RACIAL BIAS, ACCOMPLICE LIABILITY, AND THE FELONY MURDER RULE: A NATIONAL EMPIRICAL STUDY

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ABSTRACT

Two long criticized prosecutorial tools—the felony murder rule and the accomplice liability doctrine—play an outsized role in the operation of American homicide law. Though each of these tools have separately faced intense criticism for their resistance to the supposedly foundational principles of moral culpability and individual responsibility, their legacy is also defined by the way they function symbiotically and specifically to heighten racialized punishment. This Article addresses the weighty combined reach of the accomplice liability doctrine and felony murder rule, and proposes that racial bias has fueled the operation and survival of these tools. Specifically, it suggests that implicit racial bias has led to the automatic individualization of white men who are involved in group crimes, while at the same time created automatic deindividualization for Black and Latino men in similar situations, rendering these two doctrines complicit in state sanctioned racialization. This Article hypothesizes that the phenomena of implicit racial bias and white individualization sustain the felony murder rule and accomplice liability doctrine, avoiding legislative and judicial responsibility to constrain the unfair expansion of criminal liability. A national empirical study conducted by the authors supports the claim of racialized group liability within the felony murder rule by demonstrating that Americans automatically individualize white men, yet automatically perceive Black and Latino men as group members. In addition to this core finding, the study also shows that mock jurors disproportionately penalized men with Latino-sounding names compared to men with white or Black-sounding names, ascribing to Latino men the highest levels of intentionality and criminal responsibility in a group robbery resulting in a homicide. Contextualized within the troubled history of the felony murder

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rule and accomplice liability doctrine, the Article concludes by calling for the abandonment of the felony murder rule in group liability situations.

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INTRODUCTION

Robbery Gone Wrong

> At about 4:10 p.m., Jose Peres arrived in a local park, looking for his friends. He found a group of young men talking and singing. None of the men were armed with weapons. After three of the men left, one of the remaining men, Diego Rodrigues, suggested to the others that they should "get paid" by robbing someone. Two or three of the men muttered general agreement to rob someone. Rodrigues pointed at Catherine Thomas, who was walking on the other side of the street near the corner. Andres Hernandez said he would love to "get paid."
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> Juaquin Martinez, Peres, and Hernandez crossed the street and followed Thomas for approximately one block. The rest of the group followed on the other side of the street. When the group trailing Thomas approached her, Hernandez shoved Thomas into an alley; Martinez then punched her. They were soon joined by the other two. Hernandez then carried Thomas to the center of the alley and dropped her in front of a garage located at the point where the alley joined another. The others followed, except for Emilio Sanchez, who stood outside for the entire duration of the event. Members of the group then opened her handbag and struggled over her wallet and change purse. As the group began to leave with Thomas' wallet, phone, and change purse, Hernandez said something about the woman having seen them. Martinez then said, "exactly," turned around, walked over to Thomas, and hit her twice in the head with a short metal bar that had been laying on the ground nearby. Shortly thereafter, the group dispersed. When Thomas was found twenty minutes later, she was rushed to the hospital, but was pronounced dead.[1]

The felony murder *rule* and accomplice liability *doctrine*, acting in concert, can render an entire group of defendants guilty of murder despite huge deficiencies in proof concerning the *actus reus* and *mens rea* of the individual group members.[2] The simultaneous operation of the felony

1. This version of the study fact pattern we employed in the empirical study, discussed in *infra* Section IV, has been edited for conciseness. The complete fact pattern is reproduced in Appendix A. The fact pattern was inspired by the facts described in *Turner v. United States*, 582 U.S. 313, 320–25 (2017) (discussing the government's obligations to disclose favorable evidence discovered post-trial).

2. *See* Julia Tedesco, *Paradox in Practice: A Reckoning of the Common Law's Antiquated, Prejudiced Felony Murder Rule*, 45 FORDHAM INT'L L.J. 211, 213–16 (2021).

murder rule and accomplice liability doctrine has long been wielded by the government to induce cooperation from a group of defendants, alleviating the government's obligation to prove the individualized culpability of each defendant at trial.[3] In many situations, the government will employ the felony murder rule and the accomplice liability doctrine together to charge the defendants as a group. In such cases, it is almost as if the government is saying: "We are not really sure which defendants are most culpable, so let's just find them all guilty of murder."[4] Once adopted as a legal strategy, the combined rule and doctrine provide a pathway that extends government authority exponentially. Despite decades of sharp scholarly criticism,[5] these legal rules continue to prevail in the vast majority of American jurisdictions, and most legal commentary has avoided analyzing the operation of the two rules in concert.[6]

While the individual doctrines themselves have been strongly criticized, somewhat surprisingly, the way that race may directly influence a prosecutors' decision to charge all members of a group using these principles, a judge's willingness to accept such charges, and a jury's inclination to convict each defendant of the moral and legal equivalent of an intentional murder has gone relatively undiscussed. In Robbery Gone Wrong, in particular, one must ask whether all of the participants are charged and convicted of felony murder, rather than robbery or accessory after the fact, because of an indifference to individualized responsibility; whether a

3. *See* Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1331 (2003) ("As Americans backed away from the draconian punishments of old England (typically, death), however, new inducements for cooperation were needed. Conspiracy law, as we shall see, became one such inducement. Not only has this proven to be an exceptionally effective way of controlling crime, flipping has also reduced the monetary costs of law enforcement, bypassing expensive informants and detectives.").

4. *Cf. Turner*, 582 U.S. at 330–34 (Kagan, J., dissenting) (explaining that the presentation of suppressed evidence could have avoided a situation "in which the defendants, each in an effort to save himself, formed something of a circular firing squad."). Of course, in Robbery Gone Wrong, there is little doubt as to which defendant caused the victim's death. Yet in many similar cases, it is unclear who wielded the murder weapon.

5. Guyora Binder has done the most comprehensive analysis of the felony murder rule, explaining the differences in each jurisdiction as well as when the rules appeared in American jurisprudence. *See, e.g.*, Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 407–11 (2011) [hereinafter Binder, *Making the Best of Felony Murder*]; Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 132 tbl.1 (2004) [hereinafter Binder, *The Origins of American Felony Murder Rules*]; *see also* Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 446 (1985) (noting scholars and jurists describe the rule as "monstrous," "unsupportable," and "an unsightly wart on the skin of the criminal law" with "no logical or practical basis for existence in modern law" (footnotes omitted)); John F. Decker, *The Mental State Requirement for Accomplice Liability in American Criminal Law*, 60 S.C. L. REV. 237, 239 (2008); Guyora Binder, *Felony Murder and Mens rea Default Rules: A Study in Statutory Interpretation*, 4 BUFF. CRIM. L. REV. 399, 414 (2000) [hereinafter Binder, *Mens rea Default Rules*] (explaining how the Model Penal Code "raises complex questions about mistake of law and the *mens rea* of accomplice liability for felony murder").

6. *See, e.g.*, WAYNE R. LAFAVE, MODERN CRIMINAL LAW: CASES, COMMENTS, AND QUESTIONS 328, 825 (3d ed. 2001) (discussing felony murder and accomplice liability separately); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 497–500, 556–60 (4th ed. 2006) (discussing the felony murder rule and accomplice liability separately); SANFORD H. KADISH, STEPHEN J. SCHULHOFER, & CAROL S. STEIKER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 435–37, 589–91, 663–665 (8th ed. 2007) (discussing felony murder, aiding and abetting, and conspiracy separately).

determining factor was whether the Latino-sounding names of the men operated to influence which charges were brought in the first place (felony murder or not), as well as the way the judge and jury perceive each individual defendant in the context of the group wrongs. The national empirical study we created and employed based around the facts in Robbery Gone Wrong investigates just that question and leads to the conclusion that race and group-imposed liability have become psychologically intertwined in the accomplice liability and felony murder contexts.

The practice of combining the felony murder rule and the accomplice liability doctrine is scarcely mentioned in criminal law treatises but vastly expands the government's prosecutorial power, extended further through the expansion of group liability offenses like conspiracy, Racketeer Influenced and Corrupt Organizations (RICO) charges, and other association offenses.[7] For instance, in the spring of 2016, the U.S. Attorney for the Southern District of New York issued an indictment of 120 people, mostly Black and Latino men in their late teens or early twenties, "allegedly responsible for more than 1,800 shots fired, resulting in eight alleged homicides."[8] By operation of the felony murder rule, accomplice liability doctrine, and a breadth of conspiracy allegations, a significant number of the indicted individuals faced murder charges despite not having killed or intended to kill anyone.[9] Such charges have defined the racialized operation of the accomplice liability doctrine and felony murder rule, in a manner that disproportionately impacts Black men and other minorities in particular at remarkable rates.[10]

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7. The Racketeer Influenced and Corrupt Organizations Act (RICO) is codified at 18 U.S.C. §§ 1961–1968 and makes it criminal to conduct an "enterprise's affairs through a pattern of racketeering activity." *See, e.g.*, Rotella v. Wood, 528 U.S. 549, 552 (2000); *see also* WAYNE R. LAFAVE, PRINCIPLES OF CRIMINAL LAW 574–91 (1st ed. 2003); GEORGE E. DIX & M. MICHAEL SHARLOT, CRIMINAL LAW: CASES AND MATERIALS 507, 509 (6th ed. 2008) (discussing felony murder and responsibility for killings by co-felons).

8. Press Release, U.S. Dep't of Just., 120 Members and Associates of Two Rival Street Gangs in the Bronx Charged in Federal Court with Racketeering, Narcotics, and Firearms Offenses (Apr. 27, 2016), (available at https://www.justice.gov/usao-sdny/pr/120-members-and-associates-two-rival-street-gangs-bronx-charged-federal-court).

9. *See id.*

10. ALEXIA COOPER & ERICA L. SMITH, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008, at 3, 12 (2011) [hereinafter U.S. HOMICIDE TRENDS 1980–2008] (noting that although the Black community comprised only 12.6% of the United States population from 1980–2008, Black defendants constituted 59.9% of felony murder convictions over the same time period); NAZGOL GHANDNOOSH, EMMA STAMMEN, & CONNIE BUDACI, THE SENTENCING PROJECT, FELONY MURDER: AN ON-RAMP FOR EXTREME SENTENCING 6 (2022) ("Deeply concerning racial disparities in prosecutors' use of discretion—in decisions about which homicides to prosecute as felony murder and how many people to charge as co-defendants—directly disadvantages people of color."); Greg Egan, *George Floyd's Legacy: Reforming, Relating, and Rethinking Through Chauvin's Conviction and Appeal Under a Felony-Murder Doctrine Long-Weaponized Against People of Color*, 47 MITCHELL HAMLINE L. REV. 111, 118 (2021) (describing racial disparities in sentencing for accomplices under the felony murder rule in Minnesota, where "the Black codefendant who did not pull the trigger received a significantly harsher sentence than the four similarly-situated [w]hite codefendants."); Tedesco, *supra* note 2, at 242–43 (citing statistics from different states to illustrate felony murder disparities among Black and Latino defendants).

Group liability has long had sordid racist overtones.[11] From the prosecution of the "Scottsboro Boys"[12] to the Central Park Five,[13] concerns about assigning culpability through group liability continue to arise.[14] The combined legal fiction of accomplice liability and felony murder presents a wild opportunity for implicit and explicit bias to thrive. While use of the felony murder rule in group crimes has long defined America's homicide landscape, the presumption of culpability is not always applied equally. In contrast to the example of the prosecution of Black and Latino defendants in the Southern District of New York, federal prosecutors in the District of Columbia charged more than 950 individuals with various crimes in connection with the deadly January 6, 2021, insurrection, when hundreds of rioters forced their way into the U.S. Capitol.[15] A demographic

11. Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933, 956 (2004) (discussing Korematsu v. United States, 323 U.S. 214 (1944), which demonstrates that "in any interaction, we apply rules of racial mapping to place a human being or a group of human beings into a racial category. Immediately, a cache of racial meanings associated with that category is triggered both consciously and unconsciously. These meanings include cognitive beliefs (often called 'stereotypes') as well as affective feelings (often called 'prejudice'). Some meanings are explicitly held and embraced, whereas others reside implicitly in our minds. Interestingly, social cognition research demonstrates that the explicit is dissociated from the implicit. Put another way, even those who genuinely espouse equality norms on self-reported surveys may have substantial implicit biases against racial minorities. Both explicit and implicit racial meanings alter our thinking and behavior in significant ways." (citations omitted)).

12. *See, e.g.*, Ellis Cose, *The Saga of the Scottsboro Boys*, ACLU (July 27, 2020), https://www.aclu.org/issues/racial-justice/saga-scottsboro-boys; Michael J. Klarman, *Scottsboro*, 93 MARQ. L. REV. 379 (2009); *see also* Powell v. Alabama, 287 U.S. 45 (1932).

13. *See* N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1346–60 (2004); Leona D. Jochnowitz & Tonya Kendall, *Analyzing Wrongful Convictions Beyond the Traditional Canonical List of Errors, for Enduring Structural and Sociological Attributes, (Juveniles, Racism, Adversary System, Policing Policies)*, 37 TOURO L. REV. 579, 662–63 (2021) ("The Central Park Five (Richardson/Wise) and the Roscetti Four (Ollins) cases raised several common themes about the powerful influence of structural racism and tunnel vision in wrongful convictions. Groups of minority teenagers were stereotyped. Almost all of the accused youths gave false confessions.").

14. Peter Margulies, *Guantanamo by Other Means: Conspiracy Prosecutions and Law Enforcement Dilemmas After September 11*, 43 GONZ. L. REV. 513, 519 (2007) (noting conspiracy or group prosecution allows jurors to "convict when they perceive the defendant and his or her associates as possessing 'a general disposition towards unlawful behavior.' Moreover, the doctrine of conspiracy encourages guilt by association: jurors who take a dislike to one defendant on trial may extend that dislike to the others." (citing Phillip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CALIF. L. REV. 1137, 1155 (1973))).

15. Ian Prasad Philbrick, *Hundreds of Jan. 6 Cases*, N.Y. TIMES (Aug. 21, 2022), https://www.nytimes.com/2022/08/21/briefing/jan-6-attack-riot-suspects.html (discussing that despite the deaths resulting from the January 6 Capitol riot, most of the rioters—predominantly white men—only received misdemeanors with "little or no prison time"); *see also 24 Months Since the January 6 Attack on the Capitol*, U.S. DEP'T OF JUST., U.S. ATT'YS' OFF. D.C. (Jan. 4, 2023), https://www.justice.gov/usao-dc/24-months-january-6-attack-capitol#:~:text=Approximately%2011%20individuals%20have%20been,restricted%20federal%20building%20or%20grounds; *The Jan. 6 Attack: The Cases Behind the Biggest Criminal Investigation in U.S. History*, NPR (Oct. 27, 2023, 6:39 PM), https://www.npr.org/2021/02/09/965472049/the-capitol-siege-the-arrested-and-their-stories (searching for the term "murder" produced five cases involving white defendants. None were charged with murder. Matthew Jason Beddingfield was involved in an attempted murder charge at the time of the attack, but he was allowed to plead guilty to assaulting, resisting, or impeding certain officers relating to the attack on the Capitol; Michael Curzio had a prior conviction for attempted murder; Nick DeCarlo is pictured wearing a shirt that said "Murder the Media" in front of a door of the Capitol on which the same text was written; Clifford James Meteer made comments on Facebook and sent private messages to individuals relating to the attack, stating that he was "around the corner

assessment of those charged indicates that the participants were overwhelmingly white.[16] A bipartisan report found that seven people died during the insurrection;[17] however, none of the 1,171 individuals charged for their participation have been charged with felony murder.[18] This contrast gives rise to the question of whether the combined accomplice liability doctrine and felony murder rule would survive the democratic process if it was applied equally across groups.

This Article follows longstanding research on racial bias in the criminal justice system, contextualized within a particularly dangerous—and common—combination of doctrines. Much of the preceding work on the role of race in homicide law began with landmark analysis of capital sentencing schemes known as the "Baldus studies," which revealed that the race of a defendant, especially in combination with the race of a victim, introduced arbitrariness into the administration of justice.[19] Despite the findings of the Baldus studies, the United States Supreme Court rejected the challenge to the constitutionality of the death penalty.[20] Following this line of work, scholars traced the appearance of racial bias in the prosecution, conviction, and sentencing of children to life without parole.[21] Again,

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from the vet who was murdered;" Nicholas Ochs wrote the phrase "Murder the Media" on the Capitol Memorial Door.).

16. *See* Mark Denbeaux & Donna Crawley, *The January 6 Insurrectionists: Who They Are and What they Did*, Seton Hall Law School Legal Studies, Aug. 7, 2023, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4512381 (noting 92% of participants were white, 5.4% Hispanic, 1.4% Black, 1% Asian, and one Native American person).

17. Chris Cameron, *These Are the People Who Died in Connection with the Capitol Riot*, N.Y. TIMES (Oct. 13, 2022), https://www.nytimes.com/2022/01/05/us/politics/jan-6-capitol-deaths.html (summarizing a bipartisan Senate report, released in June of 2022, that found "seven deaths were connected to the Capitol attack," including four deaths that occurred in the crowd at the time of the riot).

18. *See* NPR, *supra* note 15; *One Year Since the Jan. 6 Attack on the Capitol*, U.S. DEP'T OF JUST., U.S. ATT'Y'S OFF. D.C. (Dec. 30, 2021), https://www.justice.gov/usao-dc/one-year-jan-6-attack-capitol.

19. *See* David C. Baldus, Charles Pulaski, & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 689–92, 707–10 (1983). Much of this research is also discussed in G. Ben Cohen and McCleskey's *Omission: The Racial Geography of Retribution*, 10 OHIO ST. J. CRIM. L. 65, 66 (2012). This research demonstrated, as discussed below, that arbitrariness appeared to arise most clearly in cases involving less aggravation and where jurors and decision-makers were allowed to make assessments of moral culpability from inference. *See* Robert J. Smith & G. Ben Cohen, *Capital Punishment: Choosing Life or Death (Implicitly)*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 229, 235–36 (Justin D. Levinson & Robert J. Smith eds., 2012) [*Capital Punishment: Choosing Life or Death (Implicitly)*].

20. McCleskey v. Kemp, 481 U.S. 279, 293 (1987) ("McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system . . . Thus, if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty"); *see also id.* (Brennan, J., dissenting) ("statement seems to suggest a fear of too much justice."). Notably, in a memo to colleagues after oral argument, Justice Scalia observed "It is my view . . . that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable . . . ." Reshma M. Saujani, "*The Implicit Association Test": A Measure Of Unconscious Racism In Legislative Decision-Making*, 8 MICH. J. RACE & L. 395, 395 (2003) (citing EDWARD LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLE INSIDE THE SUPREME COURT 211 (Geoff Shandler ed., Times Books 1998) (quoting untitled Scalia memorandum)).

21. *See, e.g.*, Josh Rovner, *Juvenile Life Without Parole: An Overview*, SENT'G PROJECT 4 (Apr. 2023), https://www.sentencingproject.org/app/uploads/2023/04/Juvenile-Life-Without-Parole.pdf;

scholars hypothesized that Black children—and especially Black children accused of killing white victims—were more likely to have their case transferred to an adult criminal court, where they are prosecuted as an adult, and be found guilty of murder despite lack of evidence of a specific intent to kill.[22] Since these studies were published, researchers have begun to investigate deeply the ways in which race can wreak havoc in the administration of justice,[23] including empirically studying the role of implicit bias in juror memories[24] and criminal guilt determinations,[25]principles of punishment,[26] and in capital cases.[27]

Building upon decades of studies that demonstrate the deep interconnection between race and homicide law in America, this Article deploys and leverages modern research methods from the field of implicit cognition to investigate whether specific legal tools amplify the opportunity for racial bias in the criminal justice system. Section I begins by reviewing the basic historical circumstances and legal background of the felony murder rule and accomplice liability doctrine.

Section II describes how felony murder and accomplice liability have an outsized role in the operation of the American criminal legal system, and how their combination has sordid implications with respect to capital punishment and mandatory life without parole sentencing schemes. Section II goes on to explore the way race operates in the context of charging,

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Case: Juvenile Life Without Parole, LEGAL DEF. FUND (Feb. 16, 2018), https://www.naacpldf.org/case-issue/juvenile-life-without-parole/.

22. *See, e.g.*, Beth Caldwell, *The Twice Diminished Culpability of Juvenile Accomplices to Felony Murder*, 11 U.C. IRVINE L. REV. 905, 941 (2021) (footnote omitted) ("[E]ighty percent of all juvenile offenders serving life or virtual life sentences are people of color, with over fifty percent being Black."); Michael T. Moore, Jr., *Felony Murder, Juveniles, and Culpability: Why the Eighth Amendment's Ban on Cruel and Unusual Punishment Should Preclude Sentencing Juveniles Who Do Not Kill, Intend to Kill, or Attempt to Kill to Die in Prison*, 16 LOY. J. PUB. INT. L. 99, 106–07 (2014) ("When teen violence increased in the early 1990s the media predicted a wave of juvenile "superpredators" that never came to fruition. This hype helped fuel a push for juveniles to be more easily transferred to adult courts, which began to occur with greater frequency. Juveniles transferred to adult courts were exposed to the harshest punishments, including the death penalty" (footnotes omitted)).

23. *See generally* JENNIFER L. EBERHARDT, BIASED: UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO (2020); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR BLINDNESS (2010); CHARLES J. OGLETREE, JR., THE PRESUMPTION OF GUILT: THE ARREST OF HENRY LOUIS GATES JR. AND RACE, CLASS, AND CRIME IN AMERICA (2010); DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II (2008); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035 (2011).

24. *See generally* Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decision-making, and Misremembering*, 57 DUKE L.J. 345 (2007) [hereinafter Levinson, *Forgotten Racial Equality*].

25. *See generally* Justin D. Levinson, Huajian Cai, & Danielle Young, *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187 (2010) [hereinafter Levinson, Cai, & Young, *Guilty by Implicit Racial Bias*].

26. *See generally* Justin D. Levinson, Robert J. Smith, & Koichi Hioki, *Race and Retribution: An Empirical Study of Implicit Bias and Punishment in America*, 53 U.C. DAVIS L. REV. 839 (2019) [hereinafter Levinson, Smith, & Hioki, *Race and Retribution*].

27. *See generally* Justin D. Levinson, G. Ben Cohen, & Koichi Hioki, *Deadly "Toxins": A National Empirical Study of Racial Bias and Future Dangerousness Determinations*, 56 GA. L. REV. 225 (2021) [hereinafter Levinson, Cohen, & Hioki, *Deadly "Toxins"*].

convictions, and punishment, and posits that the combination of the accomplice liability and felony murder rules is still permitted to operate specifically because is disproportionately affects Black and Latinx communities. Data gathered from multiple sources document that the accomplice liability doctrine and felony murder rule work to worsen already long-problematic racial disparities in homicide convictions. Section II then highlights the jurisdictions that have doubled down on the combination of these doctrines and provide particularly harsh punishments—capital punishment or life without parole. In addition, while not establishing a necessary causation between the operation of these rules and mass incarceration, this Section notes the overlap between those states that have mandatory life sentences for felony murder and those states with the highest levels of incarceration.

Section III builds upon the racialized data presented in Section II by investigating the psychological basis of bias in the felony murder rule and accomplice liability doctrine. Section III explores why prosecutors, jurors, and judges may systematically take erroneous and harmful cognitive shortcuts that increase the risks of the combined accomplice liability doctrine and felony murder rule. It begins by presenting relevant existing studies on implicit racial bias, including projects that devised novel Implicit Association Tests (IAT) to test theories related to criminal law, setting the stage for the novel accomplice liability focused IAT deployed in our empirical study. It then highlights psychological research on negative stereotypes surrounding Black and Latino men, particularly those stereotypes that could drive perceivers to believe that individuals may possess heightened responsibility for aggressive actions committed by other group members. Next, it provides a psychological backdrop of the dangerous combination of entitativity[28] and race that potentially invites a particularized type of implicit bias focused on accomplice liability into the administration of criminal justice.

