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2022

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#### Citation Information

Aya Gruber, Criminal “Justice” as Racial Justice?, JOTWELL (November 8, 2022) (reviewing Guyora Binder & Ekow Yankah, Police Killings As Felony Murder, 17 Harv. L. & Pol. Rev. 1 (2022)).

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## Criminal “Justice” as Racial Justice?

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**Date :** November 8, 2022

Guyora Binder & Ekow Yankah, [Police Killings As Felony Murder](#), 17 Harvard L. & Pol. Rev. 1 (2022).

Guyora Binder and Ekow Yankah’s fascinating new article is essential reading for anyone seeking a deep understanding of the legacy of the massive protests in the wake of George Floyd’s killing. The article reveals that a primary achievement—perhaps *the* primary achievement—of the agitation, Derek Chauvin’s murder conviction, may not be the racial justice victory people widely believe it to be.

The racial justice uprisings of Summer 2020 constituted the single largest worldwide protest in history. Although the sociopolitical factors underlying the eruption of activism were legion, from the ascendance of Trumpian white nationalism to the rampant health infrastructure inequities that helped Covid to devastate communities of color, it was a single nine minute viral video that galvanized the historical moment. What brought the world into the streets was the heart-wrenching video of Derek Chauvin, hands casually in his pockets, calmly—one might even say professionally—training his knee on the neck of George Floyd, who lay prone and dying and cried out for his mother. In those minutes, the world began to see the police not as the superhero criminal interdictors of ingrained American cultural mythology but as the foot soldiers of the forever war against the poor, minorities, and dissenters. The brutal conduct of the militarized police units tasked with “keeping the peace” during the protests further solidified this notion of the police as violence purveyors rather than interrupters.

For this long-time critic of policing and mass incarceration, everything seemed possible in those heady summer months of 2022. States and localities would “defund” police departments that marginalized communities and reallocate funds to the social, economic, and cultural services that prevent crime. Trained violence-interrupters would respond to mental-health and other calls and aid, not spit-hood and strangle vulnerable people in need. The federal government would pass sweeping reform, and the Supreme Court would put an end to qualified immunity.

That did not happen. A few liberal jurisdictions made these types of positive changes. But amid surging political tensions, economic woes, a surge in gun sales, and youths with idle time and high emotions, some areas—but by no means all—saw an uptick in homicides, and others experienced higher than usual homelessness and petty crime rates. The “revolutionary reckoning” of 2020 became little more than a momentary fast from the steady American diet of hysterical crime-wave coverage and tough-on-crime politics as usual. “Defund the police” barely made it off Twitter when powerful politicians, including the President, declared it a terrible slogan and idea, if not the worst thing that ever happened to the Democratic party. Today, police forces receive more funds, support, and military gear than ever before. To be sure, there was an intense backlash to, and overcompensation for, the defund movement. The problem is that there was never a lash; police departments were never defunded.

Yet, in all this gloom, there was a ray of light for millions who called for “justice for George Floyd”: Derek Chauvin was convicted of murder and sentenced to decades in prison. For good reason, activists regarded the conviction and sentence as revolutionary acts. Finally, a jury saw a Black man with a criminal record as a victim and a white decorated police officer as a criminal killer. Finally, racist policing was fought by the rule of law, and the law won. Yet, amid all the jubilation over Chauvin’s demise, a critique of the paradigm of criminal justice as racial justice bubbled up from the margins. Some argued that the focus on Chauvin as a bad apple who violated the police department’s training and ethos—never mind that he was their veteran training officer—deflected from the fact that Chauvin’s pursuit of physical control over arrestees at virtually all costs is what policing is all about. Others cautioned that the case gave a false sense of the promise of prosecutorial justice. It took millions of dollars, worldwide condemnation, and the full attention

of a resolute public to gain a conviction for this one act of police brutality—one of thousands that occur daily.

Nevertheless, even many critics overlooked a truly stunning and disturbing fact about the case: The prosecution elected to pursue a route where it could prove murder without showing that Chauvin intended to kill Floyd or even acted in reckless and malicious disregard of his life. Instead, the premier murder charge was felony murder, an offense that provokes scholarly and philosophical ire because it holds people who commit or aid felonies strictly liable for deaths they did not intend or even foresee. This is why Binder and Yankah's article is so important. It provides a necessary caution that to achieve this ostensible racial justice victory, prosecutors utilized one of the most idiosyncratic and exceptional, retributively troubling, and racially problematic criminal law doctrines in existence. Charging felony murder relieved the prosecution of having to prove anything more than the fact that Floyd died during Chauvin's perpetration of a felony. Even more stunning, the predicate felony, third degree assault, requires "assault[ing] another and inflict[ing] substantial bodily harm," but does not require the defendant to intend, know, or even foresee the risk of bodily harm. Chauvin's conviction feels a lot less symbolically vindicating when one considers that it could have been rendered by a jury that concluded that Chauvin had zero intent to kill or seriously harm Floyd.

