless of proof that the defendant actually killed or intended to kill someone, is used disproportionately against Black and Latinx people in this state. We also found racial disparities in who was convicted of felony murder after an inadvertent killing.³⁹¹ Adding an intent-to-kill requirement for participants in a predicate felony who do not kill would prevent this disparate infliction of disproportionate punishment by eliminating the disproportion attributable to the felony murder rule.

Our analysis also supports implementation of reforms to protect women and, more specifically, survivors of domestic violence.³⁹² Although the sample size of women convicted of felony murder was relatively small, it reflects disparities in the theory of liability used to secure conviction that would support reforms to allow affirmative defenses for this population. Amongst the population of women convicted of felony murder, more than 63% were convicted as accomplices rather than as principals, compared to about 50% of men.³⁹³ The fact that women were more likely than men to be convicted under an accomplice theory of liability is notable, given advocates’ concerns that a large proportion of women convicted under the felony murder doctrine have been coerced into participation in the underlying felony by abusive partners.³⁹⁴ Women’s overrepresentation in the accomplice cohort compared to men supports such concerns and is consistent with reports from California that many women arrested for and convicted of felony murder participated in the underlying felony at the behest of their abuser and co-participant.³⁹⁵ The fact that compared

387. Memorandum in Support of Legislation, *supra* note 363.

388. Assemb. B. 2899, 2023–2024 Leg., Reg. Sess. (N.Y. 2023).

389. *See supra* Table 26.

390. *See supra* Table 26.

391. *See supra* Table 37.

392. Not all survivors of domestic violence are women, but the focus of advocacy around this portion of the legislative reform has been on assisting female survivors of domestic violence.

393. *See supra* Table 27.

394. Memorandum in Support of Legislation, *supra* note 363.

395. *See supra* notes 366–68 and accompanying text.

to men, more women proportionally are arrested for felony murder than are convicted of it is also significant, given that arrest for felony murder in such circumstances can provide leverage for prosecutors to force pleas by female accomplices who would not otherwise be charged with felony murder.³⁹⁶

Finally, the data suggests a small addition to the proposed legislative reform: To give notice to the public that attempted felony murder is not an offense in New York State, as already declared in *People v. Burress*³⁹⁷ and *People v. Campbell*,³⁹⁸ and to declare that this charge cannot justify a lawful arrest. One response might be that the increased culpability required for felony murder under the legislative reform means that attempting felony murder would become possible, but that is not so.

Under the proposed reform, felony murder can be committed in two ways: (1) by killing recklessly in the course of and in furtherance of a felony; or (2) by intentionally aiding or encouraging the felony with intent to kill.³⁹⁹ But since attempt requires intent, one cannot attempt to kill recklessly. Nor can accomplices with intent to kill be convicted unless they either (1) fulfill the act element of attempted murder by trying to cause death; or (2) fulfill the act element of complicity in attempted murder by aiding or encouraging another person's attempt to cause death. If an actor attempts murder under either of these tests, they are guilty of attempted murder under NYPL section 125.25(1), and the commission or attempt of the predicate felony would be superfluous for this charge.⁴⁰⁰ In sum, even after passage of the reform, there would never be a legitimate basis for a charge of attempted felony murder.

Why is it important to prevent arrest for attempted felony murder? Because Black and Latinx people are greatly overrepresented in this cohort: Black people were eighty-seven times as likely to be arrested for attempted felony murder as white people, and Latinx people were thirty-seven times as likely to be arrested.⁴⁰¹ A quarter of the arrests were teens, *none of them white*.⁴⁰² Although these arrests do not result in convictions for attempted felony murder, more than two-thirds of the arrests result in convictions for some crime.⁴⁰³ It is important to clearly convey that these pointless and discriminatory arrests are illegal.

396. DCJS Dataset, *supra* note 225; *see also supra* Section II.C.4.ii (analyzing gender composition of felony murder convictions).

397. *People v. Burress*, 505 N.Y.S.2d 272, 273 (App. Div. 1986).

398. *People v. Campbell*, 532 N.E.2d 86, 87–88 (N.Y. 1988); *see supra* note 49 and accompanying text.