Section IV details the national empirical study we conducted on a diverse sample of Americans, identifying the way in which implicit racial bias potentially infiltrates the operation of the accomplice liability doctrine and felony murder rule. The study found that: (1) participants automatically individualize white men, while automatically deindividualizing Black and Latino men; (2) compared to white defendants, mock jurors held Latino defendants more responsible for—and ascribed greater intentionality for—the same types of felony-murder style killing; and (3) mock jurors' memories of case facts actually became sharpened when reading

28. Brian Lickel, David L. Hamilton, Grazyna Wieczorkowska, Amy Lewis, Steven J. Sherman, & A. Neville Uhles, *Varieties of Groups and the Perception of Group Entitativity*, 78 J. PERSONALITY & SOC. PSYCH. 223, 224 (2000) (describing the psychological concept of entitativity as "[t]he degree to which a collection of persons are perceived as being bonded together into a coherent unit."); *see also* Donald T. Campbell, *Common Fate, Similarity, and Other Indices of the Status of Aggregates of Persons as Social Entities*, 3 BEHAV. SCI. 14, 16–18 (1958).

about Latino defendants, demonstrating that aggressive stereotypes of certain groups can pave the way for heightened criminal responsibility.

Section V discusses these results in practical and constitutional contexts, and provides avenues for legislative reform, strategic litigation, and the exercise of prosecutorial discretion. The Article's conclusion calls for the elimination of the accomplice liability doctrine in combination with the felony murder rule as inexorably infected with racial bias. It is one thing to suggest that our legal system is especially draconian, and in the words of one prosecutor—if a perpetrator is "in for a dime," they are "in for a dollar."[29] It is entirely different to construct a system that allows white defendants to avoid the draconian consequences of the regime but permits indifference to individualization when applied to Black and Latino defendants. Acknowledging that our legal system was draconian could invite democratic outrage and legislative correction; but creating a system that permits discretionary indifference to the relative guilt or moral culpability of minority defendants avoids democratic or legislative correction.

I. THE FELONY MURDER RULE AND ACCOMPLICE LIABILITY: A DANGEROUS COMBINATION

There are perhaps no provisions of American criminal law that have been held in such disrepute as the felony murder rule and accomplice liability doctrine.[30] The felony murder rule and accomplice liability doctrine sit at the fulcrum of the criminal legal system's false promise of individualized moral culpability. Their bold, even reckless combination is a quintessential example of the system's delivery of an overly punitive, generalized class of collective punishment.[31] In a system that still promises to identify and ensure individual moral responsibility, the combination of accomplice liability and felony murder does just the opposite; it specifically authorizes and encourages prosecutors, judges, and juries to presume moral culpability and individual liability based upon group affiliation.[32]

Significantly, with respect to the prosecution function, the felony murder rule and accomplice liability doctrine shield the government from the obligation to prove core elements of the common-law offense of murder: that the defendant committed the act (*actus reus*) and that he intended

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29. *See* Waddington v. Sarausad, 555 U.S. 179, 199–200 (2009) (Souter, J., dissenting) (suggesting the accomplice liability instruction was defective owing to the ambiguity of the statutory language it incorporated, and that its deficiency was underscored by the prosecutor's erroneous argument).

30. The academic criticism of the rule is discussed more fully in Section I.A.1 and I.B.1, *infra.* In response to public outrage, California, Colorado, and Pennsylvania have begun to address their felony murder statutes, but other states like Michigan continue to incarcerate people—not for what they have done, not even for what they have intended, but for the deeds of others, or in instances where there is simply an absence of proof. *See infra* notes 168, 322, 325–26, and accompanying text.

31. John F. Decker, *The Mental State Requirement for Accomplice Liability in American Criminal Law*, 60 S.C. L. REV. 237, 239 (2008) ("No aspect of this law is more complex than that relating to the mental state requirement for accomplice liability."); *see also* Binder, *Mens rea Default Rules*, *supra* note 5.

32. *See* Tedesco, *supra* note 2, at 245–46.

to do so (*mens rea*).[33] Functionally, the combination of the felony murder rule and accomplice liability doctrine diminishes the amount of proof necessary to convict individuals, and, as we discuss, may be susceptible to the influence of implicit bias.[34] Unlike the majority of elements in a criminal prosecution, the felony murder rule and accomplice liability doctrine invite jurors to engage in an imaginative inquiry whereby both intent and action are inferred; as such, they are described as "imputed elements."[35]

Scholarship on felony murder has focused on the lacunae between the operation of the felony murder rule and America's promise of holding individuals responsible for their actions.[36] While this rule was repeatedly ascribed as having origins in common law, scholarship has noted the lack of historical basis for the provision at common law.[37] At the founding of the

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33. *See* Guyora Binder & Ekow N. Yankah, *Police Killings as Felony Murder*, 17 HARV. L. & POL'Y REV. 157, 227–28 (2022) (construing police killings as felony murder "deforms the meaning of the underlying crime[s], leaving us unable to grapple with and condemn the *mens rea* of police who kill unjustifiably"); GHANDNOOSH, STAMMEN, & BUDACI, *supra* note 10, at 10 (emphasizing the absence of "meaningful assessments of intentionally" under the felony murder rule); Cheryl Corley, *Juvenile Justice Groups Say Felony Murder Charges Harm Children, Young Adults*, NPR (Nov. 14, 2019, 5:00 AM), https://www.npr.org/2019/11/14/778537103/juvenile-justice-groups-say-felony-murder-charges-harm-children-young-adults ("Prosecutors can charge [children and young adults] with felony murder even if they didn't kill anyone or intend to do so.").

34. *See* Michael Serota, *Strict Liability Abolition*, 98 N.Y.U. L. REV. 112, 176 (2023) (contending that the broadness of a strict liability felony murder rule widens "the scope of unchecked discretion" and contributes to racial disparities among Black and white offenders); Egan, *supra* note 10, at 127–28 (2021) (finding that although prosecutors offered "a strong case for unlawful intentional discharge of a firearm," the prosecutor failed to bring a felony murder charge against the peace officer, thereby suggesting the felony murder rule is subject to "unconscionable systemic bias" and "so rarely gets used to the detriment of peace officers and is so often weaponized against people of color."); GHANDNOOSH, STAMMEN, & BUDACI, *supra* note 10, at 15 (concluding that "features of accomplice liability perpetuate the use of guilt by association, which has been linked to reinforcing biases").

35. Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 611, 617–18 (1984) ("Other exceptions inculpate actors who do not satisfy the paradigm for the offense charged. Such inculpating exceptions may be termed instances of 'imputed' elements of an offense . . . the complicity aspect of the felony-murder rule imputes both objective and culpability elements in homicide cases."). The risk of implicit bias interfering with a deliberative judgment is at its highest where decision makers are asked to make imaginative determinations or moral judgments. *See* Jody Armour, *Where Bias Lives in the Criminal Law and Its Processes: How Judges and Jurors Socially Construct Black Criminals*, 45 AM. J. CRIM. L. 203, 220–21 (2018) ("Bias in the social construction of [B]lack criminals thrives on juror discretion, which is greatest when factfinders are asked to make direct moral judgments on the basis of nondescriptive standards that are flexible and open-ended. Such discretion-laden and open-ended normative standards give maximum elbow room to conscious and unconscious bias."). Like questions of future dangerousness and impact of an offense on a victim, the imaginative question of moral responsibility is rife with opportunity for implicit bias. *See* Levinson, Cohen, & Hioki, *Deadly "Toxins"*, *supra* note 27, at 272–86 (demonstrating the connection between implicit racial bias and future dangerousness determinations in an empirical study); Molly J. Walker Wilson, *Retribution as Ancient Artifact and Modern Malady*, 24 LEWIS & CLARK L. REV. 1339, 1352–53 (2020) ("[W]e are biased against certain groups based upon assumptions we make and attitudes that we hold." (citing Alex Madva, *Implicit Bias, Moods, and Moral Responsibility*, 99 PAC. PHIL. Q. 1, 53 (2018))).

36. *See, e.g.*, Caldwell, *supra* note 22, at 913–14 (discussing the disconnect between murder that requires a mental state for culpability as compared to felony murder, which "removes the relevance of an individual's mental state for a killing from the equation" as long as the proper mental state for the enumerated felony exists).

37. Binder, *The Origins of American Felony Murder Rules*, *supra* note 5, at 63 ("Americans did not receive any felony murder rules from England, for the simple reason that there was no common law felony murder rule at the time of the American Revolution. English law traditionally imposed

United States, when a defendant was subject to capital punishment for the commission of the underlying felony alone—a participant in a burglary, for example, was already eligible for capital punishment—the felony murder rule was unnecessary.[38] In a sense, the rule emerged only after capital punishment was eliminated for ordinary felonies and was introduced as an attempt to reduce the proof of intent necessary to secure a conviction in circumstances where a defendant participated in a felony and death resulted but evidence of the requisite *mens rea* or *actus reus* was lacking.[39]

Existing scholarship on accomplice liability focuses on the unfairness of applying the same sentence to all defendants regardless of their individual culpability.[40] As independent sources of prosecutorial power, the felony murder rule and accomplice liability doctrine lean in favor of the government permitting presumptions of malice to extend beyond the measure of presented evidence.[41] Combined, however, especially in instances permitting capital punishment or mandatory life without parole sentences, the regime turns the ideals of our justice system upside down.[42] Little existing scholarship has addressed the combination of the felony murder rule and the accomplice liability doctrine. No scholarship, as far as we know, has addressed the way that both implicit bias and pre-cognition racial discrimination are elevated most under an accomplice liability felony murder regime.

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murder liability for most deaths caused by the intentional infliction of injury. Such killings were murders whether or not they occurred in the context of a felony, while a felony could not transform an accidental death into a murder.").

38. Remy J. Ferrario, *A Felon can be Held Responsible for a Murder Committed by a Fear-Motivated Victim—Responsibility is Based on a Theory of Vicarious Liability and Not Felony-Murder*, 3 ST. MARY'S L.J. 158, 159 (1971) ("A generally accepted explanation of the origin of the doctrine is that at early common law practically all felonies were punishable by death. Therefore, it was considered immaterial whether the condemned was hanged for the initial felony or for the death accidentally resulting from the felony. This is no longer true, for today, most felonies are not punishable by death."); *see* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 89, 97 (2002).

39. *See* Binder, *The Origins of American Felony Murder Rules*, *supra* note 5, at 64, 68, 203.

40. *See, e.g.*, Joseph C. Mauro, *Intentional Killing Without Intending to Kill: Knobe's Theory As a Rational Limit on Felony Murder*, 73 LA. L. REV. 1011, 1046 (2013) ("[S]entencing decisions are unavoidably infected with outcome bias. This is perhaps the most difficult problem to resolve. To be sure, outcome bias infects sentencing in all cases, not just felony murder, but the fact that felony murder authorizes murder-level punishment even when the defendant did not subjectively intend to kill or recklessly endanger exacerbates the problem of inflated sentencing. In other words, felony murder allows judges, who are unavoidably affected by bias, to be too harsh."); Rudolph J. Gerber, *The Felony Murder Rule: Conundrum Without Principle*, 31 ARIZ. ST. L.J. 763, 777–78 (1999) ("In many states, a felon involved in any minor degree in the death can be worse off with respect to the death penalty than a first degree premeditated murderer because the rule, stripped of any *mens rea* index, provides no meaningful narrowing to discriminate real from ersatz culpability.").

41. Binder, *Making the Best of Felony Murder*, *supra* note 5 (noting how the felony murder rule reduces burden to prove intentional killing and provides strict liability for deaths that occur during the course of an enumerated felony); Cynthia Ward, *Criminal Justice Reform and the Centrality of Intent,* 68 VILL. L. REV. 51, 51 (2023) (noting the doctrine of accomplice liability and the felony murder "reduce or eliminate the prosecution's burden of proving a defendant's mental culpability— 'intent'— in criminal homicide cases.").

42. *See infra* notes 144, 157 and accompanying text (discussing that seventeen states authorize the death penalty for some kind of felony murder and forty states authorize or require life without parole for felony murder).

The felony murder rule and accomplice liability doctrine have had pervasive influence on the American criminal legal system.[43] The remainder of this Section explores them individually.

A. The Felony Murder Rule: Guilt Without Intent

Applying the felony murder rule, a defendant is rendered guilty where a death occurs during the commission of an enumerated felony.[44] While states have different ways of stating the rule,[45] and in some instances provide limitation on the operation of the rule, scholars have essentially described the felony murder rule as: "either . . . a means of presuming malice to find a homicide, or . . . a distinct form of homicide based upon the intent to commit the underlying felony."[46] The Supreme Court has repeatedly upheld the felony murder rule, determining that it was not necessarily "unusual to punish individuals for the unintended consequences of their *unlawful* acts."[47]

The Supreme Court first touched on the issue of felony murder with respect to the death penalty in 1978, holding the imposition of the death sentence on Sandra Lockett unconstitutional in *Lockett v. Ohio*.[48] However, the Court failed to address the argument raised in Judge Rehnquist's dissent that the death penalty was not cruel or unusual for an aider and

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43. *See* Caldwell, *supra* note 22, at 906 ("The felony murder doctrine is one of the most criticized rules in the field of criminal law, yet it remains firmly entrenched in most jurisdictions in the United States." (footnote omitted) (citing, *inter alia*, Rudolph J. Gerber, *The Felony Murder Rule: Conundrum Without Principl*e, 31 ARIZ. ST. L.J. 763, 766–70 (1999))); Kevin Cole, *Killings During Crime: Toward a Discriminating Theory of Strict Liability*, 28 AM. CRIM. L. REV. 73, 73–74 (1991) (explaining that felony murder is "quite durable" despite much criticism); James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces that Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429, 1431 (1994) (analyzing "how a rule of law that has been maligned so mercilessly for so long and that is putatively irreconcilable with basic premises of modern criminal jurisprudence has survived and promises to persist into the twenty-first century." (footnote omitted)).

44. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 503 (9th ed. 2022); *see also* 40 AM. JUR. 2D *Homicide* § 36, Westlaw (database updated October 2023) ("Many statutes include in first-degree murder homicides that are committed in the perpetration of all or certain specified felonies. Under most of such statutes, it is not essential that there was a design to effect death, the murder being of the first degree where it takes place while the accused is engaged in the commission of certain enumerated felonies."); W.E. Shipley, Annotation, *Judicial Abrogation of Felony-Murder Doctrine*, 13 A.L.R. 4th 1226 § 1 (1982) ("The felony-murder doctrine, as developed at common law and embodied in statutes in many jurisdictions, provides that where a death occurs in the course of, or as a consequence of, the commission of another, distinct felony, the felonious intent involved in the underlying felony may be transferred to supply the intent to kill necessary to characterize the death as murder."). *But see* Binder, *The Origins of American Felony Murder Rules*, *supra* note 5, at 63 (observing that the felony murder rule was developed post-Bill of Rights).

45. *See* Joshua P. Gilmore, Comment, *Murder Felony is Felony Murder: How the Nevada Supreme Court's Decision in* Nay v. State *Reflects the Growing Misconception Surrounding "Afterthought" Robbery*, 9 NEV. L.J. 672, 677–83 (2009) (discussing differences in how state courts explain and apply felony murder statutes and noting that Hawaii and Kentucky exclude felony murder from their criminal homicide statutes altogether).

46. Roth & Sundby, *supra* note 5, at 448 ("Depending upon which conceptualization a court adopts, the felony-murder rule's constitutionality must be examined either as a presumption or as a form of strict liability.").

47. Dean v. United States, 556 U.S. 568, 575 (2009).

48. *See* Lockett v. Ohio, 438 U.S. 586, 589, 608–09 (1978).

abettor.[49] It was not until four years later, in *Enmund v. Florida*,[50] that the Court assessed the validity of the death penalty for accomplice under an Eighth Amendment analysis.[51] The Court accepted the idea of imposing criminal liability on accomplices, and that the "felony murder rule and the law of principals combine to make a felon generally responsible for the lethal acts of his co-felon."[52] However, under the Eighth Amendment, the Court found a national consensus of "[s]ociety's rejection of the death penalty for accomplice liability in felony murder[]."[53] Ultimately, the Court held that imposition of capital punishment on a person who does not kill or intend to kill violates the Eighth and Fourteenth Amendments.[54] But this holding was short-lived. Five years later, in *Tison v. Arizona*,[55] the Court held that the death penalty was constitutional for felony murder where the defendant had "major participation in the felony committed, combined with reckless indifference to human life," even where there was no evidence of intent to kill.[56] While Justice O'Connor once asserted that the felony murder rule was a fixture of English common law, and hundreds of years old,[57] multiple scholars have noted that the doctrine was actually an American, or at least a much later, invention.[58]

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49. *See id.* at 635–36 (Rehnquist, J., dissenting).

50. 458 U.S. 782 (1982).

51. *Id.* at 787.

52. *See id.* at 786 (quoting Enmund v. State, 399 So. 2d 1362, 1369 (Fla. 1981)).

53. *Id.* at 794–95.

54. *Id.* at 787–88, 798.

55. 481 U.S. 137 (1987).

56. *Id.* at 158; *see also* Cabana v. Bullock, 474 U.S. 376, 379, 392 (1986) (upholding a death sentence in a Mississippi case where "a participant in a robbery could be convicted of capital murder under the statute for a murder committed in the course of the robbery by an accomplice notwithstanding the defendant's own lack of intent that any killing take place" where finding of specific intent was made by the court on appeal rather than a jury); *id.* at 386 ("The Eighth Amendment is satisfied so long as the death penalty is not imposed upon a person ineligible under *Enmund* for such punishment. If a person sentenced to death in fact killed, attempted to kill, or intended to kill, the Eighth Amendment itself is not violated by his or her execution regardless of who makes the determination of the requisite culpability; by the same token, if a person sentenced to death lacks the requisite culpability, the Eighth Amendment violation can be adequately remedied by any court that has the power to find the facts and vacate the sentence. At what precise point in its criminal process a State chooses to make the *Enmund* determination is of little concern from the standpoint of the Constitution.").

57. *Enmund*, 458 U.S. at 816–17 (O'Connor, J., dissenting) ("[T]he felony-murder doctrine, and its corresponding capital penalty, originated hundreds of years ago, and was a fixture of English common law until 1957 when Parliament declared that an unintentional killing during a felony would be classified as manslaughter. The common-law rule was transplanted to the American Colonies, and its use continued largely unabated into the 20th century, although legislative reforms often restricted capital felony murder to enumerated violent felonies." (footnotes omitted)).

58. Leonard Birdsong, *Felony Murder: A Historical Perspective by Which to Understand Today's Modern Felony Murder Rule Statutes*, 32 T. MARSHALL L. REV. 1, 10 (2006) ("What we now know as the felony murder rule may have developed from a mistaken interpretation . . . "); Binder, *The Origins of American Felony Murder Rules*, *supra* note 5, at 63 ("[N]one of these accounts [of felony murder's origin] manages to identify when this supposed common law rule of strict liability for all deaths resulting from felonies became the law in England. None identifies a single case in which it was applied in England before American independence. . . . These accounts are equally hazy about early American law. None of them documents application of such a rule in colonial America, or in the early American republic. None of them troubles to show that such a rule ever led to the conviction of felons who had caused death truly accidentally, that is, without culpability. In short, there is something suspicious about our received account of the origins of American felony murder rules. This Article

Justice Alito's opinion in *Dobbs v. Jackson Women's Health Organization*[59] claims that a "proto-felony murder rule" existed at the founding of the United States to establish culpability for a death that resulted from an abortion.[60] While historians may debate the validity of Justice Alito's claim, *Dobbs* demonstrates the power of the felony murder rule, evident in its ability to authorize the murder prosecution of a doctor for assisting in an abortion that results in a woman's death.[61]

1. Scholarly Criticism of the Felony Murder Rule

Historically, the felony murder rule has been the subject of significant criticism.[62] As Scott Sundby and Nelson Roth observed: "Few legal doctrines have been as maligned and yet have shown as great a resiliency as the felony-murder rule."[63] Justice Brennan has described the felony murder rule as a "curious doctrine" and "[a] living fossil"; "other judges,

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vindicates such suspicion and exposes the harsh 'common law' felony murder rule as a myth." (footnote omitted)).

59. 142 S. Ct. 2228 (2022).

60. *Id.* at 2250–51.

61. *See id.* at 2250 ("That the common law did not condone even pre-quickening abortions is confirmed by what one might call a proto-felony-murder rule . . . Hale and Blackstone treated abortionists differently from *other* physicians or surgeons who caused the death of a patient 'without any intent of doing [the patient] any bodily hurt.' These other physicians — even if 'unlicensed' — would not be 'guilty of murder or manslaughter.' But a physician performing an abortion would, precisely because his aim was an 'unlawful' one." (alteration in original) (quoting MATTHEW HALE, 1 HISTORY OF THE PLEAS OF THE CROWN 429 (1736))).

62. *See* Franklin E. Zimring & Gordon Hawkins, *Murder, the Model Code, and the Multiple Agendas of Reform*, 19 RUTGERS L.J. 773, 777 (1988) ("The felony-murder doctrine, under which one is guilty of murder if a death results from the commission or attempted commission of any felony, is subjected to a cogent, thirteen-page critique in the Commentary to the Code. The Commentary condemns the doctrine for 'its essential illogic,' described as involving 'gratuitous' punishment, and said to be 'indefensible in principle.' Principled argument for the doctrine is said to be 'hard to find' and the only such argument cited—the rationale given by Holmes in *The Common Law*—is summarily rejected. '[T]he submission of the Model Code that the felony-murder doctrine should be abandoned as an independent basis for establishing the criminality of homicide' seems to follow inexorably from the critical analysis of the doctrine. Yet having discredited the doctrine, section 210.2(1)(b), in what is significantly described as '*a concession* to the facilitation of proof,' establishes 'a presumption' that rests on no more secure a basis than the discarded rule. The presumption is that the 'recklessness and indifference' required for criminal homicide to constitute murder 'are presumed if the actor is engaged, or is an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape, or deviant sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.'" (alteration in original) (footnotes omitted) (quoting MODEL PENAL CODE §§ 210.1–210.2 commentary (1980))); William W. Berry III, *Capital Felony Merger*, 111 J. CRIM. L. & CRIMINOLOGY 605, 607 (2021) (citing Jeanne Hall Seibold, Comment, *The Felony-Murder Rule: In Search of a Viable Doctrine*, 23 CATH. LAW. 133, 134 n.1 (1978) ("The felony-murder doctrine has been the subject of vitriolic criticism for centuries.")); *see also* George P. Fletcher, *Reflections on Felony-Murder*, 12 SW. U. L. REV. 413, 417 (1981); James J. Hippard, Sr., *The Unconstitutionality of Criminal Liability Without Fault: An Argument for a Constitutional Doctrine of Mens Rea*, 10 HOUS. L. REV. 1039, 1045 (1973); Maynard E. Pirsig, *Proposed Revision of the Minnesota Criminal Code*, 47 MINN. L. REV. 417, 427–28 (1963) (The felony murder rule "is highly punitive and objectionable as imposing the consequences of murder upon a death wholly unintended."); Frederick J. Ludwig, *Foreseeable Death in Felony Murder*, 18 U. PITTSBURGH L. REV. 51, 52 (1956); Norval Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50, 50 (1956).

