

May 2021

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Recommended Citation

Greg Egan, *George Floyd's Legacy: Reforming, Relating, and Rethinking Through Chauvin's Conviction and Appeal Under a Felony-Murder Doctrine Long-Weaponized Against People of Color*, 39(3) LAW & INEQ. 543 (2021), DOI: <https://doi.org/10.24926/25730037.636>.

George Floyd’s Legacy: Reforming, Relating, and Rethinking Through Chauvin’s Conviction and Appeal Under a Felony-Murder Doctrine Long- Weaponized Against People of Color

Greg Egan[†]

I. Inequity and Evolution: How Police Use of Force and the Felony-Murder Doctrine Are Poised to Change on the One-Year Anniversary of George Floyd’s Death

Minnesota’s second-degree felony-murder statute represents a unique and creative charging mechanism that affords wide discretion to prosecutors. This makes it ripe for inequitable application. It is the most serious charge brought against George Floyd’s killer, Derek Chauvin.¹ Prosecutors can find novel ways to charge felony-murder for almost any unintended death, and they often use it in cases where they also allege homicidal intent. At the same time, it is a charge prosecutors can find plausible justification not to bring in most cases. This wide discretion provides leverage to prosecutors in plea negotiations. Plea negotiations can work to the benefit of defendants who are initially charged with second-degree intentional murder by affording them the opportunity to plead down to felony-murder, which carries less than half the guideline sentence.² This wide charging discretion also has the potential to unfairly elevate crimes that should have been charged as manslaughter, third-degree murder, or other lesser offenses. The discretion can entail a twenty-fold inflation in sentencing over the

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1. Complaint at 1, *State v. Chauvin*, No. 27-CR-20-12646 (Hennepin Cnty. Dist. Ct. 2020).

2. Sentencing guidelines provide for 306 months for intentional second-degree murder and 150 months for second-degree felony-murder for an offender with no criminal history. MINNESOTA SENTENCING GUIDELINES GRID § 4.A (MINNESOTA SENTENCING GUIDELINES COMMISSION 2020). There are recent Minnesota cases where even defendants indicted for first-degree premeditated murder were allowed to plead all the way down to second-degree felony-murder. *See infra* Section II.B.

charges on which it is commonly predicated.³ For these reasons, the charging and disposition of felony-murder cases reveal much about racial disparities in the larger criminal justice system.

The felony-murder doctrine is frequently weaponized against people of color, while prosecutors and judges allow White defendants to exploit the doctrine to their benefit. Killings by peace officers magnify the disparity; officers who should be charged with felony-murder instead face reduced charges, or more frequently, no charges at all.⁴ The victim's and the killer's race matter, both in police killings and in the broader application of the felony-murder doctrine. This context allows for an informed assessment of the evolution Minnesota and the world have undergone in the year since George Floyd's killing. It also provides a framework for an analysis of the inevitable appeal of Chauvin's convictions and the implications this may have on reform or abolition of the felony-murder doctrine. It situates this prosecution within the affected community as it moves forward through reform, growth, and unity.

Section II of this Article analyzes sentencings, plea negotiations, convictions, and charging under Minnesota's felony-murder doctrine across race, buttressing statistics with examples and exposing racial inequities in the way the felony-murder doctrine is deployed. Section III provides a legal analysis of the case against Philando Castile's killer, Jeronimo Yanez. While the world applauded the second-degree manslaughter charge against Yanez, the case was actually ripe for felony-murder charging. This section juxtaposes the Yanez case with a more obscure shooting by a defendant of color who was not a peace officer, illustrating that a killing by a peace officer can be more egregious, yet not result in charges of the level faced by a lay person of color. Section IV exposes how Minnesota peace officers who kill have, until now, rarely been prosecuted at any level. It provides a brief overview of the only other four prosecuted Minnesota police killings in recent memory, reconciling these cases with larger trends and accounting for race.

3. Compare MINN. STAT. § 609.66(1)(a) (2020) (providing for a two-year statutory maximum penalty for reckless or unlawful intentional discharge of a firearm), with MINN. STAT. § 609.19(2) (2020) (providing for a forty-year statutory maximum for second-degree felony-murder). Relative to statutory maximum comparisons, the disparities are generally less pronounced when it comes to guideline sentences for common predicate felonies. But they are still marked. An offender with a criminal history score of zero faces a guideline sentence of twenty-one months for second-degree assault and 150 months for second-degree felony-murder. MINNESOTA SENTENCING GUIDELINES GRID § 4.A (MINNESOTA SENTENCING GUIDELINES COMMISSION 2020). A guideline sentence for an offender with no criminal history who is convicted of unlawful discharge of a firearm is probation. *Id.*

4. See *infra* Section IV.

The section weighs the implications of Chauvin's appeal of his convictions against the broader historical abuses of the felony-murder doctrine. It analyzes the impact these legal proceedings have on public policy and recognizes their symbolic and social power, which reframes the hurt, the hope, and the heart of the Twin Cities community.⁵

II. The Color of Injustice: Racial Disparities in Charging and Disposition of Second-Degree Felony-Murder Cases

Defendants of color have different outcomes under the felony-murder doctrine than White defendants. When defendants of color are charged with more serious murder counts, they are less likely to be afforded the opportunity to plead down to second-degree felony-murder.⁶ Defendants of color are more often convicted of the most serious charge when the top count is second-degree felony-murder.⁷ They are statistically more likely to be convicted in general and are often sentenced more harshly upon conviction.⁸ Individual cases across demographics fortify these statistical trends, making it clear that the felony-murder doctrine has long been weaponized against people of color, while representing a relatively lenient alternative for White defendants.

The statistics relied upon in this Article were drawn from a set of all second-degree felony-murder convictions sentenced from 2012 through 2018 in Ramsey and Hennepin counties, where St. Paul and Minneapolis are respectively located.⁹ The data set includes offenders who initially faced lesser or greater charges, so long as the conviction was ultimately for second-degree felony-murder. The statistical set includes cases that were resolved through guilty pleas as well as trial convictions. The data include the length of sentences, alongside the guideline sentences. Offender age, gender, and race are also included. This data set reveals much about the deployment, effect, and backdrop of Minnesota's felony-murder rule in perpetuating racial inequities.

5. The Twin Cities is a colloquialism referring to the greater Minneapolis and Saint Paul metropolitan region, generally. For the purposes of this Article, Twin Cities refers to Ramsey and Hennepin counties where the data was gathered from.

6. MINNESOTA SENTENCING GUIDELINES COMMISSION, 2ND DEGREE MURDER, § 609.19, SUBD. 2(1): SENTENCED 2012–2018 (2020) (on file with author).

7. *Id.*

8. *Id.*

9. *Id.*

A. Racially Disparate Sentencings

Sentencing statistics across race expose disparities in the application of the felony-murder doctrine. White defendants sentenced to second-degree felony-murder in Ramsey and Hennepin counties from 2012 to 2018 were two-and-a-half times more likely to receive a shorter-than-guideline sentence relative to a longer-than-guideline sentence.¹⁰ Meanwhile, defendants of color received mitigated and aggravated sentencing departures at roughly the same rate.¹¹ Judges gave reduced sentences to White defendants 25 percent of the time, compared to 16 percent for defendants of color.¹² One White defendant was sentenced to a mere five years for his involvement in a drug deal where the victim was shot to death.¹³ While the defendant did not fire the fatal shots, he was also armed.¹⁴

This disparity is also manifested by cases involving White defendants committing egregious crimes but receiving guideline sentences, instead of the aggravated sentences that similarly-situated defendants of color frequently receive. Even after hearing all the gruesome evidence during a jury trial of a White defendant who tortured his girlfriend to death, a sentencing judge ordered a guideline range sentence.¹⁵ The defendant had beaten the victim over her entire body.¹⁶ There were scrapes and scratches on her arms and knees, likely from her attempt to crawl away.¹⁷ The defendant fractured her neck before ultimately choking her to death.¹⁸ He admitted to choking her the night before as well.¹⁹ If ever a case warranted an aggravated sentencing departure, this one

10. *Id.*

11. *Id.*

12. *Id.*

13. Felony Criminal Complaint at 2–4, *State v. Sjostrand*, No. 62-CR-18-219 (Ramsey Cnty. Dist. Ct. 2012).

14. *Id.* at 2–3.

