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INTRODUCTION

The felony murder doctrine is one of the most criticized rules in the field of criminal law,[1] yet it remains firmly entrenched in most jurisdictions in the United States.[2] Under felony murder rules, people who commit certain felonies may be convicted of murder even when they do not act with the mens rea that would typically be required.[3] One of felony murder's most troubling applications is to people who do not kill but who are accomplices to a predicate felony.[4] Accomplice-based theories of felony murder are even more problematic when applied to juveniles, whose culpability is "twice diminished" due to their age and accomplice status.[5]

In 2018, the *New York Times* featured the story of Shawn Khalifa, who burglarized a house with three others when he was fifteen years old.[6] The owner of the home was tragically killed in the course of the burglary. This had not been part of the plan. Shawn was "guarding the back door" while two older youth carried out the burglary.[7] He "slipped into the kitchen and stole some chocolate candies. He briefly saw that the homeowner was seriously hurt, and he ran back outside."[8] For his participation in the burglary, Shawn was convicted of first-degree murder and was sentenced to life without the possibility of parole (LWOP).[9] The case made its

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1. *See* MODEL PENAL CODE § 210.2 cmt. 6 at 32–42 (AM. L. INST. 1980); *see also* Rudolph J. Gerber, *The Felony Murder Rule: Conundrum Without Principle*, 31 ARIZ. ST. L.J. 763, 766–70 (1999) (criticizing the felony murder doctrine).

2. *See* WAYNE R. LAFAVE, CRIMINAL LAW 605, 690 (3d ed. 2000) (stating that the felony murder rule is "well entrenched in American law"); Kevin Cole, *Killings During Crime: Toward a Discriminating Theory of Strict Liability*, 28 AM. CRIM. L. REV. 73, 73–74 (1990) (explaining that felony murder is "quite durable" despite much criticism); James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces that Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429, 1431 (1994) (analyzing "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 into the twenty-first century"); *see also* GUYORA BINDER, FELONY MURDER, at ix (2012) (stating that "[f]elony murder liability is part of homicide law in almost every American jurisdiction").

3. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 511 (6th ed. 2012) ("The felony-murder rule facially applies whether a felon kills the victim intentionally, recklessly, negligently, or accidentally and unforeseeably."); PAUL H. ROBINSON & MICHAEL T. CAHILL, CRIMINAL LAW § 15.3 (2d ed. 2012).

4. DRESSLER, *supra* note 3, at 511–12 (describing the theory of accomplice liability as it pertains to felony murder).

5. In *Graham v. Florida*, the 2010 Supreme Court decision prohibiting the sentence of life without the possibility of parole (LWOP) for juvenile offenders, the Court reasoned that "a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis." 560 U.S. 48, 69 (2010). In this Article, I posit that felony murder cases involving juveniles raise a similar issue: a juvenile convicted of murder as an accomplice to felony murder is less culpable due to age and due to a lower level of involvement—and lesser mental state—than would be present in a typical murder case.

6. Abbie VanSickle, *If He Didn't Kill Anyone, Why Is It Murder?*, N.Y. TIMES (June 27, 2018), https://www.nytimes.com/2018/06/27/us/california-felony-murder.html [https://perma.cc/53K2-6AQZ].

7. *Id.*

8. *Id.*

9. Khalifa v. Cash, 594 F. App'x 339 (9th Cir. 2014).

way to the Ninth Circuit, which upheld the conviction at the time.[10] In a dissenting opinion, Judge Harry Pregerson commented on the disproportionality of the sentence, writing that "[e]ven the deputy attorney general in this case acknowledged the harshness of Khalifa's sentence for a kid who went into a house and filled his pockets with candy."[11]

This story is not unusual.[12] Juveniles—a term I use throughout this Article to refer to people under the age of eighteen—comprise a high proportion of those who are convicted of felony murder. The exact numbers are difficult to pin down because felony murder is a theory of liability rather than an independent offense,[13] but an estimated twenty to twenty-six percent of all juveniles prosecuted for murder are charged under felony murder theories.[14] Thus, felony murder laws are a driving force behind the high numbers of young offenders in the United States who have been sentenced to spend the rest of their lives in prison.[15]

Many young people who have been convicted of felony murder were not the actual killers but were accomplices to the underlying felonies. One survey found that twenty-six percent of all people in the United States serving LWOP for a crime

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10. In 2019, an appellate court determined Shawn was not a major participant and did not act with reckless indifference in this felony, rendering him eligible for resentencing and possible release. *See In re* Khalifa, No. G057175, 2019 WL 4266820, at *9 (Cal. Ct. App. Sept. 10, 2019).

11. *Khalifa*, 594 F. App'x at 344–45 (Pregerson, J., dissenting).

12. *See* Miller v. Alabama, 567 U.S. 460 (2012) (discussing Kuntrell Jackson's case because it was a companion case); Emily C. Keller, *Constitutional Sentences for Juveniles Convicted of Felony Murder in the Wake of* Roper*,* Graham *&* J.D.B., 11 CONN. PUB. INT. L.J. 297, 300–02 (2012) (discussing the felony murder conviction of seventeen-year-old David Young who participated in a robbery where a codefendant shot the victim, but Young had no knowledge that the codefendant would do so, and that of seventeen-year-old Aaron Phillips who was convicted of felony murder for participating in a robbery of an elderly man who later died after two surgeries following a hip fracture incurred during the robbery); Alison Burton, Note, *A Commonsense Conclusion: Creating a Juvenile Carve Out to the Massachusetts Felony Murder Rule*, 52 HARV. C.R.-C.L. L. REV. 169, 170 (2017) (describing the case of seventeen-year-old Frederick Christian who, along with four others, robbed three individuals and was convicted of felony murder after one of the other participants in the robbery "pulled out a gun and shot the other three individuals without warning").

13. Felony murder is a theory of liability, rather than a separate charge. It results in a conviction of murder and is not recorded differently than other murder convictions, making it difficult to track how many people have been convicted under felony murder theories. A proposed bill in California would have required felony murder to be tracked separately from other murder convictions to gather more data, but it was defeated in the legislature. Assemb. 2195, 2016 Leg., 2015–2016 Reg. Sess. (Cal. 2016).

14. FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE 152 (1998) (reporting that one in five of all juvenile homicides are based on felony murder theories); AMNESTY INT'L & HUM. RTS. WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 1–2 (2005), https://www.hrw.org/sites/default/files/reports/TheRestofTheirLives.pdf [https://perma.cc/SA8K-YV2D] (reporting that twenty-six percent of juveniles sentenced to LWOP for homicide were convicted under felony murder rules).

15. As of 2016, 11,745 people in the United States were serving life or virtual life sentences for crimes they committed when they were under the age of eighteen. ASHLEY NELLIS, THE SENT'G PROJECT, STILL LIFE: AMERICA'S INCREASING USE OF LIFE AND LONG-TERM SENTENCES 16 (2017). Three thousand and twenty-five are in California. *Id.* Ninety-eight percent are male and 80.4% are people of color. 55.1% are African American. *Id.* at 17.

committed when they were juveniles had been convicted of felony murder as a result of their participation "in a robbery or burglary during which the co-participant committed murder, without the knowledge or intent of the teen."[16]

High rates of accomplice liability in juvenile felony murder cases are due, in part, to the fact that young people tend to commit crimes in groups.[17] Approximately half of all violent crimes committed by juveniles are committed in groups.[18] If one member of the group causes a death in the course of a qualifying felony, the others can also be convicted of murder.[19]

California recently enacted groundbreaking reforms to its felony murder rule, narrowing its reach in cases where the defendant was not the "actual killer."[20] Now, in order to be convicted of felony murder as an accomplice to an underlying felony, the defendant must be a "major participant" in the felony and must act with "reckless indifference to human life."[21] According to Guyora Binder, a leading expert on felony murder, California's reform targeted "the least popular and the least defensible" aspects of modern felony murder laws.[22] Illinois is currently considering similar legislation,[23] and other states are likely to follow.

California's felony murder reforms—which apply to both juveniles and adults—open the door to considering the legitimacy of convicting young offenders of felony murder based on their limited ability to assess future risk. Specifically, in light of criminal law's focus on punishing people "for actions for which the defendant can be justly blamed,"[24] adolescents' diminished capacity to weigh the costs and benefits of their actions, and their propensity to engage in risky behaviors regardless of the costs attached, render them less blameworthy for killings committed by their confederates when the killing was unplanned.[25] In situations like

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16. AMNESTY INT'L & HUM. RTS. WATCH, *supra* note 14, at 1–2.

17. *See* ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 39 (2008) (finding that adolescents are "far more likely than adults to commit crimes in groups"); Franklin E. Zimring, *Penal Proportionality for the Young Offender*, *in* YOUTH ON TRIAL 271, 281 (Thomas Grisso & Robert G. Schwartz eds., 2000) (reporting that "[n]o matter the crime, if a teenager is the offender, he is usually not committing the offense alone").

18. ZIMRING, *supra* note 14. A survey of California prisoners serving LWOP for crimes committed as juveniles found that over seventy-five percent reported having committed their crimes with at least one other person. HUM. RTS. WATCH, "WHEN I DIE, THEY'LL SEND ME HOME": YOUTH SENTENCED TO LIFE WITHOUT PAROLE IN CALIFORNIA 31–32 (2008), https://www.hrw.org/sites/default/files/reports/us0108_0.pdf [https://perma.cc/28BS-WQHM].

19. DRESSLER, *supra* note 3, at 511–12 (describing how an accomplice to a felony resulting in a death would be guilty of murder, without regard to her own state of mind relating to the death).

20. S. 1437, 2018 Leg., 2017–2018 Reg. Sess. (Cal. 2018) (enacted in CAL. PENAL CODE § 189(e) (West 2010 & Supp. 2019)).

21. PENAL § 189(e).

22. VanSickle, *supra* note 6.

23. H.R. 1615, 101st Gen. Assemb., Reg. Sess. (Ill. 2019) (proposing to amend the state's felony murder law to require that an accomplice to felony murder have knowledge "that the other participant would engage in conduct that would result in death or great bodily harm").

24. *See* SANFORD H. KADISH, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, *in* BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW 135, 136 (1987).

25. *See infra* Section III.A.

this, blame is ascribed to accomplices because of an assumption that they should have known that a death could result from their participation in the felony. Yet blame fundamentally "entails a judgment of responsibility"[26] that is inconsistent with adolescent brain development.[27]

In order to determine whether people qualify as "major participants," which California now requires for accomplice-based felony murder, courts consider accomplices' awareness of the danger posed by the felony and the actions they took to intervene to prevent the killing.[28] To act with reckless indifference to human life, the second requirement for proving accomplice-based felony murder, people must understand and appreciate the risks their actions create and be "subjectively aware" that their participation in the felony involves a grave risk of death.[29] An emerging body of research indicates that this may not be reasonable to expect of adolescents.[30]

The Supreme Court has recognized the unique characteristics of adolescents in a series of cases beginning with *Roper v. Simmons*, the 2005 case that eliminated the death penalty for juvenile offenders.[31] The Court found that juveniles are fundamentally different from adults in several ways, including their inability to evaluate and understand risks.[32] Incorporating studies on adolescent brain development into its jurisprudence, the Supreme Court has barred LWOP sentences for juveniles who have not committed homicide,[33] eliminated mandatory LWOP sentences for juveniles,[34] and required that a juvenile's age must be considered in the objective analysis of whether a reasonable person would feel free to terminate a police encounter for purposes of applying the *Miranda* rule.[35]

Adolescent brain development research has not yet been analyzed in relation to the "major participant" and "reckless indifference" standards that now attach to California's definition of felony murder. These standards originate from two U.S. Supreme Court cases that limited the imposition of the death penalty in felony murder cases based on accomplice liability.[36] However, *Roper v. Simmons*, the case that marks the beginning of the Supreme Court's recent reliance on adolescent development research, categorically prohibited the death penalty for juveniles.[37] Since the major participant and reckless indifference standards have previously

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26. KADISH, *supra* note 24, at 140.
27. *See* discussion *infra* Part II.
28. People v. Banks, 351 P.3d 330, 340 (Cal. 2015).
29. *In re* Bennett, 237 Cal. Rptr. 3d 610, 627 (Ct. App. 2018).
30. *See infra* Section III.A.
31. 543 U.S. 551 (2005).
32. *See id.* at 569 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)) (stating that a "lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults . . . often result[ing] in impetuous and ill-considered actions and decisions").
33. Graham v. Florida, 560 U.S. 48 (2010).
34. Miller v. Alabama, 567 U.S. 460 (2012).
35. J.D.B. v. North Carolina, 564 U.S. 261 (2011).
36. *See* Enmund v. Florida, 458 U.S. 782 (1982); Tison v. Arizona, 481 U.S. 137 (1987).
37. 543 U.S. at 578.

applied only to death penalty cases,[38] the link between these two areas of law has only become relevant with California's move to import the death penalty standard into its analysis of LWOP sentences in 2015 and into its definition of felony murder in 2019.[39]

Although a handful of others have examined the relationship between youth and felony murder,[40] no one has yet considered the major participant and reckless indifference standards in light of the adolescent development research that has become central to Supreme Court decisions involving juvenile offenders. This Article fills this gap. It discusses a body of research that demonstrates juveniles have a limited capacity to perceive future risks, which is arguably a prerequisite for satisfying both the major participant and reckless indifference standards. It also examines research demonstrating that adolescents are highly susceptible to external influences. This susceptibility makes intervening to stop a confederate's violent actions unlikely, raising the risk that a juvenile's actions will be perceived as "major" or "reckless" due to limited capacities that are characteristic of youth.

