

DEFENDING VICARIOUS FELONY MURDER[©]

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Abstract

Felony murder is a much-maligned and much-misunderstood doctrine. At its broadest, it is indefensible. Guyora Binder and David Crump have compellingly shown that this broad felony murder never really existed and that the limitations that jurisdictions have placed on the doctrine largely make it normatively acceptable.

Vicarious felony murder, however, has not been so defended. This Article provides such a defense, drawing from philosophy and psychology work on joint shared intention, action and omission, and imputation of culpability. It concludes that, to the extent that underlying felony murder is normatively appropriate and methods of proof are reliable, vicarious felony murder is also eminently defensible because it reliably functions to discern culpability and impose condign punishment.

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I. INTRODUCTION

Felony murder is, at first blush, indefensible. It is thought that the doctrine imposes first-degree murder liability on any person who participates in a felony that results in a killing.¹ One scholar has stated, “A killing during the course of a felony, whether accidental or intentional, equals first degree murder.”² Under this definition, felony murder truly is indefensible because it exposes minor actors—who could not have foreseen a killing by one of their

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1. See MODEL PENAL CODE § 210.2 (1962).

2. Leonard Birdsong, *The Felony Murder Doctrine Revisited: A Proposal for Calibrating Punishment That Reaffirms the Sanctity of Human Life of Co-Felons Who are Victims*, 33 OHIO N.U. L. REV. 497, 497 (2007).

co-felons—to murder liability.³ In such cases, the principles of transferred intent, from the felony to the killing,⁴ and deterrence, which underpins felony murder, do not hold much, if any, justificatory water.⁵

But two legal scholars, Guyora Binder and my co-panelist, David Crump, have compellingly defended felony murder by showing that the critics' version of the doctrine, mentioned above, never really existed.⁶ That version is, rather, a skeletal framework that jurisdictions have clothed with one or more important limitations. These limitations include the following:

- requiring that the underlying felony be dangerous to life,⁷ either because the felony is inherently dangerous,⁸ the manner in which the felony is carried out is dangerous, making the killing foreseeable;⁹ or the felony is among a list of statutorily enumerated dangerous felonies;¹⁰
- imposing merger, meaning that the felony must be independent of the killing;¹¹
- requiring that the killing be in furtherance of the felony;¹²
- requiring a proximate causal link between the felony and killing;¹³
- imposing a narrow construction of the time period during which the felony is said to be committed;¹⁴
- permitting affirmative defenses for non-killing co-felons;¹⁵
- permitting duress defenses;¹⁶
- limiting the death penalty to actual killers;¹⁷

3. See GUYORA BINDER, *FELONY MURDER* 4–5 (Stanford Univ. Press 2012).

4. *Id.* at 12.

5. See David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL'Y 359, 370–71 (1985); Michelle S. Simon, *Whose Crime Is It Anyway?: Liability for the Lethal Acts of Nonparticipants in the Felony*, 71 U. DET. MERCY L. REV. 223, 228–29 (1994).

6. See BINDER, *supra* note 3, at 4–5.

7. *Id.* at 177.

8. SANFORD H. KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES* 447 (8th ed. 2007).

9. David Crump, “Murder, Pennsylvania Style”: *Comparing Traditional American Homicide Law to the Statutes of Model Penal Code Jurisdictions*, 109 W. VA. L. REV. 257, 340 (2007) [hereinafter Crump, *Murder, Pennsylvania Style*].

10. WAYNE R. LAFAYE, *Felony Murder*, in 2 SUBSTANTIVE CRIM. L. § 14.5 (2d ed. 2013).

11. Crump, *Murder, Pennsylvania Style*, *supra* note 9, at 341.

12. Birdsong, *supra* note 2, at 503; Simon, *supra* note 5, at 241.

13. Simon, *supra* note 5, at 245.

14. LAFAYE, *supra* note 10.

15. *Id.*

16. Russell Shankland, *Duress and the Underlying Felony*, 99 J. CRIM. L. & CRIMINOLOGY 1227, 1227 (2009).

17. Sam Kamin & Justin Marceau, *Vicarious Aggravators*, 65 FLA. L. REV. 769, 791 (2013).

- requiring malice;¹⁸ and
- requiring gross recklessness, which is implied by the commission of a dangerous felony despite being rebuttable.¹⁹

Some of these limitations are more effective than others in responding to felony murder's principles of transferred intent and deterrence, and in ensuring normatively appropriate outcomes. Crump and Binder have described what those limitations are and how and why they are effective.²⁰ They have done so quite effectively, justifying felony murder in general as ground that does not need to be retread.²¹ For my purposes, it suffices to say two things in light of their work. First, one cannot speak of felony murder as a monolith. Rather, one should speak of many versions of felony murder, some of which are more defensible than others. Second, those versions that are the most defensible are eminently defensible.

My concern in this Article is to explore a subset of felony murder, which is vicarious felony murder. Specifically, this Article asks whether non-killing co-felons are categorically different from their killing co-venturers who commit an actual killing.²² If they are, then their culpability, liability, and ultimate sentence should be governed by a different legal structure—different criminal statutory provisions and, following from those separate provisions, different sentencing guidelines—than the legal structure that governs actual killers.²³ If non-killing co-felons are not categorically different than their counterparts, then both types of criminals should be subject to the same legal structure *ex ante*, with appropriate distinctions made *ex post* on a case-by-case basis.²⁴

Whether one is a non-killing co-felon or the actual killer appears to matter greatly to the murder liability determination and the ultimate sentence. But this is not the legally necessary outcome, because both non-killing co-felons and actual killers are judged based on the same law.²⁵ The Model Penal Code (MPC), for example, defines murder, in part, as a criminal homicide that

is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt

18. BINDER, *supra* note 3, at 161–62.

19. Guyora Binder, *Felony Murder and Mens Rea Default Rules: A Study in Statutory Interpretation*, 4 BUFF. CRIM. L. REV. 399, 481 (2000).

20. See BINDER, *supra* note 3; Crump, *Murder, Pennsylvania Style*, *supra* note 9.

21. See *supra* note 20 and accompanying text.

22. See discussion *infra* Part III.

23. See Joshua Dressler, *Reforming Complicity Law: Trivial Assistance as a Lesser Offense?*, 5 OHIO ST. J. CRIM. L. 427, 447 (2008).