15. Felony Criminal Complaint at 2, *State v. Manney*, No. 27-CR-11-16860 (Ramsey Cnty. Dist. Ct. 2012).

16. *Id.*

17. *Id.*

18. *Id.*

19. Like the trial judge, who exercised relative leniency at sentencing, prosecutors were lenient to this White defendant by declining to seek an indictment under the domestic abuse provision of the first-degree murder statute. MINN. STAT. § 609.185(a)(6) (2010) (providing for culpability when an actor “causes the death of a human being while committing domestic abuse, when the perpetrator has engaged in a past pattern of domestic abuse . . . and the death occurs under circumstances manifesting an extreme indifference to human life”).

did. However, the White defendant was given a guideline-range sentence.²⁰

Even when an aggravated sentence is arguably warranted for a defendant of color,²¹ it can still be disproportionately harsh and glaringly out of sync with what similarly-situated White defendants receive. An Asian defendant received a sentence double the presumptive sentence for killing a child in his care.²² Sentencing guideline ranges suggest that he had a criminal history score of zero.²³ Meanwhile, a White woman who suffocated her infant to death before almost killing a second child the same way received a sentence of barely half of what the sentencing guidelines prescribed.²⁴ There should be parity in sentencing across race under the felony-murder statute, but there is not.

B. Plea Negotiations and Convictions Across Race

On their surface, the racial demographics of second-degree felony-murder convictions in the Twin Cities support the claim of widespread racial disparity. Minnesota's population is approximately 83.8 percent White.²⁵ A higher concentration of people of color reside in the St. Paul/Minneapolis metro area,²⁶ which is 77.1 percent White.²⁷ Second-degree felony-murder conviction statistics do not mirror this demographic data. Between 2012 and 2018, defendants of color accounted for 80.2 percent of felony-murder convictions, while White defendants accounted for just 19.8 percent.²⁸ Normalized for demographics, people of color in

20. MINNESOTA SENTENCING GUIDELINES COMMISSION, 2ND DEGREE MURDER, *supra* note 6.

21. *See e.g.*, Felony Criminal Complaint at 2–3, State v. Meak, No. 62-CR-15-1070 (Ramsey Cnty. Dist. Ct. 2012). The defendant was alleged to have “rough housed” a child; semen was found on the child. *Id.*

22. *Id.*; MINNESOTA SENTENCING GUIDELINES GRID § 4 (MINNESOTA SENTENCING GUIDELINES COMMISSION 2011).

23. *See* MINNESOTA SENTENCING GUIDELINES GRID § 4 (MINNESOTA SENTENCING GUIDELINES COMMISSION 2011).

24. Complaint at 2, State v. Casey, No. 27-CR-13-22282 (Ramsey Cnty. Dist. Ct. 2013); MINNESOTA SENTENCING GUIDELINES COMMISSION, 2ND DEGREE MURDER, *supra* note 6.

25. *Quick Facts Minnesota*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/MN> [perma.cc/9FXV-D3H2].

26. MINNESOTA STATE DEMOGRAPHIC CENTER, DEPARTMENT OF ADMINISTRATION, AGE, RACE, & ETHNICITY (2018), <https://mn.gov/admin/demography/data-by-topic/age-race-ethnicity/> [perma.cc/6H2L-GUYN].

27. *Race and Ethnicity in the Minneapolis Area (Metro Area)*, CEDAR LAKE VENTURES, INC. (Sept. 14, 2018) (citing U.S. Census data), <https://statisticalatlas.com/metro-area/Minnesota/Minneapolis/Race-and-Ethnicity> [perma.cc/7Z53-9F8N].

28. MINNESOTA SENTENCING GUIDELINES COMMISSION, 2ND DEGREE MURDER,

the Twin Cities are statistically twelve times more likely to be convicted of second-degree felony-murder.²⁹

More troubling than the racial distribution of second-degree felony-murder convictions is the disparity in what the convictions reflect in the shadow of the original charges. The overwhelming majority of convictions are the result of plea negotiations.³⁰ Indeed, negotiated plea deals have become the vehicle by which most criminal cases are resolved around the country.³¹ 66.7 percent of the White defendants convicted of second-degree felony-murder in Minnesota were initially charged or indicted with more serious levels of homicide.³² For White defendants, a guilty plea to second-degree felony-murder most often represents generous resolution relative to the exposure under the original complaint or indictment. White defendants in the Twin Cities routinely benefit by pleading down to second-degree felony-murder.

Conviction statistics under the second-degree felony-murder doctrine present the opposite trend for defendants of color. Defendants of color sentenced to second-degree felony-murder had their charges reduced in only 38.5 percent of cases.³³ For the rest of the defendants of color, their second-degree felony-murder conviction represented the most serious count.³⁴ The plea bargaining statistics reveal a striking racial disparity: White defendants plead to reduced felony-murder charges at nearly double the rate of defendants of color.

Inequities run deeper than statistically tilted plea negotiations. The facts of individual cases, as alleged in the criminal complaints, best illustrate two parallel yet unenviable trends. White defendants are frequently punished leniently, while defendants of color receive harsher treatment even when the facts support opposite outcomes.

supra note 6.

29. *Id.*

30. *See id.*

31. INNOCENCE PROJECT, REPORT: GUILTY PLEAS ON THE RISE, CRIMINAL TRIALS ON THE DECLINE (Aug. 7, 2018), <https://innocenceproject.org/guilty-pleas-on-the-rise-criminal-trials-on-the-decline/> [perma.cc/9TSN-B7QH]; NAT'L ASS'N OF CRIM. DEF. LAWYERS, THE TRIAL PENALTY REPORT 14 (2018), <https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf> [perma.cc/7P42-YC7F].

32. MINNESOTA SENTENCING GUIDELINES COMMISSION, 2ND DEGREE MURDER, *supra* note 6.

33. *Id.*

34. *Id.*

A robbery involving six codefendants that left a young man dead illustrates this disturbing trend. Two of the codefendants were Black, and four were White.³⁵ While all six were initially indicted for first-degree murder,³⁶ the four White codefendants were permitted to plead guilty to a reduced charge under the inherently pliable second-degree felony-murder rule.³⁷ The Black defendant who fired the gun pled to second-degree intentional murder.³⁸ While the Black codefendant who did not fire the gun pled guilty to second-degree felony-murder, he received a harsher-than-guideline sentence.³⁹ The White codefendants all received sentences within guideline sentence range for second-degree felony-murder.⁴⁰ None of the four White codefendants received consecutive sentences; both of the Black codefendants did.⁴¹

According to the complaint and newspaper coverage of the incident, five of the codefendants hatched a detailed plan to break into their drug dealer's apartment to steal drugs and take back a gaming system.⁴² Newspaper coverage reported that at least part of the group was intent on "beating the [expletive] out of [the drug dealer] then taking everything."⁴³ The same source recounted an agreement to split what they burglarized, "since it's a group deal."⁴⁴ The sixth codefendant was reportedly recruited to bring a gun; he "made sure it was loaded."⁴⁵ As a car waited outside, four of the codefendants burst into the apartment, according to the criminal complaint.⁴⁶ Some reportedly ransacked it searching for drugs,

35. *Id.*

36. Brandon Stahl, *Suburban Women Plead Guilty to Murder for Their Role in Drug Robbery-Turned Slaying*, STAR TRIB. (Jan. 22, 2018), <https://www.startribune.com/suburban-women-plead-guilty-to-murder-for-their-role-in-drug-robbery-turned-slaying/470561553/> [perma.cc/3E24-VC8B].

37. MINNESOTA SENTENCING GUIDELINES COMMISSION, 2ND DEGREE MURDER, *supra* note 6.

38. *Id.*

39. *Id.* While he pled down to second-degree unintentional felony-murder like the White codefendants, his sentence was 24 percent higher than prescribed in the Minnesota Sentencing Guidelines. *Id.*; MINNESOTA SENTENCING GUIDELINES GRID § 4.A (MINNESOTA SENTENCING GUIDELINES COMMISSION 2017).

40. *Id.*; MINNESOTA SENTENCING GUIDELINES COMMISSION, 2ND DEGREE MURDER, *supra* note 6.

41. MINNESOTA SENTENCING GUIDELINES COMMISSION, 2ND DEGREE MURDER, *supra* note 6.

42. Complaint at 3, State v. Peterson, No. 27-CR-17-10674 (Hennepin Cnty. Dist. Ct. 2018).

43. Stahl, *supra* note 36.

44. *Id.*

45. *Id.*; Complaint at 3, State v. Peterson, No. 27-CR-17-10674 (Hennepin Cnty. Dist. Ct. 2018).

46. Complaint at 3, State v. Peterson, No. 27-CR-17-10674 (Hennepin Cnty. Dist.

yelling and swearing at the victim, while others attacked the decedent and “pistol whipped” him.⁴⁷ The complaint further recounts that they forced the decedent’s girlfriend onto a bed, pointed the gun at her head, and told her they would kill her if she left the bedroom.⁴⁸ She described holding the decedent as “he took his last breath.”⁴⁹ The decedent was shot in the neck; the bullet grazed his jugular vein, shattered his spine, and fractured his skull.⁵⁰ Prosecutors also noted blunt force trauma to his head and face.⁵¹ The codefendants reportedly left him there and fled with the drugs.⁵²

Although it may be argued that lesser charges are warranted because the White codefendants did not actually pull the trigger,⁵³ it is a well-established tenet of Minnesota criminal law that accomplices are liable for the conduct of the principal at the same level.⁵⁴ Even so, the disparity in sentencing under the same statutory subsection remains: the Black codefendant who did not pull the trigger received a significantly harsher sentence than the

Ct. 2018).

