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CRIMINAL JUSTICE REFORM AND THE CENTRALITY OF INTENT

CYNTHIA V. WARD*

ABSTRACT

The nationwide movement for criminal justice reform has produced numerous proposals to amend procedural and sentencing practices in the American criminal justice system. These include plans to abolish mandatory minimum schemes in criminal sentencing; address discrimination in charging, convicting, and sentencing; reform drug policy; rectify discriminatory policies and practices in policing; assist incarcerated individuals in re-entering society when released from prison; and reorganize our system of juvenile justice. But less attention has been given to reforming the substantive content of the criminal law—specifically, to addressing flaws in how the law defines the elements of criminal culpability and deploys them in criminal cases. Yet important change is needed in this area. This Article addresses that need, proposing to abolish three substantive doctrines that share a common flaw: They all reduce or eliminate the prosecution's burden of proving a defendant's mental culpability—"intent"—in criminal homicide cases. The three doctrines arise in two overlapping areas of the criminal law: the law of homicide and the law of accomplice liability. All three doctrines make it significantly easier to secure convictions for serious crimes, including murder, without requiring the state to prove the defendant's mental culpability with respect to the specific crime charged. The solution to this injustice—and the chief recommendation of this Article—is therefore identical in all three cases: Amid the current national and bipartisan movement to reform the criminal justice system, legislatures, and courts should abolish these doctrines.

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If old truths are to retain their hold on [human] minds, they must be restated in the language and concepts of successive generations.[1]

INTRODUCTION

THE nationwide movement for criminal justice reform has produced numerous proposals to amend procedural and sentencing practices in the American criminal justice system. Such proposals include plans to abolish mandatory minimum schemes in criminal sentencing;[2] address discrimination in charging, convicting, and sentencing;[3] reform drug policy;[4] rectify discriminatory policies and practices in policing;[5] assist incarcerated individuals in re-entering society when released from prison;[6] and reorganize our system of juvenile justice.[7]

Scholars have given less attention to reforming the substantive content of the criminal law—specifically, to addressing flaws in how the law defines the elements of criminal culpability and deploys them in criminal cases.[8] Yet important change is needed in this area. This Article addresses that need, proposing to abolish three substantive doctrines that share a common flaw: They all reduce or eliminate the prosecution's burden of proving a defendant's mental culpability—in layperson's language, their "intent"[9]—in criminal homicide cases.

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1. F. A. HAYEK, THE CONSTITUTION OF LIBERTY: THE DEFINITIVE EDITION 47 (Ronald Hamowy ed., 2011).

2. *See, e.g.*, RAM SUBRAMANIAN, LAUREN-BROOKE EISEN, TARYN A. MERKL, LEILY ARZY, HERNANDEZ STROUD, TAYLOR KING, JACKIE FIELDING & ALIA NAHRA, A FEDERAL AGENDA FOR CRIMINAL JUSTICE REFORM 18 (2020), https://www.brennancenter.org/our-work/policy-solutions/federal-agenda-criminal-justice-reform [https://perma.cc/36L6-68L5] (advocating reform of mandatory sentencing laws).

3. *See, e.g.*, *id.* at 20 (urging President Biden to take the lead in proposing reforms that address racial inequities).

4. *See, e.g.*, *id.* at 19.

5. *See, e.g.*, *id.* at 11.

6. *See, e.g.*, Nicholas Bogel-Burroughs, *For Inmates Released Under New Criminal Justice Reforms, 'Every Day Counts'*, N.Y. TIMES (July 20, 2019), https://www.nytimes.com/2019/07/20/us/first-step-act-criminal-justice.html [https://perma.cc/4PL8-BBY2] (discussing the reentry needs of released prisoners).

7. *See, e.g.*, NAT. CTR. FOR STATE CTS., JUVENILE JUSTICE REFORM CENTER (2015), https://ncsc.contentdm.oclc.org/digital/collection/famct/id/1617/rec/1 [https://perma.cc/98Q4-82HX].

8. An important exception is the work of Michael Serota. *See, e.g.*, Michael Serota, *Strict Liability Abolition*, 97 N.Y.U. L. REV. (forthcoming 2023) [hereinafter Serota, *Strict Liability*]; Michael Serota, *Proportional Mens Rea and the Future of Criminal Code Reform*, 52 WAKE FOREST L. REV. 1201 (2017); *see also infra* notes 165–183 and accompanying text (discussing recent amendments to the Felony Murder Rule, and to the requirements for proving accessorial liability, in several states).

9. *See, e.g.*, *Intent*, LEGAL INFO. INST., CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/intent [https://perma.cc/V2ZR-LJL3] (last visited Mar. 2, 2023) ("In Criminal Law, criminal intent, also known as mens rea, is one of two elements that must be proven in order to secure a conviction . . . .").

These three doctrines arise in connection with the overlapping legal rules governing murder and accomplice liability. According to the Felony Murder Rule (FMR) in homicide, the state can prove a murder case by demonstrating that the defendant participated in a felony and that the felony caused death—even if the defendant had no purpose, intent, or knowledge that death would ensue from the conduct.[10] In the area of accomplice liability, both the "Natural and Probable Consequences" Doctrine[11] and the so-called *Pinkerton* Doctrine (after the Supreme Court case of that name),[12] as deployed in many jurisdictions, also lack mental culpability elements that would prevent the over-punishing of convicted defendants if required to prove the crime. Under the Natural and Probable Consequences Doctrine, a defendant can be convicted of a crime (including, though not limited to, criminal homicide) if the crime is subsequently found to be a "natural," "probable," and/or a "foreseeable" result of the defendant's acts—even though the defendant lacked the mens rea that is normally required to prove guilt as an accomplice.[13] And under the *Pinkerton* Doctrine, a defendant's involvement in a conspiracy—an agreement to commit a crime—functions as the mens rea for purposes of convicting a defendant of substantive offenses in which the defendant did not physically participate and may not even have been aware.[14]

In the law of homicide, all three of these doctrines make it significantly easier to secure convictions for serious offenses, including murder, without requiring the state to prove the defendant's mental culpability. All three doctrines have been vigorously attacked by legal scholars, courts, and other commentators on the grounds that they violate basic principles of justice and, more recently, that they have particularly harsh effects on disadvantaged groups.[15] Nonetheless, all three survive in many U.S. juris-

10. *See, e.g.*, FLA. STAT. § 782.04(1)(a) (2022) (defining "Murder" as "[t]he unlawful killing of a human being . . . [w]hen committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any [of a list of enumerated felonies]"); *see also* MODEL PENAL CODE § 210.2, cmt. 6 (AM. L. INST. 1980) ("The classic formulation of the felony-murder doctrine declares that one is guilty of murder if a death results from conduct during the commission or attempted commission of any felony.").

11. *See, e.g.*, Michael G. Heyman, *The Natural and Probable Consequences Doctrine: A Case Study in Failed Law Reform*, 15 BERKELEY J. CRIM. L. 388, 395 (2021) (identifying the "common design" doctrine as synonymous with the "natural and probable consequences" doctrine in Illinois).

12. Pinkerton v. United States, 328 U.S. 640 (1946). In *Pinkerton*, the Court held that a substantive crime done by one person in furtherance of a conspiracy is attributable to all members of the conspiracy, reasoning that the intent to do the act is established by the formation of the conspiracy.

13. *See infra* notes 101–121 and accompanying text (discussing the natural and probable consequences doctrine).

14. *See infra* notes 122–139 and accompanying text (discussing the *Pinkerton* decision and its progeny).

15. *See infra* notes 25–50 and accompanying text (discussing critiques of the FMR); *infra* notes 113–121 and accompanying text (discussing critiques of the natural and probable consequences doctrine); *infra* notes 122–139 and accompanying

dictions. Even with amendments and judicially crafted limitations, these doctrines continue to produce wrongful convictions and overly harsh punishments. The solution to this injustice—and the chief recommendation of this Article—is therefore identical in all three cases: amid the current national movement to reform the criminal justice system, legislatures and courts should abolish these doctrines and require the state to prove a defendant's subjective mental culpability according to the normal rules governing liability for each homicide offense.[16] These reforms are not only a matter of abstract justice; they will also increase the consistency and coherence—and therefore the integrity—of criminal law doctrine by bringing our practices of conviction and punishment into closer alignment with the long-accepted principle that mental culpability is a central component of proving criminal guilt[17] that must be proven with respect to each criminal act of which an offender is charged.[18]

I. DELETING MENS REA IN THE LAW OF MURDER: THE FELONY MURDER RULE

Begin with some uncontroversial basics. In general, criminal law measures the gravity of a crime by (1) the amount of harm it inflicts (e.g., pickpocketing is less serious than homicide) and (2) the defendant's degree of mental culpability, or "mens rea," with respect to the prohibited

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text (analyzing the *Pinkerton* doctrine); *infra* notes 60–92 and accompanying text (discussing arguments that reforming the three doctrines would help to redress their disproportionate impact on juvenile defendants, women, and racial minorities).

16. The argument here focuses on the law of homicide, which has been the site of the most egregious injustice produced by the three doctrines discussed in this Article. *See, e.g.*, Matthew A. Pauley, *The Pinkerton Doctrine and Murder*, 4 PIERCE L. REV. 1, 7 (2005). Pauley writes:

> Convicting one person of any crime committed by another is difficult to justify, given the law's preference for individual rather than collective or associational guilt and given the independence of each person's individual will. It is even more difficult to countenance when there is no proof that the convicted person was even subjectively aware of a risk that this crime would occur. And this doctrine seems *most* strained when it is applied, as it has been, to convict one person of a *murder* committed by someone else based on such negligent perception of risk.

Id. (footnotes omitted).

Though this Article focuses its discussion on homicide cases, it may well apply to cases involving other serious crimes for which convicted defendants are potentially subject to severe punishments.

17. *See, e.g.*, Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 974 n.2 (1932) ("It is a sacred principle of criminal jurisprudence, that the intention to commit the crime, is of the essence of the crime, and to hold, that a man shall be held criminally responsible for an offense, of the commission of which he was ignorant at the time, would be intolerable tyranny." (quoting Duncan v. State, 26 Tenn. 148, 150 (Tenn. 1846))).

18. *See, e.g.*, James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces that Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429, 1434–38 (1994) (describing the evolution of the concept of mens rea in the criminal law).

act (e.g., an act done intentionally is more serious than the same act done negligently).[19] Within specific categories of crime, where the act can be seen as a constant, the defendant's mens rea is a key factor in how we "rank" the particular act and assign appropriate punishment to the offender. In the homicide category, for instance, a death caused negligently is considered less serious, and thus less deserving of punishment, than one caused recklessly—even though both intentionally and recklessly caused homicides involve the unlawful killing of a person. Recklessness-based homicide, in turn, is considered less serious than intentional killing.[20] Further, different types of murder—the most serious category of homicide offenses—are typically ranked according to the defendant's culpable mental state. Planned and purposeful (sometimes called "premeditated and deliberate") murders are most serious and thus most punishable,[21] followed by less-culpable murders including those which are intentional but not premeditated,[22] and those which are reckless to the point of demonstrating an "abandoned and malignant heart"[23] or "extreme indifference to the value of human life."[24] Premeditated, deliberate murder is considered as deserving of the severest punishment—up to and including the death penalty in some states—because defendants who plan and then purposefully carry out a killing are viewed as more dangerous, less deterrable, less able to be rehabilitated, and/or more blameworthy than other killers.

19. This is most clearly the case with respect to crimes containing result elements, as opposed to "inchoate" crimes (such as attempt and conspiracy) which are criminalized despite the fact that the anticipated crime has not been accomplished.

20. *See, e.g.*, 18 PA. CONST. STAT. §§ 2501–2504 (1995) (distinguishing the various forms of homicide in Pennsylvania).

21. *See, e.g.*, CAL. PENAL CODE § 189(a) (West 2020) (defining first-degree murder to include "willful, deliberate, and premeditated killing"); CAL. PENAL CODE § 190(a) (West 2000) ("Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life.").

22. *See, e.g.*, CAL. PENAL CODE § 189(b) (West 2020) (excepting those murders previously defined as first-degree, "[a]ll other kinds of murders are of the second degree"); CAL. PENAL CODE § 190(a) (West 2000) ("Except as [otherwise] provided . . . , every person guilty of murder in the second degree shall be punished by imprisonment in the state prison for a term of 15 years to life.").

23. *See, e.g.*, CAL. PENAL CODE § 188(a)(2) (2019) ("Malice is implied . . . when the circumstances attending the killing show an abandoned and malignant heart.").

24. *See, e.g.*, MODEL PENAL CODE § 210.2(1) (AM. L. INST. 1962) ("[C]riminal homicide constitutes murder when . . . it is committed recklessly under circumstances manifesting extreme indifference to the value of human life.").

A. *The Felony Murder Rule*

A major exception to this general pattern is the felony murder rule, which typically permits a defendant's conviction and punishment for murder even when the defendant lacked the purpose, intent, or knowledge of the victim's death that is normally required to convict a person of that crime. Under the FMR, which exists in all but a few states,[25] the prosecution can often convict a defendant of murder (even of the first-degree) upon evidence that the defendant committed a felony and that the felony caused the victim's death—whether or not the defendant had any purpose, intent, or knowledge (of result or even of risk) that the defendant's act would cause another's death.[26]

The FMR was imported from Britain, and was abolished there in 1957.[27] But the FMR has remained popular with legislators and the public in the United States, where it has been widely viewed as promoting a "tough on crime" approach by easing the prosecution's burden of proof in cases where a felony leads to death.[28] Originally, the FMR was mainly deployed in cases involving violent felonies.[29] Over time, however, the number of felonies permitted to boost a charge of manslaughter or negligent homicide into a murder charge has multiplied.[30] In addition, the

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25. *See, e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 488 (8th ed. 2018) (noting that the FMR, "at least in limited form, 'still thrives' in the United States, and is retained in some manner in the vast majority of states" (footnote omitted) (quoting State v. Maldonado, 645 A.2d 1165, 1171 (N.J. 1994))).

26. *See, e.g.*, *Felony Murder Doctrine*, LEGAL INFO. INST., CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/felony_murder_doctrine [https://perma.cc/BB3J-DUDA] (last visited Mar. 2, 2023) (defining felony murder as a "doctrine in criminal law which enables a court to convict a defendant of murder if they committed a felony which unintentionally resulted in a killing"). For a discussion of various limitations placed on the FMR by state jurisdictions, see *infra* notes 51–59 and accompanying text.

27. *See, e.g.*, Tomkovicz, *supra* note 18, at 1430 n.6 (discussing the origins and abolishment of the FMR in Britain).

28. *See, e.g.*, Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 407–08 (2011) ("Legislatures have supported felony murder for decades in the teeth of academic scorn . . . . Today, criminal justice policy is less likely than ever to be influenced by academic criticism, as candidates for office find themselves competing to appear tougher on crime than their opponents. Moreover, in adhering to the felony murder doctrine, legislatures are likely following popular opinion. Opinion studies find that mock jurors are willing to punish negligent killers far more severely if they kill in the course of a serious felony like robbery." (footnotes omitted)).

