

THE RAGE AGAINST THE FELONY MURDER RULE TRAP
WHEN JUVENILES ARE PROSECUTED FOR MURDER IN
CO-FELON KILLINGS

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ABSTRACT

As part of the *Miscarriages of Justice* 10th annual issue, this Article addresses the felony murder rule where juvenile and adult accomplices are liable for co-felon deaths at the hands of victims or police. This Article addresses the prevailing tests of agency, proximate cause, and provocative acts that applies to adults and juveniles in unraveling co-felon liability. Hundreds of innocent young people are ensnared into these wrongful convictions, serving twenty years to life for a death they never planned or intended or expected. Indeed, if accomplices can be charged with felony murder for the killing of their co-felon by victims or police, then every accomplice will be motivated to subdue victims from doing harm to the pack. The Proximate cause test will devour itself.

Table of Contents

I.	Introduction: Community Rage	966
II.	Co-Felon Murder Liability as Applied to Juveniles.....	969
	A. Juveniles Lack Mature Mens Rea	969
	B. The Extent of Violence by Co-Felons.....	972
III.	The Agency Doctrine	973
	A. A Summary of Reasons for the Agency Doctrine	973
	B. Justifiable Self-Defense	974
	C. Causation Statutes.....	975
	D. Independent Crimes by Co-Felons	976
	E. Autonomy Doctrine	977
	F. The Impact of Stand-Your-Ground Laws.....	978

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IV. Proximate Cause Doctrine	980
A. Reasons for the Proximate Cause Test to Co-Felon Deaths	980
B. Application of Proximate Cause to Co-Felon Cases	981
C. The Causation Chain of Liability	983
D. Criminal Lives Matter	986
V. Provocative Acts Doctrine	986
VI. Conclusion.....	988

I. INTRODUCTION: COMMUNITY RAGE

Foolishness and fatality have stalked throughout the ages.¹ In a Chicago suburb, six black teenagers attempted to steal a car.² As they approached the driveway, the seventy-five-year-old white homeowner issued a warning, claimed he saw a knife, claimed they kept approaching, and fatally shot one teen in the head.³ The other teens grabbed their stricken relative and sped away.⁴ They eventually ran out of gas and were apprehended. Part of the chase was captured on the TV evening news.⁵

¹ “Horror and fatality have been stalking abroad in all ages. Why then give a date to this story I have to tell?” EDGAR ALLAN POE, *Metzengerstein*, in THE COMPLETE TALES OF EDGAR ALLAN POE 5, 5 (2014). Teenagers caught in foolishness that triggers their own deaths is a perpetual story.

² See Vaidya Gullapalli, *The Felony Murder Rule as a ‘Representation of What’s Wrong in Our Criminal Legal System’*, APPEAL (Sept. 23, 2019), <https://theappeal.org/the-felony-murder-rule-as-a-representation-of-whats-wrong-in-our-criminal-legal-system/> [https://perma.cc/3EMS-9JDD].

³ See *id.*; Robert McCoppin, *Lake County Prosecutor Defends Murder Charges Against Teens Whose Friend Was Killed During Attempted Car Theft, Saying Teens ‘Ultimately’ Were Responsible for the Death*, CHI. TRIB. (Aug. 16, 2019, 6:55 AM), <https://www.chicagotribune.com/news/breaking/ct-lake-county-shooting-states-attorney-20190816-yk4sjgwgu5pxns76znlyex4-story.html> [https://perma.cc/CPX7-SHYG]; Jim Newton, *State’s Attorney Candidate Alleges ‘Prosecutorial Overreach’ for Charging Teens with Murder in Lake County Shooting*, CHI. TRIB. (Aug. 19, 2019, 2:39 PM), <https://www.chicagotribune.com/suburbs/lake-county-news-sun/ct-lns-teen-murder-charges-candidate-st-0820-20190819-tx3flypr7fhy7npdor2u3jonq-story.html> [https://perma.cc/74Y9-YFL5].

⁴ See Newton, *supra* note 3; Rosemary Sobol, *‘Why Would You Just Come Out Shooting?’ Mother of 14-Year-Old Boy Killed by Lake County Homeowner Questions Man’s Account*, CHI. TRIB. (Aug. 16, 2019, 6:00 AM), <https://www.chicagotribune.com/news/breaking/ct-jaquan-swopes-mother-lake-county-teen-murder-charges-20190817-vnnpnbmoonafbn4roq7wbo6ja-story.html> [https://perma.cc/9K8Q-G8C4].

⁵ See WGN News, *Murder Charges Filed in High-Speed Chase, Fatal Shooting*, YOUTUBE (Aug. 13, 2019), <https://www.youtube.com/watch?v=sWZ7CIXC1Ac>. State’s Attorney Michael Nerheim offered only few details about the incident, saying “the teens carried a 10-inch knife . . . and that the owner said he fired his gun to ‘scare them away.’” McCoppin, *supra* note 3. “[T]he teen who died, [was] 14-year-old Ja’quan Swopes.” *Id.* According to the prosecutor, the teens came into the community intending to commit “residential and vehicle burglaries.” *Id.* The homeowner saw something in one of the teenager’s hands “and believing he was in

The Lake County, Illinois, prosecutor absolved the homeowner and charged the five teens for first-degree felony murder for the death of their cousin.⁶ The prosecutor's position was relatively straight forward, he issued a press release stating, "[I]t's clear these offenders were solely responsible for placing the now-deceased 14-year-old offender in danger. They are ultimately responsible for his death. Had they not made the decisions they did make early Tuesday morning, this 14-year-old would still be alive today."⁷ Under Illinois law, according to the prosecutor, the teenagers were liable for all deaths that ensued from their criminal venture.⁸ The prosecutor affirmed the homeowner's claim of self-defense.⁹

In an uproar, community activists and newspaper editorials protested the prosecutor's over-charging practice.¹⁰ The beleaguered teens were plunged in criminal charges, shamed for their actions, wept for their dead cousin, and understood they too narrowly escaped death.¹¹ Community activists and religious ministers protested draconian felony murder doctrines used to ensnare unwitting teens.¹² The activists argued that the criminal justice system seeks more understanding from white males who commit mass shootings than the blistering conditions that befuddle black youth.¹³

danger . . . he fired his gun several times." *Id.* The prosecutor said the "10-inch long hunting knife" was discovered on the driveway. *Id.*

⁶ See Gullapalli, *supra* note 2; McCoppin, *supra* note 3; Sobol, *supra* note 4; Newton, *supra* note 3.

⁷ McCoppin, *supra* note 3.

⁸ See *id.*

⁹ See *id.*; Newton, *supra* note 3.

¹⁰ See, e.g., Gullapalli, *supra* note 2; Tom Negovan, *Fatal Shooting During Attempted Car Theft Topic of Community Meeting in Waukegan*, WGN9 (Sept. 4, 2019, 9:33 PM), <https://wgntv.com/2019/09/04/fatal-shooting-during-attempted-car-theft-topic-of-community-meeting-in-waukegan/> [<https://perma.cc/X3LS-639B>]; Newton, *supra* note 3.

¹¹ See Frank S. Abderholden, *Fatal Old Mill Creek Confrontation to Be Topic of Community Meeting in Waukegan About State's Felony Murder Law*, CHI. TRIB. (Sept. 4, 2019), <https://www.chicagotribune.com/suburbs/lake-county-news-sun/ct-lns-community-dialogue-teens-murder-charges-st-0904-20190903-eg75h5ljjhkzp3n4l447qj46q-story.html> [<https://perma.cc/PQ29-E2KU>]; Gullapalli, *supra* note 2; Sobol, *supra* note 4.

¹² See, e.g., Jobi Cates, *Lake County Case Shows Why Illinois Should Abolish the Felony Murder Rule*, CHI. SUN TIMES (Aug. 15, 2019, 4:09 PM), <https://chicago.suntimes.com/2019/9/15/20807715/felony-muder-rule-illinois-gurnee-teens-lake-county-restore-justice-jobi-cates> [<https://perma.cc/VSV9-BPXQ>]; Robert McCoppin, *The Felony Murder Rule Has Roots Dating Back Centuries. This Week, It Was Applied to 5 Chicago Teens Charged in a Fatal Lake County Shooting*, CHI. TRIB. (Aug. 15, 2019, 3:38 AM), <https://www.chicagotribune.com/news/breaking/ct-cb-old-mill-creek-felony-murder-rule-20190815-bdfgucyyr5ftnlcvf67xrfppxu-story.html> [<https://perma.cc/NZ6W-ZAEH>]; Saeed Richardson, *Felony Murder: Charging Black Teens for Their Friend's Death is a Crime*, CHI. REP. (Aug. 22, 2019), <https://www.chicagoreporter.com/felony-murder-charging-black-teens-for-their-friends-death-is-a-crime/> [<https://perma.cc/7XTZ-TQVB>].