47. Complaint at 3, State v. Peterson, No. 27-CR-17-10674 (Hennepin Cnty. Dist. Ct. 2018).

48. Stahl, *supra* note 36.

49. Complaint at 3, State v. Peterson, No. 27-CR-17-10674 (Hennepin Cnty. Dist. Ct. 2018); David Chanen, *Mother of Slain Teen Laments A Wasted Life Over Drugs, Mistakes*, STAR TRIB. (Apr. 7, 2018), <https://www.startribune.com/mother-of-slain-teen-laments-a-wasted-life-over-drugs-mistakes/479024163/> [perma.cc/4XD3-6ZTX].

50. Complaint at 3, State v. Peterson, No. 27-CR-17-10674 (Hennepin Cnty. Dist. Ct. 2018).

51. *Id.*

52. *Id.*

53. Admittedly, some legal scholars have taken issue with this tenet, arguing that an accomplice should not bear full liability for the actions of the principal actor. See Michael Heyman, *Losing All Sense of Just Proportion: The Peculiar Law of Accomplice Liability*, 87 ST. JOHN’S L. REV. 129 (2013); Sherif Girgis, *The Mens Rea of Accomplice Liability: Supporting Intentions*, 123 YALE L.J. 266 (2013); Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91 (1985).

54. State v. Ezeka, 946 N.W.2d 393, 407 (Minn. 2020) (citing MINN. STAT. § 609.05(1) (2018)); State v. Whitman, 114 N.W. 363, 364 (Minn. 1908). It is notable that in at least one U.S. jurisdiction, “[f]or all intents and purposes the ‘second-degree felony-murder’ rule for accomplices has been abolished.” CAL. STATE SENATE, FACT SHEET FOR SENATE BILL 1437 (2018); see also People v. Cruz, 46 Cal. Rptr. 3d 166, 169 (Cal. Ct. App. 2020) (citing CAL. STAT. ch. 1015, § 1 (2018) (explaining that “to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life”). If Minnesota had a similar limitation, the five codefendants who did not fire the fatal shot may not have been convicted of second-degree felony-murder. Other states align with Minnesota in holding accomplices fully liable under the felony-murder doctrine. See, e.g., State v. Chambers, 515 N.W.2d 531, 533 (Wisc. Ct. App. 1994); State v. Blair, 228 P.3d 564, 568 (Ore. 2010); State v. Rios, 172 P.3d 844, 846 (Ariz. 2007).

four similarly-situated White codefendants. The felony-murder rule should not be contorted to reach inequitable outcomes.

While advocates for the White codefendants may argue that they were actually treated too harshly, in reality, they reaped the benefit of the second-degree felony murder rule, considering that the facts could have yielded a conviction under a far more serious variant of the doctrine. Under Minnesota law, both the first and second-degree murder statutes have a provision for felony-murder.⁵⁵ Burglary is among the predicate felonies specifically enumerated in the first-degree felony-murder statute.⁵⁶ Ample facts alleged in the complaints would support this predicate offense.⁵⁷ Yet prosecutors were content with a conviction under the lesser second-degree felony-murder provision. Their decision transformed potential first-degree felony-murder life sentences into second-degree felony-murder sentences as short as twelve and a half years.⁵⁸

While the author does not contend that life sentences would be just in this case, an analytical juxtaposition of the second-degree and first-degree felony-murder rules illustrates the wide-ranging homicidal liability that exists on strikingly similar facts. Such discretion perpetuates further inequity in plea negotiations, trials, and sentencing, leaving a system ripe for abuse and incapable of delivering racial equity. This example exposes the reasons that both first-degree and second-degree felony-murder should be excised from Minnesota's statutory and common law schemes. Doing so will leave a set of thoughtfully-tiered laws, accounting for all levels of homicidal and less-than-homicidal liability,⁵⁹ and it will create a construct under which these six codefendants, Black and White, could have been equitably charged or indicted, negotiated with, tried, and sentenced.

55. See MINN. STAT. § 609.185(a)(3) (2016); MINN. STAT. § 609.19(2)(1) (2016).

56. See MINN. STAT. § 609.185(a)(3) (2016). The Supreme Court of Minnesota recognizes first-degree felony-murder prosecutions predicated on burglary. See, e.g., *State v. Mosley*, 853 N.W.2d 789, 794 (Minn. 2014).

57. See Complaint at 3, *State v. Peterson*, No. 27-CR-17-10674 (Hennepin Cnty. Dist. Ct. 2018) (alleging on its face burglary while possessing a firearm as the predicate felony).

58. MINN. STAT. § 609.19(1)(1) (2016); MINNESOTA SENTENCING GUIDELINES COMMISSION, 2ND DEGREE MURDER, *supra* note 6.

59. Absent the felony-murder doctrine, the Minnesota Legislature has erected a thoughtful, effective, and wide-ranging statutory scheme that aptly addresses all unjustified killings, ranging from second-degree manslaughter, MINN. STAT. § 609.205(1) (2020) to third degree murder, MINN. STAT. § 609.195(a) (2020), to second-degree intentional murder, MINN. STAT. § 609.19(1)(1) (2020), to first-degree murder, MINN. STAT. § 609.185(a)(1) (2020).

While it is easy to criticize prosecutors who apply the felony-murder doctrine in racially inequitable ways, one should not overlook that it is the theoretical underpinnings of Minnesota's felony-murder doctrines that enable them to do so. Minnesota's statutory schemes provide the architecture for convictions under statutory provisions with guideline sentences ranging from just over ten years to life in prison for essentially the same conduct. Both the theory and application of Minnesota's felony-murder doctrines must be repaired or repealed if the disparities cannot be reconciled. As the law stands now, felony-murder makes for faux plea negotiations, and as exemplified below, unjust charging. These are the byproducts of the unconscionably wide prosecutorial discretion inherent in the doctrine.

C. Charging Discretion Ripe for Abuse

White defendants frequently benefit from the felony-murder doctrine, while defendants of color have a markedly different experience. Just as this disparity is painfully apparent in plea negotiations and conviction trends, it also manifests in charging decisions. Even when prosecutors ultimately amend their charges, initial charging decisions reveal further racial inequity. These decisions inarguably impact the course of individual prosecutions, even when cases gravitate away from the initial charges. It is the stunningly wide discretion inherent in Minnesota's felony-murder doctrine, in the abstract, that sustains racially inequitable charging practices.

Defendants of color may face aggressive felony-murder charges for facts that should not warrant murder prosecutions at all. According to a criminal complaint and newspaper reports, a Black Minneapolis man had a dispute with his brother.⁶⁰ Isolated in the basement, the victim shot the defendant.⁶¹ Witnesses say they heard three shots, and the defendant shouted out, "my brother just shot me."⁶² It was only then that the defendant returned fire.⁶³ His defensive gunshots killed his brother only after the defendant himself received multiple gunshot wounds.⁶⁴

In their criminal complaint, prosecutors strained to justify their second-degree felony-murder charge by noting that the

60. Complaint at 3, *State v. Clark*, No. 27-CR-18-4772 (Hennepin Cnty. Dist. Ct. 2018).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

victim's firearm was only "a small gun,"⁶⁵ as if to imply that the bullets fired from it did not have lethal potential. It is also noteworthy that prosecutors acknowledged that it was the victim who pursued the defendant into the basement, where, cornered, they exchanged gunfire.⁶⁶ Self-defense would have negated the second-degree assault on which the felony-murder charge was predicated.⁶⁷ Legal scholars have advanced compelling arguments as to why most assaults should not be viable predicate felonies; most states have adapted their laws accordingly.⁶⁸ Charging prosecutors were almost certainly aware of this fracture in the legal and academic communities. But that did not prevent them from bringing murder charges against this Black defendant.

The felony-murder charge was not, however, enough for prosecutors: they went a step further by also bringing the grossly inflated charge of second-degree intentional murder.⁶⁹ The result was a leveraging of plea negotiations to extract a plea to what appears a lesser count of second-degree felony-murder. This prosecutorial tool creates an artificial middle count used to extort guilty pleas from people of color who are actually liable of lesser crimes, or no crime at all.

Stretching the second-degree felony-murder doctrine to charge and convict this Black defendant is not an isolated occurrence. Another Black man left to care for his girlfriend's infant children was convicted of second-degree felony-murder, primarily for failing to seek medical care for an infant's burned wrist and instead giving him too much over-the-counter medicine, which doctors opined may have had an unintended sedative effect.⁷⁰ In attending to the child, the defendant had wrapped the child's wrist,⁷¹ which likely would have made it difficult to assess the severity of the burn. This should

65. *Id.*

66. *Id.*

67. MINN. STAT. § 609.065 (2006) (characterizing "justifiable taking of life" as occurring "when necessary in resisting or preventing an offense which the actor reasonably believes exposes the actor or another to great bodily harm or death").