This is a topic with both theoretical and practical significance. Theoretically, this Article contributes to a body of scholarship that recognizes that, while problematic, felony murder laws are not likely to disappear from U.S. law anytime soon. Commentators have already thoroughly exposed myriad problems with the felony murder doctrine,[41] yet there is a disconnect between the academic analysis of the doctrine and the practical reality that felony murder laws persist.[42] In his book

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38. *E.g.*, *Tison*, 481 U.S. at 157–58.

39. In *People v. Banks*, the California Supreme Court built on the Supreme Court's reasoning in *Enmund* and *Tison* and prohibited life without the possibility of parole (LWOP) sentences based on felony murder unless the defendant was a major participant in the felony and acted with reckless indifference to human life. 351 P.3d 330, 340 (Cal. 2015). In Senate Bill 1437, California's legislature imported the *Enmund/Tison* standards into the definition of felony murder for accomplices who were not the "actual killers." S. 1437, 2018 Leg., 2017–2018 Reg. Sess. (Cal. 2018) (enacted in CAL. PENAL CODE § 189(e) (West 2010 & Supp. 2019)).

40. *See* Keller, *supra* note 12 (arguing that the Eighth Amendment should prohibit juvenile LWOP for felony murder convictions); Michael T. Moore, Jr., *Felony Murder, Juveniles, and Culpability: Why the Eighth Amendment's Ban on Cruel and Unusual Punishment Should Preclude Sentencing Juveniles Who Do Not Kill, Intend to Kill, or Attempt to Kill to Die in Prison*, 16 LOY. J. PUB. INT. L. 99 (2014) (arguing against the application of juvenile LWOP in felony murder cases); Mariko K. Shitama, *Bringing Our Children Back from the Land of Nod: Why the Eight Amendment Forbids Condemning Juveniles to Die in Prison for Accessorial Felony Murder*, 65 FLA. L. REV. 813, 842 (2013) (arguing for a categorical ban on LWOP for juveniles convicted under felony murder theories and stating that *Roper*, *Graham*, and *Miller* "call into question the propriety of ever applying the felony-murder rule to juveniles").

41. Nelson E. Roth and Scott E. Sundby's review of the literature found that "[c]riticism of the rule constitutes a lexicon of everything that scholars and jurists can find wrong with the legal doctrine." Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 446 (1985).

42. Forty-two states, and the District of Columbia, maintain felony murder laws, whilesu states have eliminated them. *See* PAUL H. ROBINSON & TYLER SCOT WILLIAMS, MAPPING AMERICAN CRIMINAL LAW: VARIATIONS ACROSS THE 50 STATES (2018) (reporting that seven states have abolished felony murder). After Robinson and Williams' publication, Massachusetts imposed an intent requirement for felony murder, eliminating felony murder as an independent theory of liability.

Felony Murder—the only academic book on the subject—Guyora Binder starts from the premise that "felony murder liability is not going away," so "we should try to make felony murder law better."[43] Thus, he suggests that scholarship on felony murder should focus on exposing the most problematic aspects of the practice in order "to identify a principle distinguishing justified from unjustified impositions of felony murder liability and to reform the felony murder doctrine in light of that principle."[44]

While I agree, like most others who have written on this topic, that felony murder rules are "rationally indefensible"[45] and should be abolished, this Article follows Binder's recommendation and tackles one particularly problematic application of the doctrine. By highlighting the normative problems with applying felony murder rules to juvenile accomplices in light of the "twice diminished culpability" of this population,[46] I argue for categorically eliminating the rule for juveniles. In doing so, I consider issues relating to blame and responsibility that are applicable to theoretical discussions about felony murder more broadly.

Although a robust body of scholarship considers adolescent development research in relation to juvenile sentencing, scholarship considering the implications of this research on mens rea is scarce. Writing in 2003, Kim Taylor-Thompson raised this as an important area to explore further, arguing that "this developmental research could fundamentally transform the way that courts weigh issues of intent when an adolescent faces charges in criminal court."[47] Although adolescent development research has expanded significantly since 2003, legal scholars have by and large ignored Taylor-Thompson's call to examine the research in relation to legal standards pertaining to mental state.[48] Jenny E. Carroll renewed this call in 2016, arguing that future scholarship should examine how "the mens rea standard as applied to juveniles should be recalibrated to account for what is now known about adolescent development."[49] This Article begins to fill this gap in the literature by focusing on the implications for mens rea posed by adolescents' limited capacity

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43. BINDER, *supra* note 2, at 7 (drawing on Ronald Dworkin's call to make the law "the best it can be" by considering "the concerns of lawyers, judges, legislators, citizens, and legal theorists in a single conversation"). Influential criminologist Nils Christie posits that the only morally "defensible position" is to "strive for pain-reduction" in crafting social responses to crime. NILS CHRISTIE, LIMITS TO PAIN: THE ROLE OF PUNISHMENT IN PENAL POLICY 11 (2007). Thus, Christie argues, "social systems ought to be constructed in ways that reduce to a minimum the perceived need for infliction of pain for the purpose of social control." *Id.*

44. BINDER, *supra* note 2, at 6.

45. Sanford H. Kadish, *The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 695–96 (1994).

46. *See* Graham v. Florida, 560 U.S. 48, 69 (2010) (reasoning that juveniles who do not kill, or intend to kill, have a "twice diminished culpability" compared to adults who kill or intend to kill).

47. Kim Taylor-Thompson, *States of Mind/States of Development*, 14 STAN. L. & POL'Y REV. 143, 145 (2003).

48. *But see* Kimberly Thomas, *Reckless Juveniles*, 52 U.C. DAVIS L. REV. 1665 (2019) (examining reckless mental states in the context of adolescent development).

49. Jenny E. Carroll, *Brain Science and the Theory of Juvenile Mens Rea*, 94 N.C. L. REV. 539, 541 (2016).

to understand the consequences of their actions, and fully appreciate the risks their actions pose, and the implications of these findings for the felony murder doctrine.

This challenge to the applicability of felony murder rules to juvenile defendants is important to situate in the context of broader challenges to mass incarceration and the racialized systems of prosecution and punishment in the United States. As Paul Butler, James Foreman, and Marie Gottshalk have explored, people convicted of violent crimes comprise the majority of those incarcerated in the United States.[50] In order to truly dismantle mass incarceration, we must think not only about reforming punishments for nonviolent offenses, but also about changing the social response to violent crimes. Felony murder is a good entry point for this broader reconceptualization of punishment of violent offenses because of the relatively lesser culpability of the offenders in this context.

This Article is of more immediate practical importance as well. It is directly relevant to a wave of cases that are being litigated across California, as courts wrestle with how to give more concrete meaning to the statutory provisions of California's new felony murder law.[51] Many of these cases are tackling the issue of how developmental capacity factors into the analysis of whether a juvenile accomplice was a major participant and acted with reckless indifference to human life under the *Enmund/Tison* factors. It is my hope that this Article will be useful to those deciding how adolescent development research should inform the law in this area.[52]

This Article proceeds as follows. Part I provides an overview of the felony murder rule, its application to accomplices, and the limits the Supreme Court has drawn on imposing the death penalty in accomplice-based felony murder cases. Part II introduces some fundamental concepts about the diminished culpability of

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50. *See* PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN (2017) (highlighting that "violent crime, much more than drug crimes, is fueling mass incarceration" and the disproportionate incarceration of African American men); JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017) (arguing that efforts to challenge mass incarceration must address violent crime in addition to nonviolent drug crimes); MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 5 (2015) (arguing that reforming sentencing practices for drug crimes will not dismantle the carceral state because about half of all people incarcerated in state prisons in the United States are serving time for violent offenses).

51. *See* Sean Emery, *California Appeals Court Decision Backs Law Limiting Who Can Be Charged with Felony Murder*, ORANGE CNTY. REG. (Nov. 25, 2019, 5:39 PM), https://www.ocregister.com/2019/11/25/california-appeals-court-decision-backs-law-limiting-who-can-be-charged-with-felony-murder/ [https://perma.cc/YNW7-GMLN] (reporting on an appellate court decision regarding the constitutionality of California's revised felony murder rule); Greg Moran, *San Diego Appeals Court Upholds New Felony Murder Law*, SAN DIEGO UNION TRIB. (Nov. 20, 2019, 5:20 PM), https://www.sandiegouniontribune.com/news/courts/story/2019-11-20/san-diego-appeals-court-upholds-new-felony-murder-law [https://perma.cc/K2ST-DB3K].

52. This analysis is also relevant to assessing juvenile accountability for felony murder in states that include a foreseeability requirement in their felony murder laws. For example, Maine's felony murder law requires that the death is a reasonably foreseeable consequence of the commission of or attempt at the underlying felony. ME. REV. STAT. ANN. tit. 17-A § 202 (West 1991); *see also* J.R. v. State, 62 P.3d 114, 119 (Alaska Ct. App. 2003) (concluding that the appropriate standard for assessing a juvenile's recklessness is "a reasonable person of . . . like age, intelligence, and experience under similar circumstances").

adolescents, as articulated by the Supreme Court, and considers the legitimacy of applying felony murder rules to juveniles in light of their unique characteristics. Part III dives into the heart of the analysis. There, I argue that juveniles' capacities are too limited to satisfy several of the factors courts use to assess the level of participation and recklessness now required to prove felony murder in California. Part IV proposes two possibilities for incorporating adolescent development research into the law in these cases: (1) an individualized approach based on developmental principles, and (2) a categorical ban on convicting juvenile accomplices for felony murder. After considering some of the shortcomings of an individualized approach, I conclude that a categorical rule would be the best way to recognize the twice diminished culpability of juvenile accomplices in felony murder cases.

I. THE FELONY MURDER DOCTRINE AND ACCOMPLICE LIABILITY

A. Background Regarding Felony Murder

A reckless or intentional mental state is ordinarily required to prove the crime of murder. Under common law, murder is defined as "the killing of a human being by another human being with malice aforethought."[53] Malice typically requires the intent to kill, the intent to inflict grievous bodily harm, or extremely reckless disregard for human life.[54] Unlawful homicides that are committed in the absence of malice are generally categorized as manslaughter, an offense that is punished less severely because the defendant is understood to be less blameworthy.[55]

However, under the felony murder rule, when a death results from the commission of a qualifying felony,[56] the defendant can be found guilty of murder even (in some states) if the death occurred by accident, or was done with a negligent or reckless mens rea.[57] According to the California Supreme Court, "[t]he

53. DRESSLER, *supra* note 3, at 498 (quoting United States v. Wharton, 433 F.2d 451, 454 (D.C. Cir. 1970)).

54. MODEL PENAL CODE § 210.2 cmt. 1 at 14–15 (AM. L. INST. 1980).

55. Under California law, for example, manslaughter carries a maximum punishment of ten years in prison, whereas first-degree murder may be punished by death. CAL. PENAL CODE §§ 187, 192 (West 2020).

56. Enumerated felonies typically include robbery, arson, rape, kidnapping, and burglary, but these vary by state. Some states limit the felony murder rule by allowing its application only when the underlying felony was "inherently dangerous to human life." *See, e.g.*, ALA. CODE § 13A-6-2 (2017) ("A person commits the crime of murder if he or she . . . commits or attempts to commit . . . any other felony clearly dangerous to human life and, in the course of and in furtherance of the crime that he or she is committing or attempting to commit, or in the immediate flight therefrom, he or she . . . causes the death of any person."); TEX. PENAL CODE ANN. § 19.02(b)(3) (West 2017) (stating that a defendant is guilty of felony murder if, "in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt" of any felony other than manslaughter, "he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual").

57. *See* Isabel Grant & A. Wayne MacKay, *Constructive Murder and the Charter: In Search of Principle*, 25 ALBERTA L. REV. 129, 136 (1987) (explaining that felony murder rules equate "accidental, negligent, reckless and intentional killings"). States' definitions of felony murder vary widely. *See*

felony-murder rule makes a killing while committing certain felonies murder without the necessity of further examining the defendant's mental state."[58] This "is untrue to the principle of gradation proportionate to the established level of mental fault" that is otherwise a cornerstone of homicide law.[59] Felony murder rules thus depart significantly from the requirement that malice aforethought is required to prove murder under all other circumstances.