¹³ See Richardson, *supra* note 12. Rev. Richardson is the Pastor of the First Baptist Church of Waukegan. *Id.*

Some argued that using the criminal justice system to correct societal wrongs was akin to the volatile mandatory sentences leveraged against black youth in the drug war.¹⁴ The Chicago activists soon discovered the national controversies surrounding the felony murder's proximate cause tool used to ensnare everything in its wake.¹⁵ After many protests, community meetings, and political debates, the prosecutor dropped the murder charges against the teens and he charged lesser offenses.¹⁶ Like a wildfire, however, the co-felon murder controversies are incendiary.

In Part II, this Article addresses the juvenile justice quagmire where many teenagers, who join as aiders and abettors, are prosecuted for murder due to the death of a co-felon, who was shot by the victim or police. This Article addresses the lack of mental maturity in juveniles regarding co-felon murder prosecutions. In Part III, this Article addresses the agency doctrine, the majority rule concerning co-felon liability, which assesses individualized culpability. In addition, this Article addresses Autonomy Principles and the impact of stand-your-ground statutes on co-felon culpability. In Part IV, this Article addresses the proximate cause doctrine, the minority rule, which applies a strict liability "but for" determination. Part V addresses the provocative acts doctrine, a hybrid determination, which reviews the aggressive behavior of the co-felons that attract resistance. The Article concludes with three recommendations and identifies an ultimate irony of proximate cause: that since co-felon's guilt is assured, there is an awkward motivation to subdue and harm victims. A reverse proximate cause to defeat a proximate cause.

¹⁴ See Clarence Page, *After 10 Years, "The New Jim Crow" Still Has Much to Say About Race, Drug Convictions and Injustice*, ROANOKE TIMES (Jan. 21, 2020), https://www.roanoke.com/opinion/wire/clarence-page-after-years-the-new-jim-crow-still-has/article_d9e9c8aa-f907-568d-a772-5ea7ccd10af3.html [<https://perma.cc/UAB2-HJDX>] ("The nation's criminal justice system uses the war on drugs to enforce forms of racial discrimination, oppression and 'social control' that most of us thought had gone away with the hard-won victories of the civil rights era."); Richardson, *supra* note 12.

¹⁵ See McCoppin, *supra* note 12; see, e.g., Abbie VanSickle, *If He Didn't Kill Anyone, Why Is It Murder?*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/2018/06/27/us/california-felony-murder.html> [<https://perma.cc/K74K-EH5Q>] (discussing a 15-year-old prosecuted for felony murder and examining national cases of accessories prosecuted under strict liability offenses).

¹⁶ See Frank S. Abderholden, *Community Meetings Focuses on Felony Murder Law Used to Charge 5 Teens in Botched Lake County Car Theft*, CHI. TRIB. (Sept. 5, 2019, 11:51 AM), <https://www.chicagotribune.com/suburbs/lake-county-news-sun/ct-lns-old-mill-creek-shooting-meeting-st-0904-20190905-zsdiwsypyjfitbqvjalgpj3tm-story.html> [<https://perma.cc/54F2-B9MY>]; Meghan Dwyer, *4 Teens Released After Lake County Drops Controversial Murder Charges*, WGN9 (Sept. 19, 2019, 5:50 PM), <https://wgntv.com/2019/09/19/lake-county-drops-murder-charges-against-5-teens/> [<https://perma.cc/XEE4-DASM>].

II. CO-FELON MURDER LIABILITY AS APPLIED TO JUVENILES

A. *Juveniles Lack Mature Mens Rea*

According to the Department of Justice, the most common juvenile felonies are theft, assault, and drug crimes.¹⁷ Theft and burglary are frequently the predicate offenses for felony murder.¹⁸ Due to the allure of money, impetuosity, recklessness, and peer pressure, juveniles join their friends and partake in criminal misadventures.¹⁹

In *Layman v. State*,²⁰ for instance, four teens in Elkhart, Indiana, attempted an afternoon house burglary and discovered an armed homeowner who shot and killed one of the teens.²¹ The prosecutor charged the surviving teens with felony murder in the death of their comrade.²² Indiana, like many states, has an automatic waiver rule where teens, from sixteen to seventeen, are waived into adult court.²³ The teenagers were convicted of murder and sentenced to forty-five to fifty-five years in prison.²⁴

On appeal in *Layman*, the defendants claimed that juveniles have diminished capacity to appreciate their criminal misadventures or possess sufficient maturity to reject peer pressure.²⁵ The defendants presented psychological literature showing that juveniles are

¹⁷ *Estimated Number of Juvenile Arrests, 2018*, U.S. DEP'T JUST. (Oct. 31, 2019), <https://www.ojjdp.gov/ojstatbb/crime/qa05101.asp> [<https://perma.cc/4N4Y-7UJD>].

All offenses: 728,280

Murder: 920

Assault (combined): 152,970 (simple and aggravated combined)

Theft (combined): 114,880 (larceny-theft and burglary combined)

Id.

¹⁸ See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 489 (8th ed. 2018) (recognizing that most felony-murder rule statutes require that a death results from a specifically listed felony such as robbery, rape, kidnapping, arson, and burglary). See MICH. COMP. LAWS § 750.316(1)(b) (2019), for example, the designated felonies are arson, criminal sexual conduct, child abuse, car-jacking, major drug offense, larceny of any kind, extortion, kidnapping, home invasion, burglary, vulnerable adult abuse, torture, and robbery.

¹⁹ See Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, FUTURE CHILD., Fall 2008, at 15, 20, 22 (“Substantial research evidence also supports the conventional wisdom that teens are more oriented toward peers and responsive to peer influence than are adults . . . especially in situations involving pressure to engage in antisocial behavior . . .”).

²⁰ *Layman v. State*, 42 N.E.3d 972 (Ind. 2015).

²¹ See *id.* at 974.

²² See *id.*

²³ See *id.* 974–75.

²⁴ See *id.* at 975.

²⁵ See *id.* at 976; Brief for Appellant-Defendant at 10–12, *Layman*, 42 N.E.3d 972 (No. 20S04-1509-CR-548).

incapable of foreseeing the risks inherent in their actions and the legal consequences.²⁶ The Indiana Supreme Court, however, refused to consider the juvenile issue, because the claims were not preserved for appellate review.²⁷ The Court, however, recognized that juvenile immaturity has substantial merit, especially when applied to co-felon liability.²⁸

In a trio of juvenile cases, *Roper v. Simmons*,²⁹ *Graham v. Florida*,³⁰ and *Miller v. Alabama*,³¹ the U.S. Supreme Court has recognized that juveniles lack the fundamental mental maturity of adults in homicide prosecutions.³² An adult's ability to foresee criminal consequences is much more advanced than an inexperienced juvenile.³³ The Supreme Court relied upon a settled body of research confirming the distinct emotional, psychological, and neurological attributes of juveniles, especially in cases associated with murder claims.³⁴ The proximate cause analysis allows for no individualized determination of a child's age, development, or intent.³⁵ Adolescents are "less likely to perceive risks and less risk-averse" than adults.³⁶ Adolescents are more prone to recklessness, impulsivity, and less likely to consider long term consequences.³⁷

Moreover, adolescents are easily swayed to negative influences and to peer pressures.³⁸ Adolescents are more likely to commit their crimes in groups.³⁹ They are attracted to mystery, financial rewards, and bravery inherent in criminal misadventures.⁴⁰ The classification

²⁶ See Brief for Appellant-Defendant, *supra* note 25, at 13.

²⁷ See *Layman*, 42 N.E.3d at 976.

²⁸ See *id.* at 978.

²⁹ *Roper v. Simmons*, 543 U.S. 551 (2005).

³⁰ *Graham v. Florida*, 560 U.S. 48 (2010).

³¹ *Miller v. Alabama*, 567 U.S. 460 (2013).

³² See *Miller*, 567 U.S. at 489 (holding that juvenile homicide offenders cannot receive mandatory life without parole); *Graham*, 560 U.S. at 82 (holding that juveniles committing nonhomicide offense cannot receive life without parole); *Roper*, 543 U.S. at 578 (holding that juveniles cannot receive the death penalty).

³³ See Scott & Steinberg, *supra* note 19, at 20.

