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Accounting for Adolescents' Twice Diminished Culpability in California's Felony Murder Rule

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ACCOUNTING FOR ADOLESCENTS' TWICE DIMINISHED CULPABILITY IN CALIFORNIA'S FELONY MURDER RULE

*Raychel Teasdale**

In 2018, the California legislature passed S.B. 1437 to narrow California's felony murder rule and theoretically apply the rule only to those with the greatest culpability in a murder. However, whether intentionally or negligently, the law leaves room to disproportionately and unjustly affect adolescents by charging those with "reckless indifference" with first-degree murder. Imbedded in psychology and neuroscience research is the conclusion that adolescent brain structure and function are still rapidly developing. As a result, adolescents are less able to weigh the risks of their actions, resist peer pressure, regulate their emotions, and control their impulses. Therefore, this Note argues that the "reckless indifference" standard under California Penal Code section 189 should not apply to adolescents because they are inherently reckless. Instead, to charge an adolescent with first-degree murder, prosecutors should be required to prove the mens rea typically associated with first-degree murder. Further, before charging an adolescent with second-degree murder under a felony murder theory, a judge should be required to analyze the youthful offender's culpability, accounting for their age and environment.

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TABLE OF CONTENTS

I. INTRODUCTION	310
II. THE HISTORY OF THE FELONY MURDER RULE	317
A. The Felony Murder Rule and Its Origins.....	317
B. California’s Felony Murder Statute	319
C. “Major Participant” and “Reckless Indifference”	
Defined	324
1. Major Participant.....	324
2. Reckless Indifference.....	327
III. ADOLESCENT BRAIN DEVELOPMENT	329
A. Neuroscience: Structural and Functional Brain	
Development.....	330
1. The Prefrontal Cortex and the Amygdala	330
2. Myelination	332
3. Pruning.....	333
B. Developmental Psychology	333
1. Outside Influence	333
2. Decision-Making.....	334
C. Transitory Nature.....	335
IV. RECENT TRENDS IN JUVENILE JUSTICE REFORM.....	336
A. United States Supreme Court Decisions.....	336
1. <i>Roper v. Simmons</i>	336
2. <i>Graham v. Florida</i>	338
3. <i>J.D.B. v. North Carolina</i>	340
4. <i>Miller v. Alabama</i>	341
5. <i>Montgomery v. Louisiana</i>	345
B. Changes in California Law	346
1. Proposition 57: The Public Safety and	
Rehabilitation Act of 2016.....	346
2. <i>People v. Contreras</i> : Sentencing Juvenile	
Nonhomicide Offenders to Lengthy Sentences	
Violates the Eighth Amendment.....	347
3. S.B. 1391: Prohibiting Prosecutors from	
Prosecuting Juveniles as Adults if They	
Are Under Age Sixteen.....	349
C. SB 439: Individuals Under Age Twelve Cannot Be	
Charged for Most Crimes	350

V. LIMITING THE FELONY MURDER RULE WHEN APPLIED TO ADOLESCENTS	351
A. The Current Law Conflicts with Adolescent Development Research	351
B. Felony Murder’s Effects on Sentencing and Transfers ..	355
1. Transfers.....	355
2. Sentencing.....	357
C. Felony Murder Justifications Are Even More Baseless When Applied to Adolescents	358
D. Youthful Offenders, Reformation, and Rehabilitation ...	360
E. Methods for Change.....	362
1. Prosecutorial Policy Changes	363
2. Judicial Decisions in the California or United States Supreme Court	364
3. California Legislative Action.....	364
VI. CONCLUSION	366

I. INTRODUCTION

The California Supreme Court has repeatedly stated that the felony murder rule is a “‘highly artificial concept’ which deserves no extension beyond its required application.”¹ Further, it recognized that the rule “anachronistically resurrects from a bygone age a ‘barbaric’ concept that has been discarded in the place of its origin” and “erodes the relation between criminal liability and moral culpability.”² Nevertheless, the felony murder rule still exists as a statute in California and contributes to overly harsh and unfair sentences for youthful offenders who are categorically less culpable than adults due to their cognitive and psychological development.³

In 2007, over 2,500 individuals in the United States were serving life without parole for crimes they committed as minors, and as measured in 2005, 26 percent of minors serving life without parole were convicted of felony murder.⁴ In California, there are around 5,206 individuals serving life without parole for felony murder, and

1. *People v. Dillon*, 668 P.2d 697, 709 (Cal. 1983) (quoting *People v. Phillips*, 414 P.2d 353, 360 (Cal. 1966)); *accord* *People v. Henderson*, 560 P.2d 1180, 1183 (Cal. 1977); *People v. Satchell*, 489 P.2d 1361, 1365 (Cal. 1971).

2. *Dillon*, 668 P.2d at 709 (quoting *Phillips*, 414 P.2d at 360 n.6); *Dillon*, 668 P.2d at 709 (quoting *People v. Washington*, 402 P.2d 130, 134 (Cal. 1965)).

3. This Note addresses individuals who are both below and above the age of eighteen, regardless of whether they are processed in either the juvenile or adult criminal justice system. Throughout the Note, the term *minor* is used to describe individuals under eighteen. *Youthful offender* is used to describe individuals under age twenty-five, and *adolescent* describes individuals between twelve and twenty-five years old, a period of time that psychologists have defined as a period of heightened development. *See* Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 9, 27 (Thomas Grisso & Robert G. Schwartz eds., 2000) (“[M]ost identity development takes place during the late teens and early twenties.”); Alan S. Waterman, *Identity Development from Adolescence to Adulthood: An Extension of Theory and a Review of Research*, 18 *DEVELOPMENTAL PSYCHOL.* 341, 355 (1982) (“The most extensive advances in identity formation occur during the time spent in college.”). In this Note, the term *juvenile* is used to describe someone under the jurisdiction of juvenile court, which is consistent with California Welfare and Institutions Code section 602. CAL. WELF. & INST. CODE § 602 (West 2019) (“[A]ny minor who is between 12 years of age and 17 years of age, inclusive, when he or she violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime other than an ordinance establishing a curfew based solely on age, is within the jurisdiction of the juvenile court.”).

4. ELIZABETH CALVIN ET AL., HUMAN RIGHTS WATCH, AGAINST ALL ODDS: PRISON CONDITIONS FOR YOUTH OFFENDERS SERVING LIFE WITHOUT PAROLE SENTENCES IN THE UNITED STATES 1 (2012); AMNESTY INT’L & HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 1 (2005), <https://www.hrw.org/sites/default/files/reports/TheRestofTheirLives.pdf>.

nearly 62 percent were twenty-five years or younger at the time of the offense.⁵

In light of staggering statistics like these, courts, legislatures, and voters have started to understand that youthful offenders are incarcerated at an alarming rate, and juvenile justice reform has been gaining traction. Within the past fifteen years, the United States Supreme Court decided that: (1) minors cannot be sentenced to the death penalty;⁶ (2) minor non-homicide offenders cannot be sentenced to life in prison without parole;⁷ (3) a suspect's age is relevant in determining whether a reasonable person would consider themselves in custody for *Miranda* purposes;⁸ (4) a sentencing scheme that mandates life in prison without parole for minor homicide offenders is prohibited and the court must first consider the offender's age and circumstances;⁹ and (5) the new required sentencing considerations apply retroactively to final dispositions.¹⁰

In addition, California made its own recent advancements in juvenile justice reform, recognizing that youthful offenders are different than adult offenders. California decided that: (1) a hearing considering mitigating factors tied to youth is required before a prosecutor can file a petition to transfer a juvenile to adult court;¹¹ (2) youthful offenders under sixteen cannot be transferred to adult criminal court;¹² (3) individuals convicted of an offense committed before the individual was eighteen years old, and sentenced to life without the possibility of parole, are eligible for parole after their

5. *Statistics*, FELONY MURDER ELIMINATION PROJECT, <https://www.endfmnow.org/new-statistics> (last visited Sept. 29, 2019).

6. *Roper v. Simmons*, 543 U.S. 551, 568 (2005).

7. *Graham v. Florida*, 560 U.S. 48, 74 (2010).

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

9. *Miller v. Alabama*, 567 U.S. 460, 479–80 (2012).

10. *Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016) (applying the holding of *Miller*, 567 U.S. at 732, retroactively).

11. CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE FOR 2016, GENERAL ELECTION 54–59 (2016),

https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2342&context=ca_ballot_props.

12. S.B. 1391, 2017–2018 Leg., Reg. Sess. (Cal. 2018). While prosecutors have alleged that S.B. 1391's retroactivity is unconstitutional, the resistance to S.B. 1391 is not relevant to this Note and does not alter the legality of the law. See Janet Cooper Alexander et al., *Constitutionality of Senate Bill 1391*, CAL. LEGAL SCHOLARS (Feb. 2019), <https://fairandjustprosecution.org/wp-content/uploads/2019/02/1391-Constitutionality-Sign-on-Letter-FINAL.pdf>; Erwin Chemerinsky, *Prosecutors' Attack on Youth Justice Reform Undermines Democracy*, SACRAMENTO BEE (Feb. 11, 2019), <https://www.sacbee.com/opinion/california-forum/article225921805.html>.

twenty-fifth year of incarceration;¹³ and (5) juvenile court generally does not have jurisdiction over offenders under age twelve.¹⁴

Ultimately, research in neuroscience and developmental psychology has forced courts and legislatures to pay attention to the problem with sentencing youthful offenders to disproportionately long sentences.¹⁵ Because adolescents' brain structure and function have not finished developing, and they are undergoing rapid neural plasticity, it is difficult for adolescents to weigh the risks of their actions, resist peer pressure, regulate their emotions, and control their impulses.¹⁶ As a result, youthful offenders are less culpable than adult offenders and, ultimately, should not be charged or sentenced in the same way as adult offenders.¹⁷

Due to adolescents' rapidly changing cognitive and behavioral development, the punishment justifications for felony murder, retribution and deterrence, lose credence when applied to youthful offenders.¹⁸ Retribution is inappropriate because youthful offenders are less blameworthy, and deterrence is inapplicable because

13. S.B. 394, 2017–2018 Leg., Reg. Sess. (Cal. 2017).

14. S.B. 439, 2017–2018 Leg., Reg. Sess. (Cal. 2018). This bill excludes rape and murder cases.

15. *Miller v. Alabama*, 567 U.S. 460, 472 n.5 (2012) (adopting this rationale as one of the bases for the Court's decision, which was previously articulated in *Graham v. Florida*, 560 U.S. 48, 68 (2010), and *Roper v. Simmons*, 543 U.S. 551, 553 (2005)).

16. Brief for the American Medical Association & the American Academy of Child & Adolescent Psychiatry as Amici Curiae in Support of Neither Party at 4–14, *Miller v. Alabama*, 567 U.S. 460 (2012) (Nos. 10-9646 and 10-9647), 2012 WL 121237, at *4–14 [hereinafter AMA Brief]; Brief for the American Psychological Association, American Psychiatric Association, National Association of Social Workers, & Mental Health America as Amici Curiae Supporting Petitioners at 6–19, *Graham v. Florida*, 560 U.S. 48 (2010) (Nos. 08-7412 and 08-7621), 2009 WL 2236778, at *6–19 [hereinafter APA Brief]; Marsha Levick et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescence*, 15 U. PA. J.L. & SOC. CHANGE 285, 298–99 (2012).

17. *Graham v. Florida*, 560 U.S. 48, 69 (2010).

18. *Miller*, 567 U.S. at 472 (“Because ‘[t]he heart of the retribution rationale’ relates to an offender’s blameworthiness, ‘the case for retribution is not as strong with a minor as with an adult.’”); *Graham*, 560 U.S. at 72 (quoting *Roper*, 543 U.S. at 571) (stating that deterrence does not justify a life without parole sentence because “the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence”); *Roper*, 543 U.S. at 571 (“Once the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults.”); Brief of the American Medical Association et al. as Amici Curiae in Support of Respondent at 21–23, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633); see Brief of the A.B.A. as Amici Curiae in Support of Petitioners at 17–20, *Miller v. Alabama*, 567 U.S. 460 (2012) (Nos. 10-9646 and 10-9647), 2012 WL 166269, at *17–20 [hereinafter ABA Brief, *Miller v. Alabama*]; Brief for the A.B.A. as Amicus Curiae Supporting Petitioners at 10–15, *Graham v. Florida*, 560 U.S. 48 (2010) (Nos. 08-7412 and 08-7621).

adolescents are less capable of considering the punishments and consequences associated with their actions.¹⁹

Further, the juvenile justice system was created in recognition of the differences between youthful and adult offenders.²⁰ Among accountability and public safety, the primary goal of the juvenile justice system is rehabilitation.²¹ Rehabilitation is especially important for adolescents because their identities are not yet fully formed, and they are more amenable to change and rehabilitation.²² Locking up a youthful offender for an extended period of time gives the offender little incentive to become a responsible member of society, and harsh sentencing practices are inconsistent with youths' capacity for change.²³

Informed by these conclusions, the courts and legislature have afforded youthful offenders more protections in the criminal justice system.²⁴ However, an area in juvenile justice law that the courts have yet to address is the felony murder rule. Before January 2019, when S.B. 1437 took effect, if a killing occurred during the commission of a felony, each felonious participant could be charged with felony murder, regardless of the individual's role in the homicide.²⁵ Grounded in the transferred intent theory, the felony murder rule satisfied the mens rea malice required for murder by transferring an

19. See *Miller*, 567 U.S. at 472; *Graham*, 560 U.S. at 72.

20. Kristin Henning, *What's Wrong with Victims' Rights in Juvenile Court?: Retributive Versus Rehabilitative Systems of Justice*, 97 CAL. L. REV. 1107, 1112 (2009) ("Juvenile courts were established and continue to operate on the principle that rehabilitation is a better response to delinquency than the punishment and stigma that generally accompany an adult conviction.").

21. CAL. WELF. & INST. CODE § 202 (West 2016) (codifying that the purpose of the juvenile courts is to "provide protection and safety to the public" while providing juveniles with "protective services . . . care, treatment, and guidance consistent with their best interest" and to encourage the "rehabilitative objectives" of the code); Henning, *supra* note 20, at 1112.

22. Samantha Buckingham, *Reducing Incarceration for Youthful Offenders with a Developmental Approach to Sentencing*, 46 LOY. L.A. L. REV. 801, 847 (2013); Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by the Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOL. 1009, 1016 (2003).

23. *People v. Contreras*, 411 P.3d 445, 454 (Cal. 2018); *Miller*, 567 U.S. at 472–73 ("Deciding that a 'juvenile offender forever will be a danger to society' would require 'mak[ing] a judgment that [he] is incorrigible'—but 'incorrigibility is inconsistent with youth.'"). *Miller* also stated that not even rehabilitation could justify a life without parole sentence for a minor because life without parole reflects "an irrevocable judgment about [an offender's] value and place in society, 'at odds with a child's capacity for change.'" *Miller*, 567 U.S. at 473 (quoting *Graham*, 560 U.S. at 74).

24. See *infra* Part IV.

25. Emily C. Keller, *Constitutional Sentences for Juveniles Convicted of Felony Murder in the Wake of Roper*, 11 CONN. PUB. INT. L.J. 297, 302–03 (2012); see CAL. PENAL CODE § 189 (West 2010), amended by CAL. PENAL CODE § 189 (West 2019).

individual's intent to commit a felony to their intent to commit the murder that occurred during the commission of the felony.²⁶

Under S.B. 1437, only those who willingly participated in the homicidal act or an act that was likely to result in homicide can be charged with felony murder.²⁷ While the bill positively limits the previous application of the felony murder rule, the revision still allows individuals to be convicted of first-degree murder without evidence of a “willful, deliberate, and premeditated killing,” the higher mental culpability required under traditional first-degree murder.²⁸ Specifically, the revision allows prosecutors to charge individuals with first-degree felony murder simply by proving that the individual was a “major participant” in the underlying enumerated felony and acted with “reckless indifference to human life.”²⁹

This Note suggests that California should limit the felony murder rule's application against individuals under twenty-five years old so that the “reckless indifference” standard outlined in the felony murder statute does not apply to those under twenty-five years old.³⁰ Further,

26. See Keller, *supra* note 25, at 302–03 (“The crime of felony murder does not require an intent to kill . . .”).

27. In February 2018, Democratic Senator Nancy Skinner introduced S.B. 1437, which sought to narrow the felony murder rule and amend the California Penal Code. S.B. 1437, 2017–2018 Leg., Reg. Sess. (Cal. 2018). The bill was passed in the Senate on August 30, 2018, with a 27 to 10 majority and three votes unrecorded. *SB-1437 Accomplice Liability for Felony Murder*, CAL. LEGISLATIVE INFO., https://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml?bill_id=2017201805B1437 (last visited Sept. 29, 2019). Governor Jerry Brown ultimately signed the bill on September 30, 2018, making the new rule effective in January 2019. Jazmine Ulloa, *California Sets New Limits on Who Can Be Charged with Felony Murder*, L.A. TIMES (Sept. 30, 2018), <https://www.latimes.com/politics/la-pol-ca-felony-murder-signed-jerry-brown-20180930-story.html>.

