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Felony Murder, Explained

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The sight of the United States Capitol shrouded in tear gas, besieged by rioters marauding toward a joint session of Congress, shocked the national conscience. Five people died at the riot, and in the weeks that followed, federal prosecutors announced hundreds of charges against dozens of individuals. But while the January 6th riot sparked debate about whether new criminal laws are needed—such as a [domestic terrorism law](#)—it also prompted discussion over whether an older controversial rule should apply in this situation. Prosecutors are considering charging certain individuals with felony murder for the deaths of Capitol Police officer Brian Sicknick, and of Ashli Babbitt, who was killed by police as she tried to advance to the Speaker’s Lobby through a broken window.

Put simply, the felony murder rule states that if a death occurs during the commission of any felony, the death can be charged as murder for all participants in the felony, despite the fact that the participants may have had no role in the actual killing or may not have intended or anticipated that a death would occur. In both the riot at the Capitol and throughout the criminal legal system, the felony murder rule raises questions as old as this country about what actions and intentions constitute murder, as well as the moral contours of implicating someone in the indirect or unintentional death of another person.

Many people across the political spectrum believe that aggressive criminal prosecution is the

only appropriate response to hold participants accountable for Sicknick and Babbitt’s deaths. But felony murder has a long and complicated history that is worth examining precisely because it’s not that simple. Like so much else in our criminal legal system, the tortuous reasoning of the felony murder rule is a dirty secret, hidden away from serious public scrutiny. As prosecutors make their charges, it’s an opportune time to examine the history of the felony murder rule, analyze how it has been applied, and explain why, in the end, it must be abolished. ■

What is the Felony Murder Rule?

For generations, law students, including the two of us, were taught that the felony murder rule originated in the common law of England, a body of laws derived from court decisions that were collected, documented, and then analyzed by scholars in treatises or commentaries.

The felony murder rule dispensed with the need for prosecutors to prove “malice,” a heightened mental state for murder that encompassed such ideas as premeditation, the intent to kill, or a “depraved heart,” which is a killing that results from extreme recklessness to human life. Instead, malice was imputed from the mere commission of the underlying felony.

Here’s how it works: John commits a burglary by breaking into a home with the intent to steal a television. John believes the home is unoccupied. But George, the homeowner, is actually asleep in the attic. When George hears John coming up the stairs, he tries to escape by climbing out of the second-floor window. George slips, falls, breaks his neck, and dies. Under the felony murder rule, John is guilty of murder, even though he only intended to steal George’s TV, and George’s death was accidental and unforeseeable.

The Application of the Felony Murder Rule in the United States

Recently, scholars like Guyora Binder have questioned whether this “strict liability” form of felony murder ever actually existed in cases in England or whether it lived mostly in the minds of those who discussed and debated it in their commentaries. What is clear, according to Binder, is that the felony murder rule spread like wildfire in the United States as state legislatures codified the law in statutes defining homicide. Regardless, by 1957, England had abolished the felony murder rule. But it remains alive and well in the United States—an outlier among common law countries—with some version of the law in place in more than 40 states and at the federal level.

The history of the felony murder rule in the US is a tug-of-war between forces seeking to expand the law’s reach and those seeking to rein it in. The first major development in American-style felony murder occurred in Pennsylvania, which in 1794 enacted a statute that divided murder by degrees based on the offender’s culpability. First degree murder included both “willful, deliberate, or premeditated” killings and felony murder—killings caused during the attempt or act of robbery, rape, arson, or burglary. Other states soon followed Pennsylvania by limiting the felony murder rule to deaths caused during the course of “inherently dangerous” felonies.

‘Agency’ vs. ‘Proximate Cause’ Theories of Causation

States have also either limited or widened the category of individuals who are liable for felony murder by applying different theories of causation. In the majority of states, the “agency theory” limits the scope of liability by holding individuals responsible only for deaths that they or their partners in the act cause. A minority of states, however, follow the “proximate cause” theory of liability. In these states, all participants are held responsible for any deaths which are set in motion by the commission of the felony. If, for example, during an armed robbery, a storeowner pulls out a gun and accidentally shoots and kills a customer, all participants in the underlying felony can be charged with murder.