399. Assemb. B. 2899, 2023–2024 Leg., Reg. Sess. (N.Y. 2023).

400. N.Y. PENAL LAW § 125.25(1) (McKinney 2020).

401. *See supra* Table 18.

402. *See supra* Table 19.

403. DCJS Dataset, *supra* note 225.

C. RETROACTIVE APPLICATION OF FELONY MURDER REFORM &
LESSONS FROM OTHER STATES

The retroactivity of the proposed reform legislation poses particular challenges. The New York bill provides for vacating the conviction and resentencing individuals previously convicted of felony murder who could not be convicted or sentenced as harshly under the new law.⁴⁰⁴ This proposal is modeled on recent legislation in California that retroactively changed that State's felony murder laws.⁴⁰⁵ 2023 legislation in Minnesota also retroactively reformed felony murder.⁴⁰⁶ As in California and Minnesota, the New York legislation poses logistical challenges, though it is less likely to pose a constitutional challenge than the California law.

California's Senate Bill No. 1437 ("SB 1437") was passed and signed into law by the Governor in 2018.⁴⁰⁷ The law amended existing felony murder law to limit the circumstances under which a non-principal may be convicted of felony murder.⁴⁰⁸ The amendment provides that malice is required for murder liability and may not be imputed based solely on a defendant's participation in the underlying felony.⁴⁰⁹ Under current California law, a defendant may now only be liable for first-degree felony murder if they were the principal, acted as an accomplice with intent to kill, or were a major participant in the underlying felony and acted with reckless indifference to human life.⁴¹⁰

SB 1437 also created a process to allow a defendant convicted of felony murder to petition the court to vacate their conviction and impose a new sentence.⁴¹¹ An applicant files a petition in the court where they were sentenced, and—if the court determines there is a prima facie showing of eligibility for relief—the court appoints counsel.⁴¹² Ultimately, the court holds a hearing to determine whether the conviction should be vacated and the defendant resentenced.⁴¹³ At such a hearing, the prosecution bears the burden of proving beyond a reasonable doubt that the defendant is ineligible for resentencing.⁴¹⁴ Parties may rely on both the underlying trial record and on new evidence.⁴¹⁵ If the defendant is found eligible, the felony murder conviction is vacated, and the defendant is resentenced on remaining charges or on the predicate

404. N.Y. Assemb. B. 2899, § 4.

405. Memorandum in Support of Legislation, *supra* note 363.

406. S.F. 2909, 93d Leg., 2023 Reg. Sess. (Minn. 2023).

407. S.B. 1437, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

408. *Id.* §§ 2–3.

409. *Id.* § 2.

410. *Id.* § 3.

411. *Id.* § 4.

412. *Id.*

413. *Id.*

414. *Id.*

415. *Id.*

felony if the predicate felony was not originally charged.⁴¹⁶ A subsequent bill, California Senate Bill 775 (“SB 775”), passed in 2021, expanded the resentencing eligibility to defendants who were originally charged with felony murder but ultimately convicted of manslaughter or attempted murder.⁴¹⁷

A similar law in Minnesota took effect in August 2023.⁴¹⁸ That law applies to both first- and second-degree felony murder and allows individuals to file an application for relief if they were convicted of felony murder and—in the case of first-degree murder—did not cause the death or act with intent to cause death or—in the case of second-degree murder—did not cause death and “[were] not a major participant in the underlying felony and did not act with extreme indifference to human life.”⁴¹⁹ Any such application is reviewed by a district court administrator or a special master’s office as necessary to determine if there is a “reasonable probability that the applicant is entitled to relief.”⁴²⁰ If the court finds such reasonable probability, the public defender’s office and the prosecutor’s office are notified, briefing and responses are submitted, and a hearing is held.⁴²¹ To obtain relief, the petitioner must demonstrate by a preponderance of the evidence that the petitioner did not cause the death and did not act with intent to cause death (first-degree murder) or “was not a major participant in the underlying felony and did not act with extreme indifference to human life” (second-degree murder).⁴²² If successful, the court will vacate the petitioner’s felony murder conviction and sentence on the most serious remaining offense or on the most serious underlying predicate felony.⁴²³

1. Logistical Challenges of Retroactive Application

The new California laws resulted in conviction vacatur and resentencing for hundreds of incarcerated individuals and has been proclaimed a success by public defenders and advocates. However, the laws have not been without challenges or controversy. After the passage of SB 1437 and SB 775, more than eight hundred people have had their sentences reduced.⁴²⁴ Advocates and media outlets touted the hundreds of people being released from prison or

416. *Id.*

417. S.B. 775, 2021–2022 Leg., Reg. Sess. § 1 (Cal. 2021).

418. H.F. 1406, 93d Leg., Reg. Sess. (Minn. 2023).

419. *Id.* § 2.