29. *E.g.*, *id.* at 414 (recounting historical focus of the FMR on dangerous felonies).

30. *See, e.g.*, SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 521 (10th ed. 2017) ("Today, of course, legislatures have enacted a long list of statutory felonies, many of them nonviolent. And even for the most serious felonies, authorized sanctions generally are much lower than those applicable to murder. Transposed into the modern context, therefore, the felony-murder rule can produce a dramatic increase in the applicable punishment.").

mental culpability requirement in felony murder cases has been weakened to the point where American courts have held that a defendant is strictly liable for homicides that occur during commission of a predicate felony.[31] A California case that is often cited for this view is *People v. Stamp*.[32] Defendant Stamp and an accomplice robbed the victim's business. During the robbery the victim was forced to lie on the floor for ten minutes. The

31. *E.g.*, *id.* (discussing "the view generally accepted in American courts—that the felony-murder rule imposes *strict liability* for killings that result from the commission of a felony; in other words, it holds felons liable for murder without proof of any mens rea—neither knowledge nor recklessness nor negligence is required with respect to the resulting death").

32. 82 Cal. Rptr. 598 (Ct. App. 1969); *see also* State v. Dixon, 387 N.W.2d 682 (Neb. 1986) (affirming defendant's first-degree felony murder conviction after his burglary victim suffered a fatal heart arrhythmia caused by the emotional trauma of defendant's forcible entry into her house). The *Dixon* court commented on felony murder, saying that:

> There need not be an intent to kill in felony murder, only an intent to commit the underlying felony. "The turpitude involved in the robbery takes the place of intent to kill . . . ." Felony murder is not on the same footing with other forms of first degree murder. Willfulness, deliberation, and premeditation are irrelevant considerations. "In [felony murder] it is the particular actus reus, the . . . means of the murder, which we have singled out for our gravest criminal sanction and not a particular mens rea. . . ."

Id. at 688 (alterations in original) (citations omitted) (quoting State v. Perkins, 364 N.W.2d 20, 26 (Neb. 1985)); *see also* Durden v. State, 297 S.E. 2d 237, 241–42 (Ga. 1982) ("Where one commits a felony upon another, such felony is to be accounted as the efficient, proximate cause of the death whenever it shall be made to appear either that the felony directly and materially contributed to the happening of a subsequent accruing immediate cause of the death, or that the injury materially accelerated the death, although proximately occasioned by a pre-existing cause."); DRESSLER, *supra* note 25, at 489 ("Thus, the felony-murder rule potentially authorizes strict liability for a death that results from commission of a felony. Although some courts have candidly suggested that the felony-murder rule dispenses with the requirement of malice [normally the required mens rea for murder], the more usual explanation is that the intent to commit the felony—itself frequently a dangerous, life-threatening act—constitutes the implied malice required for common law murder." (footnotes omitted)).

There is some disagreement among scholars as to the prevalence of the "strict liability" approach to felony murder. *See, e.g.*, Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965, 977–79 (2008) (arguing that the FMR actually came about in the Nineteenth Century as part of an effort, in both the U.S. and Great Britain, to codify and reform the law of murder to make it less severe—specifically, to narrow the circumstances under which defendants could be executed for homicide.) Guyora Binder writes:

> American reformers did not, by and large, see felony murder liability as strict liability, but instead saw felonious motive as one of a number of forms of culpability aggravating *already culpable* homicides to murder, or to murder of a higher degree. Felony murder liability was limited from the outset to deaths resulting from acts of violence committed in the furtherance of particularly dangerous felonies. These felonies almost always involved a felonious purpose independent of injury to the victim.

Id. at 978. (footnotes omitted); *see also* Binder, *supra* note 28; Tomkovicz, *supra* note 18, at 1433 (noting that the most "capacious" version of the FMR "certainly is not the predominant law in our nation today").

victim, who had a pre-existing heart condition, died of a heart attack shortly thereafter and doctors testified that the fear he experienced during the robbery had been "too much of a shock to [the victim's] system."[33] Although there was no evidence that the defendant had intended the victim's death or had known that it would occur, the state appellate court upheld defendant's conviction for first-degree murder, opining that

> [t]he [felony murder] doctrine is not limited to those deaths which are foreseeable. Rather a felon is held strictly liable for *all* killings committed by him or his accomplices in the course of the felony. As long as the homicide is the direct causal result of the robbery[,] the felony-murder rule applies whether or not the death was a natural or probable consequence of the robbery.[34]

Analogous to the FMR is the so-called misdemeanor-manslaughter rule (MMR), which provides that a misdemeanor that causes death is manslaughter and thus lifts the prosecutorial burden of proving the mens rea for manslaughter, which is typically recklessness or criminal negligence.[35] Though the MMR is no longer employed in every state, it, too, has been used to achieve extreme results.[36] In October 2021, for example, twenty-one-year-old Brittney Poolaw was convicted of manslaughter in Oklahoma after suffering a miscarriage which prosecutors argued was caused by her ingestion of methamphetamine.[37] The case was brought under a state statute which provided that "Homicide is manslaughter in the first degree . . . [w]hen perpetrated without a design to effect death by a person while engaged in the commission of a misdemeanor."[38] The state's (winning) theory was that Ms. Poolaw's unlawful possession of methamphetamine caused the death of her fetus, and that Ms. Poolaw was therefore crimi-

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33. *Stamp*, 82 Cal. Rptr. at 601.

34. *Id.* at 603 (citations omitted). Further, rejecting the defendant's argument that the victim's pre-existing heart condition was the cause of his death, the court declared in *Stamp*: "So long as life is shortened as a result of the felonious act, it does not matter that the victim might have died soon anyway. In this respect, the robber takes his victim as he finds him." *Id.* (citations omitted).

35. *See, e.g.*, Fred T. Harring, Note, *The Misdemeanor-Manslaughter Rule: Dangerously Alive in Michigan*, 42 WAYNE L. REV. 2149, 2149 (1996) (defining the MMR, "which holds that when one commits a misdemeanor, and death results from that act, criminal culpability for the death may be imputed on the basis of the commission of the underlying misdemeanor").

36. *See, e.g.*, *id.* at 2150–51, 2151 n.17 (noting that the MMR has been abandoned in many states, and listing those states); *infra* notes 37–42 and accompanying text (discussing the Brittney Poolaw case).

37. *See* Li Cohen, *Manslaughter Conviction of 21-Year-Old Oklahoma Woman Who Suffered Miscarriage Sparks Outcry*, CBS NEWS (Oct. 20, 2021, 7:37 AM), https://www.cbsnews.com/news/brittany-poolaw-manslaughter-miscarriage-pregnancy/ [https://perma.cc/HQ4J-2D9J]; Michelle Goldberg, Opinion, *When a Miscarriage Is Manslaughter*, N.Y. TIMES (Oct. 18, 2021), https://www.nytimes.com/2021/10/18/opinion/poolaw-miscarriage.html [https://perma.cc/FWF7-UGCC].

38. OKLA. STAT. tit. 21, § 711 (2014).

nally responsible for that death.[39] Under the MMR, the state did not have to prove that Ms. Poolaw was reckless (that she was aware of a risk that her actions could cause the death of the fetus) or grossly negligent (that a reasonable person in her situation would have been aware of that risk) with respect to the death of her fetus. Ms. Poolaw was sentenced to four years in prison.[40]

As the *Stamp* and *Poolaw* cases illustrate, the consequences of applying the FMR (and its cousin, the MMR) can be dramatic for defendants. Without the FMR, the state might perhaps have built a homicide case against Jonathan Stamp, but prosecutors would certainly not have been able to prove the mens rea for first-degree murder. Similarly, without the MMR,[41] the state would have been forced to prove a culpable mens rea against Ms. Poolaw, and to permit her to argue any mens rea-based defenses that might have been available.[42]

As noted above,[43] the FMR has long attracted vigorous criticism from scholars. Critics attack the FMR as contrary to the principle that criminal liability for homicide must be based on a defendant's mental culpability in the victim's death—that an act, even one that causes great harm such as the death of an innocent person, should not be charged or punished unless the defendant possessed the requisite mens rea.[44] As one scholar put it, "[c]riticism of the rule constitutes a lexicon of everything that scholars

39. *See* Asha C. Gilbert, *After Miscarriage, Woman Is Convicted of Manslaughter. The Fetus Was "Not Viable," Advocates Say*, USA TODAY (Oct. 21, 2021, 3:19 PM), https://www.usatoday.com/story/news/nation/2021/10/21/oklahoma-woman-convicted-of-manslaughter-miscarriage/6104281001/ [https://perma.cc/W2HL-82V8].

40. *See id.*

41. *See, e.g.*, People v. Howard, 104 P.3d 107, 110–11 (Cal. 2005) (noting that California's second-degree FMR "eliminates the need for proof of malice [the mens rea level normally required to prove murder] in connection with a charge of murder." (quoting People v. Robertson, 95 P.3d 872, 877 (Cal. 2004))).

42. *See* tit. 21, § 711. The first-degree manslaughter statute in Oklahoma provides, in full:

> Homicide is manslaughter in the first degree in the following cases:
>
> 1. When perpetrated without a design to effect death by a person while engaged in the commission of a misdemeanor.
>
> 2. When perpetrated without a design to effect death, and in a heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon; unless it is committed under such circumstances as constitute excusable or justifiable homicide.
>
> 3. When perpetrated unnecessarily either while resisting an attempt by the person killed to commit a crime, or after such attempt shall have failed.

Id. Subsection 1 states the misdemeanor-manslaughter rule; subsections 2 and 3 are clearly not applicable to Ms. Poolaw's miscarriage.

43. *See supra* note 15 and accompanying text.

44. *See, e.g.*, EDWARD COKE, THE INSTITUTES OF THE LAWS OF ENGLAND 10 (1797) ("[A]ctus reus non facit reum nisi mens sit rea": "[A]n act does not make a person guilty unless [their] mind is also guilty.").

and jurists can find wrong with a legal doctrine."[45] The Model Penal Code concluded that "[p]rincipled argument in favor of the felony-murder doctrine is hard to find";[46] in agreement, one prominent critic declared the rule to be "rationally indefensible."[47]

The reasoning behind opposition to the FMR is simple. While the element of mens rea originally required proof only of a generally "wicked" or "evil" state of mind—whether or not that state of mind was directly related to the charged offense—that conception long ago gave way to the widely accepted modern view that (1) criminal liability can only be justified by a finding that the defendant possessed a culpable mental state with respect to the specific offense charged, and that (2) the degree of criminal punishment inflicted on a convicted defendant is not consistent with justice unless restrained by a rule of proportionality—the punishment must

45. Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 446 (1985) ("Few legal doctrines have been as maligned and yet have shown as great a resiliency as the felony-murder rule. Criticism of the rule constitutes a lexicon of everything that scholars and jurists can find wrong with a legal doctrine: it has been described as 'astonishing' and 'monstrous,' an unsupportable 'legal fiction,' 'an unsightly wart on the skin of the criminal law,' and as an 'anachronistic remnant' that has 'no logical or practical basis for existence in modern law.' Perhaps the most that can be said for the rule is that it provides commentators with an extreme example that makes it easy to illustrate the injustice of various legal propositions." (footnotes omitted) (first quoting 3 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 65 (1883), then quoting State v. Harrison, 546 P.2d 1321, 1324 (N.M. 1977), then quoting H.L. Packer, *Criminal Code Revision*, 23 U. TORONTO L.J. 1, 4 (1973), then quoting People v. Aaron, 409 N.W.2d 304, 307 (Mich. 1973))).

46. MODEL PENAL CODE, § 210.2 cmt. 6 (AM. L. INST. 1980); *see also* KADISH, SCHULHOFER & BARKOW, *supra* note 30, at chapter 3 ("[T]here is no basis in experience for thinking that homicides *which the evidence makes accidental* occur with disproportionate frequency in connection with specified felonies . . . . [I]t remains indefensible in principle to use the sanctions that the law employs to deal with murder unless there is at least a finding that the actor's conduct manifested an extreme indifference to the value of human life." (emphasis added)). The Model Penal Code did not abolish the FMR entirely; in Article 210.2(1)(b) the Code defined murder, in part, as a homicide that

> is committed recklessly under circumstances manifesting extreme indifference to the value of human life. *Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.*

MODEL PENAL CODE § 210.2(1)(b) (AM. L. INST. 1980) (emphasis added).

47. *See, e.g.*, Sanford H. Kadish, *The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 695–97 (1994); *see also* State v. Maldonado, 645 A.2d 1165, 1171 (N.J. 1994) (noting that the FMR "has been bombarded by intense criticism and constitutional attack"); Lynne H. Rambo, *An Unconstitutional Fiction: The Felony-Murder Rule as Applied to the Supply of Drugs*, 20 GA. L. REV. 671, 674 (1986) (noting that the FMR is "almost universally condemned"); David Lantham, *Felony Murder—Ancient and Modern*, 7 CRIM. L.J. 90, 90–91, 90 n.2 (1983) (stating that "[t]he rule has many critics"); Jeanne Hall Seibold, Comment, *The Felony-Murder Rule: In Search of a Viable Doctrine*, 23 CATH. LAW. 133, 133 n.1 (1978) (asserting that the FMR "has been the subject of vitriolic criticism for centuries").

be proportional to the offense, and no more.[48] As scholar James Tomkovicz has written, "[e]very true variation of the felony-murder rule is to some extent inconsistent with these contemporary notions of culpability and fault."[49] Despite the emergence of various doctrines designed to limit the reach of the FMR, those inconsistencies remain.[50]

B. *Limits on the Felony Murder Rule*

Perceiving this conflict between efficient prosecution and the core principle of mental culpability, American courts and legislatures have imposed various limitations on the Felony Murder Rule. For example, a number of state jurisdictions have restricted the reach of the FMR via statute. Such restrictions typically limit the availability of a felony murder instruction to specific felonies—for example robbery, rape, arson, and kidnapping—deemed dangerous to life and limb.[51] Other jurisdictions have attached by statute a required mens rea to the elements of felony murder; for example, mandating that the state at least prove that the defendant caused the death of the homicide victim "recklessly" or in a manner that is dangerous to human life.[52] Finally, several state statutes permit a defendant to raise an affirmative defense to a felony-murder charge if they had no reason to believe that a death would result from the felony.[53]

48. *See, e.g.*, Tomkovicz, *supra* note 18, at 1434–38 (discussing evolution of mens rea and the proportionality rule); David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL'Y 359, 362–63 (1985) ("The classification and grading of offenses so that the entire scheme of defined crimes squares with societal perceptions of proportionality—of 'just deserts'—is a fundamental goal of the law of crimes.").

49. *See, e.g.*, Tomkovicz, *supra* note 18, at 1438 (footnote omitted).