³⁴ See Marsha L. Levick & Elizabeth-Ann Tierney, *The United States Supreme Court Adopts a Reasonable Juvenile Standard in J.D.B. v. North Carolina for Purposes of the Miranda Custody Analysis: Can a More Reasoned Justice System for Juveniles Be Far Behind?*, 47 HARV. C.R.-C.L. L. REV. 501, 506–08 (2012) ("The qualities that characterize the reasonable person throughout the common law—attention, prudence, knowledge, intelligence, and judgments—are precisely those that society fails to ascribe to minors.")

³⁵ See Emily Keller, *Constitutional Sentences for Juveniles Convicted of Felony Murder in the Wake of Roper, Graham, and JDB*, 11 CONN. PUB. INT. L.J. 297, 312–14 (2012).

³⁶ *Id.* at 313.

³⁷ See *id.* 313–14.

³⁸ See *id.* at 314.

³⁹ *Id.*

⁴⁰ See *id.* at 315.

of juveniles mens rea deserves a renewed appreciation of constitutional principles of due process and cruel and unusual punishment when teens are ensnared in co-felon killings by victims.⁴¹

Historically, courts have recognized the mental differences in juveniles as compared to adults.⁴² *Director of Public Prosecutions v. Camplin*,⁴³ for instance, a fifteen-year-old teen was on trial for the murder of a sexually abusive man.⁴⁴ The teen hit the man on the head with a heavy frying pan.⁴⁵ The trial judge instructed the jury that in applying the reasonableness standard they had to consider whether the provocation was sufficient to provoke a reasonable man, not a reasonable boy.⁴⁶ The House of Lords held that these jury instructions were wrong.⁴⁷ In considering the issue of self-control, the jury must ascertain reasonableness based on the ordinary boy standard, with the similar age of the accused.⁴⁸ The House of Lords stated that “to require old heads upon young shoulders is inconsistent with the law’s compassion to human infirmity.”⁴⁹

The juveniles in these capital cases committed notorious crimes. In *Roper*, the seventeen-year-old leader covered a woman in duct tape and drowned her.⁵⁰ In *Miller*, the juvenile hit the victim with a baseball bat.⁵¹ Yet, the Supreme Court recognized the mental immaturity of their demoniacal actions.⁵² The co-felon participants in the Chicago case, burglarizing a car, or in the *Layman* case, burglarizing a home, lack the moral descent of consciousness present

⁴¹ See Michael T. Moore, Jr., Note, *Felony Murder, Juveniles, and Culpability: Why the Eighth Amendment’s Ban on Cruel and Unusual Punishment Should Preclude Sentencing Juveniles Who Do Not Kill, Intend to Kill, or Attempt to Kill to Die in Prison*, 16 LOY. J. PUB. INT. L. 99, 116–17, 119, 126 (2014).

⁴² See *id.* at 111.

⁴³ *Dir. of Pub. Prosecutions v. Camplin* [1978] AC 705 (HL) (appeal taken from Eng.).

⁴⁴ See *id.* at 712 (Lord Diplock).

⁴⁵ *Id.*

⁴⁶ See *id.* at 712–13.

⁴⁷ See *id.* at 718.

⁴⁸ See *id.* at 713; *id.* at 721 (Lord Morris of Borth-y-Gest).

⁴⁹ *Id.* at 717 (Lord Diplock). See the summary of *Camplin* in SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 488–90 (10th ed. 2017).

⁵⁰ See *Roper v. Simmons*, 543 U.S. 551, 556–57 (2005).

⁵¹ See *Miller v. Alabama*, 567 U.S. 460, 468 (2012).

⁵² See *id.* at 477; *Roper*, 543 U.S. at 572–73. The defendants still served severe sentences; they just weren’t liable for mandatory life sentences. See *Miller*, 567 U.S. at 489; Kent Faulk, *Evan Miller, the Alabama Inmate Whose Case Became Precedent for Juvenile Sentencing, Set for Hearing*, AL.COM (Mar. 6, 2019), https://www.al.com/news/birmingham/2017/03/evan_miller_the_alabama_inmate.html [<https://perma.cc/A9KJ-2X36>].

in *Roper* and *Miller*.⁵³ The teenage co-felons at issue here are foolish kids, admittedly committing a theft, caught in a shower of gunfire.⁵⁴

B. *The Extent of Violence by Co-Felons*

While the *Layman* court refused to consider the unpreserved juvenile issue, the court reversed the conviction on other grounds.⁵⁵ The court reaffirmed the co-felon murder doctrine, under *Palmer v. State*,⁵⁶ where the co-felons actively engaged in dangerous and threatening conduct during a kidnapping that resulted in the death of a co-felon.⁵⁷ In *Layman*, however, the court found that the teens were unarmed and nonviolent during the burglary.⁵⁸ The homeowner heard the loud invasion and he shot and killed one of the intruders at their moment of dread.⁵⁹ The court invoked a type of provocative acts doctrine, discussed in Part V, and reviewed the actions of the co-felons in causing resistance.⁶⁰ Finding no weapons or violent conduct by the teens, the court reversed the felony murder convictions for co-felon liability.⁶¹

Whether peaceful or aggressive, any burglar or accomplice expects resistance when burglarizing a home.⁶² The home is one's castle where deadly force is common to thwart a home invasion.⁶³ In *Commonwealth v. Legrand*,⁶⁴ for instance, the court recognized that "[e]very burglar is a potential assassin and when his felonious purpose encounters human opposition his intent to steal becomes an intent to kill and any weapon he finds at hand becomes a weapon of murder."⁶⁵ The *Layman* court, however, compromised with the agency doctrine and proximate cause doctrine and introduced the

⁵³ See *Miller*, 567 U.S. at 468; *Roper*, 543 U.S. at 557; *Layman v. State*, 42 N.E. 3d 972, 974 (Ind. 2015); *McCoppin*, *supra* note 3.

⁵⁴ See *McCoppin*, *supra* note 3.

⁵⁵ See *Layman*, 42 N.E. 3d at 975–76, 981.

⁵⁶ *Palmer v. State*, 704 N.E.2d 124, 125–26 (Ind. 1999) (resolving an appeal from a case in which both co-felons were involved with defeating a victims' resistance).

⁵⁷ See *Layman*, 42 N.E.3d at 979 ("Aside from the fact that in each case a co-perpetrator was fatally injured by someone other than the defendant, the common thread uniting [prior co-felon killing cases] was that an armed defendant engaged in violent and threatening conduct, either as a principle [*sic*] or an accessory, that resulted in the 'mediate or immediate cause' of a co-perpetrator's death."); *Palmer*, 704 N.E.2d at 125–26.

⁵⁸ See *Layman*, 42 N.E.3d at 979.

⁵⁹ *Id.* at 974.

⁶⁰ See *id.* at 979–80.

⁶¹ See *id.*

⁶² See *DRESSLER*, *supra* note 18, at 250.

⁶³ See *People v. Ceballos*, 526 P.2d 241, 242–43, 249 (Cal. 1974) (using a spring gun to protect his home from burglars).

⁶⁴ *Commonwealth v. Le Grand*, 9 A.2d 896 (Pa. 1939).

⁶⁵ *Id.* at 899.

principle of provocative acts doctrine, where the violent participation of co-felons is material to culpability (agency) and violent actions are material to foreseeable resistance (proximate cause).⁶⁶ Let's now examine these three doctrines.

III. THE AGENCY DOCTRINE

Most American states adopt the agency theory of liability concerning a co-felon death.⁶⁷ The agency doctrine examines the accused's individualized culpability to acts intended or recklessly engaged in furtherance of the crime.⁶⁸ Accomplice liability applies where one accomplice kills a victim, or bystander, then the other accomplices are equally responsible for the deaths.⁶⁹ This is standard complicity law and conspiracy law, under which all accomplices are liable for crimes in furtherance of the criminal design.⁷⁰ Under agency doctrine, defendants are not liable for the deaths of co-felons, who are killed by victims or police;⁷¹ nor are defendants liable for deaths of bystanders, who are killed by victims or police.⁷²

A. *A Summary of Reasons for the Agency Doctrine*

Combing the arguments from case law and literature, cited herein, the following reasons justify the agency rule: First, as previously stated, the agency doctrine is devoted to individualized culpability and guilt is assessed on the defendant's intent and recklessness.⁷³ Second, the co-felon who is killed by the victim or police has been justifiably killed.⁷⁴ Consequently, the remaining accomplices cannot

⁶⁶ See *Layman*, 42 N.E.3d at 979–80.

