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# Reckless Juveniles

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## INTRODUCTION

Modern doctrine and scholarship largely take it for granted that offenders should be criminally punished for reckless acts.<sup>1</sup> Yet, developments in our understanding of human behavior can shed light on how we define and attribute criminal liability, or at least force us to grapple with the categories that have existed for so long.

This Article examines recklessness and related doctrines in light of the shifts in understanding of adolescent behavior and its biological roots, to see what insights we might attain, or what challenges these understandings pose to this foundational mens rea doctrine. Over the past decade, the U.S. Supreme Court has concluded that youth are categorically different for purposes of criminal sentencing, and that these categorical differences in maturity, ability to make reasoned decisions, resist outside pressure and influences and the like lead to objective lines being drawn between youth and adults. The Court's distinctions have drawn on a significant body of research literature, including brain imaging scans that help us understand the maturation of the human brain over the course of adolescence.

This Article posits that these developments, when mapped onto existing criminal law, call into question holding youth responsible for offenses that require *actual* foresight of the consequences of their risky behavior. Instead, the U.S. Supreme Court's recent analyses of the categorical differences between youth and adults in the criminal realm,<sup>2</sup> as well as the science and social science research underlying

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<sup>1</sup> See Geoffrey Christopher Rapp, *The Wreckage of Recklessness*, 86 WASH. U. L. REV. 111, 113 (2008) (stating that recklessness is "one of the oldest concepts in Anglo-American tort law," first applied by the U.S. Supreme Court in "common carrier and admiralty cases in the 1830s, 1840s and 1850s" and "became an important legal concept in twentieth century American codification efforts, namely the Model Penal Code"). See generally Paul H. Robinson, *A Brief History of Distinctions in Criminal Liability*, 31 HASTINGS L.J. 815, 822-30 (1980) (attempting to determine when the criminal law recognized the various modern mentes rea, noting the difficulty of pinpointing when a mens rea was generally accepted). Robinson notes "at least a partial recognition of a careless-faultless distinction by the ninth or tenth century." *Id.* at 834. Robinson further documents the rise of the distinction between recklessness and negligence in the late 18th century, when reformers would have used the distinction as the demarcation between criminal liability and non-liability. *Id.* at 841. Robinson additionally states that the distinction, for purposes of substantive liability instead of mitigation, between recklessness and negligence was not firmly entrenched until the Model Penal Code in 1962. *Id.* at 847.

<sup>2</sup> Elizabeth S. Scott, "Children Are Different": *Constitutional Values and Justice Policy*, 11 OHIO ST. J. CRIM. L. 71, 72 (2013) ("With increasing clarity, the Court has announced a broad principle grounded in developmental knowledge that 'children are different' from adult offenders and that these differences are important to the law's

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these differences, wears away — for this category of individuals — the basis for holding youth in juvenile or adult court accountable for crimes of “foresight” and express disregard for risk.

In Part I, the Article describes the Court’s significant cases addressing the line between children and adults under the Eighth Amendment and *Miranda*. Discussion of these decisions has largely been limited, with a few exceptions, to implications for sentencing law and the law of confessions. This Article draws connections between these cases, and, more importantly, considers the theoretical and doctrinal implications of these cases beyond the confines of their immediate setting.<sup>3</sup>

Part II reviews some of the research literature on youth decision-making, with a focus on the studies on risk-taking. It takes a particular interdisciplinary look at the literature of the impact of peers on youth decision-making and the impact of stress or lack of time for reflection on youth decision-making.

Part III addresses the areas in criminal law for which the juvenile cases and research have, I argue, significant implications: places where there is criminal liability based on foreseen consequences. Part III addresses the role of recklessness in criminal law, as well as the “natural and probable consequences” doctrine — the other major area of substantive criminal law where accountability is based on what the offender is supposed to have actually foreseen.

In Parts IV and V, I consider what this youth foresight doctrine would look like, consider some drawbacks, and provide a few possible tools for its implementation. Part IV also connects back to other theoretical and doctrinal implications of adopting a youth foresight approach. The Article demarcates reckless offenses from negligent offenses — asserting that we can still embrace the reasonable person (i.e., reasonable adult) with respect to negligence. Shifting our recklessness inquiry, and maintaining the negligence standard for youth is also consistent with the U.S. Supreme Court’s approach to youth crime, which looks not to excuse or justify juvenile behavior, but to adjust culpability to more closely align with expected behavior.

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response to youthful criminal conduct.”).

<sup>3</sup> For others considering these implications, see Jenny E. Carroll, *Brain Science and the Theory of Juvenile Mens Rea*, 94 N.C. L. REV. 539, 590 (2016) (inquiring about the impact of adolescent brain science on mens rea generally); Christopher Northrop & Kristina Rothley Rozan, *Kids Will Be Kids: Time for a “Reasonable Child” Standard for the Proof of Objective Mens Rea Elements*, 69 ME. L. REV. 109, 134 (2017) (suggesting that in juvenile court a “reasonable youth” standard should be adopted).

I. LAW ADDRESSING YOUTH AND THEIR APPRECIATION OF FUTURE CONSEQUENCES

In this Part, I look at the underlying U.S. Supreme Court law focusing on the ability of youth to appreciate the consequences of their actions and estimate future risk. I describe the recent U.S. Supreme Court cases in which the Court has distinguished juvenile offenders from adult offenders based on the unique characteristics of adolescence. This law forms the backdrop for the understanding that, while youth may be held culpable for their failure to appreciate risks and consequences that a reasonable adult would have foreseen, youth should not be held accountable for actual knowledge of risk and future consequences.

The Court first relied on these scientific developments and improved understanding of adolescent development in *Roper v. Simmons*.<sup>4</sup> Specifically, the Court described three important differences between youth and adults that “demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders.”<sup>5</sup> First, the Court highlighted that:

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

Second, the Court noted that youth are more vulnerable than adults to outside influences, including peer pressure.<sup>6</sup> The Court attributed this, in part, to youths’ inability to control or manage their home and neighborhood environment.<sup>7</sup> “The third broad difference is that the

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<sup>4</sup> 543 U.S. 551 (2005).

<sup>5</sup> *Id.* at 569 (citations omitted) (citing Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339 (1992)).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* (citing Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003) (“[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting.”)).

character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.”<sup>8</sup>

In distilling these three important distinctions, the *Roper* Court cited to current and earlier research on adolescent development,<sup>9</sup> and in reaching its decision the Court received amicus briefs related to youth development.<sup>10</sup> This research focused on adolescents generally or, sometimes, older teens because the question in *Roper* was the death penalty for sixteen and seventeen year olds.<sup>11</sup>

With these three distinctions in mind, the *Roper* Court examined whether the purposes of punishment were met for youth by the death penalty. Specific to the discussion in this Article, the Court found that the goal of deterrence was not met, as the “same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.”<sup>12</sup> In particular, as the plurality observed in *Thompson*, “[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.”<sup>13</sup>

Much of the Court’s understanding of the research underlying this conclusion came from an amicus brief submitted by the American Psychological Association, which argued that “behavioral studies and recent neuropsychological research” show that execution of minors would not satisfy Eighth Amendment standards or meet the goals of punishment.<sup>14</sup>

The Court extended this understanding of juvenile culpability to the context of life without parole sentences in *Graham v. Florida*,<sup>15</sup> *Miller v. Alabama*,<sup>16</sup> and *Montgomery v. Louisiana*.<sup>17</sup> In *Graham*, in which the

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<sup>8</sup> *Id.* at 570.

<sup>9</sup> See, e.g., *id.* at 569 (citing Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339 (1992); Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)).

<sup>10</sup> See Brief for the American Psychological Ass’n, & the Missouri Psychological Ass’n as Amici Curiae Supporting Respondent at 4, *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 1636447.

<sup>11</sup> See *Roper*, 543 U.S. at 555-56; see also *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (allowing death penalty for a seventeen year old); *Thompson v. Oklahoma*, 387 U.S. 815, 838 (1988) (barring death penalty for a fifteen year old).

<sup>12</sup> *Roper*, 543 U.S. at 571.

<sup>13</sup> *Id.* at 572 (citing *Thompson*, 487 U.S. at 837).

<sup>14</sup> Brief for the American Psychological Ass’n, & the Missouri Psychological Ass’n as Amici Curiae Supporting Respondent, *supra* note 10, at 4.

<sup>15</sup> 560 U.S. 48 (2010).

<sup>16</sup> 567 U.S. 460 (2012).

Court found life without parole unconstitutional for juveniles for a nonhomicide offense, the Court carried forward the *Roper* analysis and similarly emphasized the diminished culpability of youth. The Court required that these offenders have a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”<sup>18</sup> In *Miller*, in finding the mandatory imposition of life without parole unconstitutional for youth, the Court reemphasized the biological and legal differences between youth and adults.<sup>19</sup> The *Miller* Court concluded that *Graham* and *Roper* “establish that children are constitutionally different from adults for purposes of sentencing” and that laws that fail to take into account this difference are “flawed.”<sup>20</sup> The Court reiterated one of the core differences between youth and adults was the “failure to appreciate risks and consequences,”<sup>21</sup> and stated that the occasions are “rare” where a life without parole sentence is appropriate for an individual who was under eighteen at the time of their offense.<sup>22</sup> The *Miller* Court further required that any youth subject to a sentence of life without parole must have an individualized sentencing hearing at which “youth and [its] attendant circumstances” are considered.<sup>23</sup> *Montgomery* held that *Miller* involved a substantive constitutional right and that life without parole was constitutionally prohibited for all but the rarest juvenile offenders.<sup>24</sup>

While *Roper*, *Graham*, *Miller*, and *Montgomery* all address the intersection of youth and extreme punishment, the Court has also carried over its understanding of youth’s differing perceptions and experiences into other areas of the criminal law, most notably in *J.D.B. v. North Carolina*.<sup>25</sup> In *J.D.B.*, the Court held that that, for purposes of

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<sup>17</sup> 136 S. Ct. 718 (2016).

<sup>18</sup> *Graham*, 560 U.S. at 74.

<sup>19</sup> *See Miller*, 567 U.S. at 489.

<sup>20</sup> *Id.* at 471, 473-74 (citing *Graham*, 560 U.S. at 76).

<sup>21</sup> *Id.* at 477 (stating that mandatory life without parole improperly “precludes consideration of [the defendant’s] chronological age and its hallmark features . . . [including] immaturity, impetuosity, and failure to appreciate risks and consequences”).

<sup>22</sup> *Id.* at 479.

<sup>23</sup> *Id.* at 483.

<sup>24</sup> *Montgomery v. Louisiana*, 136 S. Ct. 718, 726 (2016). In *Montgomery*, the Court emphasized that the *Miller* decision drew an Eighth Amendment line between the “rare” youth whose crime reflects “irreparable corruption” and who could constitutionally be considered for a life without parole sentence, and the vast majority of youthful defendants whose crime reflected “transient immaturity” and who are not eligible for a life without parole sentence. *Id.* at 734.