50. *See, e.g.*, MODEL PENAL CODE § 210.2 (AM. L. INST. 1980) (noting that modern limitations on the FMR "confine the scope of the felony-murder rule, but they do not resolve its essential illogic").

51. *See, e.g.*, WAYNE R. LAFAVE, CRIMINAL LAW § 14.5(b) (6th ed. 2017) ("[M]ost modern felony murder statutes limit the crime to a list of specific felonies—usually rape, robbery, kidnapping, arson and burglary—which involve a significant prospect of violence."). In such cases, "lesser" felonies might be allowed to form the basis for a charge of second-degree murder or manslaughter. *Id.*

52. *See, e.g.*, KADISH, SCHULHOFER & BARKOW, *supra* note 30, at 528 (citing the Arkansas, Delaware, and Texas criminal codes as examples).

53. *See, e.g.*, N.Y. PENAL LAW § 125.25(3) (McKinney 2019) (providing for felony-murder liability "except that . . . it is an affirmative defense that the defendant: (a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and (b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and (c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and (d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury"); N.J. STAT. ANN. § 2C:11-3(a)(3) (2021) (providing for felony murder liability "except that . . . it is an affirmative defense that the defendant: (a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and (b) Was not armed with a deadly weapon, or any instrument,

Justice-based concerns about the FMR have also prompted courts in this country to adopt doctrines whose purposes are to limit the FMR's reach. Three of the most prominent limiting doctrines are as follows: (1) restricting felony murder instructions to cases involving "inherently dangerous" felonies;[54] (2) barring a felony murder instruction at trial when

article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and (c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and (d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury").

54. Most American courts have limited the availability of a felony murder instruction to cases where the predicate felony was "inherently dangerous." Even where the inherent dangerousness doctrine applies, however, differing interpretations of that doctrine can substantially impact outcomes for defendants charged with felony murder. For example, the California courts have adopted a (relatively) defendant-friendly "in the abstract" approach to the dangerous felony requirement; under that approach, the central question is whether a non-dangerous way of committing the felony can be imagined; if so, the felony is not "inherently dangerous." *See, e.g.*, People v. Howard, 104 P.3d 107, 111–13 (Cal. 2005); People v. Williams, 406 P.2d 647, 649–51 (Cal. 1965) (applying this approach); *see also* Sheriff, Clark Cnty. v. Morris, 659 P.2d 852, 859 (Nev. 1983) (applying the "in the abstract" approach to inherent dangerousness requirement in case of second-degree felony murder). Further, the California courts have ruled that a felony "is 'inherently dangerous to human life' when there is a '*high probability* that it will result in death.'" People v. Patterson, 778 P.2d 549, 558 (Cal. 1989) (quoting People v. Watson, 637 P.2d 279, 285 (Cal. 1981)). However, most courts that have adopted the "inherent dangerousness" rule interpret it in a less defendant-friendly way, using the so-called manner of commission approach. Under that interpretation, a felony can be deemed "inherently dangerous" if the defendant committed that crime in a dangerous manner (and regardless of whether a non-dangerous method of committing the felony might be imagined). An illustrative case is *Hines v. State*, 578 S.E.2d 868, 872 (Ga. 2003), in which the Supreme Court of Georgia determined that felonious possession of a firearm by a convicted felon was inherently dangerous "as committed" because the defendant, who had unintentionally shot and killed a hunting companion,

> had been drinking before he went hunting, and there was evidence that he had been drinking while hunting. He knew that other hunters were in the area and was unaware of their exact location . . . . He took an unsafe shot at dusk, through heavy foliage, at a target eighty feet away that he had not positively identified as a turkey. Under these circumstances, we conclude that Hines's illegal possession of a firearm created a foreseeable risk of death. Accordingly, Hines's violation of the prohibition against convicted felons possessing firearms was an inherently dangerous felony that could support a felony-murder conviction.

Id. (footnote omitted).

the felony is deemed to have "merged" with the homicide;[55] and (3) limiting FMR prosecutions to deaths caused by the defendant or a co-felon.[56]

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55. The "merger" doctrine typically bars a felony-murder instruction to the factfinder unless the predicate felony is deemed to be "independent" of the homicide. *See, e.g.*, JENS DAVID OHLIN, 2 WHARTON'S CRIMINAL LAW § 21:12 (16th ed. 2022). Most states have adopted the merger doctrine in some form, though courts have differed on the issue of what felonies should "merge" with the death of the victim. *See, e.g.*, KADISH, SCHULHOFER, & BARKOW, *supra* note 30, at 540 ("Although a few jurisdictions permit felonious assault to serve as a predicate felony that automatically converts a resulting death into murder, [citing the examples of Missouri and Oklahoma,] the great majority acknowledge the need for some 'merger' doctrine, in order to ensure that the felony-murder rule does not obliterate grading distinctions the legislature itself seems to have desired. But courts have had difficulty determining which felonies should merge." (footnote omitted) (citations omitted)). A number of states do not employ the merger doctrine, however, and the difference for defendants can be significant. Among the most disturbing of recent felony-murder cases are those brought against juvenile defendants, and the absence or presence of the merger rule can have a big impact in such cases. Consider, for example, the case of *Miller v. State*, 571 S.E.2d 788, 798 (Ga. 2002), where the Georgia Supreme Court upheld the felony murder conviction of Jonathan Miller. Miller was fifteen years old when he punched the victim, thirteen-year-old Joshua Belluardo, on the back of the head. The punch, which was unprovoked, tore a vertebral artery, causing a brain bleed which killed Joshua. In California (for example), the merger rule would have prevented a second-degree felony murder charge in the case on the ground that the felonious assault was "assaultive in nature" and so merged with the homicide "independent" of the homicide. *See, e.g.*, People v. Chun, 203 P.3d 425, 443 (Cal. 2009) (announcing that rule). Georgia, however, has not adopted the merger doctrine, and so prosecutors successfully charged Miller with felony murder based on the predicate felony of aggravated assault and battery. *Miller*, 571 S.E.2d at 798; *see also* Lewis v. State, 396 S.E.2d 212, 213 n.2 (Ga. 1990) (acknowledging the absence of the merger doctrine in Georgia but arguing the merits of the doctrine); Baker v. State, 225 S.E.3d 269, 271–72 (Ga. 1976) (rejecting the merger doctrine). Jonathan Miller was convicted of that crime and sentenced to life in prison. *Miller*, 571 S.E.2d at 792 n.1.

56. *See, e.g.*, OHLIN, *supra* note 55, § 21:15. In recent years, many of the most controversial felony-murder cases have turned on the issue of whether alleged felons can be charged with felony murder when a co-felon is killed by the police or another innocent third party during commission of the predicate felony. *See* Alison Flowers & Sarah Macaraeg, *Charged with Murder, but They Didn't Kill Anyone—Police Did*, CHI. READER (Aug. 18, 2016), https://chicagoreader.com/news-politics/charged-with-murder-but-they-I-kill-anyone-police-did/ [https://perma.cc/R3A7-F5B6] (citing ten cases since 2011 where police had shot and killed a co-felon and then charged surviving co-felons with murder under the FMR). The 2001 case of *State v. Sophophone*, illustrates the two main approaches courts have taken toward this issue. 19 P.3d 70, 74 (Kan. 2001). In *Sophophone*, the defendant, Sanexay Sophophone, along with three accomplices, burglarized a house in Emporia, Kansas. As he exited the house, Sophophone was arrested by a police officer, handcuffed, and placed in custody in a nearby police car. Meanwhile, another officer pursued one of Sophophone's accomplices, who shot at the officer. The officer returned fire and shot the accomplice dead. *Id.* at 72. Sophophone was charged and convicted of felony murder in the death of his co-felon. En route to reversing Sophophone's felony murder conviction, the Kansas Supreme Court discussed the two main approaches courts have taken to answer the question of whether a felon can be convicted of felony murder when the victim was a co-felon who was killed by an innocent third party. Under the "agency" approach, adopted in Kansas and most U.S. jurisdictions, a felon may not be charged with felony murder unless the

Restrictions on the FMR may render it less punitive, in terms of impact on defendants, than the strict-liability principle adopted in *Stamp*. But such limitations do not erase the risk of over-punishment that results from invoking the FMR. Not all jurisdictions have adopted such limitations. Again, according to some experts, *Stamp*'s version of the FMR remains "the view generally accepted in American courts—that the felony-murder rule imposes *strict liability* for killings that result from the commission of a felony."[57] And even when state jurisdictions have nominally adopted such restrictions, their interpretations—and thus their conse-

homicide was committed by the felon or an accomplice. *Id.* at 74. Under the "proximate cause" approach, which has been adopted in a number of states, "liability attaches for '*any* death proximately resulting from the unlawful actvity—even the death of a co-felon—notwithstanding the killing was by one resisting the crime.'" *Id.* (quoting Jennifer DeCook Hatchett, *Kansas Felony Murder: Agency or Proximate Cause?*, 48 U. KAN. L. REV. 1047, 1051 (2000)); *see also* OHLIN, *supra* note 55, § 21:15 n.16 (citing cases from California, Illinois, Indiana, and Florida as examples of the "proximate cause" approach). The *Sophophone* court adopted the majority "agency" position, which significantly restricts the availability of a felony-murder charge as compared to the proximate-cause approach. *Sophophone*, 19 P.3d at 74–77. Some courts, in fact, cite the comparatively restrictive nature of the agency rule as a reason for adopting it. *See, e.g.*, State v. Canola, 374 A.2d 20, 29–30 (N.J. 1977) ("Most modern progressive thought in criminal jurisprudence favors restriction rather than expansion of the felony murder rule. . . . [I]t appears to us regressive to extend the application of the felony murder rule . . . to lethal acts of third persons not in furtherance of the felonies scheme."). Under the proximate-cause approach, Sophophone's felony-murder conviction would almost certainly have survived; under the agency approach, the court reversed his conviction.

57. KADISH, SCHULHOFER & BARKOW, *supra* note 30, at 521 (emphasis added).

quences for defendants charged with homicide on a felony-murder theory—can vary widely.[58] The next section illustrates the potential impact on three vulnerable groups.[59]

C. *The Felony Murder Rule and Vulnerable Groups*

Scholars, courts, and commentators have attacked the Felony Murder Rule as unjust to criminal defendants generally.[60] This Article agrees with that position; the FMR is inconsistent with the modern conception of mens rea and thus results in the over-punishment of homicide defendants, period. However, a major project of today's criminal justice reform move-

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58. *See, e.g.*, State v. Stewart, 663 A.2d 912 (R.I. 1995). Defendant Tracy Stewart went on a two- to three-day cocaine binge during which she neglected to feed her infant son. The baby died from dehydration and the state charged Stewart with second-degree murder on a felony murder theory. The Rhode Island Supreme Court affirmed Stewart's conviction, rejected California's "in the abstract" approach to inherent dangerousness in favor of the "manner of commission" approach, and noted that the "manner of commission" approach to inherent dangerousness significantly expands the number of felonies which may serve as predicates in a felony-murder case. *See id.* at 917, 919–20 (naming the felonies of escape from prison and distribution of PCP resulting in death as examples where a felony murder instruction would not be allowed under the California approach, but could be permitted under the "manner of commission" approach).

A more general criticism of the Felony Murder Rule should be noted here. As a number of commentators have pointed out, many (most?) felony murder cases could also be prosecuted as homicides in the absence of the FMR. *See, e.g.*, MODEL PENAL CODE § 210.2 (AM. L. INST. 1980) ("It is true, of course, that the felony-murder rule is often invoked where liability for murder exists on another ground . . . . For the vast majority of cases it is probably true that homicide occurring during the commission or attempted commission of a felony is murder independent of the felony-murder rule."). Of course, if defendants have a potentially valid mens rea-based defense to the homicide, this might not be possible, and under the FMR prosecutors can avoid this problem by leapfrogging over the usual mens rea requirement for homicide. But in that event, where the law might normally offer a defense on grounds that the defendant lacked mental culpability, crafting an "end-run" around that defense via the FMR violates fundamental principles of justice. *See, e.g.*, *id.* ("Punishment for homicide obtains only when the deed is done with a state of mind that makes it reprehensible as well as unfortunate. Murder is invariably punished as a heinous offense . . . . Sanctions of such gravity demand justification, and their imposition must be premised on the confluence of conduct and culpability."). *Stewart* offers an illustration. As noted above, in that case, the Rhode Island Supreme Court affirmed the defendant's felony murder conviction. *Stewart*, 663 A.2d at 929. Under Rhode Island law, had the FMR not been available, the defendant might have had a diminished capacity defense to a murder charge. *See, e.g.*, Washington v. State, 989 A.2d. 94, 101 (R.I. 2010) (defining diminished capacity under state law). In *Stewart*, by choosing to prosecute the homicide case as felony murder rather than malice murder, the state bypassed the requirement of proving malice, the mental culpability element that would otherwise be required. However, the state also charged the defendant with manslaughter and, judging from the facts, it would have had an excellent chance of proving that case. Thus, boosting what would otherwise be a manslaughter charge into murder via the FMR is a prosecutorial strategy that denies defendants possible grounds for mitigation or exculpation that would be otherwise available.

59. *See infra* text accompanying notes 62–92.

60. *See, e.g.*, *supra* notes 43–47 and accompanying text.

ment is to study the effect of criminal policy on disadvantaged groups such as juvenile defendants, women, and racial minorities.[61] The FMR has generated controversy with respect to all three groups.

1. *FMR and the Prosecution of Juveniles*

Juvenile defendants have been targeted in a number of recent and controversial felony murder convictions based on killings by third parties during the course of a predicate felony. A few examples will illustrate the issue.

In August 2019, six teenagers walked onto a homeowner's driveway in Lake County, Illinois.[62] They apparently planned to steal the owner's car. The seventy-five-year-old owner shot and killed one of the teens, fourteen-year-old Jaquan Swopes. The homeowner claimed self-defense and was not charged. Prosecutors charged the remaining five teens—four of whom were sixteen and seventeen years old—with the first-degree felony murder of Swopes. According to an account of this case on the journalism website *The Appeal*:

> This charging decision was made possible by Illinois's expansive felony murder law. The law makes any member of a group liable for any killing, including of an accomplice, during the commission of an offense. The result is vast charging latitude for prosecutors. A conviction carries with it the guarantee of an ex-

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61. *See, e.g.*, Aiden Beck, *The Absurdity of the Illinois Felony-Murder Doctrine*, 48 J. LEGIS. 165, 178 (2021); Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 2019 FREEDOM CTR. J. 75 (2019); Lindsey Linder, *Expanding the Definition of Dignity: The Case for Broad Criminal Justice Reform That Accounts for Gender Disparities*, 58 U. LOUISVILLE L. REV. 435 (2020); Kristin Henning, *The Challenge of Race and Crime in a Free Society: The Racial Divide in Fifty Years of Juvenile Justice Reform*, 86 GEO. WASH. L. REV. 1604 (2018); Ellen A. Donnelly, *The Politics of Racial Disparity Reform: Racial Inequality and Criminal Justice Policymaking in the States*, 42 AM. J. CRIM. JUST. 1 (2016); Michele R. Decker & Susan G. Sherman, *Breaking the Silence: Recognizing Sexual Violence in Criminal Justice Reform*, 93 J. URB. HEALTH 719 (2016); Cynthia Jones, *Confronting Race in the Criminal Justice System: The ABA's Racial Justice Improvement Project*, 27 CRIM. JUST. 12 (2012); Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383 (2013).

