CRUEL AND UNUSUAL: WHY THE EIGHTH AMENDMENT BANS CHARGING JUVENILES WITH FELONY MURDER

Abstract: The intersection of Supreme Court jurisprudence on the Eighth Amendment, felony murder, and juvenile justice supports the conclusion that it is unconstitutional to charge juveniles who did not kill, attempt to kill, or intend to kill with felony murder—a doctrine that allows individuals who unintentionally kill while committing a felony to be charged with murder. The Supreme Court has acknowledged that juveniles are different from adults because they lack maturity and the ability to understand the consequences of their actions. The felony murder doctrine hinges on a defendant's anticipation of what might occur when carrying out a felony; thus, it cannot be applied to juveniles who did not kill, attempt to kill, or intend to kill because juveniles, unlike adults, lack the capacity to anticipate negative results from their actions. For example, when juveniles burglarize a home, they may not be able to anticipate that the situation could escalate and result in the physical harm, or even death, of the homeowner. This Note will argue that it is unconstitutional to charge juveniles who did not kill, attempt to kill, or intend to kill with felony murder because the Eighth Amendment's Cruel and Unusual Punishments Clause requires defendants to be morally culpable in order to face criminal liability. Juveniles who did not kill, intend to kill, or attempt to kill lack the requisite moral culpability to be charged with felony murder.

INTRODUCTION

In March 2003, when Ryan Holle was twenty years old, he hosted a party that continued into the early morning.[1] After the party, Holle lent his car to a friend—which he frequently did—believing that the friend was going to get food.[2] Instead, while Holle remained at the house, his friend and three others

[1] Adam Liptak, *Serving Life for Providing Car to Killers*, N.Y. TIMES (Dec. 4, 2007), https://www.nytimes.com/2007/12/04/us/04felony.html [https://perma.cc/RA9Q-NBEY]. Holle, his sister, and their roommate, Billy Allen, hosted a party at the home they shared in Pensacola, Florida. Amy Dosh, *Exclusive: Ryan Holle, Convicted for Lending Car in Robbery-Murder, Discusses Case*, TRUE CRIME DAILY (June 8, 2017), https://truecrimedaily.com/2017/06/08/exclusive-ryan-holle-convicted-for-lending-car-in-robbery-murder-discusses-case/ [https://perma.cc/EWE4-3P5G]. Holle estimated that he had six to ten drinks during the party before going to bed while the party continued. *Id.*

[2] Liptak, *supra* note 1. At around 7:00 AM, Allen woke up Holle to ask to borrow Holle's car. Dosh, *supra* note 1. Holle said yes. *Id.* Holle, who was half-asleep and still feeling the effects of the alcohol he consumed the night before, overheard Allen speaking with three strangers about committing a burglary at the home of Allen's on-again-off-again girlfriend, Jessica Snyder. *Id.* Allen believed that Snyder's mother kept a safe in her house with $20,000 inside. *Id.* Holle also overhead the men agree that they might need to knock out Jessica to carry out their plot. *Id.* Holle maintains that he was

took Holle's car to carry out a burglary.[3] During the burglary, the men killed the homeowner's daughter.[4] Holle admitted to police that he heard his friend and the other men talking about committing a robbery, but maintained that he did not take the conversation seriously and truly believed his friend was going to get food.[5] Holle, along with the other four men, was convicted of first-degree murder and sentenced to life in prison.[6] During Holle's trial, the prosecutor reiterated that without the car, no crime could have occurred and the victim would still be alive.[7] Holle is still in prison today, though in 2015, Florida

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in absolute disbelief that his roommate would commit a burglary, especially against his own girlfriend. *Id.* He instead assumed that the men would use his car to get food, which Holle also had heard them discuss, and then fell back asleep. *Id.*

[3] Liptak, *supra* note 1. Allen and the other men expected that only Snyder would be home, but her little sister was at the house as well. Dosh, *supra* note 1. They waited for her to leave for school and then went forward with the burglary. *Id.* Allen stayed in the car while the other men went inside. *Id.*

[4] Liptak, *supra* note 1. When they were met with resistance from Snyder, one of the men, Charles Miller, brutally beat Snyder with the butt of a shotgun until her skull was smashed in. Dosh, *supra* note 1. It was not long after the men returned to Holle's home with the safe that the police arrived. *Id.* Holle fully cooperated with police believing that he was innocent of any wrongdoing. *Id.* He went to the station and provided his account of what had occurred. *Id.*

[5] Liptak, *supra* note 1. Holle's roommate, Billy Allen, expressed in a pretrial deposition that Holle's only involvement in the crime was telling Allen that he could use his car. *Id.* Holle blames his naivety and impairment for not recognizing the seriousness of his friend's intention to commit robbery. *Id.* Holle's admission that he heard the men discussing the robbery solidified the prosecution's case against him. *Id.* The prosecution needed to prove that Holle intended to assist in the commission of the robbery, and the jury could interpret Holle's admission that he overheard the plan and lent his car anyway as intent to assist in the burglary. Dosh, *supra* note 1.

[6] Liptak, *supra* note 1. The other four men involved in the crime also received sentences of life without parole, even though only one of them actually had committed the killing, while two of the men were in the home and one was waiting in the car. *Id.* Because of his diminished culpability, Holle was the only one of the group to be offered a plea deal, which he rejected, because he thought he would be found not guilty at trial. Dosh, *supra* note 1. His trial lasted only one day. *Id.* The jury found Holle guilty of first-degree felony murder, robbery with a firearm, and burglary of an occupied dwelling with assault or battery. Holle v. Sec'y, Dep't of Corr., No. 3:11cv436/LAC/EMT, 2012 WL 2885527, at *1 (N.D. Fla. June 27, 2012), *report and recommendation adopted*, 2012 WL 2884947 (N.D. Fla. July 13, 2012). Holle was sentenced to life in prison without parole for the first-degree murder charge and thirteen years for the robbery and burglary charges to be served concurrently with the murder sentence. *Id.* at *1–2. Holle's appeals in both state and federal court were denied. *Id.* at *1–2, *5. In 2015, Holle's sentence was commuted to twenty-five years in prison and ten years on probation by then-Florida Governor Rick Scott. Jeremy Wallace, *Governor and Cabinet Cut Prison Sentence for Two in Rare Clemency Action*, TAMPA BAY TIMES (June 24, 2015), https://www.tampabay.com/news/governor-and-cabinet-cut-prison-sentences-for-two-in-rare-clemency-action/2234892/ [https://perma.cc/TZV2-P3JT]. Governor Scott expressed that Holle was still culpable for the death of the victim, but that he was less culpable than the actual perpetrator and thus his sentence should reflect that. *Id.*

[7] Liptak, *supra* note 1. Twelve years after the crime, at Holle's clemency hearing, Florida's Attorney General argued in favor of maintaining Holle's life sentence, claiming that Holle knew Snyder would be beaten to death and wanted the men to carry out the "dirty work." Dosh, *supra* note 1. At the same hearing, Snyder's father compared Holle to Charles Manson, the infamous cult leader who authorities suspect facilitated thirty-five murders. *Id.*; *Charles Manson Biography (1934–2017)*, BIOGRAPHY (last updated Sept. 1, 2020), https://www.biography.com/crime-figure/charles-manson [https://

Governor Rick Scott commuted Holle's life sentence to twenty-five years with ten years of probation.[8] Holle is scheduled to be released in 2024, at which point he will have spent twenty-one years and three months in prison.[9]

Opinions differ on whether someone like Holle, who was one-and-a-half miles away from the crime scene and did not plan or commit the robbery or murder, deserved to spend the rest of his life in prison.[10] Yet, the felony murder rule legally justifies Holle's original sentence.[11] The felony murder rule, at its most extreme, classifies any death that occurs during the commission of a dangerous felony as murder, regardless of whether the death was intentionally caused.[12] Further, because of the broad scope of accomplice liability, any ac-

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perma.cc/4BQK-6Y9N]. The prosecutor who handled Holle's case maintained that he did not regret pursuing such a harsh charge against Holle because Holle rejected his plea offer. Dosh, *supra* note 1.

[8] Wallace, *supra* note 6. The power to commute sentences tends to be used sparingly. *Id.* Holle's sentence was one of only three commuted by Governor Scott within a five-year period. *Id.* In comparison, former Florida Governor Jeb Bush commuted twenty-two sentences during his eight year term as governor. *Id.*

[9] Dosh, *supra* note 1. Holle stated that the clemency outcome was bittersweet. *Id.* Although he was relieved he would not die in prison, Holle still felt he should not have ended up there at all. *Id.*

[10] *See* Liptak, *supra* note 1 (outlining the different positions of members of the legal community on whether the felony murder rule is justified in cases where the defendant did not kill or intend to kill). England, India, and other common-law countries where modern criminal law focuses on holding individuals accountable for only their own actions have outlawed the felony murder rule. *Id.* In the United States, however, many prosecutors and victims' rights groups believe that people assume the risk of causing a death when they decide to participate in certain dangerous crimes, even if those individuals do not personally cause the death. *Id.*

[11] *See* Liptak, *supra* note 1 (citing the prosecutor's statement to the jury explaining that Holle must be treated the same as the other individuals who were actually involved in the robbery).

[12] *Felony Murder Rule*, BLACK'S LAW DICTIONARY (11th ed. 2019). In the early nineteenth century, states started creating statutes that treated killings committed during the course of a felony, whether intentional or not, as murder as long as the felony involved an assault or otherwise significant risk of death. Emily C. Keller, *Constitutional Sentences for Juveniles Convicted of Felony Murder in the Wake of* Roper*,* Graham *&* J.D.B., 11 CONN. PUB. INT. L.J. 297, 304 (2012). In the 1950s, many states further expanded their felony murder statutes to include unintentional killings that occurred during felonies when the death was reasonably foreseeable. *Id.* The vast majority of states employ some form of the felony murder doctrine. PAUL H. ROBINSON & TYLER SCOT WILLIAMS, MAPPING AMERICAN CRIMINAL LAW VARIATIONS ACROSS THE 50 STATES: CH. 5 FELONY-MURDER RULE 2 (Faculty Scholarship at Penn Law ed., 2017), https://scholarship.law.upenn.edu/faculty_scholarship/1719 [https://perma.cc/R6FA-6JSR]. Eight states either do not have felony murder or have a version of the rule that requires the government to prove the level of culpability needed for murder. *Id.* (noting that as of January 2017, seven states essentially did not have felony murder statutes); *see* Patrick Johnson, *SJC Ruling Narrows Massachusetts Definition of Felony Murder*, MASSLIVE (Sept. 20, 2017), https://www.masslive.com/news/2017/09/sjc_ruling_in_woburn_murder_co.html [https://perma.cc/2ESK-2YNV] (explaining that the Massachusetts Supreme Judicial Court held in September 2017 that people can be charged with felony murder only if one of the mental states necessary to be guilty of murder is proven). In proving that a defendant is guilty of felony murder, two states require the government to prove that the defendant was reckless in causing the killing, fourteen states require the government to prove some form of carelessness on the part of the defendant, and twenty-six states and the District of Columbia require no culpability on behalf of the defendant. *See* ROBINSON & WILLIAMS, *supra*, at 3–6 (noting that as of January 2017, twenty-seven states required no culpability on

complice to the underlying felony can be charged with murder even if the accomplice did not contribute to the killing.[13]

Holle was twenty years old at the time of the crime, but much younger individuals have been convicted under similar circumstances.[14] Many states do not record which murder convictions were obtained under a felony murder theory, making it difficult to determine the number of people currently serving sentences for felony murder.[15] Criminal justice advocates nevertheless maintain that the felony murder rule disproportionately impacts women and juveniles.[16] Juveniles, in particular, are more likely to participate in group crimes and are more vulnerable to the pressure of peers, making them more likely to engage in behavior that could result in a felony murder charge.[17] The punishment for felony murder varies by state, with some states permitting sentences as harsh as the death penalty or life without parole.[18] Although a felony murder conviction has enormous implications for anyone, the convictions are especially catastrophic for juveniles who, due to their immaturity and lack of foresight, could spend their entire adult life in prison.[19]

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behalf of the defendant, including Massachusetts, which started requiring proof of mens rea in September 2017).

[13] *Felony Murder Rule*, BLACK'S LAW DICTIONARY, *supra* note 12. Accomplices are individuals who come together to perpetrate a crime. *Accomplice*, *id.* Participating in a crime in any way makes a person an accomplice to that crime. *Id.* As in the case of Ryan Holle, accomplice liability can apply to anyone who assists in the commission of a crime, even if the assistance is minimal. Liptak, *supra* note 1.

[14] Liptak, *supra* note 1. For example, at the age of fifteen, Justin Doyle and two friends attempted to burglarize a home that they thought was empty. Duaa Eldeib, *Man Jailed at 15 Under Controversial Felony Murder Rule Receives Commuted Sentence*, CHI. TRIB. (Apr. 24, 2017), https://www.chicagotribune.com/news/breaking/ct-justin-doyle-felony-murder-released-met-20170423-story.html [https://perma.cc/LH95-ENKH]. The boys were unarmed, but Doyle's accomplice and friend, who was fourteen at the time, ended up dead when a startled resident fired at the intruders. *Id.* Doyle was charged with the murder of his friend, but ended up pleading to a thirty-year sentence. *Id.* Doyle served nine years before his sentence was commuted to time served by Illinois Governor Bruce Rauner. *Id.*

[15] *Punished for Another's Crime: The Felony-Murder Rule*, RESTORE JUST. ILL., https://restorejusticeillinois.org/wp-content/uploads/2019/02/HB1615-Fact-Sheet_-Felony-Murder-2.pdf [https://perma.cc/8VCU-EJVR].

[16] *See* Abbie VanSickle, *If He Didn't Kill Anyone, Why Is It Murder?*, N.Y. TIMES (June 27, 2018), https://www.nytimes.com/2018/06/27/us/california-felony-murder.html [https://perma.cc/76MB-LWDD] (citing to a survey conducted of one thousand people who had been convicted of murder that found that women and juveniles were disproportionately impacted by felony murder).

[17] *Punished for Another's Crime: The Felony-Murder Rule*, *supra* note 15. Notably, the Supreme Court has held that the death penalty and mandatory life without parole are unconstitutional when applied to juveniles. Miller v. Alabama, 567 U.S. 460, 489 (2012); Roper v. Simmons, 543 U.S. 551, 578–79 (2005). For a discussion of the significance of these Supreme Court decisions, see *infra* notes 103–142 and accompanying text.

[18] *See Punished for Another's Crime: The Felony-Murder Rule*, *supra* note 15 (stating that the sentence for felony murder in Illinois ranges from twenty years to life).

[19] *Felony Murder in Illinois*, RESTORE JUST., https://restorejustice.org/issues-solutions/felony-murder/ [https://perma.cc/LW8N-RK6M] (explaining that even though the Supreme Court has acknowledged that juveniles are particularly reckless and impulsive, the system still treats them the

The recent push for criminal justice reform, coupled with recent Supreme Court jurisprudence addressing the constitutionality of certain punishments as applied to juveniles, has made felony murder for juveniles a topic of national debate.[20] On the one hand, the rule seems difficult to justify in light of recent Supreme Court decisions acknowledging that juveniles should not be held to the same standards as adults because of their immaturity, susceptibility to peer pressure, and capacity for reform.[21] On the other hand, people, including juveniles, must be held accountable for the unintended consequences of risky and illicit actions.[22]

This Note explores whether the felony murder rule is constitutional as applied to juveniles.[23] There are multiple ways to challenge felony murder for juveniles, yet so far none have succeeded in court or gained widespread support among scholars.[24] This Note outlines three arguments challenging the application of felony murder to juveniles and analyzes which argument has the best chance at success.[25] Part I explains the intersection of felony murder, the Eighth Amendment, and juvenile justice Supreme Court precedent.[26] Part II explores three arguments that attack the constitutionality of charging juveniles with felony murder.[27] Part III argues that charging juveniles who did not kill, attempt to kill, or intend to kill with felony murder is unconstitutional because

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same as adults when they are charged with felony murder, meaning they can face life in prison and are permanently considered to be violent).