<sup>25</sup> *J.D.B. v. North Carolina*, 564 U.S. 261 (2011); *see also* Emily C. Keller, *Constitutional Sentences for Juveniles Convicted of Felony Murder in the Wake of Roper*,

the *Miranda* inquiry into custody, that the factfinder may take the age of the offender into account, as long as the youth of the individual was known or would have been apparent to a reasonable officer.<sup>26</sup>

The Court based its ruling on the fact that “children as a class”<sup>27</sup> are less mature, vulnerable to peer and other pressures, and “lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.”<sup>28</sup> And, in highlighting these distinctions between children and adults, cited to *Roper* and *Graham*, as well as earlier decisions involving youth.<sup>29</sup> The Court also made reference to tort law treatment of a “reasonable person” when a child was involved and concluded that “[i]ndeed, even where a ‘reasonable person’ standard otherwise applies, the common law has reflected the reality that children are not adults.”<sup>30</sup> The Court posited that a contrary ruling would create an “absurdity” of conducting the analysis of the facts of this case — being taken from seventh-grade social studies class and told by the assistant principal to “do the right thing” — from the position of a reasonable adult of average age.<sup>31</sup>

In *J.D.B.*, the government argued against taking age into account, in part, because of the fluid and flexible nature of custodial interrogation, including that law enforcement officers were making on the spot determinations.<sup>32</sup> Prior law, cited again by the Court, had relied on the nature of the police decision-making to constrain the analysis to an objective one.<sup>33</sup> The Court took pains to emphasize that it was not moving towards a subjectivization of the custody determination<sup>34</sup> and

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*Graham* & *J.D.B.*, 11 CONN. PUB. INT. L.J. 297, 298 (2012) (contending that juveniles convicted of a felony offense cannot constitutionally be sentenced to juvenile life without parole); Marsha Levick, *J.D.B. v. North Carolina: The U.S. Supreme Court Heralds the Emergence of the ‘Reasonable Juvenile’ in American Criminal Law*, 89 CRIM. L. REP. 753, 753 (2011) (discussing how the decisions handed down in *J.D.B.*, *Graham*, and *Roper* made a pathway for changing the “reasonable person” standard to a “reasonable child” standard).

<sup>26</sup> *J.D.B.*, 564 U.S. at 277.

<sup>27</sup> *Id.* at 271-72.

<sup>28</sup> *Id.* at 272 (quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (plurality opinion)).

<sup>29</sup> *Id.* at 271-72.

<sup>30</sup> *Id.* at 274 (citing as an example RESTATEMENT (THIRD) OF TORTS § 10 cmt. b (AM. LAW INST. 2005)).

<sup>31</sup> *Id.* at 275-76.

<sup>32</sup> *Id.* at 279-80 (citing Brief for Respondent at 20, *J.D.B.*, 564 U.S. 261 (2011) (No. 09-11121)) (rebutting government move for “clarity” with an objective standard that does not take age into consideration).

<sup>33</sup> *Id.* at 270-71.

<sup>34</sup> *See, e.g., id.* at 271 (reiterating that, under prior law, the “test . . . involves no



that age differs from other personal, and idiosyncratic, characteristics.<sup>35</sup> Instead, “childhood yields objective conclusions.”<sup>36</sup>

## II. YOUTH AND RISK-TAKING

Youth take more risks than adults.<sup>37</sup> As the U.S. Supreme Court noted, every parent knows that teenagers are prone to risk taking and poor decision-making, which can result in criminal conduct.<sup>38</sup>

What underlies this phenomenon? This Part examines some of the research literature on youth and risk taking generally, and also highlights two relevant areas of the research on youth decision-making: the effect of peer influence and the impact of stress or pressure on the decision-making of adolescents. The scientific

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consideration of the ‘actual mindset’ of the particular suspect subjected to police questioning”); *id.* at 277 (stating that age’s “inclusion in the custody analysis is consistent with the objective nature of that test”). *But see* Jesse-Justin Cuevas & Tonja Jacobi, *The Hidden Psychology of Constitutional Criminal Procedure*, 37 CARDOZO L. REV. 2161, 2218 (2016) (discussing *J.D.B.* and stating that “the decision arguably opened the door to subjective considerations under the reasonable person inquiry”).

<sup>35</sup> *J.D.B.*, 564 U.S. at 274-75.

<sup>36</sup> *Id.* at 275.

<sup>37</sup> See Bernd Figner et al., *Affective and Deliberative Processes in Risky Choice: Age Differences in Risk Taking in the Columbia Card Task*, 35 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY, & COGNITION 709, 709-30 (2009) (describing the “typical developmental trajectory” of risky behavior, which “peaks [during] adolescence and early adulthood and decreases again during adulthood,” and stating that the pattern has been identified in a range of risk-taking behaviors, including “traffic, unsafe sexual practices, delinquent behaviors, and risky recreational sports” (citations omitted)); see also, e.g., Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 339-40 (1992); Stephanie Burnett et al., *Adolescents’ Heightened Risk-Seeking in a Probabilistic Gambling Task*, 25 COGNITIVE DEV. 183, 185 (2010) (showing the results of a study on risky and safe choices in a computer gambling game, where teenagers, especially fourteen year olds, were shown to have taken more risks than other younger and older groups studied).

<sup>38</sup> See *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (“First, as any parent knows and as the scientific and sociological studies respondent and his amici cite tend to confirm, [a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.” (quoting *Johnson v. Texas*, 509 US. 350, 367 (1993))). See generally Terry A. Maroney, *Adolescent Brain Science After Graham v. Florida*, 86 NOTRE DAME L. REV. 765, 767 (2011) (“Over the last decade, developmental neuroscience has generated a scientific consensus that, when considered in the aggregate, teen brains are structurally and functionally different from those of both children and adults. As those differences are nonnegligible and as they appear to map onto teens’ social and decisional immaturity, juvenile advocates and defenders quickly began to incorporate neuroscientific claims into ones grounded in developmental psychology.”).

literature, which stems increasingly from neuroimaging studies, has begun to examine a few important points relevant to our understanding of youth culpability, risk-assessment and criminality.<sup>39</sup>

First, the prefrontal cortex, which is an important center of “executive functions” in the brain — related to such things as impulse control — develops fully in later adolescence. Studies using MRI scanning have helped researchers begin to understand further the functioning and development of the human brain.<sup>40</sup> These studies, as well as injury and animal studies,<sup>41</sup> have given insight into areas of the brain that have greater roles in certain functions.<sup>42</sup> The prefrontal cortex has been identified as the center of “executive function” in the

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<sup>39</sup> Legal scholars in a number of areas have been analyzing the effect on doctrine of current neuroscience understanding. See, e.g., Betsy J. Grey, *Neuroscience, PTSD, and Sentencing Mitigation*, 34 CARDOZO L. REV. 53, 91-94 (2012) (considering use of neuroscience in sentencing defendants diagnosed with Post Traumatic Stress Disorder (PTSD)); Uri Maoz & Gideon Yaffe, *What Does Recent Neuroscience Tell Us About Criminal Responsibility?*, 3 J.L. & BIOSCIENCES 120, 137 (2015) (“Important neuroscientific work on self-control has emerged in recent years, although it remains uncertain how, if at all, it bears on criminal responsibility.”). And, there is a rich debate in the legal scholarship on the extent and scope of our reliance on the current state of neuroscience knowledge and how much we should adjust legal doctrine in response. See, e.g., Stephen J. Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 OHIO ST. J. CRIM. L. 397 (2006) (critiquing the use of neuroscience to draw conclusions about criminal responsibility); Francis X. Shen, *Neurolegislation: How U.S. Legislators Are Using Brain Science*, 29 HARV. J.L. & TECH. 495 (2016). See generally OWEN D. JONES, JEFFREY D. SHALL & FRANCIS X. SHEN, *LAW AND NEUROSCIENCE* (2014) (casebook examining application of neuroscience in law and the courtroom). Francis X. Shen & Owen D. Jones, *Brain Scans as Evidence: Truths, Lies, and Lessons*, 62 MERCER L. REV. 861 (2011).

<sup>40</sup> See generally *Scanning the Brain*, AM. PSYCHOLOGICAL ASS'N (Aug. 2014), <http://www.apa.org/action/resources/research-in-action/scan.aspx>; Carolyn Asbury, *Brain Imaging Technologies and Their Applications in Neuroscience*, DANA FOUND. (Nov. 2011), <https://dana.org/uploadedFiles/Pdfs/brainimagingtechnologies.pdf>.

<sup>41</sup> See, e.g., John Martyn Harlow, *Recovery from the Passage of an Iron Bar Through the Head*, in 2 PUBLICATIONS MASS. MED. SOC'Y 3 (1868).

<sup>42</sup> To be sure, there is no one “place” in the brain where a function happens entirely. Instead, scientists believe, based on current research, that there are interrelated systems. The current understanding, however, is that some regions of the brain are more involved with some functions and not others. See Nancy Kanwisher, *Functional Specificity in the Human Brain: A Window into the Functional Architecture of the Mind*, 107 PROC. NAT'L ACAD. SCI. 11163, 11164 (2010). For example, the occipital lobe is known for its significant involvement with vision, yet the frontal, temporal, parietal lobes have functions dedicated to vision as well as “nearly the entire caudal half of the cerebral cortex is dedicated to processing visual information.” Valentin Dragoi, *Chapter 15: Visual Processing: Cortical Pathways*, UNIV. TEX. HEALTH: NEUROSCIENCE ONLINE, <https://nba.uth.tmc.edu/neuroscience/m/s2/chapter15.html> (last visited Nov. 18, 2018).

brain, involved with complex planning, prediction of future outcomes and planning, and control of emotion.<sup>43</sup> These functions are distinct from what might colloquially be thought of as raw intellect — the ability to do complex math or read hard books.<sup>44</sup>

Scanning studies have shown that the prefrontal cortex is one of the last brain regions to mature — with full maturation in typical individuals in the early twenties.<sup>45</sup> The U.S. Supreme Court cited to

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<sup>43</sup> See Hyun Jin Chung, Lisa L. Weyandt & Anthony Swentosky, *The Physiology of Executive Functioning*, in HANDBOOK OF EXECUTIVE FUNCTIONING 13 (Sam Goldstein and Jack A. Naglieri eds., 2014) (“Over the years, major features of executive functions have been identified, and these include abilities such as inhibitory control, attention shifting, working memory, goal-directed behavior, and strategic planning.” (citations omitted)).