68. Greg Egan, *Collateral and Independent Felonious Design: A Call to Adopt a Tempered Merger Limitation for Predicate Felonies of Assault Under a Minnesota Felony-Murder Doctrine Currently Too Productive of Injustice*, 44 MITCHELL HAMLIN L. REV., no. 5, 2018, at 98 (advocating adoption of a merger limitation to Minnesota's felony-murder doctrine, which would make most assaults inviable as predicate felonies).

69. MINNESOTA SENTENCING GUIDELINES COMMISSION, 2ND DEGREE MURDER, *supra* note 6.

70. Complaint at 2–3, State v. Todd, No. 27-CR-12-17771 (Hennepin Cnty. Dist. Ct. 2012).

71. *Id.* at 2.

have been significant to charging attorneys, because the specific cause of death was a blood infection from the burn.⁷²

There were injuries consistent with child abuse, which prosecutors implicitly speculated the defendant had caused.⁷³ But they also acknowledged that more than a dozen other people resided in a home containing rotting food, dead animals, and overall filthy conditions.⁷⁴ The complaint further acknowledged a potential accidental fall down the stairs,⁷⁵ but prosecutors refused to concede that this could have accounted for some of the injuries noted in the autopsy. Regardless of the source or intentionality of the injuries, the cause of death was listed as “complications from neglect.”⁷⁶

In assessing the fairness of attributing fatal neglect to the defendant, prosecutors should have considered several factors. The defendant, who was twenty years old, was the only one in the house who took any responsibility for caring for the children under intensely challenging circumstances.⁷⁷ He described having to feed the children nonperishable food and being relegated to a small room in the basement.⁷⁸ The defendant’s mother was upset at him for having the children in the house, but that did not stop her from leaving additional young children in his care when she too left the home for an unspecified amount of time.⁷⁹ The defendant had made scores of phone calls to the children’s mother; she ignored them all, so he did not know if or when she would return.⁸⁰ Furthermore, when she finally returned, she was with the children during the hours immediately before it became known that the infant was dead; the infant did not die while in the defendant’s care.⁸¹

Rather than focusing on those facts, the charging prosecutor focused on the allegation that the defendant left the children sleeping in a crib for an hour before their mother finally returned so he could go to the store—likely to buy food for the children.⁸² Prosecutors make no mention of which, or how many, adults were in the house for the hour during which he did not, allegedly,

72. *Id.* at 3.

73. *Id.* at 3–4.

74. *Id.* at 2.

75. *Id.*

76. *Id.* at 3.

77. *Id.* 1–2.

78. *Id.* at 2.

79. *Id.*

80. *Id.*

81. *Id.* at 3.

82. *Id.*

“arrange for supervision.”⁸³ A second-degree felony-murder conviction for this young Black defendant represents a miscarriage of justice, and it stands in stark contrast to the manner in which the doctrine is generally employed in cases charged against White defendants.

Even when later amended, initial charging decisions often reflect deference to White defendants ultimately convicted of second-degree felony-murder. Two men were shot to death at a St. Paul motel because one of them allegedly owed a codefendant \$1,000.⁸⁴ The White defendant drove the killer to the hotel, knocked on the door, then helped force entry.⁸⁵ He watched as several shots were fired, then the victims bled to death in the parking lot and on a nearby roadway.⁸⁶ After the defendant fled in his car, he later picked up the shooter and other codefendant and drove them further away from the scene while they plotted their stories to avoid incriminating one another.⁸⁷ Police found the two lifeless bodies and quickly apprehended the defendant.⁸⁸ Yet prosecutors effectively ignored both deaths when making their initial charging decision: they charged the White defendant only with aiding and abetting attempted first-degree aggravated robbery and aiding and abetting attempted simple robbery.⁸⁹ These offenses carry statutory maximum sentences of just ten and five years, respectively.⁹⁰

Prosecutors failed to charge second-degree felony-murder initially.⁹¹ The Black codefendant who was not the gunman in this case was sentenced to the statutory maximum: forty years in prison.⁹² The White codefendant was sentenced to just over twelve

83. *Id.* at 1–4.

84. Felony Criminal Complaint at 3, *State v. Benner*, No. 62-CR-16-2156 (Ramsey Cnty. Dist. Ct. 2016).

85. *Id.*

86. *Id.*

87. *Id.* at 4.

88. *Id.*

89. *Id.* at 1–2.

90. MINN. STAT. § 609.245(1) (2014); MINN. STAT. § 609.24 (2014).

91. Felony Criminal Complaint at 3, *State v. Benner*, No. 62-CR-16-2156 (Ramsey Cnty. Dist. Ct. 2016).

Defendants of color are routinely charged with felony-murder from the onset of prosecution for similar or even less serious robberies resulting in unintended deaths. *See, e.g.*, Complaint at 3, *State v. Smith*, No. 27-CR-14-1327 (Hennepin Cnty. Dist. Ct. 2014); Criminal Felony Complaint at 2–3, *State v. Calloway*, No. 62-CR-16-6907 (Ramsey Cnty. Dist. Ct. 2016); Criminal Felony Complaint at 3, *State v. Smith*, No. 62-CR-16-6906 (Ramsey Cnty. Dist. Ct. 2016); Complaint at 2–3, *State v. Foresta*, No. 27-CR-13-25524 (Hennepin Cnty. Dist. Ct. 2014); Complaint at 3, *State v. Turner*, No. 27-CR-13-25523 (Hennepin Cnty. Dist. Ct. 2013).

92. MINN. STAT. § 609.19(1) (2014). Sarah Horner, *He Didn't Pull the Trigger*,

years.⁹³ The initial decisions impact trial preparation, investigations, plea negotiations, and sentencings—further propelling racial inequities.

The Twin Cities has an unadmirable history in the disposition of second-degree felony-murder cases. The record is ripe with disheartening examples of White defendants benefiting from the felony-murder doctrine, while defendants of color receive draconian treatment. The racial inequities manifest in charging, plea negotiations, conviction levels, and sentencings. Nearly a decade of statistics support these findings. In the abstract, the felony-murder doctrine is strained, artificial, and unfair. The archaic doctrine's application magnifies its flaws. The felony-murder doctrine exacerbates racial inequities and should be overhauled or altogether abolished.

III. Culpable Negligence or Reckless Intent: A Case Study in the Charging of a Peace Officer and an Indigent Man of Color

A police shooting and a shooting by an indigent person of color occurred in recent years in Ramsey County; though similar in factual consequence, they quickly took on very different legal complexions. In 2016, after months of deliberation, Ramsey County prosecutors made a charging decision in a high-profile police shooting.⁹⁴ The victim was a Black school cafeteria worker, Philando Castile.⁹⁵ The defendant was a veteran of the St. Anthony Police Department, Jeronimo Yanez.⁹⁶ Castile had been driving

But He Gets 40 Years, ST. PAUL PIONEER PRESS (Feb. 8, 2017), <https://www.twin-cities.com/2017/02/08/st-paul-man-gets-40-years-for-midway-area-double-murder/> [perma.cc/8UQC-8CF3].

93. MINNESOTA SENTENCING GUIDELINES COMMISSION, 2ND DEGREE MURDER, *supra* note 6.

94. *See generally* John Choi, Ramsey Cnty. Att'y, *Remarks Regarding the Hiring of a Special Prosecutor to Assist in the Philando Castile Matter* (July 29, 2016), <https://www.ramseycounty.us/sites/default/files/County%20Attorney/County%20Attorney%20transcribed%20remarks%207%2029%2016.pdf> [perma.cc/3H2V-BHSX] (stressing the importance of being “thoughtful and deliberate” in order to “provide the legitimacy this case requires and deserves”). The charging decision was announced more than four months after the incident. *See* Press Release, Office of the Ramsey County Attorney, *Ramsey County Attorney Announces Criminal Charges Against Police Officer in Death of Philando Castile*, RAMSEY CNTY. ATT'Y'S OFF. (Nov. 16, 2016), https://www.ramseycounty.us/sites/default/files/County%20Attorney/11.16.16%20County%20Attorney%20Remarks%20as%20Prepared%20for%20Delivery%20in%20Yanez%20Case_0.pdf [perma.cc/UQ8S-MDVK]; Felony Criminal Complaint at 7, *State v. Yanez*, No. 0620373879 (Ramsey Cnty. Dist. Ct. 2017).

