THE STICKINESS OF FELONY MURDER: THE MORALITY OF A MURDER CHARGE

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INTRODUCTION: THE DEATH OF JAQUAN SWOPES

On August 13, 2019, a group of Chicago teenagers allegedly armed with a knife attempted to steal a car from the home of a seventy-five-year-old man in Lake County, Illinois. When the homeowner came out to investigate the incident, one teenager approached him and appeared to the homeowner to be carrying an object. The homeowner fired several shots that killed fourteen-year-old Jaquan Swopes via a fatal gunshot wound to the head. Lake County State's Attorney, Mike Nerheim, quickly charged the other five teenagers with first-degree murder under the felony murder rule.[1] Nerheim was publicly criticized for the charges, with Lake County State's Attorney candidate Eric Rinehart stating "Nerheim 'made this charging decision within [twelve] hours. The office charged first and investigated later . . . .'"[2] Nerheim defended the decision to charge the teenagers: "[I]t's clear these offenders were solely responsible for placing the now-deceased [fourteen]-year-old offender in danger. They are ultimately responsible for his death. Had they not made the decisions they did make early Tuesday morning, this [fourteen]-year-old would still be alive today . . . ."[3]

Other attorneys did not agree with Neheim's legal analysis, specifying that they felt the State's Attorney was operating outside the spirit of felony murder laws. Chicago defense attorney, Adam Sheppard, articulated this disagreement, commenting, "I think the law is being stretched beyond its intended limits in a case like this.

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[1] Eric Cox, *Family Distraught After Boy Is Shot Dead in Lake County, Cousins Charged with Murder Despite Not Pulling Trigger*, CBS CHI. (Aug. 16, 2019, 7:20 PM), https://chicago.cbslocal.com/2019/08/16/lake-county-felony-murder/ [https://perma.cc/P7WZ-JDER]; Evelyn Holmes, *Murder Charges Dropped Against 5 Teens Accused in North Suburban Attempted Car Theft*, ABC 7 CHI. (Sept. 19, 2019), https://abc7chicago.com/lake-county-murder-shooting-old-mill-creek-fatal/5552206/ [https://perma.cc/8KH9-4KT7].

[2] Luke Wilusz, *Murder Charges Dropped Against Chicago Teens in Lake County Shooting*, CHI. SUN-TIMES (Sept. 19, 2019, 9:15 AM), https://chicago.suntimes.com/news/2019/9/19/20873879/jaquan-swopes-lake-county-teens-murder-charges-dropped-diamond-davis [https://perma.cc/2S7V-2GR4].

[3] Robert McCoppin, *Lake County Prosecutor Defends Murder Charges Against Teens Whose Friend Was Killed During Attempted Car Theft, Saying Teens 'Ultimately' Were Responsible for the Death*, CHI. TRIB. (Aug. 16, 2019, 6:55 AM), https://www.chicagotribune.com/news/breaking/ct-lake-county-shooting-states-attorney-20190816-yk4sjgwgufgf5pxns76znlyex4-story.html [https://perma.cc/4995-7JNB].

. . . Death or great bodily harm has to be reasonably foreseeable. Prosecutors have to prove that mental state beyond a reasonable doubt. It seems like a tough proposition to prove."[4]

Jobi Cates, the executive director of Restore Justice, took aim at the felony murder rule itself, criticizing it for being overly broad and as levying overly severe penalties onto youth whose actions were more akin to property crimes.[5] Despite Nerheim's assertion that the felony murder rule is meant to deter serious crimes that dramatically increase the risk of death or injury, he eventually decided to drop the charges with Rinehart commenting, "Thankfully, it now appears that public pressure from our community has caused the office to retreat."[6] A majority of the teenagers' cases were transferred to juvenile court and remain sealed, but the fifth defendant (who was eighteen at the time of the incident) later pleaded guilty to conspiracy to commit burglary and criminal trespass to a vehicle and was sentenced to serve one year in prison and one year of parole.[7] Without a doubt, this one-year sentence was a profoundly different life outcome from the teenager's original felony murder charges, but not all similarly situated persons are so lucky.

In this Article, I review the history and contemporary use of the felony murder rule, ultimately interrogating the disparate racial effects of its applications and the limits of data transparency in the largest felony court system in the United States. While I point to some data from this court system, the arguments made in this Article are more theoretically oriented than classically empirical, inviting the reader to question the larger utility of the

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[4] *Id.*

[5] *See id.* Restore Justice is an Illinois 501(c)(4) advocating for changes to the Illinois criminal code. It focuses principally on harsh sentences imposed on youth, including felony murder for youthful offenders. *See generally* RESTORE JUST., https://restorejustice.org/ [https://perma.cc/7634-9HRA].

[6] Wilusz, *supra* note 2.

[7] Sam Charles, *Man Charged with Killing of U of I Student Previously Charged with Murder in Lake County*, CHI. SUN-TIMES (Sept. 3, 2020, 4:02 PM), https://chicago.suntimes.com/crime/2020/9/3/21420261/steven-davis-charged-murder-u-of-i-student-berasheet-mitchell-roseland-lake-county-burglaries [https://perma.cc/SY4Y-X6X4]; Sun-Times Wire, *Teen Charged in 14-Year-Old's Death Sentenced to 1 Year*, CHI. SUN-TIMES (Nov. 5, 2019, 10:41 PM), https://chicago.suntimes.com/crime/2019/11/5/20950975/diamond-davis-sentenced-lake-county [https://perma.cc/X4NR-TZ5D].

felony murder rule as a category of punishment and culpability and to consider what it means for felony murder charges to lack stickiness. In doing so, I necessarily confront the morality of the felony murder rule itself—not just in its specific application to a case like that of Jaquan Swopes, but also the moral foundations of the category as a whole. Part I briefly reviews the scholarly literature on various punishment philosophies, considering whether any of them neatly explains the charges in the Jaquan Swopes case as a means of introducing possible punishment rationales that could undergird the felony murder rule. Part II summarizes the state of the current literature on the felony murder rule and its specific applications in the state of Illinois. Part III describes the universe of felony murder case data available in Cook County, Illinois. Part IV makes meaning of those patterns by considering the limits of data transparency, what it means to have anomalously severe criminal penalties that affect predominantly one racial group, and why a vast majority of felony murder charges are dropped before sentencing. Part V discusses potential policy solutions and directions for future research. Part VI concludes the Article, bringing together the various elements of theory, data, and analysis.

I. THEORIES OF PUNISHMENT AND JUSTIFICATIONS FOR CRIMINAL CHARGES

Scholars postulate a multitude of reasons we might charge someone with crimes, though many of those justifications are not supported by evidence of improved outcomes for society or individuals. The tragic case of Jaquan Swopes gives us ample cause to contemplate the philosophical question of why we charge people with crimes, and more specifically, why we charge some people with felony murder. Some popularly cited theories of punishment are deterrence, retribution, rehabilitation, incapacitation, and restorative justice, which I review briefly here.[8] As this review

[8] See generally CYNDI BANKS, CRIMINAL JUSTICE ETHICS: THEORY AND PRACTICE 144-60 (Jessica Miller et al. eds., 5th ed. 2020), where Banks lays out a five-part framework for conceptualizing rationales for punishment. In order, they are deterrence, retribution, rehabilitation, incapacitation, and restorative justice. While some scholars advocate for slightly different categories (or slightly different interrelationships between

demonstrates, it is difficult to understand the utility of felony murder charges in Jaquan Swopes's case through any of these lenses.

A. Deterrence

The deterrence theory of felony murder postulates that the felony murder rule deters felony commission because offenders know that if something goes wrong and someone dies, they will be charged with murder regardless of their intent or who actually pulled the proverbial trigger.[9] This was a theory endorsed by Mike Nerheim in defense of the application of the felony murder rule in the Jaquan Swopes case.[10] Deterrence theory, on its face, is an attractive philosophy for punishment because it both explains crime (i.e., crime occurs when potential criminals are not deterred from committing a crime due to lack of consequences) and provides a solution to the crime problem (i.e., creating sufficient deterrents to lessen crime).[11] With its renewed growth in popularity in the 1970s, deterrence theory makes three principle assumptions: (1) that the target group will learn that some action is a crime and be aware of the consequences; (2) that the target group perceives those consequences as a threat; and (3) that the target group will then make the rational choice to abstain from crime based on that threat.[12] Already, deterrence theory begins to break down in practical application since the conditions necessary for those assumptions to hold are significantly less likely in the contexts that surround criminal incidents. For example, can we assume that individuals committing murder are behaving as rational actors at all and are therefore susceptible to changes in the cost-benefit analysis? Scholars also note that deterrence in practice would be significantly more complicated, in part because all crimes (and perhaps all contexts in which those crimes occur) might have highly

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them), I take Banks's framework as an orienting one to briefly considering a number of theories of punishment.

[9] *See id.* at 147.

[10] *See* McCoppin, *supra* note 3.

[11] Travis C. Pratt et al., *The Empirical Status of Deterrence Theory: A Meta-Analysis*, *in* TAKING STOCK: THE STATUS OF CRIMINOLOGICAL THEORY 367, 367 (Francis T. Cullen et al. eds., Routledge 2017) (2008).