<sup>44</sup> See Sarah-Jayne Blakemore & Suparna Choudhury, *Development of the Adolescent Brain: Implications for Executive Function and Social Cognition*, 47 J. CHILD PSYCHOL. & PSYCHIATRY 296, 301 (2006) (“The term *executive function* is used to describe the capacity that allows us to control and coordinate our thoughts and behaviour. These skills include selective attention, decision-making, voluntary response inhibition and working memory. Each of these executive functions has a role in cognitive control, for example filtering out unimportant information, holding in mind a plan to carry out in the future and inhibiting impulses.” (citation omitted)); cf. S.A. Bunge & M.J. Souza, *Executive Function and Higher-Order Cognition: Neuroimaging*, in 4 ENCYCLOPEDIA OF NEUROSCIENCE 111 (2009) (“The terms executive function and cognitive control refer to cognitive processes associated with the control of thought and action. Putative control functions include the ability to (1) selectively attend to relevant information while filtering out distracting information (selective attention and interference suppression), (2) work with information that is currently being held in working memory (manipulation), (3) flexibly switch between tasks (task switching), (4) inhibit inappropriate response tendencies (response inhibition), and (5) represent contextual information that determines whether a thought is relevant or whether an action is appropriate (e.g., task-set representation).”); Rebecca Elliott, *Executive Functions and their Disorders*, 65 BRIT. MED. BULL. 49, 50 (2003) (“This flexible co-ordination of sub-processes to achieve a specific goal is the responsibility of executive control systems. When these systems break down, behaviour becomes poorly controlled, disjointed and disinhibited. Co-ordination, control and goal-orientation are, therefore, at the heart of the concept of executive function.”).

It was previously hypothesized, and now largely rejected, that youth did not have the cognitive capacity to make reasoned, deliberate decisions. See Figner et al., *supra* note 37, at 710 (describing previous cognitive development explanations for youth risk taking).

<sup>45</sup> See Sara B. Johnson, Robert W. Blum & Jay N. Giedd, *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J. ADOLESCENT HEALTH 216, 218 (2009) (“Evidence suggests that, in the prefrontal cortex, this does not occur until the early 20s or later.”); see also CAROL LYNN MARTIN & RICHARD FABES, *DISCOVERING CHILD DEVELOPMENT* 247 (2d ed. 2009) (“The continuing [structural] development of the prefrontal cortex throughout childhood and into adolescence means that this part of the brain has the most prolonged period of development of all the regions of the brain. . . . Given that the functions associated

these neuroscience findings about maturation when it had the juvenile sentencing cases before it.<sup>46</sup>

The second, related, conclusion from the developmental literature is that young people have an increased propensity to seek out and engage in risky behavior; they are exceptionally “reward seeking.”<sup>47</sup> Relatedly, youth in search of these immediate rewards are less likely than adults to delay gratification for future benefit.<sup>48</sup>

The resulting “developmental mismatch” between youth’s risk-seeking behavior and the immature functioning of impulse control and other restraints helps us understand what we observe of teen behavior.<sup>49</sup> This “mismatch” between the development of reward seeking and impulse control systems “has been proposed to underlie stereotypical adolescent behaviors such as risk taking, sensation seeking and heightened emotional reactivity.”<sup>50</sup> A developmental

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with the prefrontal cortex are continuing to develop over childhood, and that this part of the brain is the last to develop, it should not be surprising that children have yet to reach adult-like levels of planning, behaving appropriately, and remembering.”)

<sup>46</sup> *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (citing neuroscience literature); see also Brief for the American Psychological Ass’n, & the Missouri Psychological Ass’n as Amici Curiae Supporting Respondent at 11-12, *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 1636447.

<sup>47</sup> See, e.g., Barry C. Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time*, 11 OHIO ST. J. CRIM. L. 107, 115-17 (2013).

<sup>48</sup> See Sarah-Jayne Blakemore & Trevor W. Robbins, *Decision-making in the Adolescent Brain*, 15 NATURE NEUROSCIENCE 1184, 1184 (2012); see also Bonnie L. Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-making Competence in Adolescents and Adults*, 22 J. APPLIED DEVELOPMENTAL PSYCHOL. 257, 271 (2001) (noting that “these changes have a profound effect on their ability to make consistently mature decisions”).

For articles addressing levels of planning and thinking about the future as youth grow older, see Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity and Judgment in Adolescence: Why Adolescents May be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 756-57 (2000) (reporting that adolescents, on average, were “less responsible, more myopic, and less temperate than the average adult”); Jari-Erik Nurmi, *How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning*, 11 DEVELOPMENTAL REV. 1, 29 (1991). Cauffman & Steinberg examined a study of more than 1,000 adolescents and adults to investigate the relationships among the factors of age, maturity, and antisocial decision-making. Cauffman & Steinberg, *supra* note 48, at 756. The biggest changes in behavior occurred between sixteen and nineteen years old, especially in the ability to limit impulsivity and evaluate situations before acting and the taking of different viewpoints and perspectives. See *id.*

<sup>49</sup> Daniel P. Keating, *Cognitive and Brain Development*, in HANDBOOK OF ADOLESCENT PSYCHOLOGY 45, 46-48 (Richard M. Lerner & Laurence Steinberg eds., 2004).

<sup>50</sup> Katherine L. Mills et al., *The Developmental Mismatch in Structural Brain Maturation During Adolescence*, 36 DEVELOPMENTAL NEUROSCIENCE 147, 149 (2014)

mismatch is not something specific to delinquent or wayward teens; instead, it is present in “ordinary” teens — what the literature calls neurotypical individuals.<sup>51</sup>

The upside of thinking about adolescent development through this mismatch lens is that we can see that as youth develop into adulthood, this mismatch diminishes.<sup>52</sup> With respect to criminal behavior, this observation is consistent with the literature suggesting that most youth age out of criminal behavior.<sup>53</sup>

One additional piece of the puzzle is that the adolescent development literature finds that disruptions or obstacles to decision-making, such as stress — features often found in a criminal setting — make it less likely youth will make a “better” or “mature” choice.<sup>54</sup> In other words, another important piece of the research literature suggests that youth, even those who are developmentally “able” to make (what an adult would see as) a good choice, can more easily be thrown off by disruptions or obstacles to decision-making. When faced with situations of heightened arousal, youth make riskier choices than adults, even when the youth seem to have the cognitive capacity to “think like an adult.”<sup>55</sup>

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(offering a table of studies using functional neuroimaging that use a developmental mismatch model).

<sup>51</sup> See *id.* at 148. (reporting results of a study that attempted to look at whether the mismatch occurred in individual people and, with a small sample size, the majority of the individuals showed early maturation of areas of the brain associated with sensation seeking and later maturation of the prefrontal cortex). For additional discussion of developmental mismatch, see also Linda Van Leijenhorst et al., *Adolescent Risky Decision-Making: Neurocognitive Development of Reward and Control Regions*, 51 *NEUROIMAGE* 345, 345-55 (2010).

<sup>52</sup> Mills et al., *supra* note 50, at 148 fig.1.

<sup>53</sup> See Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 *PSYCHOL. REV.* 674, 675 (1993) (“When official rates of crime are plotted against age, the rates for both prevalence and incidence of offending appear highest during adolescence; they peak sharply at about age 17 and drop precipitously in young adulthood.”).

<sup>54</sup> Cheryl B. Preston & Brandon T. Crowther, *Legal Osmosis: The Role of Brain Science in Protecting Adolescents*, 43 *HOFSTRA L. REV.* 447, 455-60 (2014) (“With respect to emotional regulation, stress can affect adolescents’ ‘ability to effectively regulate behavior as well as . . . to weigh costs and benefits and override impulses with rational thought.’”).

<sup>55</sup> Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 *ANN. REV. CLINICAL PSYCHOL.* 47, 56 (2009) [hereinafter *Adolescent Development*] (“Even when adolescent cognitive capacities approximate those of adults, youthful decision making may still differ from that of adults due to psychosocial immaturity. Indeed, research indicates that psychosocial maturation proceeds more slowly than cognitive development, and that age differences in judgment may reflect social and emotional differences between adolescents and adults that continue well beyond mid-

In their decisions about risk taking, youth are susceptible to socio-emotional influences and the influence of peers.<sup>56</sup> The literature suggests that youth are more susceptible than adults to the influence of peers.<sup>57</sup> Youth can, and do, make “good” decisions, and, as indicated above, are more likely to do so when they are not around peers and when the decision is made under circumstances that allow calm deliberation and reflection.

Finally, a related point: it may take more “work” for youth to make reasoned decisions than adults.<sup>58</sup> Studies have shown that it takes

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adolescence. Of particular relevance to the present discussion are age differences in susceptibility to peer influence, future orientation, reward sensitivity, and the capacity for self-regulation. Available research indicates that adolescents and adults differ significantly with respect to each of these attributes.”); David A. Sturman & Bita Moghaddam, *The Neurobiology of Adolescence: Changes in Brain Architecture, Functional Dynamics, and Behavioral Tendencies*, 35 NEUROSCIENCE & BIOBEHAVIORAL REVS. 1704, 1706 (2011) (stating that “[c]ollectively, these studies indicate that although adolescents often reason and behave like adults, in certain contexts there are differences in their cognitive strategy and/or in their response to risk and reward, especially under conditions of heightened emotional arousal”).

<sup>56</sup> See Jason Chein et al., *Peers Increase Adolescent Risk Taking by Enhancing Activity in the Brain’s Reward Circuitry*, 14 DEVELOPMENTAL SCI. F1, F1-F2 (2011) (“[A]dolescents’ relatively greater propensity toward risky behavior reflects the joint contribution of two brain systems that affect decision-making: (i) an incentive processing system . . . which biases decision-making based on the valuation and prediction of potential rewards and punishments; and (ii) a cognitive control system, including the lateral prefrontal cortex (LPFC), which supports goal-directed decisionmaking by keeping impulses in check and by providing the mental machinery needed for deliberation regarding alternative choices. . . . We propose that adolescents’ especially heightened propensity to take risks when with peers may derive from the maturational imbalance between these competing brain systems.”).

<sup>57</sup> See, e.g., Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEVELOPMENTAL PSYCHOL. 625, 625 (2005) (concluding from a survey using questionnaires and a task that “peer effects on risk taking and risky decision making were stronger among adolescents and youths than adults”); Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 DEVELOPMENTAL PSYCHOL. 1531, 1531 (2007) (“[T]here is little doubt that peers actually influence each other and that the effects of peer influence are stronger during adolescence than in adulthood. Indeed, one recent experimental study found that exposure to peers during a risk-taking task doubled the amount of risky behavior among middle adolescents, increased it by 50% among college undergraduates, and had no impact at all among adults.”); see also, e.g., Bruce G. Simons-Morton et al., *The Effect of Passengers and Risk-Taking Friends on Risky Driving and Crashes/Near Crashes Among Novice Teenagers*, 49 J. ADOLESCENT HEALTH 587, 588 (2011).

<sup>58</sup> See Steinberg, *Adolescent Development*, *supra* note 55, at 56 (“The notion that adolescents and adults demonstrate comparable capacities for understanding and reasoning should not be taken to mean that they also demonstrate comparable levels of maturity of judgment, however. . . . Indeed, research indicates that psychosocial

enormous focus and energy for youth to exercise executive functioning. Even when youths' external decisions appear to be the same as those of an adult, scanning studies suggest that the youth are processing differently than adults.<sup>59</sup> The understanding is that, over time, the neural pathways needed to make these types of decisions are created and honed; allowing typical adults to make decisions that are taxing for typical teenagers.<sup>60</sup>

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maturation proceeds more slowly than cognitive development, and that age differences in judgment may reflect social and emotional differences between adolescents and adults that continue well beyond mid-adolescence.”). See generally Blakemore & Robbins, *supra* note 48, at 1184-91 (discussing discrepancies between decision-making functions in adults and adolescents by analyzing various research studies, experiments, and scientific data on the brain, and finding that the discrepancies stem from factors such as the development of certain brain regions or lack thereof, sensitivity to neural activity in the brain's reward-processing regions, and the ability to resist external stimuli and manage impulses).