[20] *See* Liptak, *supra* note 1 (highlighting that although some find the felony murder rule to be "draconian," others, including the prosecutor and family of the victim in Ryan Holle's case, firmly believe that all participants in violent felonies must be held accountable for any harm resulting from their actions). Advocates across the country argue that prosecutors should not charge juveniles with felony murder. *See* Cheryl Corley, *Juvenile Justice Groups Say Felony Murder Charges Harm Children, Young Adults*, NPR (Nov. 14, 2019), https://www.npr.org/2019/11/14/778537103/juvenile-justice-groups-say-felony-murder-charges-harm-children-young-adults [https://perma.cc/V7BE-ARE2] (quoting Marsha Levick, co-founder of the Juvenile Law Center, explaining that youths' developmental differences from adults makes it unfair for them to be charged with felony murder). Judge George W. Timberlake, a retired Chief Judge of Illinois' Second Judicial Circuit, advocates that prosecutors should not charge juveniles in Illinois with felony murder and, instead, should punish juveniles more harshly for the underlying felony committed, if a death occurs. George Timberlake, *Felony Murder Rule Should Not Apply to Juveniles in Illinois*, JUV. JUST. INFO. EXCHANGE (Mar. 10, 2016), https://jjie.org/2016/03/10/felony-murder-rule-should-not-apply-to-juveniles-in-illinois/ [https://perma.cc/ZPP3-A2WT].

[21] *See Felony Murder in Illinois*, *supra* note 19 (noting that the Supreme Court has acknowledged that juveniles are reckless and impulsive, making it especially harsh to punish them with life in prison for felony murder).

[22] *See* Liptak, *supra* note 1 (explaining that the father of the victim in Holle's case felt strongly that Holle was just as responsible for his daughter's death as Holle's friend, who had beaten her to death, because she would still be alive if Holle had not lent the perpetrators his car).

[23] *See infra* Part I.

[24] *See infra* Part III.

[25] *See infra* Part III.

[26] *See infra* Part I.

[27] *See infra* Part II.

it is at odds with the Supreme Court's doctrine on juvenile justice and the Eighth Amendment.[28]

I. Eighth Amendment, Felony Murder, and Juvenile Justice Supreme Court Jurisprudence

The constitutionality of charging juveniles with felony murder implicates three lines of Supreme Court precedent: (1) Eighth Amendment, (2) felony murder, and (3) juvenile justice.[29] Connecting these distinct areas of the law is the Eighth Amendment's ban on cruel and unusual punishments, which informs the Court's felony murder and juvenile sentencing precedent.[30] Section A of this Part discusses the Supreme Court's Eighth Amendment jurisprudence.[31] Section B of this Part then outlines the history and modern application of the felony murder doctrine.[32] Finally, Section C of this Part summarizes recent developments in juvenile justice.[33]

A. The Eighth Amendment's Ban on Cruel and Unusual Punishments

The Eighth Amendment to the U.S. Constitution prohibits the government from demanding excessive bail or fines, and from inflicting cruel and unusual punishments.[34] The amendment addressed fears that the federal government would abuse its power under the Constitution to create and prosecute crimes.[35] Since the amendment passed in 1791, jurists have debated the meaning of its ban on cruel and unusual punishments.[36]

Although the scope of the Cruel and Unusual Punishments Clause remains hotly debated, the Supreme Court has acknowledged that the amendment imposes three categories of limitations on the government's ability to create and punish crimes.[37] First, it limits the types of punishments that the

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[28] *See infra* Part III.

[29] *See infra* Part I.A; Part I.B; Part I.C.

[30] *See id.* Part I.A; Part I.B; Part I.C.

[31] *See infra* Part I.A.

[32] *See infra* Part I.B.

[33] *See infra* Part I.C.

[34] U.S. Const. amend. VIII; *see* Bryan A. Stevenson & John F. Stinneford, *The Eighth Amendment*, Interactive Constitution (last visited Jan. 7, 2020), https://constitutioncenter.org/interactive-constitution/interpretation/amendment-viii/clauses/103 [https://perma.cc/9ZLP-BJDZ] (explaining that the Constitution did not originally contain this ban, and that it was incorporated as part of the Bill of Rights after the Constitution was ratified).

[35] *See* Stevenson & Stinneford, *supra* note 34 (noting that the Constitution significantly increased the power of the federal government compared to the Articles of Confederation, the Constitution's predecessor, which had created anxieties that the government would abuse its power).

[36] *See id.*

[37] *See* Ingraham v. Wright, 430 U.S. 651, 667 (1977) (explaining that the Court has interpreted the Eighth Amendment to limit (1) the types of punishments that can be inflicted for criminal conduct, (2) the imposition of punishments that are disproportionate to the charged conduct, and (3) the type of

government may inflict upon someone that is convicted of a crime.[38] There is little dispute over whether the Eighth Amendment bans inhumane forms of punishment, such as torture, and the Supreme Court has stated explicitly that the Eighth Amendment bans any punishment that inflicts unnecessary and deliberate pain.[39] The Court also has banned certain non-physical punishments as cruel and unusual.[40] For example, in 1958, in *Trop v. Dulles*, the Court adamantly rejected denationalization as a form of punishment.[41] The Supreme Court reasoned that the revocation of a person's citizenship had the effect of excluding that person from society, which the Court held to be even more cruel than physical torture.[42]

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behavior that can be made criminal); Stevenson & Stinneford, *supra* note 34 (stating that there is universal agreement that the Eighth Amendment bans the infliction of barbaric punishments, but there is disagreement over what standard should be used to determine whether a punishment is cruel and unusual, whether disproportionate sentences are cruel and unusual, and whether the death penalty is cruel and unusual, among other things); *supra* note 10 and accompanying text (explaining different theories regarding felony murder and the Eighth Amendment).

[38] *Ingraham*, 430 U.S. at 667. The Supreme Court has ruled that the Eighth Amendment bans both incarceration without medical care and expatriation for desertion. *See* Estelle v. Gamble, 429 U.S. 97, 103 (1976) (holding that because failing to provide inmates with medical care could cause pain and suffering, the government must provide it); Trop v. Dulles, 356 U.S. 86, 101 (1958) (holding that denationalization as punishment violates the Eighth Amendment because it is even more evil than physical torture given that it completely eliminates the criminal's position in society).

[39] *See* Gregg v. Georgia, 428 U.S. 153, 173 (1976) (explaining that in order to be constitutional, a punishment "must not involve the unnecessary and wanton infliction of pain"); Stevenson & Stinneford, *supra* note 34 (explaining that it is widely accepted that the Eighth Amendment "prohibits 'barbaric' methods of punishment" and that the use of "the rack, or thumbscrews, or gibbets as instruments of punishment" would clearly violate the Constitution). At the Massachusetts Ratifying Convention in 1788, convention participant Abraham Holmes expressed his concern over the lack of safeguards against the types of punishments the federal government could inflict. *See* Abraham Holmes, Speech to the Massachusetts Ratifying Convention for the United States Constitution (Jan. 30, 1788), *in* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 111 (Jonathan Elliot ed., Philadelphia, J. B. Lippincott & Co. 2d ed. 1881) ("They are nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that *racks* and *gibbets* may be amongst the most mild instruments of their discipline.").

[40] *See Trop*, 356 U.S. at 101 (holding that certain non-physical punishments, like denationalization, can violate the Eighth Amendment).

[41] *Id.* The defendant in *Trop* was convicted of desertion after he escaped from his Army post in Casablanca in 1944. *Id.* at 87. He was sentenced to "three years at hard labor" and dishonorably discharged from the Army. *Id.* at 88. When the defendant applied for a passport in 1952, he was informed that his citizenship had been revoked because of his desertion conviction and dishonorable discharge. *Id.* As a result, his passport application was denied. *Id.*

[42] *See id.* at 102 (stating that stripping a citizen of his or her citizenship is "offensive to cardinal principles for which the Constitution stands" because it "subjects the individual to a fate of ever-increasing fear and distress"). Despite the Court's rejection of the revocation of citizenship as a form of punishment in *Trop*, current criminal law allows for serious immigration consequences, like deportation, for green card holders and other noncitizens that have been convicted of crimes. *See* SARAH HERMAN PECK & HILLEL R. SMITH, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY, CONG. RES. SERV. 5–6 (2018) (listing criminal convictions for which non-citizens may be removed from the

Second, the Court has held that the Cruel and Unusual Punishments Clause forbids punishments that are egregiously harsh when compared to the nature of the crime committed.[43] This restraint, referred to as the proportionality requirement, emerged from Justice Stephen Johnson Field's 1892 dissent in *O'Neil v. Vermont*.[44] In *O'Neil*, the Court sentenced the defendant to fifty-four years of hard labor for distributing intoxicating liquors.[45] Justice Field dissented, arguing that the sentence violated the Eighth Amendment because it exceeded the length of any sentence the defendant could have received for far more serious crimes, such as burglary, robbery, or manslaughter.[46] Justice Field reasoned that because the Eighth Amendment bans the imposition of disproportionate bail and fines, its ban on cruel and unusual punishments must also prohibit disproportionate punishments.[47] In 1910, in *Weems v. United States*, the Court adopted Justice Field's view of the Eighth Amendment's proportionality requirement, holding that it was cruel and unusual to sentence a defendant who had falsified an official document to fifteen years of hard labor in pris-

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United States). The Court also has opined on whether the death penalty is a permissible punishment for someone found guilty of a crime under the Eighth Amendment, but that topic is beyond the scope of this Note. *See Trop*, 356 U.S. at 99 (stating that the death penalty cannot be challenged on Eighth Amendment grounds until it is no longer approved of throughout society).

[43] *See Ingraham*, 430 U.S. at 667. The Court held that it was cruel and unusual to sentence a defendant who had falsified an official document to fifteen years in prison in addition to other penalties. *See* Weems v. United States, 217 U.S. 349, 380–81 (1910) (reasoning that other, more severe crimes, such as certain degrees of homicide and misprision of treason, carry shorter sentences than the defendant's sentence for falsifying documents). Additionally, the Court has held that it is cruel and unusual to make an individual's status a crime. *See* Robinson v. California, 370 U.S. 660, 667 (1962) (holding that the state of California violated the Eighth Amendment when it criminalized the status of being addicted to narcotics).

[44] O'Neil v. Vermont, 144 U.S. 323, 339–40 (1892) (Field, J., dissenting).

[45] *Id.* at 330 (majority opinion). In *O'Neil*, the Supreme Court found the defendant guilty of 307 counts of selling intoxicating liquor and ordered him to pay a fine of $6,638. *Id.* In addition, the defendant was also sentenced to one month of confinement. *Id.* If the defendant failed to pay the fine before the end of the month, however, he would be required to serve three days in confinement for every dollar owed, or 19,914 days. *Id.* The defendant appealed the sentence claiming that it was cruel and unusual, but the Court upheld the sentence. *Id.*

[46] *Id.* at 339–40 (Field, J., dissenting). The defendant's sentence was "six times as great as any court in Vermont could have imposed for manslaughter, forgery or perjury." *Id.* at 339. The majority declined to rule on whether the punishment was cruel and unusual because the Eighth Amendment did not apply to the states in 1892 and therefore there was no federal question. *Id.* at 331–32 (majority opinion). Still, the Court noted that the Supreme Court of Vermont had found that the defendant's sentence was not excessive because the defendant committed the offense of selling intoxicating liquor on 307 occasions. *Id.* at 331. The Court reasoned that a person who repeatedly commits a crime cannot then claim that the sentence is unconstitutional because of its length. *Id.*

[47] *Id.* at 339–40 (Field, J., dissenting). Justice Field reasoned that the only way to assess whether bail or a fine is excessive, as neither involves barbaric physical punishment, is to determine whether the amount of the bail or fine is reasonable in comparison to the behavior charged. *See id.* The fact that such analysis is required by the Eighth Amendment demonstrates that sentences that are disproportionate to the crime are unconstitutionally cruel and unusual. *See id.*

on.[48] Since *Weems*, the Court has continued to apply the proportionality requirement, although some Justices disagree with Field's interpretation because the proportionality requirement is not explicitly stated in the language of the Eighth Amendment.[49]

Third, the Cruel and Unusual Punishments Clause places limitations on the type of behavior that can be labeled and punished as criminal.[50] In 1962, in *Robinson v. California,* the Supreme Court held that a California statute, which made it a crime for individuals to "be addicted to the use of narcotics," was unconstitutional.[51] The Court took issue with the statute in *Robinson* because a person could be found guilty under the statute without proof of actual narcotics use.[52] The Court determined that being addicted to narcotics was a chronic condition that existed after the act of using drugs was complete and persisted until the individual successfully recovered from addiction.[53] As a result, people struggling with addiction were vulnerable to arrest for merely living with their addiction.[54] The Court classified addiction as an affliction that could be contracted "innocently and involuntarily," and compared addicts to people who live with leprosy, sexually transmitted diseases, or mental illnesses.[55] Further-

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[48] *Weems*, 217 U.S. at 357, 381. In *Weems*, the defendant was a disbursement officer in the Philippine Islands. *Id.* at 357. He was charged with falsifying government documents when he recorded that wages of 208 and 408 pesos had been paid out to employees when they had not. *Id.* at 362–63. The lower court did not require that the government prove that the falsification was intentional or carried out maliciously, only that an incorrect entry existed. *Id.* at 363.

[49] *See* John F. Stinneford, *Against Cruel Innovation: The Original Meaning of the Cruel and Unusual Punishments Clause, and Why It Matters Today*, INTERACTIVE CONST., https://constitutioncenter.org/interactive-constitution/interpretation/amendment-viii/clauses/103#against-cruel-innovation-the-original-meaning-of-the-cruel-and-unusual-puni [https://perma.cc/MT66-XY9T] [hereinafter *Against Cruel Innovation*] (explaining that Justices who subscribe to originalism, such as Justices Antonin Scalia and Clarence Thomas, believe that the Eighth Amendment only bans barbaric punishments and thus punishing a parking ticket with life in prison would be constitutional); *see also Miller*, 567 U.S. at 503–04 (Thomas, J., dissenting) ("The Clause does not contain a 'proportionality principle.'").

[50] *See Ingraham*, 430 U.S. at 667 (listing *Robinson v. California* as a case in which the Court limited the type of behavior that the government can deem criminal).

[51] *See Robinson*, 370 U.S. at 660 n.1, 667 (quoting CAL. HEALTH & SAFETY CODE § 11721) (West 1962)) ("No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics.").

[52] *See id.* at 663 (explaining that the trial judge in *Robinson* instructed the jury that the defendant could be convicted if the jury found that he used illegal narcotics or was addicted to using them).

[53] *Id.* at 666. The American Society of Addiction Medicine defines addiction as a chronic medical disease in which people compulsively use substances despite the negative consequences. *Definition of Addiction*, AM. SOC'Y OF ADDICTION MED. (Sept. 15, 2019), https://www.asam.org/docs/default-source/quality-science/asam's-2019-definition-of-addiction-(1).pdf?sfvrsn=b8b64fc2_2 [https://perma.cc/HRX3-ZLWP].

[54] *See Robinson*, 370 U.S. at 666 (reasoning that a person could be arrested for entering the state of California as an addict, even if the person had not bought, sold, or taken any drugs while in the state).

[55] *Id.*

more, the Court rooted its reasoning in the insanity defense's rationale, holding that addicts, like the mentally ill, are not "responsible moral agents."[56]

In the years since *Robinson*, the Court has not expanded upon the culpability requirement articulated in its opinion.[57] Nonetheless, it has implied that a statute that punishes in the absence of fault may be unconstitutional.[58] Additionally, the Court continues to acknowledge the importance of culpability in its rulings, particularly with respect to cases of murder.[59]

B. The Felony Murder Doctrine

Scholars have criticized and debated the constitutionality of the felony murder doctrine for decades because it allows defendants to be punished for a harm they did not intend to inflict.[60] The doctrine allows prosecutors to charge individuals and their accomplices with murder when a killing occurs during the course of a felony, regardless of whether they intended to kill.[61] Legal scholars

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[56] *See* John F. Stinneford, *Punishment Without Culpability*, 102 J. CRIM. L. & CRIMINOLOGY 653, 687 (2012) [hereinafter *Punishment Without Culpability*] (interpreting *Robinson* to mean that it is unconstitutional to impose a punishment on a defendant who lacks culpability). The Court's reasoning was rooted in the principles behind the insanity defense: it asserted that addicts "are not responsible moral agents." *Id.* Because addiction did not fit the criteria of legal insanity, the Court relied on lack of culpability to invalidate the statute. *Id.*

[57] *See id.* at 702 (noting that although *Robinson* has not been overturned, the Court has refrained from continuing to uphold culpability as a constitutional principle).

[58] *Id.*; *see, e.g.*, United States v. X-Citement Video, Inc., 513 U.S. 64, 71–72 (1994) (relying on *Morissette v. United States*, 342 U.S. 246, 250 (1952), and subsequent decisions to conclude that a statute without an explicit mens rea requirement nonetheless contained one); United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 564 (1971) (reiterating the "universal and persistent" principle, articulated in *Morissette*, that a harm only constitutes a crime when it has been inflicted intentionally).