95. Mitch Smith, *Officer Cleared in 2016 Killing of Black Driver*, N.Y. TIMES at A1 (June 16, 2017).

96. *Id.*

with his girlfriend and her young daughter when Yanez pulled the car over for a broken brake light.⁹⁷ Castile “calmly” told the officer that he had a firearm; he also had a valid permit to carry.⁹⁸ Yanez suddenly fired seven times into the car, killing Castile and nearly striking his girlfriend and the child.⁹⁹ Prosecutors charged Yanez with second-degree manslaughter and intentional discharge of a firearm that endangers safety.¹⁰⁰

The same office charged a more obscure case nearly a decade earlier against a nineteen-year-old Mexican immigrant, Alfredo “Freddy” Gutierrez-Gonzales, who was mishandling a rifle on the front porch of a house.¹⁰¹ When Gutierrez-Gonzales heard someone approaching, he put the rifle down.¹⁰² His friend called out, “Don’t trip, it’s just me.”¹⁰³ As Gutierrez-Gonzales picked the rifle back up, it suddenly went off.¹⁰⁴ The bullet struck his friend, who was White, in the head; he died at the scene.¹⁰⁵ Prosecutors did not dispute that the rifle going off was anything other than a tragic accident.¹⁰⁶ Within days, prosecutors charged Gutierrez-Gonzales with second-degree felony-murder.¹⁰⁷ The peace officer and the young man of color faced markedly different consequences.

The felony-murder charge in the Gutierrez-Gonzales case rested on a legally unstable foundation. The criminal complaint clearly enumerated the predicate felony: reckless discharge of a firearm within a municipality.¹⁰⁸ Unlike most other viable predicate felonies, which require intentional or knowing levels of *mens rea* to trigger felony-murder prosecutions,¹⁰⁹ the predicate felony in the

97. *Id.*

98. *Id.*

99. *Id.*

100. Felony Criminal Complaint at 7, *State v. Yanez*, No. 0620373879 (Ramsey Cnty. Dist. Ct. 2017).

101. Felony Criminal Complaint at 1–3, *State v. Gutierrez-Gonzales*, No. 62-CR-08-16753 (Ramsey Cnty. Dist. Ct. 2008).

102. *Id.* at 3.

103. State’s Memorandum of Law, *State v. Gutierrez-Gonzales*, No. 62-CR-08-16753 (Ramsey Cnty. Dist. Ct. 2008).

104. Felony Criminal Complaint at 3, *State v. Gutierrez-Gonzales*, No. 62-CR-08-16753 (Ramsey County District Court 2008).

105. *Id.*; Mara Gottfried, *Girlfriend of Suspected Shooter: ‘Turn Yourself In . . .’*, ST. PAUL PIONEER PRESS (Nov. 16, 2008), <https://www.twincities.com/2008/11/16/girlfriend-of-suspected-shooter-turn-yourself-in/> [perma.cc/5SLC-NHDX].

106. Felony Criminal Complaint at 3, *State v. Gutierrez-Gonzales*, No. 62-CR-08-16753 (Ramsey Cnty. Dist. Ct. 2008).

107. *Id.* at 5.

108. *Id.* at 1.

109. *See, e.g., Butala v. State*, 887 N.W.2d 826, 831 (Minn. 2016) (establishing that arson is a viable predicate felony); MINN. STAT. § 609.561(1) (2020) (specifying

case against Gutierrez-Gonzales required only reckless *mens rea*.¹¹⁰ Although under Minnesota common law, offenses with reckless *mens rea*—or even strict liability—are technically viable predicate felonies,¹¹¹ this charging vehicle stretches the theoretical framework of the felony-murder doctrine, which is premised on imputed intent, and has come under harsh criticism.¹¹²

In *State v. Engle*, decided just months before Gutierrez-Gonzales was charged, the Supreme Court of Minnesota assessed the *mens rea* requirement for reckless discharge of a firearm within a municipality as a standalone offense.¹¹³ The *Engle* Court noted ambiguity in whether the reckless *mens rea* required the voluntary act of pulling the trigger, or merely any voluntary act that “increases the likelihood that the gun will discharge accidentally.”¹¹⁴ The *Engle* Court concluded that any “conscious or intentional act in connection with the discharge of a firearm” satisfies the *mens rea* element.¹¹⁵

a *mens rea* requirement of “intentionally” for the predicate felony of arson); *State v. Dorn*, 887 N.W.2d 826, 831 (Minn. 2016) (requiring that the actor knowingly or intentionally commit the predicate assault to trigger the felony-murder doctrine) (cited in Egan, *Collateral and Independent Felonious Design*, *supra* note 68 (analyzing the general intent crime of first-degree assault as a Minnesota predicate felony, contrasting it to the elevated *mens rea* threshold of specific intent assault required to trigger felony-murder under Ohio law)).

110. MINN. STAT. § 609.66(1)(a)(3) (2006); see *generally* *State v. Engle*, 743 N.W.2d 595 (Minn. 2008) (developing *mens rea* required for reckless discharge of a firearm in a municipality).

111. See *State v. Smoot*, 737 N.W.2d 849, 853–855 (Minn. Ct. App. 2007) (holding that felony Driving While Impaired, a strict liability offense, may serve as a viable predicate felony in felony-murder prosecutions).

112. Interview with Professor George M. Platt, University of Oregon School of Law (Nov. 14, 1969) (cited in *State v. Blair*, 214 P.3d 47, 57 (Oregon Ct. App. 2009) (stressing “we have approached the outer limits of the *mens rea* requirement with respect to murder in the felony-murder doctrine. In effect what we have is strict liability when one who sets out to commit a lesser felony with no *mens rea*—with no mental element of intending to kill anyone—winds up as a murderer . . . [T]here will be a door through which the very unusual defendant will be able to exit from the charge of murder”)).

113. *State v. Engle*, 743 N.W.2d 592 (Minn. 2008).

114. *Id.* at 595–96 (Minn. 2008) (cited in *State v. Coleman*, 944 N.W.2d 469, 478 (Minn. Ct. App. 2020) (defining reckless *mens rea* but applying it to third-degree murder)).

115. *State v. Engle*, 743 N.W.2d at 596. It should not be lost on the reader that the defendant in *Engle*, a private security guard, was acting in a quasi-law enforcement capacity. *Id.* at 593. While the race of the victim is unclear from the published appellate court opinion, it is clear that Mr. Engle shooting and paralyzing the victim was not justified. *Id.* Notwithstanding the horrific consequences of the shooting, Mr. Engle was not charged with attempted murder or even assault, and the sentencing judge imposed a mere two years of probation after which the conviction was to be reduced to a misdemeanor. *Id.* Rare are the cases where a lay person of color receives the benefit of such generous charging or sentencing.

Arguably, the law just months before Gutierrez-Gonzales was charged required a deliberate, volitional trigger pull.¹¹⁶ The complaint did not allege one.¹¹⁷ Still, prosecutors rushed to charge Gutierrez-Gonzales with felony-murder. More unnerving, prosecutors made no attempt to satisfy even the lower post-*Engle mens rea* threshold. They failed to plead any voluntary acts by Gutierrez-Gonzales that would have “increase[d] the likelihood that the gun will discharge accidentally.”¹¹⁸ The only facts alleged in the complaint relating to Gutierrez-Gonzales’ handling the rifle are “trying to put a clip in” and “pick[ing] the gun back up” after “put[ting] the gun down.”¹¹⁹ This is routine conduct that peace officers across the nation engage in every day without criticism; yet it is the sole alleged misconduct on which Gutierrez-Gonzales’ felony-murder charge hinged.

The same office declined to utilize a similar predicate felony against Yanez. Prosecutors had to have realized that such a charging option was available; the potential predicate felony was evident as counts two and three on the very face of the complaint: intentional discharge of a firearm that endangers safety.¹²⁰ The *mens rea* for the would-be predicate felony was intentional.¹²¹ If reckless discharge of a firearm could predicate felony-murder charges in the case against Gutierrez-Gonzales, certainly intentional discharge of a firearm could serve as a predicate felony in the case against Yanez. Intentional discharge of a firearm is a more legally sound predicate felony because of its heightened *mens rea* requirement. Charging second-degree felony-murder would have recalibrated plea negotiations, trial strategy, and the way jurors viewed the evidence. It may have even led to a guilty plea or a different verdict at trial.

The facts only bolster the case for a felony-murder charge against Yanez. He deliberately aimed his firearm in the direction of Castile and the other two occupants of the vehicle, and with full volitional control, pulled the trigger no less than seven times.¹²²

116. *See generally id.*

117. Felony Criminal Complaint at 3, State v. Gutierrez-Gonzales, No. 62-CR-08-16753 (Ramsey Cnty. Dist. Ct. 2008) (alleging the “gun suddenly went off . . . the shooting was an accident”).

118. *See Engle*, 743 N.W.2d at 596.