420. *Id.*

421. *Id.*

422. *Id.*

423. *Id.*

424. Bob Egelko, *It’s Not Just London Breed’s Brother: Hundreds Have Been Resentenced Under New State Laws*, S.F. CHRON. (July 24, 2023, 7:33 PM), <https://www.sfchronicle.com/politics/article/1-ondon-breed-resentencing-laws-18258551.php> (on file with the *Iowa Law Review*); Kevin Sawyer, *Three California Lifers Serve Time for Murders They Didn’t Commit. Is Relief Possible?*, SFGATE (Jan. 18, 2024), <https://www.sfgate.com/news/bayarea/article/three-california-lifers-serve-time-for-murders-18615172.php> [https://perma.cc/4XD9-VNQU].

-serving reduced sentences.⁴²⁵ Yet, prosecutors' offices decried the cost and difficulty involved in litigating old cases. They pointed to the challenges in bringing new evidence of intent in cases where the crime was ten, twenty, or thirty years old.⁴²⁶ These challenges, they argued, would result in dangerous individuals being released because prosecutors simply could not meet the evidentiary burden of the new law years after the case was closed and witnesses have disappeared.⁴²⁷ Prosecutors also said the new law removed their leverage and, therefore, their ability to secure convictions for dangerous crimes.⁴²⁸ And victims' advocates argued that the law was unfair to victims' families who thought that the case against the person convicted of killing their loved one was long closed.⁴²⁹

Resistance to the new law from lower courts and from prosecutors' offices, as well as the challenges inherent in re-litigating years or even decades-old cases, have meant that the road to relief is not always straightforward. Recent news coverage from California has highlighted a few cases that provide examples of the challenges of implementing retroactive reform.⁴³⁰ In one case, an initial petition was denied by the trial court despite an application apparently tailor-made for the new law, resulting in delays while the appellate court reviewed the decision and, ultimately, ordered a new hearing.⁴³¹ In two other cases, courts denied relief despite prior jury findings that the applicants did not act with reckless indifference to human life.⁴³²

In Minnesota, a couple of early resentencing decisions provide hope for further relief.⁴³³ Yet, the ramifications of a law less than a year old at the time of this writing remain to be seen. Minnesota's reform could pose particular challenges to applicants seeking relief, given that the law places the burden of proof on the applicant rather than the prosecution (as in California or the proposed New York bill).⁴³⁴

Such logistical hurdles and pushback from institutional actors are possible and perhaps to be expected with New York's reform as well. Yet, there are lessons to be learned from our data analysis here and from other reforms. First, the number of cases that could be eligible for resentencing is more

425. See sources cited *supra* note 424; see also Rector, *supra* note 24 (describing the impact of SB 1437 and SB 775 in California).

426. See Rector, *supra* note 24.

427. See *id.*

428. See *id.*

429. *Id.*

430. Sawyer, *supra* note 424.

431. *Id.*

432. *Id.*

433. See Andy Mannix, *Two Women Involved in 2017 Murder Released Early Under Revised Minnesota Law*, MINN. STAR TRIB. (Feb. 12, 2024, 7:26 PM), <https://www.startribune.com/two-suburban-women-involved-in-2017-murder-released-early-under-revised-minnesota-law/600342957> [https://perma.cc/J6U3-VA2P].