28. See CAL. PENAL CODE § 189 (West 2019) (codifying that outside of the felony murder context, first-degree murder requires a “kind of willful, deliberate, and premeditated killing”); *People v. Chiu*, 325 P.3d 972, 979 (Cal. 2018) (“First degree murder, like second degree murder, is the unlawful killing of a human being with malice aforethought, but has the additional elements of willfulness, premeditation, and deliberation, which trigger a heightened penalty.”); see also *Chiu*, 325 P.3d at 985 (Kennard, J., dissenting) (arguing that an accomplice cannot be convicted of first-degree murder on an aider and abettor theory that the actual killer committed a crime that was the natural and probable consequence of a murder unless the killer's premeditation was reasonably foreseeable).

29. CAL. PENAL CODE § 189 (West 2019) (the definition of reckless indifference is to come from the definition under CAL. PENAL CODE § 190.2(d)).

30. While limiting the felony rule to individuals under eighteen may give this Note's proposition even greater force, the reckless indifference standard should not apply to any individual under age twenty-five because, as explained in Part III, the time between twelve and twenty-five years old is a period that psychologists have defined as a period of heightened development. Further, the cases that recognize juveniles' twice-diminished capacity are based on *adolescent* developmental research. See Steinberg & Schwartz, *supra* note 3, at 27 (“[M]ost identity

before charging an adolescent with second-degree murder under a felony murder theory, a judge should be required to analyze the defendant's culpability using the same factors listed in the California Welfare and Institutions Code section 707.

Before an adolescent can be convicted of first-degree murder, prosecutors should be required to prove the mens rea required outside the felony murder context, eliminating prosecutors' ability to piggyback off the adolescent's underlying felony charge.³¹ For example, if an adolescent allegedly committed a robbery that resulted in a death, the prosecutor should be required to prove that the killing was willful, deliberate, and premeditated before the adolescent can be convicted of first-degree felony murder. A "reckless indifference" standard should not be the threshold used to convict an adolescent of first-degree murder. The conclusion that adolescents lack the ability to measure and assess risk, foresee negative consequences, and act rationally is at the very core of adolescent development research.³² Considering these conclusions, it is illogical to apply a "reckless indifference" standard when charging an adolescent with first-degree murder.

Instead, if an adolescent (1) intended to kill but did not possess premeditation and deliberation; or (2) knew that the act was dangerous to human life and had a conscious disregard for human life, then the state could prosecute them for second-degree murder.³³ The felony

development takes place during the late teens and early twenties."); Waterman, *supra* note 3, at 355 ("The most extensive advances in identity formation occur during the time spent in college.").

31. See CAL. PENAL CODE § 189 (codifying that outside of the felony murder context, first-degree murder requires a "kind of willful, deliberate, and premeditated killing"); Chiu, 325 P.3d at 979 ("First-degree murder, like second-degree murder, is the unlawful killing of a human being with malice aforethought, but has the additional elements of willfulness, premeditation, and deliberation which trigger a heightened penalty.").

32. Brief of the American Medical Association et al. as Amici Curiae in Support of Respondent, *supra* note 18, at 12; Isabelle M. Rosso et al., *Cognitive and Emotional Components of Frontal Lobe Functioning in Childhood and Adolescence*, 1021 ANNALS N.Y. ACAD. SCI. 355, 360-61 (2004); see Barry C. Feld, *Competence, Culpability, and Punishment: Implications of Atkins for Executing and Sentencing Adolescents*, 32 HOFSTRA L. REV. 463, 515 (2003).

33. CALCRIM No. 520. If the jury finds the defendant guilty of murder, it is murder of the second-degree, unless first-degree murder is proved beyond a reasonable doubt. *Id.* Murder involves an act that caused death and a state of mind either of express or implied malice aforethought. *Id.* Express malice aforethought is found when the perpetrator unlawfully intended to kill. *Id.* Implied malice aforethought is when the perpetrator: (1) intentionally committed an act; (2) the natural and probable consequences of the act were dangerous to human life; (3) at the time of the act, the perpetrator knew the act was dangerous to human life; and (4) the defendant deliberately acted with conscious disregard for human life. *Id.*; see Chiu, 325 P.3d at 979 ("First degree murder, like second degree murder, is the unlawful killing of a human being with malice

murder statute is therefore unnecessary. In the alternative, if the adolescent committed a felony that is not inherently dangerous, and did not possess conscious disregard for human life, the state can pursue involuntary manslaughter charges.³⁴

In implementing such a change, California should extend the same rationale used in recent United States Supreme Court decisions and California law reforms: the neurological and psychological development that occurs during adolescence makes adolescents less capable of avoiding a mental state of reckless indifference and, ultimately, makes them less culpable than adults.

Part II of this Note outlines the history of the felony murder rule and explains the rule's rationales. The rule's rationales focus on retribution and deterrence, which not only fail in the felony murder context but also provide zero justification in cases involving youthful offenders. Part III outlines what is known about adolescent psychological development and neuroscience and its correlation to the cognitive and psychological abilities essential to decision-making and rational thinking. Part IV provides an overview of the recent federal and California laws advancing juvenile justice reform. Part V explains why scientific research, the goals of the juvenile justice system, and recent advancements in juvenile justice reform support a felony murder rule that excludes adolescents.

Finally, Part VI proposes a new felony murder rule. This new rule will exclude adolescents from the third mental culpability standard

aforethought, but has the additional elements of willfulness, premeditation, and deliberation, which trigger a heightened penalty.”); *see also* CALJIC No. 8.30 (“Murder of the second degree is [also] the unlawful killing of a human being with malice aforethought when the perpetrator intended unlawfully to kill a human being *but the evidence is insufficient to prove deliberation and premeditation.*” (emphasis added)).

34. CALCRIM No. 581. A person commits involuntary manslaughter if the defendant's criminal negligence caused the death of another. *Id.* A defendant acts with criminal negligence when they act in a reckless way that creates a high risk of death or great bodily injury and a reasonable person would have known that acting in that way would create such a risk. In contrast to murder, the defendant does not possess a *conscious* disregard to human life. *Id.* The definition for an “inherently dangerous” felony is vague. *See Henry v. Spearman*, 899 F.3d 703, 707–08 (9th Cir. 2018). California courts define inherently dangerous by looking to “the elements of the felony in the abstract, not the particular facts” of the defendant's conduct. *People v. Chun*, 203 P.3d 425, 434 (Cal. 2009). The California Supreme Court has asked whether, “by its very nature, [the crime] cannot be committed without creating” an undue risk to human life. *People v. Burroughs*, 678 P.2d 894, 900 (Cal. 1984). At other times it has considered the ordinary commission of a crime, “even if, at the time of the [offense],” there was no innate risk at all. *People v. Hansen*, 885 P.2d 1022, 1027 (Cal. 1994), *overruled on other grounds by Chun*, 203 P.3d at 435. However, the California Supreme Court has stated that a felony that “can be committed without endangering human life” is not inherently dangerous. *People v. Howard*, 104 P.3d 107, 112 (Cal. 2005).

sufficient to find felony murder: “the person was a major participant in the underlying felony and acted with reckless indifference to human life.”³⁵ Further, before charging an adolescent with second-degree murder under a felony murder theory, a judge should be required to analyze the defendant’s culpability using the same factors listed in the California Welfare and Institutions Code section 707. These changes will force the state to find alternative means to charge an adolescent with murder. Youthful offenders are less culpable than adult offenders. Therefore, to charge an adolescent with first-degree murder, prosecutors should be required to prove an accurate mens rea of premeditation and deliberation rather than “reckless indifference,” and at least an intent to kill, when an adolescent participates in a felony that results in a death.

II. THE HISTORY OF THE FELONY MURDER RULE

A. *The Felony Murder Rule and Its Origins*

Generally, to prove a crime, the prosecution must prove that there was an actus reas and mens rea.³⁶ The actus reas is the physical, voluntary criminal act itself, and the mens rea is the culpable mental state required under the statute.³⁷ Although most crimes have a mens rea requirement, some acts that are deemed so harmful to the public are considered crimes solely because of the actus reas.³⁸ These are called strict liability crimes.³⁹

Traditionally, felony murder is a type of strict liability crime.⁴⁰ If a person is killed during the course of a felony, to satisfy the requisite intent for murder, the felony murder rule transfers the felonious actor’s malicious intent to commit the felony to their intent to commit the murder.⁴¹ This ultimately charges individuals for unintentional killings based on their intent to commit a felony.

35. CAL. PENAL CODE § 189.

36. LAURIE L. LEVENSON & ALEX RICCIARDULLI, CALIFORNIA CRIMINAL LAW § 2:2 (2018–2019 ed.).

37. *Id.* In some cases, the actus reas can be an omission that amounts to a crime. *Id.*

38. *Id.*

39. *Id.*

40. 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, 171 (2017) (“The felony murder rule is a form of strict liability.”).

41. *Id.*

While the concept of the felony murder rule is widely understood amongst lawyers, there are two working theories regarding the rule's origins: the traditional and contemporary views.⁴² Traditional commentators believe that the rule was first established in English common law to attribute malice to a felon for their co-felon's murderous act, thus, creating a strict liability crime.⁴³

Contemporary legal scholars suggest that felony murder developed based on a seventeenth century English judge's definition of an "unlawful act killing" that was subsequently misinterpreted and incorrectly applied to multiple cases in the late nineteenth century.⁴⁴ The modern felony rule then made its way to the United States after William Blackstone incorporated the misinterpreted rule in his *Commentaries on the Law of England*, which became American lawyers' reference for common law principals.⁴⁵

England's doctrine was much more limited than the United States' later-adopted, broad-sweeping felony murder doctrine.⁴⁶ The English doctrine required an affirmative act of violence, inherently dangerous to human life, in the commission or attempt of a felony.⁴⁷ England's felony murder rule added little to their existing laws attributing intent to kill unintended victims to those who had intent to commit the violent act, and the rule never held felons strictly liable for accidental deaths.⁴⁸ As a result, contemporary theorists believe that the true first felony murder rules did not start in medieval England but in nineteenth-century America.⁴⁹ Still, England recognized the felony murder rule's injustice and limited usefulness, and abolished it in 1957.⁵⁰

42. Sterling Root, Senior Thesis, *Juvenile Culpability and the Felony Murder Rule: Applying the Enmund Standard to Juveniles Facing Felony Murder Charges*, TRINITY COLL. DIG. REPOSITORY 12 (2016), <https://digitalrepository.trincoll.edu/cgi/viewcontent.cgi?article=1579&context=theses>.

43. Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 449 (1985).

44. Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 83–84, 102–03 (2004).

45. *Id.* at 95.

46. *Id.* at 64.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 107.

In the United States, the early felony murder rule required intent to inflict an injury during the felony.⁵¹ However, by the 1820s, states enacted broader felony murder statutes that imposed liability for any killing, even unintentional killings, that occurred during the commission of a felony.⁵²

B. California's Felony Murder Statute

California's first felony murder rule was adopted in 1850 and afforded murder liability for involuntary killings that occurred "in the perpetration of any felony, when the circumstances showed an 'abandoned and malignant heart.'"⁵³ In 1856, California specifically created first-degree felony murder, which involved murders that occurred in the course of enumerated dangerous felonies.⁵⁴

In California's first actual felony murder case in 1865, *People v. Pool*,⁵⁵ two stagecoach robbers were convicted of murder after one intentionally killed an arresting officer.⁵⁶ The other robber who did not shoot the officer was also charged with murder because the defendants conspired to rob and kill *anyone*, if necessary, so *any* death that resulted in furtherance of that plan made each liable for murder.⁵⁷

In the late nineteenth century, three California Supreme Court cases suggested an even broader rule, which set the tone for the modern California felony murder rule.⁵⁸ To satisfy the mens rea element required for murder, the intent to commit the inherently dangerous felony was transferred to, or merged to become, the intent to commit the murder.⁵⁹ The *People v. Olsen*⁶⁰ court rejected the argument that felony murder only covered a co-felon's killing if it was

51. *Id.* at 65–66.

52. *Id.* at 65.

53. *Id.* at 121. Abandoned and malignant heart murder requires "an act of violence, and reckless disregard of a danger of death." *Id.* at 185.

54. *See id.* at 167.

55. 27 Cal. 572 (1865).

56. Binder, *supra* note 44, at 165.

57. *Id.* The conviction was predicated on the felons' conspiracy, but later cases broadened the felony murder rule. *Id.*

58. *See* *People v. Doyell*, 48 Cal. 85 (1874); *see also* *People v. Olsen*, 22 P. 125 (Cal. 1889) (utilizing the transferred intent theory); *People v. Vasquez*, 49 Cal. 560, 563 (1875) ("If the homicide in question was committed by one of his associates engaged in the robbery, in furtherance of their common purpose to rob, he is as accountable as though his own hand had intentionally given the fatal blow . . .").

59. Binder, *supra* note 44, at 165–66.

60. 22 P. 125 (Cal. 1889).

the “ordinary and probable effect of the wrongful act especially agreed on,” and consequently charged unintentional killings as murder.⁶¹ *Olsen* also confirmed that felonies not enumerated in the felony murder statute could support a second-degree felony murder charge, which exists in California’s Penal Code today.⁶²

Prior to the recent addition to the rule under S.B. 1437, California’s felony murder rule was only detailed in one section of the California Penal Code:

(a) All murder which . . . *is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable . . . or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first-degree.*⁶³

The felony murder rule did not require premeditation or malice aforethought normally required under a first-degree murder charge.⁶⁴ Instead, the perpetrator only needed the specific intent to commit one of the felonies enumerated in the statute.⁶⁵ Once this intent to commit the felony was found, there was no requirement that the perpetrator have a specific mental culpability to commit the killing itself.⁶⁶

The new California felony murder rule under S.B. 1437 includes the same language stated above, under California Penal Code section 189(a). However, an additional section was added that reads:

(e) A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) in which a

61. *Olsen*, 22 P. at 126; see CAL. PENAL CODE § 189(a) (West 2019).

62. CAL. PENAL CODE § 189(b). “All other kinds of murders are of the second degree.” *People v. Patterson*, 778 P.2d 549, 553 (Cal. 1989) (describing a homicide that is a direct result of an inherently dangerous felony that is not enumerated in California Penal Code section 189(a), as “at least second-degree murder”).

63. CAL. PENAL CODE § 189 (West 2014) (prior to S.B. 1437, 2017–2018 Leg., Reg. Sess. (Cal. 2018)).

64. *People v. Chiu*, 325 P.3d 972, 979 (Cal. 2018) (“First degree murder, like second degree murder, is the unlawful killing of a human being with malice aforethought, but has the additional elements of willfulness, premeditation, and deliberation which trigger a heightened penalty.”). In *Chiu*, the court declined to extend a first-degree murder charge for participating in a crime that naturally, probably, and foreseeably would result in a murder. *Id.* The court reasoned that first-degree murder is understood to include a heightened culpability. *Id.*

65. See CAL. PENAL CODE § 189 (West 2019); *People v. Chun*, 203 P.3d 425, 430 (Cal. 2009).

66. *Chun*, 203 P.3d at 430; *People v. Washington*, 402 P.2d 130, 136 (Cal. 1965) (stating that “even if the killing be accidental or unintentional, if committed in the attempt to perpetrate one of the felonies named in section 189 it is first degree murder”).

death occurs is liable for murder only if one of the following is proven:

- (1) The person was the actual killer.
- (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree.⁶⁷
- (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.⁶⁸

Instead of allowing any accidental killing to be a murder if a death occurs during the commission of a felony, California Penal Code section 189(e) outlines more specific circumstances required for felony murder culpability. A defendant is only liable for felony murder if they were the actual killer, intended to kill and aided and abetted the actual killer, or, as this Note focuses on, was a major participant in the felony and acted with *reckless indifference* to human life.⁶⁹ *Still, the degree of the murder, either first or second, depends on the type of felony committed, and not the varying mental culpability of the perpetrator.*⁷⁰ Therefore, under section 189(e)(3), an individual can still be charged with first-degree murder, a conviction that comes with twenty-five years to life, without even a showing of intent to kill.⁷¹

67. CAL. PENAL CODE § 189(e)(1), (2). Section 189(e)(1) describes an actual killer with an unknown intent. Does this merely describe the trigger person regardless of intent? Section 189(e)(2) describes an individual with intent to kill but without premeditation or deliberation. However, it fails to describe what type of first-degree murder the individual aided. While these sections are not the topic of this Note, these standards also leave room to disproportionately affect adolescents because they allow an individual to be convicted of first-degree murder based on a lower standard of mental culpability than typically required for first-degree murder. It still does not address that adolescents may not foresee that engaging in a felony can result in murder.