[59] *See* Tison v. Arizona, 481 U.S. 137, 156 (1987) ("Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished.").

[60] *See* Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 60 (2004) [hereinafter Binder, *Origins*] (explaining that scholars criticize felony murder because it makes the crime of murder, which otherwise requires that a killing be carried out with some degree of malintent, a strict liability crime); *see also* Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 410 (2011) [hereinafter Binder, *Making the Best of Felony Murder*] (arguing that because the felony murder doctrine seems to be here to stay, scholars and practitioners should at least advocate for the best possible application of the rule); Charles Liebert Crum, *Causal Relations and the Felony-Murder Rule*, 1952 WASH. U. L.Q. 191, 209–10 (1952) (arguing that the felony murder rule should be changed so that evidence of a killing resulting from a felony implies an intent to kill, but does not prove it); Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 448 (1985) (arguing that the felony murder rule is unconstitutional because it does not require the government to prove the defendant's mens rea to commit murder beyond a reasonable doubt).

[61] *Felony Murder Rule*, BLACK'S LAW DICTIONARY, *supra* note 12. Felony murder is controversial because it is a strict liability crime. Binder, *Origins*, *supra* note 60, at 60. Strict liability crimes are those that do not require any intent to do harm. *Strict Liability Crime*, BLACK'S LAW DICTIONARY, *supra* note 12. For example, statutory rape is one of the longest recognized strict liability crimes and,

first articulated the concept of felony murder in the early eighteenth century, although felony murder did not become law in the United States until the nineteenth century.[62] When states began codifying their respective murder statutes in the nineteenth century, felony murder statutes emerged as a way of increasing the culpability of individuals who caused a death while attempting to inflict injury.[63] By the 1950s, states began expanding their felony murder statutes, classifying felony murder as any killing that occurred during the commission of a felony, as long as the possibility of death was reasonably foreseeable.[64]

The rationale behind the felony murder rule is based on the idea that people who negligently cause a death are more culpable if they do so in furtherance of a felony.[65] For example, without the felony murder rule, if A tortured B and C and ended up killing them, A could not be convicted of murder unless A had intentionally or recklessly killed B and C.[66] Felony murder statutes reflect

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to be found guilty, the government need not prove that the defendant knew the victim was underage. W. Robert Thomas, *On Strict Liability Crimes: Preserving a Moral Framework for Criminal Intent in an Intent-Free Moral World*, 110 MICH. L. REV. 647, 650 (2012). Strict liability crimes hold individuals accountable for the outcome of their actions, regardless of whether they intended for those outcomes to occur as a result of their conduct. *Punishment Without Culpability*, *supra* note 56, at 684. Most criminal conduct requires individuals' actions to match their mental state. *Id.* at 684 n.158.

[62] *See* Binder, *Making the Best of Felony Murder*, *supra* note 60, at 413–14 (explaining that Chief Justice Holt proposed the concept of felony murder in *Rex v. Plummer* in 1700 and that William Hawkins also endorsed the idea in his treatise written in 1716). In his 1718 treatise, William Hawkins argued that killings that resulted from a felony should be classified as murder. *Id.* at 414. Hawkins believed that all felonies, which at the time included "murder, manslaughter, rape, burglary, arson, robbery, theft, and mayhem," were of an inherently violent nature because they could result in retaliation. *Id.* William Blackstone also stated that unintended deaths resulting during the commission of a felony constituted murder. *Id*. It is unlikely, however, that he meant for this to apply to *any* unforeseeable death. *Id.* Although felony murder is often attributed to English common law, England did not adopt the felony murder rule until the late nineteenth century. *Id.* at 417. Parliament later eliminated felony murder in 1957. *Id.* at 418.

[63] *Id.* at 415. At English common law, to be charged with murder, a person need not have the intent to kill. *Id.* at 414. Instead, murder was defined as "causing death by intentionally injuring a person or intentionally striking a person with a weapon." *Id.* at 414–15. In the nineteenth century, courts narrowed the definition of murder to include intentional killings and killings carried out during the commission of especially violent crimes. *Id.* at 415. For killings carried out during violent crimes, malice was implied by the nature of the offenses, because violent crimes tend to cause death. *See id.* (explaining that malice was implied by the showing of an "abandoned and malignant heart," which was evident from unintentional killings "in the commission of an unlawful act which in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent" (first quoting 1817 Ga. Laws 92, 95–96; then quoting 1827 Ill. Laws 127–28)). Malice aforethought refers to the mental state that is required to be found guilty of murder at common law. *Malice Aforethought*, BLACK'S LAW DICTIONARY, *supra* note 12.

[64] *See* Keller, *supra* note 12, at 304 (explaining that in addition to removing the requirement that the defendant must have intended to injure the victim, states also have started expanding felony murder statutes to include felonies that are less heinous).

[65] Binder, *Making the Best of Felony Murder*, *supra* note 60, at 409.

[66] *See Tison*, 481 U.S. at 157 ("[S]ome nonintentional murderers may be among the most dangerous and inhumane of all—the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the

the belief that A is too morally blameworthy to be charged only with manslaughter or another lesser offense—A should have known that torture could easily result in death and A assumed the risk of killing B and C by torturing them in spite of this risk.[67] The felony murder rule thus provides a means for charging A with murder.[68] In addition to holding people responsible for the risks associated with committing dangerous felonies, the felony murder rule serves as a potential deterrent to criminals who are considering carrying out dangerous felonies.[69] Those contemplating committing a felony may not do so if they know they will be held accountable for unintentional harms resulting from their actions.[70]

The rationales behind the felony murder rule, however, do not legally justify the doctrine.[71] Courts still must provide legal justification for felony murder statutes, given that these statutes allow prosecutors to charge people, who had no intent to kill, with murder, which otherwise requires intent to kill.[72] Courts typically justify felony murder in one of two ways.[73] Some courts rely on the concept of transferred intent: the intent to kill is supplied by the intent to commit a felony.[74] Traditionally, transferred intent applies when the resulting

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desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an 'intent to kill.'").

[67] *See* Binder, *Making the Best of Felony Murder*, *supra* note 60, at 409 (implying that certain killings should not be classified as genuinely unintentional or accidental just because the perpetrator's objective was not murder).

[68] *See id.* (explaining that lawmakers rationally support felony murder to ensure that those deserving a punishment harsher than manslaughter receive it).

[69] *See* Roth & Sundby, *supra* note 60, at 450–51 (explaining that proponents of the felony murder doctrine believe that the extreme consequences of unintentional deaths during felonies will deter criminals from using violence during felonies and from possibly committing the felony at all).

[70] *Id.* at 450. The effect of felony murder as a deterrent is a matter of debate. *Id.* at 451–52. Opponents of the felony murder doctrine argue that it is impossible to deter unintentional acts and that would-be felons likely will not know about felony murder and how it could impact them. *Id.*

[71] Keller, *supra* note 12, at 305.

[72] *See id.* (explaining the ways that courts address the inability to prove a defendant's intent to kill in felony murder cases).

[73] *See id.* (stating that felony murder is often justified under the principle of strict liability or transferred intent).

[74] Roth & Sundby, *supra* note 60, at 453. Critics of felony murder view the justification of transferred intent with disdain. *See id.* ("Judges and commentators have criticized the transferred intent theory of felony murder as 'an anachronistic remnant' that operates 'fictitiously' to broaden unacceptably the scope of murder." (footnotes omitted)). Critics point out that the intent to steal is an entirely different intent from the malice aforethought that is required for murder. *Id.* at 454. In the absence of the felony murder rule, malice aforethought must be proven by "(1) the intent to kill, (2) the intent to inflict grievous bodily harm, (3) extremely reckless indifference to the value of human life . . . ." *Malice Aforethought*, BLACK'S LAW DICTIONARY, *supra* note 12. Opponents of the felony murder rule are even more critical of statutes that allow the intent to commit a felony to supply the intent for first-degree murder, which typically requires the government to prove premeditation or deliberation. Roth & Sundby, *supra* note 60, at 455. In the absence of a confession, the government typically has to prove that a defendant took certain steps to prove the murder was premeditated. *Id.* As a result of the

harm of an individual's actions is different from that which was anticipated, but equally malicious.[75] For example, if A intends to shoot B but accidentally shoots C, A's original malicious intent to shoot B is enough to assign A blame for the shooting of C.[76] When applied to felony murder, transferred intent allows for the malicious intent behind one action to serve as the malicious intent for causing an entirely different and unintended outcome.[77] For example, if A robs B's home and B dies from a fear-induced heart attack, A's malicious intent to the commit robbery is used to supply the intent for B's death.[78] Alternatively, other courts legally justify felony murder by classifying it as a strict liability crime.[79] Strict liability crimes hold defendants accountable for the consequences of their illegal acts, regardless of whether the defendants intended those consequences.[80]

Although the felony murder doctrine is most palatable when it punishes highly culpable individuals who should know that their actions could cause a death, in many states, the scope of the doctrine extends much further.[81] Ryan Holle's case provides an example of a broad application of felony murder—Holle, and three men involved in the robbery who did not kill, attempt to kill,

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felony murder doctrine, this huge burden of proof is reduced to proving the intent to commit a felony. *Id.*

[75] Roth & Sundby, *supra* note 60, at 454.

[76] *See id.* at 454–55 (explaining that transferred intent makes it unnecessary for the government to prove the mens rea for the murder because the intent to commit the felony supplies the requisite intent for assigning culpability for the murder).

[77] *Transferred Intent*, BLACK'S LAW DICTIONARY, *supra* note 12; *see* Keller, *supra* note 12, at 305 (explaining that courts do not need proof that a defendant had actual malice to commit murder because the intent to commit the felony serves as implied malice).

[78] *See* Roth & Sundby, *supra* note 60, at 453 (noting that transferred intent makes it unnecessary for the government to prove "premeditation or malice" because the intent to commit the felony supplies the requisite intent for assigning culpability for the murder).

[79] *See* Keller, *supra* note 12, at 305 (explaining that strict liability crimes are based on the idea that people should be held accountable for any consequences, whether intended or not, resulting from their bad acts).

[80] Roth & Sundby, *supra* note 60, at 457. Courts justified classifying felony murder as a strict liability crime both for deterrent reasons and because of the idea that people who commit bad acts should be held accountable for the consequences of their bad acts. *Id.* at 457–58. Felony murder statutes are broadest in states following the proximate cause theory of felony murder, which allows defendants to be held responsible for *any* deaths, including the deaths of third parties, that occur during the commission of a felony. *Felony Murder in Illinois*, *supra* note 19. Eighteen states and the federal government follow the proximate cause theory. *Id.*

[81] *See* Binder, *Making the Best of Felony Murder*, *supra* note 60, at 409–10 (pointing out that the felony murder rule is often applied in situations where the defendant's highly reckless behavior is not the cause of the death). Guyora Binder argues that the principle of dual culpability, which requires the "negligent imposition of risk" and "a distinct malicious purpose," must apply in order for a felony murder conviction to be valid. *Id.* at 409. Binder points out that in the most outrageous felony murder convictions—where a murder charge seems entirely disproportionate to a defendant's culpability—one of the two forms of culpability under the principle of dual culpability is always lacking. *Id.* at 410. Either the defendant did not negligently impose risk or the defendant did not have a specific malicious purpose. *Id.*

or intend to kill, faced murder charges as a result of the actions of the fourth man involved in the robbery, who carried out the killing alone.[82] Additionally, prosecutors can pursue felony murder charges in situations where an accomplice is killed by a third party, such as a frightened homeowner during a burglary.[83] The surviving accomplices, even if they did not personally carry weapons or intend to use violence to commit the burglary, can be charged subsequently with murder.[84] Finally, felony murder can apply when a death is extremely unforeseeable.[85] For example, non-violent burglars can face felony murder charges if a homeowner unexpectedly dies as a result of a home invasion, such as from a fear-induced heart attack.[86]

Most states and the federal government recognize the felony murder doctrine, and the Supreme Court has not placed significant restrictions on felony murder.[87] It has, however, stepped in to limit the severity of the punishment for co-defendants convicted of felony murder who did not kill, intend to kill, or attempt to kill.[88] In 1982, in *Enmund v. Florida*, the Court held that the Eighth

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[82] *Id.* at 405–07, 410. Binder argues that dual culpability is not fulfilled when a defendant who assisted in the commission of a felony had not "shared the felonious ends." *Id.* at 410.

[83] *See id.* at 410 (explaining that dual culpability is not fulfilled when a third party, not an accomplice, commits the killing). Justin Doyle was fifteen years old when he was charged with murdering his friend, Travis Castle. Duaa Eldeib, *Controversial Law Charges People with Murder for Death at Others' Hand*, CHI. TRIB. (Feb. 20, 2016), https://www.chicagotribune.com/news/ct-illinois-felony-murder-rule-juveniles-met-20160219-story.html [https://perma.cc/74YQ-29C2] [hereinafter *Controversial Law Charges People with Murder*]. Doyle, Castle, who was fourteen, and one other minor broke into a home they believed was empty to steal the homeowner's guns. *Id.* The boys did not know that the homeowner's friend was asleep in the house. *Id.* When the boys opened the door to the room where the friend had been sleeping, he fired a shot that struck and killed Castle. *Id.* Doyle was charged with murder but pled to thirty years in prison for involuntary manslaughter and home invasion. *Id.*

[84] *See Controversial Law Charges People with Murder*, *supra* note 83 (describing the case of Justin Doyle, who was charged with felony murder after he and a friend attempted to rob a home they believed to be empty, which then led to the occupant shooting and killing Doyle's friend).

[85] *See* Binder, *Making the Best of Felony Murder*, *supra* note 60, at 405–06 (citing cases where a defendant was charged with felony murder for striking a two-year-old who unexpectedly ran into the street while the defendant was driving a car he had stolen seven months prior, and another case in which a defendant was charged with felony murder for punching a classmate during a school yard fight, causing a brain hemorrhage and death).

[86] *See* People v. Ingram, 492 N.E.2d 1220, 1220–21 (N.Y. 1986) (holding that a burglar who frightened a homeowner, causing the homeowner to suffer a heart attack and die, could be charged with murder). William Ingram broke into the home of Melvin Cooper after determining that Cooper was not home. *Id.* at 1220. Cooper was in fact home and woke up to the sound of a break-in. *Id.* When Ingram entered Cooper's home through a window, Cooper stood over him with a gun and called the police. *Id.* After police arrested Ingram and left the scene, Cooper suffered a heart attack and died. *Id.* William Ingram was convicted of felony murder and burglary. *Id.*

[87] *See supra* note 12 and accompanying text (explaining that all but eight states employ some form of the felony murder rule). The Supreme Court has held that the death penalty may not be imposed on a co-defendant if he was not involved in the killing and his involvement with the underlying felony was minor. Enmund v. Florida, 458 U.S. 782, 801 (1982).

[88] *See Enmund*, 458 U.S. at 801 (holding that when a co-defendant did not kill or attempt to kill, he cannot be sentenced to death even if he contemplated that death might occur).

Amendment prevented a co-defendant in a felony murder case from being sentenced to death when the co-defendant did not kill or attempt to kill.[89] The defendant, Earl Enmund, was the getaway driver in an armed robbery.[90] When his co-defendants were met with resistance by the homeowners, the co-defendants killed them.[91] The Court found that there was nothing in the record to suggest that Enmund knew his co-defendants might kill.[92] The *Enmund* Court further reasoned that Enmund's role in the killing was too attenuated for the death penalty to be justified.[93]

In 1987, in *Tison v. Arizona*, the Court limited its holding in *Enmund*.[94] There, the family of Gary Tison helped Tison and his cellmate, Randy Greenawalt, escape from an Arizona prison.[95] While fleeing, the tire on the getaway car burst, so the group waived down a family to steal their car.[96] The two escaped inmates proceeded to murder the family, which the rest of the Tison family later claimed was completely unexpected.[97] At trial, the jury found both of Gary Tison's adult sons guilty of first-degree felony murder and the judge sentenced them to death.[98] They appealed, arguing that their sentences were unconstitutional under *Enmund*.[99] The Court held that when a co-defendant plays a key role in carrying out the underlying felony and displays a reckless indifference to human life, *Enmund* does not prohibit the co-defendant from being sentenced to death.[100] The *Tison* Court further emphasized the im-

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[89] *Id.*

[90] *See id.* at 784, 788 (explaining that the record at trial only supported the inference that the defendant served as the getaway driver; there was no direct evidence that confirmed the defendant as the getaway driver).