⁶⁷ See DRESSLER, *supra* note 18, at 498; Martin J. McMahon, Annotation, *Application of Felony-Murder Doctrine Where Person Killed Was Co-Felon*, 89 A.L.R.4th 683 §12(b) (1991); see, e.g., *Comer v. State*, 977 A.2d 334, 335, 337 (Del. 2009) (applying agency theory to the death of a bystander, killed by third party); *State v. Sophophone*, 19 P.3d 70, 71–72, 74–76 (Kan. 2001) (co-felon was killed resisting police arrest after burglary); *Campbell v. State*, 444 A.2d 1034, 1035, 1040–42 (Md. 1982) (co-felon killed during robbery by victim); *State v. Canola*, 374 A.2d 20, 29–30 (N.J. 1977) (same).

⁶⁸ See *Comer*, 977 A.2d at 338; DRESSLER, *supra* note 18, at 498.

⁶⁹ See DRESSLER, *supra* note 18, 435–36; Norval Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50, 72 (1956).

⁷⁰ See DRESSLER, *supra* note 18, at 435; see, e.g., *Pinkerton v. United States*, 328 U.S. 640, 647 (1946) (holding co-conspirators liable for the conspiracy and completion of an offense).

⁷¹ See *Comer*, 977 A.2d at 339 (quoting *Weick v. State*, 420 A.2d 159, 162–63 (Del. 1980)).

⁷² See *id.* (quoting *Weick*, 420 A.2d at 162–63). Although if the defendants are engaged in shootout, many courts will find liability based on the recklessness of defendants' actions. See *id.* at 338.

⁷³ See *id.*; DRESSLER, *supra* note 18, at 498.

⁷⁴ See, e.g., *State v. Sophophone*, 19 P.3d 70, 77 (Kan. 2001); *Campbell v. State*, 444 A.2d 1034, 1035, 1042 (Md. 1982).

be liable for a justified killing.⁷⁵ Third, as stated previously, juveniles are ensnared in acts of complicity and are more subject to peer pressure and immature reflection.⁷⁶ There should be a different mens rea calculus applied to juveniles. Fourth, third-party killings in resistance to a felony lack the depraved heart killing exhibited in premeditated murder, violating the principle of proportionality between crime and punishment.⁷⁷ Fifth, the surviving co-felons are already liable for the underlying crime, humiliated with a dead colleague, and shaken by their own close encounter with death.⁷⁸ Sixth, proximate cause is a facile doctrine used in tort civil law and should be inapplicable in criminal law.⁷⁹ Proximate cause avoids in-depth mens rea analysis of complicated and unique situations.⁸⁰ Scholars and judges have long called for the abolishment of the strict application of the felony murder rule.⁸¹

B. *Justifiable Self-Defense*

One of the most convincing aspect to the Agency Doctrine is that the co-felons should not be liable for a justified killing.⁸² Once the victim or police engage in self-defense to thwart an attempted felony, a co-felon's death is considered a justifiable killing.⁸³ In *Commonwealth v. Redline*, the court addressed justifiable killing:

[T]he homicide was justifiable and, obviously, could not be availed of, on any rational legal theory, to support a charge of murder. How can anyone, no matter how much of an outlaw he may be, have a criminal charge lodged against him for the consequences of the lawful conduct of another person? The

⁷⁵ See, e.g., *Sophophone*, 19 P.3d at 77; *Campbell*, 444 A.2d at 1035, 1042.

⁷⁶ See Keller, *supra* note 35, at 314.

⁷⁷ See Frederick M. Lawrence, *The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes*, 93 MICH. L. REV. 320, 325 (1994); Morris, *supra* note 69, at 60–61.

⁷⁸ See, e.g., *Sophophone*, 19 P.3d at 72, 77; *Campbell*, 444 A.2d at 1036, 1042.

⁷⁹ See Morris, *supra* note 69, at 53 & n.20.

⁸⁰ See *id.*

⁸¹ See *People v. Aaron*, 299 N.W.2d 304, 307–12 (Mich. 1980) (engaging in a full historical accounting of the felony murder rule and supporting discontinuing the strict form of felony murder); Leonard Birdsong, *Felony Murder: A Historical Perspective by Which to Understand Today's Modern Felony Murder Rule Statutes*, 32 T. MARSHALL L. REV. 1, 3 (2006); DRESSLER, *supra* note 18, at 498.

⁸² See *Commonwealth v. Redline*, 137 A.2d 472, 483 (Pa. 1958).

⁸³ See *Campbell v. State*, 444 A.2d 1034, 1035, 1042 (Md. 1982); *Redline*, 137 A.2d at 483.

mere statement of the question carries with it its own answer.⁸⁴

To make co-felons criminally liable for a justified killing straddles a giant contradiction.

C. *Causation Statutes*

In assessing liability in co-felon murder prosecutions, the courts begin with the state felony murder statute, which include causation provisions that perpetrators are liable for “all deaths” or “deaths” caused by the attempted felony.⁸⁵ The statutes seldom address the death of a co-felon.⁸⁶ In resolving the agency doctrine versus proximate cause doctrine tensions, the majority of states pair the generic causation statute with fundamental principles of individualized intent and settle with the agency doctrine.⁸⁷ The New Jersey felony murder statute had a common felony murder causation provision: “[I]f the death of anyone ensues from the committing or attempting to commit an such crime or act,” they were liable for murder.⁸⁸ This provision is famously noted as the “ensues clause.”⁸⁹ Yet, despite this clause, the court adopted the agency principle:

[I]t appears to us regressive to extend the application of the felony murder rule . . . to lethal acts of third persons not in furtherance of the felonious scheme. The language of [our] statute does not compel it, and . . . is entirely compatible with the traditional limitations of the rule. Tort concepts of

⁸⁴ *Redline*, 137 A.2d at 483. “Blackstone holds that no one can be convicted for a justifiable killing and since it is justifiable for a policeman to kill a robber during the perpetration of a robbery, no one can be convicted of murder for killing one of the robbers.” *Id.* at 485 (Bell, J., dissenting).

⁸⁵ *See, e.g.*, *State v. Canola*, 374 A.2d 20, 26–27 (N.J. 1977); *Birdsong*, *supra* note 81, at 20–21 & n.137.

⁸⁶ *See, e.g.*, N.M. STAT. ANN. § 30-2-1(A) (2019); *Birdsong*, *supra* note 81, at 24.

⁸⁷ *See Canola*, 374 A.2d at 23–30 (N.J. 1977).

⁸⁸ *Id.* at 21. The statute was repealed in 1979 and the current felony murder statute is at N.J. STAT. ANN. § 2C:11-3(a)(3) (West 2019).

⁸⁹ *See id.* at 21–23. The ensues clause noted in *Canola*, 374 A.2d at 21 (N.J. 1977), provided,

If any person, in committing or attempting to commit arson, burglary, kidnapping, rape, robbery, sodomy or any unlawful act against the peace of this State, of which the probable consequences may be bloodshed, kills another, or if the death of anyone ensues from the committing or attempting to commit any such crime or act . . . , then such person so killing is guilty of murder.

foreseeability and proximate cause have shallow relevance to culpability for murder in the first degree.⁹⁰

Many states, such as New York and Colorado, specifically exclude the death of co-felons in their respective causation provisions, by barring liability to “participants” in the felony.⁹¹ The agency standard is a more equitable standard to address the myriad of unusual situations. It is arguably possible under the Agency standard to find a co-felon guilty of an accomplice’s death if, for instance, the accomplices agree to shoot at the victims, and the police, if they resist the felony. Then, potential co-felon deaths are in furtherance of the felonious design.⁹² Some judges, however, only extend the agency doctrine to death of a co-felon, and not where innocent bystanders are shot by third parties resisting the felony.⁹³

D. *Independent Crimes by Co-Felons*

Co-felons occasionally commit independent acts outside the design intended by the other accomplices. For instance, a co-felon may shoot indiscriminately and act out of the confines of the agreed venture.⁹⁴ The agency view allows the court to adapt to the factual circumstances to decipher the extent of recklessness, whereas Proximate Cause ensnares like a spider’s web.

In *Enmund v. Florida*, the Supreme Court emphasized the importance of individualized culpability stating that the death penalty cannot be imposed upon a person who aids and abets a murder, but who does not personally kill or attempt to kill or intend to kill.⁹⁵ *Enmund* emphasized that culpability must be individualized and does not necessarily adhere to the unintended actions of other participants.⁹⁶ Proximate cause nullifies mens rea elements and, as the title of Professor Vinson’s article indicates,

⁹⁰ *Id.* at 30.

⁹¹ See COLO. REV. STAT. § 18-3-102 (2019) (“other than one of the participants”). New York seems to exempt co-felons: if “in the course of and in furtherance of [designated felonies] he, or another participant . . . causes the death of a person other than one of the participants.” N.Y. PENAL LAW § 125.25(3) (McKinney 2019).