63. Roth & Sundby, *supra* note 5 (noting scholars and jurists describe the rule as "monstrous," "unsupportable," and "'an unsightly wart on the skin of the criminal law' . . . that has 'no logical or practical basis for existence in modern law'" (footnotes omitted)).

courts, and commentators have called it . . . almost benign."[64] Indeed, it is described as the most widely criticized American criminal law rule.[65] As Professor Tomkovicz explained almost thirty years ago, the rule "cannot help but fascinate" as "[i]t permits severe punishment for the most heinous of offenses in some cases that can appropriately be described as accidents."[66]

2. Origins of the Felony Murder Rule

For decades, law students were taught that the felony murder rule—as odious as it might be—derived from England's common law. Guyora Binder's article *The Origins of American Felony Murder Rules* suggests this assumption was based on a false history.[67] Binder notes that a series of treatises and textbooks by luminaries like Wayne LaFave, Joshua Dressler, Arnold Loewy, and others—all without citation to sources or origins—assert that felony murder arose as part of common law.[68] But, Professor Binder argues that these texts were wrong:

> Americans did not receive any felony murder rules from England, for the simple reason that there was no common law felony murder rule at the time of the American Revolution. English law traditionally imposed murder liability for most deaths caused by the intentional infliction of injury. Such killings were murders whether or not they occurred in the context of a felony, while a felony could not transform an accidental death into a murder.[69]

The felony murder rule arose, Professor Binder notes, in the last thirty years of the nineteenth century—expanding state by state in legislative code, not through the common law.[70] Similarly, Professor Tomkovicz observed that the origin of "[t]he felony-murder rule has been traced to a

64. Noman J. Finkel, *Capital Felony-Murder, Objective Indicia, and Community Sentiment*, 32 ARIZ. L. REV. 819, 819 (1990) (citing Tison v. Arizona, 481 U.S. 137, 159, *reh'g denied*, 482 U.S. 921 (1987) (Brennan, J., dissenting)).

65. *See* Binder, *Making the Best of Felony Murder*, *supra* note 5, at 404 ("The felony murder doctrine, imposing murder liability for some unintended killings in the course of some felonies, is part of the law of almost every American jurisdiction. Yet it is also one of the most widely criticized features of American criminal law.").

66. Tomkovicz, *supra* note 43, at 1429–30.

67. *See* Binder, *The Origins of American Felony Murder*, *supra* note 5, at 60, 63.

68. *Id.* at 61–62.

69. *Id.* at 63.

70. *Id.* at 72, 202 ("The felony murder rules enacted in nineteenth-century America were not anachronistic vestiges of ancient rules . . . because the felony murder rules first proposed in England were never enacted into law, there or here. America's original felony murder rules were modern products of an era of legislative codification, limited by plausible conceptions of culpability from their very inception.").

variety of sources"[71] and that "[t]he reasons for the felony-murder rule are enshrouded, and destined to remain, in mystery."[72]

Not only are the origins of the felony murder rule murky, but the operation of the rule is also in contradiction to the established American legal principle "that criminal liability must rest on proof of a recognized level of mental fault for every essential element of an offense" and "implicit in some of the foregoing is the demand for liability proportionate to culpability."[73] Of particular concern, for our purposes, are the severe punishments imposed on those convicted of felony murder (often a mandatory life without parole sentence, or in some instances even death[74]) and what Binder describes as the theory of accomplice liability associated with felony murder.[75] The association of the accomplice liability theory with the felony murder rule is especially pernicious where proof of individual responsibility is missing.[76]

B. Group Liability: Accomplices and Beyond

While the felony murder rule elevates liability above an individual's moral culpability, the accomplice liability doctrine is a separate legal concept that spreads legal liability beyond individualized responsibility. An essential precept of our justice system was the promise that an individual could be punished only for an act committed in violation of a law adopted by a democratically elected government.[77] And indeed, the idea of group

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71. Tomkovicz, *supra* note 43, at 1442 ("Some say its source is Lord Dacre's Case. Others cite Mansell and Herbert's Case, which was decided just one year later. Others contend that Lord Coke fathered the doctrine in 1644. And at least one distinguished commentator believes that the rule that a killing during a felony would automatically become a murder was actually first promulgated by Sir Michael Foster in 1762. Suffice it to say that prior to Foster there is no unambiguous authority in support of the rule—either from the commentators or the courts. All of the putative earlier sources are subject to multiple interpretations—that is, the nature of the rule they intended to endorse is uncertain." (footnotes omitted)).

72. *Id.* at 1444–45.

73. *Id.* at 1437.

74. Guyora Binder, Brenner Fissell, & Robert Weisberg, *Capital Punishment of Unintentional Felony Murder*, 92 NOTRE DAME L. REV. 1141, 1147 (2017) ("[F]elony murder rules violate[] a constitutional requirement that severe punishment be conditioned on culpability. From this perspective, death is disproportionate for felony murder, because any severe punishment is disproportionate for felony murder.").

75. *See* Binder, *The Origins of American Felony Murder Rules*, *supra* note 5, at 201 (claiming "most American jurisdictions limited felony murder to (1) causing death through either violence or the reckless imposition of risk, in the course of inherently dangerous felonies; or (2) participating in felonies foreseeably involving acts of violence that resulted in death" and that "[i]n these ways, most American jurisdictions built culpability requirements into the *actus reus* of felony murder, and so avoided holding felons strictly liable for accidental death.").

76. *Id.* at 197. *But see id.* at 205 ("Imposing accomplice liability on all participants in a fatal felony might seem particularly attractive where it is difficult to establish who among a gang of assailants struck the fatal blow.").

77. United States v. Davis, 139 S. Ct. 2319, 2325 (2019) ("Vague laws also undermine the Constitution's separation of powers and the democratic self-governance it aims to protect. Only the people's elected representatives in the legislature are authorized to 'make an act a crime.'" (citing United States v. Hudson, 11 U.S. 32, 34 (1812))); United States v. Verdugo-Urquidez, 494 U.S. 259, 281 (1990) (Brennan, J., dissenting) ("The Constitution is the source of Congress' authority to criminalize conduct, whether here or abroad, and of the Executive's authority to investigate and prosecute

or collective punishment violates not only our own constitutional values but also international law.[78] Dissenting in *Korematsu v. United States*,[79] Justice Murphy observed that "to infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights."[80] He continued:

> To give constitutional sanction to that inference in this case, however well-intentioned may have been the military command on the Pacific Coast, is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow.[81]

However, group liability has emerged as a powerful tool of criminal law, in overlapping but distinct areas including "accomplice liability," "conspiracy charges," and a series of new offenses such as gang engagement or terrorism.[82] While these examples function independently of one other, they share an important element: holding an individual responsible for the actions of others. Statutes that create offenses based on group affiliation—such as Gang or RICO charges, Conspiracy charges, or Terrorism charges—are distinct from theories of culpability like "accomplice liability" which impute responsibility to one person for the actions of another.[83]

Under federal law, a person who "aids, abets, counsels, commands, induces or procures" the commission of a federal offense "is punishable as a principal."[84] As the Supreme Court has explained, "That provision derives from (though simplifies) common-law standards for accomplice liability. And in so doing, § 2 reflects a centuries-old view of culpability: that a person may be responsible for a crime he has not personally carried

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such conduct. But the same Constitution also prescribes limits on our Government's authority to investigate, prosecute, and punish criminal conduct, whether foreign or domestic. As a plurality of the Court noted in *Reid v. Covert*, 354 U.S. 1, 5–6 (1957): 'The United States is entirely a creature of the Constitution.'").

78. Evan C. Zoldan, *The Equal Protection Component of Legislative Generality*, 51 U. RICH. L. REV. 489, 504 (2017) ("Just as collective, family-based rewards were anathema to the revolutionary generation, so, too were collective, family based punishments. The Constitution's Corruption of Blood and Forfeiture Clause does not prevent a person from being punished for his *own* crime, of course. But, it does prevent a person's descendants from suffering economic disabilities because of their ancestor's crime; it reflects the belief, as the Court has held, that 'the children should not bear the iniquity of the fathers.'" (quoting Wallach v. Van Riswick, 92 U.S. 202, 210 (1875))).

79. 323 U.S. 214 (1944).

80. *Id.* at 240 (Murphy, J., dissenting).

81. *Id.*; *see also id.* at 242 ("Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States.").

82. *See* Steven R. Morrison, *Relational Criminal Liability*, 44 FLA. ST. U. L. REV. 635, 636, 641–42, 658–59, 670, 685 (2017).

83. *See* Katyal, *supra* note 3, at 1334–35.

84. 18 U.S.C. § 2(a) (2023).

out if he helps another to complete its commission."[85] The Court went on to cite a series of treatises[86] supporting the proposition that accomplice liability stretched to a person who committed any act, no matter how small because: "[a]fter all, the common law maintained, every little bit helps—and a contribution to some part of a crime aids the whole."[87]

However, many scholars have studied and questioned the propriety of imputed accomplice liability.[88] Joshua Dressler describes accomplice liability as "a disgrace" that "treats the accomplice in terms of guilt and potential punishment as if she were the perpetrator, even when her culpability may be less than that of the perpetrator . . . and/or her involvement in the crime is tangential."[89] As Dressler explained elsewhere: "To treat accomplices as if they had actually perpetrated the crime. . . deviates from the normal rules of criminal liability."[90]

Professor John Decker suggests that, "No aspect of this law is more complex than that relating to the mental state requirement for accomplice liability."[91] Complex is a kind word. Decker suggests that jurisdictions have three separate approaches to "hold[ing] an individual culpable for the conduct of another."[92] The first approach that dovetails with the commitment to holding individuals responsible for their actions is limited, holding a defendant responsible for the actions of another when "accomplice liability is dependent upon a finding that an accused's 'purpose [was] to encourage or assist another in the commission of a crime.'"[93] The second approach "turns on whether the accomplice harbored the mental state required of the substantive crime allegedly aided or abetted."[94] Last, "the third and broadest approach holds an accomplice liable for the 'natural and

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85. Rosemond v. United States, 572 U.S. 65, 70 (2014) (citing Standefer v. United States, 447 U.S. 10, 14–19 (1980); United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938) ("The substance of [§2's] formula goes back a long way.")); JOHN G. HAWLEY & MALCOLM MCGREGOR, THE CRIMINAL LAW 81 (3d ed. 1899)).

86. *See Rosemond*, 572 U.S. at 72–73 (first quoting 1 FRANCIS WHARTON, CRIMINAL LAW 322 (11th ed. 1912) ("Accomplice liability attached upon proof of '*[a]ny* participation in a general felonious plan' carried out by confederates."); then quoting 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW 392 (7th ed. 1882) ("If a person was 'present abetting while *any* act necessary to constitute the offense [was] being performed through another,' he could be charged as a principal—even 'though [that act was] *not the whole thing necessary*.'"); and then quoting ROBERT DESTY, A COMPENDIUM OF AMERICAN CRIMINAL LAW 106 (1882) ("'The quantity [of assistance was] immaterial,' so long as the accomplice did '*something*' to aid the crime.")).

87. *Rosemond*, 572 U.S. at 73.

88. *See, e.g.*, Robinson, *supra* note 35, at 613–14 ("American criminal law permits the imputation of both the objective and culpability elements of a crime. While the most obvious and common instances of imputing objective elements are found in the rules governing complicity, such rules are only one of several seemingly dissimilar doctrines that impose liability even though the defendant has not satisfied all the objective elements of an offense." (footnote omitted)).

89. Joshua Dressler, *Reforming Complicity Law: Trivial Assistance as a Lesser Offense?*, 5 OHIO ST. J. CRIM. L. 427, 428–29 (2008).

90. Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 92 (1985).

91. Decker, *supra* note 5, at 239.

92. *Id.*

93. *Id.* (alteration in original) (quoting WAYNE R. LAFAVE, CRIMINAL LAW § 13.2(b), at 675 (4th ed. 2003)).

94. *Id.* at 239–40.

probable' consequences of a principal's conduct that the accomplice somehow assisted or encouraged, regardless of the accomplice's mental state."[95] As Professor Decker notes, "[m]embers of the academic community . . . have strongly criticized" the rule for holding the accomplice to the same level of culpability as the principal.[96]

Sherif Girgis pointed to Judge Learned Hand's opinion in *United States v. Peoni*[97] to explain accomplice liability.[98] As Girgis observed, Hand suggested that "ancient authorities" opined "that 'the law of homicide is quite wide enough to comprise . . . those who have "procured, counseled, commanded, or abetted'" the felony.[99] Girgis notes that with respect to felony murder accomplice liability "the *actus reus* bar is set remarkably low."[100] There is no requirement that the aiding behavior be the "but for cause" of the homicide; all a participant needs to do is assist in the underlying felony, and they too are held responsible for the murder.[101] Thus, "[w]ith striking capaciousness, the law (in the words of one commentator) requires only that it 'could have contributed to the criminal action of the principal,' and that 'without the [helper's] influence or aid, it is possible that the principal would not have acted as he did.'"[102] As the California Supreme Court recently explained, the accomplice liability rule allows an accomplice to be held culpable for the crime and any other crime "that is the natural and probable consequence of the aided and abetted crime."[103]

In some jurisdictions the *mens rea* requirement for accomplice liability permits a finding of culpability based broadly on the mental status of another.[104] Accomplices to crimes are often "punishable for the crime of conspiracy," and "always . . . punishable . . . for assisting in crime under nonagency doctrines."[105] An accomplice to a robbery can be automatically transmogrified into a perpetrator of murder where a coconspirator's recklessness or minimal *mens rea* results in the death of a person during the felony.[106] To the extent that the combination of the accomplice liability doctrine and felony murder rule allows for the prosecution of a person who only participated in the felony, the combined doctrines address a problem

95. *Id.* at 240 (footnote omitted) (quoting People v. Feagans, 480 N.E.2d 153, 159 (Ill. App. Ct. 1985)).
96. *Id.* at 243.
97. 100 F.2d 401 (2d Cir. 1938).
98. Sherif Girgis, *The Mens rea of Accomplice Liability: Supporting Intentions*, 123 YALE L.J. 460, 465 (2013).
99. *Id.* (omissions in original) (quoting United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938)).
100. *Id.*
101. *See id.* at 465–66.
102. *Id.* (second alteration in original) (emphasis omitted) (quoting Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CALIF. L. REV. 323, 359 (1985)).
103. People v. Gentile, 477 P.3d 539, 542 (Cal. 2020).
104. *See* Decker, *supra* note 5, at 247–48.
105. Dressler, *supra* note 89, at 115.
106. *See* Decker, *supra* note 5, at 249–50.

that does not actually exist, because accomplices are already being punished for their crimes.[107]

While the accomplice liability doctrine allows an accomplice to be rendered responsible for the acts of a perpetrator, various states and the federal government have developed a series of offenses—separate and apart from the accomplice liability doctrine—that criminalize an individual's participation in an illegal enterprise with others. Of these offenses, bringing charges against an individual for the actions of others under conspiracy laws is the most commonly used.[108] Wayne Lafave and Austin Scott provide:

> Although the crime of conspiracy is somewhat vague, which is one of many reasons why it is often asserted that the prosecution has a distinct advantage in conspiracy cases, it may be said to require: (1) an agreement between two or more persons, which constitutes the act; and (2) an intent thereby to achieve a certain objective which, under the common law definition, is the doing of either an unlawful act or a lawful act by unlawful means.[109]

Conceptions of accomplice liability and conspiracy are often conflated. Conspiracy is an entirely different offense with which the government is authorized to charge a defendant, whereas accomplice liability is a method with which to charge a defendant in the underlying offense. However, while the two concepts may overlap, they are ultimately distinct legal doctrines.[110] The "principle of accomplice liability, popularly known as the *Pinkerton* rule, has been almost universally condemned by the academic community."[111] In *Pinkerton v. United States*,[112] the defendants were convicted of conspiracy to violate provisions of the Internal Revenue Code.[113] The Court held that each defendant was responsible for all of the acts of their co-conspirators done in furtherance of the conspiracy.[114]

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107. Dressler, *supra* note 89, at 115.

108. Katyal, *supra* note 3, at 1310 & n.4 (quoting United States v. Reynolds, 919 F.2d 435, 439 (7th Cir. 1990) ("[P]rosecutors seem to have **conspiracy** on their word processors as Count I; rare is the case omitting such a charge." (alteration in original) (emphasis added)); Paul Marcus, *Criminal Conspiracy Law: Time To Turn Back from an Ever Expanding, Ever More Troubling Area*, 1 WM. & MARY BILL RTS. J. 1, 9 (1992) ("[C]hange in the growing number of **conspiracy** prosecutions can be seen in large cities and small cities, in regions throughout the country, in the federal courts and in the state courts." (emphasis added))).

109. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 6.4, at 525 (2d ed. 1986).

110. *See* Michael Heyman, *Losing All Sense of Just Proportion: The Peculiar Law of Accomplice Liability*, 87 ST. JOHN'S L. REV. 129, 136–38 (2013).

111. Jon May, Pinkerton v. United States *Revisited: A Defense of Accomplice Liability*, 8 NOVA L.J. 21, 21 (1983) (footnote omitted) (first citing Pinkerton v. United States, 328 U.S. 640 (1946); then citing Note, *Vicarious Liability for Criminal Offenses of Co-Conspirators*, 56 YALE L.J. 371 (1947); then citing Note, *Developments in the Lawriminal Conspiracy*, 72 HARV. L. REV. 920, 998 (1959); then citing WAYNE R. LAFAVE & AUSTIN WAKEMAN SCOTT, HANDBOOK ON CRIMINAL LAW 515 (1972); and then citing Thomas A. Schuessler, Note, *Liability for Co-Conspirator's Crimes in the Wisconsin Party to a Crime Statute*, 66 MARQ. L. REV. 344 (1983)).

112. 328 U.S. 640 (1946).

113. *Id.* at 641.

114. *Id.* at 647; *see also* Katyal, *supra* note 3, at 1309.

One highly criticized component of the accomplice liability doctrine, as it operates on a conspiracy charge, is that it holds a defendant liable for acts committed by others who are part of the conspiracy but for which the defendant did not do or intend to be done.[115] As Professor Alex Kreit has explained: "The parallels between the two doctrines are especially strong when the felony murder rule is employed based on another person's acts (whether a co-felon's or those of a person unaffiliated with the felony)."[116] As he noted,

> [T]he felony murder doctrine began as a harsh common law rule that "declare[d] that one is guilty of murder if death results from conduct during the commission or attempted commission of any felony" and thus "operated to impose liability for murder based on . . . strict liability." . . . [M]ost modern felony murder statutes limit liability to deaths that result from the commission of an enumerated felony or an inherently dangerous felony; many others restrict the doctrine to deaths that result from the act of a co-felon.[117]

Courts allow a prosecutor to hold a defendant liable for felony murder where the death was completely accidental resulting in a strict liability "that is inconsistent with the due process concept of personal guilt."[118] These rules not only permit liability, but they "diminish the government accountability that is crucial to constitutional governance because they punish amorphous conduct based on a 'patchwork' of evidence."[119] Neal Katyal acknowledged that for over fifty years, "major scholarly articles have alleged the doctrine [of conspiracy law] 'unnecessary.'"[120] But Katyal provides a full-throated defense of conspiracy charges, arguing that, "Without [them], there would be less flipping, and with less flipping, more coercive law enforcement techniques would be necessary."[121] Katyal also observes that "some level of unfairness will always be present in the criminal justice system," and that "[u]nfortunately, innocents will be punished wrongly, and the less culpable will be found liable at times for more than they should."[122] Katyal acknowledges that these costs should be weighed against the broader efficiencies, if, for instance, further study shows that the doctrines are unfairly applied.[123]

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115. *See* Alex Kreit, *Vicarious Criminal Liability and the Constitutional Dimensions of* Pinkerton, 57 AM. U. L. REV. 585, 626–27 (2008).

116. *Id.* at 627–28.

117. *Id.* at 628–29 (second alteration in original) (quoting MODEL PENAL CODE § 210.2 cmt. 6, at 30–31 (1980)).

118. *Id.* at 629.

119. Margulies, *supra* note 14, at 514.

120. Katyal, *supra* note 3, at 1309 (citing Phillip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137, 1140 (1973)); *see id.* at 1372 (noting "the conventional wisdom that *Pinkerton* liability is some sort of criminal monster"); *id.* at 1375 ("[S]ome level of unfairness will always be present in the criminal justice system. Unfortunately, innocents will be punished wrongly, and the less culpable will be found liable at times for more than they should.").

121. *Id.* at 1372.

122. *Id.* at 1375.

123. *Id.*

Our research demonstrates that implicit bias impacts the way jurors see individuals and groups. The focus of our research applies most clearly to felony murder and accomplice liability, but the research invites consideration of the way conspiracy charges and other provisions of group liability such as RICO[124] and Continuing Criminal Enterprise (CCE)[125] invite bias into the jury determination. Other research has also raised concerns that the prosecution of RICO cases invites systemic bias.[126] The essence of "constitutional democracy" requires "the government prove that the defendant is responsible for a past misdeed."[127] However, conspiracy invites jurors to speculate on what "Justice Jackson described . . . as 'chameleon-like,' focusing on an elusive 'meeting of [the] minds' instead of on conduct. As a result, jurors can convict when they perceive the defendant and his or her associates as possessing 'a general disposition towards unlawful behavior.'"[128] As Professor Margulies explained bluntly "the doctrine of conspiracy encourages guilt by association: jurors who take a dislike to one defendant on trial may extend that dislike to the others."[129]

II. THE IMPACT OF THE FELONY MURDER RULE AND ACCOMPLICE LIABILITY DOCTRINE

The combination of the felony murder rule and accomplice liability doctrine have an outsized impact on the American legal system, permitting the imposition of draconian punishments without individualized assessments of culpability. The combination of the accomplice liability doctrine and the felony murder rule results in the over-incarceration of people of color in the United States,[130] has played a deeply concerning role in America's experiment with capital punishment,[131] is the basis for mandatory life without parole sentences in a number of jurisdictions,[132] increases risks of wrongful conviction,[133] and invites transfer of children to adult court where they are exposed, in many instances, to life sentences.[134] This Section investigates statistical information that sheds light on our thesis that the combination of the accomplice liability doctrine and felony murder rule play an intolerable and unconstitutional role in American punishment.

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124. *See generally* 18 U.S.C. §§ 1961–1968; Marjorie A. Shields, Annotation, *Validity of Criminal State Racketeer Influenced and Corrupt Organizations Acts and Similar Acts Related to Gang Activity and the Like*, 58 A.L.R. 6th 385 (collecting cases concerning the use of state and federal Gang offenses).

125. *See generally* 21 U.S.C. § 848.

126. Jordan Blair Woods, *Systemic Racial Bias and RICO's Application to Criminal Street and Prison Gangs*, 17 MICH. J. RACE & L. 303, 352 (2012) ("[T]his Article's presentation of new empirical data casts doubt over whether the application of RICO to prosecute gangs is a racially unbiased process.").

127. Margulies, *supra* note 14, at 517.

128. *Id.* (quoting Phillip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CALIF. L. REV. 1137, 1155 (1973)).

129. *Id.*

130. GHANDNOOSH, STAMMEN, & BUDACI, *supra* note 10, at 15.

131. *Id.*

132. *Id.* at 2.

133. *See* discussion *infra* Section II.B.

134. GHANDNOOSH, STAMMEN, & BUDACI, *supra* note 10, at 13.

It does this by exploring overall racialized data surrounding felony murder cases, the racialized role of felony murder in capital punishment and life without parole sentencing, and considering novel information we analyzed regarding the role of felony murder and race in wrongful convictions.