24. See *id.* at 429–30.

25. See Ursula Bentele, *Multiple Defendant Cases: When the Death Penalty Is Imposed on the Less Culpable Offender*, 38 RUTGERS L. REC. 119, 120 (2010–2011) (“In most jurisdictions, accomplice liability principles render all those who participate in a felony, where death results, equally guilty of capital murder.”).

to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnaping or felonious escape.²⁶

Under the MPC, whether the defendant is the actual killer or a non-killing co-felon makes no difference; as long as the killing is of a certain type that is related to an underlying felony and the defendant participates in that felony, the defendant is exposed to felony-murder liability.²⁷

Should non-killing co-felons and actual killers be subject to the same law, or should they, *ex ante*, be treated differently by different legal structures? The answer to this question is contingent upon the answer to three sub-questions. First, does the act of killing impose upon the actor a quality of culpability, a quantity of culpability, or both, that is categorically different or greater than that of a co-felon who does not kill?²⁸ Second, is it impossible, in reality, to discern a shared intention or other culpable *mens rea* between a non-killing co-felon and an actual killer as it pertains to the killing; and if it is impossible, should felony murder in fact require a shared intention?²⁹ Third, can non-killing co-felons ever be as culpable or even more culpable than actual killers?³⁰

This Article explores these questions and comes to some surprising answers. Applying philosophical and psychological work regarding intent, action, and shared cooperative activity, this Article concludes first that the actual killer's act of killing does not always mean that she is more culpable than her non-killing co-felon.³¹ Actions, in other words, are not as vital to a culpability determination as we tend to think they are; omissions and culpable ignorance can be just as culpability-inducing. Second, the Article concludes that it is ultimately impossible to discern a shared intention or other culpable *mens rea* between a non-killing co-felon and the actual killer as it pertains to the killing, but that felony murder does not and should not require such shared intention to kill.³² Third, the Article observes that non-killing co-felons can be just as culpable as, or even more culpable than, actual killers.³³ Non-killing co-felons and actual killers, therefore, should be treated to the same legal structures. Therein lies this Article's defense of vicarious felony murder.

This Article proceeds in four parts. Part II sets forth the law of felony murder, primarily to show how non-killing co-felons are treated to the same legal structure as actual killers.³⁴ Part III discusses, from a legal theory

26. MODEL PENAL CODE § 210.2(1)(b) (1962).

27. *Id.*

28. *See infra* Part II.

29. *See infra* notes 112–31 and accompanying text.

30. *See infra* notes 119–52 and accompanying text.

31. *See infra* Part II.

32. *See infra* notes 112–31 and accompanying text.

33. *See infra* notes 112–52 and accompanying text.

34. *See infra* Part II.

standpoint, whether non-killing co-felons and actual killers should be treated to the same legal structure.³⁵ Part IV presents extra legal challenges and defenses to felony murder.³⁶ Public opinion, psychological theories, and philosophical discussions all imply criticisms—but ultimately convincing defenses—to vicarious felony murder. Part V addresses the evidentiary problem of proof when it comes to vicarious felony murder.³⁷

II. THE LAW OF FELONY MURDER

As mentioned above, it is appropriate to speak of the many versions of felony murder, rather than speak of felony murder as a monolith. Each version has at least one commonality, which is that non-killing co-felons are judged under the same legal structure as actual killers.

David Crump has favorably compared Texas's homicide statute to that of Pennsylvania's, the latter having been, in his view, an anachronistic model for other jurisdictions.³⁸ Texas provides for murder liability when someone

commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.³⁹

Pennsylvania, in turn, provides the following definition of felony murder:

A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony.⁴⁰

To be sure, each of these states provides for *some probable* differentiation between a non-killing co-felon and the actual killer. Texas's statute, for example, has a causation requirement.⁴¹ This requirement would certainly be satisfied by the actual killing and is less likely to be satisfied—but may still be satisfied—by the contributory actions of a non-killing co-felon.⁴² In addition, capital-murder liability may be imposed only upon actual killers, not non-killing co-felons.⁴³ Pennsylvania's statute, true to Crump's criticism, differentiates in a much more limited way: first-degree murder liability may be

35. See *infra* Part III.

36. See *infra* Part IV.

37. See *infra* Part V.

38. Crump, *Murder, Pennsylvania Style*, *supra* note 9, at 259–60.

39. TEX. PENAL CODE ANN. § 19.02(b)(3) (West 2011).

40. 18 PA. CONS. STAT. ANN. § 2502(b) (West 1998).

41. PENAL CODE § 19.02(b)(3).

42. See *id.*

43. TEX. PENAL CODE ANN. § 19.03 (West 2011 & Supp. 2014).

imposed upon only actual killers,⁴⁴ but both non-killing co-felons and actual killers remain equally exposed under the state's second-degree murder provision.⁴⁵

The ways that these statutes treat non-killing co-felons and actual killers differently reflect an appreciation that there is usually a difference between the two types of criminals. Texas expresses this appreciation more than Pennsylvania. But are they, in fact, ever equal? It is at least arguable that the actual killer is always more culpable than the non-killing co-felon, and is more culpable in a fundamentally different way such that each criminal should be treated to different legal structures. New York's felony-murder statute is limited in a number of ways that recognize the potential difference between non-killing co-felons and actual killers.⁴⁶ A defendant in New York is liable for felony murder when:

Acting either alone or with one or more other persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, criminal sexual act in the first degree, sexual abuse in the first degree, aggravated sexual abuse, escape in the first degree, or escape in the second degree, and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

- (a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and
- (b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and
- (c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and
- (d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury⁴⁷

Although this felony-murder statute treats both a non-killing co-felon and an actual killer the same, the statute contains numerous limitations—enumerated underlying felonies, killing in furtherance of the felony, causation—that may differentiate *ex post* between non-killing co-felons and actual killers.⁴⁸ The narrow affirmative defense provision adds another

44. 18 PA. CONS. STAT. ANN § 2502(a).

45. *Id.* § 2502(b).

46. N.Y. PENAL LAW § 125.25(3) (McKinney 2009).

47. *Id.*

48. *Id.*

important limitation, relieving defendants of liability if they can show that they neither participated in, nor negligently failed to appreciate the possibility of, the killing.⁴⁹ While New York probably effectively differentiates *ex post* between non-killing co-felons and actual killers (where Pennsylvania does not and Texas partially does), the question remains whether they should be differentiated *ex ante* by evaluating their liability with two separate, proprietary legal structures. Are non-killing co-felons and actual killers categorically different as to warrant two separate governing laws?