⁹² See *Grunewald v. U.S.*, 353 U.S. 391, 404 (1957) (noting that a conspiracy cannot be treated as including a cover-up agreement unless there is direct evidence of an agreement to continue to act in concert to cover or resist a crime).

⁹³ See, e.g., *Canola*, 374 A.2d at 30 (Sullivan, J., concurring).

⁹⁴ See, e.g., *Enmund v. Florida*, 458 U.S. 782, 783–84, 798, 800–01 (1982).

⁹⁵ See *id.* at 798 (first quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1987); and then quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)).

⁹⁶ See *id.* In *Enmund*, the getaway driver could not be sentenced to death for the murders committed by his accomplices. See *id.* at 801.

should be barred from wandering outside negligence law.⁹⁷ He writes,

[P]roximate cause is so unruly and so devious that it's difficult to close in for the kill. Proximate cause . . . is a common law leviathan, a Moby Dick that surfaces at awkward moments from the murky deep to do evil. This white whale with the legalistic eye hypnotizes judges and juries into playing a shell game in which the players ostensibly search for concrete facts while, under the table, political choices are made.⁹⁸

E. Autonomy Doctrine

If multiple people agree to commit a crime, the autonomy principle prevails such that co-felons waive responsibility for each other's deaths.⁹⁹ In *Commonwealth v. Root*, for instance, the court faced the issue of co-felon's death where two men engaged in the American ritual of race car driving.¹⁰⁰ During the race, one of the drivers, Driver B, made an extremely reckless move where Driver B ran head-on into an oncoming truck.¹⁰¹ The issue centered on whether the other driver, Driver A, was responsible for Driver B's death.¹⁰² The court held that Driver A was not a direct cause of Driver's B's death.¹⁰³ This court rejected the proximate cause approach to fix responsibility.¹⁰⁴ The court noted that proximate cause is an essential element of tort law, found in negligence.¹⁰⁵ Civil law is more liberalized to favor claims for monetary personal injury damages, but unfair to resolve tighter criminal liability.¹⁰⁶ The actions of Driver A were not forced on Driver B.¹⁰⁷ B's reckless actions were done through B's free will and B assumed the risk of his own death.¹⁰⁸

⁹⁷ Kenneth Vinson, *Proximate Cause Should Be Barred from Wandering Outside Negligence Law*, 13 FLA. ST. U. L. REV. 215, 215 (1985).

⁹⁸ *Id.* at 216.

⁹⁹ See *Commonwealth v. Root*, 170 A.2d 310, 313 (Pa. 1961) (quoting *Kline v. Moyer*, 191 A. 43, 46 (Pa. 1937)).

¹⁰⁰ See *id.* at 310–11.

¹⁰¹ See *id.*

¹⁰² See *id.* at 310.

¹⁰³ *Id.* at 314.

¹⁰⁴ See *id.*

¹⁰⁵ *Id.* at 311.

¹⁰⁶ *Id.*

¹⁰⁷ See *id.* at 312.

¹⁰⁸ See *id.*

Similarly, in a Russian Roulette case, *Commonwealth v. Atencio*,¹⁰⁹ a group of men gathered to play Russian roulette.¹¹⁰ They passed the gun back and forth until one of the men shot himself in the head.¹¹¹ The issue became whether the other men were responsible for his death.¹¹² The court held “yes” because Russian roulette is a game of chance.¹¹³ The *Root* situation, on the other hand, concerned a game of automotive skill, according to the court.¹¹⁴ A criminal venture is more akin to the *Root* situation, where there is some control over the events and each co-felon exercises his or her individual free will to join in the endeavor and thereby assume the risk of harm.¹¹⁵

Accomplices act as one are subject to the various liabilities as one.¹¹⁶ One waives criminal liability to oneself if one provokes acts likely to result in suicide.¹¹⁷ It is like a perpetrator committing a robbery and being shot and wounded. The perpetrator is not prosecuted for assault onto himself or herself for instigating one’s own harm.

F. *The Impact of Stand-Your-Ground Laws*

The recent “stand your ground” self-defense laws eliminates the traditional retreat doctrine and allows someone a subjective determination of perceived danger.¹¹⁸ In the opening case presented in this Article, the homeowner shot the teens, who were approaching in his driveway with a knife, in an apparent attempt to steal a car.¹¹⁹ The stand-your-ground laws invite aggressiveness based on one’s discriminatory fears of opposite cultures.¹²⁰ Stand-your-ground actions influence the unpredictable foreseeability of resistance.¹²¹ The

¹⁰⁹ *Commonwealth v. Atencio*, 189 N.E.2d 223 (Mass. 1963).

¹¹⁰ *See id.* at 224.

¹¹¹ *See id.*

¹¹² *See id.* at 223–24.

¹¹³ *See id.* at 225–26.

¹¹⁴ *See id.* at 225.

¹¹⁵ *See Commonwealth v. Root*, 170 A.2d 310, 312 (Pa. 1961).

¹¹⁶ *See Atencio*, 189 N.E.2d at 224–25.

¹¹⁷ *See id.*

¹¹⁸ *See KADISH ET AL.*, *supra* note 49, at 922 (“Roughly 33 states have now enacted laws that permit the actor to meet force with force, including deadly force, even in public spaces where retreat is possible.”).

¹¹⁹ *See McCoppin*, *supra* note 3. Illinois does not have a Stand Your Ground statute, but the prosecutor said the homeowner reasonably believed he was in danger. *See id.*

¹²⁰ *See, e.g., People v. Goetz*, 497 N.E.2d 41, 44 (N.Y. 1986).

¹²¹ The Florida stand-your-ground statute states,

A person who uses or threatens to use deadly force in accordance with this [self-defense section] does not have a duty to retreat and has the right to stand his or her ground if the

teens did not foresee the homeowner standing his ground over a potential property crime.¹²² For instance, in *United States v. Peterson*, the court held the homeowner had no right to kill one of the teens burglarizing his car, even when the teens approached the homeowner with a lug wrench.¹²³ The court held that Peterson was the aggressor and that “one cannot support a claim of self-defense by a self-generated necessity to kill.”¹²⁴

The country is still reeling from racial tensions evidenced by the Trayvon Martin¹²⁵ shooting and the Bernard Goetz case claiming self-defense based in part on cultural fears.¹²⁶ With the subjective appraisal of harm that Stand Your Ground allows, foreseeability of resistance is attenuated.

The numerous reasons for adopting the agency doctrine, previously addressed, substantiates why agency is the majority rule. But big cities like Chicago, and many states, adopted the Proximate Cause Doctrine, coming next.

person using or threatening to use the deadly force is not engaged in a criminal activity and is in a place where he or she has a right to be.

FLA. STAT. § 776.012(2) (2019).

¹²² See, e.g., *United States v. Peterson*, 483 F.2d 1222, 1232 (D.C. Cir. 1973).

¹²³ See *id.* at 1225–26, 1234.

¹²⁴ *Id.* at 1231.

¹²⁵ Trayvon Martin, who was black, was shot by George Zimmerman, who is white or Latino. Zimmerman claimed Trayvon Martin was suspiciously in the Sanford, Florida, housing complex. The case raised numerous objections about Zimmerman’s insistence on following Trayvon Martin, who was visiting the area and returning from a local store where he bought Skittles candy. See Greg Botelho, *What Happened the Night Trayvon Martin Died*, CNN, <https://www.cnn.com/2012/05/18/justice/florida-teen-shooting-details/index.html> [https://perma.cc/69T5-LLA2].

¹²⁶ Goetz, who is white, shot four black youths who surrounded him in a subway car and demanded, “Give me five dollars.” See *People v. Goetz*, 497 N.E.2d 41, 43–44 (N.Y. 1986); *Bernhard Goetz Shoots Four Youths on the Subway*, HISTORY.COM, <https://www.history.com/this-day-in-history/the-bernhard-goetz-subway-shooting> [https://perma.cc/7ZUP-M7UF].