A. The Felony Murder Rule as a Driver of Racial Disparities

While studies have repeatedly noted general racial disparities in the criminal law system, analysis identifying exactly where these disparities arise within the legal process has been sparse. Research suggests that the administration of accomplice liability and the felony murder rule disproportionately impact Black and minority defendants.[135] Much of this analysis began in the context of capital punishment.[136] But emerging research suggests that racial discrepancies also apply to life without parole sentencing.[137]

The Sentencing Project's Report, *Felony Murder: An On Ramp for Extreme Sentencing*,[138] highlights the connection between race and felony murder.[139] It catalogs the fact that in Pennsylvania, four of every five "imprisoned individuals with a felony murder conviction were people of color" in 2020, and 70% were Black;[140] that "[i]n Cook County, Illinois, eight out of 10 people sentenced under [a] felony murder rule . . . were Black";[141] and that, between 2012 and 2018 in Minnesota's "Ramsey and Hennepin Counties, . . . people of color accounted for 80% of . . . felony murder convictions."[142] The report notes that, "In Missouri, felony murder

135. *Id.* at 5–6.

136. *See* Kat Albrecht, *Data Transparency & the Disparate Impact of the Felony Murder Rule*, DUKE CTR. FOR FIREARMS L. (Aug. 11, 2020), https://firearmslaw.duke.edu/2020/08/data-transparency-the-disparate-impact-of-the-felony-murder-rule/ ("A majority of this work is grounded in the most severe punishment: the death penalty (Givelber 1994, Rosen 1989, Wolfgang et al. 1962). There are only a few studies that really break the felony murder rule down by race in terms of differential death penalty outcomes. First, Rosen (1989) found that defendants involved in a first-degree felony murder actually had worse odds with the death penalty than defendants with first degree premeditated murder charges. Second, Rosen (1989) and Bowers (1989) found that black defendants are much more likely to be charged in felony murder cases if the victim is white. Wolfgang et al. (1962) also poignantly notes that the actual rate of execution is the highest for black felony murderers. This is consistent with racially charged punishment in the history of the United States. In a report commissioned by the Model Penal Code Project, they found that out of 3,096 people executed for murder 1,516 were African American (Sellin 1959)." (citations omitted)).

137. *Id.*

138. *See generally* GHANDNOOSH, STAMMEN, & BUDACI, *supra* note 10.

139. *Id.* at 2, 5–6.

140. *Id.* at 2 (citing ANDREA LINDSAY, PHILA. LAWS. FOR SOC. EQUITY, LIFE WITHOUT PAROLE FOR SECOND-DEGREE MURDER IN PENNSYLVANIA: AN OBJECTIVE ASSESSMENT OF SENTENCING 11 (2021) (available at https://www.plsephilly.org/wp-content/uploads/2021/01/PLSE-Second-Degree-Murder-Audit-Jan-19-2021.pdf)).

141. *Id.* at 5 (citing Kat Albrecht, *Data Transparency & the Disparate Impact of the Felony Murder Rule*, DUKE CTR. FOR FIREARMS L. (Aug. 11, 2020), https://firearmslaw.duke.edu/2020/08/data-transparency-the-disparate-impact-of-the-felony-murder-rule/).

142. *Id.* at 5 (citing Greg Egan, *Deadly Force: How George Floyd's Killing Exposes Racial Inequities in Minnesota's Felony-Murder Doctrine Among the Disenfranchised, the Powerful, and the Police*, 4 MINN. J.L. & INEQUITY 1, 5 (2021)).

is among the top 20 offenses for which Black individuals were imprisoned in 2020, but not so for the non-Black population."[143]

The penalties for felony murder imposed using the doctrine of accomplice liability are especially draconian. We cannot ignore the possibility that some states tolerate this combination of draconian punishment, reduction in the burden of proof, and an authorized indifference to individualized culpability because the doctrines can be applied disproportionately to Black defendants. Seventeen states permit capital punishment for individuals convicted of felony murder.[144] Additionally, "nine states and the federal system mandate LWOP [Life Without Parole][145] sentences, 15 states mandate LWOP in some cases, and 16 states and Washington, DC make LWOP a sentencing option. Five states permit or require a virtual life sentence of 50 years or longer for some or all felony murder convictions."[146]

1. Operation of the Felony Murder Rule: Capital Punishment

The combination of the felony murder rule and accomplice liability doctrine has deleterious impact on capital punishment jurisprudence, and also on the operation of schemes providing for mandatory life without parole. Professors Sam Kamin and Justin Marceau did an analysis of accomplice liability with respect to capital punishment,[147] concluding that "in many cases we can have little confidence that a statute's aggravating factors are serving their constitutional function of rationally determining who will live and who will die."[148] Currently, seventeen jurisdictions permit execution of a defendant based on the felony murder rule.[149] Eleven people in the modern era have been executed under circumstances where the prosecution was not required to prove that the condemned defendant had

143. *Id.* (citing MICHAEL L. PARSON & ANNE L. PRECYTHE, MO. DEP'T OF CORR., PROFILE OF THE INSTITUTIONAL AND SUPERVISED OFFENDER POPULATION (2021) (available at https://doc.mo.gov/sites/doc/files/media/pdf/2020/03/Offender_Profile_2019_0.pdf)).

144. Joseph Trigilio & Tracy Casadio, *Executing Those Who Do Not Kill: A Categorical Approach to Proportional Sentencing*, 48 AM. CRIM. L. REV. 1371, 1401 n.280 (2011) (identifying ten jurisdictions that permit execution under the *Tison* standard and an additional nine jurisdictions that authorize death penalty for non-triggerman based upon an additional finding of complicity or knowledge that lethal force would be used). Two states, Delaware and Colorado, have since repealed or invalidated their legislative schemes. *See Delaware Supreme Court Declares State's Death Penalty Unconstitutional*, DEATH PENALTY INFO. CTR. (Aug. 3, 2016), https://deathpenaltyinfo.org/news/delaware-supreme-court-declares-states-death-penalty-unconstitutional; *Colorado Becomes 22nd State to Abolish Death Penalty*, DEATH PENALTY INFO. CTR. (Mar. 24, 2020), https://deathpenaltyinfo.org/news/colorado-becomes-22nd-state-to-abolish-death-penalty.

145. GHANDNOOSH, STAMMEN, & BUDACI, *supra* note 10, at 2 (referring to sentences of life without the possibility of parole as LWOP sentences).

146. *Id.*

147. Sam Kamin & Justin Marceau, *Vicarious Aggravators*, 65 FLA. L. REV. 769, 769, 796–98 (2013).

148. *Id.* at 769.

149. *See* sources cited *supra* note 144.

specific intent to kill.[150] Seven of these were Black or Latinx defendants.[151] In these and other felony murder cases, race of the defendant and race of the victim play significant roles in the likelihood a defendant receives the death sentence.[152] Indeed, jurists and scholars have noted that statistical evidence of racial bias is at its highest in the least culpable cases that result in death.[153] Other scholars have more explicitly argued that sentencing defendants to death for felony murder under an accomplice liability standard anchors punishment on the most draconian outcome.[154] It is sufficient for our purposes to observe that authorizing the government to sentence a person to death for the actions of another—imputing both the requisite *mens rea* and *actus reus*—is an extreme expression of governmental power that has been tolerated because its application was limited "to a few outcast . . . whose political position is so weak and whose personal situation is so unpopular, and who are so ugly that public revulsion, which would follow the uniform application of the penalties applied to them, doesn't follow in these few outcast preachers . . . condemned to that punishment."[155]

2. Operation of the Felony Murder Rule: Life Without Parole

The felony murder rule leaves an even larger footprint on the operation of mandatory life without parole sentencing.[156] The felony murder rule exists in forty-eight states and provides for life without parole in at least forty states.[157] A number of states do not distinguish between felony murder accomplice liability and simple murder—categorizing both as

150. *Executed But Did Not Directly Kill Victim*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/executions-overview/executed-but-did-not-directly-kill-victim (last visited Nov. 5, 2023) (noting that these cases are distinguished, throughout this article, from instances where a perpetrator paid another party to commit a murder).

151. *Id.*

152. *See Executions by Race and Race of Victim*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/executions-overview/executions-by-race-and-race-of-victim (last visited Nov. 5, 2023).

153. *See* Rory K. Little, *What Federal Prosecutors Really Think: The Puzzle of Statistical Race Disparity Versus Specific Guilt, and the Specter of Timothy McVeigh*, 53 DEPAUL L. REV. 1591, 1605 (2004) (citing McCleskey v. Kemp, 481 U.S. 279, 367 (1987) (Stevens, J., dissenting) ("If Georgia were to narrow the class of death-eligible defendants to those categories [of "extremely serious" murders], the danger of arbitrary and discriminatory imposition of the death penalty would be significantly decreased, if not eradicated.")); *see also* Emily Hughes, *Concluding Thoughts: Speaking to Be Understood: Identity and the Politics of Race and the Death Penalty*, 53 DEPAUL L. REV. 1675, 1676–77 (2004) ("[D]eath row is filled with 'a substantial over-representation' of African Americans—'whites are 46%, African Americans . . . are 42%, and Latinos are 10%'—even though African Americans are only 'about 13% of the population.' While the racially-biased administration of the death penalty is disturbing, the 'disparity is not totally surprising,' in part because of the 'unmistakable, unanswerable discrimination by race of victim.' What this means is that '[t]hose who were charged with killing white victims are far more likely to be sentenced to death than those who were charged with killing black victims.'" (quoting Samuel Gross, Remarks at the DePaul University College of Law Race to Execution Symposium 6 (Oct. 24, 2003) (transcript on file with DePaul Law Review))).

154. Tedesco, *supra* note 2, at 233; David McCord, *State Death Sentences for Felony Murder Accomplices Under the* Enmund *and* Tison *Standards*, 32 ARIZ. ST. L.J. 843, 892–93 (2000).

155. Transcript of Oral Argument at 5, Aikens v. California, 406 U.S. 813 (1972) (No. 68–5027).

156. Steven Drizin & Shobha L. Mahadev, *Felony Murder, Explained*, THE APPEAL (Mar. 4, 2021), https://theappeal.org/the-lab/explainers/felony-murder-explained/.

157. GHANDNOOSH, STAMMEN, & BUDACI, *supra* note 10, at 24.

second-degree murder.[158] Other states provide for accomplice liability felony murder by case-law.[159]

The Sentencing Project suggests that "[i]n Pennsylvania, four of every five imprisoned individuals with a felony murder conviction were people of color in 2020, and 70% were African American," with similar rates of disparity in local jurisdictions like Cook County, Illinois, and Ramsey and Hennepin Counties in Minnesota.[160] The only national statistics available from the Bureau of Justice Statistics covers the years 1980-2008.[161] In those cases, 60% of the defendants were Black, and 38% of the defendants were white.[162] While there is no current data capturing the number of people convicted of accomplice liability felony murder, analysis of state data is disturbing. Notably, "a recent study out of Duke Law School's Center for Firearms Law found that in Cook County, Illinois, 81.3% of people sentenced under the felony murder rule are Black."[163] In Minnesota, Black people make up more than 50% of the individuals prosecuted under felony murder law despite making up less than 10% of the population. Based upon population, Native Americans are ten times "more likely to be charged under the [f]elony [m]urder [l]aws" and Black people are five times more likely to be prosecuted under felony murder laws.[164] As previously stated, "[f]our out of five people . . . convicted of second-degree murder in Pennsylvania are people of color, and . . . [70%] are Black."[165] Data from Florida reveals a wildly distorted use of

158. *See* Ursula Bentele, *Multiple Defendant Cases: When the Death Penalty Is Imposed on the Less Culpable Offender*, 38 RUTGERS L. REC. 119, 120 (2010) ("In most jurisdictions, accomplice liability principles render all those who participate in a felony, where death results, equally guilty of capital murder."); Russell Shankland, *Duress and the Underlying Felony*, 99 J. CRIM. L. & CRIMINOLOGY 1227, 1249 (2009) ("Where states prohibit the [duress] defense for felony murder, accomplice liability leaves a coerced actor vulnerable to conviction for the deaths of numerous people who die in a variety of ways. To hold an accomplice accountable, the victim of the felony murder does not need to also be the victim of the underlying felony. The death of any uninvolved party may trigger accomplice liability.").

159. *See* Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965, 980 (2008) ("An emerging cause of undeserved felony murder liability in the twentieth century was the tendency of some courts to expand the scope of accomplice liability for *culpable* killings, or to find increasingly attenuated connections between felonies and such killings. Another troubling development was legislative expansion of predicate felonies combined with reluctance by some courts to require an independent felonious purpose, or a genuinely dangerous felony." (footnotes omitted)).

160. GHANDNOOSH, STAMMEN, & BUDACI, *supra* note 10, at 5.

161. *See* U.S. HOMICIDE TRENDS 1980–2008, *supra* note 10, at 1.

162. *Id.* at 12 tbl.7 (detailing the race of felony murder offenders); *see id.* at 5 tbl.2 (detailing the age of felony murder offenders).

163. Molly Greene, *States Should Abolish "Felony Murder" Laws*, THE APPEAL (Mar. 30, 2021) (citing Kat Albrecht, *Data Transparency & the Disparate Impact of the Felony Murder Rule*, DUKE CTR. FOR FIREARMS L. (Aug. 11, 2020), https://firearmslaw.duke.edu/2020/08/data-transparency-the-disparate-impact-of-the-felony-murder-rule/), https://theappeal.org/the-point/states-should-abolish-felony-murder-laws/.

164. *Felony Murder Explained*, FELONY MURDER L. REFORM, https://fmlr.org/felony-murder-explained/ (last visited Nov. 5, 2023).

165. ANDREA LINDSAY & CLARA RAWLINGS, PHILA. LAWS. FOR SOC. EQUITY, LIFE WITHOUT PAROLE FOR SECOND-DEGREE MURDER IN PENNSYLVANIA: AN OBJECTIVE ASSESSMENT OF RACE 1 (2021) (available at https://www.plsephilly.org/wp-content/uploads/2021/04/PLSE_SecondDegreeMurder_and_Race_Apr2021.pdf).

felony murder charges based upon race.[166] While there are no national statistics for the number of people serving life without parole as a result of a felony murder conviction,[167] the Sentencing Project estimates that one quarter to one half of the individuals convicted of murder in states like Pennsylvania, Michigan, California, Minnesota, and Missouri were convicted of felony murder.[168] Especially with respect to children prosecuted in adult court as adults, group liability has overridden insistence on individualized assessments of culpability.[169]

The felony murder accomplice liability legal regime does not merely operate in instances where the prosecution knows that one individual was responsible for a murder committed during the course of a robbery with accomplices. Instead, the broad implication of the rule is that when the State suspects multiple individuals of being involved in a robbery, and suspects that one or more of those individuals (but not all of them) caused a death during the robbery, but the State is unable to identify who actually caused the murder, the State simply prosecutes all three individuals under the felony murder rule combined with the accomplice liability doctrine.[170] This permits prosecutors to argue alternative theories of culpability, allows for jury speculation, and ultimately ensures that one or more of the defendants may be wrongly held responsible for the actions of another.[171] Ultimately, there is really no accounting of the actual number of people serving life without parole for felony murder under an accomplice liability theory, because the statutes function as fictions that result in defendants being counted as "convicted of murder."[172] Felony murder under an accomplice liability theory is not counted as a lesser offense involving diminished culpability; rather, under data collection tools like the Bureau of Justice Statistics, each defendant convicted of felony murder under an accomplice

166. Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103, 1117–19 (1990) (detailing disproportionate use of felony murder prosecutions and capital punishment where defendant was Black and victim white).

167. *See* Drizin & Mahadev, *supra* note 156 (noting felony murder in America remains "an outlier among common law countries . . . with some version of the law in place in more than 40 states and at the federal level"); GHANDNOOSH, STAMMEN, & BUDACI, *supra* note 10, at 4 (indicating that "[o]nly two states, Hawaii and Kentucky, do not have felony murder laws").

168. GHANDNOOSH, STAMMEN, & BUDACI, *supra* note 10, at 4.

169. *See* Caldwell, *supra* note 22, at 907–08 (noting that over one quarter of the people serving life without parole for a crime of murder "were juveniles [who] had been convicted of felony murder as a result of their participation 'in a robbery or burglary during which the co-participant committed murder, without the knowledge or intent of the teen.' High rates of accomplice liability in juvenile felony murder cases are due, in part, to the fact that young people tend to commit crimes in groups." (quoting AMNESTY INT'L & HUM. RTS. WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 1–2 (2005))).

170. *But see* Bradshaw v. Stumpf, 545 U.S. 175, 190 (2005) (Thomas, J., concurring) ("This Court has never hinted, much less held, that the Due Process Clause prevents a State from prosecuting defendants based on inconsistent theories").

171. *See, e.g.*, *id.* at 191–92.

172. *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 ((("The total number of people serving sentences for felony murder in California is unknown because the cases are not tracked separately from other murder convictions. But proponents of the bill estimate that it is between 400 and 800.").

liability theory is counted as having committed a murder even though only one person in each circumstance leading to the conviction of multiple defendants actually committed the murder.[173]

3. Operation of the Felony Murder Rule: Race and Wrongful Convictions

Wrongful convictions in accomplice liability felony murder cases present particularly novel concerns due to the diminished burden of proof under these doctrines. Our research, described below, determines that these risks indeed connect to exoneration data, suggesting that the combination of the doctrines has led to unjust convictions.[174] According to records from the National Registry of Exonerations there have been 1,167 exonerations in murder cases.[175] Of these, 55% wrongfully convicted defendants were Black, 12% were Hispanic, and 2% were other minorities.[176] White defendants made up only 32% of the total number of wrongful convictions.[177] Our statistical analysis reveals that roughly 27% of these exonerations in homicide cases involved co-defendant participation.[178] A disproportionate number of these co-defendant cases involve Black, Latinx, or other minority defendants and white victims.[179] When the defendant is Black and the victim is white, the percentage of co-defendant cases rises to 40%, when the defendant is Latinx and the victim is white it rises to 42%, when the defendant is Native American and victim is white it is 57% and under "other,"[180] it is 100%.[181] The registry details dozens of cases like the prosecution of Rogelio Arroyo, who, after being told that

173. Future research should consider whether implicit bias informs arrests and charging decisions in a manner that increases computation of criminality for Black, Latino, and other minority defendants. For an emerging discussion of this issue, *see* Amanda Geller & Jeffrey Fagan, *Race, Police, and the Production of Capital Homicides*, *in* THE CAMBRIDGE HANDBOOK OF POLICING IN THE UNITED STATES 268, 268–75, 285–87 (Tamara Rice Lave & Eric J. Miller eds., 2019).

174. *See infra* Section IV; *see also* MAURICE POSSLEY, KEN OTTERBOURG, KLARA STEPHENS, JESSICA WEINSTOCK PAREDES, NAT'L REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES 2022 iii (SAMUEL R. GROSS & BARBARA O'BRIEN eds., 2022) [hereinafter RACE AND WRONGFUL CONVICTIONS], https://www.law.umich.edu/special/exoneration/Documents/Race%20Report%20Preview.pdf ("Black people are 13.6% of the American population but 53% of the 3,200 exonerations listed in the National Registry of Exonerations. Judging from exonerations, innocent Black Americans are seven times more likely than white Americans to be falsely convicted of serious crimes.").

175. RACE AND WRONGFUL CONVICTIONS, *supra* note 174, at 1 tbl.1.

176. *Id.*

177. *Id.*

178. *See Search Exonerations*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last visited Nov. 5, 2022) (making the access to underlying data available through the website). The glossary of available search terms is available here: NAT'L REGISTRY OF EXONERATIONS, CODE MANUAL FOR PUBLIC SPREADSHEET (2023), https://www.law.umich.edu/special/exoneration/Documents/Coding_Manual_Public.pdf.

179. *See Search Exonerations*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last visited Nov. 5, 2023).

180. NAT'L REGISTRY OF EXONERATIONS, CODE MANUAL FOR PUBLIC SPREADSHEET 1 (2023), https://www.law.umich.edu/special/exoneration/Documents/Coding_Manual_Public.pdf. (describing "other" as including native Hawaiians and Pacific Islanders).

181. *See Search Exonerations*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last visited Nov. 5, 2023).

one of his co-defendants implicated him, responded: "If they say I was there, then they must have been there too."[182] Similar are situations like those leading to the conviction of Davie Hurt in West Virginia, a Black man prosecuted for killing a white man based upon co-defendant testimony.[183] Or the case of Jon Keith Smith,[184] James Bowman,[185] and Donald Dixon,[186]in which three co-defendants were falsely convicted based on the coerced testimony of another co-defendant in Jackson, Missouri.[187] Or the famous case of Walter McMillan,[188] who was convicted and sentenced to death based upon testimony of a co-defendant who pled guilty to a lesser charge and received leniency.[189] Or the case of Ryan Matthews,[190] who was convicted based in part upon a co-defendant (Travis Hayes[191]) who said he was the driver and that Matthews committed the murder—even though DNA evidence ultimately exonerated both Mathews and Hayes.[192]

Accomplice liability felony murder cases are ground-zero for wrongful convictions involving false confessions—cases where innocent individuals admit to having had a minimal role in some criminal activity during which another individual caused a death and find themselves liable for the entire murder. The National Registry of Exoneration identifies 271 murder cases involving false confessions.[193] Many of these cases involve employment of the police interrogation technique known as the Reid

182. Rob Warden, *Rogelio Arroyo*, NAT'L REGISTRY OF EXONERATIONS (Jan. 3, 2018), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=2999.

183. Maurice Possley, *Davie Hurt*, NAT'L REGISTRY OF EXONERATIONS (Apr. 27, 2018), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4482.

184. Maurice Possley, *Jon Keith Smith*, NAT'L REGISTRY OF EXONERATIONS (Nov. 22, 2016), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4496.

185. Maurice Possley, *James Bowman*, NAT'L REGISTRY OF EXONERATIONS (Sept. 5, 2014), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4498.

186. Maurice Possley, *Donald Dixon*, NAT'L REGISTRY OF EXONERATIONS (Sept. 5, 2014), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4499.

187. *Id.* ("Initially, Lytle said he knew nothing about the murders, but finally told the detectives that he was at the home on the night of the crime with three other youths—17-year-old Jon Keith Smith as well as Donald Dixon and James "Eddie" Bowman, who were both 18 . . . Police then arrested Lytle, as well as Smith, Bowman, Dixon and Cunningham and charged them with first-degree murder, burglary, robbery and armed criminal action. Almost immediately after Lytle was charged, he recanted the statement that implicated Bowman and said that the truth was that the couple were already dead by the time they went into the home.").

188. Kevin Weber, *Walter McMillian*, NAT'L REGISTRY OF EXONERATIONS (Sept. 18, 2014), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3461; *see also* BRYAN STEVENSON, JUST MERCY 168–69 (2014) ("At trial, Myers testified that he was *unknowingly* and *unwillingly* made part of a capital murder and robbery on November 1, 1986 . . . Based on the testimony of Ralph Myers, Walter McMillian was convicted of capital murder and sentenced to death.").

189. Weber, *supra* note 188.

190. Maddie Garcia & Maurice Possley, *Ryan Matthews*, NAT'L REGISTRY OF EXONERATIONS (July 24, 2023), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3414.

191. Maddie Garcia & Maurice Possley, *Travis Hayes*, NAT'L REGISTRY OF EXONERATIONS (July 24, 2023), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3289.

192. *Id.*

193. *See Search Exonerations*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last visited Nov. 5, 2023).

technique[194]—a form of interrogation often described in literature[195] on interrogations and false confessions as "the most-used interrogation technique by law enforcement in the United States."[196] The Reid technique involves the use of 'minimization,' or presenting the suspect with an alternate theory of guilt, followed by 'maximization,' or warning the suspect about the highest level of punishment they are facing. The use of minimization and maximization tactics is especially draconian with respect to accomplice liability and felony murder, as suspects are encouraged to admit to the lesser charge of being a participant in a robbery or burglary— during which a co-defendant committed murder—without ever understanding that their admission imputes liability for the entire offense.[197] The State of Alabama utilized the Reid technique, relying on the testimony of Ralph Myers who falsely admitted under pressure to being an "unknowing[]" and "unwilling[]" participant, to develop evidence against Walter McMillian.[198]

III. THE PSYCHOLOGICAL BASIS OF BIAS IN FELONY MURDER

As Section II demonstrated, the pathway to inequality in accomplice liability felony murder cases is indeed well-paved. This Section contextualizes the particular racial disparities under the felony murder rule within broad research on implicit bias in the criminal justice system, psychological research on group associations (called "entitativity"), and on anti-Black and anti-Latinx aggression-related stereotypes and biases. We claim that, due to implicit and explicit racial biases that affect the way in which prosecutors, jurors, and judges perceive individual defendants who participated in a group felony that resulted in homicide, the accomplice liability

194. *About*, REID, https://reid.com/about (last visited Nov. 5, 2023).