An entrée to answering this question emerges in the Supreme Court jurisprudence on the death penalty for felony murder. In 1982, the Court decided *Enmund v. Florida*, a case involving a defendant who was the driver involved in a home robbery, during which the robbers killed two elderly homeowners.⁵⁰ The trial court instructed the jury that “[t]he killing of a human being while engaged in the perpetration of or in the attempt to perpetrate the offense of robbery is murder in the first degree even though there is no premeditated design or intent to kill.”⁵¹ To be liable, Enmund had to have been “actually present and . . . actively aiding and abetting the robbery or attempted robbery,” and the unlawful killing had to have “occurred in the perpetration of, or in the attempted perpetration of, the robbery.”⁵² Enmund was sentenced to death.⁵³

The Supreme Court reversed this sentence, holding that the death penalty violates the Eighth Amendment when imposed upon someone who does not himself kill, attempt to kill, or intend that killing take place or that lethal force be employed.⁵⁴ Although limited to the question of the death penalty—and probably a product of grammatical imprecision—the Court also suggested that the sentence violated Enmund’s Eighth Amendment rights because “the State treated [Enmund and the actual killers] alike and attributed to Enmund the culpability of those who killed.”⁵⁵ There was, to be sure, no indication that the Court actually thought that non-killing co-felons and actual killers were categorically different, or that treating them to the same legal structure would violate the Eighth Amendment.⁵⁶

Five years later, in *Tison v. Arizona*, the Court revisited the question of the death penalty for non-killing co-felons.⁵⁷ In that case, the co-felons helped break their father out of jail.⁵⁸ Knowing their father and his cellmate—who they also knew to be part of the escape attempt—had killed before, they

49. *Id.*

50. *Enmund v. Florida*, 458 U.S. 782, 784 (1982).

51. *Id.* at 784–85 (alteration in original) (quoting jury instructions) (internal quotation marks omitted).

52. *Id.* at 785 (quoting jury instructions) (internal quotation marks omitted).

53. *Id.*

54. *Id.* at 788.

55. *Id.* at 798.

56. *See id.* at 799–801.

57. *See Tison v. Arizona*, 481 U.S. 137, 138 (1987).

58. *Id.* at 139.

“assembled a large arsenal of weapons.”⁵⁹ During the escape, the party kidnapped a family for their car, and sure enough, the father and his cellmate murdered the family while the defendants were at a distance from the scene of the killing.⁶⁰ There was no indication that the defendants intended the killing, wanted it to happen, or knew ahead of time that the killers intended to kill.⁶¹

In *Enmund*, the Court distinguished between minor participants who had not killed, attempted to kill, or intended to kill, from those who did kill, attempted to kill, or intended to kill.⁶² The *Tison* defendants fit neither category because they were major actors in the underlying felony and acted with a reckless indifference to human life, but did not kill, or attempt or intend to kill.⁶³ The Court held that defendants in this intermediate category may be sentenced to death consistent with the Eighth Amendment.⁶⁴

Enmund and *Tison* are notable for two relevant reasons. First, the *Enmund* Court moved towards differentiating non-killing co-felons from actual killers, while the *Tison* Court, in addressing the same gap, moved closer towards treating them the same.⁶⁵ Second, both Courts realized that there was *some* inherent difference between non-killing co-felons and actual killers, requiring the differentiation the Court imposed.⁶⁶

With *Enmund*, *Tison*, and the felony-murder statutes in effect around the country, there is an unresolved question: should non-killing co-felons and actual killers *ever* be exposed to equal liability?⁶⁷ On one hand, the answer is no: actual killing makes a difference in culpability. This is why a completed murder is treated more seriously—and is a different crime—than attempted murder, even though defendants’ *mens rea* in each case may be the same. This is also why the *Enmund* Court’s analysis was a bit myopically focused on *Enmund*’s *mens rea*:

[T]he focus must be on petitioner’s culpability, not on those who committed the robbery and killings. He did not kill or intend to kill and thus his culpability is different from that of the robbers who killed, and it is impermissible for the State to treat them alike and attribute to petitioner the culpability of those who killed the victims.⁶⁸

59. *Id.*

60. *Id.* at 141.

61. *See id.*

62. *Id.* at 149–50.

63. *Id.* at 150–51.

64. *Id.* at 158.

65. *See Enmund v. Florida*, 458 U.S. 782, 801 (1982). *But see Tison*, 481 U.S. at 157–58.

66. *See Enmund*, 458 U.S. at 801; *see also Tison*, 481 U.S. at 151 (stating that the defendants “fall outside the category of felony murders for whom *Edmund* explicitly held the death penalty disproportional” because they acted with reckless indifference to human life).

67. *See infra* Part III.

68. *Enmund*, 458 U.S. at 782–83.

The resulting event—the killing—may matter as much as the defendant's *mens rea* in determining culpability and imposing liability. While the *Enmund* Court may have reached the right normative outcome because *Enmund* did not pull the trigger or intend, expect, or support the killing, it did not adequately account for the resulting event in determining culpability.⁶⁹

On the other hand, the answer is yes: non-killing co-felons and actual killers are, in some cases, equally liable. Both criminals can have the same intent; indeed, non-killing co-felons may be more culpable than the actual killers. Consider a situation in which a highly intelligent felon enlists an impressionable, less-intelligent person in a felony, during which the former prevails upon the latter to carry a loaded gun that he ends up using to kill. Both criminals can reasonably be seen as, at least, equally culpable in the resulting killing. Cases such as these suggest that non-killing co-felons and actual killers should be treated to the same legal structures *ex ante*, subject to *ex post* limitations to differentiate them, either at the charging, trial, or sentencing stage.⁷⁰

Tison, better than *Enmund*, demonstrates this tension. Treating non-killing co-felons and actual killers to the same legal structure makes some principled sense because, as in *Tison*, the defendants were so closely connected to the killing and certainly contributed to its commission.⁷¹ That case is also troubling, however, because it suggests that the act of killing does not mean anything on its own in terms of culpability.⁷² Despite how culpable they were, the *Tison* defendants had to have been at least slightly less culpable than their father and his cellmate.⁷³ Otherwise, criminal actions do not mean anything, and liability should be imposed on *mens rea* alone. Taking action is, furthermore, strong evidence of one's true intent; if one does not take action on one's professed beliefs, does one truly have those beliefs? If the answer is no, or even not beyond a reasonable doubt, then co-felons should always be treated as less culpable than actual killers.⁷⁴ The *Tison* holding suggests that one who intends to kill may have culpability equal to that of someone who acts with reckless indifference to human life.⁷⁵ On this logic, the barrier between first-degree premeditated murder and second-degree murder breaks down; reckless homicide becomes the same as a premeditated killing.

This tension is illustrated by the inconsistency the Eighth Amendment entails, which treats the actual killer as the most culpable of all participants in a felony,⁷⁶ but under the felony-murder rule, the non-killing co-felon is treated to

69. See *id.* at 798–801.

70. See *Tison*, 481 U.S. at 157–58.

71. See *id.* at 139.

72. See *id.* at 141.

73. See *id.*

74. See *infra* Part IV.

75. See *Tison*, 481 U.S. at 157–58.

76. Bentele, *supra* note 25, at 123.

the same legal structure as the actual killer.⁷⁷ As Justice Breyer observed in the recent case *Miller v. Alabama*, in which the Court held that mandatory life imprisonment without parole for those under the age of eighteen at the time of their crimes violates the Eighth Amendment,⁷⁸ people who do not intend to kill are “categorically less deserving of the most serious forms of punishment than are murderers.”⁷⁹ While this statement does not answer all questions regarding the comparative culpability of non-killing co-felons and actual killers—some actual killers do not intend to kill, and some non-killing co-felons do so intend but fail in their murderous goal—it does suggest that both types of criminals should be treated to different legal structures because they are categorically different.⁸⁰ If this is the case, then the *Tison* defendants ought not to have been sentenced to death.