IV. PROXIMATE CAUSE DOCTRINE

Several states adopt the proximate cause test,¹²⁷ which ensnares liability to every death that ensues from the perpetration of particular felonies.¹²⁸

A. *Reasons for the Proximate Cause Test to Co-Felon Deaths*

The reasons to adopt the proximate cause doctrine are as follows:¹²⁹ 1) the death is an aggravated feature from a grievous felony;¹³⁰ 2) but for the felony initiated by the perpetrators, the death would not have occurred;¹³¹ 3) under the state statute, perpetrators are responsible for any deaths that occur from the attempted felony;¹³² 4) the co-felon's life has intrinsic value;¹³³ 5) deadly resistance to any aggravated felony is foreseeable;¹³⁴ 6) the strict liability approach acts as a deterrent;¹³⁵ 7) the felonious intent to commit the felony supplies the malice or recklessness that is necessary for the murder;¹³⁶ 8) a crime which ends in death should be punished more severely, consequently, tort principles of proximate cause are

¹²⁷ See, e.g., *Witherspoon v. State*, 33 So. 3d 625, 630–31 (Ala. Crim. App. 2009); *State v. Lopez*, 845 P.2d 478, 479, 482 (Ariz. Ct. App. 1992) (co-felon killed by police officer); *State v. Jackson*, 697 S.E.2d 757, 757–58 (Ga. 2010) (co-felon killed by person resisting felony); *People v. Hudson*, 856 N.E.2d 1078, 1083 (Ill. 2006); *People v. Dekens*, 695 N.E.2d 474, 475 (Ill. 1998); *People v. Lowery*, 678 N.E.2d 973, 975 (Ill. 1997); *Layman v. State*, 42 N.E.3d 972, 979 (Ind. 2015); *Palmer v. State*, 704 N.E.2d 124, 126 (Ind. 1999); *State v. Baker*, 607 S.W.2d 153, 154–56 (Mo. 1980) (victim shot by another victim); *People v. Hernandez*, 624 N.E.2d 661, 665 (N.Y. 1993); *State v. Jennings*, 100 N.E.3d 93, 95, 99 (Ohio Ct. App. 2017) (co-felon killed by victim); *State v. Oimen*, 516 N.W.2d 399, 401, 404 (Wis. 1994) (co-felon killed by victim).

¹²⁸ See *Dekens*, 695 N.E.2d at 475 (quoting *Lowery*, 678 N.E.2d at 975–76).

¹²⁹ Norman Finkel notes that three reasons have been given justifying the felony murder rule. See Norman Finkel, *Culpability and Commonsense Justice: Lessons Learned Betwixt Murder and Madness*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 11, 19 (1996). The least satisfying is that felony murder is a strict liability offense requiring no mens rea. See *id.* The second is transferred intent where intent for the underlying felony substitutes for the mental state required for the homicide. See *id.* Finally, “constructive malice, [which] presume[s] the malice for the homicide from the mental state required for the commission of the underlying felony.” *Id.* What Finkel calls a “one size fits all” mens rea. *Id.*

¹³⁰ See 720 ILL. COMP. STAT. 5/9-1(b)(6) (2019).

¹³¹ See *Witherspoon*, 33 So. 3d at 631.

¹³² See N.M. STAT. ANN. § 30-2-1(A) (2019); *Dekens*, 695 N.E.2d at 476 (first quoting *People v. Payne*, 194 N.E. 539, 543 (Ill. 1935); and then citing *People v. Allen*, 309 N.E.2d 544, 548–49 (Ill. 1974)).

¹³³ *United States v. Martinez*, 16 F.3d 202, 207 (7th Cir. 1994).

¹³⁴ See *Dekens*, 695 N.E.2d at 476 (quoting *Payne*, 194 N.E. at 543).

¹³⁵ See *People v. Klebanowski*, 852 N.E. 2d 813, 821 (Ill. 2006) (quoting *People v. Dennis*, 692 N.E.2d 325, 335 (Ill. 1998)).

¹³⁶ See Finkel, *supra* note 129, at 19.

appropriate;¹³⁷ 9) law and order advocates prefer to play hard ball with criminals.¹³⁸ Justice Bell in his dissenting opinion in *Commonwealth v. Redline*,¹³⁹ makes this point:

The brutal crime wave which is sweeping and appalling our Country can be halted only if the Courts stop coddling, and stop freeing murderers, communists and criminals on technicalities made of straw. The Courts seem to have forgotten that Justice is not a one-way street—law abiding citizens and law-abiding communities are entitled, at least equally with criminals, to the protection of the law.¹⁴⁰

B. *Application of Proximate Cause to Co-Felon Cases*

The state of Illinois is unmerciful with the proximate cause approach to co-felon killings, juveniles included.¹⁴¹ In *People v. Hudson*, for instance, a fifteen-year-old teen was an accomplice to a barbershop robbery.¹⁴² Hudson was the look-out while the main accomplice demanded money from the patrons.¹⁴³ One of the patrons was an off-duty police officer getting his hair cut.¹⁴⁴ When the main accomplice was distracted, the undercover officer shot and killed the robber.¹⁴⁵ The undercover officer then shot Hudson in the leg.¹⁴⁶ Hudson was charged and convicted for first degree murder for the

¹³⁷ See *Dekens*, 695 N.E.2d at 47–77 (quoting *People v. Lowery*, 687 N.E.2d 973, 976 (Ill. 1997)).

¹³⁸ See *Commonwealth v. Redline*, 137 A.2d 472, 483 (Pa. 1958) (Bell, J., dissenting). Illinois is in a minority of states that utilize the proximate cause theory. See *Dekens*, 695 N.E.2d at 476. At least 8 other states use proximate cause. See *Witherspoon v. State*, 33 So. 3d 625, 631 (Ala. Crim. App. 2009) (co-felon killed by clerk resisting robbery); *State v. Lopez*, 845 P.2d 478, 479, 482, (Ariz. 1992) (co-felon killed by police officer); *State v. Jackson*, 697 S.E.2d 757, 757–59 (Ga. 2010) (when co-felon killed by one resisting felony); *Palmer v. State*, 704 N.E.2d 124, 126 (Ind. 1999) (co-felon killed by police officer); *State v. Baker*, 607 S.W.2d 153, 154, 156 (Mo. 1980) (victim shot by another victim); *State v. Jennings*, 100 N.E.3d 93, 95, 99 (Ohio Ct. App. 2017) (co-felon killed by victim); *State v. Oimen*, 516 N.W.2d 399, 401 (Wis. 1994) (co-felon killed by victim).

¹³⁹ In *Redline*, 137 A.2d at 475, the police officers who arrived at an armed robbery shot one of two perpetrators who were escaping during an exchange of gunfire. The issue became whether the other perpetrator was liable for the death of his accomplice. *Id.* Maryland rejected the tort causal approach to criminal law. *Campbell v. State*, 444 A.2d 1034, 1041 (Md. 1982).

¹⁴⁰ *Redline*, 137 A.2d at 483 (Bell, J., dissenting).

¹⁴¹ See *People v. Hudson*, 856 N.E.2d 1078, 1080–81 (Ill. 2006); *People v. Klebanowski*, 852 N.E.2d 813, 815, 823 (Ill. 2006).

¹⁴² See *Hudson*, 856 N.E.2d at 1080.

¹⁴³ See *id.*

¹⁴⁴ See *id.*

¹⁴⁵ See *id.*

¹⁴⁶ See *id.*

death of the co-felon and sentenced to twenty-two years in prison.¹⁴⁷ The appellate court held that engaging in the robbery alerted the defendant to the foreseeable injurious consequences.¹⁴⁸

In *Klebanowski*, the co-felon was a get-away driver.¹⁴⁹ The other felon had a surprise assaultive encounter with an undercover police officer and during their scuffle, the officer shot the felon.¹⁵⁰ Klebanowski was sitting in his pickup truck on the street when he heard the gunshots, and then left the scene.¹⁵¹ The court upheld Klebanowski's guilt, and he was sentenced to twenty years in prison.¹⁵² The court followed proximate cause doctrine, stating that "[i]t is unimportant that defendant did not anticipate the precise sequence of events that followed the armed robbery. We conclude that defendant's unlawful acts precipitated those events, and he is responsible for the consequences."¹⁵³

There are cases all over America where young people are charged with co-felon killings.¹⁵⁴ In Alabama, Marshae Jones, twenty-seven years old and five months pregnant, initiated a fight with another woman.¹⁵⁵ The other woman

shot Ms. Jones in the stomach, causing the death of Ms. Jones' unborn baby.

A grand jury indicted Ms. Jones on a manslaughter charge under the state's felony-murder statute. Prosecutors said that by starting and escalating the fight, Ms. Jones engaged in a dangerous crime that was likely to cause death.¹⁵⁶

After many protests, the prosecutor finally dropped the charges, but the protests around the country rage on.¹⁵⁷

¹⁴⁷ *See id.* at 1079.

¹⁴⁸ *See id.* at 1081.

¹⁴⁹ *See People v. Klebanowski*, 852 N.E.2d 813, 815 (Ill. 2006).