62. Vaidya Gullapalli, *The Felony Murder Rule as a "Representation of What's Wrong in Our Criminal Legal System"*, THE APPEAL (Sept. 23, 2019), https://theappeal.org/the-felony-murder-rule-as-a-representation-of-whats-wrong-in-our-criminal-legal-system/ [https://perma.cc/EHK9-8Y94]. Ultimately in this case, the state's attorney withdrew the murder charges, charging the surviving teenagers with less serious crimes. Julia Jacobo, *Murder Charges Dropped Against 5 Teens After 14-Year-Old Killed During Burglary Attempt in Illinois*, ABC NEWS (Sept. 19, 2019, 2:22 PM), https://abcnews.go.com/US/murder-charges-dropped-teens-14-year-killed-burglary/story?id=65721305 [https://perma.cc/L59W-Z5P7].

> treme sentence, even life without parole, including for children. Because adolescents tend to act in groups, the felony murder law makes young people uniquely susceptible to its reach.[63]

The murder charges were later dropped, and the "Lake County Five"[64] were charged with crimes that more closely matched their actions and their levels of mental culpability. Yet, felony murder cases against minors are still quite legal in most jurisdictions.

In a 2018 Ohio case, sixteen-year-old Julius Tate attempted to rob an undercover police officer and was shot to death by a SWAT agent. The state charged Tate's sixteen-year-old girlfriend, Masonique Saunders, with felony murder in Tate's death on the ground that she had participated with him in the robbery scheme.[65] The Ohio Criminal Code allowed the charge because the state employs the "proximate cause" approach to deaths caused by third parties during a felony. Under the Code, a defendant is guilty of murder if they "cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree."[66]

The "Elkhart Four" case in Indiana is also illustrative.[67] On October 3, 2012, five young men broke into what they thought was an uninhabited home in Elkhart, intending to steal some items and convert them into cash. However the homeowner, Rodney Scott, was sleeping upstairs. Awakened by the attempted burglary, Scott confronted the young men and shot two of them.[68] Danzele Johnson, twenty-one, was shot and killed by Scott. Johnson's four accomplices—Blake Layman, sixteen; Jose Quiroz, sixteen; Levi Sparks, seventeen; and Anthony Sharp, eighteen—

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63. Gullapalli, *supra* note 62. According to the Illinois felony murder statute, "[a] person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death . . . he or she . . . commits or attempts to commit a forcible felony other than second degree murder." 720 ILL. COMP. STAT. 5/9-1(a)(3) (2012).

64. *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://www.cbsnews.com/chicago/news/lake-county-felony-murder/ [https://perma.cc/B6XZ-PPUT]; Meghan Dwyer, *4 Teens Released After Lake County Drops Controversial Murder Charges*, WGN NEWS (Sept. 19, 2019, 5:50 PM), https://wgntv.com/news/lake-county-drops-murder-charges-against-5-teens/ [https://perma.cc/LRZ3-PG2W].

65. Billy Binion, *Police Shot Her Boyfriend During a Robbery. She Was Charged With His Murder*, REASON (Aug. 7, 2019, 5:50 PM), https://reason.com/2019/08/07/police-shot-her-boyfriend-during-a-robbery-she-was-charged-with-his-murder/ [https://perma.cc/P7U3-HXHY]. Masonique Saunders subsequently pled guilty to involuntary manslaughter and aggravated robbery, and was sentenced to three years in a juvenile facility. *Id.*

66. OHIO REV. CODE ANN. § 2903.02(B) (West 1998).

67. *See, e.g.*, Kristine Guerra, *Elkhart Four Felony Murder Convictions Overturned by Indiana Supreme Court*, INDYSTAR (Sept. 18, 2015, 11:11 PM), https://www.indystar.com/story/news/crime/2015/09/18/elkhart-four-felony-murder-indiana-supreme-court/72397844/ [https://perma.cc/JJ2X-M95H].

68. Layman v. State, 42 N.E.3d 972, 974 (Ind. 2015).

were tried and convicted of felony murder in Johnson's death under a state statute providing: "A person who . . . kills another human being while committing or attempting to commit . . . burglary" is guilty of murder.[69] The defendants were sentenced to prison terms of fifty years or more.[70] In 2015, the Indiana Supreme Court overturned the murder convictions of Layman, Sparks, and Sharp,[71] holding that the state's FMR had been improperly applied. But in the same opinion, the Court also affirmed the state's longstanding interpretation of the Felony Murder Rule, allowing defendants who participated in a predicate felony to be convicted for murder even in cases, such as that of the Elkhart Four, where the person who died was a co-felon and the physical act of killing was done by someone (in this case, homeowner Scott) who was not a party to the felony.[72]

The case of Tevin Louis in Chicago offers a similar fact pattern.[73] In July 2012, Louis and his best friend, Marquise Sampson, allegedly robbed a Chicago sandwich shop of approximately $1,250.[74] Louis and Sampson separated immediately after the robbery, running in different directions away from the shop. Officer Antonio DiCarlo and his partner pursued Sampson into a nearby neighborhood, where Officer DiCarlo shot and killed Sampson. On the ground that he had been an accomplice to the robbery, Louis was subsequently charged with the felony murder of his friend. This was surely a case where the "proximate cause" interpretation of the "in furtherance" doctrine produced a murder conviction although the death of his best friend was the furthest thing from the defendant's expectation or desire.[75]

Finally, consider the case of Marshan Allen. As a fifteen-year-old in 1992, Allen was charged and convicted of felony murder in Chicago.[76] According to an account in *The Times of Northwest Indiana*, Allen "looked up to his [twenty-one]-year-old brother, James Allen, who reportedly dealt

69. IND. CODE § 35-42-1-1 (2021).

70. *Layman*, 42 N.E.3d at 975.

71. *Id.* at 981.

72. *Id.* at 977–78.

73. *See* Flowers & Macaraeg, *supra* note 56.

74. At the time of these events, Louis had only recently become a legal adult; he was nineteen. *Id.*

75. Most jurisdictions have not adopted the "proximate cause" rule in such cases; instead, they employ the "agency rule" which allows accomplices to be charged with felony murder only for deaths that they or their co-felons cause. *See, e.g.*, State v. Canola, 374 A.2d 20, 22 (N.J. 1977). The "proximate cause" rule, however, continues to be enforced in a minority of jurisdictions and to produce murder charges and convictions, as the Tevin Louis case demonstrates. *See* Shobha L. Mahadev & Steven Drizin, *Felony Murder, Explained*, THE APPEAL (Mar. 4, 2021), https://theappeal.org/the-lab/explainers/felony-murder-explained/ [https://perma.cc/599G-C3VY] (discussing the "agency" and "proximate cause" conceptions of the "in furtherance" doctrine in felony murder cases).

76. Laura McGann, *Study Shows More Kids in Prison for Life*, TIMES NW. IND. (Oct. 12, 2005), https://www.nwitimes.com/news/local/study-shows-more-kids-in-prison-for-life/article_b47fc51a-36c9-57b6-8306-404c585ce799.html [https://perma.cc/T8KM-9QPW].

cocaine and often asked Marshan for favors."[77] On March 16, 1992, at his brother's request, Marshan helped two others steal a van to recover drugs and money that had allegedly been stolen from James's apartment. According to Marshan, he waited in the stolen van while his two accomplices went inside for the stolen goods. He later learned that two people, including a close friend from high school, had been shot to death while he was waiting outside. Based on the predicate felony of stealing the van, the state charged Marshan with two counts of felony murder.[78] He was convicted, sentenced to life without parole, and spent more than twenty-four years in prison before being released in 2016.[79]

The common doctrinal elements in these cases—that all involve murder convictions of defendants who did not physically kill the victims and clearly lacked mental culpability in their deaths—would apply in all cases of felony murder on similar facts, whatever the age of the defendant(s). But the issue perhaps gains added poignancy because the above defendants were not yet adults when they committed the predicate crimes. All were old enough to understand that the predicate offenses—burglary and robbery, for example—were wrong and that they violated the law. Many juvenile defendants can legitimately be held accountable for those acts. But it seems particularly harsh to say that a fifteen- or sixteen-year-old defendant can be convicted of murder as well, especially in cases where the person killed was someone toward whom the defendant clearly had no homicidal intent.[80] At the very least, these cases highlight the particular injustice of convicting people for murder merely upon a finding that they did, or assisted in doing, some other crime that was causally linked to a death.

2. *Race- and Gender-Based Discrepancies in Felony Murder Prosecutions*

Contemporary criminal justice reform has explored the impact of criminal convictions and punishment on women and racial minorities.[81] With respect to the Felony Murder Rule, preliminary evidence suggests

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77. *Id.*

78. *Id.*

79. Rob Stafford & Lisa Capitanini, *Race in Chicago: One Man's Fight for Redemption*, NBC CHI. (Sept. 3, 2020, 9:30 AM), https://www.nbcchicago.com/news/race-in-chicago-one-mans-fight-for-redemption/2333295/ [https://perma.cc/G8W8-GHMQ].

80. With respect to juvenile liability for felony murder, a parallel to the old common-law distinction between "general" and "specific" intent seems apt. Many teenaged defendants can justly be found responsible for violent crimes such as robbery, if they know what they are doing and have the requisite mental culpability for that crime. To hold such defendants responsible for a death of which they knew nothing beforehand, and especially the death of a co-felon, seems to expand the assumptions behind felony-murder liability even further than the FMR does in cases involving adults.

81. *See, e.g.*, *supra* note 5 and accompanying text.

that the FMR may have a disparate impact on people of color[82] and women.[83] Current empirical studies have been hard to come by, in part because authorities do not routinely collect statistics about felony murder charges or about the prevalence of such charges by race or gender.[84] But a recent survey of felony murder outcomes in Cook County, Illinois, raises questions on this front. The study, whose results were reported by Kat Albrecht on the *Duke Center for Firearms Law* blog, concluded:

> Confirming the findings of previous literature, [B]lacks are far more likely to be arrested for felony murder than whites. In the Cook County data, 74.8% of initiated cases have black defendants (N=768), and only 7.8% have white defendants (N=80). This demonstrates that enforcement of the felony murder rule is staunchly more affective of blacks both in proportion and in raw count.[85]

Other recent studies have reached similar conclusions. For example, the Sentencing Project reported that in 2022,

> [D]ata from several jurisdictions reveal that people of color—especially Black people—are disproportionately represented among those with felony murder convictions. In Pennsylvania, four of every five imprisoned individuals with a felony murder conviction were people of color in 2020, and 70% were African American. In Cook County, Illinois, 8 out of 10 people sentenced under the felony murder rule between 2010 and 2020 were Black. In Ramsey and Hennepin Counties, Minnesota, where St. Paul and Minneapolis are located, respectively, people of color accounted for 80% of second-degree felony murder convictions between 2012 and 2018. Statewide, just over half (54%) of those with felony murder convictions in Minnesota were Black and 10% were American Indian or Alaskan Native in 2021. In

82. *See, e.g.*, Kat Albrecht, *Data Transparency & the Disparate Impact of the Felony Murder Rule*, DUKE CTR. FOR FIREARMS L. (Aug. 11, 2020), https://firearmslaw.duke.edu/2020/08/data-transparency-the-disparate-impact-of-the-felony-murder-rule/ [https://perma.cc/2DYT-TB62]; *see also* Mahadev & Drizin, *supra* note 75 ("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.").

83. *See, e.g.*, Mahadev & Drizin, *supra* note 75 (noting that evidence about the FMR's effect on women in particular is "even more difficult to find" than such evidence with respect to race).

84. *Id.*

85. Albrecht, *supra* note 82; *see also*, Molly Greene, *States Should Abolish "Felony Murder" Laws*, THE APPEAL (Mar. 30, 2021), https://theappeal.org/the-point/states-should-abolish-felony-murder-laws/ [https://perma.cc/33UU-S9CA] ("Racism pervades the enforcement of felony murder laws. For example, a recent study out of Duke Law School's Center for Firearms Law found that in Cook County, Illinois, 81.3% of people sentenced under the felony murder rule are Black.").

> Missouri, felony murder is among the top 20 offenses for which Black individuals were imprisoned in 2020, but not so for the non-Black population.[86]

Data from a few jurisdictions do not prove system-wide involvement; more empirical research and analysis would be necessary to reach that conclusion. But the numerical discrepancies identified here do suggest disparate impact based on race, and that should at least put us on notice that the FMR—which, again, has long been attacked for violating the rights of all defendants charged under it—may have particularly punitive effects on people of color, and especially on Black defendants.[87]

As others have explained,[88] evidence about the FMR's effect on women in particular is "even more difficult to find" than such evidence concerning race.[89] But important questions arise here as well. For example, a 2021 article in *The Appeal* noted that:

> One California survey of 1,000 incarcerated individuals found that 72[%] of the women serving life sentences for murder had not committed the act itself, suggesting a disparate impact of the felony murder rule [and/or the "looser" conceptions of accomplice liability applied in many states, including California before its recent reforms of the FMR] on women.[90]

The 2022 Sentencing Project report referenced above noted that "[i]n the small number of states for which data are available, felony murder convictions fuel LWOP [Life Without Parole] sentences among women. In Michigan, 57 of the 203 women serving LWOP were convicted of felony murder. In Pennsylvania, 40 of the 201 women serving LWOP were convicted of felony murder."[91] The report identified a potentially important connection between gender and felony murder prosecutions:

> Because felony murder laws impose identical sentences on individuals regardless of their role in the crime, they can produce especially unjust punishments for women whose criminalized acts are coerced by intimate partners . . . . According to the Califor-

86. NAZGOL GHANDNOOSH, EMMA STAMMEN & CONNIE BUDACI, SENT'G PROJECT, FELONY MURDER: AN ON-RAMP FOR EXTREME SENTENCING, 5 (2022) (footnotes omitted) (citing Albrecht, *supra* note 82).

87. The authors of the Sentencing Project report above argue that prosecutorial charging practices with respect to the Felony Murder Rule may favor White defendants over Black defendants by using the FMR to minimize the potential liability of White defendants and to maximize the liability of Black defendants. *See, e.g.*, *id.* at 6. Although their argument involves only the two counties they studied, future work should inquire into the basis for this conclusion and test its replicability in Minnesota and in other jurisdictions.

