

# ABOLISHING FELONY MURDER: AN EMPIRICAL PERSPECTIVE<sup>†</sup>

Ian P. Farrell\*

## ABSTRACT

*The felony-murder rule is a problematic anomaly in American law. The rule imposes convictions for murder—often first-degree murder—on individuals who neither killed nor intended for someone to die. Such individuals are consequently punished with extreme prison sentences, up to and including life without the possibility of parole.*

*In addition to imposing harsh punishments on individuals who lack the guilty mind required by other homicide laws, these extreme sentences contribute to the problem of mass incarceration. This burden is also not borne equally. The felony-murder rule has a discriminatory impact on people of color, teens and young adults, and women.*

*It should come as no surprise, then, that there is a near-unanimous consensus among legal scholars—and among the legislatures of other nations—that the felony-murder rule cannot be morally justified. What is surprising, in light of these criticisms, is that felony murder remains the law in all but three U.S. jurisdictions.*

*This Article presents the findings from two original empirical studies that bolster the argument for abolition. The studies involved asking residents of Colorado and Maryland, respectively, about their knowledge of and moral attitudes towards examples of felony murder. The results were striking. The vast majority of study participants were unaware of felony murder and the sentences associated with it. More importantly, almost all study participants reported that both a first-degree murder conviction and a life sentence were morally unjustified for the examples of felony murder presented to them. Perhaps most importantly, most survey participants in both states believed the morally appropriate punishment was less than six years in prison—less than the punishment that would apply even if the felony-murder rule was abolished.*

*These findings support abolishing felony murder in two ways. First, the findings undercut both the retributivist and deterrence arguments made by the minority of scholars who defend felony murder. Second, they demonstrate to legislators*

---

<sup>†</sup> The *American Criminal Law Review* has not independently reviewed the data and analyses described herein. Data on file with author.

\* Associate Professor of Law, University of Denver Sturm College of Law. I would like to thank Guyora Binder, Jay Brown, Asha Brundage-Moore, Bernard Chao, Alan Chen, Julianne Cramer, Brenner Fissell, Rashmi Goel, Aya Gruber, Tim Holbrook, Elizabeth Jordan, Sam Kamin, Kristen Kennedy, Miriam Kerler, Nancy Leong, Andrea Lewis Hartung, Kelly Loper, Kevin Lynch, Justin Marceau, Luke McConnell, Dan Meyer, Govind Persad, Laura Rovner, Laurent Sacharoff, Sarah Schindler, Bruce Smith and Cassandra Weidner for their attendance at workshops, insights, and research assistance. © 2025, Ian P. Farrell.

*that abolishing felony murder would reflect the moral judgments of their constituents across the political spectrum.*

INTRODUCTION . . . . .	28
I. JUSTIFICATIONS OF PUNISHMENT . . . . .	33
A. <i>A Brief Summary of Justificatory Theories</i> . . . . .	33
B. <i>Justificatory Theories Applied to Felony Murder</i> . . . . .	34
1. Rationales for Felony Murder . . . . .	34
2. Criticisms of Felony Murder . . . . .	36
C. <i>The Relevance of Community Views of Justice and Desert.</i> . . . .	38
II. PRIOR STUDIES OF COMMUNITY SENTIMENT . . . . .	41
A. <i>The Robinson and Darley Study.</i> . . . .	41
1. Summary Description of the Robinson and Darley Study . . . . .	41
2. Results and Conclusions Drawn from the Robinson and Darley Study . . . . .	41
3. Limitations of the Robinson and Darley Study . . . . .	43
B. <i>The Finkel Study.</i> . . . .	46
1. Summary Description of the Finkel Study . . . . .	46
2. Results and Conclusions Drawn from the Finkel Study . . . . .	46
3. Comparing the Finkel Study with the Robinson and Darley Study . . . . .	47
4. Limitations of the Finkel Study . . . . .	48
III. FELONY MURDER IN COLORADO AND MARYLAND . . . . .	49
A. <i>Felony Murder in Colorado.</i> . . . .	49
1. Colorado Felony Murder Before 2021 . . . . .	49
2. Felony Sentencing in Colorado . . . . .	50
3. Colorado’s Felony-Murder Reform . . . . .	55
B. <i>Felony Murder in Maryland</i> . . . . .	55
IV. THE COLORADO STUDY . . . . .	58
A. <i>The Colorado Study Design.</i> . . . .	58
1. The Scenarios . . . . .	60
i. <u>Felony-Murder Scenario #1: Vending Machine Burglary</u> . . . . .	60
ii. <u>Felony-Murder Scenario #2: Home Burglary Accomplice</u> . . . . .	60
iii. <u>Felony-Murder Scenario #3: Armed Robbery Accomplice</u> . . . . .	61
iv. <u>Felony-Murder Scenario #4: Armed Robbery Trigger Person</u> . . . . .	61
v. <u>Felony-Murder Scenario #5: Carjacking Bystander</u> . . . . .	62
vi. <u>Felony-Murder Scenario #6: Carjacking Accomplice</u> . . . . .	63
vii. <u>Intentional Killing Scenario #1: Adultery</u> . . . . .	63

viii.	<u>Intentional Killing Scenario #2: Complaining . . . .</u>	64
ix.	<u>Intentional Killing Scenario #3: Lying in Wait. . . .</u>	64
2.	The Survey Questions . . . . .	64
B.	<i>The Colorado Study Results.</i> . . . .	65
1.	Judgments About Desert—All Felony-Murder Scenarios . . .	65
2.	Judgments About Desert—Individual Felony-Murder Scenarios. . . . .	67
i.	<u>Comparisons Among the Felony-Murder Scenarios</u>	68
ii.	<u>Intentional Killing Scenarios.</u> . . . . .	72
iii.	<u>Comparing Felony Murder with Intentional Killing</u>	73
iv.	<u>Comparing Felony Murder with Colorado Sentencing.</u> . . . . .	73
3.	Judgments About Desert by Democrats and Republicans . . .	76
4.	Knowledge of the Law . . . . .	79
V.	THE MARYLAND STUDY . . . . .	81
A.	<i>The Maryland Study Design</i> . . . . .	81
1.	The Scenarios . . . . .	82
i.	<u>Felony-Murder Scenario #1: Burning Down Shed. . .</u>	82
ii.	<u>Felony-Murder Scenario #2: Burglary Accomplice . .</u>	82
iii.	<u>Felony-Murder Scenario #3: Unarmed Robbery. . .</u>	83
iv.	<u>Felony-Murder Scenario #4: Armed Robbery Trigger Person</u> . . . . .	83
v.	<u>Felony-Murder Scenario #5: Run Over . . . . .</u>	83
vi.	<u>Felony-Murder Scenario #6: Carjacking Accomplice</u>	84
vii.	<u>Intentional Killing Scenarios—Adultery, Complaining, and Lying in Wait.</u> . . . . .	84
2.	The Survey Questions . . . . .	85
B.	<i>The Maryland Study Results</i> . . . . .	85
1.	Judgements About Desert—All Felony-Murder Scenarios	85
2.	Judgments About Desert—Individual Felony-Murder Scenarios. . . . .	87
i.	<u>Comparisons Among the Felony-Murder Scenarios</u>	87
ii.	<u>Intentional Killing Scenarios.</u> . . . . .	89
iii.	<u>Comparing Felony Murder with Intentional Killing</u>	90
iv.	<u>Comparing Felony-Murder Results with Maryland Sentencing.</u> . . . . .	90
3.	Judgments About Desert by Democrats and Republicans .	92
4.	Comparing the Maryland and Colorado Results . . . . .	95
5.	Knowledge of the Law . . . . .	98
CONCLUSION.	. . . . .	99

APPENDIX A—QUESTIONS AND ANSWER OPTIONS FOR EACH SCENARIO PRESENTED  
IN COLORADO STUDY . . . . . 100

APPENDIX B—QUESTIONS AND ANSWER OPTIONS FOR EACH SCENARIO PRESENTED  
IN MARYLAND STUDY . . . . . 102

APPENDIX C—COLORADO STUDY DEMOGRAPHIC INFORMATION . . . . . 104

APPENDIX D—MARYLAND STUDY DEMOGRAPHIC INFORMATION . . . . . 107

INTRODUCTION

On an August night in Miami, Sadik Baxter and his friend O’Brian Oakley spent several hours enjoying free drinks and losing their money at the blackjack table in a local casino. After midnight, Sadik suggested they recoup some of their losses by stealing from cars in a wealthy neighborhood nearby. Shortly after, O’Brian sat in his car while Sadik broke into an SUV and stole a pair of sunglasses and loose change. The vehicle’s owner saw Sadik and called the police, who arrived promptly. Sadik was arrested, handcuffed, and placed in a patrol car. O’Brian, meanwhile, attempted to get away. He led the police on a high-speed chase which ended when O’Brian sped through a red light and collided with two cyclists eighteen minutes after Sadik’s arrest. Both cyclists died.<sup>1</sup> Sadik and O’Brian were both convicted of two counts of first-degree murder and sentenced to life without the possibility of parole.<sup>2</sup>

That Sadik was guilty of first-degree murder despite having neither killed nor intended to kill the victims—and despite being securely in police custody miles away at the time—is due to the felony-murder rule. Florida is one of forty-seven states that include felony murder as part of their criminal law.<sup>3</sup> While the precise parameters of felony murder vary from jurisdiction to jurisdiction, the rule broadly provides that if someone is killed in the course of a felony, the perpetrator is guilty of murder.

The felony-murder rule is a ubiquitous yet unique and anomalous rule of American criminal law. It is ubiquitous in that all but three American jurisdictions have a version of felony murder. The rule is uniquely American in that virtually no

1. See, e.g., Sarah Stillman, *Sentenced to Life for an Accident Miles Away*, NEW YORKER (Dec. 11, 2023), <https://www.newyorker.com/magazine/2023/12/18/felony-murder-laws; Sadik, Miles Away in Handcuffs, Knew Nothing of the Fatal Crash>, THE FELONY MURDER REPORTING PROJECT, <https://felonymurderreporting.org/stories/sadik-baxter/> (last viewed Feb. 2, 2024).

2. Baxter’s conviction was upheld on appeal per curiam without a written opinion. See *Baxter v. State*, No. 4D20-749, 2021 WL 830087 (Fla. Dist. Ct. App. Mar. 4, 2021).

3. Two states, Hawaii and Kentucky, have passed legislation abolishing the felony-murder rule. A third state, Michigan, has abandoned the rule by judicial decision. See James 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 n.19 (1994).

jurisdiction outside the United States imposes felony-murder liability.<sup>4</sup> The felony-murder rule is also anomalous because it runs contrary to the fundamental tenet of criminal law that punishment should be predicated on, and proportional to, the “guilty mind,” i.e., *mens rea*, of the perpetrator. The relaxed *mens rea* requirements for felony murder extend the scope of murder to cover situations that do not intuitively deserve either the imprimatur of a murder conviction or the severe punishment that is imposed for such a conviction. These include cases, like *Sadik Baxter’s*, where the defendant is in police custody when the victims were killed;<sup>5</sup> cases involving teenagers whose friends were killed by the alleged felony victims;<sup>6</sup> cases where the victim was killed by police officers;<sup>7</sup> cases in which the victim died of a heart attack;<sup>8</sup> and other egregious examples too numerous to mention.

Courts and legislatures have attempted to avoid the unduly harsh consequences of the felony-murder rule by creating various limits on the scope and application of the rule. These include applying the felony-murder rule only when the underlying felony is inherently dangerous,<sup>9</sup> when the victim was killed by one of the felons,<sup>10</sup> and when the underlying felony was not assaultive in nature.<sup>11</sup>

---

4. The felony-murder rule, initially a creature of the common law, has been formally abolished in nearly all of the common law jurisdictions outside the United States. See NAZGOL GHANDNOOSH, EMMA STAMMEN & CONNIE BUDACI, THE SENTENCING PROJECT, FELONY MURDER: AN ON-RAMP FOR EXTREME SENTENCING 8 (2022), <https://www.sentencingproject.org/app/uploads/2023/10/Felony-Murder-An-On-Ramp-for-Extreme-Sentencing.pdf> (noting that the United Kingdom and several other Commonwealth nations have abolished the rule). The rule remains on the books in the Australian state of New South Wales. See *Crimes Act 1900* (NSW) s 18(1)(a) (stating that a person is guilty of murder if they cause the death of another person “in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years”).

5. See, e.g., *Auman v. People*, 109 P.3d 647, 650–51 (Colo. 2005) (felony-murder rule applied when defendant was in police custody for home burglary when co-felon killed police officer).

6. For example, in Illinois, five teenagers were charged with felony murder when, together with a sixth teenager, they tried to steal a car and the owner of the vehicle shot the sixth teenager in the head. See Jobi Cates, *Lake County Case Shows Why Illinois Should Abolish the Felony Murder Rule*, CHI. SUN-TIMES (Aug. 15, 2019), <https://chicago.suntimes.com/2019/8/15/20807715/felony-murder-rule-illinois-gurnee-teens-lake-county-restore-justice-jobi-cates>.

7. See generally Guyora Binder & Ekow N. Yankah, *Police Killings as Felony Murder*, 17 HARV. L. & POL’Y REV. 157 (2022) (collecting examples of such cases).

8. See, e.g., *People v. Stamp*, 82 Cal. Rptr. 598, 601 (Cal. Ct. App. 1969) (defendant convicted of felony murder when victim died of a heart attack twenty minutes after armed robbery); *Stewart v. State*, 500 A.2d 676, 677 (Md. Ct. Spec. App. 1985) (defendant convicted of felony murder when the victim died of fright-induced heart failure after armed robbery).

9. See, e.g., *People v. Howard*, 104 P.3d 107, 108 (Cal. 2005) (holding that driving with a wanton disregard for safety while fleeing police is not an inherently dangerous felony as required for felony murder under CAL. PENAL CODE § 187(a)).

10. See, e.g., *State v. Sophophone*, 19 P.3d 70, 77 (Kan. 2001) (holding that the defendant was not guilty of felony murder because the victim was killed by a police officer and not one of the participants in the felony).

11. See, e.g., *People v. Moran*, 158 N.E. 35, 36 (N.Y. 1927) (holding that the predicate felony for felony murder “must be one that is independent of the homicide and of the assault merged therein, as, e.g., robbery or larceny or burglary or rape”).

Most contemporary commentators argue, however, that the limitations placed on felony murder by courts and legislatures have not sufficiently curbed the doctrine's excesses and therefore that felony murder, in any of its current forms, is morally unjustified.<sup>12</sup> Commentators have also criticized the felony-murder rule because it contributes to mass incarceration<sup>13</sup> and is disparately applied to people of color,<sup>14</sup> youthful offenders,<sup>15</sup> and women.<sup>16</sup> Yet, the felony-murder rule has thus far weathered the storm, remaining on the books in almost every jurisdiction despite sustained criticism. Recently, several states enacted reforms that further narrow the scope of felony murder,<sup>17</sup> but so far only three jurisdictions have abandoned the rule.<sup>18</sup>

This Article presents and analyzes the results of two novel empirical studies that support abolishing felony murder. In the studies, written surveys were given to

---

12. See, e.g., MODEL PENAL CODE § 210.2 cmt. 6 (AM. L. INST., Official Draft and Revised Comments 1980); SAMUEL H. PILLSBURY, JUDGING EVIL 106–08 (1st ed. 1998); Charles Liebert Crum, *Causal Relations and the Felony-Murder Rule*, 1952 WASH. U. L.Q. 191, 203–10 (1952); George P. Fletcher, *Reflections on Felony-Murder*, 12 SW. U. L. REV. 413, 415–16 (1981); Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 706–08 (1993); Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 695–97 (1994); H.L. Packer, *Criminal Code Revision*, 23 U. TORONTO L.J. 1, 3–4 (1973); Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 490–91 (1985); Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1498–99, 1499 n.2 (1974). Professor Binder summarizes the prevailing scholarly view as follows:

Legal scholars are almost unanimous in condemning felony murder as a morally indefensible form of strict liability. Most are convinced it is an anomaly, a primitive relic of medieval law that unaccountably survived the Enlightenment and the nineteenth-century codification of criminal law. Some will concede that modern “reforms” have ameliorated the doctrine, but they regard these rules as pearl earrings on a pig, merely ornamenting an essentially barbaric principle of liability without fault. Most criminal law scholars have assumed there is nothing to say on behalf of the felony murder doctrine, no way to rationalize its rules to the lawyers who will apply it, and no reforms worth urging on courts and legislatures short of its utter abolition.

Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965, 966–967 (2008) (footnotes omitted).

13. See, e.g., GHANDNOOSH ET AL., *supra* note 4, at 1.

14. See, e.g., G. Ben Cohen, Justin D. Levinson & Koichi Hioki, *Racial Bias, Accomplice Liability, and the Felony Murder Rule: A National Empirical Study*, 101 DENV. L. REV. 65, 91 (2023); DAVID C. PYROOZ, DEMOGRAPHICS, TRENDS, AND DISPARITIES IN COLORADO FELONY MURDER CASES: A STATISTICAL PORTRAIT 2 (2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4527501](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4527501).

15. See, e.g., PYROOZ, *supra* note 14, at 2, 7–8.

16. See, e.g., ASHLEY NELLIS, THE SENTENCING PROJECT, IN THE EXTREME: WOMEN SERVING LIFE WITHOUT PAROLE AND DEATH SENTENCES IN THE UNITED STATES 10 (2021), <https://www.sentencingproject.org/app/uploads/2022/08/In-the-Extreme-Women-Serving-Life-without-Parole-and-Death-Sentences-in-the-United-States.pdf>.

17. See, e.g., S.B. 1437, 2018 Leg., Reg. Sess. (Cal. 2018) (limiting, inter alia, the felony-murder liability of accomplices to those who assisted the actual killer in the commission of the murder with the intent to kill); H.B. 3653, 101st Gen. Assemb., 2d Reg. Sess. (Ill. 2019) (removing felony-murder liability unless a felony participant, not a third-party, causes the victim's death); S.B. 21-124, 73rd Gen. Assemb., Reg. Sess. (Colo. 2021) (changing felony murder from first-degree to second-degree murder and requiring that one of the felony participants cause the victim's death).

18. See *supra* note 3.

approximately five hundred residents each of Colorado and Maryland.<sup>19</sup> These states were chosen because, at the time each study was conducted, the relevant state legislatures were considering felony-murder reform bills. The purpose of conducting the study in that context was to provide the legislatures with information about community moral attitudes towards felony murder that was heretofore unavailable. The Colorado legislature passed its felony reform bill, which reduced felony murder from first-degree to second-degree murder.<sup>20</sup> The Maryland reform bill, which proposed restricting felony murder to those at least 25 years old, was withdrawn by its sponsor.<sup>21</sup>

The survey pools were selected by Qualtrics to be representative of each state's demographics with respect to race, gender, and political preferences. Participants in each survey were presented with six vignettes describing situations that would constitute felony murder under that state's laws at that time. To compare the participants' attitudes to felony murder and intentional murder, they were also presented with three examples of intentional murder.

Four questions accompanied each vignette.<sup>22</sup> Two of the questions probed the participants' *knowledge* of their state's law. Specifically, participants were asked what crimes they believed had been committed in the situation described, under the current law, and what punishment they believed the law would impose. The other two questions asked the participants to apply their *sense of justice* and report what the actor in each scenario *deserved* as a conviction and punishment.

These surveys are the most extensive empirical studies conducted to date on community attitudes towards felony murder. They are the first to address both community knowledge and moral judgments of felony murder, the first to identify and compare the attitudes of participants with different political views, and the first to present study participants with a range of felony-murder examples based on different triggering felonies—thus providing a more fine-grained and comprehensive understanding of community attitudes than single-scenario studies.

---

19. The Colorado study, conducted in February 2020, was funded by a Hughes Pilot Project Grant. The Maryland study was conducted in November 2023 with financial support provided by the Maryland Alliance for Justice Reform.

20. See Colo. S.B. 21-124, <https://leg.colorado.gov/bills/sb21-124>. The results of the Colorado study were presented to the Colorado Senate Judiciary Committee during its hearing on the proposed bill amending the felony-murder rule, on March 18, 2021. *Amended Felony-Murder Rule: Hearing on S.B. 21-124 Before the S. Comm. on the Judiciary*, 73rd Gen. Assemb., 1st Reg. Sess. (Colo. 2021), (statement of Sen. Pete Lee, Member, S. Comm. on the Judiciary), audio available at <https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20240217/41/11143> (last visited Feb. 17, 2025). The results were also presented during a hearing of the Colorado House Judiciary Committee, on the same bill, on April 7, 2021. *Amended Felony-Murder Rule: Hearing on S.B. 21-124 Before the H. Comm. on the Judiciary*, 73rd Gen. Assemb., 1st Reg. Sess. (Colo. 2021) (statement of Rep. Mike Weissman, Member, H. Comm. on the Judiciary), audio available at <https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20240217/29/11394> (last visited Feb. 17, 2025).

21. See S.B. 0652, 2023 Gen. Assemb., Reg. Sess. (Md. 2023), <https://mgaleg.maryland.gov/mgawebsite/Legislation/Details/SB0652?ys=2023RS>.

22. To view the survey questions used, see *infra* Appendices A and B.



The results of the two studies were striking.<sup>23</sup> Across both states, very few study participants correctly identified the crime and punishment for felony murder in their state. More importantly, in both states there was an overwhelming consensus that felony murder is morally unjustified. More than nine in ten of the study participants found the felony-murder rule applicable in their respective states morally excessive.

Most surprisingly, there was minimal substantial difference between Democrats and Republicans on these issues. Survey respondents, from across the political spectrum, rejected the felony-murder rule (and its associated harsh punishment) as unjust and undeserved, suggesting the community support for legislative reform.

Furthermore, not only did the vast majority of survey participants believe the felony-murder rule was unjust, they also considered its punishment grossly excessive. In Colorado, the median sentence participants believed felony-murder perpetrators deserved was four years,<sup>24</sup> and 20% of study participants said that the perpetrators deserved less than one year in prison. In other words, *seven times* as many survey respondents believed the perpetrators deserved one year or less in prison (the sentence typically imposed for misdemeanors<sup>25</sup>) than believed the perpetrators deserved life without the possibility of parole (the sentence imposed under Colorado law at that time). In Maryland, the median sentence participants selected was seven years,<sup>26</sup> while 25% of study participants said the perpetrators deserved less than one year in prison.