<sup>59</sup> LAURENCE STEINBERG, *AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE* 76-77 (2014) [hereinafter *AGE OF OPPORTUNITY*]; see also NAT'L INST. OF MENTAL HEALTH, *THE TEEN BRAIN: STILL UNDER CONSTRUCTION* 2 (2011), <https://infocenter.nimh.nih.gov/pubstatic/NIH%2011-4929/NIH%2011-4929.pdf> (“One of the features of the brain's growth in early life is that there is an early blooming of synapses — the connections between brain cells or neurons — followed by pruning as the brain matures. Synapses are the relays over which neurons communicate with each other and are the basis of the working circuitry of the brain. . . . Scientists believe that the loss of synapses as a child matures is part of the process by which the brain becomes more efficient.”).

<sup>60</sup> See STEINBERG, *AGE OF OPPORTUNITY*, *supra* note 59, at 77 (“On very challenging tasks of self-control, adults, like children, often show more widespread activation than that seen in adolescents, but unlike the diffuse and scattershot pattern seen among children, the activity in different parts of the adult brain is highly coordinated — like the movements of experienced soccer players rather than the disorganized play of kids who know the basic rules but haven't yet figured out the intricacies of team play.”); cf. Sarah Durston & B.J. Casey, *What Have We Learned About Cognitive Development from Neuroimaging?*, 44 *NEUROPSYCHOLOGIA* 2149, 2151 (2005) (“In some studies, developmental changes in patterns of brain activation could be conceptualized as a shift in patterns of activation from diffuse to more focal, where diffuse refers to larger or more areas of activation, and focal indicates smaller areas of activation, with greater magnitude of signal change. These changes may represent a fine-tuning of relevant neural systems or related developmental changes, such as new brain regions coming online and reduced involvement of others, and may be related to shifts in cognitive strategy, in some studies.” (citations omitted)); *Teen Brain: Behavior, Problem Solving, and Decision Making*, AM. ACAD. CHILD ADOLESCENT PSYCHIATRY (Sept. 2016), [http://www.aacap.org/AACAP/Families\\_and\\_Youth/Facts\\_for\\_Families/FFF-Guide/The-Teen-Brain-Behavior-Problem-Solving-and-Decision-Making-095.aspx](http://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/The-Teen-Brain-Behavior-Problem-Solving-and-Decision-Making-095.aspx) (“Other changes in the brain during adolescence include a rapid increase in the connections between the brain cells and making the brain pathways more effective. . . . Pictures of the brain in action show that adolescents' brains work differently than adults when they make decisions or solve problems. Their actions are guided more by the emotional and reactive amygdala and less by the thoughtful, logical frontal cortex.”).

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III. FORESIGHT IN CRIMINAL LAW: RECKLESSNESS AND NATURAL AND PROBABLE CONSEQUENCES

This Part focuses in on two areas of the criminal law that should cause particular inspection when considering what effect, if any, modern adolescent development understanding and the law that has followed should have on criminal law more broadly. These doctrines — the mens rea of recklessness and the “natural and probable consequences” doctrine — both anticipate that individuals foresee the possible consequences of their risky or illegal actions. And, unlike negligence, where we as a society have made a decision to hold individuals accountable for consequences that they did not anticipate, recklessness and natural and probable consequences purport to hold individuals for the acts and consequences that they *did* anticipate. For this reason, as discussed in Part IV, these doctrines are particularly undermined by evidence that an entire class of defendants does not evaluate risk and anticipate consequences in the way that our law presumes.

A. *The Thin Line Between Recklessness and Negligence in Criminal Law and the Prevalence of Reckless Mens Rea Offenses*

In criminal law, a reckless mens rea is one where the individual knows of a significant risk, and chooses to proceed anyway, where a reasonable or law-abiding person would not. For example, the Model Penal Code (“MPC”) states that “[a] person acts recklessly . . . when he consciously disregards a substantial and unjustifiable risk,” and that this risk is such that “its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.”<sup>61</sup> The MPC posits that there should be consideration of “the nature and purpose of the actor’s conduct and the circumstances known to him,” when evaluating this risk.<sup>62</sup> Similar definitions are found in state statutes.<sup>63</sup>

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<sup>61</sup> MODEL PENAL CODE § 2.02(2)(c) (AM. LAW INST. 1962) (definition of “recklessly”).

<sup>62</sup> *Id.*

<sup>63</sup> See ALA. CODE § 13A-2-2(3) (2018); ARIZ. REV. STAT. ANN. § 13-105(10)(c) (2018); ARK. CODE ANN. § 5-2-202(3) (2018); DEL. CODE ANN. tit. 11, § 231(e) (2018); HAW. REV. STAT. § 702-206(3) (2018); 720 ILL. COMP. STAT. 5/4-6 (2018); KAN. STAT. ANN. § 21-5202(j) (2018); N.H. REV. STAT. ANN. § 626:2(II)(c) (2018); N.J. STAT. ANN. § 2C:2-2(b)(3) (2018); N.Y. PENAL LAW § 15.05(3) (2018); OR. REV. STAT. § 161.085(9) (2018); 18 PA. CONS. STAT. § 302(b)(3) (2018); TENN. CODE ANN. § 39-11-302(c) (2018); UTAH CODE ANN. § 76-2-103(3) (2018); WYO. STAT. ANN. § 6-1-104(a)(ix) (2018); see also COLO. REV. STAT. § 18-1-501(8) (2018) (not comparing to a



Common examples of offenses requiring this mens rea include manslaughter, reckless endangerment, and reckless driving.<sup>64</sup> These offenses, and others, are ubiquitous in criminal codes.<sup>65</sup> The scholarly debate largely assumes that there should be offenses that require a reckless mens rea and discusses the scope and extent of those crimes. For example, one robust area of discussion is whether there should be an offense of attempted reckless homicide.<sup>66</sup> Another area of scholarly discourse involves when it is desirable or appropriate to hold corporations or individuals within a corporate group responsible for reckless behavior.<sup>67</sup>

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law-abiding person in defining “recklessly” as: “A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that a result will occur or that a circumstance exists”); OHIO REV. CODE ANN. § 2901.22 (2018) (“A person acts recklessly when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that the person’s conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that such circumstances are likely to exist.”).

<sup>64</sup> See MODEL PENAL CODE §§ 210.3, 211.2. (AM. LAW INST. 1962); see also, e.g., CONN. GEN. STAT. § 14-222 (2018); LA. STAT. ANN. § 14:99 (2018); MD. CODE ANN., CRIM. LAW § 3-204 (2018); 18 PA. CONS. STAT. § 2705 (2018).

<sup>65</sup> See, e.g., ALA. CODE § 13A-6-24 (2018) (reckless endangerment); 720 ILL. COMP. STAT. 5/4-6 (2018) (recklessness); VT. STAT. ANN. tit. 13, § 1025 (2018) (recklessly endangering another person); cf. 5 Michael Dore, LAW OF TOXIC TORTS § 32:4 (2018) (“Many states also have statutes specifically making the reckless endangerment of the health or welfare of other human beings a criminal violation. Once again, the language of these statutes varies from state to state, but most provide that ‘a person is guilty of reckless endangerment . . . when he recklessly engages in conduct which creates a substantial risk of serious physical injury to another person.’”); Daniel G. Moriarty, *Dumb and Dumber: Reckless Encouragement to Reckless Wrongdoers*, 34 S. ILL. U. L.J. 647, 647 (2010) (“Reckless endangerment is ultimately unsuitable, however, for while it may well be available in most states (sixty percent), it is by no means available in all, and where it is available is generally graded as a misdemeanor only, with a maximum imposable prison term of about a year.”).

<sup>66</sup> See Michael T. Cahill, *Attempt, Reckless Homicide, and the Design of the Criminal Law*, 78 U. COLO. L. REV. 879, 883-84 (2007) (describing debate).

<sup>67</sup> See, e.g., Sarah Gibson, *Polluters as Perpetrators of Person Crimes: Charging Homicide, Assault, and Reckless Endangerment in the Face of Environmental Crime*, 25 J. ENVTL. L. & LITIG. 511 (2010) (arguing for criminal liability for the serious bodily injury or death that results from polluters’ activities); Robert Steinbuch, *The Executive-Internalization Approach to High-Risk Corporate Behavior: Establishing Individual Criminal Liability for the Intentional or Reckless Introduction of Excessively Dangerous Products or Services into the Stream of Commerce*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 321 (2006-07) (arguing for criminal liability for risky products); see also Anne D. Samuels, Note, *Reckless Endangerment of an Employee: A Proposal in the Wake of Film Recovery Systems to Make the Boss Responsible for His Crimes*, 20 U. MICH. J.L. REFORM 873, 873 (1987) (discussing case which held a corporate employee criminally responsible for

Negligence is usually distinguished in modern criminal law from recklessness by the actor's lack of actual appreciation of the risk.<sup>68</sup> For example, the MPC finds negligence when an individual "should be aware of a substantial and unjustifiable risk," the person "fail[s] to perceive" the risk, and this failure to appreciate the risk is "a gross deviation from the standard of care that a reasonable person would observe in the actor's situation."<sup>69</sup> Like recklessness, consideration is taken of "the nature and purpose of his conduct and the circumstances known to him."<sup>70</sup> Offenses that carry a negligence mens rea are deemed less culpable and tend to have lesser possible punishments than offenses that cause the same harm, but have a recklessness mens rea.<sup>71</sup>

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murder due to the workplace conditions created for an employee who was killed on the job); Michael Willats, Comment, *Death by Reckless Design: The Need for Stricter Criminal Statutes for Engineering-related Homicides*, 58 CATH. U. L. REV. 567, 569 (2009).

<sup>68</sup> See, e.g., Kyron Huigens, *Virtue and Criminal Negligence*, 1 BUFF. CRIM. L. REV. 431 (1998) ("The Model Penal Code includes criminal negligence among its four 'Kinds of Culpability,' but the inclusion of negligence was controversial because negligence differs from the other three kinds of culpability in one obvious respect. Each of the other three — purpose, knowledge, and recklessness — is defined as a particular consciousness of harm. For example, recklessness is defined as the conscious disregard of a substantial risk of harm. In contrast, criminal negligence is premised on a substantial risk of harm of which the actor ought to have been aware, but was not. Because negligence, unlike the other kinds of culpability, does not depend on a consciousness of harm, criminal negligence often is said to result in objective liability as opposed to subjective liability.").

<sup>69</sup> MODEL PENAL CODE § 2.02(2)(d) (AM. LAW INST. 1962) (defining "negligently"). Elsewhere, Professor Jody Armour has explored how individualizing the reasonable person in some instances endorses defendants' racist views. See Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 785 (1994).