119. Felony Criminal Complaint at 3, State v. Gutierrez-Gonzales, No. 62-CR-08-16753 (Ramsey Cnty. Dist. Ct. 2008).

120. Felony Criminal Complaint at 1–2, State v. Yanez, No. 0620373879 (Ramsey Cnty. Dist. Ct. 2017).

121. MINN. STAT. § 609.66(1)(a)(2) (2006).

122. Smith, *supra* note 95.

Obviously, prosecutors thought they had a strong case for unlawful intentional discharge of a firearm, otherwise they would not have charged Yanez with those two counts. But they failed to take the next step and bring the felony-murder charge, even though the only additional element of proof they would have needed was not in dispute: Philando Castile's lifeless body.

The Yanez prosecutors may argue that it was a legitimate exercise of discretion not to charge felony-murder. That discretion is precisely the problem: it so rarely gets used to the detriment of peace officers and is so often weaponized against people of color.¹²³ Regardless of whether it was Yanez's status as a peace officer or the race of the victims that differentiated the charging in the two cases, this disparity exemplifies unconscionable systemic bias in the prosecution of police killings and killings by civilian people of color. If prosecutors cannot harmonize their charging decisions across these demographics, the felony-murder doctrine should be abolished.

IV. George Floyd's Legacy: Lasting Reform and a Shifting Social Prism in Anticipation of Appellate Review of Minnesota's Felony-Murder Doctrine

The distorted approach to police killings, coupled with larger systemic racial bias, has plagued the Twin Cities' handling of felony-murder cases, other homicides, and crime more generally. In the four years between the Castile and Floyd killings, Minnesota prosecutors brought charges against peace officers on just two other occasions.¹²⁴ In that time there were forty-seven on-duty police killings in the state.¹²⁵ The problem goes back much further: from 2000–2016, the Office of the Hennepin County Attorney did not bring charges in a single police shooting.¹²⁶ The racial inequity of

123. See *supra* Section II; see also Greg Egan, Opinion, *Minnesota Needs to Change Its 'Felony-Murder' Doctrine. Racial Inequities Are One Reason*, ST. PAUL PIONEER PRESS at 19A (June 28, 2020).

124. Pat Borzi, *Why Are Cops in Minnesota So Rarely Charged in Officer-Involved Deaths?*, MINNPOST (June 1, 2020), <https://www.minnpost.com/metro/2020/06/why-are-cops-in-minnesota-so-rarely-charged-in-officer-involved-deaths/> [perma.cc/2STM-WX7G].

125. Jeff Hargarten, Jennifer Bjorhus, MaryJo Webster, & Kelly Smith, *Every Police-Involved Death in Minnesota Since 2000*, STAR TRIB. (Oct. 2, 2020), <https://www.startribune.com/fatal-police-encounters-since-2000/502088871/> [perma.cc/C7PV-EPNG].

126. Tom Jackman & Devlin Barrett, *Charging Officers with Crimes is Still Difficult for Prosecutors*, WASH. POST (May 29, 2020), <https://www.washingtonpost.com/crime-law/2020/05/29/charging-cops-with-crimes-is-still-difficult-prosecutors/> [perma.cc/WM2V-Z7ZD].

that approach and the tacit acceptance of the devastation, dehumanization, and terror it encompasses have deeply scarred the community. The *Chauvin* conviction and appellate posture may cultivate justice in two conflicting ways: either upholding a measure of accountability against Floyd's killer in a way that catalyzes community healing, or, alternatively, prompting a legal change in a way that would, unfortunately, lessen this killer's punishment but facilitate new law benefiting the long-abused community he has so deeply scarred.

The prosecution of George Floyd's killer stands apart from even the other exceedingly rare cases charged against peace officers. It is a sign of progress, but it also evidences just how far things had deteriorated. The other recent Minnesota police killings, while driven in part by their unique factual circumstances, still mirror the racial inequities evident in second-degree felony-murder prosecutions more generally. They also reflect a basic deference to peace officers. A Washington County Sheriff's deputy, Brian Krook, was recently indicted for second-degree manslaughter for shooting a young man in the midst of a mental health crisis.¹²⁷ The victim was a White, off-duty Emergency Medical Technician.¹²⁸ The victim's race and occupation likely motivated prosecutors to seek the indictment. In addition, there tends to be greater sympathy for victims suffering from a mental health crisis.¹²⁹ Under these circumstances, even though Krook was also White, prosecutors went to the grand jury. They did not, however, go so far as to recommend a felony-murder charge. One can speculate as to whether prosecutors would have pursued felony-murder had the shooting involved an officer of color. Conversely, had the victim been a person of color, an indictment may not have been sought at all. What appear to be surface inroads towards justice in the Krook prosecution are nuanced and may actually be yet another manifestation of racial inequity. This is an inequity challenged—but not eviscerated—by the conviction of Floyd's killer.

The Krook case stands in stark contrast to the most recent prosecuted police shooting in Minnesota leading up to George Floyd's killing, but that does not mean that it harmonizes with the

127. Summons at 1, *State v. Krook*, No. 82-CR-19-2887 (Washington Cnty. Dist. Ct. 2019); Matt Sepic, *Washington Co. Deputy Says he Felt 'Horrible' After Shooting, Killing a Man Threatening Suicide*, MINN. PUB. RADIO NEWS (Mar. 18, 2020), <https://www.mprnews.org/story/2020/03/17/washington-co-deputy-says-he-felt-horrible-after-shooting-a-suicidal-man-to-death> [perma.cc/3AS4-9RR2].

128. *Id.*

129. Hargarten et al., *supra* note 125.

Chauvin case when it comes to racial justice and policing. Mohamed Noor was a Black, Somali-American Minneapolis police officer who, in the dark of night, shot and killed a White woman.¹³⁰ While initially Noor was charged with third-degree murder and second-degree manslaughter,¹³¹ prosecutors later elevated charges, bypassing second-degree felony-murder to charge Noor with second-degree intentional murder.¹³² Although bringing criminal charges—perhaps even a felony-murder charge—was appropriate, intentional murder was a stretch.¹³³ There was no body camera footage and no incriminating statement by Noor.¹³⁴ His charges far exceeded those that Yanez and Krook faced. Noor's was the only one of the three cases where an officer of color killed a White victim, so the charging and outcome of that case should not be wholeheartedly celebrated.

Just a few miles from the courthouse where Chauvin's trial was still drawing to its conclusion, yet another young Black man was gunned down by a White peace officer, Kimberly Potter.¹³⁵ Daunte Wright had been pulled over for expired license plate tabs, allegedly tried to flee, and was shot because Potter somehow thought she was handling a taser instead of a firearm.¹³⁶ A County Attorney promptly charged the officer with Second-Degree Manslaughter, and Minnesota Attorney General Keith Ellison

130. Libor Jany, *Ex-Minneapolis Police Officer Noor to Plead Not Guilty in Diamond Shooting Death*, STAR TRIB. (April 26, 2008), <https://www.startribune.com/minneapolis-police-officer-mohamed-noor-will-plead-not-guilty-in-shooting-death-of-justine-damond/480845391/> [perma.cc/9SZJ-RWGS].

131. Complaint at 1, *State v. Noor*, No. 27-CR-18-6859 (Hennepin Cnty. Dist. Ct. 2018).

132. *Second-Degree Murder Charge Officially Added to Noor Complaint*, 5 EYEWITNESS NEWS KSTP (Mar. 26, 2019), [web.archive.org/web/20200614165049/https://kstp.com/news/second-degree-murder-charge-officially-added-mohamed-noor-complaint/5175413/].

133. In its statutory amendments in the wake of George Floyd's killing, the Minnesota Legislature recognized a more nuanced mental state required for prosecution of an officer in Noor's position, which in some ways validated his defense. Compare MINN. STAT. § 609.066(1)(1) (2016) (classifying a killing as "justified" only when actually "necessary to protect the peace officer or another from apparent death or great bodily harm"), with MINN. STAT. § 609.066(1)(1) (2020) (inserting "if an objectively reasonable officer would believe, based on the totality of the circumstances known to the officer at the time and without the benefit of hindsight, that such force is necessary").

134. Jany, *supra* note 130.

135. Nicholas Bogel-Burroughs & Azi Paybarah, *Protesters Clash with Police After Minnesota Officer Shoots Black Man*, N.Y. TIMES (Apr. 11, 2021), <https://www.nytimes.com/2021/04/11/us/brooklyn-center-minnesota-police-shooting.html> [perma.cc/8PPJ-SNRQ].

136. *Id.*

vowed to continue with the prosecution when his office took over.¹³⁷ Though it appears more a case of ineptitude than savagery, this case has many of the same racial, policing, and power elements of Chauvin's. And the likely result is another conviction. That would be the right outcome; it would reinforce the sea change finally evident in Chauvin's case. The hope is that these tragic cases will decrease in frequency, but when they do happen, the trend for greater accountability will continue.