The felony murder doctrine removes the relevance of an individual's mental state for a killing from the equation and instead *transfers* the mental state required for the commission or attempt of an enumerated felony,[60] or, in some jurisdictions, of any dangerous felony.[61] Some argue that felony murder is a strict liability offense, removing one's mental state from consideration altogether.[62] Whether it operates to transfer the intent from the enumerated felony to the homicide or functions as a strict liability offense, felony murder does not require that the individual have acted with malice.[63]

Concerns about convicting people of murder absent a showing of malice have animated many criticisms of the felony murder rule.[64] In the only academic book that specifically focuses on the topic of felony murder, Guyora Binder writes, "[l]egal scholars are almost unanimous in condemning it as a morally indefensible form of strict liability."[65] In its commentary accompanying the Model Penal Code, the American Law Institute finds that a "[p]rincipled argument in favor of the felony-murder doctrine is hard to find."[66] Legal commentators have characterized

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ROBINSON & WILLIAMS, *supra* note 42 (describing the different types of felony murder rules in all fifty states).

58. People v. Chun, 203 P.3d 425, 430 (Cal. 2009).

59. Tomkovicz, *supra* note 2, at 1439–40.

60. *See* Guyora Binder, Brenner Fissell & Robert Weisberg, *Capital Punishment of Unintentional Felony Murder*, 92 NOTRE DAME L. REV. 1141, 1145 (2017) (listing the most common enumerated felonies).

61. *See* William Bald, *Rejoining Moral Culpability with Criminal Liability: Reconsideration of the Felony Murder Doctrine for the Current Time*, 44 J. LEGIS. 239, 244–45 (2017) (discussing the transferred intent argument regarding mens rea and felony murder); Gerber, *supra* note 1, at 770.

62. *But see* BINDER, *supra* note 2, at 23 (arguing that "felony murder laws condition liability on negligence rather than strict liability").

63. *See* Steven A. Drizin & Allison McGowen Keegan, *Abolishing the Use of the Felony-Murder Rule When the Defendant Is a Teenager*, 28 NOVA L. REV. 507, 527 (2004) (finding that the felony murder rule "applies in all situations—when the felon kills intentionally, recklessly, or accidentally"). In the absence of a malice requirement, people can be found guilty of murder if they "cause[] death during the commission of a felony, regardless of that person's mental state with respect to the resultant death." Binder et al., *supra* note 60, at 1141.

64. *See* Tomkovicz, *supra* note 2, at 1441 ("Thus, the major complaint about the felony-murder rule is that it violates generally accepted principles of culpability."); Gerber, *supra* note 1; John O'Herron, *Felony Murder Without a Felony Limitation: Predicate Felonies and Practical Concerns in the States*, 46 CRIM. L. BULL. 664 (2010) (explaining that most of the criticisms of felony murder focus on the lack of mens rea).

65. BINDER, *supra* note 2, at 3. According to Sanford Kadish, the felony murder rule is "rationally indefensible." Kadish, *supra* note 45, at 695–96.

66. MODEL PENAL CODE § 210.2 cmt. 6 at 37 (AM. L. INST. 1980).

felony murder rules as "'abhor[r]ent,'[67] 'anachronistic,'[68] 'barbaric,'[69] 'injudicious and unprincipled,'[70] 'parasitic,'[71] and a 'modern monstrosity'[72] that 'erodes the relationship between criminal liability and moral culpability.'"[73]

Justifications of the felony murder doctrine primarily focus on deterrence, arguing that the existence of the law deters people from committing felonies or deters people who are committing felonies from killing people in the course of the felony. However, most robberies do not result in homicide, or even injury, so the need to deter killings in the course of felonies is questionable.[74] And in light of the fact that there is no empirical evidence that supports the deterrence theory for felony murder, "it is hard to make the case for the need for the felony-murder rule on deterrence grounds."[75]

Wayne LaFave argues that although deterrence is proffered as a reason for the persistence of the felony murder doctrine, the truer explanation for the rule's tenacity is the unstated assumption "that the defendant, because he is committing a felony, is by hypothesis a bad person, so . . . we should not worry too much about the difference between the bad results he intends and the bad results he brings about."[76] In a country whose criminal justice system is inextricably tied to race, it is impossible to divorce LaFave's hypothesis that unstated beliefs about "bad people" explain the persistence of the felony murder doctrine from race. In California, nearly eighty percent of those serving time in prison for felony murder convictions are not white, with nearly forty percent reporting they are African American and nearly thirty percent reporting they are Mexican or Hispanic.[77] Particularly in the juvenile context, it is difficult to imagine that the doctrine would persist if thousands of white teenagers were sentenced to spend the rest of their lives in prison for acting as lookouts or driving getaway cars for robberies or burglaries where the participants

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67. Tomkovicz, *supra* note 2, at 1441.

68. *Id.* at 1441 & n.46 (first citing People v. Burroughs, 678 P.2d 894, 897 (Cal. 1984), *abrogated by* People v. Blakeley, 999 P.2d 675 (Cal. 2000); then citing People v. Aaron, 299 N.W.2d 304, 307 (Mich. 1980); and then citing State v. Ortega, 817 P.2d 1196, 1201 (N.M. 1991)).

69. *Id.* at 1441 & n.47 (first citing *Burroughs*, 678 P.2d at 897 n.3; then citing People v. Smith, 678 P.2d 886, 888 (Cal. 1984); and then citing People v. Phillips, 414 P.2d 353, 360 n.6 (Cal. 1966), *overruled by* People v. Flood, 957 P.2d 869 (Cal. 1998)).

70. *Id.* at 1441 & n.48 (citing *Aaron*, 299 N.W.2d at 334).

71. *Id.* at 1441 & n.49 (citing *Aaron*, 299 N.W.2d at 333 n.16).

72. *Id.* at 1441 & n.50 (citing David Lanham, *Felony Murder—Ancient and Modern*, 7 CRIM. L.J. 90, 90–91 (1983)).

73. *Id.* at 1441 & n.51 (citing People v. Patterson, 778 P.2d 549, 554 (Cal. 1989)). As the Supreme Court of Michigan noted in an opinion abolishing the felony murder rule in Michigan, "malice is an essential element of any murder, as that term is judicially defined, whether the murder occurs in the course of a felony or otherwise." *Aaron*, 299 N.W.2d at 326.

74. *See* Enmund v. Florida, 458 U.S. 782 (1982) (describing research on the frequency with which homicides occur in the course of robberies).

75. DRESSLER, *supra* note 3, at 513.

76. LAFAVE, *supra* note 2, at 682.

77. These statistics are based on a survey conducted with California prisoners. *Statistics*, FELONY MURDER ELIMINATION PROJECT, https://www.endfmrnow.org/statistics [https://perma.cc/SQ7L-8D4X] (last visited Jan. 29, 2021).

did not plan to kill anyone. This practice comports with the modern trend of imposing harsh treatment on those juveniles who are framed as "other people's children" due to racial constructions of criminality.[78]

Although the felony murder rule persists in most jurisdictions in the United States, states have limited its application in various ways.[79] Some allow only a narrow list of enumerated felonies to qualify for felony murder prosecutions.[80] Others require that the underlying felony be "inherently dangerous to human life."[81] Most states apply the "merger doctrine," disallowing crimes that are an integral part of a homicide, such as assault with a deadly weapon, to qualify as an underlying felony.[82]

Felony murder is a distinctly American doctrine; other countries do not use it.[83] Some trace the origin of the doctrine to English common law,[84] but England statutorily abolished the felony murder rule in 1957.[85] Eight U.S. states have eliminated the felony murder doctrine.[86] Hawaii, Arkansas, New Hampshire, and Kentucky did so through legislative reforms. In Michigan, Massachusetts, Vermont, and New Mexico, felony murder has essentially been abolished in the courts.[87]

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78. *See* BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 265 (1999) (arguing that punitive policies towards juvenile offenders are fueled by the racialization of delinquency).

79. *See* ROBINSON & WILLIAMS, *supra* note 42 (describing state laws that require recklessness or negligence for felony murder); Tomkovicz, *supra* note 2, at 1465 (explaining that most states have restricted the "broad, original version" of the felony murder rule).

80. *See* Binder et al., *supra* note 60, at 1145.

81. Tomkovicz, *supra* note 2, at 1467. *But see* Malaske v. State, 89 P.3d 1116, 1117 n.1 (Okla. Crim. App. 2004) (where the underlying felony was supplying alcohol to a minor); Hickman v. Commonwealth, 398 S.E.2d 698, 699 (Va. Ct. App. 1990) (where the underlying felony was drug possession).

82. *See* Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 549 (2011) (reporting that eight states incorporate the merger doctrine into their felony murder laws). Some jurisdictions do not follow this approach. *See, e.g.*, Miller v. State, 571 S.E.2d 788, 792 (Ga. 2002) (affirming a fifteen-year-old's conviction of felony murder based on the commission of assault with a deadly weapon and battery with injury when he punched another boy during a fight at school, and the victim died as a result of a brain hemorrhage).

83. *See* DRESSLER, *supra* note 3, at 510 (stating that the felony murder rule never existed in France or Germany).

84. The origin of the felony murder doctrine is contested. *See* Roth & Sundby, *supra* note 41, at 449–50 (describing the "disputed origins" of the felony murder rule). Joshua Dressler traces the origin to Blackstone, which states that "if one intends to do another felony, and undesignedly kills a man, this is also murder." DRESSLER, *supra* note 3, 488 n.106 (8th ed. 2018) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 200–01 (1769)). Other accounts tracing felony murder's origin to English common law include: People v. Aaron, 299 N.W.2d 304, 309, 312 (Mich. 1980) (citing EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 56 (1797)), and Sidney Prevezer, *The English Homicide Act: A New Attempt to Revise the Law of Murder*, 57 COLUM. L. REV. 624, 635 (1957). Other scholars believe that the felony murder originated in the United States. *See* BINDER, *supra* note 2.

85. Homicide Act 1957, 5 & 6 Eliz. 2 c. 11, § 1 (Gr. Brit.).

86. *See* ROBINSON & WILLIAMS, *supra* note 42.

87. *Aaron*, 299 N.W.2d at 321–26 ("We believe that it is no longer acceptable to equate the intent to commit a felony with the intent to kill . . . ."); Commonwealth v. Brown, 81 N.E.3d 1173, 1178 (Mass. 2017) (holding that "a defendant may not be convicted of murder without proof of one of the three prongs of malice," meaning that "in the future, felony-murder is no longer an independent

B. Accomplice Liability for Felony Murder

Although the common law definition of felony murder was limited to cases where the defendant committed the violent act that caused death,[88] twelve states currently specify that an individual can be convicted of murder based on "participation in a felony in which any participant causes death," or where "any person" causes death.[89] This casts a wide net, encompassing people who have lower degrees of culpability or involvement than in other murder cases. For example, in Massachusetts, Timothy Brown was convicted of felony murder for providing a gun and a hooded sweatshirt to an acquaintance, knowing that the acquaintance planned to use the items to commit a robbery.[90] Although he was not present at the scene of the crime, Brown was convicted of murder as an accomplice to the robbery.[91]

Recognizing the diminished culpability of accomplices in felony murder cases, the Supreme Court has held that the death penalty may only be imposed for felony murder if the defendant (1) was a major participant in the underlying felony, and (2) acted with reckless indifference to human life.[92] In *Enmund v. Florida*, the Supreme Court held that a participant in a felony murder who "does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed"[93] is "plainly different" from someone who kills.[94] The Court reasoned that "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."[95] At first, the *Enmund* case appeared to eliminate the death penalty in felony murder convictions based on accomplice liability. In *Tison v. Arizona*, however, the Court upheld the death penalty for two accomplices whose participation in the underlying felony was "major" and "whose mental state [was] one of reckless indifference to the value of human life."[96]

California has gone farther than the Supreme Court requires, incorporating these standards into its definition of felony murder. In 2015, the California Supreme

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theory of liability for murder"). New Mexico's Supreme Court has ruled that an individual must have an intent to kill to be convicted of felony murder, which essentially abolished felony murder in the state by adding an intent requirement. State v. Ortega, 817 P.2d 1196, 1204–05 (N.M. 1991) (holding that felony murder "requir[es] proof that the defendant intended to kill the victim").

88. Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 107 (2004).

89. *See* BINDER, *supra* note 2, at 223–24. The states that require the death be caused by a participant in the felony are Alabama, Connecticut, Montana, New York, North Dakota, Oregon, and Washington, and the states that require the death by caused by any person are Alaska, Arizona, Colorado, Florida, and New Jersey. *See* Bald, *supra* note 61, at 248. The distinction between "participant" and "any person" is made because "any person" may include a victim or third party, such as a police officer.

90. *Brown*, 81 N.E.3d 1173.

91. *Id.*

92. Tison v. Arizona, 481 U.S. 137 (1987).

93. 458 U.S. 782, 797 (1982).

94. *Id.* at 798.

95. *Tison*, 481 U.S. at 149.

96. *Id.* at 152.