<sup>70</sup> MODEL PENAL CODE § 2.02(2)(d) (AM. LAW INST. 1962).

<sup>71</sup> See Carroll, *supra* note 3, at 539, 555-57; Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 695-96 (1983) ("[B]ut a defendant acting negligently is unaware of harmful consequences and therefore is arguably neither blameworthy nor deterrable. While most reject this view of negligent culpability, all nonetheless recognize that negligence represents a lower level of culpability, qualitatively different from recklessness because the negligent actor fails to recognize, rather than consciously disregards, a risk. For this reason, recklessness is considered the norm for criminal culpability, and negligence is punished only in the exceptional case."); see also John Calvin Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1372-73 (1979) ("Legislatures apparently agree, for American jurisdictions generally punish negligent homicide as a criminal offense. More commonly, however, criminal liability is confined to some variety of conscious wrongdoing. Thus, the minimum culpability most widely found in the penal law is

The amount of subjectivity that should be incorporated into the “reasonable person” has been a subject of vigorous debate. This is also one area where tort law has more commonly incorporated individual factors.<sup>72</sup> Tort law has been more willing to explicitly consider youth in determining culpability for negligent torts.<sup>73</sup> The consideration of youth in tort law, however, may be less forthcoming in situations where it is perceived that the child is engaged in “adult” activities.<sup>74</sup>

As with recklessness, many states follow the MPC’s distinction and definition for negligence.<sup>75</sup> Other states do not and, in some cases, effectively define *recklessness* using a “should have known” standard.<sup>76</sup> For example, a model jury instruction in Massachusetts holds individuals accountable for conduct it terms “reckless” when the individual “was not conscious of the serious danger that was inherent

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recklessness — a requirement of conscious disregard of a substantial and unjustifiable risk that the actor is doing that which the law forbids. Negligence as an occasion for penal sanctions tends to be reserved for conduct that the [sic] law-abiding citizen would be especially anxious to avoid — e.g., causing the death of another.”). *Compare* ALA. CODE §§ 13A-6-2, 13A-6-3 (2018) (murder and manslaughter, respectively), ALASKA STAT. § 11.41.120 (2017) (manslaughter), *and* 18 PA. CONS. STAT. § 2503 (2018) (voluntary manslaughter), *with* ALA CODE §13A-6-4 (2018) (criminally negligent homicide), ALASKA STAT. § 11.41.130 (2017) (criminally negligent homicide), *and* 18 PA. CONS. STAT. § 2504 (2018) (involuntary manslaughter). *See generally* 18 PA. CONS. STAT. § 302 (2018) (general requirements of culpability).

<sup>72</sup> *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 3 (AM. LAW INST. 2010) (stating that a person negligently caused harm if they did not exercise “reasonable care under all the circumstances”).

<sup>73</sup> Northrup & Rozan, *supra* note 3, at 110-11 (“[I]n cases involving children, ‘the inquiry into reasonable care . . . requires attention to considerations or circumstances that supplement or somewhat subordinate the primary factors,’ including the actor’s age, intelligence, and experience, unless the child was engaged in a dangerous activity ‘characteristically undertaken by adults.’” (emphasis added)).

<sup>74</sup> *Id.*

<sup>75</sup> *See* ALA. CODE § 13A-2-2(4) (2018); ARIZ. REV. STAT. ANN. § 13-105(10)(d) (2018); ARK. CODE ANN. § 5-2-202(4) (2018); HAW. REV. STAT. § 702-206(4) (2018); 720 ILL. COMP. STAT. 5/4-7 (2018); N.H. REV. STAT. ANN. § 626:2(II)(d) (2018); N.J. STAT. ANN. § 2C:2-2(b)(4) (2018); N.Y. PENAL LAW § 15.05(4) (2018); OR. REV. STAT. ANN. § 161.085(10) (2018); 18 PA. STAT. AND CONS. STAT. ANN. § 302(b)(4) (2018); TENN. CODE ANN. § 39-11-302(d) (2018); UTAH CODE ANN. § 76-2-103(4) (2018); WYO. STAT. ANN. § 6-1-104(a)(iii) (2018); *cf.* DEL. CODE ANN. tit. 11, § 231(d) (2018) (requiring for negligence only that “the person fails to exercise the standard of care which a reasonable person would observe in the situation”).

<sup>76</sup> FINDLAY STARK, CULPABLE CARELESSNESS: RECKLESSNESS AND NEGLIGENCE IN CRIMINAL LAW 49 (2016) (“Kentucky’s penal code uses the MPC’s definition of recklessness to define ‘wantonness,’ and the MPC’s definition of negligence to define ‘recklessness.’ In Kentucky, then, ‘recklessness’ is defined in terms of risks that the defendant *should have been aware of.*”); *see also* KY. REV. STAT. ANN. § 501.020 (2018) (definition of mental states).

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in such conduct . . . if a *reasonable person*, under the circumstances as they were known to the defendant, *would have recognized that such actions were so dangerous* that it was very likely that they would result in [the prohibited harm].”<sup>77</sup>

Negligence has been critiqued because, among other reasons, it can be seen as inappropriate to hold an actor culpable for risk that was not actually appreciated and negligent actors themselves — because they do not appreciate the risk — cannot be deterred.<sup>78</sup> Negligence in criminal law can be defended on a number of grounds. Kyron Huigens, for example, argues that “we impose criminal liability in the absence of a consciousness of harm in at least two other kinds of cases” and in both of those instances “our intuition is that punishment is well deserved.” Alternatively, he argues that “[t]he conception of fault or culpability upon which” the condemnation of the negligence standard “is premised is fundamentally misconceived.”<sup>79</sup>

### B. *Natural and Probable Consequences Doctrine*

In addition to recklessness in the criminal law, the “natural and probable consequences” doctrine is another place where individuals are held accountable for actions they have supposedly anticipated. The natural and probable consequences doctrine usually links the culpability of an accomplice to not only the crime the defendant intended to assist, but also to the “foreseeable” consequences of this target offense.<sup>80</sup> For example, the California Supreme Court provided these elements:

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<sup>77</sup> MASS. MODEL JURY INSTR. — CRIM. 6.260 (2018) (emphasis added) (Wantonly or Recklessly Permitting Another to Commit an Assault and Battery on a Child Under 14 Causing Substantial Bodily Injury).

<sup>78</sup> Jerome Hall, *Negligent Behavior Should Be Excluded from Penal Liability*, 63 COLUM. L. REV. 632, 641-43 (1963); see GLANVILLE WILLIAMS, *CRIMINAL LAW* 123 (2d ed. 1961). See generally John L. Diamond, *The Myth of Morality and Fault in Criminal Law Doctrine*, 34 AM. CRIM. L. REV. 111 (1996); George P. Fletcher, *The Theory of Criminal Negligence: A Comparative Analysis*, 119 U. PA. L. REV. 401 (1971).

<sup>79</sup> Huigens, *supra* note 68, at 432; see also Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst when Doing Its Best*, 91 GEO. L.J. 949, 961 (2003) (“Reliance upon a purely objective, unindividualized negligence standard is justified in much the same way as the result in *Dudley & Stephens*: it is necessary to maintain a clear standard of conduct. Holmes, for example, concludes that the reason for adopting it is the criminal law’s ‘immediate object and task to establish a general standard . . . of conduct for the community, in the interest of the safety of all.’”).

<sup>80</sup> See Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 97-98 (1985) (“Secondary parties, as at common law, are also guilty of unintended crimes

[T]he trier of fact must find that the defendant, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of a predicate or target offense; (3) by act or advice aided, promoted, encouraged or instigated the commission of the target crime . . . (4) the defendant's confederate committed an offense other than the target crime; and (5) the offense committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted.<sup>81</sup>

Under the above definition, assume Defendant A intends to commit a robbery. If Defendant B knows that Defendant A intends the unlawful act,<sup>82</sup> intends to help commit the robbery, does something to help with the robbery, and Defendant A kills, rapes or intentionally destroy property of a victim, Defendant B will be held for the murder, rape or intentional destruction of property if it is determined to be a “natural and probable consequence” of the robbery (which the courts usually will), even if Defendant B knows nothing of these crimes and does not intend to help assist in these crimes.<sup>83</sup>

The precise description of the mens rea required for culpability under the natural and probable consequences doctrine varies; it is,

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committed by the primary party if those crimes are a natural and probable consequence of the intended offense. As a matter of theory, secondary parties are usually said to be accountable for the acts of the primary actor. Their liability is derivative of the latter's conduct . . . .”); see also Sanford H. Kadish, *Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369, 375-76 (1997) (using “common purpose” doctrine and noting that American jurisdictions may allow conviction where the risk is foreseeable, while English courts require actual foresight of the risk); cf. Timothy Wu & Yong-Sung (Jonathan) Kang, *Criminal Liability for the Actions of Subordinates — the Doctrine of Command Responsibility and Its Analogues in United States Law*, 38 HARV. INT'L L.J. 272, 288 (1997) (describing a case in which the court applied the natural and probable consequences doctrine to uphold that the defendant was “guilty not only of the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets”).

<sup>81</sup> *People v. Prettyman*, 926 P.2d 1013, 1020 (Cal. 1996) (requiring the jury to be instructed on the target offense as part of the natural and probable consequences jury instructions); see CAL. PENAL CODE § 31 (2018) (defining “principals”).

<sup>82</sup> The California definition does not make clear whether the knowledge of the defendant must be of the co-defendant's intent to commit the specific predicate offense, or a more general unlawfulness. PENAL § 31.

<sup>83</sup> JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 453-54 (8th ed. 2018) (“The natural-and-probable-consequences doctrine has been subjected to substantial justifiable criticism. . . . Thus, the effect of the rule is to permit conviction of an accomplice whose culpability as to the non-target offense is less than is required to prove the guilt of the primary party.”).

nonetheless, the most permissive form of accomplice liability.<sup>84</sup> Under the natural and probable consequences doctrine, the accomplice's mens rea can be rendered irrelevant, as long as the accomplice somehow assists or encourages the principal's conduct.<sup>85</sup>

Critiques or attempts to constrain the natural and probable consequences doctrine are many.<sup>86</sup> For example, Joshua Dressler criticizes that liability can be premised on negligence, even when the underlying offense requires a greater mens rea.<sup>87</sup> Michael G. Heyman asserts that the doctrine eliminates the intent requirement, and perhaps a mens rea requirement, "dispenses with the requirement of any personal act of any kind," and lacks a causation requirement.<sup>88</sup> These critics have called for the elimination or at least modification of the doctrine. Sanford Kadish, for example, suggests modification to a doctrine of "reckless complicity," where the accomplice can only be

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<sup>84</sup> See John F. Decker, *The Mental State Requirement for Accomplice Liability in American Criminal Law*, 60 S.C. L. REV. 237, 239 (2008) ("Due to the inconsistency between the plain language of states' accomplice liability legislation and its respective interpretation in the state courts, many states' accomplice laws present a confused picture in terms of the law's stance on accomplice liability. No aspect of this law is more complex than that relating to the mental state requirement for accomplice liability.").