[12] Kelli D. Tomlinson, *An Examination of Deterrence Theory: Where Do We Stand?*, 80 FED. PROB. 33, 33 (2016).

individualized deterrence curves.[13] Additionally, not all potential deterrents are equally threatening, with scholars noting three dimensions of particular importance: (1) severity of criminal sentence; (2) certainty that one will be caught; and (3) celerity (or quickness) of facing consequences.[14]

Perhaps unsurprisingly, given these constraints, deterrence theory has been widely proven ineffective as a strategy for lessening violent crime.[15] At the conclusion of a rigorous forty-study meta-analysis, criminologists Travis C. Pratt, Francis T. Cullen, Kristie R. Blevins, Leah E. Daigle, and Tamara D. Madensen concluded that "the deterrence perspective—by itself—falls well short of being a theory that should continue to enjoy the allegiance of criminologists."[16] In a direct test of whether the project of creating sanctions via criminal law itself has a deterrent effect, the evidence demonstrated that deterrence assumptions failed on nearly every tenant.[17] Potential offenders often did not know legal rules and when they did, did not often apply those rules to their behavior.[18] When both of those uncommon criteria were met, potential offenders perceived the deterrent threat to be outweighed by potential benefits, thus dooming any potential lessening of crime via deterrence.[19] Particularly relevant to this essay, are findings that serious sentences (i.e., sentences as serious as the death penalty) do not deter homicide crimes in general or felony murder crimes in specific.[20] Given this social scientific consensus, it is difficult to endorse Nerheim's theory about the deterrent effects of

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[13] *See* Lawrence M. Friedman, *The Legal System: A Social Science Perspective* 76 (1975), *as reprinted in* LAW IN ACTION: A SOCIO-LEGAL READER 397, 398 (Found. Press 2007).

[14] *Id.*

[15] For a recent meta-analysis of forty empirical studies testing deterrence theory of using deterrence measures in their statistical models, see Pratt et al., *supra* note 11. This meta-analysis aimed to reconcile these studies in order to generate generalizable conclusions about the state of deterrence theory in criminology today.

[16] *Id.* at 385.

[17] *See generally* Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 OXFORD J. LEGAL STUD. 173, 205 (2004).

[18] *Id.* at 204.

[19] *Id.* at 205.

[20] Richard Lempert*, The Effect of Executions on Homicides: A New Look in an Old Light*, 29 CRIME & DELINQ. 88, 114 (1983); Ruth D. Peterson & William C. Bailey, *Felony Murder and Capital Punishment: An Examination of the Deterrence Question*, 29 CRIMINOLOGY 367, 388 (1991).

the felony murder rule as justification for the charging decision made in the Jaquan Swopes case. Notably, the studies of deterrence previously cited here find little evidence of direct deterrent effects at the individual level, much less finding deterrent effects for the much more indirect causal chain of being deterred from robbery because you might get charged for shooting your own accomplice when someone else pulled the trigger, despite not bringing a firearm to the scene yourself. While seemingly hyperbolic, these are the facts of the Swopes case and other similar incidents.

B. Retribution

Next, we turn to the philosophy of retribution, which asserts that severe punishment for felony murder is justified because it is deserved.[21] Theories of retributive punishment rest on theories of morality and the biblical law of *lex talionis*, often referred to colloquially as 'an eye for an eye, a tooth for a tooth.' Often attributed to Immanuel Kant in its most primitive form, this philosophy would suggest that an appropriate punishment for murder would be being put to death yourself.[22] Argument against this philosophy argue that it does not actually present useful contours of action for most offenses. Philosophy scholar Stephen Nathanson pointedly asks what the proper punishment would be then for offenses like airplane hijacking and embezzling.[23] He further notes that simply transforming the core of retributive punishment from being identical to the crime (i.e., the truest form of 'an eye for an eye') to something that is simply equal in harm (i.e., proportional) is no more effective because the principle of *lex talionis* does not neatly calculate what people then deserve.[24]

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[21] BANKS, *supra* note 8, at 148.

[22] See generally IMMANUEL KANT, KANT: THE METAPHYSICS OF MORALS (2d ed. 2017), for an updated collection of Kant's writings surrounding this topic. See also Thomas E. Hill, Jr., *Kant on Punishment: A Coherent Mix of Deterrence and Retribution?*, 5 JRE 291, 291-92 (1997), for more recent considerations by scholars that perhaps Kant has been overly regarded as a proponent of retributive justice.

[23] STEPHEN NATHANSON, AN EYE FOR AN EYE: THE IMMORALITY OF PUNISHING BY DEATH 74-75 (2001). Here, Nathanson points out that most crimes do not have an analogous behavior that would be obviously proportionate. Specifically, you cannot simply do unto others exactly what they have done unto you in order to even the score.

[24] *Id.* at 75.

Applying retributive theories to the felony murder rule is particularly fraught because the victim may be the offender, and the shooter may be a victim. Using the facts of the Swopes case, it is unclear how retribution would serve to mitigate the harms to the victim of the attempted burglary. In this case, the homeowner was not actually robbed of anything or directly threatened with great bodily harm, as his explanation for his defensive reaction was only that he believed he saw one of the teenagers holding an object. Taking proportionality into account, it would then be difficult to compellingly argue that a proportionate remedy for his harms would be a conviction for first-degree murder in Illinois.[25] In the

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[25] *See* 720 ILL. COMP. STAT. 5/9-1 (2022), the relevant text of which is provided here:

> [Section] 9-1. First degree murder; death penalties; exceptions; separate hearings; proof; findings; appellate procedures; reversals.
>
> (a) A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death:
>
> (1) he or she either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or
>
> (2) he or she knows that such acts create a strong probability of death or great bodily harm to that individual or another; or
>
> (3) he or she, acting alone or with one or more participants, commits or attempts to commit a forcible felony other than second degree murder, and in the course of or in furtherance of such crime or flight therefrom, he or she or another participant causes the death of a person.
>
> (b) Aggravating Factors. A defendant who at the time of the commission of the offense has attained the age of 18 or more and who has been found guilty of first-degree murder may be sentenced to death if:
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> . . . .
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> (6) the murdered individual was killed in the course of another felony if:
>
> (a) the murdered individual:
>
> (i) was actually killed by the defendant, or

case of Jaquan Swopes, the person who suffered the greatest harm was Jaquan Swopes himself. Thus, the theory of proportional retribution may conceptualize Swopes as the victim, attempting to seek retribution for his loss of life. Notably, in this case, the family of Jaquan Swopes was extremely outspoken that such a conceptualization would not vindicate them. To the contrary, Jaquan Swopes's mother, Tyisha Annan, reported "I'm not bitter about the situation, they didn't kill my baby, . . . I don't feel toward them no type of way. I still want justice for my son."[26] She effectively states that she did not feel that retribution against the co-defendants would ameliorate the harms nor constitute justice. If neither the legal victim, nor the family of the most harmed individual are vindicated, then we are left with the much more nebulously rationale of 'society' being the collective that needs to be so satisfied. However, this is still not a good explanation of the

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> (ii) received physical injuries personally inflicted by the defendant substantially contemporaneously with physical injuries caused by one or more persons for whose conduct the defendant is legally accountable under Section 5-2 of this Code, and the physical injuries inflicted by either the defendant or the other person or persons for whose conduct he is legally accountable caused the death of the murdered individual; and
>
> (b) in performing the acts which caused the death of the murdered individual or which resulted in physical injuries personally inflicted by the defendant on the murdered individual under the circumstances of subdivision (ii) of subparagraph (a) of paragraph (6) of subsection (b) of this Section, the defendant acted with the intent to kill the murdered individual or with the knowledge that his acts created a strong probability of death or great bodily harm to the murdered individual or another; and
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> (c) the other felony was an inherently violent crime or the attempt to commit an inherently violent crime. In this subparagraph (c), "inherently violent crime" includes, but is not limited to, armed robbery, robbery, predatory criminal sexual assault of a child, aggravated criminal sexual assault, aggravated kidnapping, aggravated vehicular hijacking, aggravated arson, aggravated stalking, residential burglary, and home invasion . . . .

[26] Holmes, *supra* note 1.

decisions in the Swopes case since it was community backlash itself that eventually pushed the State's Attorney to drop the felony murder charges.[27]

C. Rehabilitation

Rehabilitation varies from the previous two theories of punishment by examining not only the offense, but also the criminal, their social background, and their circumstances when determining punishment.[28] Rehabilitation is a relatively recent movement in criminal punishment, reaching a zenith in the 1950s, waning in popularity through the 1970s, and only recently becoming more popular in both research and popular culture once again.[29] A major point of contention in contemplating the viability of rehabilitation is whether the penal state can actually rehabilitate offenders and whether state officials are acting in good faith in their efforts to rehabilitate offenders.[30] Scholars also worry that rehabilitative philosophies may be violating the due process rights of offenders.[31]

These worries are easily understood in the practical application of determinate vs. indeterminate sentencing. More popular in the zenith of rehabilitation philosophy, but still remaining in many U.S. jurisdictions today, indeterminate sentencing generally proscribes a wide range of years of punishment with no deliberate end-date.[32] Theoretically, indeterminate sentencing makes room for a rehabilitative process tailored to the needs of the offender, but in practice, it often just precludes offenders from being released in a timely or anticipated way. Because of this, indeterminate sentencing has been met with harsh critique by researchers, policy makers, and the public.[33] Thus, we have a seen a recent shift back towards the determinate

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[27] *Id.*

[28] BANKS, *supra* note 8, at 155.

[29] Charles H. Logan & Gerald G. Gaes, *Meta-analysis and the Rehabilitation of Punishment*, 10 JUST. Q. 245, 245 (1993).

[30] Francis T. Cullen, *Rehabilitation: Beyond Nothing Works*, 42 CRIME & JUST. 299, 314-15 (2013).

[31] *Id.* at 316.

[32] Yan Zhang et al., *Indeterminate and Determinate Sentencing Models: A State-Specific Analysis of Their Effects on Recidivism*, 60 CRIME & DELINQ. 693, 694-95 (2014).