The Article proceeds as follows. Part I outlines the theoretical justifications of punishment generally and how they have been marshalled both for and against felony murder. Part I also argues that the empirical data about people's knowledge about and moral judgement of felons is relevant to the debate about whether felony murder is morally justified or should be abolished. Part II describes the findings of two earlier empirical studies of community judgments about felony murder and discusses their limitations. Part III summarizes the felony-murder rule as it applies in Colorado and Maryland. Parts IV and V explain the methodology of the Colorado and Maryland studies and present the studies' results. The Article then concludes that these results support abolishing felony murder and provides some proposals for legislative change.

---

23. For a detailed analysis of the study results, see *infra* Part IV, Part V.

24. The 95% confidence interval for this median was [3, 5]. That is, there is a 95% likelihood that the median for the Colorado population as a whole is between 3 and 5 years in prison.

25. See, e.g., *Lange v. California*, 594 U.S. 295, 305 (2021) (“[C]alling an offense a misdemeanor usually limits prison time to one year.”).

26. The 95% confidence interval for this median was [6, 8].



## I. JUSTIFICATIONS OF PUNISHMENT

### A. *A Brief Summary of Justificatory Theories*

Legal punishment is uniquely in need of moral justification because it uses the coercive apparatus of the state to intentionally impose a burden on individuals. Several dimensions of punishment demand such justification—including why we have a system of punishment, who should be punished under that system, and what that punishment should be.<sup>27</sup> For the purposes of this Article, I assume that the state is morally justified in maintaining a system of punishment and imposing some degree of punishment for felony murder. In other words, the key justificatory issue is how much punishment felony murder deserves. The punishment imposed is primarily a period of time in prison but also includes the moral condemnation implicit in being convicted of the crime of murder (and often specifically either first- or second-degree murder).

Moral justifications of punishment fall into three categories: consequentialist or utilitarian theories, retributivist theories, and “mixed theories” that combine both rationales.<sup>28</sup> Consequentialist theories suggest that punishment is justified to the extent that its positive consequences outweigh the burdens imposed. The main benefit of punishment is a reduction in future crime, which consequentialists claim is brought about by some combination of deterrence, incapacitation, and rehabilitation of the punished individual.<sup>29</sup> From this perspective, an amount of punishment is morally excessive either if the benefits attained do not outweigh the burden imposed or if the same benefits could be attained by imposing a lesser burden.

Conversely, retributivists justify punishment by arguing that there is intrinsic value in imposing a burden on wrongdoers.<sup>30</sup> Retributivist theories come in two forms. Positive retributivism holds that desert is both the reason for imposing punishment—that is, justice requires that wrongdoers be punished—and the way to measure how much punishment ought to be imposed—that is, the punishment

---

27. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 1–27 (1st ed. 1968).

28. Steven Sverdlik explains that the idea of desert as a moral “limiting condition”:

[I]ncorporates three claims: (1) if the punishment of an offender is more severe than she deserves, then it is impermissible; (2) an authorized punisher is not obligated to impose any punishment on a deserving offender simply in virtue of the fact that she deserves it; (3) an authorized punisher may use consequentialist considerations to set the level of punishment within the limit set by desert.

Steven Sverdlik, *Desert as a Limiting Condition*, 12 CRIM. L. & PHIL. 209, 210–11 (2018) (internal quotation marks and footnote omitted).

29. See, e.g., Robert Blecker, *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified*, 42 STAN. L. REV. 1149, 1150 (describing incapacitation, deterrence, and rehabilitation as the consequentialist justifications of punishment).

30. See, e.g., MICHAEL S. MOORE, PLACING BLAME: A THEORY OF CRIMINAL LAW 87–88 (1997) (asserting that, from a retributivist point of view, the quintessential justification for punishing a person is that they deserved to be punished for a wrong done).

should be proportional to the wrongdoing.<sup>31</sup> Negative retributivism, on the other hand, provides only a limitation on punishment. According to negative retributivism, desert is a necessary but not sufficient condition for punishment. We are not justified in imposing punishment more severe than what is deserved, but desert by itself does not provide a sufficient reason to punish.<sup>32</sup> Because positive retributivism lacks a positive justification for imposing punishment, it is often employed as a part of a “mixed” theory of punishment.<sup>33</sup> In mixed theories, the consequentialist benefits of punishment provide its rationale and negative retributivism provides a “side-constrain[t]”<sup>34</sup> which prohibits both punishing innocent people and imposing disproportionately excessive punishment, even when these outcomes would create benefits.<sup>35</sup> The crucial common feature of retributivism and mixed theories incorporating negative retributivism is that punishment is morally unjustified if it is greater than what the punished person deserves.<sup>36</sup>

### *B. Justificatory Theories Applied to Felony Murder*

#### 1. Rationales for Felony Murder

Both consequentialist and retributivist rationales have been advanced to justify the felony-murder rule. On the consequentialist side, some scholars have suggested that the felony-murder rule deters the underlying dangerous felony.<sup>37</sup> Given that someone might die during the dangerous felony for reasons outside the offender’s control, the only way to ensure one will not be convicted of and punished for felony murder is not to commit the predicate felony.<sup>38</sup> Just as the remote possibility of randomly winning the lottery incentivizes people to participate in the lottery by buying tickets, felony murder’s chance of punishment deters people from participating in the underlying activity.<sup>39</sup>

---

31. *Id.*; see also Jeffrie G. Murphy, *Legal Moralism and Retribution Revisited*, 1 CRIM. L. & PHIL. 5, 11 (2007) (describing a positive retributivist as “a person who believes that the primary justification for punishing a criminal is that the criminal *deserves* it”).

32. See, e.g., HART, *supra* note 27, at 236–37 (describing desert as a limit on how much punishment is morally justified).

33. See, e.g., Stephen P. Garvey, *Lifting the Veil on Punishment*, 7 BUFF. CRIM. L. REV. 445, 449–51 (2004) (explaining that according to “mixed” theories, a full justification of punishment will rely on both retributive and utilitarian concepts).

34. Mitchell N. Berman, *On the Moral Structure of White Collar Crime*, 5 OHIO ST. J. CRIM. L. 301, 313 (2007) (characterizing consequentialism “side-constrained” by retributivism as the “dominant principle” of Anglo-American criminal law).

35. See Garvey, *supra* note 33, at 449–51.

36. See *id.*

37. See Binder, *supra* note 12, at 983 (criticizing these deterrence rationales).

38. See *id.* at 980–81.

39. See Erin H. Flynn, *Dismantling the Felony-Murder Rule: Juvenile Deterrence and Retribution Post-Roper v. Simmons*, 156 U. PA. L. REV. 1049, 1063–64 (2008).

Other rationales for the felony-murder rule refer to deterring careless conduct during the felony.<sup>40</sup> The law recognizes in many contexts that negligence can be deterred even when the conduct is not intentional.<sup>41</sup> The felony-murder rule could incentivize an offender to monitor their confederates for reckless behavior by holding each responsible for the actions of their confederates.<sup>42</sup> Finally, it may also deter the intentional killer who, in the absence of the felony-murder rule, might believe they can lie and convince a jury that they didn't intend to kill the victim.<sup>43</sup>

The most influential contemporary defender of felony murder on retributivist grounds is Professor Guyora Binder.<sup>44</sup> He argues that “criminal culpability is properly understood as the product of two factors: the harm reasonably expected from an action and the moral worth of the ends for which it is committed.”<sup>45</sup> Felony murder involves culpability along both these dimensions. First, most felony-murder jurisdictions “require negligence indirectly by defining homicide as the foreseeable causation of death.”<sup>46</sup> Second, the decision to commit a felony demonstrates an independent malign purpose:

[F]elony murder liability is deserved for those who negligently cause death by attempting felonies involving (1) violence or apparent danger to life and (2) a sufficiently malign purpose independent of injury to the victim killed. How can merely negligent homicide deserve punishment as murder? Because the felon's additional malevolent purpose aggravates his culpability for causing death carelessly. To impose a foreseeable risk of death for such a purpose deserves severe punishment because it expresses particularly reprehensible values and shows a commitment to put them into action.<sup>47</sup>

---

40. *Id.* at 1063.

41. David Crump, *Reconsidering Felony Murder Rule in Light of Modern Criticisms: Does't the Conclusion Depend upon the Particular Rule at Issue?*, 32 HARV. J.L. & PUB. POL'Y 1155, 1163 (2009).

42. J. Gregory Sidak, *Two Economic Rationales for Felony Murder*, 101 CORNELL L. REV. 51, 51 (2016).

43. See Crump, *supra* note 41, at 1163.

44. Professor Binder is perhaps the most widely published scholar on felony murder, having authored over half a dozen law review articles and the seminal book on the topic. See GUYORA BINDER, *FELONY MURDER* (2012) [hereinafter BINDER, *FELONY MURDER*]; Binder & Yankah, *supra* note 7; Guyora Binder, Brenner Fissell, & Robert Weisberg, *Unusual: The Death Penalty for Inadvertent Killing*, 93 IND. L.J. 549 (2018); Guyora Binder, Brenner Fissell, & Robert Weisberg, *Capital Punishment of Unintentional Felony Murder*, 92 NOTRE DAME L. REV. 1141 (2017) [hereinafter Binder et al., *Capital Punishment*]; Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403 (2011) [hereinafter Binder, *Making the Best*]; Binder, *supra* note 12; Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59 (2004); Guyora Binder, *Felony Murder and Mens Rea Default Rules: A Study in Statutory Interpretation*, 4 BUFF. CRIM. L. REV. 399 (2000). Professor Binder has generally argued, contrary to most scholars, that some version of felony murder is consistent with our moral notions of desert and culpability—at least in theory. In a recent law review article, however, Binder and his co-author describe the racially discriminatory application of felony murder and “urge[] legislatures to abolish felony murder wherever racially disparate patterns of charging can be demonstrated.” Binder & Yankah, *supra* note 7, at 157.

45. BINDER, *FELONY MURDER*, *supra* note 44, at 9.

46. *Id.* at 18; see also *id.* at 23 (“In substance, felony murder laws condition liability on negligence rather than strict liability.”).

47. *Id.* at 8–9.

The combination of these dual culpabilities, according to Binder, means the offender deserves similar punishment to some who intentionally kills.<sup>48</sup>

## 2. Criticisms of Felony Murder

Scholars who defend felony murder on either consequentialist or retributivist grounds are in the minority. Regarding retributivism, most scholars view felony murder as inconsistent with well-established principles of culpability and fault.<sup>49</sup> According to these foundational principles, the amount of punishment an offender deserves is determined by their culpable mental state:

For centuries, courts and legislators have trumpeted the importance of limiting criminal convictions to those “blameworthy in mind,” and of imposing sentences that reflect the extent of an actor’s psychological blameworthiness. “[U]niversal and persistent in mature systems of law,” these mens rea principles are proclaimed to be as fundamental as our belief in an individual’s ability to “choose between good and evil” and “essential if we are to ‘retain the relationship between criminal liability and moral culpability on which criminal justice depends.’”<sup>50</sup>

In other words, where the same harm is caused (in these cases, the death of a human being), “offenses should be graded as more or less serious according to the level of mental fault established.”<sup>51</sup> When death during a felony is accidental, negligent, or even reckless, the offender deserves less punishment than an intentional killer—and certainly less than a premeditated and deliberate killer. “First-degree murder, the most heinous of these offenses, generally requires proof of the most culpable of all mental states—not just malice, but premeditation and deliberation.”<sup>52</sup>

Criticism of the consequentialist justifications of felony murder is equally emphatic. The most common consequentialist justification is based on the rule’s

---

48. See *id.* For examples of other scholars who have ventured to defend the felony-murder rule, see Kevin Cole, *Killings During Crime: Towards a Discriminating Theory of Strict Liability*, 28 AM. CRIM. L. REV. 73, 139–42 (1991); David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL’Y 359, 360–61 (1985). A full critique of the arguments for and against felony murder are beyond the scope of this paper. It suffices for present purposes to note that some contemporary justifications of felony murder are premised on the retributivist notion that the felony-murder offender deserves the same amount of punishment as intentional murderers. As we will see in Parts IV and V *infra*, the results of both the Colorado and Maryland study show that the study participants believed the offenders in the felony-murder examples deserved far less punishment than the offenders in the intentional killing examples.

49. See, e.g., Tomkovicz, *supra* note 3, at 1438.

50. Michael Serota, *Strict Liability Abolition*, 98 N.Y.U. L. REV. 112, 115 (2023) (footnotes omitted) (quoting *Morrisette v. United States*, 342 U.S. 246, 250, 252 (1952); then quoting *Tison v. Arizona*, 481 U.S. 137, 171 (1987) (Brennan, J., dissenting)).

51. Tomkovicz, *supra* note 3, at 1437.

52. *Id.* at 1440.

deterrent effect,<sup>53</sup> but many scholars<sup>54</sup> have argued that the claimed deterrent effect is a delusion that rests on “unrealistic . . . theoretical assumptions.”<sup>55</sup> The single empirical study of felony murder’s deterrent effect concluded that the felony-murder rule reduced neither predicate felonies nor killings.<sup>56</sup>

Even assuming *arguendo* that the consequentialist proponents of felony murder are correct regarding the deterrent effect of imposing severe legal consequences (i.e., a murder conviction and concomitant severe sentence), the felony-murder rule can only have that effect on people who are *aware* of the felony-murder rule.<sup>57</sup> The notion of deterrence presumes knowledge because the prospect of unwanted consequences can only provide someone with a reason to change their behavior if they are aware of them. In other words, all deterrence-based rationales for the felony-murder rule presume that a large segment of the potential felony-committing population are aware of the felony-murder rule. That is, if the felony-murder rule has any plausible deterrent effect, we would expect the majority of participants in the Maryland and Colorado studies to know that the law in each state treated felony-murder offenders (at the time) as first-degree murderers and imposed life sentences.<sup>58</sup> The study results

---

53. See, e.g., Cole, *supra* note 48, at 98 (asserting that deterrence is the most common justification given for the felony-murder rule); Crump & Crump, *supra* note 48, at 370 (noting that deterrence is the most often recognized policy in felony-murder cases).

54. For examples of criticisms of the deterrent effect of felony murder, see Binder et al., *Capital Punishment*, *supra* note 44; MICHAEL TONRY, SENTENCING FRAGMENTS 161, 167 (2016); Aya Gruber, *A Distributive Theory of Criminal Law*, 52 WM. & MARY L. REV. 1 (2010); Nuno Garoupo & Jonathan Klick, *Differential Victimization: Efficient and Fairness Justifications for the Felony-Murder Rule*, 4 REV. L. & ECON. 407, 417 (2008); John Darley, *On the Unlikely Prospect of Reducing Crime Rates by Increasing the Severity of Prison Sentences*, 13 J.L. & POL’Y 189 (2005); Anthony N. Doob & Cheryl Marie Webster, *Sentencing Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143 (2003); Franklin E. Zimrig & Janes Zuehl, *Victim Injury and Death in Urban Robbery: A Chicago Study*, 15 J. LEGAL STUD. 1 (1986); Fletcher, *supra* note 12, at 428; Jeanne H. Seibold, Note, *The Felony-Murder Rule: In Search of a Viable Doctrine*, 23 CATH. LAW. 133, 151–52 (1978); Schulhofer, *supra* note 12, at 1542–43.

55. Serota, *supra* note 50, at 147.

56. Anup Malani, *Does the Felony-Murder Rule Deter? Evidence from FBI Crime Data 5–6* (Paper, 2007), <http://www.nytimes.com/packages/pdf/national/malani.pdf>.

57. See, e.g., Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 953 (2003).

58. It is theoretically possible that while the public as a whole is ignorant of felony murder, the subset of people who would consider committing a predicate felony are aware of the severe punishment imposed for felony murder. From the perspective of empirical research, the first challenge in determining whether this knowledgeable subset exists would be identifying a population of people who would consider committing predicate felonies. The second challenge would be convincing them to take part in a study. We can, however, identify some rough proxies for those with a willingness to commit a predicate felony. One such proxy is having committed a felony in the past. Both the Colorado and Maryland subjects were asked whether they had ever been convicted of a felony (accompanied by assurances of anonymity). Twenty-five Colorado subjects and forty-one Maryland subjects responded that they had been convicted of a felony. None of these Colorado subjects knew the sentence for felony murder under Colorado law. Every one of them believed the sentence to be lower than the actual sentence, with the median range being three to six years. All but three of the Maryland felon subjects believed the sentence for felony murder to be lower than the actual sentence—with just as many Maryland felons believing felony murder would result in no prison time at all as knew the punishment was at least life without parole. The median sentencing range these Maryland subjects believed would apply if they committed felony murder was five to ten years. Over both studies, 95.5% of participants who admitted to prior felony convictions

discussed in Part IV and Part V below show the opposite is true: only a small fraction of the participants in either study were aware of the felony-murder rule.

*C. The Relevance of Community Views of Justice and Desert*

The relationship between community standards of justice and whether a particular punishment is morally justified depends on the theory of morality employed. For some moral theorists, such as communitarians, the argument that community standards of justice are relevant to determining the appropriate punishment for, say, felony murder, is straightforward. Communitarians argue that the communities in which we live do—and should—mold the standards of justice that apply to, and in, those communities.<sup>59</sup> Other moral philosophers argue that moral principles are “universally valid,” that standards of justice are not dependent on or contingent upon a particular community context.<sup>60</sup> Under this conception of justice, the relationship between what a community believes is morally justified and what *is* morally justified, is less obvious.

Nonetheless, even on the view that people’s beliefs and community consensus do not determine whether punishment is morally justified, data about them is nonetheless valuable for a couple of reasons.

The first reason could be described as a kind of philosophical modesty. A societal consensus that theoretical principles of punishment are wrong ought to give the theorist pause. It should make the theorist at least closely consider whether their principles are mistaken. As Robinson and Darley put it:

At the very least though, the community’s views may play a role in testing the derived rules. That is, if a rule derived by desert theorists is judged overwhelmingly by the community to be unjust, such disagreement may cast some doubt upon the accuracy of the rule in assessing a person’s moral blameworthiness, at least suggesting that closer scrutiny of the reasoning behind the rule is required.<sup>61</sup>

In other words, Robinson and Darley do not insist that the theoretical principle, or the rule it produces, should necessarily give way to the community sentiment, no matter how overwhelming.<sup>62</sup> They merely propose that, if nothing else, theorists

---

were unaware of the severe sentence that would be imposed if they committed felony murder. In other words, even the study participants who had been convicted of felonies in the past had very little knowledge of felony murder. These data undercut a claim that those with, say, prior experience with the criminal legal system may have a greater understanding of felony murder. At the very least, the burden is on those claiming that a subset of people know of, and are deterred by, felony murder to provide evidence in support of their claim. In the absence of such evidence, it is reasonable to presume that the people who would consider committing a predicate felony are as ignorant of felony murder as the public writ large—and therefore that felony murder does not have a meaningful deterrent effect.

59. See, e.g., ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (1988).

60. See, e.g., BRIAN BARRY, *JUSTICE AS IMPARTIALITY* 3 (1995) (arguing that liberal egalitarian principles should be universally valid).

61. PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME* 6 (1995).

62. *Id.*



should not dismiss contrary community sentiment lightly.<sup>63</sup> If upon further reflection and analysis, the theorist remains convinced that the rule is morally justified, the appropriate conclusion would be that the community consensus is wrong.<sup>64</sup>

The case for considering community consensus is stronger in the felony-murder context than in the situations addressed by Robinson and Darley. Their reasoning envisages situations where the moral principles derived by theorists *conflict* with the moral consensus of the community. That is not the case with respect to felony murder. The Colorado and Maryland studies show that community moral judgments of felony murder *align* with the general, theoretical principles undergirding criminal law.<sup>65</sup> According to both theory and community consensus, felony murder is unjust. In these circumstances, the moral standards of the community support, and help vindicate, the more abstract theoretical principles. It is the positive law of Colorado and Maryland that conflicts with both abstract principle and community moral standards. The vast majority of scholars have concluded that felony murder is *not* justified by moral principles. If there is also a community consensus against felony murder, there is little justificatory ground for the felony-murder rule to stand on.

The extent to which community views are relevant to whether a punishment is justified may depend on whether the community believes the punishment is too severe or not severe enough. It is perfectly coherent to afford greater weight to a community consensus that a punishment is too severe and should be reduced, than a community consensus that a punishment is too lenient and should be increased. As discussed above, the most persuasive form of retributivism is negative retributivism, either on its own or as part of a mixed theory of punishment. The punishment deserved by the offender, under negative retributivism, acts only as a *limitation* on the amount of punishment that the state may impose. In other words, that scholars or the community believe the offender deserves more punishment than currently

---

63. *Id.*

64. These two analytical approaches—applying the moral justifications of punishment and considering community consensus—are central to the Supreme Court’s “categorical approach” to the Cruel and Unusual Punishment Clause of the Eighth Amendment. In cases involving the death penalty—and, more recently, life without parole for juveniles—the Court considers “objective indicia” of community moral values to determine whether there is a consensus against the challenged punishment practice. *See, e.g.,* Ian P. Farrell, *Strict Scrutiny Under the Eighth Amendment*, 40 FLA. ST. U. L. REV. 853, 859 (2013). But the Court insists that “public perceptions of standards of decency with respect to criminal sanctions are not conclusive” of whether the sanctions are unconstitutionally excessive. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). If there is a national consensus against the challenged punishment, “our own judgment is ‘brought to bear’ by asking whether there is a reason to disagree with the judgment reached by the citizenry and its legislators.” *Atkins v. Virginia*, 536 U.S. 304, 313 (2002) (citation omitted). The Justices bringing to bear their own judgment consists of them “addressing whether the challenged punishment is disproportionate or excessive in light of legitimate penological goals, primarily retribution and deterrence.” Farrell, *supra*, at 872. However, the Court has never clarified which inquiry wins out in the event that they lead to different conclusions. By some stroke of, say, let’s call it luck, “the Court has never been forced to clarify the tension between the two prongs, for they have never led to divergent conclusions.” *Id.* at 876.

65. *See infra* Parts IV.B, V.B.



imposed does not provide a moral justification for increasing the punishment. That justification must come from elsewhere—such as deterrence and other beneficial consequences of imposing the punishment.<sup>66</sup>

There is also a second, more pragmatic, value to considering community attitudes towards a rule such as felony murder. Data on the moral judgments of a legislator's constituents may be far more persuasive to a legislator than arguments derived from fundamental principles of moral philosophy. After all, legislators do not lose their job if they stray too far from moral theory. Showing a legislator that there is a consensus among their constituents—especially constituents of their own party—for abolishing felony murder could persuade them to support reform, or at least reassure them that supporting reform will not cost them at the polls.