[91] *See id.* at 784 (stating that the situation escalated when perpetrators first held the husband at gunpoint and he called his wife for help, who came out and shot one of the perpetrators).

[92] *See id.* at 798 (noting that there was no evidence in the record to show that the defendant was aware of the possibility that his co-defendants would kill the homeowners if met with resistance).

[93] *See id.* at 797 (reasoning that although robbery deserves a serious punishment, it is not a crime "so grievous an affront to humanity that the only adequate response may be the penalty of death" (footnote omitted) (quoting *Gregg*, 428 U.S. at 184)). After the Supreme Court reversed Enmund's death sentence and remanded the case to the state court, Enmund ended up receiving two twenty-five-year sentences to be served consecutively. State v. Enmund, 476 So. 2d 165, 168 (Fla. 1985).

[94] *See Tison*, 481 U.S. at 150 (clarifying that intent as defined in *Enmund* was not as broad as some courts interpreted it to be).

[95] *Id.* at 139.

[96] *Id.* at 139–40. One member of the group attempted to get the attention of a passing car to stop while the rest of the group hid. *Id.* at 140. After a family pulled over, the group forced them into the back of their old car and drove both the old car and the victim's car deep into the desert. *Id.* The inmates then shot into the radiator of their old car to incapacitate it. *Id.* According to the rest of the group, it was after the inmates struggled to decide what to do with the victims, which included a baby, that violence ensued. *Id.*

[97] *See id.* at 141 (stating that the rest of the group reported being surprised when the two inmates killed the victims, but also admitted to witnessing the shootings and not aiding the victims).

[98] *Id.* at 141–42.

[99] *Id.* at 143; *see Enmund*, 458 U.S. at 801.

[100] *Tison*, 481 U.S. at 157–58.

portance of the defendants' mental state in determining culpability.[101] The Court held that the defendants were purposeful in orchestrating an armed prison break and car robbery—two dangerous activities likely to result in violence—and, therefore, it was permissible to give them the most severe punishment possible.[102]

C. Supreme Court Jurisprudence on Juvenile Justice

Over the past twenty years, the Supreme Court has decided several important cases related to juvenile justice.[103] In 1988, a plurality of the Court decided in *Thompson v. Oklahoma* that juveniles younger than sixteen could not receive the death penalty.[104] Yet, in 1989, the Court held in *Stanford v. Kentucky* that sentencing sixteen- and seventeen-year-old defendants to death did not violate the Constitution.[105] In 2005, in *Roper v. Simmons*, the Supreme Court held that juveniles under eighteen are not eligible for the death penal-

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[101] *See id.* at 158 (reasoning that the defendants each played a significant role in the crimes committed).

[102] *See id.* at 156 ("Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished."). The case was remanded to the state court and the judge sentenced the defendants to death. Joe Enea, *Killers Escape Prison Sparking Massive Manhunt*, ABC 15 ARIZ. (Mar. 12, 2020), https://www.abc15.com/news/crime/death-row-diary-two-prisoners-who-escaped-launched-largest-manhunt-in-arizona-history (last visited Oct. 20, 2020). In 1992, the Arizona Supreme Court overturned the death sentences and resentenced the defendants to life in prison. *Id.* The defendants are still in prison today. *Id.*

[103] *See, e.g.*, *Miller*, 567 U.S. at 489 (holding that mandatorily sentencing juveniles to life without parole violates the proportionality requirement of the Cruel and Unusual Punishments Clause, thereby violating the Eighth Amendment); Graham v. Florida, 560 U.S. 48, 82 (2010) (holding that juveniles not convicted of homicide may be sentenced to life only if the state allows juveniles a realistic chance to gain release before death); *Roper*, 543 U.S. at 578–79 (holding that juveniles under the age of eighteen cannot be sentenced to death).

[104] *See* Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (holding that executing a person who was younger than sixteen at the time of the crime violated the Eighth and Fourteenth Amendments). Simmons was charged with first-degree murder, burglary, stealing, and kidnapping. *Roper*, 543 U.S. at 557. Because he was seventeen, Simmons had aged out of juvenile court in Missouri and was tried as an adult. *Id.* Simmons was found guilty of murder at trial and was sentenced to death after the jury recommended the death penalty during the penalty trial. *Id.* at 557–58. The jury reached their conclusion even though they were allowed to consider age as a mitigating factor. *Id.* at 558. Simmons appealed his case through the Missouri courts on the grounds that his trial counsel was ineffective. *Id.* The Missouri Supreme Court denied relief. *Id.* at 559. Simmons then filed a petition for habeas corpus in federal court, which the court denied. *Id.* Simmons filed for relief again in state court after the U.S. Supreme Court held in *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), that mentally ill individuals could not be sentenced to death. *Id.* Simmons argued that the same reasoning prohibited juveniles under the age of eighteen from being sentenced to death. *Id.* The Missouri Supreme Court ruled in favor of Simmons and the Supreme Court of the United States granted certiorari. *Id.* at 559–60.

[105] *See* Stanford v. Kentucky, 492 U.S. 361, 380 (1989), *overruled in part by Roper*, 543 U.S. at 574 (reasoning that neither history nor modern social norms suggested that sentencing sixteen- and seventeen-year-old murderers to death violated the Eighth Amendment).

ty.[106] The Court's decision in *Roper*, which effectively overruled *Stanford*, was a significant milestone in juvenile justice.[107]

The Court in *Roper* completed a two-step analysis to conclude that the death penalty was a disproportionate punishment for juveniles and thus violated the Eighth Amendment.[108] First, the Court looked to the frequency with which juveniles were sentenced to death across the United States to determine whether the punishment was unusual.[109] The Court found that twelve states had banned the death penalty all together, while eighteen other states had banned the death penalty for juveniles.[110] In total, the *Roper* decision would impact only twelve states that collectively held seventy-two juveniles on death row.[111] The limited frequency with which courts imposed the death penalty on juveniles indicated to the Court that society assigns less culpability to juveniles than adults.[112]

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[106] *Roper*, 543 U.S. at 578. The defendant in *Roper*, Charles Simmons, was seventeen when he and his friend, Charles Benjamin, brutally murdered Shirley Crook. *Id.* at 556. Simmons had been planning to murder somebody and was motivated to target Crook because the two had been in the same car accident. *Id.* Simmons and Benjamin broke into Crook's home, tied her up, took her to the state park, and threw her into the Meramec River. *Id*. at 556–57. Crook's body was discovered the next day, and Simmons had already bragged to friends about killing Crook. *Id.* at 557. Law enforcement promptly arrested Simmons. *Id.* Simmons confessed to the murder and complied with law enforcement's request that he demonstrate what happened at the crime scene on video. *Id.*

[107] *See id.* at 574 (stating that *Stanford* no longer controlled on the issue of whether sixteen- and seventeen-year-olds are eligible for the death penalty); Josh Rovner, *Juvenile Life Without Parole: An Overview*, THE SENTENCING PROJECT (Feb. 25, 2020), https://www.sentencingproject.org/publications/juvenile-life-without-parole/ [https://perma.cc/FWA7-2UBV] (explaining the vast advances in juvenile sentencing made by the Supreme Court since *Roper*).

[108] *Roper*, 543 U.S. at 564.

[109] *Id.* The Court also noted that no other countries in the world still formally condone sentencing juveniles to death. *Id.* at 575. Although the Court acknowledged that the practices of other countries are not binding on U.S. law, it nevertheless examined this information for guidance on whether a punishment is cruel and unusual. *Id.* The Court was persuaded by the fact that the United States and Somalia were the only countries in the world that had not signed onto the United Nations Convention on the Rights of the Child, which bans the death penalty for youth. *Id.* at 576; *see* United Nations Convention on the Rights of the Child, art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3.

[110] *Roper*, 543 U.S. at 564.

[111] Rovner, *supra* note 107. Of the seventy-two juveniles on death row: thirteen were in Alabama, four were in Arizona, three were in Florida, two were in Georgia, four were in Louisiana, five were in Mississippi, one was in Nevada, four were in North Carolina, two were in Pennsylvania, three were in South Carolina, twenty-nine were in Texas, and one was in Virginia. *Case Summaries of Juvenile Offenders Who Were on Death Row in the United States*, DEATH PENALTY INFORMATION CENTER, https://deathpenaltyinfo.org/stories/case-summaries-of-juvenile-offenders-who-were-on-death-row-in-the-united-states [https://perma.cc/FEP6-FB6C]. The last execution of a juvenile took place in Virginia in 2000. *Id.*

[112] *See Roper*, 543 U.S. at 567 (relying on the reasoning in its decision in *Atkins*, where the Court abolished the death penalty for the mentally ill, the Court determined that the scarce application of the death penalty to juveniles indicated that society disapproved of it, and therefore that society acknowledged the diminished culpability of juveniles).

Second, the Court analyzed the proportionality of the punishment to determine whether it was unconstitutionally cruel.[113] The *Roper* Court held that the death penalty was limited to punishing the most heinous class of crimes and offenders, and because three important characteristics diminished juveniles' culpability, juveniles could never be categorically classified among the most heinous offenders.[114] First, juveniles tend to be less mature than adults, which makes any poor behavior on their part less blameworthy.[115] Second, juveniles are particularly vulnerable to peer pressure, partially because they have less control over their environments, thereby making them less culpable for any failure to extricate themselves from bad situations.[116] Third, juveniles' personality traits are not as established as those of adults, suggesting that it would be inappropriate to designate a juvenile as permanently depraved.[117]

In previous cases, the Court determined that the death penalty serves two important social purposes: retribution and deterrence.[118] In *Roper*, the Court concluded that, when applied to juveniles, the death penalty's social goals are not met due to the diminished culpability of juveniles.[119] The retributive goal of proportionality requires that the harshest possible punishment be reserved exclusively for the most morally culpable criminals, and juveniles will never be considered the most morally culpable due to their diminished capacity.[120] Additionally, the goal of deterrence is not met because less mature juveniles are unlikely to analyze whether the benefit of committing a crime outweighs the cost of possibly receiving the death penalty.[121]

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[113] *Id.* at 564.

[114] *Id.* at 569.

[115] *See id.* (explaining that juveniles' immaturity, which is evident from interactions with juveniles and the scientific literature, causes them to make impulsive and poorly thought through decisions). Psychologist Jeffery Arnett examined juveniles' proclivity for risk by studying common risky behaviors engaged in by youth, such as intercourse without protection, drunk driving, and minor criminal activity. Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 339 (1992). The study found that juveniles are frequently driven by sensation seeking and egocentrism. *Id.*

[116] *Roper*, 543 U.S. at 569; *see* Arnett, *supra* note 115, at 354 (asserting that youth is a time of life when people are most influenced by others).

[117] *See Roper*, 543 U.S. at 570 (stating that juveniles' disposition and character traits are still in flux and capable of change).

[118] *Atkins*, 536 U.S. at 319; *Gregg*, 428 U.S. at 183.

[119] *See Roper*, 543 U.S. at 571 (explaining that these justifications are applicable to adults, but less so to juveniles because of their unique characteristics).

[120] *See id.* ("Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.").

[121] *See id.* (reasoning that the same characteristics that make juveniles less culpable, like immaturity and susceptibility to peer pressure, also make it unlikely that juveniles would be deterred from committing a crime because of the possible consequences); Keller, *supra* note 12, at 317 (noting that the Court in *Enmund* was skeptical of the effect of deterrence on adults, suggesting that the Court should be even more skeptical of its effect on youths).

Five years later, applying the same two-step analysis utilized in *Roper*, the Supreme Court concluded in *Graham v. Florida* that juveniles who had not been convicted of homicide were prohibited from being sentenced to life without parole.[122] First, the Court relied upon the infrequency with which juveniles who had not killed were being sentenced to die in prison to conclude that such a sentence was unusual.[123] At the time of the ruling in *Graham*, only eleven states had juveniles serving life without parole for non-homicide offenses and, among these states, Florida was responsible for imposing the vast majority of those sentences.[124] Next, the *Graham* Court used its precedent and the Eighth Amendment's history to assess whether the punishment was cruel.[125] After *Roper*, life without parole had become the harshest possible punishment for juveniles under the age of eighteen.[126] In *Graham*, the Court reasoned that a non-homicide crime did not warrant the harshest possible punishment of death and, therefore, juveniles who committed non-homicide offenses could not be sentenced to life without the possibility of parole, as this essentially amounted to a death sentence.[127] Additionally, the *Graham* Court noted that life sentences

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[122] *See Graham*, 560 U.S. at 82 (holding that juveniles not convicted of homicide may be sentenced to life only if the state allows juveniles a realistic chance to gain release before death). The defendant, Terrance Jamar Graham, was sixteen years old in 2003 when he was arrested for a robbery attempt. *Id.* at 53. Under Florida law, it was permissible for the prosecutor to treat Graham as an adult, so Graham was charged with armed burglary with assault or battery and attempted armed robbery. *Id.* If found guilty, Graham faced a maximum sentence of life in prison without parole for the first charge and a maximum sentence of fifteen years for the second charge. *Id.* at 53–54. Instead of going to trial, Graham pleaded guilty to the charges and received three years of probation. *Id.* at 54. Graham expressed extreme remorse to the court and promised to get his life on track. *Id.* About a year after entering the plea, Graham was again arrested after fleeing from police for his suspected participation in multiple robberies, which constituted a violation of his probation. *Id.* at 55. Two hearings were held regarding Graham's probation violations and Graham, despite being advised that a violation of probation could expose him to the maximum sentences for his 2003 crimes, admitted that he violated his probation when he fled arrest. *Id.* The court found Graham to be in violation of his probation. *Id.* At his sentencing hearing, the judge ignored the sentencing recommendations put forth by both Graham's defense, the Department of Corrections, and the prosecution, and sentenced Graham to the maximum possible sentence for his probation violation: life in prison without parole for the armed burglary and an additional fifteen years for the attempted armed robbery. *Id.* at 56–57.

[123] *Id.* at 62.

[124] *See* Rovner, *supra* note 107 (pointing out that of the 123 prisoners serving life in prison for non-homicide offenses, seventy-seven were in Florida and the rest were dispersed across ten other states). After *Graham*, in 2012, the Court decided in *Miller v. Alabama* that mandatory life in prison without parole was an impermissible sentence for juveniles. *Miller*, 567 U.S. at 489. Later, in *Montgomery v. Louisiana*, in 2016, the Court held that *Miller* applied retroactively. 136 S. Ct. 718, 736–37 (2016). As a result, all individuals serving a sentence of mandatory life without parole for crimes they committed as juveniles were entitled to parole hearings. Rovner, *supra* note 107.

[125] *Graham*, 560 U.S. at 61.

[126] *See* Rovner, *supra* note 107 (explaining that because *Roper* banned the death penalty for juveniles under eighteen, the worst punishment a juvenile can receive is life in prison without parole).

[127] *See Graham*, 560 U.S. at 71 (reasoning that the worst possible punishment for juveniles should be reserved for those who commit the worst possible crimes, such as homicide).

for defendants convicted as juveniles are staggeringly long compared to the life sentences of those convicted as middle-aged adults.[128]

In 2012, the Court extended the holding of *Graham* even further in *Miller v. Alabama*.[129] In *Miller,* the Court made it unconstitutional for juveniles convicted of homicide to receive mandatory life without parole.[130] Juveniles could still be sentenced to life without parole, but only at the discretion of a judge and not because a statute mandated the sentence.[131] To reach its decision, the *Miller* Court combined its lines of precedent on proportionality and individualized sentencing requirements for the death penalty.[132] The Court determined that because juveniles are less mature, more susceptible to peer pressure, and more amenable to reform than adults, judges must assess the individual circumstances of each crime and perpetrator in order to determine a fair sentence.[133] Although, after *Miller*, judges can still make the determination based

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[128] *See id.* at 70 (reasoning that a juvenile sentenced to life without parole will serve more years than an adult and will be detained for a larger percentage of his life).