88. Mahadev & Drizin, *supra* note 75.

89. *Id.*

90. *Id.*

91. GHANDNOOSH, STAMMEN & BUDACI, *supra* note 86, at 6 (citations omitted).

> nia Coalition for Women Prisoners, the majority of their members convicted of felony murder were accomplices navigating intimate partner violence at the time of the offense and were criminalized for acts of survival.[92]

These numbers from individual studies and jurisdictions are not dispositive of the gender issue in felony murder prosecutions. Like the statistics from recent studies of FMR's racial impact, future work investigating the possible causal links between race, gender, and the deployment of the felony murder doctrine will be necessary to reach firm conclusions.

II. THE MENS REA RULES FOR ACCOMPLICE LIABILITY

Where a single defendant commits a predicate felony and that felony causes death, the question of accomplice liability for the felony or death does not arise. But as the examples discussed above illustrate, in many felony murder cases, the state seeks to charge defendants with murder on the theory that, although they did not physically kill the victim, they participated in committing the felony. In some jurisdictions, the wording of the statutory FMR itself covers accomplices as well as perpetrators. In others, prosecutors and courts separately deploy the rules of accomplice liability to justify charging accomplices who did not physically kill the victim.

A. *From Felony Murder to Accomplice Liability*

In his comprehensive work on the Felony Murder Rule, Guyora Binder outlines two main methods by which the rule might permit murder convictions for accomplices. First, Binder notes that the statutory FMRs in some states treat all participants in the predicate felony as principals, subject to conviction for murder to the same degree as the defendant who physically did the killing.[93] Binder labels this the "collective liability" approach to accomplice liability for felony murder. He explains that this is less common than the second "individual liability" approach (adopted in most jurisdictions), under which felony murder refers only to the liability of the perpetrator who killed the victim.[94] For example, the Florida felony murder statute, which Binder cites as an example of the "collective liability" approach, provides that murder is "[t]he unlawful killing of a human being . . . [w]hen committed by a person engaged in the perpetra-

92. *Id.*

93. Binder, *supra* note 28, at 501–17.

94. *Id.* at 501 ("Legislatures have taken two general approaches to the problem of defining felony murder. Most define felony murder individually, as causing death in the perpetration of a felony. In these jurisdictions other participants in the felony can only be liable for the murder as accomplices. The less common approach is to define felony murder collectively, as participating in a felony that causes death, or in which some person causes death. Such statutes avoid the problem of defining complicity in felony murder, by treating all participants as principals.").

tion of, or in the attempt to perpetrate" a list of enumerated felonies.[95] By contrast, the felony murder statute in Wyoming, an example of Binder's "individual liability" approach, allows first-degree felony murder liability for "[w]hoever . . . in the perpetration of, or attempt to perpetrate" certain enumerated felonies "kills any human being."[96] Under the former interpretation, all accomplices are treated as principals to the felony and are therefore liable for felony murder. By contrast, under the latter view, only a defendant who actually killed the victim can be charged with felony murder.[97]

In short, some conceptions of the FMR convey the legislature's intent to treat all participants in the predicate felony as principals and thus render them all equally liable for the victim's death and for the murder charge that ensues.[98] Other variations on the FMR, at least at first look, render only the defendant who physically causes the victim's death liable for murder. But even if the relevant FMR does not specifically include accomplices—and as noted above, in most felony-murder jurisdictions, it does not[99]—prosecutors in many states can bring murder charges against co-felons via the separate rules governing accomplice liability. Thus, even where constraints on the FMR limit its reach, accomplice liability offers at least two other routes to erasing mens rea when a death has resulted from commission of a felony.[100] That is the main topic of this Part.

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95. FLA. STAT. § 782.04 (1)(a) (2022).

96. Binder, *supra* note 28, at 501–02 (alteration in original) (quoting WYO. STAT. ANN. § 6-2-101 (2010)). Of course, frequently court-formulated interpretations of felony murder statutes significantly impact the actual reach of the rule in individual jurisdictions. Here, Binder is using the statutory language as a guide to the differences in approach between different jurisdictions.

97. Binder, *supra* note 28, at 501–03 (identifying Wyoming as an "individual liability" jurisdiction).

98. *See supra* note 95 and accompanying text (discussing Florida's "collective liability" approach).

99. *See supra* note 94.

100. *See, e.g.*, People v. Luparello, 231 Cal. Rptr. 832, 847–48 (Ct. App. 1986) (rejecting defendant's argument that he could not be charged with murder under the applicable conception of complicity theory).

> [O]ur courts have nevertheless consistently stated felony murder is a "highly artificial concept" which "deserves no extension beyond its required application." The rule is seen as "unnecessary" in almost all cases in which it was applied and, indeed, has been viewed as ending "the relation between criminal liability and moral culpability." . . . In contrast, the policy supporting conspiratorial liability receives neither the disfavor nor restriction which adhere to the felony-murder rule. . . . In sum, the logical and legal impediments to criminal liability found in [the felony murder context] have little or no dissuasive value here in limiting conspiratorial liability for the natural and reasonable consequences of a conspiracy. This being so, we find no obstacle in applying the well-accepted rule of liability to hold Luparello criminally responsible for [the victim's] murder.

Id. (citations omitted) (first quoting People v. Phillips, 414 P.2d 353, 582 (Cal. 1966), then quoting People v. Washington, 402 P.2d 130, 134 (Cal. 1965)).

B. *Mens Rea in Accomplice Liability: The Natural and Probable Consequences Doctrine*

In general, criminal law emphasizes personal responsibility for crime, and in a relatively narrow sense—in order to be charged and convicted, defendants must have personally done the act(s) that constitute the crime while possessing a culpable state of mind.[101] In certain types of cases, however, defendants who did not actually perform the elements of a crime can be convicted and punished for that crime as accomplices, on the ground that they contributed to the preparation or perpetration of the act(s) in a way that justifies criminal liability.[102]

Because accomplice liability hinges on defendants' *assistance* to the principal in a crime rather than on their performance of the criminal act(s) themselves, it traditionally requires the state to prove a high level of mens rea—that the defendant(s) provided such assistance while possessing the intent (or purpose) of assisting the crime and for the crime to be committed.[103] Over time, however, the requisite mens rea standards have expanded in many jurisdictions, boosting the potential liability of those who have in some way provided assistance to commission of a crime.

To start with a classic example, the lookout at a robbery does not actually perform the elements of robbery (theft of another's property accompanied by actual or threatened injury to the victim),[104] but by operation of accomplice liability, the lookout can nonetheless be charged and convicted of robbery—just like the principal(s) who did perform such acts. Thus, to charge a lookout with felony murder in a robbery-homicide case where the lookout did not physically commit the killing, the prosecution must prove that the lookout was guilty of robbery as an accomplice, and that the robbery caused the victim's death.

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101. *See, e.g.*, DRESSLER, *supra* note 25, at 437 ("[T]he concept of personal, as distinguished from vicarious, responsibility is 'deeply rooted' in criminal law jurisprudence." (quoting Francis Bowes Sayre, *Criminal Responsibility for the Acts of Another*, 43 HAR. L. REV. 689, 702 (1930))).

102. *See, e.g.*, *id.* ("At first glance, the premise that a person may be held criminally responsible for the conduct of another should prove surprising, if not also disturbing . . . . Yet Anglo-American courts impute the acts of the primary party to the secondary actor." (footnotes omitted)).

103. *Id.* at 449 ("The *mens rea* of accomplice liability is usually described in terms of 'intention.'"). *Compare id.* (noting disagreement as to whether a mental state of "knowledge" can also suffice), *with* MODEL PENAL CODE § 2.06(3)–(4) (AM. L. INST. 1985) (articulating a two-pronged test for the mens rea of accomplice liability: (1) The defendant must have "the purpose of promoting or facilitating the commission of the offense," and (2) with respect to result elements of a crime, the defendant must have acted "with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense").

104. *See, e.g.*, MODEL PENAL CODE § 222.1 (AM. L. INST. 1980). An accomplice's criminal liability is nonetheless derivative of the principal's liability, at least in the sense that to convict an accomplice who did not perform the physical act that the law forbids, the state must prove that the principal did, in fact, do that criminal act.

Writing about modern-day accomplice liability, one scholar has usefully identified three distinct approaches to accomplice mens rea in American jurisdictions.[105] According to John F. Decker, the "Category I" view "asserts that an individual should only be liable for the acts of a principal if that individual acted with the specific intent to promote or assist the principal's commission of the crime."[106] In Category I states, therefore, "a mental state of knowledge or recklessness on the part of an alleged accomplice is insufficient to hold the alleged accomplice culpable. Jurisdictions following this approach will only hold an alleged accomplice liable for the crimes that the alleged accomplice *intended* a perpetrator [to] commit."[107]

Decker's "Category II" approach is "somewhat more expansive" than the Category I approach; it enlarges the potential liability for accomplices.[108] In Category II jurisdictions, "an individual may be liable for a crime the individual did not specifically intend for the perpetrator to commit. Rather, liability attaches if the alleged accomplice acted 'with the mental culpability required for the commission' of the offense."[109] Accordingly, a person may be convicted as an accomplice under the Category II approach "if that individual possessed the mental state prescribed by the state's substantive criminal statute, whether the requisite mental state for conviction is intent, knowledge, recklessness, or criminal negligence."[110] Category II jurisdictions fall into two groups: states where the standard for the mens rea of accomplice liability is articulated by statute, and states where that approach has been developed by the courts.[111]

Finally, and of particular concern here, Decker identifies "Category III" rules for the mental culpability element of accomplice liability as "the most expansive of the approaches" in terms of extending criminal liability to accomplices.[112] This approach, adopted in twenty states,[113] embraces the Natural and Probable Consequences Doctrine.[114] Decker writes:

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

106. *Id.* at 240.

107. *Id.* (footnote omitted).

108. *Id.* at 241 ("Thus, states following this approach will hold an individual liable for the conduct of another if that individual possessed the mental state prescribed by the state's substantive criminal statute, whether the requisite mental state for conviction is intent, knowledge, recklessness, or criminal negligence.").

109. *Id.* (footnote omitted) (quoting N.Y. PENAL LAW § 20.00 (McKinney 2004)).

110. *Id.*

111. *Id.* at 242 ("Category II states can be divided into two subcategories: (1) states that articulate the Category II approach statutorily, and (2) states whose courts have judicially interpreted the Category II approach from statutes void of Category II language.").

112. *Id.*

113. *Id.* at 312.

114. *See, e.g.*, Heidi M. Hurd & Michael S. Moore, *Untying the Gordian Knot of Mens Rea Requirements for Accomplices*, 32 SOC. PHIL. & POL'Y 161, 177 n.43 (2016) (arguing that the natural and probable consequences doctrine, referred to as the

> States following this approach will hold an actor liable for all the natural and probable consequences of the intended crime. . . . [T]hese states reject the necessity of proving the accomplice had either the specific intent required by the Category I approach or the statutorily prescribed mental state mandated by the Category II approach.[115]

One implication of the Category III Natural and Probable Consequences Doctrine is that:

> if the principal committed a secondary crime in the course of carrying out the target crime even if the accomplice had no way of knowing or anticipating that an incidental or secondary crime would occur, a court will nonetheless convict the accomplice of the incidental crime if the court determines it to be a natural and probable consequence of the intended crime.[116]

The absence of an intent requirement has its most significant impact on defendants here. Under the Natural and Probable Consequences Doctrine, defendants may be liable for murder as accomplices although they did not possess any of the three mental states—conscious purpose, knowledge, or reckless disregard—which are normally required to charge someone with murder; nor did they possess the specific intent to aid the killing of victim that is normally required to convict an accomplice.[117]

The California case of *People v. Luparello*[118] offers an apt illustration of the doctrine. Defendant Luparello recruited several comrades in order to obtain information about his former girlfriend from the victim, Mark Martin. After Martin refused to give them any information on their first visit,

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"foreseeable second crime" doctrine, "makes for an extensive strict liability that is wildly disproportionate to desert").

115. Decker, *supra* note 105, at 242 (footnote omitted). Courts have interpreted the doctrine in various ways, sometimes enfolding it into a torts-like rule of "reasonable foreseeability"—if the second crime, not intended by an accomplice, was nonetheless "reasonably foreseeable," the defendant is guilty of that crime—and of the crime intended. *See, e.g.*, People v. Luparello, 231 Cal. Rptr. 832, 849 (Ct. App. 1986) (articulating this conception of the mens rea requirement for accomplice liability); People v. Croy, 710 P.2d 392, 398 n.5 (Cal. 1985) (The liability of an accomplice "is vicarious . . . he is guilty not only of the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets"); *see also infra* notes 118–121 and accompanying text (discussing *Luparello*).

116. Decker, *supra* note 105, at 242.

117. *See* Hurd & Moore, *supra* note 114, at 177 n.43 ("In one notorious instance, the common law's scope of liability is far too wide. We refer to the 'foreseeable second crime' doctrine, according to which an accomplice to one crime is held to be an accomplice to any other crime done by the principal of the first crime, so long as that second crime is a foreseeable (or natural and probable) consequence of the doing of the first crime. As the Model Penal Code recognizes in its rejection of this common law doctrine, this makes for an extensive strict liability that is wildly disproportionate to desert.").

118. 231 Cal. Rptr. 832 (Ct. App. 1986).

the friends returned to Martin's house the next day, lured Martin outside, and shot him dead. Luparello was apparently not present at Martin's killing, and the state did not produce evidence that he intended, planned, or even knew about the scheme to kill Martin. Under the traditional specific-intent requirement for accomplice liability, then, it would have been difficult to prove Luparello's liability as an accomplice to Martin's murder, especially since Martin's death obviously made it impossible for Luparello to obtain information from him. Under the Natural and Probable Consequences Doctrine, by contrast, Luparello was charged and convicted of first-degree murder. On appeal, Luparello attacked the prosecutor's interpretation of the basis for accomplice liability, arguing that "the murder here was the unplanned and unintended act of a coconspirator and therefore not chargeable to Luparello under either complicity theory."[119] The California Court of Appeals rejected the defendant's challenge and upheld his first-degree murder conviction, writing that

> to be a principal to a crime . . . the aider and abettor must intend to commit the offense or to encourage or facilitate its commission. Liability is extended to reach the actual, rather than the planned or "intended" crime, committed on the policy [that] conspirators and aiders and abettors should be responsible for the criminal harms they have naturally, probably[,] and foreseeably put in motion.[120]

Justice Howard Wiener concurred in the judgment but rejected the Natural and Probable Consequences Doctrine, quoting from the LaFave and Scott treatise on criminal law:

> "The 'natural and probable consequence' rule of accomplice liability, if viewed as a broad generalization, is inconsistent with more fundamental principles of our system of criminal law. It would permit liability to be predicated upon negligence even when the crime involved requires a different state of mind. Such is not possible as to one who has personally committed a crime, and should likewise not be the case as to those who have given aid or counsel."[121]

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119. *Id.* at 848.

120. *Id.* at 849–50 (citation omitted) (quoting state supreme court precedent for the proposition that the liability of an accomplice "is vicarious . . . . [H]e is guilty not only of the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets").