434. S.F. 2909, 93d Leg., Reg. Sess. art. 4, §§ 3(2a), 24 (Minn. 2023); S.B. 1437, 2017–2018 Leg., Reg. Sess. (Cal. 2018); Assemb. B. 2899, 2023–2024 Leg., Reg. Sess. (N.Y. 2023).

limited than in California, where several hundreds of people are potentially eligible.⁴³⁵ Second, while our analysis revealed that a fifth of cases appeared to involve prosecution without determination of who, in a multiple-defendant case, actually killed the victim, in most cases, the identity of the principal was established at trial or during plea colloquy. This makes the task for an application under the new law clear: either determine the killing was reckless or, in the case of an accomplice, demonstrate intent to cause death. Although inadvertent killing cases will require closer examination, and although we identified some cases where the details of a crime were obscured, in many cases where the principal was identified, recklessness was clear (e.g., shooting at someone and killing them or stabbing someone and killing them). Thus, the cases that might present the most logistical challenges are also the cases most important to reexamine: those where someone was convicted without actually killing or without intending to kill. Third, the placement of the onus on the prosecution rather than the applicant to prove ineligibility after a *prima facie* showing alleviates the risk—given the uneven resources between individual applicants and state actors—of otherwise eligible individuals being denied resentencing simply because they cannot obtain the necessary evidence years or decades after their cases conclude.

Nonetheless, logistical challenges of reexamining sentences will remain, and a caveat is important. Older cases pose problems for re-litigation: transcripts and other court documents can go missing, witnesses disappear or pass away, and documentary evidence is often destroyed. Yet, without reexamination of these cases, any proposed reform would fall short. Prospective-only reform would leave hundreds of cases untouched, hundreds of people serving time in prison on a sentence that is disproportionate to their culpability, and thousands of taxpayer dollars spent on needless incarceration.⁴³⁶

435. See Rector, *supra* note 24. Compare the more than 800 people resentenced under California's felony murder sentencing reform in the first four years of implementation to the 246 felony murder convictions that we identified in New York State over a twelve-year time period that would be potentially eligible for resentencing. See Sawyer, *supra* note 424; *supra* Section II.C.1.

436. Moreover, concerns are misplaced about the dangers of releasing someone who has already served a long sentence and whose crime is old enough to make re-litigation difficult. Statistics reveal a far lower recidivism rate for older adults compared to younger individuals released from prison. See, e.g., KIM STEVEN HUNT & BILLY EASLEY II, THE EFFECTS OF AGING ON RECIDIVISM AMONG FEDERAL OFFENDERS 22 (2017), https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207_Recidivism-Age.pdf [<https://perma.cc/5JQT-PXLB>]; INIMAI CHETTIAR, WILL BUNTING & GEOFF SCHOTTER, AT AMERICA'S EXPENSE: THE MASS INCARCERATION OF THE ELDERLY 23 (2012), https://assets.aclu.org/live/uploads/publications/elderlyprisonreport_20120613_1.pdf [<https://perma.cc/M377-FZ4Q>] (only 7% of incarcerated New Yorkers released from prison at age fifty or older were returned for new convictions).

2. Possible Constitutional Challenges

Prosecutors' offices throughout California have brought challenges to that State's felony murder reform's constitutionality.⁴³⁷ Despite some trial courts sustaining these challenges, California appellate courts have unanimously held that the felony murder reform law does not violate the state constitution or any other California laws.⁴³⁸ Some of the constitutional challenges brought by prosecutors' offices argued that the law inappropriately amended voter-approved initiatives to increase punishments for murder and expand the list of predicate felonies for felony murder liability.⁴³⁹ These challenges invoke the criminal laws passed by California voters in the late 1970s and in the 1990s that stiffened the penalties for murder and expanded the list of qualifying predicate felonies for first-degree murder.⁴⁴⁰ Reviewing courts determined that the felony murder legislation amended the mental state requirements for a murder conviction, not the authorized punishments or list of predicate offense, which is what the earlier voter legislation addressed, and therefore the law survives legal challenge.⁴⁴¹

In some of the cases, prosecutors also claimed the law violated separation of powers or violated victims' rights under California law.⁴⁴² The challengers argued that the new law usurps the Governor's executive clemency power and "impairs a core function of the judiciary" by allowing retroactive review of final sentences, in violation of separation of powers principles.⁴⁴³ Reviewing courts have rejected these challenges also.⁴⁴⁴ In so doing, some of the courts cited a long line of precedent for legislation, like California's Three Strikes Reform Act of 2012, that authorizes remedial resentencing.⁴⁴⁵ Finally, appellate courts have

437. Jessica Pishko, *Hundreds Stuck in California Prisons as Prosecutors Seek to Block New Law*, APPEAL (Mar. 25, 2019), <https://theappeal.org/hundreds-stuck-in-prison-in-california-as-prosecutors-look-to-block-new-law> [<https://perma.cc/4B67-9GS4>].