[129] *See Miller*, 567 U.S. at 489 (holding that mandatorily sentencing juveniles to life without parole violates the proportionality requirement of the Eighth Amendment, thereby violating the Cruel and Unusual Punishments Clause). In *Miller*, the Court considered the appeals of two petitioners, Kuntrell Jackson and Evan Miller, both of whom had been mandatorily sentenced to life without parole for crimes they committed at age fourteen. *Id.* at 465. Kuntrell Jackson was fourteen years old in 1999 when he was involved in an attempted robbery. *Id.* He made plans to rob a video store with two other boys. *Id.* On the way, he found out that one of the boys had a gun. *Id.* Jackson decided not to go into the store with the other two boys and instead waited outside. *Id.* Jackson eventually entered the store and saw one of the boys pointing the gun at the store clerk and demanding money. *Id.* The boy, Derrick Shields, shot and killed the store clerk when she threatened to call the police. *Id.* at 466. Jackson was charged and found guilty of capital felony murder and aggravated robbery. *Id.* The judge was statutorily required to sentence Jackson to life without parole. *Id.*; *see* ARK. CODE ANN. § 5-4-104(b) (2019) (requiring those convicted of capital murder to be sentenced to life in prison without parole or death); *Thompson*, 487 U.S. at 838 (holding that juveniles under the age of sixteen at the time of the offense may not be sentenced to death). Evan Miller was fourteen years old in 2003 when he attempted a robbery and ended up in an altercation with the victim. *Miller*, 567 U.S. at 468. Miller's accomplice and friend stepped in and hit the victim with a baseball bat. *Id.* Miller then took the bat and hit the victim several times himself. *Id.* The boys left the victim and then returned later to hide the evidence of the crime by setting fire to the victim's trailer. *Id.* The victim ended up dying from smoke inhalation and the blows from the baseball bat. *Id.* Miller was charged with and found guilty of "murder in the course of arson," which statutorily requires a sentence of life in prison without parole. *Id.* at 469; *see* ALA. CODE §§ 13A-5-40(a)(9); 13A-6-2(c) (2019).

[130] *Miller*, 567 U.S. at 489.

[131] *Id.*

[132] *See id.* at 470 (explaining that one line of cases focuses on the fact that certain sentences will be inappropriate for special groups of offenders, while the other line of cases focuses on the need to account for the individual circumstances of certain individuals during the sentencing phase).

[133] *See id.* at 477 (relying on the differences between juveniles and adults first articulated by the Court in *Roper*). The *Miller* ruling requires judges to consider the following factors, known as the "*Miller* factors," when sentencing juveniles: age, circumstances of upbringing, degree of participation in the offense, youth incompetency, and capacity for rehabilitation. *Id.* at 477–78.

on the circumstances that a juvenile deserves life without parole, states can no longer statutorily require judges to sentence juveniles to life without parole.[134]

In his concurrence, Justice Stephen Breyer argued that the *Miller* Court also should have eliminated discretionary life without parole for juveniles who did not kill or intend to kill.[135] According to Justice Breyer, such a conclusion was required given the Court's reasoning in *Graham*, in which the Court stated that a juvenile offender's already diminished culpability is "twice diminished," compared to that of an adult murderer, when the juvenile did not kill or intend to kill.[136] Justice Breyer's argument, moreover, logically follows the Court's prior holdings in *Enmund*, *Tison*, and *Roper*.[137] *Enmund* and *Tison* established that the culpability of those who do not kill or show reckless indifference to human life is once diminished from the culpability of those who actually kill.[138] Furthermore, *Roper* established that the culpability of juveniles, merely by the nature of their immaturity, is once diminished from that of adults.[139] Therefore, by consolidating the decisions in those three cases, the culpability

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[134] *See id.* at 479–80 (noting that judges may still make the decision to sentence juveniles convicted of homicide offenses to life in prison, but that they must consider juveniles' diminished culpability). After the *Miller* decision, there was disagreement among states over whether the Court's holding applied retroactively. *See* Rovner, *supra* note 107 (noting that of the twenty-eight states with statutes impacted by the *Miller* decision, seven states found that *Miller* was not retroactive and fourteen states found that it was). In 2016, the Supreme Court held in *Montgomery* that *Miller* applied retroactively, meaning that individuals serving mandatory life in prison without parole were entitled to parole hearings. 136 S. Ct. at 736–37; Rovner, *supra* note 107.

[135] *See Miller*, 567 U.S. at 491 (Breyer, J., concurring) (reasoning that the transferred intent used to justify the felony murder rule is insufficient to serve as intent under the Eighth Amendment because in *Enmund* the Court ruled that transferred intent cannot be relied upon to decide whether the death penalty is permissible for an adult).

[136] *See id.* at 490–91 ("Quite simply, if the juvenile either kills or intends to kill the victim, he lacks 'twice diminished' responsibility. But where the juvenile neither kills nor intends to kill, both features emphasized in *Graham* as extenuating apply.").

[137] *See id.* (reasoning that *Roper* established that juveniles are inherently less culpable than adults, while *Enmund* and *Tison* held that accomplices charged with felony murder who did not kill, attempt to kill, or intend to kill may not have the requisite culpability to receive the harshest sentence); *Roper*, 543 U.S. at 578–79 (holding that juveniles, because they possess characteristics that make them less culpable for criminal behavior than adults, can never be sentenced to death); *Tison*, 481 U.S. at 158 (holding that the Eighth Amendment does not prevent individuals convicted of felony murder who did not kill from being sentenced to death if the record supports that the individual displayed a reckless indifference to human life); *Enmund*, 458 U.S. at 801 (holding that the Eighth Amendment prohibits individuals convicted of felony murder who did not kill from being sentenced to death if the individual did not intend to kill).

[138] *See Tison*, 481 U.S. at 158 (holding that prosecutors do not violate the Eighth Amendment when they charge accomplices with felony murder who (1) play a key role in carrying out the underlying felony and (2) display a reckless indifference to human life); *Enmund*, 458 U.S. at 801 (holding that when a defendant has not killed or attempted to kill, a judge cannot sentence the individual to death even if he or she contemplated that death might occur).

[139] *See Roper*, 543 U.S. at 572–73 (holding that juveniles under the age of eighteen cannot be sentenced to death).

of juveniles who did not kill or intend to kill is "twice diminished" compared to adults who intentionally killed.[140]

Outside of its juvenile sentencing jurisprudence, in 2011, the Court held in *J.D.B. v. North Carolina* that a child's age is a relevant factor in a *Miranda v. Arizona* custody analysis.[141] In *Miranda*, the Court held that when criminal defendants undergo custodial interrogation, they must be informed of their constitutional right against self-incrimination in order for their statements to be admissible in court.[142] After *Miranda*, confusion among lower courts over the definition of "custodial interrogation" prompted the Supreme Court to outline a custody analysis in 1995 in *Thompson v. Keohane*.[143] Determining whether a suspect is "in custody" involves evaluating the factors surrounding the interrogation and assessing whether a reasonable person in those circumstances would have felt free to end the interrogation.[144] The analysis is intended to be objective—enabling a police officer, in real-time, to assess whether a reasonable person in the circumstances of the defendant would feel free to leave the interrogation.[145] In *J.D.B.*, the Court held that a child's age is a relevant factor that officers must consider when determining whether a reasonable person in the defendant's position would feel free to terminate police questioning.[146] Through its holding, the *J.D.B.* Court formally recognized that juveniles, because of their unique characteristics, require special treatment; they cannot be held to the reasonable person standard that applies to all adults.[147]

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[140] *Miller*, 567 U.S. at 490 (Breyer, J., concurring).

[141] *See* J.D.B. v. North Carolina, 564 U.S. 261, 277 (2011) (holding that considering a child's age during a *Miranda* custody inquiry comports with the test's objectivity requirement). In *Miranda v. Arizona*, the Court held that the Fifth Amendment's protection against self-incrimination renders any statement made in the course of interrogation in a police-dominated setting inadmissible if the defendant was not informed of his or her constitutional rights. 384 U.S. 436, 498–99 (1966).

[142] *Miranda*, 384 U.S. at 498–99. In addition, *Miranda* established that defendants must be made aware of their right to have an attorney present during law enforcement questioning. *Id.* at 471.

[143] *See* Thompson v. Keohane, 516 U.S. 99, 107, 112 (1995) (addressing a conflict over whether the defendant was "in custody" at time of his confession).

[144] *Id.* at 112. The Court in *Thompson v. Keohane* explained that two analyses must be done to determine whether an individual is in custody. *Id.* First, the court must consider the setting and nature of the interrogation *Id.* Second, the court must consider whether a reasonable individual would have understood that he or she was free to end the conversation. *Id.* After the scenario is reconstructed, the court makes an objective determination on whether the individual's freedom was restrained such that he or she was under formal arrest. *Id.*

[145] *See J.D.B.*, 564 U.S. at 271 (explaining that the objective analysis to determine whether a suspect is in custody is intended to ensure that police still will be able to make real-time decisions on whether they should give *Miranda* warnings). The custody analysis does not ask officers to consider specific factors. *Id.* Instead, it requires officers to make a holistic judgement, taking into consideration all the circumstances surrounding an interrogation, to determine if a reasonable person would feel free to leave. *Id.*

[146] *See id.* at 271–72 (reasoning that a child's age informs common sense deductions about the child's behavior that should be evident to anyone who used to be a kid).

[147] *Id.* at 281. Interestingly, civil law has long recognized that the reasonable person standard does not apply well to children. Marsha L. Levick & Elizabeth-Ann Tierney, *The United States Supreme*

II. THREE APPROACHES TO CHALLENGING THE APPLICATION OF FELONY MURDER TO JUVENILES

Reconciling the Supreme Court's juvenile justice jurisprudence with its Eighth Amendment and felony murder precedent is difficult because the culpability requirements of the Eighth Amendment and the felony murder doctrine contradict the Court's concession that juveniles' recklessness, immaturity, and impulsivity make them less capable of assessing the consequences of their actions.[148] Although the Court's Eighth Amendment, felony murder, and juvenile justice precedent seemingly cannot be squared, crafting a legally sound argument that establishes that such contradiction is unconstitutional remains difficult.[149] Still, there are several ways to challenge the practice of charging juveniles with felony murder.[150] Section A of this Part explains how charging juveniles with felony murder can be challenged through the constitutionality of the sentence that accompanies felony murder convictions.[151] Section B outlines how juvenile felony murder can be attacked on the basis of the policy behind felony murder.[152] Section C describes how charging juveniles with felony murder can be opposed using constitutional requirements surrounding culpability.[153]

A. The Eighth Amendment Bans Sentencing Juveniles to Die in Prison for Felony Murder

One way to challenge felony murder for juveniles indirectly is by challenging the constitutionality of the harsh sentences that are inflicted upon juveniles convicted of felony murder.[154] Discretionary life without parole is cur-

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Court Adopts a Reasonable Juvenile Standard in J.D.B v. North Carolina *for Purposes of the* Miranda *Custody Analysis: Can a More Reasoned Justice System for Juveniles Be Far Behind?*, 47 HARV. C.R.-C.L. L. REV. 501, 502 (2012). In every U.S. jurisdiction, if it is necessary to assess whether a child behaved negligently, the child is held to the standard of a "reasonable person of like age, intelligence, and experience under like circumstances." *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 283A (AM. LAW INST. 1965)). Until the Court's decision in *J.D.B.*, juveniles' developmental differences were not typically accounted for in criminal law. *Id.* at 503.

[148] *See* Amended Brief of Amici Curiae Juvenile Law Center et al., in Support of Appellants, Blake Layman and Levi Sparks at 8, Layman v. State, 17 N.E.3d 957 (Ind. Ct. App. 2014) (No. 20-A-04-1310-CR-518), 2014 WL 4168700 (noting that "*Roper, Graham, J.D.B.,* and *Miller* all preclude ascribing the same level of anticipation or foreseeability to a juvenile who takes part in a felony as the law ascribes to an adult").

[149] *See id.* (providing an example of an argument made against charging juveniles with felony murder that did not succeed in court).

[150] *See infra* notes 154–233 and accompanying text.

[151] *See infra* notes 154–194 and accompanying text.

[152] *See infra* notes 195–210 and accompanying text.

[153] *See infra* notes 211–233 and accompanying text.

[154] *See* Michael T. Moore, Jr., *Felony Murder, Juveniles, and Culpability: Why the Eighth Amendment's Ban on Cruel and Unusual Punishment Should Preclude Sentencing Juveniles Who Do*

rently the harshest sentence available for juveniles convicted of felony murder.[155] Challenging the constitutionality of that sentence would indirectly contest the application of felony murder to juveniles because it would make life *with* parole the harshest possible sentence that juveniles could receive.[156] As a result, juveniles who did not kill, attempt to kill, or intend to kill could receive sentences more proportionate to the underlying felony that they committed.[157] Although this argument would not end the practice of charging juveniles with felony murder, it could significantly improve outcomes for juveniles convicted of felony murder.[158] Much of the existing scholarship surrounding the constitutionality of felony murder as applied to juveniles focuses on sentencing because it offers a more realistic avenue for reform based upon the Supreme Court's recent favorable juvenile sentencing decisions.[159] Although this type of challenge would arguably result in the least satisfying outcome for advocates seeking to end the application of felony murder to juveniles, it is worth considering given its reasonable chance of success.[160]

Roper v. Simmons, *Graham v. Florida*, and *Miller v. Alabama* present logical inroads to challenging felony murder for juveniles because of the powerful

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Not Kill, Intend to Kill, or Attempt to Kill to Die in Prison, 16 LOY. J. PUB. INT. L. 99, 126 (2014) (arguing that the Eighth Amendment forbids sentencing juveniles who did not kill, attempt to kill, or intend to kill to life without the possibility of parole); Mariko K. Shitama, Note, *Bringing Our Children Back from the Land of the Nod: Why the Eighth Amendment Forbids Condemning Juveniles to Die in Prison for Accessorial Felony Murder*, 65 FLA. L. REV. 813, 820 (2012) (arguing that *Graham v. Florida* bans sentencing juveniles who did not kill or intend to kill to die in prison and that courts should retroactively apply *Miller v. Alabama* by reconsidering the sentences of those who did not kill or intend to kill).

[155] *See* Moore, *supra* note 154, at 101 (explaining that discretionary life without parole is currently the harshest sentence available for juveniles convicted of felony murder). Of the forty-five jurisdictions in the United States that currently recognize the felony murder doctrine, twenty-four allow defendants convicted of felony murder to be sentenced to death. Jason Tashea, *California Considering End to Felony Murder Rule*, ABA J. (July 5, 2018), https://www.abajournal.com/news/article/california_considering_end_to_felony_murder_rule [https://perma.cc/7K7J-FENQ]. Because juveniles are not eligible for the death penalty or life without parole, discretionary life without parole is the harshest available sentence for juveniles convicted of felony murder. *See* Miller v. Alabama, 567 U.S. 460, 489 (2012) (holding that mandatorily sentencing juveniles to life without parole violates the proportionality requirement of the Cruel and Unusual Punishments Clause, thereby violating the Eighth Amendment).

[156] *See* Shitama, *supra* note 154, at 819 (explaining that *Miller* did not ban life without parole entirely).

[157] Moore, *supra* note 154, at 101–02.

[158] *Id.*

[159] *See, e.g.*, *Miller*, 567 U.S. at 489; Graham v. Florida, 560 U.S. 48, 82 (2010) (holding that juveniles not convicted of homicide may be sentenced to life only if the state affords juveniles a realistic chance to gain release before death); Roper v. Simmons, 543 U.S. 551, 578–79 (2005) (holding that juveniles under the age of eighteen cannot be sentenced to death).

[160] *See infra* notes 237–245 and accompanying text (explaining the strengths and weaknesses of challenging felony murder for juveniles on sentencing grounds).

language in these opinions regarding juvenile brain development.[161] *Roper* eliminated the death penalty for juveniles, *Graham* eliminated life without parole for juveniles convicted of non-homicide offenses, and *Miller* eliminated mandatory life without parole for juveniles convicted of any crime, even homicide.[162] The next logical step would be to eliminate the harshest sentence available for juveniles following *Miller*: discretionary life without parole.[163]

Assessing the constitutionality of life without parole for juveniles requires the same analysis the Court used in *Roper* and *Graham*, both of which categorically eliminated a form of punishment for a specific group of individuals.[164] The Court must first determine if there is a national consensus on whether discretionary life without parole is an appropriate sentence for juveniles, and then it must consider whether the sentence is constitutional based on the Court's precedent and interpretation of the Eighth Amendment.[165] Following this approach, it is very possible that the Court could conclude that discretionary life without parole is an unconstitutional sentence for juveniles.[166] First, data shows that as of 2018, many states have moved away from sentencing juveniles to life without parole.[167] In twenty-six states and the District of Columbia, no incarcerated individuals were serving life without parole for crimes

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[161] *See Miller*, 567 U.S. at 472 (reiterating that the special characteristics of adolescents make harsh sentences less suitable even for juveniles that commit the worst crimes); *Graham*, 560 U.S. at 68 (explaining that advances in brain science and psychology support the conclusion that juveniles' minds are fundamentally different from those of adults); *Roper*, 543 U.S. at 579 (concluding that juveniles can never be classified among the most heinous criminals because of the status of their brain development). Kuntrell Jackson, one of the defendants in *Miller*, was charged with felony murder even though he did not kill or intend to kill the victim. *Miller*, 567 U.S. at 465–66; *see also* Jackson v. Norris, 378 S.W.3d 103, 109 (Ark. 2011) (Danielson, J., dissenting) (stating that there was scant evidence of the defendant's intent to kill as he did not have a gun, did not shoot the victim, and his involvement with the underlying felony was minor), *rev'd and remanded sub nom. Miller*, 567 U.S. 460.