Against this backdrop it appears we are at a fulcrum in our long history of racial inequity in the prosecution and sentencing of police killings, and in the use of the felony-murder doctrine more generally. Up until now, most frequently, officers who killed were never even charged.¹³⁸ On the rare occasions—two others in recent memory in Minnesota—that a White officer was charged or indicted, it was only to second-degree culpable manslaughter, not felony-murder.¹³⁹ A person of color is killed by police; the initial public outcry dissipates; only in rare cases are charges brought; then it happens all over again. Community leaders like former Minneapolis NAACP president Leslie Redmond have expressed their exasperation: “The 13th [Amendment to the U.S. Constitution] abolished slavery except if one was duly convicted of a crime. The legacy of slave patrols ha[s] continued through our current policing system and it is time for a change. The murder of George Floyd made people realize that silence equal[s] consent.”¹⁴⁰

Considering that long history of tribulation, the community rightly celebrated Chauvin's convictions. But there is a reasonable chance that the conviction to the top count, second-degree felony-murder, will not stand. The Supreme Court of Minnesota may answer the call of academics and practitioners to reevaluate the merger limitation to the felony-murder doctrine.¹⁴¹ The high Court may hold that at the very least assaults—and possibly other felony-level crimes of physical aggression towards a person—that lead to an unintended death cannot predicate felony-murder. Such a

137. Amy Forliti, *Minnesota AG's Office to Prosecute Case Involving Wright's Death*, STAR TRIB. (May 21, 2021), https://www.startribune.com/minnesota-ag-office-to-prosecute-case-in-wrights-death/600059862/?utm_source=newsletter&utm_medium=email&utm_campaign=talkers [perma.cc/TV9B-93ML].

138. Jackman & Barrett, *supra* note 126.

139. Indictment, *State v. Krook*, No. 82-CR-19-2887 (Washington Cnty. Dist. Ct. 2019); Criminal Complaint, *State v. Potter*, No. 27-CR-21-7460 (Hennepin Cnty. Dist. Ct. 2021).

140. Interview with Leslie E. Redmond, Esq., Former NAACP President, in St. Paul, Minnesota (Jan. 3, 2021) (on file with author).

141. Egan, *Collateral and Independent Felonious Design*, *supra* note 68.

holding would be grounded in the following reasoning: because the *mens rea*, or violent underlying criminal intent was common to the predicate assaultive crime and murder in the abstract, the two crimes merge.¹⁴²

As horrific as his actions were, Chauvin did not intend to kill Floyd. There was public outrage when he was not charged with intentional murder,¹⁴³ but Ellison and his team were correct to conclude that intentional murder simply did not fit. Chauvin set out to do something appalling: he likely wanted make Floyd fear the power imbalance, likely wanted to hurt Floyd; perhaps he even intended to make him beg for his life, or at the very least recognize that he had the absolute power to take it away. Chauvin likely further intended to whitewash all of this in a police report he would have turned over to prosecutors to entice them to charge Floyd, had he survived. He likely intended to make Floyd out as the bad actor, maybe even the aggressor, just as peace officers have done across the Twin Cities and across the rest of the country with impunity for far too long. Even more appalling, Chauvin used the power of his badge to try to do all of this. But none of this could be congruent with an affirmative intent to kill. The Author is among the harshest critics of what Chauvin did, but to assert that he intended to slowly kill George Floyd in broad daylight amidst a sea of onlookers is misguided.

As unsettling as this prospect is, and as much as Derek Chauvin deserves a harsh penalty for the heinous murder he without question committed, the progressive elements of the legal community have to recognize that in many ways, Chauvin's case provides a sound factual scenario to finally rewrite Minnesota's felony-murder doctrine by adopting a merger limitation. Chauvin was calculated and intentional in perpetrating an appalling and wholly unjustified assault, but he did not intend to kill. Take away the badge, take away the devastation Chauvin's actions have had on the community, take away his heartlessness, his violence, his callousness, and his horrifying belief that he was untouchable, and what is left is a text-book example of the type of prosecution that a merger limitation to the felony-murder doctrine would preclude. The law must be so clinical, so objective, and so dispassionate if it

142. *Id.* (providing thorough analysis of mechanics of felony-murder doctrine predicated on assaultive crimes).

143. Harry Litman, Opinion, *Does Third-Degree Murder Sound Too Mild for Chauvin? It's Exactly Right*, L.A. TIMES (June 2, 2020), www.latimes.com/opinion/story/2020-06-02/george-floyd-derek-chauvin-murder-charge [perma.cc/A797-5K3S].

is to dispense justice on a broad scale, even when it seems unpalatable in the short term.

Change in Minnesota's felony-murder doctrine is long overdue. But from a community, racial equity, and police reform perspective, it would seem both shameful and tragic if this were to be the case to finally deliver it. For more than forty years, the Supreme Court of Minnesota and the State Legislature have turned a deaf ear to calls for reform,¹⁴⁴ silencing those who have suffered from a racially and socioeconomically biased law weaponized against the disenfranchised.¹⁴⁵ Shameful, tragic, but not atypical: the world finally listens when a White person of power speaks.

Chauvin's legal team will invariably do just that by challenging the felony-murder conviction with a call for merger. Ironically, the unintended champion for a long-overdue change in law that would benefit communities of color may now be this White former officer who has wreaked such devastation on those very communities. It is not just ironic; it is insulting and demeaning. However distasteful it may be, Chauvin's appeal has the potential to finally cleanse Minnesota's felony-murder doctrine of some of the gross racial and socioeconomic inequity that has plagued it for generations.

Peace officers are not the only actors who have perpetuated the inequities of Minnesota's felony-murder doctrine; prosecutors and judges should not escape blame.¹⁴⁶ As sickening as overturning the most serious conviction against Chauvin would be, the accompanying evolution in the law would facilitate justice, even if prosecutors and judges were not ready. The outcry, tragedy, and reform of the past year should leave their mark on these ministers of justice, awakening them to the inequities of the felony-murder doctrine and the way it has long been employed to defile communities of color. But even if all that has happened in the past year does not have that effect, a change in the law would drag prosecutors and judges forward, whether they were ready or not, because it would finally deprive them of a tool that—unconsciously or intentionally—they have long weaponized against the disenfranchised.¹⁴⁷

So even if Chauvin's felony-murder conviction is overturned, George Floyd will still have had a lasting impact on the law and on

144. Egan, *Collateral and Independent Felonious Design*, *supra* note 68.

145. Egan, *Minnesota Needs to Change Its 'Felony-Murder' Doctrine*, *supra* note 123.

146. *See supra* Sections II & III.

147. *See supra* Sections II & III.

the broader community in which it is immersed. Slow as the waking of conscience may be, the tide is finally shifting. And that tidal pool is deeper, and hopefully longer lasting, than just Derek Chauvin's legal case. Although only one of the recent Minnesota police killings leading up to Chauvin has resulted in a conviction, all four cases were brought in the past five years.¹⁴⁸ On an unprecedented scale in the wake of George Floyd's killing, the streets have flooded with sustained protest—both in Minnesota and around the world.¹⁴⁹ Their calls are for racial equity and police reform.¹⁵⁰ And it has not been without effect: the public has successfully demanded laws aimed at fostering more effective relationships between the police and the community, preventing police killings, and imposing greater accountability when killings do occur.¹⁵¹ Moreover, leaders like Minneapolis Police Chief Medaria Arradondo are now at the helm. He immediately discharged all four officers involved in Floyd's death and promised, "The Floyd family will lead me forward."¹⁵² Finally, the aggressive charging of Chauvin,¹⁵³ like the general approach of Ellison and his team to this prosecution, are in and of themselves promising.¹⁵⁴ Things are starting to change.

148. Jon Collins & Riham Feshir, *Two Minnesota Police Shooting Trials, Two Very Different Verdicts*, MPR NEWS (May 1, 2019), <https://www.mprnews.org/story/2019/05/01/two-minnesota-police-shooting-trials-two-very-different-verdicts> [perma.cc/HQ2G-J5HE].

149. Olivia Le Poidevin, *George Floyd: Black Lives Matter Protests Go Global*, BBC NEWS (June 8, 2020), <https://www.bbc.com/news/av/world-52967551>.

150. *Id.*

151. *See, e.g.*, MINN. STAT. § 299C.80 (2020) (calling for the formation of an independent Use of Force Investigations Unit within the Bureau of Criminal Apprehension to conduct officer-involved death investigations); MINN. STAT. § 609.06(3) (2020) (limiting choke holds and other restraints by peace officers); MINN. STAT. § 609.066(2) (2020) (tightening restrictions on peace officers' use of deadly force); MINN. STAT. § 626.5534 (2020) (imposing a use of force reporting requirement upon chief law enforcement officers); MINN. STAT. § 626.8434(3) (2020) (prohibiting "warrior-style" training); MINN. STAT. § 626.8435 (2020) (establishing the Ensuring Police Excellence and Improving Community Relations Advisory Council, which legislators intended to protect civil and human rights, provide for citizen involvement, and advance reforms that "promote positive interactions between peace officers and the community"); MINN. STAT. § 626.8469 (2020) (providing for training in crisis response, conflict management, mental illness crises, and cultural diversity); MINN. STAT. § 626.8475 (2020) (imposing a duty for peace officers to intervene and report "regardless of tenure or rank").