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

69. CAL. PENAL CODE § 189(e) (West 2019).

70. *Id.* § 189(a). “All other kinds of murders are in the second degree.” California Penal Code section 189(a) states the specific felonies that will make an individual liable for first-degree murder. *People v. Patterson*, 778 P.2d 549, 553 (Cal. 1989) (describing a homicide that is a direct result of an inherently dangerous felony that is not enumerated in California Penal Code section 189(a), as “at least second degree murder”).

71. *See* CAL. PENAL CODE § 189. If an individual committed a felony enumerated in section 189(a), was a major participant in the felony, and acted with a “reckless indifference” to human life, they can be charged with first-degree felony murder. CAL. PENAL CODE § 190(a) (West 2014) (“Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life.”); *see* *People v. Chiu*, 325 P.3d 972, 979 (Cal. 2018) (“First degree murder, like second degree murder, is the unlawful killing of a human being with malice aforethought, but has

Further, California Penal Code section 188 previously stated: [Malice] may be express or implied. It is express “when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature.” It is implied “when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.”⁷²

*When it is shown that the killing resulted from the intentional doing of an act with express or implied malice as defined above, no other mental state need be shown to establish the mental state of malice aforethought.*⁷³

S.B. 1437 clarifies section 188 by changing the fourth sentence to read: “Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime.”⁷⁴ This prohibits an individual from being convicted of murder simply by implying malice from their participation in a felony, which had been an unfortunate consequence of the previous felony murder rule.⁷⁵ However, the statute still allows an individual to be charged with murder without proving the specific elements required under malice aforethought.⁷⁶ As long as one of the requirements described in subdivisions 189(e)(1)–(3) is proven, and the individual intentionally committed an inherently dangerous felony, an individual can be charged with murder.⁷⁷ This ultimately sets a lower standard to prove murder, even in the second degree.

The amendments to the law are retroactive, meaning that those who were previously convicted of felony murder can file a petition to have their felony murder sentences vacated and their charges

the additional elements of willfulness, premeditation, and deliberation which trigger a heightened penalty.”).

72. *People v. Chun*, 203 P.3d 425, 429 (Cal. 2009) (quoting CAL. PENAL CODE § 188). A person with an “abandoned and malignant heart” lacks a deliberate and premeditated intent to kill, but instead deliberately acts with a conscious disregard for human life by knowing that the conduct endangers life. *People v. Phillips*, 414 P.2d 353, 361 (Cal. 1996); Binder, *supra* note 44, at 185 (describing abandoned and malignant heart as a reckless disregard of a danger of death).

73. CAL. PENAL CODE § 188 (West 2014) (amended 2019) (emphasis added).

74. CAL. PENAL CODE § 188(a)(3) (West 2019).

75. Binder, *supra* note 44, at 165–66.

76. CAL. PENAL CODE § 188(a)(3) (“Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought”); see CALCRIM No. 520 (explaining malice aforethought).

77. See CAL. PENAL CODE § 189(e).

resentenced on any remaining counts.⁷⁸ Moreover, those entitled to relief under the new law will be given credit for the time that they have already served.⁷⁹

The new law moves closer toward allocating proportional responsibility by narrowing the application of the felony murder rule to those who are most commonly believed to be responsible for a killing.⁸⁰ Nevertheless, the rule does not go far enough to protect adolescents. The rule's "reckless indifference" standard still leaves room for the state to charge adolescents with first-degree murder, the highest degree of murder, without evidence that the adolescent possessed the highest form of mental culpability. A "reckless indifference" standard does not involve a deliberate attempt to kill, premeditation, or deliberation.⁸¹ It describes conduct that a person should know endangers human life.⁸² However, as described in Part III, adolescents have a weakened ability to appreciate the risks and dangerous consequences of their actions.⁸³ Therefore, as it stands today, California's felony murder rule condones unjustly punishing adolescents for murder because of their developmental limitations.⁸⁴

78. CAL. PENAL CODE § 1170.95.

79. *Id.* For example, if an individual was convicted of felony murder for a robbery and their participation in the murder does not rise to the standard outlined in the revised section 189 statute, then the felony murder conviction will be vacated and the individual will be sentenced for the robbery. The individual will be given credit for time served and can therefore be released if they have already served the amount of time that was newly calculated. While the issue of retroactivity is not the focus of this Note, opponents of the new statute say that it will be difficult to determine which individuals were convicted under a theory of felony murder, leading to unmanageable volumes of petitions. Robert Brown et al., *The Death of Felony Murder?: CDAA Webinar on SB 1437*, CAL. DIST. ATT'Y ASS'N (Nov. 1, 2018), <https://www.cdAA.org/wp-content/uploads/Death-of-Felony-Murder.pdf>.

80. CAL. PENAL CODE § 189(e). The statute charges those who (1) were the actual killer; (2) intended to kill, or aided the actual killer; or (3) were a "major participant" who acted with reckless indifference to human life during the underlying felony offense. *Id.*

81. *See* *Tison v. Arizona*, 481 U.S. 137, 157–58 (1987) (describing reckless indifference as "knowingly engaging in criminal activities known to carry a grave risk of death").

82. *Id.*

83. *See* Levick et al., *supra* note 16, at 294.

84. As discussed in Part V, the rule's effects result in sentencing minors to longer sentences because they can be charged with first-degree or second-degree murder, instead of being charged with the felony they committed. Further, the felony murder rule results in more transfers of minors from juvenile to adult court, where they will likely receive longer and harsher sentences. *See* Erin H. Flynn, Comment, *Dismantling the Felony-Murder Rule: Juvenile Deterrence and Retribution Post-Roper v. Simmons*, 156 U. PA. L. REV. 1049, 1060 (2008).

C. “Major Participant” and “Reckless Indifference” Defined

The “major participant” and “reckless indifference to human life” requirements under the new felony murder rule are the same standards used in California Penal Code section 190.2(d) to determine whether a defendant committed a special circumstances murder and is eligible for the death penalty.⁸⁵ Therefore, California courts will look toward special circumstances murder cases to determine the standard under the new felony murder rule.⁸⁶

The Court in *Tison v. Arizona*⁸⁷ stated that the “major participant” and “reckless indifference” “requirements significantly overlap” because “the greater the defendant’s participation in the felony murder, the more likely that he acted with reckless indifference to human life.”⁸⁸ Therefore, it is imperative to discuss how California courts analyze both requirements.

1. Major Participant

In *People v. Proby*,⁸⁹ the court found that a “major participant” is “‘notable or conspicuous in effect or scope’ and is ‘one of the larger or more important members or units of a kind or group.’”⁹⁰ In the more recent case, *People v. Banks*,⁹¹ the defendant was a getaway driver for an armed robbery in which one of the co-defendants shot and killed a security guard.⁹² The *Banks* court agreed with the *Proby* court’s definition of major participant but found that the jury must also weigh the following factors before making a “major participant” determination:

85. CAL. PENAL CODE § 189(e)(3) (“The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.”); *id.* § 190.2(d) (“[E]very person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in section 190.2 (a)(17) which results in the death of some person or persons, and who is found guilty of murder in the *first-degree* therefore, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under Section 190.4.”); S.B. 1437 2017–2018 Leg., Reg. Sess. (Cal. 2018).

86. *See* CAL. PENAL CODE § 189(e)(3).

87. 481 U.S. 137 (1987).

88. *Id.* at 153.

89. 70 Cal. Rptr. 2d 706 (Ct. App. 1998) (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY 1363 (3d ed. 1971)).

90. *Id.* at 711.

91. 351 P.3d 330 (Cal. 2015).

92. *Id.* at 333.

What role did the defendant have in planning the criminal enterprise that led to one or more deaths? What role did the defendant have in supplying or using lethal weapons? What awareness did the defendant have of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants? Was the defendant present at the scene of the killing, in a position to facilitate or prevent the actual murder, and did his or her own actions or inaction play a particular role in the death? What did the defendant do after lethal force was used?⁹³

In assessing a defendant's degree of participation, the *Banks* court suggested that juries consider the differing levels of culpability between the defendants in *Tison v. Arizona* and *Enmund v. Florida*,⁹⁴ and that no single factor is necessary or sufficient.⁹⁵

In *Enmund v. Florida*, two people attempted to rob Thomas Kersey.⁹⁶ However, after Kersey's wife brought out a gun during the attempted robbery, the two people killed Kersey and his wife.⁹⁷ Enmund was outside the Kersey's home at the time of the incident, allegedly waiting to help his two co-defendants escape after the crime.⁹⁸ The jury found Enmund guilty of two counts of first-degree murder and one count of robbery, and Enmund was sentenced to the death penalty.⁹⁹ However, the Supreme Court overturned Enmund's original death sentence, finding that it violated the Eighth and Fourteenth Amendments.¹⁰⁰ Because Enmund "did not commit the homicide, was not present when the killing took place, and did not participate in a plot or scheme to murder," his culpability did not rise to the level of culpability to warrant the death penalty.¹⁰¹ The Court held that a felony murder aider and abettor "who does not . . . kill, attempt to kill, or intend that a killing take place or that lethal force will be employed" cannot receive the death penalty.¹⁰²

93. *Id.* at 338–39.

94. 458 U.S. 782 (1982).

95. *Banks*, 351 P.3d at 337–39.

96. *Enmund*, 458 U.S. at 784.

97. *Id.*

98. *Id.* at 786.

99. *Id.* at 785.

100. *Id.* at 788.

101. *Id.* at 795, 798.

102. *Id.* at 797.

In *Tison v. Arizona*, Ricky, Raymond, and Donald Tison facilitated their father's and his cellmate's armed breakout, in which the two prisoners held guards and visitors of the prison at gunpoint.¹⁰³ After they left the prison, their car got a flat tire, and Raymond waved down a family of four to help them.¹⁰⁴ When the family stopped, the others emerged and held the family at gunpoint.¹⁰⁵ Raymond and Donald drove the family into the desert, with the others following behind.¹⁰⁶ The Tison brothers' father and his cellmate then murdered the family, while the brothers did nothing to stop it.¹⁰⁷ The United States Supreme Court agreed that the surviving brothers, Ricky and Raymond, fell outside the "intent to kill" standard as defined in *Enmund*.¹⁰⁸ However, the Court held that even if a defendant does not possess the intent to kill, if they instead are a major participant in the underlying felony and possessed reckless indifference to human life, they can still satisfy the culpability requirement for capital punishment.¹⁰⁹ The Court remanded the case to determine whether the brothers fell into that category.¹¹⁰

In *Banks*, the court ultimately overturned the defendant's death penalty sentence.¹¹¹ It found that the defendant's role as the getaway driver put his participation on the *Enmund* end of the "Tison-Enmund spectrum."¹¹² Like *Enmund*, the defendant was not at the scene when the victim was killed, played a minor role in planning the robbery, did not instigate the killing, and could not have prevented the killing. Further, without more, participation in an armed robbery does not involve "engaging in criminal activities known to carry a grave risk of death."¹¹³ Therefore, the defendant did not qualify as a major participant.

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

104. *Id.* at 139–40.

105. *Id.* at 140.

106. *Id.*

107. *Id.* at 141.

108. *Id.* at 144.

109. *Id.* at 158.

110. *Id.*

111. *People v. Banks*, 352 P.3d 330, 345 (Cal. 2015).

112. *Id.* at 340.

113. *Id.*

2. Reckless Indifference

The *Tison* Court described reckless indifference as “knowingly engaging in criminal activities known to carry a grave risk of death” or “anticipat[ing] that lethal force would or might be used in accomplishing the underlying felony.”¹¹⁴ The California Supreme Court has stated that recklessness encompasses a subjective and objective element.¹¹⁵ “The subjective element is the defendant’s conscious disregard of risks known to him or her.”¹¹⁶ The objective element requires the jury to determine whether the actor’s disregard of the risk, considering their perceptions, “involved a gross deviation from the standard of conduct that a law-abiding person in the actor’s situation would observe.”¹¹⁷

The *Tison* Court listed examples of reckless indifference, such as: [T]he person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim’s property.¹¹⁸

These examples involve a defendant who personally killed a victim, instead of a defendant who was not the actual killer, a gray area that is relevant in the context of felony murder.¹¹⁹

The *People v. Clark*¹²⁰ court later applied *Tison*’s definition to a case that fell within the gray area.¹²¹ To determine whether the defendant exhibited “reckless indifference to human life,” the *Clark* court considered the specific facts of the case “in light of some of the case-specific factors that this court and other state appellate courts” used.¹²² The factors included:

114. *Tison*, 481 U.S. at 150–51, 157.

115. *People v. Clark*, 372 P.3d 811, 886–87 (Cal. 2018).

116. *Id.* at 883.

117. *Id.* As described below, the United States Supreme Court held that an individual’s age informs the *Miranda* analysis when deciding whether a reasonable person would believe that they were free to terminate a police interrogation. *J.D.B. v. North Carolina*, 564 U.S. 261, 271–72 (2011). Similarly, in determining whether conduct amounts to reckless indifference, involving “a gross deviation from the standard of conduct that a law-abiding person in the actor’s situation would observe,” the individual’s age should be considered. *Id.*

118. *Tison*, 481 U.S. at 157.

119. *Clark*, 372 P.3d at 883.

120. 372 P.3d 811 (Cal. 2018).

121. *Id.* at 884.

122. *Id.*

(1) knowledge of weapons and use and number of weapons, (2) physical presence at the crime and opportunities to restrain the crime and/or aid the victim, (3) duration of the felony, (4) defendant's knowledge of cohort's likelihood of killing, and (5) defendant's efforts to minimize the risks of the violence during the felony.¹²³

Again, no single factor is necessary or sufficient.¹²⁴

In *Clark*, defendant Clark was charged with two first-degree murders arising from a burglary and attempted robbery of a computer store.¹²⁵ To charge Clark with two murders, prosecutors alleged that Clark surveilled the computer store in preparation of the robbery, was the head orchestrator of the plan, was seen departing from the store after a woman was murdered, and conspired to have his co-defendant murdered for testifying against Clark to a grand jury.¹²⁶

In finding that Clark did not possess reckless indifference to human life, the court found that though Clark planned the robbery, had knowledge that a gun would be used during the robbery, and may have hastily departed from the crime scene, there was a short period of interaction between the perpetrators and the victim, Clark likely did not know that his co-defendant would kill, and Clark planned the robbery with an attempt to minimize risk of violence.¹²⁷ The court ultimately determined that “reckless indifference” likely encompasses a willingness to kill or assist in a killing, “even if the defendant does not specifically desire . . . death as the outcome of his actions.”¹²⁸

In an attempt to name situations that satisfy the “reckless indifference” standard, the California and United States Supreme Courts have found that the fact that a robbery involves a gun is insufficient to support a finding of reckless indifference to human life but that “the manufacture and planting of a live bomb” could possibly suffice.¹²⁹ Though courts attempt to establish guidelines, acts that do

123. *Id.* at 884–87.

124. *Id.* at 884.

125. *Id.* at 828.

126. *Id.* at 829–34.

127. *Id.* at 884–88.

128. *Id.* at 883.

129. *Id.* at 882; *People v. Banks*, 351 P.3d 330, 344 n.9 (Cal. 2015).

or do not exhibit reckless indifference are difficult to distinguish and are case specific.¹³⁰

The “major participant” and “reckless indifference” analysis inherently include a foreseeability and awareness component.¹³¹ However, science has shown, and the courts have found, that adolescents cannot effectively anticipate risks or foresee the consequences of their actions, making the bill’s standard illogical when applied to adolescents up to twenty-five years old.¹³² Further, as outlined below, the felony murder rule’s only justifications lack merit and further support the idea that this standard should not apply to adolescents.

III. ADOLESCENT BRAIN DEVELOPMENT

Developmental psychology and neuroscience research continues to shed light on the developmental differences between adolescents and adults.¹³³ Neuroscience established that certain brain regions that control adolescents’ thoughts, actions, and emotions continue to mature during a temporary stage of development that lasts until early adulthood.¹³⁴ Due to their brain’s underdeveloped structure and function, adolescents lack the capacity for mature, independent judgments, predicting future consequences, and engaging in the cost-benefit analysis needed to make rational decisions.¹³⁵ Further, based on psychological assessment, adolescents are more vulnerable to peer pressure, trauma, and negative external influences, which influence

130. *Banks*, 351 P.3d at 338 (stating that the jury must consider the totality of the circumstances and the specific facts of the case).

131. *Tison v. Arizona*, 481 U.S. 137, 144, 157 (1987) (describing reckless indifference as “engaging in criminal activities known to carry a grave risk of death” or “anticipat[ing] that lethal force would or might be used”); *Clark*, 372 P.3d at 886 (using “defendant’s knowledge of cohort’s likelihood of killing” as a factor to determine reckless indifference); *Banks*, 351 P.3d at 338–39 (“What awareness did the defendant have of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants?”).

132. *Steinberg & Schwartz*, *supra* note 3, at 27; *APA Brief*, *supra* note 16, at 3–4.