James Tomkovicz explains the persistence of the felony-murder rule by speculating that community sentiment is more punitive than scholarly commentary. His goal was “to understand how a rule of law that has been maligned so mercilessly for so long and that is putatively irreconcilable with basic premises of modern criminal jurisprudence has survived and promises to persist.”<sup>67</sup> Tomkovicz argues that the *public's* “[d]ifferent understandings and conceptions of culpability—understandings and conceptions that are not widely accepted by the *scholarly* community—probably underlie and help explain our abiding allegiance to felony-murder.”<sup>68</sup> For example, Tomkovicz claims that the public would be less concerned about imposing an undeserved sentence for an accidental killing during the course of a felony<sup>69</sup> because embedded in “the public consciousness is the idea that felons—by virtue of their choices to engage in felonies—have effectively forfeited any entitlement to close scrutiny of their blameworthiness.”<sup>70</sup> More specifically, “the public’s sense of the punishment that killers in felony-murder contexts deserve is different”<sup>71</sup> from scholars’ judgments of what they deserve.

However, I argue that empirical research shows community sentiment is more lenient towards felony murder than scholars such as Tomkovicz have speculated. As the analysis in Part IV and Part V below show, the survey results provide powerful evidence that the public’s moral judgments align closely with general principles of culpability and liability proposed by scholars—and are concomitantly inconsistent with the felony-murder rule.

---

66. See Sverdlik, *supra* note 28; see also RICHARD FRASE, JUST SENTENCING 26–27 (2013) (arguing that over-punishing is morally worse than under-punishing, and that in some circumstances imposing no punishment for a crime is morally acceptable).

67. Tomkovicz, *supra* note 3, at 1431 (footnote omitted).

68. *Id.* at 1470 (emphasis added).

69. *Id.* at 1474.

70. *Id.* at 1475.

71. *Id.* at 1476.

## II. PRIOR STUDIES OF COMMUNITY SENTIMENT

There are two seminal studies of community attitudes towards felony murder, which were both conducted a generation ago. The first of these empirical studies was conducted by Professors Paul Robinson and John Darley in 1990–91<sup>72</sup> and the second by Professor Norman Finkel in 1993.<sup>73</sup> While the studies employed different methodologies, they each produced results indicating that the community's sense of justice did not align with the law regarding felony murder. Each study nonetheless has limitations and shortcomings which the Colorado and Maryland studies address.

### A. *The Robinson and Darley Study*

#### 1. Summary Description of the Robinson and Darley Study

In Robinson and Darley's thoughtful study, participants were given eleven brief scenarios describing criminal conduct and the death of a victim. Three of these were "control scenarios" in which the perpetrators were guilty of intentional murder, reckless manslaughter, and negligent homicide.<sup>74</sup> The other eight scenarios were examples of felony murder, all involving multiple people committing an armed robbery.<sup>75</sup> The scenarios described eight different variations of the armed robbery, with each scenario altering who killed the victim and each participant's state of mind.<sup>76</sup>

The participants' responses to the control scenarios provided a "baseline liability that [their] respondents assign[ed] for standard murder (scenario 1), for manslaughter (scenario 2), and for negligent homicide (scenario 3)."<sup>77</sup> The results for the felony-murder scenarios were then "compared to the three controls to determine which of those controls the subjects see each felony-murder scenario as more akin to, murder, manslaughter, or negligent homicide."<sup>78</sup> The felony-murder scenario results were also compared to each other to determine the effect of specific features of felony murder—such as being the principal versus an accomplice, and being negligent versus reckless—on the participants' moral judgments of the perpetrator's liability.

#### 2. Results and Conclusions Drawn from the Robinson and Darley Study

Beginning with the scenarios in which the participants were asked to evaluate the liability of the principal (that is, the felon who caused the victim's death), the

---

72. See ROBINSON & DARLEY, *supra* note 61, at 10.

73. NORMAN J. FINKEL, COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW 119 (1995).

74. See ROBINSON & DARLEY, *supra* note 61, at 171–72.

75. *Id.*

76. *Id.* at 172–79.

77. *Id.* at 171.

78. *Id.*

respondents assigned a liability that was significantly lower than the liability they assigned for intentional murder, but higher than the liability they assigned for a negligent killing in the absence of a felony.<sup>79</sup>

The authors of the study infer from these results that:

These sentences [for the felony-murder principals] are sufficiently greater than the baseline for a negligent killing to suggest that there is some support for the notion at the heart of the felony-murder rule—that a killing in the course of a felony ought to be punished more severely than it would without the felonious context . . . . The data pattern suggests that, from our respondents' view, the felony-murder rule is on the right track but simply goes too far.<sup>80</sup>

The difference in results for the actual killer versus an accomplice is inconsistent with the felony-murder rule. The authors point out that “while the doctrine treats the accomplice exactly like a murderer, the subjects impose liability somewhat less than they would for manslaughter.”<sup>81</sup> According to Robinson and Darley, this “accomplice discount” applied by the study participants is not unique to felony murder. “It reflects the view of the subjects, manifested in several studies, that the accomplice generally deserves less liability than the perpetrator, all other things being equal.”<sup>82</sup> Therefore, the lower liability for accomplices does not require abolishing the doctrine, provided that the punishment for felony murder is less than for murder and that the criminal code treated accomplices as less liable than principals across all offenses, including felony murder. That is, “[i]f the code were to adopt a standard ‘accomplice discount,’ felony-murder accomplices could remain within the rule; the accomplice would be held at some level of liability less than that of the ‘felony-manslaughter’ perpetrator.”<sup>83</sup>

In the felony-murder scenarios where an innocent bystander caused the victim's death, the liability assigned to accomplices was again lower than the liability for murder<sup>84</sup>—but “[did] not differ significantly from the baseline for a negligent killing.”<sup>85</sup> The authors suggest that “the liability levels given by the subjects in cases of killings of co-felons by innocent bystanders may be obtained in settings in which the code is applied without the felony-murder rule. The rule is needed, in the subjects' view, only in cases of negligent killings of innocents by felons.”<sup>86</sup>

Robinson and Darley acknowledge that the results of the study could be consistent with either abolishing or revising the felony-murder rule.<sup>87</sup> An amended

---

79. *See id.* at 178.

80. *Id.*

81. *Id.* at 180.

82. *Id.*

83. *Id.*

84. *Id.* at 172–73, 179.

85. *Id.* at 179.

86. *Id.* Note that these results support the “agency rule,” which limits liability for felony murder to situations where the death was caused by either the defendant or their accomplice.

87. *Id.* at 180–81.

version of the felony-murder rule would reflect the community's sense of justice provided it had the following features:

1. The rule punished the crime as manslaughter, not murder.
2. The doctrine included a rule which limits application of felony murder to situations in which the victim is killed by the defendant or a co-felon.
3. The criminal code included a standard accomplice discount that applied to felony murder which varied with the level of the accomplice's culpability and degree of contribution.<sup>88</sup>

### 3. Limitations of the Robinson and Darley Study

The first issue to note about this “amended version” of the felony-murder rule is that it is not a felony-murder rule—it is a felony-manslaughter rule. Robinson and Darley suggest abolishing, rather than amending, the felony-murder rule and replacing it with a felony-manslaughter rule.

A felony-manslaughter rule is both less objectionable than a felony-murder rule from the perspective of philosophical justifications of punishment, and far less severe in the sentences it would impose on people convicted under the rule. For example, in Colorado, the sentencing range for second-degree murder (which includes felony murder) is sixteen to forty-eight years,<sup>89</sup> whereas the sentencing range for manslaughter is four to twelve years.<sup>90</sup> These are vastly different punishments; for example, the minimum available sentence for felony murder is four years longer than the maximum sentence that would be available under a replacement felony-manslaughter rule. Similarly, in Maryland, the punishment for first-degree murder (which includes felony murder<sup>91</sup>) is life with or without the possibility of parole,<sup>92</sup> while the punishment for manslaughter is a sentence not exceeding ten years in prison.<sup>93</sup>

Robinson and Darley's analysis also appears not to incorporate the role of the triggering felony in their assessment of liability. Each of the felony-murder scenarios in their study involves a death that occurs during the course of an armed robbery. Some of the scenarios, as discussed above, involve a negligent killing by one of the felons during the armed robbery. The responses by study participants to

---

88. *Id.* at 181.

89. Felony murder is a class 2 felony in Colorado. COLO. REV. STAT. § 18-3-103(1)(b) (West 2024). A class 2 felony generally carries a minimum sentence of eight years and a maximum of twenty-four years. *Id.* § 18-1.3-401(1)(a)(V.5)(A). However, because felony murder is a “crime of violence,” it carries a minimum sentence of sixteen years and a maximum sentence of forty-eight years. *Id.* § 18-1.3-406(1)(a).

90. Manslaughter is a class 4 felony in Colorado. *Id.* § 18-3-104(2). A class 4 felony generally carries a minimum sentence of two years and a maximum of six years. *Id.* § 18-1.3-401(1)(a)(V.5)(A). However, since felony murder is a “crime of violence,” it carries a minimum sentence of four years and a maximum sentence of twelve years. *Id.* § 18-1.3-406(1)(a).

91. MD. CODE ANN., CRIM. LAW § 2-201(a)(4) (West 2024).

92. *Id.* § 2-201(b)(1).

93. *Id.* § 2-207(a)(1).

these scenarios were compared to the “baseline” negligent homicide responses to determine the difference in liability, if any, between negligent homicide *per se* and negligent homicide during the armed robbery. As outlined above, Robinson and Darley (correctly) conclude that the study participants believed the negligent killing during the armed robbery deserved greater punishment than the baseline negligent homicide.<sup>94</sup>

This does not necessarily mean, however, that the community’s sense of justice requires any form of felony-murder or felony-manslaughter rule to accommodate for the difference in liability. The difference may be accommodated by the punishment for the underlying felony, in this case, armed robbery. Robinson and Darley’s study does not compare the moral attitudes towards an armed robbery with a negligent killing to an armed robbery *without* a negligent killing. It may be that the difference between the two is not significant.

While the Colorado and Maryland studies did not ask the participants’ moral evaluations of predicate felonies such as armed robbery, the studies do allow comparison between the subjects’ moral judgment on felony murder to the relevant state’s punishment of the predicate felony. The central issue of this Article is whether the felony-murder rule should be maintained, amended, or abolished. This Article does not propose wholesale changes to the entire criminal code, so it makes sense to compare the participants’ responses to the negligent-killing felony-murder scenarios to the extant punishment for armed robbery (with or without a negligent killing) in the absence of the felony-murder rule.

Taking Colorado as an example, the armed robberies described in the scenarios would be punishable by a minimum sentence of ten years and a maximum sentence of thirty-two years.<sup>95</sup> This sentencing range is adequate to match the sentences imposed by the study participants for negligent felony-murder principles (22.5 years and 27.0 years). However, the sentencing range is excessive when applied to negligent felony-murder accomplices, since the minimum sentence is substantially greater than the sentence imposed by the study participants (6.6 years and 9.4 years).

But this is still not enough to accurately compare the moral judgments of study participants with how the scenarios would be treated, under existing law, in the absence of any felony-murder or felony-manslaughter rule. The Colorado Criminal Code mandates consecutive sentencing in these circumstances.<sup>96</sup> The punishment

---

94. See ROBINSON & DARLEY, *supra* note 61, at 178.

95. Aggravated robbery “is a class 3 felony and is an extraordinary risk crime that is subject to the modified presumptive sentencing range specified in section 18-1.3-401(10).” COLO. REV. STAT. § 18-4-302(3) (West 2024). This modified sentencing range is a minimum of four years in prison and a maximum of sixteen years in prison. *Id.* § 18-1.3-401(1)(a)(V.5)(A), (10). But since aggravated robbery is also a crime of violence, the sentencing range is modified again to a minimum sentence of ten years in prison and a maximum of thirty-two years in prison. *Id.* § 18-1.3-406(1)(a) (West 2024).

96. The code requires consecutive sentencing if the defendant is “convicted of two or more separate crimes of violence arising out of the same incident.” *Id.* § 18-1.3-406(1)(a) (West 2024).

for negligent homicide—two to six years in prison—would have to be added to the punishment for armed robbery. That is, under existing Colorado law, but in the absence of the felony-murder rule, the scenarios would be punishable by a minimum of twelve years and a maximum of thirty-eight years in prison. This sentencing range amply accommodates the moral values of the study participants; adding any form of a felony-murder or felony-manslaughter rule into the mix would result in grossly excessive punishments from what the participants considered was deserved.<sup>97</sup>

The high sentences imposed for armed robbery indicate a limitation on Robinson and Darley's study. All the felony-murder scenarios had armed robbery as the predicate felony. This was necessary for them to identify the data they were looking for. To determine the effect of factors such as whether the defendant was the principal or an accomplice, and whether the killing was negligent or reckless, other variables had to remain constant across the scenarios—including the underlying felony. This approach, however, limits the degree to which the study provides an overview of how people view the liability involved in felony murder generally. Armed robbery is treated by most criminal codes as among the more serious criminal offenses, as indicated by the severe sentences imposed. Some other offenses that trigger the felony-murder rule are considered less serious by state criminal codes. It is reasonable to hypothesize that these other triggering felonies are also considered less serious by members of the community. Consequently, it is also reasonable to hypothesize that community members will consider unintentional killings during these predicate felonies as deserving lesser punishment than unintentional killings in the course of an armed robbery. The Colorado and Maryland studies show that the liability assigned to felony murder varies a great deal depending on the predicate felonies—though regardless of the predicate felony described, none of the felony-murder examples were adjudged to deserve the punishment imposed on them under Colorado and Maryland law.

---

97. The penalties for armed robbery and negligent homicide are lower in Maryland than in Colorado. Under the Maryland criminal code, robbery with a dangerous weapon is punishable by a term of imprisonment not exceeding twenty years. MD. CODE ANN., CRIM. LAW § 3-403(b) (West 2024). The maximum sentence permissible for armed robbery is therefore slightly less than the sentence imposed for the negligent felony-murder principles in the Robinson and Darley study, but more than twice the sentence imposed by the study participants for negligent felony-murder accomplices. Crucially, criminally negligent killings are manslaughter in Maryland. *See, e.g., State v. Thomas*, 211 A.3d 274, 286 (Md. App. Ct. 2019) (explaining that Maryland's statutory manslaughter offense incorporates the common law offense of gross negligence manslaughter). The sentence for manslaughter is imprisonment not exceeding ten years. MD. CODE ANN., CRIM. LAW § 2-207(a)(1) (West 2024). And Maryland law allows consecutive sentencing for multiple offenses. *See Kaylor v. State*, 400 A.2d 419, 422 (Md. App. Ct. 1979) ("This Court has long adhered to the position that consecutive sentences are a proper exercise of the trial court's discretion."); *see also Malee v. State*, 809 A.2d 1 (Md. Ct. Spec. App. 2002) (upholding a 450-year sentence for thirty-one counts of sexual offense and child abuse). Thus, a sentence of up to thirty years is available for a criminally negligent killing during an armed robbery—encompassing the penalty imposed by the study participants—without the application of any felony-murder or felony-manslaughter rule.

### *B. The Finkel Study*

#### 1. Summary Description of the Finkel Study

Professor Finkel gauged community sentiment towards felony-murder by running a series of mock juror experiments.<sup>98</sup> Just as in the Robinson and Darley study, the subjects were presented with different versions of an armed robbery during which a person was killed.<sup>99</sup> The robbery crew consisted of a triggerman, a sidekick present when the victim was killed, a getaway driver, and a lookout.<sup>100</sup> The inclusion of four co-felons with different roles allowed the experimenters to determine whether the mock jurors would assign different liability among the accomplices with greater and lesser involvement in the acts leading up to the killing.<sup>101</sup> The versions of the robbery differed in each scenario with respect to the culpability of the triggerman. For example, in one scenario, the store clerk died of a heart attack upon seeing the gun;<sup>102</sup> in another, the gun went off during a struggle between the clerk and one of the perpetrators;<sup>103</sup> and in yet another scenario, the triggerman heinously killed the clerk after the clerk grabbed for the gun.<sup>104</sup>

In each case, all the participants in the robbery were unquestionably guilty of murder under the felony-murder rule.<sup>105</sup> Therefore, an acquittal from murder would signal moral disagreement with the felony-murder rule.<sup>106</sup>

#### 2. Results and Conclusions Drawn from the Finkel Study

The data revealed both that accomplices were considered less culpable than the triggerman and that culpability varied among the accomplices. The getaway driver was acquitted 89% of the time, the lookout 40%, the sidekick 15%, and the triggerman only 2% of the time.<sup>107</sup> In other words, the mock jurors assigned substantially different levels of culpability to each participant in the felony. The triggerman was adjudged most culpable, followed by the sidekick and then the lookout, with the getaway driver considered the least culpable.<sup>108</sup> This contrasts with the felony-murder rule, which treats all felony participants as equally culpable for the victim's killing.

As "the killing[s] grew more brutal"<sup>109</sup> in each scenario, the guilty verdicts increased for the triggerman, but did not increase for any of the accomplices. That

---

98. FINKEL, *supra* note 73, at 164–165.

99. *See id.*

100. *Id.* at 164.

101. *See id.* at 166.

102. *Id.* at 164.

103. *Id.*

104. *Id.*

105. *Id.* at 166.

106. *See id.*

107. *Id.*

108. *Id.*

109. *Id.*



is, “although subjects judged the triggerman harshly, they did not transfer their judgments to the accessories. In other words, judgments of the principal and the accessories remained distinct, whereas in the law they are linked (through accessory liability).”<sup>110</sup>

The experimenters described the results as follows. “Thus, we began to see two unmistakable patterns: first, subjects clearly differentiated the triggerman from the accessories and made individual and separate determinations of guilt; second, subjects distinguished the triggerman who committed premeditated murder from the one who committed felony-murder.”<sup>111</sup>

Finkel concludes his analysis of the results with a full-throated condemnation of felony murder:

The legal category of felony-murder, based on error and contrivance, manufactures a charge of murder for principals and accessories alike. It may be a response to murder most foul or monstrous; it may be an anachronistic remnant, a barbaric concept, and a legal fiction. But this fossil lives, divides the [Supreme] Court, and continues to produce death sentences. It prescribes a most curious way of assessing and assigning guilt, one that appears to detach criminal liability from individual culpability and that seems quite foreign to the way in which ordinary people make such judgments.<sup>112</sup>

In rejecting felony murder, the subjects’ “commonsense justice” employs (and therefore supports) the traditional principles of culpability and liability that undergird the rest of criminal law.<sup>113</sup>

### 3. Comparing the Finkel Study with the Robinson and Darley Study

Finkel’s results are broadly consistent with those of the Robinson and Darley study, despite his more emphatic denunciation of felony murder. The subjects in both studies adjudged even the felony-murder triggerman (or ‘principal,’ in Robinson and Darley’s vernacular) to have lower liability than an intentional murderer, contrary to the felony-murder rule. And the subjects in both studies considered accessories to be less liable than the triggerman, also contrary to felony-murder doctrine.

There were, however, some differences between the studies both with respect to their conclusions and study design. The conclusions differed on the “discount” given to accomplices who did not cause death. Robinson and Darley conclude that the subjects’ moral judgments can be accounted for by a “standard complicity discount” that applies to all crimes, including felony murder. But Finkel’s data contradict this one-size-fits-all approach. As discussed above, the Finkel subjects applied

---

110. *Id.*

111. *Id.*

112. *Id.* at 169.

113. *See id.* at 171.

different discounts to accomplices with different degrees of involvement in the felony and differing proximity to the killing.

This is not to say that Robinson and Darley's data are flawed. Their study was simply not designed to differentiate between accomplices with various roles. Conversely, Finkel's study was not designed to measure the amount of punishment the subjects thought each perpetrator deserved. All Finkel's study tells us in that regard is who deserves more or less liability than whom.<sup>114</sup>

#### 4. Limitations of the Finkel Study

In one respect, Finkel's data do not seem to support his denunciation of felony murder—at least at first blush. A substantial percentage of the study's subjects were willing to convict both the principal and some accomplices of murder. Specifically, “[o]n the felony-murder charge, Gordon was found guilty 2 percent of the time, John 15 percent, Bob 48 percent, and Dick 77 percent.”<sup>115</sup> While only a small minority of subjects convicted the getaway driver, Gordon, and the lookout, John, of felony murder, almost half the subjects convicted the accomplice present at the killing, of felony murder. More than three-quarters of the subjects convicted the principal of felony murder. This suggests that almost half the subjects felt the primary accomplice deserved a murder conviction and more than three-quarters of the subjects felt that the principal/triggerman deserved a murder conviction.

This criticism is only powerful on the assumption that every subject who imposed a felony-murder conviction believed that a murder conviction was morally justified. While we do not have access to direct data on why subjects chose to convict, or not convict, each actor of felony murder, it seems plausible that the above assumption is not true. That is, it is likely that some subjects followed the jury instructions they were given and convicted the actors of felony murder (which was clearly the correct *legal* decision), despite believing the conviction was morally inappropriate. If so, the Finkel study data *understates* the percentage of subjects who morally disapproved of felony murder. The Colorado and Maryland studies overcome this problem by asking the participants to report both their understanding of how the law in fact applies and what they believe the perpetrator deserved according to the participants' sense of justice.

---

114. Finkel's study does include a thoughtful and detailed analysis of whether the subjects of the study considered the death penalty, compared to a life term, an appropriate punishment for felony murder. *Id.* at 166–69. It does not, however, provide any data on sentences less than life imprisonment.

115. *Id.* at 166. The percentage of “guilty” and “not guilty” verdicts do not add up to 100 because the subjects could also answer with “guilty of a lesser offense.” *See id.* at 166 n.47.

### III. FELONY MURDER IN COLORADO AND MARYLAND

#### A. *Felony Murder in Colorado*

The Colorado study was conducted in 2020, at which time the state legislature was considering amending the state's felony-murder rule.<sup>116</sup> The bill amending the felony-murder rule passed in 2021.<sup>117</sup> The study addressed the law in place at the time the study was conducted—that is, the law prior to the 2021 amendment. However, the study results can also usefully be compared to post-amendment felony murder—for example, to see whether the amendment brought Colorado law in line with the moral judgments of Colorado residents.