III. SHOULD NON-KILLING CO-FELONS AND ACTUAL KILLERS BE TREATED THE SAME?

Justice Breyer’s suggestion that there is a categorical difference between non-killing co-felons and actual killers is reflected in traditional criminal law theory, which requires both *mens rea* and an *actus reus* for liability to attach.⁸¹ Felony murder’s principle of transferred intent, of course, sources the requisite *mens rea* and *actus reus* in the underlying felony.⁸² This principle, however, carries with it the same problems that group-crime models carry, specifically, that it is difficult to connect one person’s *mens rea* to commit one crime to the different *actus reus* of another person.⁸³ In addition to this group-crime-model problem, non-killing co-felons and actual killers will have committed fundamentally different acts: killers will have killed and non-killing co-felons will have not killed.

Joshua Dressler has invoked this difference, criticizing accomplice law as a “disgrace,” and noting that it “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.”⁸⁴ For felony murder, Dressler would perhaps support treating, *ex ante*, non-killing co-felons and actual killers to different legal structures based on relative causation.⁸⁵ Dressler might develop “a statutory distinction between ‘causal’ and ‘non-causal’ accomplices: causal

77. *See Tison*, 481 U.S. at 157–58.

78. *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012) (majority opinion).

79. *Id.* at 2475 (Breyer, J., concurring).

80. *See id.*

81. Fred J. Abbate, *The Conspiracy Doctrine: A Critique*, 3 PHIL. & PUB. AFF. 295, 301 (1974) (“It is an ancient maxim of Anglo-American law that the ‘imagination of the mind to do wrong, without an act done, is not punishable.’” (quoting *Hales v. Petit*, 1 Plow. 253, 259, 75 Eng. Rep. 387, 397 (C.B. 1562))).

82. *See Tison*, 481 U.S. at 159.

83. Abbate, *supra* note 81, at 302 (“To speak of ‘mental behavior’ [in the group context] is dubious enough; to speak of it as ‘drawing punishment’ is worse.”).

84. Dressler, *supra* note 23, at 428 (footnotes omitted).

85. *Id.* at 446–48.

accomplices (persons but for whose assistance the offense would not have occurred) could continue to be convicted of the offense committed by the principal; non-causal accomplices would be convicted of a lesser offense and punished accordingly.”⁸⁶

Related to this approach, Dressler observed that “Glanville Williams long-ago asserted that it is ‘a matter of common sense [that] a person who gives very minor assistance ought not to be held as an accessory.’”⁸⁷

This approach is valid but is also of limited applicability. For Sanford Kadish, causation is an inappropriate distinguishing factor since the principal’s voluntary action always means that the accomplice did not cause an act.⁸⁸ Daniel Yeager also rejected causation, but concluded with a different recommendation.⁸⁹ Instead of treating co-felons to the same law, as Kadish would, Yeager would separate them entirely because, in the context of felony murder, the non-killing co-felon and the actual killer will have performed entirely different crimes.⁹⁰ This approach would logically lead to the obsolescence of felony murder. Indeed, Arnold Loewy recommended abolishing the doctrine and replacing it with aggravators for the underlying felonies.⁹¹ Thus, for example, someone who raped another, which resulted in the victim’s death, should probably receive a much higher sentence than if the victim had not been killed.⁹² For Loewy, this approach would eliminate the need to rely on dubious transferred intent, but would retain felony murder’s deterrent value, as well as its function of proportionality.⁹³

These approaches are all, however, more or less inadequate for dealing with the question that this article poses. Dressler’s causation approach assumes that accomplices (non-killing co-felons) are always less culpable than principals (actual killers).⁹⁴ This may not be the case. *Tison* is illustrative: while some may believe that actual killers are more culpable than accomplices, it is certainly reasonable to conclude that people who break murderers out of jail, arm them, and participate with them in a kidnapping are culpable for resulting killings just as if they had pulled the triggers.⁹⁵ Furthermore, for the reason that Kadish has advanced, causation is an incomplete distinguishing

86. *Id.* at 429–30 (footnotes omitted).

87. *Id.* at 443 (alteration in original) (quoting K.J.M. SMITH, A MODERN TREATISE ON THE LAW OF CRIMINAL COMPLICITY 86 (1991)).

88. *Id.* at 438 (citing Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CALIF. L. REV. 323 (1985)).

89. *Id.* at 444 (citing Daniel Yeager, *Helping, Doing, and the Grammar of Complicity*, 15 CRIM. JUST. ETHICS 25, 31 (1996)).

90. *Id.*

91. Arnold H. Loewy, *Critiquing Crump: The Strengths and Weaknesses of Professor Crump’s Model Laws of Homicide*, 109 W. VA. L. REV. 369, 375 (2007).

92. *Id.*

93. *See id.* at 375–76.

94. Dressler, *supra* note 23, at 435.

95. *See Tison v. Arizona*, 481 U.S. 137, 158 (1987).

factor.⁹⁶ Yeager's approach is attractive because it treats each defendant as an individual, which is a tenet of American criminal law.⁹⁷ But it also ignores the real contributions that a non-killing co-felon might make to the actual killer's act. Finally, Loewy's approach is simpler than felony murder because it eliminates the need to rely on transferred intent, but it only functions as Loewy intends when applied to liability for actual killers.⁹⁸ Issues pertaining to vicarious felony murder would remain. Under Loewy's rape hypothetical, for example, whether someone who did not actually kill the victim (and who may or may not have committed the underlying felony) should remain liable for the killing remains unclear. The need to resort to transferred intent, therefore, would persist.

The question remains one of proportionality: Can non-killing co-felons ever be so culpable as to deserve the same punishment as actual killers?⁹⁹ Guyora Binder would treat each criminal the same, basing liability for both on whether two elements comprising "dual culpability" are met: (1) whether the felon negligently caused death by engaging in a felony that involved violence or an apparent danger to life; and (2) whether the felon was engaged in the felony for a sufficiently malign purpose independent of the injury to the victim killed.¹⁰⁰ Binder advocates for many jurisdictions' versions of felony murder because of their inclusion of dual culpability, and they "appear to be in tune with popular opinion."¹⁰¹ But is this truly so when it comes to vicarious felony murder? Binder's approach, furthermore, deemphasizes the relevance of the act of killing and the individualist frame for criminal liability, and emphasizes collective responsibility.¹⁰² Is this appropriate?