<sup>85</sup> *Id.* at 240 (citing *People v. Feagans*, 480 N.E.2d 153, 159 (Ill. App. Ct. 1985)); see also *id.* at 312 (stating that approximately twenty states hold accomplices liable for crimes that were "natural and foreseeable" or "natural and probable" consequences of the initial crime).

<sup>86</sup> See, e.g., MODEL PENAL CODE § 2.06 cmt. 6(b) at 312 & n.42 (AM. LAW INST., Official Draft and Revised Comments 1985) (rejecting natural and probable consequences doctrine); Audrey Rogers, *Accomplice Liability for Unintentional Crimes: Remaining Within the Constraints of Intent*, 31 LOY. L.A. L. REV. 1351, 1379 (1998) ("Since the natural and probable consequence doctrine flouts the most fundamental tenet of criminal law that punishment be based on blameworthiness, courts should be especially mindful of it when assessing accomplice liability for unintentional crimes."); see also Evan Goldstick, Note, *Accidental Vitiating: The Natural and Probable Consequence of Rosemond v. United States on the Natural and Probable Consequence Doctrine*, 85 FORDHAM L. REV. 1281, 1293-94 (2016) (noting that several state supreme courts, including Massachusetts, New Mexico, and Nevada, have rejected the doctrine, and collecting cases).

<sup>87</sup> See DRESSLER, *supra* note 83, at 453-54; see also Kadish, *supra* note 80, at 375 (describing the two problems with the doctrine as (1) the risk required only needs to be foreseeable for the accomplice, which is a negligence standard; and (2) the doctrine allows the accomplice to be convicted even without the mens rea required for the offense of conviction of the principal).

<sup>88</sup> Michael G. Heyman, *The Natural and Probable Consequences Doctrine: A Case Study in Failed Law Reform*, 15 BERKELEY J. CRIM. L. 388, 400 (2010); see also Michael G. Heyman, *Losing All Sense of Just Proportion: The Peculiar Law of Accomplice Liability*, 87 ST. JOHN'S L. REV. 129, 142 (2013).

held accountable if he is, at least, reckless with respect to the risk and where the principal's offense is one of recklessness, not a greater mens rea.<sup>89</sup>

Some jurisdictions have, in fact, eliminated or limited the doctrine.<sup>90</sup> Whatever our (significant) unease with the doctrine, however, it has persisted in at least some jurisdictions.<sup>91</sup>

#### IV. RECKLESS JUVENILES

In this Part, I put together the pieces from above. What should we conclude from looking at the development literature that youth cannot be expected, especially in conditions of stress and/or with peers, to perceive, assess and decide in the face of risk in the same way that the law considers culpable for recklessness offenses?<sup>92</sup> Some have suggested that youth be considered for mens rea generally<sup>93</sup> or that, at least in juvenile court, we should adopt a "reasonable youth" standard in examining mens rea.<sup>94</sup> Another choice could be a more subjective standard for all defendants. I will examine the trends in recklessness law of criminal damage in the United Kingdom, which has shifted from an objective to a more subjective standard, as a comparative

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<sup>89</sup> See Kadish, *supra* note 80, at 378-79.

<sup>90</sup> *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 190-91 (2007) ("[F]ew jurisdictions have expressly rejected the 'natural and probable consequences' doctrine."); see also *State v. Carrasco*, 946 P.2d 1075, 1079 (N.M. 1997) (declining to apply the natural and probable consequences doctrine and requiring that the defendant intend the acts of the principle); Goldstick, *supra* note 86 (citing *Commonwealth v. Richards*, 293 N.E.2d 854, 859 (Mass. 1973); *State v. Carrasco*, 946 P.2d 1075 (N.M. 1997); and *Sharma v. State*, 56 P.3d 868, 872 (Nev. 2002)).

<sup>91</sup> See, e.g., *Carter v. State*, 933 A.2d 774, 777 (Del. 2007); *People v. Robinson*, 715 N.W.2d 44, 46 (Mich. 2006); *Commonwealth v. Fisher*, 80 A.3d 1186, 1192 (Pa. 2013); *State v. Howard*, 30 S.W.3d 271, 276 (Tenn. 2000); *Commonwealth v. Herring*, 288 Va. 59, 75 (Va. 2014).

<sup>92</sup> Scholars have drawn a number of implications for legal doctrine from the shifts in current understanding of adolescent development. See, e.g., David R. Katner, *Eliminating the Competency Presumption in Juvenile Delinquency Cases*, 24 CORNELL J.L. & PUB. POL'Y 403, 404, 419 (2015) (proposing, alternatively a presumption that children fourteen and under are not competent to proceed in delinquency proceedings given developmental immaturity and the high rates of mental illness among the juvenile justice population, or a reworking of the standards for competency of juveniles); Scott Lenahan, Note, *A New Era in Juvenile Justice: Expanding the Scope of Juvenile Protections through Neuropsychology*, 20 SUFFOLK J. TRIAL & APP. ADVOC. 92, 93 (2015).

<sup>93</sup> See Carroll, *supra* note 3, at 590.

<sup>94</sup> Northrop & Rozan, *supra* note 3, at 113.

example.<sup>95</sup> I suggest that a rethinking of the doctrines that expressly account for the actor's subjective beliefs, and in a way that incorporates our understanding of what youth as a group can be expected to foresee, is the best step. Concurrent with a shift to rejecting or disfavoring youth culpability for these offenses is a retention (at least for now) of the doctrines that impose criminal liability based on what a "reasonable person" should have done. Limiting the scope of the argument to crimes of *actual* foresight would permit youth to be held to this largely unattainable "reasonable adult" standard of what they *should have* done or known. I conclude that for young people, either in the juvenile or adult criminal system, we should consider barring liability based on a reckless mens rea and on natural and probable consequences or, at a minimum, presume that young people cannot commit these offenses.

This Part also considers whether an understanding of youth development should matter for imposition of criminal liability. Perhaps we are willing to hold youth accountable for these offenses even if we can be fairly confident that we are convicting them of offenses for which they do not have culpability.<sup>96</sup> To examine this question, this section considers other normative reasons that society may be willing to impose liability even for individuals who do not perceive the circumstances as an "ordinary" person would.

#### A. *Considering a Subjective Test of Recklessness*

Note that, until now, the Article has discussed youth as a group, as the research referenced goes to what we know about adolescence generally, not to what can be said about any particular young defendant.<sup>97</sup> In thinking about possible solutions, there is a tension —

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<sup>95</sup> See *Regina v. Caldwell* [1982] AC 341 (HL) (appeal taken from Eng.) (adopting objective standard for reckless mens rea and giving rise to "Caldwell recklessness"); *Regina v. G. and R.* [2003] UKHL 50, [2004] 1 AC 1034 (appeal taken from Eng.) (adopting a subjective standard of recklessness, which applies to all defendants, in a case involving an eleven and a twelve year old); see also *infra* notes 99–105 and accompanying text.

<sup>96</sup> On the other hand, many would suggest that criminal liability not extend (or rarely extend) to those who do not choose to do wrong. See Kenneth W. Simons, *Should the Model Penal Code's Mens Rea Provisions Be Amended?*, 1 OHIO ST. J. CRIM. L. 179, 188 (2003) ("[T]he MPC's decision to make recklessness the default mental state is important as a matter of principle. For it expresses the classic liberal idea that moral culpability is, and criminal liability should be, based on a conscious choice to do wrong.").

<sup>97</sup> See, e.g., David L. Faigman, John Monahan & Christopher Slobogin, *Group to Individual (G2i) Inference in Scientific Expert Testimony*, 81 U. CHI. L. REV. 417, 454



explored at length in the law and neuroscience literature — between the group insight obtained through research and the focus on a particular individual's acts or capacity in the law, especially in the criminal law.<sup>98</sup>

One response, which keeps with criminal law's focus on individual culpability, would be to allow recklessness to be much more subjective, so that the factfinder could account, in a less constrained way, for an individual's actual lack of foresight. To consider this possibility in a concrete way, I briefly review recklessness required for criminal damage in the United Kingdom, which has moved in a few notable cases from an objective to a subjective standard. In *R. v. Caldwell*,<sup>99</sup> the House of Lords, Lord Diplock, rejected Caldwell's assertion that his voluntary intoxication affected his mens rea, and defined recklessness to include situations in which the defendant "had not given any thought to the possibility of there being" an obvious risk.<sup>100</sup> This definition was applied, sometimes uncomfortably, until *Regina v. G and R*.<sup>101</sup> In that case, an eleven and a twelve year old were camping without permission, set fire to some newspapers, threw the papers into a bin and left. The fire spread, causing significant damage,

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(2014) [hereinafter *Group to Individual*]; DAVID L. FAIGMAN ET AL., G2I KNOWLEDGE BRIEF: A KNOWLEDGE BRIEF OF THE MACARTHUR FOUNDATION RESEARCH NETWORK ON LAW AND NEUROSCIENCE 2-4 (2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2881618](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2881618).

<sup>98</sup> See, e.g., Faigman, Monahan & Slobogin, *Group to Individual*, *supra* note 97, at 419-20; Carl E. Fisher, David L. Faigman & Paul S. Appelbaum, *Toward a Jurisprudence of Psychiatric Evidence: Examining the Challenges of Reasoning from Group Data in Psychiatry to Individual Decisions in the Law*, 69 U. MIAMI L. REV. 685, 687-88 (2015); Nancy Gertner, *Neuroscience and Sentencing*, 85 FORDHAM L. REV. 533, 543 (2016).

<sup>99</sup> *Caldwell*, [1982] AC at 341.

<sup>100</sup> *Id.* at 354 ("[A] person charged with an offence . . . is 'reckless as to whether . . . property would be destroyed or damaged' if (1) he does an act which in fact creates an obvious risk that property will be destroyed or damaged and (2) when he does that act he either has not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and has nonetheless gone on to do it."). For cases involving youth applying — and pushing at — this standard prior to *Regina v. G. and R.*, see, e.g., *Elliott v. C.* (1983) 1 WLR 939 (DC) (fourteen year old who set fire to a shed because she "felt like it"); *R. v. Rogers* (1984) 79 Cr. App. R. 334 (trial court rejected an instruction sought by the young defendant that would account for his age and other characteristics that affected his appreciation of the risks); *R. v. Coles* (1995) 1 Cr. App. R. 157 (fifteen year old provided expert testimony that did have capacity to foresee the risks; convicted under reasonable adult standard).

<sup>101</sup> *R. v. G. and R.* [2003] UKHL 50, [32], [2004] 1 AC 1034 (appeal taken from Eng.).

and the youth were charged with reckless damage.<sup>102</sup> The court questioned whether a defendant can be convicted under the act “on the basis that he was reckless . . . when he gave no thought to the risk but, by reasons of his age and/or personal characteristics the risk would not have been obvious to him, even if he had thought about it?”<sup>103</sup> The trial court had instructed the jury under *Caldwell*, including that the “ordinary, reasonable” person was an adult. In deciding, the House of Lords rejected the alternative of creating a youth-only *Caldwell* rule that compared the defendant to a “normal reasonable child[] of the same age.”<sup>104</sup> Instead, they adopted a subjective standard for all individuals, where the individual must be aware of the risk and, “it is, in the circumstances known to him, unreasonable to take the risk.”<sup>105</sup>

### B. Reckless Youth

This Article posits instead that youth facing criminal charges, either in the juvenile or adult criminal courts, cannot be regularly held for offenses that require a reckless mens rea or that impose the natural and probable consequences doctrine.