#### 1. Colorado Felony Murder Before 2021

Prior to the 2021 amendments, felony murder in Colorado was first-degree murder with mandatory punishment of life imprisonment without the possibility of parole (LWOP).<sup>118</sup> Since life without the possibility of parole was the most severe punishment available in Colorado, all felony murders resulted in precisely the same punishment as the most heinous murders, including multiple murders. Grading felony murder as first-degree murder also meant unintentional felony murder was punished more severely than knowingly killing a person, which was classified as second-degree murder<sup>119</sup> with a minimum penalty of sixteen years and a maximum of forty-eight years.<sup>120</sup>

Colorado's felony-murder rule was limited to a statutory list of predicate felonies before the 2021 amendments.<sup>121</sup> Specifically, the felony-murder rule could be triggered only if someone died while that person was committing (or attempting): arson, robbery, burglary, kidnapping, sexual assault, or escape.<sup>122</sup> Colorado limited the felony-murder rule in several other ways. First, it limited the felony-murder rule to the deaths of persons other than one of the participants in the felony.<sup>123</sup>

Second, Colorado limited the felony-murder rule by providing an affirmative defense. The statute stated that it was an affirmative defense to a charge of felony murder if the defendant:

---

116. See sources cited *supra* note 20.

117. S.B. 21-124, 73rd Gen. Assemb., Reg. Sess. (Colo. 2021). Colorado's legislature passed Colo. Senate Bill 21-124 on April 16, 2021. The law applies to offenses committed on or after September 15, 2021.

118. COLO. REV. STAT. §§ 18-3-102(1)(b) (West 2024), 18-1.3-401(4)(c)(I)(B) (West 2024).

119. *Id.* § 18-3-103(1)(a).

120. *Id.* § 18-1.3-401(1)(a)(V.5)(A), (13)(a), (13)(b)(I).

121. *Id.* § 18-3-102(1)(b).

122. *Id.*

123. *Id.* This is similar but not identical to the "agency rule." Under the agency rule, which is part of the law in many U.S. jurisdictions, a felon is not liable for felony murder when someone is killed by a person other than either the felon himself, or one of the other participants in the crime.

- (a) Was not the only participant in the underlying crime; and
- (b) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and
- (c) Was not armed with a deadly weapon; and
- (d) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article, or substance; and
- (e) Did not engage himself in or intend to engage in and had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious bodily injury; and
- (f) Endeavored to disengage himself from the commission of the underlying crime or flight therefrom immediately upon having reasonable grounds to believe that another participant is armed with a deadly weapon, instrument, article, or substance, or intended to engage in conduct likely to result in death or serious bodily injury.<sup>124</sup>

This may appear to have been a substantial limitation on felony murder, but the defense was more anemic than it seemed for two reasons. First, it was an affirmative defense, and therefore the defendant bore the burden of proving the elements of the defense. Second, the affirmative defense only applied if the defendant proved *all six* factors of the defense. A failure to prove any one of those factors meant that the defense did not apply, and the defendant was guilty of felony murder. For example, imagine a defendant who was not the only participant in the underlying crime, was not armed, neither committed nor solicited the homicidal act, and had no reason to believe another participant intended to engage in any dangerous conduct—but could not prove they were unaware another participant was armed. The affirmative defense did not apply to such a defendant, and they would have been guilty of first-degree murder.

## 2. Felony Sentencing in Colorado

One of the aims of this Article is to assess whether Colorado criminal law would better align with the moral judgements of Coloradans (as represented by the study participants) if the felony-murder rule were retained, amended, or abolished. This requires comparing the study results to the penalties imposed (a) at the time of the study; (b) after the 2021 amendments; (c) in the absence of any felony-murder rule; and (d) with potential amendments to the felony-murder rule.

Any person who is guilty of felony murder is also guilty, by definition, of the predicate felony. The question of whether abolishing felony murder is not, therefore, a choice between the punishment imposed for felony murder and nothing. It is a choice between the punishment imposed with the felony-murder rule and the punishment imposed for the predicate felony.

Identifying and understanding the sentences for the predicate felonies in Colorado requires a brief discussion of the state's rather Byzantine sentencing

---

124. *Id.* § 18-3-102(1)(f)(2).

laws. These laws start out simply enough: each felony is assigned a class, and each is assigned a sentencing range.<sup>125</sup>

**Table 1—Sentencing Range for Predicate Felonies in Colorado**

Class	Minimum Sentence	Maximum Sentence
1	LWOP	LWOP
2	8 years	24 years
3	4 years	12 years
4	2 years	6 years
5	1 year	3 years
6	1 year	1.5 years

However, the criminal code also includes a host of sentence enhancers. Three of these sentence enhancers are relevant to felony murder. First, the maximum and minimum sentences are both increased<sup>126</sup> for “crimes of violence.”<sup>127</sup> Because “crimes of violence” include all crimes in which a person is killed, this sentence enhancer applies to all predicate felonies in which a person is killed—that is, all predicate felonies that lead to felony murder.<sup>128</sup>

Second, some offenses are categorized as “extraordinary risk” crimes.<sup>129</sup> These include all crimes of violence,<sup>130</sup> which means every predicate felony which leads to felony murder is an extraordinary risk crime.<sup>131</sup> The extraordinary risk enhancer increases the maximum sentence for these crimes by up to four years, depending on the class of the predicate felony.<sup>132</sup>

Third, persons convicted of at least two crimes of violence must serve the sentences consecutively.<sup>133</sup> To the extent that the causation requirement in felony murder requires foreseeability, every case of felony murder is also criminally

125. *Id.* § 18-1.3-401(1)(a)(V.5)(A).  
126. The court must “sentence the defendant to a term of at least the midpoint in the presumptive range but not more than twice the maximum term authorized in the presumptive range for the punishment of a felony.” *Id.*  
127. *Id.* § 18-1.3-406(1)(a), (2)(a)(I)(A)–(B). “Crimes of violence” include the predicate felonies that result in felony murder, meaning the sentence enhancer applies. *Id.* §§ 18-1.3-401(8)(a), 18-1.3-406(2)(a)(I)–(II).  
128. *Id.* § 18-1.3-401(8)(a).  
129. *Id.* § 18-1.3-401(10)(a).  
130. *Id.* § 18-1.3-401(10)(b).  
131. *Id.* § 18-4-102(3).  
132. *Id.* § 18-1.3-401(10)(a). The maximum sentence is increased by four years for class 3 felonies, two years for class 4 felonies, one year for class 5 felonies, and six months for class 6 felonies.  
133. Under this enhancer “a court *shall* sentence a person convicted of two or more separate crimes of violence arising out of the same incident so that the person’s sentences are served consecutively rather than concurrently . . . .” *Id.* § 18-1.3-406(1)(b) (emphasis added).

negligent homicide.<sup>134</sup> Were felony murder abolished, everyone that would have been guilty of felony murder would nonetheless still be guilty of both the predicate felony and criminally negligent homicide, with the sentences to be served consecutively. This would add two to seven years to the sentence for the predicate felony.<sup>135</sup>

**Table 2—Sentencing Range for Predicate Felonies in Colorado**

Predicate Felony	Class of Felony	Sentencing Range
Arson	3	8–28
	4	4–14
Robbery	2	16–48
	3	8–28
	4	4–14
Burglary	2	16–48
	3	8–28
	4	4–14
	5 <sup>136</sup>	2–7

134. See, e.g., BINDER, FELONY MURDER, *supra* note 44, at 207. Binder suggests:

Two closely related issues arise concerning the causal responsibility of felons for deaths in the commission or attempt of a felony. One is the causal link between a felon’s act and the resulting death. The other is the causal link between the felony and the resulting death. If either causal link requires foreseeable danger of death, the felon whose act caused the result must have negligently imposed a risk of death.

*Id.* It is unclear whether Colorado law requires foreseeability that would satisfy the mens rea for criminally negligent homicide. For example, in *Auman v. People*, the Colorado Supreme Court noted that jury instructions on felony murder were sufficient provided that they “required that the People prove a causal connection beyond a reasonable doubt.” 109 P.3d 647, 655 (Colo. 2005). The court also noted that the predicate felonies in the state’s felony-murder statute all involve a risk of death. *Id.* at 655 n.6. The court did not, however, address the relationship between this risk of death and the standard of negligence required for criminally negligent homicide.

135. Criminally negligent homicide is a class five felony and a “crime of violence,”—and therefore also an “extraordinary risk” crime, so it’s mandatory sentencing range is two to seven years. COLO. REV. STAT. §§ 18-1.3-401(1)(a)(V.5)(A) (West 2024), 18-3-105 (West 2024).

136. Third-degree burglary was a class 5 felony at the time the Colorado study was conducted. The legislature reclassified third-degree burglary as a class 2 misdemeanor in 2021. See S.B. 21-271, 73rd Gen. Assemb., Reg. Sess. § 203 (Colo. 2021). A class 2 misdemeanor has no minimum penalty but has a maximum penalty of “120 days imprisonment, not more than a seven hundred fifty dollar fine, or both.” COLO. REV. STAT. § 18-1.3-501(1)(a.5) (West 2024). While third-degree burglary is no longer a felony, “burglary” (with no exception for third-degree burglary) is still listed as an offense that triggers the felony-murder rule. *Id.* § 18-3-103(1)(b). The author is not aware of any action in Colorado that has challenged using a misdemeanor as a predicate offense for felony murder.

Table 2—Continued

Predicate Felony	Class of Felony	Sentencing Range
Kidnapping	1	LWOP
	2	16–48
	3	8–28
	4	4–14
Sexual assault	2	16–48
	3	8–28
	4	4–14
Escape	2	16–48
	3	8–28
	4	4–14

Table 2 above lists the minimum and maximum sentences for each of Colorado’s predicate felonies. Assuming the causation requirements satisfies criminal negligence, each of these sentences would be served consecutively with the two to seven years imposed for criminally negligent homicide. Table 3 below shows the total sentencing ranges for the predicate felonies and criminally negligent homicide served consecutively. If the felony-murder rule were abolished, perpetrators would nonetheless still be subject to the punishments described above. Even the least serious triggering felony in which a person is killed, the sentencing range *sans* felony murder would be four to fourteen years. The sentencing range for the most serious predicate felony involving a death would be life without the possibility of parole. These numbers ought to be kept in mind when analyzing the Colorado study data and evaluating whether abolishing felony murder would align the law with Coloradans’ sense of justice.



**Table 3 —Sentencing Range for Predicate Felonies Plus Negligent Homicide in Colorado**

Predicate Felony	Class of Felony	Sentencing Range
Arson	3	10–35
	4	6–21
Robbery	2	18–55
	3	10–35
	4	6–21
Burglary	2	18–55
	3	10–35
	4	6–21
	5	4–14
Kidnapping	1	LWOP
	2	18–55
	3	10–35
	4	6–21
Sexual assault	2	18–55
	3	10–35
	4	6–21
Escape	2	18–55
	3	10–35
	4	6–21

### 3. Colorado's Felony-Murder Reform

The Colorado legislature passed a bill amending the felony-murder rule in April 2021.<sup>137</sup> The substantive effect of this bill was to downgrade felony murder from first-degree murder to second-degree murder.<sup>138</sup> This lowered the punishment for felony murder from mandatory life without the possibility of parole to a sentencing range of sixteen to forty-eight years.<sup>139</sup> Felony-murder offenders have also committed a predicate felony. However, an offender cannot be convicted of both felony murder and the predicate felony.<sup>140</sup> The offense of felony murder includes all the elements of the predicate felony, which means the predicate felony is a lesser included offense.

The Colorado study shows whether the 2021 legislative reform brought the law into line with the community's moral judgments by determining how many subjects believed that the offenders in the felony-murder scenarios deserved between sixteen and forty-eight years in prison.

#### *B. Felony Murder in Maryland*

Maryland has two felony-murder rules. The first-degree felony-murder rule, created by the Maryland legislature, provides that an unintended death committed in the attempt or perpetration of one of the felonies listed in the statute is first-degree murder.<sup>141</sup> Any person convicted of first-degree murder is sentenced to life imprisonment.<sup>142</sup>

Maryland courts have held that this codified rule did not wholly replace the pre-existing common law felony-murder rule.<sup>143</sup> As a result, a person is guilty of second-degree murder if they unintentionally cause death in the perpetration of a felony, other than the codified predicate felonies, that is dangerous to human life.<sup>144</sup> Second-degree murder is punishable by up to forty years in prison.<sup>145</sup> The Maryland empirical study addressed the first-degree felony-murder rule since it rests upon felonies expressly singled out by the legislature as the most dangerous and results in the more severe punishment.

---

137. S.B. 21-124, 73d Gen. Assemb., Reg. Sess. (Colo. 2021).

138. *Id.*

139. COLO. REV. STAT. § 18-1.3-401(1)(a)(V.5)(A) (West 2024).

140. *People v. Huynh*, 98 P.3d 907, 914–15 (Colo. App. 2004) (defendant “may not be simultaneously convicted of felony murder *and* the felony upon which the felony murder conviction rests”).

141. *See* MD. CODE ANN., CRIM. LAW § 2-201(a)(4) (West 2024). The felonies enumerated are first-degree arson, burning an outbuilding, burglary, carjacking, first-degree escape, kidnapping, mayhem, rape, robbery, sexual offenses, sodomy as that crime existed before October 1, 2020, and offenses relating to destructive devices. *Id.*

142. More specifically, the sentence for first-degree murder is either (i) life imprisonment, or (ii) life imprisonment without the possibility of parole. *Id.* § 2-201(b)(1).

143. *Fisher v. State*, 786 A.2d 706, 724–25 (Md. App. Ct. 2001).

144. *See id.* at 733.

145. MD. CODE ANN., CRIM. LAW § 2-204(b) (West 2024).

A central thesis of this Article is that the law in Maryland (and Colorado) would more closely align with community sentiment were felony murder abolished. This claim requires comparison of the study results with the sentences that Maryland law would impose on the defendants in the study’s scenarios in the absence of felony murder. By definition, anyone guilty of felony murder is also guilty of one or more predicate felonies.

The predicate felonies listed in the Maryland Criminal Code for first-degree felony murder are: arson, burning an outbuilding, burglary, carjacking, escape, kidnapping, mayhem, rape and other sexual offenses, robbery,<sup>146</sup> and a violation concerning destructive devices.<sup>147</sup> Table 4, below, lists the sentences that apply to Maryland’s predicate felonies. If felony murder were abolished in Maryland, perpetrators would still be subject to these sentences.

**Table 4—Sentencing Range for Predicate Felonies in Maryland**

Predicate Felony	Degree of Felony	Sentencing Range
Arson	1st	0–30
Burning an outbuilding	2nd	0–20
Burglary	1st	0–20 or 0–25 <sup>148</sup>
	2nd	0–15 or 0–20 <sup>149</sup>
	3rd	0–10
Carjacking	—	0–30
Escape	1st	0–10

146. The common law crime of sodomy was recognized under Maryland law prior to being repealed by statute in 2020. *See id.* § 3-321 (“The common law crime of sodomy has been repealed.”).

147. *Id.* § 2-201(a)(4).

148. A person who breaks and enters the dwelling of another with the intent to commit theft is guilty of the felony of burglary in the first degree and is subject to imprisonment not exceeding twenty years. MD. CODE ANN., CRIM. LAW § 6-202(c) (West 2024). A person who breaks and enters the dwelling of another with the intent to commit a crime of violence is guilty of the felony of home invasion and is subject to imprisonment not exceeding twenty-five years. *Id.* § 6-202(d) (West 2024).

149. A person who breaks and enters the storehouse of another with the intent to commit theft, a crime of violence, or arson in the second degree is guilty of second-degree burglary and is subject to imprisonment not exceeding fifteen years. *Id.* § 6-203(c)(1) (West 2024). A person who breaks and enters the storehouse of another with the intent to steal, take, or carry away a firearm is also guilty of second-degree burglary and is subject to imprisonment not exceeding twenty years or a fine not exceeding \$10,000, or both. *Id.* § 6-203(c)(2) (West 2024).

Table 4—Continued

Predicate Felony	Degree of Felony	Sentencing Range
Kidnapping	—	0–20 or 0–30 <sup>150</sup>
Rape	1st	0–Life or 0–LWOP or 25–LWOP <sup>151</sup>
	2nd	0–20 or 15–Life <sup>152</sup>
Robbery	—	0–15 or 0–20 <sup>153</sup>
Destructive device	—	0–25

Unlike Colorado law, Maryland law does not mandate consecutive sentences when a defendant is convicted of multiple crimes causing death. Maryland does, however, permit consecutive sentences as an exercise of the trial court’s discretion.<sup>154</sup> In other words, without the felony-murder rule, Maryland courts could impose a maximum sentence for the predicate felony *plus* ten years for

150. A person who violates § 3-502(a) by intentionally carrying or causing a person to be carried in or outside the State is guilty of the felony of kidnapping and is subject to imprisonment not exceeding thirty years. *Id.* § 3-502 (b) (West 2024). A person who abducts a child under the age of twelve years violates § 3-503(a)(1) and is subject to imprisonment not exceeding twenty years. *Id.* § 3-503(b)(1) (West 2024).

151. A person who engages in the prohibited acts under § 3-303(a) is guilty of the felony of rape in the first degree and is subject to imprisonment not exceeding life. *Id.* § 3-303(d)(1) (West 2024). A person who engages in the prohibited acts under § 3-303(a) and kidnaps a child under the age of sixteen years is guilty of the felony of rape in the first degree and is subject to imprisonment not exceeding life without the possibility of parole. *Id.* § 3-303(d)(2) (West 2024). A person eighteen years of age or older who engages in the prohibited acts under § 3-303 (a) involving a victim who is a child under the age of thirteen years is guilty of the felony of rape in the first degree and is subject to imprisonment for not less than twenty-five years and not exceeding life without the possibility of parole. *Id.* § 3-303(d)(4) (West 2024).

152. A person who engages in the prohibited acts under § 3-304(a) is guilty of the felony of rape in the second degree and is subject to imprisonment not exceeding twenty years. *Id.* § 3-304(c)(1) (West 2024). A person eighteen years of age or older who engages in the prohibited acts under § 3-304(b) involving a child under the age of thirteen years is guilty of the felony of rape in the second degree and is subject to imprisonment for not less than fifteen years and not exceeding life. *Id.* § 3-304(c)(2) (West 2024).

153. A person who commits or attempts to commit robbery is guilty of a felony and is subject to imprisonment not exceeding fifteen years. *Id.* § 3-402(b) (West 2024). A person who commits or attempts to commit robbery with a dangerous weapon or by displaying a written instrument claiming that the person has possession of a dangerous weapon is guilty of a felony and is subject to imprisonment not exceeding twenty years. *Id.* § 3-403(b) (West 2024).

154. *See Kaylor v. State*, 400 A.2d 419, 422 (Md. App. Ct. 1979) (“This Court has long adhered to the position that consecutive sentences are a proper exercise of the trial court’s discretion.”); *see also Malee v. State*, 809 A.2d 1 (Md. Ct. Spec. App. 2002) (upholding a 450-year sentence for thirty-one counts of sexual offense and child abuse).

manslaughter.<sup>155</sup> For example, a perpetrator who would have been convicted of first-degree murder under the repealed rule for a death caused during first-degree arson could be sentenced to a term of imprisonment of up to forty years. A perpetrator who would have been guilty of felony murder where the predicate felony was third-degree burglary—the least serious of the predicate offenses—would still be punishable by up to twenty years in prison.

The upshot of the Maryland sentencing scheme is that abolishing felony murder will align with the community's sense of justice so long as the community believes the punishment deserved by the perpetrator is no more than forty years where the predicate felony is first-degree arson, no more than twenty years where the predicate felony is third-degree burglary, and so on.

#### IV. THE COLORADO STUDY

##### A. *The Colorado Study Design*

The author conducted a survey of 523 Colorado residents, using the online Qualtrics platform, to determine their knowledge of and moral attitudes towards the Colorado felony-murder rule. One of the advantages of this study over previous surveys discussed above is that the participants were curated to be representative of the state's population with respect to sex<sup>156</sup> and political affiliation.<sup>157</sup> The survey was conducted at a time when the Colorado legislature was considering felony-murder reform, and the results were presented to the Colorado legislatures during hearings on the reform bill. At the time of the survey, felony murder was a class 1 felony with a mandatory penalty of life without the possibility of parole.<sup>158</sup>

---

155. According to Professor Binder, Maryland courts have “traced both first- and second-degree felony murder rules to a supposed common law rule predicating murder on felonies foreseeably dangerous to life as committed.” BINDER, FELONY MURDER, *supra* note 44, at 203. This would mean that every person guilty of first-degree murder under the felony-murder rule would be guilty, in the rule's absence, of manslaughter as well as the predicate felony. See, e.g., State v. Thomas 211 A.3d 274, 286 (Md. App. Ct. 2019) (explaining that Maryland's statutory manslaughter offense incorporates the common law offense of gross negligence manslaughter). The sentence for manslaughter is imprisonment not exceeding ten years. MD. CODE ANN., CRIM. LAW § 2-207(a)(1) (West 2024).

156. 48.8% of participants identified their sex as male, 50.9% identified their sex as female, and 0.3% selected “other.”

157. 45.1% of Colorado participants leaned towards or strongly preferred Democrats, 45.1%, and 9.8% had no preference for either party. By comparison, a Pew Research Center study found that 42% of adult Coloradans were or leaned Democrat, 41% were or leaned Republican, and 17% had no lean. See *Party Affiliation Among Adults in Colorado*, PEW RSCH. CTR., <https://www.pewresearch.org/religious-landscape-study/database/state/colorado/party-affiliation/> (last visited Oct. 4, 2024). The Colorado felony-murder survey also collected information on the participants' ethnicity, education level, household income, and whether they had been convicted of a felony. For a detailed description of the Colorado study, see *infra* Appendix C.

158. COLO. REV. STAT. § 18-3-102(1)(b) (West 2024). In April 2021, the felony-murder rule became a class 2 felony. S.B. 21-124, 73d Gen. Assemb., Reg. Sess. (Colo. 2021). Note that the amendment does not apply retroactively. *Id.* Any person convicted of felony murder prior to the change in law remains sentenced to life without the possibility of parole. *Id.*

The study consisted of nine short scenarios. Six of the scenarios constituted felony murder under the Colorado statute but would not have been murder in the absence of the felony-murder rule. Each respondent was randomly shown just one of these six felony-murder scenarios.

These six scenarios were chosen to represent situations with varying degrees of gravity. One of the goals of using six different scenarios of different gravity was to avoid artificially influencing the results. Felony murder applies to a wide range of conduct with different culpability—including people who cause the death and those who are merely accomplices, people who are either aware or unaware that their accomplice is armed, and people convicted of different predicate felonies.<sup>159</sup>

Another goal of choosing a variety of scenarios was to test whether common limitations on the felony-murder rule reflected the community's moral judgments. These limitations are meant to prevent the rule from being applied unfairly in egregious situations. For example, many states limit the rule to inherently dangerous felonies. The first scenario below—breaking into a vending machine—is the one most likely to be considered not an inherently dangerous felony, despite its inclusion on the statutory list of predicate felonies. If the inherently dangerous felony limitation tracks with societal standards, we would expect the survey participants to judge the first scenario as less serious than the others.