133. There are differences in brain maturation and cognitive abilities within the adolescent age group. However, in this Note, the term “adolescence” encompasses individuals from age twelve to twenty-five. *See APA Brief*, *supra* note 16, at 7–15; *see, e.g., Steinberg & Schwartz*, *supra* note 3, at 27 (“[M]ost identity development takes place during the late teens and early twenties.”); *Waterman*, *supra* note 3, at 355 (“The most extensive advances in identity formation occur during the time spent in college.”).

134. *See AMA Brief*, *supra* note 16, at 3; *see, e.g., Abigail A. Baird et al., Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents*, 38 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 195, 197 (1999).

135. *See APA Brief*, *supra* note 16, at 3–4; *see also Roper v. Simmons*, 543 U.S. 551, 569–70 (2005).

their decision-making skills.¹³⁶ As informed by research, and acknowledged in the courts, youthful offenders are less culpable than adult offenders.¹³⁷ Thus, a youthful offender's culpability for murder should not be based on their alleged reckless decision to engage in a felony, and the "reckless indifference" standard under the amended felony murder statute should not apply to adolescents.

A. Neuroscience: Structural and Functional Brain Development

1. The Prefrontal Cortex and the Amygdala

Impulsivity is defined as the predisposition to rapidly override and discount goal-directing responses for inappropriate and/or more compelling thoughts and actions without regard for their negative consequences.¹³⁸ Impulsivity includes minimal to zero decision-making processes or forethought, aspects that are essential to decision-making and culpability.¹³⁹

Psychological research indicates that impulse control and self-management develops throughout childhood and early adulthood and that "expecting the experience-based ability to resist impulses . . . to be fully formed prior to age eighteen or nineteen would seem on present evidence to be wishful thinking."¹⁴⁰ This is because the prefrontal cortex is one of the last brain regions to mature, and the frontal lobes continue to develop until the mid-twenties.¹⁴¹ The prefrontal cortex controls planning, decision-making, risk assessment, voluntary behavior control, evaluation of reward and punishment,

136. See *Roper*, 543 U.S. at 569–70; NATIONAL RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 2–11 (Richard J. Bonnie et al. eds., 2013); Lucy C. Ferguson, *The Implications of Developmental Cognitive Research on "Evolving Standards of Decency" and the Imposition of the Death Penalty on Juveniles*, 54 AM. U. L. REV. 441, 458 (2004); ("Current empirical evidence from the behavioral sciences suggests that adolescents differ from adults and children in three important ways that lead to differences in behavior."); AMA Brief, *supra* note 16, at 6–7; APA Brief, *supra* note 16, at 8–9.

137. See *infra* Sections III(A)–(C); see also *Roper*, 543 U.S. at 569–70.

138. Levick et al., *supra* note 16, at 294; see AMA Brief, *supra* note 16, at 10; see, e.g., Beatriz Luna, *The Maturation of Cognitive Control and the Adolescent Brain*, in FROM ATTENTION TO GOAL-DIRECTED BEHAVIOR, 249, 250, 251 (F. Aboitiz & D. Cosmelli eds., 2009).

139. Levick et al., *supra* note 16, at 295.

140. APA Brief, *supra* note 16, at 10 (quoting Franklin E. Zimring, *Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility*, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 271, 280, 282 (Thomas Grisso & Robert G. Schwartz eds., 2000)); see Laurence Steinberg, *A Dual Systems Model of Adolescent Risk-Taking*, 52 DEVELOPMENTAL PSYCHOBIOLOGY 216, 217 (2010).

141. B.J. Casey et al., *The Adolescent Brain*, 28 DEVELOPMENTAL REV. 62, 63–64 (2008); Buckingham, *supra* note 22, at 841; Steinberg, *supra* note 139, at 216.

impulse control, responses to criticism and affirmation, moral reasoning, and emotional regulation.¹⁴² Therefore, the prefrontal cortex's large role in an individual's decision-making process, in combination with its late development, hinders adolescents' rational decision-making skills and causes them to act more impulsively than adults.¹⁴³

Further, the motivational system, which includes the amygdala, controls risky and reward-seeking behavior and develops more rapidly than the prefrontal cortex's cognitive control system, which works to regulate behavior.¹⁴⁴ Therefore, before the prefrontal cortex is fully developed, adolescents primarily rely on the amygdala when making decisions.¹⁴⁵

The amygdala is associated with emotional impulsivity and aggressive behavior.¹⁴⁶ It is a "neural system" that identifies danger and creates emotional responses to that danger quickly and reflexively.¹⁴⁷ Reliance on the amygdala and motivational system correlates with the adolescent's impulsivity, attraction to immediate rewards compared to long-term rewards, and weak ability to anticipate a decision's consequences.¹⁴⁸

Controlling one's impulses is essential to cognitive development, effective problem solving, and exercising good judgment.¹⁴⁹

142. MICHAEL S. GAZZANIGA ET AL., COGNITIVE NEUROSCIENCE: THE BIOLOGY OF THE MIND 75 (2d ed. 2002) (describing the function of the frontal lobe of the brain); Antoine Bechara et al., *Characterization of the Decision-Making Deficit of Patients with Ventromedial Prefrontal Cortex Lesions*, 123 BRAIN 2189, 2198 (2000); Jorge Moll et al., *Frontopolar and Anterior Temporal Cortex Activation in a Moral Judgment Task: Preliminary Functional MRI Results in Normal Subjects*, 59 ARQ NEUROPSIQUIATR 657, 661 (2001) (discussing a study showing that moral judgments are made using the frontopolar cortex of the brain); Robert D. Rogers et al., *Choosing Between Small, Likely Rewards and Large, Unlikely Rewards Activates Inferior and Orbital Prefrontal Cortex*, 20 J. NEUROSCIENCE 9029, 9029 (1999) (concluding that studies show the orbital prefrontal cortex is linked to decision-making and risk-reward comprehension); AMA Brief, *supra* note 16, at 17–19; see B.J. Casey et al., *Structural and Functional Brain Development and Its Relation to Cognitive Development*, 54 BIOLOGICAL PSYCHOL. 241, 244 (2000).

143. See AMA Brief, *supra* note 16, at 17–18; Buckingham, *supra* note 22, at 839–40; Flynn, *supra* note 84, at 1070.

144. AMA Brief, *supra* note 16, at 29–30.

145. See *id.*; see also GAZZANIGA ET AL., *supra* note 142, at 553–73 (describing the amygdala and its connection to learned emotional responses).

146. AMA Brief, *supra* note 16, at 30.

147. See *id.* at 31; ELKHONON GOLDBERG, THE EXECUTIVE BRAIN: FRONTAL LOBES & THE CIVILIZED MIND 31 (2001) (describing the function of the amygdala and its "fight or flight" reaction).

148. See Feld, *supra* note 32, at 519–20.

149. AMA Brief, *supra* note 16, at 10; see Luna, *supra* note 138, at 250, 251.

Consequently, adolescents' diminished capability to reflect before they act, assess dangers, and foresee consequences distinguishes adult and adolescent culpability.¹⁵⁰

Similar to adolescents' limited ability to control their impulses, adolescents struggle to regulate their emotional responses.¹⁵¹ Individuals typically control their emotional responses to stimuli based on their behavioral goals.¹⁵² However, due to an overactive amygdala and an underdeveloped prefrontal cortex, the ability to regulate emotions develops throughout childhood and early adulthood, affecting adolescents' ability to voluntarily, maturely, and effectively control their behavior and envision their goals.¹⁵³

As a result, adolescents' heightened emotional responses limit their ability to make informed decisions, causing them to more likely engage in risky, impulsive, and irrational behavior without weighing the negative consequences of their actions.¹⁵⁴

2. Myelination

Myelination occurs during adolescence, which affects brain maturity.¹⁵⁵ During myelination, neural fibers, called axons, are coated with a white fatty substance, called myelin, to carry information between different parts of the brain more quickly and reliably.¹⁵⁶ Myelination increases the efficiency of information processing and helps to integrate the frontal lobes with the areas of the brain that process emotions, rewards, and social information.¹⁵⁷ This efficient connection, in turn, increases self-control, enhances decision-making skills, and improves resistance to peer pressure.¹⁵⁸ Consequently, myelination, which continues until the mid-twenties, is positively

150. Levick et al., *supra* note 16, at 295.

151. AMA Brief, *supra* note 16, at 11–12.

152. *Id.* at 11; see Sang Hee Kim & Stephan Hamann, *Neural Correlates of Positive and Negative Emotion Regulation*, 19 J. COGNITIVE NEUROSCIENCE 776, 776 (2007); Kelly Anne Barnes et al., *Developmental Differences in Cognitive Control of Socio-Affective Processing*, 32 DEVELOPMENTAL NEUROPSYCHOLOGY 787, 788 (2007).

153. See Feld, *supra* note 32, at 519–20; see also Casey et al., *supra* note 141, at 68.

154. Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 816 (2003); AMA Brief, *supra* note 16, at 12–13; see Feld, *supra* note 32, at 515 n.203.

155. AMA Brief, *supra* note 16, at 25; APA Brief, *supra* note 16, at 25.

156. GAZZANIGA ET AL., *supra* note 142, at 31, 48–49; GOLDBERG, *supra* note 147, at 144.

157. AMA Brief, *supra* note 16, at 26.

158. *Id.*; see Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANN. REV. CLINICAL PSYCHOL. 459, 468 (2009).

correlated to an individual's improved ability to self-regulate their emotions and behavior throughout adolescence.¹⁵⁹

3. Pruning

Pruning is the process by which the brain eliminates unused neural connections, called gray matter, so that the brain can function more efficiently.¹⁶⁰ As the brain prunes gray matter, information processing is strengthened, supporting improved risk assessment, impulse control, decision-making, and emotional regulation.¹⁶¹ Without coincidence, pruning reaches its peak between ages ten and twenty, and the prefrontal cortex, the region most associated with controlling behavior, is one of the last regions in the brain where pruning is complete.¹⁶²

Research into the brain's structures and functions indicate that an adolescent's brain is not as mature or functional as that of an adult.¹⁶³ Consequently, adolescents are less able to self-regulate and cognitively control their behavior, leading to impulsive and reckless decisions.¹⁶⁴ Along with the psychological analysis presented below, this research indicates that adolescent offenders are not as culpable as adult offenders and should be treated accordingly.

B. Developmental Psychology

1. Outside Influence

Adolescents' ability to control their impulsive behavior and regulate their emotions is highly undermined by peer pressure, trauma, and authoritative influence.¹⁶⁵ Vulnerability to peer pressure and authoritative influence derives from adolescents' poor self-reliance and underdeveloped self-concept.¹⁶⁶ Peer pressure is powerful because adolescents crave validation from others, making it more difficult for them to form an independent identity and set of values and making it

159. AMA Brief, *supra* note 16, at 26; see Zoltan Nagy et al., *Maturation of White Matter is Associated with the Development of Cognitive Functions During Childhood*, 16 J. COGNITIVE NEUROSCIENCE 1227, 1231–32 (2004).

160. AMA Brief, *supra* note 16, at 21; Buckingham, *supra* note 22, at 841.

161. *Id.*

162. Buckingham, *supra* note 22, at 841.

163. AMA Brief, *supra* note 16, at 6–7.

164. *Id.*

165. Levick et al., *supra* note 16, at 295–96.

166. *Id.* at 295.

easy for others to influence their decisions and behavior.¹⁶⁷ As a result, peer pressure prevents adolescents from fully considering the consequences and risks involved in their actions.¹⁶⁸

A study by Margo Gardner and Laurence Steinberg found that when exposed to peers during a risk-taking task, adolescents doubled the amount of risky behavior that they engaged in, and even college undergraduates' risky behavior increased by 50 percent.¹⁶⁹

Adolescents both act as a direct response to pressure from peers and authoritative figures and make decisions as an indirect response to their desire for approval and fear of rejection.¹⁷⁰ This influence causes adolescents to engage in more risky behavior, *even in the absence of direct pressure*.¹⁷¹ Undoubtedly, adolescents tend to reflexively comply with authoritative figures because of their assumed superior status, leading adolescents to make decisions based on authoritative demands rather than logical reasoning or independent judgment.¹⁷²

Moreover, when adolescents are exposed to stress and trauma, it is even more difficult for them to rationally regulate their behavior and make informed decisions.¹⁷³ Adolescents are more sensitive to even daily events, making adolescents more “emotionally volatile” than both adults and young children.¹⁷⁴ As a result, adolescents are not as capable of behaving as subjectively or objectively rational as adults.

2. Decision-Making

Adolescents are highly sensitive to emotional and social stimuli and, thus, less capable of making mature and thoughtful decisions than adults.¹⁷⁵ Adolescents are sensation-seeking and, therefore, choose to

167. *Id.*

168. AMA Brief, *supra* note 16, at 12; Buckingham, *supra* note 22, at 834; *see also* Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 DEVELOPMENTAL PSYCHOL. 1531, 1531–32 (2007).

169. Steinberg, *supra* note 158, at 468–69 n.70 (citing Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEVELOPMENTAL PSYCHOL. 625, 626–34 (2005)).

170. Levick et al., *supra* note 16, at 296.

171. *Id.*

172. *Id.*

173. Linda Patia Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEHAVIORAL REVS. 417, 423 (2000).

174. *Id.* at 429.

175. Levick et al., *supra* note 16, at 293; *see, e.g.*, Dustin Albert & Laurence Steinberg, *Judgment and Decision Making in Adolescence*, 21 J. RES. ON ADOLESCENCE 211, 217 (2011) (explaining that socioemotional stimuli has an impact on adolescent decision-making).

engage in certain behavior because of its desirable emotional outcomes and immediate rewards, despite its possible risks.¹⁷⁶ This sensation and reward-seeking behavior intensifies from childhood to adolescence and declines through the mid-twenties.¹⁷⁷ This heightened sensitivity makes adolescents less capable of predicting and appreciating negative consequences and more likely to engage in risky and criminal behavior than adults.¹⁷⁸ Further, adolescents have little life experience, which typically conditions an individual to engage in long-term planning and cost-benefit analysis.¹⁷⁹ In sum, adolescents' hindered ability to rationally make decisions during development supports the idea that adolescents are less culpable than adults for the decisions that they make.

C. *Transitory Nature*

Because adolescence is characterized as a time of rapid and intense change in terms of biology, emotions, cognition, and social relationships, adolescents' developmental immaturity is transitory in nature and ultimately ends in adulthood.¹⁸⁰ Similarly, adolescents' tendency toward reckless, risky, and criminal behavior declines as they get older.¹⁸¹

Numerous studies show that as risk-taking behavior peaks in adolescence, so does criminal engagement, and both decline simultaneously thereafter.¹⁸² *Only a small percentage—5 to 10 percent—of juvenile offenders become “chronic” youthful offenders who continue offending into adulthood.*¹⁸³ Therefore, the large majority of youthful offenders do not grow up to become adult criminals, but instead, they are capable of parting with their criminal

176. Levick et al., *supra* note 16, at 294; AMA Brief, *supra* note 16, at 5–8.

177. Levick et al., *supra* note 16, at 294.

178. AMA Brief, *supra* note 16, at 7–8.

179. APA Brief, *supra* note 16, at 11–12; Buckingham, *supra* note 22, at 836, 840.

180. Levick et al., *supra* note 16, at 297.

181. *Id.*

182. Elizabeth Cauffman et al., *How Developmental Science Influences Juvenile Justice Reform*, 8 U.C. IRVINE L. REV. 21, 26 (2018).

183. *Id.*; Levick et al., *supra* note 16, at 298–99 (citing a three-year study that followed over one thousand serious male offenders charged with felonies and only found 8.7 percent of the participants to be “persistent” offenders).

behavior and integrating successfully into society without intervention.¹⁸⁴

IV. RECENT TRENDS IN JUVENILE JUSTICE REFORM

A. *United States Supreme Court Decisions*

Over the past decade, the Supreme Court has made decisions that have monumentally advanced juvenile justice reform.¹⁸⁵ The Court was guided by the neuroscience and psychology research outlining that the differences in adolescent and adult brain development diminish youthful offenders' culpability and support reduced or limited punishments and increased constitutional protections for youthful offenders.¹⁸⁶

1. *Roper v. Simmons*

The first landmark decision was *Roper v. Simmons*,¹⁸⁷ which outlawed the death penalty for individuals who are under eighteen when the crime is committed.¹⁸⁸ The Court recognized that maturity differences between adult and youthful offenders make it impossible for minors to be considered among the worst offenders.¹⁸⁹

Christopher Simmons was seventeen years old when he planned a murder with his two friends.¹⁹⁰ Just nine months after the crime, he was sentenced to death.¹⁹¹ On appeal, Simmons argued that under *Atkins v. Virginia*¹⁹² the death penalty is unconstitutional when applied to juveniles under eighteen, just as it was found unconstitutional when applied to the mentally disabled.¹⁹³ The Missouri Supreme Court agreed with Simmons and granted his appeal.¹⁹⁴ Justice Kennedy, joined by Justices Stevens, Souter, Ginsburg, and Breyer, affirmed,

184. Levick et al., *supra* note 16, at 298; *see also* Miller v. Alabama, 567 U.S. 460, 472–73 (2012) (“Deciding that a ‘juvenile offender forever will be a danger to society’ would require ‘mak[ing] a judgment that [he] is incorrigible’—but ‘incorrigibility is inconsistent with youth.’”).