[162] *See Miller*, 567 U.S. at 489 (holding that mandatorily sentencing juveniles to life without parole violates the proportionality requirement of the Cruel and Unusual Punishments Clause, thereby violating the Eighth Amendment); *Graham*, 560 U.S. at 82 (holding that juveniles not convicted of homicide may be sentenced to life only if the state affords juveniles a realistic chance to gain release before death); *Roper*, 543 U.S. at 578–79 (holding that juveniles under the age of eighteen cannot be sentenced to death).

[163] *See* Moore, *supra* note 154, at 126 (arguing that the Eighth Amendment forbids sentencing juveniles who did not kill, attempt to kill, or intend to kill to discretionary life without the possibility of parole).

[164] *See Miller*, 567 U.S. at 483 (likening the categorical ban on mandatory life without parole for non-homicide offenses in *Graham* to the complete ban on the death penalty in *Roper*); *Graham*, 560 U.S. at 61–62 (explaining that when a sentence as applied to a specific class of criminals is challenged, the Court first conducts an objective analysis of whether there is agreement across states on the appropriateness of the sentence).

[165] *Graham*, 560 U.S. at 61.

[166] *See id.* at 62 (explaining that in order to determine whether there is national consensus, the Court will look to the states' laws as well as its sentencing statistics in practice).

[167] *See* Rovner, *supra* note 107 (explaining that twenty-three jurisdictions have stopped sentencing juveniles to life without parole).

they committed as juveniles.[168] Some of those states explicitly prohibited the sentence and others evidently chose not impose it, as no prisoners were serving life without parole for crimes they committed as juveniles.[169] Twenty-eight states still permitted sentencing juveniles to life without parole.[170] Yet, only three states—Louisiana, Pennsylvania, and Michigan—imposed the vast majority of life without parole sentences for juveniles.[171] In *Graham*, although thirty-seven states allowed juveniles who committed non-homicide offenses to be sentenced to life without parole, the Court nonetheless held that the sentence was unconstitutional.[172] In the case of discretionary life without parole, only twenty-nine states allow the sentence for juveniles, and only three of those states are responsible for imposing the bulk of those sentences.[173] The Court in *Graham* also relied upon the fact that the United States was the only country in the world to sentence juveniles convicted of non-homicide offenses to life without parole.[174] Today, the United States is the only country in the world that carries out sentences of life without parole against juveniles.[175] Although the Court may conclude that there is consensus against imposing life without parole on juveniles, that alone does not make the practice unconstitutional.[176]

In addition to assessing whether there is a national consensus, the Court must examine the constitutionality of the punishment based on its precedent and interpretation of the Eighth Amendment—namely, the Court must contemplate whether the severity of the punishment is proportionate to the defendant's culpability.[177] Justice Breyer's concurrence in *Miller*, as discussed in Part I,

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[168] *See id.* (noting that these twenty-seven jurisdictions either banned the sentence or have nobody serving it).

[169] *Id.*

[170] *Id.*

[171] *See id.* (stating that Louisiana, Pennsylvania, and Michigan account for two-thirds of the juvenile life without parole sentences in the United States).

[172] *Graham*, 560 U.S. at 62–63, 82; *Roper*, 543 U.S. at 578; Rovner, *supra* note 107.

[173] *See supra* note 168 and accompanying text (stating that twenty-seven jurisdictions have eliminated life with parole for juveniles).

[174] *See Graham*, 560 U.S. at 80 (citing research finding that only eleven countries technically permit life without parole for juveniles and, of those countries, just the United States and Israel seem to inflict the sentence).

[175] *See* Rovner, *supra* note 107 (asserting that as of February 25, 2020, no other country sentenced juveniles to life in prison without parole). Two thousand one hundred juveniles in the United States were serving life in prison without parole as of 2018. Adam Janos, *The Offenders Behind 3 Court Cases That Changed Lifetime Imprisonment Laws for Juveniles*, A&E (Apr. 29, 2019), https://www.aetv.com/real-crime/terrance-graham-florida-evan-miller-alabama-henry-montgomery-louisiana-cases-life [https://perma.cc/6767-NGNX].

[176] *Graham*, 560 U.S. at 67.

[177] *See id.* (stating that the Court is ultimately responsible for determining the constitutionality of the practice in question based on the Court's precedent and interpretation of the Eighth Amendment).

makes a strong argument that sentencing juveniles to life without parole is unconstitutional based upon the Court's precedent.[178]

The penological justifications of a punishment are also relevant to the Court's judgment on whether the punishment is constitutional.[179] The felony murder doctrine is primarily justified based on the deterrent effect it supposedly has on would-be felons.[180] The underlying logic is that if individuals considering committing a felony know they will face substantial punishment should something go awry, then they will be deterred from committing the felony altogether.[181] Whether the threat of a harsh sentence effectively deters adult crime is a matter of debate, but in *Roper* and *Graham* the Court concluded that harsh sentences were unlikely to deter juvenile crime.[182] In both of these decisions, the Court explained that the same qualities that make juveniles less culpable than adults—immaturity, susceptibility to peer pressure, and capacity for reform—make the threat of harsh punishments less effective.[183] Juveniles are simply less likely to engage in the cost-benefit analysis that the deterrence model assumes.[184] The Court's reasoning in *Roper* and *Graham* can similarly be used to reject the deterrent value of sentencing juveniles convicted of felony murder to life without parole.[185]

Although felony murder is most often justified by deterrence, discretionary life without parole sentences also do not serve retributive ends.[186] Retribution relies on the principle of proportionality—the idea that the punishment for a crime should be proportionate to the defendant's moral culpability.[187] The *Roper* Court determined that retribution is less persuasive when applied to juveniles because their diminished culpability causes punishments of the harsh-

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[178] *See supra* notes 135–140 and accompanying text (outlining Justice Breyer's argument that the Constitution forbids sentencing juveniles who did not kill or intend to kill to the harshest possible sentence—discretionary life without parole).

[179] *Graham*, 560 U.S. at 71.

[180] *See* Moore, *supra* note 154, at 105 (explaining that deterrence is often relied upon as a justification for the felony murder rule).

[181] *See* Roth & Sundby, *supra* note 60, at 451 (noting that proponents of the felony murder rule believe that the possibility of being charged with murder will deter criminals from committing felonies).

[182] *See Graham*, 560 U.S. at 72 (explaining that juveniles' unique characteristics make it unlikely that they will engage in a cost-benefit analysis during their decision-making process); *Roper*, 543 U.S. at 578–79 (noting that juveniles' personality traits make it unlikely that deterrence will impact their decision making).

[183] *Graham*, 560 U.S. at 72.

[184] *Id.*

[185] *See id.* (determining that juveniles' underdeveloped brains make them unlikely to contemplate the possibility of harsh punishment before deciding to commit a crime).

[186] *See id.* at 71 (reasoning that retributivism is based on the idea that a person's punishment should be equal to his or her culpability, which is not possible when the defendant is a juvenile accused of felony murder).

[187] *See* Tison v. Arizona, 481 U.S. 137, 149 (1987) ("The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.").

est possible degree to be disproportionate.[188] These arguments also apply to discretionary life without parole.[189] Finally, incapacitation does not provide adequate justification for life without parole because such a sentence requires determining that a juvenile will always pose a threat to society.[190] The Court in *Graham* noted that making such a decision should be infrequent because juveniles by their very nature are constantly changing, evolving, and reforming.[191]

Finally, in *Miller*, the Court relied heavily upon the idea that the worst possible sentence should be reserved for the worst offenders.[192] After *Miller*, the worst possible sentence available for juveniles is currently discretionary life without parole.[193] Court precedent further suggests that the harshest possible punishment is not suitable for juveniles charged with felony murder who did not kill, attempt to kill, or intend to kill.[194]

B. The Reasonable Juvenile Standard Articulated in J.D.B. v. North Carolina *Is at Odds with the Principle of Transferred Intent, Central to the Felony Murder Doctrine*

Charging juveniles with felony murder can also be challenged on the grounds that felony murder statutes do not require the government to prove any form of intent.[195] Without a statutory requirement of proving criminal intent, there is no opportunity for juries or judges to consider juveniles' dimin-

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[188] *See Roper*, 543 U.S. at 571 (stating that retribution can be explained as a means for the community to alert the defendant to its disapproval, or as a method for remedying the harm inflicted on the victim by the defendant). The retributive goal of proportionality is not met when the culpability of a defendant is diminished by immaturity. *Id.*

[189] *See id.* (holding that the principle of proportionality is violated when courts impose the harshest penalty upon someone with diminished culpability, such as a juvenile). Sentencing juveniles who did not kill or intend to kill to life in prison violates the proportionality requirement because doing so thwarts the intention that the harshest possible sentence be exclusively reserved for the most culpable offenders. *Id.*

[190] *See Graham*, 560 U.S. at 72–73 (noting that although incapacitation is important, given the high possibility that a criminal will reoffend, the case for incapacitation is weaker with respect to youths because they have a higher capacity for reform and it is impossible to distinguish between youthful immaturity and permanent corruption).

[191] *Id.*

[192] *See Miller*, 567 U.S. at 479 (holding that sentencing juveniles to the most severe possible punishment creates the opportunity for disproportionality).

[193] *See id.* at 489 (holding that mandatory life without parole for juveniles violates the Eighth Amendment, leaving discretionary life without parole as the harshest possible sentence for juveniles).

[194] *See* Moore, *supra* note 154, at 126 (arguing that life without parole is not a suitable punishment unless the most severe possible crime is involved).

[195] *See* Levick & Tierney, *supra* note 147, at 524–25 ("Felony murder statutes generally do not incorporate the concept of reasonableness on their face—the statutes arise from legislatures' determinations that an individual electing to participate in the commission of a felony thereby subjects herself to strict liability for the results of her actions and those of her accomplices, regardless of whether she had specific intent for a death to result or subjectively foresaw the risk of death.").

ished culpability when determining their guilt or innocence.[196] Using the holding of *J.D.B. v. North Carolina*, Marsha Levick, the Chief Legal Officer of the Juvenile Law Center, and Elizabeth-Ann Tierney, a former legal fellow at the Juvenile Law Center, proposed a theory in 2012 that charging juveniles with felony murder is unconstitutional because felony murder statutes do not account for juveniles' diminished capacity.[197] In *J.D.B.*, the Court held that the custodial analysis from *Miranda v. Arizona* required law enforcement officers to consider whether a reasonable juvenile would feel free to end an interrogation when determining if *Miranda* warnings should be issued.[198]

Although the *J.D.B.* decision appears narrow, the fact that the Court acknowledged the age of a juvenile as an objective factor to be considered during *Miranda*'s custodial analysis is significant.[199] Prior to the Court's decision in *J.D.B.*, juveniles' developmental differences were not typically recognized in criminal law, despite having long been acknowledged in civil law.[200] The *J.D.B.* ruling also had implications for charging juveniles with felony murder, as felony murder is often justified by the idea that some felonies are so dangerous that it should be reasonably foreseeable to perpetrators that death may occur.[201] Although foreseeability is used to justify punishing people for crimes

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[196] *Id.* at 525.

[197] J.D.B. v. North Carolina, 564 U.S. 261, 277 (2011); *see* Levick & Tierney, *supra* note 147, at 503 (explaining that *J.D.B.* required that in *Miranda v. Arizona*'s custody analysis, the reasonable person standard, which has long been considered ill-suited for juveniles in tort law, account for a person's age).

[198] *See J.D.B.*, 564 U.S. at 277 (reasoning that a juvenile undergoing interrogation could perceive a greater pressure to respond to questions than an adult under the same circumstances); Levick & Tierney, *supra* note 147, at 503 (explaining that the Court considered whether a reasonable juvenile standard was necessary under the facts of *J.D.B.*, which involved "a thirteen-year-old middle-school student who was removed from class and interrogated about burglaries in his neighborhood by four adults, including a police investigator and a uniformed school resource officer, in a closed-door conference room"); *see also* Miranda v. Arizona, 384 U.S. 436, 498–99 (1966) (holding that suspects must be appraised of their constitutional rights during police questioning in order for their statements to be admissible in court).

[199] *See* Levick & Tierney, *supra* note 147, at 506 (noting that the Court was very concerned with making it clear that applying a reasonable juvenile standard did not interfere with the objective nature of the test). Despite *J.D.B.* representing a significant milestone for juvenile justice, some scholars argue that more substantial protections are necessary to prevent wrongful convictions of juveniles. *See* Maxwell J. Fabiszewski, Note, *Major Reforms for Minors' Confessions: Rethinking Self-Incrimination Protections for Juveniles*, 61 B.C. L. REV. 2643, 2688 (2020), https://lawdigitalcommons.bc.edu/bclr/vol61/iss7/8 [https://perma.cc/SW69-WB89] ("[M]ost juveniles, especially those below the age of fifteen, cannot understand either their rights or the consequences of waiving them and giving statements to law enforcement."). Because of their diminished capacity, confessions given by juveniles, even under the best of circumstances, pose a large risk of being invalid or involuntary. *Id.* at 2689.

[200] *See supra* note 147 and accompanying text (explaining the tradition of recognizing juveniles' diminished capacity in civil courts throughout the United States).

[201] *See* Levick & Tierney, *supra* note 147, at 524–25 (stating that the mens rea in felony murder cases is supplied using transferred intent, which is justified by the reasoning that a reasonable person would understand that death could occur as a result of committing a dangerous felony).

they did not necessarily intend to commit, most felony murder statutes do not require the government to prove that the death was reasonably foreseeable.[202] To convict an offender, the jury must find only that: (1) the defendant intended to carry out the underlying felony, and (2) a death occurred in the commission of that felony.[203] The entirely objective nature of the test removes the opportunity for a jury to consider the diminished culpability of juveniles charged with felony murder.[204] Levick and Tierney argue that the Court should, as it did in *J.D.B.*, recognize that a different standard must be used for juveniles charged with felony murder.[205] Such a standard would account for the fact that juveniles are less capable of foreseeing the possible consequences of their actions and would acknowledge that it is contradictory to charge juveniles who did not kill, attempt to kill, or intend to kill with felony murder.[206] After all, if a juvenile's age must be considered in determining whether a reasonable person in that juvenile's position would know they were free to leave a police interrogation, then it follows that a juvenile's age must also be considered in determining whether a juvenile could reasonably foresee that death could occur as a result of an inherently dangerous felony.[207]

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[202] *See id.* (noting that felony murder is considered a strict liability crime, meaning that if a person participates in a felony and death occurs, he or she may be found guilty of felony murder regardless of whether there was any intent to kill). For example, the federal felony murder statute provides in relevant part: "Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery . . . is murder in the first degree." 18 U.S.C. § 1111(a) (2018).

[203] *See* Levick & Tierney, *supra* note 147, at 525 (explaining that felony murder statutes, which are strict liability offenses, provide no opportunity for jurors to account for juveniles' diminished culpability). For a defendant to be found guilty of felony murder in federal court, "[i]t is sufficient if the government proves beyond a reasonable doubt that the defendant knowingly and willfully committed or attempted to commit the crime as charged in the indictment, and that the killing of the victim occurred during, and as a consequence of, the defendant's commission of or attempt to commit that crime." CRIMINAL PATTERN JURY INSTRUCTION COMM. OF THE U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT, CRIMINAL PATTERN JURY INSTRUCTIONS § 2.52.1 (2018), https://www.ca10.uscourts.gov/sites/default/files/clerk/Jury%20Instructions%20Update%202018.pdf [https://perma.cc/X435-ZWG6].

[204] *See* Levick & Tierney, *supra* note 147, at 526 ("Because of this flaw in the construction of the felony murder statutes, the solution to this problem is not as simple as requiring fact-finders to incorporate age into a reasonableness analysis.").