Similarly, criminal law in general often treats the principal offender more seriously than those who assist the principal offender. The results of the Robinson and Darley study, discussed above, indicate that this “accomplice discount” accords with the views of the study participants in situations involving felony murder.<sup>160</sup> The third and fourth scenarios in the Colorado study only change which participant in the felony pulled the trigger. Based on the results of the previous empirical study, and the law's treatment of accomplices generally, we would expect the survey respondents to judge the scenario that focuses on the trigger person as more serious than the scenario in which they were asked about the culpability of the accomplice.

In addition to the six felony-murder scenarios, the study also included three scenarios that were examples of intentional homicide. Each survey participant was shown all three of these examples. These other scenarios provide points of comparison against which to measure the respondents' answers concerning felony murder. If the survey participants judge the intentional homicide scenarios as deserving more serious punishment than all the felony-murder examples, that strongly suggests that felony murder ought not to be considered murder—and therefore supports reform or outright abolition of the felony-murder rule. Both the felony-murder and intentional-murder scenarios were written with women as the perpetrators. Using perpetrators of the same sex for both sets of scenarios mitigated against

---

159. A division of the Colorado Court of Appeals reiterated this point in a very recent unpublished decision. See *People v. Arenas-Foote*, No. 22CA0013, 2024 WL 3872794, at \*10 (Colo. App. Feb. 22, 2024) (describing the wide swath of culpability covered by the felony-murder rule, from the person who shoots a victim to complete an intended robbery to the getaway driver who didn't even know any of his accomplices were armed).

160. See *supra* Part II.A.

the possibility that the results would be affected by gender biases. For example, because the offenders in the felony-murder scenarios are women, without the intentional murder comparison, one could argue that subjects who said they deserved a low sentence could potentially have done so because of attitudes or biases regarding female offenders, not because they considered felony murder less serious than intentional murder. This critique does not apply if the study subjects adjudge female felony-murder offenders as deserving much lower punishment than female intentional murderers.

### 1. The Scenarios

The nine scenarios presented to the study participants are described below. The felony-murder scenarios are accompanied by comments about why they constitute felony murder in Colorado and the real cases on which many of the scenarios are based.

#### i. Felony-Murder Scenario #1: Vending Machine Burglary

Jane Smith is breaking into a vending machine in the lobby of an office building in downtown Denver. Jane uses a knife to pry open the machine and gain access to the money inside the machine. A security guard sees Jane and yells, “Don’t move!” Jane runs out the front door of the building. The security guard runs out the door after her, but slips on some ice and hits his head. The security guard later dies in hospital.

Under Colorado law, Jane has committed felony murder. Breaking into a vending machine is third-degree burglary,<sup>161</sup> which is a predicate offense for felony murder,<sup>162</sup> and Jane was in “immediate flight” from that burglary when her conduct resulted in the security guard’s death.

#### ii. Felony-Murder Scenario #2: Home Burglary Accomplice

Jane Smith and her boyfriend David Jones force open a bedroom window of a house in a suburban neighborhood. Jane is aware that David is carrying a firearm, which he has promised not to use except in self-defense, just in case someone is at home and armed. They climb through the window, planning to steal valuables from inside, but a burglar alarm goes off. David and Jane immediately jump out the window and split up, running away from the house in opposite directions. Jane is caught by a police officer on patrol, handcuffed, and placed

---

161. COLO. REV. STAT. § 18-4-204(1) (West 2024) (“A person commits third-degree burglary if with intent to commit a crime he enters or breaks into any vault, safe, cash register, coin vending machine . . . or other apparatus or equipment whether or not coin operated.”).

162. *Id.* § 18-3-103(1)(b). Curiously, third-degree burglary is a “predicate felony” for felony murder despite being merely a misdemeanor. *Id.* § 18-4-204(2) (“Third[-]degree burglary is a class 2 misdemeanor, but it is a class 1 misdemeanor if it is a burglary, the objective of which is the theft of a controlled substance . . .”).



in the back of the patrol car. A few minutes later, several blocks away, David shoots and kills another police officer who was trying to apprehend him.

This scenario is based on the facts of *Auman v. People*.<sup>163</sup> Auman was convicted of second-degree burglary and felony murder, and the Colorado Supreme Court stated:

The plain language of our statute supports the legal principle that a co-participant in a predicate felony may be liable for felony-murder even after arrest while another participant remains in immediate flight. The statute deems conduct as murder when one participates in the predicate felony and a death is caused in the course of or in furtherance of “immediate flight,” which, by its terms, is not limited to the flight of any particular participant.<sup>164</sup>

### iii. Felony-Murder Scenario #3: Armed Robbery Accomplice

David Jones and his girlfriend Jane Smith approach a man in a Best Buy parking lot with the plan to take his valuables. David has a gun, though Jane does not know that until David pulls out the gun. David points the gun at the other man and demands that the man hand over his wallet and cellphone. Instead of complying, the man tries to grab the gun out of David’s hand. The two men struggle and the gun accidentally goes off, killing the other man. [The survey asked about **Jane**.]

This scenario is loosely based on the case of Alicia Valdez, who was convicted of first-degree felony murder, attempted aggravated robbery, and conspiracy to commit robbery, relating to the shooting death of Andrew Jenicek.<sup>165</sup>

### iv. Felony-Murder Scenario #4: Armed Robbery Trigger Person

David Jones and his girlfriend Jane Smith approach a man in a Walmart parking lot with the plan to take his valuables. Jane has a gun, but does not intend to use it; she just wants to brandish to scare the man. Jane points the gun at the other man and demands that the man hand over his wallet and cellphone. Instead of complying, the man tries to grab the gun out of Jane’s hand. The two of them struggle and the gun accidentally goes off, killing the man.

This fact pattern is an amended version of the third felony-murder scenario, with “Jane Smith” as the trigger person rather than a co-participant. These two versions

---

163. 109 P.3d 647, 652–55 (Colo. 2005).

164. *Id.* at 656. Auman’s conviction was overturned on other grounds, namely that the trial judge erred in instructing the jury on the elements of second-degree burglary. *Id.* at 664.

165. Kirk Mitchell, *Jeffco Jury Convicts Woman of First-Degree Murder in Death of Man Picking Up Barbecue*, DENV. POST (July 19, 2019, 4:03 PM), <https://www.denverpost.com/2019/07/19/murder-conviction-woman-barbecue/>.

of the scenario test whether and to what extent survey participants' views on culpability and desert changed depending on whether the suspect was the trigger person or a co-felon, all else being equal.

#### v. Felony-Murder Scenario #5: Carjacking Bystander

Jane Smith is homeless and spends her time on the 16th Street Mall. While she is in an arcade, she is approached by a person, David Jones, she has seen occasionally on the Mall in the past. David asks for Jane to help him steal a car. David hands Jane a gun and tells her to fire it into the air to distract the car's owner. David and Jane then go outside and approach a person who has just parked his car. Jane fires the gun in the air, as instructed, but the car owner pulls out a gun of his own. Jane and David run away as the car owner shoots at them. All the shots miss Jane and David, but one of them hits a bystander, killing her. [The survey asked about **Jane**.]

This example is partly based on the case of Curtis Brooks, who was convicted of first-degree felony murder at the age of seventeen for his role in an attempted carjacking that resulted in the death of Christopher Ramos.<sup>166</sup> The most significant difference between Brooks' case and this scenario is that in this case, the victim of the carjacking is the shooter and the deceased victim is a bystander. This scenario brings into play the "agency rule." Many jurisdictions restrict the felony-murder rule to situations in which the defendant or one of their agents—that is, an accomplice—is the direct cause of death.<sup>167</sup> In jurisdictions with the agency rule, this scenario would not be felony murder. If the agency rule makes sense, this scenario should be considered less culpable than the following version.

Interestingly, Colorado has a form of reverse agency rule, such that the felony-murder rule only applies if the *victim* is *not* the defendant or one of their agents; the identity of the shooter is not relevant.<sup>168</sup> The above scenario is felony murder in Colorado, since a bystander—not a participant in the felony—was killed.

---

166. See Elise Schmelzer, *Curtis Brooks, Sentenced to Die in Prison at Age 17, Is Free After 24 Years Behind Bars*, DENV. POST (July 3, 2019, 10:00 AM), <https://www.denverpost.com/2019/07/02/curtis-brooks-jvenile-free-after-24-years/>. Schmelzer reports:

Brooks and three other teenagers approached Ramos as he walked to his car in Aurora in an attempt to steal the vehicle. Brooks didn't fire the gun that killed Ramos—another of the teens confessed to the act—but he was convicted two years later . . . and sentenced to life without the possibility of parole.

*Id.* Brooks was granted clemency by then-Governor John Hickenlooper in December of 2018. See Andrea Dukakis, *Once Sentenced to Life, Curtis Brooks Walks Out of Prison a Free Man*, CPR NEWS (July 1, 2019, 3:26 PM), <https://www.cpr.org/2019/07/01/once-sentenced-to-life-curtis-brooks-walks-out-of-prison-a-free-man/#>.

167. Binder, *Making the Best*, *supra* note 44, at 438 (describing the agency rule as "an approach that excludes liability when an actor not party to the felony commits a subsequent act necessary to the resulting death").

168. COLO. REV. STAT. § 18-3-103(1)(b) (restricting felony murder to situations in which "the death of a person, other than one of the participants, is caused by any participant").

### vi. Felony-Murder Scenario #6: Carjacking Accomplice

Jane Smith is homeless and spends her time on the 16th Street Mall. She is approached by a person, David Jones, she has seen occasionally on the Mall in the past. David asks for Jane to help him steal a car. David hands Jane a gun and tells her to fire it into the air to distract the car's owner. David and Jane then go outside and approach a person who has just parked his car. Jane fires the gun in the air, as instructed. Without warning, David also pulls out a gun and shoots the other person in the head. The person dies immediately. [The survey asked about **Jane**.]

As mentioned above, this scenario more closely reflects the case of Curtis Brooks<sup>169</sup> than the previous scenario, with one of the participants in the felony directly responsible for the victim's death. If the common law agency rule correctly distinguishes more serious felony murders, we would expect the survey takers to adjudge this scenario as more serious than the previous one.

### vii. Intentional Killing Scenario #1: Adultery

Betty Hughes comes home early from work one day and hears noises coming from her bedroom. She enters the room and sees her husband in bed with another woman. Enraged, Betty pulls a gun out of the bedside stand where she keeps it and shoots the other woman in the chest three times, killing her.

This is the first scenario in the Colorado study that does not involve felony murder. Instead, this is a paradigmatic example of provocation. According to common law principles, a person who is adequately provoked is guilty of manslaughter rather than murder.<sup>170</sup> Analogously, under the Model Penal Code, a person is guilty of manslaughter if they killed while experiencing extreme mental or emotional disturbance.<sup>171</sup> In Colorado, killing in response to provocation is second-degree murder that is punished less severely than other forms of second-degree murder, but more severely than manslaughter.<sup>172</sup> If the survey participants judge this scenario as involving significantly more culpability than the felony-murder examples, it would suggest that killing during the course of a felony should not be treated as murder—and perhaps not even as manslaughter.

---

169. Schmelzer, *supra* note 166.

170. See Mitchell N. Berman & Ian P. Farrell, *Provocation Manslaughter as Partial Justification and Partial Excuse*, 52 WM. & MARY L. REV. 1027, 1031 (2011).

171. MODEL PENAL CODE § 210.3(1)(b) (West 2023).

172. Second-degree murder is generally a class 2 felony. COLO. REV. STAT. § 18-3-103(3)(a) (West 2024). However, “murder in the second degree is a class 3 felony where the act causing the death was performed upon a sudden heat of passion . . . .” *Id.* § 18-3-103(3)(b). By contrast, manslaughter is a class 4 felony. *Id.* § 18-3-104(2).

### viii. Intentional Killing Scenario #2: Complaining

Sarah Johnson and her husband Fred are in the kitchen cleaning up and washing dishes. Fred begins complaining that Sarah should do all the housework herself, and that she should spend more time looking after their children instead of working part-time as a waitress. Sarah suddenly grabs a large knife that is lying on the kitchen counter, and stabs Fred in the chest. Fred dies immediately.

According to common law principles and Colorado law, Sarah is guilty of second-degree murder. She killed her husband intentionally and without provocation but did so without premeditation.<sup>173</sup>

### ix. Intentional Killing Scenario #3: Lying in Wait

Amy Walsh gets fired from her job after her boss discovers she has been stealing from the company. The next day, Amy takes her gun and drives over to her boss's house. She parks around the corner, and walks down an alley behind the house. Amy jumps over the back fence, forces open a window, climbs in, and hides in a coat closet near the front door, waiting for her boss to return home. When her boss walks through the front door a few hours later, Amy jumps out of the coat closet and shoots him in the head. Her boss dies immediately.

This is a classic example of first-degree murder under both common law principles and Colorado law.<sup>174</sup>

## 2. The Survey Questions

For each of the scenarios presented to them, the study participants were asked the following questions:

1. Under Colorado law as you understand it, what crime (or crimes) has [the person] committed?
2. Under Colorado law as you understand it, what sentence will [the person] be given if she is convicted?<sup>175</sup>
3. Based on your sense of justice—and not what you think the law actually is—what crime (or crimes) do you think [the person] should be convicted of?
4. Based on your sense of justice—and not what you think the law actually is—what punishment do you think [the person] deserves?<sup>176</sup>

---

173. See *id.* § 18-3-102(1)(a) (a person is guilty of murder in the first degree if they kill another person “[a]fter deliberation and with the intent to cause the death . . .”).

174. See *id.*

175. The sentencing ranges were chosen to correspond to the sentencing ranges imposed under Colorado law. See *supra* Table 1.

176. See Appendix A for a detailed description of the questions and the options presented to the survey participants.

The first two questions asked of the subjects are descriptive and tested the participants’ awareness of Colorado law. The second two questions are normative and ascertained the participants’ sense of justice—that is, their sense of what criminal conviction and punishment are morally appropriate for the conduct described in each scenario.

*B. The Colorado Study Results*

1. Judgments About Desert—All Felony-Murder Scenarios

The aggregated results for what punishment and conviction the subjects believed were deserved, across the six felony murder scenarios combined, are presented in Table 5 and Figure 1 below.

**Table 5 —Consequences Deserved Across All Felony-Murder Scenarios**

Deserved	Percent Selected
No prison time	8.3
<1 year	12.4
1–3 years	25.5
3–6 years (median)	17.1
6–12 years	15.5
12–24 years	8.5
24–48 years	4.3
>48 years	1.9
LWP	3.5
LWOP	2.3
Death sentence	0.8
2nd degree murder	21.9
1st degree murder	8

To appreciate the significance of these results, one must keep in mind that under Colorado law at the time, the perpetrator in every one of these scenarios would have been convicted of first-degree murder and sentenced to mandatory life without the possibility of parole. Viewed through that lens, the results are striking. For example:

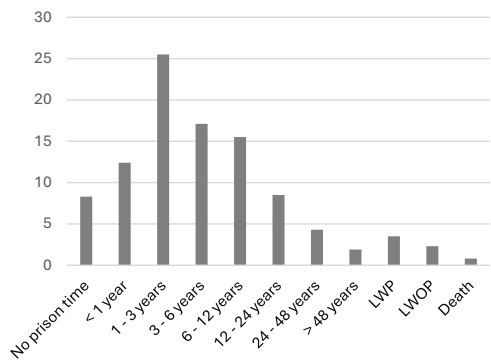
1. Only 3.1% of subjects believed that the offenders deserved either life without parole or the death penalty. That is, 96.9% of subjects believed that the felony-murder offenders deserved *less than* life without parole (the applicable sentence at the time).
2. The median sentencing range that the offenders deserved, according to the study subjects, was three to six years. The median sentence was only four years.
3. 8.3% of subjects believed the offenders deserved no prison time. To put that into perspective, almost three times as many subjects believed the offenders deserved *no prison sentence at all* than deserved life without parole.
4. 20.7% of subjects believed the offenders deserved no more than a year in prison (either no prison time at all or incarceration for less than one year). In other words, for a crime that Colorado treats as first-degree murder and sentences to mandatory life without parole, almost seven times as many study participants considered the offender to be as morally culpable as a misdemeanor<sup>177</sup> than agreed with Colorado's treatment of the offender (3.1%). This comparison is shown in Figure 2 below.
5. 6% of subjects believed the offenders deserved to be convicted of first-degree murder, meaning that 94% of subjects believed the offenders did not deserve to be convicted of the crime that applied under the Colorado code.
6. A further 21.9% of subjects believed the appropriate conviction was second-degree murder. Taken together, this means that 27.9% of subjects believed the felony-murder perpetrators deserved to be convicted of murder, of one degree or another. While this is still far from a majority, it does suggest at least a nontrivial degree of support for treating felony murder as murder. It is worth noting, however, that many of the subjects who believed a second-degree murder conviction was appropriate believed the appropriate *sentencing range* was as low as six to twelve years in prison.
7. Only 11.5% of study participants believed the felony-murder offenders deserved at least sixteen years in prison. The reader will recall the minimum sentence for felony murder in Colorado *after* the 2021 amendments is sixteen years in prison (with a maximum of forty-eight years in prison).<sup>178</sup> That is, the amended felony-murder rule is still unjustly severe according to 88.5% of the study participants across all six scenarios.

---

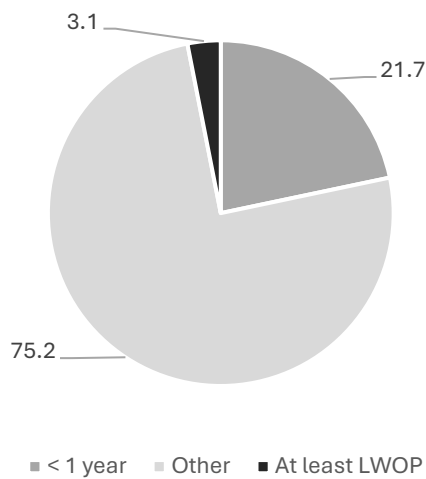
177. See, e.g., *Lange v. California*, 594 U.S. 295, 305 (2021) (“[C]alling an offense a misdemeanor usually limits prison time to one year.”).

178. See *supra* Part III.A.3.

**Figure 1.** Punishment Deserved Across All Felony-Murder Scenarios



**Figure 2.** Punishment Deserved across All Felony-Murder Scenarios — Summary



2. Judgments About Desert—Individual Felony-Murder Scenarios

As stark as the contrast is between the combined results across all felony-murder scenarios and the applicable law at the time, presenting the data in this fashion alone hides some even starker contrasts. Not surprisingly, the subjects’ judgments about deserved punishment varied across the six scenarios. Comparing the individual results for the six felony-murder scenarios and three intentional murder scenarios—summarized in Table 6 below—allows several important inferences. First, it allows comparisons among the felony-murder scenarios, which will indicate which features of the individual crimes contribute to higher and lower desert assessments.



Second, it allows comparison of responses to the felony-murder scenarios with responses to the benchmark intentional murder scenarios. Third, it shows the difference between the subjects' moral judgment of the least serious felony-murder examples and the law imposed at the time. This is especially important because Colorado law at the time imposed a mandatory minimum penalty of life without parole for all felony-murder cases, including the least serious scenarios on the survey. Fourth, comparing the individual scenario results with the sentence associated with its predicate felony allows assessment of the subjects' moral judgments of what the amended Colorado law now imposes and what Colorado law would impose if the felony-murder rule were abolished entirely.

#### i. Comparisons Among the Felony-Murder Scenarios

Table 6 shows that the subjects adjudged the felony-murder scenarios as varying greatly in terms of moral culpability. At the low end, the Vending Machine Burglary example had a median deserved-sentencing range of one to three years and a median deserved sentence of two years. Not one subject believed the sentence should have been at least life without parole, and only 1% of subjects believed it should have been treated as first-degree murder. In other words, the study participants' rejection of Colorado law in these circumstances was close to unanimous. Nor was their disagreement with Colorado law a small difference of opinion, with more than half the subjects believing the appropriate penalty was a couple of years in prison, whereas Colorado law imposed the most severe punishment available under its criminal code.

Table 6 —Consequences Deserved for Individual Scenarios

	Scenario	At Least LWOP (%)	Median Range	Median Years	1st Degree Murder (%)
Felony Murder	Vending Machine Burglary	0	1–3	2 <sup>179</sup>	1
	Home Burglary (accomplice)	4	1–3	3 <sup>180</sup>	6
	Armed Robbery (accomplice)	5	3–6	4 <sup>181</sup>	5
	Armed Robbery (trigger person)	7	12–24	20 <sup>182</sup>	12
	Carjacking (bystander)	3	3–6	3 <sup>183</sup>	5
	Carjacking (accomplice)	3	3–6	3 <sup>184</sup>	6
Intentional Killing	Adultery	19	12–24	24 <sup>185</sup>	32
	Complaining	18	24–48	37 <sup>186</sup>	38
	Lying in Wait	55	LWOP	LWOP <sup>187</sup>	86

179. The 95% confidence interval for the Vending Machine scenario median was [1, 2].  
180. The 95% confidence interval for the Home Burglary scenario median was [2, 4].  
181. The 95% confidence interval for the Armed Robbery (accomplice) scenario median was [2, 5].  
182. The 95% confidence interval for the Armed Robbery (trigger person) scenario median was [15, 35].  
183. The 95% confidence interval for the Carjacking (bystander) scenario median was [3, 5].  
184. The 95% confidence interval for the Carjacking (accomplice) scenario median was [3, 5].  
185. The 95% confidence interval for the Adultery scenario median was [20, 27].  
186. The 95% confidence interval for the Complaining scenario median was [25, 40].  
187. The 95% confidence interval for the Lying in Wait scenario median was [LWOP, LWOP].

At the other end of the culpability spectrum, the Armed Robbery (trigger person) example had a median sentencing range of twelve to twenty-four years and a median sentence of twenty years. These results are an order of magnitude higher than the Vending Machine Burglary results.<sup>188</sup>

The other four felony-murder scenarios fell in between these two examples but were clumped significantly closer to the lower end of moral culpability. The Armed Robbery (trigger person) scenario was an outlier on all metrics other than the percentage of subjects who believed life without parole was the appropriate sentence.<sup>189</sup>

The Vending Machine Burglary scenario involved several factors that likely contributed to its low moral culpability results. The predicate felony was a low-level burglary, the burglary was not of a residence, there was no firearm involved, and the victim's death was less directly caused by the actions of the offender (or of a co-felon, since there were none).