[33] *Id.* at 695.

sentencing paradigm but little parallel analysis on how precisely this shift affected crime.[34]

In this determinate sentencing framework, we often see criminal sentences of considerable length. For example, in Illinois, felony murder sentences range from twenty to sixty years, sometimes extending to life sentences.[35] Scholar Jalila Jefferson-Bullock contemplates the consequences and origins of such punishment schemes, writing:

> In an effort to appear tough on crime, lawmakers chose long sentencing periods almost arbitrarily, with no empirical foundation or justification for sentence length. It is now painfully obvious that lawmakers indiscriminately created an overly punitive sentencing scheme with disastrous outcomes. Strict, determinate sentencing ignores the indispensable and often overlooked principle of uncertainty.[36]

Therefore, Jefferson-Bullock argues that lengthy determinate sentencing is not a remedy for the problems of indeterminate sentencing.[37] In any case, felony murder sentences in Illinois do not follow the rehabilitative model of indeterminate sentencing, nor do they seem to necessarily craft determinate sentences that consider the nuances and contexts of the offense in the way that a rehabilitative framework would suggest, given that they dictate determinate sentences for both youth and adults at the length of first-degree premediated murder under more indirect theories of the felony murder rule.[38]

D. Incapacitation

Left unsatisfied by deterrence, retribution, and rehabilitation, we turn next to incapacitation. The goal of incapacitation is to remove an offender from society, often for long periods of time, in order to protect the public and prevent them from committing

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[34] *See id.* at 697.

[35] *Felony-Murder in Illinois*, RESTORE JUST., https://restorejustice.org/learn/felony-murder/#:~:text=A%20conviction%20for%20felony%2Dmurder,a%20term%20of%20natural%20life [https://perma.cc/G3GP-W44U].

[36] Jalila Jefferson-Bullock, *How Much Punishment Is Enough?: Embracing Uncertainty in Modern Sentencing Reform*, 24 J.L. & POL'Y 345, 350 (2016).

[37] *See id.* at 351.

[38] *Felony-Murder in Illinois*, *supra* note 35.

future offenses.[39] In order for such a strategy to work, incapacitation attempts to focus on offenders who would be committing crimes at very high rates, often referred to as career criminals.[40] On its face, this seems prudent, since some scholars assert that career criminals account for over half of crime in society.[41] This becomes substantially more complicated by two problems: (1) predicting career criminals is highly inexact, meaning that a number of people who would not become career criminals would be wrongfully incapacitated, and (2) belief that our system of punishment punishes past actions, not potential future conduct.[42] Consequently, researchers postulate that the crime reduction effects of incapacitation, particularly for youth, are so small that even dramatic increases to the number of incarcerated individuals would simply not be worth the trade-offs.[43]

Scholars trace the origins of restorative justice in the United States back to court ordered restitution and community service as community-involved or community-benefitting justice.[44] Restorative justice continues to be popular today, but programs implementing it are often operating on small scales.[45] Scholar Daniel Van Ness offers three foundational principles of restorative justice: (1) restorative justice must address the needs of communities, victims, and offenders; (2) communities, victims, and offenders should have the opportunity to engage actively in the justice process; and (3) a reconceptualizing of the roles of the community and the government in imposing justice.[46] Empirical evaluations suggest that though restorative justice faces significant

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[39] BANKS, *supra* note 8, at 157.

[40] Alex R. Piquero & Alfred Blumstein, *Does Incapacitation Reduce Crime?*, 23 J. QUANTITATIVE CRIMINOLOGY 267, 267-68 (2007).

[41] *See, e.g.*, Matt DeLisi, *Career Criminals and the Antisocial Life Course*, 10 CHILD DEV. PERSP. 53, 53 (2016).

[42] BANKS, *supra* note 8, at 158.

[43] Stevens H. Clarke, *Getting 'Em Out of Circulation: Does Incarceration of Juvenile Offenders Reduce Crime?*, 65 J. CRIM. L. & CRIMINOLOGY 528, 535 (1975).

[44] BANKS, *supra* note 8, at 158.

[45] *Id.* at 159.

[46] Daniel W. Van Ness, Perspectives on Achieving Satisfying Justice: Values and Principles of Restorative Justice 2 (Mar. 21, 1997) (unpublished manuscript) (presented at Achieving Satisfying Justice Symposium), https://dl.icdst.org/pdfs/files4/7310517c1768246aa5fafbbfd9863337.pdf [https://perma.cc/3CWL-SB49].

challenges when combined with traditional punitive approaches, restorative justice has been demonstrated to reduce recidivism in a number of programs.[47]

While these results might be encouraging, there is no evidence that felony murder sentences in Illinois follow any such tenants of restorative justice. Indeed, the initial decision to charge the youths in the Jaquan Swopes case made by the State's Attorney seems to violate the second foundational principle of restorative justice on its face by not incorporating the needs of the community into the decision-making. Taken in sum, then, none of the five theories of punishment, deterrence, retribution, rehabilitation, incapacitation, or restorative justice, seem to satisfactorily justify the use of the felony murder rule in the Jaquan Swopes case.

If none of these rationales explain the highly punitive felony murder charges bestowed upon the teenagers in the Jaquan Swopes case, what does? In the parts of this Article to follow, I review the origins of the felony murder rule and its current use in Illinois. I expand my analysis to the universe of recently available data on felony murder charge outcomes before engaging in a discussion of the salience of newly ascertainable patterns and the potentially insidious machinations of felony murder charges in Cook County courts.

II. THE FELONY MURDER RULE

Students of law and legal scholarship often learn that felony murder laws in England acted as a sort of origin story for the American felony murder rule, though these origins are disputed.[48] Some legal scholars assert that the American adoption and utilization of the felony murder rule is actually completely different

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[47] Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. REV. L. & SOC. SCI. 161, 176 (2007).

[48] See generally Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 449 (1985), for a discussion on some of these origin stories. Roth and Sundby introduce Morris's 1956 theory, citing Le Seignior Dacres Case [1535] 72 ENG. REP. 458, that postulates an origin connected to a sixteenth century finding of attributed malice in the case of a co-felon, a theory of mistaken extrapolation by Lord Coke in finding murder from the commission of a felony, and Fletcher's 1978 work finding the origins of the rule in Foster's work in the eighteenth century (first citing M. FOSTER, DISCOURSE OF HOMICIDE 258 (1762); and then citing G. FLETCHER, RETHINKING CRIMINAL LAW 276-85 (1978)).

or at least materially misunderstood. In his work, *Rethinking Criminal Law*, George Fletcher disputes the idea that English common law had a general felony murder rule as part of the "unlawful act" doctrine until much later when Michael Foster articulated the connection between felonies and murder in 1762, differentiating it from the felony murder laws across much of the United States.[49] Similarly, in his 2004 work titled *The Origins of American Felony Murder Rules*, legal scholar Guyora Binder spends considerable time tracing what he considers to be the mistaken mythology of the inherited common law felony murder rule.[50] Binder also attacks mythology about the scope of strict liability in early applications of the felony murder rule, noting that most American jurisdictions that had felony murder rules, which not all did, had very limited versions of felony murder rules that were normally constrained only to felonies dangerous to life that required felons to kill victims via intentional battery or destructive actions "manifestly dangerous to life."[51] This is substantially different from the legal terrain of felony murder today, which has expanded in many jurisdictions to include actions that are substantially more distant from intentional battery or actions inherently dangerous to life.[52]

Practically speaking, the felony murder rule means that if a person kills another person while committing or trying to commit a felony, that person has committed murder. Importantly, the felony murder rule does not require mens rea, or intent to kill, under either the proximate cause theory or the agency theory of felony murder, though the exact type of strict liability at issue continues to be debated.[53] This naturally leaves us with complex questions

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[49] See generally GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW § 4.4.4 (2000), for a more detailed discussion on the origins of the felony murder rule and the differentiations between the English Common Law version and the American version.

[50] *See* Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 60-72 (2004) [hereinafter Binder, *The Origins*] (discussing Binder's theory of the origins of the American felony murder rule).

[51] *Id.* at 65-66.

[52] *Know More: Felony-Murder*, RESTORE JUST., https://www.restorejustice.org/about-us/resources/know-more/know-more-felony-murder/ [https://perma.cc/FM4M-H9M5].

[53] *See generally* Mark Kelman, *Strict Liability: An Unorthodox View*, *in* 4 ENCYCLOPEDIA OF CRIME & JUST. (1983) (discussing various contours of strict liability, its origins, and arguments for and against its specific implementations); Roth & Sundby, *supra* note 48, at 453-57.

about blameworthiness and morality. Criminal law is undergirded with morality concepts. For example, consider "depraved heart" as a homicide standard or the use of colorful adjectives like "wicked" and "malignant" to separate manslaughter from murder.[54] These words invoke more than legal categories but also nod to categories of moral blameworthiness. Recent work by Albrecht and Nadler demonstrates that there continues to be a contemporaneous link between moral blameworthiness and amounts of recommended punishment that endures in the public consciousness today.[55]

Interestingly, even if it were true that the United States inherited its felony murder statutes from England, the U.K. Parliament abolished it in 1957 in the English Homicide Act of 1957.[56] In contrast, the felony murder rule still stands in forty-four U.S. states. Hawaii, Massachusetts, Michigan, and Kentucky have eliminated it entirely (with asterisks), while states like California and Ohio have passed laws that restrict its applications.[57] For example, California recently passed a law that severely limits prosecutorial discretion, functionally lessening applications of the felony murder rule.[58] Because felony murder rules vary from state to state and even at the individual level can be difficult to interpret, in lieu of discussing them all here, I turn to the particularly relevant case study of Illinois.

A. Felony Murder in Illinois

Illinois, the setting of Jaquan Swopes's death, currently uses the proximate cause theory of the felony murder rule. This theory holds defendants responsible for any foreseeable deaths that occur during the commission (or attempted commission) of a felony, even

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[54] Samuel H. Pillsbury, *Crimes of Indifference*, 49 RUTGERS L. REV. 105, 116-18 (1996).

[55] *See* Kat Albrecht & Janice Nadler, *Assigning Punishment: Reader Responses to Crime News*, FRONTIERS PSYCH., Feb. 2022, at 1.