438. See cases cited *infra* notes 439, 442–46.

439. See, e.g., *People v. Super. Ct. ex rel. Gooden*, 255 Cal. Rptr. 3d 239, 244–45 (Ct. App. 2019); *People v. Lamoureux*, 255 Cal. Rptr. 3d 253, 260–61 (Ct. App. 2019); *People v. Cruz*, 260 Cal. Rptr. 3d 166, 169 (Ct. App. 2020); *People v. Solis*, 259 Cal. Rptr. 3d 854, 858 (Ct. App. 2020); *People v. Prado*, 263 Cal. Rptr. 3d 79, 82–83 (Ct. App. 2020); *People v. Lopez*, 265 Cal. Rptr. 3d 265, 267 (Ct. App. 2020).

440. Abbie VanSickle, *California Law Says He Isn't a Murderer. Prosecutors Disagree.*, N.Y. TIMES (May 16, 2019), <https://www.nytimes.com/2019/05/16/us/california-felony-murder.html> (on file with the *Iowa Law Review*).

441. See cases cited *supra* note 439.

442. See, e.g., *Lamoureux*, 255 Cal. Rptr. 3d at 262, 272; *People v. Bucio*, 261 Cal. Rptr. 3d 692, 700–02 (Ct. App. 2020); *People v. Johns*, 263 Cal. Rptr. 3d 611, 625–26 (Ct. App. 2020); *People v. Alaybue*, 264 Cal. Rptr. 3d 876, 886 (Ct. App. 2020).

443. See, e.g., *Lamoureux*, 255 Cal. Rptr. 3d at 262.

444. See, e.g., *id.* at 266.

445. See, e.g., *id.* at 271.

rejected claims that the felony murder reforms violate victims' rights to a "prompt and final conclusion of the case and any related post-judgment proceedings."⁴⁴⁶

New York criminal law does not offer the same bases for constitutional challenges as California law. New York does not use voter initiatives to amend criminal law, so a portion of the challenges in California would simply be inapplicable in New York. Moreover, New York previously implemented retroactive reforms without constitutional challenges. Most recently, New York passed the Marihuana Regulation and Taxation Act ("MRTA"), which, inter alia, provides for conviction vacatur and expungement of certain drug crimes that would no longer be criminally punishable under current law.⁴⁴⁷ Previously, in 2004, the legislature passed the Drug Law Reform Act ("DLRA"), which changed the sentence for drug convictions from indeterminate to determinate, reduced the applicable sentences, and increased the weight threshold for certain crimes of possession.⁴⁴⁸ It also applied retroactively, which allowed individuals incarcerated for a Class A-I Felony to apply for a new sentence consistent with the reformed law. A 2005 amendment extended resentencing to A-II Felonies.⁴⁴⁹ In 2009, the Penal Law was further revised to lower the minimum sentence for B Felonies, and this change was also made retroactive.⁴⁵⁰ Since the passage of the first two DLRA laws, more than seven hundred people have been resentenced.⁴⁵¹ Hundreds more were resentenced after the 2009 reform.⁴⁵² A more recent law provides resentencing for survivors of domestic violence.⁴⁵³ At least forty people have been resentenced since that law's effective date in 2019.⁴⁵⁴ In other words, there is well-established precedent for conviction vacatur and resentencing in New York State without constitutional issue.

446. See, e.g., *People v. Lombardo*, 269 Cal. Rptr. 3d 62, 67, 71 (Ct. App. 2020); *People v. Marquez*, 270 Cal. Rptr. 3d 93, 98–99 (Ct. App. 2020); *Lamoureux*, 255 Cal. Rptr. 3d at 272–73; *Johns*, 263 Cal. Rptr. 3d at 626–27; *People v. Nash*, 267 Cal. Rptr. 3d 148, 170 (Ct. App. 2020).