Conversely, the Armed Robbery (trigger person) scenario had multiple factors that contributed to its higher culpability results. The predicate felony, armed robbery, was significantly more serious with a much higher risk of death. The offender carried a loaded firearm, was the trigger person, and almost certainly acted recklessly.

We can isolate some of these factors and get an inkling of how much they affected culpability in the subjects' eyes. The Armed Robbery (accomplice) scenario is identical to the Armed Robbery (trigger person) other than, of course, the identity of the trigger person. This one difference led to a very large difference in the subjects' moral judgments. The accomplice was adjudged to deserve a median sentencing range of three to six years and a median sentence of four years—much lower than the twenty-year median deserved sentence for the trigger person.

These data align closely with the results of both the Finkel study and the Robinson and Darley study. Both prior studies also included armed robbery scenarios that differed only as to the offender in question being the shooter or an accomplice. The results of both studies showed a marked difference in moral culpability between the trigger person and accomplices.<sup>190</sup> In the Robinson and Darley examples, subjects imposed on average a sentence of 26.7 years for the trigger person and 9.4 years for the accomplice.<sup>191</sup> These results are both higher than the corresponding results in the Colorado study, which were twenty years and four years respectively. Also, the difference in culpability between the trigger person and accomplice was somewhat larger in the Colorado study than the Robinson and Darley study.<sup>192</sup> Nonetheless, in both studies, on average, the subjects judged that a trigger person deserved a far higher sentence than an accomplice.

---

188. Even for this scenario, however, the median sentence is far lower than the sentence contemporaneously applied by law—the latter of which only 7% of subjects believed was deserved. Similarly, only 12% of subjects believed this most culpable example should be first-degree murder.

189. This example was an outlier among the scenarios tested. This does not mean that it is an outlier among all possible felony-murder scenarios or among actual felony murders committed.

190. See *supra* Part II.

191. ROBINSON & DARLEY, *supra* note 61, at 172–73.

192. There are several possible reasons for this. The underlying fact patterns in each study are not identical, attitudes towards felony murder could have softened in the intervening years, or the cohorts could simply have had slightly different attitudes.

Interestingly, in the Colorado study there was very little difference between the armed robbery accomplice and the trigger person regarding how many of the study participants believed the offender deserved at least life without parole. Only 5% of the subjects believed the armed robbery accomplice deserved at least life without parole and only 7% believed the trigger person deserved the same sentence. This suggests that despite believing there was a large difference in culpability between the accomplice and trigger person in an armed robbery, there was a consensus among study participants that neither the accomplice nor the trigger person deserve the sentence that was imposed under the Colorado felony-murder rule.

The felony-murder scenarios also include another two scenarios that differ with respect to the identity of the shooter. In the Carjacking (accomplice) example, the shooter is the offender's accomplice, whereas in the Carjacking (bystander) scenario, the victim was shot by a bystander. In both instances, the victim was someone other than the offender or their accomplice, hence both scenarios constitute felony murder in Colorado. Under the traditional agency rule, however, the Carjacking (accomplice) offender would be guilty of felony murder while the Carjacking (bystander) offender would not. The traditional agency rule treats offenders whose co-felons kill more seriously—and hence deserving of harsher punishment—than offenders who commit a felony during which someone else causes death. If the community shares this differential judgment of desert, the study participants should also adjudge the Carjacking (accomplice) offender as deserving harsher punishment than the Carjacking (bystander) offender.

The data in Table 6 above show that this is not the case. There is no significant difference in results between the two scenarios. Both scenarios have the same median deserved sentencing range (three to six years), the same median deserved sentence (three years), the same percentage of subjects who believed the offender deserved life without parole (3%), and very similar percentages of subjects who believed the offender deserved conviction for first-degree murder (5% versus 6%). This suggests that the traditional agency rule does not comport with the moral judgments of the subjects, who treated a felony murder where a co-felon killed the victim as no more or less morally culpable than where a third party killed the victim.

This does not mean, however, that the study results support doing away with the traditional agency rule because this would move the law further from the subjects' moral views. If the felony-murder rule is retained but the agency rule does not apply, the offender would be guilty of felony murder both when the victim was killed by a co-felon and when a victim was killed by a third party. By contrast, the study subjects believed that the offender did not deserve life without parole or a first-degree murder conviction in either of those cases.

Taken together, the results of the Armed Robbery and Carjacking twin scenarios show that traditional felony-murder doctrine draws the lines of moral culpability in precisely the wrong places. The felony-murder rule itself treats the trigger person and accomplice as equally culpable, while treating the offender as more culpable when the shooter is a co-felon rather than a bystander. By contrast, the study participants treated the offender as equally culpable regardless of whether the shooter

was a co-felon or a bystander, while treating the shooter as far more morally culpable than an accomplice who does not cause the victim's death.

Assuming for the moment that the felony-murder rule is not abolished, the law would align more closely with the subjects' moral judgements if the rule did not apply to accomplices who did not kill the victim, regardless of who did kill the victim. In other words, if we are to have a felony-murder rule it should apply only to the trigger person, with no vicarious liability imposed on any accomplices. As we saw above, of course, the law would align even more closely with the subjects' moral judgement if the felony-murder rule were abolished entirely. Even in the scenario where the offender was the trigger person who committed armed robbery, the overwhelming consensus among the participants was that the offender did not deserve life without parole or a first-degree murder conviction.

## ii. Intentional Killing Scenarios

Table 6 shows the results of the individual intentional killing scenarios in addition the felony-murder scenarios. Under traditional common law principles, these three scenarios constitute voluntary manslaughter (the Adultery scenario), second-degree murder (the Complaining scenario), and first-degree murder (the Lying in Wait scenario). Under Colorado law, the Adultery and Complaining scenarios are both second-degree murder, punishable by sixteen to forty-eight years in prison, whereas the Lying in Wait scenario is first-degree murder, punishable by life without parole.

The Colorado study results comport with the common law's culpability hierarchy. The subjects viewed the Complaining scenario offender as deserving more punishment than the Adultery scenario offender and they viewed the Lying in Wait scenario offender as deserving significantly more punishment than either of the other intentional killing scenarios. However, the study results differ from the common law with respect to the appropriate convictions for the Adultery and Complaining scenarios. While the study subjects believed the Adultery scenario offender deserved a lower sentence (median range of twelve to twenty-four years and median of twenty-four years) than the Complaining scenario offender (median range twenty-four to forty-eight years and median of thirty-seven years), they believed that both offenders deserved second-degree murder convictions. The median conviction for both was second-degree murder. For the Adultery scenario, 43% of subjects believed the offender deserved second-degree murder, compared to 19% who believed the offender deserved manslaughter. For the Complaining scenario, 40% of subjects believed the offender deserved second-degree murder, while 21% believed the offender deserved manslaughter. These results regarding which conviction the offender deserved align more with the law of Colorado (and many other states, including Maryland<sup>193</sup>) than with the traditional common law approach to provocation.

---

193. See *supra* Part III.

Colorado's sentencing regime also aligns with the study's results for all the intentional killing scenarios. The Adultery and Complaining scenario offenders would both be sentenced to a prison term within the range of sixteen to forty-eight years, which covers the median sentence for both the Adultery scenario (twenty-four years) and the Complaining scenario (thirty-seven years). Similarly, the median punishment for the Lying in Wait scenario was life without the possibility of parole, the punishment applied under Colorado law.

### iii. Comparing Felony Murder with Intentional Killing

The results of the intentional killing scenarios show the study participants shared the culpability judgments of the Colorado legislature which are instantiated in the common law. The results also show that the participants were willing to assign serious consequences when they believed they were warranted. For example, the median deserved sentence for the Lying in Wait scenario was life without parole, and 86% of subjects believed this offender deserved to be convicted of first-degree murder.

These data blunt any claim that the study participants were unusually and non-representatively lenient in their attitudes towards criminal desert. The participants believed felony-murder offenders deserved sentences much lower than those imposed for murder, despite agreeing that intentional murderers deserved those same sentences. The results clearly demonstrate that the subjects believed felony murderers deserved far less punishment than those who intentionally kill—including intentional killers who are guilty of only second-degree murder under Colorado law.

### iv. Comparing Felony Murder with Colorado Sentencing

The study also enables comparison of felony-murder results with sentences imposed under Colorado law. At the time the study was conducted, felony murder was classified as first-degree murder with a mandatory sentence of life without the possibility of parole. According to the study participants, this is unjust and excessive for all the felony-murder scenarios—and extremely excessive for all but one of the scenarios.

The legislature downgraded felony murder from first-degree to second-degree murder in 2021, with a sentencing range of sixteen to forty-eight years in prison. The amended minimum sentence, while far lower than life without parole, is still much higher than the median deserved sentence for five of the six felony murder scenarios. The median sentences for these five felony-murder examples were all between two and four years in prison. That is, the post-2021 *minimum* sentence is still at least *four times* higher than the sentence the study subjects believed the offenders deserved. For one scenario—Armed Robbery Trigger Person—the median deserved sentence of twenty years fell within the current sentencing range for felony murder.

Table 7 —Felony-Murder Scenarios Compared to Colorado Sentences

Scenario	Sentence Deserved According to Survey		Sentence Imposed by Colorado Law	
	Median Range	Median Years	Predicate Felony	Predicate Felony + Negligent Homicide
Vending Machine Burglary	1–3	2	0–0.25	2–6.25
Home Burglary (accomplice)	1–3	3	8–28	10–35
Armed Robbery (accomplice)	3–6	4	8–28	10–35
Armed Robbery (trigger person)	12–24	20	8–28	10–35
Carjacking (bystander)	3–6	3	8–28	10–35
Carjacking (accomplice)	3–6	3	8–28	10–35

Perhaps the most crucial comparison is between the results of the felony-murder scenarios with the punishment that would apply if the felony-murder rule was abolished. Table 7 presents this comparison.<sup>194</sup> As the data in the table show, the sentence imposed for the predicate felony alone is substantially higher than the median deserved sentence for five of the six scenarios. The Home Burglary (accomplice), Armed Robbery (accomplice), Carjacking (bystander), and Carjacking (accomplice) offenders would face a *minimum* sentence at least twice as high as the median deserved sentence in the study, for the predicate felony alone. The Home Burglary (accomplice) offender would face a minimum sentence two to three times higher than the study participants believed they deserved, again for the predicate felony alone.<sup>195</sup> The maximum penalty for the predicate felony alone in

194. The sentences imposed for predicate felonies and negligent homicide were unaffected by the felony-murder reform law, since that law only changed felony murder from first-degree murder to second-degree murder. *See supra* text accompanying note 138.

195. This strongly suggests that, even in the absence of felony murder or consecutive sentencing for multiple offenses, Colorado’s felony sentencing ranges are far higher than the study subjects believe is just. It could scarcely be disputed that felonies in which someone is killed are at the higher end of the spectrum of culpability for that type of felony. If the law mirrors community moral judgments, one would expect the felony-murder scenarios to be, at the very least, towards the higher end of the applicable sentencing range. Yet for four of the scenarios, the median deserved sentence is well below the minimum of the sentencing range.



these four scenarios was seven to nine times higher—and more than twenty years longer—than the median deserved punishment.

The median deserved sentence for one scenario—the Armed Robbery (trigger person) example—of twenty years fell within the sentencing range for the predicate felony alone, though towards the lower end of the range. The median deserved sentence for the final scenario—the Vending Machine Burglary—of two years was greater than the maximum sentence imposed for the predicate offense alone, even though this scenario had the lowest median deserved sentence of all the felony-murder examples. This is because, due to a recent amendment, the predicate “felony” of third-degree burglary is now a class-two misdemeanor with a sentence far lower than for any class of felony. Prior to the amendment, third-degree burglary was a class-five felony punishable by two to six years in prison. The median deserved sentence for the burglary felony murder sits at the bottom of this range.

In summary, if the felony-murder scenarios were punished only with respect to their predicate offenses under current law, the punishment would be grossly excessive (compared to the study results) in five scenarios, appropriate in one scenario, and inadequate in one scenario. However, in the absence of felony murder, Colorado law would not impose only the punishment for the predicate felony. Assuming the foreseeability requirement for causation satisfies the negligence required for criminally negligent homicide,<sup>196</sup> Colorado law mandates that the sentences for the predicate felony and criminally negligent homicide be served consecutively. Table 7 above includes the cumulative mandatory maximum and minimum sentences for the two offenses. The median deserved sentences for four of the felony-murder scenarios were far below the relevant combined sentences, with the minimum available punishment about three times as long as the deserved punishments. For the other two scenarios, the median deserved sentence was at the very low end of the mandatory minimum combined sentence for each scenario. Specifically, the median deserved sentence for the Vending Machine Burglary was two years, and the minimum combined sentence is also two years. The median deserved sentence for the Armed Robbery (trigger person) was twenty years, while the minimum combined sentence is ten years. Turning our eye to the maximum combined sentences, the contrast is even more stark. For four of the six scenarios, the maximum combined penalty in the absence of felony murder would to approximately ten times higher—and more than thirty years longer—than the median deserved punishment.

In other words, the felony-murder rule in Colorado is so out of step with the study participants’ sense of justice that *even if the felony-murder rule were abolished*, the mandatory sentences imposed would be massively excessive in four of the felony-murder scenarios, and just shy of excessive in the other two scenarios. Assuming the study subjects’ judgment reflects that of the community, there is no danger that abolishing felony murder will leave the state without the ability to impose the punishment deserved by offenders who commit predicate felonies during which a victim dies. Indeed, bringing the applicable sentences in line with the

---

196. See *supra* Part III.A.

results of the study would require both abolishing felony murder and lowering the punishment imposed for felonies generally.

### 3. Judgments About Desert by Democrats and Republicans

As mentioned above, the survey responses were curated so that the ratio of Democrats to Republicans matched that of the Colorado population.<sup>197</sup> These demographic data allow for comparisons between the responses of subjects who favor Democrats and those who favor Republicans. Studies on attitudes towards criminal sentencing in general have shown that Republicans are far more likely than Democrats to believe people convicted of crimes deserve longer sentences. For example, a recent Pew Research Center poll indicated that people who lean Democratic are far more likely to believe those convicted of crimes spend too much time in prison than too little, whereas the reverse is true for those who lean Republican.<sup>198</sup>

Given these attitudes towards crime and desert in general, one might expect substantial numbers of the two groups to have very different views on what felony-murder offenders deserve. Specifically, one might suspect Republican subjects to believe the offenders deserve much longer sentences and convictions for a more serious offense, than their Democratic counterparts. If there is a disparity in moral judgment, that could also help explain why the felony-murder rule remains part of criminal law in almost every state despite the overall rejection of the rule indicated by the data described above. For example, if there is strong Republican support for the felony-murder rule, that may be sufficient to prevent abolition efforts despite a consensus against felony murder among Democrats.

However, the moral judgments of Democratic and Republican participants were surprisingly similar. Table 8 and Figure 3 show the results regarding desert for the six felony-murder scenarios combined.

---

197. See *supra* note 157 and accompanying text.

198. See John Gramlich, *U.S. Public Divided over Whether People Convicted of Crimes Spend Too Much or Too Little Time in Prison*, PEW RSCH. CTR. (Dec. 6, 2021), <https://www.pewresearch.org/short-reads/2021/12/06/u-s-public-divided-over-whether-people-convicted-of-crimes-spend-too-much-or-too-little-time-in-prison/>. Gramlich explains:

Democrats and Democratic-leaning independents are much more likely to say people convicted of crimes spend too much time in prison than to say they spend too little time behind bars (41% vs. 21%). The reverse is true among Republicans and Republican-leaning independents: 44% of Republicans say people convicted of crimes spend too little time in prison, while 14% say they spend too much time behind bars.

*Id.* See also Megan Brenan, *Americans More Critical of U.S. Criminal Justice System*, GALLUP (Nov. 16, 2023), <https://news.gallup.com/poll/544439/americans-critical-criminal-justice-system.aspx>.

**Table 8 —Desert Results for Combined Felony-Murder Scenarios—  
Democrats v. Republicans**

Range Deserved	Democrats (%)	Republicans (%)
No prison time	7.3	8.3
<1 year	14.1	13.4
1–3 years	27.4	20.3
3–6 years	19.2	12.4
6–12 years	15.8	17.2
12–24 years	6.4	9.7
24–48 years	4.3	6.9
>48 years	0.4	4.1
LWP	3.8	3.1
LWOP	1.3	2.8
Death sentence	0	1.7
2nd degree murder	20.5	17.9
1st degree murder	6.0	4.5
Median range	3–6 years	3–6 years
Median years	3 years	5 years
95% confidence interval	[3, 5]	[3, 6]

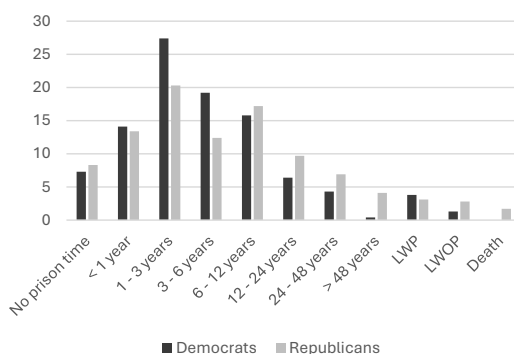
The responses by Democrats and Republicans are alike in several ways. Most importantly, both sets of participants share a consensus against the felony-murder rule. The overwhelming majority of each group believed that felony-murder offenders did not deserve either to be convicted of first-degree murder or sentenced to life without parole. The median sentencing range they believed the offenders deserved—three to six years—was the same for each group. The median sentence in years among the study participants was only slightly lower among Democrats—

three years—than Republicans—five years.<sup>199</sup> Furthermore, almost exactly the same percentage of Democrats and Republicans believed the felony-murder offenders deserved less than one year in prison—21.4% and 21.7%, respectively.

The Republican results here are especially striking. In the Pew Research Center study, only 14% of Republicans said criminals spend too much time behind bars.<sup>200</sup> In the Colorado study, by contrast, 94.5% of Republicans believed the felony-murder offenders were sent to prison for too long under Colorado law.<sup>201</sup>

In other words, study participants across the political spectrum were almost unanimous in rejecting felony murder, and also believed the appropriate punishment for offenders was far below that imposed by state law both at the time of the study and after the 2021 amendments. Whatever the reason for felony murder's continued existence in Colorado law, strong support amongst the members of one political party is not it.

**Figure 3.** Desert Results for Combined Felony-Murder Scenarios— Democrats v. Republicans



There are some differences in the judgments of the two groups, but they do not all cut in the same direction. More Republican participants believed the offenders deserved at least life without parole—but more Democrats believed the offenders deserved conviction for first- and second-degree murder. More Republicans than Democrats also believed that the offenders deserved no prison time at all. The

199. The confidence intervals for both Democrats and Republicans were narrow and very similar—[3, 5] and [3, 6], respectively. In other words, there is a 95% likelihood that the median judgement of all Democrats in the Colorado population as a whole is between three and five years in prison. Similarly, there is a 95% likelihood that the median judgement of all Republicans in the Colorado population as a whole is between three and six years in prison. This strongly suggests that the similarity between the responses of Democrat and Republican participants in the study is not an artifact of the study population in each category, but rather is strong evidence that Democrats and Republicans in Colorado have markedly similar judgements about the punishment deserved for felony murder.

200. See Gramlich, *supra* note 198.

201. The contrast is even more stark when comparing the felony-murder study to the Gallup poll cited above. See Brenan, *supra* note 198. In that poll, only 7% of Republicans believed the criminal justice system was too tough. *Id.*

main overall difference between Democrats and Republicans in this study is that the Democratic results are more centered around the median, while the Republican results are distributed more widely. For instance, 45% of Democrats believed the offenders deserved a sentence of one to six years, compared to 27.6% of Republicans.

The Democratic and Republican results were strikingly similar for every individual felony-murder scenario. Table 9 shows the median deserved sentencing range and percentage of participants who believed first-degree murder was deserved, among Democratic and Republican participants. The median sentencing range was identical for every scenario except one. In the Armed Robbery (trigger person) scenario, the Republican median range was one step higher than the Democratic median range—though slightly fewer Republicans believed first-degree murder was the appropriate conviction.

**Table 9 —Desert Results for Individual Felony-Murder Scenarios—  
Democrats v. Republicans**

Scenario	Median Range		1st Degree Murder (%)	
	DEM	GOP	DEM	GOP
Vending Machine Burglary	1–3	1–3	0	0
Home Burglary (accomplice)	1–3	1–3	2	3
Armed Robbery (accomplice)	3–6	3–6	2	2
Armed Robbery (trigger person)	6–12	12–24	5	4
Carjacking (bystander)	3–6	3–6	1	3
Carjacking (accomplice)	3–6	3–6	4	1

4. Knowledge of the Law

The study also asked the participants about their knowledge of the law. Table 10 sets out the results for what the participants believed to be the applicable conviction and sentence under state law at the time. These data strongly demonstrate a lack of knowledge among participants regarding the felony-murder rule. First, for every scenario, the overwhelming majority of participants failed to identify that the conduct described in the felony-murder scenarios was, at the time, first-degree murder. The percentage of people who falsely believed the applicable offense was something less than first-degree murder ranged from a low of 86% (for the Carjacking (accomplice) scenario) to a high of 99% (for the Vending Machine

Burglary scenario). Across all scenarios, an average of 93.7% of survey participants were unaware that the conduct described constituted first-degree murder. In other words, only 6.3% of all survey participants knew that the conduct described was, in fact, first-degree murder.

**Table 10 —Knowledge of Current Felony-Murder Rule**

Scenario	Median Range	At Least LWOP (%)	1st Degree Murder (%)
Vending Machine Burglary	1–3	0	1
Home Burglary (accomplice)	1–3	6	9
Armed Robbery (accomplice)	6–12	4	7
Armed Robbery (trigger person)	12–24	8	13
Carjacking (bystander)	3–6	3	4
Carjacking (accomplice)	6–12	5	14

The survey responses demonstrated even lower knowledge of the punishment for felony murder. The percentage of people who believed that the punishment applicable under Colorado law was something less than life without the possibility of parole ranged from 92% (for the Armed Robbery (trigger person) scenario) to 100% (for the Vending Machine Burglary scenario). An average of 95.7% of subjects across all the scenarios did not know that life without parole was the applicable punishment. In other words, only 4.3% of all survey participants realized that the minimum punishment for the described conduct was life without the possibility of parole. This significantly undercuts any claim that imposing a punishment this severe is justified by its deterrent effect: for nineteen out of twenty people, the punishment cannot have a deterrent effect for the simple reason that they’re unaware that this is the consequence of the relevant conduct.