Court extended the Supreme Court's major participant and reckless indifference requirements for the death penalty to apply to life without the possibility of parole (LWOP) sentences.[97] This case—*People v. Banks*—triggered a flurry of litigation, where people who had previously been sentenced to LWOP based on accomplice liability for felony murder petitioned to be resentenced to life *with* the possibility of parole.[98] In 2018, the California legislature imported this standard into the very definition of felony murder.[99] Now, defendants who did not actually kill may only be convicted of felony murder in California if (1) they were major participants in an underlying enumerated felony, and (2) they acted with reckless indifference to human life.[100]

II. THE DIMINISHED CULPABILITY OF YOUTH IN ADULT COURT

Defendants as young as twelve years old have been prosecuted in adult court for felony murder.[101] Although the juvenile court was established in 1899 with the purpose of treating juveniles who commit crimes differently from adults, the division between juvenile and adult courts has eroded significantly over time.[102] Juveniles are now routinely tried in adult court, according to the same rules that apply to adult defendants.[103] If convicted, they face the same sentences as adults, with some narrow exceptions. A quarter of the juvenile offenders serving LWOP in the United States received this sentence due to felony murder convictions.[104]

A. The Supreme Court & Adolescent Development

Confronted with juveniles who have committed serious offenses, and thus face the most serious punishments, the Supreme Court has limited the sentences

97. People v. Banks, 351 P.3d 330, 339 (Cal. 2015).

98. *See, e.g.*, *In re* Bennett, 237 Cal. Rptr. 3d 610, 617 (Ct. App. 2018) (noting the petitioner's argument that his sentence of life without the possibility of parole must be vacated under *Banks*).

99. S. 1437, 2018 Leg., 2017–2018 Reg. Sess. (Cal. 2018).

100. CAL. PENAL CODE § 189(e) (West 2010 & Supp. 2019).

101. *See* Drizin & Keegan, *supra* note 63, at 507, 527 (discussing various cases involving defendants age twelve, thirteen, fourteen, and fifteen at the time of the crimes). The juvenile court was founded in Chicago in 1899 as alternative to the adult court system, with the express goal of rehabilitation and reform. In the 1990s, in the context of a widespread moral panic surrounding juvenile crime, almost every state in the United States passed legislation making it easier to transfer juveniles into adult court. *See* OFF. OF JUV. JUST. & DELINQ. PREVENTION, U.S. DEP'T OF JUST., TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 9 (2011).

102. The juvenile court was founded in Chicago in 1899 as alternative to the adult court system, with the express goal of rehabilitation and reform. *See generally* Denise Wilson, *Illinois Juvenile Court Act of 1899*, *in* THE ENCYCLOPEDIA OF JUVENILE DELINQUENCY AND JUSTICE (2017). In the 1990s, in the context of a widespread moral panic surrounding juvenile crime, almost every state in the United States passed legislation making it easier to transfer juveniles into adult court. *See* OFF. OF JUV. JUST. & DELINQ. PREVENTION, *supra* note 101, at 8.

103. *See* OFF. OF JUV. JUST. & DELINQ. PREVENTION, *supra* note 101, at 13; CHARLES PUZZANCHERA, MELISSA SICKMUND & ANTHONY SLADKY, NAT'L CTR. FOR JUV. JUST., YOUTH YOUNGER THAN 18 PROSECUTED IN CRIMINAL COURT: NATIONAL ESTIMATE, 2015 CASES (2015), http://www.campaignforyouthjustice.org/images/Transfer-estimate.pdf [https://perma.cc/74MJ-8MQ6].

104. *See* AMNESTY INT'L & HUM. RTS. WATCH, *supra* note 14.

that can be imposed on this population. The Court's guiding principles in these cases have been informed by an emerging body of research that establishes that "fundamental differences between juvenile and adult minds" diminish the culpability of juvenile offenders.[105] As the Court has acknowledged, "any parent knows" that adolescents are characterized by a "lack of maturity and an underdeveloped sense of responsibility."[106] The extent to which these differences are tied to brain development, however, has only come to light in the past twenty years.[107] Based on adolescent brain development research, the Supreme Court has determined that juveniles' "irresponsible conduct is not as morally reprehensive as that of an adult."[108]

In a string of four cases limiting extreme sentences of juveniles—*Roper v. Simmons*,[109] *Graham v. Florida*,[110] *Miller v. Alabama*,[111] and *Montgomery v. Louisiana*[112]—the Court has rested its legal analysis on three conclusions about the differences between adolescents and adults. First, adolescents are less mature than adults, and this makes them disposed to make "impetuous and ill-considered actions and decisions."[113] Second, juveniles are highly susceptible to negative outside influences, including peer pressure.[114] Third, adolescents are uniquely capable of change because they are still in the process of developing, so their "personality traits . . . are more transitory, less fixed."[115]

Although these findings have been primarily applied to Eighth Amendment claims, the Court has demonstrated a willingness to carry these findings outside the Eighth Amendment context. In *J.D.B. v. North Carolina*, the Supreme Court held that a juvenile suspect's age must be considered in assessing whether he was in custody for *Miranda* purposes.[116] Although the custody analysis remains objective, the Court determined that the proper question is whether an objectively reasonable

105. Graham v. Florida, 560 U.S. 48, 68 (2010).

106. Roper v. Simmons, 543 U.S. 551, 569 (2005).

107. Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 64 AM. PSYCH. 739, 742 (2009) (writing in 2009 that "[a]lthough most of this work" demonstrating "significant changes in brain structure and function during adolescence" has "appeared just in the last 10 years, there is already strong consensus among developmental neuroscientists about the nature" of these changes); Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 98 (2009) (summarizing the growth of adolescent development research and the "veritable revolution" taking place in neuroscience in the 1990s involving imaging of adolescent brains).

108. *Roper*, 543 U.S. at 570.

109. *Id.*

110. 560 U.S. 48.

111. 567 U.S. 460 (2012).

112. 136 S. Ct. 718 (2016).

113. *Roper*, 543 U.S. at 569.

114. *Id.*

115. *Id.*

116. 564 U.S. 261 (2011).

person of the same age would feel free to leave or terminate an encounter with police under the circumstances.[117]

B. Adolescent Brain Development & Felony Murder

Fundamental differences between juveniles and adults raise serious questions about the legitimacy of applying felony murder rules to juveniles.

Although sentencing juveniles in adult court has now become the norm, judges express discomfort when they are obligated to impose life sentences on young people who have been convicted under felony murder theories.[118] For example, in a concurrence in a Georgia case involving a fifteen-year-old defendant convicted of felony murder, a judge opined, "I cannot help but believe that as we treat more and more children as adults and impose harsher and harsher punishment, the day will soon come when we look back on these cases as representing a regrettable era in our criminal justice system."[119] A trial court judge in a case where a fifteen-year-old was convicted of felony murder for "passively acting as a look-out for other people" stated that he found the possibility of imposing an LWOP sentence based on his "passive accountability" to be "blatantly unfair and unconscionable."[120]

This discomfort from the bench reflects normative concerns with applying such serious punishments in cases where a defendant's culpability is diminished due to both age and limited involvement in the offense. Similarly, community sentiment tends to disfavor the harsh treatment of juveniles based on felony murder theories of liability.[121] Experimental research using hypothetical felony murder scenarios has found that people tend to favor laws that define crimes and punishments in a way that corresponds to the level of one's level of involvement in the commission of a crime, in contrast to the felony murder rule, which treats all participants in a crime as the same for purposes of guilt and sentencing.[122] A study that set out to analyze community perceptions of the applicability of the felony murder law to juveniles found that "community sentiment does not support the assumption that all

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117. The Court reasoned that "even where a 'reasonable person' standard otherwise applies, the common law has reflected the reality that children are not adults." *Id.* at 274. For example, in negligence suits, "a person's childhood is a relevant circumstance to be considered" in assessing "what an objectively reasonable person would do in the circumstances." *Id.* (citing RESTATEMENT (THIRD) OF TORTS § 10 cmt. b (AM. L. INST. 2005)).

118. *See* Khalifa v. Cash, 594 F. App'x 339, 344–45 (9th Cir. 2014) (Pregerson, J., dissenting).

119. Miller v. State, 571 S.E.2d 788, 798–99 (Ga. 2002) (Benham, J., concurring).

120. People v. Miller, 781 N.E.2d 300, 303 (Ill. 2002).

121. *See* Nicole M. Garberg & Terry M. Libkuman, *Community Sentiment and the Juvenile Offender: Should Juveniles Charged with Felony Murder Be Waived into the Adult Criminal Justice System*, 27 BEHAV. SCIS. & L. 553, 557 (2009). This is particularly relevant in the felony murder context because the Supreme Court expressly supported its decision in *Tison*—a felony murder case—by reasoning that the community sentiment would support the decision.

122. Norman J. Finkel & Stefanie F. Smith, *Principals and Accessories in Capital Felony-Murder: The Proportionality Principle Reigns Supreme*, 27 LAW & SOC'Y REV. 129 (1993).

defendants charged under the felony murder rule should be regarded as equally culpable and sentenced in an equal[] manner."[123]

Almost all arguments put forth in support of the felony murder rule are based on deterrence.[124] Putting aside the many criticisms of the application of deterrence theory to felony murder generally,[125] deterrence loses its persuasiveness in the juvenile context.[126] Deterrence theory assumes that people will consider the consequences of their actions prior to engaging in a crime. Yet the Supreme Court has recognized that "the likelihood that the teenage offender has made the kind of cost-benefit analysis that attached any weight to the possibility of execution is so remote as to be virtually nonexistent,"[127] rendering the death penalty "ineffective as a means of deterrence."[128] The Supreme Court recognizes that "the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence."[129] The same reasoning is applicable to the felony murder context; adolescents are unlikely to be aware of the existence of felony murder laws and are similarly unlikely to understand that their involvement in a felony where death is not intended could lead to someone's death.[130]

Some also argue in support of the felony murder rule based on retributive principles.[131] From this perspective, the tremendous harm that results from a victim's death justifies categorizing otherwise negligent or reckless conduct as murder.[132] Joshua Dressler discredits this approach, arguing that "legislators must consider the actor's culpability, and not simply the harm that she has caused."[133] Equating tragic results with a defendant's culpability is not logically consistent with

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123. Garberg & Libkuman, *supra* note 121, at 573.

124. *See* David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL'Y 359 (1985); Drizin & Keegan, *supra* note 63, at 527 ("The most commonly cited defense of the felony-murder rule is deterrence, the hope of preventing negligent and accidental killings during the commission of felonies."); Tomkovicz, *supra* note 2, at 1448 ("The primary justification offered for the contemporary felony-murder rule is deterrence.").

125. Many commentators have questioned the legitimacy of the deterrence justification, arguing that there is no "credible foundation in established facts" that the doctrine deters felonies or killings in the course of felonies. Tomkovicz, *supra* note 2, at 1457. Further, it is extremely rare for felonies to result in death. *See* Enmund v. Florida, 458 U.S. 782 (1982).

126. *See* Burton, *supra* note 12, at 189 ("As the felony murder rule exploits juveniles' lack of cognitive ability, neither the rule's rationales nor the penological justifications for the rule apply to juveniles."); Drizin & Keegan, *supra* note 63, at 529 (arguing that "the felony-murder rule is even more problematic when applied to children under the age of fourteen"); Erin H. Flynn, Comment, *Dismantling the Felony-Murder Rule: Juvenile Deterrence and Retribution Post-*Roper v. Simmons, 156 U. PA. L. REV. 1049, 1069 (2008) (arguing that "[t]he felony murder rule's justifications of deterrence and retribution fail in the juvenile context, as the doctrine neither deters youth crime nor achieves justice").

127. Thompson v. Oklahoma, 487 U.S. 815, 837 (1988).

128. Roper v. Simmons, 543 U.S. 551, 562 (2005).

129. *Id.* at 571.

130. *See infra* Part III.

131. *See* Crump & Crump, *supra* note 124.

132. *Id.*

133. DRESSLER, *supra* note 3, at 513.

the focus on mens rea as a measure of culpability that undergirds the entire system of criminal law. Rather, as the California Supreme Court has recognized, there must be an individualized assessment of "the defendant's personal role in the crimes leading to the victim's death and . . . the defendant's individual responsibility for the loss of life, not just his or her vicarious responsibility for the underlying crime."[134]

For juveniles, the criticism runs deeper. According to the Supreme Court, "[w]hether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult."[135]

In *Graham v. Florida*, the Supreme Court found that juveniles who do not kill have twice the diminished culpability of others sentenced to LWOP because (1) they did not kill, and (2) hallmark features of youth render them less blameworthy.[136] This same reasoning applies to juveniles in felony murder cases, an issue that was raised in a companion case to *Miller v. Alabama*.[137] The Supreme Court sidestepped this question about felony murder, concluding only that the mandatory nature of the LWOP sentence must be reconsidered.[138] But a categorical challenge to the applicability of felony murder laws to juveniles will likely be revived in the coming years.[139]

As long as felony murder rules continue to apply to youth, incremental changes that exclude the least blameworthy category of juveniles from liability could limit some of the imbalance between culpability and punishment that arises in this context. Toward this end, Part III considers juvenile accountability for felony murder under California's model, which preserves accomplice liability for felony murder in some cases while eliminating it in cases where the involvement of the accomplice is lesser.

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134. People v. Banks, 351 P.3d 330, 337 (Cal. 2015).

135. Roper v. Simmons, 543 U.S. 551, 571 (2005).

136. 560 U.S. 48, 68–69 (2010).

137. In *Jackson v. Hobbs*, the Court was asked to consider whether an LWOP sentence violated the Eighth and Fourteenth Amendments when applied to "a fourteen-year-old who did not personally kill the homicide victim, did not personally engage in any act of physical violence toward the victim, and was not shown even to have anticipated, let alone intended, that anyone be killed." Brief for Petitioner at i, Miller v. Alabama, 567 U.S. 460 (2012) (No. 10-9647), 2012 WL 92506.