185. Root, *supra* note 42, at 32.

186. *Id.*

187. 543 U.S. 551 (2005).

188. *Id.* at 578.

189. *Id.* at 570.

190. *Id.* at 556.

191. *Id.*

192. 536 U.S. 304 (2002).

193. State *ex rel.* Simmons v. Roper, 112 S.W.3d 397, 399 (Mo. 2003) (en banc).

194. *Id.* at 413.

finding that sentencing minors to the death penalty violated the Eighth Amendment's prohibition against cruel and unusual punishment.¹⁹⁵

Justice Kennedy outlined three important distinctions between minors and adults.¹⁹⁶ He plainly stated,

[First], as any parent knows and as the scientific and sociological studies respondent and his amici cite tend to confirm, “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.” It has been noted that “adolescents are overrepresented statistically in virtually every category of reckless behavior.”¹⁹⁷

Second, the Court explained that “juveniles are more vulnerable or susceptible to negative influences and outside pressures,” and third, their character “is not as well formed as that of an adult” and their personality traits are “less fixed.”¹⁹⁸

These three distinctions, the Court said, naturally support the idea that juveniles' irresponsible conduct is not as “morally reprehensible” as adults', and even the most heinous conduct does not evidence “irretrievably depraved character” in a juvenile.¹⁹⁹ Justice Kennedy concluded that it would be morally misguided to equate the culpability of an adult and a juvenile when science indicates that juveniles' diminished risk assessment and reckless and impulsive behavior are transitory.²⁰⁰ Even more compelling, the Court stated, is that the justifications for the death penalty, retribution and deterrence, are inadequate when applied to juveniles.²⁰¹ The harshest punishments are reserved for the worst offenders, which undoubtedly are not youthful offenders,²⁰² and adolescents lack the heightened ability to weigh the

195. *Roper*, 543 U.S. at 554, 578–79.

196. *Id.* at 569–70.

197. *Id.* at 569 (citation omitted).

198. *Id.* at 569–70.

199. *Id.* at 570.

200. *Id.* (quoting Steinberg & Scott, *supra* note 22, at 1014) (“For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood . . .”).

201. *Id.* at 571–72.

202. *Id.* at 569 (“[D]ifferences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders.”).

risks and envision the negative consequences of their actions, making deterrence ineffective.²⁰³

2. *Graham v. Florida*

The Court in *Graham v. Florida*²⁰⁴ used the same rationale as it did in *Roper* when it held that juvenile non-homicide offenders cannot be sentenced to life in prison without parole (LWOP).²⁰⁵ When Terrance Jamar Graham was sixteen, he and three of his friends attempted to rob a restaurant.²⁰⁶ When Graham and one of his accomplices got inside, the accomplice struck the restaurant manager in the back of the head with a metal bar, and the two boys escaped in a getaway car driven by the third perpetrator.²⁰⁷ Graham pled guilty and received three years of probation, one of which he served in county jail.²⁰⁸ Less than six months after his release, seventeen-year-old Graham was involved in a home invasion and an attempted armed robbery.²⁰⁹ The trial court found that Graham violated his probation and sentenced him to life imprisonment for the armed burglary, and fifteen years for the attempted armed robbery, the equivalent to LWOP in the state of Florida.²¹⁰ Graham appealed, arguing that his sentence was a cruel and unusual punishment in violation of the Eighth Amendment.²¹¹

The Court first looked at sentencing practices across the United States and found that only eleven jurisdictions imposed LWOP on juvenile non-homicide offenders, indicating a national consensus against the practice.²¹² The Court also reviewed the international consensus and found that the United States was the only nation that imposed LWOP on juvenile non-homicide offenders and, along with Somalia, was the only nation that had not ratified the United Nations Convention on the Rights of the Child, which prohibits such

203. *Id.* at 572.

204. 560 U.S. 48 (2010).

205. *Id.* at 68–69, 82.

206. *Id.* at 53.

207. *Id.*

208. *Id.* at 54.

209. *Id.*

210. *Id.* at 55, 57.

211. *Id.* at 58.

212. *Id.* at 62, 64 (“[T]here are 123 juvenile nonhomicide offenders serving life without parole sentences. A significant majority of those, 77 in total, are serving sentences imposed in Florida. The other 46 are imprisoned in just 10 States—California, Delaware, Iowa, Louisiana, Mississippi, Nebraska, Nevada, Oklahoma, South Carolina, and Virginia.”).

sentencing against juveniles.²¹³ Justice Kennedy explained that, while national and international consensuses are not the only justifications for abolishing a United States law, they are “entitled to great weight” and provide a “respected and significant confirmation” of the Court’s conclusions.²¹⁴

Justice Kennedy then used the scientific evidence analyzed in *Roper* to conclude, “[W]hen compared to an adult murderer, 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.”²¹⁵ The Court pointed out that psychology and neuroscience research show that the parts of the brain that regulate behavior continue to mature through late adolescence, making it “misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”²¹⁶ Moreover, the characteristic deficiencies in adolescents are so impactful that it makes it difficult for even psychologists to differentiate between youthful offenders whose crimes are a result of the transient nature of an adolescent’s immaturity, or the “rare juvenile offender whose crime reflects irreparable corruption.”²¹⁷

Referencing *Roper*, Justice Kennedy stated that “because juveniles have lessened culpability they are less deserving of the most severe punishments.”²¹⁸ Ultimately, the Court found that a categorical prohibition on LWOP would give juvenile nonhomicide offenders the chance to rehabilitate and incentivize them to become responsible individuals when they reenter society.²¹⁹ As the Court wrote, “criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.”²²⁰

Though the Court did not address how this analysis can apply to felony murder, applying the same logic to the new California standard, a juvenile considered to have “reckless indifference to human life” still has a twice-diminished moral culpability.²²¹ Their culpability is once

213. *Id.* at 81.

214. *Id.* at 67, 81.

215. *Id.* at 68–69 (emphasis added).

216. *Id.* at 68.

217. *Id.* at 72–73.

218. *Id.* at 68.

219. *Id.* at 79.

220. *Id.* at 76.

221. See CAL. PENAL CODE § 189 (West 2019).

diminished by their age, and twice diminished because they did not kill or have intent to kill.

3. *J.D.B. v. North Carolina*

A year later, in *J.D.B. v. North Carolina*,²²² the Supreme Court found that an individual's age also informs the *Miranda* analysis when deciding whether a reasonable person would believe that they were free to terminate a police interrogation and leave.²²³ J.D.B. was a thirteen-year-old student who was pulled out of class and interrogated by four adults, including a uniformed police officer and a juvenile investigator with the local police force.²²⁴ They questioned J.D.B. for around thirty minutes about a recent home break-in that occurred in the neighborhood.²²⁵ Although the adults knew his age, no one called his grandmother or read him his *Miranda* rights prior to questioning.²²⁶ After J.D.B. denied his involvement in the alleged break-in, the investigator pressed J.D.B. to "do the right thing" and warned that the investigator may need to get a secure custody order if he thought J.D.B. would continue to break into homes.²²⁷ Fearing juvenile detention from the court order, J.D.B. confessed that he and his friend were responsible for the break-ins.²²⁸ It was not until J.D.B. confessed that the investigator told him that he could refuse to answer the investigator's questions and was free to leave.²²⁹ When asked if he understood, J.D.B. nodded and continued giving details about the crime.²³⁰

In analyzing whether age has any place in custody analysis, Justice Sotomayor did not point to scientific research, instead concluding that youth is an *objective* circumstance that "generates *commonsense* conclusions about behavior and perception" and that failing to consider a suspect's age is in the custody analysis is "*nonsensical*."²³¹ The Court highlighted the accepted view in "[a]ll American jurisdictions . . . that a person's childhood is a relevant

222. 564 U.S. 261 (2011).

223. *Id.* at 277.

224. *Id.* at 265–66.

225. *Id.*

226. *Id.*

227. *Id.* at 266.

228. *Id.* at 267.

229. *Id.*

230. *Id.*

231. *Id.* at 272, 275 (emphasis added).

circumstance” in determining the reasonable person standard.²³² Just as the Supreme Court has reasoned time and time again, Justice Sotomayor explained that children are “less mature and responsible than adults . . . lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,” and are more vulnerable to outside pressures.²³³ The Court in *J.D.B.* concluded that age is an essential factor in determining the mindset of a reasonable person and is routinely considered when determining liability in the torts context because a diminished capacity warrants extra protections.²³⁴

The decision in *J.D.B.* is significant because, regardless of what complicated scientific research concludes about the psychological and cognitive differences between adolescents and adults, it is simply commonsense that adolescents are different than adults and should be held to a different culpability standard. Using this commonsense, Justice Sotomayor still came to the same conclusion as the Court in *Roper*, in *Graham*, and, later, in *Miller v. Alabama*²³⁵: adolescents’ immaturity provides the justification for treating them differently from adults, not only in sentencing but in all aspects of the criminal justice system.²³⁶

4. *Miller v. Alabama*

In the most recent Supreme Court decision concerning juvenile justice, *Miller v. Alabama*,²³⁷ the Court made a monumental decision to outlaw sentencing structures that mandate LWOP for juvenile homicide offenders.²³⁸ The Court found that sentencing courts instead

232. *Id.* at 274.

233. *Id.* at 272 (citations omitted).

234. *Id.* at 274–76.

235. 567 U.S. 460 (2012).

236. *J.D.B.*, 564 U.S. at 271–72; *Miller*, 567 U.S. at 471 (quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (stating that one reason adolescents have a diminished culpability compared to adults is because “children have a ‘lack of maturity and an underdeveloped sense of responsibility,’ leading to recklessness, impulsivity, and heedless risk-taking.”); *Graham v. Florida*, 560 U.S. 48, 68 (2010) (quoting *Roper*, 543 U.S. at 570) (“As compared to adults, juveniles have a ‘lack of maturity and an underdeveloped sense of responsibility’; they ‘are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure’; and their characters are ‘not as well formed.’”)).

237. The decision was based on two cases, *Jackson v. State*, 194 S.W.3d 757 (Ark. 2004), and *E.J.M. v. State*, 928 So. 2d 1077 (Ala. Crim. App. 2004), *aff’d sub nom. Ex parte E.J.M. v. State*, 928 So. 2d 1081 (Ala. 2005), that the Court consolidated into one opinion. *Miller*, 567 U.S. at 465, 468.

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

must first consider the individual's age and the nature of the crime, youthful characteristics, background, and mental development.²³⁹ In addition to their young age, both Miller and Jackson were subject to trauma in their living environments, and both committed acts in the presence of peers, making them more vulnerable to negative influence and criminal behavior.²⁴⁰

Kuntrell Jackson was fourteen years old when he and two other boys attempted to rob a video store.²⁴¹ Jackson had a violent family background, with both his mother and grandmother having previously shot individuals.²⁴² On the way to the store, Jackson learned that one of his accomplices was carrying a sawed-off shotgun.²⁴³ Jackson decided to stay outside while the other boys entered the store.²⁴⁴ One boy pointed the gun at the store clerk and the other demanded that the clerk "give up the money."²⁴⁵ A few moments later, Jackson entered the store, and, "at trial, the parties disputed whether Jackson warned [the store clerk] that '[w]e ain't playin',' or instead told his friends, 'I thought you all was playin'.'²⁴⁶ After the clerk threatened to call the police, the boy with the gun shot and killed her.²⁴⁷

Miller was also fourteen years old at the time of his crime.²⁴⁸ He had been in and out of foster care, his mother suffered from alcoholism and drug addiction, and his stepfather physically abused him.²⁴⁹ He also regularly used drugs and alcohol and had previously attempted suicide four times, the first time at six years old.²⁵⁰

One night Miller was home with his friend when his neighbor delivered drugs to Miller's mother.²⁵¹ After the drug deal, Miller and his friend went to his neighbor's trailer to drink and smoke marijuana.²⁵² After the neighbor passed out, Miller stole his wallet.²⁵³

239. *Id.* at 477, 489.

240. *See id.* at 478–79.

241. *Id.* at 465.

242. *Id.* at 478.

243. *Id.* at 465.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* at 466.

248. *Id.* at 467.

249. *Id.* at 467.

250. *Id.*

251. *Id.* at 468.

252. *Id.*

253. *Id.*

When Miller attempted to put the wallet back in the neighbor's pocket, the neighbor woke up and grabbed Miller by the throat.²⁵⁴ Miller's friend hit the neighbor with a baseball bat, which Miller eventually joined in on.²⁵⁵ To cover up their crime, the boys went back to the trailer and lit two fires.²⁵⁶ The neighbor eventually died from smoke inhalation and his other injuries.²⁵⁷

Both Jackson and Miller were tried as adults, and both Arkansas and Alabama law mandated that Jackson²⁵⁸ and Miller²⁵⁹ serve LWOP. The Supreme Court granted certiorari in both cases, and reversed both sentences²⁶⁰ after analyzing the scientific evidence presented, the precedent set in *Roper*, *Graham*, and *J.D.B.*, and the American Psychological Association's brief.²⁶¹ Again, as in *Roper*, the Court found that there are three significant differences between adults and developing adolescents that diminish adolescents' culpability.²⁶²

The Court concluded that the mandatory sentencing schemes at issue were flawed because they sentenced defendants to one of the most severe punishments without considering a central element when considering culpability: age.²⁶³ Sentencing schemes that impose one of the harshest prison sentences without considering youth and youth's characteristics pose a great risk of disproportionate punishment,

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.* at 466. Jackson was charged with capital felony murder and aggravated robbery. *Id.* The judge stated, "[I]n view of [the] verdict, there's only one possible punishment . . .," and sentenced him to LWOP. *Id.* (alteration in original).

259. *Id.* at 468–69. The State charged Miller with murder in the course of arson, which carries a mandatory minimum sentence of LWOP. *Id.* at 469.

260. *Id.*

261. *Id.* at 470, 472 n.5. The Court found that the evidence of science and social science had become even stronger since *Roper* and *Graham*. *Id.* The Court quoted the APA brief, which said that it was "increasingly clear that adolescent brains are not fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance." *Id.*

262. *Id.* at 471 ("First, children have a 'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking. Second, children 'are more vulnerable . . . to negative influences and outside pressures,' including from their family and peers; they have limited 'contro[l] over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity].'" (alterations in original) (citations omitted)).

263. *Id.* at 474, 476.

ultimately requiring the same sentence for fourteen-year-old neglected and abused children as forty-five-year-old, fully developed adults.²⁶⁴

In the concurring opinion, Justice Breyer, joined by Justice Sotomayor, went further and stated that juvenile homicide offenders should never be punished with LWOP if they do not kill or intend to kill the victim.²⁶⁵ Justice Breyer quoted *Graham*, which found that juvenile offenders “who did not kill or intend to kill [have] twice diminished moral culpability” because of (1) the lack of intent; and (2) the lack of maturity and sense of responsibility, vulnerability to outside pressure, and undeveloped character “twice diminishes” their culpability.²⁶⁶ The Justices recognized that felony murder cases are complicated because the question of intent is traditionally based on the intent to commit the felony.²⁶⁷ However, they still found that the “transferred intent” is not sufficient to subject a juvenile to the harshest type of punishment.²⁶⁸

First, the Supreme Court does not recognize transferred intent for purposes of the Eighth Amendment.²⁶⁹ *Graham*’s holding strongly implies that those who have a reckless indifference to human life are ineligible for LWOP because only those who kill or intend to kill can be constitutionally sentenced to LWOP.²⁷⁰ Second, imposing the harshest sentence on a developing adolescent who did not kill or intend to kill makes no logical sense. Justice Breyer accurately stated:

At base, 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.²⁷¹

Ultimately, because of Jackson’s twice-diminished culpability, Justice Breyer and Justice Sotomayor would not have found Jackson

264. *Id.* at 477, 479.

265. *Id.* at 490 (Breyer, J., concurring).

266. *Id.* (citing *Graham v. Florida*, 560 U.S. 48, 69 (2010)).

267. *Id.* at 491.

268. *Id.*

269. *Id.*; see also *Enmund v. Florida*, 458 U.S. 782, 788 (1982) (forbidding capital punishment for an aider and abettor in a robbery, where that individual did not intend to kill and simply was “in the car by the side of the road . . . , waiting to help the robbers escape”).

270. See *Miller*, 567 U.S. at 491–92 (Breyer, J., concurring); see also *Graham*, 560 U.S. at 69.

271. *Miller*, 567 U.S. at 492.

eligible for LWOP, absent a finding that he killed or intended to kill the store clerk.²⁷² It follows that, when applied to adolescents, the felony murder rule's "reckless indifference standard" is based on even more fallacious reasoning than when applied to adults. The concurring opinion has powerful implications for the felony-murder rule's future application to adolescents and further supports that the new California standard of "reckless indifference," which does not involve a direct killing or intent to kill, is inappropriate when applied to adolescents.