195. *See, e.g.*, Katie Basalla, *Wrongful Convictions and False Confessions: Why an Innocent Person Might Actually Confess to a Crime*, U. CIN. L. REV. (May 8, 2020) (available at https://uclawreview.org/2020/05/08/wrongful-convictions-and-false-confessions-why-an-innocent-person-might-actually-confess-to-a-crime/); Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV., 1051, 1053, 1060, 1066–68, 1086, 1114–16 (2010); Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 1096–97 (1997); Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 118–19 (1997); *see generally* Yale Kamisar, *What Is an "Involuntary Confession"? Some Comments on Inbau and Reid's* Criminal Interrogation and Confessions, 17 RUTGERS L. REV. 728 (1963).

196. United States v. Monroe, 264 F. Supp. 3d 376, 391 (D.R.I. 2017) (citing DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 121–22 (2012)).

197. Justice Ecker of the Connecticut Supreme Court provides an insightful analysis of the risk of false confessions in a felony murder prosecution in the context of the Reid technique. *See* State v. Griffin, 262 A.3d 44, 88–89 (Conn. 2021) (Ecker, J., dissenting) ("It is also common in murder investigations for interrogators to suggest that the suspect killed the victim accidentally, again mitigating the criminality of the act and seemingly lowering the punishment if the suspect agrees to the accident scenario. . . . These scenarios are effective because they 'pragmatically' communicate that the suspect will receive a lower charge or lesser punishment if he agrees to the suggested scenario." (omission in original) (quoting RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 154 (2008))); *id.* at 85 ("The officers hammered the point that the defendant was not facing a charge of 'regular' murder, but felony murder because he and another person had robbed, or attempted to rob, the victim. The defendant was told—falsely, with no basis in fact or law—that '[t]he choice is yours,' that it is 'up to you' which crime he would be charged with" because what he told the officers would determine whether he was charged with regular murder, felony murder, or manslaughter. (alteration in original)).

198. *See* Stevenson, *supra* note 188.

felony murder rule continues to stand as a remarkable driver of racial bias in the criminal justice system. This Section thus focuses on theories of why implicit bias may function to lead to the automatic individualization of white men and the automatic deindividualization of Black and Latino men, and sets the stage for our national empirical study of implicit associations and accomplice liability-based felony murder.

A. Studies of Implicit Bias in the Criminal Justice System

Previous research, including empirical studies we have conducted, has sought to demonstrate not only the ways in which racial bias manifests generally across the criminal justice system, but also specifically within particularized criminal legal standards.[199] No research, however, has examined the way that implicit or explicit bias may function in the doctrine of accomplice liability or the felony murder rule. To date, published projects have empirically tested how racial bias manifests in a wide range of criminal law domains, ranging all the way from the presumption of innocence[200] to sentencing.[201] Studies have included investigations of the biased way jurors and judges remember (and misremember) case facts,[202] how implicit and explicit biases influence the evaluation of ambiguous evidence,[203] how biases lurk within capital punishment's retributive norms,[204] and how biases taint specific legal standards, such as the future dangerousness inquiry.[205] In this context, Justin Levinson and Robert Smith have claimed that the criminal legal system incorporates "systemic implicit bias," and "that the theoretical underpinnings of the entire system may now be culturally and cognitively inseparable from implicit bias."[206]

Notably, some prior studies have created specifically tailored IATs that can examine specific hypotheses within the legal system, such as the one we investigate in this Article.[207] The IAT is a game-like measure that

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199. *See, e.g.*, *Capital Punishment: Choosing Life or Death (Implicitly)*, *supra* note 19, at 230; Jerry Kang, Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson, & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 UCLA L. REV., 1124, 1126–1127 (2012); Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions,* 4 HARV. L. & POL'Y REV., 149, 154–55 (2010).

200. *See* Levinson, Cai, & Young, *Guilty by Implicit Racial Bias*, *supra* note 25, at 204.

201. *See* Justin D. Levinson, Mark W. Bennett, & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 63–64 (2017) [hereinafter Levinson, Bennett, & Hioki, *Judging Implicit Bias*]; Mark W. Bennett, Justin D. Levinson, & Koichi Hioki, *Judging Federal White-Collar Fraud Sentencing: An Empirical Study Revealing the Need for Further Reform*, 102 IOWA L. REV. 939, 958 (2017).

202. *See* Levinson, *Forgotten Racial Equality*, *supra* note 24, at 345.

203. *See* Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 337 (2010).

204. *See* Levinson, Smith, & Hioki, *Race and Retribution*, *supra* note 26, at 839–40, 856.

205. *See* Levinson, Cohen, & Hioki, *Deadly "Toxins," supra* note 27, at 225–26.

206. Justin D. Levinson & Robert J. Smith, *Systemic Implicit Bias*, 126 YALE L.J.F. 406, 407 (2017).

207. Justin D. Levinson, Danielle M. Young, & Laurie A. Rudman, *Implicit Racial Bias: A Social Science Overview*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 9, 10 (Justin D. Levinson & Robert J. Smith eds., 2012) [hereinafter Levinson, Young, & Rudman, *A Social Science Overview*] (citing

pairs an "attitude object" (such as a particular group, e.g., women or Muslim Americans) with an "evaluative dimension" (positive or negative) and tests how the speed (measured in milliseconds) and accuracy of participants' responses indicate automatic associations between concepts.[208] Study participants sit at a keyboard (frequently at their own computer) and are instructed to match an attitude object (e.g., Muslim or Christian, woman or man) with either an evaluative dimension (e.g., positive or negative) or an attribute dimension (e.g., moral or immoral, valuable or worthless) by pressing a designated response key as quickly as possible.[209] For example, in one task, participants are instructed to press a key (e.g., "E") when a Muslim name or a positive word appears on the screen. In a second task, participants are instructed to press a key (e.g., "I") when a Christian name or negative word appears. The strength of the attitude is understood as the variance in the speed at which people can respond to the two tasks.[210] For example, if participants pair the words in the first task faster than those in the second task, then they are demonstrating implicitly positive attitudes toward Muslims.[211] If, however, they are faster to respond to tasks that require categorizing Muslims with negative words than tasks that require categorizing Muslims with positive words, they are demonstrating implicit religion-based stereotyping.[212]

Legal doctrine-specific studies demonstrate how racial bias can be investigated within specific legal domains. In an IAT-based study that examined the connection between the presumption of innocence and implicit racial bias, Justin Levinson, Huajian Cai, and Danielle Young created a specialized IAT designed to measure whether people harbor racialized

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Levinson, *Forgotten Racial Equality*, *supra* note 24; Justin D. Levinson, *Race, Death, and the Complicitous Mind*, 58 DEPAUL L. REV. 599 (2009) ("Priming is a term imported from cognitive psychology that describes a stimulus that has an effect on an unrelated task. . . . Simply put, priming studies show how causing someone to think about a particular domain can trigger asscociative networks related to that domain."); *see also* Levinson, *Forgotten Racial Equality*, *supra* note 24, at 356–58 (describing priming studies that demonstrated "shooter bias" in which the participants were more likely "to shoot Black perpetrators more quickly and more frequently than White perpetrators" in a video game instructing participants "to shoot perpetrators . . . as fast as they can").

208. This description of the IAT in this paragraph and the next is derived heavily from our prior description of it. *See* Levinson, Young, & Rudman, *A Social Science Overview*, *supra* note 207, at 16–19.

209. *Id.*; *see* Anthony G. Greenwald, Debbie E. McGhee, & Jordan L. K. Schwartz, *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCH. 1464, 1466 (1998) (discussing the IAT keyboard procedure).

210. Levinson, Young, & Rudman, *A Social Science Overview*, *supra* note 207, at 17.

211. *See id.*

212. Social scientists Nilanjana Dasgupta and Anthony G. Greenwald have accurately summarized the logic underlying the IAT: "When highly associated targets and attributes share the same response key, participants tend to classify them quickly and easily, whereas when weakly associated targets and attributes share the same response key, participants tend to classify them more slowly and with greater difficulty." Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCH. 800, 803 (2001). Social psychologists Laurie A. Rudman and Richard D. Ashmore concur: "The ingeniously simple concept underlying the IAT is that tasks are performed well when they rely on well-practiced associations between objects and attributes." Laurie A. Rudman & Richard D. Ashmore, *Discrimination and the Implicit Association Test*, 10 GRP. PROCESSES & INTERGROUP RELS. 359, 359 (2007).

associations with the presumption of innocence.[213] The IAT specifically examined whether people automatically associate white or Black with the fundamental legal concepts of "Guilty" and "Not Guilty."[214] The results of the study showed that study subjects indeed harbored significant implicit associations between white people and Not Guilty, and Black people and Guilty, which raised questions about whether the presumption of innocence actually works to protect Black people charged with crimes.[215]

In one study that relied upon priming as a study method, Levinson and Young examined whether "priming mock jurors with the image of a dark-skinned perpetrator might alter judgments about the probative value of evidence."[216] Participants read a story of an armed robbery, and subsequently viewed five crime scene photos for several seconds each.[217] Four of the photos were identical across the two conditions, but one of the photos served as the conduit for the independent variable: half of the mock jurors viewed a photo of "a darker-skinned perpetrator," while the other half viewed a photo of "a lighter-skinned perpetrator."[218] Mock jurors then learned about various pieces of evidence from trial and were asked to rate the probative value of each piece of evidence.[219] The study results found that jurors who saw a darker skinned perpetrator evaluated "evidence as tending to indicate" guilt, a result that demonstrated how simply priming skin tone or race can potentially affect the way jurors evaluate key case facts and defendants.[220]

In a study of implicit racial bias and juror memories of case facts, and employing a study method that we used in our own experiment detailed in Section IV, Levinson measured whether jurors automatically misremember assault "case facts in racially biased ways."[221] Levinson hypothesized that when the facts of a case are consistent with jurors' racial or ethnic stereotypes, mock jurors would more accurately remember facts that are

213. *See* Levinson, Cai, & Young, *Guilty by Implicit Racial Bias*, *supra* note 25, at 204 ("The results of the Guilty/Not Guilty IAT confirmed our hypothesis that there is an implicit racial bias in the presumption of innocence.").

214. *See id.* at 201–03 (discussing the study's IAT method).

215. *See id.* at 204 ("These results suggest that participants held an implicit association between Black and Guilty.").

216. Levinson, Young, & Rudman, *A Social Science Overview*, *supra* note 207, at 22 (discussing the study conducted in Levinson & Young, *supra* note 203); *see also* Levinson & Young, *supra* note 203, at 310–11 (describing a study that provided "identical photos except in one key respect," the color of the perpetrator's skin, and found discrepancies based on differing skin tones).

217. Levinson, Young, & Rudman, *A Social Science Overview*, *supra* note 207, at 22 (discussing a study conducted in Levinson & Young, *supra* note 203).

218. *Id.* (discussing study conducted in Levinson & Young, *supra* note 203).

219. *Id.* (discussing study conducted in Levinson & Young, *supra* note 203).

220. Levinson & Young, *supra* note 203, at 310–11, 337 ("Participants who saw the photo of the perpetrator with a dark skin tone judged ambiguous evidence to be significantly more indicative of guilt than participants who saw the photo of a perpetrator with a lighter skin tone." (footnote omitted)).

221. *See* Levinson, *Forgotten Racial Equality*, *supra* note 24, at 353 (providing the hypothetical used and arguing "that implicit racial bias automatically causes jurors (and perhaps even judges) to misremember case facts in racially biased ways." (footnote omitted)).

consistent with these stereotypes.[222] This hypothesis was confirmed: mock jurors who read about a Black aggressor were found to remember that actor's aggressions more frequently than participants who read the same facts about a white aggressor.[223]

Other research has adapted IATs to examine implicit bias in legally relevant contexts, including in death penalty cases. Levinson, Smith, and Young studied whether mock jurors harbored implicit racial biases related to the value of human life, hypothesizing that jurors would likely automatically associate Black with lack of worth and white with concepts of value.[224] The study results supported that prediction: jurors implicitly associated white with worth and Black with lack of worth.[225] These results further call into question whether the legal system can be trusted to make equitable decisions in a range of contexts when lives are at stake or being judged.[226]

Even major legal constructs like the theories of punishment can be tested using implicit methods. For example, Levinson, Smith, and Hioki used a novel IAT to examine whether the punishment justification of retribution itself has become cognitively inseparable from race.[227] In that study, a sample of over 500 American adults were tested to measure whether people implicitly associate retributive concepts with Black people and leniency and mercy with white people.[228] The study demonstrated that participants automatically associated white faces with the words "forgive," "compassion," and "redemption," and associated Black faces with the words "punish," "payback," and "revenge."[229]

In 2022, the authors of this Article employed another unique IAT to test a specific legal domain—capital punishment's future dangerousness inquiry.[230] In that national study, participants who completed what we termed a "Future Dangerousness IAT" were asked to pair together Latinx, Black, and white groups with words depicting either danger or safety. The study demonstrated, as we hypothesized, that study participants indeed associated Black and Latinx people with future danger, and white people

222. *See id.* at 352–53, 380–81 (showing a study that draws on "cognitive science studies that show the fragility of the human memory and connect memory failures to racial biases").

223. *Id.* at 398–99.

224. Justin D. Levinson, Robert J. Smith, & Danielle M. Young, *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. REV. 513, 537–38, 565 (2014).

225. *Id.* (finding "that death-qualified participants more rapidly associate[d] White subjects with the concepts of 'worth' or 'value' and Black subjects with the concepts of 'worthless' or 'expendable'").

226. *See, e.g.*, *Capital Punishment: Choosing Life or Death (Implicitly)*, *supra* note 19, at 243; Cohen, *supra* note 19, at 66.

227. Levinson, Smith, & Hioki, *Race and Retribution*, *supra* note 26, at 844, 854, 874–75 (proposing "that the historical use of punishment in racialized ways has led to the cognitive inseparability of race and retribution" and discussing the development and use of the "Retribution IAT").

228. *Id.* at 844.

229. *Id.* at 844, 874–75, 879.

230. *See* Levinson, Cohen, & Hioki, *Deadly "Toxins," supra* note 27, at 225–26.

with future safety.[231] We connected the study to a claim that criminal law's future dangerousness requirements (particularly in—but not limited to—the death penalty) was poisoned with racial bias.[232] Thus, a range of studies have demonstrated how novel implicit methods, and specifically the IAT, may be adapted to test novel hypotheses within the legal process.

B. Stereotypes of Aggression and Entitativity

In the context of accomplice liability felony murder, it is more than relevant to consider whether implicit or explicit bias may account for one group member being held responsible for the actions of other group members, regardless of culpability. To the extent that certain group members are stereotyped as aggressive and others as peaceful, for example, one should consider the ways such stereotypes could play a role in race-based differences in accomplice liability felony murder charges, guilty pleas, or convictions. Furthermore, and specifically relevant in the felony murder context, if members of certain groups are automatically perceived as individuals while others are automatically perceived as group representatives one should be concerned that group-based liability statutes may exacerbate inequalities in the criminal justice system.

1. Latino Men, Black Men, and Stereotypes of Aggression

Although social science investigations on stereotypes of Black aggression far outnumber projects examining the aggression-related stereotypes of Latino men, social science studies indeed link Latino stereotypes with danger and aggression. A study by Melody Sadler and colleagues employed a "shooter bias" paradigm and measured how police officer participants perceive Latino and Black danger as compared to white and Asian danger.[233] Sadler and colleagues found that study participants were quicker to "shoot" both Black and Latino men as compared to white and Asian men.[234] Interestingly, they also found an association between Latino-related "shooter bias" and police officer participants' aggression-related stereotypes of Latinos.[235] As the authors described this finding, "[t]he more aggressive their personal stereotype of Latinos, the less able officers were to accurately distinguish objects."[236]

Other studies show the ways that anti-Latino implicit bias can be demonstrated empirically. Galen Bodenhausen and Meryl Lichtenstein tested the role of aggression stereotypes in the legal system and found that

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231. *Id.* at 281–82.

232. *Id.* at 287, 289, 294–95.

233. Melody S. Sadler, Joshua Correll, Bernadette Park, & Charles M. Judd, *The World Is Not Black and White: Racial Bias in the Decision to Shoot in a Multiethnic Context*, 68 J. SOC. ISSUES 286, 286, 290–92 (2012) ("The current research examined implicit racial bias in the decision to shoot White, Black, Latino, and Asian male targets in a FPS task in two studies.").

234. *Id.* at 301 ("Officers showed racial bias in the decision to shoot Latinos relative to Whites and Asians.").

235. *Id.* at 305 (noting that "[t]he more officers endorsed stereotypes of Latinos as violent and dangerous, the faster they tended to respond to armed than unarmed Latino targets").

236. *Id.* at 306.

mock jurors evaluated defendants as being more guilty (and aggressive) when defendants were portrayed as Hispanic.[237] Another study by James Weyant employed an intelligence-stereotype IAT and found that respondents automatically associated white men with intelligence and Latino men with the opposite.[238] Steffanie Guillermo and Joshua Correll used attention/perception research methods to study biases by comparing responses to Latino, Black, and white faces.[239] They found that Latino faces attracted participants' attention more quickly, and held their attention longer, than white or Black faces did.[240] The researchers contextualize their results as follows: "Since Latinos are stereotypically associated with threat, it is plausible that threat stereotypes are related to [the participants' extended] attention toward Latino faces."[241] Thus, social science research supports the notion that known racial stereotypes may potentially facilitate perceptions of culpability in the group felony murder context. We next turn to the question of whether implicit bias itself can wreak havoc specifically within the accomplice liability context.

2. Psychological Research on Group Entitativity

There are two psychological building blocks underlying our hypothesis that people implicitly individualize white men while deindividualizing Black and Latino men. First, known racial stereotypes of "dangerous" Black and Latino men allow for less concern around accomplice liability felony murder. Second, we propose that people actually automatically perceive certain people as individuals while automatically perceiving others as members of a group, especially in the commission of a crime. This requires examining a construct we have labeled "implicit entitativity."

Outside of the world of implicit bias research, social scientists have long studied the ways in which people understand each other in the context of group membership. This research is harbored under the umbrella concept "entitativity," which describes the circumstances under which people are perceived as being group members as opposed to individuals.[242] Entitativity is significant in the accomplice liability felony murder context

237. Galen V. Bodenhausen & Meryl Lichtenstein, *Social Stereotypes and Information-Processing Strategies: The Impact of Task Complexity*, 52 J. PERSONALITY & SOC. PSYCH. 871, 875 (1987) ("[S]ubjects saw the Hispanic defendant as more aggressive, more likely to be aggressive in the future, more likely to be guilty, and more likely to commit criminal assault in the future than a nondescript defendant . . . ."). The comparison group was described by the authors as being "ethnically nondescript." *Id.* at 872.

238. James M. Weyant, *Implicit Stereotyping of Hispanics: Development and Validity of a Hispanic Version of the Implicit Association Test*, 27 HISP. J. BEHAV. SCIS. 355, 357, 360 (2005).

239. Steffanie Guillermo & Joshua Correll, *Attentional Biases Toward Latinos*, 38 HISP. J. BEHAV. SCIS. 264, 265–66 (2016) ("The goal of the present research was to examine preferential attention, or attentional bias, toward Latinos.").

240. *Id.* at 274 ("The current research provides the first evidence that Latino faces capture attention faster and hold attention longer than White faces when participants are White. We demonstrated this effect across two studies, and [found the same] even when the racial context included Black faces . . . .").

241. *Id.*

242. *See* Campbell, *supra* note 28, at 14–15; Lickel, Hamilton, Wieczorkowska, Lewis, Sherman, & Uhles, *supra* note 28.

because it would be problematic if Latinx or Black groups of defendants are fundamentally perceived differently, either directly by prosecutors or as applied by prosecutors assessing the likelihood of conviction based upon their assumptions concerning the attitudes of jurors. Specifically, if Latinx or Black defendants are automatically deindividualized, while white defendants are individualized, a two-tiered system of justice would result within what is already one of the most fraught areas of criminal law. "The psychological concept of entitativity describes the degree to which a collection of persons are perceived as being bonded together into a coherent unit."[243] Outside of the context of race, entitativity is often used as a way of determining how cohesive a particular group is perceived to be.[244] For example, members of a sports team are perceived as having a higher level of entitativity than members of a jury, who are in turn perceived as having a higher level of entitativity than people in line at a bank.[245]

Within the criminal justice system, and in the accomplice liability context, it would be expected that members of groups with higher levels of entitativity would be perceived by decision-makers to be more aligned in their criminal goals, and thus more likely to be morally culpable for one or more particular offenses. So long as entitativity does not embody inter-group stereotypes, the concept has few particularized justice-based risks in assessing legal responsibilities. Group members who are likely to be more aligned will be more likely to be believed to be responsible for shared crimes, just as accomplice liability law intends.[246] Unfortunately, research indicates that certain racial groups are indeed ascribed greater levels of entitativity than others, raising the concern that there are psychological factors at play in understanding group responsibility.[247]

IV. THE EMPIRICAL STUDY: THE ACCOMPLICE LIABILITY IAT

Although entitativity has been explored by psychologists in great detail, including in the context of race,[248] it has not been explored deeply in the context of accomplice liability and felony murder. Considering the racialized history of the felony murder rule, and in light of psychological

243. Lickel, Hamilton, Wieczorkowska, Lewis, Sherman, & Uhles, *supra* note 28.

244. *Id.*

245. *Id.* at 226, 227 tbl.1.

246. Steven J. Sherman & Elise J. Percy, *The Psychology of Collective Responsibility: When and Why Collective Entities Are Likely to Be Held Responsible for the Misdeeds of Individual Members*, 19 J. L. & POL'Y 137, 160 (2010).

247. *See* Elena R. Agadullina & Andrey V. Lovakov, *Are People More Prejudiced Towards Groups That Are Perceived as Coherent? A Meta-Analysis of the Relationship Between Out-Group Entitativity and Prejudice*, 57 BRIT. J. SOC. PSYCH. 703, 704, 706, 718–19 (2018).

248. *See, e.g.*, Sheri R. Levy, Jason E. Plaks, Ying-yi Hong, Chi-yue Chiu, & Carol S. Dweck, *Static Versus Dynamic Theories and the Perception of Groups: Different Routes to Different Destinations*, 5 PERSONALITY & SOC. PSYCH. REV. 156, 163 (2001); Robert J. Rydell, Kurt Hugenberg, Devin Ray, & Diane M. Mackie, *Implicit Theories About Groups and Stereotyping: The Role of Group Entitativity*, 33 PERSONALITY & SOC. PSYCH. BULL. 549, 553 (2007); Julie Spencer-Rodgers, David L. Hamilton, Melissa J. Williams, Kaiping Peng, & Lei Wang, *Culture and Group Perception: Dispositional and Stereotypic Inferences About Novel and National Groups*, 93 J. PERSONALITY & SOC. PSYCH. 525, 527, 534 (2007).

research on racialized group membership and implicit bias, we conducted an empirical study to measure whether anti-Black and anti-Latinx biases play a role in the operation of the felony murder rule as combined with the accomplice liability doctrine.[249] We sought to build empirically on existing knowledge and apply it by testing the theory that people harbor automatic racial bias when applying the felony murder rule and the accomplice liability doctrine. Considering the social science findings consistently connecting Black and Latinx Americans to stereotypes of aggression, combined with research indicating that people may make group-based assessments of group versus individual identity, we designed an empirical study examining whether implicit and explicit biases play a role in elevating and expanding legal liability. The study we designed contained a range of components, including: a novel "Accomplice Liability IAT," a measure of explicit racialized associations with groups, a multi-defendant homicide (accomplice liability felony murder relevant) case fact pattern, and a racialized memory test. Using these results, we reflected on criminal law's assumption that each defendant be evaluated based on their own individual culpability level. Section A presents the materials and methods of the study in detail. Section B outlines our study hypotheses. Section C explains the statistical methods we used, and Section D sets forth the results.