138. *Id.*

139. *See* Marsha Levick, *Kids Are Different: The United States Supreme Court Reforms Youth Sentencing Practices for Youth Prosecuted in the Criminal Justice System*, 70 JUV. & FAM. CT. J. 25, 41–42 (2019) (predicting that challenges to the application of the felony murder doctrine to juveniles "will likely continue as the doctrine, with its harsh penalties premised on youth's limited or indirect involvement in the murder, appears especially vulnerable with respect to children"). There are many instances where a juvenile's conviction for felony murder raises serious questions about culpability and blameworthiness even when the juvenile is the "actual killer," as in the case of "the driver of a getaway car who kills a jaywalker" and "the robber who unknowingly punches a hemophiliac." Binder et al., *supra* note 60, at 1141. Consider, for example, a Georgia case where the defendant exchanged gunfire with a store owner in the course of a robbery. Durden v. State, 297 S.E.2d 237 (Ga. 1982). Although none of the bullets hit him, the victim died of a heart attack. *Id.* at 239. The Georgia Supreme Court upheld the conviction of felony murder in this case. *Id.* at 242.

III. RECOGNIZING THE TWICE DIMINISHED CULPABILITY OF JUVENILE ACCOMPLICES TO FELONY MURDER UNDER THE *ENMUND/TISON* FACTORS

Under the California approach, accomplices charged with felony murder may only be convicted if they were "major participant[s] in the underlying felony," and they "acted with reckless indifference to human life."[140] In analyzing these standards, courts consider the defendant's awareness or knowledge that death was likely to occur and the defendant's knowledge of the danger posed in the felony.[141] Courts also consider the accomplice's efforts to intervene to aid the victim, minimize the risks of violence, prevent the killing, or mitigate the harm in the aftermath.[142]

These standards are problematic when applied to juveniles because young people do not have the same capacity as adults to evaluate the risks and to take these actions.[143] The limited capacities that are characteristic of adolescents affect their blameworthiness.[144]

This Part considers the relevance of adolescent development research on assessing two key aspects of the major participant and reckless indifference standards under California's felony murder law: (1) a juvenile's understanding or awareness of the risk of death posed by participating in a felony, which is required to establish reckless indifference to human life; and (2) the extraordinary unlikelihood that an adolescent would intervene to stop others from acting violently in the course of a crime, which plays an important role in determining whether an

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140. CAL. PENAL CODE § 189(e) (West 2010 & Supp. 2019).

141. The California Supreme Court has articulated specific factors to consider in assessing whether an individual acted as a major participant in an underlying felony. They are: (1) what role defendant played in planning the felony, (2) whether defendant used or supplied any weapons, (3) whether the defendant was aware of the danger posed in committing the felony, (4) whether the defendant was present at the killing, (5) whether defendant was in a position to assist or prevent the killing, (6) what role the actions or inactions of the defendant played in the death, and (7) what actions the defendant took after lethal force was used. People v. Banks, 351 P.3d 330, 338–39 (Cal. 2015). To assess whether a defendant acted with reckless indifference to human life during the commission of a felony murder, courts must consider: (1) "[k]nowledge of weapons, and use and number of weapons"; (2) "[p]hysical [p]resence at the [c]rime and [o]pportunities to [r]estrain the [c]rime and/or [a]id the [v]ictim"; (3) "[d]uration of the [f]elony"; (4) "Defendant's [k]nowledge of [c]ohort's [l]ikelihood of [k]illing"; and (5) "Defendant's [e]fforts to [m]inimize the [r]isks of the [v]iolence [d]uring the [f]elony." People v. Clark, 372 P.3d 811, 884–88 (Cal. 2016).

142. *Clark*, 372 P.3d at 884–88.

143. The Pathways to Desistance study is the most comprehensive effort to track how adolescent development affects criminality. It tracked over 1,300 juvenile offenders over the course of seven years and identified four key differences between adolescents and adults. Juveniles are less able to consider the consequences of their actions, are more sensitive to rewards, are more susceptible to peer influence, and are less able to regulate impulsive behavior. Elizabeth Cauffman, Adam Fine, Alissa Mahler & Courtney Simmons, *How Developmental Science Influences Juvenile Justice Reform*, 8 U.C. IRVINE L. REV. 21 (2018).

144. *See* Richard J. Bonnie & Elizabeth S. Scott, *The Teenage Brain: Adolescent Brain Research and the Law*, 22 CURRENT DIRECTIONS PSYCH. SCI. 158, 160 (2013) ("This argument for diminished responsibility is reinforced and strengthened to the extent that these well-demonstrated developmental characteristics are explained by normal and predictable neurobiological processes.").

accomplice was a major participant and whether he acted with reckless indifference to human life under the *Enmund/Tison* standards.

A. Juveniles' Capacity to Understand the Risk that Death Could Result

Adolescents are not as capable as adults of understanding the consequences that are likely to result from their actions.[145] This limited capacity is germane to this context because, as Justice Breyer noted in a concurring opinion in *Miller v. Alabama*, the

> theory of transferring a defendant's intent is premised on the idea that one engaged in a dangerous felony should understand the risk that the victim of the felony could be killed, even by a confederate. Yet the ability to consider the full consequences of a course of action and to adjust one's conduct accordingly is precisely what we know juveniles lack capacity to do effectively.[146]

1. Research on Adolescents' Limited Understanding of Consequences

There is a consensus among the major professional organizations in the fields of psychology, psychiatry, and social work that juveniles "are less able to restrain their impulses and exercise self-control; less capable of considering alternative courses of action and avoiding unduly risk behaviors; and less oriented to the future and thus less attentive to the consequences of their often-impulsive actions."[147] This is in large part due to the fact that the prefrontal cortex of the brain is not fully developed until people reach their early twenties.[148] This portion of the brain is responsible for regulating impulses, controlling emotions, and predicting future outcomes.[149]

However, it is not brain development alone that explains the lesser capacity of adolescents to regulate impulses and to assess the consequences of their actions.

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145. *See* Brief for the American Psychological Association, American Psychiatric Association, and National Association of Social Workers as Amici Curiae in Support of Petitioners at 8, Miller v. Alabama, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9467), 2012 WL 174239 ("Research has shown that adolescents' judgment and decision-making differ from adults' in several respects: Adolescents are less able to control their impulses; they weigh the risks and rewards of possible conduct differently; and they are less able to envision the future and apprehend the consequences of their actions.").

146. Miller v. Alabama, 567 U.S. 460, 492 (2012) (Breyer, J., concurring).

147. Brief for the American Psychological Association, American Psychiatric Association, and National Association of Social Workers as Amici Curiae in Support of Petitioners, *supra* note 145, at 3–4.

148. *See* Cauffman et al., *supra* note 143, at 24.

149. *See* Zdravko Petanjek, Miloš Judaš, Goran Šimić, Mladen Roko Rašin, Harry B.M. Uylings, Pasko Rakic & Ivica Kostović, *Extraordinary Neoteny of Synaptic Spines in the Human Prefrontal Cortex*, 108 PROC. NAT'L ACAD. SCIS. U.S. 13281 (2011); Sarah-Jayne Blakemore & Suparna Choudhury, *Development of the Adolescent Brain: Implications for Executive Function and Social Cognition*, 47 J. CHILD PSYCH. & PSYCHIATRY 296, 301 (2006) (describing the executive functions of the prefrontal cortex of the brain).

Psychosocialmaturity also plays an important role in decision-making.[150] Thus, "even after their general cognitive abilities approximate those of adults, juveniles are less capable than adults of mature judgment and decision-making, especially in the social contexts in which criminal behavior is most likely to arise."[151]

Numerous studies have demonstrated that "juveniles differ from adults in their ability to foresee and take into account the consequences of their behavior."[152] In the "Pathways to Desistance" study, 1,300 adolescents were tracked over the course of seven years to measure their decision-making and susceptibility to peer influence as they matured.[153] This multisite, longitudinal study found that "compared with adults, the adolescent's ability to assess the long-term consequences of wrongful acts and to control conduct in the face of external pressures is severely impaired."[154] Specifically, juveniles "are less able to envision the future and apprehend the consequences of their actions."[155] Therefore, "it is less likely that they will fully apprehend the potential negative consequences of their actions."[156]

For example, one study set out to measure the influence of psychosocial factors on maturity of judgment.[157] The study included over 1,000 people between the ages of twelve and forty-eight, making it possible to compare responses across various age ranges.[158] Participants were asked about hypothetical situations involving potentially risky behavior, and they were asked to make decisions based on the hypothetical scenarios.[159] For example, participants were presented with a hypothetical scenario about being with a group of friends who decide to shoplift.[160] The friends ask the participant to shoplift too.[161] Participants were then asked whether they would shoplift if they could be assured they would suffer no negative consequences, if they would shoplift if they knew they would suffer negative consequences, and if they would shoplift if they did not know whether they would

150. Laurence Steinberg, Elizabeth Cauffman, Jennifer Woolard, Sandra Graham & Marie Banich, *Are Adolescents Less Mature than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop,"* 64 AM. PSYCH. 583 (2009).

151. Brief for the American Psychological Association, American Psychiatric Association, and National Association of Social Workers as Amici Curiae in Support of Petitioners, *supra* note 145, at 4.

152. *Id.* at 12.

153. Cauffman et al., *supra* note 143, at 27.

154. *Id.* at 29.

155. Brief for the American Psychological Association, American Psychiatric Association, and National Association of Social Workers as Amici Curiae in Support of Petitioners, *supra* note 145, at 8 (citing Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANN. REV. CLINICAL PSYCH. 47, 55–56 (2008)).

156. *Id.* at 12.

157. Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable than Adults*, 18 BEHAV. SCIS. & L. 741, 749–50 (2000).

158. *Id.* at 756.

159. *Id.* at 749.

160. *Id.*

161. *Id.*

suffer negative consequences.[162] Adolescents were more likely to engage in the negative behaviors regardless of the consequences.[163] The study found that "socially responsible decision-making is more common among older participants than among younger ones."[164] Adolescents scored lower than adults in seeing the "short and long term consequences" of their actions.[165] Notably the biggest changes occurred between the ages of sixteen and nineteen, indicating that "the period between 16 and 19 marks an important transition point in psychosocial development that is potentially relevant to debates about the drawing of legal boundaries between adolescence and adulthood."[166]

Another study tracked how age related to people's decisions and risk-taking in a gambling task.[167] Participants ranged from ten to thirty years old.[168] The study found that while adolescents focused on possible rewards, they did not think as much about possible costs, whereas adults tended to consider both costs and benefits of their decisions.[169] Numerous other studies have demonstrated that adolescents are less likely to fully appreciate the long-term consequences of their actions, not necessarily due to a cognitive inability to do so, but due to psychosocial factors that cause adolescents to focus more on the perceived benefits—including peer approval and satisfying impulses—than on the potential negative consequences.[170]

Thus, when assessing a juvenile's subjective knowledge of the dangers posed by participating in a felony, and whether a teenager would understand that death could result, this limited capacity to balance the negative consequences of one's actions against the perceived rewards must be considered. While it may be apparent to an adult that participating in a violent, armed robbery could result in injury or death, this is not nearly as obvious to an adolescent.[171]

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162. *Id.*

163. *Id.* at 751.

164. *Id.* at 756.

165. *Id.* at 748.

166. *Id.* at 756.

167. Elizabeth Cauffman, Elizabeth P. Shulman, Laurence Steinberg, Eric Claus, Marie T. Banich, Sandra Graham & Jennifer Woolard, *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 DEVELOPMENTAL PSYCH. 193 (2010).

168. *Id.*

169. *Id.* at 204, 206.

170. In another study that presented a series of hypothetical decisions to adolescents and adults, adolescents were less likely than adults to assess the potential costs and benefits, bring up possible long-term consequences, and consider possible alternative options. Bonnie L. Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults*, 22 J. APPLIED DEVELOPMENTAL PSYCH. 257, 265, 268 (2001). Even greater differences prevailed between adults and younger adolescents. *Id.* at 268.

171. *See* Thomas, *supra* note 48, at 1691 ("Young people are risk-seekers, and yet they lack the maturity to think through the very real possible consequences of their risk-taking and to reflect on and refrain from the risky behavior.").