The proximate cause theory of liability is so broad that people can be charged with murder even when police officers or other third parties shoot and kill their co-actor. These individuals, like Tevin Louis in Chicago, end up serving lengthy homicide sentences for deaths they did not cause, never anticipated, and for which they have experienced trauma and grief. Prosecutors have brought felony murder charges against people who were not even present when police killed their co-actors and in situations when the police are later found to have used “unjustified deadly force”

Theories of causation, however, are only one dimension of the rule's flawed moral logic. Egregious as they are, cases like Louis's are rare, and do not capture the full range of unjust and irrational outcomes that can be spun out of the felony murder doctrine.

Felony murder punishes people for crimes they do not intend or commit

It is a fundamental notion in criminal law that a person's responsibility for their actions is based at least in part on their intentions. Legal scholars refer to this concept as mens rea—"the guilty state of mind required for a crime in conjunction with a prohibited act." Felony murder, however, is an exception to this bedrock principle. In its most severe form—for instance, in Illinois, where a significant reform effort is underway—the rule requires no mens rea or intent to kill anyone. In fact, as it has long been applied in that state, felony murder is essentially a strict liability crime: If you were involved in the underlying crime and someone dies, your intent does not matter. Further, when the rule is coupled with deeply rooted concepts of complicity, it can be extended to apply to the actions of many more people. Prosecutors can then hold all participants in a situation equally responsible for the death, even if they played only a peripheral role or committed no intrinsically harmful acts.

Even attempts to narrow the rule by limiting the types of felonies that trigger it—for instance, to those that are "inherently dangerous"—have proven unhelpful in ameliorating its effects. Nowhere is this more evident than with burglary, which is deemed an "inherently dangerous" predicate felony in most states. There is nothing inherently dangerous about the crime of burglary, and very few burglaries result in loss of life. Certain factors may increase or decrease the likelihood that a burglary may result in loss of life—like whether the person knows that the home is occupied, enters the home while armed, or confronts an unexpected homeowner instead of fleeing—but absent such facts, burglary is not an act in which participants could reasonably foresee that a life might be lost. But in most states, the mere classification of a crime as "inherently dangerous" precludes consideration of facts which would otherwise mitigate the dangerousness of the crime and a person's culpability in it.

Bypassing the need for any knowledge or intent related to someone's death leads to absurd results. For example, consider Shawn Khalifa, a 15-year-old who, in 2004, burglarized the home of an elderly neighbor with three other teens. As the New York Times reported, Khalifa stood guard at the back door and only found that the homeowner was seriously hurt when he briefly entered the home to steal some candy. Despite the fact that "no one accused [Khalifa] of laying a hand on the victim," he was convicted of first-degree murder under California's felony murder rule and sentenced to life in prison. Or consider situations like that of Marshae Jones, the pregnant Alabama woman charged with murder because her fetus died after a woman shot her in the stomach during an escalating fight. A minority of states attempt to restrict the rule by linking it to some form of intent, such as a "reckless indifference" to human life, but these limitations still allow ample room to apply the rule to individuals who have no direct knowledge that a death might occur or intent to cause a death.

Felony Murder targets youth, women, and nonwhite people

There is now a scientific consensus that our brains do not fully mature until our mid-20s because the prefrontal cortex—the part of our brain responsible for executive functioning, judgement, and long term thinking—is not fully developed in adolescence. Based on that understanding and the underlying research, the United States Supreme Court has recognized that young people are less able to foresee consequences, more susceptible to peer influence, and more likely to engage in risky behaviors. In light of these facts, the Court has repeatedly emphasized that young people are less culpable for their actions and have "greater prospects for reform."

But the felony murder rule accepts as premise that a person should be able to foresee how their behavior could result in another person's death. It demands that youth draw upon the very cognitive functions for which they are developmentally ill-equipped: to predict how their negative or risky behaviors could have fatal consequences. As Justice Breyer put it in his 2012 concurrence to the Supreme Court's landmark decision in *Miller v. Alabama* "the ability to

consequence to the Supreme Court's landmark decision in Miller v. Alabama, the ability to consider the full consequences of a course of action and to adjust one's conduct accordingly is precisely what we know juveniles lack capacity to do effectively."