A. Methods and Materials

1. Mock Juror Participants

Study participants came from a national sample of 578 jury-eligible participants.[250] Participants were diverse in terms of gender,[251] race and ethnicity,[252] age,[253] and political preferences.[254]

249. Koichi Hioki, National Empirical Study on Racial Bias, Accomplice Liability, and the Felony Murder Rule (Feb. 19, 2023) (on file with the author).

250. Participants were recruited via MTurk and were compensated for their participation. Participants who were non-citizens or convicted felons were excluded from the study results because they would likely be excluded from jury service. In conducting data analysis, we also excluded data that failed to meet quality control expectations on the IAT. Thus, the bulk of our statistical analyses are conducted on 400 participants. Hioki, *supra* note 249.

251. 49.00% of the participants in Study 1 identified as female, and 51.00% identified as male. Hioki, *supra* note 249.

252. 82.25% of participants identified themselves as White, 9.25% identified themselves as Black or African American, 4.00% identified themselves as Asian American, 12.25% identified themselves as Hispanic or Latino, and 3.00% identified themselves as more than one race. *Id.*

253. 37.25% of participants were between ages 21-30. The second most common age range was 31-40, with 30.25% falling in this range. The third most common age range was 41-50, with 15.75% falling in this range. *Id.*

254. Participant's political preferences were asked to indicate how strongly they typically agreed with liberals and conservatives on a range of issues: 33.75% reported affiliating strongly or moderately with liberal positions, 33.25% reported affiliating strongly or moderately with conservative positions, and the remainder reported agreeing slightly more often with liberal positions (13.50%) or slightly more often with conservative positions (13.00%). The remainder of participants identified as being ideologically neutral (6.50%). *Id.*

2. The Accomplice Liability IAT

Building on our prior empirical work on implicit racial bias in the criminal justice system,[255] we designed a novel IAT to measure implicit racial biases related to accomplice liability in the felony murder context. The purpose of this IAT was to measure whether jurors automatically perceive members of some racial or ethnic groups as unique individuals while simultaneously perceiving members of other racial or ethnic groups more as members of those groups and less as individuals. It could be expected that defendants in accomplice liability situations (including group felony murder cases) who are perceived more as members of groups, and less as individuals, would likely be held more responsible for the crimes of accomplices, whereas defendants who are perceived more as individuals would be likely to be held less responsible for the crimes of accomplices. The IAT measure is thus designed to allow honing in on potentially specific implicit racialized biases regarding group liability in the felony murder context.[256] Two distinct versions of the Accomplice Liability IAT were created: the Black-white Accomplice Liability IAT and the Latino-white Accomplice Liability IAT.[257] We selected the following stimuli to represent groups: "group," "pack," "crew," "them," "crowd," "folks," and "bunch." We selected the following stimuli to represent individuals: "individual," "self," "one," "solo," "single," "somebody," and "character."[258]

3. Explicit Bias: Racialized Attitudes

Beyond implicit bias, we measured two types of explicit bias. We first measured racial biases that participants would be willing to self-report.[259] To do so, we employed the Symbolic Racism 2000 Scale.[260] This measure has been validated by prior research and is one of the more well-known scales designed to measure explicit racial (anti-Black) bias.[261] Participants are asked to state how much they agree or disagree with statements such as: "How much of the racial tension that exists in the United States today do you think blacks are responsible for creating?" and "It's really a matter of some people not trying hard enough; if blacks would

255. *See supra* notes 212–40 and accompanying text for a more detailed discussion of these studies.

256. *See, e.g.*, Sheri Lynn Johnson, *The Influence of Latino Ethnicity on the Imposition of the Death Penalty*, 16 ANN. REV. L. & SOC. SCI. 421, 425 (2020) ("Taken together, the archival studies, although limited in number, strongly suggest that sometimes (or perhaps, in some places) the likelihood of a death sentence is increased when the defendant is Latino . . . ."); *see also supra* notes 136–42 and accompanying text.

257. Hioki, *supra* note 249.

258. For the racial category stimuli, we selected men's names that are highly associated with white American, Black American, and Latinx American groups. *Id.*

259. *Id.*

260. *See* P.J. Henry & David O. Sears, *The Symbolic Racism 2000 Scale*, 23 POL. PSYCH. 253, 253, 259–62 (2002) (developing, explaining, and employing the scale for the first time); Hioki, *supra* note 249.

261. *See, e.g.*, Jamillah Bowman Williams, *Breaking Down Bias: Legal Mandates vs. Corporate Interests*, 92 WASH. L. REV. 1473, 1496 (2017) (using questions from the Symbolic Racism 2000 Scale to "measure contemporary racial attitudes").

only try harder they could be just as well off as whites," as well as several other questions.[262]

4. Explicit Bias: Group Associations

Next, we tested mock jurors' perceptions of group entitativity, or how much people perceive members of certain groups to be group-oriented as opposed to being perceived as individuals.[263] This measure was designed as an explicit-style counterpart to our implicit IAT, which measured individual versus group associations on an automatic level. For this measure, participants were asked, for example, "Prior to the crime, to what extent do you think the defendants shared common goals?"[264]

5. Criminal Case Judgments: Guilt and *Mens rea*

We then presented mock jurors with a fact pattern describing a multiple-defendant robbery and homicide case inspired by the facts of the Supreme Court case *Turner v. United States*.[265] Participants were randomly assigned to one of three conditions of the case. All participants read the exact same case facts, yet one group read about defendants with Latino-sounding names, another group read about defendants with Black-sounding names, and one group read about defendants with white-sounding names.[266]

After reading the case facts, mock jurors were asked to evaluate and decide two of the defendants' criminal responsibility, first for the robbery and then for the murder. Our research team internally identified the defendants mock jurors were asked to evaluate as The "defendant 1," the man who physically committed the homicide at the end of the robbery (Juaquin Martinez in *Robbery Gone Wrong*), and "defendant 3," who encouraged the robbery but had no apparent particular role in the homicide (Diego Rodrigues in *Robbery Gone Wrong*). Judgments of defendant 3's responsibility for the murder, therefore, were of greatest interest from a felony murder perspective. In evaluating the two defendants, mock jurors

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262. Henry & Sears, *supra* note 260, at 260 tbl.1. Due to space constraints, we did not employ a measure of anti-Latinx Explicit bias. Hioki, *supra* note 249.

263. Hioki, *supra* note 249.

264. The measure contained a total of six questions. The other questions were: "Prior to committing the crime, to what extent do you think this group of five defendants interacted with each other in their daily lives?"; "How much do you think the behavior of one member of the defendant group was controlled or influenced by other members of the group?"; "How much do you think the defendants were part of a group that has formal and informal rules?"; "How much do you think that there were strong interpersonal bonds among the five defendants?"; and "Prior to their arrest, to what degree do you believe that the defendants shared knowledge and information?" *Id.*

265. 582 U.S. 313 (2017).

266. The defendants' race and ethnicity were not specifically disclosed, but the defendants were given names that resembled popular names of Black Americans, white Americans, and Latino Americans. The names were: for white-sounding names, "Greg Baker," "Neil Miller," "Geoffrey Nelson," "Brett Murphy," "Brendan Cook"; for Black-sounding names, "Jamal Washington," "Rasheed Harris," "Darnell Jackson," "Kareem Robinson," and "Leroy Banks," and for Latino-sounding names, "Joaquin Martinez," "Jose Peres," "Diego Rodriguez," "Emelio Sanchez," and "Andres Hernandez". Hioki, *supra* note 249.

were asked not only to make a guilty/not guilty determination but also to rate the mental state of the two defendants (how intentional, how much knowledge of the crime) and how responsible the defendant was for the crime.[267]

B. Hypotheses

Prior to conducting the studies, we hypothesized as follows:

1. Anti-Black Implicit Bias in Accomplice Liability

Jury-eligible citizens will harbor implicit biases whereby they automatically associate Black men with groups and white men with individuals on the Black-white Accomplice Liability IAT.

2. Anti-Latino Implicit Bias in Accomplice Liability

Jury-eligible citizens will harbor implicit biases whereby they automatically associate Latino men as group members and white men as individuals on the Latino-white Accomplice Liability IAT.

3. Disproportionate Criminal Responsibility Placed on Black and Latino Defendants

Jurors will be more likely to convict Latino or Black defendants and impute more culpable mental states to Latino or Black defendants, as compared to white defendants.

4. Racialized Memory Errors

Jurors' memories of what happened in the case facts will be affected by racial stereotypes such that jurors will more accurately remember aggressive facts committed by Latino or Black defendants compared to white defendants. Similarly, jurors who have higher implicit bias scores will be more likely to remember particular facts.

5. Racialized False Memories

Jurors' false memories of what happened in the case facts will be affected by racial stereotypes such that jurors will misremember facts in such a way as to falsely implicate Latino and Black defendants in group liability situations compared to white defendants.

6. Racial Biases Will Predict Juror Judgements of Defendants

Implicit bias levels (on the IATs), explicit bias levels (on the Symbolic Racism Scale), explicit entitativity scores, and jurors' memory errors will predict their assessments of crime guilt and mental state culpability such that higher levels of racial bias will lead to judgments of greater intentionality and criminal guilt of Latino and Black defendants.

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267. *Id.*

7. Death Qualification Will Lead to Greater Bias

"Death Qualified"[268] jurors will possess higher levels of implicit and explicit racial biases than "nullifier"[269] or "excludable"[270] jurors.

C. Statistics

We employed multiple statistical analyses in analyzing the study results. For Hypotheses 1 and 2 (implicit bias), we calculated 'd' scores[271] and used t-tests[272] to evaluate 'd' scores for statistical significance.[273] To test Hypothesis 3, we conducted a series of Analysis of Variance tests (ANOVAs)[274] to compare culpable mental state and responsibility scores based upon the race/ethnicity-sounding name of the defendant (white, Latino, or Black). We also used chi-square tests[275] to measure for racial bias in guilty/not guilty decisions. For Hypotheses 4 and 5, we used ANOVAs to compare whether mock jurors had an easier time remembering case facts accurately when defendant group membership was varied, and to compare whether jurors made race or ethnicity-based memory errors. For Hypothesis 6, we evaluated predictive models of decision-making by regressing juror mental state judgments and guilty/not guilty decisions upon implicit bias scores of IATs, explicit entitativity judgments, Symbolic Racism Scale scores, and memory errors. For Hypothesis 7, we conducted a series of t-tests[276] to compare death qualified and excludable jurors.

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268. Levinson, Smith, & Young, *supra* note 224, at 513, 520–21 (defining "death-qualified jurors" as "those who expressed a willingness to consider imposing both a life sentence and a death sentence").

269. *Id.* at 558 n.222 (defining "nullifiers" as jurors "who could not vote to convict").

270. *See id.* at 521 n.19 ("[J]urors would be excluded because they would not be willing to convict when death was a possible penalty or to impose the death penalty after a conviction.").

271. Alexis D. J. Makin & Sophie M. Wuerger, *The IAT Shows No Evidence for Kandinsky's Color-Shape Associations*, FRONTIERS PSYCH., Sept. 2013, at 1, 4 ("The D score is the difference between incongruent and congruent blocks in standard deviation units. A positive value means the hypothesis was supported, and negative value means that the participant associates stimuli in the opposite way to that predicted.").

272. ANDREW N. CHRISTOPHER, INTERPRETING AND USING STATISTICS IN PSYCHOLOGICAL RESEARCH 164 (2021).

273. We followed the IAT scoring algorithms recommended in Anthony G. Greenwald, Brian A. Nosek, & Mahzarin R. Banaji, *Understanding and Using the Implicit Association Test: I. An Improved Scoring Algorithm*, 85 J. PERSONALITY & SOC. PSYCH. 197, 213 (2003).

274. An ANOVA test is a series of techniques that segment the observed variance in a dataset into the various sources of that variance, which allows for the comparison of the means between multiple groups. *See* CHRISTOPHER, *supra* note 272, at 246–47. For example, is the variance in a sample (such as measured happiness) attributable to differences between two groups (such as northerners and southerners), or is it due to other, unmeasured or unexplained variation within the group (such as how much candy they had this morning)? *See* BARBARA G. TABACHNICK & LINDA S. FIDELL, USING MULTIVARIATE STATISTICS 37–38 (3d ed. 1996) (explaining ANOVA techniques).

275. Todd Michael Franke, Timothy Ho, & Christina A. Christie, *The Chi-Square Test: Often Used and More Often Misinterpreted*, 33 AM. J. EVALUATION 448, 449 (defining a chi-square test as a test "used to examine independence across two categorical variables or to assess how well a sample fits the distribution of a known population").

276. One-sample t-tests are used to determine whether single populations differ from hypothesized values. *See* CHRISTOPHER, *supra* note 272 (describing one-sample t-tests). The IAT's hypothesized value is zero, meaning no bias. When an IAT score "is significantly different from zero," that IAT score indicates population bias. Thus, this one-sample t-test evaluated whether the population's IAT score differed significantly from zero. Levinson, Bennett, & Hioki, *Judging Implicit Bias*, *supra* note 201, at 103 n.214.

Relevant statistics are presented in footnotes corresponding to the findings described in the text below.

D. Results

The results of the studies supported several, but not all, of the hypotheses. Most prominently, the results of the studies demonstrate anti-Black and anti-Latino implicit bias in accomplice liability and display a significant anti-Latino sentiment in juror judgments of overall culpability.[277] We present the study results below, organized loosely by the hypotheses set forth above.

1. Implicit Bias Against Black and Latino Men.

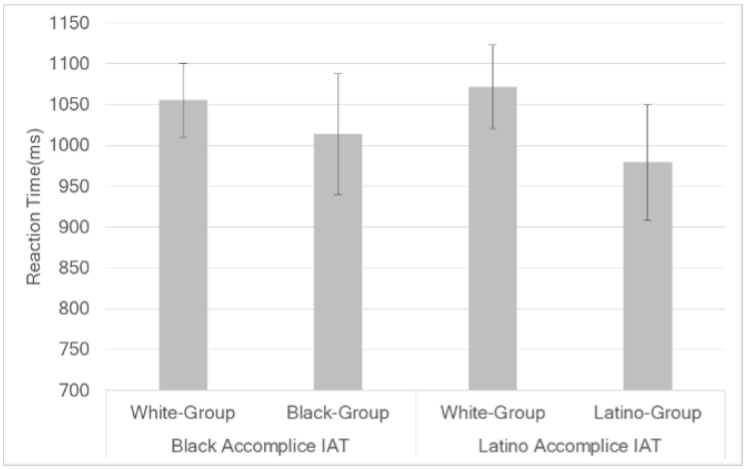
The results of the study on implicit racial associations with groups (on the Black-white and Latino-white Accomplice Liability IAT) confirmed that jury-eligible participants associated white with individuality ("Person") and Black and Latino with groups ("People"). Participants were significantly more likely to quickly group together Black and Latino names with words associated with groups, such as "group, pack, crew, them, crowd, folks, bunch," and white faces with individuality, such as "individual, self, one, solo, single, somebody, character."[278] These group-bias driven results are consistent with two decades of research on implicit racial biases but also add important details to these findings. In this IAT, participants did not just associate Black and Latino with negative attitudes, or negative stereotypes, as in our prior studies, but actually implicitly associated Black names with groups, rather than with individual people.[279] In the group liability context, then, these results are striking. These results also highlight the limitation of explicit measures. On the explicit measure of racialized association of individuals with groups, no group-based significant results emerged.

277. Hioki, *supra* note 249.

278. IAT d M = 0.27, SD = 0.44. A t-test comparing with 0 revealed that the score was significantly higher than 0 ($t(304) = 10.80$, $p<.001$). RTs: $M_{White\text{-}People} = 1064.13$ (SD=598.98), $M_{Black\text{-}People} = 1013.82$ (SD=878.48), $M_{Latino\text{-}People} = 979.12$ (SD=904.58), $F(1, 303) = 4.15$, $p< .05$. *Id.*

279. *See, e.g.*, Greenwald, Nosek, & Banaji, *supra* note 273, at 199–200 (describing significant white–Black IAT results).

Graph 1: Reaction Times (in Milliseconds)



Reaction times on IAT blocks. Error bars represent standard error.

2. Latino Defendants Judged to be Responsible and Possess More Culpable Mental States

Defendants with Latino-sounding names were judged to have more culpable mental states[280] and believed to be more responsible for the crimes[281] compared to defendants with white-sounding and Black-

280. We ran a 2 (crime: homicide / robbery, within) x 3 (defendant's group membership signaled by their name: white / Black / Latino, between) mixed factorial design ANOVA on an averaged score of the two mental state questions: intent judgments and knowledge judgments, both for the robbery and the killing (the questions were "How much did [name of defendant 1] intend to commit the murder (robbery)? And how much did [name of defendant 1] know that he was going to kill the victim (he was taking part in a robbery?)."). M_{White} = 5.78 (SD=1.24), M_{Black} = 5.70 (SD=1.26), M_{Latino} = 6.05 (SD=1.14), $F(2, 397) = 4.00$, $p = .02$, $\eta p^2 = .02$, Post hoc analysis (with Bonferroni correction) revealed that there was a significant difference between the perceived mental state of Latino defendants and white defendants ($p<.05$) such that Latino defendant #1 was judged to hold more culpable mental states than white defendant #1. Hioki, *supra* note 249. There were no significant differences when comparing Latino and Black defendant #1 or White and Black defendant #1. *Id.* Similar results held for Defendant #3, who encouraged the robbery but for whom there were no specific facts connecting him to the killing itself. *Id.* When he possessed a Latino-sounding name, Defendant #3 was judged to be acting with more intentionality and knowledge than a Black defendant 3 ((1, 397), = 3.18, $p<.05$, M_{White} = 5.30 (SD=1.32), M_{Black} = 5.11 (SD=1.44), M_{Latino} = 5.43 (SD=1.31)). *Id.* Post hoc analysis (with Bonferroni correction) revealed that there was a significant difference between the mental state of Latino defendants and white defendants ($p<.05$) such that Latino defendant #3 was judged to hold more culpable mental states than Black defendant #3. *Id.* There were no significant differences when comparing Latino and White defendant #3 or White and Black defendant #3. *Id.*

281. Similar to the analysis we ran on mental states, we ran a 2 x 3 mixed factorial design ANOVA on judgments of defendant responsibility ("How much is [name of defendant 1] responsible for the murder (robbery)?"). Results of the analysis were statistically significant, such that defendant 1 was judged to be most responsible when he had a Latino-sounding name: M_{White} = 5.93 (SD=1.24), M_{Black} = 5.96 (SD=1.31), M_{Latino} = 6.28 (SD=1.12), $F(2, 397) = 4.14$, $p = .02$, $\eta p2 = .02$. *Id.* Post hoc analysis (with Bonferroni correction) revealed specifically that there were statistically significant differences in perceived responsibility between a Latino sounding name defendant #1 and a white sounding name defendant #1 ($p<.05$), and Latino sounding name and Black sounding name defendant #1 ($p<.05$), but not between white and Black defendant #1. *Id.* When running the same type of mixed factorial ANOVA on defendant 3's responsibility, results were similar. *Id.* The results revealed group-based effect, but only of marginal statistical significance, such that defendant #3 with a Latino-sounding name were held most responsible for the crimes ($F(1, 397) = 2.43$, $p=.09$, $\eta p2 = .01$). *Id.* However,

sounding names. Guilty verdict responses trended in the same direction but did not reach statistically significant levels.[282]

3. Racialized Recall

When their memories of the case were tested, mock jurors remembered aggressive facts in different ways depending upon whether they read about a Latino, Black, or white defendant. Memories sharpened when participants read about Latino defendants in particular. When we categorized the memory test into multiple categories (accurate memories of aggression,[283] other accurate memories of who did what (but not specifically aggressive statements),[284] two types of false memories (incorrectly believing something had happened when it had not,[285] and misidentifying a defendant by confusing him with a co-defendant)),[286] significant results emerged in an interesting way. Notably, it was significantly easier for jurors to accurately remember actions taken by Latino defendants than it was if there was a Black or white defendant, whether or not the behavior was aggressive.[287] For example, mock jurors displayed group-based differences in remembering whether "[Defendant 3] suggested they should 'get paid' by robbing someone," and "[Defendant 5] carried the victim into the center of the alley and dropped her in front of a garage," both of which were true

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post hoc analysis comparing each group to each other specifically did not reach statistical significance. *Id.*

282. We ran a Chi-square test on guilty verdict decisions on defendant 1's and defendant 3's murder charges ("Is [defendant's name] guilty or not guilty of the murder?") and compared for the racialized names of the defendants. The result revealed a trend that did not reach statistical significance for either defendant 1 or 3: (for defendant 1, Chi-square(2) = 2.98, ns., N_{White}(Guilty=76, Not guilty=5), N_{Black}(Guilty=96, Not guilty=13), N_{Latino}(Guilty=99, Not guilty=16); for defendant 3, Chi-square(2) = 1.56, ns., N_{White}(Guilty=53, Not guilty=28), N_{Black}(Guilty=73, Not guilty=36), N_{Latino}(Guilty=84, Not guilty=31)). *Id.*

283. There were four such questions: "[Defendant 3's name] suggested they should 'get paid' by robbing someone"; "[Defendant 5's name] said he would love to 'get paid'"; "[Defendant 5's name] carried Thomas into the center of the alley and dropped her in front of a garage"; and "[Defendant 1's name] hit Thomas twice in the head with a metal bar."

284. These questions were: "[Defendant 2's name] confessed his role in the crime"; "Some of them followed the victim, while the others followed from across the street"; "An eyewitness reported that the group of men were being noisy and sang a song about needing money"; and "The group struggled over the victim's wallet and change purse."

285. There were three incorrect belief questions: "Catherine Thomas was sexually assaulted"; "The men were armed prior to the robbery and killing"; and "The men discussed killing Thomas while at the park."

286. There were five misidentified perpetrator questions: "[Name 3] shoved Thomas into the alley"; "[Name 4] was overheard talking about the murder in a store"; "[Name 3] punched Thomas"; "[Name 5] stood watch outside the alley"; and "As the group began to leave, [Name 3] said something about the woman having seen them."