As stated earlier, the distinct feature of these two doctrines is the assignment of culpability to a defendant who, though perhaps not intending a particular result, “saw it coming”; the defendant is deemed to have assessed a risky situation, anticipated the real and possible outcome, and acted anyway in the face of this understanding.<sup>106</sup> What we have learned from the adolescent development literature and, as the Supreme Court notes, from common experience about teens,<sup>107</sup> is that youth do not conform to these doctrinal assumptions.<sup>108</sup> Young

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<sup>102</sup> *Id.* at [2].

<sup>103</sup> *Id.* at [1] (Lord Bingham citing the point of law certified by the Court of Appeals).

<sup>104</sup> *Id.* at [37].

<sup>105</sup> *Id.* at [41] (stating that “[a] person acts recklessly . . . with respect to (i) a circumstance when he is aware of a risk that it exists or will exist; (ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk”).

<sup>106</sup> See *supra* notes 61–71, 80–85 and accompanying text.

<sup>107</sup> Scott, *supra* note 2, at 72.

<sup>108</sup> The consideration of youth, while not common in the criminal law literature, is not unheard of; the Restatement of Torts explicitly contemplates that youth will be relevant to a determination of culpability. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 10 cmt. b (AM. LAW INST. 2010) (stating that “[a]ll American jurisdictions accept the idea that a person’s childhood is a relevant circumstance” where liability turns on what an objectively reasonable person would do in the

people do not experience risk in the same way as mature adults do. Young people are risk-seekers, and yet they lack the maturity to think through the very real possible consequences of their risk-taking and to reflect on and refrain from the risky behavior.<sup>109</sup> Stated in the strongest way, they cannot conform to the criminal law expectations regarding anticipation of the consequences of their risky behavior, which is central to culpability in cases involving a reckless mens rea or the natural and probable consequences doctrine.

This is a more modest step than a completely subjective test, in that it is limited to the class of defendant for which there has been particular discomfort in applying recklessness and avoids the thorny questions around what other characteristics of a person can be considered. On the other hand, the rule suggested goes farther, in that it presumes incapacity for intent — or at the extreme, bans culpability — for a class of defendants.

Note that the import of the argument does not extend to offenses that require proof that the youth intended or otherwise acted “willfully” or even “knowingly.” These offenses require a showing that leads the factfinder to conclude that the young defendant sought out, appreciated, or desired the result of his actions.<sup>110</sup> Offenses that require proof of this “higher” mens rea,<sup>111</sup> focus the factfinder on the precisely relevant question — what did *this individual child* “know”?<sup>112</sup>

I can anticipate an argument that proving intentionality is likewise flawed — even if not equally so — in light of our current understanding of adolescent development. Doesn’t the judge or jury infer intentionality or knowledge from the surrounding facts and circumstances? And don’t we worry that the (adult) factfinders make assumptions about what young people “intended” or “knew” based on circumstantial evidence, which leads them to attribute mens rea to the young defendant that he or she did not actually have? I cannot deny this possibility. Further, young people absolutely may intend to do acts that an adult would have the maturity to choose not to do. The adolescent development literature certainly leads to the conclusion that this is the case.

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circumstances).

<sup>109</sup> See, e.g., *supra* notes 47–51 and accompanying text.

<sup>110</sup> MODEL PENAL CODE § 2.02(2)(a)-(b) (AM. LAW INST., Official Draft and Revised Comments 1985).

<sup>111</sup> See MODEL PENAL CODE § 2.02(5) cmt. 7 at 247 (AM. LAW INST., Official Draft and Revised Comments 1985).

<sup>112</sup> Carroll, *supra* note 3, at 556-57.

Yet, the adolescent development literature has the most to say in the substantive criminal law on the question of reckless behavior on the part of young people.<sup>113</sup> Further, there is a practical aspect to thinking about the elimination of culpability for recklessness, but not for intentional offenses. Criminal law carries a strong consensus that intended acts should be punished.<sup>114</sup> Given this normative framework, for crimes of intent or knowledge, the question to ask seems to be the quantum of punishment, instead of whether or not criminal opprobrium should be imposed at all.

### C. Doctrinal Dive

In this section, I press on the doctrinal pieces of recklessness to see if we can think more carefully about what is different about youth who are defendants in criminal cases. There are three key elements of recklessness, two of which overlap with negligence. These are: (1) whether the actor “knew” of the risk; (2) whether the risk taken was “substantial and unjustifiable” and (3) what is relevant to consideration of the “actor’s situation” when a youth is the actor.<sup>115</sup> I posit that while the law might, at some future point, be willing to subjectivize the inquiry about “substantial and unjustifiable” risk, or be willing to think more elastically about the “actor’s situation,” the doctrinal point at which our current understanding of youth is most relevant is the question of an actor’s knowledge of the risk.

First, focusing on a key distinction between recklessness and negligence, our current legal and scientific understanding of youth behavior gives us any insight into determining whether youth, as a group, acted in the face of *known* risk. To start, the neuropsychological literature suggests that youth have the cognitive capacity to “know,” in that, in certain environments, they can learn complicated information.<sup>116</sup> That kind of higher-level academic capacity — such as the ability to do complex math — is not, however, the relevant gauge for criminal liability. Instead, we must also look to literature on the

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<sup>113</sup> See *supra* Part III.A.

<sup>114</sup> See, e.g., Douglas N. Husak, *Retribution in Criminal Theory*, 37 SAN DIEGO L. REV. 959, 970-71 (2000); see also Anthony M. Dillof, *Transferred Intent: An Inquiry into The Nature of Criminal Culpability*, 1 BUFF. CRIM. L. REV. 501, 503-04 (1998).

<sup>115</sup> See, e.g., MODEL PENAL CODE § 2.02(2)(c) (AM LAW INST., Official Draft and Revised Comments 1985) (defining “recklessly”).

<sup>116</sup> See, e.g., Feld, *supra* note 47, at 115-16 (“Developmental psychologists distinguish between youths’ cognitive abilities and their judgment and self-control. Although mid-adolescents’ cognitive abilities are comparable with adults, their judgment and impulse control does not emerge for several more years.”).

influence of socio-emotional factors, influence of peers, and ability to assess situations under pressure, as these are more relevant to criminal situations that call for a recklessness analysis. When these are examined, we see that young people have a different relationship to risk than adults. They seek out risk and see risky activities as positive. They take more risks when in the presence of their peers than they would if they were alone.<sup>117</sup> When faced with a situation in which risk must be gauged, their assessment is different from the assessment of an adult.<sup>118</sup> We can draw a potential legal conclusion that we should not hold youth accountable for knowledge of risk in criminal situations, even if it is fair to infer that adults have that knowledge at the time.

Second, take a deeper dive at the question of a “substantial and unjustifiable” risk.<sup>119</sup> Here, the idea that can be developed from the adolescent psychology literature is that youth can perceive that “a” risk exists, but either they do not perceive it with the “correct” (adult) proportion, or they fail to see it as a risk that is not justifiable to take. Our intuitions about youth behavior, reflected in the U.S. Supreme Court’s opinions and, to some extent, supported by the literature, suggest that youth take unjustifiable risks, even when they see those risks.<sup>120</sup> And, the literature on youth sensation-seeking could suggest that it is biologically normal for youth to take risks that certainly an

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<sup>117</sup> Steinberg, *Adolescent Development*, *supra* note 55, at 56 (“[I]t is reasonable to speculate that the social and arousal processes that may undermine logical decision making during adolescence, when connectivity is still maturing, do not have the same impact during adulthood.”).

<sup>118</sup> See Kathryn Monahan, Laurence Steinberg & Alex R. Piquero, *Juvenile Justice Policy and Practice: A Developmental Perspective*, 44 CRIME & JUST. 577, 578 (2015) (“Since the mid to late 1990s, scientific research has provided consistent evidence that adolescents are developmentally different from adults in ways that have implications for the treatment of young people in the justice system.”); Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 812-16 (2003); Laurence Steinberg & Elizabeth Cauffman, *A Developmental Perspective On Serious Juvenile Crime: When Should Juveniles Be Treated as Adults?*, 63 FED. PROB. 52, 55-56 (1999).

<sup>119</sup> MODEL PENAL CODE § 2.02 cmt. 3 at 237 (AM. LAW INST., Official Draft and Revised Comments 1985) (“The risk of which the actor is aware must of course be substantial in order for the recklessness judgment to be made. The risk must also be unjustifiable. . . . There is no way to state this value judgment that does not beg the question in the last analysis; the point is that the jury must evaluate the actor’s conduct and determine whether it should be condemned. The Code proposes, therefore, that this difficulty be accepted frankly, and that the jury be asked to measure the substantiality and unjustifiability of the risk by asking whether its disregard, given the actor’s perceptions, involved a gross-deviation from the standard of conduct that a law-abiding person in the actor’s situation would observe.”).

<sup>120</sup> See *Roper v. Simmons*, 543 U.S. 551, 570 (2005).

adult would view as unjustifiable and the literature explains this with the “developmental mismatch.”<sup>121</sup> Kenneth Simons posits that even under the current MPC definition of recklessness, one reading is that individuals who see a risk, but do not perceive the severity of it, will not be deemed reckless.<sup>122</sup> Simons cites the case of *In re William G.*, which is a perfect example.<sup>123</sup> In that case, the court found insufficient evidence of recklessness — judged “by the standard of fifteen year olds of like age, intelligence and experience” — when faced with a fifteen year old doing tricks on shopping carts in a parking lot with two friends, who careened the cart into a car and was charged with reckless criminal damage.<sup>124</sup>

A number of scholars such as Peter Westen, however, would assert that the concepts of substantial and unjustifiable risk are normative ones — “they are ones that are entirely a function of which risks the people of the state regard as acceptable and unacceptable — not a function of contrary or dissenting perceptions, emotions, or judgments by individual actors.”<sup>125</sup> Youth do not perceive the risks that they are taking as substantial and unjustifiably ones. Something that is risky behavior — from an adult’s perspective — is a biologically-based and developmentally “normal” characteristic of youth.

The third doctrinal point worth examining is whether our legal and scientific understanding of youth gives any insight into what should be considered in evaluating the “actor’s situation.”<sup>126</sup> The MPC commentary allows that this language is what permits a more individualized approach to a defendant’s blameworthiness.<sup>127</sup> The

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<sup>121</sup> See *supra* notes 49–50 and accompanying text.