152. Sara Sidner, *Minneapolis Police Chief Vows to Reform Police Department*, CNN VIDEO (June 13, 2020), <https://www.cnn.com/videos/us/2020/06/13/minneapolis-police-chief-reform-george-floyd-sidner-pkg-nr-vpx.cnn>.

153. Chauvin's conviction under the second-degree felony-murder doctrine is rare for peace officers, but squarely akin to what defendants of color have historically and routinely faced. *See supra* Section II.

154. Labor Jany, *Seeking to Show Pattern of Excessive Force by Chauvin, Prosecutors Cite Incident with 14-Year-Old Boy Who Couldn't Breathe*, STAR TRIB.

The Supreme Court of Minnesota may wrestle Chauvin's murder convictions away from the communities that rightly celebrated them, but it cannot take away the reform, the unity, and the dialogue that has grown over the course of this past year. Moreover, when it comes to the felony-murder doctrine, the Supreme Court of Minnesota cannot take away that conviction without also taking away a tool that has been weaponized in the legal system against communities of color for generations. The ideal outcome is for Chauvin's appeal to catalyze a dialogue about a merger limitation to the felony-murder doctrine, but for the Supreme Court of Minnesota to recognize that public policy demands that his conviction stand.

There is momentum behind this outcome. The appellate posture of the Noor case illustrates Minnesota appellate courts' prism shift when it comes to killings by police generally. Although not specifically enumerated in statute, a time-honored common law requirement for Murder in the Third-Degree is that the killer's "general malice" involve "ill will" directed at someone other than "the person slain."¹⁵⁵ The Minnesota Court of Appeals in *Noor* could not have been any more flagrant in disregarding the long line of binding precedent from the Supreme Court of Minnesota,¹⁵⁶ instead

(Nov. 18, 2020), <https://www.startribune.com/chauvin-prosecutors-cite-incident-with-14-year-old-boy-who-couldn-t-breathe/573105501/> [perma.cc/2CWM-X8HP] (detailing prosecution's intent to introduce evidence of Chauvin's prior use of unreasonable force against a fourteen-year-old boy while "ignoring his pleas that he could not breathe"); see also Stephan Montemayor & Chao Xiong, *Four Fired Minneapolis Police Officers Charged, Booked in Killing of George Floyd*, STAR TRIB. (June 4, 2020), <https://www.startribune.com/four-fired-minneapolis-officers-booked-charged-in-killing-of-george-floyd/570984872/> [perma.cc/DV8T-GWJK] (announcing Ellison's decision to upgrade the charges to include second-degree felony-murder within days of being assigned the case).

155. *State v. Weltz*, 193 N.W. 42, 43 (Minn. 1923) (enumerating "intentional driving of a carriage in among a crowd, or the discharging of a gun among a multitude of people" as "common illustrations") (cited in *State v. Coleman*, 957 N.W.2d 72, 78 (Minn. 2021)). *Coleman* was handed down by the Supreme Court of Minnesota as the Chauvin trial was in progress. *Coleman*, 957 N.W.2d at 72.

156. The Noor intermediate appellate court used tortured reasoning to reinterpret time-honored, binding case law and statutory authority. See, e.g., *State v. Zumberge*, 888 N.W.2d 688, 698 (Minn. 2017) ("Third-degree murder cannot occur when the defendant's actions were focused on a specific person.") (cited in *State v. Noor*, 955 N.W.2d 644, 654 (Minn. Ct. App. 2021)); *State v. Hanson*, 176 N.W.2d 607, 614–15 (Minn. 1970) (holding that Murder in the Third-Degree "occurs only where the death is caused without intent to effect the death of any person, a phrase which under our decisions excludes a situation where the animus of defendant is directed toward one person only") (cited in *Noor*, 955 N.W.2d at 654); *State v. Lowe*, 68 N.W. 1094, 1095 (Minn. 1896) ("It is, however, necessary that the act was committed without special design upon the particular person or persons with whose murder the accused is charged.") (cited in *Noor*, 955 N.W.2d at 653). See also MINN. STAT. § 645.08(2) (2018) ("[T]he singular includes the plural; and the plural, the singular[.]") (cited in *Noor*,

holding without ambiguity that “[t]he phrase does not preclude the possibility of a third-degree murder conviction if an unintentional death is caused by an act directed at a single person.”¹⁵⁷ A bold stance this was for the Minnesota Court of Appeals, an error-correcting court not authorized to forge new policy.¹⁵⁸ The *Noor* appellate court made this ruling knowing that it would pave the way for reinstating the Murder in the Third-Degree charge on the eve of the Chauvin trial, which was already pending *voir dire*.¹⁵⁹ The intermediate appellate court’s legal reasoning was strained at best. In sum, the Minnesota Court of Appeals acknowledged in *Noor* the overwhelming weight of binding authority, then promptly issued a ruling in direct contradiction to it. This is result-oriented reasoning at its finest, and it demonstrates just how much the cultural climate has changed.

It is significant that the Minnesota Court of Appeals was receptive to this change in cultural climate. *Noor* suggests that appellate courts will no longer be complacent in police abuse. As a matter of public policy, they will now instead side with those terrorized by it. On some level, this is a step in the right direction. However, it is legally nuanced. What is clear is that the holding in *Noor* seems to show the courts mirroring the growing public intolerance of police killings. Not even the Minnesota Court of Appeals is immune to the evolution George Floyd’s killing has propelled this past year.

The Supreme Court of Minnesota likely will not be immune to this evolution either. It will uphold both *Noor*, when it comes to Murder in the Third-Degree, and *Chauvin* when it comes to Felony-Murder in the Second-Degree and Murder in the Third-Degree. It will uphold these convictions against former peace officers even though it requires making new law as it pertains to Murder in the Third-Degree, and upholding bad law, at least temporarily, as it pertains to Second-Degree Felony-Murder. To the extent that these laws implicate excessive force by police, that is probably a good thing. But the social dialogue and legal reform should not stop with the analysis of the five prosecuted Minnesota police killings in recent memory.

955 N.W.2d at 645) (using a mere general cannon of construction to attempt to unwrite a well-established tenet of Murder in the Third Degree). The *Noor* court even quotes the 1896 murder statute, emphasizing the words “design to effect the death” to argue that somehow the plain language of the century-old statute invalidates the requirement that the defendant endanger another person. See 955 N.W.2d at 655.

157. *Noor*, 955 N.W.2d at 656.

158. *Jensen v. 1985 Ferrari*, 949 N.W.2d 729, 741 n.21 (Minn. Ct. App. 2020).

159. *Noor*, 955 N.W.2d at 644.

If the high Court does not forge new ground by adopting the merger limitation in the *Chauvin* appeal, it should be vigilant not to overlook a more appropriate case to reform the felony-murder doctrine. Instead of protecting the White former peace officer who violently betrayed the public trust, the case that ultimately propels legal reform of the felony-murder doctrine should look more like most of the convictions that have come through the system in the last forty years. These cases have borne the mark of a tragedy, but for opposite reasons: most convictions feature disenfranchised people of color as defendants. They commit assaults, do not intend to kill, and cannot hide behind a badge. These actors, though certainly not blameless, have for years received the draconian treatment that Chauvin will seek to sidestep on appeal.

The tragedy of George Floyd must not be compounded. Even if his case exposes some of the faults of the felony-murder doctrine, Chauvin does not deserve to be the agent of reform—not after what he has done to the community. The conversation must begin here, but the true reformer has yet to come forward. The time is ripe. We are reexamining police killings; now we must reexamine the weaponization of the felony-murder doctrine against disenfranchised people of color.

Prosecutors have analyzed the Chauvin case through a different lens than past police killings. Hopefully, appellate court jurists do too. Finally deploying a second-degree felony-murder charge against a peace officer with success demonstrates this shift. It took strong evidence. It also took a jury that had absorbed the social evolution that has taken place in the year since George Floyd's killing.

The convictions will not repair the long-standing racial inequities of the felony-murder doctrine—or of criminal prosecutions more generally—nor will they completely halt the onslaught of police killings in the Twin Cities and in the rest of the nation and world. But they have already had some effect in making peace officers reevaluate use of force. And regardless of what happens in the appellate courts, the appeal will force a long-overdue conversation about substantive felony-murder reform in Minnesota, across the country, and hopefully in the few nations abroad that still employ the archaic doctrine. This conversation will embrace evolving norms about racial justice and policing. The convictions and appeal will make prosecutors and judges more cognizant of racial disparities that leave gaping wounds. They will reinforce broader reform, rethinking, and unity. They will promote, solidify,

and stand for justice both in our laws and in our communities. That will be George Floyd's legacy.