2. Major Participant Analysis and Understanding Consequences

To determine whether an individual is a major participant in an underlying felony, courts consider the defendant's awareness of the danger posed by committing the felony.[172] This is a subjective test, and the knowledge an accomplice has of a confederate's use of violence in the past is relevant to the analysis.[173] Accomplices who had previously engaged in violent activity with their codefendants are thought to be more aware that death could result from their participation in the felony.[174] For example, in *Tison*, the accomplices were two brothers who freed their father from prison.[175] They knew that he had been convicted of murder for killing a prison guard during a previous escape attempt, causing Justice O'Connor to conclude that they had a clear subjective understanding that their participation in this felony could result in death.[176] California cases have similarly considered an accomplice's knowledge of prior acts of violence committed by a confederate as evidence of this subjective awareness that the present felony "involved a grave risk of death."[177]

This link between prior violence and current risk may make sense for adults who have reached developmental maturity. But for adolescents, this link is not as clear. Although the cognitive capacity of juveniles approximates that of adults by the age of sixteen, research has identified a psychosocial maturity gap that accounts for significant differences between teenagers and adults well past this age.[178] This psychosocial immaturity means that "in situations that elicit impulsivity, that are typically characterized by high levels of emotional arousal or social coercion . . . adolescents' decision making, at least until they have turned 18, is likely to be less mature than adults."[179]

To measure this maturity gap, one study administered a series of questions and tests to a set of 935 people ages ten to thirty, to assess the differences between adolescents and adults.[180] The questionnaires and tests measured intellectual ability,[181] risk perception, sensation seeking, impulsivity, resistance to peer influence, and future orientation.[182] To assess risk perception, participants were

172. People v. Banks, 351 P.3d 330 (Cal. 2015).

173. *Id.*

174. *See* People v. Medina, 200 Cal. Rptr. 3d 133 (Ct. App. 2016) (finding an accomplice to a felony murder was a major participant and acted with reckless indifference to human life when he had participated in a shooting with the actual killer days before the current offense).

175. Tison v. Arizona, 481 U.S. 137, 139 (1987).

176. *Id.* at 152.

177. *Medina*, 200 Cal. Rptr. at 791–92.

178. Steinberg et al., *supra* note 150, at 592.

179. *Id.*

180. *Id.* at 587.

181. The study used the Wechsler Abbreviated Scale of Intelligence (WASI) Full-Scale IW Two-Subtest (Psychological Corporation, 1999), which "has been normed for individuals between the ages of 6 and 89 years." *Id.* at 588.

182. *Id.* at 588–89.

asked to rate how risky eight activities are.[183] For example, participants were asked, "if you . . . had unprotected sex, how much are you at risk for something bad happening?"[184] Although forty-five percent of adolescents between the ages of sixteen and seventeen had the same cognitive capacity as adults, only twenty-five percent had the same psychosocial capacities.[185]

Research demonstrates that adolescents are, as a group, less capable of perceiving risks, and of making responsible decisions that balance the costs of engaging in risky behavior against the perceived rewards.[186] This means that a legal standard that imputes adult perceptions of knowledge on the adolescent mind is likely to result in a systemic tendency to find that young offenders are major participants even when they do not actually have the subjective awareness that the standard requires. Accordingly, applying this standard to this population is improper.

3. Reckless Indifference to Human Life Analysis and Understanding Consequences

Although knowledge of the risk of death is merely one factor to consider in the major participant analysis, this awareness is *required* to establish that an individual acted with "reckless indifference to human life."[187] Acting with reckless indifference to human life means "knowingly engag[ing] in criminal activities known to carry a grave risk of death."[188] A defendant "is not automatically deemed to have exhibited reckless indifference to human life" merely for participating in an enumerated felony.[189] Rather, "[t]he intent to commit an armed robbery is insufficient, absent the further 'intention of participating in or facilitating a murder.'"[190] Reckless indifference "encompasses a willingness to kill (or assist another in killing) to achieve a distinct aim, even if the defendant does not specifically desire that death as the outcome of his actions."[191] A defendant must be "subjective[ly] aware[]" that his or her participation in the felony involved a "grave risk of death."[192] The likelihood that adolescents will have this subjective

183. *Id.*

184. *Id.* at 589 tbl.2.

185. *Id.* at 591 fig.3.

186. Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEVELOPMENTAL REV. 78, 81 (2008) (arguing that "the factors that lead adolescents to engage in risky activity are social and emotional, not cognitive; that the field's emerging understanding of brain development in adolescence suggests that immaturity in these realms may have a strong maturational and perhaps unalterable basis").

187. People v. Banks, 351 P.3d 330, 344 (Cal. 2015).

188. *Id.* (quoting Tison v. Arizona, 481 U.S. 137, 157).

189. *In re* Bennett, 237 Cal. Rptr. 3d 610, 627 n.7 (Ct. App. 2018).

190. *Id.* at 625.

191. *Id.*; People v. Clark, 372 P.3d 811, 883 (Cal. 2016) (defining the reckless indifference to human life standard in the context of felony murder for accomplices).

192. *Clark*, 372 P.3d at 883, 887.

awareness about the consequences that are likely to flow from their actions in felony murder cases is slim, at best.[193]

To illustrate the differences between how an adolescent and an adult would perceive a risky situation, in an article examining mens rea for juvenile offenders, Professor Kim Taylor-Thompson uses a case study of David Johnson, a fifteen-year-old young man who was charged with aggravated assault for shooting a young man who had teased him at a school dance.[194] Professor Taylor-Thompson considers the traditional mens rea analysis of intent, purpose, and knowledge in the context of the case and concludes that a jury could conclude that David intended to kill the victim when he fired the gun into the victim's chest at point-blank range.[195] Alternatively, a jury could conclude that the mens rea of knowledge was satisfied—that David knew that death could result when he fired the gun directly at the victim's chest.[196]

But Professor Taylor-Thompson argues that given his youth, David's "immaturity of judgment" must be taken into account in analyzing his intent, knowledge, or lack thereof.[197] Specifically, she argues, "if an individual lacks the capacity to foresee a particular outcome, it cannot be said that he could have known the steps to take to avoid the harm."[198] His lack of life experience, due to his youth, combined with the more limited decision-making capacity of adolescents mean that while "[a]n adult might conclude that when an individual brandishes a gun, she must foresee the potential for its use. But an adolescent's mind might process events differently."[199] Specifically, David said he *knew* the victim would back away once he saw the weapon because David said he would have done so were he in the victim's shoes.[200] This assumption, or knowledge, was wrong.[201] When the victim did not turn around, David impulsively fired the gun, not intending to kill or even shoot the victim in the chest; "[h]e simply shot without thought."[202] While this may sound irrational or unbelievable when analyzed through the lens of adult decision-making, when considered in the context of adolescent decision-making it makes more sense.[203]

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193. *See* Maroney, *supra* note 107, at 114 ("Structural and functional brain immaturity also undermines the application to juveniles of the felony murder doctrine and accomplice liability. Doctrine in each of these areas reflects baseline assumptions about rationality and forethought that are inapposite for the typical juvenile.").

194. Taylor-Thompson, *supra* note 47, at 159–64.

195. *Id.* at 161–62.

196. *Id.* at 162.

197. *Id.* at 162–63.

198. *Id.* at 163.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 163–67 (discussing a developmental analysis of David's mens rea that would take his age and developmental capacity into account using concepts of diminished capacity and developmental negligence).

This case study highlights the key differences in how adolescents and adults function, and it parallels the facts of many cases. In one case where a sixteen-year-old was charged with attempted murder after firing a gun several times in the direction of the victim, he explained, "I didn't think I would hurt him. I was just trying to scare him."[204] This appears nonsensical to an adult, but this is typical of how adolescents perceive risks.

> Research confirms that adolescents do not assess risks and make decisions in the same manner as a "reasonable adult," and it is therefore illogical to presume that an adolescent who takes part in a felony—even a dangerous felony—would anticipate or comprehend that someone may be killed as a consequence of the felony.[205]

Before turning to consider how the law should incorporate this limited awareness into its assessment of guilt, I consider a second piece of the major participant and reckless indifference analysis that also raises serious questions about the legitimacy of applying these standards to juveniles—the expectation that they should intervene to stop or prevent the actions of a coparticipant in a crime.

B. Juveniles' Capacity to Intervene During or After the Killing

Several of the factors in the major participant and reckless indifference analysis focus on whether the accused takes steps to aid the victim, or to mitigate the violence, once a confederate uses deadly force.[206] This kind of intervention would seem nearly impossible for most adolescents, however, given their strong susceptibility to external influences.

Teenagers are particularly susceptible to influence from both peers and adults.[207] Laurence Steinberg and Elizabeth Scott, whose work has been influential on the Supreme Court, have found that "adolescents' desire for peer approval—and fear of rejection—affect their choices, even without direct coercion."[208] The increased importance of peers during adolescence makes the desire to seek peer approval particularly important when groups of adolescents are together.[209] Further, "[m]ost adolescent decisions to break the law take place on a social stage, where the immediate pressure of peers is the real motive."[210]

The influential MacArthur Juvenile Capacity Study specifically measured the kind of resistance to peer influence that would be required in order for a juvenile to

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204. This is an example from my experience as a practicing attorney.

205. Keller, *supra* note 12, at 312.

206. *See* People v. Clark, 371 P.3d 811, 884–85 (Cal. 2016); People v. Banks, 351 P.3d 330, 339 & n.5 (Cal. 2015).

207. Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 DEVELOPMENTAL PSYCH. 1531, 1536, 1538 (2007).

208. Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1012 (2003).

209. *Id.* at 1013.

210. ZIMRING, *supra* note 14, at 78.

intervene to aid a victim or stop codefendants in the commission of a crime.[211] Study participants were asked to select which of two opposing statements best describes them, specifically: (1) "some people think it's better to be an individual even if people will be angry at you for going against the crowd"; or (2) "other people think it's better to go along with the crowd than to make people angry at you."[212] The study found that adolescents were much more likely to select option two and its equivalent and were much less resistant to peer influence than were adults.[213]

In some felony murder cases based on accomplice liability, this susceptibility to external influences is clear from the record.[214] In Shawn Khalifa's case, which was discussed in the Introduction, an appellate court found that "he was simply a 'follower' who was trying to put on a tough face for his older companions."[215] Therefore, the court reasoned, "[e]ven if petitioner was in the house when [the victim] was attacked and knew what was going on, it is doubtful he would have been able to do anything about it, given his standing in the group."[216]

Similarly, Timothy Kane was fourteen years old when he tagged along with two older friends on a residential burglary.[217] Timothy said that he participated in the burglary because he did not want the other boys to perceive him as a "fraidy-cat," and he did not want to be left behind.[218] The older boys killed two people in the course of the burglary.[219] Rather than intervene to stop the violence once it began, Timothy hid under a table in the home.[220] He was convicted of murder and was sentenced to life with the possibility of parole.[221]

In other cases, the influence of others is not as apparent, but is still very real. Consider the case of Kuntrell Jackson.[222] At the age of fourteen, he and two older boys, one of whom was Kuntrell's older cousin, decided to rob a video store.[223] As they were walking to the store, Kuntrell learned that one of the other boys was armed with a gun.[224] He did not decide to back out of the plan upon learning this news, and the facts are silent as to how peer influence may have affected this decision.[225] But studies have shown that adolescents are especially susceptible to the

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211. Steinberg et al., *supra* note 150, at 589.
212. *Id.* at 589 tbl.2.
213. *Id.* at 591.
214. *See, e.g.*, *In re* Khalifa, No. G057175, 2019 WL 4266820 (Cal. Ct. App. Sept. 10, 2019).
215. *Id.* at *8.
216. *Id.*
217. SCOTT & STEINBERG, *supra* note 17, at 181; Adam Liptak, *Jailed for Life After Crimes as Teenagers*, N.Y. TIMES (Oct. 3, 2005), https://www.nytimes.com/2005/10/03/us/jailed-for-life-after-crimes-as-teenagers.html [https://perma.cc/97Q4-FZ3D].
218. SCOTT & STEINBERG, *supra* note 17, at 181.
219. *Id.*
220. *Id.*
221. *Id.*
222. Miller v. Alabama, 567 U.S. 460 (2012).
223. *Id.* at 465.
224. *Id.*
225. *Id.*

influence of their peers.[226] And with antisocial peers, it is natural for young people to strive to fit in by engaging in antisocial behaviors that they think will impress their peers.[227] It seems that Kuntrell may have felt torn about his involvement because he stayed outside the store at first.[228] Eventually, he went inside, and while he was inside the store, one of the other boys shot and killed the store clerk. Kuntrell followed along and left with the other boys.[229] Although not as obvious as in the case of Shawn Khalifa, where the court specifically labeled him a "follower," or Timothy Kane, where he articulated the desire to avoid being called a "fraidy-cat," it seems that Kuntrell's decisions were similarly affected by the normal adolescent desire to fit in with a peer group.[230]

The fear of social rejection drives much of adolescent decision-making.[231] "[A]dolescents' desire for peer approval, and consequent fear of rejection, affect their choices even without direct coercion."[232] Further, adolescents experience more anxiety "over the consequences of *refusing* to engage in risky conduct than adults do, thanks to a greater fear of being socially ostracized."[233] For example, leading developmental psychologists have reported that a juvenile would be likely to think, "I know I'm likely to get killed, but I'd rather take the risk than be rejected by my friends."[234] Against this backdrop, it seems quite unlikely that an adolescent would stand up to his confederates—whether they are peers or older influencers—to stop or undermine their actions. On the contrary, in light of their desire for peer acceptance, adolescents would be much more likely to go along with the criminality even if they wanted to intervene.[235]

Adolescent immaturity "often result[s] in impetuous and ill-considered actions and decisions."[236] The poor decision-making that characterizes adolescence is exacerbated under stress, meaning that in a stressful situation—as a crime would

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226. SCOTT & STEINBERG, *supra* note 17, at 39.