121. *Id.* at 849 (Wiener, J., concurring) (quoting WAYNE R. LAFAVE & AUSTIN W. SCOTT, HANDBOOK ON CRIMINAL LAW 516 (1974)).

C. *The* Pinkerton *Doctrine*

A third route to convicting defendants of crimes (including homicides) for which they lack mens rea goes through the law of conspiracy. If the state can prove that a defendant is guilty of conspiring to commit a related crime, the federal government and a number of states allow prosecutors to use the existence of the conspiracy as a functional substitute for mens rea, in order to prove defendant-accomplices is guilty of substantive offenses in which the defendant did not participate and of which the defendant may not even have known. Under the "*Pinkerton* Doctrine," laid down in the 1946 Supreme Court case *Pinkerton v. United States*,[122] defendants can be convicted of substantive offenses that are "within the scope" or are "reasonably foresee[able]" as a "necessary or natural consequence" of the conspiracy, whether or not the defendant had personal knowledge of such offenses or was personally involved in their commission.[123] The *Pinkerton* rule is thus a form of accomplice liability based on the existence of a conspiracy.[124] As this Article will demonstrate, *Pinkerton* liability can have an even broader reach than felony murder liability, especially in jurisdictions where the latter is constrained by judicial and/or legislative limits.[125]

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122. 328 U.S. 640, 647 (1946) (holding that where the defendant is guilty of conspiracy and has not withdrawn from that conspiracy, "[t]he criminal intent to do the act is established by the formation of the conspiracy").

123. *Id.* at 647–48 (allowing conviction of defendant Daniel Pinkerton for substantive offenses done in furtherance of a conspiracy, that are within the scope of the unlawful project, and/or can be reasonably foreseen as a necessary or natural consequence of the unlawful agreement).

124. The *Pinkerton* majority appeared to see this. *Id.* at 647 ("The criminal intent to do the act is established by the formation of the conspiracy . . . . The rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle."); *see also* Bruce A. Antkowiak, *The* Pinkerton *Problem*, 115 PENN. STATE L. REV. 607, 632 (2011) ("The 'service' *Pinkerton* does identifies a subset of accomplice liability in which the parties not only consciously share in the commission of the criminal act but have reached a prior agreement to accomplish it."); Pauley, *supra* note 16, at 17 ("What was new, if anything, in the *Pinkerton* case was the proposition that this evidence of conspiracy was to be *presumed* to be evidence of complicity *as a matter of law.* In other words, the *Pinkerton* Court said, in effect, that 'conspiracy is conclusive on complicity.'" (footnotes omitted) (quoting George Fletcher, *Is Conspiracy Unique to the Common Law?*, 43 AM. J. COMP. L. 171, 172 (1995))).

125. The dissent in *Pinkerton* identified many of the concerns that have attracted criticism of the doctrine ever since. Justice Rutledge "charged the authors of the majority opinion with collapsing the distinction between three separate crimes defined by Congress: '(1) completed substantive offenses; (2) aiding, abetting or counseling another to commit them; and (3) conspiracy to commit them.'" Andrew Ingram, Pinkerton *Short Circuits the Model Penal Code*, 64 VILL. L. REV. 71, 80 (2019) (quoting *Pinkerton*, 328 U.S. at 649 (Rutledge J., dissenting in part)); *see also id.* ("Rutledge also faulted the majority for mixing civil law principles with criminal ones. . . . Rutledge rightly pointed out that what is unremarkable in civil trials is aberrant in the criminal law: 'Guilt [in the criminal context] remains personal, not vicarious, for the most serious offenses.'" (quoting *Pinkerton*, 328 U.S. at 651 (Rutledge, J., dissenting in part))).

The facts of *Pinkerton* itself illustrate the breadth of this doctrine. Defendant Daniel Pinkerton was found guilty of conspiring with his brother Walter to violate the federal tax code in connection with the brothers' suspected illegal enterprise of manufacturing and transporting bootleg whiskey. The jury also found Daniel guilty of various substantive offenses which were in fact performed by Walter, of which Daniel may not even have known, and at which Daniel was not present (indeed, it appeared that Daniel was incarcerated when Walter performed some of the substantive acts charged).[126] Daniel appealed his conviction for the substantive offenses on the ground that he should not be held responsible for substantive crimes of which he knew nothing. The Supreme Court disagreed, holding that "so long as the partnership in crime continues, the partners act for each other in carrying it forward. . . . The criminal intent to do the act is established by the formation of the conspiracy."[127] More generally, the Court suggested that substantive offenses which are done in furtherance of the conspiracy, fall within its intended scope, and are reasonably foreseeable consequences of the conspiracy may be charged against conspirators.[128]

Post-*Pinkerton*, the doctrine has been expanded by some courts. The New Jersey case *State v. Bridges*[129] illustrates the potential reach of *Pinkerton* liability in the context of a homicide case.[130] There, defendant Bridges recruited two others, Bing and Rolle, to go with him to a party where Bridges planned to engage in a fist fight with another guest. Bridges knew that Bing and Rolle had brought guns to the party, ostensibly to keep others from interfering in the fist fight. Bing and Rolle, however, began shooting into the crowd, killing one of the onlookers. Bridges was convicted of several crimes, including the murder of the onlooker, and sentenced to life imprisonment. The New Jersey Supreme Court upheld the convictions, holding that "a co-conspirator may be liable for the commission of substantive criminal acts that are not within the scope of the conspiracy if they are reasonably foreseeable as the necessary or natural consequences of the conspiracy."[131] In dissent, Justice Daniel O'Hern protested:

> An interpretation of the provisions of the Code of Criminal Justice that would allow a sentence of life imprisonment to be imposed on the basis of the negligent appraisal of a risk that another would commit a homicide, conflicts with the internal structure of the Code.

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126. *Pinkerton*, 328 U.S. at 648 (Rutledge, J., dissenting in part).

127. *See id.* at 646–47 (majority opinion).

128. *See id.* at 647–48.

129. 628 A.2d 270 (N.J. 1993).

130. *Id.* at 271; *see also* Pauley, *supra* note 16, at 19 (naming *Bridges* as a case that expands the *Pinkerton* doctrine).

131. *Bridges*, 628 A.2d at 280.

> . . . If we assume, as the majority does, that Bridges did not intend that Shawn Lockley be killed, he could not have been convicted of attempted murder.
>
> . . . [Nor] as an accomplice to the murder.
>
> . . . And finally, defendant could not even have been found guilty of conspiracy to commit murder.
>
> . . . [Under the state's criminal code], [n]o liability is foreseen . . . other than for the crime or crimes that were the object of the conspiracy.[132]

Consider, in this connection, the 2005 case of Anissa Jordan.[133] In May of that year, thirty-six-year-old Jordan, her boyfriend Greshinal Green, and a third participant, Lenora Robinson, robbed two men in San Francisco. After the robbery, Jordan returned to their car, while Green and Robinson left to rob someone else. The victim of that second robbery, Carlos Garvin, put up a fight, whereupon Greshinal Green shot him dead.

The state charged Green, Robinson, and Jordan with first-degree murder in the death of Carlos Garvin. Jordan had not been at the scene of the shooting, but the state alleged that Jordan had conspired with Green and Robinson to commit robberies and that she was therefore as responsible for the victim's death as were the other two.[134] Under the *Pinkerton* Doctrine,

> the jury in Jordan's case had to consider whether she'd conspired to commit robbery. If so—and if one of her co-conspirators then killed Carlos Garvin—Jordan, too, was responsible for his death. At trial, the jury acknowledged that Jordan did not take part in the robbery of Garvin, acquitting her of those charges. But because the jury concluded that she had conspired to commit robbery that day, she bore the same responsibility as Greshinal Green, who actually pulled the trigger.[135]

Jordan was convicted of the murder and sentenced to twenty-seven years to life in prison.[136]

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132. *Id.* at 281–86 (O'Hern, J., concurring in part) (citations omitted).

133. Lara Bazelon, *Anissa Jordan Took Part in a Robbery. She Went to Prison for Murder*, THE ATLANTIC (Feb. 16, 2021), https://www.theatlantic.com/politics/archive/2021/02/what-makes-a-murderer/617819/ [https://perma.cc/X3EN-C57Y].

134. *Id.*

135. *Id.*

136. *Id.* Anissa Jordan was ultimately released in the wake of recent reforms of California's Felony Murder Rule. *See infra* notes 177–182 and accompanying text (discussing those reforms); *see also* Ingram, *supra* note 125, at 90–91 (describing the facts of *Ervin v. State*, 333 S.W.3d 187 (Tex. App. 2010), where the defendant was convicted of murder under the *Pinkerton* doctrine, and sentenced to life without parole although the state did not prove that she had the intent, purpose, knowledge, or knowledge of risk otherwise required for a murder conviction).

Like the FMR, the *Pinkerton* Doctrine is often defended on the pragmatic ground that it is useful in winning convictions.[137] Although courts continue to struggle to reconcile the doctrine with statutory requirements that the state prove intent to commit an offense,[138] legislators have been reluctant to challenge *Pinkerton* despite vigorous attacks on it from commentators.[139]

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137. *See, e.g.*, Antkowiak, *supra* note 124, at 624 ("*Pinkerton* is a judicially created device to dilute the elements of an offense and lessen the government's burden to prove those elements beyond a reasonable doubt."); Ingram, *supra* note 125, at 73 ("*Pinkerton* . . . gives the prosecution a path to a conviction for a first-degree felony with mens rea proof that could otherwise only produce a third-degree conviction."); Peter Buscemi, Note, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122, 1152 (1975) ("[T]he ever increasing sophistication of organized crime presents a compelling reason against abandonment of *Pinkerton*." (quoting *Hearing on H.R. 8853 and H.R. 10066 Before the H. Subcomm. on Crime, 93rd Cong., 2d Sess.* 39–40 (1978) (Testimony of Deputy Assistant Att'y Gen. John C. Keeny))).

138. *See, e.g.*, KADISH, SCHULHOFER & BARKOW, *supra* note 30, at 774 ("Although the federal courts and some states continue to permit vicarious liability for the substantive offenses of co-conspirators, the doctrine is far from settled. State supreme courts continue to reconsider their acceptance or rejection of the *Pinkerton* rule.").

139. The Model Penal Code, for example, rejected the *Pinkerton* Doctrine, allowing liability for substantive offenses committed pursuant to a conspiracy only when the state can prove the elements of accomplice liability. MODEL PENAL CODE § 2.06(3) cmt. 6 (AM. L. INST. 1985) ("[T]here appears to be no better way to confine within reasonable limits the scope of liability to which conspiracy may theoretically give rise."); *see also* People v. McGee, 399 N.E.2d 1177, 1181–82 (N.Y. 1979) (rejecting the *Pinkerton* Doctrine on the grounds that "it is repugnant to our system of jurisprudence, where guilt is generally personal to the defendant, to impose punishment, not for the socially harmful agreement to which the defendant is a party, but for substantive offenses in which he did not participate" (citations omitted)); Ingram, *supra* note 125, at 82 ("If you believe that punishment should not exceed culpability, then you should be concerned that *Pinkerton* licenses a murder conviction on the mere proof that the victim's death was foreseeable to the defendant."). Heidi Hurd and Michael Moore also reject what they call the "vicarious responsibility" model of accomplice liability, according to which a "partnership in crime" can make a defendant liable for offenses of which they might never have known. Hurd & Moore, *supra* note 114, at 170 ("[I]n our view, there is no circumstance in which one is rightly blamed vicariously, no matter how explicitly one agreed, promised, ratified, or whatever, the criminal acts of another. All of us admittedly have valid normative powers to create certain kinds of moral and legal obligations. . . . But we have no normative power to make ourselves blameworthy for others' breach of their obligations merely by consent, promise, or other form of assent. We can heroically take upon ourselves another's punishment; yet such acts are heroic just because we do not deserve such punishment, not originally and not by any voluntary assumption."). *See generally* Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307 (2003) (making the case that vicarious liability based on conspiracy is helpful in fighting crime).

D. *The Impact of Erasing Intent: An Extended Example*

An example will illustrate the contrast, in terms of possible outcomes for defendants, between standards that require the state to prove criminal intent for each criminal act charged, and standards that do not. This section of the Article compares two scenarios. In Scenario 1, prosecutors must charge defendants without using the Felony Murder Rule or the *Pinkerton* Doctrine, and can rely only on the classic version of the mens rea requirement for accomplice liability—"purpose" or knowledge sufficient to justify an inference of purpose.[140] Scenario 2 analyzes the probable outcomes under the same facts and with the same defendants, if prosecutors *are* allowed to use the FMR, the Natural and Probable Consequences Doctrine, and the *Pinkerton* Doctrine. As we will see, the difference for defendants can be significant.

Suppose the following[141]:

> Bob, Carol, and Doug are spending the weekend at Bob's house. While driving around the neighborhood on Saturday, Bob points out a nearby house and tells the other two that Esther, the homeowner, is a drug dealer, keeps a large supply of illegal narcotics in a safe at the house, and is away for the weekend. "Boy, I'd love to get my hands on her stash," Bob says. Carol and Doug agree, and the three concoct a plan to break into Esther's house and steal the safe. Late that night, Bob drives them all to Esther's house, where he waits in the car while Carol and Doug break in. There, they are surprised by Esther's daughter, Flora, who was staying at the house and had been awakened by the noise of their entry. Doug picks up a rifle he'd found in the house and shoots Flora to death with the rifle. Carol witnesses the killing of Flora but does not physically participate. Carol and Doug then exit the house and are driven away by Bob.

1. *Scenario 1: Requiring the State to Prove Mens Rea for the Homicide*

Bob, Carol, and Doug are identified and arrested in a jurisdiction where the Felony Murder Rule, the Natural and Probable Consequences Doctrine, and the *Pinkerton* Doctrine do not exist. With what crimes should each defendant be charged?

140. *See supra* notes 101–104 and accompanying text (discussing the traditional mens rea requirement for accomplice liability).

141. The hypothetical is a simplified version of a well-known Florida case from 2002. For a discussion of the case, see Adam Liptak, *Serving Life For Providing Car to Killers*, N.Y. TIMES (Dec. 4, 2007), https://www.nytimes.com/2007/12/04/us/04felony.html [https://perma.cc/AT72-74HK]; *see also* Binder, *supra* note 28, at 406, 495–96 (discussing the Ryan Holle case).

First consider the felony of burglary, which typically requires the state to show that a defendant unlawfully entered a dwelling (or other building where they had no right to be) with the intent of committing a felony therein.[142] The facts indicate that all three defendants are guilty of burglary and also of conspiracy to commit burglary. By hypothesis, all three planned to steal the safe, and Carol and Doug actually entered the house to steal it. Bob waited outside, but even under the strictest version of accomplice liability—requiring the state to show that a defendant provided aid to the burglary, intended to do so, and intended for the burglary to succeed—Bob is guilty of burglary as an accomplice. The hypothetical also suggests that the three agreed beforehand to commit the burglary, a valid basis (even with an added "overt act" requirement) for the conspiracy charge.