5. *Montgomery v. Louisiana*

In *Montgomery v. Louisiana*,²⁷³ the Supreme Court reviewed the Louisiana Supreme Court's decision that *Miller v. Alabama* did not apply retroactively.²⁷⁴ When a case creates a substantive constitutional rule, the Constitution requires that the state collateral review court give the rule retroactive effect.²⁷⁵ A new substantive constitutional rule includes both rules that forbid "criminal punishment of certain primary conduct" and prohibit "a certain category of punishment for a class of defendants because of their statutes or offense."²⁷⁶ The United States Supreme Court held that the *Miller* holding was a new substantive rule that prohibited LWOP for juvenile offenders whose crimes reflect "the transient immaturity" of youth.²⁷⁷ Therefore, the *Miller* rule applies to cases even if the offender was already convicted and sentenced.²⁷⁸ Though the required hearing considering the sentencing factors is necessary to differentiate those whose crimes reflect a transient immaturity, and is procedural in nature, the hearing only gives effect to *Miller*'s substantive holding.²⁷⁹

The Court agreed that many crimes committed by minors are a result of their temporary developmental immaturity, rather than an "irreparable corruption."²⁸⁰ Due to youthful offenders' diminished culpability, and large capacity for change, they are constitutionally different from adults, and the need to sentence youthful offenders to

272. *Id.* at 493.

273. 136 S. Ct. 718 (2016).

274. *Id.* at 727.

275. *Id.* at 729.

276. *Id.* at 732.

277. *Id.* at 735.

278. *See id.* at 731.

279. *Id.* at 735.

280. *See id.* at 734.

the harshest sentences possible is highly uncommon.²⁸¹ This holding is important because the Court recognized that considering the vulnerability and immaturity of a youthful offender is absolutely essential when determining culpability and punishments, and that courts should not exclude youthful offenders, whether their convictions are final or not, from receiving the protections that the Constitution affords them.²⁸² In light of the realization that LWOP sentences are almost always illogical when applied to minors, the *Montgomery* decision results in fewer LWOP sentences for minors.²⁸³

B. Changes in California Law

1. Proposition 57: The Public Safety and Rehabilitation Act of 2016

Proposition 57 was passed in the November 2016 election and altered juvenile criminal procedure under the California Welfare and Institutions Code (CWIC).²⁸⁴ Prior to Proposition 57, prosecutors had the discretion to charge juveniles in a court of criminal jurisdiction (“adult court”), rather than in a juvenile court, as long as the juvenile was at least fourteen years old and committed a serious enumerated crime.²⁸⁵ The law did not require the court to first consider relevant factors related to culpability, such as the circumstances of the crime, the juvenile’s mental health, community and familial environment, or the possibility of rehabilitation.²⁸⁶ Instead, this evaluation was discretionary.²⁸⁷

281. *Id.* at 733–34.

282. *See id.* at 736.

283. *Id.* at 736–37.

284. OFFICIAL VOTER INFORMATION GUIDE FOR 2016, GENERAL ELECTION *supra* note 11, at 141–44.

285. *Id.* at 142 (allowing transfers “in any case in which a minor is alleged to be a person described in subdivision (a) of Section 602 by reason of the violation, when he or she was 16 years of age or older, of any felony criminal statute, or ordinance except those listed in subdivision (b), or of an offense listed in subdivision (b) when he or she was 14 or 15 years of age”). Reducing the likelihood that a juvenile is transferred to adult court is important because in adult court, they are more likely to receive harsher and longer sentences than they would have in juvenile court. Edward P. Mulvey & Carol A. Schubert, *Transfer of Juveniles to Adult Court: Effects of a Broad Policy in One Court*, JUVENILE JUST. BULL., (Office of Juvenile Justice & Delinquency Prevention, D.C.) Dec. 2012 at 1, 3, <https://www.ojjdp.gov/pubs/232932.pdf>. Further, after being sentenced, placing minors in adult prisons exposes them to heightened risk of physical, sexual, and psychological victimization, and harmful disruptions in their cognitive development. *Id.* at 1, 2.

286. *See* OFFICIAL VOTER INFORMATION GUIDE FOR 2016, GENERAL ELECTION *supra* note 11284 at 142.

287. *See id.*

Under Proposition 57, and the amended CWIC section 707, if a prosecutor wishes to charge a juvenile in adult court, the prosecutor must first make a motion to transfer the juvenile, and the juvenile court must order a probation report on the juvenile's behavioral patterns and social history.²⁸⁸ Following the consideration of the report and other relevant evidence the parties wish to submit, the juvenile court must consider the mitigating criteria specified in the statute before deciding whether the juvenile should be transferred.²⁸⁹ In addition to the relevant factors listed above, the court must consider the minor's maturity, intellectual capacity, and physical, mental, and emotional health at the time of the alleged offense, the minor's impetuosity or failure to appreciate risks and consequences of criminal behavior, the effect of familial, adult, or peer pressure on the minor's actions . . . [and] the minor's potential to grow and mature.²⁹⁰

The required factors considered under CWIC section 707 are primarily composed of the behavioral traits and cognitive abilities addressed in adolescent developmental research. In proposing the bill, it is clear that the legislature recognized the cognitive differences between adolescents and adults and how important these differences are when evaluating a youthful offender's culpability. Similarly noteworthy, among the voters' purposes for approving the bill was to "stop the revolving door of crime by emphasizing rehabilitation, especially for juveniles."²⁹¹

2. *People v. Contreras*: Sentencing Juvenile Nonhomicide Offenders to Lengthy Sentences Violates the Eighth Amendment

In *People v. Contreras*,²⁹² sixteen-year-old defendants Contreras and Rodriguez forcibly raped a fifteen-year-old female and a sixteen-year-old female.²⁹³ Rodriguez was sentenced to fifty years to life, and Contreras was sentenced to fifty-eight years to life.²⁹⁴ The California Supreme Court decided that sentencing juvenile nonhomicide

288. *Id.*

289. *Id.*

290. *Id.* The statute includes a larger list of factors and evaluative procedures not quoted above, and the court can consider additional factors not enumerated in the statute.

291. *Id.* at 141.

292. 411 P.3d 445 (Cal. 2018).

293. *Id.* at 446.

294. *Id.*

offenders who committed sex offenses to lengthy sentences violates the Eighth Amendment's prohibition against cruel and unusual punishment, ultimately extending the ruling in *Graham*.²⁹⁵

As a starting point, the *Contreras* court adopted the *Graham* Court's consideration of the offender's culpability "in light of their crimes and characteristics, along with the severity of the punishment in question."²⁹⁶ The court supported its holding with the three salient characteristics outlined in *Roper* and *Graham* that differentiate the culpability between juveniles and adults.²⁹⁷ Further, while this case involved nonhomicide offenders, as *Graham* did, the court differentiated nonhomicide offenders by describing them as those who do not "kill, intend to kill, or foresee that life will be taken" and agreed that they are "categorically less deserving of the most serious forms of punishment than are murderers."²⁹⁸ The court reasoned that when these types of offenders are juveniles, they have a "twice diminished moral culpability"²⁹⁹ because juveniles have a "limited ability to consider consequences when making decisions."³⁰⁰

In the end, the court found that youths' lack of maturity and their prospect for future rehabilitation warrant a prohibition of lengthy sentences against nonhomicide offenders.³⁰¹ The court stated that, though fifty years is less harsh than LWOP, it is still "'an especially harsh punishment for a juvenile,' who 'will on average serve more years and a greater percentage of his life in prison than an adult offender.'"³⁰² The court asserted that *Graham* ultimately prohibited "states from making the judgment at the outset that . . . [juvenile] offenders never will be fit to reenter society."³⁰³ In recognizing that juveniles possess the capacity for change, the court stated that the prospect of rehabilitation is not only a factor of juveniles' transient qualities of youth but also depends on the opportunities available to

295. *Id.* at 446, 448.

296. *Id.* at 451–52.

297. *Id.* at 452 (quoting *Graham v. Florida*, 560 U.S. 48, 67 (2010) ("[A]s compared to adults, juveniles have a 'lack of maturity and an underdeveloped sense of responsibility'; they 'are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.'").

298. *Id.* at 452 (quoting *Graham*, 560 U.S. at 69).

299. *Id.* at 454 (quoting *Graham*, 560 U.S. at 69).

300. *Id.* (citing *Graham*, 560 U.S. at 69).

301. *Id.* at 463.

302. *Id.* at 454 (quoting *Graham*, 560 U.S. at 70).

303. *Id.* at 453 (quoting *Graham*, 560 U.S. at 75).

juveniles when released.³⁰⁴ This means that juveniles should have access to rehabilitation services, such as vocational training and education.³⁰⁵ Additionally, if a juvenile is given a sentence that leaves them with no chance to leave prison for fifty or more years, a juvenile “has little incentive to become a responsible individual.”³⁰⁶ The court in *Contreras* ultimately recognized that sentencing less culpable juveniles to lengthy sentences circumvents the goals of the juvenile justice system and found its decision consistent with state legislation adopted in the wake of *Graham* and *Miller*.³⁰⁷

3. S.B. 1391: Prohibiting Prosecutors from Prosecuting Juveniles as Adults if They Are Under Age Sixteen

In September 2018, S.B. 1391 was passed to further the intent of Proposition 57 and amend section 707 of the CWIC once again.³⁰⁸ As explained above, under Proposition 57, prosecutors could still make a motion to transfer minors from juvenile court to adult court if the minor was at least fourteen years old and was alleged to have committed a specified serious offense.³⁰⁹ SB 1391 completely repealed prosecutors’ authority to make a transfer motion for a fourteen- or fifteen-year-old offender unless the individual who committed the crime at fourteen or fifteen was apprehended when they were no longer within the juvenile court’s jurisdiction (eighteen years old or older).³¹⁰ In sum, prosecutors are essentially prohibited from prosecuting juveniles as adults if they are under age sixteen.³¹¹

Along with signing S.B. 1391, Governor Jerry Brown issued a message explaining that he studied the research, data, and legislative history relevant to the bill, and ultimately concluded:

304. *Id.* at 454 (citing *Graham*, 560 U.S. at 79).

305. *Id.*

306. *Id.* (quoting *Graham*, 560 U.S. at 79).

307. *Id.* at 463. One piece of legislation the court cited was S.B. 394. *Id.* The bill extended California Penal Code section 3051 so that individuals convicted of an offense committed before they were eighteen years old and sentenced to LWOP are eligible for parole after their twenty-fifth year of incarceration. S.B. 394, 2017–2018 Leg., Reg. Sess. (Cal. 2017).

308. S.B. 1391, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

309. *See supra* Section IV(B)(1).

310. S.B. 1391, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

311. *See* OFFICIAL VOTER INFORMATION GUIDE FOR 2016, GENERAL ELECTION *supra* note 11, at 142. S.B. 1391 deleted the language allowing prosecutors to charge a fourteen- or fifteen-year-old minor for specific crimes and only left the section that allows prosecutors to charge sixteen-year-olds, unless they were eighteen or older when they were apprehended.

There is a fundamental principle at stake here: whether we want a society which at least attempts to reform the youngest offenders before cosigning them to adult prisons where their likelihood of becoming a lifelong criminal is so much higher. My view is that we should continue to work toward a more just system that respects victims, protects public safety, holds youth accountable, and also seeks a path of redemption and reformation wherever possible.³¹²

Governor Brown cited to the undisputed transitory nature of juveniles' reckless behavior and criminal tendencies to promote the well-reasoned idea that juveniles are the most capable of rehabilitation.³¹³

C. SB 439: Individuals Under Age Twelve Cannot Be Charged for Most Crimes

Previously, CWIC section 602 read that any minor under eighteen was within the jurisdiction of the juvenile court. Under S.B. 439, signed by Governor Jerry Brown in September 2018, the individual must now be between twelve and seventeen years of age, inclusive, to fall within the jurisdiction of the juvenile court or be adjudged a ward of the court.³¹⁴

Instead of wasting resources arresting and placing minors under twelve years old in the juvenile justice system, under the bill, counties are required to develop alternative child-serving systems to better address the underlying reasons for minors' alleged offenses.³¹⁵ These systems include child welfare, education, health care, or human services.³¹⁶ In requiring additional rehabilitative programs, the

312. Letter from Edmund G. Brown Jr., Office of the Governor (Sept. 30, 2018), <https://www.gov.ca.gov/wp-content/uploads/2018/09/SB-1391-signing-message.pdf> [<https://web.archive.org/web/20181110212851/http://www.gov.ca.gov/wp-content/uploads/2018/09/SB-1391-signing-message.pdf>].

313. *See id.*

314. S.B. 439, 2017–2018 Leg., Reg. Sess. (Cal. 2018). There is an exception for minors under age twelve that are alleged to have committed murder or rape, sodomy, oral copulation, or sexual penetration by force, violence, or threat of great bodily harm. These offenders would still be within the juvenile court's jurisdiction. *Id.*

315. S.B. 439, 2017–2018 Leg., Reg. Sess. (Cal. 2018); Holly J. Mitchell & Ricardo Lara, *SB 439 Fact Sheet* (Mar. 17, 2017), http://www.cjcj.org/uploads/cjcj/documents/sb_439_-_fact_sheet.pdf.

316. S.B. 439, 2017–2018 Leg., Reg. Sess. (Cal. 2018); Mitchell & Lara, *supra* note 315.

legislation has recognized that psychological and developmental factors contribute to a juvenile's criminal tendency.³¹⁷

V. LIMITING THE FELONY MURDER RULE WHEN APPLIED TO ADOLESCENTS

A. *The Current Law Conflicts with Adolescent Development Research*

S.B. 1437 was intended to diminish the effects of transferred intent. Narrowing the scope of the rule makes it less likely that a perpetrator will be charged with an unintentional killing. The prior felony murder rule only required proof of the murderous act and the intent to commit the felony, but did not require intent to commit the killing.³¹⁸ In contrast, S.B. 1437 requires that the perpetrator fit one of the specified sections in 189(e) of the California Penal Code before being charged with first-degree murder.³¹⁹

However, transferred intent is still inherent in the statute. Under the third possible mental state that confers felony murder culpability, the statute looks to the perpetrator's major participation in the underlying felony, not in the killing.³²⁰ Further, the court analyzes the perpetrator's reckless indifference in participating in the felony, not the killing, because the individual ultimately did not intend to kill.³²¹ Therefore, the prosecution can still piggyback on the perpetrator's felony to get to a murder charge and—even more illogical—a first-degree murder charge.³²²

As proven by scientific research, and recognized by federal and California law, adolescents have a diminished mental capacity, and consequently diminished culpability compared to adults.³²³ The

317. Mitchell & Lara, *supra* note 315.

318. CAL. PENAL CODE § 189 (West 2014) (prior to S.B. 1437, 2017–2018 Leg., Reg. Sess. (Cal. 2018)).

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

320. *Id.* (“The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.”).

321. *Id.*

322. Research on adolescent development strongly supports the idea that adolescents do not possess a true conscious regard for the danger of their actions compared to adults, which could support the proposition that second-degree murder should not apply to adolescents. However, this Note does not intend to take a position on that argument. The main problem with the felony murder rule is that it gives prosecutors the ability to punish an adolescent with the worst possible offense, first-degree murder, when the adolescent possesses a twice diminished capacity.

323. See *supra* Parts II–IV.

findings from *Roper* have been quoted time and time again to justify reduced sentencing and increased protections for adolescents in the criminal justice system.³²⁴ First, as the Court stated, adolescents have an “underdeveloped sense of responsibility” compared to adults, which “results in impetuous and ill-considered actions and decisions.”³²⁵ Second, adolescents “are more vulnerable or susceptible to negative influences and outside pressures” because they have “less control . . . over their own environment.”³²⁶ Third, adolescents’ character is not as well formed as that of adults.³²⁷ As a result, adolescents’ behavior is less “morally reprehensible.”³²⁸

Following the same logic, adolescents should not be charged with the most morally reprehensible crime, first-degree murder, based on a characteristic proven by science to be inherent in adolescents: reckless indifference. Adolescents are far less likely than adults to consider or plan for the consequences of their actions.³²⁹ Even if an adolescent was to weigh the positive and negative consequences of committing a felony, the adolescent’s heightened sensitivity to immediate rewards outweighs their consideration of the potential risks involved, making them more indifferent to the potential dangers of the crime.³³⁰

Further, the influence of others increases the likelihood that adolescents will engage in risky behavior and is especially important in the context of felony murder.³³¹ Felony murder is based on applying the murderous behavior of one party to the other parties involved in the felony. *Because adolescents have a difficult time defying peers and ultimately engaging in independent thought processes when faced with outside pressures, it is irrational to charge an adolescent with a first-degree murder committed by another because they recklessly engaged in the underlying felony.*³³² In a multi-perpetrator crime, adolescents are even more likely to possess reckless indifference because they are

324. *See supra* Part IV.