287. We ran a 2 (category: Aggressive / Not aggressive, within) x 3(defendant's group membership as indicated by his name: White / Black / Latino, between) ANOVA on a ratio of correct memories. The results also revealed an effect based on the defendant's group membership ($F(2, 397)=9.11$, $p<.01$ $M_{White} = 0.66(SD=0.28)$, $M_{Black} = 0.71(SD=0.26)$, $M_{Latino} = 0.78(SD=0.24)$). Hioki, *supra* note 249. This effect indicated that participants remembered the defendants' actions most accurately when they read about defendants with Latino-sounding names. Post hoc analysis revealed that participants who read about defendants with Latino-sounding names had more accurate memories than when reading about defendants with either white- or Black-sounding names, analyzed separately. *Id.* The differences between the Black and white defendant categories did not reach statistical significance when compared separately. *Id.*

statements.[288] In addition to memories connected to aggressive actions taken by the defendants, it was similarly easier for jurors to correctly remember other facts that had occurred if they had read about defendants with Latino-sounding names. False memory questions on facts that we called "incorrect belief questions" showed similar trends whereby study respondents possessed sharpened memories when the defendant had a Latino-sounding name, except for misidentifications questions.[289]

4. Implicit Bias, Explicit Bias, and Memory Accuracy Predict Guilty Verdicts

Implicit bias levels related to racialized group associations (as measured by the Accomplice Liability IAT), explicit anti-Black racial bias, as well as memory accuracy, predicted mock-jurors' criminal responsibility judgments.[290] We conducted regression analyses to better understand the specific predictors for mock jurors' Guilty and Not Guilty judgments for both defendants' murder charges (Defendant 1, whose act killed the victim, and Defendant 3, who encouraged the robbery but was not given a core role in the killing), and thus the defendant potentially charged under a felony-murder charging scheme. Regression analyses showed that, for Defendant 1, the one who committed the killing, mock jurors' implicit accomplice liability bias IAT level, memory of aggressive facts accuracy, and judgments of responsibility predicted guilty verdicts.[291] And for Defendant 3, the one who encouraged the robbery but was not involved in the killing, regression analysis showed only judgments of responsibility predicted guilty verdicts.[292]

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288. Each of these two questions was statistically significant when measured individually as well, such that mock jurors remembered these facts with greater accuracy when reading about Latino defendants. *Id.*

289. We ran a 3 (type: Totally false / Misidentified / Other (correct descriptions), within) x 3(defendant's race: White / Black / Latino, between) ANOVA on correct memory ratio (number of questions correctly answered/number of total questions). The results revealed a group membership effect whereby participants who read about Latino defendants had the sharpest memories of the event ($F(2, 397)=6.72$, $p<.01$ $M_{White} = 0.58(SD=0.25)$, $M_{Black} = 0.60(SD=0.26)$, $M_{Latino} = 0.65(SD=0.25)$). *Id.* Post hoc analysis revealed that there are significant simple main effects of race on both the categories of "Totally false questions" ($M_{White\text{-}Totally\ false} = 0.70(SD=0.27)$, $M_{Black\text{-}Totally\ false} = 0.66(SD=0.32)$, $M_{Latino\text{-}Totally\ false} = 0.77(SD=0.27)$) and "Other memory questions" ($M_{White\text{-}Other} = 0.67(SD=0.23)$, $M_{Black\text{-}Other} = 0.71(SD=0.22)$, $M_{Latino\text{-}Other} = 0.78(SD=0.20)$, but not on questions related to misidentified defendants ($M_{White\text{-}Misidentified} = 0.37(SD=0.23)$, $M_{Black\text{-}Misidentified} = 0.41(SD=0.25)$, $M_{Latino\text{-}Misidentified} = 0.39(SD=0.27)$). *Id.*

290. *Id.*

291. *Id.*

292. We ran regression analyses on two guilty(1)/not guilty(0) questions (whether defendant 1 was guilty of the homicide, whether defendant 3 was guilty of the homicide). The model was guilty(1)/not guilty(0) = beta1 x responsibility + beta2 x IATd + beta3 x entitativity + beta4 x SRS + beta5 x memory of Aggressive facts(correct ratio) + beta6 x memory of not Aggressive facts(correct ratio). We excluded mental state and core role questions from this model because they have strong correlation with responsibility. The results revealed that on defendant 1's guilty evaluation, responsibility (beta1=0.26, $t=4.52$, $p<.01$), IATd (beta2=-0.11, $t=2.02$, $p=.04$), and memory of Aggressive facts (beta6=0.11, $t=1.86$, $p=.07$) predict defendant 1's guilt (adjR2=.12, $F(6, 298) = 8.05$, $p<.01$). *Id.* On the regression analysis for defendant 3's guilt, responsibility (beta1=0.56, $t=11.50$, $p<.01$) predicted guilty verdicts (adjR2=.30, $F(6, 298) = 23.00$, $p<.01$. *Id.*

We also ran regression analysis on a combined index of mental state scores (intentionality and knowledge combined) in order to better understand what factors predict jurors' mental state judgments in murder and felony murder cases, both for Defendant 1 and Defendant 3.[293] This analysis showed that Defendant 1's mental state was predicted by two variables: implicit bias on the IAT and the accuracy of memories of aggressive actions.[294] Interestingly, Defendant 3's mental state was predicted solely by explicit anti-Black bias.

5. Death Qualified Jurors and Explicit Racial Bias

Jurors who were "death qualified" displayed higher levels of self-reported racial bias (on the Symbolic Racism 2000 Scale) than those who would be excluded from death penalty juries due to the fact that they would not consider a death sentence in any circumstance (known as "excludables"), or due to the fact that they could not vote guilty knowing that the death penalty was an option (known as "nullifiers").[295] Although research has previously shown that death qualified jurors possess higher implicit bias levels on three different race IATs—the Value of Life IAT,[296] the Stereotype IAT,[297] and the Retribution IAT[298]—death qualification status was not a significant factor in the Accomplice Liability IAT.[299]

E. Practical and Constitutional Implications of Group Association Bias

Combining the felony murder rule and accomplice liability doctrine has the practical implication in a homicide case that the government only ever needs to establish one *mens rea*—the *mens rea* for the underlying felony.[300] This is especially problematic where the rules authorize capital punishment, provide for mandatory life without parole, and authorize transfer of juveniles to adult court where individuals face life sentences. The consequence of these fast-track findings of culpability is more incarceration, and disproportionately more incarceration of Black and other

293. The model was mental state = beta1 x IATd + beta2 x entitativity + beta3 x SRS + beta4 x memory of Aggressive facts(correct ratio) + beta5 x memory of not Aggressive facts(correct ratio). The results revealed that on defendant 1's mental state evaluation, IATd (beta1=0.14, t=2.44, p=.02), and memory of Aggressive facts (beta4=0.15, t=2.45, p=.02) predict defendant 1's mental state (adjR2=.07, $F(5, 299) = 5.80$, $p<.01$). *Id.* On the regression analysis for defendant 3's mental state, SRS (beta3=0.17, t=2.94, $p<.01$) positively predicted (adjR2=.01, $F(5, 299) = 1.86$, p=.10). *Id.*

294. *Id.*

295. $M_{Death\_qualified} = 18.46$, $SD_{Death\_qualified} = 5.17$, $M_{Nullifiers\&Excludables} = 16.57$, $SD_{Nullifiers\&Excludables} = 5.39$, $t(398) = 3.57$, $p< .001$). *Id.*

296. *See* Levinson, Smith, & Young, *supra* note 224, at 559 (presenting results from the Value of Life IAT in a 2014 study).

297. *See id.* (presenting results from the Stereotype IAT in the same study).

298. *See* Levinson, Smith, & Hioki, *Race and Retribution*, *supra* note 26, at 879–82 (presenting results from the Retribution IAT in a 2019 study).

299. We ran a t-test on IAT "d" score for comparing death qualified jurors with excludables and nullifiers. The result revealed there are no significant differences between these two types of jurors ($t(303)=0.31$, ns., $M_{death\ qualified}=0.27(SD=0.45)$, $M_{excludables\ \&\ nullifiers}=0.27(SD=0.42)$). Hioki, *supra* note 249.

300. *See* Berry, *supra* note 62, at 626 (explaining that "accomplice liability under a felony murder statute typically relates only to the act of assisting in the felony's commission").

minority defendants. Our results make clear that implicit or explicit bias provide pathways that make it easier for the police to arrest, and the government to charge and convict, Black and Latino defendants.[301] Significantly, combining the felony murder rule and the accomplice liability doctrine not only fast-tracks findings of culpability, but it greases the wheels towards wrongful convictions.

Our research demonstrates that police, prosecutors, defense counsel, judges, and jurors may possess a psychological baseline whereby they automatically perceive Black and Latino defendants as group members, not as individuals,[302] inviting decisionmakers to indifferently impute guilt on Black and Latino defendants based upon mere association.

We recognize that addressing implicit bias in felony murder cases in the federal courts will be an uphill battle. In 1987, in the face of overwhelming evidence that the death penalty in America was racist, the United States Supreme Court declined to intervene.[303] The Supreme Court in *McCleskey v. Kemp*[304] threw up its hands and held that, despite overwhelming proof that the death penalty has a disproportionate racial impact, capital punishment is constitutional.[305] The decision was made in part because of what Justice Brennan described as "a fear of too much justice."[306] While *McCleskey* was "given dishonorable discharge in a number of

301. Hioki, *supra* note 249.

302. *Id.*

303. *See* McCleskey v. Kemp, 481 U.S. 279, 312–13 (1987) ("Apparent disparities in sentencing are an inevitable part of our criminal justice system. . . . Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious. In light of the safeguards designed to minimize racial bias in the process, the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants, we hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.").

304. 481 U.S. 279 (1987).

305. *Id.* at 312–13.

306. *Id.* at 339 (Brennan, J., dissenting); *see id.* at 314–17, 319 (majority opinion) ("McCleskey's claim [that the Baldus study indicates a racial disparity in Georgia's imposition of the death sentence], taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system. . . . [His claim] easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender. . . . The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment.").

symposiums, books, and law review articles,"[307] it remains the law.[308] In *United States v. Armstrong*,[309] the Court laid out the standard that a defendant would need to meet merely to secure discovery concerning an allegation of racial disparities in crack and cocaine prosecution.[310]

And although Chief Justice Roberts wrote that racial discrimination, even in small doses, was toxic,[311] he has also observed "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[312] Federal courts that have recognized implicit bias instructions have merely permitted them, not required them or intervened to overturn convictions with evidence of implicit bias.[313]

However, the issue cannot be ignored just because the United States Supreme Court is unlikely to remedy the problem in the near-term. State courts have begun to recognize that reducing opportunities for implicit bias as well as explicit bias is important. The Washington Supreme Court has observed, "we should not "throw up our hands in despair at what appears to be an intractable problem. Instead, we should recognize the challenge presented by unconscious stereotyping … and rise to meet it."[314] As the Washington Supreme Court explained: "implicit racial bias can affect the fairness of a trial as much as, if not more than, 'blatant' racial bias."[315]

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307. *Capital Punishment: Choosing Life or Death (Implicitly)*, *supra* note 19, at 65–66 (citing Symposium, *Pursuing Racial Fairness in Criminal Justice: Twenty Years After* McCleskey v. Kemp, 39 COLUM. HUM. RTS. L. REV. 1 (2007); *see also* John H. Blume, Theodore Eisenberg & Sheri Lynn Johnson, *Post*-McCleskey *Racial Discrimination Claims in Capital Cases*, 83 CORNELL L. REV. 1771 (1998)) (also citing Howard Ball, *Thurgood Marshall's Forlorn Battle Against Racial Discrimination in the Administration of the Death Penalty: The McCleskey Cases*, 1987, 1991, 27 MISS. C. L. REV. 335, 370 (2008)) (also citing *The Supreme Court, 1986 Term–Leading Cases*, 101 HARV. L. REV. 119, 158 (1987) ("Harvard Law Review concluded that *McCleskey* was "logically unsound, morally reprehensible, and legally unsupportable"); Randall L. Kennedy, McCleskey v. Kemp*: Race, Capital Punishment and the Supreme Court, in* THE SUPREME COURT IN AMERICAN SOCIETY: EQUAL JUSTICE UNDER LAW 164, 165 (Kermit L. Hall ed., 2001)) (also citing Anthony G. Amsterdam, *Opening Remarks: Race and the Death Penalty Before and After* McCleskey, 39 COLUM. HUM. RTS. L. REV. 34, 47 (2007)) ("*McCleskey* is the *Dred Scott* decision of our time.").

308. *See, e.g.*, 24 C.J.S. *Criminal Procedure and Rights of Accused* § 2196, Westlaw (database updated Aug. 2023) (stating "[a]pparent disparities in sentencing are inevitable" (citing McCleskey v. Kemp, 481 U.S. 279 (1987))).

309. 517 U.S. 456 (1996).

310. *Id.* at 458, 465 (holding that to warrant discovery, a "claimant must demonstrate that the federal prosecutorial policy 'had a discriminatory effect and that it was motivated by a discriminatory purpose'" (quoting Wayte v. United States, 470 U.S. 598, 608 (1985))).

311. Buck v. Davis, 580 U.S. 100, 121–22 (2017).

312. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007). *But see id.* at 798–99 (Stevens, J., dissenting) ("There is a cruel irony in [Chief Justice Roberts's] reliance on our decision in *Brown v. Board of Education*." (citing Brown v. Bd. of Educ., 349 U.S. 294 (1955))).

313. *See, e.g.*, United States v. Mercado-Gracia, 989 F.3d 829, 839–40 (10th Cir. 2021) ("While a trial court, in the exercise of its discretion, might decide to show such a video during voir dire, we cannot say here that the court abused its discretion in declining to do so."), *cert. denied*, 142 S. Ct. 1374 (2022); *see also id.* at 840 (noting studies on implicit bias (citing Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 156–57 (2010))).

314. State v. Berhe, 444 P.3d 1172, 1181–82 (Wash. 2019).

315. *Id.* at 1180 (quoting State v. Monday, 257 P.3d 551, 557 (Wash. 2011)); *see also id.* at 1181 ("We now hold that similar standards apply when it is alleged that implicit racial bias was a factor in

Other state courts in Iowa[316] and New Jersey[317] have begun to address the ways implicit bias can violate a defendant's right to be free from discrimination.[318] Even where courts have not granted relief, the emerging research concerning implicit bias has informed the conversation. Justice Appel of the Iowa Supreme Court observed that while constitutional law is not wind-blown by every new empirical study, research should inform analysis.[319] Especially regarding imposition of draconian sentences, jurists should pay attention to research that suggests inequitable or disproportionately harsh treatment of Black defendants.[320]

In addition to judges and justices, this research should be relevant to prosecutors and legislators. Kristin Henning used research by Sandra Graham and Brian Lowery that identified unconscious stereotypes about Black youth to inform and educate prosecutors.[321] Similar work informs

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the jury's verdict. The ultimate question for the court is whether an objective observer (one who is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have influenced jury verdicts in Washington State) could view race as a factor in the verdict. If there is a prima facie showing that the answer is yes, then the court must hold an evidentiary hearing.").

316. State v. Plain, 898 N.W.2d 801, 817 (Iowa 2017) ("While there is general agreement that courts should address the problem of implicit bias in the courtroom, courts have broad discretion about how to do so."), *modified*, State v. Lilly, 930 N.W.2d 293, 308 (Iowa 2019).

317. State v. Andujar, 254 A.3d 606, 622 (N.J. 2021) ("Although individuals may not be willing to admit they harbor racial bias, '[e]xplicit . . . bias is consciously held.'" (alteration in original) (omission in original) (quoting *Berhe*, 444 P.3d at 1181). "Implicit or unconscious bias is different. 'Implicit bias refers to . . . attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner.' Such biases 'encompass both favorable and unfavorable assessments, [and] are activated involuntarily and without an individual's awareness or intentional control.' In other words, a lawyer or self-represented party might remove a juror based on an unconscious racial stereotype yet think their intentions are proper." (alteration in original) (omission in original) (citations omitted) (quoting CHERYL STAATS, KELLY CAPATOSTO, ROBIN A. WRIGHT, & DANYA CONTRACTOR, KIRWAN INST., STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 2015, at 62 app. (2015))).

318. *Plain*, 898 N.W.2d at 817; *Andujar*, 254 A.3d at 611.

319. State v. Price-Williams, 973 N.W.2d 556, 571 (Iowa 2022) (Appel, J., dissenting) ("[T]here has been a dramatic increase in recent years in our knowledge about implicit racial bias. In addition, in a roughly parallel development, there has been a growing body of empirical studies of racial disproportionality in traffic stops. I do not subscribe to the view that our constitutional law should waiver with each new empirical study or well-written article appearing in a social science journal. Yet, I do insist that when our knowledge of social science and empirical studies reach a turning point demonstrating reliability, we should consider the new information as we seek to develop our search and seizure law.").

320. *See* State v. Kennon, 340 So. 3d 881, 890 n.4 (La. 2020) (Johnson, C.J., concurring in part) ("Individual prosecutors do not need to be motivated by racial animus or discriminatory intent in making charging decisions for implicit biases to manifest in clear racial disparities." (citing Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010))).

321. Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 420–22 (2013) ("While few empirical studies explicitly consider the impact of implicit racial bias on perception of impulsivity, lack of control, and culpability, two studies conducted by Sandra Graham and Brian Lowery provide early support for this position and lay the foundation for additional research. . . . The Graham and Lowery research is unique because it sought to measure the impact of implicit racial bias on decision makers' perceptions of developmental immaturity and adolescent culpability, which is central to the philosophy of the juvenile justice system and affects social consensus on how society should respond to adolescent offending. Their work is buttressed by at least two other studies finding evidence of bias in perceptions of culpability, risk of reoffending, and deserved punishment for adolescents when the decision maker *explicitly* knew the race of the offender." (first citing Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 L. & HUM. BEHAV. 483,

legislative efforts in places like California,[322] Illinois,[323] Minnesota,[324] Colorado,[325] and Pennsylvania.[326]

Our research and empirical study results raise grave concerns that police, prosecutors, and juries will impute *mens rea* for Black and Latino defendants, and that these defendants may face heightened risks of wrongful conviction.[327] Both *Atkins v. Virginia*[328] and *Roper v. Simmons*[329] pointed to the risk of wrongful convictions as a basis for limiting the death penalty for individuals with intellectual disabilities and adolescents.[330] But these possibilities of wrongful conviction and false confessions[331] are

494, 499–500 (2004); then citing George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554, 561–67 (1998); and then citing Aneeta Rattan, Cynthia S. Levine, Carol S. Dweck & Jennifer L. Eberhardt, *Race and the Fragility of the Legal Distinction Between Juveniles and Adults*, PLOS ONE, May 2012, at 1, 1–5)).

322. For example, California passed SB 1437 in 2018, dramatically redefining felony murder for accomplices. Now, to be convicted as an accomplice to felony murder an individual must have either intended to kill or have been "a major participant in the underlying felony who acted with reckless indifference to human life" in the killing. S.B. 1437, 2017–2018 State Assemb., Reg. Sess. (Cal. 2018).

323. *See* Rita Oceguera, *Sweeping Criminal Justice Reform Package Would Curtail Felony Murder Prosecutions in Illinois*, INJUSTICE WATCH (Jan. 13, 2021, 2:45 P.M.), https://www.injusticewatch.org/news/2021/criminal-justice-reform-felony-murder-prosecutions-illinois/ (describing proposed reform of the felony murder rule in Illinois, where "the felony murder rule serves as 'a major engine of mass incarceration in the state,' said Steven Drizin, co-director of the Center on Wrongful Convictions and clinical professor of law at Northwestern Pritzker School of Law. 'Because the punishment gap between a murder sentence and a sentence of a lesser felony is so extreme, you keep people locked up for much longer periods of time than they need to be,' said Drizin.").

324. *See, e.g.*, H.R. 1162, 2021 Leg., 92d Sess. (Minn. 2021).

325. *See, e.g.*, S.B. 21-124, 73d Gen. Assemb., Reg. Sess. (Colo. 2021).

326. *See* Press Release, Off. of Lieutenant Governor, Fetterman: Study Confirms Immediate Need for Reform of Life Without Parole Sentences for Second-Degree "Felony" Murder (Mar. 26, 2021), https://www.media.pa.gov/pages/lieutenant-governor-details.aspx?newsid=112 (noting report detailing how "[t]he mandatory life-without-parole sentence for second-degree murder in Pennsylvania" results in "[m]ore than 1,000 people . . . sitting in jail right now on what amounts to a death sentence despite never having taken a life" (citing ANDREA LINDSAY, PHILA. LAWS. FOR SOC. EQUITY, LIFE WITHOUT PAROLE FOR SECOND-DEGREE MURDER IN PENNSYLVANIA 4 (2021), https://www.plsephilly.org/wp-content/uploads/2021/01/PLSE-Second-Degree-Murder-Audit-Jan-19-2021.pdf)). Former Lieutenant Governor (now Senator) Fetterman "said the report helps everyone—the legislature, the Board of Pardons, and the public as a whole—understand what's actually happening as a result of mandatory sentencing." *Id.*

327. Hioki, *supra* note 249.

328. 536 U.S. 304 (2002).

329. 543 U.S. 551 (2005).

330. *Atkins*, 536 U.S. at 320–21 (noting individuals with intellectual disability "may be less able to give meaningful assistance to their counsel" and "in the aggregate face a special risk of wrongful execution"); *Roper*, 543 U.S. at 569–70 (noting adolescents' particular "vulnerability" may make them "'most susceptible to influence and to psychological damage'" with "less control, or less experience with control, over their own environment" (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982))).

331. For a broad description of the problem of false confessions, see Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 919 (2004) ("Regretfully, most interrogation training manuals—including the widely used and influential manual by Fred Inbau, John Reid, Joseph Buckley, and Brian Jayne—give no thought to how the methods they advocate communicate psychologically coercive messages and sometimes lead the innocent to confess. Instead, they assume, in the face of empirical evidence, that their methods will produce only voluntary confessions from the guilty and dismiss the well-established social science research on interrogation-induced false confession by mischaracterizing the authors of leadings studies as 'opponents' or 'critics' of interrogation." (citing FRED INBAU, JOHN REID, JOSEPH BUCKLEY, & BRIAN JAYNE, CRIMINAL INTERROGATION AND CONFESSION 411–47 (4th ed. 2001)).

exponentially increased in felony murder prosecutions.[332] As discussed more fully above, the Reid technique[333] of interrogation specifically encourages defendants to admit to lesser criminal responsibility—such as participation in the armed robbery—where defendants only then find that they have confessed to felony murder accomplice liability.[334] Post-*Miranda*,[335] this technique has demonstrated real power to produce confessions,[336] continuing to survive and evolve despite significant widespread concerns that it has a tendency to produce false confessions.[337] The technique invites a person being interrogated to admit to lesser involvement in the offense—and then, through the accomplice liability doctrine and felony murder rule, face consequences for the full offense,[338] especially when employed upon children and individuals with intellectual disabilities.[339] Courts have begun recognizing that this risk is heightened in the context

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332. *See* John H. Blume, Sheri Lynn Johnson, & Susan E. Millor, *Convicting Lennie: Mental Retardation, Wrongful Convictions, and the Right to a Fair Trial*, 56 N.Y. L. SCH. L. REV. 943, 966 (2011).

333. Miranda v. Arizona, 384 U.S. 436, 449–55 (1966) (citing FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS (2d ed. 1962) (cataloguing various psychological interrogation techniques)); *see* Kamisar, *supra* note 195, at 747–51.

334. Bentele, *supra* note 158, at 119 ("Lay people often find it surprising, and somewhat disturbing, that the 'lookout' is exposed to the same range of penalties, generally including life sentences, as the person who actually pulled the trigger.").

335. Miranda v. Arizona, 384 U.S. 436 (1966).

336. *See, e.g.*, Drizin & Leo, *supra* note 331, at 919 ("The genius or mind trick of modern interrogation is that it makes the irrational (admitting to a crime that will likely lead to punishment) appear rational (if the suspect believes that he is inextricably caught or perceives his situation as hopeless and cooperating with authorities as the only viable course of conduct).").

337. *See, e.g.*, Dylan J. French, *The Cutting Edge of Confession Evidence: Redefining Coercion and Reforming Police Interrogation Techniques in the American Criminal Justice System*, 97 TEX. L. REV. 1031, 1034 (2019); Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk*?, 60 AM. PSYCH. 215, 215 (2005).