But now consider the murder of Flora, again in a scenario where the FMR, Natural and Probable Consequences Doctrine, and *Pinkerton* Doctrine are not available. Under those conditions, the state can proceed with homicide charges only if it can prove the mens rea and actus reus for homicide against each defendant. Under the facts as given, Doug, who picked up the gun and shot Flora to death with it, clearly seems guilty of murder (though if Doug has a mens rea-based defense to that charge, he would be allowed to bring it under this scenario).[143] What about homicide charges against Bob and Carol, neither of whom physically participated in Flora's killing? The FMR and the *Pinkerton* Doctrine are not available here. Thus, the state can only bring homicide charges against Bob and Carol if they were accomplices to Flora's murder. But using the classic version of mens rea for accomplice liability, the state would have to show that the defendants had the conscious purpose of aiding the killing and for the killing to happen. Under the facts as given, no evidence exists that Bob or Carol had such intent. Doug did not bring the gun to the house, he found it there once he was inside. It may well be, therefore, that Bob and Carol did not even have advance knowledge of the weapon or of Flora's presence. Prosecutors could possibly pursue lesser homicide charges—involuntary manslaughter or negligent homicide, for example—against Bob and Carol, on the theory that while they may not have known about or intended Flora to be assaulted or killed, they were criminally reckless or negligent with respect to the risk of encountering someone in the residence and the risk that injury or death might follow.[144] However,

142. *See, e.g.*, MODEL PENAL CODE § 221.1 (AM. L. INST. 1980) ("(1) BURGLARY DEFINED. A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein . . . .").

143. *See, e.g.*, MODEL PENAL CODE § 210.2(1)(b) (AM. L. INST. 1980) (defining murder as homicide committed purposely, knowingly, or "recklessly under circumstances manifesting extreme indifference to the value of human life").

144. *See, e.g.*, MODEL PENAL CODE § 2.02(2)(c) (AM. L. INST. 1985) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or

even that would not be certain. A reckless homicide charge would typically require the state to prove that the defendants knew of a substantial and unjustifiable risk that their conduct would cause death or serious bodily injury to a victim and that they chose to ignore that risk. And a negligent homicide charge would require proof that a reasonable person would have been aware of such risk (despite having been informed that the homeowner, Esther, was away for the weekend), even if Bob and Carol were not so aware.

In sum, the likely outcomes under Scenario 1 are as follows:

- All three defendants are guilty of burglary and conspiracy to commit burglary.
- Doug, who entered the house and killed Flora, is also guilty of murder (but must be allowed to argue any available mens rea-based defenses to that charge).
- Bob and Carol are not guilty of murder, though the state might be able to charge them with lesser homicide offenses.

2. *Scenario 2: Reintroducing the FMR, the Natural and Probable Consequences Doctrine, and the* Pinkerton *Doctrine*

Now consider the possible outcomes for the same defendants under the above three doctrines, all of which will make the prosecution's job easier by de-emphasizing or erasing rules that require the matching of criminal acts with culpable mental states.

Again, all three defendants are guilty of burglary and conspiracy to commit burglary—as noted above, even though Bob did not enter the house, the facts indicate that he had the intent of aiding the burglary and for that crime to succeed, and that the three agreed beforehand to commit the burglary.

But with respect to the most serious charge of murder, the similarities to Scenario 1 evaporate—Bob, Carol, and Doug will probably fare much worse in this scenario than in Scenario 1. Because all three defendants are guilty of burglary, it follows that in a jurisdiction which has adopted the "collective liability" interpretation of the FMR, they would all be liable for Flora's murder.[145] If the acts were done in an "individual liability" jurisdiction, then the FMR would cover liability only for Doug, who actually did the killing. Note that Doug was also guilty of murder in Scenario 1, where the state had to prove mens rea for the homicide.[146] However, the FMR can still fill an important purpose for the state, relieving it of the burden

will result from his conduct."); *id.* § 2.02(2)(d) ("A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct.").

145. *See, e.g.*, *supra* notes 93–95 and accompanying text (discussing "individual" and "collective" liability felony murder under Guyora Binder's analysis).

146. *See supra* Section II.D.1.

of proving mental culpability for the homicide and thus depriving Doug of any mens rea-based defenses he might otherwise have been able to raise to that charge.[147]

What about the major limitations on the FMR—might defendants be able to avoid a felony murder instruction under any of them? Probably not. Burglary, which involves the unlawful entry into someone else's property with the intent of committing a felony, is regarded as a dangerous crime; indeed, for that reason it is usually among the list of enumerated felonies that are allowable bases for a first-degree felony murder charge.[148] Under the circumstances here, burglary should not "merge" with homicide because it involves the "independent felonious purpose"[149] of committing theft. And the killing of Flora would almost certainly be seen as "in furtherance" of the felony—the killing was done by one of the co-felons, and Flora's presence could have threatened the success of the contemplated theft.[150]

In an "individual liability" FMR jurisdiction where felony murder charges were not possible against Bob or Carol, prosecutors might nonetheless pursue murder charges under theories of accomplice liability—i.e., the Natural and Probable Consequences Doctrine or the *Pinkerton* Doctrine. Under the former, they would need to show that although Bob and Carol did not intend, or perhaps even know about, the killing of Flora beforehand, the killing was the "natural and probable consequence" of their contemplated burglary. And, as discussed above,[151] courts have interpreted the doctrine liberally, allowing convictions under it when "natural and probable" really means "reasonably foreseeable"—arguably establishing a threshold mens rea of negligence for a crime (murder) that

147. For example, he might want to raise the defenses of intoxication, diminished capacity, or lack of mens rea. *See, e.g.*, People v. Ireland, 450 P.2d 580, 590 n.13 (Cal. 1969) (describing the prosecution's attempt to convict defendant of second-degree felony murder "would have substantially eviscerated the defense, which was based upon principles of diminished capacity").

148. *See, e.g.*, CAL. PENAL CODE § 189(a) (West 2020) ("All murder that is . . . committed in the perpetration of, or attempt to perpetrate . . . burglary . . . is murder of the first degree.").

149. *See, e.g.*, People v. Burton, 491 P.2d 793, 801 (Cal. 1971) (stating felonies which do not involve a purpose independent of the homicide may not be the basis for a felony-murder instruction); *see also* People v. Chun, 203 P.3d 425 (Cal. 2009). Following a series of cases highlighting complications with the "independent felonious purpose" doctrine, the California Supreme Court ruled that "assaultive" felonies may not form the predicate of a felony murder charge. *Id.* at 443.

150. A few jurisdictions have adopted statutes which, in theory, permit defendants to escape a felony murder charge on the ground that they played no role in the killing, were not armed themselves, and had no reasonable grounds to believe that co-felons were armed or intended to cause harm to others. *See, e.g.*, N.J. STAT. ANN. § 2C:11-3(a)(3) (West 2017) (articulating such a defense).

151. *Supra* notes 112–121 and accompanying text.

would otherwise require proof at least of gross recklessness.[152] Was it reasonably foreseeable that, while burglarizing Esther's house in the middle of the night, the defendants would have an injurious or deadly encounter with someone staying in the dwelling? The answer might well be "yes," and if so, Bob, Carol, or both could be charged with murder.

As a threshold matter, the *Pinkerton* Doctrine would require the state to show that the defendants had conspired to commit burglary—that they had purposely agreed with each other to commit the crime of burglary with the intent that the crime be completed.[153] Under the facts as described, prosecutors would have a sound argument on this ground. Once conspiracy has been established, a defendant may be convicted of reasonably foreseeable substantive crimes that are within the scope and in furtherance of the conspiracy.[154] Again, this seems achievable under the facts: killing Flora likely made the success of the burglary more probable, and just as under the Natural and Probable Consequences Doctrine, it seems reasonably foreseeable that committing the burglary of a dwelling at night could result in a deadly confrontation with a resident in the home.

Thus, under Scenario 2, all three defendants could be charged with Flora's murder; in addition, Doug would lose the right to argue any mens rea-based defenses to that charge. Comparing the results from Scenarios 1 and 2 highlights the central point: that the presence (or absence) of the FMR, the Natural and Probable Consequences Doctrine, and the *Pinkerton* Doctrine can make a big difference for many defendants who can in some way be connected to a crime that resulted in a homicide.

III. CONTROVERSY AND REFORM

The Felony Murder Rule, Natural and Probable Consequences Doctrine, and *Pinkerton* Doctrine allow defendants to be convicted of serious crimes, including murder, when their culpability does not support such a conviction.[155] In many cases, defendants' punishments have been overly

152. *Supra* notes 112–121 and accompanying text (discussing the natural and probable consequences doctrine and its conflation with the "reasonably foreseeable" standard).

153. *See* Pinkerton v. United States, 328 U.S. 640, 646 (1946) (articulating threshold requirement that defendants be proved guilty of conspiracy).

154. *Id.* at 647–48. To find a more recent actual case where this has happened, we need only remember the charges against Anissa Jordan, described earlier. *See supra* notes 133–136 and accompanying text. Jordan was convicted of murder, and spent more than a decade in prison, because she had participated in another robbery with a co-defendant who physically killed the victim. On that basis, Jordan was determined to have conspired with the two others although she was not present at the time the victim was killed and had no prior knowledge of the killing. This is how the *Pinkerton* Doctrine can work in practice.

155. *See, e.g.*, Melissa E. Holsman, *Jury Acquits Gifford Man Who Claimed Self-Defense After Girlfriend Killed by Sheriff's SWAT Team in 2017 Raid*, TREASURE COAST NEWSPAPERS (Nov. 19, 2021, 5:20 PM), https://www.tcpalm.com/story/news/crime/indian-river-county/2021/11/19/andrew-coffee-iv-cleared-murder-charge-2017-alteria-woods-death/8651720002/ [https://perma.cc/3WET-LAGK]

harsh when compared to their actions. Most scholarly treatments of the three doctrines have been highly critical;[156] yet all three survive in many U.S. jurisdictions.

A. *Pinkerton and the Natural and Probable Consequences Doctrine*

Although many jurisdictions continue to employ one or both doctrines, neither the *Pinkerton* nor the Natural and Probable Consequences Doctrines have been universally adopted in the United States. The *Pinkerton* rule is used in the federal courts and in a number of states.[157] But the doctrine is "far from settled."[158] By contrast, the Natural and Probable Consequences Doctrine is said to apply in most American jurisdictions, even though the doctrine "has been subjected to substantial justifiable criticism."[159]

Most scholarly objections to these two doctrines are grounded in fairness to all criminal defendants, based on the mismatch between criminal liability and criminal intent. With respect to their impact on particular groups, the empirical evidence is even more scant than for the FMR.[160] On a more theoretical level, however, Michael Serota makes an interesting and relevant observation in a 2023 article where he argues for abolishing

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(describing the 2021 case of Andrew Coffee IV in Florida). In a shoot-out during a late-night drug raid at Coffee's father's house (Coffee was not a target of the drug raid), police officers shot and killed Coffee's girlfriend. The state charged Coffee with second-degree felony murder in the girlfriend's death. A jury acquitted him of that crime on November 19, 2021.

156. *See supra* notes 43–47 and accompanying text (discussing scholarly attacks on the doctrines); Antkowiak, *supra* note 124, at 639 ("In every place where *Pinkerton* lives by the will of the courts alone, the doctrine should be retired given its impact on the jury right and the grave due process problems it creates.").

157. *See, e.g.*, DRESSLER, *supra* note 25, at 463 ("It has been said that the *Pinkerton* rule, adopted in the federal courts, is the majority rule in states that have considered the issue. However, . . . [m]any courts that have approved of the rule have done so in cases in which the result would have been the same had traditional accomplice rules been invoked." (footnotes omitted)); *see also* Paul Marcus, *Criminal Conspiracy Law: Time to Turn Back from an Ever Expanding, Ever More Troubling Area*, 1 WM. & MARY BILL RTS. J. 1, 6 (1992) (noting that *Pinkerton* "is applied in an enormous number of prosecutions.").

158. KADISH, SCHULHOFER & BARKOW, *supra* note 30, at 774 (explaining that "[s]tate supreme courts continue to reconsider their acceptance or rejection of the *Pinkerton* rule"); Pauley, *supra* note 16, at 3 ("The *Pinkerton* rule[ ] is one of the most controversial doctrines in modern criminal law."); *id.* at 6 (discussing "vituperative criticism" directed at the *Pinkerton* doctrine and quoting from statement by the President of the National Association of Defense Lawyers: "[Under *Pinkerton*,] if the government cannot prove the defendant guilty on various substantive charges, it need only convince the jury of the defendant's guilt of conspiracy to secure convictions on the otherwise unsupportable substantive charges." (quoting Marcus, *supra* note 157, at 7 (citing Letter from Jeff Weiner, Pres. Nat'l Ass'n Crim. Def. Laws. (Feb. 1991)))).

159. DRESSLER, *supra* note 25, at 453.

160. *See supra* notes 81–92 and accompanying text (discussing race- and gender-based impacts of the FMR).

strict liability in criminal law.[161] Pointing to studies that have identified "racially disparate effects of prosecutorial discretion" with respect to decisions regarding the charging, pre-trial disposition, and sentencing of Black defendants,[162] Serota suggests two primary reforms. First, he speculates that, in general, introducing mens rea requirements (or as applied to the thesis here, more exacting *standards* of mens rea) into criminal statutes might help to redress racial imbalances by limiting prosecutorial discretion.[163] Second, he suggests that reforms focused on enhancing mens rea could reduce unjust and over-long terms of incarceration overall.[164] Scholarly critiques of the FMR, the Natural and Probable Consequences doctrine, and the *Pinkerton* rule have generally emphasized the latter goal—an approach which (whatever our other criminal reform goals may be) is surely worth pursuing.

B. *Current Reform Proposals Re: The Felony Murder Rule*

In a number of other countries including Britain, the Felony Murder Rule has been abolished or severely limited.[165] In the United States, only a few states have abolished their felony murder rules, but others have recently amended or are considering amendments to their FMRs. In Michigan[166] and Massachusetts,[167] reform has been accomplished by court

161. *See generally* Serota, *Strict Liability*, *supra* note 8.

162. *See id.* (manuscript at 55–56).

163. *See id.* (manuscript at 56–60).

164. *See id.* (manuscript at 60) ("So long as the racial distribution of mens rea reform's decarceral benefits at least roughly mirrors underlying enforcement disparities . . . —as there is good reason to think would be true—that is enough to reject the Mass Incarceration Assumption"); *id.* (manuscript at 71–75) (arguing that mens rea reform by abolishing strict liability would be both efficacious and politically possible).

165. *See, e.g.*, Liptak, *supra* note 141 (noting that the United States is alone among western nations in retaining vigorous forms of the FMR and quoting Yale professor James Whitman: "The view in Europe . . . is that [criminal law should] hold people responsible for their own acts and not the acts of others").