IV. EXTERNAL CHALLENGES TO FELONY MURDER

It may not be entirely accurate to state, as Binder does, that felony murder is in tune with popular opinion. This may be the case when it comes to imposing liability on actual killers, but a study performed at Georgetown University by psychologists Norman Finkel and Stefanie Smith suggests otherwise.¹⁰³ In the wake of the *Enmund* and *Tison* decisions, Finkel and Smith

96. See Kadish, *supra* note 88, at 336–68.

97. *Kotteakos v. United States*, 328 U.S. 750, 772 (1946) ("Guilt with us remains individual and personal, even as respects conspiracies.").

98. Loewy, *supra* note 91, at 375–76.

99. See Kamin & Marceau, *supra* note 17, at 803 (The authors ask "whether a defendant who did not himself kill can be made eligible for death through vicarious aggravating-factor liability. In other words, can an aggravating factor be imputed to a defendant based on the actions or status of his codefendant?").

100. BINDER, *supra* note 3, at 8–9.

101. *Id.* at 7.

102. *Id.* at 9–10.

103. See generally Norman J. Finkel & Stefanie F. Smith, *Principals and Accessories in Capital Felony-Murder: The Proportionality Principle Reigns Supreme*, 27 LAW & SOC'Y REV. 129 (1993) (discussing several experiments that analyzed death penalty statistics).

noted that the Court had “increasingly committed itself to a social science analysis of [community] sentiment” to gauge what punishments were permissible under the Eighth Amendment.¹⁰⁴ In those two cases, the Court alleged that there was broad societal consensus to support the death penalty in *Tison*-like circumstances, but not in *Enmund*-like circumstances.¹⁰⁵

Finkel and Smith, however, found that the “equalist” position espoused in *Tison*—“that accessories and principals should be punished equally”¹⁰⁶—was “not only counterintuitive to psychological theories of attribution and legal theories of proportionality but [was] unsupported on empirical grounds as well.”¹⁰⁷ They found little social support for attributing liability for a killing to non-killing co-felons.¹⁰⁸ Rather, proportional justice, “which would weigh each defendant’s culpability individually,” would closer align with social norms.¹⁰⁹

The equalist principle does not align well with traditional criminal law norms of proportionality and individual guilt, but it is less clear that the *Enmund* and *Tison* cases are as troublesome as Finkel and Smith thought. This is illustrated by the likelihood that, even under the proportionality principle, both *Enmund* and *Tison* would have come out the same way. Furthermore, both *Enmund* and *Tison* drew lines based on the proportionality.¹¹⁰ Finkel and Smith appeared to argue that non-killing co-felons should never be subjected to as severe a sentence as co-venturers that actually killed because they are always less culpable pursuant to community standards.¹¹¹ This conclusion is defensible, but only if it is true that non-killing co-felons are categorically always less culpable than actual killers. If that is not true, Finkel and Smith’s argument rejects both equality and proportionality approaches by imposing an *ex ante* distinction that treats non-killing co-felons and actual killers to two different legal structures. Finally, as David Crump has argued, felony murder, as it exists, already partakes of proportionality, in part by supporting the notion that the *actus reus*, and not just the *mens rea*, is relevant to culpability.¹¹² Put another way, the proportionality analysis should encompass the seriousness of the harm produced by an action and not just the actor’s intent.¹¹³

Vicarious felony murder remains a difficult issue in part because group crime has been undertheorized and remains a problematic area of criminal law itself.¹¹⁴ Philosopher Tracy Isaacs, for example, has argued that instead of

104. *Id.* at 131.

105. *Id.* at 129.

106. *Id.*

107. *Id.*

108. *Id.* at 134, 139–40, 142–43, 149.

109. *Id.* at 132.

110. *See Tison v. Arizona*, 481 U.S. 137, 156–58 (1987); *Enmund v. Florida*, 458 U.S. 782, 823–27 (1982).

111. *See Finkel & Smith, supra* note 103, 129–34.

112. Crump, *Murder, Pennsylvania Style, supra* note 9, at 330.

113. Simon, *supra* note 5, at 230.

114. *Id.* at 236–37; David Crump, *Reconsidering the Felony Murder Rule in Light of Modern Criticisms: Doesn’t the Conclusion Depend upon the Particular Rule at Issue?*, 32 HARV. J.L. & PUB. POL’Y 1155, 1185

treating people as individuals *or* as members of groups,¹¹⁵ the law should consider an “intermediate solution—recognizing the distinctive intentional structure of collective enterprises without calling them collective entities.”¹¹⁶ This approach is “a two-level analysis [that] helps explain how collective [groups] are formed and dissolved, and how individuals within these collectives retain enough autonomy to continue acting as individuals in other areas of their lives.”¹¹⁷ It “admits the possibility of group-level agency, and the necessity of judgments about group-level behavior, but also permits judgments about the agency of the individual members of the collective.”¹¹⁸

Isaacs argues, “in cases of goal-directed collectives, its members should only be responsible for their individual contributions.”¹¹⁹ But she acknowledges that “translating this philosophical insight into legal doctrine is notoriously difficult,” and Jens David Ohlin, criticizing Isaac’s work, notes that “collective responsibility is easier to impose in theory than in reality.”¹²⁰ For Ohlin, the best that can be hoped for is a convincing analysis “that separates out the most culpable members from the less culpable individuals.”¹²¹ For Ohlin, a person’s “*reason* for contributing to a collective plan” informs that person’s individual culpability, which should be the basis for liability.¹²²

But Ohlin’s analysis is unremarkable and simply restates the longstanding maxim that guilt is personal.¹²³ It does not shed light on whether a non-killing co-felon should be liable for an actual killer’s actions and, if so, under what circumstances.¹²⁴ Ohlin’s analysis does, however, suggest that some shared cooperative activity is necessary for felony murder to apply.¹²⁵ But is this actually so?

Philosopher Michael E. Bratman observed that shared cooperative activity requires parties’ mutual responsiveness, a commitment to the joint activity, and a commitment to mutual support that usually entails an intention in favor of joint activity.¹²⁶ If individuals share a joint plan, their overall plan must be

(2009) (“The hardest cases remain those with multiple parties, that is, those involving group-committed felonies in which one actor does something particularly blameworthy, and a resulting unintended death is attributed to an arguably less blameworthy codefendant.”).

115. Jennifer Hornsby, *Collectives and Intentionality*, 57 PHIL. & PHENOMENOLOGICAL RES. 429, 429–30 (1997) (describing John Searle’s and Carl Popper’s analysis).

116. Jens David Ohlin, *The One or the Many*, 664 CORNELL L. FAC. PUBLICATIONS (2013), available at <http://scholarship.law.cornell.edu/facpub/664>.

117. *Id.* at 4.

118. *Id.*

119. *Id.* at 13.

120. *Id.* at 12–13.