[56] James W. Hilliard, *Felony Murder in Illinois—The "Agency Theory" vs. the "Proximate Cause Theory": The Debate Continues*, 25 S. ILL. U. L.J. 331, 334 (2001).

[57] Roth & Sundby, *supra* note 48, at 446 nn.6-7. It is an oversimplification to assert that the felony murder is completely abolished in some jurisdictions. It is also important to consider that changes to felony murder laws are not always retroactive.

[58] S.B. 1437, 2017-18 Leg., Reg. Sess. (Cal. 2018) (amending Sections 188 and 189 and adding Section 1170.95 of penal code).

if the killing is committed by a third party.[59] The proximate cause theory is importantly distinct from the other most common version of the felony murder rule: the agency rule.

Under the agency rule, the actions committed by a perpetrator can be attributed to a co-perpetrator.[60] Commonly cited is *People v. Washington*, where the would-be victim killed one of two armed robbers.[61] The Supreme Court of California applied the agency theory and found that in order to apply the felony murder rule, the killing must be committed by the defendant or an accomplice of the defendant, so the felony murder rule did not apply.[62] This put restrictions on the actions of third parties and victims in applying the rule, which also can substantially change the amount of punishment.

However, under the proximate cause theory, culpability under the felony murder rule "includes deaths of innocent bystanders caused by third parties, and even, as in two recently decided Illinois Supreme Court cases, the deaths of co-felons at the hands of police officers."[63] In practice, this means that the actions of accomplices can be even more distinct from those of the literal killer and still fall under the jurisdiction of the felony murder rule. In essence, the defendant does not have to be the person who commits the felony *and* kills the victim, allowing for the victim to be killed by a third party entirely.[64] In the Swopes case, Illinois could first satisfy foreseeability under the definition of a forcible felony.[65] Two potentially applicable forcible felonies are armed robbery and some other felony that involves the use of threat or physical force or violence against any individual under the definition of a forcible felony.[66] In this case, Swopes was shot by a third party (the car owner); therefore, even though the accomplices did not shoot

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[59] Martin Lijtmaer, Comment, *The Felony Murder Rule in Illinois: The Injustice of the Proximate Cause Theory Explored via Research in Cognitive Psychology*, 98 J. CRIM. L. & CRIMINOLOGY 621, 622 (2008).

[60] Hilliard, *supra* note 56, at 332.

[61] 402 P.2d 130 (1965).

[62] *Id.* at 134.

[63] Lijtmaer, *supra* note 59, at 621.

[64] *See* People v. Jenkins, 545 N.E.2d 986, 995 (Ill. App. Ct. 1989).

[65] *See* 720 ILL. COMP. STAT. 5/2-8 (2022).

[66] "Armed" is here to reflect the knife at the scene of the car theft. The presence of the knife in particular likely makes an easier case for a forcible felony.

anyone, the foreseeability of the injury allows for the application of the felony murder rule under proximate cause theory.

Particularly relevant to the plight of the Lake County teenagers are two cases from the Illinois Supreme Court in 2006. In both *People v. Hudson* and *People v. Klebanowski*, the defendants tried to rob an off-duty police officer.[67] Operating in parallel, in both cases, the police officer fatally shot one of the would-be robbers.[68] However, only Klebanowski was charged with the death of his accomplice due to differing theories of felony murder.[69] These real-life cases are eerily similar to the hypothetical posed by Hilliard in his article debating the merits of the agency vs. proximate cause theories. Hilliard clarifies the distinction, where the agency theory has the higher standard of only extending to the killing if the defendants engaged in the felony commission also do the killing.[70] Returning to the case of Jaquan Swopes, the agency theory would exempt the Lake County teenagers from culpability under the felony murder rule and yield substantially less punishment.

There is some current legislation in Illinois that might alter the scope of the felony murder rule.[71] State Senator Robert Peters introduced Senate Bill 2292 in direct response to Jaquan Swopes's death and on behalf of the Restore Justice Initiative.[72] If passed, the bill would prevent prosecutors from charging an individual when a third party causes a death.[73] The bill's status has not changed since the senate adjourned sine die on January 13, 2021.[74]

B. Perspectives on the Felony Murder Rule

Society has an important role to play in both the persistence and critique of the felony murder rule, in part due to its foundations

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[67] People v. Hudson, 856 N.E.2d 1078 (Ill. 2006); People v. Klebanowski, 852 N.E.2d 813 (Ill. 2006).

[68] *See Hudson*, 856 N.E.2d at 1079; *Klebanowski*, 852 N.E.2d at 816.

[69] *See Hudson*, 856 N.E.2d at 1080; *Klebanowski*, 852 N.E.2d at 820.

[70] Hilliard, *supra* note 56, at 332.

[71] Cox, *supra* note 1.

[72] Press Release, Robert Peters, New Peters Bill Challenges Felony Murder Laws (Oct. 30, 2019), https://www.senatorrobertpeters.com/news/press-releases/56-new-peters-bill-challenges-felony-murder-laws [https://perma.cc/GT37-4HXP].

[73] S.B. 2292, 101st Gen. Assemb., Reg. Sess. (Ill. 2020).

[74] *Bill Status of SB 2292*, ILL. GEN. ASSEMB., https://www.ilga.gov/legislation/BillStatus.asp?DocNum=2292&GAID=15&DocTypeID=SB&SessionID=108&GA=101 [https://perma.cc/BWL3-ZBEL].

in morality. Scholar Joseph Kennedy explains how something like the felony murder rule can exist in that, "Monstrous crimes and monstrous criminals provide appetizing fare for a society hungry for agreement and cohesion."[75] Kennedy uses this frame to unpack the tendency to exaggerate the "baddest bads" in a way that makes something like the felony murder rule socially sustainable. Regardless of the "truth," if we can cultivate an othering identity and idea of blameworthiness that casts felony murderers as the baddest bads, the felony murder rule can exist in our social context even if it is difficult to empirically justify. Accordingly, when we look at the history of the justice system, the felony murder rule has certainly endured and continues to be implemented in a vast majority of states.

This is not to say that everyone agrees that the felony murder rule is a good thing or good law. In the aforementioned case of Jaquan Swopes, public outcry was at least partially credited for the charges being dropped.[76] Similarly, other newsworthy cases have sparked public outcry against the felony murder rule. Notable is the case of Ryan Holle, a twenty-year-old who lent his car to his roommate.[77] After borrowing the car, Holle's roommate committed a robbery and a murder.[78] Despite that fact that Holle was asleep in bed at the time, he is serving a life sentence for murder on the predicate that he should have foreseen that his roommates were going to commit a crime due to previous conversations about a plan to steal money/drugs and beat up a resident of the house.[79] Cases like these capture the public consciousness and allow for the vocal expression of public opinion. Even so, on the other side of the spectrum, some people do not even know the felony murder rule applies in their state.[80] This was true of Marshan Allen who was

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[75] Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 830 (2000).

[76] Holmes, *supra* note 1.

[77] Charles Grodin, *Felony Murder Rule Should Be Killed*, N.Y. DAILY NEWS (May 8, 2008), https://www.nydailynews.com/news/world/felony-murder-rule-killed-article-1.331509 [https://perma.cc/W882-HUU6].

[78] *Id.*

[79] *Id.*

[80] Will Jones, *Illinois Law Allows Those Involved with Crime to Be Charged with Murder if Someone Dies*, ABC7 (Aug. 15, 2019), https://abc7chicago.com/illinois-crime-murder-felony-rule-law/5471018/ [https://perma.cc/BT28-GQ45].

sentenced under the felony murder rule. He stated that "[he] thought [he] could beat the case because [he] hadn't murdered anyone."[81] Released after decades of hard time, Allen now works at one of several known nonprofits that fight against the felony murder rule.[82]

The public is not the only one with strong feelings about the felony murder rule. Many legal scholars and practitioners have been highly critical of felony murder as anachronistic and antiquated.[83] Of particular critique are the amounts of discretion available to the prosecutor under the felony murder rule. Returning to the Jaquan Swopes case, before the charges were ultimately dropped, former Cook County prosecutor Irv Miller went on record saying, "I would not have charged murder in this case."[84] This demonstrates that even within a similar set of stakeholders, very different decisions can be made about felony murder rule cases.

C. Racism and the Felony Murder Rule

Previous research related to the felony murder rule quantitatively emphasizes racial inequality, primarily disproportionately affecting African Americans. A majority of this work is grounded in the most severe punishment: the death penalty.[85] There are only a few studies that really break the felony murder rule down by race in terms of differential death penalty outcomes, and there is a dearth of accompanying legal analyses. However, the existing work finds that Black defendants are distinctly disadvantaged under the felony murder rule and that the felony murder rule is especially punitive.[86] In fact, in some states, scholars argue that defendants with felony murder charges are

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[81] *Id.*

[82] *Marshan Allen*, REPRESENT JUST., https://www.representjustice.org/team/marshan-allen/ [https://perma.cc/U925-76HR].

[83] *See* Binder, *The Origins*, *supra* note 50.

[84] Cox, *supra* note 1.

[85] See generally Daniel Givelber, *The New Law of Murder*, 69 IND. L.J. 375 (1994); Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103 (1990); and Marvin E. Wolfgang et al., *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 301 (1962), for empirical papers measuring racial inequality and the death penalty.