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

326. *Id.* (citations omitted).

327. *Id.* at 570.

328. *Id.*

329. Levick et al., *supra* note 16, at 295.

330. *Id.*

331. *See id.* at 296.

332. Root, *supra* note 42, at 64.

not only suffering from developmental immaturity but the mere presence of peers further diminishes their decision-making skills.³³³

As described above, reckless indifference is found where the perpetrator “appreciated that their acts were likely to result in” death, or could have “kn[own] death was likely to occur.”³³⁴ Therefore, under California’s new felony murder rule, an adolescent can be sentenced to the harshest penalty next to death, life in prison, for failing to appreciate the serious consequences of their reckless actions.³³⁵ This “reckless indifference” standard is flawed because science and the courts have found that adolescents cannot necessarily foresee the consequences of their actions and that, instead, adolescents innately behave recklessly.³³⁶ As a result, an adolescent should not be charged with first-degree murder for possessing a reckless mental state.

The existing California Penal Code already provides adequate criminal charges for adolescents involved in a murder without the need for a felony murder provision. For example, if the adolescent engaged in a premeditated, deliberate, and willful killing, the state can charge the adolescent with first-degree murder.³³⁷ If the prosecutor can prove that the adolescent possessed an intent to kill without premeditation or deliberation, then the state can charge the adolescent with second-degree murder.³³⁸ Further, if the adolescent possessed reckless indifference to human life, then the prosecutor can attempt to convict the adolescent of second-degree murder for their alleged conscious disregard for human life.³³⁹ Alternatively, the prosecutor can instead attempt to charge the adolescent with involuntary manslaughter if the defendant’s criminal negligence in committing a non-inherently

333. See Levick et al., *supra* note 16, at 296.

334. See *Tison v. Arizona*, 481 U.S. 137, 152, 154 (1987).

335. *Id.* at 157 (describing a person who is “utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim’s property”).

336. See *supra* Parts II–IV.

337. *People v. Chiu*, 325 P.3d 972, 979 (Cal. 2018) (“First-degree murder, like second-degree murder, is the unlawful killing of a human being with malice aforethought, but has the additional elements of willfulness, premeditation, and deliberation which trigger a heightened penalty.”).

338. CALJIC No. 8.30 (“Murder of the second degree is . . . the unlawful killing of a human being with malice aforethought when the perpetrator intended unlawfully to kill a human being but the evidence is insufficient to prove deliberation and premeditation.”).

339. CALCRIM No. 580 (Murder is “an unlawful killing caused by a willful act done with full knowledge and awareness that the person is endangering the life in another and is done in conscious disregard of that risk.”).

dangerous crime caused the death of another person.³⁴⁰ If the prosecutor cannot prove any of the above, the adolescent should only be charged for the felony, while the perpetrator who actually killed the victim can be charged for murder under the appropriate murder statute. Instead, as the statute stands today, a prosecutor has the ability to charge an adolescent with first-degree murder when they simply possessed a reckless mental state in committing the felony.³⁴¹

Though the perpetrators in *Contreras* and *Graham* were non-homicide offenders, as both courts stated, *those who do not kill, intend to kill, or foresee death, are less morally reprehensible and therefore less culpable.*³⁴² The courts did not simply state that murderers were different from nonmurderers. Instead, the courts specifically differentiated two groups of people by their intent and lack of intent to kill. Though a killing that results from the perpetration of a felony can be a “murder” under the felony murder statute, an adolescent involved in a felony who does not kill, intend to kill, and also does not foresee death because of their developmental immaturity, is still less culpable under the *Contreras* and *Graham* standard than one who does. Furthermore, the qualifications that the *Contreras* court and *Graham* Court used to ultimately find the defendants less morally reprehensible and deserving of shorter sentences are the same characteristics that adolescents lack when they recklessly engage in a felony that they do not intend to result in death.

The *Contreras* court acknowledged that rape is a serious crime that warrants a serious punishment.³⁴³ Like rape, an act that results in

340. CALCRIM No. 581. A person commits involuntary manslaughter if the defendant’s criminal negligence caused the death of another. A defendant acts with criminal negligence when they act in a reckless way that creates a high risk of death or great bodily injury and a reasonable person would have known that acting in that way would create such a risk. In contrast to murder, the defendant does not possess a *conscious* disregard to human life. See CAL. PENAL CODE § 192(b) (West 2015).

341. Typically, recklessness is reserved for second-degree murder. See CALCRIM Nos. 520, 580.

342. See *Graham v. Florida*, 560 U.S. 48, 69 (2010); *People v. Contreras*, 411 P.3d 445, 463 (Cal. 2018).

343. *Contreras*, 411 P.3d at 462–63 (“In so holding, we do not minimize the gravity of defendants’ crimes or their lasting impact on the victims and their families. No one reading the disturbing facts of this case could disagree with the trial court that the crimes were ‘awful and shocking.’ The Court of Appeal was correct to observe that ‘[w]hatever their final sentences, Rodriguez and Contreras will need to do more than simply bide their time in prison to demonstrate parole suitability. . . . The record before us indicates Rodriguez and Contreras have much work ahead of them if they hope to one day persuade the Board they no longer present a current danger to society and should be released on parole.’”).

a killing is a serious crime that should not be taken lightly. Nevertheless, an unintentional killing greatly differs from an intentional killing in a moral and logical sense. This difference warrants a lower charge and, as follows, a less severe punishment.

B. Felony Murder's Effects on Sentencing and Transfers

This Note suggests that the California felony murder “major participant” and “reckless indifference” standards should not apply to adolescents, rather than merely suggesting that adolescents should receive shorter sentences. Nevertheless, this proposition naturally affects the likelihood of the transfer of minors to adult court and adolescents’ punishments if adolescents are charged with second-degree murder, involuntary manslaughter, or simply the underlying felony, rather than first-degree murder. Therefore, it is imperative to discuss the transfer and sentencing effects on minors and more broadly, adolescents.

1. Transfers

CWIC section 707 outlines the procedure of transferring a minor from juvenile court to adult court.³⁴⁴ Upon a transfer, the minor is tried as an adult, given an adult sentence, and placed in an adult correctional facility.³⁴⁵ Following the passage of Proposition 1391 in September 2018, only minors ages sixteen and seventeen can be tried as adults in adult court.³⁴⁶ Further, before transferring the minor from juvenile court to adult court, the juvenile court must consider mitigating criteria in making its decision.³⁴⁷

Under the proposed amendments to the current felony murder scheme outlined in this Note, if a minor is charged with the underlying felony or involuntary manslaughter instead of murder, then the minor may not qualify to be transferred under CWIC section 707.³⁴⁸ It is true

344. CAL. WELF. & INST. CODE § 707 (West 2019).

345. See Flynn, *supra* note 84, at 1057, 1059.

346. CAL. WELF. & INST. CODE § 707(a)(2) (West 2016 & Supp. 2016). Generally, the minor must be sixteen or older, but a minor who committed a crime when they were fourteen or fifteen and was not apprehended prior to their eighteenth birthday, then the prosecution can move to have the offender transferred to adult court.

347. See *id.* § 707(a)(3).

348. See CAL. WELF. & INST. CODE § 707(b) (West 2019) (outlining the offenses that can trigger a transfer motion). Involuntary manslaughter is not an offense that can trigger a transfer motion if the perpetrator does not use a weapon enumerated in California Welfare and Institutions Code section 16950. See *id.*

that included in the offenses that can trigger a transfer are many of the felonies outlined in the felony murder statute.³⁴⁹ However, burglary is one felony that does not trigger a transfer motion but is included in the felony murder statute.³⁵⁰

Further, included in the criteria that the juvenile court must assess in deciding to transfer the minor is the seriousness of the offense.³⁵¹ Therefore, even if a charge of the underlying felony could allow the prosecutor to file a transfer motion, the lesser offense of the felony, instead of murder, will weigh against transferring the minor. Moreover, even a second-degree murder charge can reduce the likelihood that that juvenile court decides to grant the transfer motion when compared to a first-degree murder charge.

Transfers are important because transferred minors may receive longer and harsher sentences in adult court, and minors are at an increased risk of experiencing physical, sexual, and psychological victimization and harmful disruptions in their cognitive development.³⁵² Ultimately, transferring a minor to adult court characterizes them as adults twice: first, by finding the youthful offender culpable enough to be transferred to adult court, next by holding the youthful offender to the same adult standard when charging them with a crime. Just appearing in an adult court creates the illusion that the individual's conduct is more culpable.

Further, the juvenile justice system's primary goal is to rehabilitate the minor during the time of their lives when their identities are most amenable to change.³⁵³ A critical consideration in sentencing a minor is the chance that the minor will be rehabilitated

349. See CAL. PENAL CODE § 189(a) (West 2019) (including “arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289, or murder that is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death” as felonies that trigger first-degree felony murder); CAL. WELF. & INST. CODE § 707(b) (West 2016 & Supp. 2019) (listing murder, arson, robbery, rape, sodomy, kidnapping, discharge of a firearm, carjacking, and acts under section 288, 289 as offenses that qualify to file a transfer motion).

350. See CAL. PENAL CODE § 189; CAL. WELF. & INST. CODE § 707(b) (West 2019).

351. CAL. WELF. & INST. CODE § 707(a)(3)(E)(i) (West 2016 & Supp. 2019) (“The circumstances and gravity of the offense alleged in the petition to have been committed by the minor.”).

352. Mulvey & Schubert, *supra* note 285, at 3–6

353. CAL. WELF. & INST. CODE § 202 (West 2016) (stating that the purpose of the juvenile courts is to “provide for the protection and safety of the public” while providing juveniles with “protective services . . . care, treatment, and guidance consistent with their best interest” and the “rehabilitative objectives” of the code); Henning, *supra* note 20, at 1122.

and will reenter society as a law-abiding citizen.³⁵⁴ However, adult facilities are not designed to foster identities outside the prison walls, and placing youthful offenders in adult facilities creates a dangerous environment that exposes youthful offenders to heightened stress and trauma.³⁵⁵

Changing the way that the state charges minors can reduce transfers. As a result, youthful offenders will have an increased chance of rehabilitating and will be less likely to reoffend.³⁵⁶ Studies show that minors who are transferred, compared to those who were not transferred, are more likely to reoffend, and reoffend more quickly.³⁵⁷ Therefore, limiting transfers will allow more minors to start a promising life once they complete their sentences.

2. Sentencing

In California, an involuntary manslaughter charge results in imprisonment of between two and four years.³⁵⁸ A robbery charge can result in two to nine years.³⁵⁹ A second-degree murder conviction results in fifteen years to life in a state prison.³⁶⁰ A conviction of first-degree murder, at a minimum, results in imprisonment for twenty-five years to life.³⁶¹ *Consequently, charging an adolescent with second-degree murder, involuntary manslaughter, or the underlying felony, instead of first-degree felony murder can shave off at least ten years, and up to a lifetime in prison from a youthful offender's sentence, ultimately increasing the chances for rehabilitation.*³⁶² Further, while

354. *Graham v. Florida*, 560 U.S. 48, 68 (2010) (stating that it is “misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed”).

355. *See Mulvey & Schubert*, *supra* note 285, at 5.

356. *See id.* at 3–5, 7.

357. *Id.* at 7 (describing study conducted in Florida and a study performed in Pennsylvania).

358. CAL. PENAL CODE § 193 (West 2014). These sentence estimates are based on the California Penal Code, and those charged as adults. Juveniles charged in juvenile court will not receive state prison sentences but can be placed in the Department of Corrections and Rehabilitation, Division of Juvenile Facilities. CAL. WELF. & INST. CODE § 731.

359. CAL. PENAL CODE § 213.

360. *Id.* § 190. If the individual previously served time in prison for murder, a second murder charge can result in life imprisonment without parole. CAL. PENAL CODE § 190.05 (West 2019). However, this would not apply to an adolescent who, realistically, could not have already served time for a murder before age twenty-five.

361. CAL. PENAL CODE § 190 (West 2014) (“Every person guilty of murder in the first-degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life.”).

362. *Id.* As stated, the minimum sentence for second-degree murder is fifteen years and the minimum sentence for first-degree murder is twenty-five years.

Miller prohibited a *mandatory* LWOP sentence scheme for minor homicide offenders, after a minor is found guilty of murder, and the court considers the circumstances of the crime, the court can still sentence the minor to LWOP.³⁶³

The courts and legislature have already established that imprisoning juveniles for extended periods of time contradicts the goals of the juvenile justice system: rehabilitation and reintegration.³⁶⁴ As described in *Graham*, juveniles have a once diminished moral culpability because of their age, and those “who did not kill or have intent to kill,” have a twice-diminished moral culpability.³⁶⁵ If this twice diminished culpability rationale is used when deciding whether a sentencing practice is harsh, it makes even more sense to apply the rationale when deciding that a criminal charge is too harsh to apply to youthful offenders. The crime is ultimately what brought the youthful offender to the point of sentencing. Therefore, it follows that charging adolescents with first-degree murder based on a “reckless indifference” standard does not comport with the foundational pillars of the juvenile justice system or the basics of adolescent development.

C. Felony Murder Justifications Are Even More Baseless When Applied to Adolescents

The felony murder rule has two justifications: deterrence and retribution.³⁶⁶ These two purposes promote the idea that “bad actors” should be severely punished for engaging in a dangerous felony that results in social harm.³⁶⁷

In theory, the rule will deter individuals from carelessly committing felonies and participating in dangerous felonies in the first place.³⁶⁸ *However, unintentional or unforeseeable acts cannot possibly be deterred.*³⁶⁹ The only study of the felony murder rule’s deterrent effect found little to no deterrent effect and, in some instances, even found that the rule increases felony deaths.³⁷⁰ Instead

363. *Miller v. Alabama*, 567 U.S. 460, 465, 480 (2012).

364. *See People v. Contreras*, 411 P.3d 445, 462 (Cal. 2018).

365. *Graham v. Florida*, 560 U.S. 48, 69 (2010).

366. Flynn, *supra* note 84, at 1063.

367. *Id.*

368. *See id.*

369. *See id.* at 1064.

370. Anup Malani, *Does the Felony-Murder Rule Deter? Evidence from FBI Crime Data*, at 6, 25 (2002) (unpublished manuscript), <http://www.nytimes.com/packages/pdf/national/malani.pdf> (“[W]ithout the felony murder rule, if a robbery victim died accidentally, the robber has a strong

of charging the perpetrator with murder, increasing the punishment of the underlying intentional felony can have the same, if not greater, deterrent effect.³⁷¹

Further, due to adolescent cognitive development, the United States Supreme Court continues to recognize that deterrence is not effective in the adolescent context.³⁷² Because adolescents have “a lack of maturity, an underdeveloped level of responsibility,” and have a tendency to engage in impulsive and reckless actions, they are less likely to consider the possible punishments when making decisions.³⁷³ Therefore, “the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence.”³⁷⁴

Therefore, if an adolescent inherently possesses a reckless character and rarely considers the immediate consequences of their actions, a first-degree murder charge based on reckless indifference will not deter the adolescent from engaging in reckless behavior that results in unforeseen consequences. Even if an adolescent does weigh the risks involved, an adolescent’s vulnerability to outside pressure, heightened sensitivity to rewards, and tendency to underappreciate risks increase the chances that an adolescent will still engage in the risky behavior.³⁷⁵

Moreover, studies suggest that there is no significant difference in the deterrence effect of a death penalty and LWOP sentence because adolescents lack foresight and pay more attention to short-term gratification than long-term consequences.³⁷⁶

A deterrence justification also assumes that the felonious individual understands the risks inherent in their actions and is aware of the severe punishment they will face for any death that results from

incentive to avoid intentionally causing additional deaths because his punishment would increase from a robbery sentence to a murder sentence. [But] [w]ith the rule, after causing the accidental death,” the “increment in punishment” for a second murder is smaller, decreasing the disincentive to intentionally take additional lives.)

371. *Id.* at 25; Flynn, *supra* note 84, at 1064.

372. Miller v. Alabama, 567 U.S. 460, 472 (2012); Graham v. Florida, 560 U.S. 48, 72 (2010); Roper v. Simmons, 543 U.S. 551, 571 (2005).

373. *Graham*, 560 U.S. at 72.

374. *Id.* (quoting *Roper*, 543 U.S. at 571).