121. *Id.* at 13.

122. *Id.* at 14.

123. *See id.*

124. *See id.*

125. *See id.*

126. Michael E. Bratman, *Shared Cooperative Activity*, 101 PHIL. REV. 327, 328–29 (1992).

jointly intended, but their “subplans” must also “mesh,” meaning they too must be jointly shared, or at least acceptable, to all other participants.¹²⁷

Similarly, philosopher Facundo Alonso observed that joint action depends upon actors having a collective or shared intention to act.¹²⁸ This shared intention depends upon the relevant attitudes of the participants being “public” or “common knowledge” among them.¹²⁹

But both Bratman’s and Alonso’s observations, however valid they are internally, may make little difference to understanding the appropriate contours of vicarious felony murder.¹³⁰ Consider again the *Tison* case.¹³¹ It appears that the non-killing defendants and the actual killers shared the overall jailbreak plan, but that the killing was a subplan of the actual killers that did not mesh because the killing was unacceptable to, and unintended by, the non-killing defendants.¹³² If Bratman’s and Alonso’s theories are relevant in the felony-murder context, then the *Tison* defendants ought not have been liable for the killings.¹³³ Furthermore, if these theories are relevant, then non-killing co-felons could be liable for the actual killers’ actions without recourse to felony murder—if non-killing co-felons and actual killers shared an intent, then criminal conspiracy law would suffice.¹³⁴

It appears, then, that the usefulness of vicarious felony murder depends upon a lack of shared cooperative activity, at least as far as the killing goes. This suggests that the principle of transferred intent is necessarily a fiction, and that the underlying felony and the killing are separate in all of the meaningful ways. Two co-felons may enter into crime together, but at some point their shared intention diverges and one of them kills, much to the surprise and dismay of the other. Under a theory of shared cooperative activity, the non-killing co-felon and the actual killer should each be treated as individual actors, each liable only for her own actions. But this conclusion depends upon the assumption that only full intent can connect the underlying felony and the killing. In fact, jurisdictions’ various forms of felony murder connect the felony and the killing in other important ways: the dangerousness of the felony, the dangerousness of the conduct surrounding the felony, the foreseeability of the killing, and Dressler’s causation approach.¹³⁵ These four ways of connecting the felony with the killing are justifying bases for vicarious felony murder and for holding non-killing co-felons to the same legal structure as actual killers. Criminal law norms are not necessarily offended when equalist

127. *Id.* at 332–34.

128. Facundo M. Alonso, *Shared Intention, Reliance, and Interpersonal Obligations*, 119 *ETHICS* 444, 444–45 (2009).

129. *Id.* at 458.

130. See Alonso, *supra* note 128, at 444; Bratman, *supra* note 126, at 328–29.

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

132. See *id.*

133. See *supra* note 130 and accompanying text.

134. See Bratman, *supra* note 126, at 328–29.

135. See Dressler, *supra* note 23, at 429.

vicarious liability is imposed based on one or more of these four, what I shall call, “justifying connectors.”

Having rejected the necessity of shared cooperative activity for felony-murder liability to attach, the question of conduct remains: should it make a categorical difference whether someone actually killed or whether someone was an active participant in setting the stage for the killing? Although the intuitive answer is yes because successful killers are more liable than unsuccessful would-be killers, the case may be that conduct is less relevant to liability than it initially appears.

If the question regarding conduct is one of determining a person’s *mens rea*, then the answer is elusive. The law occasionally treats conduct as probative of *mens rea*, which justifies requiring some convicts to register as sex offenders (past conduct indicates future risk); supports a finding of *mens rea* in the genocide context;¹³⁶ and supports the Similar Acts rule of evidence, which is predicated on the notion that a pattern of similar conduct can indicate someone’s intent.¹³⁷ The law also, however, treats conduct as not necessarily indicative of intent or culpability,¹³⁸ but only as indicative when coupled with other evidence.¹³⁹

One’s conduct may not significantly point to culpability, and one’s inaction may not indicate a lack thereof. Medical ethical rules regarding end-of-life care illustrate this.¹⁴⁰ While American medical ethics tend to differentiate between active euthanasia and letting a patient die by withholding

136. *State v. Ferguson*, 120 Ohio St. 3d 7, 2008-Ohio-4824, 896 N.E.2d 110, 118 (Ohio 2008) (noting the General Assembly’s “clear reaffirmation of an intent to protect the public from sex offenders,” the court found the new regulations merely represented “an effort to better protect the public from the risk of recidivist offenders by maintaining the predator classification so that the public had notice of the offender’s past conduct—conduct that arguably is indicative of future risk”); Application of Convention on Prevention and Punishment of Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), 2007 I.C.J. 43, 123 (Feb. 26), available at <http://www.icj-cij.org/doctrines/files/91/13685.pdf#view=FitH&pagemode=none&search=%22ethnic%20cleansing%22> (“[I]t is clear that acts of ‘ethnic cleansing’ may occur in parallel to acts prohibited by Article II of the Convention, and may be significant as indicative of the presence of a specific intent . . . inspiring those acts.”).

137. FED. R. EVID. 404(b) (stating that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial”).

138. *Kingsdown Med. Consultants, Ltd. v. Hollister Inc.*, 863 F.2d 867, 876 (Fed. Cir. 1988) (“We adopt the view that a finding that particular conduct amounts to ‘gross negligence’ does not of itself justify an inference of intent to deceive; the involved conduct, viewed in light of all the evidence, including evidence indicative of good faith, must indicate sufficient culpability to require a finding of intent to deceive.”).

139. *Halliburton Co. v. Schlumberger Tech. Corp.*, 925 F.2d 1435, 1443 (Fed. Cir. 1991) (“This court has clarified that negligent conduct can support an inference of intent only when, ‘viewed in light of all the evidence, including evidence indicative of good faith,’ the conduct is culpable enough ‘to require a finding of intent to deceive.’ . . . Gross negligence cannot elevate itself by its figurative bootstraps to an intent to mislead based on the identical factors used to establish gross negligence in the first instance unless all the facts and circumstances indicate sufficient culpability.”).