338. *See* Welsh S. White, *Accomplices' Confessions and the Confrontation Clause*, 4 WM. & MARY BILL RTS. J. 753, 775–77 (1996); *see also* Gisli H. Gudjonsson, *The Science-Based Pathways to Understanding False Confessions and Wrongful Convictions*, 12 FRONTIERS PSYCH., Feb. 22, 2021, at 1, 1, 4; Samson J. Schatz, Note, *Interrogated with Intellectual Disabilities: The Risks of False Confession*, 70 STAN. L. REV. 643, 650–51 (2018); Lauren Rogal, *Protecting Persons with Mental Disabilities from Making False Confessions: The Americans with Disabilities Act as a Safeguard*, 47 N.M. L. REV. 64, 66–68 (2017); Ariel Spierer, Note, *The Right to Remain a Child: The Impermissibility of the Reid Technique in Juvenile Interrogations*, 92 N.Y.U. L. REV. 1719, 1728–29 (2017).

339. *See* Drizin & Leo, *supra* note 331, at 919, 971 (citing Morgan Cloud, George B. Shepherd, Alison Nodvin Barkoff, & Justin V. Shur, *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 499–516 (2002); James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 445–52 (1985); Paul T. Hourihan, *Earl Washington's Confession: Mental Retardation and the Law of Confessions*, 81 VA. L. REV. 1471, 1491–94 (1995)); Thomas Grisso, Laurence Steinberg, Jennifer Woolard, Elizabeth Cauffman, Elizabeth Scott, Sandra Graham, Fran Lexcen, N. Dickon Reppucci, & Robert Schwartz, *Juvenile's Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. & HUM. BEHAV. 333, 351, 357–58 (2003); J. Thomas Grisso & Carolyn Pomicter, *Interrogation of Juveniles: An Empirical Study of Procedures, Safeguards, and Rights Waiver*, 1 L. & HUM. BEHAV. 321, 339 (1977); Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1011–14 (2003). For a comparison of the unique vulnerabilities of juveniles and the mentally challenged, see generally Victor L. Streib, *Adolescence, Mental Retardation, and the Death Penalty: The Siren Call of* Atkins v. Virginia, 33 N.M. L. REV. 183 (2003).

of felony murder.[340] In Colorado, a federal court declined to dismiss a wrongful conviction civil rights suit where police officers used the Reid technique to elicit a false confession to felony murder.[341]

Advocates like Neal Katyal point to the prosecutorial benefits of using accomplice liability and conspiracy charges to facilitate prosecutions and to encourage cooperation, which seems to be factually accurate.[342] However, there is little research to suggest that the defendants from whom it encourages cooperation are the least culpable, and indeed common sense suggests that cooperation reflects a defendant's savvy, the quality of their lawyer, and the existence of other evidence pointing to their guilt of the greater offense. Perhaps this risk is tolerated in part because Black and Latino defendants are the most likely to run it.

The government's expansions of power have always most seriously impacted the least enfranchised individuals and the most serious offenses.[343] Over fifty years ago, Anthony Amsterdam warned about applying the law to "a few outcast . . . whose political position is so weak and whose personal situation is so unpopular, and who are so ugly that public revulsion, which would follow the uniform application of the penalties applied to them, doesn't follow in these few outcast preachers . . . condemned to that punishment."[344]

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340. The Connecticut Supreme Court recently heard a case where police officers used the Reid technique on a defendant "charged with felony murder, the very crime that his interrogators told him would be avoided by a confession." State v. Griffin, 262 A.3d 44, 86 (Conn. 2021) (Ecker, J., dissenting) ("The interrogation tactics employed against the defendant reflect a particular application of a method, commonly known as the Reid method, that has been the subject of scholarly debate and judicial criticism for decades. . . . The Reid Manual, [is] the most widely used and influential interrogation training manual in the United States . . . " (citing Miranda v. Arizona, 384 U.S. 436, 448–53 (1966); Dassey v. Dittmann, 877 F.3d 297, 320–21 (7th Cir. 2017) (Wood, C.J., dissenting), *cert. denied*, 138 S. Ct. 2677 (2018); *Dassey*, 877 F.3d 335–36 (Rovner, J., dissenting); Alan Hirsch, *Going to the Source: The "New" Reid Method and False Confessions*, 11 OHIO ST. J. CRIM. L. 803, 805–08 (2014); Saul M. Kassin, *The Psychology of Confession Evidence*, 52 AM. PSYCH. 221, 222–24 (1997)).

341. Montoya v. City & Cnty. of Denver, No. 16-cv-01457-JLK, 2021 U.S. Dist. LEXIS 67006, at *3–4 (D. Colo. Mar. 4, 2021) ("Mr. Montoya alleges Defendant Officers violated the Fourth, Fifth, and Fourteenth Amendments to the U.S. Constitution by using coercive interrogation techniques to obtain a false confession from him and then by relying on his obviously false confession throughout the criminal case against him.").

342. *See* Katyal, *supra* note 3, at 1313, 1328–29.

343. *See, e.g.*, J. Matthew Gorga, *"Retribution, Not a Solution": Drug-Induced Homicide in North Carolina*, 42 CAMPBELL L. REV. 161, 165–66 (2020) (discussing the history of drug policy in the United States, the earliest instances of which "were less about the dangers of the drugs and more about the people associated with them").

344. Anthony Amsterdam explained the precept in arguing Aikens v. California, 406 U.S. 813, 813 (1972), by stating "the bedrock of a Constitution [is] designed to endure for time. And to give continuing and constant expression to the notion that there are limitations on the power of government to deal with individuals. Guarantees such as cruel and unusual punishment and due process and equal protection are broad statements in grand form, cast for an unforeseeable future and intended to be construed to give continuing protection to the limitations upon governmental power." Transcript of Oral Argument at 5, Aikens v. California, 406 U.S. 813 (1972) (No. 68–5027). This concept was adopted by Justice Douglas in his concurring opinion in Furman v. Georgia, 408 U.S. 238 (1972), where he concluded that statutes which permitted discretion in the imposition vel non of the death penalty were unconstitutional in their operation, as infrequently and arbitrarily applied to unpopular groups, thereby violating the principle of equal protection implicit in the Eighth Amendment's ban on cruel and unusual punishment. *Furman*, 408 U.S. at 256–58.

In the legal context, Amsterdam's argument paralleled the confessional prose of Martin Niemöller.[345] This broad expansion of culpability and group liability appears to operate most harshly on Black and Latino defendants, whereas white defendants are more likely to receive individualized consideration of legal and moral culpability.[346] Gang statutes and mass indictments are the logical extensions of mass culpability.[347] And again and again, they are applied first to Black and Latino communities.[348]

Compare the individualized prosecutions of hundreds of white defendants for the actions on January 6, 2020, in the nation's capital, to the Southern District of New York's prosecution of 120 largely Black and Latino young people on a single federal indictment holding multiple defendants responsible for eight deaths.[349] The individualized assessments of culpability made for white defendants—all of whom engaged in criminal behavior and could reasonably foresee death resulting from their actions (and

345. *See Martin Niemöller: "First They Came For . . .,"* U.S. HOLOCAUST MEM'L MUSEUM, https://encyclopedia.ushmm.org/content/en/article/martin-niemoeller-first-they-came-for-the-socialists (last visited Nov. 5, 2023) (detailing the life and views of Niemöller, who originated the quote, "First they came for the socialists, and I did not speak out—because I was not a socialist . . ." as he came to regret his complicity in Nazi targeting of German society's least enfranchised populations).

346. *See* Keegan Stephan, *Conspiracy: Contemporary Gang Policing and Prosecutions*, 40 CARDOZO L. REV. 991, 993–94 (2018) (finding that "over ninety percent of people added to gang databases are Black and Latino, most with no serious criminal record" nationwide, which draws a sharp contrast from criminal records that indicate "at least twenty-five percent of gang members are white, and openly violent white supremacist gangs avoid this intense policing" (footnotes omitted)).

347. *See* BABE HOWELL & PRISCILLA BUSTAMANTE, REPORT ON THE BRONX 120 MASS "GANG" PROSECUTION 9 (2019) (underlining that, during "the largest gang raid in the history of New York," a startling number of people, "prosecuted by way of mass indictments . . . were either non-gang members or gang members who had little to no involvement in violent conduct"); K. Babe Howell, *Prosecutorial Misconduct: Mass Gang Indictments and Inflammatory Statements*, 123 DICK. L. REV. 691, 710–11 (2019) (referencing mass indictments like the Bronx 120 and Harlem 103 to describe the nation's "already-high risk of wrongful conviction" based on association, which is grounded in mass conspiracy theories); Jeffrey Lane, Fanny A. Ramirez, & Katy E. Pearce, *Guilty by Visible Association: Socially Mediated Visibility in Gang Prosecutions*, 23 J. COMPUT.-MEDIATED COMMC'N 354, 364–66 (2018) (finding that increased visibility from social media "expands the opportunity for gang prosecution," particularly of young African American and Latino men).

348. *See* Binder & Yankah, *supra* note 33, at 206–08 ("[N]ot only can felony murder rules authorize disproportionate liability, they have been imposed on a racially disparate basis anywhere anyone has looked."); Fareed Nassor Hayat, *Killing Due Process: Double Jeopardy, White Supremacy and Gang Prosecutions*, 69 UCLA L. REV. DISCOURSE 18, 34–35 (2021) (citing previous scholarship to contend that gang statutes "ensur[e] continued mass incarceration of Black and Brown people"); *see also* Stephan, *supra* note 346.

349. *Compare* Philbrick, *supra* note 15 (describing the criminal charges associated with the January 6, 2021, attack on the Capitol), *with* U.S. Dep't of Just., *supra* note 8 (describing the criminal charges against members of two gangs).

it did)[350]—is in stark contrast to the treatment of Black and Latino defendants prosecuted for felony murder and accomplice liability.[351]

Prior scholarship has repeatedly demonstrated that bias invades the criminal legal system from the moment of arrest[352] to charging decisions,

350. The Senate Report on the U.S. Capitol attack found that "140 law enforcement officers reported injuries suffered during the attack," and three lost their lives. GARY PETERS, ROB PORTMAN, AMY KLOBUCHAR, & ROY BLUNT, S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFS. & S. COMM. ON RULES & ADMIN., EXAMINING THE U.S. CAPITAL ATTACK: A REVIEW OF THE SECURITY, PLANNING, AND RESPONSE FAILURES ON JANUARY 6, at 29 (2021) . This included United States Capitol Police Officer Brian Sicknick, who was beaten and attacked with bear spray. *Id.* Their deaths were not unforeseeable as participants shouted "We're gonna kill you," "We're gonna murder you and then them." *Id.* at 28. *See also* Cameron, *supra* note 17 (noting at least seven people died during the attack, including Rosanne Boyland, who appeared to have been crushed in the stampede, and Officer Brian Sicknick "who was attacked by the mob"); NPR, *supra* note 15 (noting that at least one individual charged with conspiracy wore a shirt that said "Murder the Media").

351. *Compare* Jeremy Stahl, *The Jan. 6 Defendants Are Getting Off Easy*, SLATE (Jan. 6, 2022, 2:40 PM), https://slate.com/news-and-politics/2022/01/jan-6-capitol-riot-criminal-prosecutions-status.html (describing the criminal justice system's more lenient treatment towards January 6th rioters, who are 95 percent white), *with* Madison Hall, Skye Gould, Rebecca Harrington, Jacob Shamsian, Azmi Haroun, Taylor Ardrey, & Erin Snodgrass, *At Least 1,003 People Have Been Charged in the Capitol Insurrection So Far. This Searchable Table Shows Them All*., INSIDER (Feb. 16, 2023, 9:53 AM), https://www.insider.com/all-the-us-capitol-pro-trump-riot-arrests-charges-names-2021-1 (listing individual charges for all rioters), *with* Binder & Yankah, *supra* note 33, at 207 (finding through the limited available data that "a person of color was 12 times more likely than a white person to be convicted of felony murder"), *and* LINDSAY TURNER, GREG EGAN, & KILOMARIE GRANDA, TASK FORCE ON AIDING & ABETTING FELONY MURDER: REPORT TO THE MINNESOTA LEGISLATURE 6–7 (2022), https://mn.gov/doc/assets/AAFM-LegislativeReport_ACCESSIBLE_2-1-22_tcm1089-518411.pdf (highlighting the disproportionate rate of incarceration for felony murder in Minnesota according to race).

352. SUSAN NEMBHARD & LILY ROBIN, URB. INST., RACIAL AND ETHNIC DISPARITIES THROUGHOUT THE CRIMINAL LEGAL SYSTEM: A RESULT OF RACIST POLICIES AND DISCRETIONARY PRACTICES 3–4 (2021), https://www.urban.org/sites/default/files/publication/104687/racial-and-ethnic-disparities-throughout-the-criminal-legal-system.pdf (attributing bias to a higher rate of police stops, police-initiated contact, and arrests among people of color); *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, SENT'G PROJECT (Apr. 19, 2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities/ (citing bias as a reason why black drivers are "far more likely to be searched and arrested" than white drivers).

through defense counsel bias,[353] plea bargaining,[354] and jury verdicts.[355] And, perhaps it is impossible to determine whether our research establishes discrimination against Black and Latino defendants or the ease of white privilege to avoid criminal responsibility. The difference should not matter. Ultimately, courts, prosecutors, and legislatures need to determine whether they are going to consistently express indifference to the question of moral culpability—or, instead, return to principles of individualized responsibility through correcting the legal system legislatively and executively. It is one thing to suggest that our legal system is especially draconian, and in the words of one prosecutor—if a perpetrator is "in for a dime," they are "in for a dollar."[356] It is entirely different to suggest that we tolerate error at identifying who is responsible, especially when the defendants are Black or Latino.

The possibility of the Supreme Court eliminating capital punishment for felony murder, or life without parole for children convicted of felony murder, may be years away. It may be some future generation that produces a court opinion which requires individualized assessments of

353. *See* Jessica Blakemore, *Implicit Racial Bias and Public Defenders*, 29 GEO. J. LEGAL ETHICS 833, 840 (2016) (arguing that, although public defenders "deal largely with minority clients and often have a conscious ideological commitment to racial equality," they, too, are impacted by implicit bias); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U.L. REV. 795, 806–08 (2012) (demonstrating how racial bias plays an impactful role in charging decisions); Vanessa A. Edkins, *Defense Attorney Plea Recommendations and Client Race: Does Zealous Representation Apply Equally to All?*, 35 L. & HUM. BEHAV. 413, 422 (2011) (finding that "practicing defense attorneys displayed a tendency to recommend plea bargains for African Americans that were longer than those that they would recommend for Caucasian clients"); Alafair S. Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J.L. & LIBERTY 512, 516–17 (2007) (explaining prosecutors are subject to cognitive bias during initial charging decisions); *see also* Claire Radda, Implicit Racial Bias and Public Defenders: Assessing the Intersection of Implicit Bias with Limited Time and Resources (2021) (honors thesis, University of Wyoming) (available at https://wyoscholar.uwyo.edu/articles/thesis/Implicit_Racial_Bias_and_Public_Defenders_Assessing_the_Intersection_of_Implicit_Bias_with_Limited_Time_and_Resources/14600001).

354. *See* Elayne E. Greenberg, *Unshackling Plea Bargaining from Racial Bias*, 111 J. CRIM. L. & CRIMINOLOGY 93, 124–30 (2021) (illustrating how implicit bias contributes to the process of plea bargaining, which results in unjust outcomes for African American defendants); Joseph J. Avery & Joel Cooper, *Racial Bias in Post-Arrest and Pretrial Decision Making: The Problem and a Solution*, 29 CORNELL J. L. & PUB. POL'Y 257, 264–65 (2019) (finding the Department of Justice's instructions to prosecutors to determine whether to pursue a plea bargain involves and is impacted by racial perceptions, as well as finding that "[p]rosecutors are less likely to offer blacks a plea bargain, less likely to reduce charge offers for blacks, and more likely to offer blacks plea bargains that include prison time").

355. *See* Anona Su, *A Proposal to Properly Address Implicit Bias in the Jury*, 31 HASTINGS WOMEN'S L.J. 79, 97 (2020) (commending Judge Mark W. Bennet for his implicit bias jury instruction, which helps to "keep[] bias out of the decision-making process for the defendant"); Christian Sundquist, *Uncovering Juror Racial Bias*, 96 DENV. L. REV. 309, 316–17, 350 (2019) (discussing and acknowledging racial bias in the context of juror decision-making "to impeach otherwise final verdicts" given recent caselaw); Ashley Southall, *To Curb Bad Verdicts, Court Adds Lesson on Racial Bias for Juries*, N.Y. TIMES (Dec. 15, 2017), https://www.nytimes.com/2017/12/15/nyregion/to-curb-bad-verdicts-court-adds-lesson-on-racial-bias-for-juries.html; Kang, Bennett, Carbado, Casey, Dasgupta, Faigman, Godsil, Greenwald, Levinson, & Mnookin, *supra* note 199, at 1142–43 (analyzing results from a previous study, which indicated the small effect of "juror bias against racial outgroups" nonetheless carries significant impacts in the context of verdicts and sentencing).

356. *See* Waddington v. Sarausad, 555 U.S. 179, 199–200 (2009) (Souter, J., dissenting) (suggesting the accomplice-liability instruction was defective owing to the ambiguity of the statutory language it incorporated, and its deficiency was underscored by the prosecutor's erroneous argument).

culpability and proportional accountability, as our understanding of these issues continues to evolve. As Justice Stevens explained: "Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes. Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time . . . ."[357]

CONCLUSION

The time has long come and gone for legislatures and courts to eliminate the combined application of the felony murder rule and accomplice liability doctrine. The combined doctrines provide no opportunity to consider a defendant's limited role in an offense and threaten to create a dragnet of culpability. Our research adds to the lengthy criticism of the felony murder rule in combination with the accomplice liability doctrine by providing evidence that racial bias—implicitly or explicitly—enters the arena when they are combined. A credible legal system cannot impose the most draconian sentences based upon presumptions and imputed elements, especially where race plays a significant role in the operation of these presumptions. Repeatedly, the credibility of our legal system is tested when the accomplice liability doctrine and felony murder rule are used to prosecute Black and Latino defendants, such as the decision to prosecute one hundred and twenty mostly Black and Latino teenagers and young adults collectively for the murder of eight people, while individually determining the culpability of over eight hundred, largely older white men invading the Capitol where seven people died. Eliminating the dual felony murder and accomplice liability doctrine does not insulate a defendant from all criminal liability. Rather, it simply ensures holding the person liable for the acts that they commit and for the intent that they had, rather than imputing those elements in acts of imaginative legal speculation.

The risk that implicit bias plays a role in charging decisions and jury verdicts provides sufficient concern to warrant eliminating the doctrine. Regardless of the benefits of expedience the exercise of power offers—and in part because of them—we call for the deactivation of this doctrine. The risk that jurors assessing liability for these types of offenses will assume group responsibility for the actions of Black and Latino defendants but assess white defendants' culpability solely for their own actions, warrants limiting the combined use of the felony murder rule and accomplice liability doctrine in non-mandatory life without parole sentences.

Our research does not complete the inquiry into the use of gang prosecutions, and whether racial bias influences finding group liability in non-

357. Graham v. Florida, 560 U.S. 48, 85 (2010), *as modified* (July 6, 2010) (Stevens, J., concurring) (noting "unless we are to abandon the moral commitment embodied in the Eighth Amendment, proportionality review must never become effectively obsolete. . . . While Justice [Thomas] would apparently not rule out a death sentence for a $50 theft by a 7–year–old, the Court wisely rejects his static approach to the law. Standards of decency have evolved since 1980. They will never stop doing so" (citations omitted)).

homicide contexts.[358] It invites further research and inquiry into the constitutionality of group liability in those contexts. However, our findings confirm the argument made decades, even centuries ago—encumbrances on the protections of the Bill of Rights are first applied to marginalized groups. These encumbrances are expanded and still used primarily against the powerless. When implicit racial biases predictably wreak havoc in the application of the combined accomplice liability doctrine and felony murder rule, these encumbrances undermine faith and trust in our justice system, as well as the promise that individuals are held accountable for their actions, not as a result of their group association.

358. *See, e.g.*, Powell v. Alabama, 287 U.S. 45, 49–50 (1932); *The Scottsboro Affair*, FACING HIST. & OURSELVES (Mar. 14, 2016), https://www.facinghistory.org/resource-library/scottsboro-affair; Carl Suddler, *How the Central Park Five Expose the Fundamental Injustice in Our Justice System*, WASH. POST (June 12, 2019, 6:00 AM), https://www.washingtonpost.com/outlook/2019/06/12/how-central-park-five-expose-fundamental-injustice-our-legal-system/.

APPENDIX A

On July 22, 2021, 5 men were arrested for the robbery and murder of Catherine Thomas. After a thorough police investigation, which included surveillance camera review, eyewitness interviews, and the cooperation of Jose Peres (who confessed and agreed to testify in exchange for leniency by the prosecution), the following facts were established: on July 10th, at around 4:30 p.m., Catherine Thomas left her home to go shopping. At around 6 p.m., a local worker found Thomas's body inside an alley garage just a few blocks from Thomas's home. Thomas had been robbed and struck in the head twice with a hard object that caused bleeding in the brain and eventually death.

Peres signed a written statement that asserted as follows: at about 4:10 p.m. on the day of the murder, he arrived in a local park, where he was looking for his friends. He said he found a group of people gathered there. It included Joaquin Martinez, Diego Rodriguez, Emelio Sanchez, and Andres Hernandez, as well as three other young men who left the park shortly thereafter and were not involved in the robbery and killing. When Peres arrived, those in the group were talking and singing. None of the men were armed with weapons, to his knowledge. After the three other young men left, Rodriguez suggested to the others that they should "get paid" by robbing someone.

Two or three of them muttered general agreement to rob someone. Rodriguez pointed at Catherine Thomas, who was walking on the other side the street near the corner. Hernandez said he would love to "get paid." Martinez, Peres, and Hernandez crossed the street and followed Thomas for approximately one block. The rest of the group followed on the other side of the street. When the group trailing Thomas approached her, Hernandez shoved Thomas into an alley. And Martinez punched Thomas. They were soon joined by the other two. Hernandez then carried Thomas to the center of the alley and dropped her in front of a garage located at the point where the alley joins another. The others followed, except for Sanchez, who stood outside for the entire duration of the event.

Members of the group then opened her handbag and struggled over her wallet and change purse. As the group began to leave with Thomas' wallet, phone, and change purse, Hernandez said something about the woman having seen them. Martinez then said, "exactly," turned around, walked over to Thomas, and hit her twice in the head with a short metal bar that had been laying on the ground nearby. Shortly thereafter, the group dispersed and left the alley. When Thomas was found twenty minutes later, she was rushed to the hospital, but was pronounced dead.

Eyewitness testimony is similar to Peres's statement. A local man described some of the events. He said that he had gone to the park, where he saw the five young Hispanic men gathered. Hernandez was talking to the group about "getting paid" and Martinez said, "Yeah, let's go get that

woman." At that point, he saw Martinez, Peres, and Hernandez follow Thomas, while Sanchez and Rodriguez followed in a separate group across the street. The eyewitness added that he himself began to follow to see what the young men were doing, but by the time he got there, all he saw was Sanchez standing watch outside the alley. He then went to look for police, as he did not have his phone with him.

Other witnesses corroborated different portions of the above accounts. One man told investigators that he was in the park on the afternoon of the murder. He saw Martinez, Peres, Rodriguez, and others gathered there. The group was being noisy and singing a song about needing money. Somebody then said they were "going to get that one," and the witness saw that Rodriguez was pointing to a woman standing on the corner. The young men then got up and walked in the woman's direction. The witness did not follow them.

A 14-year-old boy told police that he saw Martinez at a local store that same evening, and heard Martinez say to someone that he "had to kill her" because "she saw us."

-end of facts-

All five young men are being charged with crimes in connection with the robbery and killing.