¹⁵⁰ *See id.* at 816.

¹⁵¹ *See id.* at 815.

¹⁵² *See id.* at 823.

¹⁵³ *Id.* (citing *People v. Lowery*, 687 N.E.2d 973, 978 (Ill. 1997)).

¹⁵⁴ *See* Daja Henry, *High-Profile Cases Sparking New Debate over Old Legal Concept of Felony Murder*, WALL STREET J. (Sept. 21, 2019, 9:00 AM), <https://www.wsj.com/articles/high-profile-cases-sparking-new-debate-over-old-legal-concept-of-felony-murder-11569070801> [<https://perma.cc/U9EY-VZDK>].

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *See id.*

C. *The Causation Chain of Liability*

Proximate cause fits within a causal chain. First, there must be an actual cause, the “but for” test, where the death is directly caused by someone’s act.¹⁵⁸ Second, proximate cause liability can extend to those killings closely related to the criminal transaction that are not a necessary direct cause;¹⁵⁹ for instance, transferred intent doctrine, shooting at person A, and hitting B, an unintended target, will cause murder.¹⁶⁰ Third, some courts stretch liability to reasonably foreseeable events.¹⁶¹ Proximate cause presents shifting sands about what is reasonably foreseeable.¹⁶²

A co-felon’s death presents multiple contributory forces: the original felony and then resistance to the felony. With multiple causes, there must be a sufficient independent cause to blame a death on the co-felon.¹⁶³ In *Burrage v. United States*, regarding a drug overdose, the seller was convicted of supplying heroin, which caused the victim’s death.¹⁶⁴ Heroin was a contributing factor, but the decedent also ingested three other drugs that contributed to his death.¹⁶⁵ The Supreme Court, per Justice Scalia, reversed the conviction holding that there was insufficient proof of direct causation.¹⁶⁶ Even if the heroin was a substantial and contributing factor, the Court said that the prosecutor could not independently relate its significance.¹⁶⁷ “Uncertainty of that kind cannot be squared with the beyond-a-reasonable-doubt standard . . . where use of the drug distributed by the defendant is not an independently sufficient

¹⁵⁸ See *Burrage v. United States*, 571 U.S. 204, 210, 211 (2014).

¹⁵⁹ See *id.* at 210; Martin Lijtmaer, Comment, *The Felony Murder Rule in Illinois: The Injustice of the Proximate Cause Theory Explored via Research in Cognitive Psychology*, 98 J. CRIM. L. & CRIMINOLOGY 621, 624–25 (2008).

¹⁶⁰ See, e.g., *Gladden v. State*, 330 A.2d 176, 188 (Md. 1974).

¹⁶¹ See Vinson, *supra* note 97, at 245.

¹⁶² See *id.* at 226. Here are the following “shifting sands” of causal liability:

proximate, sole, active, direct, immediate, legal, causa causans, causa sine qua non, effective, continuing, operative, independent, concurring, intervening novus actus interveniens, efficient, controlling, producing, procuring, preponderating, responsible, just, substantial, material, appreciable, subsequent, supervening, superceding, dependent, remote, passive, indirect, consequential, sole proximate, independent intervening, intervening independent supervening, and so forth.

Id.

¹⁶³ See *Burrage*, 571 U.S. at 214–15.

¹⁶⁴ See *id.* at 206–08.

¹⁶⁵ See *id.* at 207.

¹⁶⁶ See *id.* at 218–19.

¹⁶⁷ See *id.*

cause of the victim's death or serious bodily injury, a defendant cannot be liable under the penalty enhancement provision"¹⁶⁸

In the co-felon cases, there may be an insufficient showing that the co-felon acted independently enough to cause the victim to shoot.¹⁶⁹ The co-felon was a contributory factor, perhaps, but not enough to cause resistance.¹⁷⁰

In *People v. Acosta*,¹⁷¹ the court defined proximate cause as an artificial term serving matters of public policy "based partly on expediency and partly on concerns of fairness and justice."¹⁷² Such concerns are more a matter of common sense, said the court.¹⁷³ "Unless an act is an actual cause . . . , it will not be considered a proximate cause."¹⁷⁴ Proximate cause means a close relationship with the transaction, which excludes extraordinary results.¹⁷⁵ In *Paroline v. United States*,¹⁷⁶ the Court added that proximate cause is a flexible concept, often explained in terms of foreseeability, as the scope of the risk created by the conduct, which must avoid mere fortuity.¹⁷⁷

Causation can be severed by unusual intervening or superseding forces.¹⁷⁸ If a victim or a third party responds recklessly to a criminal act, a superseding or intervening claim may be lodged that the recklessness of the victim or police is responsible for the killing, and not the co-felons who initiated the felony.¹⁷⁹ For instance, if the police engage in a high speed chase and drive their car through a person's house and through a playground, and kill innocent bystanders, the co-felon may claim that the police's reckless acts amounts to a superseding event which severs his liability.¹⁸⁰ Or a victim who

¹⁶⁸ *Id.* at 218.

¹⁶⁹ Lijtmaer, *supra* note 159, at 632.

¹⁷⁰ *See id.*

¹⁷¹ *People v. Acosta*, 284 Cal. Rptr. 117 (Ct. App. 1991) (as modified on Aug. 2, Aug. 14, and Aug. 28, 1991).

¹⁷² *Id.* at 121.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 122.

¹⁷⁵ *See Palsgraf v. Long Island R.R.*, 162 N.E. 99, 99, 101 (N.Y. 1928), in which a plaintiff claimed injuries from scales that were thrown down because a bomb exploded.

¹⁷⁶ *See Paroline v. United States*, 572 U.S. 434 (2014).

¹⁷⁷ *See id.* at 439, 444–45 (first citing *Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639, 654 (2008); and then citing *Exxon Co. v. Sofec*, 517 U.S. 830, 838 (1996)) (determining damages in a child porn case).

¹⁷⁸ *See Stephenson v. State*, 179 N.E. 633, 635, 639 (Ind. 1932) (per curiam), in which a victim took poison during her kidnapping.

¹⁷⁹ *See id.* at 639.

¹⁸⁰ *See, e.g.,* Danny Spewack, *State Patrol: Troopers Justified in Chase that Injured 3 on Playground*, KARE 11 (Dec. 4, 2018, 1:42 PM), <https://www.kare11.com/article/news/state->

shoots wildly at a school bus to stop perpetrators—superseding event.¹⁸¹ And a robbery victim who stopped a blood transfusion to save her own life¹⁸²—intervening event. Superseding or intervening claims can be lodged to sever a co-felon’s liability.¹⁸³

In *People v. Acosta*, for instance, a helicopter pilot violated several Federal Aviation Administration (FAA) rules in pursuit of a car thief.¹⁸⁴ In so doing, the pilot encountered a mid-air collision with another aircraft.¹⁸⁵ Acosta was charged with felony murder for the death of the pilot.¹⁸⁶ The court reversed Acosta’s conviction and held Acosta lacked sufficient malice to be responsible for the helicopter chase.¹⁸⁷

Typically, in a felony murder case, liability extends through the escape phase if the escape is continuous, close in time, and near the criminal transaction.¹⁸⁸ For instance, one can be convicted of felony murder as one is escaping and crashes and kills another.¹⁸⁹ The escape phase can also be bifurcated from the felony murder and be charged as a distinct crime.¹⁹⁰ This is discussed more in the provocative act doctrine, Part V, coming up.

As the co-felon liability cases are presented in their unique factual formulas, it’s important to keep in mind causal attacks along standard causation lines: independent sufficient cause; and superseding or intervening events may sever the chain of liability.¹⁹¹

patrol-troopers-justified-in-chase-that-injured-3-on-playground/89-620808831 [https://perma.cc/H6FC-Y7AF].

¹⁸¹ See, e.g., Matt Sepic, *Man Who Shot School Bus Driver on Minneapolis Interstate Sentenced to 7 years*, MPR NEWS (Nov. 15, 2019, 5:35 PM), <https://www.mprnews.org/story/2019/11/15/man-who-shot-school-bus-driver-on-minneapolis-interstate-sentenced-to-7-years> [https://perma.cc/DL3H-HB4U].

¹⁸² See *Regina v. Blaue*, [1975] 3 All ER 446, 447–48 (Eng.) (involving a defendant who stabbed a girl, but the girl was a Jehovah’s witness and refused a blood transfusion, which would have saved her life); KADISH ET AL., *supra* note 49, at 631.

¹⁸³ See Kara M. Houck, *People v. Dekens: The Expansion of the Felony-Murder Doctrine in Illinois*, 30 LOY. U. CHI. L.J. 357, 367 (1999).