227. *Miller*, 567 U.S. at 472 n.5; *see also* SCOTT & STEINBERG, *supra* note 17, at 39 (explaining the increased susceptibility to peer influence during adolescence and concluding that "some adolescents may engage in antisocial conduct to impress their friends or to conform to peer expectations").

228. *Miller*, 567 U.S. at 465.

229. *Id.*

230. SCOTT & STEINBERG, *supra* note 17, at 38 (discussing the processes of social comparison, where "adolescents use others' behavior as a measure of their own behavior," and social conformity, which "leads adolescents to adapt their behavior and attitudes to that of their peers").

231. *See* Franklin E. Zimring, *Toward a Jurisprudence of Youth Violence*, 24 CRIME & JUST. 477, 488–90 (1998) ("The ability to resist peer pressure is yet another social skill that is a necessary part of legal obedience and is not fully developed in many adolescents.").

232. SCOTT & STEINBERG, *supra* note 17, at 39.

233. Taylor-Thompson, *supra* note 47, at 153.

234. Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 163 n.102 (1997).

235. *See* SCOTT & STEINBERG, *supra* note 17, at 38–39 (discussing the heightened influence of peers during adolescence).

236. Roper v. Simmons, 543 U.S. 551, 569 (2005) (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

certainly be—they are less likely to make good decisions.[237] At a biological level, adolescents are more reactive to stress than are adults.[238] Further, "the presence of peers makes adolescents and youth, but not adults, more likely to take risks and more likely to make risky decisions."[239]

This research explains why Shawn, Timothy, and Kuntrell did not intervene when the crimes they assisted with turned deadly. Moreover, it shows that their responses were quite normal for their developmental stage. The brains of people their age are wired to seek the approval of others to a much greater degree than the brains of adults,[240] and standing up to others can trigger the rejection by peers, a loss of social status, and even the risk of assault.[241] In this context, the desire for peer approval and fear of rejection becomes comparable to duress.

Juveniles are not as equipped as adults to understand the potential consequences of their actions, assess risks, make good decisions, and stand up to external influences.[242] Thus, the rules for assessing the culpability of accomplices in felony murder cases assume "maturity and capacity beyond ordinary adolescent attainments."[243] In light of this disconnect between the research and the law, this framework is not appropriate when the offenders were juveniles at the time of the offense.

IV. RESOLVING THE TENSION BETWEEN THE RESEARCH & THE LAW

I turn now to consider how the law might be reformulated to better incorporate the findings of adolescent development research. As Supreme Court Justice Frankfurter wrote in 1953, "legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a

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237. *See* Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249, 261–62 (1996) (discussing the relationship between adolescence, stress, and decision-making); Cheryl B. Preston & Brandon T. Crowther, *Legal Osmosis: The Role of Brain Science in Protecting Adolescents*, 43 HOFSTRA L. REV. 447, 455–60 (2014) (explaining how stress inhibits emotional regulation in adolescence, which in turn affects adolescent decision-making).

238. *See generally* Russell D. Romeo, *Adolescence: A Central Event in Shaping Stress Reactivity*, 52 DEVELOPMENTAL PSYCHOBIOLOGY 244 (2010).

239. Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEVELOPMENTAL PSYCH. 625, 634 (2005); *see* Steinberg & Monahan, *supra* note 207, at 1538.

240. *See generally* Catherine Sebastian, Essi Viding, Kipling D. Williams & Sarah-Jayne Blakemore, *Social Brain Development and the Affective Consequences of Ostracism in Adolescence*, 72 BRAIN & COGNITION 134 (2010) (describing experimental results indicating that adolescents are more affected by ostracism than are adults and linking these findings to adolescent brain development and adolescents' greater susceptibility to peer influence).

241. SCOTT & STEINBERG, *supra* note 17, at 134 (explaining that "a youth who seeks to avoid confrontation when challenged by a rival may lose social status and be ostracized by peers or even by vulnerable to physical assault"); Jeffrey Fagan, *Contexts of Choice of Adolescents in Criminal Events*, *in* YOUTH ON TRIAL 371, 376 (Thomas Grisso & Robert G. Schwartz eds., 2000).

242. *See* SCOTT & STEINBERG, *supra* note 17, at 35–46 (discussing adolescent decision-making).

243. ZIMRING, *supra* note 14, at 153 (discussing that the strict liability nature of felony murder may not be appropriate for adolescents because of this lack of maturity and capacity).

State's duty towards children."[244] The criminal law "is deeply rooted in our moral sense of fitness that punishment entails blame and that, therefore, punishment may not justly be imposed where the person is not blameworthy."[245] It is widely accepted that in some circumstances, people's mental states—through no fault of their own—render it unjust to hold them criminally responsible for their actions.[246] Such is the case with defenses such as insanity, involuntary intoxication, or diminished capacity.[247] It is also the case with youth.

Holding a young person responsible for felony murder based on an awareness of the risks his actions posed is morally wrong when the scientific evidence clearly shows that people of the same age are unlikely to be able to appreciate this risk.[248] Expecting young people to intervene when we know they are predisposed *not* to do so is similarly problematic.

This Part explores several possibilities for resolving the tension between the research and the law, in an effort to avoid the "fallacious reasoning" Justice Frankfurter warned against.[249] One option would be for courts to consider how the diminished culpability of youth affects each young person accused of a crime on a case-by-case basis, with a requirement, like that established in *Miller v. Alabama*, that courts consider the "hallmark features of youth" when assessing whether they acted as major participants and with reckless indifference to human life.[250] Interpretive guidance based on relevant characteristics of youth could attach to the consideration of specific factors, such as the awareness that death could result. Alternatively, a rebuttable presumption could recognize the diminished capacity of most young people, while reserving the option of accomplice-based felony murder convictions for those whose conduct is most culpable. After discussing several problems with these case-by-case approaches, this Part concludes by recommending a categorical bar on accomplice-based felony murder for juveniles.

A. Individualized Assessments of Diminished Capacity

Criminal law typically recognizes defenses based on mental capacities in one of two primary ways. First, an accused can be completely dissolved of criminal responsibility due to mental incapacity.[251] For example, a mental disorder can excuse

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244. May v. Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring), *superseded by statute*, Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A.

245. Sanford H. Kadish, *Why Substantive Criminal Law—A Dialogue*, 29 CLEV. ST. L. REV. 1, 10 (1980).

246. *See, e.g.*, DRESSLER, *supra* note 3 (discussing provocation as a partial defense).

247. *Id.* at 311–12, 317–18, 343–53 (8th ed. 2018) (discussing involuntary intoxication, insanity, and diminished capacity).

248. *See generally* Brief for the American Psychological Association, American Psychiatric Association, and National Association of Social Workers as Amici Curiae in Support of Petitioners, *supra* note 145.

249. *May*, 345 U.S. at 536 (Frankfurter, J., concurring).

250. 567 U.S. 460, 477–79 (2012).

251. Arlie Loughnan, *Mental Incapacity Doctrines in Criminal Law*, 15 NEW CRIM. L. REV. 1, 2–3 (2012).

criminality through the defense of insanity, or a child's immaturity can excuse guilt under the common law infancy defense.[252] In these situations, the defendant's mental disorder or childhood "serves to identify such a breakdown of the normal, human capacities of judgment and practical reason that the afflicted person cannot fairly be held liable."[253] Second, diminished culpability due to an internal mental state or external circumstances can mitigate the severity of a criminal conviction, as when someone acts in the "heat of passion."[254] For example, murder can be reduced to manslaughter if a homicide is committed due to an extreme mental or emotional disturbance, or due to provocation.[255] Under this approach, the criminal conduct is not completely excused, as in the case of insanity. Rather, it is partially excused and is treated as less severe.[256]

The law requires that characteristics attached to a defendant's youth be taken into account in some situations.[257] Age must be considered in the objective analysis of custody in *Miranda* cases.[258] Mitigating evidence and characteristics of adolescent development must be considered before LWOP sentences are imposed for juveniles.[259] Further, a handful of courts have employed "reasonable adolescent" standards in criminal cases that require an objective analysis of reasonableness.[260]

Some scholars have suggested that juvenile accountability should be measured according to specialized standards appropriate for their developmental stage because otherwise, "jury instructions presuppose an adult's conduct and thought processes," and decision-makers impose their own (adult) capacities for decision-making on the analysis of adolescent behavior.[261] Standards applicable to

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252. *See* Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 510–12 (1984); Michael S. Moore, *Choice, Character, and Excuse*, 7 SOC. PHIL. & POL'Y 29 (1990) (discussing infancy as an excuse).

253. SANFORD H. KADISH, *Excusing Crime*, *in* BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW 99 (1987).

254. DRESSLER, *supra* note 3, at 501–11 (8th ed. 2018).

255. *See* MODEL PENAL CODE § 210.3(1)(b) (AM. L. INST. 1980) (stating that extreme emotional disturbance reduces murder to manslaughter); SCOTT & STEINBERG, *supra* note 17, at 128–29 (discussing how a mental illness that distorts thinking but does not rise to the level of insanity can reduce the severity of the offense, and how provocation or coercion can reduce murder to manslaughter).

256. DRESSLER, *supra* note 3, at 501–11 (8th ed. 2018).

257. *See infra* notes 258–260 and accompanying text.

258. J.D.B. v. North Carolina, 564 U.S. 261, 277 (2011).

259. Miller v. Alabama, 567 U.S. 460 (2012).

260. *In re* William G., 963 P.2d 287, 293 (Ariz. Ct. App. 1987); *see also* J.R. v. State, 62 P.3d 114, 115, 119 (Alaska Ct. App. 2003) (adopting a "reasonable person of similar age, intelligence, and experience" standard to assess whether the juvenile defendant acted with extreme indifference to the value of human life).

261. *See* Taylor-Thompson, *supra* note 47, at 159 (proposing a standard of developmental negligence informed by adolescent development research); SCOTT & STEINBERG, *supra* note 17, at 139 (arguing for mitigation due to "diminished capacity" based on developmental stage of adolescence because adolescents are a "well-defined group, whose development follows a roughly predictable course to maturity and whose criminal choices are affected predictably in ways that are mitigating of culpability"). This approach shares some similarities with Barry Feld's "youth discount" recommendation for juvenile sentencing. Feld's proposal for a youth discount would categorically

adolescents as a group are the only way to incorporate brain development research into the law because the neuroscientific research thus far has only been able to "provide[] group data showing a developmental trajectory in brain structure and function during adolescence and into adulthood."[262] According to experts, at this point, "the research does not currently allow us to move from that group data to measuring the neurobiological maturity of an individual adolescent because there is too much variability within age groups and across development."[263] Thus, individualized expert opinions about the capacity of particular defendants in relation to others of the same age would be "exceeding the limits of science."[264]

Clear standards that require decision-makers to consider the unique characteristics of youth could import the research into the law. Providing specific direction in this way would limit the overriding tendency of adults to impose their own capacity for reasoning on their assessment of a juvenile's reasoning. For example, in recommending a standard of developmental negligence for juveniles, Kim Thompson-Taylor proposes the following jury instruction:

> In deciding whether the defendant acted with the requisite intent in this case, you may take his age into consideration in assessing whether he had reached a level of development that enabled him to form the specific intent to kill. You may consider whether developmental immaturity prevented him from exercising the sort of judgment in which he fully appreciated the risks involved or the potential outcome of his acts. If you find that the defendant lacked the capacity to form the specific intent in this case, you must find him not guilty and may proceed to consider whether the state has met its burden of proof with respect to the lesser included offense of assault with a dangerous weapon.[265]

Applying a similar approach to the major participant and reckless indifference standards could take a variety of forms. Guidance could be provided regarding how to apply the factors that are most affected by developmental research. For example, the following could attach to the analysis of knowledge that death could result from the involvement in the felony:

> In determining whether the defendant acted with this knowledge, you must consider that adolescents as a group are categorically less capable than adults of understanding the consequences that are likely to result from their actions. Thus, in all but the most unusual cases, an adolescent will not be

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reduce sentences in relation to a defendant's age, thus folding "the principle of youthfulness as a mitigating factor" into sentencing rules. Feld argues that the youth discount would "hold youth accountable and recognize their diminished responsibility without excusing their criminal conduct." *See* Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy:* Roper*,* Graham*,* Miller/Jackson*, and the Youth Discount*, 31 LAW & INEQ. 263, 316 (2013).

262. Bonnie & Scott, *supra* note 144, at 161.

263. *Id.*

264. *Id.*

265. *See* Taylor-Thompson, *supra* note 47, at 164–65.

> able to appreciate that participating in a felony, including an armed robbery, presents a risk to human life.

In assessing a juvenile's actions, or inactions, to intervene to prevent the violence or to aid the victim, the law could require decision-makers to consider the following:

> In cases involving a defendant who was under the age of eighteen at the time of the offense, failure to intervene to prevent the violence, to aid the victim, or to minimize the harm does *not* tend to show that the individual was a major participant or that he acted with reckless indifference to human life. Rather, these are behaviors that are normal and expected for adolescents.