[205] *See* Amended Brief of Amici Curiae Juvenile Law Center et al., in Support of Appellants, Black Layman and Levi Sparks, *supra* note 148, at 12–13 (encouraging the State of Indiana to adopt a unique juvenile standard when a juvenile is charged with felony murder).

[206] *See id.* at 13 (arguing that because youths are unlikely to anticipate or understand the risk that an individual could die during the commission of a felony, felony murder should not be applied to them).

[207] *See id.* ("[T]he transferred intent theory which undergirds the modern felony murder doctrine cannot be squared with the settled behavioral and scientific research regarding children which has led the United States Supreme Court to abandon decades-old sentencing and police interrogation tactics where juveniles are involved.").

Although Levick and Tierney's reasoning has yet to succeed in court, Levick and the Juvenile Law Center raised this argument to the Indiana Supreme Court in an amicus brief submitted in 2015 in *Layman v. State*.[208] The court ultimately decided the case on other grounds and did not address the argument made in the brief.[209] The argument was credited, however, by a concurring opinion following the Indiana Court of Appeals' review of the case.[210]

C. The Original Meaning of the Constitution Prohibits Punishing Conduct in the Absence of Moral Culpability

Another way to challenge the constitutionality of charging juveniles with felony murder stems from the Supreme Court's precedent concerning culpability.[211] The history of the Cruel and Unusual Punishments Clause suggests that the Constitution does not permit punishments that are offensively harsh when compared to the moral culpability of the offender.[212] The English common law

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[208] *See* Layman v. State, 42 N.E.3d 972, 979–80 (Ind. 2015) (holding that because the victim was killed by a third party, and not one of the accomplices, and because the co-perpetrators' behavior was not violent or threatening such that their actions were the "mediate or immediate" cause of the victim's death, the evidence was insufficient to support a felony murder conviction); Amended Brief of Amici Curiae Juvenile Law Center et al., in Support of Appellants, Black Layman and Levi Sparks, *supra* note 148, at 22 (arguing that a juvenile who did not kill, attempt to kill, or intend to kill should not face a felony murder charge because the charge did not account for his diminished capacity). In *Layman*, the defendant, Blake Layman, and four co-defendants broke into the home of Rodney Scott. 42 N.E.3d at 974. Layman and two other co-defendants were juveniles at the time of the crime. *Id.* All of the co-defendants were unarmed and specifically chose to break into Scott's house because they believed he was not home. *Id.* Scott, however, was home and woke up when the boys kicked in his back door. *Id.* Scott went downstairs and fired shots at the intruders, killing one and injuring another. *Id.* Layman and the other juvenile defendants were convicted under a felony murder theory and sentenced to fifty-five years in prison. *Id.* Layman appealed, challenging among other things the constitutionality of the sentence for juveniles convicted of felony murder, the constitutionality of Indiana's direct filing statute, and the constitutionality of a forty-five- to sixty-five-year sentence for reckless behavior. *Id.* at 975 n.2.

[209] *Layman*, 42 N.E.3d at 980–81. The court declined to address the constitutional claims made by Layman, asserting that major revisions should be left to the legislature. *Id.* at 977–78. The court instead distinguished Layman's case from others that it had decided and held that the evidence presented was insufficient to sustain a felony murder conviction, because the victim was killed by the third-party homeowner and the co-defendants did not behave violently or threateningly. *Id.* at 979–80.

[210] *See id.* at 968–69 (May, J., concurring) (expressing concern with holding juveniles to the same foreseeability requirement as adults, and arguing that precedent does not preclude the court from deciding that juveniles should not be charged with felony murder when the victim is killed by a third party).

[211] *See Miller*, 567 U.S. at 492 (Breyer, J., concurring) (asserting that using transferred intent to satisfy the mens rea of felony murder would require "fallacious reasoning").

[212] *Against Cruel Innovation*, *supra* note 49. According to Professor John F. Stinneford, at the time of the framing of the U.S. Constitution, the term "unusual" meant "new" or "contrary to long usage." *Id.* Therefore, a punishment is unusual if it is contrary to longstanding practice. *Id.* This inquiry confirms the existence of a proportionality requirement in the Eighth Amendment: if a punishment is disproportionate when compared to the punishment typically imposed for the same crime, it violates the Eighth Amendment. *Id.*; *see* Brief Amicus Curiae of Professor John F. Stinneford in Sup-

inspired the Cruel and Unusual Punishments Clause.[213] By the 1600s, English common-law courts had started to apply the principle of proportionality to criminal punishments.[214] For example, in *Hodges v. Humkin*, a case decided in fifteenth-century England, the court granted relief to a man who had been imprisoned for insulting the local mayor.[215] The court reasoned that confinement of an individual must be proportionate to the offense with which the individual was charged.[216] The English Bill of Rights, enacted in 1689, banned excessive bail, excessive fines, and the infliction of "cruell and unusuall Punishments."[217] English courts interpreted this clause to include the requirement that the punishment fit the crime and the clause, moreover, eventually inspired the Eighth Amendment to the U.S. Constitution.[218] Throughout the development of Eighth Amendment jurisprudence, the mental state of the defendant has always been a central focus of the Court in its evaluation of a punishment's proportionality to the underlying offense.[219]

The Supreme Court has continued in modern times to consider the mental state of defendants when determining whether behavior should result in crimi-

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port of Neither Party at 8, Kahler v. Kansas, 139 S. Ct. 1318 (2019) (No. 18-6135), 2019 WL 2418947 (noting that the origin of the Cruel and Unusual Punishments Clause goes back to the Magna Carta, which stated that fines must be proportionate to the offense and served as inspiration for future laws and cultural norms).

[213] *See* Brief Amicus Curiae of Professor John F. Stinneford in Support of Neither Party, *supra* note 212, at 16–17 (explaining that the Cruel and Unusual Punishments Clause of the Eighth Amendment is understood as an adoption of English common law).

[214] *Id.* at 8.

[215] *Id.*

[216] *See id.* (stating that the Court of the King's Bench held in *Hodges* that "imprisonment ought always to be according to the quality of the offence" (quoting Hodges v. Humkin, 80 Eng. Rep. 1016 (1615))).

[217] *Id.* at 11. The case of Titus Oates in 1685 illustrated the meaning of the clause. *See id.* at 11–12 (citing *Trial of Titus Oates*, 10 How. St. Tr. 1079, 1314–15 (K.B. 1685)) (explaining that English Parliament determined based on the case of Titus Oates that the ban on cruel and unusual punishments included a ban on disproportionate punishments). There, a jury found Oates guilty of perjury and sentenced him to two whippings, life imprisonment, pillorying four times a year, a fine, and removal from the clergy. *Id.* Although the court upheld Oates's sentence on appeal, representatives in the House of Commons expressed that such a sentence was precisely banned by the Bill of Rights. *Id.* at 13.

[218] *See id.* at 12 (noting that all of the representatives in the House of Lords found the punishment "extravagant" and "exorbitant"). Because all of the penalties inflicted on Oates, with the exception of removal from the clergy, were legal, one can infer that the representatives found the punishment to be disproportionate to Oates's offense. *See id.* at 13 (reasoning that because the punishments were not illegal or barbaric, they must have been cruel and unusual given how disproportionate they were to the crime of insulting the mayor).

[219] *See* Ely v. Thompson, 10 Ky. 70, 75 (1820) (holding that it was unconstitutional for the lower court to punish a defendant who had utilized the right to self-defense, even though the statute permitted punishment, because the defendant was justified in using self-defense and therefore morally blameless); Brief Amicus Curiae of Professor John F. Stinneford in Support of Neither Party, *supra* note 212, at 21 (explaining that on the rare occasions where laws were passed that allowed for punishment without culpability, courts were quick to strike down the laws as unconstitutional).

nal liability.[220] In *Enmund v. Florida*, the Court held that a defendant who did not kill or attempt to kill could not be sentenced to death because he did not possess the requisite moral culpability.[221] In *Tison v. Arizona*, the Court limited the holding of *Enmund*, but still articulated that a defendant must show some recklessness and indifference in order to be sentenced to death under an accomplice felony murder theory.[222] In *Robinson v. California*, when the Court considered whether a statute that criminalized the status of drug addiction was constitutional, it struck the statute down because it punished a condition for which defendants bore no moral responsibility.[223] Finally, in 1968, in *Powell v. Texas*, the Court affirmed that individuals may not be punished for conditions they cannot control.[224] With these cases in mind, how can a juvenile who did not kill, attempt to kill, or intend to kill during the commission of a felony possess the requisite moral culpability to face criminal liability for felony murder?[225]

The research on adolescent brain development that the Court endorses in *Roper*, *Graham*, and *Miller* demonstrates that juveniles are reckless, susceptible to peer pressure, and less able to assess the possible consequences of their actions.[226] These characteristics are inherent to adolescents and are not within their control.[227] Although the condition of being a juvenile in no way eliminates culpability for all criminal behavior, it certainly reduces, if not eliminates, culpability for crimes, like felony murder, that assign fault based on

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[220] *See Tison*, 481 U.S. at 158 (holding that the Eighth Amendment is not violated when an accomplice, who plays a key role in carrying out the underlying felony and displays a reckless indifference to human life, is charged with felony murder and sentenced to death); Enmund v. Florida, 458 U.S. 782, 801 (1982) (holding that when a co-defendant does not kill or attempt to kill, he cannot be sentenced to death even if he contemplated that death might occur).

[221] *Enmund*, 458 U.S. at 801.

[222] *See Tison*, 481 U.S. at 158 ("Rather, we simply hold that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement."). Although *Enmund* suggested that it might be unconstitutional to charge a person who did not kill, attempt to kill, or intend to kill with murder, *Tison* significantly limited that holding by allowing co-defendants who show reckless indifference to human life to be charged with murder if a killing occurs during the commission of a felony. *Id.*; *Enmund*, 458 U.S. at 801.

[223] *See supra* notes 51–56 and accompanying text (explaining the background and reasoning for the Court's decision in *Robinson*).

[224] *See* Powell v. Texas, 392 U.S. 514, 567 (1968) ("Criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change.").

[225] *See Punishment Without Culpability*, *supra* note 56, at 693 (explaining that the Constitution does contain a culpability requirement, although the Court has been hesitant to acknowledge it outright).

[226] *See supra* notes 103–147 and accompanying text (outlining the Court's decisions in *Roper*, *Graham*, and *Miller*, and the adolescent brain science that the decisions adopted).

[227] *See supra* notes 103–147 and accompanying text (explaining the adolescent brain science credited by the Court to support the conclusion that the capacity of juveniles is diminished compared to the capacity of adults).

foreseeability.[228] Charging juveniles who did not kill, attempt to kill, or intend to kill with felony murder is unconstitutional because doing so assigns culpability for a condition over which juveniles lack control.[229]

If the Court is unwilling to ban charging juveniles who did not kill, intend to kill, or attempt to kill with felony murder, it should at least establish a defense for juveniles to account for their diminished culpability.[230] The Court has frequently compared the diminished culpability of juveniles to the diminished culpability of individuals with mental illness and treated the groups in a similar manner, such as by abolishing the death penalty for both groups.[231] Yet, whereas the insanity defense is available to the mentally ill, no such diminished culpability defense is available to juveniles.[232] If juveniles' diminished culpability is not accounted for in the crimes they may be charged with, juveniles should at least have the opportunity to mount their diminished culpability as a defense.[233]

III. Likelihood of Success: Can the Supreme Court Stop the Practice of Charging Juveniles Who Did Not Kill, Attempt to Kill, or Intend to Kill with Felony Murder?

Existing Supreme Court precedent provides multiple avenues for attacking the constitutionality of charging juveniles with felony murder; however, each approach has its respective strengths and weaknesses.[234] Section A of this Part explores the benefits and drawbacks of challenging felony murder as applied to juveniles through juvenile sentencing precedent and through *J.D.B. v. North Caro-*

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[228] *See supra* notes 135–140 and accompanying text (discussing Justice Breyer's concurrence in *Miller* in which he argued that the culpability of juveniles who do not kill, attempt to kill, or intend to kill is significantly diminished).

[229] *See Miller*, 567 U.S. at 491 (Breyer, J., concurring) (reasoning that the transferred intent used to justify the felony murder rule is not sufficient to serve as intent under the Eighth Amendment because, in *Enmund*, the Court ruled that transferred intent could not be relied upon to decide whether the death penalty was permissible for an adult).

[230] *See* Sinclair v. State, 132 So. 581, 584 (Miss. 1931) ("It certainly would be cruel and unusual to punish a child of tender years, incapable of judging the consequences of its acts, should it, through misjudgment or otherwise, administer poison to another child or to another person. It would be equally cruel and equally as unusual to impose life imprisonment or death upon any person who did not have intelligence enough to know that the act was wrong or to know the consequences that would likely result from the act.").

[231] *See id.* at 559 (noting that the petitioner filed a state petition for post-conviction relief after the Supreme Court decided in *Atkins v. Virginia* to ban the death penalty for the mentally ill). The Court in *Atkins* determined that the reduced culpability of the mentally ill meant that the group could not be subjected to the harshest punishment available. 536 U.S. 304, 319 (2002). In *Roper*, the Court determined that the same conclusion applied to juveniles: their diminished culpability meant they could not face the harshest available sentence. 543 U.S. at 571.

[232] *See* Levick & Tierney, *supra* note 147, at 526 (explaining that juveniles have no defense that takes into consideration their developmental differences).

[233] *Id.*

[234] *See infra* notes 237–271 and accompanying text.

lina's reasonable juvenile standard.[235] Section B of this Part asserts that the Eighth Amendment argument against charging juveniles who did not kill, attempt to kill, or intend to kill with felony murder has the greatest chance of success.[236]

A. Challenging Felony Murder as Applied to Juveniles Through Juvenile Sentencing Precedent and J.D.B. v. North Carolina*'s Reasonable Juvenile Standard*

Challenging the practice of charging juveniles who did not kill, intend to kill, or attempt to kill through the Supreme Court's precedent on juvenile sentencing is the most natural argument given the direction of the precedent, but it does not provide a direct challenge to the application of felony murder to juveniles.[237] There are also additional weaknesses that come with attacking juvenile felony murder from this angle.[238] First, supporters of the felony murder rule can argue that juveniles' diminished culpability has already been accounted for through *Miller v. Alabama*.[239] Because *Miller* banned mandatory life without parole, judges must take the circumstances of the offense, which could include a juvenile's diminished culpability, into consideration before sentencing a juvenile to life without parole, making the argument that juveniles should not be sentenced to life without parole at all a tougher sell.[240]

Second, the benefit of attacking juvenile felony murder from the sentencing perspective is reaching its logical end.[241] After all, if discretionary life without parole is deemed unconstitutional for juveniles, states favoring harsh punishments can still sentence juveniles to extremely lengthy sentences and refuse to grant parole.[242] This outcome is not particularly satisfying in light of

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[235] *See infra* notes 237–257 and accompanying text.

[236] *See infra* notes 258–271 and accompanying text.

[237] *See* Graham v. Florida, 560 U.S. 48, 55–57 (2010) (explaining that the trial judge, who had the authority to sentence the defendant to as little as four years in prison, sentenced him to life without parole).

[238] *See* Moore, *supra* note 154, at 126 (arguing that the Eighth Amendment forbids sentencing juveniles who did not kill, attempt to kill, or intend to kill to discretionary life without the possibility of parole).

[239] *See* Miller v. Alabama, 567 U.S. 460, 489 (2012) (holding that mandatory life in prison without the possibility of parole is not a permissible sentence for juveniles).

[240] *See id.* (stating that by abolishing mandatory life without parole for juveniles, juveniles' individual circumstances can be considered by the sentencing judge). The respondents in *Miller*, Alabama and Arkansas, both argued that the abolition of mandatory life without parole was unnecessary because the personalized circumstances of juveniles are already considered when the prosecution decides whether to charge them as an adult. *Id.* at 480. It is likely that a challenge to discretionary life without parole would be met with even greater opposition, given that individual circumstances are further considered in determining a sentence. *See id.*

[241] *See id.* at 492 (Breyer, J., concurring) (arguing that sentencing juveniles who did not kill, intend to kill, or attempt to kill to life in prison is unconstitutional).