[86] *See* sources cited *supra* note 85.

actually in worse positions than those with first degree premeditated murder charges.[87] Other work found that Black defendants are much more likely to be charged in felony murder cases if the victim is white.[88] Citing data about interracial felony murders, Bowers notes that such sentences almost always involve a white victim and a Black defendant (Florida – 93%, Georgia – 93%, Texas – 85%).[89] Work by Hans Zeisel confirms these conclusions, finding that 31% of arrests for white victims during a felony resulted in a death penalty sentence compared to 1% of arrests with a Black victim.[90] Other researchers also find that the actual rate of execution is the highest for Black felony murderers.[91] This is consistent with racially charged punishment in the history of the United States. In a report commissioned by the Model Penal Code Project, they found that out "[o]f the 3,096 people executed for the crime of murder, 1,516 (nearly 50%) were African American."[92]

Other research finds that the creation of new statutory law and implementation of prosecutorial discretion further worsens racial disparity. Daniel Givelber illustrates how the creation of law has served to further disadvantage defendants in the felony murder category. He explains that in 1994 in the United States, "[a]s a matter of law, an efficient killing [could not], in many states, be particularly 'heinous' or 'atrocious' because the victim did not suffer consciously before expiring."[93] This means that an extremely proficient premeditated domestic murderer might be exempt from the death penalty while a felony murder rule participant would not be. Notably, no such exemption or interpretation was made in a category of crime predominantly consisting of Black defendants. Here, we might consider legacies of racial hysteria to explain the difference. Zeisel explains that the "tabooed border crossing[]" of a black person murdering a white person can trigger more punitive

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[87] Rosen, *supra* note 85, at 1120.

[88] *Id.* at 1117-18.

[89] *Id.* at 1118 n.39 (citing WILLIAM BOWERS ET AL., LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864–1982, at 230-31 (1984)).

[90] Hans Zeisel, Comment, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456, 460 (1981).

[91] Wolfgang et al., *supra* note 85, at 305.

[92] Givelber, *supra* note 85, at 389 n.63.

[93] *Id.* at 378 n.14.

responses due to racist beliefs about black people's lack of status.[94] Importantly, research postulates that police and prosecutors might be choosing to charge felony murder more often when there is a white victim.[95] These types of gatekeeping choices on the front-end mean that the unequal outcome statistics cited here are inevitable. Given this constellation of history and set of quantitative outcomes, it seems undeniable that felony murder is deeply racialized and merits careful scrutiny.

III. DATA ON THE FELONY MURDER RULE

Many of the available statistics on unequal applications of the felony murder rule are very old or from very specific jurisdictions that have demographic and social contexts very different from the current site of analysis. In order to update and clarify these issues, I conducted my own brief analysis of Cook County felony murder rule data to illuminate patterns in felony murder charges. While this analysis makes use of newly available data, it serves more as a form of pattern revelation than the basis of a purely empirical line of inquiry. Such extended empirical work would doubtless be valuable and should be done, but it is not in the purview of this Article.

Cook County is a fertile ground for this analysis for several reasons, including the large jurisdictional population and subsequent number of cases, the specificity of the statute numbers, and newly available data that makes analyzing felony murder charges uniquely possible. I used the Cook County Open Data Portal ("CCODP"), which contains case-level information about every felony case processed by the State's Attorney. This data ran from January 2011 to January 2021, comprising approximately ten years of data. I created a dataset of felony murder rule case outcomes at multiple stages. The data portal contains information from initiation, intake, disposition, and sentencing about hundreds of thousands of cases. I selected data from three of those stages to better track felony murder charges through the life cycle of a case.

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[94] Zeisel, *supra* note 90, at 467-68.

[95] William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination Under Post*-Furman *Capital Statutes*, 26 CRIME & DELINQ. 563, 615 (1980).

The analysis here is parsimonious in its simplicity and is descriptive rather than attempting causality. First, I filtered the data from all three usable stages into two categories: felony murder rule cases and all other homicide-type cases.[96] Second, I collapsed and constructed two parallel figures to depict stage-by-stage results for felony murder and all other types of homicide cases by race (see *Figures 1* and *2*). While this Article is not principally concerned with other types of murder, I construct this comparison so we can tell if patterns found in felony murder charges are meaningfully similar or different to patterns across other types of murder charges.

Figure 1: Felony Murder Charges in Cook County by Defendant Race

	Black	Hispanic	White	Other	Total
Initiation	971	220	90	3	1,284
Disposition	511	121	59	2	693
Sentencing	97	13	12	0	122

Note: Full data available from Author

Confirming the findings of previous literature, there is significant racial disparity in felony murder charges between white and Black defendants (*Figure 1*). In the Cook County data, 75.62% of initiated cases have Black defendants (N=971), and only 7.01% have white defendants (N=90).[97] This is significantly more than you would expect based on population proportions alone by race. According to the U.S. Census, 42% of the Cook County population

[96] This includes cases as coded by the CCODP, which offers a coded variable for "offense type" where homicide is one such category. I do not make distinctions further than explained in the main text, since the purpose of this analysis is to analyze general trends as narrowly as possible.

[97] The data was transformed into per-individual counts with the following procedure. The data was downloaded raw and then a dichotomous variable was created delineating felony murder or other types of murder using the section "9-1(a)(3)" to delineate felony murder charges. Then for each group, I removed duplicates by "case_participant_id." This identifier is advantageous because it allows for co-defendants but prevents any one defendant who has many charges from dominating that data. An analysis of raw charges could be useful in its own right, but it is not the primary unit of analysis desired here.

is white (not Hispanic or Latino/a) and 23.8% of the Cook County population is Black or African American.[98] Comparing this population data to the number of charges per racial group, it is clear that Black defendants are over-represented in the pool of felony murder rule cases. This fact taken alone indicates disparity, but not necessarily bias. However, further examination reveals more information about systemic features of felony murder charges.

A considerable amount of felony murder cases does not appear in the sentencing data, and I consider these charges to have "not survived" the life cycle of a case. Only 9.5% of felony murder charges appear in both the initiation and sentencing data.[99] By sentencing, about 13.33% of white defendants are found guilty of a felony murder charge while 9.89% of Black defendants are found guilty of a felony murder charge.[100] On their face, these numbers seem relatively equivalent. However, we must not neglect the magnitude of harm affecting one group when we look at the initial population disparity of felony murder charges.

This result also comes with an important caveat that constitutes perhaps the single most important finding: around 90.5% of these charges simply do not survive through sentencing to culminate in guilty verdicts for felony murder. This means that it's relatively uncommon to be found guilty of felony murder even when you are charged with it. There are a multitude of reasons why a charge might not stick all the way through, including insufficient evidence, Fourth Amendment violations, procedural issues, lack of resources, willingness to cooperate, and plea deals, some of which I will consider in more detail in Part IV.

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[98] *QuickFacts: Cook County, Illinois; United States*, U.S. CENSUS BUREAU (July 1, 2021), https://www.census.gov/quickfacts/fact/table/cookcountyillinois,US/PST045221 [https://perma.cc/3AFP-MW6L].

[99] I generated this statistic by creating a combined dataset that linked the charge_id across the initiation and sentencing data. This allowed me to determine which specific charges survived.

[100] Here, I use the term "found guilty" to refer to three outcomes: a guilty plea, a finding of guilty, or a verdict of guilty. One Black defendant was found not guilty, so this calculation is performed using a numerator of ninety-six.

Figure 2: All Other Murders vs. Felony Murder

	All Other Murders	Felony Murder	Total
Initiation	3,205	1,286	4,491
Disposition	1,553	693	2,246
Sentencing	1,214	122	1,336

The patterns described in felony murder charges are especially notable because they are substantially different from the patterns seen in other murder charges, which are arguably similarly situated charges. The relationship between race and felony murder is different than other types of homicide. Felony murder charges are substantially less likely to survive into the sentencing dataset curated by the State's Attorney. Felony murder charges have a survival percentage of 9.49%. All other homicides have a survival rate over four times higher, at 37.88%. This indicates a significant pattern of difference between felony murder and other types of homicide. In other words, this suggests that the logistics of how felony murder is charged and pursued through the criminal justice system is different than other types of homicide crimes, including first degree homicide crimes that necessarily require a different level of intent and direct action by the perpetrator.

IV. HOW BIASED IS THE FELONY MURDER RULE?

This is the question at the heart of this Article, and I argue, the most difficult one to answer with precision. While we will look at some of the quantitative statistics presented above, I argue that we must not consider them in isolation when attempting to determine whether the felony murder rule is biased. Instead, I propose that we must consider several additional ideas in tandem that function at a large level of morality and macro-level utility for felony murder as a charging category: (1) the limits imposed by the data itself; (2) what it means to have crime categories that apply predominantly to one group; and (3) what it means for concepts of justice and morality to use a category of charges that do not result in completed sentences very often. I begin first with the

quantitative data and then make my way through each additional complexity to construct a more nuanced picture of the entangled web of bias that is the felony murder rule.

A. Quantitative Interpretations of Cook County Data

Perhaps the most straightforward task in the remainder of this Article is to carefully consider the results of the quantitative data extracted from the CCODP. Despite being the most straightforward consideration left, the task itself is actually quite complex for a simple data rendering. The same small data vignette seems to tell its story in three parts. In part one of the data story, we see that 13.33% of white defendants are ultimately sentenced under felony murder charges, while 9.89% of Black defendants are so sentenced. These statistics seem to suggest that sentencing under the felony murder rule might not be biased by race because these numbers seem similar. However, in part two of the same data story, the data clearly indicates disparate representation of Black defendants in the pool of felony murder charges, to the point where Black defendants comprise over 75% of persons charged with felony murder. The data also indicates that 90.5% of felony murder charges do not survive through sentencing. These facts taken in combination seem to suggest that there is racial bias in felony murder charges and unusual patterns of charge survival that belie the seeming relative equivalence described in part one. In part three of the data story, we see that the racial sentencing patterns and stickiness of felony murder charges are substantially different from non-felony murder charges. This seems to suggest that felony murder is operating differently than other types of murder charges.