140. See John Coggon, *On Acts, Omissions and Responsibility*, 34 J. MED. ETHICS 576, 576 (2008).

life-sustaining treatment, there is no necessary ethical difference.¹⁴¹ British legal scholar and medical ethicist John Coggon observes, “[I]n normative moral discourse, ascertaining whether an event was caused by someone’s act or omission is of no concern. Of concern are matters of agency and responsibility, not passive or active causation.”¹⁴² For Coggon, people are moral actors when they omit to do something and thereby contribute to an outcome.¹⁴³ In contrast, medical ethicist H.V. McLachlan would distinguish between acts and omissions in this moral argument, holding that there is a moral difference between active and passive euthanasia.¹⁴⁴

If Coggon’s approach is preferred, then felony murder as it exists to judge both non-killing co-felons and actual killers by the same legal structure may be appropriate. Felony murder that imposes liability based on one of the four justifying connectors seems appropriate under Coggon’s agency/responsibility approach.¹⁴⁵ Under McLachlan’s approach, however, non-killing co-felons should be treated categorically different than actual killers because there is a moral distinction between action (the killing) and omission (the non-killing co-felon’s not-killing).¹⁴⁶ But if Coggon’s view is adopted, the distinction to be drawn is not between action and omission, but agency/responsibility and non-agency/non-responsibility.¹⁴⁷

The theory of culpable ignorance enriches, but does not resolve, this debate. Philosopher William FitzPatrick argues that “ignorance can be culpable whether or not it features a knowing act or omission in its causal history.”¹⁴⁸ For him, the question of culpability asks, “What, if anything, could the agent reasonably (and hence fairly) have been expected to have done in the past to avoid or to remedy that ignorance?”¹⁴⁹ FitzPatrick would hold someone culpable for an act they did not commit and of which they were ignorant if that person “could reasonably have been expected to take measures that would have corrected or avoided it, given his or her capabilities and the opportunities provided by the social context, but failed to do so” due to *akrasia*—i.e. the state of acting against one’s better judgment.¹⁵⁰ Ignorance may be culpable “even when it is not the direct or indirect result of an *akratic* action.”¹⁵¹ By contrast,

141. *Id.* (“Although it seems to have become received wisdom from ethicists of quite conflicting views that moral propriety can not hang merely on whether a situation obtains because of (inter alia) an agent’s action or inaction, there continue to be defences[sic] of the act/omission distinction.”).

142. *Id.*

143. *Id.*

144. H.V. McLachlan, *The Ethics of Killing and Letting Die: Active and Passive Euthanasia*, 34 J. MED. ETHICS 636, 638 (2008).

145. See *supra* notes 142–40 and accompanying text.

146. McLachlan, *supra* note 144, at 637–38.

147. Coggon, *supra* note 140, at 578.

148. Neil Levy, *Culpable Ignorance and Moral Responsibility: A Reply to FitzPatrick*, 119 ETHICS 729, 729 (2009).

149. *Id.* at 732.

150. *Id.* at 734.

151. *Id.* at 730.

philosopher Gideon Rosen would hold someone culpable for their ignorance if that person's ignorance

traces back to an action with regard to which they are ignorant neither of relevant facts nor of norms. In that case, blameworthiness must always be for, or traceable back to, an akratic act since agents in full possession of the relevant facts concerning a wrongful act they perform recognize that they ought not to perform that act, and agents who perform an act while recognizing that they ought not to perform it act akratically.¹⁵²

For philosopher Holly Smith, this original akratic conduct is a “benighting act,” or “an act regarding which agents are neither normatively nor circumstantially ignorant but which they performed despite knowing that doing so was wrong.”¹⁵³ Smith points to the benighting act as the source of culpability in cases that “involve a sequence of acts: an initial act, in which the agent fails to improve (or positively impairs) his cognitive position, and a subsequent act in which he does wrong because of his resulting ignorance.”¹⁵⁴ “[T]he benighting act must be objectively wrong,”¹⁵⁵ and the resulting unwitting wrongful act must fall “within the known risk of the benighting act, for only in these cases does it become tempting to say . . . that culpability for the earlier act infects the later act.”¹⁵⁶

These theories of culpable ignorance sound a lot like vicarious felony murder as it is practiced in states that limit liability by one or more of the four justifying connectors.¹⁵⁷ If we assume that ignorance includes situations in which someone lacks intent, but nonetheless participates in some way in the event the commission of which he is ignorant, then that ignorance, for Rosen and Smith, must arise from the original akratic felony.¹⁵⁸

Under FitzPatrick's theory, non-killing co-felons could be liable for the killing, but they must be expected to, be capable of, and have the opportunity to prevent the killing.¹⁵⁹ This does not lead to clear answers because it does not say when the non-killing co-felon should have intervened. In *Tison*, for example, the non-killing co-felons could have not committed the jail break, not brought guns to the jail break, or not kidnapped the victims.¹⁶⁰ Once the killing was imminent, however, they lacked the opportunity to stop the actual

152. *Id.* at 729–30.

153. *Id.* at 730.

154. Holly Smith, *Culpable Ignorance*, 92 PHIL. REV. 543, 547 (1983).

155. *Id.*

156. *Id.* at 551.

157. *See, e.g.*, *Enmund v. Florida*, 458 U.S. 782, 788 (1982) (holding the get-away driver guilty of first-degree murder based on the actions of his accomplices).

158. Levy, *supra* note 148, at 729; Smith, *supra* note 154.

159. Levy, *supra* note 148, at 729–30.

160. *See generally* *Tison v. Arizona*, 481 U.S. 137 (1987) (showing an example of when a non-killing co-felon could have intervened).

killers.¹⁶¹ FitzPatrick might argue that the *Tison* defendants were culpably ignorant since it was only at the very last moment, after a long string of akratic and dangerous acts, that the defendants were powerless to stop the killing.¹⁶²

The key factor, therefore, in imposing felony-murder liability appears to not be the killing itself or the non-killing co-felon's role in that killing, but in the type of connection between the felony and the killing.¹⁶³ Where none of the four justifying connectors are present, there may be no adequate connection between the felony and the killing on which to base vicarious liability. Where there is one or more justifying connectors, however, vicarious liability appears to be defensible.

V. EVIDENCE AND VICARIOUS FELONY MURDER

There are, to be sure, principled reasons to criticize vicarious felony murder. But most of these assume the broad felony-murder rule that Binder and Crump have shown never really existed.¹⁶⁴ There are, however, evidentiary reasons to criticize the doctrine. As argued above, there is no necessary moral difference between acting and omitting to act, nor is there necessarily a difference between these two when it comes to imputing *mens rea*. That said, medical ethicist R. Mohindra has posited that the actor and the ommitter will occupy different factual matrices, which provide each person with a different set of choices.¹⁶⁵ This means that “an external independent observer cannot know what is in the minds of the agents save through the interpretation of their actions.”¹⁶⁶ The external observer “can say with certainty that [the actor] had the moral strength to [do the bad act]. What the external independent observer cannot say with certainty from the facts . . . is that if [the ommitter] had faced the same choice as [the actor] that” the ommitter would have acted to produce the bad outcome.¹⁶⁷ Because external observers can morally evaluate the actor with a higher degree of certainty than the ommitter, “in terms of our moral evaluation we must conclude that [the ommitter] cannot be equated with [the actor].”¹⁶⁸

Although Mohindra would generally treat the actor and ommitter in a categorically different manner,¹⁶⁹ he also acknowledges that “it is entirely possible that the proportional difference between the choices offered to [an

161. *Id.* at 141.