[242] *See Graham*, 560 U.S. at 55–57 (explaining that the trial judge, who had the authority to sentence the defendant to as little as four years in prison, sentenced him to life without parole).

what science shows about juveniles' diminished culpability due to their immaturity, susceptibility to peer pressure, and capacity for reform, especially because it would not actually prohibit charging juveniles with felony murder.[243] Juveniles with diminished culpability who are convicted of felony murder could still spend a quarter or more of their lives in prison, where they would lose years essential for education, job training, and starting a family.[244] Continuing to attack felony murder as applied to juveniles from the sentencing angle will not yield the results juvenile justice advocates desire because juveniles could still unfairly face felony murder convictions and the lengthy sentences that accompany them.[245]

Arguing that juveniles are entitled to a different reasonable person standard than adults is compelling because it exposes the ultimate contradiction between Supreme Court precedent on juveniles and the principle justifying the felony murder rule: felony murder is predicated on foreseeability, yet the Supreme Court has made explicit that juveniles cannot appreciate the consequences of their actions to the same extent that adults can.[246] The Court reiterated in *Miller*, *Graham v. Florida*, and *Roper v. Simmons* that juveniles are different from adults and less capable of assessing consequences and risk.[247] Yet juveniles can be charged with felony murder, which is justified entirely on the rationale that perpetrators of dangerous felonies assume the risk of their actions.[248] The Court has stated that this is precisely what juveniles are less capable of doing.[249] Pointing out this contradiction through *J.D.B.* is compel-

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[243] *See* Levick & Tierney, *supra* note 147, at 525 (explaining that felony murder statutes, which are strict liability offenses, provide no opportunity for jurors to account for juveniles' diminished culpability).

[244] *Felony Murder in Illinois*, *supra* note 19. In addition to the individual repercussions of life without parole sentences for juveniles, there is also a significant financial cost to society. Rovner, *supra* note 107. It is estimated that if a juvenile serves fifty years starting at age sixteen, the total cost of incarceration will be around $2.25 million. *Id.*

[245] Rovner, *supra* note 107. There are also significant racial disparities within juvenile life without parole sentences. *Id.* According to Rovner, "[w]hile 23.2% of juvenile arrests for murder involve an African American suspected of killing a white person, 42.4% of [juvenile life without parole (JLWOP)] sentences are for an African American convicted of this crime. White juvenile offenders with African American victims are only about half as likely (3.6%) to receive a [JLWOP] sentence as their proportion of arrests for killing an African American (6.4%)." *Id.*

[246] *See* Amended Brief of Amici Curiae Juvenile Law Center et al., in Support of Appellants, Black Layman and Levi Sparks, *supra* note 148, at 8 (stating that Supreme Court precedent on juvenile justice and felony murder "cannot be squared").

[247] *See supra* notes 161–163 and accompanying text (explaining the brain science supporting the contention that juveniles have diminished capacity).

[248] Levick & Tierney, *supra* note 147, at 525.

[249] *Graham*, 560 U.S. at 82; Roper v. Simmons, 543 U.S. 551, 578–79 (2005); Levick & Tierney, *supra* note 147, at 525; *see Miller*, 567 U.S. at 492 (Breyer, J., concurring) (asserting that felony murder is justified by the idea that someone who decides to commit a dangerous felony should be aware that the victim could be killed, however, this "ability to consider the full consequences of a course of

ling because the Court in *J.D.B.* provided that a different standard must be used to account for the differences between children and adults in the context of custodial interrogations.[250]

The weakness of applying the argument in *J.D.B.* to juvenile felony murder is that it requires asking the Court to impose an entirely different type of remedy from what the Court did in *J.D.B.*[251] There, the custody analysis already included a reasonable person standard.[252] Without disrupting the custody analysis test significantly, the Court simply held that the reasonable person standard must consider juveniles' age when they are interrogated.[253] Felony murder statutes contain no reasonable person requirement; the rule is justified by the idea that death is reasonably foreseeable to the perpetrator, but the jury does not have to find that the death was reasonably foreseeable in order to convict.[254] Without a reasonableness requirement built into the analysis, the Court cannot simply instruct juries to consider juveniles' age in felony murder cases.[255] Instead, the Court would have to come up with a substantially altered remedy, such as banning felony murder for juveniles who did not kill, intend to kill, or attempt to kill.[256] It is possible that the Court would find the connection between *J.D.B.* too attenuated to justify this measure.[257]

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action and to adjust one's conduct accordingly is precisely what we know juveniles lack capacity to do effectively" (citing *id.* at 471–72 (majority opinion))).

[250] *Miller*, 567 U.S. at 492 (Breyer, J., concurring); *see* J.D.B. v. North Carolina, 564 U.S. 261, 262 (2011) (stating that "[a] child's age is far 'more than a chronological fact'" (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982))).

[251] *See* Levick & Tierney, *supra* note 147, at 526 (noting that because the intent requirement for felony murder is so flawed, the Court will have a more difficult time finding a solution to account for juveniles' immaturity when it comes to felony murder).

[252] *See J.D.B.*, 564 U.S. at 271 (pointing out that the custody analysis intentionally contains an objective reasonable person standard so that police will not be responsible for guessing on the idiosyncrasies of different people).

[253] Levick & Tierney, *supra* note 147, at 503; *see J.D.B.*, 564 U.S. at 275 (holding that considering a child's age during the *Miranda* custody analysis comports with the test's objectivity requirement).

[254] *See supra* note 74 and accompanying text (explaining that the jury must only find that the named victim was killed and that the defendant knowingly or willfully carried out the underlying felony).

[255] Levick & Tierney, *supra* note 147, at 526; *see* Amended Brief of Amici Curiae Juvenile Law Center et al., in Support of Appellants, Black Layman and Levi Sparks, *supra* note 148, at 13–14 (suggesting possible remedies to the constitutional problem of charging juveniles with felony murder).

[256] Levick & Tierney, *supra* note 147, at 526.

[257] *See* Amended Brief of Amici Curiae Juvenile Law Center et al., in Support of Appellants, Black Layman and Levi Sparks, *supra* note 148, at 13–14 (outlining possible remedies to the constitutional problem of charging juveniles with felony murder).

B. Charging Juveniles Who Did Not Kill, Attempt to Kill, or Intend to Kill with Felony Murder Is Unconstitutional Because the Eighth Amendment Prohibits Punishment Without Fault

The argument that applying felony murder to juveniles violates the culpability requirement of the Cruel and Unusual Punishments Clause is more likely to succeed.[258] Charging juveniles who did not kill, intend to kill, or attempt to kill with felony murder violates the Eighth Amendment's requirement that actors must have some culpability if their behavior is to be labeled criminal.[259] Because the Court has recognized that juveniles are inherently reckless and susceptible to peer pressure, it makes little sense to impose criminal liability on juveniles who did not kill, attempt to kill, or intend to kill for failing to foresee the possibility that a death might occur during a felony.[260] Just as the statute in *Robinson v. California* punished addicts for their addiction, the felony murder doctrine punishes juveniles who did not kill, attempt to kill, or intend to kill for characteristics that are not directly within their control—it punishes juveniles for outcomes for which they cannot logically be assigned blame.[261]

Further, the Eighth Amendment provides the opportunity for the mentally ill, a group that the Court has often treated similarly to juveniles, to demonstrate their diminished culpability through the insanity defense.[262] Accordingly, juveniles must be afforded an opportunity to demonstrate their diminished culpability before guilt or innocence is determined, not just during the sentencing phase.[263] Because the felony murder rule does not require the jury to find an

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[258] *See Miller*, 567 U.S. at 491–92 (Breyer, J., concurring) (reasoning that the transferred intent used to justify the felony murder rule is not sufficient to serve as intent under the Eighth Amendment because in *Enmund v. Florida* the Court ruled that transferred intent cannot be relied upon to decide when the death penalty is permissible for an adult).

[259] *See* Robinson v. California, 370 U.S. 660, 666 (1962) (holding that the government cannot impose criminal liability for being a drug addict).

[260] *See Miller*, 567 U.S. at 492 (Breyer, J., concurring) (asserting that juveniles are less likely to assess the possible consequences of their actions and decide not to follow through with them if there's a chance their actions could result in negative outcomes).

[261] *Id.* at 489 (majority opinion); *see Robinson*, 370 U.S. at 666 (reasoning that any punishment in the absence of fault is cruel and unusual).

[262] *See* Kahler v. Kansas, 140 S. Ct. 1021, 1037 (2020) (observing that for hundreds of years, courts have recognized that insane individuals cannot be held responsible for crimes); Levick & Tierney, *supra* note 147, at 526 (explaining that juveniles have no defense that takes into consideration their developmental differences). Although in *Kahler v. Kansas* the Court "decline[d] to require that Kansas adopt an insanity test turning on a defendant's ability to recognize that his crime was morally wrong," it did so because it found that Kansas's approach still took into consideration a defendant's mental health at "both trial and sentencing." *Kahler*, 140 S. Ct. at 1037.

[263] *See Kahler*, 140 S. Ct. at 1030 (relying on the authority of English jurist Henry de Bracton, who "thought that a 'madman' could no sooner be found criminally liable than a child," to assert the longstanding existence of an insanity defense (quoting 2 BRACTON ON LAWS AND CUSTOMS OF ENGLAND 384 (G. Woodbine ed., S. Thorne trans., 1968))). In the mid-thirteen century, Henry de Bracton wrote "[f]or take away the will and every act will be indifferent because your state of mind gives meaning to your act, and a crime is not committed unless the intent to injure intervene, nor is a theft

intent to kill, defendants cannot attempt to negate the intent requirement.[264] This is unconstitutional in the case of juveniles because it makes fruitless any attempt, through a juvenile's own testimony or that of an expert, to show a jury that the juvenile could not have assumed the risk of death when deciding to commit a felony.[265]

Although the Court has refrained from expanding the Eighth Amendment culpability requirement, banning juveniles who did not kill, attempt to kill, or intend to kill from being charged with felony murder may still appeal to the Court for several reasons.[266] First, juveniles involved in dangerous felonies that result in deaths can still face lengthy sentences if they are found guilty of the underlying felony charge or a lesser degree of murder.[267] Eliminating felony murder for juveniles will not allow juveniles who commit crimes to avoid punishment, but it will ensure that they are punished in proportion to their culpability.[268] Additionally, the Court would cause less disruption to its established precedent if it abolished felony murder in some situations for juveniles based on their diminished culpability.[269] If the Court decided that the Constitution prohibits punishment in the absence of culpability in all circumstances, states' ability to impose felony murder on adults and to create strict liability crimes would be seriously undermined.[270] Because this argument would end felony murder for juveniles with the least disruption to Court precedent, it has the strongest chance of success.[271]

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committed except with the intent to steal." THE PSYCHIATRIST IN THE COURTROOM: SELECTED PAPERS OF BERNARD L. DIAMOND, M.D. at xxx (Jacques M. Quen ed., 1994).

[264] *See* Levick & Tierney, *supra* note 147, at 526 (explaining that "creative solutions" will be necessary to recognize juveniles' diminished culpability in felony murder trials).

[265] *See id.* (noting that one possible solution would be to eliminate the irrebuttable presumption in felony murder cases that the defendant possessed the intent to kill).

[266] *See id.* ("To subject young defendants to an adult reasonableness standard in the felony murder context fails to account adequately for their actual level of culpability. As such, strict application of the felony murder doctrine to juvenile defendants ignores key holdings of *Roper*, *Graham*, and *J.D.B.*").

[267] *See* Moore, *supra* note 154, at 126 (arguing that life without parole should be banned for juveniles, which would leave life with parole as the harshest possible sentence). If a person is sentenced to life with parole, he or she will have the opportunity to appear before the parole board fifteen to fifty years after they are sentenced, depending on the state statute. Beth Schwartzapfel, *Nine Things You Probably Didn't Know About Parole*, THE MARSHALL PROJECT (July 10, 2015), https://www.themarshallproject.org/2015/07/10/nine-things-you-probably-didn-t-know-about-parole [https://perma.cc/5LU8-79NN].

[268] *See Miller*, 567 U.S. at 493 (Breyer, J., concurring) (asserting that if Kuntrell Jackson, who was serving life without parole for felony murder, did not intend to murder the victim who was killed by his accomplices, then he could not receive the harshest sentence available for juveniles).

[269] *See id.* at 491–92 (pointing out the conflict within the Court's precedent that arises when juveniles are charged with felony murder, suggesting that the practice cannot continue without threatening the legitimacy of the entire felony murder doctrine).

[270] *Id.*

[271] *See id.* at 490 (arguing that juveniles who do not kill or intend to kill have twice diminished culpability).

CONCLUSION

Recent Supreme Court precedent on juvenile justice has made it difficult to defend the constitutionality of charging juveniles who did not kill, attempt to kill, or intend to kill with felony murder. The felony murder rule is justified by the idea that some felonies are so dangerous that the possibility of death should be reasonably foreseeable to the perpetrator. The Supreme Court has made clear that juveniles' immaturity and impulsivity make it difficult for them to understand the possible consequences of their actions. Therefore, as Justice Stephen Breyer explained in his concurrence in *Miller v. Alabama*, assigning criminal liability via felony murder to juveniles who did not kill, attempt to kill, or intend to kill is based on "fallacious reasoning."[272] The inconsistencies in precedent on the felony murder doctrine and on juvenile justice are readily identifiable, making it possible to develop a well-supported legal argument demonstrating that such inconsistencies are unconstitutional. Because the Eighth Amendment's Cruel and Unusual Punishments Clause requires that criminal liability only be imposed in the presence of moral culpability, it is unconstitutional to charge juveniles who did not kill, attempt to kill, or intend to kill with felony murder.

Despite the promising nature of the arguments, the makeup of the current Supreme Court makes it uncertain that any argument will succeed in the near future.[273] In his dissent in *Miller*, Justice Clarence Thomas expressed his disdain for combining two lines of Supreme Court precedent to reach a result that he believed had no foundation.[274] Today, Justice Thomas might have the necessary support to form a majority.[275] Three of the five Justices who formed the majority in *Miller* remain on the Court today, and two of those Justices expressed in a concurring opinion their desire for the Court to further

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[272] *Id.* at 489.

[273] *See Kahler*, 140 S. Ct. at 1037 (holding that Kansas did not violate the Eighth Amendment by abandoning a definition of the insanity defense that stated that individuals must understand that their actions are morally wrong in order to be held criminally liable). The Supreme Court decided *Kahler* on March 23, 2020. *Id.* The *Kahler* ruling, which pertained to the insanity defense and not juvenile culpability, provides insight into the Court's current outlook on the constitutional requirements for mens rea. *Id.* The decision did not contain anything explicitly at odds with the argument that juveniles who did not kill, intend to kill, or attempt to kill cannot form the necessary criminal intent to be charged with felony murder; however, the ruling displayed great deference to states on the topic of mens rea. *See id.* (holding that enabling defendants to negate the mens rea of a crime sufficiently accounted for the diminished capacity of the mentally ill). The Court was satisfied by the many ways that the diminished culpability of the mentally ill could be accounted for absent a constitutional standard. *Id.*

[274] *See Miller*, 567 U.S. at 502 (Thomas, J., dissenting) (stating that in addition to misunderstanding the original meaning of the Constitution for two lines of precedent, the Court "compounds its errors by combining these lines of precedent and extending them to reach a result that is even less legitimate than the foundation on which it is built").

[275] *Kahler*, 140 S. Ct. at 1037.

acknowledge the diminished culpability of juveniles.[276] It is possible that if two other, typically more conservative Justices were persuaded to abolish the practice of charging juveniles with felony murder in light of the originalist justifications for reevaluating the Constitution's culpability requirement, the blatant contradiction between the Court's existing precedent on juveniles' diminished culpability and the justification for the felony murder rule would finally be resolved.[277]

CAMERON CASEY

[276] *Miller*, 567 U.S. at 463. Justice Elena Kagan delivered the majority opinion, which was joined by Justices Anthony Kennedy, Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor. *Id.* Justice Breyer filed a concurring opinion, which was joined by Justice Sotomayor, expressing a desire that the Court further acknowledge the diminished culpability of juveniles. *Id.* at 493–502 (Breyer, J., concurring). Justices Breyer, Sotomayor, and Kagan remain on the Court today, as do Justices Roberts, Thomas, and Alito, who dissented in *Miller*. *Justices*, OYEZ, https://www.oyez.org/justices [https://perma.cc/P99G-FKWU]. Justices Gorsuch, Kavanaugh, and Barrett joined the Court since the *Miller* decision as President Donald Trump appointees. *Id.*

[277] *See supra* notes 195–210 and accompanying text (describing why the justification for charging juveniles with felony murder is completely at odds with Supreme Court jurisprudence on juveniles' diminished culpability); *supra* notes 211–219 and accompanying text (outlining an originalist interpretation of the Constitution that concludes that the Constitution requires punishments to be proportionate to an offender's moral culpability).