447. S.B. 854A, 2021–2022 Leg., Reg. Sess. § 24 (N.Y. 2021).

448. Drug Law Reform Act, ch. 738, sec. 36, §§ 70.70, 70.71, 2004 N.Y. Laws 3907, 3923 (codified at N.Y. PENAL LAW § 70.70 (McKinney 2021 & Supp. 2024)).

449. Act of Aug. 30, 2005, ch. 643, § 1, 2005 N.Y. Laws 3435, 3435–36.

450. Act of Apr. 7, 2009, ch. 56, pt. AAA, §§ 21–26, 2009 N.Y. Laws 128, 231–32.

451. Peter A. Mancuso, *Resentencing After the "Fall" of Rockefeller: The Failure of the Drug Law Reform Acts of 2004 and 2005 to Remedy the Injustices of New York's Rockefeller Drug Laws and the Compromise of 2009*, 73 ALB. L. REV. 1535, 1553 (2010).

452. *Implementation and Funding of the Rockefeller Drug Law Reform Legislation: Hearing Before the Assemb. Standing Comm. on Codes, the Assemb. Standing Comm. on Judiciary, the Assemb. Standing Comm. on Corr. & the Assemb. Standing Comm. on Alcoholism & Drug Use*, 2010 N.Y. State Assemb., 233d Sess. 16 (N.Y. 2010), https://nystateassembly.granicus.com/DocumentViewer.php?file=nystateassembly_g63c5e5fbf95701025do4f8dfe848c92.pdf&view=1 [<https://perma.cc/SA3S-YH4L>].

453. N.Y. CRIM. PROC. LAW § 440.47 (McKinney 2023).

454. LIZ KOMAR ET AL., SENTENCING REFORM FOR CRIMINALIZED SURVIVORS: LEARNING FROM NEW YORK'S DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT 1 (2023), <https://www.sentencingproject.org/app/uploads/2024/02/Sentencing-Reform-for-Criminalized-Survivors.pdf> [<https://perma.cc/99ZQ-C9JP>].

CONCLUSION

This Article has demonstrated that one state's felony murder law routinely attributes blame and imposes punishment that most people would consider undeserved. In the years observed, half of those convicted and punished for felony murder were not proven to have killed anyone. Of those who did kill, about a quarter appear to have done so inadvertently.

Nor can such punishment be justified as deterring killing or the commission of underlying predicate felonies. The rare coincidence of these two events makes felony murder liability a punishment lottery: a prospect of punishment combining low certainty and high severity and so unlikely to deter.⁴⁵⁵

Moreover, the impact of this pointless injustice falls almost entirely on those who can bear it least—communities of color already burdened by other deprivations born of injustice. Felony murder is far more frequently imposed on Black and Latinx suspects anywhere anyone has looked, and that holds true for New York. By conditioning murder liability on complicity in crime, felony murder invites attributions of guilt by association, perhaps informed by implicit bias like that observed in experimental settings. Thus, we expected we might find higher racial disparities among those convicted of felony murder as accomplices rather than principals, and we did. Ours is one of the first studies to observe this linkage in operation.

Reform of felony murder was one of the aims of the Model Penal Code, as part of a larger program of conditioning all liability on culpable choice. Yet the prospect of such reform was long dimmed by our country's prolonged War on Crime. In New York, for example, prosecutors dominated the drafting and defeated Herbert Wechsler's effort to enact his Model Penal Code reform for felony murder.

Recently, increasing awareness of the discriminatory roots and destructive consequences of that war has revived possibilities for criminal justice reform. In recent years, Massachusetts, California, and Minnesota have achieved fundamental reforms of their felony murder laws, and Colorado and Illinois have significantly ameliorated laws formerly among the harshest.⁴⁵⁶ The California and Minnesota reforms are also retroactive, which gives them immediate and important impact on the incarcerated population.⁴⁵⁷

Measuring the disproportionate and disparate impact of felony murder is something every felony murder jurisdiction should do. Where such deficiencies are found, legislatures should consider reforms like those introduced in New York.

455. See Malani, *supra* note 110, at 25 (finding little effect on the overall felony or felony murder rate and a potential perverse effect on homicides during robberies).

456. See *supra* notes 24–26, 116 and accompanying text.

457. See *supra* notes 30, 406–07 and accompanying text.