Beyond the lack of long-term foresight, teens are also biologically wired to try to fit in with or impress their peers, which is why they tend to commit crimes in groups. This developmental trait makes the felony murder rule a trap for teens and young adults. For example, consider the case of the Lake County 5 in Illinois, when a group of teens—siblings, cousins, and a friend of the group—pulled up in an elderly homeowner's driveway in a stolen car. When the teens tried to break into the homeowner's car, the homeowner shot and killed one of the teens, resulting in felony murder charges against the surviving members of the group. While community pressure eventually led the Lake County prosecutor to drop the murder charges, the case brought into stark focus the reality of the felony murder rule's practical implications for youth. The teens easily could have been convicted of the murder of their own friend and family member, without firing a gun or having any intention of harming him. Similar troubling scenarios have played out over and over again.

The felony murder rule is also stacked against nonwhite people and women. Felony murder charges are not systematically tracked by prosecutors, defense agencies, or courts, which makes it difficult to exactly measure the rule's effect on different groups. As a recent piece in Duke Law School's Center for Firearms Law blog explained, the majority of research into the impact of the felony murder rule comes from studies on the death penalty. But new research is emerging, and the results are alarming.

The data published in the Duke Law Center piece found that in Cook County, Illinois, Black people are both arrested and sentenced for felony murder at exponentially higher rates than are whites. The research showed that at the time of initiation, almost 75 percent of cases had a Black defendant, while less than eight percent had a white defendant. That data further showed that both groups had a roughly equal rate of charge reduction or dismissal, which means that over 81 percent of individuals sentenced under the rule in Cook County are Black. In Pennsylvania, more than 1,000 people convicted of felony murder are serving life without parole sentences. Seventy percent of them are Black, nearly eight times the proportion of Black people living in the state.

Data on the rule's effects on women is even more difficult to find. According to FBI statistics, women were convicted of less than nine percent of all homicides in 2019. One California survey of 1,000 incarcerated individuals found that 72 percent of the women serving life sentences for murder had not committed the act itself, suggesting a disparate impact of the felony murder rule on women. We see further evidence of that impact in cases like Carolyn Moore's. In Louisiana in 1985, Moore testified that she was coerced by a male abuser into participating in an armed robbery in which two people were murdered. She was waiting in the car when the co-actor, Mark Miller, pulled the trigger—but she was given the same sentence of life without parole. According to Moore's testimony, Miller had held her captive, beaten her repeatedly, and threatened to harm her children if she left him. More research is needed to understand both the rates at which women are charged and convicted of felony murder, as well as the impact of emotional, psychological, or financial coercion or other abuse on their participation in these offenses.

Felony murder is not a deterrent

Commentators and policy makers have long relied on the assumption that the felony murder rule deters crime. The theory is that if a person understands they may face murder charges and a lengthy sentence, they will be less likely to engage in behavior that could lead to deadly results. But there is no data or empirical evidence to back this deterrence hypothesis, and at least one study that refutes it. The author of that study found that that the felony murder rule does not "substantially affect either the overall felony or felony murder rate" and concluded that "if the main reason a state retains the rule is to reduce crime, it should reconsider the rule."

The reason that the rule is ineffective to deter crime is simple. In order for the rule to curb certain behaviors, people must know that it exists and act accordingly. But most people are not aware of the felony murder rule or how it applies. Even if they know that the rule exists, in the pressure-filled heat of the moment, they are unlikely to foresee the various possible deadly outcomes of their actions, particularly when they do not plan or intend for those consequences.

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Felony murder does not ‘honor the sanctity of life’

Proponents of the felony murder rule have also argued that the rule is necessary to honor the sanctity of human life. The argument equates “honor” with “punishment” and presumes both that the punishment for the underlying act is insufficient and thus disrespectful to the dead, and that all crime victims want those involved in the death of their loved one to be punished as if they were murderers. But one need not treat a person accused of burglary as a murderer in order to honor human life. In today’s punitive criminal legal system—with its mandatory minimum sentences, so-called “truth-in-sentencing” provisions (requiring that defendants serve most or all of their time), and sentencing enhancements—judges have ample punishment at their disposal to impose lengthy prison sentences on people who have been charged with a felony. In fact, it is these excessive punishments that are inhumane and disrespectful of the value of a life. Consider the teens and their families in the Lake County 5 case. The loss of a child and then murder charges for those who survived did not restore justice, it only created more suffering.