For most of the scenarios, the subjects believed that a person who committed the crimes described would, if caught, be sentenced to a term of years as low as one to three years in prison. Crucially, the subjects believed the offenders would be punished with a lower sentence than would be imposed upon the offenders *if the*

felony-murder rule were abolished.<sup>202</sup> Even assuming, for the sake of argument, that harsh punishments do in fact deter more than lesser punishments, the existence of the felony-murder rule adds nothing to the deterrent effect created by the punishment that would be imposed in its absence.

The community's lack of awareness about the felony-murder rule could also be a factor in the rule's continued ubiquity in American criminal law. The results of the Colorado study suggest that, when presented with examples of felony murder, people overwhelmingly agree that the felony-murder rule produces grossly unjust results. But the general public is simply not aware of the rule's existence. Without greater awareness, legislators have not felt significant pressure to abolish what is, when known about, an extremely unpopular law.<sup>203</sup>

## V. THE MARYLAND STUDY

### A. *The Maryland Study Design*

In November 2023, the author conducted a study of Maryland residents similar to the earlier Colorado study. The Maryland study asked participants about their moral attitudes towards and knowledge of the Maryland first-degree felony-murder rule. Like the Colorado study, the survey was conducted using the Qualtrics platform and involved 512 Maryland residents who were representative of the state's population with respect to sex<sup>204</sup> and political affiliation.<sup>205</sup>

The Maryland study was designed along the same lines as the Colorado study. The online survey consisted of six scenarios that described examples of first-degree felony murder under Maryland law, along with three "baseline" scenarios depicting intentional killings involving different degrees of culpability. Like the Colorado survey, the Maryland survey posed four questions about each scenario—two of which asked about the subjects' sense of justice, and two which asked about their knowledge of Maryland law.<sup>206</sup>

---

202. See *supra* Table 7.

203. See *supra* Table 5 and related discussion (only 3.1% of participants believed the sentence imposed for felony murder under the current law was morally deserved).

204. 48.2% of study participants identified their sex as male and 51.6% as female. One participant selected the "other" category.

205. Among the participants, 54.1% leaned towards or strongly preferred Democrats, 31.5% leaned towards or strongly preferred Republicans, and 14.5% had no preference for either party. By comparison, according to a Pew Research Center study, 55% of the Maryland population are or lean Democrat, 31% are or lean Republican, and 14% have no lean. See *Party Affiliation Among Adults in Maryland*, PEW RSCH. CTR., <https://www.pewresearch.org/religion/religious-landscape-study/state/maryland/party-affiliation/> (last visited Oct. 4, 2024). The Maryland felony-murder survey also collected information on the participants' age, ethnicity, education level, household income, and whether they had been convicted of a felony. For the study's full demographic information, see *infra* Appendix D.

206. See *infra* Appendix B for a detailed description of the questions and the options presented to the survey participants.



## 1. The Scenarios

The nine scenarios presented in the Maryland study are described below. The three intentional killing scenarios are identical to those in the Colorado study. Three of the six felony-murder scenarios are the same as (or very similar to) their counterparts in the Colorado study, while the other three felony-murder vignettes are substantially different. There were several reasons for having a mix of repeated and original scenarios. Including some of the same fact patterns in both studies allowed for direct comparisons of the Colorado and Maryland results with respect to those examples. Adding some original fact patterns provided results for some of the different predicate felonies under Maryland law. Several of these new scenarios were based on actual Maryland cases. This mix of scenarios meant that the two studies, together, provided data for nine distinct examples of felony murder.

### i. Felony-Murder Scenario #1: Burning Down Shed

Jane Smith works at a small dairy farm in rural Maryland. The owner of the farm allows tourists to tour the farm and sells branded t-shirts and coffee mugs. He stores the extra t-shirts and coffee mugs in a small shed behind the main dairy. Jane is angry at having to sell merchandise on top of her other farm work, so she decides to burn down the storage shed. Unbeknownst to Jane, her co-worker John is inside the shed when she sets it on fire. John dies from smoke inhalation.

Under Maryland law, Jane has committed first-degree felony murder. Burning down an outbuilding containing merchandise is a predicate felony for felony murder.<sup>207</sup>

### ii. Felony-Murder Scenario #2: Burglary Accomplice

Jane Smith and her boyfriend David Jones break a window of a men's clothing warehouse, planning to steal merchandise from inside. Jane is aware that David is carrying a firearm, which he has promised not to use except in self-defense, in case someone is inside and armed. As David climbs through the window, a security guard sees him and calls the police. When the police promptly arrive, they find Jane standing outside the warehouse. She is arrested and placed in handcuffs. A few minutes later, several blocks away, David, who is inside the warehouse, shoots and kills the security guard. [The survey asked about **Jane**.]

---

207. MD. CODE ANN., CRIM. LAW § 2-201(a)(4)(ii) (West 2024).

The predicate felony here is burglary in the second degree.<sup>208</sup> This scenario is materially similar to the Home Burglary (accomplice) scenario in the Colorado study. That scenario was based on the Colorado case of *Auman v. People*.<sup>209</sup>

### iii. Felony-Murder Scenario #3: Unarmed Robbery

Jane Smith decides to rob a motel without using a weapon. She walks up to the front desk and hands the clerk a note that reads, “Don’t say a word. Put all the money in this bag and no-one will get hurt!” The clerk is 60 years old and she only has one lung, due to previous cancer surgery. About 40 minutes later, the clerk tells police that she is having difficulty breathing and holds her upper chest. She is taken to a hospital immediately. Two hours after the robbery, she dies from a heart attack. A medical expert later testifies that her heart attack was triggered by the acute emotional stress of the robbery.

The predicate felony in this scenario is (unarmed) robbery,<sup>210</sup> and the facts are based on the case of *Stewart v. State*.<sup>211</sup> The Court of Special Appeals of Maryland held that evidence supported the jury’s finding that the fright caused by the robbery caused the victim’s death, notwithstanding the lapse in time and the victim’s preexisting heart condition.<sup>212</sup>

### iv. Felony-Murder Scenario #4: Armed Robbery Trigger Person

David Jones and his girlfriend Jane Smith approach a man in a Walmart parking lot with the plan to take his valuables. Jane has a gun but does not intend to use it; she just wants to brandish it to scare the man. Jane points the gun at the other man and demands that the man hand over his wallet and cellphone. Instead of complying, the man tries to grab the gun out of Jane’s hand. The two of them struggle and the gun accidentally goes off, killing the man.

The predicate felony in this scenario is (armed) robbery.<sup>213</sup> This example is the same as its counterpart in the Colorado study.

### v. Felony-Murder Scenario #5: Run Over

Jane Smith and her boyfriend David Jones decide to steal valuables from a house. They are both unarmed. While Jane breaks in, David stays behind the

---

208. *Id.* § 6-203(a) (“A person may not break and enter the storehouse of another with the intent to commit theft, a crime of violence, or arson in the second degree.”).

209. 109 P.3d 647 (Colo. 2005).

210. MD. CODE ANN., CRIM. LAW § 2-201(a)(4)(ix) (West 2024). The predicate robbery felony includes both armed robbery under § 3-403 and unarmed robbery under § 3-402.

211. *Stewart v. State*, 500 A.2d 676 (Md. Ct. Spec. App. 1985).

212. *Id.* at 683.

213. MD. CODE ANN., CRIM. LAW §§ 2-201(a)(4)(ix) (West 2024), 3-403 (West 2024).

wheel of the getaway car. A neighbor sees the break-in and calls 911. The police promptly respond and use their patrol car to partially block the getaway car. An officer gets out and tells David to get out of his car. David remains in his car and the officer points her gun at David. David runs over the officer, killing her. [The survey asked about **Jane**.]

The predicate offense in this scenario is burglary in the first degree.<sup>214</sup> The scenario is based on the case involving the death of police officer Amy Caprio. In that case, four teenagers aged sixteen and seventeen were involved in the break-in. The teenager who ran over Amy Caprio was convicted of felony murder, among other charges, and the other three teenagers pleaded guilty to felony murder charges.<sup>215</sup>

#### vi. Felony-Murder Scenario #6: Carjacking Accomplice

Jane Smith is homeless and spends her time on Charles St in Baltimore. While she is in an arcade, she is approached by a person, David Jones, she has seen occasionally on the street in the past. David asks for Jane to help him steal a car. David hands Jane a gun and tells her to fire it into the air to distract the car's owner. David and Jane then go outside and approach a person who has just parked his car. Jane fires the gun in the air, as instructed. Without warning, David also pulls out a gun and shoots the other person in the head. The person dies immediately. [The survey asked about **Jane**.]

The predicate offense here is carjacking.<sup>216</sup> This example is identical to the accomplice carjacking scenario in the Colorado study.

#### vii. Intentional Killing Scenarios—Adultery, Complaining, and Lying in Wait

The intentional killing scenarios in the Maryland study were identical to those in the Colorado study. Just as in Colorado, under Maryland law both the Adultery and Complaining scenarios are second-degree murder<sup>217</sup> whereas the Lying in Wait scenario is first-degree murder.<sup>218</sup>

---

214. *Id.* § 6-202(a).

215. See Tim Prudente, *Baltimore Teen Sentenced to Life for Murdering Officer Amy Caprio. The Punishment Is Fitting, Prosecutor Says*, BALT. SUN (Aug. 21, 2019), <https://www.baltimoresun.com/2019/08/21/baltimore-teen-sentenced-to-life-for-murdering-officer-amy-caprio-the-punishment-is-fitting-prosecutor-says/>; *Man Appeals Life Sentence in Killing of Baltimore County Officer Amy Caprio*, CBS NEWS (Mar. 3, 2022, 10:30 PM), <https://www.cbsnews.com/baltimore/news/man-appeals-life-sentence-in-killing-of-baltimore-county-officer-amy-caprio/>.

216. MD. CODE ANN., CRIM. LAW §§ 2-201(a)(4)(iv) (West 2024), 3-405(b) (West 2024).

217. *Id.* §§ 2-204(a), 2-207(b) (“The discovery of one’s spouse engaged in sexual intercourse with another does not constitute legally adequate provocation for the purpose of mitigating a killing from the crime of murder to voluntary manslaughter even though the killing was provoked by that discovery.”).

218. *Id.* § 2-201(a). Murder is in the first degree if it is deliberate and premeditated, committed by lying in wait or poison, or the first-degree felony-murder rule applies. *Id.* All other murder is second-degree murder. *Id.* §§ 2-204(a), 2-207(a).

## 2. The Survey Questions

The questions in the Maryland survey were the same as those in the Colorado survey, except that the sentencing range options were adjusted to align more closely with the sentences imposed under the Maryland Criminal Code. For the two questions relating to what the participants believed the legally applicable sentencing range to be, and what sentencing range the participants believed the offender deserved, the options were:

- No prison time
- Less than 6 months in prison
- 6 months-1 year in prison
- 1-5 years in prison
- 5-10 years in prison
- 10-20 years in prison
- 20-30 years in prison
- More than 30 years in prison
- Life with the possibility of parole
- Life without the possibility of parole
- Death penalty

Just as with the Colorado study, the Maryland survey also asked participants to state the specific sentence deserved by the offender within the range they chose.

### *B. The Maryland Study Results*

#### 1. Judgements About Desert—All Felony-Murder Scenarios

Table 11 and Figure 4 show the results for the sentence and conviction that the participants believed the felony-murder offenders deserved across the six scenarios. Keep in mind that under Maryland law, each of these offenders would be guilty of first-degree murder and face a sentence of life with or without parole.<sup>219</sup> Like the Colorado results, these findings show that the Maryland study subjects do not believe the offenders' conduct should be treated as first-degree murder or sentenced to life. To wit:

- 1) Just over one in ten of the Maryland residents surveyed (11.5%) believed that the felony-murder offenders deserved at least a life sentence. In other words, almost nine out of ten of the Maryland residents surveyed (88.5%) believed the felony-murder offenders did *not* deserve a life sentence—that is, they considered a life sentence to be unjustly excessive. This comparison is depicted in Figure 5 below.
- 2) A quarter of the residents surveyed (24.7%) believed that the felony-murder offenders deserved no more than one year in prison. That means three times as many participants believed the offenders deserved a misdemeanor-length

---

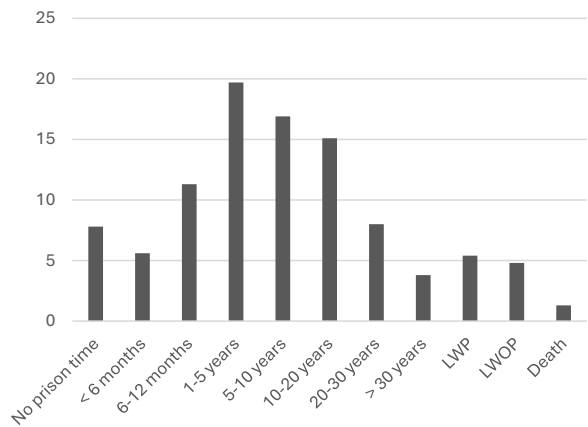
219. See *supra* Part III.B.

- sentence than believed they deserved the life sentence imposed by Maryland law (8%).
- 3) The median deserved sentencing range for the felony-murder offenders was five to ten years in prison and the median deserved sentence was seven years.
  - 4) 7.8% of study participants believed the offenders deserved no prison time. That is almost exactly the same as the number of participants who believed the offenders deserved a life sentence (8%).
  - 5) 8% of the survey subjects believed the offenders deserved to be convicted of first-degree murder, meaning 92.0% of the people surveyed believed the felony murders did not deserve the first-degree murder conviction applicable under Maryland law.

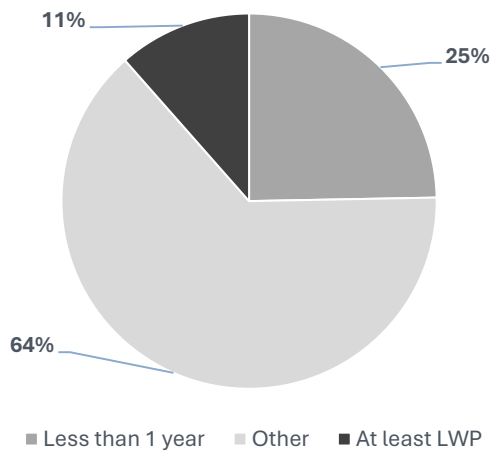
**Table 11 —Consequences Deserved Across Felony-Murder Scenarios**

Deserved	Percent Selected
No prison time	7.8
<6 months	5.6
6–12 months	11.3
1–5 years	19.7
5–10 years	16.9
10–20 years	15.1
20–30 years	8
>30 years	3.8
LWP	5.4
LWOP	4.8
Death sentence	1.3
2nd degree murder	27.1
1st degree murder	8

**Figure 4.** Punishment Deserved Across All Felony-Murder Scenarios



**Figure 5.** Punishment Deserved Across All Felony-Murder Scenarios – Summary



2. Judgments About Desert—Individual Felony-Murder Scenarios

i. Comparisons Among the Felony-Murder Scenarios

The Maryland study participants believed that the offender in every felony-murder scenario deserved a far lesser punishment than the sentence imposed under Maryland law. They nonetheless also believed that the different felony-murder scenarios involved differing degrees of moral culpability and desert. The key results for each individual scenario are listed in Table 12.

The study participants adjudged the Armed Robbery (trigger person) felony-murder scenario as deserving the most severe punishment. This is not surprising since it involved the most serious predicate felony and the offender was the trigger person. This same scenario was also considered the most serious felony-murder example in the Colorado study.<sup>220</sup> Even for this most egregious example, only 14% of subjects believed that the offender deserved the punishment imposed in Maryland. The same percentage of subjects believed the offense should be considered first-degree murder. The median deserved punishment (a range of ten to twenty years and a sentence of fifteen years) was well below Maryland’s life sentence for felony murder.

Table 12 —Consequences Deserved for Individual Scenarios

	Scenario	At Least LWP (%)	Median Range	Median Years	1st Degree Murder (%)
Felony Murder	Burning Down Shed	16	5–10	10 <sup>221</sup>	11
	Burglary (accomplice)	2	1–5	3 <sup>222</sup>	2
	Unarmed Robbery	12	1–5	5 <sup>223</sup>	4
	Armed Robbery (trigger person)	14	10–20	15 <sup>224</sup>	14
	Run Over	13	5–10	6 <sup>225</sup>	10
	Carjacking (accomplice)	12	5–10	6 <sup>226</sup>	5

220. See *supra* Table 6 and related discussion. Interestingly, the median sentence in the Maryland study was fifteen years, compared to the twenty years in the Colorado study. See *id.*; Table 12. For a more comprehensive comparison of the data from each study, see *infra* Part V.B.4.

221. The 95% confidence interval for the Burning Down Shed scenario median was [8, 20].

222. The 95% confidence interval for the Burglary (accomplice) scenario median was [0.83, 5].

223. The 95% confidence interval for Unarmed Robbery scenario median was [3, 8].

224. The 95% confidence interval for the Armed Robbery (trigger person) scenario median was [10, 18].

225. The 95% confidence interval for the Run Over scenario median was [4, 10].

226. The 95% confidence interval for the Carjacking (accomplice) scenario median was [4, 10].



Table 12—Continued

	Scenario	At Least LWP (%)	Median Range	Median Years	1st Degree Murder (%)
Intentional Killing	Adultery	29	20–30	24 <sup>227</sup>	41
	Complaining	34	20–30	25 <sup>228</sup>	43
	Lying in Wait	62	LWP	LWP <sup>229</sup>	82

The second most egregious felony-murder scenario, according to the Maryland subjects, was the Burning Down Shed scenario. This also makes sense, given that the predicate felony (arson) is also a very serious offense with a high risk of death, and that the offender herself—not an accomplice—caused the victim’s death.

The four scenarios with lower deserved penalties all involved either an offender whose accomplice caused the victim’s death, or a cause of death more tenuously connected to the offender’s conduct (the Unarmed Robbery scenario). This is consistent with the findings of other studies, including the Colorado study, in which the participants treated offenders who did not kill the victim as deserving less punishment than offenders who did kill the victim, all else being equal.

The scenario with the least moral culpability was the Burglary (accomplice) scenario. In that example, 98% of subjects believed the offender deserved neither the conviction (first-degree murder) nor sentence (a life sentence) imposed by Maryland law. Rather, the offender deserved, at the median, only three years in prison.

ii. Intentional Killing Scenarios

Table 12, above, also includes the results for the three intentional killing scenarios. These scenarios are considered at common law to be voluntary manslaughter (the Adultery scenario), second-degree murder (the Complaining scenario), and first-degree murder (the Lying in Wait) scenario.<sup>230</sup> Maryland, like Colorado, treats both the Adultery and Complaining scenarios as second-degree murder punishable by up to forty years in prison,<sup>231</sup> and the Lying in Wait scenario as first-degree murder punishable by life with or without parole.<sup>232</sup>

227. The 95% confidence interval for the Adultery scenario median was [20, 25].  
228. The 95% confidence interval for the Complaining scenario median was [4, 10].  
229. The 95% confidence interval for the Lying in Wait scenario median was [LWP, LWOP].  
230. See *supra* Part V.A.1.  
231. MD. CODE ANN., CRIM. LAW § 2-204(b) (West 2024).  
232. *Id.* § 2-201(a)(2), (b)(1).

The Maryland study results—just like the Colorado results—align in different ways with both the common law and state statutory law regarding these examples of intentional killing. Like the common law, the study participants ranked the Adultery scenario offender as deserving the least punishment of the three, followed by the Complaining scenario offender, with the Lying in Wait scenario offender deserving the most punishment.

Unlike the common law, the study subjects believed the Adultery scenario offender deserved more severe punishment (a median sentencing range of twenty to thirty years and a median sentence of twenty-four years) than that imposed for manslaughter (up to ten years in prison<sup>233</sup>). In this respect, the results align with Maryland (and Colorado) law's treatment of the Adultery scenario as second-degree murder. This indicates that the trend of not considering adultery as adequate provocation for voluntary manslaughter<sup>234</sup> has brought the law in those jurisdictions more in line with community moral values. The results for the Lying in Wait scenario also align with Maryland law, with a median deserved sentence of life with parole.

### iii. Comparing Felony Murder with Intentional Killing

When we compare the felony-murder scenarios with the intentional murder scenarios in the Maryland study, once again the results mirror those of the Colorado study. The Maryland study subjects assigned far higher deserved punishments and more serious convictions to the intentional killers than the felony-murder offenders. Despite felony murder being first-degree murder in Maryland, the study subjects believed felony-murder offenders deserved far less severe punishment than the intentional killers who would be guilty of second-degree murder in Maryland.

Once again, the data contradict any claim that the study participants could have simply been an unusually lenient cohort. They were willing to impose both a high punishment and serious conviction when they felt it was merited, including 82% of subjects who believed the Lying in Wait killer deserved to be convicted of first-degree murder.

### iv. Comparing Felony-Murder Results with Maryland Sentencing

A defender of the felony-murder rule might argue that even though the current punishment for felony murder is too high, the proper solution is to amend rather than abolish the rule. Such a proponent might argue that without *some* additional penalty for felony-murder situations, the offenders will not receive a sufficiently just punishment. The right approach, then, would be to lower felony murder to second-degree murder and substantially lower the sentence imposed.

---

233. *Id.* § 2-207(a)(1).

234. *See* Berman & Farrell, *supra* note 170.

This was the approach taken by the Colorado legislature in 2021.<sup>235</sup> I have argued that even with the lessened consequences, the amended felony-murder rule sentences were grossly excessive compared to study participants’ sense of justice. The injustice of the Colorado rule is exacerbated by both the mandatory minimum sentences imposed for all felonies and the mandatory consecutive sentences imposed for multiple felonies when a person dies. In fact, these features of the Colorado sentencing scheme would result in excessive punishment for felony-murder scenarios even if the felony-murder rule was abolished.

Comparing the sentences that the study participants believed were deserved and the sentences that would be imposed in the absence of the felony-murder rule, the study shows that felony murder would be appropriately punished in Maryland if the felony-murder rule was abolished. Table 13 presents these comparisons.