B. The Limits of Data Transparency

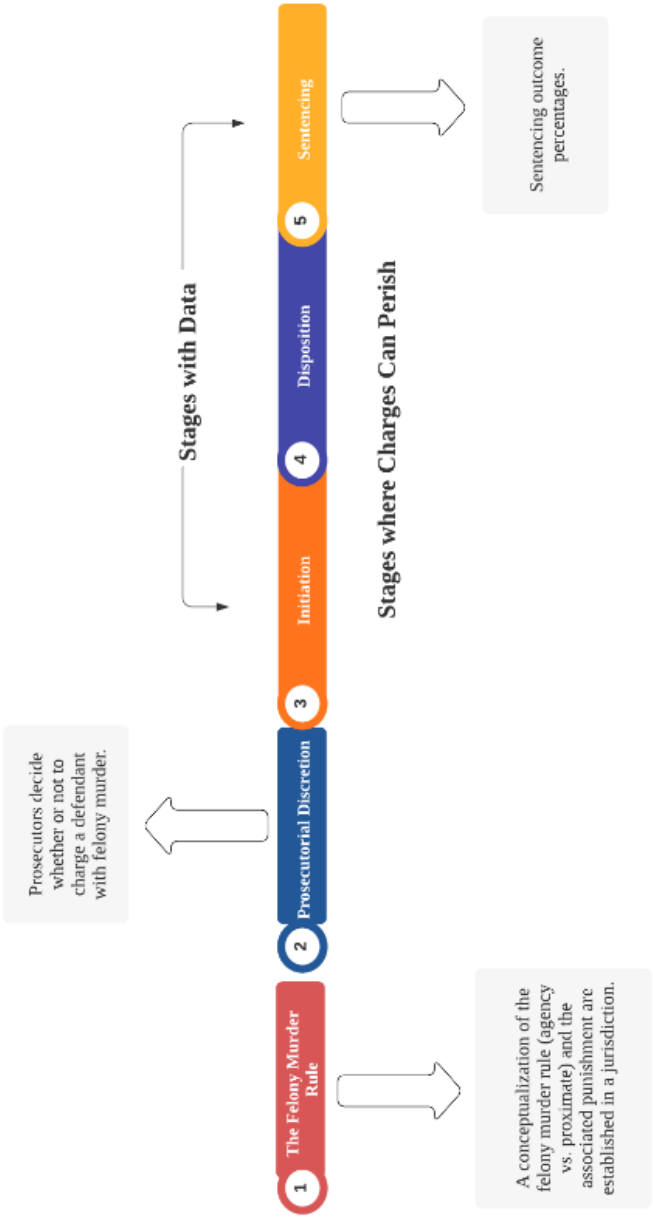
Taken in sum, this data presents a cautionary tale and demonstrates a need for further interpretation of the unusual patterns it reveals. If we looked at only the sentencing endpoint of the data, using a simple Black versus white comparison, we would be making an extremely narrow comparison that falsely winnows out various risk points for the injection of bias into the system. By this, I mean that there could be any number of biases or alternative pressures already baked into the charging and court process that

would not show up by analyzing only the final steps in quantitative data form.

As an example, imagine a jurisdiction where ten Black and ten white defendants meet the criteria to possibly receive felony murder charges. Imagine our hypothetical prosecutor chooses to charge all ten Black defendants with felony murder and only two of the white defendants. At sentencing, five Black defendants are found guilty, and one white defendant is found guilty. This would be a 50% yield from each group, if we start counting after individuals are charged. However, if we started counting before individuals are charged, we would instead have a conviction percentage of 50% for Black defendants and 10% for white defendants. In this way, where in the system you begin your bias/utility analysis is extremely important.

I argue that this blurring of bias is what is happening in the case of felony murder. I propose that there are several sources of bias that may impact felony murder rule outcomes much earlier in the process, but it is difficult to tell for certain from the data as it is currently. I discuss three of these possibilities here, in order. First, we are limited by the scope of the data itself. Second, we must consider the meaning of extremely punitive categories of crime that apply predominantly to one group. Third, we should consider the lack of stickiness of felony murder rule charges and how that stickiness might exacerbate bias in the system. I plot these potential system determinants in *Figure 3*.

Figure 3: Life Cycle System of Felony Murder Charges



The data available from the CCODP is limited in several ways, including what type of data it provides, when in the process the data is provided, and difficulties in acquiring supplemental data at scale. First, the data provided by CCODP is limited in that it is tabular data at specific points in time. This means it lacks the rich description needed to understand the specifics of individual cases. This by itself is not necessarily disruptive to the project of determining aggregate patterns since some individual variation should average out across the data. Much more difficult is the temporal specificity of the data. In essence, there is missing data that structures the possible charges and therefore constrains the universe of outcomes. These blanks in the data story are where important elements like prosecutorial discretion in making charging decisions, offers of plea bargains, or different types of case delays would be found. We can make informed guesses about what happens in these data voids but cannot know for sure without collecting that data or it being released more broadly.

This brings up the question of whether court data should be public and transparent. There are arguments both for and against data transparency in the courtroom. Arguments against data transparency focus on issues of financial cost to the court, privacy concerns, and the ability of judges to do their jobs without fear of intimidation or retaliation.[101] There are also arguments against court transparency because of what external actors will do with the information. Closely related to this privacy concern, significant scholarly work has studied the harmful and stigmatizing effects of public information, particularly publicizing of mugshots.[102] Scholars find that mugshot images, which are part of the public record, are being monetized by companies with harmful effects on the individuals featured in them. This is a compelling argument of

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[101] See Lynn M. LoPucki, *Court-System Transparency*, 94 IOWA L. REV. 481, 513-36 (2009), for a detailed discussion of arguments against data transparency in courts and for arguments in the alternative, with the ultimate conclusion that courts should pursue data transparency for both court efficiency and public access to data.

[102] See also Sarah Esther Lageson, *Criminal Record Stigma and Surveillance in the Digital Age*, 5 ANN. REV. CRIMINOLOGY 67 (2022), for a more detailed discussion about the potentials harms of digital criminal records used for extralegal applications. See generally Eumi K. Lee, *Monetizing Shame: Mugshots, Privacy, and the Right to Access*, 70 RUTGERS U. L. REV. 557 (2018), for a detailed analysis of stigmatization and shame regarding commercialized mugshots.

how data can cause harm, but there is a key distinction here in who the intermediary of the information actually is. In the case of mugshot images, that data is already public and could be accessed with the veil of corporate monetization. This is a key sticking point for arguments about personal privacy that would curtail data availability in courts: The records are already available.[103]

This brings up a reasonable question. If many types of court records are already available, then what's the problem with acquiring the type of data we would need to fully flesh out the patterns observed here? The issue is that available does not mean reasonably accessible. That is, while public rights to data exist and the data is available in shareable form, it is often prohibitively expensive.[104] These costs are high for the average member of the public seeking a single case, much less for a team committed to auditing cases systemically for important information about constitutional protections who need thousands of records to accomplish the task. For example, accessing the Public Access to Court Electronic Records ("PACER") data costs ten cents per page.[105] This means that a single case might cost $100, which can scale up to millions of dollars for large, robust datasets.[106] This means that retrieving the data needed to fill the identified data voids, even if it exists in ideal form, is simply not functionally public.

Some data is also not collected in a usable form. For example, a prosecutor might consider handing down a particular charge but ultimately not pursue it. This decision might not be documented anywhere at all or might be documented in a form that is difficult to turn into large-scale data. From a data perspective, this puts data analysis in a tough spot because it can mean we are selecting

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[103] LoPucki, *supra* note 101, at 485. LoPuki concludes that arguments against transparency of records in favor of protecting privacy don't acknowledge that the records in question are already "public and widely available." *Id.* LoPuki further argues that increased transparency would be a net benefit because then everyone in the public could use the data to make decisions. *Id.*

[104] *About Scales*, SCALES, https://scales-okn.org/about-the-project/ [https://perma.cc/57BG-ZXK9].

[105] Stephen Gossett, *Machine Learning Could Jolt Legal Research — We Just Need the Data*, BUILT IN (Feb. 16, 2021), https://builtin.com/machine-learning/scales-judicial-analytics [https://perma.cc/AVP2-9NFL].

[106] *Id.*

on the dependent variable. That is, we are left with the pool of cases that did receive a felony murder charge at some point—not the pool of cases that COULD have received one at any point but never did. These omissions have large implications for different types of bias. Similar to the sentencing hypothetical above, this means a fundamental misunderstanding about the data may exist due to bias entering the system before data is available. This makes the project of transparent courtrooms and expanding and improving data offerings extremely important not just for scholars but also for attorneys and members of the public who are legally entitled to the information.

C. The Lack of Stickiness of Felony Murder Charges

The moral imperative undergirding the felony murder rule becomes more difficult to justify when we look at the true pattern of charges and their propensity to be dropped 88% of the time.[107] Before contemplating the substantive meaning of this pattern, I consider plea bargaining, prosecutorial discretion, and the limits of protection from coercion.

An enormous majority of legal cases are adjudicated via plea bargaining and do not go to trial.[108] This trend has grown more pronounced in recent years, with estimates that as few as 1-3% of cases are tried (in state and federal criminal courts, respectively).[109] A robust literature has considered and tested various motivations for plea bargaining, but I will not review that literature here.[110]

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[107] This percentage was calculated based on the data reviewed *supra* Section IV.B.

[108] Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, but Not Quite Gone*, 101 JUDICATURE 26, 28 (2017) (reviewing several studies and recent quantifiable data, including charge outcomes by year and the percentage of cases resolved by trial).