¹⁸⁴ See *People v. Acosta*, 284 Cal. Rptr. 117, 119–20 (Ct. App. 1991) (as modified on Aug. 2, Aug. 14, and Aug. 28, 1991).

¹⁸⁵ See *id.* at 120.

¹⁸⁶ See *id.* at 119.

¹⁸⁷ See *id.* at 119, 130–31.

¹⁸⁸ See *People v. Gillis*, 712 N.W. 2d 419, 439 (Mich. 2006).

¹⁸⁹ See *id.* at 422–24, 440 (holding that a felony murder conviction was proper when a burglary escapee drove recklessly and killed two people).

¹⁹⁰ See, e.g., *People v. Gilbert*, 408 P.2d 365, 368–69 (Cal. 1965).

¹⁹¹ See Tory A. Weigand, *Tort Law—The Wrongful Demise of But For Causation*, 41 W. NEW ENG. L. REV. 75, 83, 90 (2019).

D. Criminal Lives Matter

The deaths of co-felons, even though justifiably killed, are irredeemable. In *United States v. Martinez*, five men planned to bomb several adult bookstores because the owners refused to pay them protection money.¹⁹² The men used remote control pipe bombs.¹⁹³ As they traveled along Chicago's main streets with electromagnetic signals, one of the bombs exploded killing one of the men.¹⁹⁴ The court held that the other four accomplices could be sentenced for felony murder for the death of their co-felon.¹⁹⁵ Judge Posner recited that "[t]he lives of criminals are not completely worthless, so their deaths should not be considered nonevents for sentencing purposes."¹⁹⁶ Some courts, however, place a co-felon killing into a lower grade of homicide.¹⁹⁷ Co-felon lives are of lesser value than victims and innocent bystanders.¹⁹⁸

V. PROVOCATIVE ACTS DOCTRINE

Agency versus proximate cause are alternate doctrines which leads to a hybrid compensatory doctrine, provocative acts.¹⁹⁹ Provocative acts doctrine dictates a bifurcated depraved heart murder proceeding that examines the acts of the co-felons during any resistance by the victim or police.²⁰⁰ This is similar to the shield cases, where a co-felon might use another as a shield to avoid injury.²⁰¹ The conduct of

¹⁹² See *United States v. Martinez*, 16 F.3d 202, 204 (7th Cir. 1994).

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 204–05, 208.

¹⁹⁵ See *id.* at 205, 208.

¹⁹⁶ *Id.* at 207.

When a person is killed in the perpetration of, or in the attempt to perpetrate, any: [enumerated felonies] by a person other than the person engaged in the perpetration of or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate such felony is guilty of murder in the second degree . . . punishable for a term of years not exceeding life

Leonard Birdsong, *The Felony Murder Doctrine Revisited: A Proposal for Calibrating Punishment that Reaffirms the Sanctity of Human Life of Co-Felons Who Are Victims*, 33 OHIO N.U. L. REV. 497, 515 (2007) (first alteration in original).

¹⁹⁷ See *State v. Williams*, 254 So. 2d 548, 550–51 (Fla. Dist. Ct. App. 1971), *overruled by* *State v. Perez*, 382 So. 2d 732–33 (Fla. Dist. Ct. App. 1980) (per curiam).

¹⁹⁸ See *id.*

¹⁹⁹ See *People v. Johnson*, 164 Cal. Rptr. 3d 505, 510, 513 (Cal. Ct. App. 2013); *supra* note 66 and accompanying text.

²⁰⁰ See *People v. Gilbert*, 408 P.2d 365, 372–74 (Cal. 1966).

²⁰¹ See *Taylor v. State*, 55 S.W. 961, 965 (Tex. Crim App. 1910) (placing a fireman who the train as a shield to avoid being shot was murder in the first degree); see also *Taylor v.*

defendants in using others as shields reflects expressed malice and depraved heart murder.²⁰²

The Indiana case of *Layman v. State*, also used a de facto provocative acts doctrine to settle the juvenile co-felon issue.²⁰³ The court reviewed the actions of the co-felons during the felony.²⁰⁴ In *Layman*, the court found that the unarmed, nonviolent actions by the teens dictated their innocence under co-felon liability.²⁰⁵ Whereas in *Palmer v. State*, the violent actions of the co-felons required a finding of co-felon liability.²⁰⁶

Under the provocative act doctrine, each co-felon is treated with individualized determination of culpability.²⁰⁷ The court reviews the aggressive conduct of each co-felon, even through acts of encouragement.²⁰⁸ The Indiana Supreme Court applied the provocative acts approach to resolve a co-felon killing during a house burglary, but the court found no provocative acts to justify the co-felon liability.²⁰⁹

One court recognizes a hybrid approach where co-felons are responsible for deaths of innocent bystanders, but are not liable for co-felon's death.²¹⁰ The difference is that a dead co-felon is justifiably killed, whereas an innocent bystander death is an irresponsible public harm.²¹¹ This bifurcation was recognized in a Florida appellate court in *State v. Williams*, which held co-felons are in a mitigated class than the innocent public.²¹²

Superior Court, 477 P.2d 131, 132–33, 135 (Cal. 1970) (deciding that where the robber says “your money or your life” without displaying a weapon as a provocative act).

²⁰² See *People v. Antick*, 539 P.2d 43, 51 (Cal. 1975) (“[D]eath ‘was sufficiently provocative of lethal resistance’ to support a finding of implied malice.” (quoting *Taylor*, 477 P.2d at 134)); *State v. Canola* 374 A.2d 20, 26 (N.J. 1977) (“The conduct of the defendants in cases such as these is said to reflect ‘express malice’, justifying a murder conviction.” (quoting *Commonwealth v. Redline*, 137 A.2d 472, 482 (Pa. 1958))).

²⁰³ See *Layman v. State*, 42 N.E.3d 972, 974–75, 978–80 (Ind. 2015).

²⁰⁴ See *id.* at 978–80.

²⁰⁵ See *id.* at 979.

²⁰⁶ See *Palmer v. State*, 704 N.E.2d 124, 126 (Ind. 1999).

²⁰⁷ See DRESSLER, *supra* note 18, at 500.

²⁰⁸ See, e.g., *People v. Washington* 402 P.2d 130, 132–35 (Cal. 1965); *People v. Johnson*, 164 Cal. Rptr. 3d 505, 508, 510 (Cal. Ct. App. 2013); see also DRESSLER, *supra* note 18, at 500 (“Distinguishing Felony-Murder from Other Theories (The ‘Provocative Act’ Doctrine)”).

²⁰⁹ See *Layman*, 42 N.E.3d at 979–80.

²¹⁰ See DRESSLER, *supra* note 18, at 499–500.

²¹¹ See *id.*; compare *People v. Podolski*, 52 N.W.2d 201, 203–04 (Mich. 1952) (ruling that a felon is guilty of felony-murder in excusable death of Police Officer who was shot by another police officer), with *People v. Austin*, 120 N.W.2d 766, 775 (Mich. 1963) (ruling that because victim justifiably kills felon, then other co-felons are not guilty under felony murder).

²¹² See *State v. Williams*, 254 So. 2d 548, 550–51 (Fla. Dist. Ct. App. 1971), *overruled by State v. Perez*, 382 So. 2d 732–33 (Fla. Dist. Ct. App. 1980) (per curiam) (acknowledging that killings should apply to co-felons).

VI. CONCLUSION

Proximate Cause meets social condemnation for the harsh application of the felony murder rule to teens ensnared in criminal misadventures. Used in co-felon liability, proximate cause is a type of legal fabricated lynching. Co-felons on the collateral edge of misadventure are placed in the same immoral platform as premeditated murderer, kidnappers, rapists, and terrorists. The points raised within this article apply as well to adult offenders.

Three reforms are necessary: the adoption of the agency doctrine; statutory amendments similar to New York and Colorado, which eliminate “participants” as subjects of felony murder prosecutions;²¹³ and adoption of provocative acts doctrine in cases where third parties kill innocent bystanders.

The proximate cause doctrine straddles a giant contradiction. It encourages co-felons to vigorously subdue victims to prevent resistance. Law becomes emotionally real when teens are imprisoned for long years due to their foolish acts. The many protests against the strict application of the felony murder rule illustrates no more submission to fate.²¹⁴ Proximate cause masquerades as moralism. The agency approach reflects law’s true moral vocabulary.

²¹³ See COLO. REV. STAT. § 18-3-102(1)(b) (2019); N.Y. PENAL LAW § 125.25(3) (McKinney 2019).

²¹⁴ See Henry, *supra* note 154.