Prosecutors use felony murder to coerce guilty pleas

Prosecutors rely on guilty pleas in order to move cases through the system quickly. The felony murder rule gives prosecutors tremendous leverage to threaten excessive punishment and coerce people to plead guilty to a lower charge, often a charge that is still greater and carries a longer sentence than the underlying act merits. The data bears this out. For instance, in Cook County, some 60 percent of felony murder charges for Black and white defendants are reduced by the time of sentencing.

But “efficiency” in this context is clear injustice, and it comes at a heavy cost. Take the example of 15 year old Justin Doyle. He and his friends, all unarmed, entered a home they believed was unoccupied. To their surprise, they encountered a house sitter who shot and killed Justin’s 14 year old friend. In Illinois, a charge of residential burglary carries a sentence of between 4 and 15 years for good behavior. Because he was only 15, Justin’s case would almost certainly have been prosecuted in juvenile court, where the maximum sentence would have been up to six years in a juvenile facility. But because prosecutors charged Justin with felony murder, he was automatically transferred into the adult criminal court, where he faced a sentence of between 20 and 60 years with no possible time reduction. With his conviction nearly certain, Justin was forced to accept a plea to lesser charges, including involuntary manslaughter, and a fixed 15 year sentence.

When it comes to people’s lives, particularly the lives of young and marginalized people, efficiency should never be the goal. The felony murder rule does not make the criminal legal system more effective, nor does it make the public safer. Instead, it is a frequently abused and powerful prosecutorial tool, ratcheting up harmful and unnecessary incarceration and destroying lives.

Momentum toward reform

In Illinois, a successful push to reform the state’s felony murder law may lead to similar efforts nationwide. Just last week, Governor J.B. Pritzker signed into law a sweeping criminal justice bill that pares down the state’s felony murder rule. While the old law gave prosecutors virtually unchecked discretion to charge murder in any situation where a felony was committed and a death occurred, the new law will instead reflect the “agency” theory for felony murder. As a result, the new law should prevent the most extreme and unjust applications of felony murder—for instance when a co-participant in an underlying offense is killed by a third party or even a police officer and the other co-participant is charged with first degree murder.

But other reforms have gone further. In California, where the state Supreme Court referred to felony murder as “barbaric,” a 2018 reform effort led to a more expansive overhaul of the state’s rule. Now prosecutors must prove that an accomplice acted as a “major participant” in the felony and acted with “reckless indifference to human life” during the killing—a much higher level of culpability. The law also abolished the common law “natural and probable consequences

doctrine,” by which participants in a crime, even a misdemeanor, could be charged with murder if

a participant killed someone. California’s reform is retroactive and provides a resentencing process for those in prison under felony murder or the natural and probable consequences doctrine.

The new law has led to thousands of resentencing and release petitions, including that of [Anissa Jordan](#), who waited in a vehicle as two others attempted multiple armed robberies near downtown San Francisco. The third victim, Carlos Garvin, was shot and killed. While the jury acknowledged that Jordan did not take part in the robbery, she was held just as responsible as the man who pulled the trigger. The new law allowed the judge reviewing Jordan’s petition to consider only her role in the underlying felony—armed robbery—and only those robberies in which she was directly involved. Jordan secured release after serving nearly half of her initial 27 year sentence for felony murder.

Conclusion

It is a cruel irony in our nation’s history that laws ostensibly intended to punish the few in the most egregious of circumstances are instead wielded to oppress vast numbers of our most vulnerable people. The felony murder rule is a stark example, with its disparate and cruel impact on young and nonwhite people and women. This draconian doctrine serves no value for most people in our society, as it is not designed to address the true acts or intentions of an accused person. Instead, the rule makes people responsible for acts they do not or cannot intend, know, or foresee. It does not enhance public safety because it has no effect on deterring potentially dangerous activity. And prosecutors have largely relied on the rule to saddle Black people, women, and teens with crippling punishments that far outweigh their culpability. The U.S. criminal legal system is punitive enough as it is. It’s time to replace the felony murder rule with a more logical and humane approach to acts that have unforeseen results.

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