[109] *Id.*

[110] For a discussion on the historical approval or disapproval of plea bargaining, see Doug Lieb, Note, *Vindicating Vindictiveness: Prosecutorial Discretion and Plea Bargaining, Past and Future*, 123 YALE L.J. 1014, 1022-25 (2014). Lieb explains that in the 1950s, there was a very real possibility that plea bargaining might have been declared illegal entirely and, until that point, there had been little formal recognition about whether plea bargains were constitutional. For more insight into scholarly debates around plea bargains, motivations for plea bargaining, and the history of the practice, see generally Rebecca Hollander-Blumoff, Note, *Getting to "Guilty": Plea Bargaining as Negotiation*, 2 HARV. NEGOT. L. REV. 115 (1997); H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63 (2011); GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING

Instead, I consider the practical *function* of plea bargaining and then apply these ruminations specifically to the case of felony murder. Conceptually speaking, plea bargaining is a mutually beneficial agreement struck between a prosecutor and a defendant (via their attorney) that saves the prosecutor the time, effort, and expense of a trial and nets the defendant some sort of concession. Practically speaking, some scholars argue that this is not the case. Rather, they argue that there is no such mutually beneficial contract between prosecutor and defendant and, instead, the prosecutor acts as the sole arbitrator of the defendant's blameworthiness and what punishment is merited at a critical juncture of a given case.[111] With such power and discretion comes the possibility for bias and role distortion. Scholar Albert Alschuler explains the stakes of prosecutorial decision-making by conceptualizing the prosecutor's job as dynamic due to its different roles—where the prosecutor might be acting as an administrator, an advocate (for punitive sentencing), a judge, or a legislator when deciding whether or not to offer a plea bargain.[112] That means prosecutors have a large universe of possible motivations and options and a defendant who has substantially less leverage, if any.

Despite this fundamentally unequal power dynamic, courts rarely investigate any pressures a defendant might face in deciding to plead guilty.[113] Legal protections against vindictive prosecution do exist, but they are very specific and limited in scope.[114] Scholar Doug Lieb concludes that such protections are not designed for preventing high stakes plea bargains rather that, "[u]sing charging discretion aggressively to pressure defendants into pleading guilty is exactly what the existing doctrine of vindictive prosecution permits."[115] More concrete legal protections seem to exist to protect

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IN AMERICA (Stanford Univ. Press 2003) (2000); Jeff Palmer, Note, *Abolishing Plea Bargaining: An End to the Same Old Song and Dance*, 26 AM. J. CRIM. L. 505 (1999).

111 Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 42-54 (1983).

112 Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 52-53 (1968).

113 Gifford, *supra* note 111, at 39-40.

114 See generally Lieb, *supra* note 110, for a history of vindictiveness and its somewhat accidental origins, resulting in a standard that is neither here nor there and is consequently very narrow in what it actually protects. Lieb also proposes a new conceptualization of vindictiveness. *Id.* at 1045-67.

115 *Id.* at 1017.

defendants' rights by ensuring their guilty plea is voluntary, but, again, these protections are functionally extremely limited.[116] Relevant to this analysis of felony murder, *United States v. Pollard* narrowly defined prosecutorial coercion as physical harm, threats of harassment, and prosecutorial misrepresentation or threats.[117] This narrowly constrains the universe of coercion such that extremely unequal deals simply do not count as coercive. *Brady v. United States* formalizes this assertion, in which even a defendant facing the death penalty for refusing the plea deal, was not considered coerced.[118] This is particularly problematic for sentences like felony murder, where the post-conviction penalty can vary so substantially from the plea deal, like simply pleading guilty to the underlying felony.[119] Lieb fittingly concludes this grim assessment of the coercive potential of plea bargains writing, "The inevitable effect of plea bargaining is to discourage the assertion of the Fifth Amendment right not to plead guilty and to deter the exercise of the Sixth Amendment right to demand a jury trial."[120]

In light of these possibilities, we now turn to the pattern revealed in the Cook County felony murder data, which demonstrates that 88% of felony murder charges do not endure through the life cycle of a criminal case. Now, as discussed in the data transparency section of this Article, we are prohibited from making causal arguments about any of the cases represented in the aggregate data because there is insufficient information to understand why each charge exited the life cycle of a given case and what plea bargain may or may not have existed.[121] However, I argue that what we see is a pattern of a lack of stickiness of felony murder charges in such an overwhelming aggregate that it would be unconscionable to not investigate a likely cause of this phenomenon

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[116] See Dawn Reddy, *Guilty Pleas and Practice*, 30 AM. CRIM. L. REV. 1117, 1119-30 (1993), for a primer on plea bargaining in U.S. criminal courts, including an analysis of the limits of Rule 11 of the Federal Rules of Criminal Procedure covering both guilty pleas and plea bargaining.

[117] *Id.* at 1120 ("A plea is voluntary if it is not the product of actual or threatened physical harm, mental coercion overbearing the defendant's will, or the defendant's sheer inability to weigh her options rationally.").

[118] Brady v. United States, 397 U.S. 742, 752-53 (1970).

[119] *See* Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIM. L.Q. 67, 87 (2005).

[120] Lieb, *supra* note 110, at 1036.

[121] *See* discussion *supra* Part III.

in more depth. The literature cited in this Article indicate a number of known facts: (1) decisions to charge felony murder are to some extent discretionary; (2) the history of felony murder and other severe criminal charges are fraught with racial bias; (3) scholars have identified plea bargains in high-cost situations like felony murder as potentially coercive; and (4) we have a universe of felony murder charges where pleading guilty or being convicted of felony murder is astonishingly rare compared to the incidence rate of felony murder charges. Focused empirical research should be done to identify how plea bargains and prosecutorial charging decisions may be contributing to increased guilty pleas under duress to avoid extremely punitive sentences, particularly because those sentences predominantly affect Black defendants.

There is one more thread to tie up and that is the question of how these profoundly un-sticky charges justify or do not justify the larger category of felony murder. When looking at a category of charges that do not lead to a conviction under those charges 90.5% of the time, we must ask ourselves if the imperative of moral blameworthiness is justified under that pattern. That is, if the criminal legal system functions to rarely convict under the felony murder doctrine, then what is its true usefulness or function? Surely, were the felony murder doctrine a true indicator of increased moral blameworthiness so as to justify its punitive sentences, it would be a systemic failure for the charges to be so rarely carried out to completion. It is with larger, philosophical questions about the societal purpose of the felony murder doctrine that I leave this analysis—in the uncomfortable space where many of the justifications for continued use of the felony murder rule do not seem to mirror its use in court.

D. Crime Categories that Only Apply to One Group

The data shows that felony murder in Cook County applies to Black defendants over 80% of the time, meaning that this is a criminal category that mostly affects one group of people. In this Section, I consider why that might be by looking at the foundations of blameworthiness, morality, and the creation of criminal categories themselves.

While it is tempting to consider law and morality as separate constructs (i.e., that law is free from subjective moral judgements),

morality is codified into many areas of law and is inexorably linked to it. For example, morality is foundational to the very concept of criminal liability by setting culpability standards through the vehicle of mens rea, or "guilty mind."[122] Historically attached to Christianity, immoral conduct was generally sufficient to prove mens rea.[123] By the middle of the thirteenth century, it was well established that "justifiable punishment [was] premised on and proportional to moral guilt."[124] In this way, morality concepts become the basis for what counts as criminal behavior and what counts as acceptable punishment.

Studies of crime news and violent crime indicate that laypeople are prone to see certain groups as more blameworthy. Emile Durkheim proposes an explanation for this saying, "Crime . . . consists of an action which offends certain collective feelings which are especially strong and clear-cut."[125] In other words, something is a crime because it violates the collective consciousness. Therefore, if racial, ethnic, gendered, or other forms of bias were deeply ingrained into American society, we should expect to see certain groups of people elevated in blameworthiness even if their actions are comparable. Indeed, experimental results support this assertion, with one study finding that even just a brief image of a Black man in a crime news story activates racial stereotypes causing participants to rate Black suspects as more guilty and more deserving of punishment.[126] In this way, it becomes difficult to convincingly argue that a bad crime is a bad crime because it is a bad crime (a tautology for the ages). Rather, we must

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[122] Paul H. Robinson, *Mens Rea*, *in* 3 ENCYCLOPEDIA OF CRIME & JUST. 995, 996 (Joshua Dressler ed., 2d ed. 2002).

[123] *Id.*

[124] Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 655, 655 n.90 (1993).

[125] EMILE DURKHEIM, THE RULES OF SOCIOLOGICAL METHOD 99 (Steven Lukes ed., W. D. Halls trans., First Am. ed. 1982).

[126] Mark Peffley et al., *The Intersection of Race and Crime in Television News Stories: An Experimental Study*, 13 POL. COMMC'N 309, 321 (1996). In the study, researchers manipulated the race of a suspect in crime news video broadcasts. *Id.* at 313-14. They found that very briefly showing an image of a Black suspect in the context of a violent crime to white viewers was sufficient to "activate their global racial stereotypes." *Id.* at. 321. They then found that white individuals endorsing these stereotypes viewed the African American suspect "as more guilty, more deserving of punishment, more likely to commit future violence, and with more fear and loathing than a similarly portrayed white suspect." *Id.*

contemplate the moral foundation of social consensus that cast a particular act as so particularly blameworthy compared to other acts.

Theories of blameworthiness postulate that punishment should reflect the individual's degree of moral culpability rather than being based merely on the degree of resulting harm.[127] In considering this proposition, it's useful to contemplate the difference between an attempted robbery and a successful one. Under this theory of punishment, the both the successful and the unsuccessful robber are equally blameworthy because they had the same intent, regardless of the outcome.[128] Scholar Martin Gardner explains that a deserved sentence would be proportionate to the sentences of others with similar amounts of blameworthiness.[129] However, such a calculation is very difficult as there is no value-free way to calculate harm, which thus imbues all such valuations with some sort of moral judgement.[130]

A useful way of conceptualizing the relationship between intention, harm (or outcomes), and punishment is to consider the example of homicide. In our current criminal legal system, we have several degrees of homicide as well as other designations for crimes that result in a death, like justifiable homicide or manslaughter.[131] This allows some definitional murderers to be punished less severely than others—even if the outcome of death is the same.[132] We see this frequently in the contemporary justice system where we distinguish justifiable and non-justifiable killings but also divide non-justifiable killings into degrees that call for less punishment based on less intent and mitigating circumstances.[133] Rather than being some sort of exact empirical calculation about differing values of the outcome (i.e., human life), we vary punishment based on blameworthiness for the act itself.[134] This

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[127] James Edwards & Andrew Simester, *Crime, Blameworthiness, and Outcomes*, 39 OXFORD J. LEGAL STUD. 50, 60 (2019).