One might be tempted to rejoin, "Well, given that prosecutors bend over backwards to exonerate bad cops and stretch the law to incarcerate marginalized people daily, I don't care that Chauvin's prosecutors used a controversial but totally legal doctrine to ensure a murder conviction so integral to racial accountability." Professor Yankah, a scholar of criminal law theory and race, and Professor Binder, the nation's foremost expert on felony murder, provide a compelling case for why we should care. In the vein of scholarship on the "level-up, level-down" conundrum in criminal law, Binder and Yankah consider the possibility that the Chauvin case could serve as a model for prosecutors across the nation to level up the use of felony murder against racist killer cops. They analyze this possibility alongside the costs of further expanding and legitimizing felony murder during a time when there is nascent movement in the direction of civil libertarian reform.

Binder and Yankah begin by noting that the felony murder rule in Minnesota is one of the broadest around because of its inclusion of the very homicidal assault as a predicate felony, and Chauvin could not have been prosecuted for felony murder without this feature. As the authors observe, unlike Minnesota, most jurisdictions do merge assault and homicide, for good reason. Allowing felony murder to be predicated on assault—especially assault that does not itself require intent—gives prosecutors absolute discretion over whether to charge a given assault that accidentally causes a death as a murder, manslaughter, or just assault. Indeed, the Minnesota law declares that assaults that accidentally and unintentionally result in death *are* murders. In any case, because assault is not a common predicate, the felony murder doctrine holds little promise in punishing killer cops, absent nationwide reform.

What troubles Binder and Yankah more about celebrating a felony murder conviction as a progressive victory is that felony murder statutes often adopt a "proximate cause" approach that holds defendants liable for murder when a third party reacting to the felony kills someone, including a co-felon (Minnesota however does not). The authors provide a captivating and detailed history of the proximate cause doctrine and demonstrate that the notion of saddling a felon with murder liability for the independent acts of third-parties, which courts initially widely rejected, gained acceptance at two critical junctures in U.S. history. The first was after World War II when courts drew parallels between felons reaping what they sow and Japanese citizens of Hiroshima deserving to be nuked because the Japanese bombed Pearl Harbor. The second and greater expansion of the probable cause approach occurred during the period of the late 1960s through the 1990s, what many scholars have described as a racialized "war on crime" era. Expanding felony murder liability granted prosecutors powerful tools to incarcerate the usual suspects and served to normalize police and private homicidal violence as the natural and inevitable reaction to crime.

Not content to rest on the proximate cause approach's ignoble history, the authors point to a particularly noxious deployment of it, that is unfortunately all too common. Felony murder liability often arises when the police respond to minor felonies committed by Black men and employ disproportionate and deadly force that kills one or more of the people engaged in the crime. Make no mistake, the person charged with murder is *not* the cop but the suspects lucky enough to survive the onslaught of police violence. Moreover, as the authors demonstrate through empirical evidence,

it is precisely Black men who bear the brunt of this charge-the-victim practice. Black men disproportionately draw police fire, and they are disproportionately charged with felony murders because of the officers' homicidal choices. Far from being a potential tool to control police violence, the felony murder doctrine shifts the blame for police brutality on to its victims and normalizes violence as the prototypical response to felonious behavior in system where everything seems to be a felony.

There is so much packed into this article: a normative point about using expansive criminal law doctrine to achieve social justice, a detailed history of the felony murder doctrine, an exposition of the philosophical justifications and critiques of the doctrine, and a distributional racial analysis of broad felony murder rules and who wins and loses under them. It is critical reading for not just those interested in the Chauvin case but everyone wanting to learn more about the complex ways substantive doctrine and prosecutorial practice combine to produce racialized police violence and mass incarceration.

Cite as: Aya Gruber, *Criminal "Justice" as Racial Justice?*, JOTWELL (November 8, 2022) (reviewing Guyora Binder & Ekow Yankah, *Police Killings As Felony Murder*, 17 *Harvard L. & Pol. Rev.* 1 (2022)), <https://crim.jotwell.com/criminal-justice-as-racial-justice/>.