162. *See id.* at 158; *supra* note 147.

163. *See Dressler, supra* note 23, at 429 (stating a causal accomplice's connection warrants conviction for the crimes of the principle; however, a non-causal accomplice often receives punishment for a lesser included offense).

164. *See BINDER, supra* note 3, at 97–99; Crump, *Murder, Pennsylvania Style, supra* note 9, at 359, 370–71.

165. R. Mohindra, *Positing a Difference Between Acts and Omissions: The Principle of Justice, Rachels' Cases and Moral Weakness*, 35 J. MED. ETHICS 293, 294 (2009).

166. *Id.* at 295.

167. *Id.*

168. *Id.* at 296.

169. *Id.* at 297.

actor] and [an omitter] together with the selections they each make from their respective choices could be so small as to be *de minimis* in practical reality.”¹⁷⁰ To function as a truth-finding process, the criminal-justice system ought to allow for moral equivalency between actors and omitters, however rarely that equivalency might arise. Treating non-killing co-felons and actual killers to the same legal structure allows for this moral equivalency. This treatment also allows them to be distinguished where warranted. Mohindra’s initial position regarding felony murder would probably be that non-killing co-felons and actual killers should be treated to unique legal structures.¹⁷¹ Proceeding from that, the issue becomes an epistemic one: how can the criminal-justice system, as the external observer, find that the non-killing co-felon had the requisite *mens rea*? This issue points to two important legal premises. First, the presumption of innocence gives both a non-killing co-felon and an actual killer the benefit of the doubt, assuming that neither person killed or intended to kill. Presumably, Mohindra would not have a problem with this type of equal treatment.¹⁷² Second, the criminal-justice process—including investigation, charging, trial, and sentencing—is designed to determine individual culpability and so the epistemic question becomes an evidentiary one. The answer to this question will sometimes resolve in favor of non-killing co-felons and actual killers being treated equally when it comes to conviction and sentence, and sometimes being treated differently when the facts merit distinction.¹⁷³ Therefore, to the extent that evidentiary rules, trial procedures, and so forth are reliable, felony murder, as it stands in many jurisdictions, is untroubling. This is, however, an assumption that is far from proven, especially in the context of vicarious felony murder.

Psychologist Joshua Knobe empirically demonstrated a theory called the Knobe Effect.¹⁷⁴ He examined the concept of “intentional action,” and found that

people’s intuitions as to whether or not a behavior was performed intentionally can sometimes be influenced by *moral* considerations. That is to say, when people are wondering whether or not a given behavior was performed intentionally, they are sometimes influenced by their beliefs about whether the behavior itself was good or bad.¹⁷⁵

170. *Id.* at 295.

171. *Id.* at 296–97.

172. *Id.* at 297–98.

173. See Bentele, *supra* note 25, at 119–21, 129.

174. See generally Joseph C. Mauro, *Intentional Killing Without Intending to Kill: Knobe’s Theory as a Rational Limit on Felony Murder*, 73 LA. L. REV. 1011 (2013) (detailing the Knobe Effect and the theory’s research regarding intent and the felony-murder rule).

175. Joshua Knobe, *The Concept of Intentional Action: A Case Study in the Uses of Folk Psychology*, 130 PHIL. STUD. 203, 205 (2006).

Knobe gave two questionnaires to two groups of people.¹⁷⁶ One group's questionnaire involved a hypothetical CEO whose profit-maximization plan would end up harming the environment; the second group's questionnaire involved a hypothetical CEO whose profit-maximization plan would end up helping the environment.¹⁷⁷ In both hypothetical situations, neither CEO cared whether her plan would hurt or help the environment: she intended only to maximize profits.¹⁷⁸ Eighty-two percent of subjects who received the environment-harming situation thought the CEO intentionally harmed the environment, and only twenty-three percent of subjects who received the environment-helping situation thought the CEO intentionally helped the environment.¹⁷⁹

The Knobe Effect suggests that juries will have a perverted bias in favor of finding that a non-killing co-felon intended the killing; although most non-killing co-felons do not intend the killing, and would even probably prefer that the killing not occur, juries will impute intent because the killing is a bad outcome.¹⁸⁰ The principle of transferred intent emerges as, strictly speaking, a legal fiction. Transferred intent might serve as a conceptually useful framework, however, because it justifies vicarious felony murder as limited by one or more of the justifying connectors. Alternatively, the Knobe Effect suggests that the problem of transferred intent as a fiction is compounded by fact finders' apparent compulsion to find that non-killing co-felons actually intended the killing.¹⁸¹

These concerns with vicarious felony murder deserve to be explored. They are, however, evidentiary concerns that do not undermine vicarious felony murder as a sound doctrine. If anything, they support treating non-killing co-felons and actual killers to the same legal structure in three ways.¹⁸² First, evidentiary concerns challenge the notion that committing a bad act is more culpability-inducing than omitting to act or participating in a benighting act that leads to the bad act.¹⁸³ Second, the concerns support many forms of extant vicarious felony murder that become limited by justifying connectors.¹⁸⁴ Third, making the question an evidentiary one acknowledges that non-killing co-felons and actual killers can, in some circumstances, be equally culpable.¹⁸⁵ This places the onus of reform not on the felony-murder doctrine, but on methods of proof.

176. *Id.* at 205–06.

177. *Id.*

178. *Id.*

179. *Id.* at 206.

180. *Id.*

181. *Id.*

182. *See supra* Parts IV–V.

183. *See Mohindra, supra* note 165, at 295.

184. *See supra* Part IV.

185. *See Bentele, supra* note 25, at 119–21, 129.

VI. CONCLUSION

Criticisms of felony murder uniformly assume that the doctrine is the broad one that Binder and Crump have shown never to have existed in reality.¹⁸⁶ They have, in turn, advanced compelling defenses of the doctrine.¹⁸⁷ It remains to defend vicarious felony murder specifically because the doctrine appears to be troubling and most people, when asked, do not agree with what they believe are felony murder's provisions. A critical analysis of vicarious felony murder itself is called for.

This Article has taken a step in that direction by coming to the doctrine's defense. At its core, this Article is a rejection of the apparently true notion that non-killing co-felons are categorically different than actual killers, and so deserve to be treated to separate, proprietary, legal structures. While non-killing co-felons are often, and may usually be, less culpable than actual killers, they may also be as much, or more culpable. A legal structure is necessary that can accurately discern differences in culpability.

Many versions of felony murder currently in operation reflect such a legal structure. To the extent that these versions include justifying connectors, any problems that arise emerge as evidentiary in nature, not doctrinal. While the evidentiary concerns are important, they must be left for another day.

* * *

186. See *id.* at 97–99; Crump, *Murder, Pennsylvania Style*, *supra* note 9, at 359, 370–71.

187. *Id.*