**Table 13 —Felony-Murder Scenarios Compared to Maryland Sentences**

Scenario	Sentence Deserved According to Survey		Sentence Imposed by Maryland Law	
	Median Range	Median Years	Predicate Felony Max. Sentence	Predicate Felony + Negligent Homicide Max. Sentence
Burning Down Shed	5–10	10	20	30
Burglary (accomplice)	1–5	3	15	25
Unarmed Robbery	1–5	5	15	25
Armed Robbery (trigger person)	10–20	15	20	30
Run Over	5–10	6	20	30
Carjacking (accomplice)	5–10	6	30	40

As we can see from the table, the sentencing ranges available for each of the study’s predicate felonies include the median deserved sentence in every case. In

<sup>235</sup>. See *supra* Part III.A.3.

most cases, the maximum sentence for the predicate felony is three to five times as long as the study subjects believed was deserved for the felony murder. For the other two scenarios, the maximum applicable sentence for the predicate felony alone was twice as high and one-third higher than the median deserved sentence for the felony-murder scenarios. These comparisons show that if the Maryland legislature abolished the felony-murder rule, judges would still be able to impose sentences that match, and even substantially exceed, the sentences that the study participants believed the offenders deserved.

This point applies *a fortiori* when criminally negligent homicide is taken into account. Assuming that the foreseeability requirement of causation satisfies the requisite negligence for negligent homicide, then every felony-murder offender is guilty of both the predicate felony and criminally negligent homicide. Unlike Colorado, Maryland law does not impose mandatory consecutive sentencing for these offenses. Maryland law does, however, permit judges the discretion to impose consecutive sentences. In other words, if a judge felt that the predicate felony sentence alone was insufficient to give the offender the punishment they deserved, the judge could apply the negligent homicide sentence to run consecutively, thereby adding up to ten more years to each sentence. Table 13 shows the maximum sentence that could be imposed if the predicate felony and negligent homicide were sentenced to run consecutively. For the majority of scenarios, this increases the maximum available sentence to five to eight times the median deserved sentence. The more likely potential sentencing injustice, even in the absence of the felony-murder rule, is that offenders will be punished more severely than they deserved, not too leniently.

An important difference between the Colorado and Maryland sentences *sans* felony murder is that the Maryland sentences do not have mandatory minimums. Colorado's mandatory minimum sentences have the effect that, even in the absence of felony murder, judges could not avoid imposing sentences much higher than the median deserved sentences reported in the study. Since Maryland sentences have no minimums, this problem does not arise. The high maximum sentences for predicate felonies make it *possible* to impose excessive punishment, but (unlike Colorado) excessive punishment is not inevitable.

### 3. Judgments About Desert by Democrats and Republicans

The participant pool for the Maryland study was curated to ensure that the participants' political preferences matched those of the state as a whole.<sup>236</sup> In the Colorado study, the Democratic and Republican participants had surprisingly similar views on the punishment and convictions that felony-murder offenders deserved. Crucially, both Democratic and Republican participants believed that the felony-murder rule imposed far more punishment than the offenders deserved.

---

236. For a breakdown of political preferences among the Maryland participants, see *supra* note 205 and accompanying text.

The Maryland study yielded results along the same lines. Table 14 and Figure 6 lay out the aggregate results regarding deserved sentences and convictions across the six felony-murder scenarios. The table shows several important similarities between the two groups of participants. First, an overwhelming majority of both Democrats (91.6%) and Republicans (82.9%) believed the felony-murder offenders did not deserve a sentence of life or greater. An even higher percentage of both Democrats (94.9%) and Republicans (87.3%) believed the offenders did not deserve to be convicted of first-degree murder. The two cohorts also had the same median deserved sentencing range of five to ten years—well below the life sentence imposed under Maryland law.

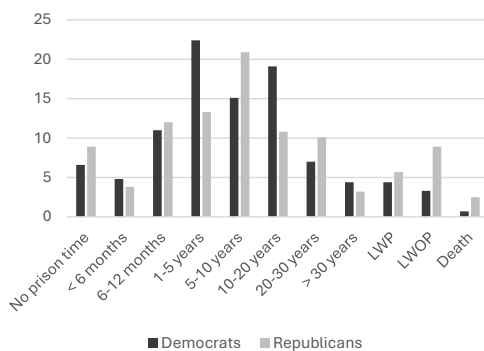
**Table 14 —Desert Results for Combined Felony-Murder Scenarios—  
Democrats v. Republicans**

Range Deserved	Democrats (%)	Republicans (%)
No prison time	6.6	8.9
<6 months	4.8	3.8
6–12 months	11	12
1–5 years	22.4	13.3
5–10 years	15.1	20.9
10–20 years	19.1	10.8
20–30 years	7	10.1
>30 years	4.4	3.2
LWP	4.4	5.7
LWOP	3.3	8.9
Death sentence	0.7	2.5
2nd degree murder	15.1	25.3
1st degree murder	5.1	12.7
Median range	5–10 years	5–10 years
Median years	6 years	8 years
95% confidence interval	[6, 8]	[7, 10]

There are a few differences between Democrats' and Republicans' sense of justice in the Maryland study. Some of these differences show Republicans adjudging felony-murder offenders more harshly than Democrats, but other differences show the opposite. For example, twice as many Republicans as Democrats believed both that the offenders deserved at least a life sentence and that they deserved conviction for first-degree murder. On the other hand, more Republicans than Democrats believed that the offenders deserved no prison time at all. Overall, the median deserved sentence was slightly lower among Democrats than Republicans—six years versus eight years—with significant overlap between the confidence intervals.

We can obtain more granular results by comparing the data regarding the individual felony-murder scenarios. These data are shown in Table 16. They show more differences between Democrats and Republicans than were evident in the aggregate results across all the felony-murder scenarios. Once again, these differences cut both ways (and so cancel each other out to some degree in the aggregate results). Republicans identified a higher deserved sentencing range in two scenarios—the Unarmed Robbery and Armed Robbery (trigger person) scenarios. But Democrats adjudged the median deserved sentencing range to be higher in three scenarios—the Burning Down Shed, Burglary (accomplice), and Run Over scenarios. The median range was the same for the remaining scenario.

**Figure 6.** Desert Results for Combined Felony-Murder Scenarios—Democrats v. Republicans



On the conviction side, a slightly higher percentage of Democrats than Republicans believed the offenders deserved a first-degree murder conviction in two instances—the Burning Down Shed and Unarmed Robbery scenarios. However, a much higher percentage of Republicans believed the offenders deserved first-degree murder in the other four instances. Most notably, for the Run Over and Carjacking (accomplice) scenarios, ten times more Republicans than Democrats believed first-degree murder was the morally appropriate conviction.

Counterintuitively, while far more Republicans than Democrats believed the Run Over accomplice deserved first-degree murder, the Republicans also believed the offender deserved a *lesser* sentence than the Democrats did.

**Table 15 —Desert Results for Individual Felony-Murder Scenarios—  
Democrats v. Republicans**

Scenario	Median Range		1st Degree Murder ( %)	
	DEM	GOP	DEM	GOP
Burning Down Shed	10–20	5–10	11	9
Burglary (accomplice)	1–5	0.5–1	0	5
Unarmed Robbery	1–5	5–10	5	3
Armed Robbery (trigger person)	10–20	20–30	11	23
Run Over	5–10	1–5	2	21
Carjacking (accomplice)	5–10	5–10	2	21

There is no obvious pattern to these differences. For present purposes, however, the key findings are consistent. There is a strong consensus among both Democrats and Republicans in the Maryland study that felony-murder offenders deserve far less punishment than the life sentence currently imposed. There is also a strong consensus across the political spectrum that felony-murder offenders do not deserve to be labeled first-degree murderers.

4. Comparing the Maryland and Colorado Results

Two of the felony-murder scenarios in the Maryland and Colorado studies are identical, namely the Armed Robbery (trigger person) and the Carjacking (accomplice) scenarios. A third scenario in the Maryland study—the Burglary (accomplice) scenario—is very similar to the Home Burglary (accomplice) scenario in the Colorado study. Both scenarios involve a burglary in which the offender is in police custody when their accomplice shoots the victim at a different location.

**Table 16 —Desert Results for Combined Felony-Murder Scenarios—  
Colorado v. Maryland**

Range Deserved	Colorado (%)	Maryland (%)
No prison time	3.2	8
<1 year	12.1	18.9
1–3 years	24.7	10.3
3–6 years	12.6	12.7
6–12 years	18.2	16.7
12–24 years	9.7	14.7
24–48 years	5.7	8
>48 years	3.2	1.2
LWP	5.7	5.6
LWOP	3.6	2.8
Death sentence	0.8	1.2
2nd degree murder	25.1	28.7
1st degree murder	8.1	7.2
Median range	3–6 years	3–6 years
Median sentence	5 years	6 years
95% confidence interval	[4,10]	[5, 8]

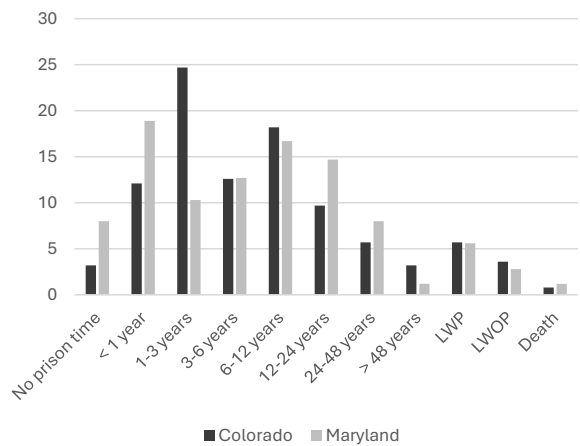
These shared scenarios allow an apples-to-apples comparison of the Colorado and Maryland results for at least these three felony-murder examples.<sup>237</sup> Table 17 and Figure 7 show the aggregate results across these three scenarios in each study. The results are substantially similar between the two studies. Both sets of participants gave the same median deserved sentencing range (three to six years) and very similar deserved sentences (five years in the Colorado study versus six years in the Maryland study). The percentage of participants who believed that the

237. The Maryland study presented participants with different sentencing ranges to choose from than the Colorado study. However, because each participant was asked to provide the specific sentences they believed the offenders deserved, the Maryland sentencing range results can be translated to match the sentencing ranges in the Colorado study.



offenders deserved a first-degree murder conviction was also similar (33.2% in Colorado compared to 35.9% in Maryland). Curiously, significantly more Marylanders (26.9%) than Coloradans (15.3%) said the offenders deserved less than a year in prison—though far more Coloradans (24.7%) than Marylanders (10.3%) said the offenders deserved one to three years in prison. If we expand our scope to consider the range of zero to three years, the percentages even out—40% for Coloradans compared to 36.9% for Marylanders.

**Figure 7.** Desert Results for Combined Felony-Murder Scenarios—Colorado v. Maryland



Delving into the comparative results for the individual scenarios, the data still show close alignment in the Maryland and Colorado participants’ sense of justice. The individual results are displayed in Table 18. The median deserved sentencing range in the Maryland and Colorado studies was the same for all three scenarios. For the Armed Robbery (trigger person) scenario, two percentage points more Maryland participants than Colorado participants believed the offender deserved a first-degree murder conviction. Conversely, for the Carjacking (accomplice) scenario, 1.7 percentage points more Coloradans than Marylanders believed the offender deserved conviction for first-degree murder.

**Table 17 –Desert Results for Individual Felony-Murder Scenarios—Colorado v. Maryland**

Scenario	Median Range		1st Degree Murder (%)	
	Colorado	Maryland	Colorado	Maryland
Burglary (accomplice)	1–3	1–3	5.6	2.2
Armed Robbery (trigger person)	12–24	12–24	12.3	14.3
Carjacking (accomplice)	3-6	3-6	6.5	4.8

The difference in the number of Maryland and Colorado participants who believed the Burglary accomplice deserved first-degree murder was larger. That is not surprising given the slight difference in the fact patterns. The main difference between the two is that the offenders break into a home in the Colorado version, and in the Maryland version they break into a warehouse. One would expect the subject participants to consider a home break-in worse than a warehouse break-in, all else being equal.

5. Knowledge of the Law

The results for whether the Maryland study subjects understood the felony-murder rule are set out in Table 17. Like with the Colorado study, these results show very low awareness of the felony-murder rule among the subjects. Very few participants knew that the conduct described in each scenario was considered first-degree murder—ranging from a low of 2% (for the Unarmed Robbery scenario) to a high of 15% (for the Armed Robbery (trigger person) scenario). Across all felony-murder scenarios combined, only 7.4% of subjects were aware that the scenarios were first-degree murder.

**Table 18 —Knowledge of Current Maryland Felony-Murder Rule**

Scenario	Median Range (years)	At Least LWP (%)	1st Degree Murder (%)
Burning Down Shed	5–10	4	6
Burglary (accomplice)	1–5	2	4
Unarmed Robbery	1–5	4	2
Armed Robbery (trigger person)	10–20	10	15
Run Over	5–10	10	8
Carjacking (accomplice)	5–10	9	4

The study subjects were similarly unaware that the felony-murder offenders would be sentenced to life with or without parole under the applicable law. Only 2% of participants realized the Burglary (accomplice) offender would be sentenced to at least life; at the other end of the spectrum, 10% of participants knew that the Armed Robbery (trigger person) and Run Over (accomplice) would be given a life sentence. Across all scenarios, only 6.6% of participants understood that a life sentence would be imposed on the offenders.

Importantly, the median sentencing range that participants thought was applicable under Maryland law was lower, for every scenario, than the sentencing range for the predicate felony alone. This suggests that abolishing the felony-murder rule would not diminish the deterrent effect purportedly created by the felony-murder rule.<sup>238</sup>

### CONCLUSION

Most scholars have denounced the felony-murder rule as morally unjustified, and nearly every nation other than the United States has abolished the rule. Yet, a minority of scholars defend at least an ideal version of felony murder and almost every United States jurisdiction retains the rule as part of the criminal law. Defenders of felony murder argue either that it gives offenders the punishment they deserve or that it has a deterrent effect that justifies its imposition. One of the explanations proposed for the rule's endurance is that it reflects popular—rather than theorists'—notions of desert.<sup>239</sup>

The results of both the Colorado and Maryland empirical studies give us reason to be skeptical of these justificatory and explanatory claims. Both sets of results showed that the participants—a demographically representative sample of the population of each state—wholeheartedly rejected the felony-murder rule as just. They believed the felony-murder offenders did not deserve to be considered first-degree murderers. They believed that the offenders deserved far lower punishments than those imposed by the legislature in both states (including in Colorado after its recent felony-murder reform). They believed the offenders deserved a sentence either less than (sometimes far less than) or within the range that would be imposed if the felony-murder rule were abolished. A criminal code with no felony-murder rule, in other words, would far better reflect the participants' sense of justice. If anything, sentences in Colorado would still be unjustly severe even if felony murder was abolished.

Moreover, only a small fraction of the participants were aware of the felony-murder rule. That is, only a small fraction are even candidates for being deterred by the rule.

These results also point towards some steps that would assist in attempts to convince legislatures to abolish the felony-murder rule. First, individual lawmakers should be made aware of the community's moral consensus against felony murder. This would provide them with an incentive to push for reform or, at least, not to resist reforms proposed by others. Second, the community should be made aware of the existence of the felony-murder rule and how it operates in individual situations. Once aware of the rule, the community is likely to support, or even demand, abolition of a rule that their notions of justice so vehemently reject.

---

238. See Malani, *supra* note 56, at 25–26.

239. See *supra* Part I.C.

APPENDIX A—QUESTIONS AND ANSWER OPTIONS FOR EACH SCENARIO PRESENTED IN  
COLORADO STUDY

1. Under Colorado law as you understand it, what crime (or crimes) has [Name] committed? (You may select more than one.)<sup>240</sup>
  - Vandalism
  - Robbery
  - Burglary
  - Attempted robbery
  - Attempted burglary
  - Assault
  - Kidnapping
  - Manslaughter
  - Second degree murder (i.e. less serious murder)
  - First degree murder (i.e. more serious murder)
  - Don't know
2. Under Colorado law as you understand it, what sentence will [Name] be given if she is convicted?
  - No prison time
  - Less than one year in prison
  - 1-3 years in prison
  - 3-6 years in prison
  - 6-12 years in prison
  - 12-24 years in prison
  - 24-48 years in prison
  - More than 48 years in prison
  - Life with the possibility of parole
  - Life without the possibility of parole
  - Death penalty
  - Don't know
3. Based on your sense of justice—and not what you think the law actually is—what crime (or crimes) do you think [Name] *should* be convicted of? (You may select more than one.)
  - Vandalism
  - Robbery
  - Burglary
  - Attempted robbery

---

240. The ordering in which these questions appeared was randomly assigned so that half the subjects first saw the questions about what they believed the law was (Q.1 and Q.2 in this Appendix) and half the subjects first saw the questions about what they believed the law should be (Q.3 and Q.4 in this Appendix).

- Attempted burglary
  - Assault
  - Kidnapping
  - Manslaughter
  - Second degree murder (i.e. less serious murder)
  - First degree murder (i.e. more serious murder)
  - Don't know
4. (a) Based on your sense of justice—and not what you think the law actually is—what punishment do you think [*Name*] ***deserves***?
- No prison time
  - Less than one year in prison
  - 1-3 years in prison
  - 3-6 years in prison
  - 6-12 years in prison
  - 12-24 years in prison
  - 24-48 years in prison
  - More than 48 years in prison
  - Life with the possibility of parole
  - Life without the possibility of parole
  - Death sentence
  - Don't know
- (b) [*If relevant*] Within the range you selected, please indicate the number of [*months or years*] you think [*Name*] deserves.

APPENDIX B—QUESTIONS AND ANSWER OPTIONS FOR EACH SCENARIO PRESENTED IN  
MARYLAND STUDY

1. Under Maryland law as you understand it, what crime (or crimes) has [Name] committed? (You may select more than one.)<sup>241</sup>
  - Vandalism
  - Robbery
  - Burglary
  - Attempted robbery
  - Attempted burglary
  - Assault
  - Kidnapping
  - Manslaughter
  - Second degree murder (i.e. less serious murder)
  - First degree murder (i.e. more serious murder)
  - Don't know
2. Under Maryland law as you understand it, what sentence will [Name] be given if she is convicted?
  - No prison time
  - Less than one year in prison
  - 1-3 years in prison
  - 3-6 years in prison
  - 6-12 years in prison
  - 12-24 years in prison
  - 24-48 years in prison
  - More than 48 years in prison
  - Life with the possibility of parole
  - Life without the possibility of parole
  - Death penalty
  - Don't know
3. Based on your sense of justice—and not what you think the law actually is—what crime (or crimes) do you think [Name] *should* be convicted of? (You may select more than one.)
  - Vandalism
  - Robbery
  - Burglary
  - Attempted robbery

---

241. The ordering in which these questions appeared was randomly assigned so that half the subjects first saw the questions about what they believed the law was (Q.1 and Q.2 in this Appendix) and half the subjects first saw the questions about what they believed the law should be (Q.3 and Q.4 in this Appendix).

- Attempted burglary
  - Assault
  - Kidnapping
  - Manslaughter
  - Second degree murder (i.e. less serious murder)
  - First degree murder (i.e. more serious murder)
  - Don't know
4. (a) Based on your sense of justice—and not what you think the law actually is—what punishment do you think [*Name*] ***deserves***?
- No prison time
  - Less than one year in prison
  - 1-3 years in prison
  - 3-6 years in prison
  - 6-12 years in prison
  - 12-24 years in prison
  - 24-48 years in prison
  - More than 48 years in prison
  - Life with the possibility of parole
  - Life without the possibility of parole
  - Death sentence
  - Don't know
- (b) [*If relevant*] Within the range you selected, please indicate the number of [*months or years*] you think [*Name*] deserves.

APPENDIX C—COLORADO STUDY DEMOGRAPHIC INFORMATION

Table C.1—Age (years)

Minimum	18
Maximum	86
Mean	53.26
Standard Deviation	18.49

Table C.2—Sex (%)

Male	48.76
Female	50.86
Other	0.38

Table C.3—Political Views (%)

Strongly prefer Democrat	27.92
Lean towards Democrat	17.21
No party preference	9.75
Lean towards Republican	20.46
Strongly prefer Republican	24.67

Table C.4—Ethnicity (%)

White	89.29
Black or African American	3.44
American Indian or Alaska Native	0.76
Asian	2.87
Native Hawaiian or Pacific Islander	0.19
Other	3.44



**Table C.5—Spanish/Hispanic/Latino (%)**

Not Spanish/Hispanic/Latino	92.54
Mexican/Mexican American/Chicano	3.06
Puerto Rican	1.15
Cuban	0.19
Other Spanish/Hispanic/Latino	3.06

**Table C.6—Education (%)**

Elementary school	0.19
Some high school	0.96
High school graduate	13.19
Some college credit	19.12
Associates degree	9.56
Bachelor’s degree	30.40
Master’s degree	20.46
Professional degree	4.21
Doctoral degree	1.91

**Table C.7—Household Income (%)**

Less than \$10,000	3.28
\$10,000 – \$29,999	14.29
\$30,000 - \$49,999	17.57
\$50,000 – \$99,999	35.52
\$100,000 - \$199,999	25.48
\$200,000 or more	3.86

**Table C.8—Felony Conviction (%)**

Yes	4.83
No	95.17

APPENDIX D—MARYLAND STUDY DEMOGRAPHIC INFORMATION

Table D.1—Age (years)

Minimum	18
Maximum	86
Mean	42.38
Standard Deviation	17.17

Table D.2—Sex (%)

Male	48.24
Female	51.56
Other	0.20

Table D.3—Political Views (%)

Strongly prefer Democrat	25.98
Lean towards Democrat	28.13
No party preference	14.45
Lean towards Republican	17.58
Strongly prefer Republican	13.87

Table D.4—Ethnicity (%)

White	70.51
Black or African American	16.02
American Indian or Alaska Native	2.93
Asian	5.47
Native Hawaiian or Pacific Islander	1.37
Other	3.71

**Table D.5—Spanish/Hispanic/Latino (%)**

Not Spanish/Hispanic/Latino	81.25
Mexican/Mexican American/Chicano	3.32
Puerto Rican	5.27
Cuban	1.17
Other Spanish/Hispanic/Latino	8.98

**Table D.6—Education (%)**

Elementary school	0.20
Some high school	2.73
High school graduate	28.13
Some college credit	21.09
Associates degree	8.01
Bachelor’s degree	22.85
Master’s degree	11.52
Professional degree	2.93
Doctoral degree	2.54

**Table D.7—Household Income (%)**

Less than \$10,000	6.57
\$10,000 – \$29,999	14.54
\$30,000 - \$49,999	19.12
\$50,000 – \$99,999	32.47
\$100,000 - \$199,999	21.91
\$200,000 or more	5.38

**Table D.8—Felony Conviction (%)**

Yes	8.17
No	91.83