Recognizing that most juveniles do not have the capacity to meet these standards, a rebuttable presumption that juvenile accomplices do not fill the requirements of being major participants or acting with reckless indifference to human life could be created to more fully acknowledge these limitations of adolescents as a group. A presumption would recognize that most juveniles are *incapable* of engaging in the same type of reasoned decision-making as are adults. This would not completely excuse their behavior, because they could still be convicted of the underlying felony offense, but it would limit murder convictions for accomplice-based felony murders to only the most sophisticated juveniles, where evidence of their understanding of the risks and ability to intervene to stop their confederates can be clearly proven.

Since the major participant and reckless indifference analysis is subjective, mitigating evidence that bears on the subjective state of mind of the individual should be required, much like the individualized assessments *Miller v. Alabama* requires when courts are considering imposing LWOP sentences for juveniles.[266] Attorneys would need to present evidence about childhood abuse and trauma, which has been shown to reduce impulse control and self-regulation among adolescents,[267] school performance and behavior, mental health, childhood development, experiences of abuse or neglect, exposure to community violence, and psychological functioning, at a minimum.[268]

B. Limitations of an Individualized Approach

The case-by-case approaches discussed above, however, may not go far enough because it is very difficult for decision-makers to separate their reactions to

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266. *See* Miller v. Alabama, 567 U.S. 460 (2012).

267. Kathryn C. Monahan, Kevin M. King, Elizabeth P. Shulman, Elizabeth Cauffman & Laurie Chassin, *The Effects of Violence Exposure on the Development of Impulse Control and Future Orientation Across Adolescence and Early Adulthood: Time Specific and Generalized Effects in a Sample of Juvenile Offenders*, 27 DEV. & PSYCHOPATHOLOGY 1267 (2015).

268. *See* Beth Caldwell, *Appealing to Empathy: Counsel's Obligation to Present Mitigating Evidence for Juveniles in Adult Court*, 64 ME. L. REV. 391 (2012) (arguing that failing to present mitigating evidence about a juvenile client facing prosecution in adult court amounts to ineffective assistance of counsel).

the tragic harms that have resulted in these cases from the culpability analysis.[269] In cases involving death, there is a serious risk that decision-makers will focus on the harm caused, rather than on the proper focus of the legal analysis. This concern motivated the Supreme Court to adopt a categorical ban on the death penalty for juveniles and on life without parole sentences for juveniles who have not killed.[270] According to the Court, a categorical bar was required because "[a]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death."[271] This tendency for logical reasoning to be overwhelmed by emotional reactions to tragic crimes may be one reason why felony murder rules have persisted despite their "rational[] indefensib[ility]" in light of a defendant's culpability.[272] The disturbing facts that inevitably surround a homicide can misdirect the focus of the analysis to the harm caused rather than to the defendant's actions and mental state.[273]

In addition, even with specific guidelines that require the consideration of adolescent development principles, there remains a risk of systematically ascribing the awareness typical of adults to people whose brains operate differently.[274] This is a phenomenon that is evident in parole hearings for young offenders, where a growing number of states require the consideration of the diminished culpability of youth in parole suitability hearings.[275] For example, California requires the Board of Parole Hearings to "take into consideration the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual."[276] The guidelines are specific, and they incorporate adolescent development research. Nonetheless, they still require some subjective analysis as decision-makers apply the standards to the facts of individual

269. In *Roper v. Simmons*, the Court rejected a case-by-case approach to assessing culpability, reasoning that a categorical rule was necessary to prevent decisionmakers from being unduly influenced by the "brutality" or "cold-blooded nature" of the crime. 543 U.S. 551, 573 (2005).

270. *Id.* at 578 (barring the death penalty for juvenile offenders); Graham v. Florida, 560 U.S. 48, 73, 77–78 (2010) (quoting *Roper*, 543 U.S. at 573) (adopting a categorical bar against imposing life without the possibility of parole sentences for juveniles in nonhomicide cases).

271. *Roper*, 543 U.S. at 573.

272. Sanford H. Kadish has characterized the felony murder rule as rationally indefensible. Kadish, *supra* note 45, at 695–96.

273. *See Roper*, 543 U.S. at 573.

274. As Kim Taylor-Thompson warns, when decision-makers are asked to "infer the actor's mental state from the circumstances surrounding the offense," they "may be influenced by [their] own preconceptions of both human behavior and justice," and by jury instructions that "presuppose an adult's conduct and thought processes even when the behavior under scrutiny is that of an adolescent." Thus, "considerable gaps in interpretation may emerge between the accused and those evaluating her behavior." Taylor-Thompson, *supra* note 47, at 158–59.

275. *See* Beth Caldwell, *Creating Meaningful Opportunities for Release:* Graham, Miller *and California's Youth Offender Parole Hearings*, 40 N.Y.U. REV. L. & SOC. CHANGE 245, 248–49 (2016) (discussing specialized parole rules and procedures for young offenders in California, Connecticut, West Virginia, and Massachusetts).

276. CAL. PENAL CODE § 3051(f)(1) (West 2010 & Supp. 2019).

cases.[277] Parole Commissioners demonstrate challenges with accepting the legitimacy of the adolescent mental states people describe when recounting their thoughts and behaviors when they were young.[278]

For example, the California Court of Appeals reviewed the transcript of one youth offender parole hearing where throughout the hearing

> [t]he commissioners rejected petitioner's attempts to explain his perceived need to prove himself and lack of regard for the value of life or consequences of his actions, seeking logical, rational reasons for petitioner's conduct that failed to allow for, much less give great weight to, the mindset of a 19-year-old drug dealer immersed in a violent, criminal lifestyle.

Rather than take his explanations regarding his thought process when he was younger at face value, the commissioners consistently substituted their logical, adult decision-making.[279]

The risks of adult decision-makers imposing their own perspectives on the analysis of whether a juvenile had the requisite subjective awareness or knowledge at the time of the offense would pose a significant challenge to the case-by-case approach.

C. Categorical Bar

A categorical rule like the Supreme Court has adopted in other juvenile cases would be the better approach to resolving this disconnect between the scientific research and the law.[280]

In light of the research that clearly demonstrates that adolescent decision-making is fundamentally different from that of adults, Professor Kim Thomas argues in a recent law review article that juvenile offenders should not be prosecuted for criminal offenses requiring a reckless mens rea.[281] Professor Thomas argues that young people "cannot conform to the criminal law expectations regarding anticipation of the consequences of their risky behavior, which is central to culpability in cases involving a reckless mens rea or the natural and probable consequences doctrine."[282] The same applies in the felony murder context. Barring

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277. *See* Caldwell, *supra* note 275, at 276–80 (summarizing the statistically significant factors in parole eligibility determinations for youth offenders).

278. *In re* Poole, 234 Cal. Rptr. 3d 754, 761 (Ct. App. 2018).

279. *Id.* at 767.

280. Scott and Steinberg recommend a diminished capacity defense based on mitigating conditions accompanying youth, and conclude that a categorical approach is more appropriate than individualized assessments because "the capacities and processes associated with adolescence are characteristic of individuals in a relatively well-defined group, whose development follows a roughly predictable course to maturity and whose criminal choices are affected predictably in ways that are mitigating of culpability." SCOTT & STEINBERG, *supra* note 17, at 139.

281. *See* Thomas, *supra* note 48.

282. *Id.* at 1691.

prosecution of juvenile accomplices in felony murder cases is the only solution that fully reconciles the research on the diminished capacity of adolescents with the law.

The Supreme Court has reasoned that "[t]he susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensi[ve] as that of an adult.'"[283] When this is considered in relation to the widely recognized lesser culpability of accomplices to felony murder, the case for a categorical bar becomes stronger.

In *Graham v. Florida*, the Supreme Court reasoned that "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. Age and the nature of the crime each bear on the analysis."[284] The Court's reasoning about the diminished culpability in nonhomicide cases drew on *Enmund*, a felony murder case, to highlight the diminished culpability that applies not only in cases where no one is killed,[285] but also in cases where the defendant did not "intend to kill or foresee that life will be taken."[286] Juveniles facing liability for felony murder as accomplices share this "twice diminished culpability," pointing towards the need for a categorical bar like the Court adopted in *Graham*.[287]

Further, the risk of disparate racial impacts resulting from implicit racial bias that decision-makers inevitably bring to individualized assessments underscores the importance of a categorical rule. An emerging body of research about implicit bias reveals that "the integrity and legitimacy of any individualized decision-making process is vulnerable to contamination from racist attitudes or from unconscious racial stereotyping that operates even among those who lack overt prejudice."[288] Implicit racial biases are unconscious stereotypes people associate with specific racial groups.[289] The existence of implicit bias is well documented and pervasive.[290] It is particularly influential in the criminal justice arena. According to L. Song Richardson, "[t]here is copious evidence that individuals of all races have implicit racial biases linking blacks with criminality and whites with innocence."[291] These biases have been shown to "influence the behaviors and judgments of even the most egalitarian individuals in ways that sustain problematic and unwarranted racial disparities."[292] Judgments shaped by unconscious racial biases result in systemically

283. Roper v. Simmons, 543 U.S. 551, 570 (2005) (quoting Thompson v. Oklahoma, 487 U.S. 815, 835 (1988)).

284. 560 U.S. 48, 69 (2010).

285. Enmund v. Florida, 458 U.S. 782 (1982).

286. *Graham*, 560 U.S. at 69.

287. *Id.* at 69, 74.

288. SCOTT & STEINBERG, *supra* note 17, at 141.

289. *See* L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Courtroom*, 126 YALE L.J. 862, 876 (2017).

290. *See generally* IMPLICIT RACIAL BIAS ACROSS THE LAW (Justin D. Levinson & Robert J. Smith eds., 2012).

291. *Id.* at 876.

292. *Id.* at 876–77.

harsher results for youth of color, including a tendency to discount developmental immaturity when considering their behavior.[293]

These disparities are evident in the disproportionate numbers of youth of color in both prosecutions of juveniles in adult court and prosecutions under the felony murder doctrine. For example, eighty percent of all juvenile offenders serving life or virtual life sentences are people of color, with over fifty percent being Black.[294] A small study in Florida found that ninety-five percent of those prosecuted for felony murder in a three-year period were Black.[295]

Racial disparities are endemic in the U.S. criminal justice system and exist at every level, from arrest to prosecution to sentencing.[296] As this Article has discussed, the accomplice-based felony murder doctrine is of questionable utility and legitimacy even absent the consideration of its disproportionate applicability to Black defendants. When seen in light of the fact that it is employed almost exclusively against people of color, and especially toward Black men, the practice is even more troubling.[297] Indeed, this could explain the doctrine's persistence, highlighting even more urgently the need for change. The risks of implicit bias skewing the outcomes of a case-by-case approach underscore the need for a categorical approach that exempts juvenile accomplices from felony murder liability.[298]

CONCLUSION

California's groundbreaking reforms to its felony murder rule, which limit accomplice liability to the most extreme cases, mark an important step forward in mitigating the harms posed by felony murder laws.[299] Eliminating the practice of prosecuting juvenile accomplices under felony murder theories of liability would bring even greater proportionality into this area of the law, and would mitigate the extreme imbalance between the severity of the punishment and the individual's culpability that manifests in these cases.

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293. *See* Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 418 (2013); Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483, 500 (2004).

294. NELLIS, *supra* note 15, at 17.

295. *See* Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103, 1118–19 (1990).

296. Angela J. Davis, *Introduction* to POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT, at xi (Angela J. Davis ed., 2017).

297. *See* Kat Albrecht, *Data Transparency & the Disparate Impact of the Felony Murder Rule*, DUKE CTR. FOR FIREARMS L. (Aug. 11, 2020), https://firearmslaw.duke.edu/2020/08/data-transparency-the-disparate-impact-of-the-felony-murder-rule/ [https://perma.cc/AE83-9HVS] (analyzing data from Cook County, Illinois and finding that 81.3% of those sentenced under the felony murder rule were Black).

298. *See* Richardson, *supra* note 289, at 882.

299. S. 1437, 2018 Leg., 2017–2018 Reg. Sess. (Cal. 2018) (enacted in CAL. PENAL CODE § 189(e) (West 2010 & Supp. 2019)).

Given the widespread criticisms of felony murder rules, and accomplice-based felony murder rules in particular, other states will be looking to California as a model for reform.[300] Thus, this is an issue of importance not only to the thousands of accomplices serving life in prison for felony murder in California, but also to the rest of the country.

There is a widely articulated normative sense that accomplice-based liability for felony murder is unjust, particularly when the defendants are juveniles.[301] Failure to address the glaring problems highlighted in these cases risks undermining the legitimacy of the criminal justice system as a whole.[302]

300. *See, e.g.*, Jesse Paul, *Colorado Poised to Revisit Murder Law that Can Send People to Prison for Life—Even When They Didn't Kill Anyone*, COLO. SUN (Jan. 6, 2020, 5:10 AM), https://coloradosun.com/2020/01/06/colorado-felony-murder-law-change-2019/ [https://perma.cc/MB9C-X452] (acknowledging that "Colorado's forthcoming reexamination of felony murder comes on the heels of efforts in other states to take a second look at their felony murder statutes" and specifically discussing California's reforms to its felony murder rules).

301. *See supra* notes 121–123 and accompanying text.

302. *See* Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 OXFORD J. LEGAL STUD. 173 (2004).