166. *See* People v. Aaron, 299 N.W.2d 304, 326–29 (Mich. 1980) ("We believe that it is no longer acceptable to equate the intent to commit a felony with the intent to kill, intent to do great bodily harm, or wanton and willful disregard of the likelihood [of] death or great bodily harm. . . . Today we exercise our role in the development of the common law by abrogating the common-law felony-murder rule.").

167. *See, e.g.*, Patrick Johnson, *SJC Ruling Narrows Massachusetts Definition of Felony Murder*, MASS. LIVE (Sept. 20, 2017, 6:57 PM), https://www.masslive.com/news/2017/09/sjc_ruling_in_woburn_murder_co.html [https://perma.cc/UHP8-ZPWG].

ruling, while in California[168] and Illinois[169] it has been accomplished by statute. In several other states, felony murder reform is on the agenda.[170] The substantive changes vary, but most aim to achieve the same core result: retaining the FMR while introducing some elements of mental culpability into felony murder charges. The Pennsylvania state legislature recently held hearings on amending the FMR, for which state senator Daylin Leach articulated the main rationale:

> One of the foundational principles of justice is that we must punish people for crimes they commit or intend to commit in a way that's proportional to the crime . . . . The hearing today reaffirmed my belief that the way Pennsylvania uses the felony murder statute should be reformed. People who did not kill or intend to kill are being imprisoned for life. Such an unjustified punishment undermines the effectiveness of our justice system and the public's faith in it. Furthermore, paying to imprison someone for life without taking into consideration their intent is a bad deal for taxpayers, as it's enormously costly but does not make us any safer. This discussion was long overdue . . . .[171]

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168. *See, e.g.*, Mahadev & Drizin, *supra* note 75; Greene, *supra* note 85; Bazelon, *supra* note 133; *see also* Abby Vansickle, *Can It Be Murder If You Didn't Kill Anyone?*, MARSHALL PROJECT (June 27, 2018, 5:00 AM), https://www.themarshallproject.org/2018/06/27/can-it-be-murder-if-you-didn-t-kill-anyone [https://perma.cc/3YU6-6GK2] ("If the bill passes the State Assembly, California will join a growing number of states in abolishing or severely restricting felony murder. Over the decades, legislatures in Hawaii and Kentucky have abolished the rule, and, last fall, Massachusetts joined Michigan in ending it through the courts.").

169. *See, e.g.*, Mahadev & Drizin, *supra* note 75; Emanuella Evans & Rita Oceguera, *Illinois Criminal Justice Reform Ends Cash Bail, Changes Felony Murder Rule*, INJUSTICE WATCH (Feb. 23, 2021), https://www.injusticewatch.org/news/2021/illinois-criminal-justice-reform-cash-bail-felony-murder/ [https://perma.cc/D3NQ-UPLA]; Flowers & Macaraeg, *supra* note 56 (compiling ten cases since 2011 where police killed a civilian in Chicago and charged an accomplice with murder).

170. *See, e.g.*, Jessica Folker, *2021 to Bring Reboot of Felony Murder, Child Pornography Bills*, L. WEEK COLO. (Jan. 6, 2021), https://lawweekcolorado.com/article/2021-to-bring-reboot-of-felony-murder-child-pornography-bills/ [https://perma.cc/W7SS-BH8T]; Heidi Wigdahl, *In New Article, Public Defender Details Racial Inequities in Minnesota's Felony Murder Doctrine*, KARE 11, (Mar. 7, 2021, 10:14 PM), https://www.kare11.com/article/news/local/george-floyd/in-new-article-public-defender-details-racial-inequities-in-minnesotas-felony-murder-doctrine/89-679c712b-cfa3-4df7-ae43-9d94ce65e013 [https://perma.cc/KMP5-D87B]; *Pa. S. Judiciary Comm. Hearing on S.B. 293*, 25th Sess., 1 (Pa. 2018) (statement of Sen. Daylin Leach) (urging reform of the Felony Murder Rule in Pennsylvania by a state senator).

171. *Pa. S. Judiciary Comm. Hearing on S. B. 293*, 25th Sess., 1 (Pa. 2018) (statement of Sen. Daylin Leach).

For several decades, Michigan was one of a very few states that rejected the FMR.[172] But recently other states have reconsidered the issue as well. In Massachusetts, for example, the Supreme Judicial Court significantly narrowed the state's FMR in the 2017 case *Commonwealth v. Brown*.[173] Brown participated in the planning of a robbery, supplied a gun to be used in the crime, and had also supplied sweatshirts for the perpetrators to wear as a means of concealing their identities.[174] Brown was convicted of first-degree murder on a felony murder theory. Defendant Brown, the court explained,

> knew the home invasion was going to happen, and he helped plan the robbery. But [the S.J.C.] ruled prosecutors failed to produce evidence that Brown was "a knowing participant in the felony murder." Instead, it found he was "on the 'remote outer fringes' of an attempted armed robbery and armed home invasion," and that a conviction of second-degree murder is "more consonant with justice."[175]

The Supreme Judicial Court concluded "that the scope of felony-murder liability should be prospectively narrowed, and . . . that, in trials that commence after the date of the opinion in this case, a defendant may not be convicted of murder without proof of . . . malice."[176]

California courts have long struggled to balance the state legislature's embrace of the FMR with judicial skepticism about the rule. As far back as 1983, the California Supreme Court called the Rule "barbaric" because it separates intent from criminal liability and punishment for murder.[177] California recently changed its FMR in the wake of cases such as that of Bobby Garcia. In high school, along with others, Garcia robbed a man for gas money and, after one of his accomplice killed the man, was convicted of felony murder and served twenty-one years in prison.[178] Advocates, including Garcia, lobbied for limitations on California's FMR, and won.

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172. *See, e.g.*, Roth & Sundby, *supra* note 45, at 446 n.6 (stating that Hawaii and Kentucky abolished the rule by statute).

173. *See* 81 N.E.3d 1173, 1189–90 (Mass. 2017).

174. Johnson, *supra* note 167.

175. *Id.*

176. *Brown*, 81 N.E.3d at 1178.

177. *See, e.g.*, Kate Chatfield & Lara Bazelon, *Punish Californians for the Crimes They've Committed, Not for Murders They Didn't Do*, L.A. TIMES (Aug. 20, 2018, 4:05 AM), https://www.latimes.com/opinion/op-ed/la-oe-chatfield-bazelon-felony-murder-reform-20180820-story.html [https://perma.cc/6SSP-DXHJ] (describing proposed amendments to California's FMR).

178. *See* Scott Shackford, *California Reforms Murder Laws to Require Defendants to Actually Play a Role in the Killing*, REASON (Oct. 1, 2018, 1:35 PM), https://reason.com/2018/10/01/california-reforms-murder-laws-to-requir/ [https://perma.cc/AN56-YUFB].

California Governor Jerry Brown signed a criminal justice reform law in 2018.[179] The law explicitly defines accomplices to felony murder as those who had the intent to kill the victim, and the state must prove such intent to convict an accomplice under the reformed FMR.[180] With respect to the statutorily enumerated felonies which can be bases for a first-degree murder conviction in California, the new law would prohibit convictions for murder unless the person was the actual killer or was a major participant in the felony and acted with reckless indifference to life.[181] Significantly, the new law is retroactive, allowing prior convictions that were not in accord with its terms to be amended or overturned.[182]

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179. *See, e.g.*, Jazmine Ulloa, *California Sets New Limits on Who Can be Charged with Felony Murder*, L.A. TIMES (Sept. 30, 2018, 9:40 PM), https://www.latimes.com/politics/la-pol-ca-felony-murder-signed-jerry-brown-20180930-story.html [https://perma.cc/Q63G-TR6B] ("The new law . . . scales back California's current felony murder rule, which allows defendants to be convicted of first-degree murder if a victim dies during the commission of a felony—even if the defendant did not intend to kill, or did not know a homicide took place. For defendants facing prosecution for the crime, the new law could mean a shot at less time in prison. Hundreds of inmates serving time will be able to petition the court for a reduced sentence.").

180. *See* CAL. PENAL CODE § 189 (West 2020). The text of the bill was taken from S.B. 1437, which provides:

> This bill would require a principal in a crime to act with malice aforethought to be convicted of murder except when the person was a participant in the perpetration or attempted perpetration of a specified felony in which a death occurred and the person was the actual killer, was not the actual killer but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree, or the person was a major participant in the underlying felony and acted with reckless indifference to human life.

S.B. 1437, 2017–18 Leg. (Cal. 2018).

181. S.B. 1437, 2017–2018 Leg. (Cal. 2018) ("This bill would prohibit a participant in the perpetration or attempted perpetration of one of the specified first degree murder felonies in which a death occurs from being liable for murder, unless the person was the actual killer or the person was not the actual killer but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer, or the person was a major participant in the underlying felony and acted with reckless indifference to human life, unless the victim was a peace officer who was killed in the course of performing his or her duties where the defendant knew or should reasonably have known the victim was a peace officer engaged in the performance of his or her duties."). Note that this language creates an exception to these rules in the case where the victim was a police officer, acting in the performance of their duty, and the defendant had reason to know those facts.

182. *See* Mahadev & Drizin, *supra* note 75 ("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 California law will benefit defendants like in the case of Anissa Jordan. *See supra* notes 133–136 and accom-

Finally, Illinois's crime reform legislation, signed into law in February 2021, also narrows the scope of felony murder by adopting the "agency" rule, providing that co-felons cannot be charged with felony murder unless the victim of the homicide was killed by a co-felon.[183] Thus, in cases where a co-felon is killed by the police or another third party, defendants can no longer face murder charges for the co-felon's death.

CONCLUSION: RESTORING CRIMINAL INTENT

When the state is not forced to prove a defendant's mental culpability for the particular crime(s) charged, defendants lose a vital protection against overly harsh prosecution and punishment. Thus, restoring criminal intent to all murder prosecutions—including accomplice liability through the *Pinkerton* and Natural and Probable Consequences Doctrine—is necessary to bring the law back into line with our best intuitions about criminal justice.

As explained above, most scholars who have addressed felony murder have opposed the FMR.[184] A notable exception is Guyora Binder. Binder acknowledges that the FMR has been improperly applied in some cases,[185] but argues for a defensible version of it.[186] Binder's argument is that society must "make the best of felony murder" because, essentially, it's not going anywhere:

> Like it or not, however, we are probably stuck with the felony murder doctrine. Legislatures have supported felony murder for decades in the teeth of academic scorn. Although most states revised their criminal codes in response to the American Law Institute's (ALI) Model Penal Code, only a few accepted the ALI's proposal to abolish felony murder. Today, criminal justice policy is less likely than ever to be influenced by academic criticism, as candidates for office find themselves competing to appear tougher on crime than their opponents.[187]

panying text; *see also* S.B. 1437, 2017–2018 Leg. (Cal. 2018) ("This bill would provide a means of vacating the conviction and resentencing a defendant when a complaint, information, or indictment was filed against the defendant that allowed the prosecution to proceed under a theory of first degree felony murder or murder under the natural and probable consequences doctrine, the defendant was sentenced for first degree or 2nd degree murder or accepted a plea offer in lieu of a trial at which the defendant could be convicted for first degree or 2nd degree murder, and the defendant could not be charged with murder after the enactment of this bill.").

183. *See supra* notes 56, 66, and 75 and accompanying text (discussing "agency" and "proximate cause" rules governing co-felon liability for homicides committed by third parties); Evans & Oceguera, *supra* note 169.

184. *See supra* notes 43–50 and accompanying text.

185. *See generally* Binder, *supra* note 28.

186. *See id.*; *see also* Binder, *supra* note 32.

187. Binder, *supra* note 28, at 407 (footnotes omitted).

Given that reality, Binder argued that an "expressive theory of justice" could normatively justify the doctrine. The theory premises criminal culpability on the harm caused by an act and the defendant's purpose(s) in doing it.[188]

Eleven years later, amid a nationwide movement to reform the criminal justice system, we can ask a different question: Not how to retain the FMR in a way that contains some measure of justice, but whether *abolishing* the FMR would be *un*just. In 2023 we can question Binder's claim that we are "stuck with" the FMR. That may have been true in the past, but today we encounter new opportunities for criminal justice reform.[189] Against background concerns about overly intrusive criminal statutes, overly harsh punishments of those convicted, and disproportionately harsh punishments inflicted on vulnerable groups, the burden is on advocates of the FMR to persuade us that the rule fills an important need in the criminal justice system and is consistent with legitimate justifications of punishment. To date, they have not done so.

Similarly, courts and scholars have criticized the Natural and Probable Consequences Doctrine and the *Pinkerton* Doctrine—which offer alternative routes to murder convictions for prosecutors who cannot prove mental culpability for a homicide—for contravening the bedrock principle that conviction for serious crime requires proof of both act and mental culpability.

Restoring justice to these doctrines necessitates the strengthening of mens rea, thereby reconnecting mental culpability with criminal conviction and punishment. Regarding felony murder, states should proceed beyond incremental reforms that ultimately preserve the doctrine (albeit in a weaker state); instead, they should directly engage the issue of abolition. Would the public be harmed if (like the rest of the world) the United States were to abolish the felony murder shortcut and insist that the state prove culpable mens rea for the victim's death in every homicide charge? The availability of other homicide charges, ranging from those based on negligence to those based on recklessness, knowledge, and premeditation, suggests that the harm to the criminal justice system of abolishing these doctrines would be small at most. A few states have enacted reforms, either by court rulings or legislation, and they go some way toward redressing the evils of the FMR. But abolition should be the end against which rationales for keeping it are tested. Rather than "how to amend?" the core question should be, "why not abolish?"

188. *See generally* Binder, *supra* note 28 (developing this theory).

189. *See, e.g.*, Marianne Levine, *As Police Reform Talks Sputter, Bipartisan Criminal Justice Bills Advance*, POLITICO (July 1, 2021, 4:30 AM), https://www.politico.com/news/2021/07/01/democrats-eager-replicate-trump-achievement-497276 [https://perma.cc/Z64D-VH3N] ("Bipartisan criminal justice reform is chugging ahead in Congress, a potential deal that follows 2018's cross-aisle First Step Act.").

The same rationales that support abolition of the FMR also support the eradication of *Pinkerton* and accomplice liability. Prosecutors defend both doctrines because their existence makes the the state's job easier. But do we *want* to make the state's job easier in this respect? Perhaps we have gone too far in that direction, to the substantial detriment of too many defendants and the system as a whole.

Beginning from the most defendant-protective standard—which would require proof of criminal intent for all homicides—would put advocates of looser standards to the test and force them to affirmatively argue why the mens rea standard for accomplice liability should be lower. That seems, at least, to start from the right end—offering maximum protection to criminal defendants and forcing advocates for more prosecution-friendly standards to prove the harm that would result from strengthening those protections. The criminal justice system must embrace the need for reform not only of procedural rules but also of substantive criminal law. That project requires that we strengthen the core criminal law principle that proving someone's guilt requires proving their mental culpability for the crime. In criminal law, intent matters, and in the most fundamental sense—that it is impossible to do justice without it.