[128] *Id.*

[129] Gardner, *supra* note 124, at 707.

[130] Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965, 1007 (2008) [hereinafter Binder, *The Culpability*].

[131] Gardner, *supra* note 124, at 706-07.

[132] *Id.*

[133] Edwards & Simester, *supra* note 127, at 65-66.

[134] *Id.*

also demonstrates that the culpability framework engaged by the felony murder rule is not universal, even for homicide specific crimes.

The felony murder rule has a particular way of applying morality and mens rea. Felony murder scholar Guyora Binder's work on the subject suggests it imposes strict liability in the formal sense, but it is still grounded in moral blameworthiness.[135] Felony murder can usefully be contemplated using the law doctrine of "*versanti in re illicitae imputantur omnia guae sequntor ox delicto* (one acting unlawfully is held responsible for all the consequences of his conduct)."[136] In felony murder, the morality of the motives behind the underlying felony is used to justify homicide liability without a homicidal intent.[137] As put by felony murder scholar Martin Gardner,

> The doctrines of felony murder and unlawful act manslaughter reflect the *versanti in re illicitae* principle. Both hold offenders committing certain predicate felonies or other unlawful acts guilty of murder or manslaughter respectively if deaths occur in connection with the predicate crime, even though the offenders neither intended nor foresaw the possibility that their conduct would result in death. Indeed, the doctrines sometimes create homicide liability for deaths accidentally and nonnegligently occurring in the commission of the predicate felonies, or other unlawful acts, even if the offender has taken precautions to avoid causing death.[138]

Work by other scholars in the space tends to agree that the "bad motive" standard in criminal law features prominently in felony murder and in other places in criminal law.[139]

Gardner argues that *versanti in re illicitae* seems out of place in a modern legal framework that has moved towards requiring evidence of specific mental states for specific crimes.[140] Gardner argues that contemporary law is not just concerned with a larger "evil motive" but also with the degree of criminal culpability or

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[135] Binder, *The Culpability*, *supra* note 130, at 988.
[136] Gardner, *supra* note 124, at 705.
[137] Binder, *The Culpability, supra* note 130, at 968.
[138] Gardner, *supra* note 124, at 706 (footnotes omitted).
[139] Binder, *The Culpability*, *supra* note 130, at 1052.
[140] Gardner, *supra* note 124, at 705.

blameworthiness, which leaves felony murder doctrines incoherent and anachronistic with current systems of criminal law.[141] That is not to say that all scholars universally agree the felony murder rule is improperly imposing liability. Binder writes,

> Felony murder rules appropriately impose liability for negligently causing death for a very depraved motive, as long as the predicate felony involves coercion or destruction, and a felonious purpose independent of the fatal injury. In evaluating the offender's motives, felony murder rules are compatible with other rules of American criminal law, and with the limits of criminal law in a liberal state that promotes autonomy and that fairly distributes the burdens and the authority of democratic citizenship.[142]

In the jurisdiction under consideration here, the punishment for felony murder is equal to the punishment for first-degree murder, despite the lack of homicidal mens rea. I argue that this is inconsistent with how we conceptualize other types of crime that result in death. In Illinois, some circumstances of vehicular manslaughter are punishable with a sentence of no less than three, but not more than fourteen years.[143] So, despite there being a death outcome—a death outcome in which the perpetrator is directly involved and deemed to have either lawfully on unlawfully engaged in actions likely to cause death or great bodily harm to some individual—the punishment is substantially lower than applications of the felony murder rule. This suggests that a universe of punishment where the Lake County teenagers would receive more prison time for a criminal incident where their intent and actions were a (failed) carjacking than they would have received for killing someone with a vehicle while breaking the law.

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[141] *Id.* at 706-08.

[142] Binder, *The Culpability*, *supra* note 130, at 1060.

[143] *See* 720 ILL. COMP. STAT. 5/9-3 (2022).

V. POLICY PRESCRIPTIONS

Here, I suggest several policy prescriptions that interrogate different elements of the problems with the felony murder rule in general, in Illinois, and in Cook County specifically. These suggestions presume that the general categorization of felony murder is here to stay, though seriously considering its removal entirely would certainly remedy a number of these problems.

[Section] 9-3. Involuntary Manslaughter and Reckless Homicide.

(a) A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly, except in cases in which the cause of the death consists of the driving of a motor vehicle or operating a snowmobile, all-terrain vehicle, or watercraft, in which case the person commits reckless homicide. A person commits reckless homicide if he or she unintentionally kills an individual while driving a vehicle and using an incline in a roadway, such as a railroad crossing, bridge approach, or hill, to cause the vehicle to become airborne.

(b) (Blank).

(c) (Blank).

(d) Sentence.

(1) Involuntary manslaughter is a Class 3 felony.

(2) Reckless homicide is a Class 3 felony.

(e) (Blank).

(e-2) Except as provided in subsection (e-3), in cases involving reckless homicide in which the offense is committed upon a public thoroughfare where children pass going to and from school when a school crossing guard is performing official duties, the penalty is a Class 2 felony, for which a person, if sentenced to a term of imprisonment, shall be sentenced to a term of not less than 3 years and not more than 14 years.

Id.

First, rationales for the felony murder should be reconceptualized and rigorously interrogated using proven scientific rationales. In this work, I demonstrated how virtually none of the major theories of justification for punishment mapped onto the Jaquan Swopes case. The State's Attorney endorsed deterrence, which has been discredited by empirical research.[144] The facts of the case under the proximate theory of felony murder do not map onto the ideals of retribution.[145] Long, determinate sentencing principally related to actions not taken by the offenders is not compatible with rehabilitative practices. The indirect association with the violent offense and lack of evidence of career criminality seem to make the teenagers unsuited to incapacitation. And finally, the public backlash and familial backlash suggest that restorative justice principles were not being followed. Felony murder rules and their punishments should be reconsidered in light of the misalignment between the felony murder doctrine and theories of purpose of punishment.

Second, states should also consider the machinations of the larger category of felony murder, especially states that use the proximate cause theory of felony murder. These considerations should be taken in three places: (1) comparing the punitive nature of the punishment with that of first-degree murder; (2) interrogating use of prosecutorial discretion; and (3) analyzing the survival rate of various charges to ensure that felony murder charges are not simply a tool to prompt guilty pleas to the underlying felony in ways that are coercive and may violate the rights of criminal defendants. In order to accomplish this, states will have to evaluate their laws and their internal data consistently.

Third, my final policy prescription concerns data itself. In the case of Cook County, releasing data that included felony murder rule cases made the pattern analysis in this Article possible, and so arguably is already a valuable step forward. However, the simple

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[144] Pratt et al., *supra* note 11, at 385.

[145] Here, I am alluding to the fact that neither society nor the family of Jaquan Swopes wanted to see the teenagers receive felony murder charges. Moreover, the homeowner was never the victim of potential deadly violence, so it is unclear how matching proportional harms under retribution theory would lead to felony murder charges.

existence of some data does not satisfy the criteria of open and transparent data about a phenomenon. Data releases need to come with context that clearly and openly explains the limits and omissions of that data. Ideally then, best efforts should be made to also provide the public with the data they need to transparently and openly understand the practice. In the case of felony murder, that might be: (1) information about how prosecutors make charging decisions; (2) information about who could have received felony murder charges but did not; and (3) the reasons that felony murder charges did not endure in a given case. The information given to the public to accompany the data should be dynamic and updating (like data dashboards or portals), rather than static (like traditional reports or pages that do not receive updates). This work needs to happen across all data outputs from the criminal justice system, but felony murder is an important place to start and is a smaller category of crimes (in raw numbers) so also is a reasonable place to pilot such practices.

CONCLUSION

In this analysis of the felony murder rule in Illinois, I began not with a legal hypothetical, but rather a real case that demonstrates the divorce between the felony murder rule in practice and scientifically supported theories of punishment. Next, I provided a brief history of the felony murder rule in order to set up an exploratory look at felony murder case data recently made available by the Cook County State's Attorney.[146] I then used that data to articulate patterns in felony murder case populations like the reductive nature of endpoint sentencing comparison, disparate demographic impact of the larger criminal category, and the lack of stickiness of felony murder charges. I then explored different meanings and limitations that relate to those patterns, ultimately concluding that the felony murder rule is biased—but in more complex and macro-systemic ways than was previously ascertainable.

More research needs to be done to tease apart the lifecycle of a charge where it concerns felony murder. Since so many felony murder charges drop out (~90.5%), we need to understand where

[146] *See* discussion *supra* Section IV.B.

and why these charges leave the system. Also, felony murder is not the only example of distorted categorization to maintain the status quo in criminal justice so this work should be continued across many criminal categories. What the case of felony murder does do, however, is demonstrate that the formalized letter of the law may not eliminate inequality but rather serves to legally legitimate a moral decision about culpability in a way that systematically harms Black defendants. The felony murder rule application is particularly stark because it represents a category constructed out of moral blameworthiness rather than direct actions, especially under the proximate cause theory of felony murder. In the case of felony murder, we have perpetuated and perhaps unequally enforced a statute that amplifies existing racial disparity. This study of the felony murder rule is then more than an indictment of even one very important criminal category—it is rather a cautionary tale about the need to conduct more nuanced and new types of analysis of bias across the criminal justice system.