375. Levick et al., *supra* note 16, at 295.

376. ABA Brief, Miller v. Alabama, *supra* note 18, at 18; *Less Guilty by Reason of Adolescence*, MACARTHUR FOUND. RES. NETWORK ON ADOLESCENT DEV. & JUV. JUST. (2006), http://www.adjj.org/downloads/6093issue_brief_3.pdf.

the felony.³⁷⁷ Instead, it is unlikely that the perpetrator knows that they are engaging in what is considered a felony under the California Penal Code, and it is even more unlikely that they know that the felony murder rule exists or how it functions, especially if the perpetrator is an adolescent.³⁷⁸

A retribution justification provides that a criminal sentence is proportional to the criminal's culpability.³⁷⁹ However, the felony murder rule holds the defendant responsible for any death that results from their involvement in the felony, even if they did not intend to cause any harm.³⁸⁰ Measuring punishment based on resulting harm equally punishes individuals who accidentally kill, and those who intentionally kill. Consequently, two very different types of perpetrators receive the same sentence that is "traditionally [only] reserved for the most culpable offenders."³⁸¹

The felony murder rule's retribution justification is even more irrational when applied to adolescents. The purpose of retribution is to proportionally punish an individual based on their culpability.³⁸² However, the scientific findings cited in recent court decisions and legislation state that adolescents possess a twice-diminished culpability when compared to adults.³⁸³ Therefore, punishing an adolescent without considering their individual characteristics ignores these crucial findings. Adolescents should be punished in line with not only the harm that resulted but also their diminished culpability due to their youth. As a result, adolescents should not be charged with first-degree murder based on a "reckless indifference" standard, and their youthful characteristics should be considered before they can be charged with second-degree murder based on a felony murder theory.

D. Youthful Offenders, Reformation, and Rehabilitation

While applying the felony murder rule to adolescents under age twenty-five directly conflicts with scientific research, applying the rule to individuals under eighteen further conflicts with the goals of

377. Keller, *supra* note 25, at 305; *Contra Less Guilty by Reason of Adolescence*, *supra* note 376, at 2.

378. See Roth & Sundby, *supra* note 43, at 452.

379. Keller, *supra* note 25, at 311.

380. See Flynn, *supra* note 84, at 1064.

381. *Id.* at 1065.

382. *Id.* at 1063, 1065.

383. *Supra* Part IV; Flynn, *supra* note 84, at 1072.

the juvenile justice system. The primary purpose of having a juvenile justice system separate from adult criminal court is to reform and rehabilitate youthful offenders.³⁸⁴ Because minors are far less likely to have an “irretrievably depraved character” than adults, rehabilitation in juvenile detention centers gives minors a chance to reform and productively reenter society.³⁸⁵ Therefore, charging a minor with first-degree murder, a charge that inevitably comes with a lengthy or lifelong sentence, for possessing recklessness has no place in California law.

Further, research shows that the developmental immaturity that contributes to adolescents’ reckless behavior is transitory, and when given the opportunity, adolescents are capable of change.³⁸⁶ Due to increased development during adolescence, as risk-taking behavior peaks, so does criminal engagement, but both simultaneously decline thereafter.³⁸⁷ Accordingly, numerous studies have found that only a small percentage—5 to 10 percent—of youthful offenders become “chronic” juvenile offenders who continue offending into adulthood.³⁸⁸ The large majority of youthful offenders do not grow up to become adult criminals but, instead, are capable of parting with their criminal behavior and integrating successfully into society as law-abiding citizens.³⁸⁹ Research indicates that developmental immaturity is the major factor that distinguishes youth who persist in crime and those who do not, and that once developmental immaturity is accounted for, age may not have a direct effect on crime.³⁹⁰ Because youthful offenders’ developmental maturity contributes to their

384. Daniel P. Mears et al., *Public Opinion and the Foundation of the Juvenile Court*, 45 CRIMINOLOGY 223, 226 (2007).

385. *Graham v. Florida*, 560 U.S. 48, 68 (2010); *Roper v. Simmons*, 543 U.S. 551, 570 (2005).

386. Levick et al., *supra* note 16, at 298.

387. Peter W. Greenwood, *Responding to Juvenile Crime: Lessons Learned*, 6 FUTURE OF CHILD. 75, 77–78 (1996); Cauffman et al., *supra* note 182, at 26.

388. Greenwood, *supra* note 387, at 77–78; Levick et al., *supra* note 16, at 297 (citing a study that found that “chronic” juvenile offenders with five or more arrests only make up approximately 6 percent of the juvenile offender population). The Pathways to Desistance Study, a longitudinal study of over 1,000 felony-offenders, also found that fewer than 10 percent of the participating youth persisted in high-level offending after seven years. Cauffman et al., *supra* note 182, at 27.

389. Cauffman et al., *supra* note 182, at 27.

390. Kathryn C. Monahan et al., *Trajectories of Antisocial Behavior and Psychosocial Maturity from Adolescence to Young Adulthood*, 45 DEVELOPMENTAL PSYCHOL. 1654, 1665 (2009); see Gary Sweeten et al., *Age and the Explanation of Crime, Revisited*, 42 J. YOUTH AND ADOLESCENCE 921, 934–35 (2013) (explaining that age acts as a “proxy” for criminality).

criminal tendencies, punishing them for their inherent “reckless indifference” is harsh and counterproductive.

Imprisoning adolescents for the majority, if not all, of their lives because they possessed recklessness that was caused by developmental immaturity, and almost positively would have dissipated with age, does not give adolescents an opportunity to change. As *Graham* and *Miller* stated, not even rehabilitation can justify a sentence of life without parole because such a sentence eliminates a rehabilitative possibility by keeping the individual expelled from society forever.³⁹¹ Ultimately, charging an adolescent with first-degree murder for “reckless indifference” ignores the developmental difference between adolescents and adults and the proven transitory nature of an adolescent’s reckless character and contradicts current jurisprudence.

E. Methods for Change

There are at least three possible ways that California can limit the felony murder rule as applied to adolescents: (1) prosecutorial policy changes; (2) judicial decisions in the California or United States Supreme Court; or (3) California legislative action. These three avenues would limit the application of the felony murder rule so that, under the “reckless indifference” standard outlined in the felony murder rule, (a) adolescents cannot be charged with first-degree murder; and (b) a judge must analyze the adolescents’ culpability using the factors listed in CWIC section 707 before adolescents can be charged with second-degree felony murder.

As stated above, charging an adolescent with first-degree murder for possessing a “reckless indifference” equates an adolescent’s and an adult’s culpability and is incompatible with recent jurisprudence recognizing that an adolescent possesses a weak ability to make informed and rational decisions.³⁹² Further, charging an individual with second-degree felony murder under a reckless indifference standard still allows the state to analyze the individual’s major participation in the felony and reckless indifference in engaging in the

391. *Miller v. Alabama*, 567 U.S. 460, 473 (2012) (stating that rehabilitation could not justify a sentence of life without parole because it “forfeits the rehabilitative ideal” because it reflects “an irrevocable judgment about [an offender’s] value and place in society,” at odds with a child’s capacity for change” (quoting *Graham v. Florida*, 560 U.S. 48, 72–74 (2010))).

392. *Root*, *supra* note 42, at 60–61.

felony.³⁹³ Therefore, the adolescent with alleged reckless indifference will still be punished for their decision to engage in the felony, and not necessarily the murder. Instead, as proposed in this Note, the adolescent's culpability should be assessed before charging them with murder instead of the underlying felony.

1. Prosecutorial Policy Changes

Under the first avenue, district attorneys' offices can implement a prosecutorial policy that limits the way prosecutors charge adolescents under the felony murder rule. This policy would prohibit prosecutors from charging adolescents with first-degree felony murder under the amended California Penal Code section 189 based on the "reckless indifference" standard. In recognizing an adolescent's diminished cognitive capacity, the policy would also encourage prosecutors to pursue involuntary manslaughter or simply felony charges, instead of murder charges, when an adolescent engages in a dangerous felony that that they did not intend to result in death.

Implementing a new policy could be easier and faster than waiting for the legislature to pass an amended statute or waiting for the California Supreme Court or United States Supreme Court to issue a policy-changing decision. However, such a policy is unstable. Either the Chief Prosecutors from each county or the California Attorney General could implement the policy. If the Attorney General or Chief Prosecutors implement the policy, it could easily be revoked with the election of a new Chief Prosecutor or Attorney General who does not agree with the policy. Implementing policies by county would also likely result in inconsistent policies across California, with adolescents receiving more protection in some counties than others due to the political climate. Further, policies are guidelines, as opposed to hard rules that prosecutors are mandated to follow, like a legislative statute or judicial decision. Without having a law requiring them to do so, it would be difficult to prohibit prosecutors from charging adolescents with first-degree felony murder and to require prosecutors to consider certain factors before charging an adolescent with second-degree felony murder.

393. *Id.* at 27.

2. Judicial Decisions in the California or United States Supreme Court

As a second option, the California or United States Supreme Court could rule on the issue.³⁹⁴ However, in order to amend the felony murder rule through the judiciary, there must be a case that presents a clear violation of either the California Constitution or United States Constitution. Like in *People v. Contreras*, the California Supreme Court could decide that charging an adolescent with first-degree murder under a “reckless indifference” standard is considered cruel and unusual punishment in violation of the Eighth Amendment.³⁹⁵ The court could find that the sentence given to those convicted of first-degree murder is unjustifiably long for an adolescent with a twice-diminished capacity. Further, the court could decide that factors associated with adolescence must be considered before charging an adolescent with second-degree felony murder.

The recent trend in United States Supreme Court jurisprudence has been to recognize adolescents’ unique characteristics that make them less capable of making informed decisions, more vulnerable to outside pressures, and less culpable than adults.³⁹⁶ This trend creates hope that the courts will appreciate the problems with the current felony murder rule, especially as applied to adolescents. However, using this method would take a great deal of time. It would require finding a case with relevant facts and precedential value to litigate up to the California or United States Supreme Court.

3. California Legislative Action

The third, and likely best, option is through the California legislature.³⁹⁷ Just as the felony murder rule was amended under S.B.

394. In *People v. Aaron*, the Michigan Supreme Court abolished the common law felony murder rule. 299 N.W.2d 304, 329 (Mich. 1980). With the Michigan Supreme Court finding that the felony murder rule had no place in Michigan, one justice stated:

The Court has correctly outlined the injudicious and unprincipled premises on which the common-law doctrine of felony murder rests. The basic infirmity of the felony-murder rule lies in its failure to correlate, to any degree, criminal liability with moral culpability. It permits one to be punished for a killing, with the most severe penalty in the law, without requiring proof of any mental state with respect to the killing. This incongruity is more than the state’s criminal jurisprudence should be permitted to bear.

Id. at 334 (Ryan, J., concurring in part, dissenting in part).

395. *People v. Contreras*, 411 P.3d 445 (Cal. 2018).

396. *Supra* Part IV.

397. Michigan, Kentucky, and Hawaii have all abolished the felony murder rule by amending their murder statutes. KY. REV. STAT. ANN. § 507.020 (West 2019); HAW. REV. STAT. ANN. § 707-

1437, the California legislature can pass a new bill that limits the felony murder rule when applied to adolescents. California Penal Code section 189 would be amended to include a subdivision (g) excluding adolescents from subdivision 189(e)(3), which charges an individual with first-degree felony murder based on the “reckless indifference” standard.³⁹⁸ The new section would state that subdivision (e)(3) does not apply to a defendant who is under the age of twenty-five and that before charging an adolescent with second-degree murder under a felony murder theory, the judge must analyze the defendant’s culpability using the same factors listed in CWIC section 707.

Like Proposition 57, S.B. 1391, and other recent legislature in juvenile justice reform, it is important to create a bright line age cutoff.³⁹⁹ While eighteen is the age that “draws the line for many purposes between childhood and adulthood” and presents a compromise to prosecutors’ potential push-back, the research that courts and legislatures rely on in protecting youthful offenders is based on the conclusions that individuals’ thoughts, actions, and emotions continue to mature throughout their early twenties.⁴⁰⁰ Therefore, the cutoff that would most effectively protect youthful offenders would be age twenty-five.

As mentioned, pushback from prosecutors may limit the possibility of legislative action. Just as prosecutors challenged S.B. 1437, they likely will challenge a bill further limiting the felony murder rule.⁴⁰¹ Though going through the state legislature always

701 (West 2016); *People v. Aaron*, 409 Mich. 672 (1980) (eliminating the felony murder rule in Michigan); Kevin E. McCarthy, *OLR Research Report*, Connecticut General Assembly, Feb. 13, 2008, <https://www.cga.ct.gov/2008/rpt/2008-r-0087.htm>. Ohio effectively eliminated the felony murder rule by replacing felony murder with an involuntary manslaughter statute. *See* OHIO REV. CODE ANN. § 2903.01 (West 2019); McCarthy, *supra*. In the commentary to Hawaii’s amendment, the Hawaii legislature stated, “Engaging in certain penally-prohibited behavior may, of course, evidence a recklessness sufficient to establish manslaughter, or a practical certainty or intent, with respect to causing death, sufficient to establish murder, but such a finding is an independent determination which must rest on the facts of each case.” Commentary on § 707-701, Hawaii State Legislature, https://www.capitol.hawaii.gov/hrscurrent/Vol14_Ch0701-0853/HRS0707/HRS_0707-0701.htm.

398. CAL. PENAL CODE § 189(e)(3) (West 2019).

399. *See* S.B. 1391, 2017–2018 Leg., Reg. Sess. (Cal. 2018) (setting age sixteen as the youngest age of minors who can be transferred to adult court unless the minor committed the offense when they were fourteen or fifteen years old but they were not apprehended prior to turning eighteen).

400. *Roper v. Simmons*, 543 U.S. 551, 568–69 (2005); *see* AMA Brief, *supra* note 16, at 3.

401. *See* Jessica Pishko, *Hundreds Stuck in Prison in California as Prosecutors Seek to Block New Law*, APPEAL, (Mar. 25, 2019) <https://theappeal.org/hundreds-stuck-in-prison-in-california-as-prosecutors-seek-to-block-new-law/>. The period of time between twelve and twenty-five years old is a period that psychologists have defined as a period of heightened development. *See* Steinberg

depends on the political climate at the time, it appears to be the fastest and most stable way of making the much-needed amendment. Further, based on legislative action in juvenile justice reform in 2018, the legislature seems to be supportive of additional protections for youthful offenders despite prosecutors' pushback.⁴⁰²

VI. CONCLUSION

The felony murder rule should be restricted so that an adolescent cannot be charged with first-degree murder by simply possessing a "reckless indifference to human life." Allowing a first-degree murder charge based on a lower mental culpability "erodes the relation between criminal liability and moral culpability," especially when applied to adolescents.⁴⁰³ Further, an amended felony murder rule should require that a judge assess the adolescent's culpability characteristics, much like they are before transfers under CWIC section 707, before an adolescent is charged with second-degree felony murder under the reckless indifference standard. In the alternative, prosecutors could try to charge such adolescents with involuntary manslaughter or the underlying felony.

A prosecutor should not be able to charge an adolescent with one of the most morally reprehensible crimes based on the adolescent's decision to engage in a felony that resulted in unforeseen consequences. Instead, a prosecutor should be required to prove that the adolescent's act and mental culpability fit within the appropriate murder statute, while analyzing the felony separately. Similar to the reasoning used by the Hawaii legislature in abolishing the felony murder rule, the decision to engage in a felony may be a factor in determining recklessness under a second-degree murder or manslaughter charge, but that determination should be made on a case by case basis, rather than mandated by a broad sweeping statute.⁴⁰⁴

& Schwartz, *supra* note 3, at 27 ("[M]ost identity development takes place during the late teens and early twenties."); Waterman, *supra* note 3, at 355 ("The most extensive advances in identity formation occur during the time spent in college.").

402. See S.B. 1391, 2017–2018 Leg., Reg. Sess. (Cal. 2018); S.B. 1437, 2017–2018 Leg., Reg. Sess. (Cal. 2018); S.B. 439, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

403. *People v. Dillon*, 668 P.2d 697, 709 (1983).

404. Further, while the felony murder rule is arguably illogical even when applied to adults, limiting the felony murder rule as applied to adolescents is a crucial first step needed to quickly conform to the current jurisprudence and to advance juvenile justice reform.

Further, charging a minor with a murder because of a supposed recklessness in committing a felony undermines the goals of the juvenile justice system. As data suggests, the felony murder scheme does not meet the supposed objectives of deterrence and rehabilitation.⁴⁰⁵ The United States Supreme Court, California legislature, and California courts continue to make decisions that further protect youthful offenders in the criminal justice system. As discussed, in prohibiting courts from sentencing nonhomicide offenders who did not kill, intend to kill, or foresee death to lengthy sentences, the court in *Contreras* recognized the developmental and behavioral differences between adolescents and adults. In addition, the passing of SB 1391 amended a proposition that already protected minors and once again raised the age permitted to transfer a juvenile to adult court. The bill acknowledged that minors do not belong in adult criminal court because their reckless nature is transitory, and shorter sentences and a rehabilitative environment will more effectively decrease their criminal behavior.⁴⁰⁶

The California courts and legislature are willing to afford adolescents more protection because science has indicated that adolescents and adults are cognitively different, and thus, adolescents are less culpable. Using the same rationale employed time and time again, not only in California but in the United States Supreme Court, California should take the next logical step in recognizing that adolescents have a diminished cognitive capacity and should limit the application of the felony murder rule when applied to adolescents.

405. See *supra* Section V(D).

406. Letter from Edmund G. Brown Jr., *supra* note 312.