<sup>122</sup> Simons, *supra* note 96, at 191 (“[T]here is an important third possible category — namely, where an actor realizes that he is creating some risk, but concludes (either reasonably or unreasonably) that the risk is tiny and insubstantial. (Imagine a speeding driver supremely confident that he has the skill to avoid a collision.) Should such an actor really be treated as merely negligent, not reckless? Especially if he was unreasonable in inferring that the risk was insubstantial? Courts in MPC jurisdictions appear to have reached different conclusions.”).

<sup>123</sup> *Id.* (citing *In re William G.*, 963 P.2d 287, 292 (Ariz. Ct. App. 1997)).

<sup>124</sup> *In re William G.*, 963 P.2d 287, 293 (Ariz. Ct. App. 1997).

<sup>125</sup> Peter Westen, *Individualizing the Reasonable Person in Criminal Law*, 2 CRIM. L. & PHIL. 137, 145 (2008).

<sup>126</sup> See generally Simons, *supra* note 96, at 185-86 (noting that the Code “fudges” with this phrase and encouraging guidance on how subjectivized the inquiry should be).

<sup>127</sup> See MODEL PENAL CODE § 2.02 cmt. 3 at 237 (AM. LAW INST., Official Draft and Revised Comments 1985); see also *id.* at 238 (“Ultimately, then, the jury is asked to perform two distinct functions. First, it is to examine the risk and the factors that are relevant to how substantial it was and to the justifications for taking it. In each

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MPC Commentary, cases and scholarship are, understandably, reluctant to allow the “situation” of the actor to individualize the inquiry based on the idiosyncratic or anti-social perspective of the defendant. The MPC commentary explicitly recognizes the “inevitable ambiguity” created.<sup>128</sup> On one hand, this possibility of subjectivization could be seen as a promising location to consider the age of a defendant; and, in a given case with an individual defendant, that might be true. On the other hand, shoehorning the general group characteristics of young people into one of the few doctrinal areas that accounts for individualization may be misguided if the goal is to account for how youth, as a group, might be accounted for by the law.

*D. Should We Hold Youth Culpable for Reckless Offenses even if We Are Convicting Them for Offenses for Which They Do Not Actually Have the Legal Mens Rea?*

This Article focuses on criminal offenses that hold the defendant accountable for risks that she supposedly actually was aware of, and perceived as unjustifiable, and asserts that youth cannot and should not be held accountable for these offenses.

Even if youth cannot actually appreciate the relevant risks in the way that the law of recklessness provides, we should consider whether the law might nevertheless want to impose this unobtainable standard. This section considers the possibility that even if youth do not (or often do not) perceive, assess and act in the face of “known” risk in the way that recklessness requires, that we should hold them accountable for these offenses because of what they, if they were adults, *should* perceive. I examine briefly three of the common reasons — the harm caused by their actions, society’s desire to incentivize them to take care, and the value of objective, easier-to-apply standards. I conclude that none of these overcomes the need, under recklessness, to have defendants who can actually meet the stated standard.

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instance, the question is asked from the point of view of the actor’s perceptions, i.e., to what extent he was aware of risk, of factors relating to its substantiality and of factors relating to its unjustifiability.”); Michael Vitiello, *Defining the Reasonable Person in the Criminal Law: Fighting the Lernaean Hydra*, 14 LEWIS & CLARK L. REV. 1435, 1444 & n.74 (2010) (noting, in discussing the *Goetz* case, that “the court’s observation that an actor’s ‘situation’ includes the physical attributes of the victims and defendant” was “non-controversial,” as it “largely tracks the law elsewhere”).

<sup>128</sup> MODEL PENAL CODE § 2.02 cmt. 4 at 242 (AM. LAW INST., Official Draft and Revised Comments 1985).

1. Harm caused.

One commonly asserted reason to hold individuals accountable for harm that they did not foresee, or that they did not contemplate, is simply the consequences of their acts.<sup>129</sup> The real harm caused — whether anticipated or not — is of such significance that society is willing to impose a criminal punishment.<sup>130</sup> This is, for example, one justification offered for holding individuals responsible for the natural and probable consequences of their actions.<sup>131</sup>

2. Care taking.

An additional reason that society holds people accountable for reckless and negligence offenses is simply to induce or require care taking, and punish those who are unwilling, or unable, to take sufficient care.<sup>132</sup> Even if we know that in some cases, the person might actually only be grossly negligent, we may be willing to convict and punish them for a reckless offense because we want to induce care taking.<sup>133</sup>

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<sup>129</sup> Cf. Kent Greenawalt, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 347 (1983) (“Why should wrongdoers be punished? Most people might respond simply that they deserve it or that they should suffer in return for the harm they have done. Such feelings are deeply ingrained . . .”); Rebecca Hollander-Blumoff, *Crime, Punishment, and the Psychology of Self-Control*, 61 EMORY L.J. 501, 520-21 (2012) (“A moral theorist, instead, might suggest that because the actor had the initial choice to engage in behavior that led to the wrongful act, he must be held responsible for his actions.”).

<sup>130</sup> See Aya Gruber, *A Distributive Theory of Criminal Law*, 52 WM. & MARY L. REV. 1, 4-5 (2010); see also Russell P. Hanser, *Punishing Hate, Punishing Harm*, 90 J. CRIM. L. & CRIMINOLOGY 1047, 1052 (2000).

<sup>131</sup> See Kimberly Kessler Ferzan, *Opaque Recklessness*, 91 J. CRIM. L. & CRIMINOLOGY 597, 600-01 (2001) (“Moreover, the flip side also presents a problem. That is, the law, in its current state, presents the danger that opaquely reckless people are being treated as purely reckless, and hence, our criminal justice system may be treating them as more culpable than they actually are. For example, South Dakota’s Supreme Court suggested that merely being aware of the dangerous nature of one’s conduct will suffice for manslaughter; the defendant need not foresee death as a result. But doesn’t it matter why the opaquely reckless actor thinks his conduct is dangerous? What if he never foresees the prospect that someone might die? Should the disregard of ‘dangerousness’ suffice for responsibility for manslaughter?” (citing *State v. Olsen*, 462 N.W.2d 474 (S.D. 1990))); Claire Finkelstein, *Responsibility for Unintended Consequences*, 2 OHIO ST. J. CRIM. L. 579, 579-81 (2005) (arguing against imposing negligence criminal liability for effects that individual perpetrator did not foresee or deemed highly unlikely to occur in order to align with responsibility judgments in ordinary morality).

<sup>132</sup> Finkelstein, *supra* note 131, at 580.

<sup>133</sup> This argument can be made for corporate actors who put risky products into the stream of commerce.



3. Upholding value of objective standard and greater ease of application<sup>134</sup>

Third, even if we recognize that some individuals — either as a group or because of their idiosyncrasies — cannot meet the required mens rea standard, the law might be willing to enforce the law anyway to have a consistent standard that applies across all cases. Another reason would be to avoid the difficulty of determining who actually cannot meet the legal standard from those who would assert their inability to do so for the sake of avoiding liability.

These are not insignificant reasons to be cautious about eliminating the culpability of youth for reckless offenses. In the end, these are overcome, however, by the capacity (and actual practice) of the law to continue to punish for harm caused and encourage care taking through the codification of other offenses, especially offenses involving negligence and strict liability. Other offenses, which are not tied to the subjective understanding of a young person, can and do address these goals of criminal law. There is, additionally, benefit — and moral authority — to laws that mean what they say. If the law of recklessness purports to hold offenders accountable for their actual, individual foresight, then the force of the law is enhanced by taking that language seriously.

#### CONCLUSION

The ban or presumption against finding youth culpable for reckless offenses could work in a number of ways.

One possibility would be to ban charges involving recklessness for potential defendants under a certain age in both juvenile and adult criminal court.<sup>135</sup> If the defendant is a youth under eighteen or twenty-

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<sup>134</sup> Perhaps a variant on the goal of implementing objective, widely applicable standards is a skeptical of claims that “didn’t foresee risk” or “didn’t know” or a concern that the cost of determining whether the person actually had the required mens rea is prohibitively high.

<sup>135</sup> That age could reflect the literature’s understanding of development; meaning that it would extent to perhaps twenty-one years old or even up to twenty-five years old. If a rule is established at, for example, the age of twenty-one, we can wonder what difference there is between a defendant who is twenty and eleven months, who would receive the benefit of the rule, and a defendant who is twenty-one and one month, who would be assessed under standard rules of liability. In the area of youth, the U.S. Supreme Court has drawn a line in the Eighth Amendment at the age of eighteen, although many have critiqued this line and it has shifted over time. *Compare* *Stanford v. Kentucky*, 492 U.S. 361 (1989) (allowing the death penalty for offenders at or above sixteen years old), *with* *Roper v. Simmons*, 543 U.S. 551 (2005) (barring the death

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one or twenty-five, the youth recklessness doctrine would bar accountability for offenses that sound in recklessness or natural and probable consequences. These youth could be charged with and convicted of, when it exists, similar offenses that sound in negligence, because we could make a decision that, even if youth do not actually meet the mens rea requirement, that we want to hold them to an adult standard of what they “should have” done. The strength of a ban can be seen from the perspective of the categorical remedy taken by the Court in *Graham*.<sup>136</sup> In *Graham*, the Court acknowledged that it was hypothetically possible for a youth to be one of the few who showed developmental maturity and whose crime would merit life without parole, but that the questionable ability to make this determination demanded a ban nonetheless.<sup>137</sup>

Another, more permissive, way to map the law and research on youth onto recklessness doctrine is through burden shifting and a series of jury instructions. Young people who are facing offenses that involve reckless mens rea or the natural and probable consequences doctrine would be presumed, as a class, to not be culpable of these offenses and would get a jury instruction to that effect. The government would have to prove the traditional elements of the offense, and would have to overcome, by a beyond a reasonable doubt standard, the presumption that the young person was not able to anticipate risk. Youth under eighteen, twenty-one, or twenty-five charged with offenses that have a reckless mens rea requirement or youth that are being charged with the “natural and probable consequences” of an act would also receive specialized jury instruction. These instructions should do at least three things: First, an instruction should make clear — contrary to recklessness instructions in some states — that a reckless offense requires actual foresight and appreciation of the risk, under the circumstances of the case. While I believe that this legal distinction is a good one — and keeping the distinction between recklessness and negligence would be salutary for adult and child defendants as a demarcation of culpability — the distinction, I argue, certainly matters for children and young adults. Second, instructions for these young defendants should expressly subjectivize and force the fact-finder to consider the pressure of circumstances, foresight, and ability to resist impulsive risk-taking from the perspective of a teenager. Third, the fact-finder

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penalty for offenders under eighteen).

<sup>136</sup> *Graham v. Florida*, 560 U.S. 48, 77-78 (2010).

<sup>137</sup> *Id.*

should be given succinct and accurate information about the ability of youth to perceive, think through and resist risky behavior, especially under conditions of stress or the influence of others, so that youth are held accountable for behavior that is developmentally attainable for them.

Implementation of these potential changes would not be flawless, but could be accomplished. And, consistent with our recklessness doctrine, we would move toward holding criminally liable of crimes of foresight individuals who actually can and do foresee the risks of their activities.